19 JUIN 2012

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AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE DU CONGO)

(Indemnisation due par la République démocratique du Congo à la République de Guinée)

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)

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JUDGMENT

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INTERNATIONAL COURT OF JUSTICE

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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)

Introductory observations.

Object of the present proceedings pursuant to Court's Judgment of 30 November 2010 — Determination of amount of compensation — Injury resulting from unlawful detentions and expulsion of Mr. Diallo — Guinea's exercise of diplomatic protection — General rules governing compensation — Establishment of injury and causal nexus between the wrongful acts and that injury — Valuation of the injury — General rule that it is for the party which alleges a particular fact to prove existence of that fact — That rule to be applied flexibly in this case as Respondent may be in a better position to establish certain facts — Evidence adduced by Guinea as starting point of the Court's inquiry — Assessment in light of evidence introduced by the Democratic Republic of the Congo (DRC) — Allowance for the difficulty in providing certain evidence because of abruptness of Mr. Diallo's expulsion — The Court's inquiry limited to the injury resulting from the breach of Mr. Diallo's rights as an individual.

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Claim for compensation for non-material injury suffered by Mr. Diallo.

Non-material injury may take various forms — Establishment of non-material injury even without specific evidence — Non-material injury of Mr. Diallo as an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court in its Judgment on the merits — Reasonable to conclude that the wrongful conduct of the DRC caused Mr. Diallo significant psychological suffering and loss of reputation — Number of days for which Mr. Diallo was detained, as well as fact that he was not mistreated, taken into account — Context in which the wrongful detentions and expulsion occurred, as well as their arbitrary nature, as factors aggravating Mr. Diallo's non-material injury — Importance of equitable considerations in the quantification of compensation for non-material injury — US$85,000 in compensation awarded.

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Claim for compensation for material injury suffered by Mr. Diallo.

Alleged loss of personal property.

Property of the two companies not taken into account given the Court's prior decision that claims related thereto were inadmissible — Personal property located in Mr. Diallo's apartment appearing on an inventory prepared 12 days after his expulsion — Failure of Guinea to prove extent of loss of Mr. Diallo's personal property listed on inventory and extent to which any such loss was caused by the unlawful conduct of the DRC — Lack of any evidence regarding value of items on inventory — Mr. Diallo nevertheless required to transport his personal property to Guinea or to arrange for its disposition in the DRC — US$10,000 awarded based on equitable considerations.

High-value items not specified on the inventory — No evidence put forward by Guinea that Mr. Diallo owned these 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 Mr. Diallo's treatment by the DRC — No compensation awarded.

Assets alleged to have been contained in bank accounts — No information provided by Guinea about total sum held in bank accounts, the amount of any particular account or the name(s) of bank(s) in which account(s) were held — No evidence put forward by Guinea demonstrating that the unlawful detentions and expulsion of Mr. Diallo caused the loss of any assets held in bank accounts — No compensation awarded.

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

Cognizable character, as a component of compensation, of claim for income lost as a result of unlawful detention — Estimation may be appropriate where amount of lost income cannot be calculated precisely — No evidence however offered by Guinea to support the claim that

Mr. Diallo was earning US$25,000 per month as gérant *of Africom-Zaire and Africontainers-Zaire — Evidence, on the contrary, that neither of the companies was conducting business during the years immediately prior to Mr. Diallo's detentions — Failure of Guinea to prove how Mr. Diallo's unlawful detentions would have caused him to lose any remuneration he could have been receiving — Guinea's claim for loss of remuneration during period of Mr. Diallo's detention rejected — Reasons for rejecting claim equally applicable to Guinea's highly speculative claim relating to the period following Mr. Diallo's expulsion — No compensation awarded.*

Alleged deprivation of potential earnings.

Guinea's claim concerning "potential earnings" as beyond the scope of the proceedings, given the Court's prior decision on the inadmissibility of Guinea's claims relating to the injuries alleged to have been caused to the companies — No compensation awarded.

*

Total sum awarded and post-judgment interest.

The total sum awarded to Guinea is US$95,000 to be paid by 31 August 2012 — Should payment be delayed, post-judgment interest on the principal sum due to accrue as from 1 September 2012 at an annual rate of 6 per cent — Sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo intended to provide reparation for the latter's injury.

*

Procedural costs.

Article 64 of the Statute of the Court as implying that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties — No such circumstances exist in the present case.

JUDGMENT

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE; *Judges* ad hoc MAHIOU, MAMPUYA; *Registrar* COUVREUR.

In the case concerning Ahmadou Sadio Diallo,

between

the Republic of Guinea,

represented by

Mr. Mohamed Camara, First Counsellor for Political Affairs, Embassy of Guinea in the Benelux countries and in the European Union,

as Agent;

Mr. Hassane II Diallo, Counsellor and *chargé de mission* at the Ministry of Justice,

as Co-Agent,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Henri Mova Sakanyi, Ambassador of the Democratic Republic of the Congo to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

as Agent;

Mr. Tshibangu Kalala, Professor of International Law at the University of Kinshasa, member of the Kinshasa and Brussels Bars, and member of the Congolese Parliament,

as Co-Agent,

The COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 December 1998, the Government of 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 the Application, Guinea maintained that:

> "Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled."

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

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

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

2. On 3 October 2002, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In its Judgment of 24 May 2007 on these preliminary objections, the Court declared the Application of the Republic of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire". However, the Court declared the Application of the Republic of Guinea to be inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire" *(Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, pp. 617-618, para. 98, subparas. 3 *(a)*, *(b)*, and *(c)* of the operative part).

3. 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") (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 692, para. 165, 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 (*ibid.*, p. 692, para. 165, subpara. (3) of the operative part).

4. 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]" (*ibid.*, p. 693, para. 165, subpara. (7) of the operative part), namely the unlawful arrests, detentions and expulsion of Mr. Diallo.

5. 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 (*ibid.*, p. 692, para. 165, subpara. (4) of the operative part). It did not however order the DRC to pay compensation for this violation (*ibid.*, p. 693, para. 165, subpara. (7) of the operative part).

6. In the same Judgment, the Court rejected all other submissions by Guinea relating to the arrests and detentions of Mr. Diallo, including the contention that he was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant during his detentions (*ibid.*, p. 693, para. 165, subpara. (5) of the operative part). Furthermore, the Court found that the DRC had not violated Mr. Diallo's direct rights as an *associé* in the companies Africom-Zaire and Africontainers-Zaire (*ibid.*, p. 693, para. 165, subpara. (6) of the operative part).

7. Finally, the Court decided, with respect to the question of compensation owed by the DRC to Guinea, that "failing agreement between the Parties on this matter within six months from the date of [the said] Judgment, [this] question . . . shall be settled by the Court" (*ibid.*, p. 693, para. 165, subpara. (8) of the operative part). Considering itself to have been "sufficiently informed of the facts of the . . . case", the Court found that "a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 692, para. 164).

8. 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 of compensation due to Guinea, the President of the Court held a meeting with the representatives of the Parties on 14 September 2011 in order to ascertain their views on the time-limits to be fixed for the filing of the two pleadings envisaged by the Court.

9. By an Order of 20 September 2011, the Court fixed 6 December 2011 and 21 February 2012 as the respective time-limits for the filing of the Memorial of Guinea and the Counter-Memorial of the DRC on the question of compensation due to Guinea. The Memorial and the Counter-Memorial were duly filed within the time-limits thus prescribed.

10. In the written proceedings relating to compensation, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

in the Memorial:

> "In compensation for the damage suffered by Mr. Ahmadou Sadio Diallo as a result of his arbitrary detentions and expulsion, the Republic of Guinea begs the Court to order the Democratic Republic of the Congo to pay it (on behalf of its national) the following sums:
>
> — US$250,000 for mental and moral damage, including injury to his reputation;
>
> — US$6,430,148 for loss of earnings during his detention and following his expulsion;
>
> — US$550,000 for other material damage; and
>
> — US$4,360,000 for loss of potential earnings;
>
> amounting to a total of eleven million five hundred and ninety thousand one hundred and forty-eight American dollars (US$11,590,148), not including statutory default interest.
>
> Furthermore, 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 and which are assessed at US$500,000. The Republic of Guinea also begs the Court to order the DRC to pay it that sum.
>
> The Democratic Republic of the Congo should also be ordered to pay all the costs."

On behalf of the Government of the DRC,

in the Counter-Memorial:

> "Having regard to all of the arguments of fact and law set out above, the Democratic Republic of the Congo asks the Court to adjudge and declare that:
>
> (1) compensation in an amount of US$30,000 is due to Guinea to make good the non-pecuniary injury suffered by Mr. Diallo as a result of his wrongful detentions and expulsion in 1995-1996;
>
> (2) no default interest is due on the amount of compensation as fixed above;
>
> (3) the DRC shall have a time-limit of six months from the date of the Court's judgment in which to pay to Guinea the above amount of compensation;
>
> (4) no compensation is due in respect of the other material damage claimed by Guinea;

(5) each Party shall bear its own costs of the proceedings, including costs and fees of its counsel, advocates, advisers, assistants and others."

*

* *

I. INTRODUCTORY OBSERVATIONS

11. It falls to the Court at this stage of the proceedings to determine the amount of compensation to be awarded to Guinea as a consequence of the unlawful arrests, detentions and expulsion of Mr. Diallo by the DRC, pursuant to the findings of the Court set out in its Judgment of 30 November 2010 and recalled above. In that Judgment, the Court indicated that the amount of compensation was to be based on "the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-96, including the resulting loss of his personal belongings" (*I.C.J. Reports 2010 (II)*, p. 691, para. 163).

12. The Court begins by recalling certain of the facts on which it based its Judgment of 30 November 2010. Mr. Diallo was continuously detained for 66 days, from 5 November 1995 until 10 January 1996 (*ibid.*, p. 662, para. 59), and was detained for a second time between 25 and 31 January 1996 (*ibid.*, p. 662, para. 60), that is, for a total of 72 days. The Court also observed that Guinea failed to demonstrate that Mr. Diallo was subjected to inhuman or degrading treatment during his detentions (*ibid.*, p. 671, paras. 88-89). In addition, the Court found that Mr. Diallo was expelled by the DRC on 31 January 1996 and that he received notice of his expulsion on the same day (*ibid.*, p. 659, para. 50, and p. 668, para. 78).

13. The Court turns to the question of compensation for the violations of Mr. Diallo's human rights established in its Judgment of 30 November 2010. It recalls that it has fixed an amount of compensation once, in the *Corfu Channel case ((United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244). In the present case, Guinea is exercising diplomatic protection with respect to one of its nationals, Mr. Diallo, and is seeking compensation for the injury caused to him. As the Permanent Court of International Justice stated in the *Factory of Chorzów* case (*Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, pp. 27-28), "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law". 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.

14. 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 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" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 233-234, para. 462). If the existence of injury and causation is established, the Court will then determine the valuation.

15. The assessment of compensation owed to Guinea in this case will require the Court to weigh the Parties' factual contentions. The Court recalled in its Judgment of 30 November 2010 that, as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact (*I.C.J. Reports 2010 (II)*, p. 660, para. 54; see also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, Judgment of 5 December 2011, para. 72; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162). The Court also recognized that this general rule would have to be applied flexibly in this case and, in particular, that the Respondent may be in a better position to establish certain facts (*I.C.J. Reports 2010 (II)*, pp. 660-661, paras. 54-56).

16. In the present stage of the proceedings, the Court once again will be guided by the approach summarized in the preceding paragraph. Thus, the starting point in the Court's inquiry will be the evidence adduced by Guinea to support its claim under each head of damage, which the Court will assess in light of evidence introduced by the DRC. The Court also recognizes that the abruptness of Mr. Diallo's expulsion may have diminished the ability of Mr. Diallo and Guinea to locate certain documents, calling for some flexibility by the Court in considering the record before it.

17. Before turning to the various heads of damage, the Court also recalls that the scope of the present proceedings is determined in important respects by the Court's Judgments of 24 May 2007 and of 30 November 2010. Having declared Guinea's Application inadmissible as to alleged violations of the rights of Africom-Zaire and Africontainers-Zaire (*I.C.J. Reports 2007 (II)*, p. 616, para. 94), the Court will not take account of any claim for injury sustained by the two companies, rather than by Mr. Diallo himself. Moreover, the Court will award no compensation in respect of Guinea's claim that the DRC violated Mr. Diallo's direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire, because the Court found that there was no such violation in its Judgment of 30 November 2010 (*I.C.J. Reports 2010 (II)*, p. 690, para. 157, and pp. 690-691, para. 159). The Court's inquiry will be limited to the injury resulting from the breach of Mr. Diallo's rights as an individual, that is, "the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-96, including the resulting loss of his personal belongings" (*ibid.*, p. 691, para. 163).

II. HEADS OF DAMAGE IN RESPECT OF WHICH COMPENSATION IS REQUESTED

A. Claim for compensation for non-material injury suffered by Mr. Diallo

18. "Mental and moral damage", referred to by Guinea, or "non-pecuniary injury", referred to by the DRC, covers harm other than material injury which is suffered by an injured entity or individual. Non-material injury to a person which is cognizable under international law may take various forms. For instance, the umpire in the *Lusitania* cases before the Mixed Claims Commission (United States/Germany) mentioned "mental suffering, injury to [a claimant's] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation" (Opinion in the *Lusitania* Cases, 1 November 1923, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. VII, p. 40). The Inter-American Court of Human Rights observed in *Gutiérrez-Soler* v. *Colombia* that "[n]on pecuniary damage may include distress, suffering, tampering with the victim's core values, and changes of a non pecuniary nature in the person's everyday life" (Judgment of 12 September 2005 (Merits, Reparations and Costs), IACHR, Series C, No. 132, para. 82).

19. In the present case, Guinea contends that

> "Mr. Diallo suffered moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his arrests, detentions and expulsion by the DRC."

No specific evidence regarding this head of damage is submitted by Guinea.

20. The DRC, for its part, does not contest the fact that Mr. Diallo suffered "non-pecuniary injury". However, the DRC requests the Court to

> "take into account the specific circumstances of this case, the brevity of the detention complained of, the absence of any mistreatment of Mr. Diallo, [and] the fact that Mr. Diallo was expelled to his country of origin, with which he had been able to maintain ongoing and high-level contacts throughout his lengthy stay in the Congo".

*

21. In the view of the Court, 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 (*I.C.J. Reports 2010 (II)*, p. 666, para. 74, and p. 670, para. 84); that he was detained for an unjustifiably long period pending expulsion (*ibid.*, pp. 668-669, para. 79); that he was made the object of accusations that were not substantiated (*ibid.*, p. 669, para. 82); 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 (*ibid.*, pp. 666-667, paras. 73 and 74). Thus, it is reasonable to conclude that the DRC's wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation.

22. The Court has taken into account the number of days for which Mr. Diallo was detained and its earlier conclusion that it had not been demonstrated that Mr. Diallo was mistreated in violation of Article 10, paragraph 1, of the Covenant (*ibid.*, p. 671, para. 89).

23. The circumstances of the case point to the existence of certain factors which aggravate Mr. Diallo's non-material injury. One is the context in which the wrongful detentions and expulsion occurred. As the Court noted in its Judgment 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" (*I.C.J. Reports 2010 (II)*, p. 669, para. 82).

In addition, Mr. Diallo's

> "arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter" *(ibid.)*.

24. Quantification of compensation for non-material injury necessarily rests on equitable considerations. As the umpire noted in the *Lusitania* cases, non-material injuries "are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages" (*RIAA*, Vol. VII, p. 40). When considering compensation for material or non-material injury caused by violations of the Covenant or the African Charter, respectively, the Human Rights Committee and the African Commission on Human and Peoples' Rights recommended "adequate compensation" without specifying the sum to be paid (see, for example, *A.* v. *Australia*, HRC, 3 April 1997, communication No. 560/1993, United Nations doc. CCPR/C/59/D/560/1993, para. 11; *Kenneth Good* v. *Republic of Botswana*, ACHPR, 26 May 2010, communication No. 313/05, *28th Activity Report*, Ann. IV, p. 110, para. 244). Arbitral tribunals and regional human rights courts have been more specific, given the power to assess compensation granted by their respective constitutive instruments. Equitable considerations have guided their quantification of compensation for non-material harm. For instance, in *Al-Jedda* v. *the United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that, for determining damage,

> "[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred" (Application No. 27021/08, Judgment of 7 July 2011, *ECHR Reports* 2011, para. 114).

Similarly, the Inter-American Court of Human Rights has said that the payment of a sum of money as compensation for non-pecuniary damages may be determined by that court "in reasonable exercise of its judicial authority and on the basis of equity" (*Cantoral Benavides* v. *Peru*, Judgment of 3 December 2001 (Reparations and Costs), IACHR, Series C, No. 88, para. 53).

*

25. With regard to the non-material injury suffered by Mr. Diallo, the circumstances outlined in paragraphs 21 to 23 lead the Court to consider that the amount of US$85,000 would provide appropriate compensation. The sum is expressed in the currency to which both Parties referred in their written pleadings on compensation.

B. Claim for compensation for material injury suffered by Mr. Diallo

26. As previously noted (see paragraph 14), Guinea claims compensation for three heads of material damage. The Court 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)

27. Guinea claims that 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. Guinea refers to an inventory of items in Mr. Diallo's apartment that was prepared 12 days after he was expelled, claiming that the inventory understated his personal property because it failed to include a number of high-value items that were in the apartment. It states that all of these assets have been irretrievably lost and estimates the value of lost tangible and intangible assets (including bank accounts) at US$550,000.

28. The DRC contends that Guinea was responsible for having produced the inventory in question as evidence before the Court, only later to declare it incomplete. Citing Guinea's role in preparing the inventory, the DRC characterizes that inventory as "credible" and "serious", and

contends that Guinea cannot now claim that Mr. Diallo owned additional assets not reflected in it. The DRC further asserts that it cannot be held responsible for the alleged loss of any property that was in the apartment because the DRC did not order Mr. Diallo's eviction from the apartment and because Mr. Diallo's personal property was under the control of officials from the Guinean embassy and of Mr. Diallo's friends and relatives. Further, the DRC states that Guinea has provided no evidence regarding bank assets.

*

29. The Court here addresses Guinea's claim for the loss of Mr. Diallo's personal property, without taking into account property of the two companies (to which Guinea also refers), given the Court's prior decision that Guinea's claims relating to the companies were inadmissible (see paragraph 17 above). 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 above-referenced inventory; 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.

30. As to personal property that was located in Mr. Diallo's apartment, it appears 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. While Guinea complains about omissions from the inventory (the high-value items discussed below), 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.

31. There is, however, uncertainty about what happened to the property listed on the inventory. Guinea does not point to any evidence that Mr. Diallo attempted to transport or to dispose of the property in the apartment, and there is no evidence before the Court that the DRC barred him from doing so. The DRC states that it did not take possession of the apartment and that it did not evict Mr. Diallo from the apartment. Mr. Diallo himself stated in 2008 that the company from which the apartment was leased took possession of it soon after his expulsion and that, as a result, he had lost all of his personal effects. Therefore, taken as a whole, 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.

32. 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 offers no evidence regarding the value of the items on the inventory (either with respect to individual items or in the aggregate).

33. 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 thirty 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 an amount of compensation based on equitable considerations (see paragraph 36 below). Other courts, including the European Court of Human Rights and the Inter-American Court of Human Rights, have followed this approach where warranted (see, e.g., *Lupsa* v. *Romania*, Application No. 10337/04, Judgment of 8 June 2006, *ECHR Reports* 2006-VII, paras. 70-72; *Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador*, Judgment of 21 November 2007 (Preliminary Objections, Merits, Reparations and Costs), IACHR, Series C, No. 170, paras. 240 and 242).

34. The Court next considers Guinea's contention that Mr. Diallo's apartment contained certain high-value items not specified on the inventory described above. Guinea mentions several items in its Memorial (e.g., a diamond-studded watch and two paintings by a renowned artist), but offers few details and provides no evidence to support the assertion that the items were located in Mr. Diallo's apartment at the time of his detentions and expulsion. There is no statement by Mr. Diallo describing these goods. There are no records of purchase, even as to items allegedly purchased from well-known establishments selling high-value luxury items that can be expected to keep records of sales, and which are located outside the territory of the DRC, thus making them accessible to Mr. Diallo. Guinea has put forward no evidence whatsoever that Mr. Diallo owned these 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.

35. As to assets alleged to have been contained in bank accounts, 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.

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36. The Court therefore awards no compensation in respect of the high-value items and bank account assets described in paragraphs 34 and 35 above. However, in view of the Court's conclusions above (see paragraph 33) regarding the personal property of Mr. Diallo and on the basis of equitable considerations, the Court awards the sum of US$10,000 under this head of damage.

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

37. 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 (see, e.g., *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30). Therefore, in the present Judgment, it will first consider the claim of US$80,000 for loss of professional remuneration during Mr. Diallo's detentions (see paragraphs 38-46) and then will examine the claim of US$6,430,148 for loss of professional remuneration following his expulsion (see paragraphs 47-49).

38. Guinea asserts 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 he was detained, an amount that, according to Guinea, takes account of inflation. Guinea states that remuneration from the two companies was Mr. Diallo's "main source of income" and does not ask the Court to award compensation in respect of any other income relating to the period of Mr. Diallo's detentions. Guinea further asserts that Mr. Diallo was unable to carry out his "normal management activities" while in detention and thus to ensure that his companies were being properly run.

39. In response, 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. According to the DRC, no compensation for loss of remuneration during the period of Mr. Diallo's detention is warranted.

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40. The Court observes that, in general, a claim for income lost as a result of unlawful detention is cognizable as a component of compensation. This approach has been followed, for example, by the European Court of Human Rights (see, e.g., *Teixeira de Castro* v. *Portugal*, Application No. 44/1997/828/1034, Judgment of 9 June 1998, *ECHR Reports* 1998-IV, paras. 46-49), by the Inter-American Court of Human Rights (see, e.g., *Suárez-Rosero* v. *Ecuador*, Judgment of 20 January 1999 (Reparations and Costs), IACHR, Series C, No. 44, para. 60), and by the Governing Council of the United Nations Compensation Commission (see United Nations Compensation Commission Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the Fourteenth Instalment of "E3" Claims*, United Nations doc. S/AC.26/2000/19, 29 September 2000, para. 126). Moreover, if the amount of the lost income cannot be calculated precisely, estimation may be appropriate (see, e.g., *Elci and Others* v. *Turkey*, Application Nos. 23145/93 and 25091/94, Judgment of 13 November 2003, ECHR, para. 721; *Case of the "Street Children" (Villagrán-Morales et al.)* v. *Guatemala*, Judgment of 26 May 2001 (Reparations and Costs), IACHR, Series C, No. 77, para. 79). Thus, the Court must first consider whether Guinea has established that Mr. Diallo was receiving remuneration prior to his detentions and that such remuneration was in the amount of US$25,000 per month.

