INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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

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WRITTEN COMMENTS

COMMENTS ON BEHALF OF THE SECRETARY-GENERAL OF THE UNITED NATIONS ON THE CORRECTED STATEMENT OF THE VIEWS OF MR. MOHAMED FASLA SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE

New York, January 1973.

I. Nature of the Review by the Court

A. Scope of the Review

1. The present proceeding is designed to enable the Court to respond, in the form of an advisory opinion, to two specific questions addressed to it by the Committee on Applications for Review of Administrative Tribunal Judgements within the context of Article 11 of the Statute of the Administrative Tribunal (doc. No. 13). Neither the procedure designed by the General Assembly for the review of certain aspects of judgements of the Tribunal, nor the particular questions formulated by the Committee in relation to Tribunal Judgement No. 158, were intended to open up for consideration by the Court all aspects of that Judgement (see also the Secretary-General's written Statement of September 1972, hereinafter cited as *Statement*, paras. 20, 91-92). The two questions formulated by the Committee (quoted in *Statement*, para. 19) incorporate by reference the particular contentions made in the Application submitted to the Committee by Mr. Mohamed Fasla, the person to whom that Judgement relates. These contentions pertain to just three[1] of the 17 claims or pleas (*Statement*, para. 15) that Mr. Fasla had submitted to the Tribunal and to which its Judgement No. 158 relates.

2. The greater part of the statement of the views of Mr. Fasla (Corrected Statement of the Views of Mr. Mohamed Fasla, December 1972, hereinafter cited as *Views*) relates to some ten claims other than the three discussed in his Application to the Committee on Applications for Review, to which the Committee's questions to the Court referred (see in particular *Views*, paras. 36-83, 103-106, 111-116). The issues relating to these ten additional claims are therefore not ones as to which the advisory opinion of the Court was requested, and consequently should not have been referred to in the statement of his views that Mr. Fasla requested the Secretary-General to submit to the Court pursuant to Article 11, paragraph 2, of the Statute of the Tribunal.

3. It is even less appropriate for Mr. Fasla now to "amend" the pleas he had submitted to the Tribunal, as he appears to attempt to do in demanding restoration of his *status quo ante* as of May 1969 (*Views*, para. 37) or to add novel charges, such as the allegation that UNDP took punitive action against him (*Views*, paras. 4, 31-32, 39, 57-59).

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[1] Plea *(m)*: reimbursement for legal costs; plea *(n)*: damage to professional reputation and career prospects; plea (*p* or *b'*): recalculation of emoluments for foreshortened stay in Yemen.

4. Furthermore, the advisory opinion of the Court has been solicited only as to whether the Tribunal, in its Judgement No. 158, failed to exercise jurisdiction vested in it or committed a fundamental error in procedure. Since the sole issue is thus whether the Tribunal acted correctly, this determination can only be based on the data that were available to or should have been obtained by the Tribunal. Any material that had not been explicitly submitted to the Tribunal as part of the pleadings before it (doc. No. 3, Annexes 86-91), including the Annexes thereto (doc. No. 3, Annexes 1-84), or was not otherwise available to it[1], should therefore not be considered in evaluating the Judgement of the Tribunal. This applies in particular to the alleged incidents related in respect of a World Food Programme (WFP) shipment (*Views*, paras. 46-47), the recruitment of officers for FAO's Locust Control Project (*Views*, paras. 48-52) and the alleged diversion of UNICEF and WHO medical supplies (*Views*, paras. 54-55), as well as to the relevant supporting documentation (*Views*, Attachments 2-8).

5. Some of the incidents now related by Mr. Fasla are even less relevant to the present proceeding, in that it is clear from his own account that he had, for various reasons, not reported them fully to UNDP headquarters (*Views*, paras. 46-47 and 56; see also paras. B4-B5, B7-B9 below). Inasmuch as UNDP was not currently apprised of these incidents, they could hardly, as Mr. Fasla continues to allege, have influenced his treatment by that organization—which was the substantive issue principally in dispute between himself and the Secretary-General.

B. Functions of the Court in the Review Process

6. The General Assembly has carefully defined and circumscribed the functions of the Administrative Tribunal, particularly in Articles 2 and 9 of the Tribunal's Statute: the former Article specifies the types of allegations that the Tribunal is competent to hear and judge, and the latter specifies the remedies available to it. Under Article 11, paragraph 1, of that Statute, the Court may be asked to review whether the Tribunal has committed any of four possible errors specified in that paragraph—of which two are mentioned in the questions addressed to the Court in respect of the present proceeding. It would therefore be incongruous for the Court to consider the dispute, as Mr. Fasla repeatedly suggests (*Views*, paras. 3, 5-7, 59, 122-125), from a different point of view or in a wider context than was appropriate for the Tribunal itself.

7. In this connection the Court might wish to take account of the fact that each judgement of the Administrative Tribunal is supplied to all Members of the United Nations. Thus if any judgement should explicitly or implicitly raise policy issues beyond the competence of the Tribunal, it is for the General Assembly to consider what corrective action might be taken through amendment of the Staff Regulations or of the Tribunal's Statute, or by inviting the Secretary-General to take administrative measures.

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[1] Mr. Fasla's Official Status File, the Joint Appeals Board files on his two appeals, and the dossier of correspondence between the Executive Secretary of the Tribunal and the parties to the proceeding—all referred to in the penultimate sentence of paragraph 8 to the Introductory Note to the Dossier submitted by the Secretary-General to the Court in August 1972 pursuant to Article 65, paragraph 2, of its Statute.

II. Comments on Substantive Issues

A. A Policy Question

8. Mr. Fasla's counsel argues at length (*Views*, paras. 3, 6, 31, 59, 122-125) the proposition that a staff member whose appointment would not otherwise be renewed, because of his record of service or for other reasons, should be specially continued in the service if he had raised serious accusations against his supervisors or the Organization, in order not to discourage other staff members from showing similar courage. Plainly, this proposition is not tenable, since it might merely encourage staff members whose appointments are about to be terminated or not extended to make accusations as loudly and publicly as possible so as to obtain for themselves a certain immunity.

9. Furthermore, requiring the Secretary-General to maintain on the staff of the United Nations persons who, in his opinion, do not meet the "highest standards of efficiency, competence, and integrity" would conflict with his responsibility under paragraph 3 of Article 101 of the United Nations Charter. Thus neither he, nor the Joint Appeals Board nor the Administrative Tribunal, should be required to take as a significant consideration the putative psychological effect that a personnel action regarding one staff member might have on others. While the Secretary-General recognizes that there may be situations in which great care must be exercised lest a legitimate action have the effect of discouraging other staff members from conforming to a high but difficult interpretation of their duty, for the reasons indicated below (in particular in part A of the Annex) the instant case does not present such a dilemma.

B. Questions concerning the Tribunal's Statute

1. Interpretation of Article 9 (3)

10. Mr. Fasla again asserts (*Views*, para. 98), as he did in his Application to the Committee on Applications for Review (doc. No. 3, para. A6), that paragraph 3 of Article 9 of the Tribunal's Statute obliges the Tribunal, without giving it any discretion, to award compensation where a wrong cannot be remedied by relief provided for in paragraph 1 of that Article. However, as has already been demonstrated in the *Statement* (paras. 32-33), that construction is based on a misinterpretation of paragraph 3. The context of that provision in the entire Article 9, the plain text of the French version of that provision, as well as the *travaux préparatoires*, indicate clearly that the only purpose of the clause in question is to specify that it is the Tribunal, rather than the Secretary-General, that determines the amount of compensation to be paid if the Secretary-General decides not to grant the specific relief provided for under paragraph 1 of Article 9. Thus paragraph 3 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.

2. Interpretation of Articles 10 (3) and 11(1)

11. Paragraph 3 of Article 10 of the Tribunal's Statute specifies that "the judgements [of the Tribunal] shall state the reasons on which they are based". Mr. Fasla argues (*Views*, paras. 27, 33) that this provision requires the Tribunal to explain specifically its disposition of each "plea" that may be submitted by

an applicant. However, as has already been demonstrated in the *Statement* (paras. 37-40, 43), the cited provision should not be interpreted to require an explicit analysis of every plea, as long as the judgement as a whole is adequately supported by reasons. This is so because the entire concept of individual pleas is not one that appears in the Statute of the Tribunal, nor was it even included in its original Rules. The requirement that applicants list individual pleas (Rules of the Tribunal, doc. No. 13, Art. 7 (3)) was adopted by the Tribunal only in September 1962, over a decade after the Statute had originally been adopted, and some seven years after Article 11 had been added thereto in order to permit the review of judgements on the ground, *inter alia*, that the Tribunal had failed to exercise jurisdiction vested in it. The specification of pleas was only meant to assist the Tribunal in making sure that it had not unintentionally overlooked any request advanced by an applicant somewhere within the text of a long application or any further written pleading. But neither paragraph 3 of Article 10 nor paragraph 1 of Article 11 of the Statute should be interpreted in the light of this subsequent Rule.

12. As also demonstrated in the *Statement* (paras. 39-40), the Tribunal is not obliged to explain explicitly the basis on which it fixes the amount of compensation to be paid, since such a requirement is specified, in paragraph 1 of Article 9 of its Statute, only for the contingency that it should exceptionally order an indemnity payment higher than the limit of two years' net base salary specified in that paragraph. Nor can a failure to explain a judgement in sufficient detail be considered as "occasioning a failure of justice" within the meaning of paragraph 1 of Article 11 of the Tribunal's Statute, since the General Assembly did not include in that paragraph, among the issues that might be submitted to the Court for review, the failure of a judgement to state reasons.

