DISSENTING OPINION BY JUDGE HACKWORTH

I regret that I am obliged to dissent from the Opinion of the Court in the present case.

Two questions are presented to the Court. The first is whether the General Assembly has the right "on any grounds" to refuse to give effect to an award of compensation made by the United Nations Administrative Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent.

The second question, which requires an answer only in the event of an affirmative answer to the first one, asks for a statement of the principal grounds upon which the General Assembly could *lawfully* exercise such a right.

The United Nations Administrative Tribunal was established by Resolution 351 (IV) adopted by the General Assembly on November 24th, 1949, approving a Statute by which the Tribunal was to be governed. It was given authority to pass upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of their appointment. The words "contracts" and "terms of appointment" were declared by Article 2 of the Statute to include "all pertinent regulations and rules in force at the time of alleged non-observance including the staff pension regulations".

The present questions arise primarily by reason of provisions contained in Articles 9 and 10 of the Statute.

Article 9 states, *inter alia*, that:

> ".... In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations, or, as appropriate, by the specialized agency participating under Article 12 [1]."

Article 10 states in paragraph 2 that the "judgments shall be final and without appeal".

It is these provisions concerning payment of monetary awards and the finality of judgments, that have given rise to the questions on which advice of the Court is requested.

The question, "has the General Assembly the *right* .... to refuse to give effect to an award of compensation...." must be understood as meaning a legal right. This follows from the fact that the Court

[1] Article 12 makes provision for extension of the competence of the Tribunal to specialized agencies under certain conditions.

is authorized to give Advisory Opinions only on legal questions (Article 65 of the Statute), and also from the request in the second question for a statement of the principal grounds upon which the General Assembly could "lawfully" exercise such a right.

We might content ourselves by looking to the language of the Statute of the Tribunal and applying common canons of statutory construction. By this process it might be said that the language of the Statute is clear and unambiguous and consequently lends itself to but one construction, namely, that the Tribunal's decisions are final and without appeal and that the Assembly is obligated to pay any monetary award given by the Tribunal. Such a process would constitute an over-simplification of the problem. Indeed the Assembly's request asks the Court to have regard not only to the Statute of the Administrative Tribunal but also to "other relevant instruments and to the relevant records".

When we are considering the legal implications of any action taken by an organ of the United Nations, the Charter of the Organization is naturally a relevant instrument. It is the instrument by which the powers and duties of the organs of the United Nations have been delineated. It is the instrument by which the respective Organs are governed. It is, in short, the organic law—the Constitution of the Organization.

By this instrument the Organization has allocated to its principal organs their respective fields of operation. Action taken by an Organ must find its justification within the compass of the powers and duties there stated. It must of necessity be weighed in the light of, and reconciled with, the powers and duties conferred upon that organ by the Charter.

* * *

The matter with which we are here concerned relates to functions of two of the principal organs of the United Nations—the General Assembly and the Secretariat.

The Secretary-General is the principal administrative officer of the United Nations, and he and the staff under him go to make up the Secretariat (Article 97).

The Secretary-General makes the appointments but he must do so under regulations prescribed by the General Assembly. They have separate functions, but they also have a joint responsibility. That joint responsibility is to assure that "in the employment of the staff and in the determination of the conditions of service .... the highest standards of efficiency, competence and integrity" shall be secured (Article 101).

Although it is not so stated, it may be assumed that it was for the purpose of meeting this requirement of a high standard

of efficiency, of which harmony within the Secretariat is an essential element, that the Administrative Tribunal was created. It is in relation to disputes between the Secretary-General and members of the staff that the Tribunal was given competence by Article 2 of the Statute.

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We now come to the question concerning the nature of the Administrative Tribunal to which much attention has been devoted in both the written statements and the oral presentations by the various governments.

Article 7 of the Charter, after listing the principal organs of the United Nations, states in the second paragraph that:

> "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter."

The statement "in accordance with the present Charter" is given definite expression in Articles 22 and 29 by which the General Assembly and the Security Council, respectively, are authorized to establish subsidiary organs.

Article 22 provides:

> "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."

It must be concluded, therefore, that when the General Assembly approved the Statute creating the Administrative Tribunal it did so in the exercise of its authority under Article 22. Nowhere else in the Charter is any such authorization to be found. And nowhere else in the Charter can there be found any authorization, express or implied, for the establishment by the General Assembly of any other kind of organ be it judicial, *quasi* judicial or non-judicial.

