DISSENTING OPINION OF VICE-PRESIDENT BADAWI

[Translation]

I regret that I am unable to concur in the Opinion of the Court upholding the jurisdiction of the Administrative Tribunal of the International Labour Organisation in the four cases concerning Unesco. I agree with the conclusions reached by President Hackworth and Judge Read for the following reasons:

The Request for Advisory Opinion submitted to the Court consists of three questions.

The first question is expressed in terms of jurisdiction, and the third in terms of validity. Both these questions use the wording of Article XII of the Tribunal's Statute. Both represent the same order of ideas considered from different angles: from the angle of cause and the angle of effect. The link between the two questions is therefore indissoluble. The two questions in fact constitute but one.

Question II is put in the event of the reply to Question I being in the affirmative. It would therefore be premature to examine it before answering Question I, for the purpose of giving an answer to it or of stating that it does not arise.

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The Administrative Tribunal of the International Labour Organisation has held that it had jurisdiction to hear the complaints of four Unesco officials. In order to examine these four judgments which, apart from the particular facts of each case, are identical, it will suffice to take Judgment No. 17 in the Duberg case as an example.

It is obvious that to enable the Executive Board of Unesco to challenge the decision of the Administrative Tribunal confirming its jurisdiction and to request the advisory opinion provided for in Article XII of the Statute of the Tribunal, the grounds on which the Tribunal bases its jurisdiction must, independently of the merits, be in themselves sufficient to establish the precise legal basis of its jurisdiction. It would indeed be inconceivable that the Tribunal should be able to declare itself competent on the basis of reasons not subject to legal evaluation.

However, it is sometimes the case that jurisdiction can only be established by reasons which are bound up with the merits. In such a case, a court orders the joinder of the objection to the jurisdiction and of the merits and deals with them together, giving its decision first on the issue of jurisdiction and then on

the merits. Such joinder facilitates a better ordering of the judgment and is conducive to greater clarity. It also makes possible the avoidance of repetitions which are inevitable in the statement of the reasoning of the decision if the issue of jurisdiction and the merits are separately dealt with.

A joinder of objection and merits, however, would only be possible if the tribunal dealing with the case has no superior court above it or, if it is a court of first instance, if its judgments are subject to appeal, that is to say if the whole judgment is subject to review. In the latter case, its decision, both as regards jurisdiction and merits, will be subject to review by the higher court.

But in the case of Article XII of the Statute of the Administrative Tribunal, the Tribunal's decision is subject to examination by the Court only with regard to the question of jurisdiction; the Court has no power of review with regard to the merits, the Tribunal's judgments, so far as they are concerned, being final and without appeal.

In order, however, to exercise its power of control over the jurisdiction of the Tribunal, the Court must necessarily base its Opinion on the Tribunal's interpretation and application of the provisions of its Statute.

Where an objection to the jurisdiction is joined to the merits, the Court will seek this interpretation and application in the reasoning as a whole. But where the tribunal deals with the two questions, that of jurisdiction and that relating to the merits, separately, the Court will confine its examination to the reasoning on which the tribunal has based its finding that it has jurisdiction.

If, however, the tribunal, while not ordering the joinder of the objection and of the merits, fails to observe the necessary distinction between the two questions and is satisfied with a mere division, in two sections in which the reasons are mingled, the Court is bound, if the section relating to jurisdiction does not contain adequate reasoning, to seek further in the other section. Although mixed up with the examination of the merits, the legal reasoning supplementing that specifically referable to jurisdiction itself properly pertains to the issue of jurisdiction and is, therefore, subject to review by the Court.

In the present case, no joinder was ordered by the Tribunal, but the Tribunal, while not deciding on that course, has in fact mixed up the grounds relating to the two questions, jurisdiction and merits. That part of the Judgment devoted to jurisdiction contains—apart from certain observations which are not relevant and a mere reference to the Memorandum of July 6th, 1954—nothing but a recital of the complaint, followed by an assertion of the competence of the Tribunal. The part of the Judgment which deals with the merits gives a clearer indication of the Tribunal's ideas with regard to jurisdiction.

This method of operation on the part of the Administrative Tribunal is clearly revealed by an examination of the two succeeding parts of the Judgment.

But before undertaking this examination, it is desirable to establish the border line between jurisdiction and merits. The distinction between the two is fundamental for the exercise by the Court of its power of review.

In order to determine the jurisdiction of the tribunal, it is unnecessary for the claimant to prove his right (that pertains to the merits), but it is essential to define the basis of his action in order to ascertain whether it falls within the sphere of activity of the tribunal or, in other words, whether the tribunal is or is not competent to hear it.

But, according to the words of Article II, paragraph 5, of the Statute of the Administrative Tribunal of the International Labour Organisation, the Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations (of Unesco).

The expression "in substance or in form" *(soit quant au fond, soit quant à la forme)* does not here refer to the underlying meaning of the terms and provisions, as opposed to their liberal meaning. Such a contrast, indeed, would be odd in a legislative text. It is merely a reference to the well-known concept of "substantive rules" as contrasted with "adjectival or procedural rules" *(règles de fond, règles de forme ou de procédure)*. This coupling of the two categories of rules is designed to put them on a footing of equality, in the sense that non-observance of either will give rise to judicial proceedings and that it is the duty of the Tribunal to safeguard and protect officials against their non-observance.

