DISSENTING OPINION BY JUDGE ALVAREZ

[Translation]

I

The question referred to the International Court of Justice by the General Assembly of the United Nations for an Advisory Opinion in the matter of the Effect of Awards of Compensation made by the United Nations Administrative Tribunal in favour of certain staff members is drafted in very precise terms which considerably limit its scope.

In Question (1) of the Request for an Advisory Opinion, the General Assembly asks whether, having regard to the Statute of the Administrative Tribunal and any other relevant legal instrument or to the relevant records, it has the *right* on any grounds to refuse to give effect to an award of compensation made by the Tribunal in favour of a staff member of the United Nations ; and in Question (2) it asks, if the answer given by the Court to Question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise its right.

The question however is more general in character by reason of the third recital in the Request for an Opinion, which reads as follows : "Considering, nevertheless, that important legal questions have been raised in the course of debate in the Fifth Committee with respect to that appropriation (for the purpose of covering the awards made by the Administrative Tribunal)...."

What the General Assembly is really asking is whether, apart from the specific texts indicated in Question (1), there are other considerations or grounds upon which the General Assembly could exercise a right to refuse to give effect to an award of compensation made by the Administrative Tribunal.

It becomes necessary, therefore, to indicate these considerations or grounds ; they may be not only legal but also political, for the question presents this two-fold character.

Some of the Governments to which the Registrar of the Court, in accordance with Article 66 of the Statute of the Court, had communicated the present Request for an Opinion, relied in their Written Statements, or in oral statements made before the Court, not only on the documents referred to in Question (1) but also on legal considerations or considerations of a more general character.

The opinions thus expressed show that there are two conflicting views :

A.—The Administrative Tribunal, established by the Assembly of the United Nations, is a subsidiary organ of the Assembly and accordingly the Assembly is not bound by the decisions of the Tribunal.

B.—The Administrative Tribunal is a real tribunal whose awards are binding and therefore the Assembly must always respect them.

I am unable to concur in the opinion of the majority of the Court because they have relied almost exclusively on the documents indicated in Question (1) of the Request for an Opinion. I, for my part, consider that apart from these elements there are other very important elements of a general character which must also be taken into account.

It is for this reason that I have appended my dissenting opinion to the opinion of the Court.

II

My basic assumption is that the question referred to the Court relates to the international organization established by the Charter of the United Nations ; it is therefore a problem of politics and of the new international law, which must be resolved in accordance with those elements and having regard to a new criterion.

Before we show in what respect the problem belongs to the domain of the new international law and before we deal with the solution which should be given to it in accordance with that law, let us consider how it would be resolved by classical international law.

Before 1914 there were no arbitral tribunals operating on a permanent basis; there were merely occasional arbitrators who adjudicated upon disputes regarding specific matters. A distinction had to be made between appeals against such awards and their performance.

As regards appeal, this was provided for in the arbitration agreement, which usually stipulated that revision might be undertaken by the arbitrator in certain cases.

And as regards the performance of the award, the practice was that it was carried out in good faith ; but if it contained grave defects and in particular if the arbitrator had acted *ultra vires*, the party concerned could refuse to give effect to the award. Such a refusal, moreover, might give rise to a new dispute between the parties.

These precedents of arbitral tribunals finally gave rise to a principle of classical international law to the effect that a party might refuse to give effect to an arbitral award if the award contained grave defects.

If classical international law is applied to the case now before the Court, there can be no doubt as to the solution : the General Assembly of the United Nations must not give effect to awards of the Administrative Tribunal if it considers that they are vitiated by some important defect.

But now that, in addition to arbitral tribunals, the International Court of Justice, which is permanent in character, has come into existence, the question of the review and performance of arbitral awards must be resolved, having regard to the new conditions of arbitration as well as to the new conditions of international life in general.

In this connection, it is necessary to proceed on the basic assumption that, following the last two social cataclysms in particular, rapid and profound transformations have occurred in the life of peoples and in the traditional or classical international law, which have not been sufficiently appreciated. By reason of the extent of these changes, a new *epoch*, a new *era* has opened in the life of peoples and in the traditional or classical international law.

A rapid review of these transformations will serve to show how important they are.

Until the two last world wars, all the States formed a mere *community* and there existed between them no links other than those which had been freely accepted. Since then, and as a result of a number of circumstances, particularly the ever-increasing relations between States, the complexity and variety of those relations, the great number of international services created by the States, as well as the increasing dynamism of the life of peoples, this community has been transformed into a real *international society* which includes all the States of the world. This transformation has taken place without any convention or solemn act being required for that purpose.