At this point it is pertinent to refer to the *travaux préparatoires* of the San Francisco Conference.

The draft of Article 22 as it emanated from the appropriate Committee at San Francisco stated that the Assembly might create ".... such *bodies* and *agencies* as it deems necessary for the performance of its functions". This followed the wording of the Dumbarton Oaks Proposals.

This draft was later changed to its present wording in order that it might conform to Article 7 *supra*, of the Charter. It was approved by the Conference as changed and as it now reads. There is, therefore, no point to saying that the Statute of the Tribunal is based on Article 101 of the Charter, as has been argued, and as so based is relieved of the consequences of Article 22. That argument must be dismissed as without legal justification.

The reasonable deduction, then, is that the Administrative Tribunal is a *subsidiary* organ of the General Assembly, created by an act of the Assembly, pursuant to the authorization in Article 22.

Two questions are here presented. One relates to the meaning of "subsidiary organ", and the other concerns the expression "necessary for the performance of its functions"—meaning functions of the General Assembly.

The term "subsidiary organ" has a special and well recognized meaning. It means an auxiliary or inferior organ; an organ to furnish aid and assistance in a subordinate or secondary capacity. This is the common acceptation of the meaning of the term.

The expression "necessary for the performance of its functions" means performance by the General Assembly of its functions under the Charter.

It was recognized by the framers of the Charter that with the multiplicity of duties assigned to the General Assembly the assistance of different types of subsidiary organs would be needed, hence the provision in Article 22 giving the Assembly the authority to provide this assistance. But nowhere in the Charter is there to be found any suggestion or intimation that the General Assembly might abdicate any of its functions or that it might reassign them to some other organ or agency in such manner as to relinquish its control over the subject-matter.

It is equally unrealistic to assume that a *subsidiary* organ with certain delegated authority could bind the principal organ possessing plenary powers under the Charter. This would present an anomalous and unique situation in international organization—a situation that can find no sanction, express or implied, in the Charter. The aims and purposes of the Charter must not be obscured or frustrated by such a phenomenon. The whole idea of the Charter was that the role of subsidiary organs should be, as the name implies, to assist and *not* to control the principal organ. Any other view, if accepted, would render extremely hazardous the creation of subsidiary organs, unless their powers were severely circumscribed. The principal organ must continue to be the principal organ with authority to accept, modify, or reject, the acts or recommendations of the subordinate organs if the former is not to become *functus officio* in any given field.

To conclude that the General Assembly, by conferring upon the Administrative Tribunal certain authority in administrative matters is now estopped to question any action of the Tribunal which it created, would be to penalize the Assembly for having been less guarded than it might have been in trying to give to members of the staff, by establishing the Tribunal, assurance of its desire that they should have fair treatment. But any such assurance must be understood and accepted with knowledge that in the final analysis

the General Assembly is the supreme authority. Any act by the Assembly which might seem to be open to a different construction must be considered in the light of this background to the end that the Charter shall be preserved in its present form unless and until it shall have been amended in the manner contemplated by Chapter XVIII.

One cannot lightly assume that the Assembly, in approving the Statute of the Administrative Tribunal, had any intention of inhibiting itself from acting where action might be needed. A reasonable approach to the problem in which the Charter as well as the Statute of the Tribunal are given their proper places will avoid any such assumption. We cannot reach a sustainable conclusion by examining the Statute in isolation. This undoubtedly was recognized by the Assembly when in its Resolution it asked the Court to have regard "to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments". Certainly the Charter is a relevant instrument. All other instruments, including the Statute, must be viewed in the light of and with due regard for the Charter.

In support of the contention that the General Assembly is without power to review decisions of the Administrative Tribunal it has been said that the Statute contains no reservation of such right. This argument is by no means convincing. I can readily admit that such a reservation might have simplified matters as they have since developed, but I cannot admit that such a reservation was at all necessary. The nature of the Tribunal, the method by which it was created and the purpose for which it was created belie any such notion. Any and all power not specifically delegated, including the power of review, was, as a matter of law, reserved to the Assembly.