According to paragraph 6 *(a)* and *(b)* of the same article, which lays down to whom the Tribunal shall be open, an official alleges non-observance of the terms of appointment or of the Staff Regulations for the purpose of asserting a *right*.

It is therefore necessary for the official to state the right which he is claiming and to invoke the term non-observance of which has given rise to that right, to enable the Tribunal to find that it has jurisdiction after it has checked each of these, without, however, going into the facts relied upon to prove the case (the merits), from the point of view of their correctness, truth or reality, and without forming a judgment on the interpretation or application put forward by the official.

This does not constitute an excessive requirement, but the complaint and the Tribunal's decision must, clearly, indicate the nature of the right claimed by the official and state the terms and provisions the interpretation or application of which might serve as a basis for that right and the probable, or possible, weight of these.

The right claimed by the four officials is undoubtedly the renewal of their contracts. But what is the term or provision entitling them to that right which has not been observed by the Director-General?

It has been thought that the word "alleging", which is used in Article II of the Statute of the Tribunal, is not the same as the expression "based on" and that it has a wider and more flexible meaning. If the purpose of this observation is to show that it is unnecessary for the complainant to prove that the right which he claims is well-founded, the distinction is quite correct, and no one would disagree that the question of jurisdiction is clearly different from that of the merits.

But if this distinction between the words has as its purpose to enable the complainant—who has to allege—to refer generally to the terms of appointment and the Staff Regulations, without indicating the precise terms and provisions the non-obsèrvance of which has given rise to his complaint, such an interpretation would fail to take into account certain necessities inherent in the drafting of legislative texts which commonly use the plural to include the singular.

For the purposes of greater precisions, it was thought possible to interpret the provision relating to the "allegation of non-observance ... of the terms of appointment ... and of provisions in the Staff Regulations" as meaning that it was enough that there should be a legal relationship (without indicating either its name or its nature) between renewal and the original contract, between non-renewal and the legal position of the complainant at the time when renewal was refused, for the Tribunal to have jurisdiction.

No doubt renewal is something different from an original appointment. In this connexion it is sufficient to observe that a fixed-term appointment may be transformed after five years into an indeterminate appointment, and that a fixed-term appointment not so transformed may not be renewed beyond a maximum period of five years.

This difference itself makes it possible to say that renewal is different in character from original appointment, but this difference does not make it possible—quite obviously and in spite of all the possible resources of legal dialectic—to give the official any title or right to renewal on the expiry of each fixed-term appointment. Every renewal amounts to a new appointment, without prejudice to the fact that a number of renewals would permit of the transformation of a fixed-term appointment into an indeterminate appointment if the Director-General, in his entire discretion, should wish to retain the services of the official.

This is an argument similar in character to the statement that a fixed-term appointment does not cease, on its expiry, to produce legal effects. Apart from the fact that it begs the question, which

is precisely that of ascertaining, in spite of the terms of Rule 104.6 *(d)*, the extent of these legal effects and their source, this argument fails to reveal any definite concept of a right, although what has to be alleged is a right in the true sense of the word.

In fact, there is no real difference between the words "alleging" and "based on". In each case, a precise term or provision ought to be cited, together with an indication of the right which it is claimed would enure from its non-observance and of the "substantial and not merely artificial connexion" between that right and the provision invoked.

How, moreover, is it possible for the Court to check the existence or non-existence of a legal relationship or of legal effects which have not been relied upon by the complainants or found to exist by the Tribunal as a basis for its jurisdiction? In any event, it is certain that if this interpretation should be accepted the result would be that there would be practically no case in which the Tribunal lacked jurisdiction, and review by the Court, provided for in Article XII, would in fact be impossible or useless.

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Let us now consider the reasons given in the Judgment on competence, which are the subject of seven paragraphs.

The first paragraph draws a distinction between probationary and fixed-term appointments. The Tribunal perhaps wished to indicate that the former may be terminated at any moment *ad nutum*, whereas this is not the case of the latter. Apart from the fact that there is no such thing as a probationary appointment as an autonomous contract, but merely a probationary period in the first year of a fixed-term contract, this reason is irrelevant and constitutes a mere assertion by implication.

The second paragraph quotes Unesco Staff Rule 104.6 *(d)*, which provides that:

> "A fixed-term appointment shall expire, without notice or indemnity, upon completion of the fixed term unless a renewal is offered and accepted three months before the expiry date in the case of an initial fixed-term appointment of one year, and six months before the expiry date in other cases [1]"

and states that this text only deals with the duration of the appointment and in no way bars the Tribunal from being seised of a complaint requesting the examination of the validity of the *positive* or negative decision taken regarding the renewal of the appointment.

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[1] The text in force at the time when the Director-General took his decision reads as follows :

> "A fixed-term appointment shall expire upon completion of the fixed term unless a new appointment is offered and accepted three months before the expiry date, if the staff member has served for less than one year or six months before the expiry date, if he has served for more than one year."

