1973 I.C.J. 166, 1973 WL 7 (I.C.J.)

**APPLICATION**
FOR
**REVIEW**
OF
**JUDGMENT**
No.
**158**
OF THE
**UNITED NATIONS ADMINISTRATIVE TRIBUNAL**

International Court of Justice

July 12,
**1973**

General List No. 57

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Declarations:
President Lachs
Judges Forster and Nagendra SinghSeparate Opinions:
Judge Onyeama
Judge Dillard
Judge Jimenez de ArechagaDissenting Opinions:
Vice-President Ammoun
Judge Gros
Judge de Castro
Judge Morozov
*

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ADVISORY OPINON

Request for advisory opinion by the Committee on Application for Review of Administrative Tribunal Judgements–General Assembly resolution 957 (X)–Article 11 of the Statute of the United Nations Administrative Tribunal–Competence of the Court–Question whether the body requesting the opinion is a body duly authorized to request opinions–Article 96 of the Charter–Legal questions arising within the scope of the activities of the requesting body–Propriety of the Court's giving the opinion–Compatibility of system of **review** established by res-

olution 957 (X) with general principles governing the judicial process.Scope of questions submitted to Court–Nature of task of Court in proceedings instituted by virtue of Article 11 of Statute of the **United Nations Administrative Tribunal**.Objection to **Judgement** on ground of failure by **Administrative Tribunal** to exercise jurisdiction vested in it–Test of whether the **Tribunal** has failed to exercise jurisdiction–Allegations that **Tribunal** failed to exercise jurisdiction in that it refused to consider fully laims for costs, failed to direct recalculation of rate of remuneration and to order correction and completion of employment record–Extent of power of **Tribunal** to award compensation–Question of misuse of power by **administration**.Objection to **Judgement** on ground of fundamental error in procedure which occasioned a failure of justice–Meaning of ‘fundamental error in procedure‘–Absence or insufficiency of statement of reasons for a **judgment** as fundamental error in procedure–Rejection by the **Tribunal** of staff member's claim for costs–Question of costs of **review** proceedings.
***167** Present: President LACHS; Vice-President AMMOUN; Judges FORSTER, GROS, BENGZON, ONYEAMA, DILLARD, DE CASTRO, MOROZOV, JIMENEZ DE ARECHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; Registrar AQUARONE.

In the matter of the **Application** for **Review** of **Judgment** No. **158** of the **United Nations Administrative Tribunal**,

THE COURT,

composed as above,

gives the following **Advisory Opinion**:

1. The questions upon which the **advisory opinion** of the Court has been asked were laid before the Court by a letter dated 28 June 1972, filed in the Registry on 3 July 1972, from the Secretary-General of the **United Nations**. By that letter the Secretary-General informed the Court that the Committee on **Applications** for **Review** of **Administrative Tribunal Judgements**, set up by General Assembly resolution 957 (X), had, pursuant to Article 11 of the Statute of the **United Nations Administrative Tribunal**, decided on 20 June 1972 that there was a substantial basis for the **application** made to that Committee for **review** of **Administrative Tribunal Judgement** No. **158**, and had accordingly decided to request an **advisory opinion** of the Court. The decision of the Committee, which was set out in extenso in the Secretary-General's letter, and certified copies of which in English and French were enclosed with that letter, read as follows:

> ‘The Committee on **Applications** for **Review** of **Administrative Tribunal Judgements** has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the **Administrative Tribunal** for the **application** for the **review** of **Administrative Tribunal Judgement** No. **158**, delivered at Geneva on 28 April 1972.
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> Accordingly, the Committee requests an **advisory opinion** of the International Court of Justice on the following questions:
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> 1. Has the **Tribunal** failed to exercise jurisdiction vested in it as contended in the applicant's **application** to the Committee on **Applications** for **Review** of **Administrative Tribunal Judgements** (A/AC 86/R.59)?
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> 2. Has the **Tribunal** committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's **application** to the Committee on **Applications** for **Review** of **Administrative Tribunal Judgements** (A/AC.86/R.59)?‘

2. In accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an **advisory opinion** was given on 10 July 1972 to all States entitled to appear before the Court; a copy of the Secretary-Gen-

eral's letter with the decision of the Committee appended thereto was transmitted to those States.

3. The Court decided on 14 July 1972 that it considered that the United Nations and its member States were likely to be able to furnish information on the question. Accordingly, on 17 July 1972 the Registrar notified the Organization and its member States, pursuant to Article 66, paragraph 2, of the Statute of the Court, that the Court would be prepared to receive written statements from them within a time-limit fixed by an Order of 14 July 1972 at 20 September 1972.

***168** 4. Pursuant to Article 65, paragraph 2, of the Statute of the Court, the Secretary-General of the United Nations transmitted to the Court a dosssier of documents likely to throw light upon the question; these documents reached the Registry on 29 August 1972.

5. One written statement was received within the time-limit so fixed, namely a statement filed on behalf of the United Nations and comprising a statement on behalf of the Secretary-General of the United Nations and a statement of the views of Mr. Mohamed Fasla, the former staff member to whom the Judgement of the Administrative Tribunal related; the latter statement was transmitted to the Court by the Secretary-General pursuant to Article 11, paragraph 2, of the Statute of the United Nations Administrative Tribunal.

6. Copies of the written statement were communicated to the States to which the communication provided for in Article 66, paragraph 2, of the Statute had been addressed. At the same time, by letter of 6 October 1972, these States, and the United Nations, were informed that it was not contemplated that public hearings for the submission of oral statements would be held in the case, and that the President of the Court had fixed 27 November 1972 as the time-limit for the submission of written comments as provided for in Article 66, paragraph 4, of the Statute.

7. It subsequently appeared to the President of the Court from certain communications from Mr. Fasla, forwarded to the Court by the Secretary-General, that there was doubt whether the statement furnished to the Secretary-General and transmitted to the Court, accurately represented Mr. Fasla's views; the President therefore decided on 25 October 1972 that the written statement referred to in paragraph 5 above might be amended by the filing of a corrected version of the statement of Mr. Fasla's views, and fixed 5 December 1972 as the time-limit for this purpose. A corrected statement of the views of Mr. Fasla was filed through the Secretary-General within the time-limit so fixed, and copies thereof were communicated to the States to which the original written statement had been communicated.

8. In view of the time-limit for the amendment of the written statement, the President extended the time-limit for the submission of written comments under Article 66, paragraph 4, of the Statute to 31 January 1973. Within the time-limit as so extended, written comments were filed on behalf of the United Nations, comprising the comments of the Secretary-General on the corrected version of the statement of the views of Mr. Fasla, and the comments of Mr. Fasla on the statement on behalf of the Secretary-General.

9. Copies of the written comments were communicated to the States to whom the communication provided for in Article 66, paragraph 2, of the Statute had been addressed. At the same time, by letter of 22 February 1973, these States were informed that the Court had decided not to hold public hearings for the submission of oral statements in the case. This decision, taken on 25 January 1973, had been communicated to the United Nations by telegram the same day.

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10. The circumstances which have given rise to the present request for an advisory opinion are briefly as follows. Mr. Mohamed Fasla, the former staff member referred to above, entered United Nations service ***169** on 30 June 1964 with a two-year fixed-term contract as Assistant Resident Representative of the Technical Assistance Board in Damascus (Syrian Arab Republic). After further assignments in Beirut (Lebanon), New York and Freetown (Sierra Leone), Mr. Fasla was on 15 September 1968 reassigned to the office of the United Nations Development Programme (UNDP) in Taiz (Yemen) as Assistant Resident Representative. His contract had by then been renewed by successive periods of six months, one year, three months and twenty-one months, and was due to expire on 31 December 1969. On 22 May 1969 Mr. Fasla was informed that while every effort would be made to secure another assignment for him, it might well be that no extension of his existing contract would be made. This advice was reiterated in a letter of 12 September 1969 informing Mr. Fasla that it had not so far been possible to find him an assignment and that he would be maintained on leave with full pay until the expiry of his contract. Mr. Fasla requested the Secretary-General to review that decision, but was informed that no review by the Secretary-General was required. By letter of 20 November 1969, the Director of the UNDP Bureau of Administrative Management and Budget notified Mr. Fasla that it had not been possible to find a new assignment for him and that no extension of his contract could therefore be envisaged. Mr. Fasla, having again requested a review of that decision, was informed by letter of 12 December 1969 that there was no basis for the Secretary-General to alter the position taken by UNDP. On 28 December 1969, he lodged an appeal with the Joint Appeals Board. On 3 June 1970 the Board, having found that UNDP's efforts to assign Mr. Fasla elsewhere were inadequate since the fact-sheet circulated concerning his performance record was incomplete, recommended the correction and completion of the records concerning Mr. Fasla's service, the renewal by UNDP of endeavours to find him a post and, should these fail, an ex gratia payment of six months' salary. By a letter of 10 July 1970, however, Mr. Fasla was informed that the Secretary-General had decided that there was no basis for the granting of an ex gratia payment and that no action should be taken in respect of that recommendation by the Board. By a letter of 31 August 1970 Mr. Fasla was informed that UNDP did not intend to offer him another appointment, as all possible efforts, it was maintained, had been made to find a suitable post for him within UNDP or with other agencies when he was under contractual status with UNDP. On 31 December 1970, after seeking to re-open the proceedings before the Joint Appeals Board, which however considered that this was not possible under the relevant Staff Rules and Regulations, he filed an application with the United Nations Administrative Tribunal. On 11 June 1971, following proceedings before the Joint Appeals Board in respect of a decision dated 15 June 1970 relating to calculation of remuneration, Mr. Fasla filed a supplement to the application with the Administrative Tribunal. Written pleadings were submitted in accordance with the Rules of the Tribunal, and there were also requests for production of documents; judgment (in respect of both the application and the supplement) was given by the Tribunal on 28 April ***170** 1972. By an application of 26 May 1972, Mr. Fasla raised objections to the decision and asked the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion of the Court.

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11. In formulating the request for an advisory opinion, the Committee on Applications for Review of Administrative Tribunal Judgements exercised a power conferred upon it by the General Assembly by its resolution 957 (X) of 8 November 1955. This resolution, inter alia, introduced into the Statute of the Administrative Tribunal of the United Nations a new Article 11 by which provision was made for the possibility of challenging judgements of the Tribunal before the Court through the machinery of a request for an advisory opinion. After the Court had given its Opinion concerning the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (I.C.J. Reports 1954, p. 47), the General Assembly set up a Special Committee to study the question of

establishing a procedure for review of the Tribunal's judgements. The new Article 11 embodies the proposals of that Special Committee, as amended at the Tenth Session of the General Assembly, and it is pursuant to the procedure provided in Article 11 that the present request for an opinion has been submitted to the Court.

12. The applicable provisions of Article 11 are contained in its first four paragraphs, which read as follows:

> '1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.
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> 2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.
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> 3. If no application is made under paragraph 1 of this article, ***171** or if a decision to request an advisory opin on has not been taken by the Committee, within the periods prescribed in this article, the judgement of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court.
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> 4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. The Committee shall be composed of the Member States the respresentatives of which have served on the General Committee of the most recent regular session of the General Assembly. The Committee shall meet at United Nations Headquarters and shall establish its own rules.'

13. During the debates in the Special Committee and in the Fifth Committee of the General Assembly which led up to the adoption of resolution 957 (X), a number of delegations questioned the legality or the propriety of various aspects of the procedure set out in these paragraphs. In fact, before the adoption of the resolution at the 541st plenary meeting of the General Assembly, one delegation made a formal proposal that the Court should be requested to give an advisory opinion on the question whether the resolution was juridically well founded. Furthermore, although resolution 957 (X) was adopted nearly 18 years ago, this is the first occasion on which the Court has been called upon to consider a request for an opinion made under the procedure laid down in Article 11. Accordingly, although no question has been raised in the statements and comments submitted to the Court in the present proceedings either as to the competence of the Court to give the opinion or as to the propriety of its doing so, the Court will examine these two questions in turn.

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14. As to the Court's competence to give the opinion, doubts have been voiced regarding the legality of the use of the advisory jurisdiction for the review of judgements of the Administrative Tribunal. The contentious juris-

diction of the Court, it has been urged, is limited by Article 34 of its Statute to disputes between States; and it has been questioned whether the advisory jurisdiction may be used for the judicial review of contentious proceedings which have taken place before other tribunals and to which individuals were parties. However, the existence, in the background, of a dispute the parties to which may be affected s a consequence of the Court's opnion, does not change the advisory nature of the Court's task, which is to answer the questions put to it with regard to a judgment. Thus, in its Opinion concerning Judgments of the Administrative***172** Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956, p. 77), the Court upheld its competence to entertain a request for an advisory opinion for the purpose of reviewing judicial proceedings involving individuals. Moreover, in the earlier advisory proceedings concerning the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (I.C.J. Reports 1954, p. 47) the Court replied to the General Assembly's request for an opinon notwithstanding the fact that the questions submitted to it closely concerned the rights of individuals. The Court sees no reason to depart from the position which it adopted in these cases. If a request for advisory opinion emanates from a body duly authorized in accordance with the Charter to make it, the Court is competent under Article 65 of its Statute to give such opinion on any legal question arising within the scope of the activities of that body. The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute.

15. In the present case, however, of a request for an opinion made under Article 11 of the Statute of the United Nations Administrative Tribunal, it has been questioned whether the requesting body itself is a body duly authorized under the Charter to initiate advisory proceedings before the Court. Under Article 11 the requesting body is the Committee on Applications for Review of Administrative Tribunal Judgements (hereafter for convenience called the Committee), which was created by General Assembly resolution 957 (X) specifically to provide machinery for initiating advisory proceedings for the review of judgements of the Tribunal. This Committee, it has been maintained is not such a body as can be considered one of the ‘organs of the United Nations‘ entitled to request advisory opinions under Article 96 of the Charter. It has further been argued that the Committee does not have any activities of its own which might enable it to qualify as an organ authorized to request advisory opinions on legal questions arising within the scope of its activities.

16. Article 7 of the Charter, under the heading ‘Organs‘, after naming the six principal organs of the United Nations in paragraph 1, provides in the most general terms in paragraph 2: ‘Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.‘ Article 22 then expressly empowers the General Assembly to ‘establish such subsidiary organs as it deems necessary for the performance of its functions‘. The object of both those Articles is to enable the United Nations to accomplish its purposes and to function effectively. Accordingly, to place a restrictive interpretation on the power of the General Assembly to establish subsidiary organs would run contrary to the clear intention of the Charter. Article 22, indeed, specifically leaves it to the General Assembly to appreciate the need for any particular organ, and the sole restriction placed by that Article on the General Assembly's ***173** power to establish subsidiary organs is that they should be ‘necessary for the performance of its functions‘.

17. In its Opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, it is true, the Court expressly held that the Charter ‘does not confer judicial functions on the General Assembly‘ and that, when it established the Administrative Tribunal, it ‘was not delegating the performance of its own functions‘ (I.C.J. Reports 1954, at p. 61). At the same time, however, the Court pointed out that under Article 101, paragraph 1, of the Charter the General Assembly is given power to regulate staff relations, and it held that this power included ‘the power to establish a tribunal to do justice between the Organization and the staff members‘ (ibid., at p. 58). From the above reasoning it necessarily follows that the General Assembly's

power to regulate staff relations also comprises the power to create an organ designed to provide machinery for initating the review by the Court of judgments of such a tribunal.

18. Nor does it appear to the Court that there is substance in the suggestion that the particular constitution of the Committee would preclude it from being considered an ‘organ‘ of the United Nations. As provided in paragraph 4 of Article 11, the Committee is composed of ‘the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly‘. But this provision is no more than a convenient method of establishing the membership of the Committee, which was set up as a separate committee invested with its own functions distinct from those of the General Committee. Paragraph 4, indeed, underlined the independent character of the Committee by providing that it should establish its own rules. These it drew up at its first meeting, amending them at later meetings. Accordingly, the Court sees no reason to deny to the Committee the character of an organ of the United Nations which the General Assembly clearly intended it to possess.

19. Article 96, paragraph 2, of the Charter, empowers the General Assembly to authorize organs of the United Nations to ‘request advisory opinions of the Court on legal questions arising within the scope of their activities‘. In the present instance paragraph 4 of Article 11 of the Statute of the Administrative Tribunal expressly states that the Committee ‘For the purpose of this article ... is ... authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court‘. These two provisions, prima facie, suffice to establish the competence of the Committee to request advisory opinions of the Court. The point has been raised, however, as to whether under Article 11 of the Statute of the Administrative Tribunal the Committee has any activities of its own which enable it to be considered as requesting advisory opinions ‘on legal questions arising within the scope of [its] activities‘. Thus, the view has been expressed that the Committee has no other activity than to ***174** request advisory opinions, and that the ‘legal questions‘ in regard to which Article 11 authorizes it to request an opinion arise not within the scope of ‘its activities‘ but of those of another organ, the Administrative Tribunal.

20. The functions entrusted to the Committee by paragraphs 1 and 2 of Article 11 are: to receive applications which formulate objections to judgements of the Administrative Tribunal on one or more of the grounds set out in paragraph 1 and which ask the Committee to request an advisory opinion; to decide within 30 days whether or not there is a substantial basis for the application; and, if it so decides, to request an advisory opinion of the Court. The scope of the activities of the Committee which result from these functions is, admittedly, a narrow one. But the Committee's activities under Article 11 have to be viewed in the larger context of the General Assembly's function in the regulation of staff relations of which they form a part. This is not a delegation by the General Assembly of its own power to request an advisory opinion; it is the creation of a subsidiary organ having a particular task and invested it with the power to request advisory opinions in the performance of that task. The mere fact that the Committee's activities serve a particular, limited, purpose in the General Assembly's performance of its function in the regulation of staff relations does not prevent the advisory jurisdiction of the Court from being exercised in regard to those activities; nor is there any indication in Article 96 of the Charter of any such restriction upon the General Assembly's power to authorize organs of the United Nations to request advisory opinions.

21. In fact, the primary function of the Committee is not the requesting of advisory opinions, but the examination of objections to judgements in order to decide in each case whether there is a substantial basis for the application so as to call for a request for an advisory opinion. If it finds that there is not such a substantial basis for the application the Committee rejects the application without requesting an opinion of the Court. When it does

find that there is a substantial basis for the application, the legal questions which the Committee then submits to the Court clearly arise out of the performance of this primary function of screening the applications presented to it. They are therefore questions which, in the view of the Court, arise within the scope of the Committee's own activities; for they arise not out of the judgements of the Administrative Tribunal but out of objections to those judgements raised before the Committee itself.

22. True, Article 11 does not make it part of the Committee's function to implement any opinion given by the Court in response to the Committee's request; for under paragraph 3 of that Article the implementation of the Court's opinions is a matter for the Secretary-General and the Administrative Tribunal. But this does not change the fact that the questions which are the subject of the Committee's requests for advisory opinions are legal questions ‘arising‘ within the scope of its activities. All that is necessary for a question to qualify under Article 96, paragraph 2, of the Charter is that it must be a legal one and must arise out of the ***175** activities of the organ concerned. In the present case, the Committee's request is for an advisory opinion regarding alleged failure by the Administrative Tribunal to exercise jurisdiction vested in it and fundamental errors in procedure which it is alleged to have committee. These are questions which by their very nature are legal questions similar in kind to those which the Court in its 1956 Opinion in the Unesco case considered as constituting legal questions within the meaning of Article 96 of the Charter. Moreover, there is nothing in Article 96 of the Charter or Article 65 of the Statute of the Court which requires that the replies to the questions should be designed to assist the requesting body in its own future operations or which makes it obligatory that the effect to be given to an advisory opinion should be the responsibility of the body requesting the opinion.

23. In the light of the foregoing considerations, the Court concludes that the Committee on Applications for Review of Administrative Tribunal Judgements is an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal. It follows that the Court is competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal.

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24. Article 65 of the Statute is, however, permissive and, under it, the Court's power to give an advisory opinion is of a discretionary character. In exercising this discretion, the Court has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions (see, e.g., Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 84; Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, Advisory Opinion, I.C.J. Reports 1960, p. 153). During the debates which preceded the adoption of General Assembly resolution 957 (X) and the introduction of Article 11 into the Statute of the Administrative Tribunal, doubts were expressed by some delegations concerning certain features of the procedure established by Article 11 precisely from the point of view of the Court's judicial character. The Court will, therefore, now consider whether, although it is competent to give the opinion requested, these features of the procedure established by Article 11 are of such a character as should lead it to decline to answer the request.

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***176** 25. One objection that has been taken to Article 11 is that it inserts a political organ into the judicial pro-

cess for settling disputes between staff members and the Organization. The Administrative Tribunal being a judicial organ, it is incompatible with the nature of the judicial process, so it has been suggested, that a political organ should be involved in the judicial review of its judgements. Certainly, being composed of member States, the Committee is a political organ. Its functions, on the other hand, are merely to make a summary examination of any objections to judgements of the Tribunal and to decide whether there is a substantial basis for the application to have the matter reviewed by the Court in an advisory opinion. These are functions which, in the Court's view, are normally discharged by a legal body. But there is no necessary incompatibility between the exercise of these functions by a political body and the requirements of the judicial process, inasmuch as these functions merely furnish a potential link between two procedures which are clearly judicial in nature. In the Court's view, the compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system.

26. In the present instance, where recourse is to be made to the International Court of Justice, it is understandable that the General Assembly should have considered it necessary to establish machinery for the purpose of ensuring that only applications for review having a substantial basis should be made the subject of review proceedings by the Court. At the same time, the Court notes that the Rules which the Committee has adopted take account of the quasi-judicial character of its functions. Thus, these Rules provide that the other party to the proceedings before the Administrative Tribunal may submit its comments with respect to the application, and that, if the Committee invities additional information or views, the same opportunity to present them is afforded to all parties to the proceedings. This means that the decisions of the Committee are reached after an examination of the opposing views of the interested parties.

27. The reports of the Committee's meetings reveal that it has dealt with 16 applications for the review of judgements of the Administrative Tribunal, all of which have been made by staff members and none by the Secretary-General or by a member State. The application which is the subject of the present request for an advisory opinion was the fourteenth received by the Committee, and up to date it is the only one in regard to which the Committee has decided that there was ‘a substantial basis for the application‘ calling for recourse to the advisory jurisdiction of the Court. It is for the Committee to interpret the function entrusted to it by paragraph 2 of Article 11, under which it has to ‘decide whether or not there is a substantial basis for the application‘. In dealing with applications the practice of the Committee has been to limit itself to a bare report of its decision as to whether or not there was a substantial basis for the application and whether or not, in consequence, it should ***177** request an advisory opinion. The decisions taken by the Committee are communicated to all member States, to the parties to the proceedings, and to the Administrative Tribunal. However, the reports do not state the grounds of the applicant's objections to the Tribunal's judgement or the reasons which led the Committee to reject or, as in the present instance, to endorse the application. The Committee meets in closed session, and does not draw up summary records of its proceedings concerning applications, and in the present instance the Court has been informed that these proceedings are regarded as confidential.

28. While it might be desirable for the applicant to receive some indication of the grounds for the Committee's decision in those cases in which the application is rejected, the fact that the Committee's reports are confined to a bare statement of the decision reached does not deprive the review proceedings as a whole of their judicial character, nor constitute a valid reason for the Court's declining to answer the present request. A refusal by the Court to play its role in the system of judicial review set up by the General Assembly would only have the consequence that this system would not operate precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgement. When the Committee reaches such an affirmative decision there is no occasion for a reasoned statement of its views or a public record

of its proceedings; for the Committee's affirmative decision, based only on a prima facie appreciation of the objections, is merely a necessary condition for the opening of the Court's advisory jurisdiction. It is then for the Court itself to reach its own, unhampered, opinion as to whether the objections which have been raised against a judgement are well founded or not and to state the reasons for its opinion.

29. Other than what may be derived from the present proceedings, there is no information before the Court regarding the criteria followed by the Committee in appreciating whether there is ‘a substantial basis‘ for an application. The statistics of the Committee's decisions may appear to suggest the conclusion that, in applications made by staff members, it has adopted a strict interpretation of that requirement. But such a conclusion, even if established, would not suffice by itself to render the procedure under Article 11 of the Tribunal's Statute incompatible with the principles governing the judicial process. It would, on the other hand, be incompatible with these principles if the Committee were not to adopt a uniform interpretation of Article 11 also in cases in which the applicant was not a staff member. Furthermore, the legislative history of Article 11 shows that recourse to the International Court of Justice was to be had only in exceptional cases.

30. In the light of what has been said above, it does not appear that there is anything in the character or operation of the Committee which requires the Court to conclude that the system of judicial review established by General Assembly resolution 957 (X) is incompatible with the general principles governing the judicial process.

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***178** 31. The Court does not overlook that Article 11 provides for the right of individual member States to object to a judgement of the Administrative Tribunal and to apply to the Committee to initiate advisory proceedings on the matter; and that during the debates in 1955 the propriety of this provision was questioned by a number of delegations. The member State, it was said, would not have been a party to the proceedings before the Administrative Tribunal, and to allow it to initiate proceedings for the review of the judgement would, therefore, be contrary to the general principles governing judicial review. To confer such a right on a member State, it was further said, would impinge upon the rights of the Secretary-General as chief administrative officer and conflict with Article 100 of the Charter. It was also suggested that, in the case of an application by a member State, the staff member would be in a position of inequality before the Committee. These arguments introduce additional considerations which would call for close examination by the Court if it should receive a request for an opinion resulting from an application to the Committee by a member State. The Court is not therefore to be understood as here expressing any opinion in regard to any future proceedings instituted under Article 11 by a member State. But these additional considerations are without relevance in the present proceedings in which the request for an opinion results from an application to the Committee by a staff member. The mere fact that Article 11 provides for the possibility of a member State applying for the review of a judgement does not alter the position in regard to the initiation of review proceedings as between a staff member and the Secretary-General. Article 11, the Court emphasizes, gives the same rights to staff members as it does to the Secretary-General to apply to the Committee for the initiation of review proceedings.

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32. Even so, the Court has still to consider objections which have been raised against the use of advisory jurisdiction for the review of Administrative Tribunal judgements because of what was said to be an inherent inequality under the Statute of the Court between the staff member, on the one hand, and the Secretary-General and member States, on the other. Personal appearance, it was argued, was an essential feature of due process of

law, but under Article 66 of the Statute, only States and international organizations were entitled to submit statements to the Court. It was also maintained that a mere expression of a hope by the General Assembly in the proposed resolution (see para. 36 below) that member States and the Secretary-General would forgo their right to an oral hearing was not a sufficient guarantee of equality; nor was it thought appropriate that an individual should be dependent on another party to the dispute for the presentation of his views to the Court.

33. In the year following the adoption of Article 11, as it happened, the Court was called upon to examine the compatibility with its judicial ***179** character of the use of the advisory jurisdiction for review of Administrative Tribunal judgements, though in the different context of Article XII of the Statute of the ILO Administrative Tribunal. Despite the different context, the views then expressed by the Court in its Opinion concerning Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956, p. 77) are, in certain respects, apposite for the purposes of the present Opinion.

34. The difficulty regarding the requirement of equality between staff members and their organization in review proceedings involving the Court's advisory jurisdiction arises from the terms of Article 66 of the Statute of the Court. This Article makes provision for the submission of written or oral statements only by States and international organizations. In the 1956 proceedings the difficulty was recognized by Unesco, whose Legal Counsel notified counsel for the staff members that the Organization would transmit directly to the Court, without checking the contents, any observations or information that they might desire to present. The Court indicated that it saw no objection to this procedure, and counsel for the staff members notified Unesco of his agreement to it. Subsequently, the Court informed the States and organizations which had been considered likely to be able to furnish information on the question before the Court that it did not contemplate holding public hearings in the case. At the same time, it fixed a date within which further comments might be submitted in writing, and Unesco informed counsel for the staff members of its readiness to transmit to the Court such further observations as they might wish to present. In the light of the procedure adopted, the Court concluded that the requirements of equality had been sufficiently met to enable it to comply with the request for an Opinion. It observed:

> ‘The difficulty was met, on the one hand, by the procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and, on the other hand, by dispensing with oral proceedings. The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which has been adopted has not given rise to any objection on the part of those concerned. It has been consented to by counsel for the officials in whose favour the Judgments were given. The principle of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized ***180** to ask for an Advisory Opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials. Any seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object.‘ (I.C.J. Reports 1956, p. 86.)

35. In that Opinion, therefore, the Court took the view that any absence of equality between staff members and the Secretary-General inherent in the terms of Article 66 of the Statute of the Court is capable of being cured by

the adoption of appropriate procedures which ensure actual equality in the particular proceedings. In those advisory proceedings, instituted under the Statute of the ILO Administrative Tribunal, the adoption of the appropriate procedures was entirely dependent upon the will of the Organization concerned, Unesco; and yet the Court considered that ‘any seeming or nominal absence of equality‘ inherent in Article 66 of the Court's Statute ought not to prevent it from complying with the request for an opinion. True, certain judges considered that the absence of oral proceedings constituted either an insuperable or a serious obstacle to the Court's complying with the request for an advisory opinion. But that view was not shared by the Court. Moreover, in the present proceedings, instituted under the Statute of the United Nations Administrative Tribunal, the procedural position of the staff member is more secure. Paragraph 2 of Article 11 expressly provides that, when the Committee requests an advisory opinion, the Secretary-General shall arrange to transmit to the Court the views of the staff member concerned. The implication is that the staff member is entitled to have his views transmitted to the Court without any control being exercised over the contents by the Secretary-General; for otherwise the views would not in a true sense be the views of the staff member concerned. Thus, under Article 11, the equality of a staff member in the written procedure before the Court is not dependent on the will or favour of the Organization, but is made a matter of right guaranteed by the Statute of the Administrative Tribunal.

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36. In resolution 957 (X) the General Assembly sought also to remedy the inequality in regard to the oral procedure between staff members, on the one hand, and member States and the Secretary-General, on the other, which exists in Article 66 of the Court's Statute. In that resolution, after adopting the text of the new Article 11 of the Statute of the Administrative Tribunal, it added the recommendation:

> ‘... that Member States and the Secretary-General should not make oral statements before the International Court of Justice in any ***181** proceedings under the new article 11 of the Statute of the Administrative Tribunal adopted under the present resolution‘.

As to this recommendation, the Court observes that, when under Article 66, paragraph 2, of its Statute written statements have been presented to the Court in advisory proceedings, the further procedure in the case, and in particular the holding of public hearings for the purpose of receiving oral statements, is a matter within the discretion of the Court. In exercising that discretion, the Court will have regard both to the provisions of its Statute and to the requirements of its judicial character. But it does not appear to the Court that there is any general principle of law which requires that in review proceedings the interested parties should necessarily have an opportunity to submit oral statements of their case to the review tribunal. General principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal. But that condition is fulfilled by the submission of written statements. Accordingly, the Court sees no reason to resile from the position which it took in its Opinion in the Unesco case that, if the Court is satisfied that adequate information has been made available to it, the fact that no public hearings have been held is not a bar to the Court's complying with the request for an opinion.

37. In the present proceedings, in accordance with Article 65, paragraph 2, of the Statute of the Court, the Secretary-General supplied the Court with a large dossier of relevant documents, including copies of documents which were before the Administrative Tribunal and of those submitted by Mr. Fasla to the Committee; he also submitted a written statement to the Court, and subsequently submitted written comments on the statement of the views of Mr. Fasla, together with some additional documents. Mr. Fasla, on his side, was accorded every opportunity to present his views to the Court in writing on a basis of equality with the Secretary-General, and this opportunity he used to the full. First, through the instrumentality of the Secretary-General, a written statement of

his views was transmitted to the Court, together with an annexed document. Some two months later and by leave of the President of the Court, Mr. Fasla transmitted by the same channel a corrected, but at the same time much amplified, statement of his views, together with further documents. Finally, within a further time-limit fixed by the President, he transmitted to the Court his written comments on the Secretary-General's written statement, and to these comments, signed by his counsel, there were appended a ‘personal statement‘ by Mr. Fasla and additional documents. As to oral proceedings, by a letter of 6 October 1972 the United Nations and its member States were informed that it was not contemplated that public hearings for the submission of oral statements would be held in the case. Subsequently, by a letter dated 15 November 1972, that is, ***182** prior to submitting his corrected statement, Mr. Fasla transmitted to the Court a request to be permitted to make an oral statement. On 25 January 1973 the Court decided not to hear oral statements and on the same date telegraphed its decision to the United Nations Legal Counsel. Mr. Fasla having renewed his request in a letter of 29 January 1973, the Court adhered to its decision not to hold a public hearing for the purpose of receiving oral statements.

38. In advisory proceedings, as previously mentioned, it lies within the entire discretion of the Court to decide whether to obtain oral in addition to written statements. It may be true that in the present proceedings for the review of an Administrative Tribunal Judgment the questions submitted to the Court relate to a contentious case between a staff member and the Secretary-General. It may also be true that this aspect of the proceedings is accentuated by the fact that Article 11, paragraph 3, of the Tribunal's Statute provides that the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgment, or give a new judgment, in conformity with the opinion of the Court. Nevertheless, the proceedings before the Court are still advisory proceedings, in which the task of the Court is not to retry the case but to reply to the questions put to it regarding the objections which have been raised to the Judgment of the Administrative Tribunal. The Court is, therefore, only concerned to ensure that the interested parties shall have a fair and equal opportunity to present their views to the Court respecting the questions on which its opinion is requested and that the Court shall have adequate information to enable it to administer justice in giving its opinion. The Court is satisfied that these requirements have been met in the present proceedings.

