

INTERNATIONAL DECISIONS

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Human rights—diplomatic protection—arbitrary detention—expulsion—damages—citation of other courts by International Court of Justice—remedies in international law

AHMADOU SADIO DIALLO (Republic of Guinea v. Democratic Republic of the Congo). Judgment on Compensation. At <http://www.icj-cij.org>. International Court of Justice, June 19, 2012.

For the first time since the *Corfu Channel* case of 1949,¹ the International Court of Justice (Court) has awarded damages. The Court did so on June 19, 2012, in its third judgment in the *Diallo* case, brought by the Republic of Guinea for human rights violations committed against a Guinean citizen by the Democratic Republic of the Congo (DRC).² The judgment was also the Court's first on damages in a human rights case.³

The proceeding was filed in 1998. According to Guinea, Ahmadou Sadio Diallo, a Guinean citizen who had resided in the DRC for thirty-two years, was the manager and, in the end, the sole shareholder of two private limited liability companies he had founded: an import-export company and a company specializing in container transport of goods. In the late 1980s, Diallo initiated various steps, including in the courts, in an effort to recover substantial debts owed to these companies by the DRC (in particular, by Gécamines, a state enterprise with a monopoly on mining) and by oil companies operating in that country (Zaire Shell, Zaire Mobil, and Zaire Finna). In retaliation, Guinea alleged, he was arrested and imprisoned on January 25, 1988; more than a year later the public prosecutor in Kinshasa ordered his release. On October 31, 1995, the prime minister issued an expulsion order against Diallo on grounds that his presence breached public order. He was again detained and, on January 31, 1996, deported to Guinea.

In its application to the Court, Guinea contended that Diallo had been unlawfully imprisoned in both 1988–89 and 1995–1996; divested of his important investments, companies, bank accounts, and movable and immovable properties; and then expelled. Invoking its right of diplomatic protection, Guinea sought compensation for Diallo's material damage and an official public apology.⁴

¹ *Corfu Channel* (UK v. Alb.), Assessment of Amount of Compensation, 1949 ICJ REP. 244 (Dec. 15). Decisions and documents of the Court cited herein are available at its website, <http://www.icj-cij.org>.

² Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea (Int'l Ct. Justice June 19, 2012) [hereinafter Compensation Judgment].

³ *Corfu Channel* concerned compensation for loss suffered by a state. *Factory of Chorzów* (Ger. v. Pol.), Merits, 1928 PCIJ (ser. A) No. 17, in the Permanent Court of International Justice, concerned compensation to two companies. But neither court had awarded damages in a human rights case.

⁴ Application Instituting Proceedings (Guinea v. Dem. Rep. Congo) (Dec. 28, 1998).

In 2007, the Court rejected the DRC's preliminary objections based on Guinea's right to exercise diplomatic protection for Diallo (including his direct rights as a shareholder of the private limited liability companies) and on failure to exhaust local remedies.⁵

In the 2010 judgment on the merits, the Court ruled that in carrying out the arrest, detention, and expulsion of Diallo, the DRC had violated his fundamental rights under applicable human rights treaties, including the International Covenant on Civil and Political Rights (Covenant) and the African Charter on Human and Peoples' Rights (African Charter); but it rejected Guinea's claims based on his direct rights as a shareholder or a manager of the private limited liability companies.⁶ Congolese restrictions on these rights, it said, did not constitute a violation of any protected right to property. Moreover, Guinea's claims concerning the 1988–89 arrest had been submitted too late and were rejected. But the 1995–96 detention and expulsion were arbitrary and thus obligated the DRC "to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations" under the Covenant and the African Charter.⁷ Failing agreement between the parties within six months on the amount of compensation owed to Guinea by the DRC, the question was to be settled by the Court.⁸ When the six months expired without an agreement, it fell to the Court to decide on the amount.

In the subsequent proceeding, Guinea sought compensation for nonmaterial injury as well as three heads of material damage: alleged loss of personal property, alleged loss of professional remuneration during Diallo's detentions and after his expulsion, and alleged deprivation of "potential earnings." The total amount of its claim exceeded US\$11.5 million. The DRC offered US\$30,000 for nonpecuniary injury and nothing for material damage.

