SEPARATE OPINION OF JUDGE *AD HOC* MAMPUYA

[Translation]

The amount of compensation calculated by the Court in respect of the moral injury is excessive, and disproportionate to Mr. Diallo's suffering — The principles governing the assessment of pecuniary reparation in international law should be applied with the same rigour to reparation for moral injury — The general obligation to make full reparation should not have a punitive or exemplary character — The pecuniary award should simply represent fair compensation for the injury sustained — The established jurisprudence of the human rights courts, arbitral tribunals and claims commissions shows that these organizations adhere to the principle of proportionality when determining the amount of reparation — The amounts awarded by those bodies in respect of moral injury resulting from graver human rights violations than those suffered by Mr. Diallo are smaller than that awarded to Mr. Diallo — The conditions which surrounded Mr. Diallo's detentions and expulsion do not constitute aggravating circumstances justifying the excessive award for moral injury — The applicable principles for reparation of material injury — Evidence of the existence of the material injury and of the causal link between the injury and the wrongful conduct of the responsible State is essential in order to establish the right to compensation — Guinea has failed to provide "sufficient proof" *establishing the material injury allegedly suffered by Mr. Diallo in the form of loss of personal property — The principle of equity to which other courts have referred in their jurisprudence is only applicable for the purpose of estimating the value to be used as the basis for calculating the amount of compensation — Guinea has not demonstrated that there is a causal link between the material injury resulting from the loss of personal property alleged by Mr. Diallo and the conduct of the DRC — The human rights courts are more exacting in respect of evidence and require that there be a direct causal link with the alleged offences — While the existence of Mr. Diallo's personal property has been proved by the inventory, Guinea, however, has failed to demonstrate that certain other property, in addition to that recorded in the inventory, existed, or that this property was lost or that its loss was imputable to the DRC — The sum of US$10,000 fixed by the Court for the material injury has no legal basis.*

I firmly supported the principle of the main conclusions adopted in the Judgment rendered by the Court, in order to finally bring an end to this case, which has been ongoing since 1998, by fixing the amount of compensation owed as a result of its finding that the international responsibility of the DRC is engaged by internationally wrongful acts which violated Mr. Diallo's individual rights. I would very much have liked to have agreed with the majority of the Court on all of the points under discussion; unfortunately, I could not subscribe to two of the six points of the operative clause. Hence the explanations I am obliged to set out in this opinion, which is quite clearly not dissenting, but separate.

1. Firstly, I disagree with the finding relating not to the principle of the compensation owed by the DRC to Guinea for the moral — or "non-material" — injury suffered by Mr. Diallo following his detentions and expulsion by the Respondent's authorities, but to the assessment of the amount of that compensation, which, in my view, is unjustifiably high. I have also expressed my disagreement with a second point: a point of law concerning the legal basis of the compensation awarded for the material injury caused by the loss of Mr. Diallo's personal property, a basis which, to my mind, in the absence of any evidence, does not exist. I opposed the majority of the Court on this point, and voted accordingly, because there is an important legal question of principle at issue: not in view of the amount of compensation awarded, which at US$10,000 is a modest sum, but in view of the significant evidentiary issue in relation to reparation.

2. This is the first time since its Judgment fixing the amount of compensation in the case concerning the *Corfu Channel (United Kingdom* v. *Albania)* (*Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, pp. 244 *et seq.*) that the Court has been called upon to decide the compensation owed by a State whose international responsibility is engaged by internationally wrongful acts; the Court, therefore, has no choice but to refer to the rich experience of other courts, including that of arbitration and claims tribunals. The most illustrative practice in this regard is that of the two regional human rights courts — the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR) — as well as that of the Iran-United States Claims Tribunal. The abundant case law of these courts has enabled principles to be identified, which today govern the examination of any questions raised by the assessment of the reparation and the fixing of the compensation owed by a State whose international responsibility is engaged.

3. It is, therefore, this case law and these principles which, according to the Court itself, should guide it in its approach to reparation in general and in fixing the amount of compensation. However, my analysis of the present Judgment, carried out in the light of these sources, leads me to conclude that they have not, in fact, been taken into account by the Court.

4. I will begin by addressing the question of the determination of the amount of compensation owed for the non-material or moral injury — a straightforward exercise, because it amounts simply to an assessment of the facts. In so doing, I will demonstrate that the Court has failed to respect those principles which have emerged from the established jurisprudence, by fixing an amount which is clearly excessive in view of the practice of all the other courts, including those specializing in the safeguarding of human rights, although these are, in principle, the most favourable to the victims.

5. I will then explain in more detail my view of the Court's decision to award Guinea compensation — whatever the amount — for "material

injury" caused by Mr. Diallo's alleged loss of his property following his detentions and expulsion by the DRC in January 1996. I will demonstrate that this award of compensation has no legal basis and no justification, since Guinea has failed to provide evidence of the existence of the injury; such evidence, although not a condition of responsibility — which derives directly from the commission of the internationally wrongful act — is nevertheless the indispensable basis for the award of reparation and the measure of the amount of compensation to be awarded. In particular, such evidence should show that Mr. Diallo did in fact possess and lose the property in question, and that its loss was imputable to the DRC as a direct consequence of the wrongful detentions and expulsion of the Guinean national by that State.

