INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

ADVISORY OPINION OF 12 JULY 1973

1973

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DEMANDE DE RÉFORMATION DU JUGEMENT N° 158 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

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INTERNATIONAL COURT OF JUSTICE

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

ADVISORY OPINION

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

Scope of questions submitted to Court—Nature of task of Court in proceedings instituted by virtue of Article 11 of Statute of the United Nations Administrative Tribunal.

Objection to Judgement on ground of failure by Administrative Tribunal to exercise jurisdiction vested in it—Test of whether the Tribunal has failed to exercise jurisdiction—Allegations that Tribunal failed to exercise jurisdiction in that it refused to consider fully claims for costs, failed to direct recalculation of rate of remuneration and to order correction and completion of employment record—Extent of power of Tribunal to award compensation—Question of misuse of power by administration.

Objection to Judgement on ground of fundamental error in procedure which occasioned a failure of justice—Meaning of "fundamental error in procedure"—Absence or insufficiency of statement of reasons for a judgment as fundamental error in procedure—Rejection by the Tribunal of staff member's claim for costs—Question of costs of review proceedings.

Present: *President* LACHS; *Vice-President* AMMOUN; *Judges* FORSTER, GROS, BENGZON, ONYEAMA, DILLARD, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Registrar* AQUARONE.

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

THE COURT,

composed as above,

gives the following Advisory Opinion:

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

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

2. In accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an advisory opinion was given on 10 July 1972 to all States entitled to appear before the Court; a copy of the Secretary-General's letter with the decision of the Committee appended thereto was transmitted to those States.

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

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

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

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

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

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

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

* *

10. The circumstances which have given rise to the present request for an advisory opinion are briefly as follows. Mr. Mohamed Fasla, the former staff member referred to above, entered United Nations service

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

1972. By an application of 26 May 1972, Mr. Fasla raised objections to the decision and asked the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion of the Court.

* *

11. In formulating the request for an advisory opinion, the Committee on Applications for Review of Administrative Tribunal Judgements exercised a power conferred upon it by the General Assembly by its resolution 957 (X) of 8 November 1955. This resolution, *inter alia*, introduced into the Statute of the Administrative Tribunal of the United Nations a new Article 11 by which provision was made for the possibility of challenging judgements of the Tribunal before the Court through the machinery of a request for an advisory opinion. After the Court had given its Opinion concerning the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954*, p. 47), the General Assembly set up a Special Committee to study the question of establishing a procedure for review of the Tribunal's judgements. The new Article 11 embodies the proposals of that Special Committee, as amended at the Tenth Session of the General Assembly, and it is pursuant to the procedure provided in Article 11 that the present request for an opinion has been submitted to the Court.

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

> "1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.
>
> 2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.
>
> 3. If no application is made under paragraph 1 of this article,

or if a decision to request an advisory opinion has not been taken by the Committee, within the periods prescribed in this article, the judgement of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court.

4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. The Committee shall be composed of the Member States the respresentatives of which have served on the General Committee of the most recent regular session of the General Assembly. The Committee shall meet at United Nations Headquarters and shall establish its own rules."

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

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14. As to the Court's competence to give the opinion, doubts have been voiced regarding the legality of the use of the advisory jurisdiction for the review of judgements of the Administrative Tribunal. The contentious jurisdiction of the Court, it has been urged, is limited by Article 34 of its Statute to disputes between States; and it has been questioned whether the advisory jurisdiction may be used for the judicial review of contentious proceedings which have taken place before other tribunals and to which individuals were parties. However, the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court's opnion, does not change the advisory nature of the Court's task, which is to answer the questions put to it with regard to a judgment. Thus, in its Opinion concerning *Judgments of the Adminis-*

trative Tribunal of the ILO upon Complaints Made against Unesco (*I.C.J. Reports 1956*, p. 77), the Court upheld its competence to entertain a request for an advisory opinion for the purpose of reviewing judicial proceedings involving individuals. Moreover, in the earlier advisory proceedings concerning the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954*, p. 47) the Court replied to the General Assembly's request for an opinon notwithstanding the fact that the questions submitted to it closely concerned the rights of individuals. The Court sees no reason to depart from the position which it adopted in these cases. If a request for advisory opinion emanates from a body duly authorized in accordance with the Charter to make it, the Court is competent under Article 65 of its Statute to give such opinion on any legal question arising within the scope of the activities of that body. The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute.

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

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

power to establish subsidiary organs is that they should be "necessary for the performance of its functions".

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

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

19. Article 96, paragraph 2, of the Charter, empowers the General Assembly to authorize organs of the United Nations to "request advisory opinions of the Court on legal questions arising within the scope of their activities". In the present instance paragraph 4 of Article 11 of the Statute of the Administrative Tribunal expressly states that the Committee "For the purpose of this article . . . is . . . authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court". These two provisions, prima facie, suffice to establish the competence of the Committee to request advisory opinions of the Court. The point has been raised, however, as to whether under Article 11 of the Statute of the Administrative Tribunal the Committee has any activities of its own which enable it to be considered as requesting advisory opinions "on legal questions arising within the scope of [its] activities". Thus, the view has been expressed that the Committee has no other activity than to

request advisory opinions, and that the "legal questions" in regard to which Article 11 authorizes it to request an opinion arise not within the scope of "its activities" but of those of another organ, the Administrative Tribunal.