In its judgment on compensation, the Court first addressed the nonmaterial injury. It recalled its earlier finding that Diallo had been arrested without being informed of the reasons for that action or being given the possibility of seeking a remedy; that he had been detained for an unjustifiably long period pending expulsion; that he had been made the object of accusations that were not substantiated; and that he was wrongfully expelled from the country where he had resided for thirty-two years and engaged in significant business activity (para. 21). Noting that "non-material injury can be established even without specific evidence," the Court said it was "reasonable to conclude that the DRC's wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation" (*id.*). The Court took into account the duration of Diallo's detention and certain aggravating factors, including the link between the expulsions and Diallo's attempts to recover debts from the state or state-owned companies (paras. 22–23).

Turning to quantification, the Court stated that compensation for nonmaterial injury necessarily rests on equitable considerations (para. 24). It fixed on the amount of US\$85,000 as "provid[ing] appropriate compensation" for the nonmaterial injury suffered by Diallo (para. 25).

⁵ Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 ICJ REP. 582 (May 24) [hereinafter Preliminary Objections Judgment].

⁶ Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, 2010 ICJ REP. 639 (Nov. 30) [hereinafter Merits Judgment] (reported by Eirik Bjorge at 105 AJIL 534 (2011) (emphasizing that the Court developed the human rights protection even further than the human rights tribunals)).

⁷ *Id.*, para. 165(7). The Court cited, in para. 165, the International Covenant on Civil and Political Rights, Arts. 9(1), (2), & 13, Dec. 16, 1966, 99 UNTS 171; and the African (Banjul) Charter on Human and Peoples' Rights, Arts. 6, 12(4), June 27, 1981, 1520 UNTS 217, 21 ILM 58 (1982).

⁸ Merits Judgment, para. 164.

The Court then addressed the issue of material damage. Guinea's claim for the loss to Diallo of his personal property included the furnishings of his apartment listed on an inventory prepared after his expulsion, certain high-value items not on that inventory, and assets in bank accounts. Holding that Guinea had failed to prove the loss of any specific item, the Court was nevertheless satisfied that the DRC's unlawful conduct had caused some material injury, 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" (para. 33). The Court therefore awarded compensation on the basis of equitable considerations for US\$10,000 (para. 36).

The Court pointed to additional evidentiary deficiencies in rejecting Guinea's claims for alleged loss of professional remuneration during the detention of Diallo and as a result of his expulsion. While "in general, a claim for income lost as a result of unlawful detention is cognizable as a component of compensation," the Court observed (para. 40), Guinea had failed to submit evidence capable of establishing its claims in this regard (paras. 41–46). For the same reasons, the Court rejected the claims based on loss of remuneration as a result of the unlawful expulsion, which it also dismissed as "highly speculative" (para. 49). Finally, it rejected claims for loss of "potential earnings" as essentially based on the loss in value of Diallo's companies and therefore "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" (para. 53).

As noted, Guinea had sought more than US\$11.5 million. The Court, however, ordered the DRC to pay a total of US\$95,000, or less than 1 percent of that claim. There were two reasons for the lower amount. First, Guinea was unsuccessful in convincing the Court to reconsider its restrictive rulings in the two earlier judgments. In its judgment on preliminary objections, the Court had held that Guinea could not claim for alleged infringements of the rights of Diallo's two companies, Africom-Zaire and Africontainers-Zaire.⁹ In its subsequent judgment on the merits, the Court had rejected Guinea's claims for the violation of Diallo's rights as a shareholder of the companies.¹⁰ Both of these rulings were based on development of the principle in the *Barcelona Traction* case separating companies from the shareholders, so that a state exercising diplomatic protection of a shareholder could claim only as regards the rights of the shareholder, not those of the company.¹¹ In *Barcelona Traction*, the company was incorporated in one country and the shareholders were nationals of many others. Since a single country of incorporation or establishment determined the nationality of the company, and the shareholders were nationals of many countries, one might have good reason to resort to the law of the country of the company. In the present case, shareholders of different nationalities were not a concern; Diallo was the sole owner. The Court also recalled, in the judgment on preliminary objections, that in *Elettronica Sicula*¹² a chamber of the Court had applied the protection developed in a bilateral investment treaty to protect shareholder claims for compensation for violations against a company (protection by substitution).¹³ Guinea had also referred to the International Law Commission's draft Articles on Diplomatic Protection and case law from

⁹ Preliminary Objections Judgment, paras. 86–94.

¹⁰ Merits Judgment, paras. 99–159.

¹¹ *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3, para. 41 (Feb. 5).

¹² Preliminary Objections Judgment, para. 87 (citing *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. It.), 1989 ICJ REP. 15 (July 20)).