To begin with, it is incorrect that the provision deals only with the duration of the appointment, since it determines the legal situation as between Unesco and the officials. Again, a complaint requesting the examination of the validity of a positive decision regarding renewal is inconceivable. The Tribunal is in fact only open to officials and those claiming through them, and it is difficult to see how an official could attack the validity of a decision to renew his contract, since there can be no renewal in the absence of an acceptance by him.

The Tribunal, nevertheless, states that Rule 104.6 *(d)* in no way bars it (notwithstanding its categorical terms) from considering the validity of a decision of non-renewal.

Unesco has been at pains to explain that non-renewal does not constitute a decision, and it has relied for this purpose on the terms of Staff Rule 104.6 *(d)* and on the nature of the legal relationship between Unesco and the official. But without pausing to dwell on an examination of this aspect of the question, it is to be observed that at the end of June 1954 it could be known that Duberg's contract, which was due to expire on December 31st, 1954, would not be renewed because no offer of renewal had been made to him by that date, the offer being one which had to be made six months before the expiry of his contract. Providentially, there was the Administrative Memorandum of July 6th, which was followed, on August 13th, by a letter from the Director-General to Duberg informing him that his contract would not be renewed. There is therefore no difficulty in admitting that there was a decision not to renew.

In fact, the Tribunal's declaration that Rule 104.6 *(d)* was not a bar to its adjudication on the validity of a decision not to renew showed that it was preparing to say that, in spite of that provision, there existed, within certain limits, either a right of the official to renewal, or an obligation upon the Director-General in this respect.

The following paragraph appears to lend substance to this idea. That paragraph cites the Administrative Memorandum of July 6th, 1954, which is referred to as "a general measure" *(une mesure d'ensemble)* and in the next paragraph as "a general measure" *(une mesure générale)* to which the complainant was made an exception.

In the fourth paragraph, the Tribunal summarizes Duberg's complaint in these words: "The Director-General could not legitimately thus make an exception of him on the sole ground which he invoked against him as justification for the view that he did not possess the quality of integrity recognized in those of his colleagues whose contracts had been renewed, and in the absence of any contestation of his qualities of competence and efficiency."

(In his complaint the complainant maintained that "he had—in circumstances clearly determined by the Administration—*an acquired right to the renewal of his contract* and that this assurance was more than a mere hope". He relied on the Administrative Memorandum of July 6th, 1954, and dealt at length with the facts relating to his career and with the concept of integrity, the reason invoked by the Director-General for not renewing his contract.)

The following paragraphs of the Judgment (relating to jurisdiction) add nothing to the reasoning already given: paragraph 5 states the submissions of the complainant; paragraph 6 says that the question is *thus* a dispute concerning the interpretation and application of the Staff Regulations and Rules of Unesco, and paragraph 7 states that, by virtue of Article II, paragraph 1 [1], the Tribunal is competent to hear it.

Apart from the reference to the Memorandum of July 6th, 1954, these seven paragraphs, which constitute the whole of the reasoning on the question of jurisdiction, fail completely to state the basis of that jurisdiction.

The one and only ground on which the Tribunal founds its jurisdiction therefore appears to be the Memorandum of July 6th.

By placing the emphasis on the Memorandum of July 6th, in its reasoning on the question of jurisdiction, and by its description of it as a "general measure", the Tribunal seems to be adding it to the sources of the officials' rights (contract and Staff Regulations and Rules). Did this Memorandum really constitute a new source of such rights, to the extent to which it modified the Staff Regulations and Rules?

A lively controversy has been engendered as to the scope of the Memorandum. In the view of some, it was merely a declaration of policy, an obviously expedient statement which did not and could not alter the character of relationships created by the contracts and the Staff Regulations and Rules.

The Director-General found himself in a dilemma:

> he either had to transform fixed-term contracts into indeterminate appointments without regard to programme requirements, or else not to renew such contracts.

Since he had to seek directives from the Conference, which was to meet in November 1954, the Director-General proposed, pending a settlement of the question on a solid foundation *involving the establishment of a permanent cadre*, to grant a general one-year renewal in the circumstances which he indicated. This announcement in no way implied that the normal rules would not be observed, namely, the necessity for an offer and an acceptance, or that he had abandoned his rights, since surrender of a right cannot be presumed.

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[1] The Tribunal's reference is incorrect, since this paragraph relates to the International Labour Organisation, whereas it is paragraph 5 which applies to Unesco.

For those holding this view, it is difficult to understand how a declaration made after the date prescribed for an offer of renewal—as in the case of the four complainants—can give rise to new rights. In their view, Rule 104.6 *(d)*, even in its revised form, consequently remains in force and should be applied. Failing an offer and an acceptance, the appointment expired on December 31st, 1954, without notice or indemnity. According to this interpretation, there was no right to renewal and, in the absence of non-observance of any term or provision, the Tribunal was incompetent to hear the complaint.