3. Function of the Tribunal

13. The Administrative Tribunal is not an investigating body, as Mr. Fasla repeatedly suggests (*Views*, paras. 26a, 45, 59). Rather, it is charged with adjudicating claims raised by certain persons against the Organization, on the basis of the pleadings and evidence submitted by the parties. While the Tribunal may, under Article 10 of its Rules (doc. No. 13), call on the parties to elucidate certain questions by submitting additional statements and documents, it was never intended, either by the General Assembly or by the Tribunal itself, that it should on its own initiative investigate the background of disputes submitted to it—nor is it equipped to do so. Thus there is no ground for suggesting that the Tribunal failed to exercise its jurisdiction by not carrying out such investigations and thus uncovering the new factual allegations Mr. Fasla is now presenting to the Court.

14. In this connection it should be noted that the matters Mr. Fasla now asserts the Tribunal should have investigated, namely the circumstances of his service in Yemen, were not at issue in the proceeding before that body. Neither the conditions prevailing at that post nor allegations concerning certain UNDP and other international officials were relevant to pleas based on alleged actions and omissions of UNDP after Mr. Fasla's recall from his post.

15. The only question as to which Mr. Fasla had asked the Tribunal to obtain further information and as to which the Tribunal was unable to secure such material, was the alleged report prepared by Mr. Hagen on Mr. Fasla (see para. 22 below, and the Judgement of the Tribunal, doc. No. 11, part II *(c)*). It is difficult to see how the Tribunal could have gone further to obtain a document that UNDP was unable to locate in its files, nor did or does Mr. Fasla

give any additional leads or suggestions in that regard. Moreover, the information in such a report, even if favourable to Mr. Fasla, could not have done more than to support the evaluations by Mr. Hagen to which Mr. Fasla had already drawn the attention of the Tribunal (doc. No. 3, Annex 43, and the passage from the letter-report to which doc. No. 11, part II *(b)* relates). As to the other questions he now alleges should have been investigated, Mr. Fasla did not then provide even the slender but assertedly precise leads now contained in his new factual allegations.

C. Factual Questions

16. The claims and legal arguments of Mr. Fasla are based on a number of factual assertions, which according to him are either well established, or uncontested, or accepted by the Joint Appeals Board and the Administrative Tribunal. Actually most of these assertions can and have been controverted, have not been endorsed by the Board or the Tribunal, and are entirely unsupported by credible evidence. Though Mr. Fasla's assertions are largely irrelevant to the issues properly before the Court, the more basic and general of these assertions are briefly examined in part A of the Annex.

17. The largest portion of Mr. Fasla's *Views* consists of an analysis of practically each one of the pleas he had submitted to the Tribunal, including both the three that he had specifically mentioned in his Application to the Committee on Application for Review (see note 1, p. 103), as well as a number of others that were not included therein. Although it is considered that the latter group of pleas is therefore not included in the questions as to which the Court was requested to give an advisory opinion pursuant to paragraph 1 of Article 11 of the Tribunal's Statute (see paras. 1-2 above), they are in part based on serious charges against the United Nations and several related organizations as well as against officials of these. Consequently, though considered irrelevant to the present proceeding, these pleas too are briefly analysed in part B of the Annex, merely to demonstrate how weakly they are supported and the basic soundness of the Tribunal's decisions with respect to them. As the three pleas that are incorporated by reference into the questions addressed to the Court were already analysed in the Secretary-General's original *Statement* (Sec. II, paras. 20-83), the appropriate passages of that *Statement* are merely cited and summarized in the Annex for the convenience of the Court.

III. Procedural Issues

A. Requests for Documents

1. Letter from Mr. Hagen

18. Mr. Fasla several times requests the Court to require production of the entire text of the letter written by Mr. Toni Hagen, then a consultant to UNDP and later its Representative in the Yemen Arab Republic, to the UNDP Deputy Administrator on 9 March 1969 (*Views*, paras. 26, 43). This constitutes a repetition of a plea that Mr. Fasla had submitted to the Administrative Tribunal (doc. No. 11, p. 1, para. *(b)*). The latter after studying the text of the letter, concluded that only a single passage was relevant (doc. No. 11, part II *(b)*),

which it then ordered to be disclosed to Mr. Fasla, whose counsel thereupon submitted observations thereon; with respect to the balance of the letter, the Tribunal concluded (at a time when it was already fully familiar with the issues in the case) that it was not relevant to Mr. Fasla's appeal. Mr. Fasla did not challenge this part of the Tribunal's Judgement before the Committee, and therefore should be precluded from doing so now (paras. 1-2 above).

19. UNDP's reluctance to release the balance of the letter, which it too considers irrelevant to the present proceeding, is based not on a desire to obstruct effective presentation of Mr. Fasla's views to the Court, but rather is an effort to protect the privilege of confidential reports on investigations made on its behalf by experts and consultants. It is feared that if reports written with the assurance that they will remain confidential are later disclosed, this will inhibit the communication of frank views.

2. Correspondence with the Government of the Yemen Arab Republic

20. Mr. Fasla repeatedly requests production of a letter he alleges the President of the Yemen Arab Republic addressed to the Secretary-General on 26 April 1969, to which the UNDP Administrator is said to have responded on 28 May 1969 (*Views*, paras. 26, 43, 47). It has been possible to locate a letter that the Minister for Foreign Affairs of Yemen addressed to the UNDP Administrator on 26 April 1969, to which the latter replied on 28 May under the reference number cited by Mr. Fasla, as well as a letter from the President of Yemen to the Secretary-General dated 2 May 1969 and the Secretary-General's reply thereto dated 14 May. With respect to these letters, which were exchanged with the Government of a member State, the Secretary-General first had to obtain the permission of the Yemeni Government for their release—but as soon as that had been secured the correspondence was made available to Mr. Fasla for submission to the Court.

21. It should be noted that an examination of this correspondence did not disclose anything of direct relevance to Mr. Fasla's pleas. Moreover, since this correspondence was neither available to the Tribunal, nor had Mr. Fasla asked the Tribunal to request it, its consideration would appear irrelevant to a determination of the correctness of the Tribunal's Judgement (see paras. 1-2 and 4 above).

3. Evaluations of Mr. Fasla by Mr. Hagen

22. Mr. Fasla asserted before the Tribunal (doc. No. 3, Annex 86, para. 96; see also doc. No. 11, p. 1, para. *(c)*) that at the request of UNDP's Bureau of Administrative Management and Budget, Mr. Hagen prepared a special evaluation of Mr. Fasla in the summer of 1969. As the Secretary-General informed the Tribunal, a diligent search of UNDP's files had failed to disclose such an evaluation. Because of Mr. Fasla's renewed request for this paper (*Views*, para. 26a), a further search was made at the present time, which was similarly unproductive.

4. Report of High-Level Investigation by UNDP of Its Programme in Yemen

23. Mr. Fasla asserts that following his "exposures" UNDP conducted a high-level investigation of its programme in Yemen (*Views*, para. 124). However, aside from the two special visits to Yemen during the spring of 1969 by

Messrs. Satrap and Hagen, UNDP records do not disclose any other missions or special reports made during 1969 on the programme or on the Resident Representative's office in Yemen.

5. Dossier of Correspondence with the Administrative Tribunal

24. Mr. Fasla requests that the dossier of correspondence between the Executive Secretary of the Administrative Tribunal and the parties to the proceeding in his case be made available to the Court (*Views*, paras. 34, 105). This dossier, which is referred to in the penultimate sentence of paragraph 8 of the Introductory Note to the Dossier of Documents submitted by the Secretary-General to the Court in August 1972, will be made available to the Court should it wish to examine it.

6. Minutes of the Tribunal's Consideration of Mr. Fasla's Appeal

25. Mr. Fasla also requests the Court to require the production of the "minutes" of the Tribunal's proceedings in his case (*Views*, paras. 34, 105). However, since no oral proceeding took place on Mr. Fasla's appeal, no records whatsoever were kept of any part of the Tribunal's deliberations on this case.

26. Mr. Fasla advances no reasons or justifications for this most extraordinary request. Even if some minute or record were kept of the private deliberations of the members of a judicial body, the requirement that these be revealed and produced in any other proceeding, whether or not of an appellate nature, would be unprecedented and could not be justified by the practices of other international or national courts. It might even be asserted that the privacy of judicial deliberations is among the general principles of law recognized by civilized nations (cf. ICJ Statute, Article 38 (1) *(c)*).

B. Certain Objections by Mr. Fasla

1. Contents of the Dossier of Documents

27. Pursuant to Article 65, paragraph 2, of the Statute of the Court, the Secretary-General in August 1972 transmitted to the Court a Dossier of "all documents likely to throw light upon the question(s)" addressed to the Court by the Committee on Applications for Review. Part I of that Dossier consisted of documentation relating to the proceedings leading to the request by the Committee for an advisory opinion of the Court, while Part II included documentation "relating to the formulation of Article 11 of the Statute of the Administrative Tribunal". Mr. Fasla now considers as "unacceptable" the submission of these latter documents (*Views*, para. 118), alleging that the Secretary-General has thereby attempted to "shift the emphasis" from the questions formulated by the Committee to the legitimacy and powers of that body.

