

SEPARATE OPINION OF JUDGE *AD HOC* MAHIOU

[*Translation*]

Principles governing reparation of an injury resulting from a wrongful act of a State — Reparation for the non-material or moral injury, the loss of personal property and other material injury (professional remuneration and loss of earnings) — Determination of the amount of compensation due from the DRC to Guinea on behalf of Mr. Diallo — Time-limit for payment and rate of interest payable in case of non-payment — Procedural costs

1. Following the Judgment of 30 November 2010, the Court asked the Parties to negotiate an agreement on the amount of compensation, setting a deadline of six months from the date of the Judgment for them to do so. It would seem that there were no real negotiations, doubtless because the differences between the two Parties on the amount of the compensation were too great. They blame one another for this failure, as can be seen from their written submissions. In light of this failure, it is thus for the Court to rule on the Parties' claims in order to determine the amount of compensation owed by the Democratic Republic of the Congo ("the DRC") to the Republic of Guinea ("Guinea").

2. It should be noted that the Court has seldom had occasion to rule on the issue of compensation, and in particular to determine its amount. While it had already identified the principles which should govern reparation of an injury resulting from an illegal act of a State in the celebrated case of the *Factory at Chorzów*, it has only ever applied them in practice in a single case, the *Corfu Channel*, where it determined the amount of compensation due from Albania on account of the material and personal injury caused by mines to vessels of the British Royal Navy.

3. The principles governing compensation for injury resulting from internationally wrongful acts are, for the most part, quite firmly established in international law, under the rules derived both from international conventions and from the jurisprudence of various international courts and tribunals (Permanent Court of International Justice and International Court of Justice, arbitral tribunals and, above all, regional human rights courts), as well as from the Draft Articles of the International Law Commission ("ILC") on the Responsibility of States, the work of the International Human Rights Commission and, finally, the work of legal commentators. The issue which we must address is the extent to which those principles can be applied to the present case and on what bases compensation should be determined.

4. In fact, the substance of the deliberations on compensation was very largely predetermined by the above-mentioned Judgment of 30 November 2010, where the Court had decided that, on account of the violation of certain provisions of the International Covenant of Civil and Political Rights, of the African Charter on Human and People's Rights and the Convention on Consular Relations, the DRC was obliged to make reparation for the resultant loss and injury. It should be noted at the outset that the Court precluded reparation in kind, which has logically been the basic principle for the reparation of injury, since the celebrated dictum of the Permanent Court of International Justice in the case concerning the *Factory at Chorzów*:

“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” (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47*).

5. Given that Guinea is not requesting restitution in kind and that, moreover, in this case that is no longer possible, the aim of the present Judgment is to rule on payment of a sum corresponding to the value which a restitution in kind would bear, on the basis of the conditions likewise set out in *Factory at Chorzów*, namely by envisaging “*the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it*” (*ibid.*), these being “*the principles which should serve to determine the amount of compensation due for an act contrary to international law*” (*ibid.*) (emphasis added). This solution, which forms part of general international law, was taken up in Article 36, paragraph 1, of the 2001 ILC Draft Articles, according to which “[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution” (emphasis added). As we also know, in the more precise context of human rights violations, the relevant texts and practice require the culpable State to compensate the injured person in full.

6. How can we ensure that compensation results in full reparation? The Court has based itself on information and practice regarding the various courts and tribunals mentioned above, or other organs which have addressed the issue. Two courts have played a particularly important role in defining the parameters of compensation: the European Court of Human Rights and the Inter-American Court of Human Rights. Their decisions have provided a reference scale and been a source of inspiration for the Court, even though, of course, the latter is not bound by the decisions of these two regional courts and, moreover, the context of diplomatic protection gives the present case a special character. It may be helpful to recall that, according to Principle 20 of resolution 60/147

adopted by the United Nations General Assembly on 16 December 2005 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law,

“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 . . .”.

7. It is apparent from international practice that a floor and a ceiling have to be established, between which the indemnity must lie, so as to create a balance between two considerations:

- on the one hand, to ensure effective compensation for all the consequences of the internationally wrongful act;
- on the other hand, to avoid making compensation excessive, or giving it a punitive character.