This obviously was not the opinion of the Tribunal, which regarded the Memorandum as having the character of a general measure or of a regulation provisionally modifying the régime then in force and which considered that the officials were entitled to the benefit thereof.

The Tribunal, however, was unable to hold that the Memorandum gave right to a renewal of the appointment or to an obligation on the part of the Director-General to renew it, as claimed by the applicant in his complaint. The Tribunal contented itself with stating that "an official who combines all the necessary qualities has a *legitimate expectancy (espoir légitime)* of being offered a new appointment in the position which he occupied".

But does the disappointment of a legitimate expectancy or hope constitute non-observance of the terms of appointment or of the provisions of the Staff Regulations? So to hold would be to attribute to legitimate expectancies a legal substance not warranted by any legal principle.

However that may be, is it necessary for the Court to choose between these two conflicting views—a "declaration of policy" on the one hand, which would involve a finding that the Tribunal lacked jurisdiction on the ground that it had incorrectly defined the legal position, or "a general measure" on the other hand, which would involve a finding that the Tribunal had jurisdiction?

Such a choice would not in fact resolve the problem of jurisdiction, for, even regarded as a general measure, the Memorandum could not by itself serve as a basis for the Tribunal's Judgment confirming its jurisdiction.

The Memorandum indeed did not envisage an offer of renewal to all professional staff members in an absolute manner. The offer was made subject to conditions covering the need for their services and the achievement of the required standards which necessarily were to be determined by the Director-General.

In these circumstances, there could not be any non-observance of the terms of appointment or of the provisions of the Staff Regulations if non-renewal was based on the absence of any need for the services of the official or on the failure to achieve the required standards, and in such a case there could be neither

any right nor any legitimate expectancy or hope on the part of the official that his contract would be renewed.

The Memorandum, which made renewal subject to these conditions of need for the services and of achievement of the required standards, cannot justify an assumption of jurisdiction in proceedings based upon some right of an official, providing it be granted that judgment of the satisfaction of the conditions is within the discretion of the Director-General.

But the Tribunal does not appear to admit this so far as the condition of integrity is concerned. It appears not to have had any difficulty about admitting it so far as the other conditions are concerned [1]. The whole section devoted to an examination of the merits deals only with the discretionary power of the Director-General and at the outset the Tribunal states that *"if the Director-General is granted authority not to renew a fixed-term appointment and so to do without notice or indemnity, this is clearly subject to the implied condition that this authority must be exercised only for the good of the service and in the interest of the Organization"*.

The Tribunal, postulating that the exercise of this power, subject to the implicit conditions which it has indicated, should be subjected to its judicial control, proceeds to an examination of the facts and to a definition of the condition of integrity, and it concludes "that the decision not to renew the appointment is one which should not only be rescinded in the present case, but also constitutes a wrongful exercise of powers and an abuse of rights which consequently involves the obligation to make good the prejudice resulting therefrom" [2].

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Since the Court must review all the grounds on which the jurisdiction of the Tribunal is founded, and since it must seek them wherever they may be found, the Court must stress this ground as being the principal ground on which the Tribunal relied in declaring that it had jurisdiction and in dealing with the merits. In the portion of the Judgment devoted to the question of jurisdiction, the Tribunal stated that "the question is a dispute concerning the interpretation and application of the Staff Regulations and Rules of Unesco", but it did not indicate the provision involved, apparently leaving this to the examination of the merits.

[1] This distinction was not, however, justified by the Tribunal, in spite of the fact that in an international political organization such as Unesco the concept of integrity should have, apart from its etymological meaning, a relative and wider meaning.

[2] The wording here used implies the existence of two grounds, but a careful reading of the Judgment reveals no ground other than that of *détournement de pouvoir* which is the natural conclusion following from the implied conditions postulated and gone into at length by the Tribunal.

The reference in this part of the Judgment to the Memorandum of July 6th was merely paving the way for these *implied conditions* inasmuch as the Memorandum constitutes the document to which reference must be made and which contains the *conditions* to which the Director-General made his general offer of one-year renewals subject. The Tribunal did not rely on the Memorandum in any other way, nor did it draw any other conclusion from it.

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It will, however, be observed at the outset that the Tribunal did not seek to base its Judgment on any right enjoyed by the official himself, by virtue of his contract or of the Staff Regulations, but on conditions relating to the Director-General's right or to his discretionary power which, if not satisfied, would give rise to a wrongful act *(détournement de pouvoir)* involving a right of the official to be compensated (by money or otherwise).

It may next be observed that these "implied conditions" have nothing to do with good faith, which is the basis of any contract and, accordingly, an implied condition inherent in its performance. In fact, the Tribunal's analysis of the good of the service and the interest of the Organization reveals an appreciation by the Tribunal of these criteria which differs from that of the Director-General but which does not go so far as to question his good faith.

Finally, it may be observed that "implied conditions" cannot be regarded as provisions non-observance of which would constitute a basis for the jurisdiction of the Tribunal. Such provisions clearly cannot be anything but express and positive provisions. That this is so appears clearly from the use in the article of the words "in substance or in form".