39. Again, the fact that under Article 11, paragraph 3, of the Tribunal's Statute the opinion given by the Court is to have a conclusive effect with respect to the matters in litigation in that case does not constitute any obstacle to the Court's replying to the request for an opinion. Such an effect, it is true, goes beyond the scope attributed by the Charter and by the Statute of the Court to an advisory opinion. It results, however, not from the advisory opinion itself but from a provision of an autonomous instrument having the force of law for the staff members and the Secretary-General. Under Article XII of the Statute of the ILO Administrative Tribunal the Court's opinion is expressly made binding. In alluding to this consequence the Court, in the Unesco case, observed:

> ‘It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself. Accordingly, the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with.‘ (I.C.J. Reports 1956, p. 84.)

***183** Similarly, the special effect to be attributed to the Court's opinion by Article 11 of the Statute of the United Nations Administrative Tribunal furnishes no reason for refusing to comply with the request for an opinion in the present instance.

40. The Court has repeatedly stated that a reply to a request for an advisory opinion should not, in principle, be refused and that only compelling reasons would justify such a refusal (see, e.g., Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 86; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwith-

standing Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27). In the light of what has been said above, it does not appear to the Court that there is any compelling reason why it should decline to reply to the request in the present instance. On the contrary, as in the 1956 proceedings concerning the ILO Administrative Tribunal, the Court considers that it should not ‘adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials‘ (I.C.J. Reports 1956, p. 86). Although the records show that Article 11 was not introduced into the Statute of the United Nations Administrative Tribunal exclusively, or even primarily, to provide judicial protection for officials, they also show that steps were, nevertheless, taken to ensure that the regime established by it should provide such protection. Moreover, it has so far been officials alone who have sought to invoke the regime of judicial protection established by Article 11. Accordingly, as already indicated, although the Court does not consider the review procedure provided by Article 11 as free from difficulty, it has no doubt that, in the circumstances of the present case, it should comply with the request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion.

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41. The scope of the questions on which, therefore, the Court has now to advise is determined first, by Article 11 of the Statute of the Administrative Tribunal, which specifies the grounds on which a judgment of the Tribunal may be challenged through the medium of the advisory jurisdiction, and, secondly, by the terms of the request to the Court. Under Article 11 an application may be made to the Committee for the purpose of obtaining the review by the Court of a judgment of the Tribunal on any of the following grounds, namely that the Tribunal has:

(i) ‘exceeded its jurisdiction or competence‘;

(ii) ‘failed to exercise jurisdiction vested in it‘;

(iii) ‘erred on a question of law relating to the provisions of the Charter of the United Nations‘; or

***184** (iv) ‘committed a fundamental error in procedure which has occasioned a failure of justice.‘

Consequently, the Committee is authorized to request, and the Court to give, an advisory opinion only on legal questions which may properly be considered as falling within the terms of one or more of those four ‘grounds‘. Again, under Article 65 of the Court's Statute, its competence to give advisory opinions extends only to legal questions on which its opinion has been requested. The Court may interpret the terms of the request and determine the scope of the questions set out in it. The Court may also take into account any matters germane to the questions submitted to it which may be necessary to enable it to form its opinion. But in giving its opinion the Court is, in principle, bound by the terms of the questions formulated in the request (Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955, pp. 71-72; Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, pp. 98-99). In the present instance, the questions formulated in the request refer to only two of the four ‘grounds‘ of challenge specified in Article 11 of the Administrative Tribunal's Statute, namely, failure to exercise jurisdiction and fundamental error in procedure. Consequently, it is only objections to Judgement No. 158 based on one or other of those two grounds which are within the terms of the questions put to the Court.

42. The text of the request which is now before the Court has been set out at the beginning of this Opinion. The two questions which it contains read as follows:

‘(1) Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments (A/AC.86/R.59)?

(2) Has the Tribunal committed a fundamental error of procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative

Tribunal Judgments (A/AC.86/R.59)?‘

The document mentioned in each question is Mr. Fasla's formal application to the Committee in which he set out his grounds of objection to Judgment No. 158 and his contentions in support of those grounds. Thus the questions are specifically limited to the grounds of objection and the contentions advanced by him in his application to the Committee. He also formulated four questions at the end of his application with the request that they be submitted to the Court. These questions referred only to two of the four grounds of objection envisaged by Article 11 of the Tribunal's Statute, namely failure to exercise jurisdiction and fundamental error in the procedure having occasioned a failure of ***185** justice; the other two grounds recognized in Article 11–excess of jurisdiction and error on a question of law relating to the provisions of the Charter–were not raised by the applicant before the Committee. The two grounds advanced by the applicant before the Committee are therefore identical in substance with those upon which the opinion of the Court has been requested.

43. In order to determine the scope of the questions put to the Court and the framework within which the Court has to give its opinion, it is necessary to have regard to Mr. Fasla's contentions before the Committee. As, however, the implications of these contentions can be appreciated only in the context of the claims presented by him to the Administrative Tribunal and of the disposal of those claims by the Tribunal, the Court must first set out his claims before the Tribunal and the Tribunal's decisions in regard to them.

44. Mr. Fasla instituted his proceedings against theSecretary-General before the Administrative Tribunal by an application, dated 31 December 1970, in which he requested it ‘to order the following measures‘:

‘(a) As a preliminary measure, production by the Respondent of the report by Mr. Satrap, Chief, Middle East Area Division, UNDP on his nvestigation of the UNDP office in Yemen in February 1969.

(b) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, Consultant to the UNDP Administrator, on his investigation of the UNDP office in Yemen in March 1969.

(c) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, UNDP Special Representative in Yemen, concerning the Applicant's performance, prepared at the request of the UNDP in the summer of 1969.

(d) Restoration of the Applicant to the status quo ante prevailing in May 1969, by extending the Applicant's last fixed-term appointment for a further two years beyond 31 December 1969, with retroactive pay of salary and related allowances; alternatively, a payment by the Respondent to the Applicant of three years' net base salary.

(e) Correction and completion of the Applicant's Fact Sheet which is intended for circulation both within and outside the UNDP, with all the required Periodic Reports and evaluations of work; alternatively payment by the Respondent to the Applicant of two years' net base salary.

(f) Invalidation of the Applicant's Periodic Report covering his ***186** service in Yemen, prepared in September 1970; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

(g) Further serious efforts by the Respondent to place the Applicant in a suitable post either within the UNDP or within the United Nations Secretariat or within a UN Specialized Agency; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

(h) As compensation for injury sustained by the Applicant as the result of the repeated violation by the Respondent of Administrative Instruction ST/AI/115, payment by the Respondent to the Applicant of two years' net base salary.

(i) As compensation for injury sustained by the Applicant as the result of the continuous violation by the Respondent of his obligation to make serious efforts to find an assignment for the Applicant, payment by the Respondent to the Applicant of two years' net base salary.

(j) As compensation for injury sustained by the Applicant as the result of prejudice displayed against him, payment by the Respondent to the Applicant of five years' net base salary.
(k) As compensation for the emotional and moral suffering inflicted by the Respondent upon the Applicant, payment by the Respondent to the Applicant of one Yemen rial.
(l) As compensation for delays in the consideration of the Applicant's case, especially in view of the fact that no Joint Appeals Board was in existence during the first four months of 1969 since the Respondent had failed to appoint a Panel of Chairmen, payment by the Respondent to the Applicant of one year's net base salary.
(m) Payment to the Applicant of the sum of $1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case necessitated the Applicant's travel from California to New York in May 1970 as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date.
(n) As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading ***187** information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary.‘

On 11 June 1971 a supplement to the application was filed with the Administrative Tribunal, whereby it was requested to order the following additional measures:

‘(a) As compensation for the further delay in the consideration of the Applicant's case early in 1971, payment by the Respondent to the Applicant of one year's net base salary.
(b) Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the pplicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.
(c) As compensation for the illegal suspension of the Applicant from duty, payment by the Respondent to the Applicant of five years' net base salary.‘

45. Judgment was given by the Tribunal on 28 April 1972. In the body of the Judgment the Tribunal noted that certain of Mr. Fasla's requests had been met and made a number of findings, some of which were favourable and others unfavourable to his case. The precise terms of these findings are given later in this Opinion.

46. On 26 May 1972 Mr. Fasla submitted an application to the Committee, setting out his objections to the Judgment and asking the Committee to request an advisory opinion of the Court. In his application, as already mentioned, he objects that the Administrative Tribunal (1) failed to exercise jurisdiction vested in it and (2) committed fundamental errors in procedure which occasioned a failure of justice. He supports each of these objections by a number of contentions in regard to alleged defects in the Judgment. These contentions, to which further reference will be made later, he groups together under three main heads: compensation for injury to his professional reputation and employment opportunities; compensation for the costs incurred by him in presenting his claims to the Joint Appeals Board and the Administrative Tribunal; recalculation of his rate of remuneration while posted to Yemen. The contentions advanced before the Committee cover a wide area of the case before the Administrative Tribunal. Consequently, the Court finds no reason to adopt a restrictive interpretation of the questions framed in the request.

47. Under Article 11 of the Statute of the Tribunal, as already indicated, the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgment. The Court is not therefore entitled to substitute its own ***188** opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they re-

late to merits or procedure, show that any objection made to the Judgment on one of the grounds mentioned in Article 11 is well founded. In so doing, the Court is not limited to the contents of the challenged award itself, but takes under its consideration all relevant aspects of the proceedings before the Tribunal as well as all relevant matters submitted to the Court itself by the staff member and by the Secretary-General with regard to the objections raised against that judgment. These objections the Court examines on their merits in the light of the information before it.

48. Furthermore, as the Court pointed out in its Advisory Opinion in the Unesco case, a challenge to an administrative tribunal judgment on the ground of unauthorized assumption of jurisdiction cannot serve simply as a means of attacking the tribunal's decisions on the merits. Speaking of Article XII of the Statute of the ILO Administrative Tribunal, which recognizes only unauthorized assumption of jurisdiction and fundamental fault in the procedure as grounds for attacking the judgments of that tribunal, the Court said:

> 'The request for an Advisory Opinion under Article XII is not in the nature of an appeal on the merits of the judgment. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against the decisions of the Administrative Tribunal. A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision.' (I.C.J. Reports 1956, pp. 98-99.)

So too, under Article 11 of the Statute of the United Nations Administrative Tribunal a challenge to a decision for alleged failure to exercise jurisdiction of fundamental error in procedure cannot properly be transformed into a proceeding against the substance of the decision. This does not mean that in an appropriate case, where the judgment has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may not be called upon to review the actual substance of the decision. But both the text of Article 11 and its legislative history make it clear that challenges to Administrative Tribunal judgments under its provisions were intended to be confined to the specific grounds of objection mentioned in the Article.

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49. Turning to the first question, the Court will now examine whether the Tribunal has failed to exercise jurisdiction vested in it, as contended in the application to the Committee.

***189** 50. Article XII of the Statute of the ILO Administrative Tribunal speaks only of a challenge to 'a decision of the Tribunal confirming its jurisdiction', and does not make any mention of a failure of the Tribunal to exercise its jurisdiction. Similarly, in the draft of Article 11 of the United Nations Administrative Tribunal's Statute recommended to the General Assembly by the Special Committee on Review of Administrative Tribunal Judgments, a challenge on this ground was contemplated only if the Tribunal had 'exceeded its jurisdiction or competence'. The words 'or that the Tribunal has failed to exercise jurisdiction vested in it' were added at the 499th meeting of the Fifth Committee on the proposal of the Indian delegation, who had explained that:

> 'According to the text of the proposed new article 11, a review might be requested on the ground that the Tribunal had exceeded its jurisdiction or competence. There might, however, be cases where the Tribunal had failed to exercise the jurisdiction it possessed under the law; cases of errors in the exercise of jurisdiction were also feasible. In Indian legislation reliefs analogous to review were granted both where a tribunal exercised jurisdiction not vested in it by law and where it failed to exercise jurisdiction vested in it by law, provision thus being made not only for cases of excess of jurisdiction but also for those of failure or neglect to exercise jurisdiction. (Emphasis added.)

This explanation appears to confirm that this additional ground for challenging a judgment was regarded as hav-

ing a comparatively narrow scope; i.e., as concerned essentially with a failure by the Tribunal to put into operation the jurisdictional powers possessed by it–rather than with a failure to do justice to the merits in the exercise of those powers. It further appears that in accepting failure to exercise jurisdiction as an additional ground of challenge the General Assembly regarded it as eiusdem generis with cases where the Tribunal had exceeded its jurisdiction or competence; and the Fifth Committee thus seems to have viewed both excess and failure in the exercise of jurisdiction as essentially concerned with matters of jurisdiction or competence in their strict sense. In a more general way, the comparatively narrow scope intended to be given to failure to exercise jurisdiction as a ground of challenge is confirmed by the legislative history of Article 11, which shows that the grounds of challenge mentioned in the Article were envisaged as covering only ‘exceptional‘ cases.

51. In the Court's view, therefore, this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case. Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of ***190** the matter and not merely to the form. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue. No doubt, there may be borderline cases where it may be difficult to assess whether the Tribunal has in any true sense considered and determined the exercise of relevant jurisdictional powers. But that does not alter the duty of the Court to appreciate in each instance, in the light of all pertinent elements, whether the Tribunal did or did not in fact exercise with respect to the case the powers vested in it and relevant to its decision.

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52. The first contention in the application to the Committee is that the Tribunal did not fully consider and pass upon the claim for damages for injury to professional reputation and career prospects. The claim referred to is that set out in plea (n) in the application to the Tribunal, in the following words:

> ‘As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary.‘

In support of this contention Mr. Fasla invokes Articles 2 and 9 of the Tribunal's Statute, maintaining that under their provisions the Tribunal was competent and had jurisdiction to award compensation to him for such injuries; and that it failed to exercise such competence and jurisdiction in not awarding him either damages or specific relief. In support of that proposition he maintains that a claim to compensation for damage to his professional reputation and career prospects was specifically pleaded; that such a claim fell within the Tribunal's competence under Article 2, paragraph 1, of its Statute; that the Tribunal did not even discuss the claim, although it found that his personnel record and fact-sheet had been maliciously distorted; that the Tribunal had before it matters which evidenced the damage flowing from that distortion; that the damage was not remote but the direct and natural consequence of the distortion; that the malicious distortion of his personnel record and fact-sheet was a wrongful act attributable in law to the Secretary-General; and that the Tribunal, having taken cognizance of the wrongful act and yet having provided no remedy for the damage occasioned thereby, obviously failed to exercise its jurisdiction.

53. The validity of this contention cannot be adequately considered without taking account of all the claims submitted by the applicant to ***191** the Administrative Tribunal and the latter's disposal of those claims. In all, as

previously indicated, the applicant had presented no less than 17 separate pleas. Three of those were of a preliminary character, requesting the production of certain reports; the remaining 14 sought substantial relief in the form either of a specific remedy or of monetary compensation. As to the three pleas of a preliminary character, the Tribunal in its Judgement:

(i) noted that the respondent had produced the first report;

(ii) noted that the second report was in the applicant's ‘official status file‘ and therefore available to the counsel of the parties; that a letter, which the applicant had explained he had had in mind when he requested the production of ‘Mr. Hagen's report‘, had been supplied confidentially to the Tribunal; and that the Tribunal had made available to the applicant the few lines of the letter which it had held to be relevant;

(iii) stated that, the Tribunal having requested the production of the third report, the respondent had replied that it did not have such a report in the files of the body concerned; and that the Tribunal could only take note of that reply.

As to the pleas for substantial relief, the Tribunal gave two decisions in the applicant's favour, namely:

‘1. The Respondent shall pay the Applicant a sum equal to six months' net base salary;

2. The periodic report prepared for the period June 1968 to March 1969 is invalid and shall be treated as such.‘

In a third decision, while not upholding the applicant's claim to recalculation of his emoluments during his period of service in Yemen, the Tribunal took note in paragraph XV of its Judgment of the respondent's agreement, pursuant to a recommendation of the Joint Appeals Board, to make the applicant ‘an ex gratia payment in the amount of any losses that he could show he had suffered as a result of his precipitate recall from Yemen‘. On this point, after declaring that the applicant was entitled to take advantage of the possibility thus offered, the Tribunal made formal provision for giving effect to that decision:

‘3. Any requests for payment made in accordance with paragraph XV above shall be submitted, together with the necessary supporting evidence, by the Applicant to the Respondent, within a period of two months from the date of this judgment.‘

The Tribunal concluded its Judgment with a comprehensive rejection of the applicant's other claims, stating that:

‘4. The other requests are rejected.‘

***192** 54. The first contention must also be considered in the light of three other factors. First, there was a considerable degree of overlap in the 14 claims to substantial relief, in the sense that a number of them appeared to be claims to different relief founded on the same act or omission. Yet the staff member did not indicate whether and, if so, to what extent the claims were to be considered as alternative or cumulative. Secondly, in its Judgement the Tribunal set out all his claims, recited the facts of the case at considerable length and gave a detailed summary of the contentions of both parties. Moreover, the recital of facts included a comprehensive account of the two proceedings before the Joint Appeals Board in which there had been extensive consideration of various aspects of the case. Thirdly, the Tribunal's own analysis of the case was substantial, even if it did not deal specifically with each of the claims presented. In its analysis it concentrated on what it considered to be the relevant issues and those in regard to which it found substance in these claims, namely (i) that the Staff Rules concerning periodic reports had not been properly complied with and that, by way of consequence, the commitment of the Secretary-General to make serious efforts to place the applicant in a suitable post had not been correctly fulfilled (paras. IV-VII of the Judgement), and (ii) that a report filed in 1970 as a result of the recommendations of the Joint Appeals Board was motivated by prejudice against the applicant (paras. VIII-XII). After that examination of the main contentions of the applicant concerning the violation of Staff Rules and the prejudice evidenced in the 1970 report on his performance in Yemen, the Tribunal, in paragraph XIII of the Judgement, examined the question of the damages to be awarded as compensation, in lieu of the specific performance of the obligations

which the respondent had failed to observe. The remainder of the substantive part of the Judgement related to the additional claims filed in a supplementary application concerning recalculation of remuneration and alleged illegal suspension from duty (paras. XIV and XV), the claim for damages as a result of delays in considering the case (para. XVI) and, finally, the question of costs (para. XVII).

55. In organizing the structure of its Judgement, the Administrative Tribunal followed the logical sequence of examining the existence of violations of substantive law before entering into the question of compensation for damage. Article 2, paragraph 1, of the Tribunal's Statute gives it jurisdiction ‘to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members‘. This same paragraph adds: ‘The words 'contracts' and 'terms of appointment’ include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.‘ A subsequent Article refers successively to the specific relief ***193** which may be granted by the Tribunal and to the award of monetary compensation to be paid in lieu of such specific relief (Art. 9). The Tribunal first determines the non-observance of contracts of employment or of staff regulations before it examines the question of rescission of a decision, or specific performance of an obligation. The latter questions in their turn take priority over the fixing of monetary compensation. The sequence followed by the Administrative Tribunal in the Judgement under consideration thus corresponds to the provisions of its Statute. It can hardly be denied, however, that in this particular case the structure adopted created the difficulty that some of the applicant's pleas, though covered by the general consideration of the basic questions of nonobservance of regulations, of rescission and of damage, were not expressly mentioned or specifically dealt with in the paragraphs in which the Tribunal developed its reasoning and analysed what it deemed to be the pertinent issues.

56. To find that such a difficulty has arisen in the present case does not signify that, as contended by the applicant, there has been on the part of the Tribunal a failure to exercise its jurisdiction with respect to those pleas which were not expressly mentioned nor specifically dealt with in the substantive part of the Judgement. The test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned eo nomine in the substantive part of a judgment: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based, and drew its own conclusions therefrom as to the obligations violated by the respondent and as to the compensation to be awarded therefor. Such an approach is particularly requisite in a case such as the present one, in which the Tribunal was confronted with a series of claims for compensation or measures of relief which to a considerable extent duplicated or at least substantially overlapped each other and which derived from the same act of the respondent: the circulation of an incomplete fact-sheet annexed to the enquiry concerning new employment for the applicant. This act, which was identified by the Tribunal as the cause of the inadequate performance by the respondent of the commitment to seek new employment for the applicant, also constituted the basis for the claim that the applicant's professional reputation and career prospects had been damaged.

57. While the claim for damage to professional reputation and career prospects was couched by the applicant in broad terms, to the effect that it resulted from ‘the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant‘, the record shows that the only act attributable to the respondent which could fall within that description consisted precisely in that same distribution to the United Nations central recruitment service, to three specialized agencies, to two UNDP resident representatives, and to several other services of the United Nations, of a ***194** fact-sheet which, while containing information reflecting valid periodic reports, did not include statements in rebuttal by the staff member nor reports concerning other periods of employment, which, contrary to Staff Regulations, had not been pre-

pared or incorporated. Since this act of the respondent was at the same time both the cause of the inadequate performance of the commitment to seek a new assignment and the source of the claimed harm to reputation and career prospects, Mr. Fasla himself, in his explanatory statement to the Administrative Tribunal, did not develop the argument in support of the two pleas separately. It was reasonable in these circumstances for the Administrative Tribunal, in one and the same part of its Judgement, to consider and dispose of all the allegations of injury to the applicant resulting from that particular conduct of the respondent.

58. In his application to the Committee, however, Mr. Fasla contends that the award of damages made by the Tribunal ‘was solely in compensation for Respondent's failure to take all reasonable steps to fulfill its legal obligation to find another position for Applicant‘. In short he refers to the particular plea filed by him as plea (i) in his application to the Tribunal (para. 44 above). Since, as already indicated, the Tribunal did not pronounce on each specific head of claim, but examined on a global basis and in succession the questions of violation of staff rules or regulations, of specific relief and of monetary compensation for the injury sustained, there is no suggestion in the terms of the Judgement that the Tribunal's decision awarding damages was connected with only one among the inter-related pleas filed by the applicant.

59. The preceding observations show that it was not unreasonable for the Tribunal to consider jointly and make a single award for the damage to the professional reputation and career prospects of the applicant together with the damage resulting from the inadequate observance of the commitment to seek new employment for him. The question however remains whether the Tribunal, in awarding damages, did in fact consider and take into account both aspects of his case. From the text of paragraph XIII of the Judgement it appears that in awarding damages the Tribunal based itself on the following consideration among others:

> ‘Having regard to the findings of the Joint Appeals Board in its report of 3 June 1970 (paragraph 45) and to the fact that UNDP refused to make further efforts to find an assignment for the Applicant after agreeing to correct the fact sheet ...‘ (Emphasis added.)

The reasoning of the Judgement thus incorporates by reference the findings of the Joint Appeals Board in paragraph 45 of its report. Paragraph 45 contains the following sub-paragraph:

> ***195** ‘(e) UNDP's efforts to assign the appellant elsewhere were inadequate especially since the fact sheet was incomplete. It is the view of the Board that, as a result of these facts, the performance record of the appellant is incomplete and misleading and that this seriously affected his candidacy for a further extension of his contract or for employment by other agencies.‘ (Emphasis added.)

From the concluding sentence of this sub-paragraph, which the Tribunal reproduced in its Judgement, it is clear that in making the award the Tribunal considered and took into account, inter alia, the damage inflicted on the professional reputation and career prospects of the applicant by the circulation of the fact-sheet; for the Tribunal clearly recognized that the circulation of that fact-sheet had ‘seriously affected his candidacy for a further extension of his contract or for employment by other agencies‘. In short, the Tribunal applied its mind to the basic act of the respondent which gave rise to the claim for damages–the circulation of an incomplete fact-sheet–and not merely to one of its consequences, namely, that the efforts to seek a new position for the applicant had, for that very reason, not been fully adequate. Thus the Tribunal went to the root of the matter and, in accordance with its Statute (Art. 9), fixed the amount of compensation to be paid to the applicant in lieu of specific performance, taking into account the ‘injury sustained‘ by him resulting from the refusal to circulate an appropriately corrected fact-sheet to potential employers.

60. It is necessary to add certain observations which confirm this conclusion. Article 9, paragraph 1, of the Tribunal's Statute, which governs the power of the Tribunal to award compensation, begins by providing that the Tribunal, if it finds that the application is well founded, ‘shall order the rescinding of the decision contested or

the specific performance of the obligation invoked‘. An order of this kind normally constitutes the basic content of a decision of the Tribunal in favour of an applicant. The immediately following sentence of Article 9, paragraph 1, adds that:

> ‘At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; ...‘

Thus, the damages to be awarded by the Tribunal are of a subsidiary character, in the sense that they are granted in lieu of specific performance. The power of the Tribunal to award damages in lieu of specific performance has been interpreted by the Tribunal as also empowering it to ***196** award damages when it finds that it is not possible to remedy the situation by ordering the rescinding of the decision contested or specific performance of the obligation invoked.

61. In the present case the ‘specific performance‘ which could have been ordered by the Tribunal was not merely that further, undefined, efforts should be made to obtain a position for the applicant but that those efforts should consist in the circulation to the personnel departments of the United Nations and specialized agencies of a completed and corrected fact-sheet giving a fuller picture of the applicant's past performance as an official of the United Nations. This is implicit in the statement made in paragraph XIII of the Judgement that in assessing damages the Tribunal had had regard ‘to the fact that UNDP refused to make further efforts to find an assignment for the Applicant after agreeing to correct the fact sheet by taking into consideration the periodic reports which were previously missing ...‘.

62. The Tribunal held in the present case that, in view of the negative position taken by the respondent as to the possibility or usefulness of making further efforts for obtaining a new position for the applicant, compensation was due without waiting for a new decision by the Secretary-General within the 30-day period referred to in Article 9, paragraph 1. The payment of compensation to an applicant depends on a decision by the Secretary-General that no further action shall be taken in his case, and in this particular instance the Tribunal already had before it such a decision. It would have served no purpose and indeed not have been in the applicant's interest to await the repetition of that decision. In the circumstances, this was not an unreasonable way of applying Article 9, paragraph 1, of the Tribunal's Statute.

63. Compensation was therefore awarded, as the Judgement states, ‘in lieu of specific performance‘, such compensation to constitute ‘sufficient and adequate relief‘ for the injury sustained. It follows that the amount awarded as compensation did not merely seek to provide, as contended by the applicant, relief for the non-execution of the obligation to seek a new post for him, but was also intended to cover that particular form of restitution which would have consisted in the circulation of a completed and corrected fact-sheet. Such a circulation among the recipients of the original letters would have provided specific relief for the harmful effects resulting for the applicant from the previous circulation of the incomplete fact-sheet. This confirms that the award of damages was also intended to comprise compensation for the injury to the applicant's professional reputation and career prospects.

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64. In his application to the Committee the applicant asserts that the Tribunal's decision constituted a woefully inadequate judgement. This could be interpreted as a disagreement with the adequacy of the amount awarded. The hypothesis of a failure to exercise jurisdiction on account ***197** of the extreme paucity of an award would

only arise in the event of there being such a discrepancy between the findings of a tribunal and the remedy granted that the award in question could be viewed as going beyond the exercise of reasonable discretion. On such a hypothesis, the obvious unreasonableness of the award could be taken into account in determining whether there had been a ‘failure to exercise jurisdiction‘, within the meaning given to this term by the Court in paragraphs 50 and 51 above; and it might lead to the conclusion that the Tribunal had not in substance and in fact exercised its jurisdiction with respect to the issue of compensation. But except in such an extreme case, once a tribunal has pronounced on the amount of compensation to be paid for a wrongful act, it has exercised its jurisdiction on the matter, regardless of whether it allows the full amount claimed or allows only in part the compensation requested.

65. In the present case the Administrative Tribunal found itself in the situation of having to translate the injury sustained by the applicant into monetary terms. In this respect the Tribunal possesses a wide margin of discretion within the broad principle that 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. This power of appreciation of the Tribunal is subject to the rule provided for in the concluding words of paragraph 1 of Article 9 of its Statute:

> ‘... such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.‘

This rule does not require the Tribunal to state in every judgement whether or not it is confronted with an exceptional case, but only to do so in judgements in which it has decided to ‘order the payment of a higher indemnity‘. Moreover, even under this rule, the discretion given to the Tribunal is a wide one. If the Court were acting in this case as a court of appeal, it might be entitled to reach its own conclusions as to the amount of damages to be awarded, but this is not the case. In view of the grounds of objection upon which the present proceedings are based, and of the considerations stated above, the Court must confine itself to concluding that there is no such unreasonableness in the award as to make it fall outside the limits of the Tribunal's discretion. This being so, the Tribunal cannot be considered as having failed to exercise its jurisdiction in this respect. In reaching this conclusion the Court has taken account of the fact that in paragraph XIII of the Judgement, when fixing the amount of compensation, the Tribunal referred to ‘the circumstances of the case‘. Regard must therefore be had to various circumstances ***198** of fact appearing from the documentation before the Tribunal which may have been relevant for its determination. Among them the following may be noted:

> (1) The report on the applicant's service in Yemen, which the Tribunal invalidated, was not circulated, and remained in the UNDP Personnel Division.
>
> (2) While the Joint Appeals Board qualified the performance record as ‘incomplete and misleading‘, the Tribunal described the fact-sheet in its own words as ‘incomplete, if not inaccurate‘ and the information as having ‘serious gaps‘. The three ratings circulated included a favourable one in which the applicant was described as ‘an efficient staff member giving complete satisfaction‘, but also two in which he was described as ‘a staff member who maintains only a minimum standard‘.
>
> (3) The Tribunal found that the applicant had raised no objection to, and had no grounds for contesting, the decision to grant him special leave with pay from 10 September 1969 till the expiration of his contract on 31 December 1969.
>
> (4) The Judgement itself, which is a public United Nations document, vindicated in several respects certain claims of the applicant.

Account has also to be taken of the fact that the number of months of salary by reference to which the Tribunal determined the amount of its award was the same as the number of months of salary adopted by the Joint Ap-

peals Board as the measure of the ex gratia payment which it had recommended in its report of 3 June 1970.

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66. The second contention in the application to the Committee is that the Tribunal failed to exercise its jurisdiction because, although it found that the respondent had not performed his legal obligations with respect to the applicant, it

> '... nevertheless unjustifiably refused to fully consider Applicant's request for the reimbursement of the unavoidable and reasonable costs in excess of normal litigation costs involved in presenting his claims to the Joint Appeals Board and the Administrative Tribunal, and refused to order compensation therefor'.

The claim referred to is set out in plea (m) in the application to the Tribunal in the following words:

> 'Payment to the Applicant of the sum of $1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case ***199** necessitated the Applicant's travel from California to New York in May 1970 as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date.'

67. In support of his second contention Mr. Fasla invokes, inter alia, general principles of law and the case law of the Tribunal itself, as establishing its jurisdiction and competence to award costs to a successful applicant. He then maintains that the Tribunal failed to address itself fully to the question of costs: for the Judgement, although mentioning costs in a summary fashion, rejected a demand for counsel's fees which had never been made, but made no reference to the actual costs prayed for. Recalling his success before the Tribunal in obtaining an award of compensation and the invalidation of the periodic report on his service in Yemen, he maintains that these and other elements of the decision showed that he was justified in pursuing his claims. This being so, he further maintains that the Tribunal refused fully to consider his request for the reimbursement of expenses; for, without stating any standards or reasons, the Tribunal said simply that it saw no justification for the request and rejected it. As to the expenses in question, he refers to the complexity of the case, the long duration of the appellate process, the necessity of his residing in California and the consequential expenses involved in communicating and consulting with his counsel. These expenses, he maintains, were reasonable, could not have been avoided otherwise than by extremely inefficient and ineffective means, and were in excess of normal litigation costs before the Tribunal. Referring to what he calls a consistent pattern in previous Judgements of awarding costs to successful applicants, he stresses that he was not claiming costs for the assistance of outside counsel such as had been disallowed in the more recent practice of the Tribunal. However, he maintains that the costs, other than counsel's fees, which he incurred were necessary, unavoidable and in excess of normal litigation expenses before the Tribunal; and that the Tribunal has previously found that it had jurisdiction to award such costs.

68. The claim to costs was mentioned by the Tribunal at the beginning of its Judgement among the applicant's claims to substantial relief. The Tribunal's decision in regard to costs was, no doubt, somewhat laconic (para. XVII of the Judgement):

> 'The Applicant requests payment of one thousand dollars for exceptional costs in preparing the case. Since the Applicant had the ***200** assistance of a member of the panel of counsel, the Tribunal finds this request unfounded and rejects it.'

This decision has, however, to be read in the light of the history of the question of the award of costs by the Tribunal. Although not expressly empowered by its Statute to award costs, the Tribunal did so in some of its early cases on the basis of what it considered to be an inherent power. In 1950, this power was questioned by the

Secretary-General, who contended that: (a) the Tribunal was without authority under its Statute to tax costs against the losing party and (b) even if the Tribunal decided that it had competence to assess costs they should be strictly limited and not include all types of actual costs. After consideration of the legal issues involved the Tribunal formally adopted on 14 December 1950 a statement of policy on the matter which, inter alia, provided:

> ‘4. In view of the simplicity of the proceedings of the Administrative Tribunal, as laid down in its rules, the Tribunal will not, as a general rule, consider the question of granting costs to applicants whose claims have been sustained by the Tribunal.
>
> 5. In exceptional cases, the Tribunal may, however, grant a compensation for such costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal.
>
> 6. In particular, it will not be the policy of the Tribunal to award costs covering fees of legal counsel with respect to cases which do not involve special difficulties.‘ (Emphasis added.)

To this it may be added that the Secretariat has established a panel of counsel in disciplinary and appeal cases. The counsel, drawn from the Secretariat, are assigned to assist applicants as part of their official duties and receive secretarial assistance and other support services. This assistance is available to staff members without cost. As recognized by Mr. Fasla, it has been the normal practice of the Tribunal, since the creation of the panel of counsel, not to award costs for the assistance of outside counsel.

