DISSENTING OPINION OF VICE-PRESIDENT AMMOUN

[Translation]

I fully share the Court's view concerning its competence and the propriety of responding to the request for an advisory opinion, and I concur in its conclusions with regard to Question II.

Where Question I is concerned, however, I regret that I am unable to subscribe to a view the effect of which is to dismiss the applicant's claims for damages for injury to his professional reputation and future employment opportunities, and for the reimbursement of the costs he incurred through having, on account of the complexity of the case, to travel from California to New York in May 1970 and to hold frequent transcontinental telephone conversations with his counsel before and after then.

(1) *Dismissal of the claim for damages for injury to the applicant's professional reputation and future employment opportunities, inasmuch as the Tribunal's rejection of it did not constitute a failure to exercise jurisdiction*

The reparation of injury caused by fault is a principle of universal application in municipal law; in international law, it has also been said that:

> "The principle laid down by international practice is that the victim must be put in the position in which he would have been if the act which caused the injury had not occurred: the reparation is to be matched as closely as possible with the damage suffered. The reparation should be equivalent to the damage." (Personnaz, *La réparation du préjudice en droit international public*, p. 98.)

Are there, however, any reasons why the United Nations Administrative Tribunal could not give a decision on a claim for reparation, wholly or in part? And in particular a claim for the reparation of injury to the applicant's professional reputation and future employment opportunities?

The administration has queried the Tribunal's power to award the damages which might otherwise be due in respect of such injury.

In its opinion, paragraph 3 of Article 9 of the Tribunal's Statute was never intended to create an independent obligation or even a power of the Tribunal to award compensation in circumstances other than those provided for in paragraph 1 of Article 9, that is to say: non-observance of the staff member's contract of employment or the terms of his appointment.

Clearly, what is being argued here is that damages cannot be awarded by the Tribunal by way of reparation for injury suffered by the applicant to his professional reputation and future employment opportunities, because these do not fall within the framework of the contract of employment or the terms of appointment.

I do not have the impression that this can be correct.

This is because the reparation of injury caused by fault is one, if not indeed the most important, of the principles common to nations in the sense of Article 38, paragraph 1 *(c)*, of the Court's Statute, and one of the traditional bases of law.

It may of course be pointed out that in this case we are dealing with a provision determining a question of competence—that of the Administrative Tribunal—and not a text enshrining the principle of compensation for an act or omission amounting to a fault. But a logical interpretation of paragraph 1 of Article 9 will serve to reconcile the principle and the competence. In other words, one must consider what is the scope of the contract linking the applicant and the administration, in order to ascertain whether a contractual fault may be imputed to the latter: this would be—precisely—a non-observance of the contract of employment or a breach of the terms of the applicant's appointment.

Now can there be any doubt but that the employer must, in his behaviour toward the employee, respect his personality and not injure him in his dignity and honour? It is from the contract linking them that this obligation arises, as it is also the normal terms of appointment which require it.

If, therefore, it is proved that as a result of the employer's incorrect entries on the record an employee has wrongly been described as incompetent or otherwise blameworthy, is that not a fault on the part of the employer which gives rise to an obligation to repair the injury caused the employee?

I would add that the responsibility and the resultant compensation cannot be excluded, nor the consequences of the one and the amount of the other be limited, in the contractual régime governing the administration and the applicant, unless both parties so agree (League of Nations, *Official Journal*, 1927, pp. 206 f.). If the Tribunal, in refusing compensation wholly or in part, based itself on a practice or instructions—or on a statement like that of 14 December 1950—which are not part of the Staff Rules and Regulations or of the contract knowingly accepted, would it not have been failing to exercise jurisdiction, wholly or in part? This is naturally a different matter from the sovereign discretion which a tribunal deciding the merits of a case enjoys in the assessment of the damages due.

I cannot, moreover, refrain from observing that I find the statement of 14 December 1950 unacceptable in view of the principle that a tribunal may not, by a measure or regulation of general scope, lay down a rule which would reach out beyond the pending case to affect future pro-

ceedings like a legislative text which is incompatible with the judicial function.

In fact, the applicant, in claim *(n)* in his application of 31 December 1970, asked the Tribunal to order the administration to pay him a sum equivalent to five years' net base salary as compensation for the injury caused to his professional reputation and career prospects as a result of the circulation by the administration, both within and outside the United Nations, of incomplete and misleading information concerning him.

The Judgement dismisses this claim *en bloc* with certain others, without there being the slightest reference in its reasoning to the injury caused to his professional reputation and career prospects.

Contrary to what is asserted by the administration in its first written statement to the Court (para. 22), this claim is not so bound up with a number of other claims "concerning the means and diligence with which the UNDP had tried to place Mr. Fasla" that the stated grounds of decision concerning them may be taken to apply to it also, as is further maintained. In any case, the grounds relating to certain so-called "inter-dependent" questions resulted in decisions favourable to the applicant. How, therefore, can it be admitted that the argument in the Judgement taken as a whole, including these grounds, may be regarded as reasons for the dismissal of claim *(n)*?

What is more, the injury to professional reputation and career prospects constitutes a contractual fault and a tort.

A tort, like a crime, has two components, one material, one moral.

To find upon a tort, it is necessary to discuss both its material and its moral component.

What, I now ask, did the Tribunal do? Did it discuss the moral as well as the material component?