¹³ *E.g., id.*, paras. 83–84.

various human rights bodies. But the Court did not extend protection by substitution to a rule of customary international law in the judgment on the merits of 2010, and did not reconsider the matter in the judgment on compensation.

The second reason for the Court's award of less than 1 percent of Guinea's claim was the lack of supporting evidence. The award of US\$95,000 was wholly based on "equitable considerations."

* * * *

The 2010 judgment in *Diallo* was the first contentious case in the International Court of Justice where a breach of an individual's rights was established. In its most recent judgment, the Court pointed out that it had determined an amount of compensation once before, in the *Corfu Channel* case (para. 13).¹⁴ But that case involved injury by one state to another. The *Diallo* judgment is different. As Judge Greenwood noted in his separate declaration to the judgment, although Guinea had brought the action in the exercise of its right of diplomatic protection, "the case is in substance about the human rights of Mr. Diallo" (dec., Greenwood, J., para. 1).¹⁵

In reaching its decision, the Court consciously took 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. (Para. 13)

Judge Cançado Trindade highlighted this important issue in his separate opinion by noting that "the ICJ has rightly taken into account the experience of other contemporary international tribunals in the matter of reparations for damages" (sep. op., Cançado Trindade, J., para. 1). Judge Greenwood elaborated the point in his declaration, observing that

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. (Dec., Greenwood, J., para. 8)¹⁶

Until recently, the International Court of Justice had not referred to the decisions of other courts, or for that matter to academic scholarship.¹⁷ It had traditionally cited and relied

¹⁴ *Corfu Channel* (UK v. Alb.), Assessment of Amount of Compensation, 1949 ICJ REP. 244 (Dec. 15).

¹⁵ The Court itself emphasized the point when it stated "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." Compensation Judgment, para. 57.

¹⁶ However, Judge Greenwood argued that the US\$85,000 for Diallo's nonmaterial injury far exceeded the level awarded by the European and Inter-American Courts of Human Rights. Interestingly, in the judgment on the merits, Judges Greenwood and Keith had pointed out that the jurisprudence cited by the Court on the human rights treaty provisions on arbitrary expulsion did not confer protection on substance, only on procedure. Merits Judgment, 2010 ICJ REP. at 716–19, paras. 11–14 (joint dec., Greenwood & Keith, JJ.).

¹⁷ Most national, and international, courts are increasing their rates of citation of decisions by courts from other jurisdictions. For a discussion of this development, see Mads Andenas & Duncan Fairgrieve, *There Is a World Elsewhere*—Lord Bingham and Comparative Law, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM 831 (Mads Andenas & Duncan Fairgrieve eds., 2009).

on arbitral decisions.¹⁸ But in the *Wall* case of 2004, the Court for the first time cited the United Nations Human Rights Committee (HRC), referring to its decisions in individual cases, its “constant practice” on extraterritorial application, and its statements on interpretation of the provisions of the Covenant at issue (as well as pronouncements of the Committee on Economic, Social and Cultural Rights and the UN special human rights mandates and rapporteurs).¹⁹ In its 2007 judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*, the Court cited both the trial chamber of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.²⁰ While declining to embrace the Yugoslav tribunal’s views on state responsibility, the Court did rely on its findings of fact and on both ad hoc tribunals for the elements of international criminal offenses. In *Former Yugoslav Republic of Macedonia v. Greece, Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization, Belgium v. Senegal*,²¹ and *Germany v. Italy*,²² the Court continued to develop the use of decisions of other courts and tribunals, even broadening its consideration in the latter case to an extensive review of the case law of national courts.²³

The *Diallo* case occupies an important place in this development. In the 2010 judgment on the merits, for example, the Court relied explicitly on the HRC’s jurisprudence, including *Maroufidou v. Sweden* and General Comment No. 15.²⁴ It justified this step on the importance of achieving “the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.”²⁵ While in no way obliged to model its own interpretation of the Covenant on that of the committee, the Court said, it believed that “it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.”²⁶

Referring to the decisions of regional courts and bodies presents a different set of considerations from the perspective of the “regime problem” in international adjudication. Because the DRC (a party to the proceeding) had ratified the African Charter on Human and Peoples’ Rights, it followed that the Court would find some relevance in the practice of the African Commission on Human and Peoples’ Rights, and indeed in its 2010 judgment on the merits

¹⁸ See the extensive list in BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 40 nn.128–29 (James Crawford ed., 8th ed. 2012).