69. Mr. Fasla complains that the Judgement rejected a demand for counsel's fees which had never been made but did not mention the actual costs prayed for, namely his exceptional costs. But this reading of the Judgement does not appear to be correct. The Tribunal first recalled expressly that he had requested compensation for ‘exceptional costs in preparing the case‘ and went on to state: ‘since the applicant had the assistance of a member of the panel of counsel, the Tribunal ***201** finds this request unfounded and rejects it‘ (emphasis added). This would seem to be simply a terse, and somewhat oblique, way of saying that the Tribunal did not find the case one for the award of exceptional costs. Furthermore, under the Tribunal's Statement of Policy adopted on 14 December 1950, referred to above, it is clear that the award of costs is a matter within its discretion; and that there is always an onus probandi upon the applicant to demonstrate that the costs have been unavoidable, reasonable in amount and in excess of the normal expenses of litigation before the Tribunal. The question of costs is therefore very much a matter for the appreciation of the Tribunal in each case.

70. In the circumstances the Court does not think that the contention that the Tribunal failed to exercise jurisdiction vested in it with respect to costs is capable of being sustained. The Tribunal manifestly addressed its mind to the question and exercised its jurisdiction by deciding against the applicant's claim. Therefore this contention turns out to concern not a failure by the Tribunal to exercise its jurisdiction but an appeal against its decision on the merits. In so far as this contention is a challenge to the Judgement on the ground of any inadequacy in the motivation of the decision, it falls to be considered not in the present context of a failure to exercise jurisdiction but in that of the second question put to the Court as to whether there has been a fundamental error in procedure which has occasioned a failure of justice (see paras. 97-98 below.)

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71. The third contention in the application to the Committee is that the Tribunal failed to exercise its jurisdiction in that it did not direct the Secretary-General to recalculate the applicant's rate of remuneration while posted to Yemen on the basis of the actual duration of his assignment there. The claim referred to is set out in the supplementary application to the Administrative Tribunal, in the following words:

> ‘(b) Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the

actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.‘

In support of that contention Mr. Fasla invokes Article 9, paragraph 1, of the Tribunal's Statute. He refers to his posting to Yemen in September 1968 and his precipitate recall to Headquarters in May 1969; the payment of his salary and allowances while in Yemen at the lower rate of a staff member assigned to a post for longer than one year; the Secretary-General's admission before the Joint Appeals Board that they would have been recalculated if he had been assigned to another post within the ***202** year; the Secretary-General's argument that the applicant had never been reassigned from Yemen; and the rejection of that argument by the Joint Appeals Board, which found that his duty station had been changed on 22 May 1969. The Tribunal, in Mr. Fasla's view, failed to draw the necessary legal conclusion from these circumstances and, by not granting the same form of recognition and remedy as in the case of the respondent's obligation to seek a new post for him, failed to exercise its jurisdiction.

72. The claim under this head was recited at the beginning of the Judgement. Subsequently the Tribunal summarized the history of this claim before the Joint Appeals Board, which made no recommendation on it, because it was not covered by the Staff Regulations or Rules or by administrative instructions, but recommended an ex gratia payment in the amount of any losses that the applicant could show that he had suffered as a consequence of his precipitate recall from Yemen. The Judgement also transcribed the dissenting opinion which the member of the Joint Appeals Board elected by the staff had made in support of the claim. After summarizing the applicant's and respondent's arguments on the question, the Tribunal devoted paragraph XV of its Judgement to dealing with this claim. The Tribunal set out the text of Staff Rule 103.22 (c), invoked by the applicant, and stated:

‘The Tribunal observes that this text leaves the Respondent a margin of discretion with respect to the payment of an assignment allowance: it is possible for the allowance to be paid for a stay of less than one year. In addition, the text lays down a very strict rule: the subsistence allowance is payable only where an assignment allowance has not been paid. In the present case, however, the Applicant received an assignment allowance and is therefore not entitled, under the Staff Rules, to a subsistence allowance.‘

In the light of this statement it is difficult to perceive the basis for the contention made in the application to the Committee that the Tribunal did not consider or discuss the matter, since it specifically dealt with this particular claim in paragraph XV of its Judgement and reached a concrete decision rejecting it as ill-founded.

73. In the same paragraph XV of the Judgement, the Tribunal also referred to the Joint Appeals Board recommendation for an ex gratia payment in the amount of any losses that the applicant could show to have resulted from his recall and to the fact that the Secretary-General had agreed to make such an ex gratia payment, and added:

‘... in view of the above decision concerning the subsistence allowance, the Applicant is entitled to take advantage of the possibility ***203** offered by the Respondent within a reasonable period of time from this judgment ...‘ (emphasis added).

To give effect to this decision the Tribunal, in the operative part of the Judgment, provided that:

‘3. Any requests for payment made in accordance with paragraph XV above shall be submitted, together with the necessary supporting evidence, by the Applicant to the Respondent within a period of two months from the date of this judgment.‘

Having regard to the applicant's initiation of review proceedings, the Court is of the opinion that this term of two months should not be regarded as expired but should be considered to run only from the date when the Judgment becomes final in accordance with paragraph 3 of Article 11 of the Statute of the Administrative Tribunal.

74. Accordingly, the contention that the Tribunal failed to exercise its jurisdiction with respect to the claim for recalculation of the rate of remuneration is not sustainable on the face of the Judgment. The Tribunal manifestly

addressed its mind to the applicant's claim, referred specifically to it and exercised its jurisdiction by deciding to reject it. The complaint thus again turns out to concern not a failure by the Tribunal to exercise its jurisdiction but an appeal against its treatment of the merits of the claim.

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75. In his application to the Committee, Mr. Fasla alleges that the Tribunal did not order the correction of his fact-sheet and that gaps in his employment record which were still in existence had not been filled. This allegation may be interpreted as a complaint that the Tribunal failed to exercise its jurisdiction with respect to plea (e) in the application to the Tribunal, which reads as follows:

> 'Correction and completion of the Applicant's Fact Sheet which is intended for circulation both within and outside the UNDP, with all the required Periodic Reports and evaluations of work; alternatively, payment by the Respondent to the Applicant of two years' net base salary.'

In the written statement of his views submitted to the Court, Mr. Fasla specifically complains that the Tribunal failed to exercise its jurisdiction with respect to this particular plea among others.

76. The Tribunal, while not mentioning this plea specifically, applied its mind to it by stating, in paragraph VIII of the Judgment:

> 'The preparation of a corrected fact sheet becomes meaningless ***204** once UNDP decided not to take the necessary further steps to find the Applicant a new assignment.'

The obvious inference from the Tribunal's statement is that to allow the specific relief claimed would no longer serve any useful purpose. Thus to state its conclusion by implication is one of the ways in which a tribunal may, and not infrequently does, exercise its jurisdiction with respect to a particular plea.

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77. In his application to the Committee Mr. Fasla also contends that Article 9, paragraph 3, of the Tribunal's Statute imposes upon the Tribunal the duty to award compensation when the wrong cannot be remedied by the relief provided for in paragraph 1 of Article 9. In support of this contention he invokes the text of paragraph 3, which provides that, where applicable, 'compensation shall be fixed by the Tribunal'. After noting the use of the imperative 'shall', he submits that the correct construction of paragraph 3 deprives the Tribunal of any discretion to refrain from awarding compensation where the wrong cannot be remedied by the rescinding of the decision or the specific performance of the obligation. This is an interpretation to which the Court cannot subscribe. Paragraph 3 may not be interpreted in isolation from paragraph 1. The introductory words of paragraph 3, 'in all applicable cases', refer back to paragraph 1 and only comprise those cases in which compensation must be awarded under that first paragraph. This interpretation is confirmed by the text of paragraph 3 in other official languages. Thus the paragraph does not impose an obligation or confer a power on the Tribunal to award compensation in circumstances other than those provided for in paragraph 1.

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78. The Court will now proceed to consider the basic contentions advanced by Mr. Fasla in the statement of his views submitted to the Court which concern the exercise of the discretionary powers of the administration and allege the existence in this case of improper motives constituting a misuse of power. It may be open to doubt how far these contentions, which were not fully adduced in the application presented to the Committee, fall strictly within the contentions referred to in the first question put to the Court. The Court, however, as it has previously stated, does not consider that it should adopt a restrictive interpretation of the question. It will therefore

examine those contentions and, in deciding to do so, it takes particular account of the fact that in the application to the Committee, and with regard to the ground of failure to exercise jurisdiction, reference was made to ‘misuse of powers with improper motive‘.

79. In his statement of views Mr. Fasla contends that it was as a consequence***205** of his reporting serious administrative irregularities in the UNDP office in Yemen that he was recalled from his post there; he further contends that the failure of the Secretary-General to renew his fixed-term contract was ‘an intentional or negligent consequence‘ of the efforts made by Mr. Fasla, particularly in a report dated 17 January 1969, to deal with the conditions existing in that office. He points out in this respect that, in taking this action and informing his superiors of what he felt was an unsatisfactory situation, he was fulfilling his duties under the Staff Regulations, since by accepting an appointment with the United Nations, he had pledged himself to discharge his functions and to regulate his conduct ‘with the interests of the United Nations only in view‘. He then asserts that the failure of the United Nations Administrative Tribunal to investigate the link between his efforts in the Yemen office and the decisions concerning his recall and non-renewal of contract constituted what he describes as the most fundamental failure of the Administrative Tribunal to exercise the jurisdiction vested in it.

80. The allegations thus advanced assume that the two basic administrative decisions which vitally affected Mr. Fasla in 1969, his recall from Yemen and the non-renewal of his fixed-term contract, were the reaction of the administration to the attitude which he had taken in denouncing serious administrative irregularities. This implies the assertion that he was persecuted not only for having exercised his rights but for having performed his obligations in the interests of the United Nations; it also implies that those administrative decisions were determined by improper or extraneous motivation.

81. The adoption by the General Assembly of the Statute of the Administrative Tribunal and the jurisprudence developed by this judicial organ constitute a system of judicial safeguards which protects officials of the United Nations against wrongful action of the administration, including such exercise of discretionary powers as may have been determined by improper motives, in violation of the rights or legitimate expectations of a staff member. In view of the existence of this system of judicial safeguards, and in line with the position now taken before the Court, it would have been the proper course for Mr. Fasla to have challenged before the United Nations Administrative Tribunal the validity of the two decisions, of recall and non-renewal, on the grounds alleged, namely, that they violated his rights, interfered with the performance of his duties to the Organization, and were inspired by improper motivation.

82. However, in his application to the United Nations Administrative Tribunal, Mr. Fasla did not request the Tribunal to rescind, on the grounds of illegality or improper motivation, the decisions concerning his recall from Yemen and the non-renewal of his fixed-term contract. Under the Rules of Procedure of the Tribunal each application must specify ‘the decisions which the applicant is contesting and whose rescission he is requesting under Article 9, paragraph 1, of the Statute‘. The pleas submitted to the Administrative Tribunal, transcribed in paragraph ***206** 44 above, do not however refer to these two basic decisions, and this indicated that they were not disputed by the applicant. Thus, with respect to the recall from Yemen, the specific plea submitted as plea (b) of the supplementary application only concerned certain economic consequences of his recall from Yemen. The other pleas for rescission or specific performance were submitted on the assumption that the original fixed-term contract had expired, since pleas (e) and (g) concerned the non-fulfilment of the obligation assumed by the Secretary-General to make efforts to seek a new position for Mr. Fasla. Prejudice was invoked not as a basis for the rescission of any administrative decision but as a ground for compensation (plea (j)). The only request for rescission with respect to which the claim of prejudice was relevant was plea (f), concerning the invalidation of

the report prepared in September 1970. As to plea (d) its scope will be examined separately. All the other pleas claimed only compensation (pleas (h), (i), (k), (l), (m), (n), and pleas (a) and (c) of the supplementary application). In other words, the applicant was basing his claim before the Administrative Tribunal on the inadequacy of the efforts of the Secretary-General to obtain for him a new contract, but not on the illegality or improper motivation of the decisions to recall him from Yemen and not to renew his fixed-term contract.

83. In these circumstances, the Administrative Tribunal was justified in finding, as it did in paragraph III of its Judgment, that although the applicant had requested the Tribunal (in plea (d)) to order the Secretary-General to restore him to the status quo ante, such a claim was not based on the right to have his contract extended. In the same paragraph the Tribunal found that the request concerning further employment depended on the pleas that the Secretary-General be ordered to correct and complete Mr. Fasla's fact-sheet and make serious efforts to place him in a suitable post.

84. The explanatory statement accompanying the pleas confirms the correctness of this conclusion of the Tribunal. In the arguments then advanced in support of the pleas, frequent reference was made to irregularities in the Yemen office, but it was never asserted, as is now vigorously contended before the Court, that it had been as a consequence of the efforts displayed by Mr. Fasla to correct such irregularities that he had been recalled from Yemen and that his contract had not been prolonged. On the contrary, that explanatory statement mentioned that Mr. Fasla had requested on his own initiative to be recalled from Yemen before the expiry of his assignment.

85. Inasmuch as the applicant had not sought from the Administrative Tribunal the rescission of the decisions of recall and non-renewal on the grounds of their illegality and improper motivation, it is obvious that the Administrative Tribunal could not have been expected to go into these issues proprio motu, or proceed on its own account to an examination of ***207** or inquiry into these matters. While the Administrative Tribunal under its Statute and in accordance with its jurisprudence examines the allegedly improper motivation of an administrative decision, and under its Rules of Procedure may arrange any measures of inquiry as may be necessary, it results from its character as ‘an independent and truly judicial body‘ (I.C.J. Reports 1954, p. 53) that it can only proceed to inquiries of that kind on the basis of a plea from the aggrieved party for rescission of the contested decision and a specific allegation by that party that that decision has been inspired by improper or extraneous motivation. Equally, it would not have been appropriate for the Court to proceed on its own to such an inquiry under Articles 48 to 50 of its Statute. The Court's abstention from carrying out an inquiry into the administrative situation in Yemen or into the motives of the decision to recall the applicant from there does not mean that, in review proceedings, the Court regards itself as precluded from examining in full liberty the facts of the case or from checking the Tribunal's appreciation of the facts. Such an inquiry would have been directed to facts and allegations invoked to substantiate claims and submissions not advanced by the applicant before the Administrative Tribunal. An inquiry into those matters could have no place in review proceedings designed to determine whether the Tribunal had failed to exercise its jurisdiction, a question which necessarily relates only to claims and submissions presented to the Tribunal.

86. Furthermore the documentation before the Tribunal permitted it to verify the motivation which had determined the decision of recall. After having received the applicant's denunciations of irregularities in the management of the Yemen office, the administration had in February 1969 sent a senior official to visit that office and report on the measures to be taken. His report, the submission of which to the Tribunal was insisted upon by the applicant in his plea (a), and which contained favourable comment on Mr. Fasla's efforts in Yemen, dealt in its conclusions with the management of the Yemen office. On this point the report advised that Mr. Fasla could

‘continue in charge of the office during the immediate period of [the Resident Representative's] absence‘; at the same time, however, it recommended that ‘in the interest of competent field representation and operation it would be advisable to move him out of the Yemen Arab Republic as well‘.

87. These circumstances suffice to explain why the Court is unable to accept the contention that the Administrative Tribunal failed to exercise its jurisdiction in that it did not enquire into the situation in the Yemen office. No tribunal can be fairly accused of failure to have exercised the jurisdiction vested in it on the ground that it failed to make an inquiry or a finding of fact which was not required in order to adjudicate on the case presented to it, and which none of the parties asked it to make. One must bear in mind the principle previously recalled by the Court, that it is the duty of an international tribunal ‘not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from ***208** deciding points not indicated in those submissions‘ (I.C.J. Reports 1950, p. 402).

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88. The Court must now take up the second question in the request for advisory opinion, which requires it to determine whether the Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice as contended in the application to the Committee.

89. The contentions in the above document with regard to ‘a fundamental error in procedure which has occasioned a failure of justice‘ may be summarized as follows. First, Mr. Fasla contends that the ‘failure of justice‘ was apparent from the facts he had alleged with regard to failure to exercise jurisdiction and from the information contained in the annexes to his application; and that a woefully inadequate judgment had resulted from the failure of the Tribunal to utilize its established procedure and method of dealing with applications. Secondly, he contends that the Tribunal had not proceeded ‘to fully consider and pass upon‘ various pleas and requests, contrary to its normal practice and to what he termed the well-established general principle that a court of justice must analyse and decide all claims properly brought before it, with a reasoned explanation of its conclusions and factual support therefor. Thirdly, he contends that the failure even to mention claims was a deviation from normal judicial procedure constituting fundamental error.

90. Under this question the Court has to determine, first, what is the meaning and scope of the provision in Article 11 which allows a judgement to be challenged on the ground ‘that the Tribunal ... has committed a fundamental error in procedure which has occasioned a failure of justice‘; and, secondly, in what respects, if any, the facts before it disclose such a fundamental error in procedure in the present case.

91. ‘A fundamental fault in the procedure‘ is one of the two grounds of challenge contained in Article XII of the Statute of the ILO Administrative Tribunal, and it was in a similar form–‘fundamental error in procedure‘–that this ground was incorporated in the draft of a new Article 11 of the Statute of the United Nations Administrative Tribunal recommended to the General Assembly by the Special Committee on Review of Administrative Tribunal Judgments in 1955. The words ‘which has occasioned a failure of justice‘ were introduced at the 499th meeting of the Fifth Committee on the proposal of the Indian delegation, who had stated that:

> ‘Another ground for review provided in the proposed new Article 11 was the commission of a fundamental error in procedure. The ***209** use of the word 'fundamental’ was intended to preclude review on account of trivial errors in procedure or errors that were not of a substantial nature. In order to make the intention clearer, the Indian delegation would suggest that the phrase 'which has occasioned a failure of justice' should be inserted after the words 'fundamental error in procedure' in the text of the article.‘

The additional phrase was not, therefore, intended to alter the scope of this ground of challenge, still less to create an independent ground of objection, but merely to provide an indication as to the meaning of the word ‘fundamental‘; and in accepting the Indian proposal the Fifth Committee seems to have assumed that it did not involve any change in the substance of the original draft. One delegate indeed observed that ‘a fundamental error in procedure clearly implied a failure of justice‘.

92. It may not be easy to state exhaustively what is involved in the concept of ‘a fundamental error in procedure which has occasioned a failure of justice‘. But the essence of it, in the cases before the Administrative Tribunal, may be found in the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes ‘a failure of justice‘ when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice. To put the matter in that way does not provide a complete answer to the problem of determining precisely what errors in procedure are covered by the words of Article 11. But certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-a-vis the opponent; and the right to a reasoned decision.

93. Mr. Fasla, both in his application to the Committee and in his written statement and comments transmitted to the Court, to a large extent pleads failure to exercise jurisdiction and fundamental error in procedure as alternative or joint grounds upon which to formulate what appear to be essentially the same complaints concerning the Tribunal's handling of his case. In consequence, many of the considerations which apply to his contentions in regard to the former ground apply also to his contentions concerning the latter. For the most part, these contentions appear to be complaints against the Tribunal's adjudication of the merits of the claims, rather than assertions of errors in procedure in the proper sense of that term. In so far as they may be said to touch matters of procedure, they appear, with one exception, to be dealt with in the next paragraph, to express disagreement with the Tribunal's determinations of the procedure to be followed in the light of its appreciation of the facts ***210** and merits of the case, rather than to allege errors in procedure within the meaning of Article 11. This is shown, for instance, in the complaint that the Tribunal failed to exercise its jurisdiction and committed an error in procedure when it declared relevant to the case only one part of the document production of which was requested by the applicant in his plea (b), and limited itself to taking note of the declaration of the respondent with respect to the document requested in plea (c). Subject to the one question which now requires separate examination, Mr. Fasla's contentions do not raise matters which constitute errors in procedure in the true sense of that term.

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94. The one exception is the complaint that the Tribunal's decisions rejecting the claims were not supported by any adequate reasoning. This complaint does, in the opinion of the Court, concern an alleged error in procedure in the proper sense of the term, and is of a kind to call for consideration under the provision in Article 11 relating to a fundamental error in procedure which has occasioned a failure of justice. The Secretary-General, in his written statement, contends that a failure to state the reason on which every part of a judgment of the Administrative Tribunal is based is not a ground included among serious departures from a fundamental rule of procedure, for although the Secretary-General explicitly mentioned the possibility of including this among the grounds for review when Article 11 of the Tribunal's Statute was drafted, this was not done. The Court is unable to ac-

cept this contention. The fact that failure to state reasons was not expressly mentioned in the list of grounds for review does not exclude the possibility that failure to state reasons may constitute one of the errors in procedure comprised in Article 11. Not only is it of the essence of judicial decisions that they should be reasoned, but Article 10, paragraph 3, of the Tribunal's Statute, which this Court has found to be a provision ‘of an essentially judicial character‘ (I.C.J. Reports 1954, p. 52), requires that: ‘the judgments shall state the reasons on which they are based.‘

95. While a statement of reasons is thus necessary to the validity of a judgment of the Tribunal, the question remains as to what form and degree of reasoning will satisfy this requirement. The applicant appears to assume that, for a judgment to be adequately reasoned, every particular plea has to be discussed and reasons given for upholding or rejecting each one. But neither practice nor principle warrants so rigorous an interpretation of the rule, which appears generally to be understood as simply requiring that a judgment shall be supported by a stated process of reasoning. This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not ***211** obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole.

96. The general nature of the judgment in the present case has already been indicated. The applicant's claims are set out seriatim and every one of them is thus mentioned; there is an extensive review of what the Tribunal considered to be the pertinent facts; there is a substantial summary of what the Tribunal regarded as the pertinent parts of the proceedings before the Joint Appeals Board; there is a substantial summary of the arguments of both the applicant and the respondent; there is an extensive statement of the reasoning and the conclusions of the Tribunal in regard to those closely related matters and issues which it identified as requiring substantial examination. In selecting those matters and issues the Tribunal followed the pattern of the applicant's explanatory statement, which did not analyse each plea separately but concentrated on the substantive legal issues. The sequence in the Tribunal's reasoning thus corresponded in broad lines to the one followed by the applicant himself in developing his legal grounds in his explanatory statement. There is, finally, in the Judgment, an operative part making three affirmative findings and, in accordance with a usual practice of the Tribunal, rejecting all other requests in a single provision. No doubt a judgment framed in this manner relies to a certain extent on inference and implication for the understanding of its reasoning in regard to some particular issues. It is possible however to identify and determine with precision those parts in the reasoning of the Judgment where each one of the claims of the applicant is considered. In any event, the question at issue is not whether the Tribunal might have used different forms or techniques, or whether more elaborate reasoning might have been considered as preferable or more adequate. The question is whether the Judgment was sufficiently reasoned to satisfy the requirements of the rule that a judgment of the Administrative Tribunal must state the reasons on which it is based. Having regard to the form and content of the Judgment, the Court concludes that its reasoning does not fall short of the requirements of that rule.

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97. Particular consideration is required, however, of the decision rejecting***212** the claim for exceptional costs,

which has already been described as somewhat laconic. The Tribunal merely asserted that the claim for exceptional costs was unfounded, without indicating the reasons why it reached that conclusion. The applicant's complaint in this respect is that the Tribunal, without stating any standards or reasons, said simply that it did not see any justification for the request and flatly rejected it. In this respect, however, the Statement of Policy adopted by the Tribunal on 14 December 1950 should be taken into account, since it sets the standards applicable by the Tribunal on the subject. The declaration that the request for exceptional costs was unfounded must be understood, in the light of that general statement, as signifying that the applicant, upon whom lay the onus probandi, had not demonstrated that such exceptional costs had been unavoidable and reasonable in amount.

98. Account must also be taken of the basic principle regarding the question of costs in contentious proceedings before international tribunals, to the effect that each party shall bear its own in the absence of a specific decision of the tribunal awarding costs (cf. Article 64 of the Statute of the Court). An award of costs in derogation of this general principle, and imposing on one of the parties the obligation to reimburse expenses incurred by its adversary, requires not only an express decision, but also a statement of reasons in support. On the other hand, the decision merely to allow the general principle to apply does not necessarily require detailed reasoning, and may even be adopted by implication. It follows that on this point also the Judgment of the Administrative Tribunal cannot be said to be open to challenge on the basis of inadequate reasoning, as contended by the applicant.

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99. As to Mr. Fasla's request for costs in respect of the review proceedings, first before the Committee and afterwards before the Court, there is no occasion for the Court to pronounce upon it. The Court confines itself to the observation that when the Committee finds that there is a substantial basis for the application, it may be undesirable that any necessary costs of review proceedings under Article 11 of the Statute of the Administrative Tribunal should have to be borne by the staff member.

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100. After having stated its conclusions on the questions referred to it, the Court wishes to reaffirm the opinion which it expressed in paragraph 73 above, namely that Mr. Fasla is entitled, in accordance with paragraph XV of the Administrative Tribunal's Judgment, to a payment in the amount of any losses suffered as a result of his precipitate recall from ***213** Yemen, and that the period of two months fixed in this connection by the Administrative Tribunal, having been suspended for the duration of the review proceedings, is to be calculated from the date when the Judgment becomes final in accordance with paragraph 3 of Article 11 of the Statute of the Tribunal.

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101. For these reasons,

THE COURT DECIDES,

by 10 votes to 3,

to comply with the request for an advisory opinion;

THE COURT IS OF OPINION,

with regard to Question I,

by 9 votes to 4,

that the Administrative Tribunal has not failed to exercise the jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements;

with regard to Question II,

by 10 votes to 3,

that the Administrative Tribunal has not committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twelfth day of July, one thousand nine hundred and seventy-three, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Manfred LACHS, President.

(Signed) S. AQUARONE, Registrar.

***214** President LACHS makes the following declaration:

While I am in full agreement with the reasoning and conclusions of the Court, there are two observations which I feel impelled to make.

1. That it should be possible for judgments of the United Nations Administrative Tribunal to be examined by a higher judicial organ is a proposition which commends itself as tending to provide a greater measure of protection for the rights involved. However, the manner in which this proposition has been given effect has raised doubts which I share. Indeed, I would go farther than the Court's observation that it does not consider the procedure instituted by Article 11 of the Tribunal's Statute as ‘free from difficulty‘ (para. 40), for neither the procedure considered as a whole nor certain of its separate stages can in my view be accepted without reserve. Not surprisingly, the legislative history of the provisions in question reveals that they were adopted against a background of divided views and legal controversy.

There would, perhaps, be little point in adverting to this problem if the sole choice for the future appeared to lie between judicial control of the kind exemplified by the present proceedings and no judicial control at all. That, however, does not, in my view, have to be the case, for the choice ought surely to lie between the existing machinery of control and one which would be free from difficulty and more effective. I see no compelling reason, either in fact or in law, why an improved procedure could not be envisaged.

2. My second observation concerns the discrepancy between the two systems of review: one established by Article XII of the Statute of the ILO Administrative Tribunal and the other by Article 11 of that of the United Nations Administrative Tribunal. Each of them has been accepted by a number of organizations, mainly specialized agencies; and in the light of the co-ordination which should be manifest between these organizations, belonging as most of them do to the United Nations family, it is regrettable that divergences should exist in the nature of the protection afforded to their staff members. There can be little doubt that, in the interest of the administrations concerned, the staff members and the organizations themselves, the procedures in question should be uni-

form.

Judges FORSTER and NAGENDRA SINGH make the following declaration:

While voting in favour of the Opinion of the Court, we find that there are certain considerations which merit being mentioned, and hence, availing ourselves of the right conferred by Article 57 of the Statute read with Article 84 of the Rules of Court, we append hereunder the following declaration:

***215** I

The nature and character of the procedural channel for obtaining the advisory opinion of the Court vide Article 11 of the Statute of the United Nations Administrative Tribunal, it is said, raises issues concerning the appropriateness of the Committee on Applications for Review of Administrative Tribunal Judgments[FN1] which is a political body but still authorized by the General Assembly to function as the fountain source for putting legal questions to the Court under Article 96 (2) of the Charter. That apart, there is also the question of equality of the Parties, namely in this case the Secretary-General and the official, in relation to their capacity to appear before the Court (Art. 66 of the Statute of the Court and the oral procedures). It may be relevant to mention here that in spite of the recommendation contained in paragraph 2 of General Assembly resolution 957 (X) of 1955, to the effect that neither member States nor the Secretary-General should make oral statements before the Court, the applicant official Mr. Fasla made a written request, vide his letter of 15 December 1972, to be allowed to make an oral presentation of his case to the Court. This request was repeated in writing on 29 January 1973. It was, however, the Court's decision not to hold any public sitting for the purpose of hearing oral statements which went to establish equality between the Parties in the present case.

It is the prime concern of any judicial tribunal, whether sitting in appeal or in review proceedings, and whether giving a judgment or an advisory opinion, to see that all interested parties are given full and equal opportunity to present their respective viewpoints so that the dispensation of justice is based on all that information which is necessary and hence required for that supreme purpose. It may be that in the circumstances of the present case the decision to dispense with oral hearings was warranted since adequate information to enable the Court to administer justice was forthcoming but that cannot be said of each and every case that may come up to the Court seeking its advisory opinion under Article 11 of the Statute of the United Nations Tribunal. There can be, therefore, no question of any generalization regarding procedures being always regular in all the different circumstances of each and every case that may crop up under this particular category. It may even be granted that there is no general principle of law which requires that in review proceedings the interested parties should necessarily have an opportunity to submit oral statements to the review tribunal, but surely legal procedures are prescribed to cover all eventualities, leaving it to the review tribunal to exercise its discretion in the different circumstances of each case as to what is just and necessary. A judicial procedure cannot be held to be sound in every respect if, as in this case, fetters are placed on the Court as a review tribunal thereby ruling out oral statements altogether in order ***216** to maintain equality of the parties, although in the peculiar circumstances of any particular case oral hearings become necessary and are duly justified. Some room for improvement in procedures would thus appear to be indicated to cover all eventualities.

Moreover, attention has also to be invited to the legislative history of Article 11 of the Statute of the Tribunal. The delegates from the United Kingdom and the United States who co-sponsored the General Assembly's resolution 957 (X) left it expressly to the Court to decide if there were any legal flaws in the procedure concerning review of questions of law arising from the judgments of the Administrative Tribunal. The hope was expressed by

these delegates that:

> '... the Court will not hesitate to inform us if any important element of the procedure is contrary to the provisions of the Charter or of the Statute of the Court itself, or if it does not give the necessary protection to the parties who might be affected' (General Assembly, 10th Session, 541st Meeting, 8 November 1955, paras. 54-67, pp. 283-284).

In response to the aforesaid enquiry dating back to 1955 it appears desirable to make some observation concerning the possible scope for improvement of procedures established under Article 11 of the Statute of the United Nations Administrative Tribunal. For example no reasons are given by the Committee either for granting the request of the applicant or for refusing it. The Committee meets in closed session, and does not draw up summary records of its proceedings concerning applications, and these proceedings are treated as confidential and not even made available to the Court. These are some of the non-judicial features of the Committee functioning in accordance with the procedures established for moving the Court to give an advisory opinion. Moreover it cannot be denied that the decisions of the Committee are indeed vital to the staff members of the United Nations, since an affirmative decision becomes a 'necessary condition' or a sine qua non for the 'opening of the Court's advisory jurisdiction'. This would amount to the Committee becoming a crucial legal step in the entire procedure for redressing the grievances of the staff members for the simple reason that without the assent of the Committee access to the Court's unhampered opinion can never be had. This may be said in addition to the non-judicial character and composition of the screening machinery of the Committee which may not invariably provide the appropriate legal forum for seeking an advisory opinion. This is an aspect already dealt with in the present Opinion of the Court with which we agree. We support the view that the Court should comply with the request for giving its advisory opinion in this case. The regime set up by Article 11 of the Statute of the Tribunal may not be legally flawless. It may even be far from a perfect judicial procedure but it ***217** certainly is not such as to warrant the Court to refuse to answer the two questions raised in this case for the Court's opinion. It may also be true that this procedural aspect is certainly not before the Court in 1973 and as such it may not be correct to make any observations directly or even by way of obiter dictum. Nevertheless, we would consider it not inappropriate to draw attention to it in our declaration and leave it to the authorities concerned to examine, if they so feel, whether the procedural machinery centring round the Committee could not be bettered.

II

Again, while we support the finding that both the questions posed to the Court should be answered in the negative, there is a certain aspect and a distinct consideration which deserves to be mentioned in the overall interests of justice. We endorse the view that in regard to the procedures adopted by the Tribunal there has been no fundamental error which could be said to have occasioned a failure of justice in this case. In fact due procedures have been throughout observed and there is no difficulty in answering this particular question in the negative.

As far as failure in the exercise of jurisdiction is concerned, however, more than one view could be taken, both in regard to what constitutes a failure in the exercise of jurisdiction and what are the limits to the Court's functions 'in review', particularly in the light of the restricted terms of reference. It is, of course, true that the Court is in no position to retry the case already decided by the Administrative Tribunal. The Court should not generally enter into the substance or merits of the dispute and particularly not in relation to that which falls outside the reviewable categories, namely the two specified by the Committee out of the four enumerated in paragraph 1 of Article 11 of the Statute of the Administrative Tribunal. There is also no intention here to depart from the jurisprudence of the Court already established from the days of the Permanent Court that it should remain 'within the scope of the question thus formulated', holding that if there were certain points falling 'outside the scope of

the question as set out above, the Court cannot deal with them‘ (P.C.I.J., Series B, No. 16, p. 16). ‘Therefore the Court should keep within the bounds of the questions put to it‘ (I.C.J. Reports 1955, pp. 71, 72).