8. We still have to ascertain what exactly are the injuries in respect of which compensation is to be made and what is the amount of compensation that would fully make good the damage suffered. It is on this issue that in my view the Judgment adopts a particularly restrictive view of the compensable injuries, as a result of which I am unable to subscribe fully to the solution reached. First, we have to distinguish between the injuries suffered by the Guinean State and those suffered by its national, Mr. Diallo. Since this case concerns human rights, and in particular the individual rights of the victim, I will naturally begin with the injuries suffered by Mr. Diallo, since he is at the heart of the case in these diplomatic protection proceedings. In this regard, the Court distinguishes two types of injury for purposes of ruling on their compensation: non-material or moral injury, and material injury, which it breaks down into a certain number of heads of compensation according to Guinea’s claims.

I. COMPENSATION FOR NON-MATERIAL OR MORAL INJURY

9. The Court duly found a certain number of facts, including an initial period of arbitrary detention in 1988, which was disallowed because Guinea pleaded it too late, and above all an arbitrary detention of almost two and half months, with no information as to the grounds for this, no possibility of communicating with the Guinean authorities and no means of knowing what the ultimate outcome might be. It is clear that, quite apart from the unpleasantness of being subjected to conditions of detention as disagreeable as they were painful and distressing, such a situation

engenders a sense of anxiety or anguish which is particularly intense and stressful for the detained individual, in that he is in a state of total uncertainty in regard to his future fate.

10. In the present case, the mental harm resulted from the conduct of the Congolese authorities, who began harassing Mr. Diallo as soon as he attempted to recover debts owed to him by certain public bodies or undertakings. Not only was he detained, but it was sought by various means to discredit and undermine him professionally, by besmirching his reputation and his honour, in particular by accusing him of having bribed government officials and judges, without allowing him to defend himself against such allegations, which were not supported by the slightest evidence. As it happened, the Congolese judges themselves did not act on these accusations, but the fact that they had been made and the publicity surrounding them had extremely damaging consequences for the activities of the accused individual, and for his future presence in Zaïre (now the Democratic Republic of the Congo).

11. It is appropriate to recall here the context of the period during which these events took place, when there was an authoritarian, single-party régime, with a press entirely controlled by the State, which could launch or spread all kinds of accusations, without the individual under attack being able to avail himself of any means of defence in order to deny or dispute the acts of which he was accused. The aim was to discredit Mr. Diallo with influential persons at national and international level, because he had gradually built up an important network of relationships in order to reap the profits from the activities of the two companies which he managed. We know that, in general, personal relations play a substantial role in running and maintaining a successful business, and that is *a fortiori* all the more true in Africa and in the former Zaïre, given the importance of human relationships in African society and the characteristics of the political system then obtaining in that country.

12. Mr. Diallo's problems with the Congolese authorities created a prejudicial situation in respect of which he must be paid adequate compensation. It is true that the amount of such compensation is not altogether easy to determine, given that this is a situation where the subjective elements predominate over objective criteria. While international practice, and in particular the practice of courts and tribunals, can provide bases of comparison, albeit with important variations, the Court quite correctly relies essentially on equity in order to arrive at a fair and reasonable amount of compensation.

13. The wrongful acts of the Congolese authorities were a source of physical and psychological suffering, of frustration, humiliation and dishonour, not only during the periods of detention, for those sufferings have continued for long afterwards and still continue today, more than 17 years after the events which triggered them. Indeed, an entire life has been ruined as a result of the two spells of arbitrary imprisonment fol-

lowed by a brutal expulsion from a country where the victim had lived for 32 years, to the point where Mr. Diallo looked upon it as a second homeland. On this issue, I agree with the Court's approach, while taking the view that, even if no sum of money can truly make full reparation for mental harm, it would certainly have been fairer to award a sum greater than US\$85,000. However, notwithstanding these misgivings, I am in agreement with the Court's final decision.

II. COMPENSATION IN RESPECT OF PERSONAL PROPERTY

14. In regard to compensation for personal property, the Court has found itself in some difficulty in ruling on the extent and reality of the loss suffered by Mr. Diallo, because the evidence provided by the Applicant is far from conclusive in respect of the contents of the apartment, and indeed totally lacking in relation to the list of valuable items and the contents of the bank accounts.

15. For the contents of the apartment, there is admittedly an inventory, but it is very approximate and, in particular, it is difficult to determine what could have happened between Mr. Diallo's arrest and the time when it was drawn up, since items could have been removed during that period. This is not simply pure speculation, for Mr. Diallo enjoyed a very high standard of living and had contacts with many personalities in the political and business world, which would lead one to believe that he was living in a comfortable, well-furnished apartment. For that reason, while paragraph 36 specifies a lump sum of \$10,000 as compensation for the loss concerning the contents, it may be felt that this is an underestimate of the amount of the loss and that, in equity, it could be valued at an amount higher than that decided on by the Court. However, here again, I have finally accepted the Court's reasoning and decision.

