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.