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

21. In fact, the primary function of the Committee is not the requesting of advisory opinions, but the examination of objections to judgements in order to decide in each case whether there is a substantial basis for the application so as to call for a request for an advisory opinion. If it finds that there is not such a substantial basis for the application the Committee rejects the application without requesting an opinion of the Court. When it does find that there is a substantial basis for the application, the legal questions which the Committee then submits to the Court clearly arise out of the performance of this primary function of screening the applications presented to it. They are therefore questions which, in the view of the Court, arise within the scope of the Committee's own activities; for they arise not out of the judgements of the Administrative Tribunal but out of objections to those judgements raised before the Committee itself.

22. True, Article 11 does not make it part of the Committee's function to implement any opinion given by the Court in response to the Committee's request; for under paragraph 3 of that Article the implementation of the Court's opinions is a matter for the Secretary-General and the Administrative Tribunal. But this does not change the fact that the questions which are the subject of the Committee's requests for advisory opinions are legal questions "arising" within the scope of its activities. All that is necessary for a question to qualify under Article 96, paragraph 2, of the Charter is that it must be a legal one and must arise out of the

activities of the organ concerned. In the present case, the Committee's request is for an advisory opinion regarding alleged failure by the Administrative Tribunal to exercise jurisdiction vested in it and fundamental errors in procedure which it is alleged to have committed. These are questions which by their very nature are legal questions similar in kind to those which the Court in its 1956 Opinion in the Unesco case considered as constituting legal questions within the meaning of Article 96 of the Charter. Moreover, there is nothing in Article 96 of the Charter or Article 65 of the Statute of the Court which requires that the replies to the questions should be designed to assist the requesting body in its own future operations or which makes it obligatory that the effect to be given to an advisory opinion should be the responsibility of the body requesting the opinion.

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

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

* *

25. One objection that has been taken to Article 11 is that it inserts a political organ into the judicial process for settling disputes between staff members and the Organization. The Administrative Tribunal being a judicial organ, it is incompatible with the nature of the judicial process, so it has been suggested, that a political organ should be involved in the judicial review of its judgements. Certainly, being composed of member States, the Committee is a political organ. Its functions, on the other hand, are merely to make a summary examination of any objections to judgements of the Tribunal and to decide whether there is a substantial basis for the application to have the matter reviewed by the Court in an advisory opinion. These are functions which, in the Court's view, are normally discharged by a legal body. But there is no necessary incompatibility between the exercise of these functions by a political body and the requirements of the judicial process, inasmuch as these functions merely furnish a potential link between two procedures which are clearly judicial in nature. In the Court's view, the compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system.

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

27. The reports of the Committee's meetings reveal that it has dealt with 16 applications for the review of judgements of the Administrative Tribunal, all of which have been made by staff members and none by the Secretary-General or by a member State. The application which is the subject of the present request for an advisory opinion was the fourteenth received by the Committee, and up to date it is the only one in regard to which the Committee has decided that there was "a substantial basis for the application" calling for recourse to the advisory jurisdiction of the Court. It is for the Committee to interpret the function entrusted to it by paragraph 2 of Article 11, under which it has to "decide whether or not there is a substantial basis for the application". In dealing with applications the practice of the Committee has been to limit itself to a bare report of its decision as to whether or not there was a substantial basis for the application and whether or not, in consequence, it should

request an advisory opinion. The decisions taken by the Committee are communicated to all member States, to the parties to the proceedings, and to the Administrative Tribunal. However, the reports do not state the grounds of the applicant's objections to the Tribunal's judgement or the reasons which led the Committee to reject or, as in the present instance, to endorse the application. The Committee meets in closed session, and does not draw up summary records of its proceedings concerning applications, and in the present instance the Court has been informed that these proceedings are regarded as confidential.

28. While it might be desirable for the applicant to receive some indication of the grounds for the Committee's decision in those cases in which the application is rejected, the fact that the Committee's reports are confined to a bare statement of the decision reached does not deprive the review proceedings as a whole of their judicial character, nor constitute a valid reason for the Court's declining to answer the present request. A refusal by the Court to play its role in the system of judicial review set up by the General Assembly would only have the consequence that this system would not operate precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgement. When the Committee reaches such an affirmative decision there is no occasion for a reasoned statement of its views or a public record of its proceedings; for the Committee's affirmative decision, based only on a prima facie appreciation of the objections, is merely a necessary condition for the opening of the Court's advisory jurisdiction. It is then for the Court itself to reach its own, unhampered, opinion as to whether the objections which have been raised against a judgement are well founded or not and to state the reasons for its opinion.

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

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

* *

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

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32. Even so, the Court has still to consider objections which have been raised against the use of advisory jurisdiction for the review of Administrative Tribunal judgements because of what was said to be an inherent inequality under the Statute of the Court between the staff member, on the one hand, and the Secretary-General and member States, on the other. Personal appearance, it was argued, was an essential feature of due process of law, but under Article 66 of the Statute, only States and international organizations were entitled to submit statements to the Court. It was also maintained that a mere expression of a hope by the General Assembly in the proposed resolution (see para. 36 below) that member States and the Secretary-General would forgo their right to an oral hearing was not a sufficient guarantee of equality; nor was it thought appropriate that an individual should be dependent on another party to the dispute for the presentation of his views to the Court.