I. Excessive Amount of Compensation for Non-Material (Mental or Moral) Injury

6. It is not disputed that Mr. Diallo sustained moral injury as a consequence of his arrests and expulsion, which were declared unlawful and arbitrary by the Court in its Judgment of 30 November 2010 (*I.C.J. Reports 2010 (II)*, p. 692, para. 165, points 2, 3 and 4 of the operative clause), or that he is therefore entitled to reparation in the form of compensation. The problem is the amount of the "appropriate compensation".

7. In this connection, the amount claimed by Guinea (US$250,000) is clearly disproportionate given the practice in this area (even by domestic courts) and the nature of the injury (purely moral and mental), in respect of which, in certain cases, particularly those concerning reparation to States, reparation has often been limited to satisfaction and to a "declaratory judgment", for example, the finding in the Judgment on the merits of 30 November 2010 that the DRC had violated Article 36, paragraph 1 *(b)* of the Vienna Convention on Consular Relations (*ibid.*, p. 691, para. 161 and p. 693, point 7 of the operative clause). It is clear that the Court also considered Guinea's claim of US$250,000 (see para. 10 of the present Judgment) to be both excessive and disproportionate, because it did not accede to Guinea's request on this point. Nevertheless, the US$85,000 compensation which it has awarded is significantly higher than the amounts awarded to date for similar and even more serious violations of comparable obligations. Of course, moral injury cannot be measured. One can even argue that, strictly speaking, it does not have to be proved, because it is inherent to the human condition when subjected to a violation of rights. However, there is nevertheless a standard by which to measure such injury in the present case which, in view of its specific circumstances, can only be the conditions surrounding Mr. Diallo's detentions and expulsion.

8. From the case law and practice a certain number of principles emerge, which govern how compensation should be measured. Among these is the

undeniable principle that, while the primary aim of compensation is to remedy as fully as possible all forms of loss suffered as a result of an internationally wrongful act, compensation is in no sense intended to punish the responsible State, and nor should it be of an expressive or exemplary nature. This approach was adopted by the ILC from its very first reports on State responsibility, citing, *inter alia*, from the work of Jiménez de Aréchaga: "punitive or exemplary damages . . . are incompatible with the basic idea underlying the duty of reparation" (E. Jiménez de Aréchaga, "International Responsibility", *Manual of Public International Law*, London, Macmillan, 1968, cited in UN doc. A/CN.4/425 & Corr.1 and Add.1 & Corr.1, *Second Report on State Responsibility*, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, 1989, para. 24). That principle is incorporated in the ILC's Draft Articles on State Responsibility, first in the commentary on Article 36 relating to compensation and then in Article 37, paragraph 3, in respect of satisfaction: "[s]atisfaction shall not be *out of proportion to the injury and may not take a form humiliating to the responsible State*" (*Yearbook of the International Law Commission*, 2001, Vol. II; J. Crawford, *The International Law Commission's Articles on State Responsibility — Introduction, Text and Commentaries*, "Commentary under Article 36", p. 219 and pp. 231 and 234; emphasis added). This principle of proportionality between the reparation, whatever form it takes, and the injury, is well established: the extent of the injury should be the measure of the level or amount of the compensation, thus ensuring that the latter simply represents fair compensation for the injury suffered. A pecuniary award should not exceed the level of compensation, even though there is a temptation in respect of human rights violations — which are regarded as particularly shocking and offensive to human dignity — to go beyond this, either to punish the State responsible for those violations or, by making an exemplary or spectacular award, to intimidate other States and discourage them from similar conduct.

9. Of course, all reparation, particularly pecuniary reparation, entails an element of dissuasion, but this element is inherent to the principle of reparation, just as criminal punishment is necessarily punitive and therefore intimidating, yet does not reflect a desire to punish the offender publicly. However, reparation goes beyond this inherently dissuasive aspect and function when the sum awarded no longer corresponds to an amount of compensation reflecting not only as fully as possible, but at the same time as precisely as possible, the scale of the injury for which reparation must be made; such is the case of compensation which is clearly excessive. It is true, moreover, that a moral injury cannot be measured in monetary terms, but money is, as the saying goes, "the common measure of valuable things" (Grotius), and since the injury must therefore be compensated by sums of money, a court should not decline to be guided by the practice of other courts and arbitral bodies, whose decisions may be

regarded as giving an indication of the average size of the sums awarded to "ease" the moral injury of victims or their relatives.

10. The foregoing explains why even the Inter-American Court of Human Rights, which has a very compassionate and generous attitude towards the compensation claims of victims of human rights violations, adopted this principle of proportionality in its very first judgment on reparation, in the *Velásquez Rodríguez* v. *Honduras* case (judgment of 21 July 1989 (reparations and costs), para. 38), which has since become a point of reference in the field, and in which it stated that international law did not recognize reparation which punished States. It is not that "punitive damages" are completely inconceivable, rather that, while certain national systems do permit the award of such damages, punishment is not the purpose of reparation, pecuniary or otherwise, in international law.