41. The claim that Mr. Diallo was earning US$25,000 per month as *gérant* of the two companies is made for the first time in the present phase of the proceedings, devoted to compensation. Guinea offers no evidence to support the claim. There are no bank account or tax records. There are no accounting records of either company showing that it had made such payments. It is plausible, of course, that Mr. Diallo's abrupt expulsion impeded or precluded his access to such records. That said, the absence of any evidence in support of the claim for loss of remuneration at issue here stands in stark contrast to the evidence adduced by Guinea at an earlier stage of this case in support of the claims relating to the two companies, which included various documents from the records of the companies.

42. Moreover, 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. In particular, the record indicates that the operations of Africontainers-Zaire had, even according to Guinea, experienced a serious decline by 1990. In addition, as the Court noted previously, the DRC asserted that Africom-Zaire had ceased all commercial activities by the end of the 1980s and for that reason had been struck from the Trade Register (*I.C.J. Reports 2007 (II)*, p. 593, para. 22; *I.C.J. Reports 2010 (II)*, p. 677, para. 108); this assertion was not challenged by Guinea. It appears that disputes about the amounts payable by various entities to Africom-Zaire and Africontainers-Zaire continued into the 1990s, in some cases even after Mr. Diallo's expulsion in 1996. But there is no evidence of operating activity that would have generated a flow of income during the years just prior to Mr. Diallo's detentions.

43. 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.

44. 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.

45. Guinea also does not explain to the satisfaction of the Court 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* (their managing director and the owner of the companies). Moreover, as noted above (see paragraph 12), 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.

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

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47. In addition to the claim for loss of remuneration during his unlawful detentions, 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 (described above) 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.

48. 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.

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49. For the reasons indicated above, the Court has already rejected the claim for loss of professional remuneration during the period of Mr. Diallo's detentions (see paragraphs 38-46). 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 (cf. *Khamidov* v. *Russia*, Application No. 72118/01, Judgment of 15 November 2007 (Merits and Just Satisfaction), ECHR, para. 197; *Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador*, Judgment of 21 November 2007 (Preliminary Objections, Merits, Reparations and Costs), IACHR, Series C, No. 170, paras. 235-236; see also Commentary to Article 36, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (2), pp. 104-105 (concerning "lost profits" claims)). Thus, the Court concludes that no compensation can be awarded for Guinea's claim relating to unpaid remuneration following Mr. Diallo's expulsion.

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50. 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

51. 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.

52. The DRC points out 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 Africom-Zaire or Africontainers-Zaire to which Guinea refers could not be sold on the open market.

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53. 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 these 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 (*I.C.J. Reports 2007 (II)*, p. 617, para. 98, subpara. (1) *(b)* of the operative part).

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54. For these reasons, the Court awards no compensation to Guinea in respect of its claim relating to the "potential earnings" of Mr. Diallo.

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55. 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

56. 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 (see, for example, *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS, para. 175; *Bámaca-Velásquez* v. *Guatemala (Reparations and Costs)*, Judgment of 22 February 2002, IACHR, Series C, No. 91, para. 103; *Papamichalopoulos and Others* v. *Greece (Article 50)*, Application No. 33808/02, Judgment of 31 October 1995, ECHR, Series A, No. 330-B, para. 39; *Lordos and Others* v. *Turkey (just satisfaction)*, Application No. 15973/90, Judgment of 10 January 2012, ECHR, para. 76 and *dispositif*, para. 1 *(b)*), 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.

57. 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

58. 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".

59. 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 DRC contends that Guinea lost the major part of the case and that, moreover, the amount claimed "represents an arbitrary, lump-sum determination, unsupported by any serious and credible evidence".

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60. 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.

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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, Cançado 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, Cançado 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, Cançado 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, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Mampuya;

AGAINST: *Judge* ad hoc Mahiou.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this nineteenth day of June, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO 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.

(Initialled) P.T.

(Initialled) Ph.C.

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SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *PROLEGOMENA*

1. I have voted in favour of the adoption of the present Judgment in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo), whereby the International Court of Justice (ICJ) has ordered reparations for the damages suffered by Mr. A.S. Diallo (established in the previous Judgment on the merits, of 30.11.2010), as an individual, under the U.N. Covenant on Civil and Political Rights (Article 13), and under the African Charter on Human and Peoples' Rights (Article 12(4)), as well as under the Vienna Convention on Consular Relations (his right to information on consular assistance, under Article 36(1)(b)). In the present Judgment, in determining the reparations due ultimately to Mr. A.S. Diallo, as a result of the damages he suffered (para. 57), the ICJ has rightly taken into account the experience of other contemporary international tribunals in the matter of reparations for damages.

2. Amongst those tribunals, of particular importance is the case-law of the international tribunals of human rights (in particular that of the Inter-American and the European Courts of Human Rights), as I shall seek to demonstrate in the present Separate Opinion. Although I have

agreed 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 I feel obliged to dwell upon in the present Separate Opinion, so as to clarify the matter dealt with by the Court, and the foundations of my personal position thereon. One of the key points concerns 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.

3. My reflections, developed in the present Separate Opinion, pertain to other points as well, at conceptual and epistemological levels, namely: a) the subject of the rights breached and the subject of the right to reparations; b) *neminem laedere*: insights on reparations from the "founding fathers" of the law of nations (*droit des gens*); c) the dawn of State responsibility and the *rationale* of duty of reparations; d) an indissoluble whole: breach of international law and compliance with the duty of reparation for damages; e) the centrality of the victims in human rights protection, and its implications for reparations, and the distinct forms of these latter; f) assessment of the contribution of the case-law of the international human rights tribunals (in particular that of the Inter-American and the European Courts of Human Rights); g) *neminem laedere* and reparation for moral damage to individuals; and h) the relevance of the rehabilitation of victims. The way will then be paved, in the epilogue, for the presentation of my concluding reflections on the matter.

II. The Subject of the Rights Breached and the Subject of the Right to Reparations

4. In its Judgment on the merits (of 30.11.2010) in the present case *A.S. Diallo* (Guinea *versus* D.R. Congo), the Court established the violations of the *rights* of Mr. Diallo "as an individual" (para. 34), namely, his rights under Article 13 of the U.N. Covenant on Civil and Political Rights, and under Article 12(4) of the African Charter on Human and Peoples' Rights, in addition to his right to information on consular assistance under Article 36(1)(b) of the Vienna Convention on Consular Relations[1]. This was the first time in its history that the Court established violations of human rights, under two human rights treaties, in addition to the relevant provision of the 1963 Vienna Convention.

5. 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. In the previous Judgment on the merits (of 30.11.2010) in the present case, the Court referred to the reparation — in the form of compensation — "due to Guinea for the injury suffered by Mr. Diallo" (para. 161). The Court further referred to the compensation owed by the D.R. Congo 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" (para. 163).

6. In the subsequent proceedings as to reparations (written phase only), Guinea referred repeatedly, in its *Memorial* of 06.12.2011, to the damages[2] or injuries[3] or harms[4] suffered by

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[1]Resolutory points 2, 3 and 4 of the *dispositif*.

[2]Paras. 16 and 48, and cf. para. 63.

[3]Paras. 35 and 47, and cf. para. 62.

[4]Para. 24.

Mr. Diallo, to the discrimination[5] and arbitrariness[6] inflicted against him. It also referred to the D.R. Congo's breaches of human rights obligations[7]. For its part, in its *Counter-Memorial* of 21.02.2012, the D.R. Congo acknowledged the injuries[8] or damages[9] suffered by Mr. Diallo. The two contending parties thus agreed that reparations were here due to the victim, for the human rights violations he suffered. The *titulaire* of the rights breached, and the *beneficiary* of the reparations due, was the individual concerned, Mr. A.S. Diallo.

7. Accordingly, in its *Memorial* Guinea invoked a recent case from the inter-American system of human rights, concerning Haiti[10]. And, for its part, the D.R. Congo, in its Counter-Memorial, invoked a series of decisions from the European and the Inter-American Courts of Human Rights and surveyed them[11], stressing their importance for the determination of "compensation for non-pecuniary damage suffered by individuals"[12]. The D.R. Congo made a point of stressing that it deemed it fit to draw on the case-law of the Inter-American and European Courts of Human Rights as the corresponding two regional systems of human rights protection

> "are the oldest and best developed in the world and which have abundant practice in fixing compensation to make good the non-pecuniary damage resulting from wrongful and prolonged detentions of physical persons by certain States. In the light of the jurisprudence of these two international courts, the Respondent will submit its own proposal to the Court regarding the amount of compensation which it considers reasonable and proportionate in relation to the non-pecuniary damage suffered by Mr. Diallo"[13].

8. In its present Judgment on reparations in the case *A.S. Diallo*, the Court has recalled its finding in its previous Judgment on the merits (para. 163) in the *cas d'espèce*, whereby the amount of compensation due to Mr A.S. Diallo is based on the damage suffered resulting from his "wrongful detentions and expulsion" in 1995-1996 and the consequent "loss of his personal belongings" (para. 11). The whole reasoning of the Court is developed on the basis of the damages suffered by Mr. A.S. Diallo, as established by it in its earlier Judgment on the merits (of 30.11.2010). In the present Judgment the Court reiterates its position that the damages were done to Mr. A.S. Diallo, the individual victim (para. 57), not to his State of nationality or origin.

9. The 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. Not at all; in their contents, cases vary considerably, and, throughout the last decades, some of them have directly concerned the condition of individuals. I have had the occasion to point this out in my Separate Opinion (paras. 78-79) in the Court's recent Advisory Opinion (of 01.02.2012) on *Judgment n. 2867 of the ILO Administrative Tribunal upon a Complaint Filed against the International Fund for*

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[5]Para. 43.

[6]Para. 61.

[7]Para. 21.

[8]Paras. 2, 4 and 1.05.

[9]Paras. 1.05 and 1.44.

[10]Para. 30.

[11]Paras. 1.07-1.43.

[12]Para. 1.47, and cf. para. 1.41.

[13]Para. 1.07.

Agricultural Development, and I do so again in the present Separate Opinion in the *A.S. Diallo* case (Judgment on Reparations).

10. Notorious examples in that sense are provided, e.g., by the *Nottebohm* case (Liechtenstein *versus* Guatemala, 1955, on double nationality); the case concerning the *Application of the Convention of 1902 Governing the Guardianship of Infants* (The Netherlands *versus* Sweden, 1958); the cases of the *Trial of Pakistani Prisoners of War* (Pakistan *versus* India, 1973), of the *Hostages (U.S. Diplomatic and Consular Staff) in Tehran* case (United States *versus* Iran, 1980), of the *East-Timor* (Portugal *versus* Australia, 1995); the case of the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia, 1996); the case of *Land and Maritime Boundary between Cameroon and Nigeria*, 1996); the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda, 2000); the three successive cases concerning consular assistance — namely, the cases *Breard* (Paraguay *versus* United States, 1998), *LaGrand* (Germany *versus* United States, 2001), and *Avena and Others* (Mexico *versus* United States, 2004); the case on *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Order of 2009); the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, 2010); the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation, 2011); the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand, Order, 2011); the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, 2010-2012).

11. The insufficiency, if not artificiality, of the exclusively inter-State outlook of the procedures before the ICJ has become manifest, in the light of the very nature of some of the contentious cases submitted to it. The same has been disclosed by the exercise of its advisory function, as illustrated by its last two Advisory Opinions, on the *Declaration of Independence of Kosovo* (2010), and on *Judgment n. 2867 of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012). Despite 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.

12. In effect, in the present case *A.S. Diallo*, the Court's Judgments on the merits (2010) and now on reparations clearly show that its findings and reasoning have rightly gone well beyond the straight-jacket of the strict inter-State dimension. There are circumstances wherein the Court is bound to do so, in the faithful exercise of its judicial function, in cases concerning distinct aspects of the condition of individuals. After 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.

13. 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.

III. *NEMINEM LAEDERE*: INSIGHTS ON REPARATIONS FROM THE 'FOUNDING FATHERS' OF THE LAW OF NATIONS *(DROIT DES GENS)*

14. This duty of reparation has deep historical roots, going back to the origins of the law of nations: such duty was in fact in the minds of the "founding fathers" of our discipline, as disclosed by their classical writings which have survived the onslaught of time. The present case *A.S. Diallo*, unique in the history of this Court, — as I pointed out in my Separate Opinion in its earlier Judgment on the merits (of 30.11.2010), — seems to provide an invitation to embark on the rescue of the earlier thinking on such duty of reparation. In effect, in his celebrated Second *Relectio-De Indis* (1538-1539), Francisco de Vitoria made a proposition to the effect that "the enemy who has done the wrong is bound to give all this redress"[14]; there is a duty, even amidst armed hostilities, to make restitution (of losses) and to provide reparation for "all damages"[15].

15. One was here in the realm of *jus gentium*, the law of nations, of all peoples, wherein the right to redress was reckoned[16]. The rules of that emerging law of nations were to be "just and fitting for all persons"; the damages caused by wrongful acts were to be assessed, in order to provide redress to those who suffered them, and restitution of the losses[17]. In F. Vitoria's understanding, redress of wrongs was to take place in disputes between States, or between groups, or between individuals, i.e., in all sorts of disputes. He viewed the international community of (emerging) States as "coextensive with humanity"; such redress corresponded, in his conception, to "an international need"[18].

16. Hugo Grotius, for his part, dedicated a whole chapter of his *De Jure Belli ac Pacis* (1625) to the obligation of reparation for damages (book II, chapter 17)[19]. In his outlook, the "injured party" was not necessarily a State; he referred to distinct kinds of damage caused by breaches of "rights resulting to us", or from "losses suffered by negligence"; such damages or losses create an obligation of reparation[20]. In his conception of the *jus gentium*, the (emerging) law of nations, H. Grotius focused on the reasonable, on the dictates of the right reason, bearing in mind also the common needs and, ultimately, the universal human society.

17. Samuel Pufendorf, likewise, in his *Elementorum Jurisprudentiae Universalis-Libri Duo* (1672), asserted that whoever has caused damage by a wrongful act is bound "to make good" and "to restore as much as he contributed to the damage"[21]. In this duty of restitution, each one was bound to provide reparation for the damage he caused, "to restore the whole", on the basis of

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[14]*Loc. cit. infra* n. (16), Appendix B: Franciscus de Victoria, *Second Relectio-On the Indians* [*De Indis*] [1538-1539], Oxford/London, Clarendon Press/H. Milford, 1934 [reed.], p. LV.

[15]*Ibid*., p. LV; and cf. Francisco de Vitoria, "Relección Segunda - De los Indios" [1538-1539], *in Obras de Francisco de Vitoria- Relecciones Teológicas* (ed. T. Urdanoz), Madrid, BAC, 1955, p. 827.

[16]J. Brown Scott, *The Spanish Origin of International Law-Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford, 1934, pp. 140, 150, 163 and 165.

[17]*Ibid*., pp. 172 and 210-211.

[18]*Ibid*., pp. 282-283; and cf. also: Association Internationale Vitoria-Suarez, *Vitoria et Suarez: Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pp. 73-74, and cf. pp. 169-170.

[19]Hugonis Grotii, *De Iure Belli Ac Pacis* [1625]-*Liber secundus*, *caput* XVII, The Hague, M. Nijhoff, 1948, pp. 79-82.

[20]*Ibid*., pp. 79-80, paras. I and VIII-IX; and cf. H. Grotius, *Le droit de la guerre et de la paix* (1625), Paris, PUF, 2005 [reed.], pp. 415-416 and 418, paras. I and VIII-IX.

[21]S. Pufendorf, *Elementorum Jurisprudentiae Universalis-Libri Duo* [1672], Oxford/London, Clarendon Press/H. Milford, 1931 [reed.], pp. 264-265.

natural law[22]. In his work *On the Duty of Man and Citizen* (1673), S. Pufendorf pondered that one who has suffered loss or damage cannot live in peace with the wrongdoer, without compensation; hence the need of restitution. Natural law, attentive to the sociable (*sociabilis*), condemned vengeance[23]. "Natural equity" set forth the "obligation to make restitution" for loss or harm done with malice or negligence[24].

18. For his part, Christian Wolff held, in his *Jus Gentium Methodo Scientifica Pertractatum* (1764), that whoever caused a loss or wrong "to a citizen or subject of another State" is "bound to repair it"; the same applies in the relations among nations, wherein "the loss caused should be repaired"[25]. Any international wrong, — he added, — entails the duty of reparation, or of restoration of the loss[26]. In his *Principes du droit de la nature et des gens* (1758), C. Wolff situated the duty to provide reparation for the damage caused in the realm of natural law thinking[27].

19. To the writings, on the subject-matter at issue, of F. Vitoria, H. Grotius, S. Pufendorf and C. Wolff, others could be added, such as the ponderation of Alberico Gentili (*De Jure Belli*, 1598) and of Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612), as to the need of a legal system that would regulate the relations of the members of the universal *societas gentium*, and the approach pursued by Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; *Questiones Juris Publici-Libri Duo*, 1737), in keeping on upholding a multiplicity of subjects of *jus gentium* (nations, peoples, persons). By and large, the attention to the common condition of humankind was proper to natural law, which, with the *recta ratio*, provided the basis for the regulation of human relations with the due respect for each other's rights[28]. The duty of reparation responded to an *international need*, in conformity with the *recta ratio*, — whether the beneficiaries were States (emerging in their days), peoples, or individuals.

20. Subsequently to the works of S. Pufendorf and Wolff (*supra*), international legal thinking embarked on the reductionist path of the *jus inter gentes* pursuant to a much stricter inter-State outlook. The juxtaposition of absolute State sovereignties led to the exclusion from that legal order of the individuals as subjects of rights (*titulaires de droits*). At international level, the States assumed the monopoly of the condition of subjects of rights; the individuals, for their protection, were left entirely at the mercy of the discretionary intermediation of their nation-States. The international legal order thus erected, — which the excesses of legal positivism attempted in vain to justify, — excluded therefrom precisely the ultimate addressee of the juridical norms: the human being.

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[22]*Ibid.*, p. 266.

[23]S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law* [1673], Cambridge, Cambridge University Press, 2003 [5th printing], Book I, chapter 6, pp. 56-57 and 60.

[24]*Ibid.*, pp. 58-59; and cf. S. Pufendorf, *Os Deveres do Homem e do Cidadão de Acordo com as Leis do Direito Natural* [1673], Rio de Janeiro, Liberty Fund/Topbooks, 2007 [reed.], Book I, chapter 6, pp. 152-153 and 156.

[25]C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* [1764], Oxford/London, Clarendon Press/H. Milford, 1934 [reed.], p. 162, paras. 318-319.

[26]*Ibid.*, pp. 408 and 425, paras. 789 and 821.

[27]C. Wolff, *Principes du droit de la nature et des gens* [1758], vol. III, Caen, Presses Universitaires de Caen, 2011 [reed.], book IX, ch. VI, pp. 293-294 and 296, paras. II, IV and XIII.

[28]The *right reason* lies at the basis of the law of nations, being the spirit of justice in the line of natural law thinking; this trend of international legal thinking has always much valued the *realization of justice*, pursuant to a "superior value of justice". P. Foriers, *L'organisation de la paix chez Grotius et l'école de droit naturel* [1961], Paris, J. Vrin, 1987, pp. 293, 333, 373 and 375 [reed. of study originally published *in*: *Recueil de la Société Jean Bodin pour l'histoire comparative des institutions*, vol. 15-part II, Bruxelles, Libr. Encyclopédique, 1961].

21. The teachings of the "founding fathers" of the law of nations, however, 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. The 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.

IV. THE DAWN OF STATE RESPONSIBILITY AND THE *RATIONALE* OF DUTY OF REPARATION

22. In effect, as from the late XIXth century, some jurists had the intuition to dwell upon reparation for international wrongs, even before the advent of the era of (contemporary) international tribunals. They wrote within distinct theoretical frameworks. One of the earlier jurists to do so was Dionisio Anzilotti. On the one hand, his views on the legal standing of individuals (acknowledged by him only in positive domestic law)[29] became promptly and wholly unacceptable, even in the emerging legal doctrine of his times; this was largely due to the gradual establishment of the direct contacts between individuals and the international legal order (as from, e.g., the pioneering case-law of the Central American Court of Justice, 1907-1917, followed by the Advisory Opinion of 1928 of the Permanent Court of International Justice [PCIJ] on the *Jurisdiction of the Courts of Danzig*, 1928) and the gradual recognition of the access of individuals to international justice[30].

23. On the other hand, another concern expressed by D. Anzilotti, as to the duty of reparation of damages resulting from breaches of international law so as to preserve the integrity of the international legal order, seems to retain its contemporaneity, over a century later. In fact, already in 1902, in his book *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale*, he pondered, in his conceptualization, that a *violation* of international law (ensuing from an anti-juridical fact, a *factum contra jus*) generates *responsibility*[31]; hence the need to cease that violation (in its effects) and to provide *reparation* for the *damage*[32]. And D. Anzilotti added that

> "il *neminem laedere* è norma giuridica fondamentale nei rapporti degli Stati come in quelli degl'individui / [the *neminem laedere* is a fundamental juridical norm in the relations of States as in those of individuals]"[33].

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[29] D. Anzilotti, "La responsabilité internationale des États à raison des dommages...", *op. cit. infra* n. (34), pp. 5-6 and 8.

[30] A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos,* Bilbao, Universidad de Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, Santiago de Chile, CECOH/Librotecnia, 2008, pp. 61-407; A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236.

[31] D. Anzilotti, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale*, part I, Firenze, F. Lumachi Libr.-Ed., 1902, pp. 75, 78 and 102-103.

[32] *Ibid*., pp. 95-97 and 100-101.

[33] *Ibid*., p. 99.

24. Four years later, D. Anzilotti stressed that any "act contrary to international law" engages international responsibility[34]. To him, an "international illicit act" is an act which is "in opposition with the objective international law"; thus, "le caractère illicite d'un acte dérive toujours de son opposition avec le droit objectif"[35]. To him, the damage is always encompassed implicitly in the "anti-juridical character of the act"[36]. And he added, with insight, that

> "tout acte accompli par un sujet contrairement à la règle [de droit] entraîne en conséquence l'obligation de rétablir, sous une forme quelconque, l'ordre juridique troublé par lui.
>
> La violation de l'ordre juridique international commise par un État soumis à cet ordre donne ainsi naissance à un devoir de réparation, qui consiste en général dans le rétablissement de l'ordre juridique troublé"[37].

25. In the following years, it became generally accepted that the duty of reparation was one of general or customary international law. Another international law theorist, Hans Kelsen, endeavoured in vain to challenge that. In 1932, dwelling upon reparation, he built his conceptualization within the straight-jacket of the exclusive *inter-State dimension*. He took an isolated position (already in those days) to the effect that the duty of reparation (compliance with which would in his view avoid recourse to force and retaliation or reprisals) would necessarily require a prior *agreement* between the States concerned[38]. H. Kelsen overlooked the general acknowledgement, discernible already in his times, that that duty was one of general or customary international law, and could not be entirely subsumed under the will of individual States *tout court*. *Opinio juris communis* stood above the will of each State.