28. In submitting the Dossier of Documents, the Secretary-General acted as required by the Statute of the Court and in accordance with his previous practice in connection with all other advisory opinions requested by organs of the United Nations. In particular, in connection with the Opinion requested by the General Assembly on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, he submitted to the Court all documents relating to the establishment of the Tribunal. Since that request

preceded the General Assembly's adoption of Article 11 of the Statute of the Tribunal, the documentation relating to that Article was not included in that previous Dossier. Consequently, the Secretary-General considered that, in order to enable the Court to have a complete record of the establishment of the Tribunal, including especially the provisions under which the present proceeding is taking place, he should supplement that earlier Dossier by documents relating to the Assembly's consideration of the Statute of the Tribunal at its ninth, tenth and twelfth sessions.

He further considered that this material may be particularly helpful to the Court in deciding on how to carry out the special function foreseen for it by the General Assembly in establishing a procedure for the review of judgements of the Administrative Tribunal.

2. Role of the General Legal Division vis-à-vis the Administrative Tribunal

29. Mr. Fasla calls attention to a provision of a document on the Organization of the Secretariat (Secretary-General's *Bulletin—ST/SGB/131*)[1] specifying that among the functions of the General Legal Division is to "represent the Secretary-General before the Administrative Tribunal and, on request, advise the Tribunal on legal questions" (*Views*, para. 119). He objects that this presents an impermissible conflict.

30. It is evident that the quoted provision is designed to enable the Tribunal to secure legal advice on certain general questions relating to its rules, functions, operations and powers, and that in any event advice can be tendered to the Tribunal only at its request. As a matter of fact, the Tribunal has never made such a request with respect to any dispute pending before it, and in particular it has not made such a request, nor has the General Legal Division tendered any advice (except in the form of regular pleadings), with respect to Mr. Fasla's appeal. Consequently, Mr. Fasla's procedural objection in this respect has no bearing on this case.

C. Request for Oral Hearings

31. Mr. Fasla's counsel requested that he be given an opportunity to supplement his written statement by an oral presentation (*Views*, para. 127). This request follows one Mr. Fasla addressed, through the Secretary-General, to the Registrar of the Court on 15 November 1972. In view of the Court's recent Order denying this request, it is not discussed herein.

D. Publication of the Statement of Mr. Fasla's Views

32. In the statement of his *Views*, Mr. Fasla has included a number of serious but entirely unsupported charges against not only the United Nations and UNDP, but against several other operations of the United Nations and two of its specialized agencies; similarly, he has included charges against a number of individuals identified by name (in particular, *Views*, paras. 46, 48-52, 54). By the nature of these proceedings, these organizations, and especially these individuals, have not had any opportunity of responding to these charges—or indeed of formally taking account of them.

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[1] A copy of which was transmitted to the Registrar of the Court on 13 October 1972.

33. It would therefore appear desirable if the Court would take special account of this unusual situation and consider how the Registrar, in publishing in the series of *Pleadings, Oral Arguments, Documents* the papers relating to the present proceeding, can adequately protect the interests of the organizations and individuals mentioned by Mr. Fasla.

IV. Summary and Conclusions

34. In his *Views*, Mr. Fasla ranges far beyond the issues relevant to the two questions addressed to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements, and thus inappropriately attempts to reopen at this time practically all the issues that had been considered by the Tribunal in its Judgement No. 158. Not only is the greater part of his statement devoted to pleas other than the three to which, at his behest, the Committee's questions relate, but the factual support for his arguments consists largely of accounts of incidents that he had neither submitted to the Tribunal for consideration nor even fully reported to his former employer, the United Nations Development Programme.

35. Mr. Fasla's appeal, both before the Tribunal and more particularly as he now presents it to the Court, largely rests on a number of factual assertions as to his behaviour and the responses of UNDP and its officials thereto. But these assertions are almost completely undocumented and unsupported by any other persuasive evidence, some indeed are directly contradicted by the record of his own written communications, and many of his speculative conclusions and accusations are inherently implausible (see part A of the Annex). On the principal issue of prejudice he has, except with respect to a single person and incident accepted by the Tribunal and reflected in its award, completely failed to carry the burden of proof that rested upon him. His explanation of his service record on the basis of ill-will dating back to the beginning of his international service is unconvincing, as is his claim that UNDP has since carried out a vendetta against him because of various courageous criticisms he alleges to have uttered from his last post (see paras. A1-A2, A15-A19, B19-B24 below).

36. To some extent his challenge of the Tribunal's Judgement relates to the latter's interpretation of certain Staff Regulations and Rules, in particular those concerning the emoluments payable for temporary assignments away from Headquarters and those relating to the granting of special leave. Here Mr. Fasla argues for constructions at variance with the clear wording of or the practice under these provisions, and he raises a number of other issues irrelevant to the bases on which the Court has been requested to review the Tribunal's Judgement (see paras. B39-B44 below). He essays to shift the Court's attention entirely away from what he alleges was a narrow, technical treatment by the Tribunal, to certain wider policy issues—which, however, are not of a nature that the General Assembly ever considered to be proper subjects for judicial examination or review.

37. Finally, Mr. Fasla advances a number of bold but untenable assertions about the powers, functions and duties of the Tribunal. On the one hand he criticizes it for not carrying out an extensive investigation of affairs in Yemen on the basis of the less than slender leads he had provided, while on the other he asserts that its discretion as to the form in which it must cast its judgements and as to the circumstances under which it awards remedies and other collateral relief are, at least in certain respects—but not necessarily those specified in its Statute—extremely limited. He therefore refuses to recognize that the Admini-

strative Tribunal had actually examined, conscientiously and extensively, all the pleas he had presented to it (including particularly the three referred to in the questions addressed to the Court), had commented on all the issues raised by those pleas in a lengthy judgement formulated consistently with its Statute and established practices and had thus fully and without procedural error exercised its jurisdiction with respect to all the matters presented to it.

Annex

ANALYSIS OF FACTUAL QUESTIONS AND OF PLEAS

A. Preliminary Factual Questions[1]

1. Mr. Fasla's Record of Service

A1. Even before Mr. Fasla's assignment to Yemen, he had at most a mediocre record of service—hardly one that can objectively be considered as measuring up to the "highest standards" required by the Charter (see para. 9 above). This is evident, *inter alia*, from the several periodic reports, both the three prepared before the expiration of his final appointment and the two prepared retroactively thereafter, and excluding the one on his service in Sierra Leone and Yemen which was invalidated consequent on the Tribunal's Judgement (see *Statement*, para. 2 *(c)*, and doc. No. 3, Annexes 9, 13, 14, 21, 22). This evaluation is reinforced even by the several letters on which Mr. Fasla principally relies to support the proposition that he would have received more favourable evaluations on the periods not covered by formal reports or if his rebuttals and complaints about certain reports had been properly investigated. Thus the Resident Representative in Syria, who was the first reporting officer on Mr. Fasla's first periodic report, on 23 December 1965 justified in three detailed paragraphs his original low evaluation of Mr. Fasla's first year of service, and merely in conclusion noted that Mr. Fasla's performance during the subsequent months had somewhat improved (doc. No. 3, Annex 10). The letter of 8 April 1966 from the Resident Representative in Lebanon, on which Mr. Fasla relies for another favourable passage, is actually largely devoted to a series of excuses explaining his evidently indifferent performance: the recent birth of a child, a previous emotional crisis, adjustment difficulties in his new post, a basically emotional nature, etc. (doc. No. 3, Annex 11). However, even less favourable evaluations appear in other correspondence on record, such as the letter of 23 July 1968 from the Acting UNDP Resident Representative in Sierra Leone (doc. No. 3, Annex 64).

A2. Further evidence of the fact that Mr. Fasla was from the beginning—and not only as a result of his period of service in Yemen—considered to be less than a valuable staff member appears from the record of his successive appointments (see *Statement*, para. 2 *(a)*); after an initial two-year contract he received (instead of a normal extension of two or more years or of at least of one) only a six-month renewal, followed by another for one year, then one for three months, and finally one for thirteen months which was later extended by another eight; this is hardly the record of a staff member whose services his supervisors wished to secure on a long-term basis. It should also be noted that he had a number of such supervisors, since during his less than five years of active service he had no fewer than seven separate assignments (*Statement*, para. 2 *(b)*)—again an indication that his services were not found particularly valuable in any of the posts that he filled.

[1] See para. 16 above.

2. Circumstances of Mr. Fasla's Assignment to Yemen

A3. Mr. Fasla asserts that he was especially assigned to Yemen to "clean up the mess" allegedly existing there (*Views*, paras. 4, 12, 40). Aside from the fact that he presents no evidence for this assertion except his own recollection of a conversation with the late UNDP Co-Administrator (doc. No. 3, Annex 86, para. 38)—which, even if true, would hardly by itself constitute an assignment—it should be noted that this assertion is inherently implausible: if UNDP Headquarters was aware of unsatisfactory conditions at one of its posts, to which it was simultaneously dispatching a new Resident Representative and a new Assistant Representative, it would hardly give the task of reform to the considerably junior of these officers in both rank and service.