However, it cannot be said that one is precluded from examining in all its aspects the concept of ‘failure to exercise jurisdiction‘. These words are specifically used in the terms of reference to this Court and hence should not escape scrutiny. ‘Failure to exercise jurisdiction‘ would certainly cover situations where the Tribunal has either deliberately but erroneously omitted to consider a material issue in the case or has inadvertently forgotten to do so.

The Tribunal may also be said to have failed to exercise jurisdiction if it has palpably and manifestly caused injustice, since such an exercise of ***218** jurisdiction would tend to amount to a failure of that exercise. This interpretation would be applicable only if the exercise of jurisdiction was so blatantly faulty as to render it invalid.

Again, depending upon the circumstances of each case it may also cover situations where the Tribunal has applied its mind and considered the exercise of its jurisdictional powers to any particular issue in the case, but after such consideration has decided to negative it. It may be that in such circumstances the Tribunal may be said to have exercised and not failed to exercise its jurisdiction. In such cases it would be essential to consider whether in coming to its conclusion the Tribunal has remained within the margin of reasonable appreciation or what may be called a normal reasonable exercise of discretion in the evaluation of the facts and issues presented by the case. What has to be examined is a challenge to the Judgment of the Tribunal on the ground that the Tribunal ‘failed to exercise jurisdiction vested in it‘. It therefore becomes necessary to make an appraisal in each case whether or not there has been a failure to exercise jurisdiction within the meaning of Article 11 of the Statute of the Tribunal.

It is at this stage that considerations relating to the nature and the kind of failure to exercise jurisdictional powers vested in the Tribunal crop up for examination. It could not, therefore, be stated as a general rule that the concept of ‘failure to exercise jurisdiction‘ would always exclude considerations relating to the adequacy of that exercise. It has been said that when dealing with that aspect the Court has to take care to see that in discharging its review function it does not trespass on the merits of the case. However, it is neither clear nor certain to what extent the Court should be completely guided by the Advisory Opinion of 1956 which related to the ILO Tribunal an interpretation of Article XII of its Statute that is quite different from Article 11 of the Statute of the United Nations Administrative Tribunal. Even if the Court were to be guided by that ruling, namely that ‘errors ... on the part of the Administrative Tribunal in its Judgments on the merits cannot [be corrected by the Court on a request for an advisory opinion]‘ (I.C.J. Reports 1956, p. 87) there would still appear to be nothing to prevent the Court from analysing the conclusions reached by the lower tribunal to determine whether or not the basic interests of justice are served in so far as there is adequate, proportionate or balanced relationship between the findings of the Tribunal and the conclusions reached in its Judgment. In this particular case, even though there may not be a miscarrige of justice on account of failure to exercise jurisdiction as such, and hence the answer to the question posed by the Committee may be strictly in the negative, there would still remain room for observation if there were to be noticed an imbalance between the findings arrived at and the remedial conclusions pertaining to relief reached by the lower court.

This aspect needs to be examined at some length which could best be done by referring separately to those portions of the Judgment No. 158 of the Tribunal which relate to (a) the contention of the applicant and the ***219** findings of the Tribunal on the one side, and (b) the conclusions reached concerning remedial relief on the other:

(a) In Judgment No. 158 the Tribunal sums up the contention of the applicant in the following

words:

‘The Applicant does not, however, claim that, merely by virtue of being the holder of a fixed-term appointment, he had the right to have his contract extended beyond 31 December 1969. He [the applicant] first requests the Tribunal to order the Respondent to correct and complete his fact sheet and the required periodic reports and evaluations of his work; he also requests the Tribunal to order the Respondent to make further serious efforts to place the Applicant in a suitable post[FN1].‘ (Emphasis added.)

As against the aforesaid contentions of the applicant, the findings of the Tribunal, expressed in clear and categoric terms, read as follows:

‘The Tribunal notes that, at the time when the search for a new assignment was undertaken, no periodic report had been made on the Applicant's services from 1 July 1965 to 31 May 1966 and from November 1967 to 31 December 1969. The established procedure for the rebuttal of periodic reports had not been observed. Lastly, certain complimentary assessments of the Applicant's service did not appear in the file. The fact sheet drawn up solely on the basis of the existing reports was therefore incomplete. After examining that situation, the Joint Appeals Board stated 'that, as a result of these facts, the performance record of the appellant’ was 'incomplete and misleading' and that that fact had 'seriously affected his candidacy for a further extension of his contract or for employment by other agencies'.

The Tribunal considers that the commitment undertaken by the Respondent was not correctly fulfilled since the information concerning the Applicant's service, as it appeared in his file and his fact sheet, had serious gaps. The search for a new assignment could have been made correctly only on the basis of complete and impartial information.[FN2].‘ (Emphasis added.)

(b) Again the Tribunal states in its conclusion the relief side of its decision which is both vital to the applicant, Mr. Mohamed Fasla, as well as of importance to the Court in evaluating and assessing the just balance between the findings of the Tribunal and the ultimate ***220** compensatory relief granted to the applicant. The true essence of the exercise of jurisdiction is to be judged in the light of these paragraphs of the Tribunal's Judgment. The conclusions of the Tribunal are accordingly reproduced below:

‘The Tribunal must conclude from this that the prejudice shown by the first reporting officer towards the Applicant was in no way corrected by the superior officer required to participate in the drafting of the report which the Respondent had agreed to prepare, as he was obliged to do under the Staff Rules.

The Respondent thus allowed a report manifestly motivated by prejudice, containing no reservation or personal comment on the part of the second reporting officer, to be placed in the Applicant's file and used in the fact sheet, as revised in response to the recommendation of the Joint Appeals Board which had been accepted by the Respondent.

.....

The Tribunal, having reached the conclusion that the Respondent did not perform in a reasonable manner the obligation which he had undertaken to seek an assignment for the Applicant, notes that it is not possible to remedy this situation by rescinding the contested decision or by ordering performance of the obligation contracted in 1969. In similar cases (Judgements Nos. 68: Bulsara and 92: Higgins), the Tribunal held that compensation, in lieu of specific performance, may constitute sufficient and adequate relief.

Having regard to the findings of the Joint Appeals Board in its report of 3 June 1970 (paragraph 45) and to the fact that UNDP refused to make further efforts to find an assignment for the Applicant after agreeing to correct the fact sheet by taking into consideration the periodic reports which were previously missing, the Tribunal considers that in the circumstances of the case the award to the Applicant of a sum equal to six months' net base salary constitutes 'the true measure of compensation and the reasonable figure of such compensation' (Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 100)[FN3].‘ (Emphasis ad-

ded.)

A scrutiny of the findings of the Tribunal in relation to the conclusions reached, including the relief granted, would thus appear to reveal a certain lack of proportion in the exercise of jurisdictional powers of the Tribunal.

***221** This relief aspect of the case would not appear to relate to error in procedure as that has a limited scope and, as stated earlier, there has also not been any procedural flaw as such in this case let alone causing a miscarriage of justice. Again, it could not relate to excess of jurisdiction or competence which are the other alternatives for reference to the Court mentioned in Article 11 of the Statute of the Tribunal but not specified to us by the Committee. Similarly the aforesaid imbalance could not refer to the provisions of the United Nations Charter. It can, therefore, only relate to the exercise of jurisdiction and it does pertain to the question of adequacy of that exercise which is further explained below.

The Tribunal has accepted the major contentions of the applicant and has recorded a finding to the effect that the respondent ‘failed to fulfil the commitment undertaken‘. It has further stated that the ‘respondent refused to undertake a search for an assignment in a more correct manner‘, and ‘that the obligation assumed in the letter of 22 May 1969 has therefore not been performed‘ (emphasis added). It cannot therefore be denied that looking to the case as a whole, the net result of this episode of the applicant's service with the UNDP has been immediate termination of employment as an ‘unwanted official‘, with little or no hope for the future, thus involving a serious damage to his professional reputation and in consequence a clear loss to him in his career prospects. The Tribunal undoubtedly applied its mind to this all important issue raised by the applicant and feeling empowered to award damages whenever it finds that it is not possible to remedy the situation by rescinding the decision contested, it rightly proceeded to exercise its jurisdiction and to grant compensation to the applicant. The object of any tribunal in such circumstances would be to give proper and meaningful compensation and not a compensation in mere name. This would also appear to be the clear intention of the United Nations Administrative Tribunal as can be gathered from the words used in its Judgement that compensation was being awarded ‘in lieu of specific performance‘ and such compensation had therefore to ‘constitute sufficient and adequate relief‘ for the injury sustained. In short the compensatory relief of six months' net base salary awarded in this case is meant to cover not merely relief for non-execution of the obligation to get a new posting or further assignment for the applicant but also to cover restitution in the shape of circulation of a completed and corrected fact-sheet and on the whole, therefore, it is intended to provide reparation in kind for the entire injury to the applicant's professional reputation including career prospects. In the light of the aforesaid position coupled with a clear finding of a grave and serious nature against the respondent and with the Secretariat procedures coming in for sharp criticism at the hands of the Tribunal, it appears incongruous that the concluding relief should be nothing more than six months' net base salary as against the maximum prescribed by Article 9 (1) of the Statute of the Tribunal which could extend to two years and in ‘exceptional cases‘ could be more.

***222** Even if there may not be ‘obvious unreasonableness‘ in the meagreness of the award which may still be held to be such as would not amount to a ‘failure to exercise jurisdiction‘, there does certainly appear to be an inadequate or somewhat disproportionate exercise of jurisdiction which need not be overlooked in so far as it relates to a mention being made of that aspect in this declaration without, of course, in any way affecting the Advisory Opinion of the Court. We consider this conclusion warranted even though this is not an appeal, because the Tribunal required to translate the injury sustained into monetary terms does possess a wide margin of discretion within the broad principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. The application of that principle in relation to the power of the Tribunal to grant compensation though

limited by Article 11 of the Statute of the Tribunal still leaves a clear margin much wider than six months actually allowed in this case.

While pinpointing, therefore, the shortcoming in the Judgment of the Tribunal as symbolized by the imbalance between its findings in favour of the applicant, and the relief granted him, we have no hesitation in emphasizing that the exact quantum of compensation is not for the Court to pronounce upon as it relates to the merits of the case. Moreover, the issue pertaining to compensation has already been the subject of adjudication by the Tribunal and the Court, confined to answering the two specific questions raised ‘in review‘, is not in a position to state what the right relief, or its nature or degree or kind should be to meet the present circumstances.

Nevertheless, it would not be inappropriate in this declaration to state that aspect which vitally affects the applicant and also concerns the overall interests of justice. If the attention of the authorities concerned, whether the Secretary-General or otherwise, is drawn to this aforesaid imbalance in the relief side of the case, the administration of justice would certainly appear to be promoted rather than hindered. This indeed furnishes the true raison d'etre of this declaration.

Judges ONYEAMA, DILLARD and JIMENEZ DE ARECHAGA append separate opinions to the Opinion of the Court.

Vice-President AMMOUN and Judges GROS, DE CASTRO and MOROZOV append dissenting opinions to the Opinion of the Court.

(Initialled) M.L.

(Initialled) S.A.

FN1 Hereafter for convenience called the Committee.

FN2 See doc. AT/DEC/158 of 28 April 1972; Case No. 144, Judgement No. 158, pp. 14-15.

FN3 See doc. AT/DEC/158 of 28 April 1972; Case No. 144, Judgement No. 158, p. 18.

***223** SEPARATE OPINION OF JUDGE ONYEAMA

I have voted on the merits of the Opinion notwithstanding that I do not agree with the Opinion on the view it takes on the question of jurisdiction; in my view, it is for the Court, under Article 36, paragraph 6, of the Statute of the Court, to settle the question of jurisdiction. Its decision on this question concludes the matter in the particular case and is binding on the Court as a whole, subject to the right of Members of the Court under Article 57 of the Statute to express their separate opinions. Having expressed their separate opinions, they should then approach the rest of the case on the footing that the Court's decision on jurisdiction is the right one.

***

I am in agreement with the Opinion that the questions put to the Court should be answered in the negative contrary to the contentions of Mr. Fasla.

There can be no failure to exercise jurisdiction when a tribunal whose judgment is attacked on the ground that it had failed to exercise a jurisdiction vested in it had directed its mind to the issues raised and decided them. A

failure to exercise jurisdiction will arise when the tribunal decides, erroneously, that it has no jurisdiction on the issue submitted, or when it neglects or fails to decide such an issue. A decision on the merits which could be overturned on appeal cannot properly be described as a failure by the trial court to exercise jurisdiction. 'A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision[FN1].' Similarly, a complaint that there has been a failure to exercise jurisdiction is not made out by demonstrating that the tribunal concerned had reached a wrong decision on the merits or erred in its interpretation of the law applicable to the merits.

On the question of a fundamental error in procedure which has occasioned a miscarriage of justice, I have nothing to add to the Opinion in the present case with which, on this issue, I fully concur.

***

I add this separate opinion because I have grave doubts whether the questions***224** put to the Court are receivable from the body which purported to request them; namely the Committee on Applications for Review of Administrative Tribunal Judgments (hereinafter referred to as the Committee).

By resolution 957 (X) on procedure for review of United Nations Administrative Tribunal judgments, the General Assembly established the Committee, and authorized it under Article 96 (2) of the Charter of the United Nations to request an opinion of this Court if the Committee decided that there is substantial basis for an application for review of a judgment of the Tribunal.

The relevant portion of the Statute of the Administrative Tribunal of the United Nations as adopted by the General Assembly by resolution 957 (X) on 8 November 1955 is Article 11 which provides:

> '1. If a Member State, the Secretary-General or the person in respect of whom a judgment has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgment on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgment, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.
>
> 2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.
>
> 3. If no application is made under paragraph 1 of this article, or if a decision to request an advisory opinion has not been taken by the Committee, within the periods prescribed in this article, the judgment of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgment, or give a new judgment, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgment or bring it into conformity with the opinion of the Court.
>
> 4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request ***225** advisory opinions of the Court. The Committee shall be composed of the

Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. The committee shall meet at United Nations Headquarters and shall establish its own rules.

5. In any case in which award of compensation has been made by the Tribunal in favour of the person concerned and the Committee has requested an advisory opinion under paragraph 2 of this article, the Secretary-General, if satisfied that such person will otherwise be handicapped in protecting his interests, shall within fifteen days of the decision to request an advisory opinion make an advance payment to him of one-third of the total amount of compensation awarded by the Tribunal less such termination benefits, if any, as have already been paid. Such advance payment shall be made on condition that, within thirty days of the action of the Tribunal under paragraph 3 of this article, such person shall pay back to the United Nations the amount, if any, by which the advance payment exceeds any sum to which he is entitled in accordance with the opinion of the Court.'

It is clear from this Article that the Committee was set up for the sole purpose of deciding whether or not an advisory opinion should be requested of the Court. No other functions were assigned to it by the General Assembly in the Article or elsewhere.

In the Article reference is made to paragraph 2 of Article 96 of the Charter which provides:

'2. Other organs of the United Nations and specialized agencies which may at any time be so authorized by the General Assembly may also request advisory opinions of the Court on legal questions arising within the scope of their activities.'

It is this provision of the Charter which enables the General Assembly to authorize other organs of the United Nations to request advisory opinions of the Court.

In authorizing other organs to request advisory opinions of the Court the General Assembly must in my view adhere strictly to this Article of the Charter which seems to me in this respect, to lay down the following conditions:

1. The authorization must be to an organ of the United Nations.

2. The organ must be engaged in the performance of certain functions, or be engaged on some activity assigned to it by the General Assembly.

3. The authorization must be limited to requesting advisory opinions on legal questions arising within the scope of the activity of the organ authorized. (Emphasis added.)

It seems to me that if any or all of these conditions are not met the ***226** authorization would be ineffective for its purpose and the organ 'authorized' would in law be incompetent to request an advisory opinion of the Court.

The power of the General Assembly to establish subsidiary organs derives from Article 22 of the Charter of the United Nations which provides that the General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

The term 'subsidiary organ' has not been defined in the Charter and, in practice, appears to have been used interchangeably with such expressions as commissions, committees, subsidiary bodies and subordinate bodies[FN2]. But by whatever name it is called a characteristic feature of a subsidiary organ is that it has been established to carry out certain functions in aid of the principal organ establishing it–functions embraced within the overall functions of the principal organ and closely corresponding to the legitimate activities of the principal organ.

I am of the opinion that the General Assembly cannot legally establish a subsidiary body to perform functions which were not specifically assigned to the Assembly itself, or within the range of its functions.

Thus the Committee on International Criminal Jurisdiction established by the Assembly by resolution 489 (V) to prepare preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court, stated in its report:

> ‘Under the Charter, the Court could only be established as a subsidiary organ. The principal organ would presumably be the General Assembly, but a subsidiary organ could not have a competence falling outside the competence of its principal, and it was questionable whether the General Assembly was competent to administer justice[FN3].‘ (Emphasis added.)

In its Advisory Opinion on Effect of Awards of Compensation Made by the United Nations Administrative Tribunal[FN4] the Court, dealing with a view which had been expressed about the binding effect on a principal organ of the judgment of a subsidiary organ which it had itself created, said:

> ‘In the third place, the view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgments cannot bind the General Assembly which established it.
>
> ***227** This view assumes that, in adopting the Statute of the Administrative Tribunal, the General Assembly was establishing an organ which it deemed necessary for the performance of its own functions. But the Court cannot accept this basic assumption. The Charter does not confer judicial functions on the General Assembly and the relations between staff and Organization come within the scope of Chapter XV of the Charter. In the absence of the establishment of an Administrative Tribunal, the function of resolving disputes between staff and Organization could be discharged by the Secretary-General by virtue of the provisions of Articles 97 and 101. Accordingly, in the three years or more preceding the establishment of the Administrative Tribunal, the Secretary-General coped with this problem by means of joint administrative machinery, leading to ultimate decision by himself. By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations. In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with, particular instances.‘

I understand this Opinion to mean that the General Assembly, in establishing the United Nations Administrative Tribunal, could not have been acting under Article 22 of the Charter as the Charter does not confer judicial functions on the General Assembly, but, that it was exercising a power which it had to regulate staff relations under Chapter XV of the Charter.

In view of the foregoing, it does not appear to me that the Committee, which is charged with a very limited judicial function, is such a subsidiary organ as is contemplated in Article 22 of the Charter.

The Court appears to equate the establishment of a subsidiary organ by the General Assembly to delegation of the performance of its own functions by the Assembly. (I.C.J. Reports 1954, p. 61.)

The Court in the present opinion takes the view, however, that the validity of the establishment of the Committee is saved on the ground that ‘the General Assembly's power to regulate staff relations also comprises the power to create an organ designed to provide machinery for the review of judgments of the [the United Nations Administrative] Tribunal‘.

In my opinion the General Assembly in establishing the Committee set up a judicial or at least a quasi-judicial body, to screen applications for advisory opinions for the Court as provided in Article 11 of the Statute of the United Nations Administrative Tribunal, and to decide, on each application, if a substantial basis for the application exists. There is thus such a link between the Committee and the Administrative Tribunal, as is sufficient to justify the view of the Court ***228** that the establishment of the Committee was a valid exercise of the power to regulate staff relations.

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The functions of the Committee are set out in Article 11 of the Statute of the Administrative Tribunal of the United Nations, and are: (1) to receive the written application of a member State, the Secretary-General or the person in respect of whom a judgment has been rendered by the Tribunal, asking the Committee to request an advisory opinion of the Court; (2) to decide within 30 days whether or not there is a substantial basis for the application; and if there is: (3) to request an advisory opinion of the Court.

The Committee is not charged with the duty of reviewing the judgment of the Tribunal. It is only concerned with the application made to it, and studies the judgement of the Tribunal only for the purpose of deciding if there is substance in the objections contained in the application.

These functions set the limit and define the scope of the activities of the Committee, and it is out of the scope of these activities that the legal questions on which the advisory opinion of the Court can properly be requested under Article 96 (2) of the Charter must arise.

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The purpose of a request for an advisory opinion seems to be to enlighten the body requesting it, and enable it more confidently to deal with legal questions which may present difficulties to it in the performance of its functions. Thus in resolution 171A (II) entitled ‘Need for Greater Use by the United Nations and its Organs of the International Court of Justice‘, the General Assembly recommended that the organs of the United Nations and the specialized agencies, if duly authorized in accordance with Article 96, should refer to the Court for an advisory opinion points of law within the jurisdiction of the Court ‘which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled ...‘ (emphasis added).

In its Advisory Opinion given on 23 October 1956[FN5] the Court stated:

> ‘The question put to the Court is a legal question. It arose within the scope of the activities of Unesco when the Executive Board had to examine the measures to be taken as a result of the four judgments.
>
> ***229** The answer given to it will affect the result of the challenge raised by the Executive Board with regard to these Judgments. In submitting the Request for an Opinion the Executive Board was seeking a clarification of the legal aspect of a matter with which it was dealing.‘ (Emphasis added.)

The Committee has an extremely narrow compass of activities, and the four grounds on which it is ‘authorized‘ to request an advisory opinion from the Court cannot possibly arise within the scope of its own activities. The sole purpose of the Committee's existence seems to be to request advisory opinions on legal questions arising within the scope of the activities of the United Nations Administrative Tribunal. It forms no part of this tribunal and is in no way involved in its activities except, as has been noted, to request advisory opinions on legal questions arising out of those activities.

The advisory opinion requested, and the grounds on which the request can be founded, can in no way affect the manner in which the Committee will perform its function which essentially is to decide whether or not a substantial basis exists in a given case for an application for a review of the judgment of the United Nations Administrative Tribunal by way of an advisory opinion from the Court, and request the opinion. In other words, the legal questions on which it is authorized to request an advisory opinion have no relevance to its own activities.

In my view, an authorization under Article 96 (2) of the Charter in circumstances which enable an organ of the United Nations to request an advisory opinion on legal questions not arising out of the scope of its activities, does not accord with Article 96 (2) of the Charter; and this being the case with the Committee, I am of the opinion that although the Court has jurisdiction to answer a request for an advisory opinion, the present request does not come from a body legally authorized to make it and cannot be received by the Court.

(Signed) Charles D. ONYEAMA.

***230** SEPARATE OPINION OF JUDGE DILLARD

I agree with the decision and operative clauses of the Opinion. I am prompted to add a separate opinion only because in some respects the reasons which have led me to agree do not coincide with those revealed in the Opinion. As will appear, this separate opinion is concerned less with an analysis of facts than with matters of emphasis and with certain theoretical considerations bearing on one of the two principal questions addressed to the Court.

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I agree with the view that the Court should respond to the request and is competent to do so. The only element of doubt, in my mind, attaches to the meaning to be ascribed to Article 96 (2) of the Charter. Read literally it might well invite some question as to whether the ‘activities‘ of the Committee on Applications fall within the originally intended scope of that Article. The Opinion has dealt with this matter in detail and while I believe its analysis can be fortified by certain canons of construction I see no need to elaborate upon them.

In short, it seems clear to me that the opinion is requested by an authorized organ of the United Nations on legal questions arising within the scope of its activities and that the two questions fall within the terms and scope of Article 11 of the Statute of the United Nations Administrative Tribunal. The competence of the Court thus derives from Article 96 (2) of the Charter and Article 65 of its Statute read in conjunction with Article 11 of the Statute of the United Nations Administrative Tribunal.

Under the settled jurisprudence of the Court a request for an advisory opinion should be complied with unless compelling reasons dictate otherwise. This flows from the relationship of the Court to the United Nations in performing its role as the principal judicial organ of the United Nations. Compelling reasons for refusing would, of course, exist if responding to the request would entail a weakening of the integrity of the judicial process.

Under the permissive terms of Article 65 of its Statute, this determination falls exclusively within the province of the Court and should be diligently preserved. Despite the expression of numerous doubts concerning the impact of the proceedings provided for in Article 11, especially as they may impinge on the need for preserving equality between the parties, there is not, in my view, a sufficiently compelling reason for ***231** refusing the request in the present proceedings. At the same time it is important that the Opinion of the Court should not be considered as setting in motion a potential weakening of the judicial process. For this reason, the Court has ap-

propriately sounded a cautionary note, as was done in the Unesco case, by stressing that its decision is strictly confined to the circumstances of the present proceedings and should not be construed as involving any other aspects of the review procedures provided for in Article 11.

I now turn to the specific problems embraced in the two questions addressed to the Court.

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After more than five years of devoted efforts in the service of the United Nations, principally on behalf of the United Nations Development Programme, the applicant found himself without a job. He attributes this, at least in part, to faulty conduct on the part of the United Nations Development Programme in failing to live up to an obligation it had undertaken. The United Nations Administrative Tribunal found that there had been fault, awarded applicant six months' net base salary and in so doing reversed a prior decision by the respondent. Applicant's contention before this Court is thus, not that the Tribunal's judgment failed to vindicate his complaint, but that it failed sufficiently to do so. In support of this contention he reads the Judgment of the United Nations Administrative Tribunal as having failed to consider fully all of his 17 pleas and to support its conclusions with adequate reasoning. This failure, he asserts, is evident from an analysis of the Judgment and is reflected in the ‘woefully inadequate‘ remedies it provided.

A conscientious probing of all the matters in the elaborate dossier supplied the Court on behalf of both the applicant and the respondent might lead a sympathetic reader to the conclusion that the applicant's contract should have been renewed by UNDP or that a new assignment should have been made available–that is to say, that any power of discretion in the matter should have been exercised in his favour. His services under admittedly hardship conditions in Yemen led to certain improving changes in that area and at no time was he charged with performing in an unsatisfactory manner. Indeed the attempts by UNDP to find him another assignment are inconsistent with the notion that he was incapable of discharging his duties in a satisfactory manner. These considerations might have even reinforced an asserted legal right to renewal which, under appropriate circumstances and if properly raised, would have changed the entire complexion of his case, including the amount of compensation justly due in the event renewal was not granted or a new assignment not found[FN1] .

***232** The fact that the applicant was employed under a fixed-term contract does not automatically exclude the possibility of a legal right to renewal. This conclusion can be abundantly demonstrated by the manner in which this Court has interpreted such contracts and by the jurisprudence of the United Nations Administrative Tribunal. Such a legal right can be grounded on the reasonable expectations aroused by implicit as well as explicit assurances that a renewal is to be granted or may be expected. Much, of course, depends on the nature and scope of the assurance and the context in which it was made in light of all the circumstances of the case[FN2].

In his application to the United Nations Administrative Tribunal applicant requested the Tribunal to order the respondent to restore him to the status quo ante prevailing in May 1969 by extending his fixed-term appointment for a further two years beyond 31 December 1969. He did not, however, allege or attempt to demonstrate that he was possessed of an acquired legal right to a renewal of his contract, a fact to which the Judgment itself called attention in paragraph III. The point is important because no explicit assurance of such renewal was ever made. Furthermore, the available facts fail to indicate that it might have been implied[FN3].

The commitment which respondent made in its important letter of 22 May 1969 was a limited one and was couched in language cautiously calculated to dampen rather than stimulate an expectation that its undertaking to use ‘every effort‘ to ‘secure another assignment‘ for applicant would necessarily prove successful. Nevertheless

it was a formal commitment, ‘obviously‘ implying, as the United Nations Administrative Tribunal Judgement itself stated, ‘an obligation to act in a correct manner and in good faith‘ (para. IV). It was the failure to perform this obligation in a reasonable manner by disseminating ‘incomplete if not inaccurate‘ fact-sheets which constituted the basis for the United Nations ***233** Administrative Tribunal's Judgment awarding applicant relief (paras. VII and VIII).

The Opinion has addressed itself to the consequences flowing from this finding of fault with great thoroughness, and in paragraphs 56 and 57 it sought to demonstrate that a single act, viz., the dissemination of faulty fact-sheets, was both the cause for the inadequate performance of the obligation by the respondent and the basis for the claim that the applicant had suffered injury to his professional reputation and career prospects. I do not agree. In my view, it does not follow that a single source need have a single consequence; on the contrary, the damage to reputation and career prospects is sufficiently distinct to fall in a different category from that attributable to the failure to act in a correct manner and in good faith in the effort to secure another assignment for the applicant. Theoretically at least, the former may have already occurred and may have persisted even if the latter had been ultimately remedied by the respondent. True, the method used by the respondent contributed to the injury caused to the applicant's professional reputation and career prospects but that is not to say that the double consequences flowing from it need be linked together[FN4].

The matter, which involves certain analytical refinements, need not, however, be pressed since, in my view, the Opinion has correctly concluded that there had been no failure to exercise jurisdiction. As will appear later, I rest this conclusion not on ‘a single fault and consequence theory‘ but on the very narrow scope correctly attributed by the Opinion to that ground of objection, viz., ‘failure to exercise jurisdiction‘ vested in the Tribunal, specified in Article 11 of its Statute and relied upon by the applicant.

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In the written statements before this Court, applicant's newly assigned counsel in a forceful, earnest and even eloquent fashion, attempted to shift the focus of the argument in order to provide a new perspective on the case which, allegedly, was insufficiently apprehended by the United Nations Administrative Tribunal.

The major thrust of this contention as revealed in his last two statements before this Court (December 1972 and January 1973) may be crisply described as a ‘vendetta‘ or conspiracy charge combined with a ‘link‘ theory. The former is asserted to stem from prejudice on the part of some of the hierarchy of UNDP and the latter links this prejudice to the efforts of applicant in ‘cleaning up the mess in Yemen‘ and in ***234** exposing corruption, to the great embarrassment of his superiors. It was the failure of the United Nations Administrative Tribunal to appreciate and even investigate the latter and to link it to the former that, in applicant's view, constituted both a fundamental error in procedure which has occasioned a failure of justice and a failure to exercise jurisdiction vested in the Tribunal.

Thus in his corrected statement of December 1972 (para. 122, p. 42) applicant asserted:

> ‘In other words, the acknowledged failures to maintain Applicant's file in fair condition or to make an adequate search for further employment must be linked to the underlying factual claim of the Applicant ... In a more technical vein, it is the failure of the Administrative Tribunal to investigate the link between Applicant's response to corruption in the Yemen office of the UNDP and the subsequent treatment of him at Headquarters that constitutes the main basis for an affirmative response to the two questions put to this Court for an Advisory Opinion.‘ (Emphasis added.)

The same note was sounded in his comments of January 1973 (para. 6 at pp. 6 and 7):

> ‘The failure of the Administrative Tribunal to render appropriate relief must be understood in relation to this documented refusal of the UNDP to carry out either the substance or the spirit of the earlier recommendations of the Joint Appeals Board. In turn, such a refusal has to be assessed in relation to the underlying failure of the UNDP to protect Applicant from damages that followed from assigning him the task of straightening out a situation of undisputed corruption and dereliction in the Yemen office of UNDP. It is the magnitude of this inequity in relation to the experience of the Applicant in seeking some satisfaction for his grievances that is at the center of his contentions. It is for this reason, also, that it becomes evident that the relief and reasoning, of the Administrative Tribunal in its Judgement No. 158 must be understood as 'woefully inadequate’ that is, to find on the merits so clearly for the Applicant and yet to grant relief that does not begin to rectify the wrongs inflicted is to compound the injustice. The Respondent's statement confuses this problem by its contention that Applicant's complaints were directed toward the inadequacy of the award rather than, as we have made clear, the link between the findings and the relief, i.e., the essence of the Judgement itself.‘ (Emphasis added.)

The respondent's response to this particular contention submits two points. The first is simply that it has not been adequately established and the second is that, in so far as it would have entailed an independent investigation by the United Nations Administrative Tribunal, the latter body is neither charged with such a responsibility nor equipped to handle it.

***235** The applicant, on the contrary, contends that the contention has been established by a necessary inference flowing from the documented facts[FN5]. Furthermore he asserts that it furnishes the underlying motif for the more specific pleas addressed to the United Nations Administrative Tribunal and justifies the contention that each of them should have been considered in light of the fundamental prejudice animating the actions of UNDP. So viewed, the gross disproportion between the injury suffered and the compensation awarded would be seen in proper perspective. This, he asserts, is particularly true of pleas (d) and (g), which he claims were summarily dismissed by the Tribunal.

The Opinion has described and analysed this contention in paragraphs 79 through 87. I agree with this analysis as applied to the present case but am moved to sound a cautionary note.

In my view this particular contention of the applicant is related less to the facts, though they are obviously important, than to the ‘perception‘ of those facts by the United Nations Administrative Tribunal. It is a question of the failure of the Tribunal to act not so much as an investigating body but as a body which has been put on notice of the facts and has failed to react by either drawing the proper inferences from them or ‘seeing‘ their relevance to the pleas advanced by the applicant[FN6].

It should be borne in mind that a reviewing body, responding to a request for an advisory opinion in the exercise of what is presumably a non-appellate function, is not strictly confined to the record sent up from below. As stated in the Unesco case (I.C.J. Reports 1956, p. 87):

> ‘The Court is not confined to an examination of the grounds of decision expressly invoked by the Tribunal; it must reach its decision on grounds which it considers decisive with regard to the jurisdiction of the Tribunal.‘

It is submitted that this observation is more compelling when the issue centres not on the jurisdiction of the Tribunal but on its ‘failure to exercise jurisdiction‘ and when the provisions of Article 11 contemplate that the

Tribunal should conform its Judgement to the opinion of the Court.

***236** Nevertheless there is an obvious limit to the extent to which arguments advanced de novo can be effectively employed to alter completely the case as presented before the Tribunal. As previously noted, applicant's case was not rested on the assumption that an acquired right to renewal was in issue or that the fault attributed to respondent was an invasion of that right. Furthermore the argument rested largely on inferences from facts which were not adequately supported by the record. At the theoretical level the argument also failed adequately to take into account the limited scope of the two grounds for review embraced in Article 11 of the Tribunal's statute which were in issue before the Court. It is to a consideration of these grounds that I now turn.