I agree that some facts entering into the material component were discussed. But not all of them. The Tribunal found that there had been certain wrongful acts for which the administration was responsible; it even annulled a false report. But it did not discuss these facts in their entirety.

By way of example, I would refer to the element of publicity. The degree of injury to reputation depends on the amount of publicity given to the false or incomplete information. But the element of publicity as such was not treated by the Tribunal, which therefore failed to give reasons for its rejection of all the facts entering into the material component of the injury to the applicant's professional reputation and future employment opportunities.

The moral component is arrived at as follows: if the material facts, including the degree of publicity, have been established, were they likely

to have injured the applicant's reputation in his social circle and in the context of his professional activity, and does that mean that his future candidature for posts has been affected?

This moral component was ignored in the consideranda of the Tribunal, except in so far as it noted the applicant's reliance thereon.

It must therefore be concluded that the Tribunal, by not finding upon the reparation due for the injury caused to the applicant's professional reputation and future employment opportunities, failed to exercise its jurisdiction.

(2) *Refusal, on the ground already mentioned, of the request for compensation for necessary and unavoidable costs in excess of normal litigation costs*

An order for payment of costs by the losing party is a general principle, unless the tribunal with good reason decides otherwise.

The League of Nations Administrative Tribunal was the first international tribunal to affirm that there is a general principle of law to the effect that the costs are paid by the losing party (Judgement No. 13, *Schumann*, 7 March 1934).

It has been denied in this connection that a practice can be regarded as a general principle of law when it runs counter to the Common Law system and, to a certain extent, the law of the United States of America. The Memorandum A/CN.5/5 (paras. 11-14) which sets out this view is a closely reasoned document, which however betrays a predominant Anglo-American influence. The question being, of course, of considerable importance, it will be as well to dwell upon it.

It should be observed that the law applied by the International Court of Justice, while it is close to Anglo-American law in certain fields, such as in the notion of estoppel, diverges from it radically through the adoption of Article 59, in combination with Article 38, paragraph 1 *(d)*, of the Statute, which excludes the system of precedents, as well as through the power to make an Order for costs, conferred by Article 64 of the Statute, notwithstanding the attitude of Common Law, which itself is more flexible than American practice. The United Nations and ILO Administrative Tribunals, following the League of Nations Administrative Tribunal, have consciously opted in favour of the continental practice, which is that of the International Court of Justice.

The fact is that a common administrative law is in course of formation, in the same way as international law, in which continental law predominates, but which is tending towards unity and becoming universal. It cannot be otherwise with a principle like that of full reparation, including damages and costs.

Furthermore, I am not sure it is true that there is no relationship between reparation and costs. As has been pointed out above, there is no doubt that "the reparation should be equal to the damage". But the direct damage suffered by the victim includes, both equitably speaking

and as a matter of logic, the expenses incurred in making good his rights; in other words, as Personnaz expresses it, "the victim must be put in the position in which he would have been if the act which caused the injury had not occurred". From the equitable viewpoint, this would not be the case if, in order to be put in the same position, he had to bear costs, sometimes heavy costs, which would correspondingly diminish any damages awarded.

Thus the obligation on the losing party to bear the costs could be regarded either as a general principle or law in itself, as stated by the League of Nations Administrative Tribunal, or as an application of the equity principle deriving from Article 38, paragraph 1 *(c)*, of the Statute of the Court.

It is true that the Statute and Rules of the Administrative Tribunal do not include any provision laying down this principle, and setting out how it is to be applied. Nonetheless, the Tribunal of the United Nations could not wash its hands of it. Continuing the line of cases of the League of Nations Tribunal, it has made awards of costs against the losing parties in 17 cases, which confirms that the Tribunal has regarded the making of an order for costs as a general principle, even though the Statute does not provide for it.

In a number of these Judgements, the Tribunal considered that it was justified in awarding compensation for the fees of applicant's counsel, since its rules authorized the applicant to be represented by counsel (United Nations Administrative Tribunal, Judgements Nos. 2, 3, 15 and 28-38 of 21 August 1953). For the ILO Administrative Tribunal this has also become practically a rule (*Jurisclasseur de droit international, Les Tribunaux administratifs*, para. 88; see in particular Judgments 17, 18 and 19 of 26 April 1955, with the participation of Georges Scelle as a member of the Tribunal).

There remains the question whether the obligation imposed on the United Nations staff member, of restricting his choice of counsel to those on a given list on pain of inability to recover the fees, is not in certain cases a breach of the rights of the defence.

What is more, repayment of travel and subsistence costs incurred by the applicants to attend sittings of the Tribunal away from Headquarters has been granted by the Tribunal (Judgement No. 3, *Aubert*, and 14 others, 26 July 1950; Judgement No. 15, *Robinson*, 11 August 1952). Should this not also be the case when the applicant must come from a place of residence which is a long way from United Nations Headquarters?

It would seem that international administrative tribunals should take into account the fact that staff members or employees who appear before them may have to bear much heavier expenses than parties before a municipal tribunal, because of the longer and more expensive journeys which international officials are sometimes obliged to make.

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In fact, the applicant asked the Tribunal to order the administration to pay him the sum of $1,000 for expenses in view of the fact that, although he 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 his counsel before and after then.

The Tribunal did not answer this request, as witness the following clause of the Judgement, which does not refer to the telephone calls and concerns only the assistance of counsel:

> "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."

In sum, it appears to me that by not finding upon this request the Tribunal again failed to exercise its jurisdiction.

(Signed) Fouad AMMOUN.