33. In the year following the adoption of Article 11, as it happened, the Court was called upon to examine the compatibility with its judicial

character of the use of the advisory jurisdiction for review of Administrative Tribunal judgements, though in the different context of Article XII of the Statute of the ILO Administrative Tribunal. Despite the different context, the views then expressed by the Court in its Opinion concerning *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* (*I.C.J. Reports 1956*, p. 77) are, in certain respects, apposite for the purposes of the present Opinion.

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

> "The difficulty was met, on the one hand, by the procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and, on the other hand, by dispensing with oral proceedings. The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which has been adopted has not given rise to any objection on the part of those concerned. It has been consented to by counsel for the officials in whose favour the Judgments were given. The principle of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized

> to ask for an Advisory Opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials. Any seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object." (*I.C.J. Reports 1956*, p. 86.)

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

* *

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

> "... that Member States and the Secretary-General should not make oral statements before the International Court of Justice in any

proceedings under the new article 11 of the Statute of the Administrative Tribunal adopted under the present resolution".

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

37. In the present proceedings, in accordance with Article 65, paragraph 2, of the Statute of the Court, the Secretary-General supplied the Court with a large dossier of relevant documents, including copies of documents which were before the Administrative Tribunal and of those submitted by Mr. Fasla to the Committee; he also submitted a written statement to the Court, and subsequently submitted written comments on the statement of the views of Mr. Fasla, together with some additional documents. Mr. Fasla, on his side, was accorded every opportunity to present his views to the Court in writing on a basis of equality with the Secretary-General, and this opportunity he used to the full. First, through the instrumentality of the Secretary-General, a written statement of his views was transmitted to the Court, together with an annexed document. Some two months later and by leave of the President of the Court, Mr. Fasla transmitted by the same channel a corrected, but at the same time much amplified, statement of his views, together with further documents. Finally, within a further time-limit fixed by the President, he transmitted to the Court his written comments on the Secretary-General's written statement, and to these comments, signed by his counsel, there were appended a "personal statement" by Mr. Fasla and additional documents. As to oral proceedings, by a letter of 6 October 1972 the United Nations and its member States were informed that it was not contemplated that public hearings for the submission of oral statements would be held in the case. Subsequently, by a letter dated 15 November 1972, that is,

prior to submitting his corrected statement, Mr. Fasla transmitted to the Court a request to be permitted to make an oral statement. On 25 January 1973 the Court decided not to hear oral statements and on the same date telegraphed its decision to the United Nations Legal Counsel. Mr. Fasla having renewed his request in a letter of 29 January 1973, the Court adhered to its decision not to hold a public hearing for the purpose of receiving oral statements.

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

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

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

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

40. The Court has repeatedly stated that a reply to a request for an advisory opinion should not, in principle, be refused and that only compelling reasons would justify such a refusal (see, e.g., *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27). In the light of what has been said above, it does not appear to the Court that there is any compelling reason why it should decline to reply to the request in the present instance. On the contrary, as in the 1956 proceedings concerning the ILO Administrative Tribunal, the Court considers that it should not "adopt in this matter a negative attitude which would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials" (*I.C.J. Reports 1956*, p. 86). Although the records show that Article 11 was not introduced into the Statute of the United Nations Administrative Tribunal exclusively, or even primarily, to provide judicial protection for officials, they also show that steps were, nevertheless, taken to ensure that the régime established by it should provide such protection. Moreover, it has so far been officials alone who have sought to invoke the régime of judicial protection established by Article 11. Accordingly, as already indicated, although the Court does not consider the review procedure provided by Article 11 as free from difficulty, it has no doubt that, in the circumstances of the present case, it should comply with the request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion.

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

(i) "exceeded its jurisdiction or competence";
(ii) "failed to exercise jurisdiction vested in it";
(iii) "erred on a question of law relating to the provisions of the Charter of the United Nations"; or

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

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

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

> "(1) Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?
>
> (2) Has the Tribunal committed a fundamental error of procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?"

The document mentioned in each question is Mr. Fasla's formal application to the Committee in which he set out his grounds of objection to Judgement No. 158 and his contentions in support of those grounds. Thus the questions are specifically limited to the grounds of objection and the contentions advanced by him in his application to the Committee. He also formulated four questions at the end of his application with the request that they be submitted to the Court. These questions referred only to two of the four grounds of objection envisaged by Article 11 of the Tribunal's Statute, namely failure to exercise jurisdiction and fundamental error in the procedure having occasioned a failure of

justice; the other two grounds recognized in Article 11—excess of jurisdiction and error on a question of law relating to the provisions of the Charter—were not raised by the applicant before the Committee. The two grounds advanced by the applicant before the Committee are therefore identical in substance with those upon which the opinion of the Court has been requested.

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

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

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

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

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

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

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

(f) Invalidation of the Applicant's Periodic Report covering his

service in Yemen, prepared in September 1970; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

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

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

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

(j) As compensation for injury sustained by the Applicant as the result of prejudice displayed against him, payment by the Respondent to the Applicant of five years' net base salary.

(k) As compensation for the emotional and moral suffering inflicted by the Respondent upon the Applicant, payment by the Respondent to the Applicant of one Yemen rial.

(l) As compensation for delays in the consideration of the Applicant's case, especially in view of the fact that no Joint Appeals Board was in existence during the first four months of 1969 since the Respondent had failed to appoint a Panel of Chairmen, payment by the Respondent to the Applicant of one year's net base salary.

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

(n) As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading

information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary."