26. Yet, just as it happened with the theory of D. Anzilotti, in that of H. Kelsen there is a concern which seems to have subsisted to date, retaining its contemporaneity: reparation cannot "efface" the breach of international law already committed, but it can rather avoid the negative consequences of the wrongful act (i.e., recourse to force and reprisals on the part of the affected State). In H. Kelsen's own words, in dwelling upon reparation,

> "Ihr Sinn liegt nicht darin, dass durch sie — wie ihr Name sagt — ein begangenes Unrecht wieder „gut" gemacht wird, denn dies ist unmöglich. Der einmal gesetzte Unrechtstatbestand kann nicht aus der Welt geschafft werden. Sondern ihr Sinn liegt darin, dass durch sie kraft Rechtens der Eintritt der Unrechtsfolge ausgeschaltet wird". / [Its significance does not lie with the fact that through such reparation — as its name implies — a wrong that has already happened will be repaired, as this is impossible. The wrongful behaviour cannot be made to disappear from the world. Its significance lies with the fact that through it, pursuant to a rule, the onset of the consequences of the wrong is made impossible]"[39].

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[34]He used indistinctly the terms "acte" and "fait de l'État"; cf. D. Anzilotti, "La responsabilité internationale des États à raison des dommages soufferts par des étrangers", 13 *Revue générale de Droit international public* (1906) pp. 292 and 296.

[35]*Ibid.*, p. 14.

[36]*Ibid.*, p. 13.

[37]*Ibid.*, p. 13.

[38]H. Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", 12 *Zeitschrift für öffentliches Recht* (1932) pp. 481-608.

[39]*Ibid.*, p. 560.

27. Reparation, in H. Kelsen's outlook, would thus contribute not only to justice, but also to peace (a topic which was, later on, towards the end of the II world war, to attract his attention[40]). In addition, he admitted that reparation (for material and immaterial damage) might take distinct forms[41]. On the obligation of reparation, the celebrated *dictum* of the PCIJ in the *Chorzów Factory* case (Judgment of 26.07.1927) did not escape his attention[42]. Without abandoning his inter-State approach, in his Hague Academy lectures of 1953 he conceded, as to the obligation of reparation, that

> "un tribunal international doit se borner à constater la violation d'une obligation internationale et à ordonner la réparation du dommage causé"[43].

28. Despite the constraints of the traditional inter-State outlook, the *rationale* of reparation began to attract growing attention, and its conceptual framework was gradually to take place. The PCIJ much contributed to that, in referring, in the aforementioned *Chorzów Factory* case, to 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 effect, support to the duty of reparation came from distinct trends of opinion.

29. There were those who held, in the early XXth century, that that duty originated in the postulates of natural law. Amongst those was Paul Fauchille, who, in 1922, lucidly pondered that the rules governing the international responsibility of States, as to reparations,

> "se résument dans l'idée de droit naturel que tout fait qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer. Cette idée est appliquée en droit privé dans les rapports des individus; il n'y a pas de motifs pour ne pas l'appliquer aussi dans les relations que des collectivités ont entre elles-mêmes ou avec des individus"[44].

Depending on the circumstances of the cases, the duty of reparation for damages may thus be performed to the benefit of States, or else of individuals, whoever has been injured. Parallel to the trend of jusnaturalist thinking on the matter, there were also those who beheld the duty of reparation in all legal systems of (positive) law, without which those systems would simply not exist[45].

30. In any case, attention began to be turned to the situation of the victim, as beneficiary of reparation, and if there were treaties which provided for reparation, this was so — unlike what H. Kelsen had assumed — because such treaties acknowledged a pre-existing and well-established

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[40]Cf. H. Kelsen, *Peace through Law*, Chapel Hill, University of North Carolina Press, 1944, pp. 71-124; and cf. H. Kelsen, *A Paz pelo Direito* [1944], São Paulo, Ed. Martins Fontes, 2011 [reed.], pp. 65-114.

[41]Cf. H. Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", *op. cit. supra* n. (38), pp. 555-560.

[42]Cf. *ibid.*, p. 550.

[43]H. Kelsen, "Théorie du Droit international public", 84 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) p. 96, and cf. p. 30.

[44]P. Fauchille, *Traité de Droit international public*, vol. I-Part I, Paris, Libr. A. Rousseau Éd., 1922, p. 515.

[45]Cf., e.g., L. Reitzer, *La réparation comme conséquence de l'acte illicite en Droit international*, Paris, Libr. Rec. Sirey, 1938, p. 30.

principle of *customary* international law to the same effect[46]. At the basis of this principle, found in all national legal systems, was the "idée philosophique" which "traduit le précept du droit naturel '*neminem laedere*'"[47]. Be that as it may, reparation was already widely acknowledged as a postulate of *customary* international law, whereby a "*prestation*" is owed by the wrongdoer to the victim, as a reparation for the harm done, and the victim has the corresponding right to claim it[48]. By the mid-XXth century, it was possible to state, as Hildebrando Accioly did, that

> "Le principe général du devoir de réparation des dommages est partout accepté dans l'ordre international"[49].

31. Yet, there was a long way to go, in the progressive development of *reparation* for injuries resulting from international wrongs. The matter continued to be studied — as, in the era of the United Nations, in the long-standing work of the International Law Commission (mainly in the period 1956-2001), — largely in the framework of the relations among States. With the gradual expansion of international legal personality (and capacity), ineluctably accompanied by the corresponding expansion of international responsibility, the need was felt to consider reparation for damages in other and distinct contexts, beyond that of the strict inter-State framework of dispute-settlement, which became conceptually unsatisfactory.

V. AN INDISSOLUBLE WHOLE: BREACH OF INTERNATIONAL LAW AND COMPLIANCE WITH THE DUTY OF REPARATION FOR DAMAGES

32. The domain of international responsibility is central to international law, as without international responsibility the international legal system would not exist. The duty of full reparation is the prompt and indispensable complement of an international wrongful act, so as to cease all the consequences ensuing therefrom, and to secure respect for the international legal order[50]. The 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*)[51]. 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*)[52].

33. The treatment to be dispensed to reparations was only to evolve, and considerably so, with the advent of the International Law of Human Rights, being ineluctably *victim-oriented* as it is. The imperative of compliance with the duty of reparation was not to be limited to the avoidance of sanctions or reprisals (as propounded by H. Kelsen - *supra*) at inter-State level. Beyond that

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[46]J. Personnaz, *La réparation du préjudice en Droit international public*, Paris, Libr. Rec. Sirey, 1939, pp. 53 and 60.

[47]*Ibid*., p. 59.

[48]L. Reitzer, *La réparation comme conséquence de l'acte illicite…*, *op. cit. supra* n. (45), pp. 19, 23, 25, 48 and 213.

[49]H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", 96 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) p. 415.

[50]C. Cepelka, *Les conséquences juridiques du délit en Droit international contemporain*, Praha, Universita Karlova, 1965, pp. 15, 17-18, 21-22, 60-61 and 79.

[51]*Ibid*., pp. 15 and 53.

[52]A.A. Cançado Trindade, *Évolution du Droit international au droit des gen- L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 1-187.

advantage stood, in the domain of juridical epistemology, the imperative of the *realization of justice*. The original breach or violation of international law (irrespective of who committed it) came to be regarded as forming an *indissoluble whole* with the compliance with the duty of reparation (irrespective of who is its beneficiary).

34. This is so, irrespective of the circumstances of the case, as that imperative, in my understanding, touches on the foundations of international law. It was soon to meet with judicial recognition of the Hague Court (both the PCIJ and the ICJ). Thus, as early as in 1927-1928, in the [aforementioned] *Chorzów Factory* case, the PCIJ invoked a precept of customary international law, reflecting a fundamental principle of international law, to the effect that "the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention"[53]. And the PCIJ added that such reparation "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[54]. Furthermore, — as I recalled in a recent Dissenting Opinion (in this Court's Judgment of 03.02.2012),

> "In the present case concerning the *Jurisdictional Immunities of the State*, (…) [t]he State's obligation of reparation ineluctably ensues therefrom, as the 'indispensable complement' of those grave breaches. As the *jurisprudence constante* of the old PCIJ further indicated, already in the inter-war period, that obligation is governed by international law in all its aspects (e.g., scope, forms, beneficiaries); compliance with it shall not be subject to modification or suspension by the respondent State, through the invocation of provisions, interpretations or alleged difficulties of its own domestic law (PCIJ, Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, 1928, pp. 26-27; PCIJ, Advisory Opinion on the *Greco-Bulgarian 'Communities'*, 1930, pp. 32 and 35; PCIJ, case of the *Free Zones of Upper Savoy and the District of Gex*, 1932, p. 167; PCIJ, Advisory Opinion on *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, p. 24)" (para. 241).

35. 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 which I have sustained in my Dissenting Opinion in the recent case on the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening, Judgment of 03.02.2012), and which I again sustain in the present Judgment of the *A.S. Diallo* case: the reparations are owed by the responsible State concerned to the individuals victimized, as illustrated, in my perception, by both cases. The individual right to reparation is well-established in International Human Rights Law, as demonstrated by the considerable case-law of the IACtHR and the ECtHR on the matter.

36. Contemporary international tribunals cannot remain oblivious of such significant development in recent years. As I deemed it fit to warn in my aforementioned Dissenting Opinion in the recent case on the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening, Judgment of 03.02.2012), it would be without foundation to keep on claiming that the regime of reparations for breaches of human rights would exhaust itself at inter-State level, "to the detriment of the individuals" concerned. After all, the individual victims of those violations "are the *titulaires* of the right to reparation", and

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[53]PCIJ, *Chorzów Factory* case, Jurisdiction, 1927, p. 21.

[54]PCIJ, *Chorzów Factory* case, Merits, 1928, pp. 29 and 47-48.

> "An interpretation of the regime of reparations as belonging purely to the inter-State level would furthermore equate to a complete misconception of the position of the individual in the international legal order. In my own conception, 'the human person has emancipated herself from her own State, with the acknowledgement of her rights, which are prior and superior to this latter'[55]" (paras. 251-252).

Thus, the regime of reparations for human rights violations could not exhaust itself at the inter-State level, leaving the individual at the end without any reparation, and at the mercy of the entire discretion of the wrongdoing State.

37. The right of access to justice *lato sensu* encompasses not only the access to a competent tribunal (at national or international level), but also the right — and its exercise — to an effective remedy and the guarantees of the due process of law, so as to have one's case fairly heard and adjudicated upon. It further comprises the reparations owed to the victims (whenever they are due to them), in the full and faithful compliance with, or execution of, the judgments at issue. Thus properly conceptualized, the right of access to justice forms part of international protection itself.

38. In the present domain of reparations, as in others, contemporary international law, the *jus gentium* of our days, has at last liberated itself from the chains of statism. Human rights constitute a basic foundation of the international legal order, with the reassuring advent of the new primacy of the *raison d'humanité* over the *raison d'État*. States are aware that nowadays they are bound to respond for the treatment they dispense to human beings under their respective jurisdictions. The present case *A.S. Diallo*, decided by the ICJ on the basis of human rights treaties, bears witness of this reassuring evolution.

39. Within this humanized outlook, the *reparatio* (from the Latin *reparare*, "to dispose again") ceases all the effects of the breaches of international law (the violations of human rights) at issue, and provides satisfaction (as a form of reparation) to the victims; by means of the reparations, the Law re-establishes the legal order broken by those violations, — a legal order erected on the basis of the full respect for the rights inherent to the human person. The full *reparatio* does not "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.

40. One has to be aware that it has become commonplace in legal circles — the conventional wisdom of the legal profession — to repeat that the duty of reparation, conforming a "secondary obligation", comes after the breach of international law. This is not my conception; when everyone seems to be thinking alike, no one is actually thinking at all. In my own conception, breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former. The duty of reparation is a *fundamental* obligation, and this becomes clearer if we look into it from the perspective of the centrality of the victims, which is my 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.

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[55]A.A. Cançado Trindade, *The Access of Individuals to International Justice*, *op. cit. supra* n. (30), p. 209; A.A. Cançado Trindade, *Évolution du Droit international au droit des gens-L'accès des particuliers à la justice internationale: Le regard d'un juge*, *op. cit. supra* n. (52), pp. 29 and 146.

VI. THE CENTRALITY OF THE VICTIMS IN HUMAN RIGHTS PROTECTION, AND ITS IMPLICATIONS FOR REPARATIONS

1. The Central Position of the Victims

41. International law itself, in recognizing rights inherent to the human person, disauthorized the archaic positivist dogma which purported, in an authoritarian way, to reduce those rights to the ones "granted" or "conceded" by the State. Contrariwise, the recognition of the individual as a subject of both domestic and international law comes at last to give an ethical content to the norms of both legal orders, domestic and international. It further acknowledges the need for all States, — in order to avoid new violations of human rights, — to answer for the way they treat human beings under their respective jurisdictions, and to provide reparation for the harm done to them. Rights, being inherent to the human person, and anterior and superior to the State, and are not reduced to those which the State is prepared to "grant" or "concede" to persons under its jurisdiction, at its sole discretion.

42. The subjects of rights and the beneficiaries of reparations (*supra*), under human rights treaties, are the individuals. The *centrality* of their position in the present domain of protection is well-established. This responds to a true *need* of the international community itself, which seeks nowadays to be guided by superior common values. Such need was intuitively perceived and heralded, some decades ago, in the first half of the XXth century, in a pioneering way, by André N. Mandelstam[56], Georges Scelle[57] and Charles de Visscher[58]. In our times, 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, to take into other areas the contribution of the International Law of Human Rights. In this way, the historical process of the *humanization* of international law, intuitively detected and propounded, some decades ago, by a generation of jusinternationalists with a humanist formation (such as, e.g., M. Bourquin, A. Favre, S. Sucharitkul, and S. Glaser)[59], will keep on advancing[60].

43. In fact, no one would, in sane conscience, challenge today that individuals are subjects of rights and bearers of duties which emanate directly from international law, and that States which violate their rights are bound to provide them reparation for the damages. In recent decades, the international community itself has reckoned the *need* to provide protection to the rights of the human beings who compose it (grouped under distinct forms of socio-political organization, either

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[56]A.N. Mandelstam, *Les droits internationaux de l'homme*, Paris, Éds. Internationales, 1931, pp. 95-96, 103 and 138.

[57]G. Scelle, *Précis de Droit des Gens-Principes et systématique*, part I, Paris, Libr. Rec. Sirey, 1932 (reimpr. CNRS, 1984), p. 48.

[58]Ch. De Visscher, "Rapport-'Les droits fondamentaux de l'homme, base d'une restauration du Droit international'", *Annuaire de l'Institut de Droit International* (1947) pp. 3 and 9.

[59]Cf. M. Bourquin, "L'humanisation du droit des gens", *in La technique et les principes du droit public - Études en l'honneur de Georges Scelle*, vol. I, Paris, LGDJ, 1950, pp. 24-38; A. Favre, "Les principes généraux du droit, fonds commun du droit des gens", *in Recueil d'études de droit international en hommage à Paul Guggenheim*, Geneva, IUHEI, 1968, pp. 369-390; S. Sucharitkul, "L'humanité en tant qu'élément contribuant au développement progressif du droit international contemporain", *in L'avenir du droit international dans un monde multicultural/The Future of International Law in a Multicultural World* (Colloque de La Haye de 1983, ed. R.-J. Dupuy), The Hague, Nijhoff/Académie de Droit International de La Haye/UNU, 1984, pp. 418-427; S. Glaser, "La protection internationale des valeurs humaines", 60 *Revue générale de Droit international public* (1957) pp. 211-241.

[60]Cf. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium*-General Course on Public International Law-Part II", 317 *Recueil des Cours de l'Académie de Droit International de La Haye* (2005) pp. 19-27 and 269-282.

the State or others), with particular attention to those — individually or in groups — who find themselves in a situation of special vulnerability.

44. Even if, in certain cases, the international legal capacity of some individuals undergoes certain contingencies in view of their juridical or existential condition (children, elderly persons, stateless persons, among others), this in no way affects the essence and fundamental unity of their legal personality. They remain subjects of rights emanating from the *jus gentium*, and their unaffected international legal personality is the concrete expression of their inherent dignity[61]. They cannot be mistreated by the holders of the public power of the State, and, in case they are, reparation is owed to them. The international legal personality of the human person and the protection of the Law subsist intact, irrespective of his or her juridical or existential condition; and his or her personality imposes limits to the power of the State.

2. The Implications for Reparations

45. 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. Thus, towards the end of the last century, in the mid-eighties, the Cuban jurist F.V. García-Amador criticized the traditional outlook (reminiscent of E. Vattel) of international responsibility which viewed this latter as a "strictly 'inter-State' legal relationship"; he retorted that that traditional approach was not appropriate to deal with claims for reparations to damages to individuals, such as cases of unlawful detention followed by arbitrary expulsion[62]. The damage — he added — is done to the individual himself (and not to his State of nationality), who is subjected to the "unnecessary humiliation" of the expulsion[63].

46. In sum, it is a damage done to the human person and not to the State. It is that damage that is taken as "the measure" for the determination of the reparation due[64], i.e., the damage done to the individual concerned. It is incongruous to approach this matter from a strict "inter-State" outlook. In this respect, F.V. García-Amador rightly observed:

> "The artificiality, and consequently also the inconsistencies and contradictions, of the traditional doctrine become clearly apparent when one considers the criterion generally applied for measuring the reparation"[65].

47. The U.N. International Law Commission (ILC) itself, in the 2001 *Report* on its work on the international responsibility of a State, saw it fit to recall, in addressing the obligation "to make full reparation for the injury caused by the internationally wrongful act", the possibility that

> "an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus State responsibility extends, for example, to

[61]IACtHR, Advisory Opinion OC-17/02 (of 28.08.2002), on the *Juridical Condition and Human Rights of the Child*, Concurring Opinion of Judge Cançado Trindade, paras. 32-34.

[62]F.V. García-Amador, *The Changing Law of International Claims*, vol. II, N.Y./London, Oceana Publs., 1984, pp. 560 and 584-586.

[63]*Ibid*., pp. 563-564.

[64]*Ibid*., p. 562.

[65]*Ibid*., p. 562.

> human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State"[66].

The ILC thus expressly reckoned that the international responsibility of a State "may accrue directly to any person or entity other than a State, and article 33 makes this clear"[67].

48. As disclosed by the present case of *A.S. Diallo*, one is, in sum, faced with a damage done to an individual. He (and not his State of origin) is the subject of the rights breached, he suffered unlawful detention and arbitrary expulsion (from the State of residence), he is the subject of the corresponding right to reparation, and the beneficiary thereof. His case was originally brought before this Court by his State of nationality (in the exercise of diplomatic protection), but, in its decision on the merits (Judgment of 30.11.2010), the Court made clear that the applicable law was the International Law of Human Rights, concerned with the rights of human beings and not at all of States. The *cas d'espèce*, further clarified in this regard by the present Judgment on reparations, bears witness of the reassuring historical process, presently in course, of the *humanization* of international law, — as I have been pointing out and supporting since the nineties[68].

49. This is the situation, how it stands, in the present case *A.S. Diallo*, resolved by the ICJ on the basis of the applicable treaties on the protection of the rights of the human person. In other and entirely distinct situations (e.g., in territorial and boundary matters, in the regulation of spaces, in diplomatic relations, among others) damage may be found to have been done to the State. And in yet other circumstances (e.g., in situations of armed conflicts), damage may be found to have been done to *both* the State and the human person. This is what happened, e.g., in the case concerning *Armed Activities on the Territory of the Congo* (Judgment of 19.12.2005), wherein the Court, in recalling that a State responsible for international wrongful acts is under the obligation to make full reparations for the injury caused by those acts, added that, in the *cas d'espèce*, those acts resulted in injury done to the D.R. Congo "and to persons on its territory" (para. 259)[69]. Circumstances vary from case to case; but at least they leave it clear that a strict inter-State approach to the State's compliance with the duty to provide reparation, irrespective of such circumstances, appears anachronistic and unsustainable.

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[66]U.N., *Report of the International Law Commission*, 53rd. Session (2001), N.Y., U.N., 2001, p. 214.

[67]*Ibid*., p. 214.

[68]Cf., to this effect, my earlier Individual Opinions in the IACtHR (1998 until 2003), namely: IACtHR, case *Castillo Petruzzi et alii versus Peru* (Preliminary Objections, Judgment of 04.09.1998), Concurring Opinion of Judge Cançado Trindade, paras. 6-7; IACtHR, Advisory Opinion n. 16 of the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999), Concurring Opinion of Judge Cançado Trindade, paras. 34-35; IACtHR, case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Provisional Measures of Protection, Resolution of 18.08.2000), Concurring Opinion of Judge Cançado Trindade, para. 12; IACtHR, Advisory Opinion n. 17 on the *Juridical Condition and Human Rights of the Child* (of 28.08.2002), Concurring Opinion of Judge Cançado Trindade, paras. 66-67 and 71; IACtHR, Advisory Opinion n. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (of 17.09.2003), Concurring Opinion of Judge Cançado Trindade, paras. 27-28; there follow successive references to, and assertions of, the *humanization* of international law, in other of my Individual Opinions in the IACtHR, also from 2004 to 2008. For earlier writings, likewise followed by subsequent ones to the same effect, cf., *inter alia*, A.A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", 6/7 *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro* (1998-1999) pp. 425-434; A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte/Brazil (2001) pp. 11-23.

[69]And cf. also paras. 342 and 344.

3. The Distinct Forms of Reparation

50. It has been in the domain of international human rights protection that reparations have been reckoned as comprising, in the light of the general principle of *neminem laedere*, the *restitutio in integrum* (re-establishment 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. The duty of reparation, corresponding to a general principle, has found judicial recognition (*supra*), and support in legal doctrine[70]. The duty of reparation for damages stands as the indispensable complement of the breach of a conventional obligation of respect for human rights [71].

51. Contemporary doctrine has identified the aforementioned distinct *forms* of reparation *from the perspective of the victims*, of their claims, needs and aspirations. By the *restitutio in integrum* one seeks the re-establishment — whenever possible[72] — of the *statu quo ante*. The *rehabilitation* comprises all the measures — medical, psychological, juridical and others — to be taken to re-establish the dignity of the victims. The *indemnizations*, — often and unduly confused with the reparation, of which they are but one of the forms, — comprise the pecuniary sum owed to the victims for the damages (material[73] and moral or immaterial[74]) suffered. The *satisfaction* is linked to the purported aim to cease the effects of the violations, and the *guarantee of non-repetition* (of the breaches) discloses a preventive dimension.