But if these implied conditions do not constitute the terms and provisions referred to in Article II of the Statute of the Tribunal, is it possible that they might constitute the interpretation or application of such terms and provisions? Interpretation is undoubtedly of the essence of the administration of justice, but judicial interpretation presupposes the existence of a text to be interpreted. Moreover, interpretation is subject to certain rules which are susceptible of control.

What is the term or provision which the Tribunal, in the cases submitted to it for judgment, has interpreted or applied and what are the rules which it followed?

The Tribunal proclaims the existence of implied conditions by way of a mere assertion, and it fails to explain the paradox of a discretionary power subject to judicial control. The conclusion reached by the Tribunal that non-renewal constitutes a *détournement de pouvoir,* shows that it regarded itself as having jurisdiction to deal with a *détournement de pouvoir.* But such a power cannot be presumed to be inherent in administrative justice. Though the

French *Conseil d'État* may have exercised it after a lengthy evolution and as a result of a series of decisions which may be described as praetorian, the administrative tribunals established in various countries only exercise it by virtue of express provisions.

So far as the French *Conseil d'État* is concerned, the concept of *détournement de pouvoir* is a theory of historical growth due to the rôle which the *Conseil* has played in French life, to its structure, to its functions and, above all, to the successive extensions of its competence due to its power to build up a veritable case law [1]. Even in France, resort to the theory is in general less frequent.

A writer, Professor Jean de Soto, in an article entitled "*Recours pour excès de pouvoir et interventionnisme économique*", published in the Collection "*Conseil d'État, Études et Documents*", 1952, No. 6, pages 77-78, seeks to explain this fact:

> "... What is the explanation for this disaffection with regard to *détournement de pouvoir ?* Perhaps a certain disillusionment, for a form of control of this sort may seem deceptive... Above all, no doubt, administrative tribunals have thought that by themselves precisely determining the special purpose which professional and economic authorities should have in mind in forming their decisions in respect of their every act, they were adjudicating upon matters outside their ken and that their official assertions with regard to the ultimate purpose might endanger their prestige in the eyes of the public ; it should be added that it was not always easy to ascertain this ultimate purpose and that the necessary experience was often lacking for the forming of any sure opinion."

However that may be, when, as a result of the development of the French institution of the *Conseil d'État*, certain countries desired to establish Councils on the French model, they deemed it necessary to crystallize the case law which had been developed by the *Conseil d'État* over a century and a half, by conferring on their new Councils a jurisdiction which was at once wide and well-defined, in order to avoid the incoherence and uncertainty involved in the building up of a case law, the direction of which was in any event unsure, and in order to avoid any resistance on the part of the Administration or any conflicts with it.

By way of examples of such texts, which are to be found in many countries in Europe, I shall content myself with citing Article 22 of the Greek Law of December 22nd, 1928; Articles 11 and 23 of the Turkish Law of December 26th, 1938; Article 9 of the Belgian Law of December 23rd, 1946; Article 33 of the Treaty establishing the European Coal and Steel Community of April 18th, 1951 (*cf.* Article 3 of the Egyptian Law No. 9 of 1949, amending Law No. 112 of 1946 which brought the Conseil d'État into being). (See Annex.)

[1] *Cf.* an article by President Josse, in the *Livre jubilaire du Conseil d'État pour commémorer son 150me anniversaire*, 1949. See also an article by Professor Pierre Lampué, published in the *Revue internationale des Sciences administratives*, 1954, p. 383.

These provisions which recognize the doctrine of *détournement de pouvoir* entrust the necessary judicial control to the *Conseil d'État* or to the Court of the Community.

If these various laws have considered it necessary to make express provision for *détournement de pouvoir* as an element of jurisdiction and not as a substantive rule, that is because such a ground of appeal cannot be regarded as automatic and because it is not a necessary consequence of the general power of annulment conferred on *Conseils d'État*. This form of appeal in fact relates to the exercise of the discretionary power of the Administration, and it involves, independently of judicial control over the interpretation and application of legislative provisions and regulations, a searching enquiry into the purpose of such provisions and into the way in which that purpose has been circumvented or disregarded, as well as an enquiry into the reason for the misuse of the power.

There are indeed two possibilities: *either* in the absence of a provision conferring special competence in respect of *détournement* or *abus de pouvoir*, these *Conseils d'État* may exercise such a special competence by virtue of their general power of annulment for breach of the law, in which case it may be asked why, in framing the Statutes establishing the *Conseils*, it was considered necessary to make provision for such special competence, *or* such provision was necessary and without it the *Conseils* could not exercise the power in question. It is the second of these alternatives which clearly must be accepted.

The seriousness of such interference in administrative matters and of the substitution of the views of courts for those of responsible administrators clearly militates against the presumption that such a power can be deemed to be included within the normal concept of the interpretation and application of laws and regulations. Accordingly, apart from the case of the French *Conseil d'État*, which in the course of the development of its case law over a period of more than 150 years has elaborated so many theories which constitute the foundations of that unwritten law, administrative law, an express provision has always been considered necessary.