***

I agree with the reasoning of the Opinion and its conclusion that the present proceedings fail to reveal ‘a fundamental error in procedure which has occasioned a failure of justice‘ (emphasis added).

It might have been supposed that, to avoid redundancy, the italicized clause qualified in some way the meaning of the antecedent clause and by so doing extended the range of inquiry into an area inviting an analysis of complex problems of ‘justice‘ including concepts of ‘proportionality‘ so much debated since the time of Aristotle. It is abundantly clear from the legislative history of Article 11, however, that no such consequence was intended but, on the contrary, that the clause, which does not appear in the comparable provision of the ILO Administrative Tribunal, was added merely to reinforce the notion that the error must be a fundamental one. It is true that the reason supplied to justify the amount of the award appears to be cryptic, but nevertheless the Judgement was sufficiently reasoned to avoid the implication of a fundamental error in procedure within the meaning correctly ascribed to this concept by the Opinion.

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The meaning and potential application of the second ground of objection, viz., that the Tribunal ‘has failed to exercise jurisdiction vested in it‘ is more difficult to analyse. The Opinion, in paragraph 50, has drawn from the legislative history of this provision the conclusion that it has a ‘comparatively narrow scope, i.e., as concerned essentially with a failure [of UNAT] to put into operation the jurisdictional powers possessed by it–rather than with a failure to do justice to the merits on the exercise of those powers. It is thus concerned with matters of jurisdiction or competence in their strict sense‘ (emphasis added).

While I do not think this conclusion is necessarily compelled, inasmuch as the provision was presumably inserted for the benefit of applicants rather than the reverse, it is yet, in my view, sufficiently supported by the ***237** legislative history of Article 11 to constitute an authoritative interpretation of the provision.

So viewed, it may be contrasted with the third ground of possible objection to a judgement embraced in Article 11 which, while not formally included in the questions put to the Court, may serve to illuminate the limited scope of those that were so included. Although the meaning and scope of the third ground must await possible future interpretation, it yet seems clear, on the face of it, that the contention that the Tribunal has ‘erred on a question of law relating to the provision of the Charter of the United Nations‘ would not call directly into play the issue of whether the Tribunal has exceeded its jurisdiction or has failed to exercise it, but rather that of whether it has correctly applied the law it is competent to administer. This would appear to require a review of substantive legal issues, and, as such, to constitute a challenge to the judgement on the merits[FN7].

In striking contrast, the scope of review in the present proceedings, as previously noted, is strictly confined to a jurisdictional issue even when the applicable norm is stated to be a failure to exercise jurisdiction. Such issues are primarily concerned with the proper allocation or distribution of the power to decide the merits of a controversy in the face of competing claims to the exercise of such power by another organization or agency. Only incidentally are they concerned with the merits themselves. It is precisely this factor, in the absence of competing claims to authority, which makes a review proceeding directly involving individual rights appear to be, if not utterly illusory, at least, highly inappropriate. In a normal case, as in the present one, the individual is obviously less concerned with the power of the tribunal to hear the case, whose jurisdiction he has himself invoked, than with the way it exercises it. And, even if substantial equality between the parties is preserved, as was contemplated by Article 11, a decision on purely jurisdictional grounds is likely to arouse a feeling of frustration on the part of the individual to the extent that the merits embraced in his objections remain undetermined by the reviewing body.

This consequence would be particularly telling if the lower tribunal could be deemed always to have exercised jurisdiction by the simple device of listing all pleas, considering some and disposing of all that remained through the comprehensive and usual formula employed by the Tribunal that ‘the other requests are rejected‘. If one of applicant's pleas ***238** were obscured by being included within the scope of such a formula, how could he effectively challenge the exercise of jurisdiction by the Tribunal? By hypothesis, it has assumed jurisdiction over all pleas; hence none is neglected. A challenge based on a failure to exercise jurisdiction over a plea rejected in the collective formula would then invite the curious contradiction that although the Tribunal had exercised jurisdiction, it had yet failed to do so. An objection based on this ground would then appear to be stripped of all decisive legal and practical significance.

The above observation is not intended to imply any criticism of the Tribunal's methods in analysing and disposing of the numerous pleas in the many cases it is called upon to consider and decide. It is merely intended to direct attention to one of the peculiar difficulties which inhere in the very concept of a failure to exercise jurisdiction when invoked by an individual applicant as a ground of objection to the Tribunal's judgement.

Considerations of this kind underlie, in my view, the significance and purport of paragraph 51 of the Opinion. That paragraph makes it abundantly clear that the Administrative Tribunal must have regard to the substance of the matter and not merely the form; that a mere purported exercise of jurisdiction is insufficient and that the Tribunal must in fact have applied its jurisdictional powers to the determination of the material issues.

Nevertheless it remains true that this ground of objection concerns only a failure to put into operation jurisdictional powers ‘rather than a failure to do justice to the merits on the exercise of those powers‘. This does not rule out an analysis by the Court to determine whether the judgement omitted a particular material issue or treated a particular plea in a purely perfunctory manner. The Opinion has addressed itself to this matter with manifest thoroughness. It does mean that once it is determined that the Tribunal has ‘applied its mind‘ to the material issues, the Court's reviewing role is strictly limited. It is thus apparent that both legally and practically the scope allowed this ground of objection is so narrowly confined as to leave little, if any, room for the Court to deal with the merits.

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This concededly theoretical analysis leads up to an additional aspect of the Opinion with which I am not in full agreement although I agree with the conclusions stated in the operative clauses. It concerns the relationship

between an alleged failure to exercise jurisdiction and the remedies provided by the Judgment.

In the Factory at Chorzow case, the Permanent Court of International ***239** Justice announced a general principle governing reparation in the following terms:

> 'The essential principle contained in the actual notion of an illegal act–a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals–is that reparation must, so 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.' (P.C.I.J., Series A, No. 17, p. 47.)

The question therefore arises as to whether a ground of objection based on 'failure to exercise jurisdiction' may be based on an alleged failure to provide adequate relief. Bearing in mind that the Tribunal will have normally addressed its mind to the matter, may the 'adequacy' of the compensation awarded in lieu of specific performance be the object of legitimate challenge?

The reach of this question is obviously important viewed both theoretically and practically. In the Opinion (para. 64) the question is located in the context of the exercise by the Administrative Tribunal of 'reasonable discretion'. It is there stated that 'the obvious unreasonableness of the award could be taken into account in determining whether there had been a failure to exercise jurisdiction within the meaning given to this term by the Court in paragraphs 50 and 51 above' (emphasis added). It will be recalled that this meaning was a very restricted one keyed to the concept of jurisdiction in the strict sense. The Opinion cautiously indicates that only in an extreme case may it be considered that there had been a failure to exercise jurisdiction. Its view that such an instance would be highly exceptional is reinforced by ascribing to the Tribunal a 'wide margin of discretion' within the broad principle of reparation announced in the Factory at Chorzow case.

The sluice gate this opens to a possible review may be a narrow one, nevertheless it permits an opening and in one sense, at least, it appears inconsistent with the purely 'jurisdictional' concept attributed to an objection based on a failure to exercise jurisdiction. This follows because it allows the 'obvious unreasonableness' of the award to constitute an independent ground of review distinct from the omission by the Tribunal, either through inadvertence or design, to address itself to one or more material issues in the case as indicated in paragraph 51 [FN8].

***240** In my view an approach more consistent with the antecedent analysis would compel the conclusion that the amount of the award, in and of itself, is not sufficient for holding that the Tribunal has gone beyond the exercise of reasonable discretion and, further, that standing alone it does not constitute a failure to exercise jurisdiction within the strict, jurisdictional meaning ascribed to that term. Nevertheless, it is distinctly relevant in determining whether the Administrative Tribunal has, in fact, omitted to consider one or more material issues or that it has considered one or more of them in such a perfunctory manner as to amount to an omission.

Applied to the present case the argument would be that the amount of the award indicated that the Tribunal either had not 'applied its mind' to the question of the injury to the applicant's professional reputation and career prospects or that the Judgement revealed in paragraph XIII that it had done so in such a perfunctory manner as to constitute an omission. This argument would be fortified by the not altogether unreasonable assertion that while the award could be logically related to the failure to use reasonable good faith efforts to find applicant another assignment, it bore no sufficient relation to the damage to his professional reputation or career prospects.

In my view this is the most plausible single argument which might have proved effective at the trial level in the present case. The Opinion has addressed itself to it with great care and the reasons for rejecting it at the review

level need not be repeated in this opinion. As previously indicated I do not agree entirely with the reasons advanced in so far as they relate to a ‘single consequence‘ approach[FN9]. However I agree that the Administrative Tribunal did address itself to the problem, that its margin of discretion includes an appreciation of the facts and that the very narrow scope accorded the concept of a ‘failure to exercise jurisdiction‘ leaves very little room for the Court to say that the Tribunal has failed ‘to put into operation its jurisdictional powers‘. Inasmuch as it has done so, the conclusion follows that it has not failed to exercise its jurisdiction.

***241** By way of conclusion, I venture to make one additional observation. The fact that an advisory opinion affects the rights of an individual may not be sufficient, in itself, to question the propriety of rendering it. It should be appreciated, however, that when the request for the opinion is generated by a dispute between two parties and the dispute is not, itself, keyed to a jurisdictional issue, while, at the same time, a principal ground for review, relied upon by the applicant, is limited to such an issue, a certain element of artificiality attends the reviewing process. This, in my view, is the principal lesson to be drawn from the present request for an advisory opinion.

(Signed) Hardy C. DILLARD.

***242** SEPARATE OPINION OF JUDGE JIMENEZ DE ARECHAGA

While concurring entirely in the reasoning and the operative part of the Court's advisory opinion I wish to state certain additional considerations which show why it would be unjustified, in my view, for the Court to refuse to comply with the request.

The system of judicial review established by the General Assembly in 1955 was to a certain degree inspired by certain general observations which were made by the Court in its 1954 Advisory Opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal. In that Advisory Opinion the Court interpreted the question put to it as directed to awards ‘made within the limits of the competence of the Tribunal‘, and not referring to those awards ‘which may exceed the scope of that statutory competence‘ (I.C.J. Reports 1954, p. 50). It was with respect to the former awards that the Court advised that ‘the Organization becomes legally bound to carry out the judgment‘, and that ‘the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment‘ (ibid., p. 53).

After reaching that conclusion the Court examined the question ‘whether the General Assembly would in certain exceptional circumstances be legally entitled to refuse to give effect to awards of compensation made by the Administrative Tribunal‘ (ibid., p. 55).

After recalling that ‘the first Question submitted to the Court asks, in fact, whether the General Assembly has the right to refuse to do so 'on any grounds'‘, the Court stated:

> ‘When the Court defined the scope of that Question above, it arrived at the conclusion that the Question refers only to awards of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence, and the previous observations of the Court are based upon that ground. If, however, the General Assembly, by inserting the words 'on any grounds', intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award, there would arise a problem which calls for some general observations.‘ (I.C.J. Reports 1954, p. 55.)

The Court's ‘general observations‘, following this paragraph, were therefore addressed to those cases in which the validity of an award had been challenged on the ground of its being in excess of the Tribunal's competence or having other serious defects capable of vitiating it.

***243** The Court said in this respect:

> ‘In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal. Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ–considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them–all the more so as one party to the disputes is the United Nations Organization itself.‘ (Ibid., p. 56.)

It was in this context, then, that the Court made in 1954 its thinly veiled suggestion for the establishment of a system of judicial review which would have the consequence of excluding such a review by the General Assembly itself. In making these observations the Court must have taken into account the fact that in 1946 a decision was adopted in the Assembly of the League of Nations and in 1953 arguments were advanced in the General Assembly of the United Nations which presupposed that these political bodies had the power to refuse to comply with awards which they considered to exceed the competence of an administrative tribunal.

The basic purpose of the 1955 amendments to the Statute of the Administrative Tribunal thus appears to have been to deal with the question raised in the general observations of the Court which have been cited above in the way suggested therein. This explains why the system of judicial review established in 1955 is confined to certain specific grounds upon which the validity of a judgment may be challenged: excess of or failure to exercise jurisdiction or a fundamental error in substantive law or in procedure. This also explains why the amendments adopted exclude the possibility that the General Assembly may itself pronounce on the validity of an award which has been challenged.

The essential feature of the system of judicial review as adopted in 1955 is that a judgement the validity of which has been challenged may only be treated as invalid by the United Nations or any other international organization concerned if the Court has found, in an advisory opinion, that the challenge is well founded.

***244** The system of judicial review thus adopted by the General Assembly amounts to a self-denial of any unilateral power of annulment or of refusal to comply with a judgement of the Administrative Tribunal the validity of which has been challenged. Therefore, this system, viewed as a whole, constitutes a definite step forward in the establishment of guarantees for the ju icial determination of the validity of contested international awards, and by entrusting to the Court the responsibility for such a determination, it enhances the judicial role of the Administrative Tribunal and the judicial nature of its awards.

The fact that an organ such as the Committee on Application for Review is called upon to screen the applications and seise the Court cannot be considered to be such a serious defect as to counteract the progressive step taken, and still less to justify the adoption by the Court of a negative position which would frustrate the purpose of the system of judicial review established in 1955.

The need for some screening organ designed to avoid frivolous or unjustified objections being brought before the Court cannot be denied. Nor would criticism of this screening organ appear to be justified on the ground that

it has taken a strict or even a rigorous view as to the existence of ‘substantial basis‘ for requesting an advisory opinion from the Court. Such an attitude cannot be presumed to result from any deliberate policy or improper instruction but from the fact that, as Court itself indicated in 1954, those cases in which the validity of an award, and not its justice, is challenged, constitute, ex definitione, ‘exceptional circumstances‘ (I.C.J. Reports 1954, p. 55).

Despite the rarity of the occasions for the exercise of such a review the mere existence of the system has beneficial effects, because of the care which must be exercised by the Administrative Tribunal in each of its judgements. An organ of first instance does not know in advance which of its decisions is going to be scrutinized later by a higher tribunal.

As to the political composition of the Committee on Applications, this criticism may be exaggerated and the negative consequences which are deduced from it are in my view unjustified. We are, after all, concerned with international awards affecting member States, since those member States are finally bound to pay, directly or indirectly, any amounts awarded.

In respect of international awards in general, the States affected by them possess under international law an undeniable right to challenge their validity, if they consider that there are grounds justifying such a challenge, subject of course to a general obligation to submit the dispute to methods of peaceful settlement. No criticism has ever been voiced in this respect on the ground that the challenge emanates from a political body–which the State undoubtedly is.

In the case of awards of the Administrative Tribunal, some progress has been made as a result of Article 11 of the Statute of the Administrative Tribunal. Instead of each State concerned retaining its individual power ***245** of challenge, it is an organ of the United Nations which is called upon to decide by a majority vote whether or not there is a substantial basis for the challenge which is requisite to seise the Court of the matter. It has also been formally provided that the review procedure may be initiated by an application from any of the parties to the dispute to which the award refers, thus giving those parties the additional guarantee of being able to set in motion the review proceedings. (Incidentally, in Art. XII of the Statute of the ILO Administrative Tribunal–on the basis of which the Court gave its 1956 Advisory Opinion–while the Executive Board of the international organization concerned, composed of member States, is empowered to challenge the judgments, it has not been found necessary to give the same additional guarantee to the parties of the original dispute.) There is further an obligatory submission of the challenge to the advisory jurisdiction of the Court followed by an opinion of the Court to which binding force has been accorded.

The suggestion that the Court should refuse to comply with the request because of the composition of, or the strict policy followed by, the Committee in dealing with applications would lead to practical consequences that could only aggravate the supposed defects.

The situation would not be changed with respect to those cases in which no substantial basis has been found; for them the judgement of the Administrative Tribunal would remain final and unreviewable. The only difference arising in this respect from a negative position of the Court would be that the beneficial preventive effects of the mere existence of a review system on administrative tribunals' judgements in general would be eliminated.

In those cases where it has been found by a majority decision of the Committee on Applications that there is substantial basis for the challenge, the situation (should the Court take a negative position) would be much worse: there would be no judicial review of a judgement in respect of which at least a majority of a body com-

posed of 25 States had considered it should be referred to the Court. It may be feared that the disappearance of the system of judicial review established in 1955 might again resurrect, in the event of a repetition of certain circumstances, those ideas and proposals which prevailed in 1946 and were forcefully advanced again in 1953 advocating the power of the General Assembly to refuse to comply with, or to pronounce the invalidity of, awards challenged by member States as being ultra vires.

(Signed) E. JIMENEZ DE ARECHAGA.

FN1 I.C.J. Reports 1956, p. 98.

FN2 UN Repertory I, p. 224.

FN3 GA (VII), Suppl. No. 11 (A/2136), para. 21.

FN4 I.C.J. Reports 1954, pp. 60-61.

FN5 I.C.J. Reports 1956, p. 84.

FN1 The relevance of this seemingly digressive point will be alluded to later in connection with applicant's ‘principal contention‘.

FN2 It is unnecessary to elaborate on this point in the main body of this Opinion. It was thoroughly argued by counsel and discussed in the Unesco case (I.C.J. Reports 1956, pp. 90-97), where the facts revealed an explicit assurance, and in many cases before UNAT where the assurance was implicit.

FN3 Whether such an assurance might have been implied would depend on an analysis of all the circumstances of the case. In Dale (Judgement No. 132), the applicant argued that Yanez (Judgement No. 112) recognizes the possibility of the Tribunal undertaking an examination of the reasons for a discretionary decision when such decision affects a right or legitimate expectation of renewal. Respondent had argued that the conclusion of a new contract was within his discretionary power. Relying on Yanez he asserted the Tribunal could not inquire into the reasons or grounds for the decision not to renew the contract.

> The Tribunal, however, following the argument of applicant stated that it must ‘consider whether in the circumstances of the case, the Respondent was under an obligation to renew the applicant's contract upon its expiration‘. Under the circumstances of the case, it assessed Dale's frustrated expectations in the amount of a one-year contract.

FN4 It should be added that the capacity of the United Nations Administrative Tribunal to award compensation for injury to professional reputation and career prospects, even if not mandated by Article 9 of its Statute, is permitted by it. Furthermore the fact that the damages appropriate to such injury cannot be ascertained with certainty does not entail the consequence that they are merely speculative. In Higgins (Judgement No. 92) damages were awarded for mental suffering.

FN5 While this contention runs like a thread throughout applicant's many statements it is made particularly explicit in Annex 86, para. 147.

FN6 It is appreciated that one of the difficulties in any review proceeding consists in determining the line to be drawn between the exercise of non-reviewable discretionary power on the one hand, and the misuse of that power on the other hand. Occasionally this turns less on the actual facts than on the way they are apprehended

and characterized in light of applicable legal standards. In my view applicant's major contention, while not sufficiently established, could not be said to be irrelevant.

FN7 The point is made with admirable clarity and characteristic thoroughness by Professor Leo Gross in connection with the problem of equality of the parties. Gross, ‘Participation of Individuals in Advisory Opinions before the International Court of Justice: Questions of Equality Between the Parties‘, 52 A.J.I.L. 16 (1958).

FN8 A measure of Statute of the Administrative Tribunal. Paragraph 5 of Art. 11 clearly contemplates the possibility that an award by the Administrative Tribunal might be excessive and, if so, a rebate by the person to whom a one-third advance had been made, based on the award would be required to be made to the extent that the sum advanced exceeds the amount to which he is entitled ‘in accordance with the opinion of the Court‘. While the matter is not altogether free from doubt, it would appear that if the Court is invested with some control over an excessive award, it might, by parity of reasoning, also have some control over an ‘obviously unreasonable one‘ running in the other direction. In other words, paragraph 5 may indicate that a consideration of the relationship between the findings of the Tribunal and the amount of the award may fall within the province of this Court on review. However, as indicated, the matter is not free from doubt and need not be analysed in this opinion. Conceivably an excessive award might have resulted from the fact that the Tribunal had exceeded its jurisdiction.

> It is hardly necessary to add that the Court would, in no instance, be called to define the exact extent of a ‘failure to exercise jurisdiction‘ or to fix the amount of compensation that is appropriate. The latter function falls within the province of those charged with carrying out the provisions of Art. 11 (3) of the Tribunal's Statute.

FN9 I am impelled to add that I cannot subscribe also to the view expressed in para. 63 of the Opinion that the ‘circulation among the recipients of the original letters would have provided specific relief for the harmful effects resulting for the applicant from the previous circulation of the incomplete fact-sheet‘.

***246** DISSENTING OPINION OF VICE-PRESIDENT AMMOUN

[Translation]

I fully share the Court's view concerning its competence and the propriety of responding to the request for an advisory opinion, and I concur in its conclusions with regard to Question II.

Where Question I is concerned, however, I regret that I am unable to subscribe to a view the effect of which is to dismiss the applicant's claims for damages for injury to his professional reputation and future employment opportunities, and for the reimbursement of the costs he incurred through having, on account of the complexity of the case, to travel from California to New York in May 1970 and to hold frequent transcontinental telephone conversations with his counsel before and after then.

> (1) Dismissal of the claim for damages for injury to the applicant's professional reputation and future employment opportunities, inasmuch as the Tribunal's rejection of it did not constitute a failure to exercise jurisdiction

The reparation of injury caused by fault is a principle of universal application in municipal law; in international law, it has also been said that:

> ‘The principle laid down by international practice is that the victim must be put in the position in which he would have been if the act which caused the injury had not occurred: the reparation is to be matched as

closely as possible with the damage suffered. The reparation should be equivalent to the damage.‘ (Personnaz, La reparation du prejudice en droit international public, p. 98.)

Are there, however, any reasons why the United Nations Administrative Tribunal could not give a decision on a claim for reparation, wholly or in part? And in particular a claim for the reparation of injury to the applicant's professional reputation and future employment opportunities?

The administration has queried the Tribunal's power to award the damages which might otherwise be due in respect of such injury.

In its opinion, paragraph 3 of Article 9 of the Tribunal's Statute was never intended to create an independent obligation or even a power of the Tribunal to award compensation in circumstances other than those provided for in paragraph 1 of Article 9, that is to say: non-observance of the staff member's contract of employment or the terms of his appointment.

***247** Clearly, what is being argued here is that damages cannot be awarded by the Tribunal by way of reparation for injury suffered by the applicant to his professional reputation and future employment opportunities, because these do not fall within the framework of the contract of employment or the terms of appointment.

I do not have the impression that this can be correct.

This is because the reparation of injury caused by fault is one, if not indeed the most important, of the principles common to nations in the sense of Article 38, paragraph 1 (c), of the Court's Statute, and one of the traditional bases of law.

It may of course be pointed out that in this case we are dealing with a provision determining a question of competence–that of the Administrative Tribunal–and not a text enshrining the principle of compensation for an act or omission amounting to a fault. But a logical interpretation of paragraph 1 of Article 9 will serve to reconcile the principle and the competence. In other words, one must consider what is the scope of the contract linking the applicant and the administration, in order to ascertain whether a contractual fault may be imputed to the latter: this would be–precisely–a non-observance of the contract of employment or a breach of the terms of the applicant's appointment.

Now can there be any doubt but that the employer must, in his behaviour toward the employee, respect his personality and not injure him in his dignity and honour? It is from the contract linking them that this obligation arises, as it is also the normal terms of appointment which require it.

If, therefore, it is proved that as a result of the employer's incorrect entries on the record an employee has wrongly been described as incompetent or otherwise blameworthy, is that not a fault on the part of the employer which gives rise to an obligation to repair the injury caused the employee?

I would add that the responsibility and the resultant compensation cannot be excluded, nor the consequences of the one and the amount of the other be limited, in the contractual regime governing the administration and the applicant, unless both parties so agree (League of Nations, Official Journal, 1927, pp. 206 f.). If the Tribunal, in refusing compensation wholly or in part, based itself on a practice or instructions–or on a statement like that of 14 December 1950–which are not part of the Staff Rules and Regulations or of the contract knowingly accepted, would it not have been failing to exercise jurisdiction, wholly or in part? This is naturally a different matter from

the sovereign discretion which a tribunal deciding the merits of a case enjoys in the assessment of the damages due.

I cannot, moreover, refrain from observing that I find the statement of 14 December 1950 unacceptable in view of the principle that a tribunal may not, by a measure or regulation of general scope, lay down a rule which would reach out beyond the pending case to affect future proceedings***248** like a legislative text which is incompatible with the judicial function.

In fact, the applicant, in claim (n) in his application of 31 December 1970, asked the Tribunal to order the administration to pay him a sum equivalent to five years' net base salary as compensation for the injury caused to his professional reputation and career prospects as a result of the circulation by the administration, both within and outside the United Nations, of incomplete and misleading information concerning him.

The Judgement dismisses this claim en bloc with certain others, without there being the slightest reference in its reasoning to the injury caused to his professional reputation and career prospects.

Contrary to what is asserted by the administration in its first written statement to the Court (para. 22), this claim is not so bound up with a number of other claims ‘concerning the means and diligence with which the UNDP had tried to place Mr. Fasla‘ that the stated grounds of decision concerning them may be taken to apply to it also, as is further maintained. In any case, the grounds relating to certain so-called ‘interdependent‘ questions resulted in decisions favourable to the applicant. How, therefore, can it be admitted that the argument in the Judgement taken as a whole, including these grounds, may be regarded as reasons for the dismissal of claim (n)?

What is more, the injury to professional reputation and career prospects constitutes a contractual fault and a tort.

A tort, like a crime, has two components, one material, one moral.

To find upon a tort, it is necessary to discuss both its material and its moral component.

What, I now ask, did the Tribunal do? Did it discuss the moral as well as the material component?

I agree that some facts entering into the material component were discussed. But not all of them. The Tribunal found that there had been certain wrongful acts for which the administration was responsible; it even annulled a false report. But it did not discuss these facts in their entirety.

By way of example, I would refer to the element of publicity. The degree of injury to reputation depends on the amount of publicity given to the false or incomplete information. But the element of publicity as such was not treated by the Tribunal, which therefore failed to give reasons for its rejection of all the facts entering into the material component of the injury to the applicant's professional reputation and future employment opportunities.

The moral component is arrived at as follows: if the material facts, including the degree of publicity, have been established, were they likely ***249** to have injured the applicant's reputation in his social circle and in the context of his professional activity, and does that mean that his future candidature for posts has been affected?

This moral component was ignored in the consideranda of the Tribunal, except in so far as it noted the applicant's reliance thereon.

It must therefore be concluded that the Tribunal, by not finding upon the reparation due for the injury caused to

the applicant's professional reputation and future employment opportunities, failed to exercise its jurisdiction.

(2) Refusal, on the ground already mentioned, of the request for compensation for necessary and unavoidable costs in excess of normal litigation costs

An order for payment of costs by the losing party is a general principle, unless the tribunal with good reason decides otherwise.

The League of Nations Administrative Tribunal was the first international tribunal to affirm that there is a general principle of law to the effect that the costs are paid by the losing party (Judgement No. 13, Schumann, 7 March 1934).

It has been denied in this connection that a practice can be regarded as a general principle of law when it runs counter to the Common Law system and, to a certain extent, the law of the United States of America. The Memorandum A/CN. 5/5 (paras. 11-14) which sets out this view is a closely reasoned document, which however betrays a predominant Anglo-American influence. The question being, of course, of considerable importance, it will be as well to dwell upon it.

It should be observed that the law applied by the International Court of Justice, while it is close to Anglo-American law in certain fields, such as in the notion of estoppel, diverges from it radically through the adoption of Article 59, in combination with Article 38, paragraph 1 (d), of the Statute, which excludes the system of precedents, as well as through the power to make an Order for costs, conferred by Article 64 of the Statute, notwithstanding the attitude of Common Law, which itself is more flexible than American practice. The United Nations and ILO Administrative Tribunals, following the League of Nations Administrative Tribunal, have consciously opted in favour of the continental practice, which is that of the International Court of Justice.

The fact is that a common administrative law is in course of formation, in the same way as international law, in which continental law predominates, but which is tending towards unity and becoming universal. It cannot be otherwise with a principle like that of full reparation, including damages and costs.

Furthermore, I am not sure it is true that there is no relationship between reparation and costs. As has been pointed out above, there is no doubt that ‘the reparation should be equal to the damage‘. But the direct damage suffered by the victim includes, both equitably speaking ***250** and as a matter of logic, the expenses incurred in making good his rights; in other words, as Personnaz expresses it, ‘the victim must be put in the position in which he would have been if the act which caused the injury had not occurred‘. From the equitable viewpoint, this would not be the case if, in order to be put in the same position, he had to bear costs, sometimes heavy costs, which would correspondingly diminish any damages awarded.

Thus the obligation on the losing party to bear the costs could be regarded either as a general principle or law in itself, as stated by the League of Nations Administrative Tribunal, or as an application of the equity principle deriving from Article 38, paragraph 1 (c), of the Statute of the Court.

It is true that the Statute and Rules of the Administrative Tribunal do not include any provision laying down this principle, and setting out how it is to be applied. Nonetheless, the Tribunal of the United Nations could not wash its hands of it. Continuing the line of cases of the League of Nations Tribunal, it has made awards of costs against the losing parties in 17 cases, which confirms that the Tribunal has regarded the making of an order for costs as a general principle, even though the Statute does not provide for it.

In a number of these Judgements, the Tribunal considered that it was justified in awarding compensation for the fees of applicant's counsel, since its rules authorized the applicant to be represented by counsel (United Nations Administrative Tribunal, Judgements Nos. 2, 3, 15 and 28-38 of 21 August 1953). For the ILO Administrative Tribunal this has also become practically a rule (Jurisclasseur de droit international, Les Tribunaux administratifs, para. 88; see in particular Judgments 17, 18 and 19 of 26 April 1955, with the participation of Georges Scelle as a member of the Tribunal).

There remains the question whether the obligation imposed on the United Nations staff member, of restricting his choice of counsel to those on a given list on pain of inability to recover the fees, is not in certain cases a breach of the rights of the defence.

What is more, repayment of travel and subsistence costs incurred by the applicants to attend sittings of the Tribunal away from Headquarters has been granted by the Tribunal (Judgement No. 3, Aubert, and 14 others, 26 July 1950; Judgement No. 15, Robinson, 11 August 1952). Should this not also be the case when the applicant must come from a place of residence which is a long way from United Nations Headquarters?

It would seem that international administrative tribunals should take into account the fact that staff members or employees who appear before them may have to bear much heavier expenses than parties before a municipal tribunal, because of the longer and more expensive journeys which international officials are sometimes obliged to make.

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***251** In fact, the applicant asked the Tribunal to order the administration to pay him the sum of $1,000 for expenses in view of the fact that, although he was represented by a member of the panel of counsel, the complexity of the case necessitated the applicant's travel from California to New York in May 1970 as well as frequent transcontinental telephone calls to his counsel before and after then.

The Tribunal did not answer this request, as witness the following clause of the Judgement, which does not refer to the telephone calls and concerns only the assistance of counsel:

> ‘The Applicant requests payment of one thousand dollars for exceptional costs in preparing the case. Since the Applicant had the assistance of a member of the panel of counsel, the Tribunal finds this request unfounded and rejects it.‘

In sum, it appears to me that by not finding upon this request the Tribunal again failed to exercise its jurisdiction.

(Signed) Fouad AMMOUN.

***252** DISSENTING OPINION OF JUDGE GROS

[Translation]

I regret that I am unable to concur in the Opinion of the Court and, that being so, I set forth the grounds of my dissent below.

1. We are here concerned with an application for the review of Judgement No. 158 of the United Nations Administrative Tribunal, founded on a text, Article 11 of the Statute of the United Nations Administrative Tribunal,

as amended by resolution 957 (X), which the General Assembly adopted on 8 November 1955 for the very purpose of instituting a remedy and procedure that had not existed before that date.

The nature of the exceptional remedy and procedure thus established must be clearly ascertained for, as neither the contentious application to the Court which is open to States nor an ordinary request for an advisory opinion is concerned, the first question to be resolved is whether the Court, as a judicial organ whose jurisdiction is fixed by the Statute, is able, within the conditions laid down by that Statute, to proceed to the review requested by means of the advisory opinion to which Article 11 of the Statute of the United Nations Administrative Tribunal refers.

2. There are two Advisory Opinions of the Court (13 July 1954, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal; 23 October 1956, Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco) which deal with the problem of the review of decisions of administrative tribunals, and they shed light upon the manner in which the Court, at the times in question, envisaged what conditions must be satisfied for it to be able, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character when an application for review is addressed to it. As, moreover, the explanation of the origin of the system of judicial review is to be found in part in those Advisory Opinions, it will be as well to recall certain points.

3. The Advisory Opinion of 13 July 1954 on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, requested by the General Assembly, followed normal advisory proceedings that had therefore nothing in common with the present case from the viewpoint of the referral procedure, but the Court took occasion to scrutinize the Statute of the United Nations Administrative Tribunal and noted that it was ‘the result of a deliberate decision that no provision for review of the judgments of the United Nations Administrative Tribunal was inserted in the Statute of that Tribunal‘ (I.C.J. Reports 1954, p. 54). The Court went on to observe, with all the discretion called for in the circumstances, that:

> ***253** ‘In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal. Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of the opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ–considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them–all the more so as one party to the disputes is the United Nations Organization itself.‘ (I.C.J. Reports 1954, p. 56; emphasis added.)

4. This passage from the Advisory Opinion is important, for it constitutes a formal indication in favour of a judicial means of redress and, consequently, of the exclusion of the General Assembly from the suggested review procedure, an indication which the Court considered it was possible to give the General Assembly before the system for the review of the judgements of the United Nations Administrative Tribunal was set up in the amended Article 11. The Court, then, was adopting a certain position in regard to the ‘review of the awards [jugements]‘ of the United Nations Administrative Tribunal, and what it had to say regarding the powers of a ‘judicial organ‘ shows that what it had in mind was indeed the institution of a genuine review procedure, that is

to say, a reconsideration of the case, for the consideration of the arguments, the appraisal of the evidence and the study of the facts before declaring the law constitute, in the above-cited passage of the Opinion, a complete description of judicial proceedings.