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

"*(a)* As compensation for the further delay in the consideration of the Applicant's case early in 1971, payment by the Respondent to the Applicant of one year's net base salary.

(b) Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.

(c) As compensation for the illegal suspension of the Applicant from duty, payment by the Respondent to the Applicant of five years' net base salary."

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

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

47. Under Article 11 of the Statute of the Tribunal, as already indicated, the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement. The Court is not therefore entitled to substitute its own

opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgement on one of the grounds mentioned in Article 11 is well founded. In so doing, the Court is not limited to the contents of the challenged award itself, but takes under its consideration all relevant aspects of the proceedings before the Tribunal as well as all relevant matters submitted to the Court itself by the staff member and by the Secretary-General with regard to the objections raised against that judgement. These objections the Court examines on their merits in the light of the information before it.

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

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

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

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

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

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

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

51. In the Court's view, therefore, this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case. Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of

the matter and not merely to the form. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue. No doubt, there may be borderline cases where it may be difficult to assess whether the Tribunal has in any true sense considered and determined the exercise of relevant jurisdictional powers. But that does not alter the duty of the Court to appreciate in each instance, in the light of all pertinent elements, whether the Tribunal did or did not in fact exercise with respect to the case the powers vested in it and relevant to its decision.

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

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

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

53. The validity of this contention cannot be adequately considered without taking account of all the claims submitted by the applicant to

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

(i) noted that the respondent had produced the first report;
(ii) noted that the second report was in the applicant's "official status file" and therefore available to the counsel of the parties; that a letter, which the applicant had explained he had had in mind when he requested the production of "Mr. Hagen's report", had been supplied confidentially to the Tribunal; and that the Tribunal had made available to the applicant the few lines of the letter which it had held to be relevant;
(iii) stated that, the Tribunal having requested the production of the third report, the respondent had replied that it did not have such a report in the files of the body concerned; and that the Tribunal could only take note of that reply.

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

> "1. The Respondent shall pay the Applicant a sum equal to six months' net base salary;
> 2. The periodic report prepared for the period June 1968 to March 1969 is invalid and shall be treated as such."

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

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

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

> "4. The other requests are rejected."

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

55. In organizing the structure of its Judgement, the Administrative Tribunal followed the logical sequence of examining the existence of violations of substantive law before entering into the question of compensation for damage. Article 2, paragraph 1, of the Tribunal's Statute gives it jurisdiction "to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members". This same paragraph adds: "The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations." A subsequent Article refers successively to the specific relief

which may be granted by the Tribunal and to the award of monetary compensation to be paid in lieu of such specific relief (Art. 9). The Tribunal first determines the non-observance of contracts of employment or of staff regulations before it examines the question of rescission of a decision, or specific performance of an obligation. The latter questions in their turn take priority over the fixing of monetary compensation. The sequence followed by the Administrative Tribunal in the Judgement under consideration thus corresponds to the provisions of its Statute. It can hardly be denied, however, that in this particular case the structure adopted created the difficulty that some of the applicant's pleas, though covered by the general consideration of the basic questions of non-observance of regulations, of rescission and of damage, were not expressly mentioned or specifically dealt with in the paragraphs in which the Tribunal developed its reasoning and analysed what it deemed to be the pertinent issues.

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

57. While the claim for damage to professional reputation and career prospects was couched by the applicant in broad terms, to the effect that it resulted from "the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant", the record shows that the only act attributable to the respondent which could fall within that description consisted precisely in that same distribution to the United Nations central recruitment service, to three specialized agencies, to two UNDP resident representatives, and to several other services of the United Nations, of a

fact-sheet which, while containing information reflecting valid periodic reports, did not include statements in rebuttal by the staff member nor reports concerning other periods of employment, which, contrary to Staff Regulations, had not been prepared or incorporated. Since this act of the respondent was at the same time both the cause of the inadequate performance of the commitment to seek a new assignment and the source of the claimed harm to reputation and career prospects, Mr. Fasla himself, in his explanatory statement to the Administrative Tribunal, did not develop the argument in support of the two pleas separately. It was reasonable in these circumstances for the Administrative Tribunal, in one and the same part of its Judgement, to consider and dispose of all the allegations of injury to the applicant resulting from that particular conduct of the respondent.

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

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

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

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

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

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

60. It is necessary to add certain observations which confirm this conclusion. Article 9, paragraph 1, of the Tribunal's Statute, which governs the power of the Tribunal to award compensation, begins by providing that the Tribunal, if it finds that the application is well founded, "shall order the rescinding of the decision contested or the specific performance of the obligation invoked". An order of this kind normally constitutes the basic content of a decision of the Tribunal in favour of an applicant. The immediately following sentence of Article 9, paragraph 1, adds that:

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

Thus, the damages to be awarded by the Tribunal are of a subsidiary character, in the sense that they are granted in lieu of specific performance. The power of the Tribunal to award damages in lieu of specific performance has been interpreted by the Tribunal as also empowering it to

award damages when it finds that it is not possible to remedy the situation by ordering the rescinding of the decision contested or specific performance of the obligation invoked.