But the jurisdiction of the administrative tribunals of international organizations is in no way comparable to that of the various national judicial systems which include a body of the *Conseil d'État* type. No one will dispute that the jurisdiction of the Tribunal, as defined by Article II of its Statute, is a limited jurisdiction and that it is restricted to questions of non-observance of terms of appointment and of the Staff Regulations. It is this very restriction which provides the *raison d'être* for the procedure for requesting an advisory opinion of the Court, which is provided for by Article XII of the Statute of the Tribunal.

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Might it nevertheless be considered that since it is not a tribunal deciding as between States, in which case a restrictive interpretation will be necessary as a result of the principle of the sovereignty of States, the jurisdiction of the Tribunal of the International Labour Organisation should be liberally interpreted on the basis of the Charter and of the modern tendencies to provide certain guarantees for the status of officials, or that it should be interpreted in such a way as to provide security for the international civil service?

It is clear that the constitution of the Tribunal, even with its limited competence *(compétence d'attribution)* reflects these tendencies. It would then be necessary to determine at what point such a liberal interpretation should cease in order not to bring about a change in the character of the Tribunal, altering it from a tribunal with a limited competence to one having full administrative jurisdiction including powers of annulment in cases of *détournement de pouvoir.* Such a liberal or extensive interpretation would not thus lead to any precise conclusion.

Such a liberal or extensive interpretation is the less acceptable in the present case in that the jurisdiction of the Administrative Tribunal of the International Labour Organisation, so far as the staff of Unesco are concerned, is the result of an agreement between the latter Organization and the International Labour Organisation under which the former is entitled to rely on the precise limits to the jurisdiction as defined in Article II, paragraph 5, of the Tribunal's Statute.

Moreover, it is difficult to conceive that, in the case of a tribunal starting out without any traditions and whose only function is to ensure respect for the contracts and the status of a civil service in the process of formation, it can have been the intention to grant it powers as wide as those which may be involved by the concept of *détournement de pouvoir* in relation to administrative heads (the Secretary-General or Director-General), subject to the hierarchical control of higher bodies (in this case, the Executive Board and the General Conference of Unesco) and acting on the instructions or with the agreement of those bodies.

It is true that in the days of the League of Nations M. Albert Thomas suggested the establishment of an administrative tribunal on the model of the French *Conseil d'État.* But after this suggestion, and before its implementation, the question passed through a number of committees which did not proceed on the basis of this idea. It is not therefore possible to place reliance on administrative decisions or on the administrative law of the various countries in an effort to attribute to the administrative tribunals of international organizations the same powers as are enjoyed by national legal systems.

The fact that the Tribunal was called an administrative tribunal does not automatically confer upon it the powers of *Conseils d'État* in various countries. The Tribunal is "administrative" because it has no powers beyond those which relate to the administration and the officials. By reason of this intrinsic character, it is nothing more than a judicial organ with limited powers which it must exercise in the same way as any other judicial tribunal, that is to say, it must interpret and apply the terms of appointment of officials and the provisions of the Staff Regulations. The Tribunal itself said so in the sixth paragraph of the section of the Judgment devoted to competence.

An entirely different matter is the judicial control of the discretionary exercise of the powers of the Administration; this is a quite special matter which can only appertain to a type of court which bears the same relationship to the Administration as do the *Conseils d'État* in the various countries which have adopted that institution.

In fact, the duality of their functions as an advisory body and as a court having jurisdiction to annul decisions, in the words of MM. Puget and Maleville, in a study on the *"Revision des décisions administratives sur recours des administrés"*, undertaken by the *Institut international des Sciences administratives* for the United Nations (1953), "effects a conciliation which is perhaps illogical but certainly felicitous between the contradictory necessities of keeping the administrative judge apart from the power to decide issues in the continual activity and operation of departments and of allowing him to plunge constantly into the realities of administrative tasks... This duality ensures that he is at all times in close contact with living realities, and it is favourable to flexibility and progress. It is to the benefit both of those who administer and those who are administered."

There is not only this duality of the functions of the *Conseil d'État* as a basis for the extension of its competence and of its control penetrating to the acts of the Administration, but as a basis for this extension and control there is also the duality of a judicial jurisdiction and an administrative jurisdiction: the former limited to the interpretation and application of existing texts, the latter developing administrative law, to a great extent unwritten law, particularly from the point of view of its general principles.

The case of the Administrative Tribunal of the International Labour Organisation is, however, something quite different from a *Conseil d'État.* It is an exclusively judicial tribunal, although administrative in name. There is not here, therefore, any duality of function or of jurisdiction.

The difference between the Tribunal and a *Conseil d'État* is fundamental, and it cannot be otherwise both as regards the atmosphere in which the Tribunal exercises its jurisdiction and as

regards the complex conditions of the functioning of international organizations.