11. Of course, the conditions of detention or expulsion — for example, solitary confinement, torture, ill-treatment, the length of the detention, etc. — are circumstances specific to each case and could, depending on the case, justify a higher amount of compensation, while their absence would impose a lesser amount. In the present case, however, the Court has acknowledged that Mr. Diallo did not suffer inhuman or degrading treatment during his detentions. Having briefly alluded to such treatment, Guinea chose to abandon any such accusations, and did not attempt to offer the slightest proof that such treatment occurred (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J Reports 2010 (II)*, p. 671, paras. 88-89 and p. 693, para. 165, point 5 of the operative clause; present Judgment, para. 21). Furthermore, the total duration of Mr. Diallo's detentions did not exceed — to use the variable figures advanced by Guinea (*I.C.J Reports 2010 (II)*, pp. 659-660, paras. 48-52) and disregarding the DRC's challenge to those figures — 66 to 72 days. Of course, the deprivation of liberty, whether for a few hours or several years, should be condemned when it is wrongful or arbitrary, but its duration is not irrelevant when measuring the sufferings endured by the individual detained or the seriousness of the injury for which reparation must be made. It would therefore have been useful for the Court to compare the duration of Mr. Diallo's detention with the much longer detentions considered by other courts, whose practice and experience should have guided the Court in the present case.

12. Nor, strictly speaking, did the Court accept that there were aggravating circumstances beyond the unlawful and arbitrary character of the detentions and expulsion which, moreover, constitute the full extent of the DRC's violation of its obligations, for, as the Court said itself, "the fact that [Mr. Diallo] suffered non-material injury is an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court" (Judgment, para. 21). It then recalled *(ibid.)*, without expressly calling them aggravating, the specific circumstances of Mr. Diallo's detentions and expulsion, as described in its Judgment on the merits (*I.C.J*

Reports 2010 (II), pp. 666-670, paras. 74-84). In respect of these specific circumstances, even the fact that, expelled on 31 January 1996, Mr. Diallo "[only] received notice of his expulsion on the same day" is not considered as an aggravating circumstance in itself. And while the Court states that Mr. Diallo "was detained for an unjustifiably long period pending expulsion" (present Judgment, para. 21, and *I.C.J Reports 2010 (II)*, p. 668, para. 79), it does so in response to the DRC's argument that the detention was necessary, in order to prevent the individual concerned from fleeing and escaping expulsion. These circumstances constitute the very form of the violation.

13. Thus, a comparison of Mr. Diallo's case with certain cases ruled on by the European Court of Human Rights or the Inter-American Court of Human Rights shows that, without making light of Mr. Diallo's suffering, the situations presented before those courts were often much graver than that of the Guinean national: notification of the expulsion measure on the same day it was carried out, detention of several years, torture, inhuman and degrading treatment, solitary confinement, enforced disappearance, extrajudicial executions, etc. However, in many of these cases, the courts awarded much smaller sums: US$30,000 at most, which was the amount offered by the Respondent itself as appropriate compensation taking into account the specific circumstances of the case. The few cases in which comparatively high sums were awarded by the Inter-American Court of Human Rights involved enforced disappearance, kidnappings, extrajudicial executions, and so on.

14. In general, the compensation awarded for non-material injury is thus relatively modest, in keeping with the nature of the injury suffered, especially if that injury has had no proven significant somatic effects. Below are some examples of the sums awarded as reparation for moral injury.

(a) European Court of Human Rights: €24,000 in *M.S.S.* v. *Belgium and Greece*, €15,000 in *Khodzhayev* v. *Russia*, €8,000 in *Ahmed* v. *Romania* and €15,000 in *Lupsa* v. *Romania* for detentions lasting for several years accompanied by aggravating circumstances; US$50,000 in *M.* v. *Germany* for arbitrary detention lasting more than eight years. In *Nowak* v. *Ukraine* the European Court of Human Rights awarded €16,000 for unlawful detention, arbitrary expulsion and ill-treatment, and violations of guarantees provided by Protocol No. 7. However, Mr. Nowak had a valid residency permit at the time of his expulsion and was an "alien lawfully resident" in Ukraine, within the meaning of Article 1 of Protocol No. 7. Moreover, he was notified of the expulsion order on the day of its execution, in a language which he did not understand and in circumstances which did not allow for him to be represented or to submit arguments against his expulsion.

(b) Inter-American Court of Human Rights: US$30,000 in *Neptune* v. *Haiti*, US$20,000 in *Maritza Urrutia* v. *Guatemala*, US$50,000 in *Chaparro Alvarez and Lapo Iñiguez* v. *Ecuador*. In *Goiburú et al.* v. *Paraguay*, the Inter-American Court of Human Rights in fact made several awards, ranging from US$10,000 to US$50,000, to the various victims of collective and grave violations, including infringements of the rights to life and liberty, enforced disappearance, etc., with the highest amounts awarded for disappearances.

(c) United States/Mexico General Claims Commission: US$2,500 in the *Daniel Dillon* case, US$8,000 in the *Harry Roberts* case and US$4,000 in the *Mary Ann Turner* case.

15. In light of the foregoing, it seems to me that, having regard to the circumstances of this case, the established violations and the moral injury described above (see the present Judgment, para. 25), the sum of US$85,000 is grossly excessive; it does not reflect the extent of the injury suffered and is not proper compensation for the moral injury actually sustained. Thus, contrary to what is stated in the Judgment *(ibid.)*, it does not appear to me to be "appropriate". In view of earlier practice, including that of the human rights courts, it is clear that this amount, which does not reflect the circumstances of the case, bears no relation to the practice, and in my view it has not been adequately justified. Because of its unprecedented size and exemplary, if not punitive, character (see paras. 8 and 9 above), it is likely to attract attention and constitutes a reversal of the jurisprudence on this question, which is not the function of reparation.