It has also been emphasized that in establishing the Administrative Tribunal the General Assembly relied, or had the right to rely, upon certain implied powers under the Charter, and in particular the power to implement Article 101, paragraph 3, concerning the maintenance of a high standard of efficiency, etc. This, it is said, necessitated the establishment of a judicial Tribunal. The argument is not persuasive.

The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions, whether those functions should relate to Article 101 or to any other article in the Charter. Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind, nor is there warrant for concluding

that such a thing has resulted. It is of little consequence in the end result whether the Tribunal be described as a judicial, an arbitral or an administrative tribunal—which it is in fact called. No controlling significance is to be attached to the name or to the functions of the Tribunal.

On this first phase of the problem, then, I conclude that the Administrative Tribunal is a subsidiary organ of the General Assembly, and that decisions of the Tribunal are not immune from review by the Assembly, should occasion for such review arise.

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In order the more clearly to understand the legal position of the Assembly vis-à-vis decisions of the Tribunal, it will be convenient to consider Articles 9 and 10 of the Statute in the inverse order, since if the provisions of Article 10 concerning the finality of judgments do not apply to the Assembly, arguments relating to supposed obligations under Article 9 lose much of their force.

The purpose to be served by the Administrative Tribunal is well known. It was to afford a remedy to members of the staff who might have a grievance against the Secretary-General, based on an alleged non-observance by him of their contracts of employment.

Within this limited field the Tribunal undoubtedly has competence to give decisions, which by Article 10 are declared to be "final and without appeal".

But this competence and this finality of decisions are not determinative of the broader question before the Court, that is to say, whether decisions of the Tribunal are binding on the United Nations in general and on the Assembly in particular.

It is common knowledge that decisions of a tribunal, be it a judicial or other tribunal, are binding only on the parties to the cases before it. This is but a statement of a general rule of law which finds expression in concrete form in Article 59 of the Statute of this Court, providing that :

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Now who are the parties to a case coming before the Administrative Tribunal ?

The parties are the applicant (the staff member) on the one hand, and the Secretary-General or the specialized agency, as the case may be, on the other hand. This is made abundantly clear by the history incident to the creation of the Tribunal. It is made equally clear by Articles 9 and 12 of the Statute, by the Rules of procedure adopted by the Tribunal, and by the cases that have come before it.

The applicant is the party plaintiff and the Secretary-General, or the specialized agency, is the party defendant. The captions of the cases are: "[Name of staff member], Applicant, *vs* the Secretary-General of the United Nations, respondent". These parties are consistently referred to by the Tribunal as the "applicant and respondent" or as the "two parties". The subject-matter is a contested decision or action of the Secretary-General or of the specialized agency, as the case may be.

But is the General Assembly or the United Nations, as such, also a party to these cases?

It is difficult to see how this could be. The staff member has no complaint against the Assembly or against the United Nations Organization. His complaint is against the Secretary-General. It is he who is alleged to have failed in some manner properly to honor the contractual rights of the staff member.

But it has been said that the Secretary-General represents the Organization and that therefore the Organization is responsible for his acts.

It is possible to carry this argument much too far. It is true that the Secretary-General is the chief administrative officer of the United Nations and that in that capacity he acts for the Organization. His official acts, in so far as concerns transactions between the Organization and outside entities, personal or juristic, such as contracts for the purchase of supplies and equipment, contracts for services, the lease of premises, etc., when performed within the scope of his authority, engage the responsibility of the Organization. These activities are governed by private law concepts. Disputes concerning them are the kind of disputes which, by Article VIII, Section 29, of the Convention of 1946 on the Privileges and Immunities of the United Nations, the United Nations was authorized to "make provisions for appropriate modes of settlement". (1, U.N. Treaty Series (1946-1947), 16, 30.)

But there is another category of activities in which the Secretary-General functions in quite a different capacity. This category pertains to the internal affairs of the Organization. This is a purely *intra*-organizational field. Operations within this field are not governed by private law concepts. They are governed by provisions of the Charter, and by regulations made pursuant to the Charter. It is within this field that disputes between staff members and the Secretary-General fall. They, to apply an analogy in international law, are disputes of a domestic character.

The Secretary-General and the staff, as we have seen, constitute the Secretariat, one of the principal organs of the United Nations. Disputes between members of the staff and the Secretary-General are disputes between component parts of that organ. They are not disputes between two organs of the United Nations, or between

a principal organ, on the one hand, and the United Nations, on the other hand. They are not disputes between staff members and the United Nations as such or between staff members and the General Assembly.