As justification for the extraordinary powers which international administrative tribunals claim to possess, one of the defenders of the system, Professor Georges Langrod, speaking of the Administrative Tribunal of the United Nations, said: "The Administrative Tribunal, that newborn judicial body, with limited jurisdiction and without direct traditions on the inter-governmental plane, should not only impose its authority in the face of repeated attempts to cast doubt on the character of *res judicata* of its judgments, that is, undertake a mission of a 'pedagogical' order, but it should go farther—in view of the meagreness, so far as substance is concerned, and of the endless fluctuation, so far as the form of the *internal law* of the United Nations is concerned—and bring about, almost *ab nihilo*, a real body of case law, as did the Roman praetor." (*Rivista di Diritto Internazionale*, 1954, p. 245.) The author of these words fails to indicate the legal provisions or the authority which would justify such an extended and praetorian power of administrative tribunals. This conception of the powers of administrative tribunals is obviously without any foundation. The present state of international administrative law provides no sanction or authority therefor.

* * *

Other arguments have been invoked in order to justify the competence of the Administrative Tribunal of the International Labour Organisation to exercise a judicial control over the discretionary powers of the Director-General, such as the statistics of fixed-term appointments, the special features of such appointments, the general (but by no means absolute) practice that they are renewed [1], the necessity of ensuring stability and security within the international civil service. These are extra-legal, I might even say political, considerations. International organizations have an undoubted interest in settling these questions by general measures and have more effective means of dealing with them than administrative tribunals, dealing with individual cases, can possibly have.

* * *

In support of the jurisdiction of the Administrative Tribunal of the International Labour Organisation, decisions of other administrative tribunals have been cited, in particular:

[1] There was no examination by the Court nor discussion before the Administrative Tribunal of the precise scope of this practice or of the facts relevant thereto, namely, the part played in the formation of the practice by the examination in each individual case of the need for the services of the official and his having achieved the necessary standards (of efficiency, competence and integrity). In any event, while it is always desirable in interpreting texts not to have regard only to the letter of the provision but to bear in mind the spirit of the texts, this so-called practice cannot be assimilated to the spirit of the provisions of the Staff Regulations.

1. Howrani *v.* Secretary-General of the United Nations, Judgment No. 4—September 14th, 1951.
2. Robinson *v.* Secretary-General of the United Nations, Judgment No. 15—April 11th, 1952.
3. Kergall *v.* European Coal and Steel Community—July 18th, 1955.

Without examining these judgments in detail, it may be pointed out that none of these judgments adopted the doctrine of *détournement de pouvoir* as openly as the four judgments now in question.

Moreover, neither the Statutes of these Tribunals nor the Staff Regulations of these Organizations are identical with the Statute of the Administrative Tribunal of the International Labour Organisation and the Staff Regulations of Unesco.

Furthermore, the instrument establishing the European Coal and Steel Community expressly confers on the Court of the Community the power of annulment on the ground of *détournement de pouvoir* in certain cases (Art. 33) (see Annex).

Finally, it is difficult to see how the decisions of tribunals of the same standing as the Administrative Tribunal, whose judgments are subject to review by the Court, decisions never sanctioned by this Court, can serve as authorities justifying the present judgments.

* * *

It is necessary to remember in connexion with these arguments and similar arguments referred to at the beginning of the present Opinion that they were not relied on by the Administrative Tribunal itself, which placed itself on an altogether different ground, that not of a right of the official but of a wrongful act relating to the exercise of the Director-General's power—*détournement de pouvoir*.

* * *

Since the task of the Court is to give an Opinion on the challenge raised against a concrete decision of the Tribunal confirming its competence, the Opinion should naturally relate to the grounds on which the Tribunal held that it had jurisdiction. In general, the Court's rôle should not be to examine the Tribunal's jurisdiction and to adjudicate upon it *proprio motu*.

This limitation is necessary particularly in a case where the Tribunal adopted an element of jurisdiction such as *détournement de pouvoir*, which has not been conferred upon it, in the guise of a ground for its finding on the merits.

The Tribunal's judgment on the merits has thus been influenced by this arbitrary arrogation of jurisdiction. The result is an inextricable confusion between jurisdiction and merits.

The Court has several times stated that it is not called upon to give an Opinion on the merits of the case the judgments of which have been submitted to it, but it has at the same time sought bases for the jurisdiction of the Tribunal other than those relied upon by the Tribunal itself.

In upholding the jurisdiction of the Tribunal, however, on different grounds, the Opinion of the Court cannot fail to clothe the Tribunal's judgment on the merits with an authority in no way intended by the Court.

In fact, even if the Tribunal had founded its jurisdiction on the practice with regard to fixed-term appointments, on the special position which that practice occupies in international organizations, on the Memorandum of July 6th, 1954, it could not, without the assistance of *détournement de pouvoir*, have done otherwise than dismiss the complaints of the officials. Neither the practice, the legal relationship between renewal and the original contract or the legal effects which a fixed-term appointment continues to produce after its expiry, nor an examination of the terms of appointment or of the Staff Regulations or of the Rules or of the Memorandum of July 6th, would have provided the Tribunal with *a basis for a right resulting from non-observance* of the terms of appointment or of the provisions of the Staff Regulations.

The Tribunal seems to have examined all these possibilities itself. But all it could deduce was "that an official who combines all the necessary qualities has a legitimate expectancy *(espoir légitime)* of being offered a new appointment in the position which he occupied".