So far as the Court's conception in 1954 of the review of judgements of the Administrative Tribunal is concerned, one may therefore note that the Advisory Opinion of 1954 is in favour of review by a judicial organ, adjudging as such.

5. In the Advisory Opinion of 23 October 1956 the Court again evinced from the outset the cautious attitude of 1954 with regard to the procedure used as a means of reviewing the judgments of an administrative tribunal (this time, that of the ILO).

> ‘The Court is not called upon to consider the merits of such a procedure or the reasons which led to its adoption. It must consider only the question whether its Statute and its judicial character do or ***254** do not stand in the way of its participating in this procedure by complying with the Request for an Advisory Opinion.
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> .....
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> > The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which has been adopted has not given rise to any objection on the part of those concerned ... The principle of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem ... only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials.‘ (I.C.J. Reports 1956, pp. 85 f.; emphasis added.)

6. The rules are here plainly expressed, and I propose to apply them to the present case, for I see no reason to depart from them. The Court emphasized in 1956 that it was ruling on the particular case and was careful not to enunciate a general rule; each case should be considered on its merits: ‘The Court ... is bound to remain faithful to the requirements of its judicial character. Is that possible in the present case?‘ (I.C.J. Reports 1956, p. 84.) This question has also to be raised in the present proceedings, and I feel compelled to answer it in the negative.

7. To complete the picture of the situation at the time of the 1956 Advisory Opinion, attention should be drawn to the opposition expressed by several Members of the Court to the very principle of using advisory procedure for purposes of review, on account in particular of the absence of any oral proceedings.

Judge Winiarski, in the first place, remarked in his separate opinion that ‘as is noted in the Opinion, the procedure thus brought into being 'appears as serving, in a way, the object of a judicial appeal’ against the four judgments of the Administrative Tribunal, and this utilization of the advisory procedure was certainly not contemplated by the draftsmen of the Charter and of the Statute of the Court‘ (I.C.J. Reports 1956, p. 106). Later he observes: ‘The important thing is that the oral proceedings, which constitute the means by which the Court usually obtains clarification of the issue before it, have been dispensed with beforehand.‘ (Ibid., p. 108.)

8. Judge Klaestad, likewise, in his separate opinion, declared that the Court, although jurisdiction had regularly

been conferred upon it by the terms of Article XII of the Statute of the ILO Administrative Tribunal, ***255** ought to have abstained from exercising that jurisdiction. His reasons also derived, inter alia, from the elimination of oral proceedings ‘in spite of the fact that such hearings have hitherto been fixed in all advisory cases which have been considered by this Court as being a normal and useful, if not an indispensable, part of its proceedings‘ (ibid., p. 110).

9. Judge Sir Muhammad Zufrulla Khan took the same attitude, in the following terms:

> ‘By dispensing with oral proceedings the Court deprived itself of a means of obtaining valuable assistance in the discharge of one of its judicial functions. Oral proceedings were dispensed with not because the Court considered that it could not receive any assistance through that means, but because the inequality of the parties in respect of oral hearings could not be remedied in any manner.‘ (I.C.J. Reports 1956, p. 114.)

Sir Muhammad concluded by stating that the Court should not have complied with the request.

10. Judge Cordova said that the 1956 advisory proceedings could not be considered as anything different from a contentious case:

> ‘One cannot think of this case as being of two different natures, a contentious case before the Administrative Tribunal and not a contentious one when it comes before the Court.‘ (Dissenting opinion, ibid., p. 163.)

He goes on to describe the proceedings as an appeal or as a revision of a decision of a lower court (ibid., p. 164).

11. It will be as well to bear these statements in mind in endeavouring to analyse the meaning of the Court's pronouncements in its Advisory Opinion of 1956 on the principles it then accepted as the basis of its reasoning with regard to its own role in the review of decisions of the administrative tribunals of international organizations.

On 12 April 1955, in the Special Committee on Review of Administrative Tribunal Judgments (A/AC.78/SR.6, p. 8 [Annexes 35-47 to the dossier]), the representative of the Secretary-General referred to a letter from the Registrar of the Court on the problems to which the revision of judgments gave rise, a document naturally known to the Court.

Considering together all these various indications as to the thinking of Members of the Court in 1954-1956, I believe it established that the Court endorsed two essential principles for the examination of its own jurisdiction in each review case that might be submitted to it; the first in order, and in my view the first hierarchically speaking–for it is a matter of whether a court is to accept any ompromise touching its judicial status–, is that, in adjudicating any such case, the Court must not permit any encroachment on ‘the requirements of good administration of justice‘, the second principle being that there must be compelling reasons before the Court could refuse its collaboration in the working of a regime for the judicial protection of officials.

***256** It is by applying these two principles that I reach different conclusions from those of the Court's Advisory Opinion as regards the exercise of its jurisdiction in the present case. Since the Court has not considered that there was any serious difficulty with regard to the requirements of good administration of justice, it is necessary for me to set forth at some length my reasons for dissenting on that point, which is the first question put in the operative clause of the Advisory Opinion.

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12. There is one preliminary observation of general scope which must be made. The procedure whereby the Court is requested to give a review decision via advisory proceedings is what it is:

> ‘The Court is not called upon to consider the merits of such a procedure or the reasons which led to its ad-

> option. It must consider only the question whether its Statute and its judicial character do or do not stand in the way of its participating in this procedure by complying with the Request for an Advisory Opinion.‘ (Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 85; emphasis added.)

This sentence is a perfect summary of my position in the present case, where neither the jurisdiction conferred upon the Court nor the method of utilizing advisory procedure is in issue, but the question of the application in the present case of the principles of judicial review and of the texts which have instituted the Court's jurisdiction in the matter.

13. ‘The Court itself, and not the parties, must be the guardian of the Court's judicial integrity‘ (I.C.J. Reports 1963, p. 29); if, then, the procedure laid down in Article 11 of the Statute of the United Nations Administrative Tribunal encounters an obstacle in the Court's Statute and judicial character, whatever may be the merits of and grounds for this review procedure, the Court, having been established as a judicial body, must be able to act as such in the full exercise of the powers conferred upon it by its Statute; if this action is hampered by the review procedure, it is the latter which must be set aside, not the Statute of the Court or the requirements of good administration of justice.

14. The jurisdiction of the Court to give an advisory opinion derives from Article 11, paragraph 1, of the Statute of the Administrative Tribunal as amended on that point on 8 November 1955 (resolution 957 (X)). It is necessary for a State, theSecretary-General or the staff member concerned in the Tribunal's judgement to object to that judgement on the grounds that the Tribunal has exceeded its jurisdiction or competence, or has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice.

Is there no obstacle in the Statute of the Court and the essence of the Court's judicial function to this attribution to the Court of a review ***257** jurisdiction? The provisions of the Statute concerned are Articles 34, 35, 36 and 38; on the one hand the Court is open only to States, while on the other its function is ‘to decide in accordance with international law such disputes as are submitted to it‘ and subparagraphs (a), (b) and (c) of Article 38, paragraph 1, scarcely correspond to the basis upon which an application for the review of administrative tribunal judgments generally relies. The manner in which an administrative tribunal has settled the question of its jurisdiction and exercised it or not, or its commission of a fundamental error in procedure, do not raise any question of int rnational law within the meaning of Article 38; as for the objection concerning an error of law relating to the Charter, which would raise a question of international law, it has not been taken into consideration by the Court in its Advisory Opinion. The two objections examined and not accepted by the Court have led it to decide problems of procedure and to touch upon the internal administrative law of the United Nations; these do not enter into the essential competence of the Court, which is not to settle just any legal problem but only problems of international law.

It will no doubt be replied that Article 65 of the Statute of the Court speaks in general terms of ‘any legal question‘, but that is to force the text beyond its meaning and context. It will be sufficient on this point to recall that the report of the Advisory Committee of Jurists says that it is obvious that the disputes referred to in the last sentence of Article 14 of the Covenant (the Court shall also ‘give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly‘) can only be of an international nature (Advisory Committee, Proceedings, p. 730).

It would not be reasonable today to wring any further meaning out of Article 65, and we must therefore take note of the existence in the Statute of the Court of an obstacle to the review of judgments of administrative

tribunals. The view may be held that this obstacle is not decisive on account of the second general principle admitted by the Court, that of the assistance owed to the functioning of a regime for the protection of officials, but the objection exists. And the manner of meeting it reveals a choice as to the role of the Court.

15. The law applicable in the present case is not international law, which is the source of the jurisdiction conferred upon the Court. It is naturally no reply to say that ‘he who can do more can do less‘, for that is not the point, even allowing the validity of such a tag in the relationships between the various forms of law. The problem is that the Court's Statute and mission make of it neither a universal judge nor a universal provider of advisory opinions, and that its composition, the rules under which it operates and its habits of work are likewise based upon its role as a tribunal of international law.

Legality and expediency must be clearly separated. Even if it were convenient to refer applications for the review of judgments to the Court for decision–which has constantly been doubted and is not in my view ***258** borne out by the present case–, the principle that such a procedure must be in conformity with the Statute and judicial character of the Court is a principle of legality which the convenience argument is powerless to rebut.

16. The obstacle encountered is therefore a serious one, on the one hand because of the compromises called for by the system of review in respect of the statute and the nature of the Court's judicial function, and on the other hand because of the way in which it was generally affirmed when this system was set up in November 1955 that it constituted a strictly judicial remedy; that being so, it cannot be maintained that the Court can modify its rules and working-methods as a court for the sake of these special cases without a grave self-contradiction.

17. When matters are seen in that perspective, the argument that it is sufficient for Article 11 of the Statute of the Tribunal to have organized the review procedure within the framework of the powers of the General Assembly does not answer the objection. As I said in a preliminary observation (para. 12 above), it is not necessary for the Court, when such cases are referred to it, to ask itself whether the General Assembly's decision was lawful. The Court is the only judge of its own jurisdiction and if it considers that it is unable to pronounce upon a matter addressed to it because that matter stands outside its Statute or requires modifications of that Statute, it does no more than interpret the rules of its own operation, which are subject to no authority but that of the Court itself.

It is moreover sufficient to recall the jurisprudence of the Court on this aspect, more particularly as expressed in the Advisory Opinion on Certain Expenses of the United Nations:

> ‘It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.‘ (I.C.J. Reports 1962, p. 157; emphasis added.)

Certainly, the Court, having been invested with a review jurisdiction, ought to decline to exercise it only in circumstances where it finds conclusive grounds for such refusal; but the process which resulted in this jurisdiction being exercised in the present proceedings, whether at the stage of the submission of the request or at those of its being considered by the Court, appeared to me to give rise to conclusive objections.

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18. The method instituted by Article 11 for the reference to the Court of an application for review takes the form of the intervention of a Committee, a political organ, composed of member States represented on the General

Committee of the last regular session of the General ***259** Assembly. This is, in other words, a representation of the past, the assistance of which is enlisted by the General Assembly for the sake of convenience. For the consideration of the present case, the composition of this Committee is relevant only as a factor in the problem of the seisin of the Court. As it is the Committee alone which decides whether there is occasion to request an advisory opinion, and hence to seise the Court, it is this Committee which enables the Court to exercise the judicial-review jurisdiction which it had been decided to institute.

19. This Committee, devoid as it is of permanence and of continuity in its composition, and not accumulating any experience, is merely a kind of occasional panel meeting at irregular intervals, or a conference of member States, but certainly not an organ in the proper, institutional sense of the word.

But how can even those who reject this analysis claim that the Committee has an activity regarding which it has a right under Article 96, paragraph 2, of the Charter to request the opinion of the Court on legal questions arising therefrom. That is untenable: at the most it might be said that the activity of the Committee is to transmit to the Court–or not–an application for review, but the legal questions transmitted are quite unconnected with the activity of the Committee; they are put by the applicant and must be transmitted as they are put. It is not the Committee, but the applicant, that enquires whether the judgement is vitiated within the meaning of Article 11, and it is not the Committee which is interested, for the sake of its own activities, to know whether the judgement is or is not to be reviewed. No right has been conferred upon the Committee to modify these questions; it may only find that they lack a substantial basis, but then its ‘activity‘ comes to an end and the Court is not seised; and if the Committee finds that there is a substantial basis, that ‘activity‘ is not referred to the Court, which, merely taking note that the Committee has seised it, does not concern itself with investigating how substantial the activity is, since in the present case it admits knowing nothing whatever about it and does not wish to know more.

But the theoretical origin of what I consider to be an unfounded interpretation of Article 96, paragraph 2, of the Charter must also be treated with reserve. In support of the contention that the Committee has activities of its own, the Court has stated that the General Assembly has not delegated its own power to request advisory opinions, inasmuch as Article 11, paragraph 4, of the Statute of the Tribunal specifies in terms that it is Article 96, paragraph 2, which is taken as the basis for empowering the Committee to request advisory opinions. But the Court has at the same time decided that the Committee was a subsidiary organ within the meaning of Article 22 of the Charter, thus deemed necessary for the performance of the General Assembly's functions, more particularly in this instance the function of regulating the relations between the administration and the staff, by introducing the creation of ‘an organ designed to provide machinery for initiating the review by the Court of judgments‘ (Advisory Opinion, para. 17).

***260** It thus remains to be explained–and this is no easy matter–how a subsidiary organ of the General Assembly, with the composition described in paragraph 18 above, can exercise a judicial function which the Court, in 1954, disallowed the General Assembly in the plainest of terms. The Administrative Tribunal is a judicial body; the Committee is not. It has no particular function apart from its role as a hurdle in the path of access to the Court, and that function–if correctly discharged–cannot, intrinsically, be anything other than judicial in character. The task the Committee should undertake before deciding whether there is any substantial basis for the application, namely that of confronting the judgement with the objections submitted, necessarily connotes a consideration of the facts and of law.

20. As the Committee bars the path of access to the Court–this is what it has done in respect of 15 applications out of 16 in 17 years–, it follows that the exercise of the Court's review jurisdiction depends on the conditions

under which the Committee considers each case.

The session for the consideration of Mr. Fasla's application was held from 8 to 20 June 1972 and took up four meetings and, the rapporteur excepted, there is no means of knowing whether lawyers sat on the Committee and what course this brief deliberation took (see, on this point, paras. 23 and 31 below). Now, when an application is made by one or other of the parties–or by a member State, which is not required to have any particular interest in the dispute decided by the judgment contested–, the Committee does not receive a documentation of the case for each of its members and it is impossible to know how these members form some idea of the degree to which the bases of an application for review are ‘substantial‘. In principle, the Committee might procure some information from its secretariat, but that very secretariat is provided by the administration, i.e., by one of the parties.

21. Mr. Fasla's application for the review of Judgement No. 158 is contained in A/AC.86/R.59, an essential document in the proceedings, for it indicates the reasons for the application and sets forth the objections on which the applicant relies for the purpose of securing a review within the framework of Article 11 of the Statute of the Administrative Tribunal. It is on the basis of this document and of its 92 annexes that the Committee took its decision to request an opinion of the Court, considering as it did that there was a ‘substantial basis‘ for a review of Judgement No. 158 of 28 April 1972. For the scope of the Committee's role in the present case to be grasped, it is necessary briefly to recall the manner in which the application made to the Committee on behalf of Mr. Fasla was presented by his counsel at that time.

22. It is argued in the application that the Tribunal ‘failed to exercise its jurisdiction within the meaning of Article 11 ... in that the Tribunal did not fully consider and pass upon Applicant's claim for damages for injury to his professional reputation and future employment opportunities caused by the respondent's misuse of powers with improper motive as found by the Tribunal‘ (para. A.1, p. 5).

***261** All the important terms for the definition of the objections raised are to be found in this quotation; they are enlarged upon in paragraphs A.5, A.6, A.9, A.12 (misuse of powers), B.5, C.3, D.1 (fundamental errors in procedure which have occasioned a failure of justice), D.2 and D.3 (failure to consider every claim). Be it noted that the explanations are of a summary nature and are sometimes replaced by mere assertions without any mention of evidence.

23. The comments of the Secretary-General on the applicant's written statement take up no more than one page and a half (A/AC.86/R.60). The report of the Committee (A/AC.86/14) is of like exiguity and simply indicates the voting on the two questions transmitted to the Court, without conveying anything of the discussion which occupied four meetings. It will be noted that only the States composing the Committee are mentioned and that it is therefore impossible to know who in fact sat.

Article VII of the Committee's Provisional Rules of Procedure (A/AC.86/2/Rev. 1) enables the Committee to enquire into the case by inviting additional information or views, but nothing of that kind was done.

24. Given the extreme reticence of the Committee, are we to suppose that the ten or so pages of the application could in themselves have sufficed to convince its members that there existed a substantial basis for a review? That is hard to believe and, in all objectivity, the document is not decisive. There are, it is true, its 92 annexes, of which many are relevant, but these were not distributed to the members of the Committee, who were simply informed that they were ‘available for consultation ... in the Office of the Committee's Secretary‘ (A/AC.86/R.59, p. 22). Similarly, the case-file of the Administrative Tribunal is merely deposited in the office of the Secretary of the Committee. How many members spent in that office the time required for reading and an-

notating the case-file or those 92 annexes which add up to a considerable documentation? It was legitimate to wonder, and well one might; the question has remained unanswered.

25. On 29 March 1973, exercising the right of every Member of the Court to put to parties the questions he would like answered for his own information, I requested the Secretariat to communicate to the Court the recordings of the four meetings of the Committee on the present case. On 5 April I received the following reply:

> 'Tape recordings exist of four meetings of Committee on Applications for Review in Fasla case, but no transcript has been made from these tapes as Committee did not request a transcript nor did it authorize release of tapes. Unlike verbatim records and summary records in final form, tapes have never been considered official records as they have not been subject to right of correction by delegations which is exercised in relation to verbatim or summary records. Moreover, in this instance statements recorded on tapes were made by delegations in closed meeting with belief on their part ***262** that no disclosure would be made without their permission. We are thus compelled to conclude that these tapes do not constitute an official record and that they possess a confidential character.'

26. My first observation is that the elimination of the oral proceedings in this case prejudiced the right of Members of the Court to obtain information. Unwillingness to open the door of oral argument for the staff member concerned has led to its being closed not only to the administration–which obviously did not mind–but also to the judge. A prolonged written exchange would have had little effect, since the Court, adopting a different view on the substantive aspect of the case no less than on the conduct of the Committee, was not interested in taking cognizance of anything other than the file in its possession. That is why other questions were not put, by other judges and myself, who refrained out of deference to the views of the Court.

This situation impels me to explain why I am unable to accept the Secretariat's argument as to the confidential character of the Committee's meetings where the Court is concerned, in the case of an application for review being referred to it. I note incidentally that the reply does not appear to emanate from the Committee on whose behalf it is given, which confirms one's doubts as to the Committee's organic and permanent character.

27. On the most indulgent hypothesis, the Committee is in the same position as the General Assembly itself would be in examining a draft request for advisory opinion; but nobody would imagine that such a discussion could be 'confidential' and its contents admissible withheld from the Court. In every case when an advisory opinion has been requested by the Security Council or the General Assembly, the records of all the discussions have been transmitted to the Court. But where the opinion requested concerns the review of a judgment, it is even more abnormal to suppose that the General Assembly, had it conferred upon itself the power to decide whether the request should be transmitted to the Court, could have operated in secret. In 1954 the Court said in plain terms why the General Assembly could not have any place in a judicial procedure for the review of judgments (para. 3 above), and this pronouncement embraced the whole of the procedure, i.e., not only the final decision concerning the review but also whatever led up to it. Yet the Secretariat's reply has shown us a secret committee with, potentially, discretionary power to decide the question of revision by the Court, and this is something which nobody would have dreamed of suggesting in 1955 when, in the case of the General Assembly itself, there had been no question of entrusting it with any role whatever in the organization of a means of redress which, according to the express wish of all, should be judicial.

28. I cannot accept that any secrets should be kept back from the ***263** judge in a system intended to be judicial, a system in which the preliminary examination on which the exercise by the Court of its review jurisdiction depends has been made subject to stipulated legal conditions, and it is, I regret, my duty to say that the refusal to

communicate information deemed necessary for the satisfactory consideration of the present application for the review of Judgement No. 158 not only encroaches upon the prerogative of Members of the Court under the Statute and the judicial character of the Court but suggests that if the Committee were to ignore the criteria imposed upon it by its own Statute and decide for reasons, say, of mere expediency, entirely unconnected with the notion of a substantial basis, it would escape any form of control.

The seisin of the Court cannot be left to chance; it is not a lottery. The exercise of a competence for judicial review, which is the kind of jurisdiction that the General Assembly decided to introduce, cannot be dependent on a political committeeappropriating–and in secret, at that–the Court's role of rendering justice, which is what it in fact did on the 15 occasions when it refused review. When, in municipal systems, leave to appeal is refused without giving reasons, the decision in question is rendered by judges who are members of the appellate judiciary; there is no comparison.

One cannot have it both ways: either the discussions of the Committee are exchanges of views showing that the applications are properly considered–in which case the Court, which is not an organism foreign to the United Nations, should be allowed to know as much–, or they demonstrate the reverse and the hurdle in question does not correspond to the intentions expressed when Article 11 was drafted. The manner in which the Court is seised is a matter of direct concern for the Court, which, as the Advisory Opinion of 1956 pointed out, has the right to find that its judicial character is thereby prejudiced.

29. It has been argued that the impairment of justice cannot lie in a case where the hurdle of the Committee was cleared and that it is hypothetical at the most in the 15 cases where review was refused. This argument is misdirected, for the problem is whether the Court considers that its judicial character has or has not suffered in one way or another, in relation to the only application which the Committee has found to have a substantial basis. The fact that the Court has not followed the Committee in the only case it has referred to it is no reason for supposing that the Committee went astray in refusing one or other of the 15 other applications. Neither, on the other hand, is there any presumption as to the correctness of the Committee's decisions. But in any case, such a committee, having a pre-judicial task entrusted to it, must discharge that task as a judge would. And it would not be acceptable for a judge to call secrecy in aid.

30. In sum, one cannot have a political committee, discretionary and secretive in operation, set up a hurdle, and at the same time claim to have provided ‘machinery‘ for initiating a procedure of judicial review.

***264** If the consideration to which the Committee proceeds is not directed to the ascertainment of the existence of any substantial bases for review, as is required by Article 11, which founds and is the warrant for the jurisdiction of the Court, if it is not an examination carried out from a judicial viewpoint, rather than a mere discussion of the expediency of the application, it has nothing to do with the judicial means of redress which it had been undertaken to establish, and the Court owed it to itself to make a finding in that sense–especially as it has accepted the mere rules of procedure of a committee as a valid rejoinder and those very rules, at the beginning, had provided for the discussions to be minuted.

31. The documents made available provide a blatant confirmation of the foregoing views and shed light upon the functioning of the Committee as the ‘machinery‘ of a procedure for reference to the Court. Among the parsimonious indications furnished to the Court in regard to the four meetings of the Committee there were two very brief documents. The first, entitled ‘Note by the Secretariat‘ (A/AC.86/R.61), dated 13 June 1972, indicates that at the second meeting of the Committee, held that day, a request was made for the examination of four questions

corresponding to the grounds of objection listed in Article 11, and that the Committee decided ‘in connexion with the application under consideration, to vote only on questions 2 and 4‘, those which were finally put to the Court. The report of the Committee, only two pages long, says nothing of this meeting of 13 June. The second document, of 19 June 1972, comprises a suggestion by Zambia providing for three questions to be put to the Court, the third in addition to those evetually put being: ‘Any other question relevant to the judgment of the Administrative Tribunal‘ (A/AC.86/R.63). The report of the Committee does not indicate what became of this proposal at the meeting of 19 June. But it does show that the Committee, on that date, first voted on each of the two questions finally put to the Court, just as if it were the Court, and then only on the question: ‘Is there a substantial basis for the application of Mr. Mohamed Fasla under the terms of article 11 ...?‘ (para. 7). The same report, in paragraph 10, inverts the order of the problems and begins with the Committee's decision on the existence of a substantial basis. Though one would not wish to attach undue importance to this contradiction, these were the only documents of which the Court was given knowledge and they show, on the one hand, how the Committee deliberately restricted to two the proposed questions laid before it, which covered all the grounds of objection provided for in Article 11, and, on the other hand, how the Committee, instead of considering, discussing and finding upon the question of substantial bases, voted on the actual merits of the questions now before the Court. Whatever explanation it may be sought to provide, the Committee, in its voting, acted like a court of first instance.

32. The Court has but partly corrected this situation by interpreting the request in such a way as to include the complaint of isuse of powers; but it has refused to contemplate any supervision of the Committee's ***265** activity, even though the Committee behaved like a court. Thus viewed, the Committee becomes a judge whose decisions are without appeal and whose discretionary power is absolute. That is a disfigurement of the system of judicial review instituted in 1955 and entrusted to the Court.

33. While I agree that the Court has jurisdiction under Article 11 to judge review cases, the reasons indicated in paragraphs 12-32 left me no other choice but to return a negative reply to the first question put by the Court.

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34. At the time when the draft of Article 11 was being considered by the General Assembly and in the Special Committee, doubts were quite openly expressed as to the possibility of the Court's accepting the role proposed for it; this I mention by way of recalling the atmosphere, for, as the Court once indicated, it is not always necessary to enlist the proceedings of the General Assembly for the purpose of interpreting a resolution (Certain Expenses of the United Nations, I.C.J. Reports 1962, p. 156). Following the guideline given by the Court in 1956 as to the necessity of making sure in each case of review that there is nothing in the Statute or the judicial character of the Court to prevent it from giving an advisory opinion, I consider that the right application of the Statute and observance of the judicial character of the Court necessitated a different approach to both the investigation and the disposition of the present application for review.

35. In the first place, once the Court has decided not to accept any oral statements, the investigative stage of any proceedings for review is limited by that very fact so far as the means of action left to the Court are concerned. Nevertheless such means do exist, as it happens, in Articles 48, 49 and 50 of the Statute; the Court did not agree that these means should be employed, whereas I consider them an indispensable condition for any proper investigation of the case.

36. In all cases, whether contentious or advisory, the Court acquires its information through the dual form of

both written and oral proceedings, and through the fact that the investigation is generally taken care of in contentious proceedings by the parties themselves, who have nothing to gain by leaving areas of vagueness in their case, and in advisory proceedings by the organizations and States whose participation serves to enlighten the Court. In a review case, the Organization is one of the parties and, both before the Administrative Tribunal, which rebuked it on this point, and before the Court, the information it provided in the present instance, remained incomplete. How, on the other hand, can one expect the former staff member to be able to provide the Court with all the facts and factors in a dispute the parties to which are not equal? That is a point with which all administrative tribunals are familiar, and the Court itself showed more indulgence in 1956 when it said–

> ***266** 'The Court cannot attach to this provision [Article II, paragraph 5, of the Statute of the ILO Administrative Tribunal] any purely formal meaning so as to require that the official should expressly indicate in his complaint the particular term or provision on which he intends to rely. In the first place, what must be alleged, according to Article II, paragraph 5, is non-observance, namely, some act or omission on the part of the Administration; in the present case, the complainant invoked the refusal to renew his contract. Secondly, the Tribunal is entitled to ascertain and to determine what are the texts applicable to the claim submitted to it. In order to admit that the Tribunal had jurisdiction, it is sufficient to find that the claims set out in the complaint are, by their nature, such as to fall within the framework of Article II, paragraph 5, of the Statute of the Administrative Tribunal in the sense indicated in another part of this Opinion.' (I.C.J. Reports 1956, p. 88.)

37. It was therefore conceded that the staff member, being less well informed of a file of which he could know only the documents addressed to himself, less well armed for the contest than the Organization itself, was in sum in a position of relative inferiority which one should avoid aggravating by formalistic requirements. This is another way of recognizing the absolute necessity of equality, in law and in fact, between parties. And when the Court held that the Administrative Tribunal was entitled to ascertain the law applicable to the claim submitted to it, however presented, it was simply recalling a constant principle of all judicial organization, namely the obligation that lies upon a judge to acquire knowledge of the law and the facts involved in a case by whatever means are at his disposal.

I consider that it has been impossible for the Court to conduct a satisfactory investigation into Mr. Fasla's claim, for want of an oral phase during which questions could have been put to the Organization and the applicant, and failing and enquiry or request for explanations during the deliberation of the Court. In the proceedings prior to the Advisory Opinion of 21 June 1971, ten judges put 33 questions, which shows, or so it seems to me, that there is some point in the system (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)).

38. It must indeed be clearly realized that, once oral proceedings are refused, the effect of the Court's own rules of internal procedure is a total merger of the enquiry stage with the study of the case-file for the purpose of deliberation and decision on the whole, that is to say that there would have been an investigation as a phase separate from the adjudication only if the Court had considered, as I did, that an enquiry and additional explanations were required before going ahead.

The matter was settled for the present proceedings by the refusal to admit that the Court would be in any way served by explanations ***267** supplementing the case-file already laid before it. I nevertheless persist in believing that such a decision not to use Articles 48, 49 and 50 of the Statute give rise in the present proceedings to a de facto and de jure inequality from which the staff member suffered. For want of information, it is not in my power to enlarge hereon; I ought however to add, in order to show in regard to what point there was occasion to

make an enquiry, that the reason for the attitude of the administration to the applicant is not sufficiently clear from the file. An investigation of the case was therefore essential if the inequality between the parties was to be redressed; for this the Statute made provision and provided the means. Once again, the Advisory Opinion of 1956 takes the same line:

> 'The Court is not confined to an examination of the grounds of decision expressly invoked by the Tribunal; it must reach its decision on grounds which it considers decisive with regard to the jurisdiction of the Tribunal.' (I.C.J. Reports 1956, p. 87; emphasis added.)

'With regard to the jurisdiction' covers the notion, introduced in Article 11 of the Statute of the United Nations Administrative Tribunal, of failure to exercise jurisdiction, subsequent to those of lack of jurisdiction and action in excess of jurisdiction.

This is where my path sharply diverges from that taken by the Court in its answers to Questions II and III in the present Advisory Opinion. How is it possible to find any other decisive reasons if the Court restricts its examination on principle to those it finds in the Judgement of the Tribunal, which is what the Court has unswervingly and deliberately done? It is this essential difference of approach to the problem which underlies my dissent as to the way in which the Court should have set about investigating and judging this application for review.

39. The Court has decided that within the role of review instituted by Article 11 it is not its task 'to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement' (Advisory Opinion, para. 47). For this the Court finds authority in a passage from the Advisory Opinion of 1956, cited in paragraph 48 of the present Opinion, the essential part of which is that 'A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision'–which is in effect another way of saying that one may not retry the case (cf. also para. 65 of the present Advisory Opinion).

40. The 1956 Advisory Opinion, both in general and, more particularly, in the passage cited in paragraph 48 of the present Opinion, applies to Article XII of the Statute of the ILO Administrative Tribunal, which provides only for challenges to decisions of the Tribunal confirming jurisdiction and cases of fundamental fault of procedure. It applies in other words to two situations–lack of jurisdiction and formal defect–which in fact are detachable from the substance of any case and, as the ***268** Court said in 1956, cannot be 'transformed' into a procedure concerning the substance of the decision. Today, if there were an application for review based upon Article XII of the ILO Administrative Tribunal, it would still be necessary to say the same.

But Article 11 is not Article XII, nor is the procedure for the review of the judgements of the United Nations Administrative tribunal the same as that for review of the judgments of the ILO Administrative Tribunal. This is perhaps regrettable, but here again the Court must consider each system of redress for what it is. Is it then possible to apply the pronouncement of 1956, unchanged, to Article 11?

41. Article 11 allows for the possibility of review if 'the Tribunal has exceeded its jurisdiction or competence or ... has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice'. Here we again encounter the notions of lack of jurisdiction and formal defect, but in the latter case a complication is already present in the reference to an error which has occasioned a failure of justice, since there we have an additional factor in comparison with Article XII. Above all, there are two new hypotheses, that of failure to exercise jurisdiction and that of error on a question of law, and in respect of these I cannot conceive

how it is possible to say, as if it were still a question of Article XII of the Statute of the ILO Administrative Tribunal, that they have no connection whatever with the substance of the case, as judged by the Tribunal, and that the Court may not re-open the case on any part of the merits. The reasons for the pronouncement of 1956 being no longer applicable, it must be re-examined, and if it is still correct to say that an allegation of lack of jurisdiction does not authorize an inspection of the merits, it is incorrect to apply the same prohibition when it is alleged that there has been an error on a question of law. What judge, ex hypothesi, could ever decide whether there has been an error on a question of law without re-opening the merits?

42. That disposes of the unqualified application of the Advisory Opinion of 1956 in the doctrine of the review of judgements under Article 11. One inference from the earlier proceedings has, however, persisted, namely that the Court is not entitled to retry the case because it is a question of review. That is nevertheless what Article 11 provides for, not, it is true, in a general way and on any ground, but in the event of allegations concerning failure to exercise jurisdiction, error on a question of law and failure of justice.

43. An opinion which has left the Court unconvinced should be limited to essentials; I have shown how the Court was led by its choice of rule to effect a kind of artificial separation between jurisdiction and substance, which is necessary for the interpretation of Article XII of the Statute of the ILO Administrative Tribunal but is incorrect for the interpretation of Article 11 of the Statute of the United Nations Administrative Tribunal. Another consequence of this attitude is that the Court, ***269** having forbidden itself to retry, has had to content itself with the casefile as considered by the Administrative Tribunal and with the documents the Tribunal deemed relevant, as also with its consideranda and decisions. On that basis, therefore, if review was to have been possible at all, it would have had to be the Tribunal itself which provided the evidence. That is a great deal to ask.