A4. While Mr. Fasla's assignment to Yemen no doubt took into account his experience in the Middle East and his knowledge of Arabic, two further particular reasons for that assignment appear from the record: immediately previously, he had served together with Mr. Faruqi in Sierra Leone, just before the latter was to be transferred to Yemen and before Mr. Fasla's health made it necessary to withdraw him prematurely from Freetown, and apparently their collaboration there had been sufficiently satisfactory to make their practically simultaneous transfer to Yemen appear desirable to them and acceptable to Headquarters. Furthermore, the Health Service concluded that the Yemeni climate would be suitable for Mr. Fasla's medical problem (doc. No. 3, Annex 80).

3. Circumstances of Mr. Fasla's Recall from Yemen

A5. It is one of Mr. Fasla's important contentions that he was prematurely recalled from Yemen because of the serious accusations he had made against his supervisor, Mr. Faruqi, the Resident Representative in Yemen (*Views*, paras. 8, 17-18), as well as against the officials of related agencies working in Yemen. The facts do not bear this out.

A6. In the first place, the complaints about Mr. Faruqi that Mr. Fasla communicated to Headquarters in several letters starting in December 1968 (doc. No. 3, Annexes 33, 35, 37) did not concern corruption or other illegal conduct. Instead, these letters dealt with Mr. Faruqi's style of running his office, his alleged prolonged absences, administrative confusion, impoliteness in dealing with subordinates (including Mr. Fasla), the demand for a perhaps unauthorized advance, etc. The serious accusations of corruption and misconduct were made only later, in the course of the proceedings before the Joint Appeals Board and the Tribunal, long after Mr. Fasla's recall. Similarly, the messages he sent to Headquarters about his dealings with FAO, UNICEF, and WHO officials (doc. No. 3, Annex 45; Appendix 6 hereto) were either entirely cryptic or merely replete with minor bureaucratic complaints. Only now, over three years after his recall from Yemen, has he set out any concrete, particular and serious charges.

A7. In this connection it should be recalled that Mr. Fasla alleges that he himself had first learned of the difficulties at the UNDP's office in Taiz from his pre-departure briefings at Headquarters (see *Views*, para. 12). If that was so, there was no reason for UNDP to be disturbed by and to resent his confirmation of such information.

A8. An important reason for Mr. Fasla's recall was his explicit request that this be done, expressed as early as 17 January 1969 (doc. No. 3, Annex 35, final paragraph) and as late as 29 April 1969 (doc. No. 3, Annex 47, third and final paragraphs). In addition he had made repeated demands (doc. No. 3,

Annex 33, Appendices 1, 4, 8), starting in December 1968 and continuing steadily until May 1969, for repatriation of his family to California, for immediate home leave (to which he was entitled in Algiers, but which he wished to take in the United States), and for consultations in New York (for which he gave no convincing reasons).

A9. The final reason for Mr. Fasla's recall was the report written by Mr. Satrap, Chief of UNDP's Division for Europe, Mediterranean and Middle East Area, after his brief inspection visit in Yemen which had been solicited by Mr. Fasla (doc. No. 3, Annex 36), in which Mr. Satrap concluded that although Mr. Fasla appeared to have established good relations with the few key officials in Yemen he should not be maintained in the Taiz office past the immediate period of Mr. Faruqi's absence. After expressing some doubts as to the means Mr. Fasla had used to secure the confidence of Yemeni officials, Mr. Satrap described Mr. Fasla as not being a person of even temper, and added that his arguments were more emotional than logical and that he would need to acquire greater knowledge and experience in administration and programming (doc. No. 3, Annex 65, paras. VI *(i)*, X).

A10. Mr. Fasla complains in particular about the suddenness of his recall. But it is evident from the correspondence between himself and New York that he had in the previous months constantly importuned Headquarters for an opportunity to leave Yemen on a shorter or longer basis, culminating in the above-mentioned letter of 29 April 1969 asking for a transfer "as soon as possible" (doc. No. 3, Annex 47, third paragraph). While it is true that in the event the message recalling him left him little time to arrange his affairs, this does not appear to have been the intention of the officials at Headquarters. It appears from his Official Status File that the cable asking him to report in New York by 20 May was drafted on 9 May and dispatched on the 10th, but unfortunately it arrived only on the 14th. There is no reason to suppose, however, that Headquarters would not have agreed to a short extension if Mr. Fasla had indicated that he needed one; indeed, when he cabled his doubt that he could arrive in New York on time, the response was that he should merely inform New York of his revised estimated time of arrival (Appendices 9 and 10).

4. The Timing of the Decision to Dispense with Mr. Fasla's Services

A11. Mr. Fasla asserts repeatedly that a decision had been taken to terminate his service long before his recall from Yemen. But again, the evidence he presents is not convincing.

A12. First of all, he asserts that a decision to terminate his appointment was taken as a result of his letter of 17 January 1969 (doc. No. 3, Annex 35), which he identifies as "a comprehensive report . . . about the derelictions of the Resident Representative" (*Views*, paras. 17-18). However, that letter itself began with the assertion that the Resident Representative had on the instruction of Headquarters requested his resignation, and that statement, if true, would obviously imply that the decision to terminate was taken before the letter in question was sent. Further, and somewhat inconsistently, he asserts that the decision to dispense with his services resulted from disputes over a World Food Programme shipment (*Views*, para. 46), because of his recommendations against the Wadi Zabid Project (*Views*, para. 52), or because of an investigation he claims to have undertaken as to the alleged diversion of WHO and UNICEF medicines (*Views*, para. 54). However, these are all mere speculations by Mr. Fasla, unsupported by any evidence.

A13. The only document that Mr. Fasla presents in support of his contention

that a decision to dispense with his services had been taken while he was still in Yemen is a passage from a letter addressed to him by the UNDP Resident Representative in Turkey, in which the latter expressed "the hope that [a refund of $15] will reach you wherever you may be" (doc. No. 3, Annex 43). This Mr. Fasla interprets as evidence that somehow his correspondent had learned of the alleged decision to remove him (*Views*, para. 18). However, this supposition is hardly persuasive. In the first place there would have been no reason for the Representative in Turkey to know of a confidential personnel decision that might have been reached at Headquarters. In the second, if he was so well informed, he would know that Mr. Fasla was still in Yemen—indeed, since he had just seen Mr. Hagen who had come from Taiz less than a week earlier, he actually knew that Mr. Fasla was still there. If he had any doubts on that point, it would have been because of Mr. Fasla's own repeated requests, which he no doubt also communicated to Mr. Hagen, for an early recall or at least for consultations or home leave away from Yemen. Thus the quoted passage appears to be no more than a mere pleasantry.

A14. Indeed, there is no evidence whatsoever that UNDP had decided that it would be unable to use Mr. Fasla any further until just before he was informed on 20 November 1969 (doc. No. 3, Annex 56) that his contract would not be extended. It is true that already in May 1969 there was serious concern whether any post could be found for Mr. Fasla, and these doubts were expressed in the letter addressed to him on 22 May 1969 (doc. No. 3, Annex 50); however, in spite of such doubts UNDP in subsequent weeks approached a number of its Resident Representatives in the Middle East to determine whether Mr. Fasla could again be assigned to the field (doc. No. 3, Annex 53; Appendices 23-24). There is no evidence, nor is it plausible, that this exercise was undertaken in bad faith and was meant from the beginning to be futile, since UNDP was not under any obligation to renew Mr. Fasla's fixed-term contract after it was to expire in December 1969 (see para. A16 below).

5. Did UNDP Take any Punitive Action against Mr. Fasla?

A15. Mr. Fasla repeatedly asserts (*Views*, paras. 4, 31-32, 39, 57-59) that UNDP punished him for the accusations he had made as a result of his service in Yemen and even suggests that the Joint Appeals Board and the Tribunal agreed with that assertion. However, neither the Board (doc. No. 3, Annexes 2, 67) nor the Tribunal (doc. No. 11) found any evidence of punitive intent or action against Mr. Fasla—indeed, this was not a charge that Mr. Fasla had presented to those bodies.

A16. In this connection it should again be noted that Mr. Fasla's fixed-term appointment contained no expectation of renewal, as is explicitly stated in each of his letters of appointment (see in particular the last such letter, doc. No. 3, Annex 1, part 3) and as the Tribunal has repeatedly held[1] in respect of ap-

[1] For example, in Judgement Nos. 94, part XI, and 112, part VI. In the latter case it held that "there are no grounds for examining the presumed or possible motives for non-renewal of the [fixed-term] contract; for in order to give rise to the possibility of considering rescission of a discretionary administrative decision for misuse of power, on the basis of an inquiry into its motivation, that discretionary decision must impair a right or a legitimate expectation. On the other hand, the Tribunal cannot, in principle, undertake an examination of the reasons or grounds for a decision not to renew [a] contract where the administrative decision in question does not affect any right or legitimate expectation, as in the case of a staff member whose appointment ends simply because its period has expired."

pointments with similar provisions. Moreover his record (see paras. A1-A2 above) would be sufficient to explain the non-renewal, as would the inability of finding another assignment.

6. Was Mr. Fasla a Victim of Prejudice on the Part of UNDP?

A17. Basic to Mr. Fasla's entire case, as well as to one of his specific pleas, is the contention that he was and indeed continues to be a victim of deliberate prejudice on the part of UNDP or of some of its officials—a proposition which he claims was accepted by the Tribunal and in connection with which he cites or refers to many major and minor incidents throughout his *Views*. In so far as these instances are relevant particularly to his plea *(j)*, they are examined in part B.6 below (paras. B19-B24); however, as to the general question of prejudice it may be useful to make some preliminary observations.