16. In regard to the particularly valuable items in respect of which compensation is claimed, all that the Applicant has produced to the Court is a simple list, without any evidence to confirm the items' actual existence and value. That does not necessarily mean that those items did not exist, since, as previously stated, Mr. Diallo enjoyed a very high standard of living before encountering the troubles which led not only to the ruin of his companies, but also to his own personal ruin. It thus would not have been unreasonable to give credit to his claim to possession of the property mentioned in the list. Indeed, while it is understandable that, in the absence of any evidence, the Court could not base itself purely and simply on the Applicant's affirmation, it would have been possible for it not to dismiss the claim outright; given that its decision is based on equity, the Court could have made a symbolic award of an appropriate lump-sum amount. The Court did not consider that it should do so and,

while expressing my misgivings, I have not voted against the solution adopted.

III. THE LOSS OF PROFESSIONAL REMUNERATION AND POTENTIAL EARNINGS

17. In regard to this head of damage, it may be regretted that Guinea's claim is not only disproportionate and manifestly excessive, but, furthermore, that it interprets the Court's Judgment of 2010 in a way that goes beyond what it states, in seeking to include losses suffered by the companies managed by Mr. Diallo, whereas the Court excluded such losses and consequently rejected the possibility of any compensation therefor. It follows that the Court is bound, naturally and logically, to act in accordance with its previous Judgment and to dismiss the claim for compensation in respect of all items relating to any losses of the companies themselves.

18. The fact remains that, while the losses suffered by the two companies are excluded from the scope of the present discussion, Mr. Diallo was receiving remuneration as an employee of those companies, of which he was the *gérant*. The fact that he was twice detained for over two months and then expelled meant that he was unable to exercise his functions as *gérant* and deprived him of the income to which he was entitled as such. It seems to me that it would have been logical and fair to allow for that loss of income and to compensate him on that account. A *gérant* who is at the same time an *associé* is regarded as working on a self-employed basis, and on that basis he receives remuneration as long as he is effectively carrying out his duties. That is the case even where the *associé* is the majority or sole shareholder, as in the present case, for the law maintains the fiction of a private limited company (*société privée à responsabilité limitée* (SPRL)), which was the status of the two companies managed by Mr. Diallo. Although Guinea provides no evidence on the amount of the remuneration attaching to the duties of *gérant* of the two companies, it is possible to calculate a reasonable amount in equity, rather than dismissing the claim outright, as the Court does, and, for reasons of logic and common sense, I therefore cannot subscribe to such a clear-cut solution. Thus, even while in detention, Mr. Diallo was necessarily entitled to a certain income, on some basis or other, whether in order to pay various unavoidable expenses, such as the rent for his apartment, the fees of the lawyers acting on his behalf, everyday living expenses, including his food in prison, since detainees were not provided with food, and so on. While the amount of compensation claimed by Guinea is quite clearly disproportionate, and it is not easy to put a figure on the amount of such income, it was open to the Court to take account of the particular circumstances of the case and award an appropriate amount of compensation; it is thus difficult to understand the radical solution adopted in paragraph 46

of the Court's Judgment, and that is the reason why, to my great regret, I cannot accept that the claim should be dismissed outright in this way.

IV. THE PROCEDURAL COSTS

19. Finally, regarding the costs incurred in respect of legal representation, it should first be noted that, under this head of compensation, we pass from Mr. Diallo's personal situation to that involving the Guinean State. Thus it is the Guinean State, acting on the basis of diplomatic protection, which is the Applicant in the present case and which has incurred the costs required in order to defend the rights and interests of its national.

20. In this case, Guinea was partially successful in regard to the admissibility of the Application, in that the Judgment of 24 May 2007 dismissed the objection to admissibility in relation to the protection of Mr. Diallo's personal rights, and upheld it in relation to the protection of the rights of the companies owned and managed by him. The Judgment of 30 November 2010 was also partially favourable to Guinea in regard to the violations of Mr. Diallo's personal rights. Finally, Guinea was totally successful on the principle of compensation for the non-material injury, and partially successful on the principle of compensation for certain of the material injuries. In these circumstances, it seems to me that, both in principle and in equity, it would have been reasonable to allow the reimbursement of a modest proportion of the costs incurred in this third and final phase of proceedings which have lasted for a total period of close to 14 years, having commenced in December 1998 and terminated in June 2012. It is thus for this reason of principle and equity that I have not voted in favour of the Court's operative clause on this point.

(Signed) Ahmed MAHIU.