52. Juridical concepts, while encompassing values, are a product of their time, and as such are not unchangeable. The juridical categories crystallized in time and which came to be utilized — in a context distinct from the ambit of the International Law of Human Rights — to govern the determination of reparations were strongly marked by analogies with solutions of private law, and, in particular, of civil law (*droit civil*), in the ambit of national legal systems: such is the case, e.g., of the concepts of material damage and moral or immaterial damage, and of the elements of *damnum emergens* and *lucrum cessans*. Such concepts have been strongly determined by a patrimonial content and interest, — which is explained by their origin, — marginalizing what is most important in the human person, namely, her condition of spiritual being[75].

53. The pure and simple transposition of such concepts onto the international level was bound to generate uncertainties and discussion. The criteria of determination of reparations, of an essentially patrimonial content (ensuing from civil law analogies), does not appear to me entirely adequate or sufficient when transposed into the domain of the International Law of Human Rights, endowed with a specificity of its own. It is not surprising that, as from the early nineties, the matter

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[70]Cf., *inter alia*, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, University Press, 1994 (reprint), p. 233; J.A. Pastor Ridruejo, *La Jurisprudencia del Tribunal Internacional de La Haya - Sistematización y Comentarios*, Madrid, Ed. Rialp, 1962, p. 429; H. Wassgren, "Some Reflections on *Restitutio in Integrum* Especially in the Practice of the European Court of Human Rights", 6 *Finnish Yearbook of International Law* - Helsinki (1995) pp. 575-595.

[71]Cf., *inter alia*, P. Reuter, "Principes de Droit international public", 103 *Recueil des Cours de l'Académie de Droit International de La Haye* (1961) pp. 585-586; R. Wolfrum, "Reparation for Internationally Wrongful Acts", *Encyclopedia of Public International Law* (ed. R. Bernhardt), vol. 10, Amsterdam, North Holland, 1987, pp. 352-353.

[72]In case of violation of the right to life, for example, restitution becomes impossible.

[73]Not seldom, in relation to this point, in practice reference is made to *damnum emergens* and *lucrum cessans*.

[74]Which, in most cases, is determined by a judgment of equity.

[75]This is disclosed by the fact that even the moral damage itself is commonly regarded, in the classical conception, as amounting to the so-called "non-patrimonial damage". The point of reference still keeps on being the patrimony.

began to be reassessed in the realm of this latter, at the United Nations[76], well before the endorsement by the U.N. General Assembly in 2005 of the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"[77], elaborated and adopted by the [former] U.N. Commission on Human Rights[78] (cf. *infra*).

54. The important point here to retain is that, in the ambit of the International Law of Human Rights, the *forms* of reparation (*restitutio in integrum*, indemnizations, rehabilitation, satisfaction, guarantee of non-repetition) are to be necessarily approached *as from the perspective of the victims themselves*, keeping in mind their claims, their needs and aspirations. Reparations for human rights breaches are, in fact, directly and ineluctably linked to the condition of the victims and their next of kin, who occupy in it a central position herein. Reparations are to be constantly reassessed as from the perspective of the integrality of the personality of the victims themselves, bearing in mind the fulfilment of their aspirations as human beings and the restoration of their dignity[79].

55. It is crystal clear that the aforementioned 2005 U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparations is also ineluctably *victim-oriented*: it rightly pursues a victim-centred approach, envisaging the right to reparation as a right of the individuals victimized, entailing the corresponding duty to have justice done to the individuals victimized, what becomes fundamentally important in cases of grave breaches of their rights[80]. Under certain circumstances, next of kin or dependants of the direct victims may also be regarded as "victims", entitled to make use of the right of access to justice.

56. The 2005 U.N. Basic Principles and Guidelines, at last adopted on 16.12.2005, were 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

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[76]Cf. Th. Van Boven (special *rapporteur*), *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms - Final Report*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1993/8, of 02.07.1993, pp. 1-65; and cf. also: [Various Authors,] *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (Proceedings of the Seminar of Maastricht of 1992), Maastricht, SIM/Univ. Limburg, 1992, pp. 3-253. And cf., subsequently, M.C. Bassiouni (special *rapporteur*), *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms - Final Report*, doc. E/CN.4/2000/62, of 18.01.2000, pp. 1-11.

[77]U.N. General Assembly resolution 60/147, of 16.12.2005.

[78]By its resolution 2005/35, of 19.04.2005.

[79]It is significant that the IACtHR, in its Judgment (of 27.11.1998) in the case of *Loayza Tamayo versus Peru*, has, besides the measures of reparation that it ordered, also rightly recognized the existence of a damage to the *project of life* (linked to satisfaction) of the victim, caused by her detention (in the circumstances in which it took place). Cf. IACtHR, case of *Loayza Tamayo versus Peru* (Reparations), Judgment (of 27.11.1998), Series C, n. 42, paras. 83-192, and Joint Separate Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, paras. 1-17.

[80]Cf. P. d'Argent, "Le droit de la responsabilité internationale complété? Examen des Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire", 51 *Annuaire français de droit international* (2005) pp. 34-35, 40, 43, 45 and 52.

years[81] (cf. *infra*). It can safely be stated that, in some respects, 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[82].

57. The centrality of the position of the victims, as *justiciables*, has implications for the approach to distinct forms of reparations. Let us take, as an example to illustrate this point, *satisfaction* as a form of reparation. Within the framework of strictly inter-State relations, satisfaction as a form of reparation has been met with criticism, given the susceptibilities surrounding the relations between States *inter se*[83]. However, in the framework of the relations between States and individuals under their respective jurisdictions, satisfaction has proven to be a very appropriate form of reparation, and a particularly important one for the human beings, victims of breaches of their rights by the States at issue.

58. The reassuring centrality of the victims in human rights protection (an imperative of justice) has other implications as well, beyond the realm of reparations. It is not my intention to dwell upon them, as they lie beyond the scope of the present Separate Opinion. I shall limit myself to observing that the victims' central position has helped to awaken conscience as to their importance, and the corresponding need of honouring them, the victims. In our times, along the last decades, attention is at last turning from the past praises of the deeds of national heroes (including military and war heroes, conquerors and the like), to the memory of the silent victims, to the need to honour their suffering in enduring the violations of their fundamental rights, and to avoid dropping their suffering into oblivion[84].

59. In my Dissenting Opinion (paras. 247-249) in the case on the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening, Judgment of 03.02.2012), I have referred to endeavours, throughout the last decade, to secure reparations also to individuals, in the realm of International Humanitarian Law (e.g., the 2000 legal regime of the Ethiopia-Eritrea Claims Commission, the 2004 *Report* of the U.N. International Commission of Inquiry on Darfur, the 2010 Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) of the International Law Association's International Committee on

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[81]Cf., e.g., [Various Authors,] *Réparer les violations graves et massives des droits de l'homme: La Cour interaméricaine, pionnière et modèle?* (eds. E. Lambert Abdelgawad and K. Martin-Chenut), Paris, Société de Législation Comparée, 2010, pp. 17-334; M. Scalabrino, "Vittime e Risarcimento del Danno: L'esperienza della Corte Interamericana dei Diritti dell'Uomo", 22 *Comunicazioni e Studi*-Milano (2002) pp. 1013-1092; C. Sandoval-Villalba, "The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on Their Implications for Reparations", *in Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (eds. C. Ferstman, M. Goetz and A. Stephens), Leiden, Nijhoff, 2009, pp. 243-282; K. Bonneau, "La jurisprudence innovante de la Cour interaméricaine des droits de l'homme en matière de droit à reparation des victimes des violations des droits de l'homme", *in Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pédone, 2009, pp. 347-382; I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 133-145; J. Schönsteiner, "Dissuasive Measures and the 'Society as a Whole': A Working Theory of Reparations in the Inter-American Court of Human Rights", 23 *American University International Law Review* (2007) pp. 127-164.

[82]A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional-Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, Annex IV, pp. 313-340.

[83]Cf., e.g., B. Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages", 185 *Recueil des Cours de l´Académie de Droit International de La Haye* (1984) pp. 84-87.

[84]Cf., e.g., [Various Authors,] *Commémorer les victimes en Europe-XVIe-XXIe siècles* (eds. D. El Kenz and F.-X.. Nérard), Champ Vallon, 2011, pp. 10, 18, 25, 65, 144, 262 and 328-330.

Reparation for Victims of Armed Conflict. There appears thus to be an ever-growing awareness nowadays of the individual victims' right to reparation, not only in the domain of the International Law of Human Rights, but encompassing also the realm of International Humanitarian Law.

VII. THE CONTRIBUTION OF THE CASE-LAW OF THE INTERNATIONAL HUMAN RIGHTS TRIBUNALS (IACTHR AND ECTHR)

1. The Relevance of Their Case-Law on Reparations Due to the Victims

60. In the light of all the aforesaid, the contribution of the case-law of the international human rights tribunals (the IACtHR and the ECtHR) is noteworthy, and deserves particular attention for the consideration of the matter of the reparations due to victims of human rights violations. The growing case-law of the IACtHR and the ECtHR in recent years, on reparations to the victims of human rights violations, has contributed to shift attention to the victims, human beings (and not States), disclosing the centrality of their position in the present domain of protection (cf. *infra*). In this respect, the present case *A.S. Diallo* is a landmark in the evolving case-law of the ICJ itself, as this latter has, for the first time in its history, established violations of rights enshrined into human rights treaties. The victim, the subject of rights and *titulaire* of the right to reparations, is a human being (and not a State), Mr. A.S. Diallo.

61. To him, and not to his State of origin or of nationality, reparations are due, pursuant to the human rights treaties at issue (the U.N. Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights). In determining those reparations, it is only too natural that the ICJ takes into due account the case-law of the two Human Rights Courts, in construction for many years, and which has further been invoked by the contending parties themselves in the course of the present proceedings before this Court, namely, the Inter-American and the European Courts of Human Rights.

62. This is most reassuring, given the common mission of contemporary international tribunals of securing the *realization of justice*. Both the IACtHR and the ECtHR have built a pioneering case-law on the *condition of the victims* for purposes of reparation. The IACtHR has, moreover, much contributed to the evolution of the International Law of Human Rights itself with its creative jurisprudential construction of the distinct *forms of reparation* (cf. *infra*). To the recently-established African Court on Human and Peoples' Rights a similar role is reserved[85], in the years to come.

63. In the first meeting ever, which brought together members and special guests of the three contemporary Human Rights Courts (held at the *Palais des Droits de l'Homme* in Strasbourg, on 08-09 December 2008, on the occasion of the 60th anniversary of the Universal Declaration of Human Rights)[86], one of the topics more extensively discussed, — as I well recall, — was precisely the experience accumulated by the IACtHR and the ECtHR in the matter of reparations to

[85]In this respect, reference can be made to the practice, on reparations, of the African Commission on Human and Peoples' Rights; cf., *inter alia*, e.g., G.J. Naldi, "Reparations in the Practice of the African Commission on Human and Peoples' Rights", 14 *Leiden Journal of International Law* (2001) pp. 681-693.

[86]For accounts of the meeting, cf. A.A. Cançado Trindade, "Vers un droit international universel: la première réunion des trois Cours régionales des droits de l'homme", *in* XXXVI *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano-2009,* Washington D.C., Secretaría General de la OEA, 2010, pp. 103-125; Ph. Weckel, "La justice internationale et le soixantième anniversaire de la Déclaration Universelle des Droits de l'Homme", 113 *Revue générale de droit international public* (2009) pp. 5-17.

victims of human rights violations, and the role reserved, from now onwards, to the three co-existing international human rights Tribunals in the on-going evolution of the international case-law on the matter.

64. Other contemporary international tribunals have much to benefit from the experience gathered in this specific domain, in being attentive to it and taking it into due account. Parallel to this development, in the last two decades there have been endeavours to construct the practice of reparations also in the ambit of international humanitarian law[87]. Attention has thereby been turned, for the purposes of protection, to the *condition of the victims*, human beings, to the actual situation wherein they find themselves. The human person has thus gradually recovered the central place reserved to it in the contemporary international legal order, in the new *jus gentium* of our times. The growing jurisprudence on reparations for human rights violations bears witness of that.

2. The Contribution of the Inter-American Court of Human Rights

65. Reference has already been made to the unique and innovative jurisprudential construction of the IACtHR in the matter of reparations due to the victims of human rights violations (para. 56, *supra*). It has not passed unperceived in expert writing that the IACtHR has relied on the greater precision of the terms of Article 63(1) of the American Convention on Human Rights[88] to construct its innovative and progressive case-law on the matter[89]. To start with, the IACtHR has singled out the role of considerations of equity in setting forth the amounts of reparations due to individual victims, even in the absence of sufficient evidence (even more forcefully in certain cases where respondent States withheld their virtual monopoly of evidence).

66. Thus, for example, in the case of *El Caracazo versus Venezuela* (reparations, Judgment of 29.08.2002), the IACtHR proceeded to the determination of compensation on the basis of equity, taking into account the suffering and "the alterations in the conditions of existence" of the victims and their next of kin (paras. 99-100). In the case of *Cantoral Benavides versus Peru* (reparations, Judgment of 03.12.2001), the IACtHR also decided on the basis of equity (paras. 80 and 87). In my Separate Opinion in this case of *Cantoral Benavides*, I pondered *inter alia* that

> "In the present Judgment, the Inter-American Court extended the protection of the Law to the victim in the *cas d'espèce*, in establishing, *inter alia*, the State's duty to provide him with the means to undertake and conclude his university studies in a centre of recognized academic quality. This is, in my understanding, a form of providing reparation for the damage to his project of life, conducive to the *rehabilitation* of the victim. The emphasis given by the Court to his *formation*, to his *education*, places this form of reparation (from the Latin *reparatio*, derived from *reparare*, 'to prepare or to dispose again') in an adequate perspective, from the angle of the integrality of the personality of the victim, bearing in mind his self-accomplishment as a human being and the reconstruction of his project of life" (para. 10).

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[87] Recent examples of the recognition of the right of individual reparation also in the domain of International Humanitarian Law, are provided in my Dissenting Opinion (paras. 247-250) in the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy case, Greece intervening, Judgment of 03.02.2012).

[88] Cf. note (93), *infra*.

[89] Cf., to this effect, *inter alia*, e.g., G. Cohen-Jonathan, "Responsabilité pour atteinte aux droits de l'homme", *in La responsabilité dans le système international* (Société Française pour le Droit International, Colloque du Mans), Paris, Pédone, 1991, pp. 114 and 116.

67. In effect, the IACtHR has ordered a wide range of forms of reparation (*restitutio in integrum*, compensation, victim satisfaction, victim rehabilitation, acts of public apology, guarantees of non-repetition of human rights breaches), unparalleled in the case-law of other contemporary international tribunals. In the recent cycle of cases of massacres[90] adjudicated by the IACtHR (cf., *inter alia*, e.g., *Aloeboetoe versus Suriname* case, reparations, Judgment of 10.09.1993; case of the *Massacre of Plan de Sánchez versus Guatemala*, reparations, Judgment of 19.11.2004; case of the *Moiwana Community versus Suriname*, Judgment of 15.06.2005; case of the *Massacres of Ituango versus Colombia*, Judgment of 01.07.2006), the reparations ordered by the IACtHR have included health, housing, education and human development initiatives. In a distinct context, such measures of reparations were also ordered by the IACtHR in the paradigmatic case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua* (Judgment of 31.08.2001), concerning the communal property of the members of an indigenous community. The IACtHR thereby indicated, in such cases, that the rehabilitation of victims (cf. *infra*) may also have a collective dimension, when it concerns the members of a given community.

68. In the leading case of the *"Street Children" (Villagrán Morales and Others) versus Guatemala* (reparations, Judgment of 26.05.2001), the Court deemed it fit to warn that the obligation to make reparation is regulated, in all aspects (scope, nature, forms and determination of the beneficiaries) by international law; the respondent State "may not invoke provisions of its domestic law in order to modify or fail to comply" with that obligation (para. 61). The IACtHR has reiterated this warning in successive cases, e.g., its Judgments on the cases of *Bulacio versus Argentina* (of 18.09.2003, para. 72), of *Las Palmeras versus Colombia* (of 26.11.2002, reparations, para. 38), of *Hilaire, Constantine and Benjamin and Others versus Trinidad and Tobago* (of 21.06.2002, para. 203), of *Trujillo Oroza versus Bolivia* (of 27.02.2002, reparations, para. 61), of *Bámaca Velásquez versus Guatemala* (of 22.02.2002, reparations, para. 39), and, earlier on, of *Suárez Rosero versus Ecuador* (of 20.01.1999, reparations, para. 42). This point forms today part of its *jurisprudence constante* on reparations.

69. Still as to the forms of reparation, the IACtHR has ordered, for example, acts to honour the memory of victims, as in its Judgments in the cases of *Bámaca Velásquez versus Guatemala* (of 22.02.2002, reparations), of *Myrna Mack Chang versus Guatemala* (of 25.11.2003), of the *Moiwana Community versus Suriname* (of 15.06.2005), of *Trujillo Oroza versus Bolivia* (of 27.02.2002, reparations), of the *Massacre of Plan de Sánchez versus Guatemala* (of 19.11.2004, reparations). In this last and dramatic case, those acts were to be accompanied (as they in fact were) by social programmes (rehabilitation) for the members of the affected community.

70. Furthermore, the IACtHR has also ordered, e.g., the public dissemination of the Court's decisions and/or of the result of the ordered investigations. It has done so in its Judgments in the aforementioned cases of *Bulacio*, of *Bámaca Velásquez*, of *El Caracazo*, as well as in the cases of *Barrios Altos versus Peru* (of 14.03.2001), and of the *Institute of Reeducation of Minors versus Paraguay* (of 02.09.2004). Moreover, in its Judgments in the aforementioned case of *Bámaca Velásquez* (of 25.11.2000, merits, and 22.02.2002, reparations) as well as in that of *19 Tradesmen versus Colombia* (of 05.07.2004), the IACtHR dwelt upon the right to truth as a measure of reparation. In addition thereto, satisfaction as a form of reparation for damage to the victim's "project of life" was ordered by the IACtHR, in its Judgments both in the aforementioned case of *Cantoral Benavides*, and in the case of *Loayza Tamayo versus Peru* (of 27.11.1998, reparations). Last but not least, the guarantee of non-repetition of human rights breaches was ordered by the IACtHR in, *inter alia*, e.g., its Judgments in the aforementioned case *Bulacio*, as well as in that of *Castillo Páez versus Peru* (of 27.11.1998, reparations).

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[90]For a recent study, cf. A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice* (Inaugural Address, 10.11.2011), Utrecht, Universiteit Utrecht, 2011, pp. 1-71.

3. The Contribution of the European Court of Human Rights

71. Like the IACtHR (*supra*), the ECtHR has also pointed out the role of considerations of equity in the determination of the amounts of reparations due. Thus, for example, in the case of *Lupsa versus Romania* (Judgment of 08.06.2006), the ECtHR found that "deporting the applicant did objectively disrupt the management of his business", and that "the consequences of that disruption cannot be precisely quantified" (para. 70); it then ordered a sum on an equitable basis, to cover all heads of damage (para. 72, and cf. paras. 73-77). In the case *Assanidze versus Georgia* (Judgment of 08.04.2004), concerning arbitrary detention, the ECtHR ruled likewise on an equitable basis (para. 201, and cf. paras. 204-207), and awarded a lump-sum amount for all heads of (material and immaterial) damage, without setting out the reasons that led it to the specified amount (para. 201).

72. In the same line of thinking, in the case of *Orhan versus Turkey* (Judgment of 18.06.2002), the ECtHR decided, at the "level of just satisfaction", on the basis of considerations of equity (paras. 431-434, and cf. paras. 423-424). It did the same in the case *Lustig-Prean and Beckett versus United Kingdom* (Judgment of 25.07.2000), as compensation, on an "equitable basis", for "emotional and psychological" disturbances (paras. 12 and 23). And again in the case *Selçuk and Asker versus Turkey* (Judgment of 24.04.1998), the ECtHR likewise awarded reparations for damages on the basis of equitable considerations (paras. 109-112, and cf. para. 106). And once more, in the *Delta versus France* case (Judgment of 19.12.1990), the ECtHR took its decision, of award of compensation, on an "equitable basis" (para. 43).

73. Parallel to such considerations of equity, as for the awarding of reparations itself, the case-law of the ECtHR has, however, never been as proactive as that of its sister institution across the Atlantic, the IACtHR. It has not disclosed the same creativity, and has in general been particularly cautious, in generally starting from predetermined categories of pecuniary and non-pecuniary damages, at times conveying the impression that compensation would better be left for national courts to decide[91]. The distinct drafting of the respective provisions on reparations of the European and the American Conventions on Human Rights, furthermore, conveys the impression that the phraseology of Article 41 of the European Convention[92] did not ascribe to the ECtHR as wide a horizon for the determination of reparations than the one ascribed by Article 63(1) of the American Convention[93] to the IACtHR; in any case, this is at least what the ECtHR seems to have understood to date. It is thus not surprising to find arguments as to the need for the ECtHR "to revisit" its own case-law on just satisfaction/*satisfaction équitable*, and in particular on reparation for moral (or "non-pecuniary") damages, so as to enlarge its horizon to the benefit of the *justiciables*[94].

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[91]Cf., *inter alia*, e.g., L. Wildhaber, "Reparations for Internationally Wrongful Acts of States-Article 41 of the European Convention on Human Rights: Just Satisfaction under the European Convention on Human Rights", 3 *Baltic Yearbook of International Law* (2003) pp. 1-18.

[92]Article 41 (formerly Article 50)-on just satisfaction-of the European Convention states that:-"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

[93]Article 63(1) of the American Convention states that:-"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

[94]Cf., *inter alia*, e.g., P. Tavernier, "La contribution de la jurisprudence de la Cour européenne des droits de l'homme relative au droit de la responsabilité internationale en matière de réparation-une remise en cause nécessaire", 72 *Revue trimestrielle des droits de l'homme* (2007) pp. 945-966.

VIII. *NEMINEM LAEDERE* AND REPARATION FOR MORAL DAMAGE TO INDIVIDUALS

74. In domestic legal systems, the whole theory of civil liability/*responsabilité civile* found inspiration in the fundamental principle *neminem laedere* (cf. *supra*). The conception of damage and of the reaction of the legal system to wrongful acts, requiring reparation, goes back to Roman law, to the theory of *id quod interest*, whereby the harmed person is entitled to redress. One restored thereby the balance or equilibrium needed in human relations. There was also concern to safeguard thereby human personality as such, the integrity of the human person. From ancient to modern times, unlike material damage, it proved particularly hard to conceptualize moral damage (*dommage moral*/non-pecuniary damage).