44. That being so, it is obviously impossible for me to re-examine the case and in that way to assemble the elements of a different decision, because my requests for additional information remain unsatisfied. I can only say, briefly, why the Court is entitled, when seised with an application for review, to request further information whenever it thinks fit, and to what extent such additional knowledge was necessary in the present case.

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45. The review provided for in Article 11 may be founded on formal illegalities and on illegalities in respect of or affecting the merits, as in the case of failure to exercise jurisdiction, error on a question of law or failure of justice occasioned by fundamental error. These grounds of objection, though specific, are much wider in scope than those indicated in Article XII of the Statute of the ILO Administrative Tribunal. I maintain that, if the review system thus instituted is to function properly, the Court, when examining and deliberating upon a case, is not restricted to the contents of the case-file as transmitted to it, or by the way in which the questions put by the Committee have been formulated. On the latter point, as it has been conceded by the Court, I shall add nothing. There remains the problem of the case-file, i.e., of the evidence.

46. Reviewing in the judicial sense is an exacting task and one which, in the framework of a legally constituted institution like an international organization, should be performed with the interests of all concerned in mind and as unformalistically as possible. The society consisting of the administration, the staff and States is, in this sense, a closed world with its own laws; into this world it was decided to introduce justice and, as it happens, a procedure for the judicial review of the judgements of the Administrative Tribunal. Somewhere between the rule adopted by the Court of not retrying the case and the impossibility of performing the task of review without some form of re-examination there ought to lie a good solution.

47. The Court's rejection of the application is based on an analysis of the Tribunal's Judgement and only of that Judgement; it represents a verification of the legal soundness of a judgment viewed from within. I feel this to have been a basic mistake. Every court of first instance lends the solution of the problem put to it a character of certainty through its decision, which would be definitive if there were no possibility of challenge. The mere fact of a challenge removes this character of certainty ***270** from the decision, which the review judge has to confront with the application for review. If one sets out from the idea that the judgement impeached is regular on principle, the equality of the parties before the Court becomes non-existent, because the Tribunal, ex hypothesi, has found, in whole or in part, in favour of one party or the other. Before the Court, the judgement criticized and the application for review have to be examined on the same level. Had the Court not refused to hold oral proceedings, this aspect of the matter would have been very clear; the adversary nature of all forensic debate is an essential guarantee, for it alone enables the causes and effects of the positions adopted in the case to be grasped. Every judicial decision has its light and its shade, and an adversary oral debate in the proceedings for review would have lighted up the darker corners.

48. As in the case of any other application to the Court, it is the application for review which itself defines the object thereof, i.e., the intentions of the applicant. ‘What is really sought?‘–it is this classic question that arises. In a review case internal to the United Nations, formalism should, I feel, be restricted to the minimum. It is of course necessary that the submissions should clearly specify the nature of the underlying claim and that the successive pleas should all apply to that same claim; more I see no reason to demand, and in this regard I find Mr. Fasla's application for review to be entirely clear and to meet these requirements without calling for any interpretation. New pleas are admissible, provided they are relevant to the claim submitted to the lower tribunal. To adopt any other attitude would impel litigants formally and systematically to raise all the grounds of objection allowed for in Article 11 from their very first challenge to an administrative decision prejudicial to themselves, lest they be deemed precluded at a later stage. When most disputes are settled without judicial intervention, that would not be a good system, and it is one which the Court expressly condemned in 1956, in the dictum cited above in paragraph 36:

> ‘The Court cannot attach to this provision any purely formal meaning so as to require that the official should expressly indicate in his complaint the particular term or provision on which he intends to rely.‘ (I.C.J. Reports 1956, p. 88.)

49. Nor do I find it possible to assert that a court in review proceedings is prohibited from appraisal of the facts. The Administrative Tribunal exercises a certain supervision over the discretionary power of the administration; when, as in the present case, a problem concerning misuse of powers is raised in the application for review and the Court considers it, it may verify the lower tribunal's interpretation of the facts if not sure of its correctness. The Court having proceeded from a different premise, no inspection of the kind took place. But I consider that its possibility is necessary in principle to a system of judicial review, for if all the Tribunal's appraisals of facts are held exempt from control it would not be ***271** possible to review any judgement which had decided a question of misuse of powers.

50. Misuse of powers is use of a power for a purpose other than that for which it was conferred. A court has therefore to ascertain the motives of the authors of the act, and it is usually the enquiry into a case which provides such information. The Court did not look behind the consideranda of the Tribunal in order to form its own view. Here again, it seemed to me that the judge ought to have been entirely free in his quest for information and was entitled to examine all relevant elements in order to form his view.

51. It seems to me that in the present Opinion (para. 64) the Court admits the existence of this problem when it

outlines a theory of ‘obviously unreasonable‘ compensation which authorizes verification of the correspondence between the facts and the reparation. But it is in my view necessary that whenever the Court feels a doubt it should check the interpretation of all the facts from which the lower tribunal drew–or refused to draw–conclusions, and not merely in relation to the character of the compensation.

52. Such, in brief, should be the principles to be applied in the procedure of judicial review established by the provisions of Article 11. In 1954 Judge Winiarski had no doubt as to the meaning attached by the Court to the review procedure which the Advisory Opinion envisaged in the passage quoted in paragraph 3 above, and even then he wrote that what was contemplated was possibly ‘an established system of review, review in the sense of a further consideration of the case‘. And indeed no other meaningful construction could be placed on the Court's 1954 formula, for to appraise the evidence, establish the facts and declare the law applicable to them is to carry out an unfettered examination of the case.

One need hardly add that in applying these principles the review court should evince both understanding for the problems of the administration and complete independence of it, finding on the sole basis of law.

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53. The Tribunal based its solution on the obligation assumed by the administration in May 1969 to find Mr. Fasla another post, an obligation which it ‘did not perform in a reasonable manner‘ (Judgement, para. XIII)–an understatement, for the Tribunal had already more drily found ‘that the obligation assumed in the letter of 22 May 1969 has not been performed‘ (Judgement, para. VII). That being so, it is impossible, in the absence of any stated ground, to see how the awa d of only six months' salary was justified. An obligation to do something was assumed in May 1969 (and on 20 and 21 May, before the letter of 22 May, Mr. Fasla had has with the UNDP Director of the Bureau of Administrative Management and Budget and Chief, Personnel Division, two conversations of which the Court knows nothing) and not only did nothing come of that ***272** obligation but its performance was undertaken in such a way that nothing could come of it; the attitude thus evinced inflicted on the applicant a lasting injury, one that persists to this day. The Tribunal drew only the ordinary contractual conclusions from the non-performance of this obligation to act, and failed to exercise its jurisdictional right under Article 9, paragraph 1, of its Statute to enquire whether the circumstances were sufficiently exceptional to justify awarding a higher indemnity than the limit of two years' salary. It would be an exaggeration to say that in referring to the general principle of just compensation enunciated by the Court in its Advisory Opinion of 23 October 1956, without any individualization of this principle in relation to the case in hand, the Tribunal ‘exercised its jurisdiction‘ in the question of exceptional circumstances, even to the degree necessary to determine its lack of pertinence.

54. As for the objection of fundamental error in procedure having occasioned a failure of justice, the manner in which some of Mr. Fasla's requests are rejected in paragraph 4 of the operative clause of the Judgement without even the briefest statement of reasons seems to me to raise the same problem of inadequate substantiation. I will simply observe that, given the thesis of the Court that the review tribunal's supervisory powers are strictly limited to the content of the judgement impeached, it is impossible to see how the examination for the purpose of review can be carried out if the judgement in question contains no adequate statement of reasons. It therefore appears to me that the inadequacy or omission of stated reasons must be treated as a fundamental error in procedure.

In the present case, that omission does not allow it to be said with certainty that there was an error ‘having occa-

sioned a failure of justice‘. It is possible that the silences of the Judgement are no more than reticence on the part of the Tribunal and that adequate grounds of decision were considered during the deliberation. But as those grounds are not apparent, the Court should have said as much and sought to have the defect cured, which was technically possible even if it meant sending the Judgement back to the Tribunal on that score.

55. For the reasons indicated in paragraphs 34-54 of this opinion, I am impelled to vote for a negative answer likewise to Questions II and III of the operative clause.

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56. If this case has been dealt with at considerable length, that is because it represents the first application for review before the Court based on Article 11 and because the Court has been confronted with all the questions of principle raised at the outset and never resolved. But I would find it an overstatement to say that the protection of United Nations staff members depends on the Court's jurisprudence in matters of review. That would be forgetting that the very notion of reviewing the Administrative Tribunal's judgements, when the procedure was introduced, was not allied to that of the protection of the staff–far from it; ***273** that when the new Article 11 was in preparation the Secretary-General submitted a paper on judicial review which concealed none of the difficulties involved, especially where the jurisdiction of the Court was concerned (A/2909, 10 June 1955, pp. 17-25; see paras. 66-71) and that the United Nations Staff Council, on that same occasion, did not desire implementation of the principle of judicial review, or at any rate not in the sense of a procedure involving the plenary Court (ibid., pp. 31 and 33; para. 2–cf. also paras. 7-10). The impression conveyed by the course of events since the beginning of the United Nations in the matter of relations between the administration and the staff is rather that the latter has managed to secure, within the system itself, the provision of the necessary safeguards and of supervisory institutions in which the staff participate in such a way that a judicial presence is required solely for the purpose of preventive action on rare occasions. Rather than the first steps of an international administrative justice, it is possible that what we here witness is the development of a form of staff-union protection, satisfactory for all concerned, in which the intervention of the Court plays, likewise, no more than a preventive role. From this standpoint the developments of the present case can be seen in their proper perspective, and it would be sufficient in future to ensure that this role of the Court, if valued, was not restricted in such a way as to preclude the proper exercise of its judicial function.

(Signed) Andre GROS.

***274** DISSENTING OPINION OF JUDGE DE CASTRO

[Translation]

To my regret, I find that I am obliged to append a dissenting opinion to the Advisory Opinion of the Court.

I agree with the majority of the Members of the Court on the question of the Court's competence to give the opinion, and I propose to give my reasons on this point.

I am not in agreement with the conclusions reached by the majority of the Members of the Court on the substance of the case, and I think that I should set out the reasons which support my dissent.

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I. PRELIMINARY QUESTIONS

A. Jurisdiction of the Court

1. The preliminary question of the Court's jurisdiction to give an opinion in the case has not been raised by the interested Parties, but no forum prorogatum rule can apply in regard to **advisory opinions** and ‘Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine proprio motu the question of its own jurisdiction‘ (Fisheries Jurisdiction (United Kingdom v. Iceland) Jurisdiction of the Court, **Judgment**, **I.C.J** . **Reports 1973**, p. 7)[FN1].

2. The jurisdiction of the Court is based on Article 11 of the Statute of the **United Nations Administrative Tribunal**, according to which the Committee on **Applications** for **Review** of **Administrative Tribunal Judgements** may request the Court to give an **advisory opinion** on certain questions. This Article was based on Article XII of the Statute of the ILO **Administrative Tribunal**, under which the question of the validity of certain decisions given by the **Tribunal** can be submitted to the Court for **advisory opinion** by the ILO Executive Board.

Before 1955 nobody appears to have maintained that Article XII was legally unsound or conflicted in some way or other with the provisions ***275** of the **United Nations** Charter or of the Statute of the Court.

3. Doubts with regard to the Court's jurisdiction arose when it was proposed to amend the Statute of the **United Nations Administrative Tribunal** so as to create a remedy by way of an **advisory opinion** to be given by the Court. The proposal to this effect originated in the grave crisis that arose out of certain **judgements** given by the **Tribunal** in 1953 in favour of staff members of **United** States **nationality** who had been accused of subversion. This explains why the discussions in the Special Committee on **Review** of **Administrative Tribunal Judgements**, the Fifth Committee and the General Assembly had a political flavour. Some legal arguments on the Court's jurisdiction were nevertheless relied on in this controversy, and they should not be overlooked. One of the sponsors of the proposed amendments remarked–and his remark was repeated by others–that in the last resort it would be for the Court to rule on its own competence to give an advisory opinion.

It is therefore not surprising that some doubts should have remained with regard to the jurisdiction of the Court, even after the adoption of General Assembly resolution 957 (X) of 8 November 1955 adding the new Articles 11 and 12 to the Statute of the United Nations Administrative Tribunal. The objections raised against the Court's jurisdiction have to be examined. I do not find those known to me convincing.

4. The mechanism set up by Article 11 of the Statute of the United Nations Administrative Tribunal (like that provided for by Article XII of the Statute of the ILO Administrative Tribunal) is open to criticism de lege ferenda as a ‘hybrid procedure‘ or ‘pseudo-advisory opinion‘[FN1], inasmuch as the advisory procedure is, so to speak, made to do duty as a form of cassation (with regard to the Organization, the Administrative Tribunal and the Secretary-General) in proceedings between the United Nations and one of its staff members. But this artifice does not deserve the epithet fraus legis. It is a legitimate development of the law, on the lines of the techniques of Common Law or the Roman praetor, whereby existing provisions are employed for new ends. Article 11 is not contra legem. There is no rule either in the Charter or in the Statute of the Court which prohibits giving the advisory opinion[FN2]. It is true that the force conferred upon the opinion will exceed the scope attached by the Charter and the Statute to an advisory opinion, but the origin of that force is outside the Charter and Statute. Any action to be taken pursuant to the Court's opinion by the Secretary-General or by the Administrative Tribunal ‘in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the contents of the Opinion it-

self. Accordingly, the fact that the Opinion of the Court is ***276** accepted as binding provides no reason why the Request for an Opinion should not be complied with.‘ (Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 84.)

The Court gives an advisory opinion endowed with the limited force proper to it. Such force as provisions, agreements, statutes or rules emanating from States or organizations may bestow on the opinion ante factum or ex post facto neither diminishes nor enlarges the jurisdiction of the Court.

5. The criticism derived from the imperative character of Article 34 of the Statute of the Court is misdirected. The rule contained in that text is limited to contentious cases, disputes between States, and does not affect advisory opinions.

6. There is more substance in the following doubt: can the Committee on Applications for Review of Administrative Tribunal Judgements legitimately request the Court to give an advisory opinion (Art. 11 of the Statute of the Tribunal)?

Supporters of the negative contend that the Charter (Art. 96) and the Statute of the Court (Art. 65) give the right to request advisory opinions of the Court solely to organs and specialized agencies which already exist and have a personality of their own (what Art. 65 calls ‘bodies‘) and can in no circumstances confer such a power on a committee which is composed of member States and was instituted for the sole purpose of requesting advisory opinions of the Court.

7. Paragraph 4 of Article 11 of the Statute of the United Nations Administrative Tribunal provides that, for the purpose of Article 11, a committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. This Article 11 was adopted by General Assembly resolution 957 (X). Now a ‘resolution of a properly constituted organ of the United Nations which is passed in accordance with the organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted‘ (I.C.J. Reports 1971, p. 22). The presumption of validity so far as the powers conferred on the Committee by Article 11 are concerned is buttressed by both the letter and the purposes of the United Nations Charter and the Statute of the Court.

Capacity to request advisory opinions has been given to the General Assembly, the Security Council and to other organs of the United Nations and specialized agencies which may at any time be so authorized by the General Assembly (Charter, Art. 96). There are no restrictions ratione temporis. Organizations, organs or bodies yet to come (Statute, Art. 65) may enjoy the right to request advisory opinions of the Court.

The organs that can be authorized to request advisory opinions are not only the principal organs of the United Nations but also the subsidiary organisms or administrative instruments by means of which organizations may exercise their rights, for example the Governing Body ***277** of the ILO or the Executive Board of Unesco. It appears to me that the General Assembly, which has the power to request opinions and authorize other organs and specialized agencies to do so, and has also the power of establishing subsidiary organs (Charter, Art. 22), can bestow on those organs or on one of the elements of its administration the right to seek advisory opinions (in eo quod plus sit, semper in est et minus, D. 50, 17, 110)[FN1]. The General Assembly can exercise its rights either itself or by conferring them upon a particular organ (potest quis, per alium, quod potest facere per se ipsum)–in the present instance on the Committee on Applications for Review[FN2].

Despite the foregoing, the validity of the provision in Article 11 conferring on the Committee on Applications

for Review the right to seek advisory opinions has been doubted but, as I think, without good reason. The Committee is really of a special nature[FN3]. But, so far as we are here concerned, this is because it is an organ which is independent by reference to the system of judicial organization of the United Nations. Article 11 is intended to effect its integration into that system. The Committee is an organ which is supplementary to the Administrative Tribunal; it was set up to provide additional guarantees of the judicial function of the Tribunal. The United Nations has conferred specific functions on the Tribunal and on the Committee, by giving them the status of independent organs. This is what States themselves do when they create a judicial organization equipped with independent and coordinated organs[FN4].

Nor do I consider that one would be justified in denying the Committee the right to seek advisory opinions from the Court on legal questions arising within the scope of its activities (Charter, Art. 96, para. 2) on the ground that it does not have the activities of an organ, or that it has no activities of its own. The Committee does have activities, namely to decide whether the objection to the Tribunal's judgement has a substantial basis, and if so, to request the Court to give an advisory opinion. I see no valid reason for requiring that, in order to be regarded as an organ within the meaning of Article 96 of the Charter, the organ in question should have activities of a particular magnitude. The Committee is not an organ unrelated to the Administrative Tribunal; it is a supplementary organ, established in order to afford additional guarantees that the ***278** Administrative Tribunal will exercise its own function. The General Assembly has conferred certain functions on the Tribunal and on the Committee by setting them up as co-ordinated organs.

8. The frequently heard objection as to the political nature of the Committee's composition and the fact that its members do not necessarily possess legal qualifications does not hold water. One need only recall that the Charter confers the right to request opinions in the first place on the General Assembly and the Security Council, i.e., on bodies of an undoubtedly political character.

It should also be observed that the expression ‘political nature‘ may be ambiguous. One may say of a body the members of which are appointed by States that it has a political character. But it is not correct so to describe it when it performs judicial functions. It is not difficult to demonstrate by means of examples that a distinction must be made between appointment and functions; thus in some States, the ministere public carries out the screening of applications for cassation, and does so as a judicial organ. When deciding whether or not effect will be given to an application by a staff member that an advisory opinion of the Court be requested, the members of the Committee are not engaged in political activity, but are and must be carrying out a judicial activity.

9. The objections made to the competence which the Court derives from Article 11 of the Statute of the United Nations Administrative Tribunal seem to have been forgotten once the political controversies of 1953 had died down.

The Court's Advisory Opinion on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956) would seem to have had a decisive effect in the same direction. In 1956 the Court had to decide a question virtually identical with the one arising in the present case, namely that of its jurisdiction by virtue of Article XII of the Statute of the ILO Administrative Tribunal. In the 1956 Advisory Opinion referred to, the Court did not find that there were in the Charter or in its own Statute any obstacles to the jurisdiction conferred upon it by that Article XII. The request for advisory opinion did indeed relate to a legal question that had arisen within the scope of the activities of the Organization. The only doubt stemmed from the necessity, owing to ‘the judicial character‘ of the Court, for observance of the ‘principle of equality of the parties‘, which follows from the requirements of good administration of justice; but, as the Court said, ‘These require-

ments have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco‘ and ‘although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it‘ (I.C.J. Reports 1956, p. 86).

Judges Winiarski, Klaestad and Sir Muhammad Zafrulla Khan, in their separate opinions, showed their concern for the safeguard of the equality of the parties before the Court, but they expressed no doubts as to the competence of the Court. President Hackworth, in his dissenting ***279** opinion, began by saying that he concurred ‘in the conclusion of the Court that it is competent to give an Advisory Opinion in response to the request from the United Nations Educational, Scientific and Cultural Organization, and that it should do so‘ (I.C.J. Reports 1956, p. 116). Like Vice-President Badawi and Judge Read, President Hackworth grounded his dissent on an argument relating to the ILO Administrative Tribunal's lack of jurisdiction to deal with the subject-matter of the case.

10. Article 11 of the Statute of the United Nations Administrative Tribunal endeavours to safeguard the principle of equality in the proceedings by placing the Secretary-General under an obligation to transmit to the Court the views of the person in respect of whom the judgement was rendered. The General Assembly, for its part, recommended in resolution 957 (X) that ‘Member States and the Secretary-General should not make oral statements before the International Court of Justice in any proceedings under the new article 11 of the Statute of the Administrative Tribunal‘.

11. The authority of the Advisory Opinion of 1956 in the Unesco case and the soundness of its reasoning explain why such distinguished writers as Rosenne and Mrs. Bastid do not, when they come to examine Article 11 of the Statute of the United Nations Administrative Tribunal, express the slightest doubt as to the right of the Committee on Applications for Review to request advisory opinions of the Court or as to the Court's competence to give such opinions; they do not even cite the objections to the Court's jurisdiction discussed above (paras. 4-8)[FN1].

I myself do not, in present circumstances, discern any reasons for change in the criterion applied by the Court.

B. Advisability of Giving an Opinion

12. The Court may give an advisory opinion (Statute, Art. 65); therefore it may choose not to do so. But a refusal by the Court may not be arbitrary; it must be based on sound and weighty reasons. The Court has never refused to give an advisory opinion sought by an organ authorized to request one, with the sole exception, going back to the Permanent Court, of the Status of Eastern Carelia (Advisory Opinion, 1923, P.C.I.J., Series B, No. 5) [FN2], which was a very special case.

The view has been expressed that the function assigned to the Court by Article 11 of the United Nations Administrative Tribunal is not consonant with the dignity and standing of the Court. One may reply that the dignity of a judicial organ is not to be measured by the prestige of those subject to its jurisdiction–be they States or private persons–but derives from its contribution to the upholding of justice.

***280** 13. ‘The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: 'A reply to a request for an Opinion should not, in principle, be refused.’ (I.C.J. Reports 1951, p. 19.) The Court has considered whether there are any 'compelling reasons', as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it would not only 'remain faithful to the requirements of its judicial character' (I.C.J. Reports 1960, p. 153), but also discharge its functions as 'the principal judicial organ of the United

Nations' (Art. 92 of the Charter).' (I.C.J. Reports 1971, p. 27.[FN1])

14. In the Unesco case, the Court, after having examined the particular nature of the procedure provided for in Article XII of the Statute of the ILO Administrative Tribunal–which is very similar to Article 11 of the Statute of the United Nations Administrative Tribunal–stated:

> 'In view of this [respect for the principle of equality of the parties] there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude whith would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials.' (I.C.J. Reports 1956, p. 86.)

15. It might also be considered that the possibility of some supervision of the decisions of the United Nations Administrative Tribunal by the Court, which is afforded by Article 11 of the Statute of the Tribunal, enlists 'the support of the Court for the good functioning of the Organization' (I.C.J. Reports 1972, p. 60), and thus enables it to fulfil its task as an organ of the United Nations.

C. Application of Article 11 of the Statute of the United Nations Administrative Tribunal

16. Article 11 of the Statute of the United Nations Administrative Tribunal is the source of the Court's jurisdiction to give an opinion in the present case, and thus defines the extent of its jurisdiction. It will be as well to consider this text here, for the purposes of its application by the Court.

17. A member State, the Secretary-General, or the person in respect of whom a judgement has been rendered by the Administrative Tribunal, ***281** has the power to object to the judgement and to ask the Committee on Applications for Review to request an advisory opinion of the Court on the matter. In any case in which a request is made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court, or request the Tribunal to confirm its original judgement or give a new judgement in conformity with the opinion of the Court.

The Court is not called upon to judge the case afresh; it does not itself play the part either of a court of appeal or of a court of cassation. When an advisory opinion is requested, the Court gives it in order to co-operate, within well-defined limits, in the judicial function of the Administrative Tribunal, and to lend its support for the proper functioning of the Organization.

18. Article 11 lays down a limited number of grounds on which the judgement may be challenged. There is thus a numerus clausus of questions on which the Court may be asked to give an opinion: the judgement may be challenged on the grounds that the Tribunal has exceeded its jurisdiction or competence, or has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice.

It should be observed that the grounds on which the judgement may be objected to are questions of law, the only questions on which the Court may give an opinion (Charter, Art. 96; Statute, Art. 65). The Court has no jurisdiction to consider all the complaints made by the person who challenges the judgement. It has no power to re-examine the evidence laid before the Administrative Tribunal, still less to consider facts or evidence which were not laid before the Tribunal, or which were not taken into account by it[FN1] . Thus the Court is legally de-

barred from taking into account the presentation of the case in the corrected statement of the views of Mr. Mohamed Fasla. This is certainly a very brilliant account of the matter, but the Court cannot follow it; it cannot step outside the limits of its jurisdiction. Still less can it take account of presumptions, rumours, hearsay, of the multiplicity of ‘perhaps‘, ‘presumably‘, ‘it would seem‘, to be found all over the statement. Nor can the Court take note of documents which were not laid before the Administrative Tribunal. Finally, the Court can say nothing about those of Mr. Fasla's claims which do not fall within the scope of the request for advisory opinion; it may not go beyond its jurisdiction.

19. In the advisory proceedings in the Unesco case in 1956, the question was raised of the proper method of interpreting the provisions governing ***282** the functions of the ILO Administrative Tribunal. The international character of the Tribunal was relied on in support of a restrictive interpretation of these provisions. The Court's answer on this point was as follows:

‘The Court does not deny that the Administrative Tribunal is an international tribunal. However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between Unesco and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization.‘ (I.C.J. Reports 1956, p. 97.)

The Court thus drew attention to the way in which the internal regulations of organizations should be interpreted when a decision has to be given on legal questions arising within the scope of their activities. The law applicable to the relationships between the staff member and the administration in an international organization can be described as international, but solely in order to explain the lack of jurisdiction of municipal tribunals to deal with such disputes. They are not true international disputes, but cases to be determined on the basis of an internal system of law–the internal law of the organization–which must be interpreted as such, in conformity with the object and purpose of the rules which it lays down[FN1].

20. Article XII of the Statute of the Administrative Tribunal of the ILO gives the Executive Board (in the case of Unesco) the right to submit the question of the validity of the Tribunal's decision to the International Court of Justice for an advisory opinion in any case in which it ‘challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed‘.

The power granted to the Governing Body to challenge decisions of the Tribunal is a very limited one; the terms of Article XII have been relied on in support of the view that this power is confined to cases of ultra vires and error in the application of formal procedural rules, and that Article XII does not make it possible to challenge a decision of the Tribunal on the grounds of a failure of justice on the merits.

21. Article 11 of the Statute of the United Nations Administrative Tribunal presupposes a complete and, as it were, ‘Copernican‘ change, as compared with Article XII of the Statute of the ILO Administrative Tribunal.

The political motive for the proposal of the new Article 11 was that of ***283** affording States means of challenging judgements of the Tribunal. But in the draft texts submitted, as in the discussions in the Special Committee, the Fifth Committee and the General Assembly, a new spirit, broader and more just, made itself felt.

The right to challenge the Tribunal's judgement ceased to be a privilege of the highest administrative body; it was of course conferred upon member States and upon the Secretary-General, but it was also conferred upon

‘the person in respect of whom a judgement has been rendered by the Tribunal‘. Thus staff members obtained the right to challenge judgements.

During the United Nations discussions, the representatives of various States sought to show that one of the objects of the reform ought to be to strengthen the legal situation of the staff, to take account of their legitimate interests, to ensure security of employment for staff members, and strict respect for their rights[FN1].

22. Nor is the scope of Article 11 confined to revision of a judgement for defects of form; it also contemplates error of law ‘relating to the provisions of the Charter of the United Nations‘.

These words have been interpreted as covering ‘not only interpretations of the provisions of the Charter but also the interpretation or application of staff regulations deriving from Chapter XV of the Charter‘ (Mr. Evans, A/AC.78/SR.10, p. 3); they cover questions under Articles 97, 100 and 101 of the Charter (Mr. Bender, ibid., p. 6); they cover, inter alia, ‘such questions as whether the Secretary-General's judgment should be upheld in regard to the conduct of the staff member and the United Nations standards of e ficiency, competence, and integrity as prescribed in accordance with Article 101 of the Charter ...‘ (Mr. Merrow, GA, OR, 10th Session, Fifth Committee, 494th Meeting, p. 44, para. 20)[FN2].

23. An important divergence from Article XII of the Statute of the ILO Administrative Tribunal was introduced in the third ground of challenge laid down in Article 11 of the Statute of the United Nations Administrative Tribunal. In place of a ‘fundamental fault in the procedure followed‘ there is reference to the Tribunal having ‘committed a fundamental error in procedure which has occasioned a failure of justice‘. The source of the mention of ‘failure of justice‘ was an amendment proposed by India and accepted withoutdiscussion[FN3]. The effect thereof is farreaching: the formula enables the Court, in the advisory opinion requested, to examine the question whether the decision of the Administrative Tribunal on the merits is just.

***284** 24. Each of the grounds for revision laid down in Article 11 is to be interpreted in the spirit with which the Article as a whole is imbued–the spirit of its reference to the provisions of the Charter and to failure of justice. The Court must consider whether or not there was failure of justice, and for this purpose must ascertain whether the judgement respects the purposes and principles of the United Nations, the general principles of law (Art. 38 of the Statute), and in particular the principles of administrative law, labour law (relations between the organization and staff members), and procedural law[FN1].

The phrase ‘which has occasioned a failure of justice‘ has independent significance. There is no valid reason for considering that it refers to defects in the procedure (error in procedendo). It cannot be supposed that the expression is an unnecessary repetition of the words ‘fundamental error‘. The failure of justice contemplated is a failure of justice on the merits (error in judicando), the result of the error and not the error itself committed in the procedure.

I am unable to perceive any reasons weighty enough for not interpreting this phrase in its literal sense, or for narrowing down its scope to such an extent as to render it unnecessary. Nor are there any grounds for attributing such an intention to the Indian delegation and to the majority in the Assembly which voted for the adoption of Article 11.

Study of the discussions in the Fifth Committee rather leads to the view that opinion moved in a direction favourable to the rights of staff members, and towards an interpretation which permits of errors of law being taken into account, though to a very limited extent[FN2]. This tendency did not finally assume a concrete form, but

one may consider that it operated in favour of acceptance of the Indian proposal. That proposal made it possible to satisfy to some extent the desire expressed by some delegates that the Court should give an advisory opinion in order to resolve a legal problem in a way which would be equitable for all those concerned.

## II. QUESTIONS SUBMITTED TO THE COURT FOR ITS OPINION

### A. Has the Tribunal Failed to Exercise Jurisdiction Vested in it as Contended by Mr. Fasla?

25. In his application to the Committee objecting to the Tribunal's judgement, the applicant claims that the Tribunal failed to exercise its ***285** jurisdiction in that the Tribunal did not fully consider all his claims, that is to say item by item. The Committee on Applications for Review considered that there was ‘a substantial basis‘ for Mr. Fasla's application, 11 of its members being in favour of asking the Court to give an advisory opinion on the question of failure by the United Nations Administrative Tribunal to exercise jurisdiction.

26. The intended meaning in Article 11 of the words ‘failed to exercise jurisdiction vested in it‘ (n'a pas exerce sa juridiction) does not seem clear. Is it the everyday meaning of the words which is intended–does it mean that the Tribunal failed to consider and pass up n one or more of the applicant's claims? In a more technical sense, on the other hand, such an omission may be regarded only as an error or defect in the procedure. The Tribunal does not exercise its jurisdiction (n'exerce pas sa juridiction) when it declares that it has no competence, whether the question of lack of competence is raised by one of the parties or by the Tribunal proprio motu; on the other hand, it does exercise its jurisdiction even if it commits an error in the procedure by not examining one of the applicant's claims.

The distinction does not seem to be an easy one to make in practice. In the written statements of Mr. Fasla, the difficulty is got round by accusing the Tribunal of having ‘failed to exercise its jurisdiction and/or committed a fundamental error in procedure‘.

It is true that in the municipal codes of various States, no distinction is sometimes made between procedural error in judgments given infra petita (judgments in which the judge does not decide all the points in issue) and failure to exercise the power conferred on the judge; the reason for this is that by refraining from determining some of the points in issue, the judge will not have exercised his jurisdiction in respect of those points.

27. It seems to me however that Article 11 contemplates jurisdiction in its strict or technical sense. The distinction made in the phrase ‘has exceeded its jurisdiction or competence or ... has failed to exercise jurisdiction vested in it‘[FN18] militates in favour of this interpretation. In my opinion, the Tribunal did not deny that it had jurisdiction to judge the case, and it did not refuse to receive and consider the claims of Mr. Fasla.

It is under the heading of ‘fundamental error in procedure‘ that the question must be examined.

The distinction is of practical importance. In a case in which jurisdiction was not exercised, there could be no question of the case being wrongly decided (mal-juge, rendered in Art. 11 as ‘failure of justice‘); but an error in procedure can only be taken up if this condition is fulfilled.

### ***286** B. Has the Tribunal Committed a Fundamental Error in Procedure which Has Occasioned a Failure of Justice?

28. Error and failure of justice. The question here raised is a complex one. Fundamental error in procedure is a ground for revision if it has occasioned a failure of justice. It is not such a ground unless there has been a failure

of justice.

It would seem logical to begin by considering whether there has been a failure of justice. If there has been none, even the most fundamental error in the procedure cannot be made a ground for revision.

It must first of all be borne in mind that the reference to failure of justice gives a different aspect to this ground; it ceases to have the formalistic nature appropriate to a defect in procedure, and acquires a more substantive nature, in harmony with the respect due to the provisions of the Charter.