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

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

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

* *

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

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

65. In the present case the Administrative Tribunal found itself in the situation of having to translate the injury sustained by the applicant into monetary terms. In this respect the Tribunal possesses a wide margin of discretion within the broad principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. This power of appreciation of the Tribunal is subject to the rule provided for in the concluding words of paragraph 1 of Article 9 of its Statute:

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

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

of fact appearing from the documentation before the Tribunal which may have been relevant for its determination. Among them the following may be noted:

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

Account has also to be taken of the fact that the number of months of salary by reference to which the Tribunal determined the amount of its award was the same as the number of months of salary adopted by the Joint Appeals Board as the measure of the *ex gratia* payment which it had recommended in its report of 3 June 1970.

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

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

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

> "Payment to the Applicant of the sum of $1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case

necessitated the Applicant's travel from California to New York in May 1970 as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date."

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

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

"The Applicant requests payment of one thousand dollars for exceptional costs in preparing the case. Since the Applicant had the

assistance of a member of the panel of counsel, the Tribunal finds this request unfounded and rejects it."

This decision has, however, to be read in the light of the history of the question of the award of costs by the Tribunal. Although not expressly empowered by its Statute to award costs, the Tribunal did so in some of its early cases on the basis of what it considered to be an inherent power. In 1950, this power was questioned by the Secretary-General, who contended that: *(a)* the Tribunal was without authority under its Statute to tax costs against the losing party and *(b)* even if the Tribunal decided that it had competence to assess costs they should be strictly limited and not include all types of actual costs. After consideration of the legal issues involved the Tribunal formally adopted on 14 December 1950 a statement of policy on the matter which, *inter alia*, provided:

"4. In view of the simplicity of the proceedings of the Administrative Tribunal, as laid down in its rules, the Tribunal will not, as a general rule, consider the question of granting costs to applicants whose claims have been sustained by the Tribunal.

5. In exceptional cases, the Tribunal may, however, grant a compensation for such costs *if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal.*

6. In particular, it will not be the policy of the Tribunal to award costs covering fees of legal counsel with respect to cases which do not involve special difficulties." (Emphasis added.)

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

69. Mr. Fasla complains that the Judgement rejected a demand for counsel's fees which had never been made but did not mention the actual costs prayed for, namely his exceptional costs. But this reading of the Judgement does not appear to be correct. The Tribunal first recalled expressly that he had requested compensation for "exceptional costs in preparing the case" and went on to state: "since the applicant had the assistance of a member of the panel of counsel, the Tribunal

finds *this request unfounded and rejects it*" (emphasis added). This would seem to be simply a terse, and somewhat oblique, way of saying that the Tribunal did not find the case one for the award of exceptional costs. Furthermore, under the Tribunal's Statement of Policy adopted on 14 December 1950, referred to above, it is clear that the award of costs is a matter within its discretion; and that there is always an *onus probandi* upon the applicant to demonstrate that the costs have been unavoidable, reasonable in amount and in excess of the normal expenses of litigation before the Tribunal. The question of costs is therefore very much a matter for the appreciation of the Tribunal in each case.

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

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

> "*(b)* Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received."

In support of that contention Mr. Fasla invokes Article 9, paragraph 1, of the Tribunal's Statute. He refers to his posting to Yemen in September 1968 and his precipitate recall to Headquarters in May 1969; the payment of his salary and allowances while in Yemen at the lower rate of a staff member assigned to a post for longer than one year; the Secretary-General's admission before the Joint Appeals Board that they would have been recalculated if he had been assigned to another post within the

year; the Secretary-General's argument that the applicant had never been reassigned from Yemen; and the rejection of that argument by the Joint Appeals Board, which found that his duty station had been changed on 22 May 1969. The Tribunal, in Mr. Fasla's view, failed to draw the necessary legal conclusion from these circumstances and, by not granting the same form of recognition and remedy as in the case of the respondent's obligation to seek a new post for him, failed to exercise its jurisdiction.

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

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

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

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

> "... in view of the above *decision* concerning the subsistence allowance, the Applicant *is entitled* to take advantage of the possibility

offered by the Respondent within a reasonable period of time from this judgement ..." (emphasis added).

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

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

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

74. Accordingly, the contention that the Tribunal failed to exercise its jurisdiction with respect to the claim for recalculation of the rate of remuneration is not sustainable on the face of the Judgement. The Tribunal manifestly addressed its mind to the applicant's claim, referred specifically to it and exercised its jurisdiction by deciding to reject it. The complaint thus again turns out to concern not a failure by the Tribunal to exercise its jurisdiction but an appeal against its treatment of the merits of the claim.

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

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

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

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

"The preparation of a corrected fact sheet becomes meaningless

once UNDP decided not to take the necessary further steps to find the Applicant a new assignment."

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

* *

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

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78. The Court will now proceed to consider the basic contentions advanced by Mr. Fasla in the statement of his views submitted to the Court which concern the exercise of the discretionary powers of the administration and allege the existence in this case of improper motives constituting a misuse of power. It may be open to doubt how far these contentions, which were not fully adduced in the application presented to the Committee, fall strictly within the contentions referred to in the first question put to the Court. The Court, however, as it has previously stated, does not consider that it should adopt a restrictive interpretation of the question. It will therefore examine those contentions and, in deciding to do so, it takes particular account of the fact that in the application to the Committee, and with regard to the ground of failure to exercise jurisdiction, reference was made to "misuse of powers with improper motive".