75. This latter became the object of endless discussions (ever since the first codifications), given the resistance of some doctrinal trends to attribute a value or price to the suffering of the victims (*pretium doloris*). The prolonged construction of the theory of the *responsabilité civile* was made possible, however, by the recourse to general criteria, such as, e.g., the gravity of the breach, the intensity of the suffering it generated, the social repercussion of the breach, the consequences for the victim, the intentionality and *culpa* of the perpetrator.

76. The moral character of the damage was regarded as an infringement of the *human personality*, not only in what is most intimate to it but also in the human relations in its social *milieu*. It was against such damage that the legal system reacted, requiring reparation to the victim, so as to preserve the integrity of the human personality of the victim. Hence the conception of *responsabilité civile*, emanating from the immemorial general principle of *neminem laedere*. Such juridical construction was transposed from domestic law into international law, by means of private law analogies[95] (mainly of civil law). They were thereby heavily marked by a patrimonial content and interest (what can be explained by their origin). Hence their conceptualization, in civil law and also in common law countries, as "non-pecuniary damage"[96]. The point of reference was patrimonial or financial.

77. The simple transposition of such concepts to international law level was bound to raise uncertainties. Yet, at least it did not pass unnoticed, in the debates on the matter going back to the XIXth century, that consideration of moral damages inevitably turns attention to human suffering[97], 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[98].

78. The analogies with solutions proper to common law or to civil law (*droit civil*) have never appeared convincing or satisfactory to me, as, by focusing — for the purpose of reparation — on the relationship of the human person with material goods, they marginalized the most important

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[95]E.g., the concepts of material and moral damages, the elements of *damnum emergens* and *lucrum cessans*, among others.

[96]For comparative law surveys, cf., e.g., [Various Authors,] *Damages for Non-Pecuniary Loss in a Comparative Perspective* (ed. W.V. Horton Rogers), Vienna, Springer-Verlag, 2001, pp. 1-311; [Various Authors,] *Redress for Non-Material Damage / Réparation du préjudice moral* (London Colloquy of 1969), Strasbourg, Council of Europe, 1970, pp. 4-127.

[97]Cf. R. André and A. Smedts, *La réparation du dommage moral*, Anvers, Impr. Dugardin & Persoons, [1951,] pp. 6, 17 and 125, and cf. p. 10.

[98]L. Reitzer, *La réparation comme conséquence de l´acte illicite...*, *op. cit. supra* n. (45), p. 124.

trait in the human person, as a spiritual being[99]. Moral damages should not be reduced to a consideration of material goods, patrimony, capacity for work, and the projection of these elements in time, — as upheld by the regrettable cosmovision of the *homo oeconomicus* so widespread in our times. It was necessary to wait for the advent of the International Law of Human Rights, in order to go beyond these short-minded categories, and look also into the human person's aspirations, freedom and integrity.

79. Juridical concepts, encompassing values, are product of their time, and are open to progressive development. With the formation of the *corpus juris* of the International Law of Human Rights, it became clearer that the determination of reparations should keep in mind the integrality of the personality of the victim, should consider the impact on this latter of the violation of the rights inherent to her, should approach the matter from an integral, rather than patrimonial or financial outlook, with special attention to the aspirations, personal freedom and integrity of the individual victim. Hence the importance of *restitutio in integrum* (not always possible), given the manifest insufficiencies of indemnizations (for material damage).

80. On the basis of my own experience of magistrate serving successively two international jurisdictions, that of the IACtHR and then of the ICJ, I attribute particular importance to reparations for moral damages. In some cases, of particular gravity, I dare to say that they prove to be even more significant or meaningful to the victims than those for pecuniary damages, or indemnizations. The granting of reparations for moral damages, by international human rights tribunals, has been made feasible by their recourse to considerations of *equity*. Given the prolongation of the proceedings of the *cas d'espèce* opposing Guinea to the D.R. Congo, in the merits as well as the reparations stages (suggesting that the time of human justice is not the time of human beings), I have felt obliged to draw attention, in my Declaration (paras. 1-4) appended to the Court's Order of 20.09.2011 in the present case of *A.S. Diallo*, to the relevance of the award of reparations within a reasonable time (as justice delayed is justice denied), as well as to the *considerations of equity* to bear in mind for the determination of reparations (mainly for moral damages).

IX. The Relevance of the Rehabilitation of Victims

81. The *reparatio* for damages comprises distinct forms of compensation to the victims for the harm they suffered, at the same time that it re-establishes the legal order broken by wrongful acts (or omissions), — a legal order erected on the basis of the full respect for the rights inherent to the human person. The observance of human rights is the *substratum* of the legal order itself. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts. The *realization of justice* thereby achieved (an imperative of *jus cogens*) is in itself a form of reparation (satisfaction) to the victims. Such *reparatio* does not put an end to the suffering ensuing from the human rights violations already perpetrated, 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 of the social *milieu*, the oblivion of the victims and the impunity of the perpetrators.

82. In this framework, the *rehabilitation* of the victims is of the utmost importance. It is a matter of not only re-establishing the legal order broken by wrongful acts (or omissions), but also of seeking to rehabilitate the victims themselves of such wrongs, as subjects or *titulaires* of the

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[99]In this respect, the 1948 American Declaration on the Rights and Duties of Man states, in its fourth preambular paragraph that:-"Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources".

rights recognized therein that have been breached. After all, the individual victims (and not the States) occupy a central position in the framework of the International Law of Human Rights, oriented towards them, — which is a Law of protection (*droit de protection*). By granting the individual victims *jus standi*, or else *locus standi in judicio*, in this domain of protection at international level, the International Law of Human Rights has rescued the central position occupied therein by the victimized[100] (even in situations of great vulnerability, if not defencelessness), and has thereby asserted the (active) international subjectivity of individuals in the law of nations (*droit des gens*) at large.

83. The centrality of the victims in the present domain of protection draws attention to the pressing need of their *rehabilitation*, — to be considered as from the integrality of the personality of the victims[101], — in the framework of *restorative* justice. The rehabilitation of the victims projects itself into their social *milieu*. It has both an individual and a social dimensions. Restorative justice has made great advances in the last decades, due to the evolution of the International Law of Human Rights, humanizing the law of nations (the *droit des gens*). Such advances are now being felt, though in a lesser degree but a reassuring one, also in the domain of International Humanitarian Law and of contemporary International Criminal Law. The universal juridical conscience seems to be at last awakening as to the need to honour the victims of human rights abuses and to restore their dignity.

84. Rehabilitation of the victims acquires a crucial importance in cases of grave violations of their right to personal integrity. In effect, there have been cases where medical and psychological assistance to the victims has been ordered, — mainly by the IACtHR, — as a form of reparation, aiming at their rehabilitation[102]. Such measures have intended to overcome the extreme vulnerability of victims, and to restore their identity and integrity. Rehabilitation of the victims mitigates their suffering and that of their next of kin, thus irradiating itself into their social *milieu*.

85. Rehabilitation, discarding the apparent indifference of their social *milieu*, helps the victims to recuperate their self-esteem and their capacity to live in harmony with the others. Rehabilitation nourishes the victims' hope in a minimum of social justice[103]. Rehabilitation helps to restructure the psyche of the victims, in their difficult quest for recovery from the injustice of humiliation. Rehabilitation as a form of reparation is intended to reorder ultimately the human relations disrupted by acts of cruelty, in breach of human rights. In sum, rehabilitation restores one's faith in human justice.

X. EPILOGUE: CONCLUDING REFLECTIONS

86. As we have seen in the present Separate Opinion, reparation and its *rationale*, in the light of the basic principle of *neminem laedere*, are deeply-rooted in international legal thinking, going back in time to the early beginnings of the law of nations (the *droit des gens*). Consideration of the

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[100]To this effect, IACtHR, case *Castillo Petruzzi et alii versus Peru* (Preliminary Objections, Judgment of 04.09.1998), Concurring Opinion of Judge Cançado Trindade, paras. 5 and 12; IACtHR, case *Tibi versus Ecuador* (Merits and Reparations, Judgment of 07.09.2004), Separate Opinion of Judge Cançado Trindade, paras. 16 and 18-20.

[101]A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, p. 442.

[102]A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, *op. cit. supra* n. (82), pp. 329-330.

[103]*Ibid.*, pp. 330-332.

subject-matter marked presence, as I have pointed out[104], in the writings of F. Vitoria, H. Grotius, S. Pufendorf and C. Wolff (as well as in those of A. Gentili, F. Suárez and C. van Bynkershoek), from the XVIth to the XVIIIth centuries. Concern to secure *reparations for damages done to the human person* was present therein, and in a way even antedated their writings, going far back to the XVth century, when the term "person" (meaning the physical or moral person) had then been conceptualized[105], as referring to the subject of rights.

87. By then, — and certainly by the following time of the insights of F. Vitoria in the early XVIth century, and of F. Suárez and H. Grotius in the early XVIIth century (followed by those of S. Pufendorf in the late XVIIth century, and of C. Wolff in the XVIIIth century), — it had been understood that the human person "embodied" humanity, and a damage done to him/her was a *wrong*, which required reparation. The reductionist outlook which followed (starting with E. Vattel in the mid-XVIIIth century) of an international legal order conformed in pursuance of a strict inter-State conception (in the light of distinct trend of legal positivism), — with individuals subjected to their respective States, as upheld mainly by Hegelian legal philosophy, as from the early XIXth century, with its personification of the all-powerful sovereign State, — with the disastrous consequences which followed, was incapable of removing the human person from the framework of the law of nations, as originally conceived.

88. As a matter of fact, even at the dark time when absolute State sovereignty (devoid of any precise meaning) came to be invoked, also in the ambit of the relations between States and individuals, to attempt to justify, and to cover-up, grave abuses against these latter, there were those who raised their voices to unmask such deception. Examination of this particular point lies beyond the purposes of the present Separate Opinion. Suffice it here only to recall that, in the early XXth century, Léon Duguit, in his philosophical construction of the "*solidarisme de la liberté*", outlining State obligations *vis-à-vis* the human person (individually or in groups), denounced the gross abuses perpetrated in the name of State sovereignty as unwarranted tyrannical oppression[106].

89. Throughout the XXth century, despite so many abuses and successive atrocities victimizing millions of individuals, a trend of humanist thinking flourished, in the writings of Emmanuel Mounier (1905-1950) and Gabriel Marcel (1889-1973), asserting the 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). In a world of violence amidst the misuses of language, there were, thus, also those who succeeded in preserving their lucidity. This and other precious trends of humanist thinking, almost forgotten (surely by the legal profession) in our hectic days, can, in my view, still shed much light towards further development of reparations for moral damages done to the human person.

90. Such reparations for moral damages[107] should not be limited always to awards of reparations on a pecuniary basis only; there are times, depending on the circumstances of the

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[104]Cf. section III, paras. 14-21, *supra*.

[105]In ancient times, — it may be recalled, — the term *person* (the Etruscan *phersu*, the Greek *prôsopon*, the Latin *persona*) meant the mask, in theatrical representation; later on, it came to refer to the character (*personnage*), paving the way for the medieval sense of "person" (the human person), meaning, from the XVth century onwards, the physical or moral person, as subject of rights.

[106]He did so, e.g., in his lucid and thoughtful lectures of 1920-1921, as Visiting Professor at Columbia University; cf. Léon Duguit, *Souveraineté et liberté* [1920-1921], Paris, Éd. La Mémoire du Droit, 2002 [reed.], pp. 126-127, 132-134, 150-151 and 202.

[107]Cf. section VIII, paras. 74-80, *supra*.

cases, when they call for other forms of (non-pecuniary) reparations (obligations of *doing,* such as satisfaction and rehabilitation of the victims). Be that as it may, I dare to nourish the hope that the day will come when it is properly learned and well-established that the State's duty to provide reparations for damages it did to individuals is an ineluctable and indispensable one: it cannot, in my understanding, be evaded by an unacceptable, unethical and unfounded invocation of State sovereignty or of State immunity[108].

91. Another lesson we can extract 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. In this respect, also in the previous Judgment of the Court (on the merits, of 30.11.2010) in the present case of *A.S. Diallo*, I pointed out, in my Separate Opinion thereon, that the individual concerned is the subject of the right to reparation and its ultimate beneficiary (paras. 200-212), beyond the inter-State dimension (paras. 213-221).

92. As the Court stated in that Judgment on the merits of 30.11.2010, the *cas d'espèce* concerns breaches of human rights treaties (cf. *supra*). And as I pondered in my earlier Separate Opinion appended to that Judgment on the merits, the hermeneutics of human rights treaties has put limits to the excesses of State voluntarism (paras. 83-88); it has done so in pursuance of the principle *pro persona humana* (paras. 89-92). In a larger horizon, one is here guided by the principle of humanity (paras. 93-105), in conformity with the *necessary* law of the *societas gentium*, regulating relations in the international community constituted by human beings socially organized in States and co-extensive with humankind (para. 106).

93. As I deemed it fit to add in the aforementioned Separate Opinion, that necessary law of the *societas gentium*, has — pursuant to natural law thinking — "prevailed over the will of individual States", thus remaining

> "respectful of the human person, to the benefit of the common good[109]. The precious legacy of natural law thinking, evoking the natural law of the right human reason (*recta ratio*), has never faded away, and this should be stressed time and time again (…)" (para. 106).

Furthermore, the old monopoly of States of the titularity of rights at international level can no longer be sustained.

94. The reasserted presence — and a central one — of the individual in the framework of the law of nations has much contributed, as I have sought to demonstrate in the present Separate Opinion, to the more recent progressive development of international law in respect of reparations for damages ensuing from violations of human rights. With the rescue of the individual as subject of the contemporary *jus gentium*, the centrality of victims in the international protection of human rights is nowadays well-established and beyond question. In the present domain of protection, reparations are due to individual victims, and not to States. The victim-centred outlook has entailed implications for the reparations due, has clarified their forms, has fostered the progressive development of international law in the present domain.

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[108]Cf., in this sense: ICJ, case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening; Judgment of 03.02.2012), Dissenting Opinion of Judge Cançado Trindade, paras. 1-316.

[109]A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 9-14, 172, 318-319, 393 and 408.

95. The international subjectivity of individuals has had this additional beneficial impact upon contemporary *jus gentium*. The contribution of the case-law of the international tribunals of human rights (the IACtHR and the ECtHR) bears witness of this. The centrality of victims singles out, in particular, as we have just seen, the relevance, in particular, of reparation of moral damage to individuals, so as to alleviate their suffering, as well as of the rehabilitation of victims. The *realization of justice* is of key importance to the victims, and belongs, in my understanding, to the domain of *jus cogens*. Without it, — the right of access to justice *lato sensu*, — there is no legal system at all.

96. The jurisprudential and doctrinal developments that I have cared, and felt obliged, to examine in the present Separate Opinion, have been made possible in the light of the recognition that the victims, subjects of the right to reparation, are the ones who actually suffered the damage, — human beings of flesh and bone, and not their States. It is, furthermore, not to be forgotten that the legal construction on the matter, existing today in international law (but still in its infancy), was transposed to it from the secular experience gathered earlier in domestic legal systems; the recent contribution of international human rights tribunals (the IACtHR and the ECtHR) sheds new light into it (cf. *supra*), and develops the aptitude on international law to regulate relations in circumstances such as those of the present *A.S. Diallo* case. The traditional and strict inter-State dimension is of little use, if any, here.

97. Furthermore, in modern times, since the dawn of State responsibility, it has become clear that the breach of international law and the compliance with the duty of reparation for damages form an indissoluble whole, which cannot at all be disrupted by undue and irresponsible invocations of State sovereignty or State immunity. The obligation to provide reparation of damages stands as a *fundamental* one, rather than as a "secondary" one. It is an imperative of justice.

98. The resurgence of individuals as subjects of the law of nations (the new *jus gentium*) has entailed other consequences, in addition to that on reparations for damages resulting from human rights violations (*supra*), and related to this latter. It has, for example, called for a reassessment of issues pertaining to international legal procedure. This has been recently reckoned by this Court itself, in its most recent Advisory Opinion (of 01.02.2012) on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. In my Separate Opinion appended thereto, I sustained that the international legal personality (and capacity) of individuals, requiring the observance of the basic principle of procedural equality (equality of arms/*égalité des armes*), corresponds to a *necessity* of the international legal order itself in our days (paras. 1-118).

99. Last but not least, I come back to my initial point. Bearing in mind that in the present case the damages were done to an individual (Mr. A.S. Diallo) and not to a State, there is one precision that I deem it fit to make at this final stage in this Separate Opinion. In the *dispositif* of the present Judgment, the Court fixes the amount of compensation for *non-material* as well as *material* damage "suffered by Mr. Diallo" (resolutory points (1) and (2)). I have concurred with the Court majority's decision as to a larger amount of compensation for non-material damage, given the particular importance that I attach to reparation for moral damages (cf. *supra*).

100. Although the amounts of compensation are formally due from the D.R. Congo (as respondent State in the *cas d'espèce*) to Guinea (as complainant State in the present case), 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 the proper meaning, as I perceive it, of resolutory points (1) and (2) of the *dispositif* of the present Judgment, in combination with paragraph 57 of the reasoning of the Court.

101. This understanding is well in accordance with the basic postulates of the International Law of Human Rights (the applicable law in the present case), and bears witness of the international legal personality of the individual as subject of contemporary international law. This is clearly so, even if, out of a surpassed dogmatism, individuals remain deprived of their international legal capacity, of their *locus standi in judicio*, that would otherwise have enabled them — as it should happen, in the light of all the aforementioned, — to appear directly in legal proceedings before this Court.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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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." (Case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, *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'." (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 (ECtHR) and the Inter-American Court of Human Rights (IACtHR). 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:

> "[I]t 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." (*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, the Inter-American Court of Human Rights, 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 ECtHR 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 ECtHR in *Stafford* v. *The 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. *The 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 ECtHR was unable to make a precise calculation of his lost earnings. However, the ECtHR 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), IACtHR, para. 88; *El Amparo* v. *Venezuela,* Judgment of 14 September 1996 (Reparations and Costs), IACtHR, para. 28). In the *Ituango Massacres* case (2006), while the IACtHR 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." (Case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), 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 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.

(Signed) Abdulqawi A. YUSUF.

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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), Judgment, I.C.J. Report 2010*, 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 percent 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 paras. 86-94 of the Judgment of 24 May 2007). In its Judgment of 30 November 2010 *(Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Judgment, I.C.J. Report 2010*, p. 693), the Court rejected Guinea's claims for violation of Mr. Diallo's rights as *associé* in the companies (see paras. 99-159 of that Judgment). 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 (*RIAA*, 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" (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 (*I.C.J. Reports 1949*, p. 4), 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 *M/V Saiga (No. 2) (St. 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 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.

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OPINION INDIVIDUELLE DE M. LE JUGE *AD HOC* MAHIOU

Principes régissant la réparation d'un préjudice résultant d'un acte illicite d'un Etat — Réparation du préjudice immatériel ou moral, du préjudice aux biens personnels et d'autres préjudices matériels (revenus professionnels et pertes de gains) — Fixation du montant des indemnités dues par la RDC à la Guinée au profit de M. Diallo — Délai pour le paiement assorti d'un taux d'intérêt en cas de non-paiement — Frais de procédure.

1. A la suite de l'arrêt du 30 novembre 2010, la Cour avait demandé aux Parties de négocier un accord sur le montant de l'indemnisation, en fixant un délai de six mois à compter du prononcé de l'arrêt pour y parvenir. Apparemment, il n'y a pas eu réellement de négociations, sans doute en raison de divergences trop grandes entre les deux Parties sur le montant de l'indemnisation. Elles se renvoient mutuellement la responsabilité de cet échec, comme cela ressort de leurs mémoires respectifs. Devant cet échec, il revient donc à la Cour de se prononcer sur le bien-fondé des positions en présence en vue de déterminer le montant de l'indemnisation due par la République démocratique du Congo (ci-après la «RDC» à la République de Guinée (ci-après la «Guinée»).

2. Notons que le Cour a eu rarement l'occasion de se prononcer sur la question des indemnisations et notamment la fixation de leur montant. Certes, elle avait déjà dégagé les principes devant régir la réparation d'un dommage résultant d'un acte illicite d'un Etat dans la célèbre affaire de l'*Usine de Chorzów*, mais elle n'a eu à les mettre en œuvre effectivement que dans une seule affaire, celle de l'affaire du *Détroit de Corfou* pour fixer le montant de l'indemnisation due par l'Albanie pour les dommages matériels et humains causés par des mines à la marine britannique.

3. Les principes gouvernant l'indemnisation pour les dommages résultant d'actes internationaux illicites sont, pour la plupart d'entre eux, assez bien établis en droit international, en raison des règles découlant tant des conventions internationales que de la jurisprudence de différents tribunaux internationaux (Cour permanente de Justice internationale et Cour internationale de Justice, tribunaux arbitraux et surtout cours régionales des droits de l'homme), que du projet d'articles de la Commission du droit international (la «CDI») sur la responsabilité des Etats, des travaux de la Commission internationale des droits de l'homme et, enfin, des travaux doctrinaux. Le point qui doit nous préoccuper est de savoir dans quelle mesure ces principes sont susceptibles de s'appliquer dans l'affaire soumise à notre examen et sur quelles bases déterminer l'indemnisation.

4. En fait, le contenu des délibérations sur l'indemnisation était déjà très largement prédéterminé par l'arrêt précité du 30 novembre 2010 par lequel la Cour avait décidé que, pour avoir violé certaines dispositions du Pacte international relatif aux droits civils et politiques, de la Charte africaine des droits de l'homme et des peuples et de la convention sur les relations consulaires, la RDC était tenue de réparer les préjudices qui en découlaient. Notons d'emblée que la Cour a exclu la réparation en nature qui est logiquement le principe de base pour la réparation du préjudice, depuis le célèbre *dictum* énoncé par la Cour permanente de Justice internationale dans l'affaire relative à l'*Usine de Chorzów* :

> «la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis» (*Usine de Chorzów, fond, arrêt no. 13, 1928, C.P.J.I. série A no. 17*, p. 47).

5. Etant donné que la Guinée ne demande pas la restitution en nature et que, au demeurant et en l'espèce, celle-ci n'est plus possible, le présent arrêt a pour objet de se prononcer sur le paiement d'une somme correspondant à la valeur qu'aurait la restitution en nature en se basant sur les conditions également énoncées dans la même affaire de l'*Usine de Chorzów*, c'est-à-dire en envisageant l'«*allocation, s'il y a lieu, de dommages-intérêts pour les pertes subies et qui ne seraient pas couvertes par la restitution en nature ou le paiement qui en prend la place» (ibid.)* puisque «*tels sont les principes desquels doit s'inspirer la détermination du montant de l'indemnité due à cause d'un fait contraire au droit international*» *(ibid.)* (les italiques sont de nous). Cette solution qui fait partie du droit international général a été reprise au premier paragraphe de l'article 36 des articles de la CDI de 2001, aux termes duquel «*[l]'Etat responsable du fait internationalement illicite est tenu d'indemniser le dommage causé par ce fait dans la mesure où ce dommage n'est pas réparé par la restitution*» (les italiques sont de nous). On sait également que, dans le contexte plus précis de la violation des droits de l'homme, les textes et la pratique font peser sur l'Etat fautif l'obligation d'indemniser intégralement la personne lésée.