II. Unjustified Compensation for the Material Injury Resulting from the Loss of Personal Property

The Legal Rules Governing This Area

16. In terms of compensation for an internationally wrongful act consisting in the violation by a State of an international obligation engaging the latter's international responsibility, this case, as the Court confirms (Judgment, para. 13), is only the second since its creation in the aftermath of World War II in which it has been called upon to fix compensation. The Court's only precedent is the *Corfu Channel* case *(United Kingdom* v. *Albania)* (*Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, pp. 244 *et seq.*), which concerned the destruction of British warships and the deaths of naval personnel, and which was also a "material" case in terms of the nature of the injury sustained by the United Kingdom. In that case, the Court was extremely demanding, and was not content to accept the Applicant's claims or even the evidence of the destruction of

the ships and the deaths of crew members. Although the Court ultimately ruled in favour of the United Kingdom and awarded it the compensation it sought, it did so on the basis of documentary evidence provided both by the United Kingdom and by the experts' report — which confirmed the existence of a causal link, in that the material damage alleged was indeed the direct consequence of the mine explosions (*I.C.J. Reports 1949*, p. 265) — and the figures presented by the Applicant could be considered as a "fair and accurate estimate of the damage sustained" (*ibid.*, p. 250). The emergence of two conditions can clearly be observed: there must be evidence of the injury to justify the compensation amount and there must be evidence of a causal link.

17. This decision marked the introduction, in case law and in practice, of the requirement that there be "sufficient proof" of the injury sustained and that the nature of the victim's pecuniary claims be "fair". This case law and practice of the international courts which regularly rule on such claims, notably the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR) and the various joint claims tribunals, in particular the Iran-United States Claims Tribunal, together with several arbitral awards, are well established today.

18. In the present case, it seems clear to me that, even though the Court claims to have taken into account the practice in other courts (Judgment, para. 13), it did not rigorously adhere to this when it awarded compensation for a material injury, without requiring independent proof of the allegations made by Mr. Diallo.

19. The point of law at issue here is that of the burden of proof: proof of the existence of the injury, which is, in fact — both in the legal tradition and in the situations contemplated by the ILC's Draft Articles — the basis and measure of compensation, and proof of the causal link between the injury and the wrongful behaviour of the responsible State.

Evidence of the Material Injury: The Requirement of "Sufficient Proof"

20. In many instances there is no evidence in support of Guinea's allegations and claims. Doubtless aware of the evidence requirement, the Court had to consider whether it was still possible, in the absence of evidence, to award reparation in the form of pecuniary compensation. At the same time, however, this concern shows that the Court believes that evidence plays a central role in cases concerning responsibility, reparation and compensation. Thus it is well established that "[a]s a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact", as the Court recalled in its Judgment on the merits of the case which is the subject of these proceedings (*I.C.J Reports 2010 (II)*, p. 660, para. 54). This is why, in its 2010 Judgment, the Court did not hesitate to dismiss facts which were alleged but not proved (*ibid.*, pp. 679-687, paras. 117-148, and p. 690, paras. 157 and 158).

21. Just a few examples will suffice to confirm this principle, which the Court itself recognizes: for example, *Papamichalopoulos and Others* v. *Greece (Article 50)* (application No. 33808/02, judgment of 31 October 1995, ECHR, Series A, No. 330-B, para. 37), which concerned the question of the expropriation of land belonging to individuals, and *Akdivar and Others* v. *Turkey (Article 50)* (application No. 21893/93, judgment of 1 April 1998, ECHR, paras. 15-34), in which the applicants sought damages for material injury resulting from the loss of their homes, burnt down by Turkish security forces. Although there was no doubt that the land and the houses had existed, or that the land had been expropriated and the houses burnt down by the army, in order to establish their true value the European Court of Human Rights called experts, refusing to rely on the unsubstantiated claims advanced by the applicants. Similarly, in *McCann and Others* v. *United Kingdom* (application No. 18984/91, judgment of 27 September 1995, ECHR, A324), which involved a violation of Article 2 of the European Convention on Human Rights (right to life) consisting in the murder of three members of the IRA in Gibraltar by British security forces, the European Court rejected the argument of premeditated execution put forward by the victims' representatives, for lack of evidence. In a case concerning violence in custody, the European Court also demanded that the Austrian Government "satisfactorily [establish] that the applicant's injuries [had been] caused otherwise than — entirely, mainly, or partly — by the treatment he underwent while in police custody"; in the absence of evidence to that effect, it concluded that the violations had been established (*Ribitsch* v. *Austria*, application No. 1889/91, judgment of 4 December 1995, ECHR, A336, para. 34). In a case involving discrimination — behaviour which is difficult to prove — the European Court of Human Rights demanded proof that the alleged difference in treatment was based on discriminatory grounds related to a protected characteristic (for example, sex, race, religion) and that, therefore, it was wrongful, even though, by a sort of sharing of the burden of proof, there then arose a presumption of discrimination, which the Respondent would have to refute by producing evidence to the contrary (*Timishev* v. *Russia*, applications Nos. 55762/00 and 55974/00, judgment of 13 December 2005, ECHR, paras. 40-44; see also, to the same effect, the judgment of the ECJ of 26 June 2001 in *Susanna Brunnhofer* v. *Bank der österreichischen Postsparkasse AG*, case C-381/99, *2001 Reports*, p. I-04961). This sharing of the burden of proof does not contradict the established rule in this regard, which stipulates that he who alleges a fact must provide proof of that fact. These are cases where the claims put forward are mutually contradictory, and it is for each party to substantiate its own argument with evidence capable of convincing the court. Finally, in *H.L.R.* v. *France* (application No. 24573/94, judgment of 29 April 1997, ECHR), the European Court of Human Rights concluded that the expulsion of the Colombian applicant had not violated Article 3 of the European Convention on Human Rights, because no relevant proof had been produced in support of the allegations of risks of ill-treatment.