A18. First of all, there appears to be a fundamental contradiction in Mr. Fasla's assertions concerning the prejudice to which he was allegedly exposed. On the one hand, he suggests that from the very beginning of his service with UNDP he was subjected to persecution by an elaborate conspiracy, which concealed favourable and procured unfavourable assessments about him, arranged for unsatisfactory assignments and even inexplicably prevented him from leaving the Organization when he tried to transfer to FAO. On the other hand, inconsistently, he also claims that after a basically successful career of over four years in various UNDP posts he was given the difficult assignment in Yemen because of his special talents, and was later martyred solely because of the faithfulness with which he carried out his charge. It is really on that second assumption that he bases all his requests for specific relief, since only if it is assumed that the prejudice against him was caused by some specific event (i.e., his disclosure of corruption in Yemen) rather than being widespread and deeply rooted, can one explain the strong insistence on reinstatement (claim *(d)—Views*, paras. 36-59) or can one expect that from an impartial re-examination of his past services a significantly more favourable assessment would emerge.

A19. Further, it should be noted that contrary to Mr. Fasla's assertion, the fora that examined his case earlier did not find any evidence of prejudice by UNDP or its officials. Thus, the Joint Appeals Board explicitly stated that it found "no evidence to indicate prejudice on the part of officials at UNDP headquarters", and though recognizing that there may have been prejudice on the part of the Resident Representative in Yemen it found no clear evidence to substantiate that assumption (doc. No. 3, Annex 2, paras. 42-43). The Tribunal itself found only a single instance of prejudice: the retroactive periodic report on Mr. Fasla's service in Sierra Leone and Yemen, written by Mr. Faruqi after both he and Mr. Fasla had left the service of UNDP, and after Mr. Fasla had published serious accusations against Mr. Faruqi in the course of the Joint Appeals Board proceedings (doc. No. 11, parts IX-XI); as to the second reporting officer on that report, the Director of UNDP's Bureau of Administrative Management and Budget, the Tribunal found no malice but merely that he had, perhaps negligently, failed to correct the prejudice shown by the first reporting officer and thus had improperly allowed the report in question to be placed into Mr. Fasla's file and to be reflected in a revised Fact Sheet (doc. No. 11, part XII). Since neither that report nor that Fact Sheet were ever circulated, and have since been withdrawn, the effect of the single proven instance of prejudice was at most extremely limited.

7. Efforts to Find Another Post for Mr. Fasla

A20. Mr. Fasla repeatedly asserts (*Views*, paras. 6, 22-23) that UNDP not only made no serious efforts to place him, but indeed tried and is still trying to discourage other organizations from employing him. Again, the evidence does not bear out this charge.

A21. Mr. Fasla's Official Status File shows that in June 1969 UNDP contacted no fewer than three other international organizations (FAO, ILO and Unesco), several other services of the United Nations (UNIDO, UNCTAD and the Department of Economic and Social Affairs), the central recruitment service of the Secretariat, as well as several of its own field offices (Appendices 11-24). It is true that in doing so an incomplete summary of Mr. Fasla's employment record was used, and consequently both the Joint Appeals Board and the Tribunal found that UNDP's efforts were inadequate (doc. No. 3, Annex 2, para. 45 *(e)*; doc. No. 11, parts V and XIII). But there is no evidence that the extensive correspondence that was undertaken was not in good faith—indeed there would have been no reason to contact so many agencies except to find a new post for Mr. Fasla. Aside from the two responses specifically cited by Mr. Fasla (doc. No. 3, Annex 86, para. 99), in which reference is made to the unsatisfactory record reflected on the Fact Sheet as a reason for not considering Mr. Fasla's candidacy, most of the other services merely indicated a lack of available posts, and the ILO in particular stated that it would write Mr. Fasla directly to obtain more information about his background and experience (Appendix 21).

A22. While both the Joint Appeals Board and the Tribunal found that the use of the incomplete Fact Sheet vitiated the efforts of UNDP, it should be noted that it probably did so only in a formal sense. That is, if the Fact Sheet had been completed with all the necessary information about Mr. Fasla's service, it would not substantially have improved his prospects (see paras. A1-A2 above). In this connection account should also be taken of the fact that the record of Mr. Fasla's service was incomplete because of his frequent changes in assignment which rarely left his supervisors enough time to evaluate him, and that during his service he neither complained about not receiving reports on periods long enough to justify a report nor did he make any special requests—as he was entitled to do—for reports on periods too short to warrant a normal periodic report (see *Statement*, paras. 23-25, A1-A8).

A23. Mr. Fasla also presents no evidence for his assertion that UNDP is actively discouraging prospective employers from hiring him (*Views*, para. 23). Though Mr. Fasla now asserts that his lack of gainful employment since the expiration of his UNDP appointment is directly attributable to his service with the United Nations (*Views*, para. 22), in his Application to the Tribunal he had given as the reason for his inability to find employment his unsettled residency status in the United States (doc. No. 3, Annex 86, para. 123) a difficulty that was later resolved (doc. No. 3, Annex 88, para. 78).

B. Comments on Specific Pleas[1]

1. Plea (d)*: Restoration of the* status quo ante

(a) *Legal Issues*

B1. Plea *(d)* (*Views*, paras. 27, 36-59) is one that was not included in the questions addressed to the Court (see paras. 1-2 above). Moreover, it is one

[1] See para. 17 above.

that Mr. Fasla now attempts to amend and expand (*Views*, para. 37), a step inappropriate at the present stage of these proceedings (see para. 3 above).

B2. Mr. Fasla asserts that the Tribunal entirely failed to consider this plea, and consequently failed to exercise its jurisdiction with respect to it. However, as demonstrated in the *Statement* (paras. 28-30), this plea constituted merely one of a series of closely interconnected, indeed largely inseparable and duplicative requests for monetary and other relief that the Tribunal analysed as a unit in parts III-XIII of its Judgement (doc. No. 11), where it discussed the various questions of responsibility, fault and damage, and fashioned appropriate remedies within the limits of its jurisdiction. The fact that the Tribunal did not separately refer to this plea, as well as to most of the others in the series *(d)-(k)* and *(n)*, does not mean that it disregarded any of them, but merely that it followed its usual custom of considering and discussing together closely related issues. In doing so it also followed the pattern of Mr. Fasla's own Application to the Tribunal (doc. No. 3, Annex 86), which, after reciting the various claims, did not attempt to analyse each one separately either from a factual or a legal point of view, but instead concentrated on the various substantive issues: the validity of the periodic reports, the efforts to provide further employment and evidence of prejudice.

B3. The restoration of the *status quo ante* would require a renewal or extension of Mr. Fasla's last appointment which expired on 31 December 1969—and indeed this is explicitly demanded in plea *(d)*. However, as has already been stated (para. A16 above), Mr. Fasla had no right to expect such an extension or renewal of his fixed-term contract, and the mere fact that he had made serious accusations against his supervisor and against other organizations in the United Nations family could not create such a right (paras. 8-9 above).

(b) *Factual Issues*

B4. It is not clear whether Mr. Fasla is asserting that United Nations pouches were used for smuggling even after his arrival in Yemen (*Views*, paras. 13, 41, 44). In any event there is no record that he had ever sent to Headquarters either a formal report or any other complaint about the misuse of pouches, as would have been his clear obligation as pouch officer (doc. No. 3, Annex 88, para. 56) had he discovered any such violation.

B5. The entire incident concerning his alleged frustration of the diversion of a World Food Programme shipment (*Views*, para. 46) appears to be entirely irrelevant. In the first place, Mr. Fasla admits that he never reported this incident to UNDP Headquarters (*Views*, para. 46, p. 79, *supra*), nor did he present it to the Tribunal for consideration (see, therefore, paras. 4-5 above). As the *Views* thus constitute his first report of this matter, it is after so many years naturally difficult to establish, especially on short notice, the truth or falsity of his allegations. In any event the documentary annexes he submitted to support his interpretation of the events, consisting of four letters exchanged between himself and the WFP Project Officer on 21 April 1969 and of three cables the latter sent him three days later, do not support Mr. Fasla's interpretation of conspiracy or any other malfeasance, but merely indicate some confusion about the responsibility that various governmental units in Yemen had concerning the shipment.

B6. Incidentally, the document Mr. Fasla mistakenly considered and now cites as the basis of his authority in relation to this incident was completely irrelevant to that situation. That paper (doc. No. 3, Annex 44, quoted in *Views*, para. 46, pp. 78-79, *supra*) merely constituted full powers to sign a so-called

standard OPEX Agreement[1] which had no connection with the World Food Programme and in any event did not give the person authorized to sign any responsibility concerning operations under the Agreement.

B7. In connection with the same incident, Mr. Fasla also links an alleged attempt on his life with his subsequent recall from Yemen (*Views*, para. 46, p. 79). Since he never reported this event to Headquarters—indeed UNDP still has no other information on it—it is not clear how, even if an assassination had actually been attempted, it could in any way have been linked to UNDP's decision to recall him.

B8. Mr. Fasla further complains, in connection with this incident, that his attempt to report it to Headquarters was frustrated by the latter's refusal to permit him to return to New York for 24 hours of consultations (*Views*, para. 47). However, since in his cable requesting such consultations (doc. No. 3, Annex 45) he merely indicated a wish to discuss *inter alia* "programme coverage of our operations in YAR which cannot be discussed in communications", it would appear that UNDP did not act unreasonably in declining to approve the expense of such an extended journey for such an unclear reason. Finally, there is no record, and Mr. Fasla presents no evidence, that he was ever criticized, as he claims, for addressing his message to two officials at Headquarters—a common and unobjectionable practice.