If, then, they are not disputes between the staff member and the United Nations or between the staff member and the General Assembly, and if neither the United Nations nor the General Assembly is a party to a case coming before the Administrative Tribunal, where lies the justification for concluding that either is bound by a decision of the Tribunal?

It must follow, as a matter of law, that the statement in Article 10 of the Statute that decisions of the Tribunal shall be final and without appeal can only mean that they shall be final and without appeal as between the parties to the case, and neither the United Nations nor the General Assembly may be regarded as a party.

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This brings us to a consideration of Article 9 of the Statute, stating that any award of compensation by the Tribunal shall be paid by the United Nations.

Here again, it does not suffice to look at the Statute alone and to apply to the language there used the ordinary rules of statutory construction. We cannot, as stated above, examine the Statute in isolation. We must examine it in the light of other relevant instruments. The Charter is such an instrument. The duty of a court when faced with apparent incompatibility between a legislative enactment and the constitution (the Charter) is to try to reconcile the two. If this cannot be done the constitution must prevail.

The functions of the General Assembly as they were stated in the Dumbarton Oaks proposals were revised and elaborated at the San Francisco Conference. But throughout the discussions from Dumbarton Oaks to the signing of the Charter at San Francisco, the General Assembly was recognized as the organ of the United Nations to which should be entrusted the over-all control of the fiscal affairs of the Organization. It was given authority to "consider and approve" the budget, and to apportion among the Member States the "expenses of the Organization" (Article 17). It is both the taxing authority and the spending authority. In its relationship to the Organization it occupies a status of a *quasi* fiduciary character.

In the performance of these dual functions of raising and disbursing revenue, the General Assembly acts for and on behalf of the Organization. The importance which the Organization attaches to the exercise of these functions is shown by Article 18 of the Charter with respect to voting in the General Assembly. It is there

stated that each Member shall have one vote, and that decisions on "important questions" shall be made by a "two-thirds majority of the members present and voting".

As a guide to the General Assembly in determining what questions should be regarded as important, and hence as requiring this two-thirds majority vote, there is set forth in Article 18 a list, not all inclusive, but a representative list, of subjects deemed by the Organization to occupy a pre-eminent position. Included in this list are "budgetary questions". This, then, clearly shows the importance attached by the parties to the Charter, to the fiscal affairs of the Organization. Indeed, budgetary or fiscal affairs of any organization, be it a national government, a municipality, a private corporation, a social or an eleemosynary institution, are elements of preoccupation in the life of the Organization.

Various methods of supervising fiscal affairs of national and lesser organizations with their checks and counter-checks have been devised. In the case of the United Nations, control over both the raising of revenue and of its expenditure is vested in the General Assembly. All Members of the United Nations have a direct interest in what the Assembly does in these matters. Their own national budgetary problems may be affected by wise or unwise expenditures made on their behalf by the General Assembly.

This brings us more directly to the focal question presented in the request for an opinion : Has the General Assembly the "right on any grounds to refuse to give effect to an award of compensation made by" the Administrative Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent ?—or, stated in another way : Has the General Assembly, by approving the Statute of the Administrative Tribunal, deprived itself of the right to exercise its normal functions under the Charter, and in particular those pertaining to budgetary questions ?

Those who have contended that awards by the Administrative Tribunal must be effectuated by payments, have advanced various reasons in support of their contentions, among them being the theory that a contractual relationship is established between the staff member and the United Nations, by reason of the fact that the Administrative Tribunal is referred to in the Staff Regulations (Regulation 11.2 ; as adopted by General Assembly Resolution 590 (V) of 2 February 1952 and amended by Resolutions 781A (VIII) and 782 (VIII)) ; also that the Tribunal is a judicial organ whose decisions must be respected.

These arguments do not go to the root of the question. Regulation 11.2 merely states that :

> "The United Nations Administrative Tribunal shall, under conditions prescribed in its statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules."

It is difficult to see how this may be said to establish a contractual relationship between the staff member and the United Nations, placing upon the latter a duty to pay all judgments given by the Tribunal, regardless of their nature. Moreover, those who make this contention admit that the Assembly may at any time change the staff regulations. In fact, it is specifically stated in the Staff Rules (Chapter IV, Annex II *(a)* (i)) that the appointment is subject to changes "made in such regulations and rules from time to time".