¹⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 13, paras. 109–10, 112, 133 (July 9).

²⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ REP. 43, paras. 188, 198 (Feb. 26).

²¹ Application of the Interim Accord of 13 September 1995 (Former Yugo. Rep. Maced. v. Greece) (Int’l Ct. Justice Dec. 5, 2011); Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development, Advisory Opinion (Int’l Ct. Justice Feb. 1, 2012); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.) (Int’l Ct. Justice July 20, 2012).

²² Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening) (Feb. 3, 2012) (reported by Alexander Orakhelashvili at 106 AJIL 609 (2012)).

²³ *Id.*, *passim*.

²⁴ *Maroufidou v. Sweden*, Communication No. 58/1979, para 9.3, in Human Rights Comm., Selected Decisions Under the Optional Protocol 80, UN Doc. CCPR/C/OP/1, UN Sales No. E.84.XIV.2 (1985); Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant (Apr. 11, 1986), at <http://www.unhcr.org/refworld/docid/45139acfc.html>.

²⁵ Merits Judgment, para. 66.

²⁶ *Id.*

the Court did cite two of its cases, *Kenneth Good* and *World Organization Against Torture v. Rwanda*.²⁷ It did not necessarily follow, however, that the Court should make use of the jurisprudence of other regional bodies, such as the Inter-American Court of Human Rights and the European Court of Human Rights.²⁸ But, in fact, the Court took the opposite approach and found additional support in the case law of both the Inter-American and European Courts, which was “consistent” with the Court’s own findings.²⁹

In this way the 2012 judgment on compensation has further developed the use of judgments by other international courts and tribunals. Judge Greenwood noted this expansion with approval in his separate declaration:

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. (Dec., Greenwood, J., para. 8)

This is not the place to formulate a thesis, but the multiplicity of sources relied on by the Court in *Diallo* reflects the nature of public international law as an open system. By engaging the different regimes of international law, and by explicitly citing its sources, the Court has asserted its role as the principal judicial body of the United Nations, a genuine world court, and the ultimate arbiter of general international law. The three judgments in the *Diallo* case are important expressions of the changing paradigm of the Court, as it moves away from an arbitral model in contentious cases and further develops its jurisprudence on jurisdiction, procedure, remedies, method, sources, and substantive law.

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European Union law—relationship with international law—climate change—greenhouse gases—regulation of international aviation—Open Skies Agreement—Chicago Convention—Kyoto Protocol

AIR TRANSPORT ASSOCIATION OF AMERICA v. SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE. Case No. C-366/10. At <http://curia.europa.eu>.

Court of Justice of the European Union (Grand Chamber), December 21, 2011.

In a landmark decision, on December 21, 2011, the Court of Justice upheld the extension to international aviation activities of the greenhouse gas emissions trading scheme (ETS) of the

²⁷ *Id.*, para. 67 (citing *Good v. Rep. of Botswana*, Communication No. 313/05, para. 204, Afr. Comm’n on Human & Peoples’ Rights, 28th Annual Activity Rep. 66 (2010); *World Organization Against Torture v. Rwanda*, Communication Nos. 27/89, 46/91, 49/91, 99/93 (joined), *id.*, 10th Annual Activity Rep. 49 (1996)).

²⁸ See James Crawford & Penelope Nevill, *Relations Between International Courts and Tribunals: The ‘Regime Problem,’* in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 235 (Margaret A. Young ed., 2012); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETTLEMENT 5, 19–20 (2011) (stating that the International Court of Justice “always abstained itself from the smallest reference to the rationales employed by the regional jurisdictions”). Previously, the Court’s registrar would informally advise judges that the Court does not cite regional courts in its judgments, as discussed by Mads Andenas, International Court of Justice, Case Concerning Ahmadou Sadio Diallo, 60 INT’L & COMP. L.Q. 810, 817 n.26 (2011). In the secretariats of the different UN human rights bodies different views have been taken on this, which is reflected in their decisions and general comments. But here, too, the system of citations is opening up. See *Yevdokimov v. Russia*, Communication No. 1410/2005, [2011–12] 1 Report of the Human Rights Committee 127, UN Doc. A/67/40 (Vol. I) (dissenting views clarifying the breach with established practice that the majority’s reliance on the European Court of Human Rights represented).

²⁹ Merits Judgment, para. 68.