B9. Similarly the entire account of his difficulties in arranging for the appointment of certain persons to participate in FAO's regional Locust Control Project (*Views*, paras. 48-52—see also Appendix 27 hereto) appears irrelevant to the present proceeding since he had not submitted it for consideration to the Administrative Tribunal. He does assert (*Views*, para. 52), that in April 1969 he sent to Headquarters "a full report with evidence and supporting documents sufficient to enable any responsible person to understand that something unusual was occurring" but that this report was merely filed without any action. A copy of that report, which was in a form of a letter dated 6 April 1969 addressed to the Assistant Administrator and Director of the Bureau of Operations and Programming of UNDP, has now been located and is attached (Attachment 6). Clearly that communication does not suggest any malfeasance or conspiracy, as Mr. Fasla is now alleging, but in effect merely complains that FAO's approaches to Mr. Fasla were not in the correct form and that finally the Organization had sent him a rather strong letter of complaint; a reader of Mr. Fasla's "report" would therefore conclude that he was merely preparing an explanation or advance defence should FAO's complaint also be routed to Headquarters, and there was no reason to suspect that the matter required any investigation by Headquarters.

B10. Finally, Mr. Fasla speculates (*Views*, paras. 54-56) that his recall may have been motivated by another investigation that he claims to have undertaken into an alleged diversion of medicines provided to the Government of Yemen by WHO and UNICEF. Again he produces no evidence either of the truth of his new allegation or of any report that he had written thereon to UNDP

[1] Standard agreement on operational assistance between the United Nations, the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the International Civil Aviation Organization, the World Health Organization, the International Telecommunication Union, the World Meteorological Organization, the International Atomic Energy Agency, the Universal Postal Union, the Inter-Governmental Maritime Consultative Organization and the Government of the Yemen Arab Republic, UN *Treaty Series*, Vol. 669, p. 46.

Headquarters or to the Organizations concerned, merely stating that this was one of the matters on which he had wished to report orally had his request for consultations in New York been granted. Attached hereto are communications from WHO and UNICEF commenting on these allegations (Appendices 25-26) to the effect that although after so many years and on such short notice and without any supporting evidence it is impossible to establish definitively their truth or falsity, the allegations are nevertheless highly improbable in view of the nature of the operations of the two Organizations in Yemen during the period in question.

2. Plea (e)*: Correction and Completion of Mr. Fasla's Fact Sheet*

B11. Plea *(e)* (*Views*, paras. 27, 60-62) also is one that was not included in the questions addressed to the Court (see paras. 1-2 above). Furthermore, this plea too was one of those considered by the Tribunal as part of the complex of requests discussed in parts III-XIII of its Judgement.

B12. The legal basis for the preparation of Fact Sheets and the actual one on Mr. Fasla were discussed in the original *Statement* (paras. 23-25, A1-A8). It should also be noticed that the Tribunal did not pass over in silence Mr. Fasla's request for the correction and completion of his Fact Sheet, but explicitly considered that plea, and in parts VII and VIII of its Judgement indicated why it would not accede to it: it pointed out that since Fact Sheets are solely designed to summarize information about current, departing and former United Nations employees for use in placement or by other recruitment offices, when UNDP decided to make no further effort to place Mr. Fasla (see para. B14 below), still another revision of his Sheet became pointless. The soundness of the Tribunal's Judgement is not subject to review, since Mr. Fasla's challenge is and can be addressed only to the exercise of the Tribunal's jurisdiction and to the adequacy of its procedures.

3. Plea (g)*: Further Efforts to Place Mr. Fasla*

B13. Plea *(g)* (*Views*, paras. 27, 64-65) also is one that was not included in the questions addressed to the Court (see paras. 1-2 above). Furthermore, this plea too was one of those considered by the Tribunal as part of the complex of requests discussed in parts III-XIII of its Judgement.

B14. The Tribunal concluded (doc. No. 11, part XIII), reasonably on the basis of the facts presented to it, that there would be no point in UNDP making further efforts to place Mr. Fasla some three years after its initial attempts and two and a half years after Mr. Fasla had left the service of the United Nations (see also paras. A20-A23 above). In part the futility of requiring such a new effort was evidently due to the impossibility of formulating at such a late date a new Fact Sheet about Mr. Fasla that would more completely reflect the quality of his five and a half years of service (see paras. A1-A2 above) and at the same time would be significantly more favourable than the incomplete one UNDP had circulated in June 1969 (doc. No. 3, Annex 51). It was with special reference to the pointlessness of awarding the specific remedy requested by Mr. Fasla in this plea that the Tribunal decided to award to him a sum equal to six months' net base salary.

4. Plea (h)*: Compensation for Violation of Rules concerning Periodic Reports*

B15. Plea *(h)* (*Views*, paras. 27, 66-68) also is one that was not included in the questions addressed to the Court (see paras. 1-2 above). Furthermore, this

plea too was one of those considered by the Tribunal as part of the complex of requests discussed in parts III-XIII of its Judgement.

B16. Mr. Fasla's complaints concerning his periodic reports are analysed at length in the original *Statement* (paras. 23-25, A1-A8). As is explained there, most of the violations of which Mr. Fasla complains were merely technical in nature. The failure to submit reports for certain periods was largely due to his relatively brief assignments in a series of posts or to the fact that most of his extensions were for fractional parts of a year. Moreover, during his period of service Mr. Fasla never complained about the failure to receive the reports that he now insists should have been prepared, nor did he make any formal request, as is specifically foreseen in the relevant Administrative Instruction (ST/AI/115, doc. No. 16, para. 9), for interim reports in respect of assignments too short to justify a regular report. Finally, Mr. Fasla presents no plausible evidence that the missing reports would have presented a significantly more favourable account of his services, since even the several letters he relies on are on the whole far more negative than the particular passages that he selectively quoted to the Tribunal and now to the Court (see para. A1 above).

5. Plea (i)*: Compensation for Failure to Make an Effort to Place Mr. Fasla*

B17. Plea *(i)* (*Views*, paras. 69-71) also is one that was not included in the questions addressed to the Court (see paras. 1-2 above). Furthermore, this plea too was one of those considered by the Tribunal as part of the complex of requests discussed in parts III-XIII of its Judgement. The Tribunal did not confuse pleas *(g)* and *(i)*—it merely considered them together in view of their close relationship.

B18. As already indicated above (paras. A20-A23), it is not true that UNDP made no serious or good faith effort to place Mr. Fasla in another post either in its own service or with other United Nations units or with the specialized agencies that came into question. While these efforts were formally not sufficient because of the incompleteness of Mr. Fasla's record, on the basis of all the available facts it does not appear that the use of a more complete record would have led to significantly greater success.

6. Plea (j)*: Compensation for Injury Sustained by Mr. Fasla as the Result of Prejudice Displayed against Him*

B19. Plea *(j)* (*Views*, paras. 27, 72-77) also is one that was not included in the questions addressed to the Court (see paras. 1-2 above). Furthermore, this plea too was one of those considered by the Tribunal as part of the complex of requests discussed in parts III-XIII of its Judgement.

B20. As already pointed out (para. A19 above), the Tribunal found evidence of only a single instance of prejudice displayed against Mr. Fasla: the delayed periodic report prepared by Mr. Faruqi after both he and Mr. Fasla had already left the service of UNDP. Neither that report, nor the revised Fact Sheet in which it was temporarily incorporated, was ever circulated outside UNDP's Personnel Division.

B21. In his *Views* (para. 74) Mr. Fasla also advances as evidence of prejudice the fact that the second reporting officer on his first periodic report (doc. No. (3), Annex 9: Damascus from 30 June 1964 to 30 June 1965) must have been prejudiced, because he gave him a below average overall rating even though he

did not personally know Mr. Fasla, and the first reporting officer had marked the majority of the specific ratings as average. However, it appears that of the remaining ratings three were indicated as below and only one as above average, and thus it is clear that the weight of the ratings of the first reporting officer was on the whole below average. In addition, the second reporting officer at Headquarters had access to other information about the functioning of the office in Damascus, and could take account of such information in making his rating. Thus the fact that he concluded that Mr. Fasla's service was on the whole below average does not prove prejudice.

B22. Mr. Fasla further asserts (*Views*, para. 75) that the first reporting officer on that initial report subsequently tried to modify that report, in a letter written in response to Mr. Fasla's rebuttal. But, as already pointed out (para. A1 above), in that letter (doc. No. 3, Annex 10) the first reporting officer, far from changing his initial conclusions, reinforced them by detailed justifications—and merely concluded his letter by the paragraph quoted out of context by Mr. Fasla, which referred to the period subsequent to the one covered by the report in question.

B23. Mr. Fasla continues by reciting a series of actual or alleged incidents (*Views*, para. 76), all of which he advances as proof of prejudice evidently going back to the very beginning of his service with UNDP. Following is an attempt to comment briefly on each of these points:

(a) As already pointed out (para. A1 above) the "favourable reports" (doc. No. 3, Annexes 10, 11) that Mr. Fasla alleges were concealed (doc. No. 3, Annex 86, paras. 21, 24-26) were neither formal reports nor were they particularly favourable. Nor is there any evidence that these letters were deliberately concealed.