There are great differences between the old community and the new international society.

Without expatiating on this point, I shall merely indicate that in the new international society the psychology of peoples has been deeply modified from a two-fold point of view. Certain peoples who for centuries had followed a traditional course, adopted new ways of life and embraced, almost abruptly, a political, social and economic régime which was entirely different from the one that had hitherto prevailed. This is particularly true of Russia, where the Soviet regime was born. Since that time there has also been an awakening among many peoples of Asia, Oceania and North Africa who are desirous of casting off what they call the European yoke. In this way more than half of the world to-day has, particularly from the international point of view, a psychology which is very different from what it formerly was.

Furthermore, all the peoples now understand that they are no longer isolated or bound only by the instruments which they have freely accepted, but that they are a part of a real society which is broader than the civil community to which they belong and which limits their absolute sovereignty.

As a result, the classical international law which governed the old community has been modified from several points of view.

First, it has established, in many respects, a new legal order by creating certain rights and duties which States did not formerly have ; secondly, international law must henceforth have primacy over national law, a fact which was formerly challenged ; and finally, international law has undergone considerable change in so far as the concept of that law and its essential facts are concerned ; it is no longer exclusively *juridical* and *individualistic*, as was classical international law ; it now assumes a *political* and *social* character as well.

The profound modifications in international life and in international law which I have just outlined are not the mere expression of doctrine or legal speculation, as might be thought at first sight ; what are involved are facts, declarations, and bases recognized by the Charter of the United Nations, particularly in its Preamble and in Chapter I.

The *political* character of international law has been recognized, at least by implication, by the Third Assembly of the United Nations, when it debated the Advisory Opinion of the Court in the matter of the Admission of New Members to the United Nations.

The *social* character of the international law of to-day is a result of the new *régime of inter-dependence* which has emerged and which tends to replace the traditional *individualistic* régime. Having regard to this *social* character, what may be called the new international law is particularly concerned with the maintenance of peace and the development of confidence and co-operation between States ; it assigns an important place to the general interest and condemns *abus du droit ;* it also has a new aim : the well-being of the individual and of society.

The Charter applies this social law in a number of its provisions, particularly in Chapters IX to XIV. It was also applied in some of the decisions of the International Court of Justice and in the work of the Codification Commission in the preparation of regulations governing certain matters.

Finally, a further characteristic of the international society is that it has been organized by the Charter of the United Nations. The Charter has established six principal organs, including, with particular reference to the matter we are considering, the General Assembly and the Secretariat (Art. 7). And Article 22 provides that "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions".

The principal organs play the most important part in the new international society ; almost all the activity of that society is concentrated in those organs. The only purpose of the subsidiary organs is to assist the principal organs to discharge their duties.

One fact must be particularly stressed and that is that the organs and agencies established by the Charter—as, indeed, all social institutions—evolve more or less rapidly in accordance

with the new conditions of the life of peoples; this evolution to-day constitutes a real sociological or social law.

As regards the subject we are here considering, I shall confine myself to the evolution of the General Assembly of the United Nations. This evolution is characterized by a number of factors which transform the Assembly into an all-powerful legislative organ.

First, the Assembly tends to be in almost permanent session.

Secondly, the Assembly is becoming a real international legislative power for, apart from *recommendations* made to States, it adopts *resolutions* whose provisions are binding on them all. This fact is of great importance for the future of international law.

A number of publicists and statesmen have expressed the desire for the establishment of an international legislative power: in fact such a power already exists.

A third tendency of the Assembly of the United Nations is to intervene more and more in the solution of the great international problems which arise. To-day, whenever a difficult situation presents itself in international life, its reference to the General Assembly for consideration is always envisaged.

A fourth tendency relates to the formation, within that Assembly, of a special psychology in international matters. Indeed, when the States meet in the Assembly—except in cases involving their vital interests—the juridical conscience of peoples is developed there, along with the new conception of law and of justice.

This conscience gives rise either to legal principles—in other words, principles whose observation can be required, and they are then principles of *social law* or more properly, of the international *law of social inter-dependence*—or merely to moral principles, and these constitute *international social justice*. The latter may become principles of law by means of resolutions of the General Assembly of the United Nations, or by decisions of certain international organs, such as the International Court of Justice, which, in respect of a given matter, may declare that a certain principle of international social justice should be established in positive terms and applied as the law in force.