The fact, if it be a fact, that the Administrative Tribunal is a judicial organ, does not place upon the Assembly an obligation to appropriate funds under Article 9 of the Statute in a *pro forma* manner. In the exercise of its budgetary authority the Assembly acts as a deliberative body with complete discretionary power to approve or refuse to approve any budgetary item, as in its judgment the interests of the United Nations and of good administration shall require. It is not permissible to conclude that by Article 9 of the Statute the Assembly has given, or ever intended to give, prior blanket approval to unpredictable amounts called for by awards of the Tribunal. There is no justification for ascribing to the Assembly such a broad curtailment of its constitutional functions.

In the final analysis the Administrative Tribunal, regardless of what we may call it, is *not* an organ created by the Charter. It does not have a constitutional status co-ordinate with the General Assembly. Precisely it is, as previously stated, a "subsidiary organ" of the Assembly.

But it has been urged that an award by the Administrative Tribunal establishes for the United Nations a debt or legal obligation, and for the staff member an acquired or vested right.

These conclusions must presuppose the existence of a valid award. No debt or legal obligation, having a fixed juridical status, may be said to result from an unjust judgment, nor can any acquired or vested right be said to result from such a judgment.

We may admit the existence of a right to have recourse to the Administrative Tribunal for the adjudication of a complaint, but an award by the Tribunal does not *ipso facto* create an obligation for the United Nations or a vested right in the staff member.

As a further argument in support of the thesis that the awards are binding on the Assembly it has been urged that by Article 9 of the Statute the Assembly has committed itself to the payment of

monetary awards. But are we to conclude from this that Article 9 means that the Assembly has agreed to pay any and all awards regardless of whether they may, for some legitimate reason, seem to the Assembly not to merit that treatment ? Does it mean that the Assembly has estopped itself from looking into an award which on its face may be open to question ? Finally, does it mean that the Assembly has surrendered part of its functions in budgetary matters to a subordinate agency whose decisions it must honor by appropriations even though it may not agree with them ? These questions seem to supply their own answers.

It is common knowledge that courts of law and other tribunals, however praiseworthy their intentions may be, are not infallible. In recognition of this fact appellate tribunals are usually provided. In this instance the Administrative Tribunal is the sole tribunal. There is, therefore, all the greater reason for rejecting the contention that the General Assembly has lost all control and is completely at the mercy of the Tribunal in the absence of incontrovertible evidence that such is the case.

If it be concluded that by Article 9 of the Statute the Assembly has surrendered its discretionary authority in budgetary matters to the extent of awards made by the Tribunal, and that it must appropriate the necessary funds to satisfy such awards, then, there is nothing in the Charter which would prevent the Assembly from making similar commitments to other subsidiary organs and thus gradually to whittle away all control in a field where it has been given complete control.

The Assembly is charged by the Charter with a duty to "consider and approve" the budget of the Organization. It manifestly is not permissible to abdicate, or to transfer to others, this essentially legislative function with which it has been so carefully invested.

What then do we understand to be the real meaning and effect of Article 9 of the Statute ? Must the Assembly honor judgments without question or does it have a right to question them ?

A reasonable construction of Article 9, and one which is consonant with the Charter, is that in saying that in any case involving compensation the amount shall be fixed by the Tribunal "and paid by the United Nations", the Assembly was announcing a general policy to be followed by it in the ordinary course, but that it was not entering into an unqualified undertaking that in no event and under no circumstances would it withhold an appropriation. It was not saying that under no circumstances would it enquire into a judgment, or have it enquired into, even if there were apparent reasons for doing so. To summarize, we may draw these conclusions :

First, that in the exercise of its budgetary authority to which we have already referred, the Assembly can scarcely fail to consider

an award when it forms an item in a budget to be voted ;

Second, that the Assembly cannot close its eyes to an award if on its face it is open to serious question ;

Third, that as part of the process of considering and adopting budgets, each Member of the Assembly has an express constitutional right to vote for or against any item in the budget ; and

Fourth, that no Member of the Assembly may be deprived of this right.