79. In his statement of views Mr. Fasla contends that it was as a con-

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

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

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

82. However, in his application to the United Nations Administrative Tribunal, Mr. Fasla did not request the Tribunal to rescind, on the grounds of illegality or improper motivation, the decisions concerning his recall from Yemen and the non-renewal of his fixed-term contract. Under the Rules of Procedure of the Tribunal each application must specify "the decisions which the applicant is contesting and whose rescission he is requesting under Article 9, paragraph 1, of the Statute". The pleas submitted to the Administrative Tribunal, transcribed in paragraph

44 above, do not however refer to these two basic decisions, and this indicated that they were not disputed by the applicant. Thus, with respect to the recall from Yemen, the specific plea submitted as plea *(b)* of the supplementary application only concerned certain economic consequences of his recall from Yemen. The other pleas for rescission or specific performance were submitted on the assumption that the original fixed-term contract had expired, since pleas *(e)* and *(g)* concerned the non-fulfilment of the obligation assumed by the Secretary-General to make efforts to seek a new position for Mr. Fasla. Prejudice was invoked not as a basis for the rescission of any administrative decision but as a ground for compensation (plea *(j)*). The only request for rescission with respect to which the claim of prejudice was relevant was plea *(f)*, concerning the invalidation of the report prepared in September 1970. As to plea *(d)* its scope will be examined separately. All the other pleas claimed only compensation (pleas *(h)*, *(i)*, *(k)*, *(l)*, *(m)*, *(n)*, and pleas *(a)* and *(c)* of the supplementary application). In other words, the applicant was basing his claim before the Administrative Tribunal on the inadequacy of the efforts of the Secretary-General to obtain for him a new contract, but not on the illegality or improper motivation of the decisions to recall him from Yemen and not to renew his fixed-term contract.

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

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

85. Inasmuch as the applicant had not sought from the Administrative Tribunal the rescission of the decisions of recall and non-renewal on the grounds of their illegality and improper motivation, it is obvious that the Administrative Tribunal could not have been expected to go into these issues *proprio motu*, or proceed on its own account to an examination of

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

86. Furthermore the documentation before the Tribunal permitted it to verify the motivation which had determined the decision of recall. After having received the applicant's denunciations of irregularities in the management of the Yemen office, the administration had in February 1969 sent a senior official to visit that office and report on the measures to be taken. His report, the submission of which to the Tribunal was insisted upon by the applicant in his plea *(a)*, and which contained favourable comment on Mr. Fasla's efforts in Yemen, dealt in its conclusions with the management of the Yemen office. On this point the report advised that Mr. Fasla could "continue in charge of the office during the immediate period of [the Resident Representative's] absence"; at the same time, however, it recommended that "in the interest of competent field representation and operation it would be advisable to move him out of the Yemen Arab Republic as well".

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

deciding points not indicated in those submissions" (*I.C.J. Reports 1950*, p. 402).

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* *

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

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

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

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

> "Another ground for review provided in the proposed new Article 11 was the commission of a fundamental error in procedure. The

> use of the word 'fundamental' was intended to preclude review on account of trivial errors in procedure or errors that were not of a substantial nature. In order to make the intention clearer, the Indian delegation would suggest that the phrase 'which has occasioned a failure of justice' should be inserted after the words 'fundamental error in procedure' in the text of the article."

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

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

93. Mr. Fasla, both in his application to the Committee and in his written statement and comments transmitted to the Court, to a large extent pleads failure to exercise jurisdiction and fundamental error in procedure as alternative or joint grounds upon which to formulate what appear to be essentially the same complaints concerning the Tribunal's handling of his case. In consequence, many of the considerations which apply to his contentions in regard to the former ground apply also to his contentions concerning the latter. For the most part, these contentions appear to be complaints against the Tribunal's adjudication of the merits of the claims, rather than assertions of errors in procedure in the proper sense of that term. In so far as they may be said to touch matters of procedure, they appear, with one exception, to be dealt with in the next paragraph, to express disagreement with the Tribunal's determinations of the procedure to be followed in the light of its appreciation of the facts

and merits of the case, rather than to allege errors in procedure within the meaning of Article 11. This is shown, for instance, in the complaint that the Tribunal failed to exercise its jurisdiction and committed an error in procedure when it declared relevant to the case only one part of the document production of which was requested by the applicant in his plea *(b)*, and limited itself to taking note of the declaration of the respondent with respect to the document requested in plea *(c)*. Subject to the one question which now requires separate examination, Mr. Fasla's contentions do not raise matters which constitute errors in procedure in the true sense of that term.

* *

94. The one exception is the complaint that the Tribunal's decisions rejecting the claims were not supported by any adequate reasoning. This complaint does, in the opinion of the Court, concern an alleged error in procedure in the proper sense of the term, and is of a kind to call for consideration under the provision in Article 11 relating to a fundamental error in procedure which has occasioned a failure of justice. The Secretary-General, in his written statement, contends that a failure to state the reason on which every part of a judgement of the Administrative Tribunal is based is not a ground included among serious departures from a fundamental rule of procedure, for although the Secretary-General explicitly mentioned the possibility of including this among the grounds for review when Article 11 of the Tribunal's Statute was drafted, this was not done. The Court is unable to accept this contention. The fact that failure to state reasons was not expressly mentioned in the list of grounds for review does not exclude the possibility that failure to state reasons may constitute one of the errors in procedure comprised in Article 11. Not only is it of the essence of judicial decisions that they should be reasoned, but Article 10, paragraph 3, of the Tribunal's Statute, which this Court has found to be a provision "of an essentially judicial character" (*I.C.J. Reports 1954*, p. 52), requires that: "the judgements shall state the reasons on which they are based."