A *détournement de pouvoir* alone—a special competence which it did not possess—was able to provide the Tribunal with the bases for its Judgment.

* * *

In the conditions in which international organizations operate, mistakes are possible. But these mistakes, however serious they may be, cannot justify an extension of the jurisdiction of international administrative tribunals which is contrary to their Statutes, to the conditions in which they operate and to the conditions in which international organizations operate.

The formative period through which international administration is at present passing will in due course come to an end. It is then that it will be possible and practicable to adopt rules which are applicable to national administrative courts. Among such rules, that relating to *détournement de pouvoir* might become a part of the law of the future. That it will is the hope expressed by Professor F. Chiesa, in a report to the Ninth International Congress of Admin-

istrative Sciences, 1953, which is published in the *Revue internationale des Sciences administratives*, 1954, n° 1, page 67:

> "Moreover, all administrative tribunals should be given a general jurisdiction to control the validity of all administrative measures taken by the United Nations and other international Organizations in order to eliminate from the field of law all measures vitiated by lack of competence, *abus de pouvoir* or breach of the regulations or rules, as well as a jurisdiction of appraisal, a jurisdiction on the merits, to enable the tribunals to proceed to a consideration of the substance of the case and the law involved."

Summary of the article in English given in the Revue

> "In the present situation, it is not yet justifiable to think of an administrative jurisdiction, on an international level, in terms of its definition as it is given in national legal texts. Most of the international administrative jurisdictions now in existence are confined in their competence to litigations pertaining to international officialdom, whereas it should be permissible to refer to a judge the question of whether or no an organ of an international organisation has exceeded its powers or has misused its competence within its powers."

But until then it is to the international legislator and not to the administrative tribunal that the right or the duty pertains to choose the public law doctrine *(détournement de pouvoir)* or the private law doctrine *(abus de droit)* which the Administrative Tribunal saw fit to include together in one of the recitals of its Judgment.

* * *

For all these reasons, I am of opinion, so far as Question I is concerned, that the Administrative Tribunal of the International Labour Organisation was not competent, because the essential basis on which it held itself competent is what it called the "implied conditions" of the Director-General's power, a postulate designed to enable it to deal with acts reserved for his discretion, in order to submit them to judicial review and to rescind these discretionary administrative acts on the ground of a *détournement de pouvoir*. Such a competence was not conferred upon it by Article II of its Statute.

Question II does not arise.

The reply to Question III is that the Judgment, based on a foundation which does not exist, are nullities.

(Signed) BADAWI.

Annex

Greece

Law of December 22nd, 1928.

Article 22.

. . . . . .

"The full Council shall sit :

(a) when considering applications for rescission of administrative measures on the ground of *excès de pouvoir* or for breach of a law."

Turkey

Law of December 26th, 1938.

Article 11.

"The functions of the *Conseil d'État* include :

. . . . . .

(d) dealing with and deciding applications and appeals in contentious administrative matters."

Article 23.

"The *Sections du contentieux* shall finally and definitively consider the following matters :

A. Proceedings brought by those claiming to have suffered injury as a result of acts and decisions of an administrative character relating to questions outside the jurisdiction of judicial tribunals ;

. . . . . .

C. Proceedings for annulment brought by those claiming to have suffered injury as a result of acts and decisions of an administrative character alleged to be in conflict with the provisions of laws and regulations, so far as their purpose and their substance are concerned, and from the point of view of procedure and jurisdiction;"

Belgium

Law of December 23rd, 1946.

Chapter II.— Judgments.

"9. The Administrative Section shall adjudicate by means of judgments on claims for annulment on the ground of a defect of procedure which is of a substantial character or where the sanction for departure therefrom is annulment, on the ground of *excès* or *détournement de pouvoir*, alleged against the acts or regulations of the various administrative authorities or against contentious administrative decisions."

Egypt

Law of 1946 on the *Conseil d'État*, as amended in 1949.

Article 3.

"The Contentious Administrative Court is alone competent to adjudicate upon the following questions and possesses unlimited jurisdiction over these questions.

. . . . . .

6. Appeals lodged by private persons or corporate bodies for the rescission of final administrative decisions.

The appeals referred to under 3, 4, 5, 6 must be based on lack of jurisdiction, on a formal defect or on a breach or erroneous application or interpretation of laws or regulations, or on a *détournement de pouvoir*."

Treaty establishing the European Coal and Steel Community, of April 18th, 1951

Article 33.

"The Court shall have jurisdiction over appeals by a member State or by the Council for the annulment of decisions and recommendations of the High Authority on the grounds of lack of legal competence, major violations of procedure, violation of the Treaty or of any rule of law relating to its application, or abuse of power. However, the Court may not review the High Authority's evaluation of the situation, based on economic facts and circumstances, which led to such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application.

The enterprises, or the associations referred to in Article 48, shall have the right of appeal on the same grounds against individual decisions and recommendations affecting them, or against general decisions and recommendations which they deem to involve an abuse of power affecting them.

The appeals provided for in the first two paragraphs of the present article must be lodged within one month from the date of notification of publication, as the case may be, of the decision or recommendation."