It has been generally admitted that the Assembly has the "power" to withhold appropriations, and an effort has been made to draw a distinction between the exercise of a "power" and the exercise of a "right". And it has been said that in the situation here presented there is no legal right to decline to appropriate. This conclusion is wholly lacking in legal justification. It amounts to saying that the exercise of a constitutional right is not the exercise of a legal right. In declining to appropriate funds to effectuate an award the Assembly would not be exercising sheer power. It would be exercising not only "power" but an incontestable "legal right" conferred by the Charter, a right which, in my judgment, it has in no sense surrendered.

It follows that the provision in the Statute that awards of the Tribunal shall be paid by the United Nations does not deprive the Assembly of its right, when a question has been raised, to examine the award or to cause it to be examined. The decision is not *res judicata* in the sense that the Assembly is precluded from exercising its powers under the Charter. Even if we assume that the Assembly could surrender its prerogatives in this respect, we cannot assume that it has done so by innuendo.

In support of the proposition that decisions of the Tribunal create a legal liability for the Organization which it is not free to ignore, reference has been made to Section 21 of the Headquarters Agreement between the United Nations and the United States of America of June 26, 1947, wherein provision is made for submitting to an arbitral tribunal for "final decision", any dispute concerning the interpretation or application of the Agreement. It is reasoned that a decision by the arbitral tribunal would be binding on the United Nations Organization and not merely on the Secretary-General, and that the General Assembly would have no legal right to repudiate the award (11, U.N. Treaty Series (1947), 12, 30).

This conclusion is not open to question. But it can hardly be said that a decision of the Administrative Tribunal is, from the point of view of its binding force, analogous to a decision of an

arbitral tribunal under the Headquarters Agreement. The two situations are entirely different.

Section 21 of the Headquarters Agreement relates to disputes between the United Nations on the one hand and the United States of America on the other hand, and not to disputes between the United States and the Secretary-General. It provides that three arbitrators shall be chosen, one by the Secretary-General, one by the Secretary of State of the United States, and the third by agreement of the two, or, in the event of their failure to agree, by the President of this Court. Then follows a provision for a request by the General Assembly for an Advisory Opinion, after which the arbitral tribunal shall render a final decision.

It is to be observed:

First, that the Headquarters Agreement is an agreement between the United Nations and a Member State;

Second, that the disputes there envisioned are disputes between the United Nations and the Member State;

Third, that in such a situation the Secretary-General acts merely in a nominal capacity as agent for the United Nations;

Fourth, that the Headquarters Agreement was concluded pursuant to the Convention on Privileges and Immunities, approved by the General Assembly on February 13, 1946. This Convention specifically conferred upon the United Nations, capacity *(a)* to contract, *(b)* to acquire and dispose of property, *(c)* to institute legal proceedings, and *(d)* to make provision for appropriate modes of settlement of "disputes arising out of contracts", etc. (1, U.N. Treaty Series (1946-1947), Art. VIII, Sect. 29, pp. 17, 30); and

Fifth, that the Privileges and Immunities Convention provided as a condition precedent to its coming into force as regards any Member of the United Nations, the deposit by that Member with the Secretary-General of an instrument of accession. Such instruments were deposited.

It will thus be apparent that decisions of an arbitral tribunal under the Headquarters Agreement occupy a status quite different from decisions of an Administrative Tribunal created by the General Assembly.

In the *first* place, decisions by the arbitral tribunal under the Headquarters Agreement have back of them an international convention.

In the *second* place, the disputes are disputes between the United Nations and a Member State, under an Agreement made pursuant to a Convention.

Whereas in the case of the Administrative Tribunal,

(a) it was not created pursuant to an international convention, but pursuant to authority of the General Assembly under the Charter to create subsidiary organs, and

(b) the disputes coming before the Tribunal are not disputes between the United Nations and a staff member, but between the Secretary-General and a staff member.

It must therefore be obvious that from the point of view of the finality of decisions and the establishment of a legal liability of the United Nations, there is no analogy between the two situations.

What has just been said regarding the Headquarters Agreement applies with equal force to arbitration under the Agreement of July 1, 1946, between the United Nations and the Swiss Confederation concerning certain properties in the "Town of Geneva" (1, U.N. Treaty Series (1946-1947), 155).

Finally, it has been said that a decision of the Administrative Tribunal is a decision of a judicial organ and that the General Assembly is not empowered by the Charter to exercise judicial functions, and hence cannot review such a decision.