22. The Iran-United States Claims Tribunal, for its part, has shown itself to be particularly stringent with respect to establishing the existence of an alleged injury in the form of a loss of property, requiring the applicant to demonstrate that, before the commission of the unlawful acts, the property in question existed and was in his or her possession ("possession, expropriation and value of the items"). In this respect, the case law of the Tribunal reveals a preference for documentary proof — undoubtedly the most reliable form of evidence — despite the fact that the applicants, in this case American nationals expelled from Iran, had often been forced to flee that country, thereby abandoning the documents which proved the existence, ownership and value of the property alleged to have been lost (see, in particular, the cases of *Daley (United States of America* v. *Iran)*, award 360-10514-1, 1988 WL 637289 (Iran-US Cl. Trib.); *Rankin (United States of America* v. *Iran)*, award 326-10913-2, 1987 WL 503860 (Iran-US Cl. Trib.) and *Yeager (United States of America* v. *Iran)*, award 324-10199-1, 1987 WL 503859 (Iran-US Cl. Trib.)).

23. The *Daley* case, for example, concerned an American national who claimed to have lost various property (including, a car, a thoroughbred horse, a Rolex watch, jewellery, a coin collection, a total of US$15,000 in cash and some luxury carpets) when he was detained and expelled from Iran. The fact that the circumstances of his expulsion meant that he was no longer in possession of the supporting documents did not prevent the Tribunal from declaring that it "does not find that the horse was expropriated", and that "[t]his part of the claim is therefore dismissed" (1988 WL 637289, para. 24). To establish the ownership and value of the coin collection, proof was required as to where and when the coins had been bought, who had sold them, the details of their insurance cover, etc. The burden of proof is such that, in the same case, even though the carpets in question had been seen in the Daley residence in Teheran, the Tribunal found that "[t]he evidence is not sufficient to establish, however, that the carpets or any of the other furniture were at the apartment on the date of the alleged taking" (*ibid.*, para. 27); it also required the applicant to "establish that these items [had been] removed from the premises by individuals or groups for whose acts the Government of Iran is legally liable" (*ibid.*, para. 28). The Tribunal's insistence on the need for proof of the causal link can be seen in the following paragraph, in which it states that the presence of the carpets and other effects at the applicant's residence does not enable it to conclude that they "[had been] removed in circumstances which would give rise to liability on the part of the Iranian Government". The requirement is a manifold one: the "possession, expropriation and value of the items for which" compensation is sought must be established (*ibid.*, para. 30).

24. It is worth mentioning here an arbitral award rendered in a case involving the same head of damage and factually similar circumstances, namely the *Chevreau* case between France and Great Britain, and which was very similar to the present case in that it related to the wrongful detention and expulsion of a foreigner of French nationality, Mr. Chevreau,

followed by a claim for compensation by the French Government for material damage resulting from the loss of personal property during Mr. Chevreau's detention and expulsion (*Chevreau* case *(France* v. *Great Britain)*, 9 June 1931, English version from 27 *American Journal of International Law* 153, 1933).

25. The *Chevreau* case, which bears a very strong resemblance to the present one, concerned in particular property, that is, "money, watches and jewels, clothes, books and other articles which, according to Mr. Chevreau, were in his lodgings . . . when he was arrested, but which were not found on December 24, 1918, when an inventory was made . . . in the presence of two English officers and of the Director of Customs" (*ibid.*, p. 178). The list of property provided by Mr. Chevreau included not only the items whose presence had been noted in the inventory of 24 December 1918, but other items, too, notably "money, watches and jewels", which he claimed were in his possession before the events in question. The French State therefore contended that the British State was responsible for the loss of the securities and articles enumerated in Mr. Chevreau's list, but not detailed in the inventory. The Arbitrator found that the United Kingdom could not be held responsible for this loss, even though the British authorities did not deny that they were responsible for the safe-keeping of the effects in question (*ibid.*, p. 179). Therefore, he took account only of the contents of the inventory, without taking into consideration the other items claimed by Mr. Chevreau, which had not been found at the house when the inventory was drawn up. It was under these circumstances that, on the sole basis of the declarations and because of a lack of "documentary proof", the Arbitrator found that "Mr. Chevreau's claim for loss of effects in Persia could not be sustained", and decided that, in law, "[t]he burden of proof [wa]s upon the French Government and [that] the allegations of Mr. Chevreau [could] not be accepted as *sufficient proof*" (*ibid.*, p. 181; emphasis added).