There is a close interdependence between the error and the failure of justice, but it is not necessary that the error should be the cause of the failure of justice, if causality is understood in a purely logical way, or as analogous to the relation of cause and effect in the law of tort. It is sufficient that the failure of justice should have been occasioned by it (French text: provoque, that is to say, called from outside (pro-vocare)). Of the two elements involved in this ground, that relating to the justice of the judgment is of primary importance.

The word ‘occasioned‘ is not a technical term. It was chosen to avoid imposing an obligation to prove that the error was the conditio sine qua non of the failure of justice. It thus gives the Review Committee, and consequently the Court, the opportunity of applying the Statute in accordance with common sense. The error preceding the injury suffered by the victim is to be regarded as ‘a circumstance generally favouring failure of justice‘; the link to be established is the existence of a reasonable presumption that the error favours a failure of justice or is the occasion thereof[FN19].

29. The facts to be considered. To ascertain whether there was a failure of justice, one must first all of ascertain which facts are of importance in the case. As has been said above (para. 18), the Court cannot go outside the bounds of its competence; it must confine itself to the facts examined and accepted as proved in Judgment No. 158 of the Administrative Tribunal[FN20].

30. Mr. Fasla entered the service of the United Nations under a contract which, after several prolongations, was to expire on 31 December 1969.

***287** The Chief of the UNDP Personnel Division informed Mr. Fasla, by letter of 22 May 1969, that, as the Director of the Bureau of Administrative Management and Budget of UNDP had explained to him, ‘every effort will be made to secure another assignment for you‘.

The chances of finding an official another assignment in the Organization, in the specialized agencies, and even outside the United Nations, depend on the assessments and notes made in the administrative file and in the fact sheet of the person concerned.

Mr. Fasla's file was ‘incomplete and misleading‘ and his fact sheet was ‘incomplete‘ (to adopt the words of the Joint Appeals Board), because of the carelessness and ill-will of certain officials of the Organization.

In the Tribunal's opinion, the letter of 22 May 1969 constituted ‘a formal commitment by the Respondent to try to find another assignment for the Applicant. Such a commitment to make 'every effort’ obviously implies an obligation to act in a correct manner and in good faith‘. The Tribunal considered that this commitment ‘was not correctly fulfilled‘, since the information concerning Mr. Fasla's service ‘had serious gaps‘, and was not ‘complete and impartial‘.

The Tribunal held that the report of September 1970, which was very unfavourable to the applicant, could ‘be

due only to a violence of feeling and lack of self-control which, in this case, revealed prejudice on the part of the first Reporting Officer‘; this prejudice shown by the first Reporting Officer was in no way corrected by the second Reporting Officer, who adopted the terms of the first Officer, and did not take into account information favourable to Mr. Fasla ‘from an authorized person who had been requested to make an investigation of the mission in Yemen‘.

The Administrative Tribunal concluded that the prejudice shown by the first Reporting Officer was in no way corrected by the superior Officer ‘as he was obliged to do under the Staff Rules‘, that the Organization allowed a report ‘manifestedly motivated by prejudice‘ to be placed in the applicant's file, and used in the fact-sheet as revised in response to the recommendation of the Joint Appeals Board, that the periodic report ‘is invalid‘ and that ‘the Respondent did not perform in a reasonable manner the obligation which he had undertaken to seek an assignment for the Applicant‘[FN21].

***288** 31. The Tribunal awarded the applicant compensation in lieu of execution of the obligation undertaken by the respondent to seek an assignment for the applicant. The Tribunal fixed as the sole compensation for all damage suffered by Mr. Fasla a sum equal to six months' net base salary of the applicant.

32. The Applicant's claims. Mr. Fasla has also sought compensation for the injury sustained by him as a result of the prejudice displayed against him, compensation for the emotional and moral suffering inflicted upon him, compensation for the damage inflicted on his professional reputation and career prospects as a result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the applicant[FN22].

33. The Judgment of the Administrative Tribunal. The applicant was able to criticize the Tribunal's Judgement on two grounds: first that it did not take into account several of his claims, and secondly that it did not grant sufficient compensation for the heads of damage which the Tribunal did examine.

34. In its statement of facts, the Tribunal did not fail to mention the series of acts causing injury to the applicant originating from the negligence and prejudice (dishonest conduct) of certain officials of the Organization, but it subsequently failed to give a decision on several of the applicant's complaints, which were well founded in law, and overlooked the fact that he who causes injury is under an obligation to make good the damage he has caused.

35. According to the Tribunal, the Organization undertook a formal commitment to try to find another assignment for Mr. Fasla, and did not in fact do so ‘in a correct manner and in good faith‘. The Tribunal also observed that it was only possible to remedy the situation by the award of compensation, and it fixed the compensation at a sum equal to six months' net base salary for the applicant.

Compensation for injury must be related to the damage and loss suffered; otherwise there is a failure of justice.

36. The letter of 22 May 1969 gave rise, according to the Tribunal, to an obligation for the respondent to endeavour to find a new assignment for the applicant. The Joint Appeals Board, in its report of 3 June 1970, made the following recommendation: ‘UNDP should make further serious efforts to place the appellant in a suitable post either within UNDP ***289** or with one of the other international organizations‘. The Board also held that ‘the performance record of the appellant is incomplete and misleading and that this seriously affected his candidacy for further extension of his contract or for employment by other agencies‘.

The Joint Appeals Board recommended the payment of a sum equivalent to six months' salary to Mr. Fasla. This recommendation is explained by the fact that the compensation was assessed taking into account the period of six months which had elapsed between the end of the applicant's contract (31 December 1969) and the date of the Board's report (3 June 1970). During that period, account had to be taken of Mr. Fasla's hopes that he would be accepted for employment in an international organization. But the recommendations of the Board themselves further nourished the hopes of Mr. Fasla, who could legitimately have continued to cherish them until the Judgment of 28 April 1972.

37. The Tribunal noted that UNDP did not fully comply with the recommendation that it should correct the file and fact sheet of Mr. Fasla, so that if the new fact sheet had been circulated, ‘it would not have elicited a more favourable response from prospective employers than the fact sheet prepared in 1969[FN23] ‘.

The Tribunal concluded that the respondent had not fulfilled the obligation which he had undertaken to seek an assignment for Mr. Fasla, and also noted ‘that it is not possible to remedy the situation by rescinding the contested decision or by ordering performance of the obligation contracted in 1969‘.

38. It is noted that, as a result of negligence and ill-will on the part of the respondent, and despite his promises, Mr. Fasla was unable to obtain an assignment in the Organization, and it was made practically impossible for him to obtain a post elsewhere.

39. The Tribunal has the power and the duty, should the execution of the obligation relied on not be possible, to assess the extent of the damage suffered. In view of the Tribunal's finding that it was not possible to carry out the obligations undertaken by the Organization towards Mr. Fasla, and the existence of very serious damage, the Tribunal should have granted adequate compensation.

In accordance with the principles of law, the existence of injury resulting from a fault involves an obligation to compensate. Where specific relief is not possible, because the person responsible cannot or will not provide it (nemo potest praecise cogi ad factum), there is to be equivalent compensation. Such compensation must cover the damnum emergens and the lucrum cessans. The amount must be such that the injured party is restored as nearly as possible to the position in which he would have been if there had been no fault on the part of the respondent, and this responsibility***290** must be heavier still if the injury results from dishonest conduct.

The United Nations Administrative Tribunal considered that the promise made to Mr. Fasla in the letter of 22 May 1969 was not kept, and that it could no longer be performed, through fault and ill-will on the part of the respondent. The expectation created by such a promise was strengthened by the report of the Joint Appeals Board (3 June 1970) and remained alive up to the date of the judgment (28 April 1972). The injury suffered by Mr. Fasla thus consists of the loss of his salary up to this latter date, after which he had to look for a position outside the Organization. One must also take into account the damage and the loss of salary during the period he needed to find another post[FN24].

It should be observed that the Administrative Tribunal failed to examine other complaints concerning injury suffered by Mr. Fasla. It left on one side, without comment, the injury and damage resulting from the injury to Mr. Fasla's professional Reputation, deriving from the misleading nature of the uncorrected file and fact sheet; this is a serious fault, for which the Organization is responsible.

It is true that, by virtue of an abnormal and inequitable rule (odiosa sunt restringenda) in the Statute of the United Nations Administrative Tribunal, compensation cannot exceed the equivalent of two years' net base

salary of the applicant. The Tribunal may, however, in exceptional cases, order the payment of a higher indemnity (ibid., art. 9, para. 1).

In the case which has been brought before the Court, the injury caused to Mr. Fasla is of an exceptional nature as to its origin and to its extent; there was failure to carry out a promise, and serious damage to Mr. Fasla's professional reputation and career, damage resulting from the dishonest and improper conduct of officials of the Organization.

The Administrative Tribunal therefore appears to have committed a failure of justice by limiting the compensation granted to six months' salary; it should have fixed ‘what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation‘ (I.C.J. Reports 1956, p. 100, quoting I.C.J. Reports 1949, p. 249).

40. Error in the procedure. Complaint has been made that the Tribunal did not consider all the applicant's claims, and in particular the claims for compensation concerning damage caused to Mr. Fasla with regard to ***291** his career prospects and professional reputation, and for his emotional and moral suffering, each due to the fault of the respondent.

It is also complained that the Tribunal did not consider these claims, and dismissed them en bloc and without discrimination between them, and without giving reasons, when the Tribunal stated that ‘the other requests are rejected‘.

41. Fundamental errors in the procedure. In procedural law, lack of correlation between the judgment and the subject-matter of the application is regarded as a fundamental error.

A judgment may be invalid through going too far (ultra petita) or not going far enough (infra aut minus petita). It fails to go far enough ‘if no decision has been given on one of the heads of claim[FN25]‘. The Court must render a decision according to the petitum in the application (sententia debet esse conformis libelli), and the judgment should not leave out any of the claims made in the party's submissions. A judge does not fulfil his judicial duty (judex decidere debet) if he fails to give a decision on one of the causae petendi of the application (non est judex minus petita partium).

In municipal law, this failure is considered so serious that the remedies of requete civile and pourvoi en cassation are available in respect of it. It is fully justifiable to describe it as a fundamental error in the procedure.

42. An error in procedure is fundamental also if it occasions a failure of justice.

Moral damage should be compensated according to the general principles of law, and such compensation is the guarantee of human rights. Its importance in law is well known. The United Nations Charter begins with an affirmation of faith in ‘fundamental human rights, in the dignity and worth of the human person‘, a doctrine which is taken further in the Universal Declaration of Human Rights, according to which ‘No-one shall be subjected to ... attacks upon his honour and reputation‘ and ‘Everyone has the right to the protection of the law against such ... attacks‘[FN26]. The protection due to the dignity of the human person applies to honour and professional reputation. But the Tribunal did not look into the injury to the professional honour and reputation of Mr. Fasla, and this defect influenced the whole of its Judgment; it completely distorted the way in which the whole case was envisaged.

43. The Tribunal considered Mr. Fasla's claims as based upon the non-fulfilment of the promise by the administration to do everything ***292** within its power to find him an assignment in the Organization. But this is to take the wrong view of the matter.

It is not the non-fulfilment of the promises which is of major importance. The heart of the matter is the fact that there was damage to Mr. Fasla's professional honour as a result of the improper and dishonest conduct of certain officials, for which the Organization must bear the responsibility, and which brought about the breach of the promise. But in addition and above all, the injury to Mr. Fasla's professional honour was the origin of the financial and moral damage which he suffered; it was the unsurmountable obstacle which prevented him from obtaining an assignment with the Organization, or finding one outside the Organization.

The Tribunal did not directly consider the claim for compensation for injury to professional honour; this is the only possible explanation for its limiting the compensation granted to six months' salary.

44. In the respondent's written statement to the Court, it is stated that the Administrative Tribunal took account of Mr. Fasla's claim for damages in respect of his professional reputation and career prospects, as it included that claim in its recitals of the facts (para. 27).

The respondent's argument is misconceived. The Judgement is not being criticized for giving an incomplete statement of the facts. The criticism made of the Tribunal is that it failed to consider and pronounce in its Judgement upon one of the heads of claim, the one which is the central point of the case. Thus it committed a fundamental error in the procedure which has occasioned a failure of justice.

45. In his statement to the Court, the respondent relies on paragraph 4 of the operative clause of the Tribunal's Judgement (‘the other requests are rejected ‘) to support the conclusion that the Tribunal fully exercised its jurisdiction in respect of the claims presented to it (para. 30).

In my opinion (see para. 27 above), the Tribunal did exercise its jurisdiction, but in doing so committed an error in procedure. It did not give a decision on each of the heads of claim, and the very general form of words which it used did not repair this defect.

46. To avoid any misunderstanding, I would add in passing that a distinction must be made between defects or errors in a judgment which render it void (absolutely void, or void ipso jure), and errors or mistakes which render it voidable, so that it may be challenged before a higher court or tribunal. Judgments of a court or tribunal of final resort, in respect of which there is no higher tribunal, cannot be challenged on the basis of mere mistakes or errors in procedure.

47. The decision of a tribunal is only justified if it is logically based on the grounds and conclusions which are set out in it.

The respondent claims that non-motivation of a judgment is not a procedural error which can give rise to revision, because Article 11 of the Statute of the Administrative Tribunal does not expressly mention this ground, despite the fact that in the working paper submitted by the ***293** Secretary-General ‘failure to state the reasons for the award‘ was included among possible grounds for challenge (see para. 102 of the written statement, referring to United Nations document A/2909, Annex II.A, para. 53). He also claims that in any event this would not be a procedural fault of sufficient gravity to occasion a failure of justice (para. 104).

48. I do not find these arguments of the respondent convincing. The fact that failure to state reasons is not mentioned in the list of grounds for possible revision does not exclude the possibility of this failure being an error in the procedure. Article 11 of the Statute of the United Nations Administrative Tribunal, which uses the words ‘a fundamental error‘ in the procedure, is directed to all fundamental errors in the procedure, and it is obvious that failure to give reasons in the procedure of the Administrative Tribunal is a fundamental error. Article 10, paragraph 3, of the Statute, which provides that ‘judgments shall state the reasons on which they are based‘, confirms this[FN27].

49. The grounds, recitals and introductory clauses in judgments and decisions are not there for ornament. The requirement, to be found as well in legislation as in the Statute of the United Nations Administrative Tribunal, to give reasons for judgments is a consequence of the very nature of the judicial function. ‘It is of the very essence of judicial decisions that they state their reasons[FN28].‘

50. Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides that either party may request annulment of the award on the ground ‘that the award has failed to state the reasons on which it is based‘. The written statement filed on behalf of the Secretary-General relies on this Article to buttress the argument that the fact that failure to state full reasons was not mentioned in Article 11 of the Statute implies that such failure is not a valid reason for challenging the Judgment (para. 40).

In my view, Article 52 is rather to be read as a manifestation of the generality of the principle that it is of the very essence of judgments that they state their reasons. The silence of Article 11 of the Statute on the subject of reasons was to avoid repetition; any such mention was unnecessary, since Article 10 of the Statute lays this down as a condition for the judgments to be in proper form.

51. The importance of giving reasons for a judgment has been recognized universally and at all times. Francis Bacon said that judices sententiae suae ratione adducant (Aph. 38). The earliest codes of procedure ***294** also require reasons to be given for judgments[FN29]. The Court has held that giving reasons is a condition appropriate to the judgments of a court of justice and to awards of arbitrators[FN30]; and the conclusion has rightly been drawn that ‘it has become a truism to say that a statement of reasons is nowadays obligatory because it is indispensable[FN31].‘

52. A judge does not give his decisions by virtue of a discretionary power (ex voluntate) but according to the law (ex ratione legis), and he demonstrates this by giving reasons for his judgments. The reasons are the logical premise of the judgment. A judgment without reasons or with insufficient reasons has the appearance of an arbitrary decision and not of a true judgment[FN32].

Giving reasons for judgments has another purpose: the reasons also permit the parties to know the grounds for judicial decisions, and thus to know what possibilities are open to them of challenging the judgment on appeal or by way of cassation, and, in appropriate cases, how to go about it.

The Permanent Court stated that ‘all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion‘ (P.C.I.J., Series B, No. 11, p. 30).

53. In the case before the Court, the dismissal of the applicant's claims–and claims of fundamental importance–en bloc and without reasons by the Judgement of the Administrative Tribunal was itself an error in the procedure; but it also brings out another error in the procedure, inasmuch as the Judgment failed to give a decision

on certain heads of claim.

54. The respondent claims in his written statement (para. 105) that, according to the Court, whatever procedural mistakes the Tribunal may have committed, there is no need to examine them, particularly inasmuch as the irregularities alleged did not ‘prejudice in any fundamental way the requirements of a just procedure‘ (Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 69).

It should be observed that Article 84 of the ICAO Convention, which was applied by the Court in the case just mentioned, makes no mention of procedural irregularities, and that on the other hand Article 11 of the Statute of the Administrative Tribunal, which now falls to be applied, expressly refers to error in the procedure. In the Judgment which the respondent has cited, the Court said: ‘If there were in fact procedural ***295** irregularities, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless it would have reached the right conclusion‘ (ibid., p. 70). In my opinion, not only was the Judgement of the Administrative Tribunal vitiated by a fundamental error in the procedure, and did not produce the right conclusion, but in addition that fundamental error occasioned a failure of justice.

(Signed) F. DE CASTRO.

***296** DISSENTING OPINION OF JUDGE MOROZOV

I voted against the decision to comply with the request for an advisory opinion and also in the negative on both Question I and Question II in the operative part of the Advisory Opinion of the Court, and I am unable to support the reasoning in the Opinion.

The basic grounds for my position are the following.

1. I believe that the Court has no competence to give the advisory opinion which has been requested by the Committee on Applications for Review of Administrative Tribunal Judgements in implementation of Article 11 of the Statute of the Tribunal, this being the first such request almost 18 years after the Statute was amended by General Assembly resolution 957 (X) of 8 November 1955.

In this connection I can only say that if the procedure established for the so-called review of the judgments of the Tribunal were really judicial, in accordance with the Court's Advisory Opinion of 13 July 1954, the review body concerned, but not the International Court of Justice, would be in a position to give a proper judgment on the specific case of Judgment No. 158 of the Tribunal.

2. Article 65, paragraph 1, of the Statute of the Court provides that ‘The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request‘.

It is indisputable that the Statute imposed no duty on the Court automatically to accept any kind of request for advisory opinion. The Court should only give effect to a request for an advisory opinion, and deliver such an opinion, strictly in accordance with the provisions of the Charter and the Statute of the Court and in particular in accordance with Articles 34 and 65 of its Statute and Article 96 of the Charter.

The present request for advisory opinion contravenes the principles of the Charter and the Statute of the Court.

It is for the General Assembly to adopt whatever resolutions it sees fit, and I do not intend to involve the Court

in any revision of resolution 957 (X) adopted by the General Assembly; for this is in no way a function of the Court.

But at the same time the competence of the Court itself and its function must be based, not upon this or that resolution adopted by the General Assembly, but on the Charter of the United Nations and the Statute of the Court, which forms an integral part of the Charter.

***297** 3. Contrary to the conclusion of the majority of the Court, the procedure which has now been imposed on the Court is not a judicial one.

To my mind, the Advisory Opinion makes use of a number of unconvincing arguments in order to justify the procedure referred to as a normal judicial procedure for review of United Nations Administrative Tribunal Judgements; and points of great importance have not been taken into account.

For example, the main argument of the Opinion is that review of United Nations Administrative Judgements in contentious casses between United Nations officials and the Secretary-General could become subject to review by the International Court of Justice, not in the form of a continuation, at least to some extent, of the contentious procedure but in the form of advisory procedure. This unusual procedure was devised 18 years ago and it is quite clear that the above-mentioned procedure could be regarded as intended to conceal the fact that private persons (United Nations officials) had been given the right to request the review of a judgement, and to become parties before the International Court of Justice, contrary to the provisions of Article 34 of the Court's Statute, which lays down that ‘only States may be parties in cases before the Court‘.

But nothing can cover up the fact that, albeit by means of so-called advisory procedure, private persons become parties to the proceedings before the Court. These persons can initiate the procedure of appeal against the judgment of the Administrative Tribunal, have a right to present to the Court statements and evidence of any kind, and have a right to make an oral statement before the Court if the Court decides to hold oral proceedings.

Such limitations of these rights as result from the activity of the Committee on Applications and from the restricted character of the reasons which may be the grounds of an appeal (failure to exercise jurisdiction or fundamental error in the procedure) make no difference in principle, but are merely directed against the interests of the United Nations officials; this last point will be examined further below.

Now it is necessary to recall that the question of the competence of the International Court of Justice was settled by the United Nations Conference on International Organization in very clear terms, which are reflected in Article 34 of the Statute of the Court. It is well known that one of the delegations suggested at that time that Article 34 of the Statute be redrafted to include provision that not only States but also private persons could be permitted to be parties before the Court in cases of review by it of the judgments of administrative tribunals connected with the United Nations when such a right of appeal was provided by the statutes of such tribunals.

That suggestion was rejected by the Conference (United Nations Conference on International Organization, Documents, Vol. 13, p. 482).

4. But what situation arose at the 1955 session of the General Assembly, when the procedure for review of the judgements of the United Nations ***298** Administrative Tribunal was adopted contrary to the decision of the United Nations Conference on International Organization?

To answer this question it is necessary to turn our attention to the Advisory Opinion of the Court of 13 July 1954 and the travaux preparatoires of the amendment of Article 11 of the Statute of the Administrative Tribunal of the United Nations.

In 1954 the Court, in answer to the question put by the General Assembly, stated that:

> 'Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ–considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them–all the more so as one party to the disputes is the United Nations Organization itself.' (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954, at p. 56.)

But what did happen in 1955? The General Assembly created, allegedly on the basis of Article 22 of the Charter, a subsidiary organ–the Committee on Applications for Review of Administrative Tribunal Judgements, and authorized it to request advisory opinions of the Court in cases in which the Committee found a substantial basis for the application made to it, including applications from private persons, from the United Nations Secretary-General and from member States. It is quite clear that, to take such a decision, the Committee should consider the merits of the relevant judgement of the Administrative Tribunal.

In the light of the above-cited Opinion of the Court, the General Assembly created a 'subsidiary' organ authorized to implement a function which the General Assembly should not, according to the Opinion of the Court, itself exercise.

But Article 22 of the Charter permits the General Assembly to 'establish such subsidiary organs as it deems necessary for the performance of its functions' (emphasis added).

Therefore according to the above-mentioned view expressed by the Court in 1954, which I share completely, the Committee created in 1955 cannot be considered as an organ of the United Nations within the meaning of Articles 7 and 22 of the Charter and therefore this Committee has no right to ask for advisory opinions of the Court in accordance with Article 96, paragraph 2, of the Charter.

There is additional evidence that this Committee could not request opinions of the Court, because any organ of the United Nations other than the General Assembly and the Security Council may be authorized ***299** to do so only 'on legal questions arising within the scope of their activities' (Art. 96, para. 2, of the Charter). But the Committee (which is not a permanent organ of the United Nations) has requested an advisory opinion not in the scope of its own activities but in the scope of the activities of another body–the United Nations Administrative Tribunal.

5. It is suggested in the present Advisory Opinion that the activity mentioned above could be explained on the basis of Article 101 of the Charter.

I should like to recall that Article 101 provides: 'The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.' But as the Court said in 1954, the Charter 'does not confer judicial functions on the General Assembly' and that when it established the Administrative Tribunal it 'was not delegating performance of its own functions' (I.C.J. Reports 1954, p. 61).

These observations of the Court stressed the judicial nature of the activity of the United Nations Administrative Tribunal, and can be correctly interpreted in the sense that any procedure for reviewing the judicial decisions of that Tribunal should be a judicial one.

6. From the very outset the adoption of the procedure which has now been approved by the majority of the Court was inspired by considerations other than the interests of United Nations officials.

The Secretary-General, as well as the representative of the United Nations Staff Committee, objected to the proposed review procedure.

The discussions in the Fifth Committee and the plenary meetings of the General Assembly in 1955 showed very important divergences of views, which touched upon the Charter and the Statute of the Court.

In the Fifth Committee 30 out of the 57 delegations did not support the amendments to Article 11 of the Statute of the Tribunal. In the plenary meetings of the General Assembly 26 out of 59 delegations did not support these amendments.

It may also be useful at this point to indicate some important consequences of the procedure which the Court has approved.

As has already been observed, that procedure is not a judicial one. In addition to the evidence of this mentioned above, I should like to stress the following.

Paragraph 3 of Article 11 of the Statute of the Administrative Tribunal authorizes the Secretary-General to give effect to the opinion of the Court. This means that if the opinion of the Court is contrary to the judgement of the Tribunal, and the Secretary-General is in agreement with the opinion, he can de jure and de facto nullify the judgement of the Tribunal, despite the fact that the Secretary-General is only one of the parties in the case.

7. Reference was made in the Advisory Opinion to the Opinion of the ***300** Court in the Unesco case; and the fact that the Governing Body of the ILO has been authorized by the International Labour Conference to seek the advisory opinion of the Court with regard to judgments delivered by the ILO Administrative Tribunal has been used as an analogy for the procedure accepted by the Court in the present case. But it is necessary to stress that the Governing Body of the ILO (like the governing bodies of some other specialized agencies) is the executive committee of the ILO, whereas the Committee on Applications it not an executive committee of the United Nations, nor is its composition comparable with that of the ILO Governing Body.

A further important point is that the right to initiate the procedure for review of the judgments of the ILO Tribunal does not belong to private persons or to any State, but to the Governing Body itself alone.

I do not intend to analyse all the other ways in which the provisions of the Statute of the ILO Tribunal concerning the question of review of judgments of the Tribunal differ from those concerning the United Nations Administrative Tribunal. There is a well-known divergence of views upon that matter; and I have mentioned the main differences only in order to show that there is no room for any analogy of the kind mentioned above.

(Signed) Platon MOROZOV.

FN1 As I have occasion to observe, the consensual nature of the Court's jurisdiction does not operate where advisory opinions are concerned (separate opinion, I.C.J. Reports 1971, p. 174). In my view, Article 68 of the Stat-

ute only permits application to advisory opinions of the rules peculiar to contentious cases with the implied reservation that such rules must not be irreconcilable with the nature of advisory opinions.

FN2 Mrs. Bastid sees it as ‘an exceptional adaptation of the rules generally applicable to the Court‘: Le Tribunal administratif des Nations Unies, Conseil d'Etat, Etudes et documents, 1969, No. 22, p. 20, Note 1.

FN3 On this statement, see para. 5 et seqq.

FN4 As the Court once said, the General Assembly has the power to amend the Statute of the Administrative Tribunal and ‘to provide for means of redress by another organ‘ (I.C.J. Reports 1954, p. 56).

FN5 The Committee was set up in order to be able to request advisory opinions.

FN6 On the nature of the Committee, compare A. M. Del Vecchio, Il Tribunale ammini strativo delle Nazioni Unite, 1972, pp. 172 ff.

FN7 It has been said that the organization is ‘represented by one of its organs‘, namely the Committee on applications for Review: see Dehaussy, ‘La procedure de reformation des jugements du Tribunal administratif des Nations Unies‘, Annuaire francais de droit international, 1956, p. 476. This expression is ambiguous; it is more a question of creation of an organ better to meet the needs of the organization, than one of representation.

FN8 Rosenne, The Law and Practice of the International Court, 1965, Vol. II, pp. 686-690; Mrs. Bastid, loc. cit., pp. 19-21; see also Del Vecchio, loc. cit., pp. 163-184. Koh, in The United Nations Administrative Tribunal, 1966, p. 92, refers to these examinations of the question, but without disputing the Court's jurisdiction. Dehaussy has no doubt as to the Court's jurisdiction, despite his reservations de lege ferenda: loc. cit., p. 479.

FN9 As to this Advisory Opinion, see my separate opinion in I.C.J. Reports 1971, p. 171.

FN10 See, in this sense, my separate opinion in I.C.J. Reports 1971, pp. 170 and 173.

FN11 One of the leitmotive of the discussion on the revision of the Statute of the Administrative Tribunal was that the review would not involve re-opening questions of fact. The Court will have to examine the facts as established by the Tribunal. It does not play the part of a court of appeal; its role has a certain analogy with that of a court of cassation, since it is confined to the grounds of objection advanced by the applicant which have been regarded as substantial by the Committee, and to the grounds for review permitted by Article 11 of the Tribunal's Statute.

FN12 The Administrative Tribunal thus takes into account the principle of effectivity–‘must give the maximum effect to these rules‘: see Koh, loc. cit., p. 84.

FN13 While also avoiding anything which would weaken the authority of the Administrative Tribunal or afford opportunities of hampering the Secretariat in the exercise of its functions.

FN14 See also Del Vecchio, loc. cit., pp. 168 ff.

FN15 It was intended ‘to preclude review on account of trivial errors in procedure or errors that were not of a substantial nature‘ (GA, OR, 10th Session, 5th Committee, 496th Meeting, para. 26).

FN16 Art. 38 of the Statute applies in disputes between States. In its advisory opinion the Court applies the in-

ternal law of the Organization, which it supplements with the rules of common law of States; the Administrative Tribunal ‘often relies on fundamental legal concepts which have a place in any legal system‘ (Mrs. Bastid, loc. cit., p. 26. On the applications of the general principles of law and equity see Koh, loc. cit., pp. 82 and 83).

FN17 The concern generally felt was to exclude the possibility of objections to judgements relating to factual matters.

FN18 In the text recommended by the Special Committee, the passage referring to failure ‘to exercise jurisdiction vested in it‘ does not appear.

FN19 Paul tells us that ‘et qui occasionem praestat, damnum fecisse videtur‘, D.9, 2, 30, para. 3.

FN20 The Court does not have to examine Mr. Fasla's allegations that he was persecuted and even punished for having acted loyally towards the United Nations, by reporting the abuses and improper practices of a superior. There may be some indication that this was the case, but the matter was not duly argued and proved before the Administrative Tribunal.

FN21 The respondent has not contested the Tribunal's judgement; he therefore accepts the facts stated therein as proved.

> In order properly to understand the decisions of the Tribunal, one must bear in mind that, in the practice of the United Nations and the specialized agencies, ‘fixed-term contracts are not like an ordinary fixed-term contract between a private employer and a private employee‘ (I.C.J. Reports 1956, p. 91), and also that ‘there may be circumstances in which the non-renewal of a fixed-term contract provides a legitimate ground for complaint‘ (ibid.). This practice is reflected in Article 4.4 of the Staff Regulations.
>
> In municipal law, contracts must be ‘performed in good faith‘; they ‘bind not only to what is expressed therein, but also to all consequences attached to the obligation according to its nature by equity, custom or law‘ (Arts. 1134 and 1135 of the French Civil Code). Hence the legitimate nature of the hopes born of the employer's conduct towards the employee. In case of non-performance, the obligation is resolved by the award of damages. These general principles apply to the contractual relationship between the United Nations and its staff members.

FN22 I do not mention here all Mr. Fasla's claims, but merely those which, in my view, could have been the subject of a fundamental error in procedure which occasioned a failure of justice.

FN23 The Tribunal regarded the decision taken by the United Nations Administration, not to employ Mr. Fasla in any event, as not capable of being reversed.

FN24 In order to determine the extent of the injury suffered, the United Nations Administrative Tribunal has said that it must ‘consider to what extent the applicant has expectation of continued employment, taking into account the terms and nature of the contract, the Staff Rules and Regulations and the facts pertaining to the situation and must evaluate the applicant's chances of earning a livelihood after separation from the United Nations‘ (Eldridge case, UNAT Judgement No. 39, p. 184; quoted in Koh, loc. cit., p. 85, note 134).

FN25 This is how Article 480 of the French Code of Civil Procedure adopted in 1806 expresses the principle; I quote the French Code because many other codes, which I will not quote in order not to overburden this opinion, were modelled upon it. See also an observation in I.C.J. Reports 1950, p. 402.

FN26 On the fundamental rights of the human person, see I.C.J. Reports 1970, p. 32. The Administrative Tribunal of the League of Nations recognized a contrario the right to compensation for moral damage: Judgement No. 13, 7 March 1934. In Judgement No. 99 (M.A. case), the United Nations Administrative Tribunal decided to award compensation for moral damage (see Mrs. Bastid, loc. cit., p. 27).

FN27 See also Art. 9, para. 1, in fine. The purpose of these Articles is ‘to prompt the Tribunal to take care over the reasoning in its judgements and the wisdom of its decisions‘, Mrs. Bastid, loc. cit., p. 20; this is all the more important because of the members of the Administrative Tribunal ‘very few have any judicial experience‘, ibid., p. 25.

FN28 Submissions of M. Letourneur (Conseil d'Etat, 27 January 1950) quoted by Juret, ‘Observations sur la motivation des decisions juridictionnelles internationales‘, R.G.D.I.P. 1960, p. 519.

FN29 For example Article 141 of the French Code of Civil Procedure of 1806 (re-enacting on this point the law of 16-24 August 1790).

FN30 This statement of reasons, which is of ‘an essentially judicial character‘ is required by Art. 56, para. 1, of the Statute of the Court (**I.C.J**. **Reports** 1954, p. 2); an arbitrator's award should contain ‘ample reasoning and explanations in support‘ ( **I.C.J**. **Reports** 1960, p. 216).

FN31 Juret, loc. cit., p. 568 and passim.

FN32 This is not the case for other categories of decisions, judicial, **administrative** or jury decisions.

**I.C.J**., **1973**
**APPLICATION** FOR **REVIEW** OF **JUDGEMENT** No. **158** OF THE **UNITED NATIONS ADMINISTRATIVE TRIBUNAL**
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