6. Comment faire en sorte que l'indemnisation aboutisse à la réparation intégrale ? La Cour a tenu compte des informations et de la pratique des différentes juridictions précitées ou d'autres organes qui se sont penchés sur le problème. Deux juridictions ont joué un rôle particulièrement important pour préciser les contours de l'indemnisation : la Cour européenne des droits de l'homme et la Cour interaméricaine des droits de l'homme. Leur jurisprudence a fourni une grille de lecture et une source d'inspiration pour la Cour, même si naturellement celle-ci n'est pas liée par les décisions de ces deux cours régionales et que par ailleurs le contexte de la protection diplomatique confère un caractère particulier à la présente affaire. Il n'est pas inutile de rappeler que selon le principe 20 de la résolution 60/147 adoptée par l'Assemblée générale des Nations Unies le 16 décembre 2005 sur les principes fondamentaux et directives concernant le droit à réparation des victimes de violations flagrantes du droit international des droits de l'homme :

> «[u]ne indemnisation devrait être accordée pour tout dommage résultant de violations flagrantes du droit international des droits de l'homme … qui se prête à une évaluation économique, selon qu'il convient et de manière proportionnée à la gravité de la violation et aux circonstances de chaque cas».

7. Il ressort de la pratique internationale que l'on établit un plancher et un plafond entre lesquels doit se situer l'indemnité, de façon à établir un équilibre entre deux considérations :

— d'une part, garantir que l'indemnité efface toutes les conséquences de l'acte internationalement illicite ;

— d'autre part, éviter que l'indemnité ne soit excessive ou ne comporte un caractère punitif.

8. Encore faut-il savoir quels sont exactement les dommages à indemniser et quel montant de l'indemnisation est de nature à réparer intégralement le préjudice subi? C'est sur ce point que l'arrêt se prononce en retenant, à mon avis, une interprétation particulièrement restrictive des dommages indemnisables qui ne me permet pas d'adhérer pleinement à la solution retenue. Il convient, d'abord, de distinguer entre les dommages subis par l'Etat guinéen et ceux subis par son ressortissant, M. Diallo. Comme l'affaire concerne les droits de l'homme et plus précisément les droits individuels de la victime, je commencerai naturellement par les dommages subis par M. Diallo puisque celui-ci est au cœur du problème dans cette affaire de protection diplomatique. Dans cette perspective, la Cour distingue deux types de préjudice en vue de se prononcer sur leur indemnisation : le préjudice immatériel ou dommage moral et le préjudice matériel qu'elle décompose en un certain nombre de chefs d'indemnisation en fonction des demandes de la Guinée.

1. L'indemnisation du dommage immatériel ou préjudice moral

9. La Cour a dûment constaté un certain nombre de faits, notamment une première détention arbitraire en 1988 qu'elle n'a pas retenue pour invocation tardive par la Guinée, et surtout une détention arbitraire de près de deux mois et demi sans aucune information sur les raisons de celle-ci, sans aucune communication possible avec les autorités guinéennes et sans savoir ce que réserve la suite de la procédure. Il est évident que, outre le désagrément d'être soumis à des conditions de détention aussi désobligeantes que pénibles et désagréables, une telle situation engendre une situation d'inquiétude ou d'angoisse d'autant plus intense et stressante pour le détenu qu'il est dans l'incertitude la plus totale sur son sort.

10. Dans le cas d'espèce, le dommage moral découle du comportement des autorités congolaises qui ont harcelé M. Diallo à partir du moment où il a tenté de recouvrer les créances que lui devaient un certain nombre d'organismes publics ou d'entreprises publiques. Non seulement, il a été détenu, mais on a cherché à le disqualifier et à le déstabiliser en tant qu'homme d'affaires, en s'efforçant par divers moyens de porter atteinte à sa réputation et à son honneur, notamment en l'accusant d'avoir soudoyé des agents de l'Etat et des juges et sans lui permettre de se défendre contre de telles allégations dépourvues de tout élément de preuve. Au demeurant, les juges congolais eux-mêmes n'ont pas donné suite à ces accusations, mais leur formulation et la publicité dont elles ont été l'objet ont eu des conséquences très gravement préjudiciables sur les activités de l'accusé et sur l'avenir de sa présence au Zaïre (actuellement République démocratique du Congo).

11. Il convient de rappeler ici le contexte de l'époque de ces faits où il y avait un régime autoritaire de parti unique, avec une presse entièrement contrôlée par l'Etat qui pouvait lancer ou colporter toutes sortes d'accusations, sans que la personne mise en cause soit en mesure d'avoir quelque moyen de défense afin de répondre pour démentir ou contester les faits qui lui sont reprochés. Cela avait pour objectif de discréditer M. Diallo auprès de personnes influentes nationales et internationales, parce que l'intéressé avait progressivement tissé un important réseau de relations en vue de faire fructifier les activités des deux sociétés qu'il dirigeait. On sait que, de manière générale, les relations personnelles jouent un rôle considérable pour mener à bien une activité commerciale et la maintenir et cela est *a fortiori* encore plus vrai en Afrique et dans l'ex-Zaïre, compte tenu de l'importance des rapports humains dans la société africaine et des caractéristiques du système politique prévalant alors dans ce pays.

12. Les démêlés avec les autorités congolaises ont créé une situation préjudiciable qui doit donner lieu à une indemnisation adéquate. Certes, il n'est pas toujours aisé d'en déterminer le montant dans la mesure où l'on est en présence d'une situation où les éléments subjectifs prédominent sur les critères objectifs. Bien que la pratique internationale et notamment jurisprudentielle fournissent des bases de comparaison avec des variations importantes, c'est à juste titre que la Cour se réfère essentiellement à l'équité afin de parvenir à une indemnisation juste et raisonnable.

13. Les actes illicites des autorités congolaises ont été une source de souffrances physiques et psychologiques, de contrariété, d'humiliation et de déshonneur non seulement pendant les périodes de détention, mais ces souffrances se sont prolongées bien au-delà et elles perdurent encore plus de dix-sept ans après les événements qui les ont déclenchées. En fait, c'est toute une vie qui a été ruinée par les conséquences des deux incarcérations arbitraires suivies d'une expulsion brutale d'un pays où la victime a résidé pendant trente-deux ans, au point que M. Diallo l'a considéré comme sa seconde patrie. Sur ce point, tout en souscrivant à la démarche de la Cour et en estimant par

ailleurs que même si les sommes d'argent ne parviennent qu'imparfaitement à réparer des préjudices moraux, il aurait sans doute été plus équitable de fixer un montant plus élevé que celui de 85 000 dollars des Etats-Unis. Cependant, cette réticence ne m'empêche pas d'être en accord avec la décision finale de la Cour.

2. L'indemnisation concernant les biens personnels

14. Pour l'indemnisation concernant les biens personnels, la Cour s'est trouvée embarrassée pour se prononcer sur l'ampleur et la réalité du préjudice subi par M. Diallo parce que les éléments de preuve fournis par la Partie demanderesse sont bien loin d'être concluants pour ce qui concerne l'ameublement de l'appartement et ils sont même absents pour ce qui concerne la liste d'objets de grande valeur et le contenu des comptes en banque.

15. S'agissant du mobilier de l'appartement, il y a certes un inventaire mais il est approximatif et surtout il est difficile de savoir ce qui a pu se passer entre l'arrestation de M. Diallo et le moment où l'inventaire a été établi, car des biens pourraient avoir été subtilisés pendant cette période. Il ne s'agit pas là simplement de pures spéculations puisque M. Diallo avait un standing de vie très élevé et entretenait des relations avec beaucoup de personnalités du monde politique et des affaires, ce qui permet de conclure qu'il habitait un appartement confortable et bien meublé. De ce fait, lorsque le paragraphe 36 de l'arrêt fixe à 10 000 dollars des Etats-Unis le montant forfaitaire de l'indemnisation pour le préjudice concernant l'ameublement, il est permis de penser qu'il y a une sous-estimation du montant du préjudice et que son évaluation en équité permettait d'aller au-delà de cette somme retenue par la Cour. Mais, là encore, je me suis finalement rallié à l'argumentation et la décision de la Cour

16. S'agissant des objets de grande valeur pour lesquels une indemnisation est réclamée, la Partie demanderesse n'a produit devant la Cour qu'une simple liste sans aucun élément de preuve pouvant étayer leur existence effective et leur évaluation. Cela ne signifie pas pour autant que ces objets n'ont pas existé parce que, comme indiqué précédemment, M. Diallo avait un standing de vie très élevé avant de connaître les tourments ayant entraîné non seulement la ruine de ses sociétés mais aussi et surtout sa ruine personnelle ; il n'aurait donc pas été déraisonnable de donner crédit à l'affirmation de la possession des biens mentionnés dans la liste. Aussi, tout en comprenant que, devant l'absence de toute preuve, la Cour ne puisse se fonder sur la seule et simple affirmation de la demanderesse, elle aurait pu ne pas rejeter purement et simplement la demande ; en effet, dans la mesure où sa décision est basée sur l'équité, elle aurait pu allouer à titre symbolique une somme forfaitaire d'un montant adéquat. La Cour n'a pas estimé devoir le faire et, tout en exprimant ma réserve, je n'ai pas voté contre la solution retenue.

3. Les pertes de revenus professionnels et de potentiel de gains

17. A propos de ce chef de réclamation, il est permis de regretter que la demande de la Guinée soit non seulement disproportionnée et manifestement excessive mais, en outre, elle donne une interprétation de l'arrêt de la Cour de 2010 qui va au-delà de ce qu'il énonce en voulant réintégrer des dommages concernant les dommages subis par les deux sociétés dirigées par M. Diallo alors que la Cour n'a pas retenu ces dommages et qu'elle a rejeté, par voie de conséquence, leur éventuelle indemnisation. La Cour ne peut alors, naturellement et logiquement, que tirer les conclusions de son précédent arrêt en rejetant la demande d'indemnisation pour tout ce qui concerne les éventuels dommages concernant les sociétés elles-mêmes.

18. Il reste que si les préjudices subis par les deux sociétés sont hors du champ du présent débat, M. Diallo tirait des revenus professionnels au titre d'employé de ces sociétés dont il était le gérant. Or, le fait de l'avoir détenu à deux reprises plus de deux mois pour l'expulser ensuite l'a privé de l'exercice de ses fonctions de gérant et des revenus auxquels il avait droit à ce titre. Il me semble qu'il aurait été logique et équitable de prendre en considération cette perte de revenus pour l'indemniser. En effet, un gérant qui est en même temps associé est considéré comme un travailleur non salarié et, à ce titre, il perçoit une rémunération dès lors qu'il exerce effectivement ses fonctions. Cette solution prévaut même si l'associé est majoritaire ou s'il est associé unique, comme dans le cas d'espèce, car le droit maintient la fiction d'une société privée à responsabilité limitée (S.P.R.L.) qui est le statut des deux sociétés gérées par M. Diallo. Bien que la Guinée n'apporte pas de preuve sur le montant de la rémunération qui s'attache aux fonctions de gérant des deux sociétés, il est possible de déduire en équité un montant raisonnable au lieu de rejeter purement et simplement la demande comme le fait la Cour, et je ne peux donc adhérer à une solution aussi tranchée pour une raison logique et de bon sens. En effet, alors même que M. Diallo était détenu, il devait nécessairement bénéficier de certains revenus, à un titre ou un autre, ne serait-ce que pour pourvoir à diverses dépenses objectives comme le loyer de l'appartement dont il disposait, les honoraires d'avocats plaidant sa cause, les frais courants de la vie quotidienne, y compris son alimentation en prison puisque les détenus n'étaient pas nourris, etc. Même si le montant de l'indemnisation réclamée par la Guinée est très manifestement disproportionné et s'il est malaisé d'évaluer le montant de ces revenus, il était loisible pour la Cour de prendre en compte les circonstances particulières de l'espèce pour accorder une indemnisation appropriée, et il m'est donc difficile de comprendre la solution radicale de rejet retenue dans le paragraphe 46 de l'arrêt et c'est pourquoi, à mon grand regret, je ne puis souscrire à ce rejet pur et simple.

4. Les frais de procédure

19. Enfin, s'agissant des frais encourus pour l'assistance en justice, notons d'abord qu'avec ce chef d'indemnisation, on quitte la situation personnelle de M. Diallo pour passer à une autre situation impliquant l'Etat guinéen. En effet, avec la mise en œuvre de la protection diplomatique, c'est l'Etat guinéen qui est demandeur dans la présente affaire et qui a engagé les frais adéquats pour défendre les droits et intérêts de son ressortissant.

20. Dans cette affaire, la Guinée a obtenu partiellement gain de cause sur la recevabilité de la requête avec l'arrêt du 24 mai 2007 qui a rejeté l'exception d'irrecevabilité pour la protection des droits propres de M. Diallo et accepté ladite exception pour la protection des droits des sociétés dont il était le propriétaire et le responsable. La Guinée a également et partiellement obtenu gain de cause sur les violations des droits propres de M. Diallo avec l'arrêt du 30 novembre 2010. Elle a enfin obtenu gain de cause, entièrement, sur le principe de l'indemnisation du dommage moral et, partiellement, sur le principe de l'indemnisation de certains dommages matériels. Dans ces circonstances, à la fois pour une question de principe et d'équité, il me semble qu'il aurait été raisonnable d'accorder le remboursement d'un montant modeste des frais exposés dans cette troisième et dernière phase d'une procédure dont la durée totale avoisine quatorze années puisqu'elle a commencé en décembre 1998 pour s'achever en juin 2012. C'est donc pour cette raison de principe et d'équité que je n'ai pas voté en faveur du dispositif de la Cour sur ce point.

(Signé) Ahmed MAHIOU.

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OPINION INDIVIDUELLE DE M. LE JUGE *AD HOC* MAMPUYA

Le montant de l'indemnité au titre du préjudice moral calculé par la Cour est exorbitant et n'est pas proportionnel au préjudice subi par M. Diallo — les principes régissant la fixation du montant de la réparation en droit international doivent s'appliquer avec la même rigueur à la réparation pour préjudice moral — l'obligation générale de réparation intégrale ne doit pas comporter un caractère punitif ni exemplaire — le montant de l'indemnisation ne doit représenter que la juste compensation du dommage subi — la jurisprudence constante des cours des droits de l'homme, des tribunaux arbitraux et des commissions de réclamations montre que ces juridictions respectent le principe de proportion au moment de fixer le montant de la réparation — les indemnités au titre de préjudice moral accordées par ces juridictions pour des violations des droits de l'homme plus graves que celles subies par M. Diallo sont inférieures à celles accordées à M. Diallo — les conditions qui ont entouré les détentions et l'expulsion de M. Diallo ne constituent pas des circonstances aggravantes justifiant le montant excessif au titre du préjudice moral — des principes applicables pour réparation du préjudice matériel — la preuve de l'existence du préjudice matériel, ainsi que le lien de causalité entre le préjudice et le comportement illicite de l'Etat responsable s'avèrent fondamentaux pour l'établissement de l'indemnisation — la Guinée n'a pas apporté de «preuves suffisantes» établissant le dommage matériel allégué par M. Diallo sous la forme de perte de biens personnels — le principe d'équité auquel d'autres juridictions ont fait appel dans leur jurisprudence n'est applicable qu'aux fins d'estimation de la valeur devant servir de base au calcul du montant de l'indemnisation — la Guinée n'a pas démontré un lien de causalité entre le préjudice matériel pour perte des biens personnels allégué par M. Diallo et le comportement de la RDC — les cours des droits de l'homme se montrent plus exigeantes en matière de preuves et demandent un lien de causalité directe avec les faits incriminés — bien que l'existence de biens personnels de M. Diallo ait été prouvée par l'inventaire, la Guinée n'a pourtant pas démontré que certains autres biens aient existé en dehors de ceux énumérés dans l'inventaire ni que ces biens avaient été perdus ou que leur perte était imputable à la RDC — Le montant de 10 000 dollars des Etats-Unis, fixé par la Cour, pour préjudice matériel ne repose sur aucun fondement juridique.

J'ai franchement adhéré, sur leur principe, aux principales conclusions retenues dans l'arrêt que la Cour a rendu pour enfin clore, par la fixation du montant de l'indemnisation découlant de la reconnaissance de la responsabilité internationale de la RDC pour fait internationalement illicite à raison de la violation des droits individuels de M Diallo, cette affaire qui dure depuis 1998. J'aurais bien voulu être d'accord avec la majorité de la Cour sur l'ensemble des points en discussion ; malheureusement, je n'ai pu suivre la majorité sur deux points du dispositif, qui en comporte sept. Voilà ce qui justifie les explications que je me dois de présenter dans cette opinion, non, bien évidemment, pas dissidente mais individuelle.

1. Il s'agit d'abord d'un point d'appréciation en relation, non avec le principe, mais avec l'évaluation du montant, pour moi d'une hauteur injustifiée, de l'indemnisation due par la RDC à la Guinée pour le préjudice moral, ou «immatériel», subi par M. Diallo à la suite de ses détentions et expulsion par les autorités du défendeur. J'ai exprimé mon désaccord sur un deuxième point : il s'agit d'un point de droit concernant la base juridique, pour moi inexistante en l'absence de toute preuve, de l'indemnisation allouée au titre de préjudice matériel du fait de la perte de biens personnels de M. Diallo. Ma divergence avec la majorité de la Cour sur ce point ainsi que mon vote subséquent s'expliquent du fait qu'il s'agit d'une importante question juridique de principe, nullement en raison du montant, du reste modeste, de l'indemnité accordée de 10 000 dollars des Etats-Unis, mais au regard de l'importante question de l'administration de la preuve en matière de réparation.

2. Etant entendu que, depuis son arrêt sur la fixation du montant de l'indemnisation dans l'affaire du *Détroit de Corfou ((Royaume-Uni c. Albanie) fixation du montant des réparations, C.I.J. Recueil 1949*, p. 244 et suiv.), c'est la première fois qu'elle est appelée à se prononcer sur la fixation de l'indemnisation due par un Etat au titre de la responsabilité internationale de celui-ci pour fait internationalement illicite, la Cour ne peut se référer qu'à la riche expérience d'autres juridictions, y compris celle des tribunaux d'arbitrage et de réclamations. La pratique la plus exemplaire, à cet égard, est celle des deux cours régionales des droits de l'homme : la Cour européenne des droits de l'homme (CEDH) et la Cour interaméricaine des droits de l'homme (CIADH), mais aussi celle du Tribunal des réclamations Etats-Unis/Iran. L'abondante jurisprudence de ces juridictions a permis de dégager les principes qui, aujourd'hui, président à l'examen de toutes les questions soulevées par la détermination de la réparation et la fixation de l'indemnisation due par un Etat en matière de responsabilité internationale.

3. Ce sont donc cette jurisprudence et ces principes qui, selon la Cour elle-même, devraient la guider aussi bien pour la réparation en général que pour la fixation du montant de l'indemnisation. Or, l'analyse que j'ai faite du présent arrêt à la lumière de ces sources me conduit à constater que, finalement, la Cour ne s'en est pas inspirée.

4. Je commencerai mon exposé par la question, facile parce que de simple appréciation de fait, de la détermination du montant de l'indemnisation dû au titre du préjudice immatériel ou moral. Cela pour démontrer que la Cour n'a pas respecté les quelques principes dégagés par la jurisprudence constante, en fixant un montant qui s'avère nettement exorbitant au regard de ce que pratiquent toutes les autres juridictions, y compris celles spécialisées dans la sauvegarde des droits de l'homme, pourtant en principe les plus favorables aux victimes.

5. C'est après cela que j'expliquerai plus longuement ma vision sur la décision de la Cour d'octroyer une indemnité, peu importe son montant, à la Guinée pour «préjudice matériel» du fait de la perte, alléguée par M. Diallo, des biens de ce dernier à la suite de ses détentions et expulsion par la RDC en janvier 1996. Je démontrerai que cette indemnisation n'a aucune espèce de fondement juridique, aucune justification, faute pour la Guinée d'avoir prouvé l'existence du préjudice, preuve qui, sans être une condition de la responsabilité, laquelle découle directement de la commission du fait internationalement illicite, n'en est pas moins la base incontournable de la réparation et la mesure de l'indemnité à allouer. Cette preuve devait, notamment, démontrer que M. Diallo avait effectivement possédé et perdu les biens en question et que leur perte était imputable à la RDC comme la conséquence directe des détentions et expulsion illicites du ressortissant guinéen par cet Etat.

I. Montant exagéré de l'indemnité pour préjudice immatériel (psychologique ou moral)

6. Il est incontestable que M. Diallo a subi un préjudice moral du fait de ses arrestations et expulsion déclarées illégales et arbitraires par la Cour dans son arrêt du 30 novembre 2010 (*C.I.J. Recueil 2010 (II)*, p. 692, par. 165, points 2, 3 et 4 du dispositif) et que, pour cela, une réparation sous forme d'indemnisation lui est due. Le problème qui se pose est celui du montant d'une «indemnisation appropriée».

7. A cet égard, le montant réclamé par la Guinée (250 000 dollars des Etats-Unis) est manifestement disproportionné au regard de la pratique en cette matière (même de la part des tribunaux internes) et de la nature du préjudice (purement moral et psychologique), à propos duquel

la jurisprudence a dans certains cas, notamment lorsqu'il s'est agi de réparer au profit des Etats, souvent limité la réparation à la satisfaction et à un «jugement déclaratoire», comme l'arrêt de fond du 30 novembre 2010 en a jugé concernant la violation par la RDC de l'alinéa *b)* du paragraphe 1 de l'article 36 de la convention de Vienne sur les relations consulaires (par. 161 et point 7 du dispositif). Certes, la Cour elle-même a trouvé exagérées et disproportionnées les prétentions guinéennes de 250 000 dollars des Etats-Unis (voir le présent arrêt, par. 10), parce qu'elle ne suit pas la Guinée sur ce point. Mais l'indemnisation de 85 000 dollars des Etats-Unis qu'elle lui accorde va bien au-delà des sommes pratiquées jusque-là pour des violations semblables et même plus graves visant des obligations comparables. Certes, le préjudice moral ne peut se mesurer ; on peut même affirmer qu'il n'a pas à se prouver, à strictement parler, parce qu'il est inhérent à la condition humaine en situation de violation des droits. Mais il existe tout de même une aune à laquelle mesurer un tel dommage dans le cas d'espèce, au regard de ses circonstances spécifiques, laquelle ne peut résider que dans les conditions qui ont entouré les détentions et l'expulsion de M. Diallo.