26. In the present case, the Court has correctly applied this principle in respect of some of the claims, dismissing the alleged material injury for loss of earnings and the claim for compensation made by Guinea for the loss of high-value items which were alleged to have been in Mr. Diallo's apartment at the time of his expulsion, but which were not found or listed on the inventory (Judgment, para. 34), as well as the claims for the alleged loss of income (*ibid.*, paras. 41, 42, 44, 45 and 46) and potential earnings (*ibid.*, para. 48).

27. As can be seen, although a certain degree of flexibility is permitted in respect of non-material damage, regarded as inherent to the human condition when subjected to violations and not having to be proved, judges and arbitrators have always enforced a higher standard of proof, that of "sufficient proof" or "proof to the satisfaction of the Court".

Recourse to the Principles of Equity

28. While, in respect of material injury, the Court has sometimes based reparation on considerations of equity, it has done so not because the exis-

tence or loss of the property in question was in doubt, but simply for the purpose of estimating the value to be used as the basis for assessing the amount of compensation. Thus, in *Orhan* v. *Turkey*, in which "no decisive . . . proof of the size and nature of the houses, property and possessions destroyed and lost [was] provided", the European Court of Human Rights had to award compensation which was "speculative and based on principles of equity" (*Orhan* v. *Turkey*, application No. 25656/94, judgment of 18 June 2002, ECHR, paras. 423-424). Similarly, in a case involving the loss of a house and personal effects, whose value had not been proved, but whose existence and ownership had been established, the same court ruled that "[its] assessment of the amounts to be awarded must, by necessity, be based on principles of equity"; it fixed that amount at GBP 4,500, "[i]n the absence of any decisive evidence and making its assessment on an equitable basis" (*Bilgin* v. *Turkey*, application No. 23819/94, judgment of 16 November 2000, ECHR, paras. 140 and 144).

Causal Link

29. Furthermore, generally speaking — and in this case — material injury resulting from the loss of personal property and any subsequent claim for reparation in respect of that injury should be rejected if there is no causal link between the alleged injury and the wrongful conduct of the State in question, in this case the DRC.

30. It is true that the European Court of Human Rights, like the Inter-American Court of Human Rights, has shown greater flexibility in respect of the causal link for non-material injury, often presuming that such an injury and the necessary causal link exist on the basis of the nature of the violation, since the applicant could not be required to furnish evidence of the non-material damage sustained, because this is inherent to the human condition and does not have to be proved, as indicated by the Inter-American Court of Human Rights (*Goiburú and al.* v. *Paraguay*, judgment of 22 September 2006 (merits, reparations and costs), IACHR).

31. However, even the Inter-American Court of Human Rights, the most favourable of all the courts in terms of safeguarding human rights and providing reparation for their violation, insists that there must be a minimal causal link. Indeed it defines material injury for which compensation may be made as "the loss or impairment of the victims' income, the expenses incurred as a result of the facts and the monetary consequences thereof *bearing a causal link to the facts of the instant case*" (*Cantoral Benavides* v. *Peru* judgment, para. 166, and *La Cantuta* v. *Peru*, judgment of 29 November 2006, para. 213; emphasis added).

32. That said, the characteristic flexibility which is shown almost systematically by that court should not be applied elsewhere, with the same

reasoning or the same justification. In reality, even though this Court has had cause to address certain aspects relating to human rights in the present case, it remains a case of diplomatic protection between States, and the Court has not become a human rights court. Furthermore, there is a specific historical reason as to why the Inter-American Court has an already established practice of flexibility towards evidence, essentially working on the basis of equity in order to determine the existence of the violation and of the injury and in assessing compensation: the court's first judgments were in cases concerning mass disappearances of persons under dictatorships which were in place for decades in the States of Latin America. As well as the atrocities of dictatorships, these cases also concerned a period in which a number of these States were, for reasons of national interest and security, engaged in wars against armed rebel groups ("Shining Path" and other "Maoists") and in the arrest, detention, torture and execution of suspects, such as the two Gómez-Paquiyauri brothers, who were killed by security forces in Peru (*Gómez-Paquiyauri Brothers* v. *Peru*, judgment of 8 July 2004 (merits, reparations and costs), IACHR). These are systematic crimes by the State, which led Judge Cançado Trindade, who described this tragedy as a reality which has always existed at the heart of the human race — irrespective of the régime or the era — to state that, for the victims of this tragedy, "[n]othing will be as it was before" and "[t]he survivors . . . today have the memory of paradise lost" (*Gómez-Paquiyauri Brothers* v. *Peru*, separate opinion of Judge Cançado Trindade, para. 6). Under these circumstances, it is understandable that, from its first judgment on reparation and the assessment of compensation, the *Velásquez-Rodríguez* v. *Honduras* judgment rendered on 21 July 1989 (that is to say, before the *Gómez-Paquiyauri Brothers* judgment), the Inter-American Court of Human Rights adopted this attitude, whereby it considered the systematic practice of violations of the right to life as constituting an "autonomous human rights violation" [see Elise Hansbury, *Le juge interaméricain et le "*jus cogens*"*, Geneva, Graduate Institute of International and Development Studies, para. 34, referring to the case of *Velásquez-Rodríguez* v. *Honduras*, judgment of 29 July 1988 (merits), IACHR, para. 155]. This gave rise to the theory of "aggravated responsibility", which is not found elsewhere. The type of cases submitted to the Inter-American Court of Human Rights have thus lent themselves to a less stringent approach: the circumstances of the systematic disappearances and acts of torture for which the State was responsible actually deprived the victims, or their relatives, of the possibility of establishing the violations (right to life, torture, etc.) or of proving that they had suffered both physical and mental inhuman treatment. It is not surprising, therefore, that from the outset this court decided in principle that this type of suffering did not have to be proved, and thus that it benefited from a sort of irrefutable presumption as to its existence. But can it be said that such specific conditions could ever justify the general, systematic application of such flexibility — and its extension to all types of material injuries — by the Court, which does not deal either with crimes of the