(b) The failure to request periodic reports on the basis of two relatively short periods of service (six remaining months in Damascus, followed by five in Beirut) (doc. No. 3, Annex 86, paras. 22, 26) was not the result of prejudice but followed the normal practice of the Secretariat and the relevant Administrative Instruction (doc. No. 16, quoted in part in *Statement*, para. 23 *(b)*). Mr. Fasla did not then complain of the lack of such reports, nor did he make any effort to request them (see *Statement*, paras. A2-A3).

(c) While it is no doubt courteous and generally useful to consult a staff member's supervisor before a reassignment, the necessities of the service do not always permit this to be done, and the alleged failure to do so in one instance (doc. No. 3, Annex 86, para. 31) is no evidence of prejudice against the staff member concerned.

(d) There is no particular mystery surrounding Mr. Fasla's failure to secure a post with FAO in 1967 (doc. No. 3, Annexes 16-19 and 86, para. 31). It is not true that he had been offered a choice of two posts in FAO—rather, a preliminary cable indicating that there might be two vacancies for which he could qualify was followed by a letter indicating that they had meanwhile been filled. As pointed out in the *Statement* (para. 26), such routine contretemps often occur in any recruitment process, and Mr. Fasla presents not the slightest evidence that UNDP intervened against him, nor does he suggest any reason for it to have done so, for UNDP subsequently extended his appointment.

(e) Though Mr. Fasla's periodic report for November 1966 to November 1967 was not signed on behalf of his second supervising officer (doc. No. 3, Annexes 21 and 86, para. 33), the first reporting officer was his immediate

supervisor, and there is no evidence that the normal second reporting officer was either deliberately circumvented or even that he was actually present in New York at the time the report was written (*Statement*, para. A5).

(f) Mr. Fasla served in UNITAR for only some three months (doc. No. 3, Annex 86, paras. 34-35), and no periodic report is normally prepared for such a short period, nor did he request one at the time (*Statement*, para. 6).

(g) Mr. Fasla was assigned to Yemen with Mr. Faruqi after both had served together for some months in Sierra Leone, and both of them had evidently been sufficiently satisfied with their relationship to wish to continue their collaboration (see para. A4 above).

(h) Though Mr. Faruqi was by December 1968 evidently dissatisfied with Mr. Fasla's services and had suggested his recall from the post (doc. No. 3, Annex 32), there is no evidence, aside from Mr. Fasla's assertion in his letter of 17 January 1969 (doc. No. 3, Annex 35, second para.), that Mr. Faruqi had requested his resignation, and in particular of the fact that he had done so on instructions from Headquarters. None of the subsequent correspondence between Mr. Fasla and UNDP's office in New York alludes to such a request.

(i) There was no concealment of the report that Mr. Satrap made subsequent to his visit in Yemen in February 1969 (doc. No. 3, Annex 65). It was not initially included in Mr. Fasla's Official Status File, since basically it constituted a report concerning UNDP's programme in Yemen. The passages relating to Mr. Fasla were secondary, and by no means particularly favourable (para. A9 above).

(j) Mr. Fasla presents no evidence to support his bald assertion (doc. No. 3, Annex 86, para. 72) that any UNDP official had released any unfavourable information about him to the Permanent Representative of Yemen (see also *Statement*, para. 26).

(k) There is not the slightest evidence of any decision to remove Applicant for alleged errors committed by higher level UNDP and FAO officials, nor of any pressure by FAO to remove Applicant (doc. No. 3, Annex 86, para. 79). Even the newly related incidents concerning Mr. Fasla's relations with various FAO programmes (*Views*, paras. 46, 48-52) do not yield any evidence of pressure by FAO to remove him.

(l) Again, there was no attempt to conceal a favourable assessment of Mr. Fasla's performance made by Mr. Hagen on the basis of his visit to Yemen in March 1969 (quoted in relevant part in *Views*, para. 18), but that confidential report, which was evidently written only a few hours after Mr. Hagen's arrival in Taiz, was not included in Mr. Fasla's file since it did not primarily deal with him but with UNDP's programme in Yemen (see also paras. 18-19 above).

(m) As already pointed out above (paras. A11-A14) there is no evidence of any decision taken by UNDP in March 1969 to dispense with Mr. Fasla's services. Indeed, this assertion is inconsistent with Mr. Fasla's simultaneous complaints that his resignation had been requested as early as December 1968, or on the basis of his January 1969 letter, or as a result of various other incidents both before and after March 1969.

(n) There was no rupture of contact between UNDP Headquarters and Mr. Fasla during the period March-May 1969. This is indicated by the various messages included in his Official Status File (e.g., Appendices 5 and 7)—which does not even contain any communications on purely programmatic

matters. Besides, in late March Mr. Fasla was visited by Mr. Hagen and by early May the message to recall him had been sent.

(o) There was nothing "perplexing" about the consultations with UNDP in New York in May 1969. They followed on repeated requests by Mr. Fasla for just such an opportunity (e.g., the message quoted in *Views*, para. 47).

(p) Aside from Mr. Fasla's assertion (doc. No. 3, Annex 86, para. 96), UNDP has not yet been able to discover any evidence of a further assessment made by Mr. Hagen of Mr. Fasla (see also para. 22 above).

(q) As pointed out above (paras. A20-A22), the efforts to find another assignment for Mr. Fasla, while not effective, were certainly extensive and by no means "conducted in such a way as to ensure their failure".

B24. The Tribunal has repeatedly and reasonably held (for instance in its Judgement No. 93, part XII) that "the burden of proving prejudice or improper motivation rests with the Applicant". Mr. Fasla has not sustained that burden.

7. Plea (k)*: Compensation of One Yemeni Rial for Emotional and Moral Suffering*

B25. Plea *(k)* (*Views*, paras. 27, 78-80) is also one that was not included in the questions addressed to the Court (see paras. 1-2 above). Furthermore, this plea too was one of those considered by the Tribunal as part of the complex of requests discussed in parts III-XIII of its Judgement.

B26. The Tribunal is not authorized under Article 9 of its Statute to award "symbolic" damages. To the extent that it considered and found that Mr. Fasla had in any way been morally injured by UNDP, that finding in its Judgement constitutes whatever symbolic relief Mr. Fasla might be entitled to.

8. Plea (l)*: Compensation for Delay in Disposing of JAB Case No. 172*

B27. Plea *(l)* (*Views*, paras. 27, 81-83) is also one that was not included in the questions addressed to the Court (see paras. 1-2 above).

B28. This claim was explicitly considered by the Tribunal in its Judgement, and Mr. Fasla is thus merely objecting to the Tribunal's decision and not to any failure by it to exercise jurisdiction (doc. No. 11, part XVI).

B29. The Tribunal's conclusion that the delay in disposing of Mr. Fasla's first appeal to the Joint Appeals Board was not "abnormal" reflects its familiarity with the general speed of proceedings in the Board, and that evaluation is not one that should be reviewed by the Court.

9. Plea (m)*: Reimbursement for Legal Costs*

B30. Mr. Fasla's assertion that the Tribunal failed to exercise its jurisdiction because of its refusal to award him any legal costs (*Views*, paras. 27, 84-95, 121 (6)) was discussed in the original *Statement* (paras. 44-64). That passage extensively examined both the Tribunal's limited competence to award costs, as well as the Tribunal's cautious practice in exercising that power. It pointed out that the Tribunal has always taken most seriously its decision of principle of 14 December 1950 (doc. No. 23) that if costs are to be awarded they must have been unavoidable, reasonable in amount, and in excess of the normal expenses of litigation before the Tribunal, and that it is for the applicant to the Tribunal

to demonstrate that his claim falls within each of these criteria. But in the instant case, except for advancing this claim, Mr. Fasla made no effort at all to establish any of these points or even to justify the amount of the claim.

B31. Indeed, he would have had difficulty in proving the reasonableness of his claim. In part it was for an excessive (by United Nations standards) number of long-distance telephone calls, for typing and copying services that were available free to Mr. Fasla's counsel in the Secretariat, and for travel and subsistence at a cost which had inexplicably been raised between the original submission of that claim to the Joint Appeals Board and his later statement to the Committee on Applications for Review (doc. No. 3, Annex 92). Moreover, the bulk of the expenses was incurred not in respect of the Tribunal proceeding but in connection with the earlier ones in the Board, even though the Tribunal regularly has recognized only costs incurred in the proceedings before it and its authority to go further is most doubtful.

B32. Finally, the Tribunal awards costs only if an applicant is substantially successful in respect of the pleas he advances (*Statement*, para. 58, note 3, p. 47, *supra*). However, this is not true of Mr. Fasla, who convinced the Tribunal of the merits of only a minor fraction of his various claims, which *inter alia* were for compensation equivalent to 30 years of net base salary.

10. Plea (n)*: Damage to Professional Reputation and Career Prospects*

B33. Plea *(n)* (*Views*, paras. 27, 96-102, 121 (3)) was the principal one presented by Mr. Fasla to the Committee on Applications for Review, and is consequently dealt with extensively in the original *Statement* (paras. 21-43). That passage also includes comments on paragraph 3 of Article 9 of the Tribunal's Statute, on which Mr. Fasla particularly relies in this connection (*Views*, para. 98)—an analysis that is summarized above (para. 10).