8. De la jurisprudence et de la pratique se dégagent un certain nombre de principes présidant à la fixation du montant de l'indemnité. Au nombre de ces principes, figure celui, incontestable, selon lequel si l'indemnisation a pour mission première de remédier aussi intégralement que possible à toutes les formes de pertes subies par suite d'un fait internationalement illicite, elle n'a certainement pas pour but de punir l'Etat responsable et ne doit pas non plus avoir un caractère expressif ou exemplaire. La CDI avait déjà retenu cette idée dès ses premiers rapports sur la responsabilité des Etats, citant la doctrine, entre autres, Jiménez de Aréchaga : «Les dommages-intérêts à caractère punitif ou exemplaire sont incompatibles avec l'idée qui est à la base du devoir de réparation» (E. Jiménez de Aréchaga, «International Resonsability», *in Manual of Public International Law,* Londres, Macmillan, 1968, cité dans les documents de l'ONU *A/CN.4/425* & *Corr. and Add.1* & *Corr.1 , Deuxième Rapport sur la responsabilité des Etats*, par M. Gaetano Arangio-Ruiz, rapporteur spécial, 1989, par. 24). Elle la reprend dans son Projet d'articles sur la responsabilité de l'Etat, d'abord en commentant l'article 36 relatif à l'indemnisation, puis à propos de l'article 37, paragraphe 3 qui, pour la satisfaction, fixe la même limite : «La satisfaction ne doit pas être *hors de proportion avec le préjudice* et *ne peut pas prendre une forme humiliante pour l'Etat* responsable» (*Annuaire de la Commission du droit international, 2001,* vol. II ; J. Crawford, *The International Law Commission's Articles on State Responsability —Introduction, Text and Commentaries*, «Commentary under Article 36», p. 219, et p. 231 et 234 ; les italiques sont de moi). Ce principe de proportion entre la réparation, quelle qu'en soit la forme, et le préjudice est bien établi, faisant de ce dernier la mesure du niveau ou du montant de l'indemnisation, afin que cette dernière ne représente que la juste compensation du dommage subi. L'indemnité ne doit donc pas dépasser le niveau de la compensation, même s'il est tentant, dans le domaine des droits de l'homme, où l'on considère les violations comme particulièrement choquantes et insupportables pour la dignité de la personne, de dépasser ce niveau, soit pour punir l'Etat ayant ainsi méconnu la valeur de l'humanité, soit, par l'exemplarité ou le caractère spectaculaire, pour intimider ou dissuader les autres Etats de se comporter de la même manière.

9. Certes, toute réparation, surtout pécuniaire, comporte en elle-même un élément de dissuasion, mais c'est un élément inhérent à la réparation dans son principe même, comme la sanction pénale revêt un caractère nécessairement punitif et donc intimidant, sans pour autant procéder d'une volonté de vengeance publique contre le délinquant. Mais la réparation va au-delà de cet aspect et de ce rôle inhérents de dissuasion lorsque, notamment, son montant ne correspond plus à une compensation aussi complète, mais en même temps aussi exacte que possible de la hauteur du préjudice à réparer ; tel est le cas d'une indemnisation manifestement trop élevée. Il est vrai, par ailleurs, qu'un préjudice moral ne peut se mesurer en valeur monétaire, mais l'argent étant, comme il a été dit, «la commune mesure de toutes les valeurs» (Grotius), parce qu'il faudra ainsi compenser le préjudice par des sommes d'argent, le juge ne dédaignera pas de s'inspirer de la

pratique des autres juridictions et arbitres, dont les décisions peuvent être regardées comme une indication du niveau moyen des sommes allouées pour «soulager» le préjudice moral des victimes ou de leurs proches.

10. C'est ce qui explique que même la Cour interaméricaine des droits de l'homme, si bienveillante et si généreuse à l'égard des demandes d'indemnisation des victimes de violations des droits de l'homme, a adopté ce principe de proportion dès son tout premier arrêt en matière de réparations, dans l'affaire *Velásquez-Rodriguez* v. *Honduras, Judgment of 21 July 1989 (Reparations and Costs)*, par. 38), devenu la référence en la matière, où elle a déclaré que le droit international ne reconnaissait pas de réparation à caractère pénal contre les Etats. Ce n'est pas que les «dommages-intérêts punitifs» (*punitive damages*) soient absolument inconcevables, mais plutôt que, même si certains systèmes nationaux en permettent l'octroi, telle n'est pas la destination de la réparation, pécuniaire ou autre, en droit international.

11. Certes, les conditions de détention ou d'expulsion, par exemple, l'isolement, la torture, les mauvais traitements, la durée de la détention, etc., sont des circonstances propres à chaque affaire et pourraient, selon le cas, expliquer une indemnisation plus élevée, tandis que leur absence imposerait une indemnisation moins élevée. Or, dans le cas d'espèce, la Cour a reconnu que M. Diallo n'avait pas subi de traitements inhumains ou dégradants au cours de ses détentions. Après y avoir fait une rapide allusion, la Guinée a renoncé à maintenir de telles accusations et n'a pas tenté d'en donner un commencement de preuve (affaire *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), arrêt, C.I.J. Recueil 2010 (II)*, p. 671, par. 88-89, et p. 693, par. 165, point 5 du dispositif ; présent arrêt, par. 21). De même, la durée totale des détentions de M. Diallo n'a guère dépassé, pour retenir, sans considérer les contestations de la RDC, les chiffres contradictoires avancés par la Guinée elle-même (*arrêt, C.I.J. Recueil 2010 (II)*, p.659-660 , par. 48 à 52), soixante-six à soixante-douze jours. Certes, la privation de la liberté, qu'elle soit de quelques heures ou de plusieurs années, est condamnable lorsqu'elle est illicite ou arbitraire, mais sa durée n'est pas indifférente pour mesurer les souffrances endurées par la personne détenue et la gravité du préjudice qu'il faudra réparer. Aussi n'aurait-il pas été inutile que la Cour comparât cette durée avec celles, bien plus longues, examinées par d'autres juridictions dont la pratique et l'expérience auraient dû l'inspirer dans la présente affaire.

12. La Cour n'a pas non plus retenu, à proprement parler, de circonstances aggravantes en dehors des caractères illicite et arbitraire des détentions et expulsion, ce à quoi se résume, du reste, la violation de ses obligations par la RDC, car, comme elle le dit elle-même, «le préjudice immatériel subi découle nécessairement des faits illicites dont la Cour a déjà établi l'existence» (par. 21). Elle rappelle par la suite (*ibid.*), sans les qualifier expressément d'aggravantes, les circonstances particulières des détentions et de l'expulsion de M. Diallo, telles que décrites dans son arrêt au fond (*arrêt, C.I.J. Recueil 2010 (II)*, p. 666-670, par. 74-84). S'agissant de ces circonstances particulières, même le fait que, expulsé le 31 janvier 1996, M. Diallo «[n']avait reçu [que] le même jour notification de la mesure dont il faisait l'objet», n'est pas, comme tel, relevé comme circonstance aggravante. Et si la Cour a dit que M. Diallo «avait été détenu pendant une période exagérément longue en attendant son expulsion» (présent arrêt, par. 21, et *arrêt, C.I.J. Recueil 2010 (II)*, p. 668, par. 79), c'est par rapport à l'argument qu'avançait la RDC pour justifier la détention par la nécessité d'éviter que l'intéressé ne s'évade et n'échappe à l'expulsion. Ces circonstances constituent précisément la forme prise par la violation.

13. C'est pourquoi la comparaison du cas de M. Diallo avec certaines affaires jugées par la Cour européenne des droits de l'homme ou la Cour interaméricaine des droits de l'homme fait découvrir, sans minimiser pour autant la souffrance de M. Diallo, que les situations portées devant celles-ci étaient très souvent bien plus graves que celle du ressortissant guinéen : notification de la

mesure d'expulsion le jour même de son exécution, détention de plusieurs années, tortures, traitements inhumains et dégradants, isolement, disparitions forcées, exécutions extrajudiciaires, etc. Pourtant, dans nombre de ces cas, les juridictions ont alloué des sommes bien plus faibles, approchant tout au plus de la somme de 30 000 dollars des Etats-Unis offerte par le défendeur lui-même comme une indemnisation adéquate compte tenu des circonstances spécifiques de l'affaire. Dans les quelques cas où des sommes relativement élevées furent accordées par la Cour interaméricaine des droits de l'homme, il s'agissait de disparitions forcées, d'enlèvements, d'exécutions extrajudiciaires, etc.

14. Généralement, l'indemnité accordée pour préjudice immatériel est donc relativement modeste, en rapport avec la nature du dommage subi, surtout si celui-ci n'a pas eu de manifestations somatiques notables et prouvées. Ci-dessous figurent quelques exemples des sommes allouées en réparation du préjudice moral :

a) **Cour européenne des droits de l'homme** : 24 000 euros dans l'affaire *M.S.S. c. Belgique et Grèce* ; 15 000 euros dans l'affaire *Khodzhayev c. Russie* ; 8 000 euros dans l'affaire *Ahmed c. Roumanie* ; 15 000 euros dans l'affaire *Lupsa c. Roumanie*, pour des détentions de plusieurs années accompagnées de circonstances aggravantes ; 50 000 dollars dans l'affaire *M. c. Allemagne*, pour une détention arbitraire de plus de huit ans. Dans l'affaire *Nowak c. Ukraine*, la Cour européenne des droits de l'homme a accordé 16 000 euros pour détention illicite, expulsion arbitraire et mauvais traitements, et violation des garanties offertes par le protocole n° 7. Pourtant, M. Nowak était titulaire d'un permis de séjour en cours de validité à la date de son expulsion et était un «étranger résidant régulièrement» en Ukraine au sens de l'article 1 du protocole n° 7. De plus l'arrêté d'expulsion lui a été notifié à la date de son départ dans une langue qu'il ne comprenait pas et dans des circonstances qui ne lui ont pas permis de se faire représenter ou de soumettre des arguments contre son expulsion.

b) **Cour interaméricaine des droits de l'homme** : 30 000 dollars des Etats-Unis dans l'affaire *Neptune c. Haïti* ; 20 000 dollars dans l'affaire *Maritza Urrutia* v. *Guatemala* ; 50 000 dollars dans l'affaire *Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador*. Dans l'affaire *Goiburu et al. c. Paraguay*, la Cour interaméricaine des droits de l'homme a, en fait, accordé plusieurs indemnités allant de 10 000 à 50 000 dollars aux différentes victimes de violations collectives graves constituées d'atteintes aux droits à la vie et à la liberté, de disparitions forcées, etc., la disparition entraînant les sommes les plus élevées (arrêt, par. 161).

c) **Commission générale des réclamations Etats-Unis d'Amérique/Mexique** : 2500 dollars des Etats-Unis dans l'affaire *Daniel Dillon* ; 8000 dollars dans l'affaire *Harry Roberts* ; 4000 dollars dans l'affaire *Mary Ann Turner*.

15. A la lumière de ce qui précède, il me semble que, eu égard aux circonstances de l'espèce, aux violations établies et au préjudice moral décrit ci-dessus (voir le présent arrêt, par. 25), la somme de 85 000 dollars des Etats-Unis est largement exagérée : elle ne reflète pas la mesure du préjudice subi, ne constitue pas la juste compensation du préjudice moral réellement subi. Elle ne me paraît donc pas, contrairement à ce qu'affirme l'arrêt (*ibid.*) «appropriée». A coup sûr, au regard de la pratique antérieure, y compris celles des juridictions garantes des droits de l'homme, ce montant, que n'expliquent pas les circonstances de l'espèce, est sans commune mesure avec la pratique et ne me semble pas justifié à satisfaction. On peut s'attendre à ce que, par son caractère inédit et son exemplarité, voire son caractère «punitif» (voir par. 8 et 9 ci-dessus), il attire l'attention et constitue un revirement de jurisprudence sur cette question, ce qui n'est pas la fonction de la réparation.

II. Indemnisation sans fondement du préjudice matériel pour perte de biens personnels

Les règles juridiques qui commandent la matière

16. En matière d'indemnisation pour responsabilité internationale découlant d'un fait internationalement illicite consistant dans la violation d'une obligation internationale par un Etat, ainsi que le confirme la Cour (par. 13), la présente affaire est la deuxième seulement dans laquelle elle est amenée, depuis sa création après la deuxième guerre mondiale, à se prononcer sur la fixation de l'indemnité. L'unique précédent fut l'affaire du *Détroit de Corfou ((Royaume-Uni c. Albanie), fixation du montant des réparations, arrêt, C.I.J. Recueil 1949*, p. 244 et suiv.), qui concernait la destruction de navires de guerre britanniques et le décès de membres du personnel naviguant, affaire aussi «matérielle» en ce qui concerne la nature du préjudice subi par le Royaume-Uni. La Cour se montra alors extrêmement exigeante, refusant de se contenter des allégations du demandeur ou même de l'évidence de la destruction des navires et du décès de membres du personnel. Si la Cour a fini par adjuger ses conclusions au Royaume-Uni et lui allouer l'indemnité demandée, c'était sur la base des preuves documentaires fournies par lui ainsi que par le rapport des experts ayant confirmé l'existence d'un lien de causalité, puisque les dommages matériels allégués étaient bien la conséquence directe de l'explosion des mines (*ibid*., p. 265) et que les chiffres présentés par le demandeur pouvaient être considérés comme une «évaluation raisonnable et adéquate des dommages subis» (*ibid*., p. 250). On voit bien clairement apparaître deux conditions : la preuve du préjudice dans l'optique de la justification du montant, ainsi que la preuve du lien de causalité.

17. Cette décision inaugura la jurisprudence et la pratique concernant l'exigence de «preuves suffisantes» du préjudice subi ainsi que celle du caractère «raisonnable» des prétentions pécuniaires de la victime. Cette jurisprudence et cette pratique des juridictions internationales habituées à statuer dans ce genre de réclamations, notamment la Cour européenne des droits de l'homme (CEDH), la Cour interaméricaine des droits de l'homme (CIADH) et les tribunaux mixtes de réclamations, en particulier le Tribunal des réclamations Etats-Unis/Iran, et il en va de même de nombreuses sentences arbitrales, sont aujourd'hui constantes.

18. En l'espèce, il me semble clair que, bien qu'elle ait dit s'en inspirer (par. 13), la Cour n'a pas rigoureusement suivi cette démarche lorsqu'elle a accordé l'indemnisation d'un préjudice matériel sans exiger de preuve indépendante des allégations formulées par M. Diallo.

19. La question de droit examinée ici est celle de la charge de la preuve, preuve de l'existence du préjudice, celui-ci étant en effet, dans la tradition juridique comme dans les perspectives envisagées par le Projet d'articles de la CDI, le fondement et la mesure de l'indemnisation, et preuve du lien de causalité entre le préjudice et le comportement illicite de l'Etat responsable.

Concernant la preuve du préjudice matériel : l'exigence d'une «preuve suffisante»

20. Dans bien des cas, il manque de preuve à l'appui des allégations et des réclamations guinéennes. C'est, sans doute, convaincue de ces exigences que la Cour a eu à envisager s'il était possible, sans une telle preuve, de tout de même accorder une réparation sous forme d'indemnité compensatoire. Mais, en même temps, ce souci montre la conviction de la Cour quant à la place centrale qu'occupe l'administration de la preuve en cette matière concernant la responsabilité, la réparation et l'indemnisation. Il est en effet bien établi que, «en règle générale, il appartient à la

partie qui allègue un fait au soutien de ses prétentions de faire la preuve de l'existence de ce fait», comme la Cour l'a rappelé dans son arrêt au fond dans l'affaire qui nous occupe en cette procédure (*arrêt, C.I.J. Recueil 2010 (II)*, p. 660, par. 54). C'est ainsi que, dans l'arrêt de 2010, elle n'a pas hésité à rejeter les faits allégués mais non prouvés (par. 117-148, 157 et 158).

21. Il suffira de quelques exemples pour étayer ce principe reconnu par la Cour elle-même : l'affaire *Papamichalopoulos et autres c. Grèce (Article 50)*, (requête n° 14556/89, arrêt du 31 octobre 1995, CEDH, série A, n° 330-B, par. 37), où il était question de l'expropriation de terrains appartenant à des particuliers, et l'affaire *Akdivar et autres c. Turquie (Article 50)* (requête n° 21893/93, arrêt du 1er avril 1998, CEDH, par. 15-34), dans laquelle les requérants demandaient des dommages-intérêts pour le préjudice matériel résultant de la perte de leurs maisons incendiées par les forces de sécurité turques. Alors même que l'existence des terrains et des maisons ne faisait aucun doute, ni l'expropriation des terrains ou l'incendie des maisons par l'armée, pour établir la valeur actuelle des terrains et des maisons, la Cour européenne des droits de l'homme fit appel à des experts et refusa de s'en tenir aux réclamations avancées sans preuve par les requérants. De même, dans l'affaire *McCann et autres c. Royaume-Uni* (requête no 18984/91, arrêt du 27 septembre 1995, CEDH, A324), où il s'agissait de la violation de l'article 2 de la convention européenne des droits de l'homme (droit à la vie), consistant dans le meurtre de trois membres de l'IRA à Gibraltar par les forces de sécurité britanniques, elle rejeta, faute de preuve, la thèse de l'exécution préméditée avancée par les représentants des victimes. Dans une affaire de violences au cours d'une garde à vue, elle exigera également du Gouvernement autrichien qu'il «établi[sse] de manière satisfaisante que les blessures du requérant [avaient été] causées autrement que — exclusivement, principalement ou partiellement — par les traitements subis pendant la garde à vue» et décida de considérer que, faute de preuve à cet effet, les violations avaient été établies (affaire *Ribitsch c. Autriche*, requête n° 1889/91, arrêt du 4 décembre 1995, CEDH, A336, par. 34). En matière de discrimination, comportement pourtant difficile à prouver, la Cour européenne des droits de l'homme n'en exigea pas moins la preuve que la différence de traitement incriminée reposait sur des motifs discriminatoires liés à une caractéristique protégée et de ce fait stigmatisée (par exemple, sexe, race ou religion), même si, par une sorte de partage de la charge de preuve, il en naissait une présomption de discrimination que le défendeur allait devoir, au moyen de preuves contraires, réfuter (affaire *Timichev c. Russie*, requête nos 55762/00 et 55974/00, arrêt du 13 décembre 2005, CEDH, par. 40-44 ; voir aussi, au même effet, l'arrêt de la CJCE du 26 juin 2001 dans l'affaire *Susanna Brunnhofer c. Bank der österreichischen Postsparkasse AG*, affaire C-381/99, *Recueil 2001*, p. I-04961). Ce partage du fardeau de preuve ne contredit pas la règle traditionnelle en la matière, qui impose à celui qui allègue un fait d'en fournir la preuve. En l'occurrence, les thèses avancées sont contradictoires et il incombe à chacune des Parties d'appuyer la sienne par des preuves de nature à emporter la conviction de la juridiction. Enfin, dans l'affaire *H.L.R. c. France* (requête n° 24573/94, arrêt du 29 avril 1997, CEDH), la Cour européenne des droits de l'homme en vint à la conclusion qu'il n'y avait eu aucune violation de l'article 3 de la convention européenne des droits de l'homme du fait de l'expulsion du demandeur colombien, parce qu'aucune preuve pertinente n'avait été apportée à l'appui des allégations de risques de mauvais traitements.

22. Le Tribunal des réclamations Etats-Unis/Iran s'est quant à lui montré particulièrement strict en ce qui concerne l'établissement de l'existence du dommage allégué sous la forme de perte de biens, exigeant que le requérant démontre que, avant la commission des faits illicites, les biens en question existaient et lui appartenaient («possession, expropriation et valeur des biens» *[traduction libre]*). A cet égard, la jurisprudence du Tribunal révèle une préférence pour les preuves documentaires, sans doute les plus sûres, alors même que les requérants, en l'occurrence ressortissants américains expulsés d'Iran, avaient souvent été contraints de fuir ce pays en abandonnant les documents établissant l'existence des biens prétendument perdus, leur

appartenance aux victimes et leur valeur, (notamment, affaires *Daley (USA* v. *Iran)*, *Award* 360-10514-1, 1988 WL 637289 (Iran-US.Cl. Trib.), *Rankin (USA* v. *Iran)*, Award 326-10913-2, 1987 WL 503860 (Iran-US.Cl. Trib.) et *Yeager (USA* v. *Iran)*, Award 324-10199-1, 1987 WL 503859 (Iran-U.S.Cl. Trib.)).

23. Ainsi, dans l'affaire *Daley*, un Américain détenu et expulsé d'Iran qui affirmait avoir perdu au cours de ses mésaventures divers biens (entre autres, une voiture, un pur-sang, une montre Rolex, des bijoux, des pièces de monnaie de collection, un total de 15 000 dollars des Etats-Unis en argent et des tapis de luxe). Le fait que les circonstances de son expulsion ne lui aient pas permis de conserver les pièces justificatives n'a pas empêché le Tribunal d'affirmer, s'agissant du cheval que «n'étant pas en mesure de conclure à l'expropriation de ce bien … [il devait en conséquence rejeter] cette portion des réclamations» *[traduction libre]* (*ibid*., par. 24). En ce qui concerne la propriété et la valeur des pièces de collection, il aurait fallu prouver où et quand elles avaient été achetées, qui les avait vendues, les détails de la police d'assurance, etc. L'exigence de preuve est telle que, dans cette même affaire, bien que des tapis aient été vus au domicile de Daley à Téhéran, le Tribunal a jugé que «les preuves étaient insuffisantes pour établir, toutefois, que les tapis et autres pièces d'ameublement se trouvaient dans l'appartement à la date où ils sont censés avoir été pris» *[traduction libre]* (*ibid*., par. 27), imposant de surcroît au requérant de «prouver que l'enlèvement des biens en question était le fait d'individus ou de groupements dont les actes étaient susceptibles d'engager la responsabilité de l'Etat iranien» *[traduction libre]* (*ibid*., par. 28). On voit ainsi le tribunal insister sur la nécessité de prouver le lien de causalité en disant au paragraphe suivant que la présence des tapis et autres objets au domicile du requérant ne permettait pas de conclure qu'ils «avaient été enlevés dans des circonstances de nature à engager la responsabilité de l'Etat iranien». L'exigence est multiple : établir «la propriété, l'expropriation et la valeur des biens pour lesquels» *[traduction libre]* la réparation est demandée (*ibid*., par. 30).

24. Il n'est pas inintéressant de présenter ici une sentence arbitrale rendue dans une affaire mettant en œuvre le même chef du dommage et des circonstances factuelles similaires, l'affaire *Chevreau*, qui opposait la France à la Grande-Bretagne et qui était très proche de l'affaire qui nous occupe, parce qu'elle se rapportait à la détention et à l'expulsion illicites d'un étranger de nationalité française, M. Chevreau, suivies de la réclamation par le Gouvernement français d'une indemnisation à raison du dommage matériel résultant de la perte de biens personnels lors de la détention et de l'expulsion de l'intéressé (affaire *Chevreau (France c. Royaume-Uni)*, 9 juin 1931, *Recueil des sentences arbitrales [traduction libre]*, vol. II, p. 1113).