State or with "autonomous human rights violations" of this kind? That is highly doubtful.

33. For its part, the European Court of Human Rights has always maintained that, in respect of material injuries, the burden of proof relating to the existence of those injuries and to the causal link should normally be borne by the applicant, and the absence of proof of one or other of these has frequently led to the rejection of the claim. In *Borisenko* v. *Ukraine*, for example, although the court awarded compensation of €1,700, "ruling on an equitable basis, in respect of non-pecuniary damage", this was on account of the non-material injury, the court having dismissed the material injury for which the applicant was claiming compensation: "The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects that claim." (*Borisenko* v. *Ukraine*, application No. 25725/02, judgment of 12 January 2012, ECHR, para. 67.) Similarly, in *Airey* v. *Ireland*, the European Court rejected the claim for material injury on the grounds that the applicant had failed to establish that there was a causal relation between the alleged violations and the losses suffered (*Airey* v. *Ireland*, application No. 6289/73, judgment of 6 February 1981, ECHR, para. 12).

34. In *Ahmed* v. *Romania* (application No. 34621/03, judgment of 13 July 2010, ECHR), the Court, having awarded compensation for non-material injury resulting from an arbitrary detention lasting more than six months and followed by an unlawful expulsion, rejected the claim for material injury on account of the loss of property, the bankruptcy of the company and resettlement in another country, because of a lack of evidence of the causal link:

> "63. The Court finds that there is *no causal link between the established violations and the alleged material damage*. However, it is of the opinion that the applicant has suffered an undeniable moral injury as a result of the established violations. Taking account of all of the facts in its possession and ruling on the basis of equity . . . it decides to award the applicant a sum of €8,000 in this connection." (Emphasis added.)

There is one circumstance specific to the European Court of Human Rights: the notion of equity is expressly provided by Article 41 of the European Convention on Human Rights, which states that "[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto . . . the Court shall, if necessary, afford *just* satisfaction to the injured party" (emphasis added). It is not, therefore, a general reflection of current practice in the area of human rights, rather a provision limited to compensation.

35. The case of *Somogyi* v. *Italy* also involved a violation of Article 6 of the European Convention. The European Court of Human Rights

stated the following, first in respect of material damage and then in relation to moral damage:

> "83. The Court does not consider it appropriate to compensate the applicant for the alleged losses, *no causal link* having been established between the violation found and the negative effects the applicant's conviction allegedly had on his commercial activities and his social relations. (Emphasis added.)
>
> . . . . . .
>
> 85. As regards non-pecuniary damage, the Court considers that, in the circumstances of the case, the finding of a violation constitutes in itself sufficient just satisfaction (see *Brozicek* v. *Italy*, judgment of 19 December 1989, Series A, No. 167, p. 20, para. 48; *F. C. B.* v. *Italy*, cited above, p. 22, para. 38; and *T.* v. *Italy*, cited above, p. 43, para. 32)." (*Somogyi* v. *Italy*, application No. 67972, judgment of 18 May 2004, ECHR, paras. 83-85.)

36. If one had to choose some exemplary cases in this respect from the case law of the Iran-United States Claims Tribunal, it would be appropriate to recall those which are similar to the one before the Court, namely the *Rankin*, *Daley* and *Yeager* cases, in which the Tribunal demanded proof of a causal link between the alleged loss of property and the conduct of the author of the internationally wrongful act, requiring the applicants to demonstrate that they had abandoned the property in question on leaving Iran, or that the property had been expropriated.

37. In view of all of the foregoing, it seems to me that whenever an injury is linked to an object, a tangible thing whose existence can be substantiated by evidence, decisions should not be made on the basis of conjecture or of equity — as the majority of the Court has chosen to do in the present Judgment; nor should the Court act on the basis of any reason or consideration other than that of sufficient proof, that is to say, proof evidenced by documents.

The Present Case

38. Had this case law and practice been applied in the present case, the Court would inevitably have had to reject Guinea's claims for every head of material injury or loss of material property for which it had failed to provide "sufficient proof" in support of its claim. This is what the Court did in respect of the alleged loss of earnings (Judgment, paras. 44, 45 and 46).

39. Thus, although considerations of equity may be used in the event of material loss in order to put a figure to the compensation —when the exact value of the loss sustained (property or earnings) is not indicated or cannot be determined — it is not possible to dispense with evidence in order to prove the existence of the object in question, be it property or earnings.