95. While a statement of reasons is thus necessary to the validity of a judgement of the Tribunal, the question remains as to what form and degree of reasoning will satisfy this requirement. The applicant appears to assume that, for a judgment to be adequately reasoned, every particular plea has to be discussed and reasons given for upholding or rejecting each one. But neither practice nor principle warrants so rigorous an interpretation of the rule, which appears generally to be understood as simply requiring that a judgment shall be supported by a stated process of reasoning. This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not

obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole.

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

* *

97. Particular consideration is required, however, of the decision re-

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

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

* *

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

*
* *

100. After having stated its conclusions on the questions referred to it, the Court wishes to reaffirm the opinion which it expressed in paragraph 73 above, namely that Mr. Fasla is entitled, in accordance with paragraph XV of the Administrative Tribunal's Judgement, to a payment in the amount of any losses suffered as a result of his precipitate recall from

Yemen, and that the period of two months fixed in this connection by the Administrative Tribunal, having been suspended for the duration of the review proceedings, is to be calculated from the date when the Judgement becomes final in accordance with paragraph 3 of Article 11 of the Statute of the Tribunal.

*
* *

101. For these reasons,

THE COURT DECIDES,

by 10 votes to 3,

to comply with the request for an advisory opinion;

THE COURT IS OF OPINION,

with regard to Question I,

by 9 votes to 4,

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

with regard to Question II,

by 10 votes to 3,

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

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

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

President LACHS makes the following declaration:

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

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

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

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

Judges FORSTER and NAGENDRA SINGH make the following declaration:

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

I

The nature and character of the procedural channel for obtaining the advisory opinion of the Court *vide* Article 11 of the Statute of the United Nations Administrative Tribunal, it is said, raises issues concerning the appropriateness of the Committee on Applications for Review of Administrative Tribunal Judgements [1] which is a political body but still authorized by the General Assembly to function as the fountain source for putting legal questions to the Court under Article 96 (2) of the Charter. That apart, there is also the question of equality of the Parties, namely in this case the Secretary-General and the official, in relation to their capacity to appear before the Court (Art. 66 of the Statute of the Court and the oral procedures). It may be relevant to mention here that in spite of the recommendation contained in paragraph 2 of General Assembly resolution 957 (X) of 1955, to the effect that neither member States nor the Secretary-General should make oral statements before the Court, the applicant official Mr. Fasla made a written request, *vide* his letter of 15 December 1972, to be allowed to make an oral presentation of his case to the Court. This request was repeated in writing on 29 January 1973. It was, however, the Court's decision not to hold any public sitting for the purpose of hearing oral statements which went to establish equality between the Parties in the present case.

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

[1] Hereafter for convenience called the Committee.

to maintain equality of the parties, although in the peculiar circumstances of any particular case oral hearings become necessary and are duly justified. Some room for improvement in procedures would thus appear to be indicated to cover all eventualities.

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

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

In response to the aforesaid enquiry dating back to 1955 it appears desirable to make some observation concerning the possible scope for improvement of procedures established under Article 11 of the Statute of the United Nations Administrative Tribunal. For example no reasons are given by the Committee either for granting the request of the applicant or for refusing it. The Committee meets in closed session, and does not draw up summary records of its proceedings concerning applications, and these proceedings are treated as confidential and not even made available to the Court. These are some of the non-judicial features of the Committee functioning in accordance with the procedures established for moving the Court to give an advisory opinion. Moreover it cannot be denied that the decisions of the Committee are indeed vital to the staff members of the United Nations, since an affirmative decision becomes a "necessary condition" or a *sine qua non* for the "opening of the Court's advisory jurisdiction". This would amount to the Committee becoming a crucial legal step in the entire procedure for redressing the grievances of the staff members for the simple reason that without the assent of the Committee access to the Court's unhampered opinion can never be had. This may be said in addition to the non-judicial character and composition of the screening machinery of the Committee which may not invariably provide the appropriate legal forum for seeking an advisory opinion. This is an aspect already dealt with in the present Opinion of the Court with which we agree. We support the view that the Court should comply with the request for giving its advisory opinion in this case. The régime set up by Article 11 of the Statute of the Tribunal may not be legally flawless. It may even be far from a perfect judicial procedure but it

certainly is not such as to warrant the Court to refuse to answer the two questions raised in this case for the Court's opinion. It may also be true that this procedural aspect is certainly not before the Court in 1973 and as such it may not be correct to make any observations directly or even by way of *obiter dictum*. Nevertheless, we would consider it not inappropriate to draw attention to it in our declaration and leave it to the authorities concerned to examine, if they so feel, whether the procedural machinery centring round the Committee could not be bettered.

II

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

As far as failure in the exercise of jurisdiction is concerned, however, more than one view could be taken, both in regard to what constitutes a failure in the exercise of jurisdiction and what are the limits to the Court's functions "in review", particularly in the light of the restricted terms of reference. It is, of course, true that the Court is in no position to retry the case already decided by the Administrative Tribunal. The Court should not generally enter into the substance or merits of the dispute and particularly not in relation to that which falls outside the reviewable categories, namely the two specified by the Committee out of the four enumerated in paragraph 1 of Article 11 of the Statute of the Administrative Tribunal. There is also no intention here to depart from the jurisprudence of the Court already established from the days of the Permanent Court that it should remain "within the scope of the question thus formulated", holding that if there were certain points falling "outside the scope of the question as set out above, the Court cannot deal with them" (*P.C.I.J., Series B, No. 16*, p. 16). "Therefore the Court should keep within the bounds of the questions put to it" (*I.C.J. Reports 1955*, pp. 71, 72).