And, finally, the General Assembly of the United Nations tends to be guided by the notion of social law and international social justice in its work and resolutions, as has already been pointed out above.

This character, this omnipotence which has been acquired by the General Assembly of the United Nations is to be explained by the fact that it is made up almost permanently of representatives of most of the countries of the world, whereas this was not formerly the case.

The Assembly constitutes the supreme power ; it is bound only by the Charter which established it, or by its own resolutions. There is nothing above the Assembly except moral forces, particularly public opinion, which may censure the acts of the Assembly if it considers them open to criticism.

A logical and practical consequence of the foregoing is that any attempt to limit the power of the General Assembly of the United Nations would run counter to the realities of international life.

A further very important consequence is that in the solution of international problems that may arise in the future, regard may no longer be had—as was hitherto the case and as was done by a number of governments in their opinions, to which reference has already been made—for diplomatic precedence, international awards, preparatory work or the views expressed by delegates during the debates relating thereto. In international life there can no longer be any looking backwards, although this was admissible when international life scarcely moved forward ; the dynamism of that life makes it necessary to look ahead.

III

The great transformations in international life and in international law which I have just indicated in summary form are so important that they deserve special consideration with regard to the solution of the question put to the Court.

First, the Administrative Tribunal was established by reason of the fact that the Secretariat of the United Nations consists of some thousands of staff members who were engaged under contracts which may give rise to disputes between the Secretariat and the staff members. These disputes are not decided by the General Assembly of the United Nations—this would burden it unduly ; nor by the International Court of Justice—this would increase its task considerably ; nor by any other tribunal. Accordingly, the General Assembly considered it necessary to establish a subsidiary organ in accordance with Article 22 of the Charter.

Certain governments, in their opinions, and the Court itself, have sought at considerable length to prove that the General Assembly had the capacity to establish that organ ; in my opinion, the Assembly clearly had that capacity by virtue of Article 22 quoted above and by virtue of the omnipotence of the Assembly.

The name of this organ is especially significant : "The United Nations Administrative Tribunal".

What is involved is, indeed, a *tribunal* and not—as alleged by certain governments—a mere advisory body of the Assembly because, under the terms of its Statute, the Tribunal delivers binding judgments ; it is not, however, a judicial tribunal : it is an *administrative* tribunal because it deals only with specific questions

in that field, which, in the first instance, fall within the purview of the General Assembly which established the Tribunal to assist it in the discharge of its duties.

The members of the Tribunal are appointed by the General Assembly and the Statute of the Tribunal was drawn up by the Assembly.

It is self-evident that the Tribunal has no competence other than that conferred upon it expressly by the Assembly ; the Tribunal's competence is indicated in Article 2 of its Statute : its particular task is to settle disputes arising out of contracts of employment entered into between the Secretariat and the staff members of the United Nations.

Article 10, paragraph 2, of the Statute provides that "the judgments shall be final and without appeal" ; and Article 9 provides that "in any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations....".

It is to be noted that the Statute of the Administrative Tribunal does not provide for any means of appeal against the awards ; nor does it indicate how effect is to be given to the awards.

There is therefore a difference between the Tribunal and the International Court of Justice in this respect.

The judgments of the International Court of Justice, which is the principal judicial organ of the United Nations (Art. 92 of the Charter), are "final and without appeal" (Art. 60 of the Statute of the Court), but provision is made for revision or interpretation by the Court in certain cases (Arts. 60-61 of the Statute).

As regards compliance with the decisions of the Court, the interested party may, in accordance with Article 94 of the Charter, have recourse to the Security Council "which may, *if it deems necessary*, make *recommendations* or decide upon *measures to be taken* to give effect to the judgment".

The carrying out of the judgments of the Court is thus dependent upon the Security Council, which may make a decision in this respect, as has just been pointed out.

Since the Statute of the Administrative Tribunal contains no provision for the review of its awards and no provision relating to their performance, do those awards automatically bind the Assembly so that the Assembly must always give effect to them even when they are vitiated by a patent defect, such as excess of powers or manifest injustice ? Obviously not.