40. In the *Diallo* case, beyond the inventory of Mr. Diallo's personal property drawn up by the Guinean Embassy — an inventory which is

mentioned by the DRC in its Counter-Memorial, but actually provided by Guinea itself (see Annexes 199 and 200 of the Memorial) — no evidence has been produced by Guinea attesting to the existence of any other property. Mr. Diallo's lavish lifestyle in 1984 (Cartier watches, grand receptions and designer clothes) does not prove that a number of luxury and prestige items, not listed on the inventory, still existed in 1996, in circumstances where, in 1995, Mr. Diallo had had himself declared indigent and was experiencing financial difficulties. If Mr. Diallo was forced to abandon the property which he claims to have lost, it was because of the financial difficulties of the companies he managed, and not because of the wrongful expulsion carried out by the Congolese authorities.

41. Furthermore, the standard of proof — if only in respect of the evaluation of the amount to be reimbursed — is such that, in the *Chevreau* case, while accepting that it appeared "probable that Mr. Chevreau had in his rooms more clothing than was indicated in the inventory", the arbitrator, having contemplated the possibility of awarding an indemnity for the loss of this clothing, was obliged to reject that claim "*for lack of information which would permit him* to calculate an indemnity on this ground" (*Chevreau* case, cited above, paras. 24-25 and 41-42; emphasis added).

42. One might also add in respect of the *Chevreau* case that, although the arbitrator made an exception concerning the loss of a violin, whose existence had not been recorded, he did so because it had been established that an empty violin case had been found at the house, allowing for the presumption that Mr. Chevreau could have owned a violin. For the potential loss of the violin, he was awarded compensation of 100 pounds sterling. In the present case, the Court is unable even to raise a convincing presumption that Mr. Diallo owned possessions other than those listed on the inventory.

43. It is true that it has not been possible to establish definitively the fate of the property in question following the drawing up of the inventory; however, nor has it not been demonstrated that they had been lost. On this point, the Congolese Government argues — and no evidence to the contrary has been produced — that this property should have been in the apartment, which in all likelihood was under the guard of the Guinean Embassy. In any event, no attempt has been made to prove that the DRC is responsible for the possible loss or theft of that property while it was under the guard of Mr. Diallo's trusted household staff, his friends or the Guinean Embassy itself. This reasoning was adopted by the DRC to support its view that the inventory of the property found in the apartment occupied by Mr. Diallo was a credible piece of evidence of probative value, since it had been drawn up on the initiative of and by the Guinean Embassy itself. As the Judgment recalls (para. 31), the Respondent also maintained that, in the absence of evidence to the contrary, that inventory included all Mr. Diallo's property that was in his apartment and that this property had subsequently been recovered by the Embassy, because the Congolese Government had had no opportunity or reason to take possession of it, nor had it confiscated it.

44. Equally, while the arbitrator in the *Chevreau* case considered that it had not been satisfactorily established that there was a causal link

between the loss, as alleged by the French Government, of certain property belonging to Mr. Chevreau and the conduct of the British Government — even though the latter did not deny that it was responsible for safeguarding the property (see *Chevreau* case, cited above, paras. 24-25 and 41-42), the situation in the present case is somewhat unclear. In effect, the Court itself lets it be understood that there is no clearly established causal link enabling it to be concluded that the alleged loss of that property "was caused by the DRC's unlawful conduct" (Judgment, para. 32). Moreover, it freely admits that "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" and that "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" (*ibid.*, para. 31), concluding therefore that there is no causal link between the alleged loss of property and the wrongful detentions and expulsion of Mr. Diallo.

45. In any event, no evidence has been produced which attests to the loss of this property, or to its value, or to the fact that the DRC was responsible for that purported loss, as the Court recognizes (*ibid.*, paras. 31-33); this head of damage should therefore have been rejected.

46. Paradoxically, however, having thus concluded that there is no "definite" proof, the Court proceeds to award compensation by producing a sort of unexpected auxiliary argument. Thus, while accepting that the DRC might be 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 nevertheless 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". Reparation is thus no longer envisaged on account of the definite loss of the property in question, nor of the role played by the Congolese Government in that loss; consequently, it no longer has any legal basis. However, unable to rely on the "transport" of the property to Guinea or its "disposition" in the DRC as a serious basis for compensation — which would imply that there was proof of the property's existence, its loss and the causal link between that loss and the DRC's conduct — it is by pure artifice, and with no clear reasoning, that the majority of the Court is content to state (*ibid.*, para. 36) that "in view of the Court's conclusions above . . . regarding the personal property of Mr. Diallo . . ., the Court awards the sum of US$10,000 under this head of damage". However, on this precise point, it can be seen that the Court had, in fact, reached the opposite conclusion — that no evidence whatsoever had been supplied by Guinea. What, then, is the head of damage in question?

47. I am therefore of the opinion that the majority has failed to assess the situation correctly in holding that it was entitled to award compensation for loss of physical property whose existence and value have not been

established, nor its loss, or the DRC's responsibility for that loss. It appears to have been difficult to avoid comparing the size of Guinea's initial claims with the amount of reparation that it was ultimately entitled to claim on the basis of the case file submitted by it and considered by the Court. That notion of compensation does not, in my view, correspond in the present case to what might be called "equity".

(Signed) Auguste MAMPUYA.