25. Il s'agissait en particulier, dans cette affaire ressemblant très fortement à la présente espèce, de biens, c'est-à-dire «argent, montres et bijoux, vêtements, livres et autres objets qui, selon M. Chevreau, se trouvaient dans son logement … lors de son arrestation, mais qui n'ont pas été retrouvés quand, le 24 décembre 1918, un inventaire fut dressé … en présence de deux officiers anglais et du Directeur des douanes» (*ibid*., p. 1140). La liste des biens fournie par M. Chevreau comprenait non seulement les objets dont la présence avait été constatée par l'inventaire du 24 décembre 1918 mais aussi d'autres objets, notamment «argent, montres et bijoux», qu'il disait posséder avant les événements. L'Etat français soutenait donc que l'Etat britannique était responsable de la perte des valeurs et objets énumérés dans la liste de M. Chevreau mais pas dans l'inventaire. L'arbitre a jugé que le Royaume-Uni ne pouvait pas être rendu responsable de cette perte, alors même que les autorités britanniques n'avaient pas nié leur responsabilité pour la conservation des biens en question (*RSA*, p. 1141). L'arbitre s'en tint donc au contenu de l'inventaire, sans prendre en considération les autres biens réclamés par M. Chevreau qui n'avaient pas été trouvés dans la maison lors de l'établissement de l'inventaire. C'est ainsi que, au seul vu des déclarations et faute de «preuve documentaire», il se dit d'avis que «la réclamation

de M. Chevreau pour perte de biens en Perse ne saurait être retenue», et décida, conformément à la logique juridique, que «la charge de la preuve incomb[ait] au Gouvernement français et [que] les allégations de M. Chevreau ne [pouvaient] être acceptées comme *preuves suffisantes*» (*ibid*., p. 1142 ; les italiques sont de moi).

26. Dans la présente affaire, pour certaines revendications, la Cour a avec justesse fait application de ce principe et a, pour cela, rejeté le préjudice matériel allégué pour perte de revenus et la demande d'indemnisation formulée par la Guinée pour la perte de biens de grande valeur qui se seraient trouvés dans l'appartement de M. Diallo au moment de son expulsion mais qui n'auraient pas été retrouvés ni répertoriés dans l'inventaire (par. 34), ainsi que pour la perte alléguée de revenus (par. 41, 42, 44, 45 et 46) et de gains potentiels (par. 48).

27. Comme on le voit, si une certaine souplesse est admise concernant le dommage immatériel, considéré comme inhérent à la condition humaine en situation de violation et comme n'ayant pas à être prouvé, les juges et arbitres ont toujours appliqué une norme de preuve élevée, soit celle de la «preuve suffisante» ou de la «preuve à la satisfaction de la Cour».

Recours aux principes d'équité

28. Si, concernant le préjudice matériel, la Cour a parfois fondé la réparation sur des considérations d'équité, c'était, non pas en raison de doutes quant à l'existence ou à la perte douteuses du bien en question, mais, uniquement pour l'estimation de la valeur devant servir de base au calcul du montant de l'indemnisation. Ainsi, dans l'affaire *Orhan c. Turquie*, dans laquelle «il n'avait été fourni aucune preuve décisive de la taille et de la destination des maisons, biens et possessions détruits et perdus», la Cour européenne des droits de l'homme dut allouer une indemnité dont le montant serait «fondé sur des conjectures et basé sur les principes d'équité» *[traduction libre]* (*Orhan c. Turquie*, requête n° 25656/94, arrêt du 18 juin 2002, CEDH, par. 423-424). De même, concernant la perte d'une maison et d'effets personnels dont aucune preuve n'établissait la valeur, mais dont l'existence et la propriété avaient été établies, la même juridiction décida que «son évaluation des sommes à accorder devait forcément reposer sur les principes d'équité», pour fixer ce montant à 4 500 livres sterling, «en l'absence de toute preuve décisive, et statuant en équité» *[traduction libre]* (*Bilgin c Turquie*, requête n° 23819/94, arrêt du 16 novembre 2000, CEDH, par. 140 et 143).

Lien de causalité

29. Par ailleurs, en général comme dans la présente affaire, le préjudice matériel pour perte de biens personnels ainsi que la demande consécutive de réparation sur ce chef de préjudice devraient également être rejetés en cas d'inexistence d'un lien de causalité entre le préjudice allégué et le comportement illicite de l'Etat en cause, en l'occurrence la RDC.

30. Certes, la Cour européenne des droits de l'homme, tout comme la Cour interaméricaine des droits de l'homme, a fait preuve d'une plus grande souplesse en ce qui touche le lien de causalité en matière de préjudice immatériel, présumant régulièrement l'existence d'un tel préjudice et du lien de causalité requis en se fondant sur la nature de la violation, parce qu'il ne pouvait être exigé du demandeur qu'il fournisse une quelconque preuve du dommage immatériel subi, lequel, inhérent à la condition humaine, n'a pas à être démontré, ainsi que l'a décidé la Cour interaméricaine des droits de l'homme (affaire *Goiburú et al.* v. *Paraguay*, *Judgment of 22 September 2006 (Merits, Reparations and Costs)* CIADH).

31. Mais, même pour la Cour interaméricaine des droits de l'homme, la plus favorable de toutes les juridictions quant à la sauvegarde et à la réparation en matière de droits de l'homme, il doit exister un lien de causalité minimal. Elle définit en effet le préjudice matériel indemnisable comme «la perte de revenus de la victime, les frais encourus en raison des faits de la cause et les conséquences de caractère *pécuniaire qui ont un lien de causalité direct avec les faits incriminés*» (arrêt *Cantoral Benavides*, par. 166, et arrêt *La Cantuta c. Perou*, 29 novembre 2006, par. 213 [traduction tirée de Karine Bonneau, «Le droit à réparation des victimes de violations des droits de l'homme : Le rôle pionnier de la Cour interaméricaine des droits de l'homme», *Droits fondamentaux*, n° 6, janvier–décembre 2006, p. 12] ; les italiques sont de moi).

32. Pour autant, la souplesse caractéristique dont cette juridiction fait preuve pour ainsi dire systématiquement ne saurait être étendue avec les mêmes raisons ou les mêmes justifications. De fait, si, comme dans son actuel arrêt, la Cour a été amenée à évoquer certains aspects relatifs aux droits de l'homme, d'une part, l'espèce en elle-même ne cesse pas d'être avant tout une affaire de protection diplomatique entre Etats et, d'autre part, la Cour n'en devient pas pour autant une cour garante des droits de l'homme. Par ailleurs, la Cour interaméricaine a une raison historique spécifique d'être déjà ancrée dans une pratique de souplesse en matière de preuve, se prononçant essentiellement en équité sur l'existence de la violation, ainsi que sur l'existence du préjudice et sur l'évaluation de l'indemnisation : en effet, les premiers arrêts de cette juridiction sont intervenus dans des affaires de disparitions massives de personnes sous les régimes dictatoriaux en place durant de longues décennies dans les Etats d'Amérique latine. Et aux atrocités des dictatures s'ajoutèrent, au nom des contraintes de la raison d'Etat et de la sécurité nationale, à une période où nombre de ces Etats étaient engagés dans des guerres contre des groupes armés rebelles («sentier lumineux» et autres «maoïstes»), les arrestations, détentions, tortures et exécutions de suspects, comme les deux frères Gomez Paquiyauri tués au Pérou par les forces de sécurité (affaire *Gomez-Paquiyauri Brothers* v. *Peru, Judgment of 8 July 2004 (Merits, Reparations and Costs)*, CIADH). On se trouve ici dans le contexte de ces crimes d'Etat systématiques qui ont fait dire au Juge Cançado Trindade, parlant de la tragédie comme d'une réalité qui a toujours existé au cœur de la race humaine, quelles qu'en soient le régime et l'époque, alors que, pour les victimes de cette tragédie, «rien ne sera plus comme avant» et que «aujourd'hui les survivants ont le souvenir d'un paradis perdu» (affaire *Gómez-Paquiyauri Brothers* v. *Peru*, opinion individuelle de M. le juge Cançado Trindade, par. 6). Dans ces conditions, on comprend que, dès son premier arrêt en matière de réparation et de fixation de l'indemnisation, l'arrêt *Velasquez Rodriguez c. Honduras*, rendu le 21 juillet 1989 (c'est-à-dire avant l'arrêt *Gómez-Paquiyauri Brothers*), la Cour interaméricaine des droits de l'homme ait adopté cette attitude, considérant que la pratique systématique des violations du droit à la vie comme constituant une «violation autonome des droits de l'homme» (affaire *Velásquez Rodriguez* v. *Honduras, Merits, Judgment of 29 July 1988*, CIADH, par. 155 [traduction tirée de Hansbury, Elise, *Le juge interaméricain et le «jus cogens»*, Genève, Institut de hautes études internationales et du développement, par. 34]). C'est ce qui a donné naissance à la théorie de la «responsabilité aggravée», qu'on ne trouve pas sous d'autres latitudes. Le genre d'affaires qui étaient soumises à la Cour interaméricaine des droits de l'homme se prêtait donc à la mansuétude : les circonstances de ces disparitions et tortures systématiques comme imputables à l'Etat privaient en effet les victimes ou leurs survivants de la possibilité de prouver les violations (droit à la vie, tortures, etc.) ou d'en avoir ressenti les souffrances déshumanisantes dans leur chair et dans leur cœur. On ne saurait donc s'étonner que cette juridiction ait, dès le début, posé en principe que ce genre de souffrances n'avait pas à se prouver, jouissant ainsi d'une sorte de présomption irréfragable quant à leur existence. Mais, peut-on soutenir que des conditions aussi spécifiques puissent jamais fonder la généralisation, la systématisation et l'extension à tous types de préjudices matériels de ce genre de souplesse, au niveau de la Cour qui ne connaît pas de ces crimes d'Etat ni de ces «violations autonomes des droits de l'homme» ? Rien n'est moins sûr.

33. Quant à elle, la Cour européenne des droits de l'homme a toujours estimé, pour les dommages matériels, que la charge de la preuve relative à l'existence de ceux-ci et au lien de causalité incombait normalement au requérant, et l'absence de preuve sous l'un ou l'autre de ces rapports a régulièrement conduit au rejet de la demande. Dans l'affaire *Borisenko c. Ukraine*, par exemple, si elle accorda une indemnité de 1 700 euros, «statuant en équité, relativement au dommage non pécuniaire» *[traduction libre]*, ce fut à raison du préjudice immatériel, puisqu'elle écarta le préjudice matériel pour lequel le plaignant réclamait une indemnisation : «La Cour n'arrive à discerner aucun lien de causalité entre les violations constatées et le dommage pécuniaire invoqué ; aussi rejettera-t-elle cette partie de la demande» *[traduction libre]* (*Borisenko c. Ukraine*, requête n° 25725/02, arrêt du 12 janvier 2012, CEDH, par. 67). De même, en l'affaire *Airey c. Irlande*, la même juridiction a rejeté la demande relative au préjudice matériel, faute pour la demanderesse d'avoir établi le lien de causalité entre les violations alléguées et les pertes subies (*Airey c. Irlande*, requête n° 6289/73, arrêt du 6 février 1981, CEDH, par. 12).

34. Dans l'affaire *Ahmed c. Roumanie* (requête n° 34621/03, arrêt du 13 juillet 2010, CEDH), après avoir accordé une indemnisation du préjudice immatériel pour détention arbitraire de plus de six mois, suivie d'expulsion illicite, elle a rejeté la demande relative au préjudice matériel pour perte de biens, faillite de l'entreprise et réinstallation dans un autre pays, faute de preuve du lien de causalité :

> «63. La Cour constate qu'il n'y a *pas de lien de causalité entre les violations établies et le dommage matériel allégué*. Toutefois, la Cour estime que le requérant a subi un dommage moral indéniable du fait des violations constatées. Eu égard à l'ensemble des éléments se trouvant en sa possession et statuant en équité, … elle décide d'allouer au requérant 8 000 EUR à ce titre» (les italiques sont de moi).

Circonstance particulière concernant la Cour européenne des droits de l'homme, la notion d'équité est expressément prévue par l'article 41 de la convention européenne des droits de l'homme, qui stipule que «[s]i la Cour déclare qu'il y a eu violation de la convention ou de ses Protocoles, … la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction *équitable*». Il ne s'agit donc pas d'une généralisation de la pratique courante dans le domaine des droits de l'homme, mais d'une disposition limitée à l'indemnisation.

35. De même, l'affaire *Somogyi c. Italie* mettait en jeu la violation de l'article 6 de la convention européenne. La Cour européenne des droits de l'homme s'est exprimée ainsi en ce qui concerne d'abord le dommage matériel, puis le préjudice moral :

> «83. La Cour ne considère pas approprié de dédommager le requérant des pertes alléguées. *Aucun lien de causalité* ne se trouve en effet établi entre la violation constatée et les répercussions négatives que la condamnation aurait eues sur les activités commerciales et les relations sociales de l'intéressé (les italiques sont de moi).
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> 85. Quant au préjudice moral, la Cour estime que, dans les circonstances de l'espèce, le constat de violation constitue en soi une satisfaction équitable suffisante (*Brozicek c. Italie*, arrêt du 19 décembre 1989, série A, n° 167, p. 20, par. 48 ; *F.C.B. c. Italie*, arrêt précité, p. 22, par. 38 ; *T. c. Italie*, arrêt précité, p. 43, par. 32).» (*Somogyi c. Italie,* requête n° 67972/01, arrêt du 18 mai 2004, CEDH, par. 83-85.)

36. S'il fallait opérer une sélection, exemplaire à cet égard, dans la jurisprudence du Tribunal des réclamations Etats-Unis/Iran, il y aurait lieu de citer à nouveau ces affaires similaires à la nôtre, les affaires *Rankin*, *Daley* et *Yeager*, où le Tribunal a exigé la preuve d'un lien de causalité entre la perte de biens alléguée et le comportement de l'auteur du fait internationalement illicite en demandant aux requérants de démontrer que, lorsqu'ils avaient quitté l'Iran, ils avaient abandonné le bien en question ou que celui-ci leur avait été confisqué («*expropriation*»).

37. Au vu de tout ce qui précède, il me semble que, chaque fois que le préjudice est lié à un objet, à une chose palpable dont l'existence peut toujours être constatée par une preuve, il n'y a pas lieu de conjecturer, ni de statuer en vertu de l'équité, comme a choisi de le faire la majorité de la Cour dans le présent arrêt, ni d'agir sur la base de toute autre raison ou considération, si ce n'est sur celle d'une preuve suffisante, c'est-à-dire nécessairement documentaire.

Le cas d'espèce

38. L'application de cette jurisprudence et de cette pratique à la présente affaire aurait exigé, en toute logique, que la Cour déboute la Guinée sur chaque chef de préjudice matériel ou de perte de biens matériels pour lequel elle n'avait pas fourni de «preuve suffisante» à l'appui de sa prétention. C'est ce que la Cour a fait concernant la perte alléguée de revenus (par. 44, 45 et 46).

39. En effet, si les considérations d'équité peuvent, en cas de perte matérielle, être utilisées pour chiffrer l'indemnité lorsque n'est pas indiquée ou ne peut être connue la valeur précise de l'objet de la perte (bien matériel ou revenu), on ne peut pas faire l'économie de la preuve pour établir l'existence de l'objet en question, bien ou revenu.

40. Dans l'affaire *Diallo*, en dehors de l'inventaire, établi par les soins de l'ambassade guinéenne, des biens personnels de M. Diallo, inventaire rapporté par la RDC dans son contre-mémoire mais fourni par la Guinée elle-même (voir annexes 199 et 200 du mémoire introductif d'instance), aucune preuve n'a été administrée par la Guinée qu'il existait d'autres biens. Ce n'est certainement pas le luxe dans lequel vivait M. Diallo en 1984 (montres Cartier, grandes réceptions et vêtements de haute couture) qui prouverait la présence, non constatée par l'inventaire, de nombreux biens de luxe et de prestige jusqu'en 1996, alors que, depuis 1995, M. Diallo s'était fait déclarer indigent et connaissait des difficultés financières. Si M. Diallo a dû renoncer aux biens qu'il prétend avoir perdus, c'est en raison des difficultés financières des sociétés qu'il dirigeait, et non du fait de l'expulsion illicite opérée par les autorités congolaises.

41. Par ailleurs, la norme de preuve, ne serait-ce que pour l'évaluation de la valeur à rembourser, est telle que, dans l'affaire *Chevreau*, l'arbitre, tout en admettant qu'il paraissait «probable que M. Chevreau ait possédé dans son logement plus de vêtements que ceux qui figurent à l'inventaire», dut renoncer, après en avoir considéré la possibilité, à accorder une indemnité pour la perte de ces vêtements, «*faute de renseignements lui permettant* de calculer une indemnité de ce chef» (affaire *Chevreau*, précitée, p. 1143 ; les italiques sont de moi).

42. On peut également penser que, si dans l'affaire *Chevreau*, l'arbitre fit une exception concernant la perte d'un violon non répertorié, c'est parce qu'il avait été établi qu'un étui à violon avait bien été retrouvé vide dans la maison, ce qui permit de présumer que M. Chevreau avait pu détenir un violon, pour l'éventuelle perte duquel il lui fut alloué une indemnité de 100 livres sterling. Dans la présente affaire, la Cour ne dispose même pas d'une présomption convaincante qui montrerait que M. Diallo ait disposé d'autres biens que ceux listés dans l'inventaire.

43. Certes, le sort des biens en question après l'établissement de l'inventaire n'a pas pu être établi avec précision, mais il n'a pas non plus été démontré qu'ils avaient été perdus. Sur ce point, le Gouvernement congolais soutient, et aucune preuve à l'effet contraire n'a été présentée, que ces biens devaient s'être retrouvés dans l'appartement sans doute sous la garde de l'ambassade guinéenne. En tout état de cause, rien n'a été tenté pour prouver que la RDC serait responsable de leur perte ou de leur vol éventuels, alors qu'ils étaient sous la garde des fidèles employés de la maison de M. Diallo, de ses amis ou de l'ambassade guinéenne elle-même. Cet argument a été utilisé par la RDC pour montrer que, de son point de vue, l'inventaire des biens trouvés dans l'appartement qu'occupait M. Diallo constituait une pièce probante et crédible parce qu'il avait été dressé à l'initiative et par les soins de l'ambassade guinéenne elle-même. Le défendeur a soutenu également, comme le rappelle l'arrêt (par. 31), que, jusqu'à preuve du contraire, cet inventaire faisait état de la totalité des biens détenus par M. Diallo dans son appartement et que, ensuite, ils avaient été récupérés par l'ambassade parce que le Gouvernement congolais n'avait eu aucune occasion ni aucune raison d'en prendre possession, ni ne les avait confisqués.

44. De même, si l'arbitre saisi de l'affaire *Chevreau* considéra qu'il n'avait pas été prouvé à sa satisfaction qu'un lien de causalité existât entre la perte, alléguée par le Gouvernement français, de certains biens de M. Chevreau et le comportement du Gouvernement britannique alors même que ce dernier n'avait pas nié avoir eu la responsabilité de la garde des biens (affaire *Chevreau*, précitée, par. 1141), en l'espèce, la situation est plutôt incertaine. En effet, la Cour elle-même laisse entendre qu'il n'y aurait aucun lien de causalité clairement établi et permettant de conclure que les biens prétendument perdus «l'[avaient] été en conséquence du comportement illicite de la RDC» (par. 32). De plus, elle admet volontiers que «[l]a Guinée n'avance aucune preuve que M. Diallo aurait tenté de déménager les biens qui se trouvaient dans son appartement ou de les céder à des tiers, et il n'a pas davantage été démontré que la RDC l'en aurait empêché», et que «la Guinée n'a pas réussi à établir l'étendue de la perte subie par M. Diallo en ce qui concerne ses biens personnels répertoriés dans l'inventaire ni la mesure dans laquelle cette perte aurait été causée par le comportement illicite de la RDC» (par. 31), ne trouvant donc aucun lien de causalité rattachant une éventuelle perte de biens aux détentions et à l'expulsion illicites de M. Diallo.

45. De toute façon, aucune preuve n'a été faite de la perte de tels biens, ni de leur valeur, ni du fait que la RDC fût responsable de cette prétendue perte, ainsi que la Cour le reconnaît (par. 31-33) ; ce chef de préjudice aurait donc dû être rejeté.

46. Mais, paradoxalement, après avoir pourtant ainsi conclu à l'inexistence de quelque preuve «certaine», la Cour alloue une indemnité qu'elle fonde sur une sorte d'argument supplétif inattendu. En effet, tout en envisageant que puisse être fondée «l'affirmation de la RDC selon laquelle ces biens de M. Diallo se seraient trouvés entre les mains de représentants guinéens et de proches de M. Diallo après l'expulsion de ce dernier», elle considère néanmoins que «à tout le moins l'intéressé aurait eu à les déménager en Guinée ou à prendre des mesures pour pouvoir en disposer en RDC». La réparation n'est donc plus envisagée en raison de la perte certaine des biens en question ni du rôle joué par le Gouvernement congolais dans cette perte ; du coup, elle ne repose plus sur aucun fondement. Toutefois, ne pouvant sérieusement avancer la circonstance du «déménagement» des biens en Guinée ou de leur «disposition» en RDC comme fondement d'une indemnisation, ce qui supposerait la preuve de l'existence de leur existence, de leur perte et du lien de causalité entre cette perte et le comportement de la RDC, c'est visiblement par artifice et sans

motivation évidente que la majorité de la Cour se contente (par. 36) d'affirmer que, «étant parvenue aux conclusions qui précèdent … au sujet des biens personnels de M. Diallo, … la Cour décide d'attribuer la somme de 10 000 dollars des Etats-Unis au titre de ce chef de préjudice». Or, sur ce point précis, on se rend compte, bien au contraire, que la Cour était parvenue à la conclusion qu'aucun élément de preuve n'avait été fourni par la Guinée. Alors, au titre de quel préjudice ?

47. Je suis donc d'avis que la majorité n'a pas correctement apprécié la situation en jugeant qu'elle était fondée à accorder une indemnisation pour la perte de biens matériels dont ni l'existence, ni la valeur, ni même la perte et l'imputabilité de celle-ci à la RDC, ne sont établies. Il semble qu'il eût été difficile de ne pas comparer la hauteur des prétentions initiales de la Guinée et celle des réparations auxquelles elle pouvait finalement prétendre sur la base du dossier présenté par elle et jugé par la Cour. Cette idée de la compensation ne me semble pas correspondre, en l'espèce, à ce qu'on pourrait appeler l'«équité».

(Signé) Auguste MAMPUYA.

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