This would seem to be confusing two quite distinct procedural processes, i.e. that of review in the political or administrative sense, and that of review in the judicial sense. It is hardly to be expected that the Assembly would convert itself into a court of law exercising appellate jurisdiction in such cases. The notion of an appellant and a respondent is wholly excluded. The Assembly would be acting as a political body having responsibility for the proper functioning of one of its subordinate organs. It is not for the Court to say in what manner the power of review should be exercised. It is sufficient to say that the authority to review exists, and that it is for the Assembly to decide how best it may be exercised.

The only question before the Court is the abstract question of the right of the Assembly to decline "on any grounds" to give effect to an award of compensation. To this question I find no difficulty in giving an affirmative answer.

* * *

This brings me to the second question presented, namely, what are the "principal grounds upon which the General Assembly could lawfully exercise such right".

It is not to be supposed that the Assembly would desire to act on frivolous grounds, nor is it to be supposed that it would desire to act arbitrarily. This would not be in keeping with its purposes in creating the Administrative Tribunal. There must, in the nature of things, be an intermediate position between arbitrary action by the Assembly and compulsory action by it—a position which will safeguard the staff members vis-à-vis the Secretary-General and at the same time safeguard the Assembly and the United Nations.

We may take as our premise that in creating the Tribunal the Assembly had in mind *(a)* the protection of the contractual rights

of members of the staff against faulty or arbitrary acts of the Secretary-General; *(b)* that it also had in mind protection of the Secretary-General against unreasonable and vexatious demands by members of the staff; and *(c)* that, in short, and in a broad sense, it had in mind the maintenance within the Secretariat of a proper *esprit de corps*.

An obvious departure by the Tribunal from these broad purposes, such as by denying relief where relief is warranted, or by granting a greater measure of relief than is warranted by the facts and the applicable Rules and Regulations would constitute a deficiency in the administrative process. The extent of the deficiency would be a major consideration in any given case, since no one can expect of any tribunal an unfaltering degree of perfection.

As part of this general picture it is appropriate to observe that there is a presumption that decisions of courts of law, especially courts of last resort, are just and proper. But this is a rebuttable presumption. It is common knowledge that justice is not always administered, and hence there may be a resulting denial of justice.

Denial of justice is a term well recognized in international law. It constitutes a sound basis for establishing State responsibility in the field of international reclamations. It serves as the justification for questioning and enquiring into decisions of national courts of last resort. The term has been variously defined and given varying shades of meaning by international tribunals, depending upon the nature of the cases before them. Examples of expressions used are: manifest injustice, an obvious error in the administration of justice, a clear and notorious injustice, fraud, corruption or wilful injustice, bad faith, a manifestly unjust judgment, a judgment that is arbitrary or capricious, a decision that amounts to an outrage, etc., etc.

I am not suggesting that judgments of the Administrative Tribunal might fall within any one of these categories. I am not here discussing any particular case or any group of cases. Such a discussion is not envisaged by the questions submitted to the Court.

The Court is asked to consider only the abstract question of *right* to decline to make an appropriation to satisfy an award. To this I have answered that there is no justification for concluding that the General Assembly is bound to effectuate a decision which is not juridically sound, and which, because of the absence of juridical plausibility, does not command the respect of the Assembly. A proper administration of justice within the Secretariat must be the guiding criterion. A denial of justice in the sense of the prevailing jurisprudence on the subject should find no place in the United Nations Organization.

If I am correct in my conclusion stated above, that the Assembly has a right to review a decision of the Tribunal, as a corollary to

its duty to "consider and approve the budget of the Organization" and to maintain a high standard of efficiency and integrity, it must follow that it may "lawfully" exercise that right with respect to any decision which does not commend itself to respectful and favorable consideration.

The *principal* grounds upon which the Assembly may lawfully exercise a right to decline to give effect to an award may be simply stated as follows :

(1) That the award is *ultra vires ;*

(2) That the award reveals manifest defects or deficiency in the administration of justice ;

(3) That the award does not reflect a faithful application of the Charter, the Statute of the Tribunal, or the Staff Rules and Regulations, to the facts of the case ; and

(4) That the amount of the award is obviously either excessive or inadequate.

(Signed) Green H. HACKWORTH.