It is inadmissible that a principal organ of the United Nations, such as the General Assembly, which has very broad powers, should be bound passively to give effect to all the awards of a tribunal which it has established. The Assembly is bound to do so only in cases in which the Tribunal has acted within the limits of its competence. But if the Assembly considers that the Tribunal has acted *ultra vires*—for example, if it grants an amount of compensation which is higher than the amount claimed, or if

the compensation has been awarded without valid grounds, or if the Tribunal has committed an *abus du droit*—then there can be no doubt that the Assembly can refuse to give effect to the award by not providing for the amount of compensation in the budget of the Organization ; but in such a case the Assembly is bound to indicate expressly the grounds for its refusal, failing which its attitude would be open to criticism.

As I have already pointed out above, it is a principle of classical international law—and also of modern international law—that the awards of tribunals are not binding when they are vitiated by some defect, as, for example, when the tribunal has acted *ultra vires*, and that accordingly the parties may refuse to give effect to them. In order to make the awards binding in such cases, an express provision would be required in the instrument providing for the constitution of the tribunal. But no such provision exists in the case of the Administrative Tribunal.

What the Court said in its Advisory Opinion in the matter of Reparation for Injuries suffered in the Service of the United Nations is perfectly applicable here ; the relevant passage which is quoted in the present Advisory Opinion by the Court in support of other assertions is as follows : "Under international law, the Organization (the Assembly in the present case) must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties" (I.C.J. Reports 1949, p. 182).

The General Assembly of the United Nations which, as has been pointed out above, must constantly be guided by the notion of international social justice, cannot passively agree to give effect to the awards of a subsidiary organ which it has established if those awards are vitiated by a patent defect.

Furthermore, the nature of the Tribunal is such that its decisions do not have the same scope in respect of the applicant as they do in respect of the respondent, or the General Assembly of the United Nations. They are binding on the applicant since he resorted to this Tribunal, which was especially created to deal with his complaints and which, moreover, is the only tribunal in existence for this purpose ; but the decisions of the Tribunal are not binding upon the General Assembly, which may refuse to *give effect to* them if it considers that there are valid reasons for such a refusal. By acting in this way, the Assembly is not setting itself up as a court of appeal ; nor does it proceed to review the awards : it is merely exercising a right which it has to supervise the performance of the judgments of the Administrative Tribunal which it has established. To deny this right to the Assembly would be tantamount to placing the Tribunal above the Assembly, which is inadmissible.

A concrete case may arise which would fully justify the foregoing assertion : it is the opposite case to the one usually considered. Let us suppose that the Assembly should consider that an application is well-founded which the Administrative Tribunal has found to be inadmissible. Could it then be argued that the General Assembly is not entitled to sustain this application ? This is a question which answers itself.

Furthermore, a considerable change may occur in the economic or social conditions between the date of the giving of the award and that of its performance, which might entirely alter the scope of the award, for example, if there should be an abrupt fluctuation in the value of the dollar, the currency in which the amount of compensation is fixed, resulting in a considerable modification in the real value of the compensation. Should the Assembly remain passive ? Should it not have the power to refer the matter back to the Tribunal for necessary adjustment, or should the Assembly itself not have the power to make such an adjustment ?

Finally, it may happen that an award of compensation has been validly made, but that the Assembly has no funds available for that purpose ; the Assembly must then decide how the payment shall subsequently be made.

The Assembly must make provision in the budget of the United Nations for the following expenditure : first, all expenditure relating to bodies established by the Charter, for the Assembly is bound to respect the provisions of the Charter ; secondly, all other expenditure deemed necessary by the Assembly, as well as that arising from the performance of the obligations contracted by the Organization ; and finally, the compensation to be paid in pursuance of those awards of the Administrative Tribunal which the Assembly regards as justified.

In short, the Assembly is sovereign in the matter of the drawing up and adoption of the budget of the Organization ; there is no appeal against the decisions of the Assembly and the only sanction in respect of its actions is the criticism of public opinion.

For the foregoing reasons, I give the following answer to the questions referred to the Court :

In reply to Question (1), I am of opinion that the General Assembly has the right to refuse to give effect to an award of compensation made by the United Nations Administrative Tribunal if it considers that there are serious grounds justifying such a refusal.

In reply to Question (2), I am of the opinion that the grounds on which the General Assembly is entitled to refuse to give effect to such an award are, in particular, if the Tribunal has acted *ultra vires* or if there has been manifest injustice especially if in conflict with the concept of international social justice, or a violation of the great principles of international law.

(Signed) A. ALVAREZ.