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

The Tribunal may also be said to have failed to exercise jurisdiction if it has palpably and manifestly caused injustice, since such an exercise of

jurisdiction would tend to amount to a failure of that exercise. This interpretation would be applicable only if the exercise of jurisdiction was so blatantly faulty as to render it invalid.

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

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

This aspect needs to be examined at some length which could best be done by referring separately to those portions of the Judgement No. 158 of the Tribunal which relate to *(a)* the contention of the applicant and the

findings of the Tribunal on the one side, and *(b)* the conclusions reached concerning remedial relief on the other:

(a) In Judgement No. 158 the Tribunal sums up the *contention of the applicant* in the following words:

> "The Applicant does not, however, claim that, merely by virtue of being the holder of a fixed-term appointment, he had the right to have his contract extended beyond 31 December 1969. He [the applicant] *first requests the Tribunal to order the Respondent to correct and complete his fact sheet* and the *required periodic reports* and evaluations of his work; *he also requests* the Tribunal to order the *Respondent to make further serious efforts to place the Applicant in a suitable post*[1]." (Emphasis added.)

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

> "The Tribunal notes that, at the time when the search for a new assignment was undertaken, no periodic report had been made on the Applicant's services from 1 July 1965 to 31 May 1966 and from November 1967 to 31 December 1969. The *established procedure for the rebuttal of periodic reports had not been observed.* Lastly, *certain complimentary assessments of the Applicant's service did not appear in the file.* The fact sheet drawn up solely on the basis of the existing reports was therefore incomplete. After examining that situation, the Joint Appeals Board stated 'that, as a result of these facts, the *performance record of the appellant' was 'incomplete and misleading'* and that that fact had *'seriously affected his candidacy for a further extension of his contract or* for employment by other agencies'.
>
> The Tribunal considers that the *commitment undertaken by the Respondent was not correctly fulfilled* since the information concerning the Applicant's service, as it appeared in his file and his fact sheet, had serious gaps. The *search for a new assignment could have been made correctly only on the basis of complete and impartial information.*[1]" (Emphasis added.)

(b) Again the Tribunal states in its *conclusion* the relief side of its decision which is both vital to the applicant, Mr. Mohamed Fasla, as well as of importance to the Court in evaluating and assessing the just balance between the findings of the Tribunal and the ultimate

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

compensatory relief granted to the applicant. The true essence of the exercise of jurisdiction is to be judged in the light of these paragraphs of the Tribunal's Judgement. The conclusions of the Tribunal are accordingly reproduced below:

> "The Tribunal must conclude from this that *the prejudice shown by the first reporting officer towards the Applicant was in no way corrected* by the superior officer required to participate in the drafting of the report which the Respondent had agreed to prepare, as he was obliged to do under the Staff Rules.
>
> The *Respondent thus allowed a report manifestly motivated by prejudice*, containing no reservation or personal comment on the part of the second reporting officer, *to be placed in the Applicant's file and used in the fact sheet*, as revised in response to the recommendation of the Joint Appeals Board which had been accepted by the Respondent.
>
> . . . . . .
>
> The Tribunal, having reached the conclusion that the *Respondent did not perform in a reasonable manner the obligation which he had undertaken to seek an assignment for the Applicant, notes that it is not possible to remedy this situation by rescinding the contested decision or by ordering performance of the obligation contracted in 1969.* In similar cases (Judgements Nos. 68: *Bulsara* and 92: *Higgins*), *the Tribunal held that compensation, in lieu of specific performance, may constitute sufficient and adequate relief.*
>
> Having regard to the findings of the Joint Appeals Board in its report of 3 June 1970 (paragraph 45) and to the *fact that UNDP refused to make further efforts to find an assignment for the Applicant after agreeing to correct the fact sheet by taking into consideration the periodic reports which were previously missing, the Tribunal considers* that in the circumstances of the case *the award to the Applicant of a sum equal to six months' net base salary constitutes 'the true measure of compensation* and the reasonable figure of such compensation' (Advisory Opinion of 23 October 1956, *I.C.J. Reports 1956*, p. 100)[1]." (Emphasis added.)

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

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

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

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

Even if there may not be "obvious unreasonableness" in the meagreness of the award which may still be held to be such as would not amount to a "failure to exercise jurisdiction", there does certainly appear to be an inadequate or somewhat disproportionate exercise of jurisdiction which need not be overlooked in so far as it relates to a mention being made of that aspect in this declaration without, of course, in any way affecting the Advisory Opinion of the Court. We consider this conclusion warranted even though this is not an appeal, because the Tribunal required to translate the injury sustained into monetary terms does possess a wide margin of discretion within the broad principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. The application of that principle in relation to the power of the Tribunal to grant compensation though limited by Article 11 of the Statute of the Tribunal still leaves a clear margin much wider than six months actually allowed in this case.

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

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

Judges ONYEAMA, DILLARD and JIMÉNEZ DE ARÉCHAGA append separate opinions to the Opinion of the Court.

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

(Initialled) M.L.
(Initialled) S.A.