B34. This plea, like most of the others referred to above, was also considered by the Tribunal as an integral part of the complex of claims *(d)-(k)* to which the greater portion of its Judgement, namely parts III-XIII, and the relevant portion of its award (part XVIII, 1, 2, 4) was addressed. To separate out plea *(n)* for individual consideration apart from the other closely related claims, would have been inconsistent with the Tribunal's usual practice in dealing with similar series of issues, as well as with Mr. Fasla's own presentation (doc. No. 3, Annexes 86, 88). Furthermore the Tribunal stated at considerable length its analysis of the factual and legal issues relevant to UNDP's treatment of Mr. Fasla during the months immediately before and after the expiration of his appointment, with particular reference to the efforts made to find him another post and the papers circulated in that connection. While the amount of the Tribunal's award in relation to this treatment may have disappointed Mr. Fasla, who desired far greater compensation, this is not a matter subject to review under the scheme established by the General Assembly.

B35. With reference to the once more reiterated assertion (*Views*, para. 101) that the Tribunal found that the Director of UNDP's Bureau of Administrative Management and Budget had connived in the distortion of Mr. Fasla's file, it must be repeated that the Tribunal merely found that he had failed to correct the prejudice shown by Mr. Faruqi in preparing the periodic report on Mr. Fasla's service in Sierra Leone and Yemen (see para. A19 above). The Tribunal did not find any "misuse of power with improper motive", nor did it find that the Director's actions "were motivated by prejudicial considerations". Nor was there any "falsification and distortion" of Mr. Fasla's employment record (*Views*, para. 100).

11. Plea (o)*: Compensation for Delay in Disposing of JAB Case No. 181*

B36. The issues raised by plea *(o)* (*Views*, paras. 27, 103-106) are largely the same as those referred to under heading 8 above (paras. B27-B29).

B37. Mr. Fasla asserts that the Secretary-General's slow decision on the second report of the Joint Appeals Board was responsible for a one-year delay in the consideration of the case by the Tribunal. However, the dates of the submissions of the various reports and pleadings (*Statement*, paras. 13-16) and the time-limits allowed by the Rules of the Tribunal (doc. No. 13, Articles 8 (4) and 9 (1)) do not bear him out. Even if the Secretary-General had acted more promptly, consideration by the Tribunal at its spring 1971 session would have been possible only if both Mr. Fasla and the Secretary-General had waived considerable portions of the normal time-limits for the submission of pleadings to the Tribunal. On the other hand, the communication of the Secretary-General's decision in March 1971 still left ample time for the normal submission of the case to the Tribunal by its autumn session of that year.

B38. Mr. Fasla's requests for additional documents under this heading (*Views*, para. 105) are discussed in section III, A5-A6 above (paras. 24-26).

12. Plea (p)*: Recalculation of Emoluments for Foreshortened Stay in Yemen*

B39. Plea *(p)* (*Views*, paras. 27, 107-110, 121 (4)) is also one that was dealt with at length in the original *Statement* (paras. 65-83). In that passage the bases for the payment of United Nations emoluments, depending on the expected length of a staff member's stay in a particular post, were analysed in detail. It was demonstrated, first of all that the Secretary-General had sufficient discretion to decide on the rate and type of emoluments payable for a particular assignment so that he could have ordered the payments that were actually made, even if it had been known from the beginning that Mr. Fasla would stay in Yemen only eight months rather than the minimum of 15 months originally planned. Moreover, Mr. Fasla's assertion of a right to a retroactive recalculation because the length of his actual stay was less than originally planned, is not based on any Staff Regulation or Rule, is indeed inconsistent with their wording and moreover would violate the logic on the basis of which such emoluments are calculated.

B40. Against the force of these arguments, Mr. Fasla only advances a single statement made by the Secretary-General's representative in the second Joint Appeals Board proceeding (doc. No. 3, Annex 67, para. 34)—a statement open to various interpretations (see, e.g., doc. No. 3, Annex 90, para. 21)—as well as the dissenting opinion of one member of that Board. In effect, Mr. Fasla asserts that the Tribunal erred by not making that dissenting opinion its own (*Views*, para. 109). But the correctness of the Tribunal's interpretation of the provisions of the Staff Regulations and Rules is not a matter to be reviewed by the Court: paragraph 1 of Article 11 of the Tribunal's Statute only permits review of an error on a question of law relating to the provisions of the United Nations Charter. Nor can it be asserted that the Tribunal, which gave extensive consideration to this question in its Judgement (doc. No. 11, part XV), had in any way failed to exercise its jurisdiction or had committed any procedural error in doing so.

13. Plea (q)*: Placement of Mr. Fasla on Special Leave with Full Pay*

B41. Plea *(q)* (*Views*, paras. 27, 111-116, 121 (5)) is also one that was not included in the questions addressed to the Court (see paras. 1-2 above).

B42. Mr. Fasla in effect asserts that his placement on special leave, with full pay but without his consent (though the Tribunal found that at least initially he did not object), was equivalent to a "Suspension Pending Investigation" under Staff Rule 110.4 (doc. No. 15). It should, however, be noted that special leave with full pay (under Staff Rule 105.2) has none of the punitive or accusatory attributes of a disciplinary suspension to which Mr. Fasla wishes to compare it. The Secretary-General must have the flexibility to decide to place a staff member on special leave, without however reducing his emoluments, between assignments or if his appointment is expiring and there is no short-term job that he might conveniently fill. This flexibility is provided for by Staff Regulation 5.2, which in this respect supplements Regulation 1.2.

B43. This plea was specifically and individually examined by the Tribunal in its Judgement (doc. No. 11, part XIV). It therefore cannot be asserted that the Tribunal had not exercised its jurisdiction and at most the disagreement is about its interpretation of the relevant Staff Regulations and Rules—a matter not to be reviewed by the Court (see para. B40 above).

B44. Under this heading Mr. Fasla also asserts (*Views*, para. 112) that he had not requested permission to go on home leave. This is contradicted by the record which shows that Mr. Fasla requested home leave in his communications of 19 December 1968 and 8 February, 12 March, 29 April, 11 May 1969 (doc. No. 3, Annexes 36, 47; Appendices 1, 4, 8). It is true that he desired home leave in the United States, but as early as 27 December 1968 (Appendix 2) he had been informed that he was only entitled to such leave in his home country (Algeria).

LIST OF APPENDICES TO THE COMMENTS ON BEHALF OF THE SECRETARY-GENERAL OF THE UNITED NATIONS[1]

1. Cable 568 from Fasla (UNDP, Taiz) to Birt (UNDP, New York), 19 December 1968.
2. Cable from Birt (UNDP, New York) to Faruqi (UNDP, Taiz), 27 December 1968.
3. Cable 14 from Birt (UNDP, New York) to Faruqi for Fasla (UNDP, Taiz), 18 January 1969.
4. Cable 44 from Fasla (UNDP, Taiz) to Birt (UNDP, New York), 12 March 1969.
5. Cable from Vaidyanathan (UNDP, New York) to Fasla (UNDP, Taiz), 17 March 1969.
6. Letter from Fasla (UNDP, Taiz) to M. Cohen (Assistant Administrator and Director, Bureau of Operations and Programming, UNDP, New York), 6 April 1969.
7. Cable from Vaidyanathan (UNDP, New York) to Fasla (UNDP, Taiz), 8 April 1969.
8. Cable 105 from Fasla (UNDP, Taiz) to Vaidyanathan (UNDP New York), 11 May 1969.
9. Cable 106 from Fasla (UNDP, Taiz) to Vaidyanathan (UNDP, New York), 14 May 1969.
10. Cable 104 from Vaidyanathan (UNDP, New York) to Fasla (UNDP, Taiz), 16 May 1969.
11. Memorandum from Grafteaux (UNDP Personnel, New York) to K. K. Tsien (Chief, Section for Asia and the Far East, OTC, ESA, UN, New York), 5 June 1969.
12. Memorandum from Birt (Chief, UNDP Personnel, New York) to B. K. Whitelaw (Chief, Secretariat Recruitment Service, UN, New York), 9 June 1969.
13. Memorandum from Birt (Chief, UNDP Personnel, New York) to N. Groby (Chief, Administrative Division, UNCTAD, New York), 9 June 1969.
14. Letter from Birt (Chief, UNDP Personnel, New York) to M. Askerstam (Chief, Recruitment and Staff Services, FAO, Rome), 9 June 1969.
15. Letter from Birt (Chief, UNDP Personnel, New York) to G. Bolla (Director, Bureau of Personnel, UNESCO, Paris), 9 June 1969.
16. Letter from Birt (Chief, UNDP Personnel, New York) to A. Aboughanem (Chief, Employment Branch, ILO, Geneva), 9 June 1969.
17. Memorandum from Birt (Chief, UNDP Personnel, New York) to J. B. Foran (Chief, Professional Recruitment Section, UNIDO, Vienna), 9 June 1969.
18. Memorandum from F. Caballero-Marsal (Chief, Personnel Section, UNCTAD, New York) to J. Birt (Chief, UNDP Personnel, New York), 16 June 1969.
19. Letter from M. Schlosberg (Chief, Personnel Recruitment Section, FAO, Rome) to Grafteaux (UNDP Personnel, New York), 16 June 1969.

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[1] Appendices not reproduced. *[Note by the Registry.]*

20. Memorandum from G. R. Holmes (Chief, Personnel Services, UNIDO, Vienna) to Birt (Chief, UNDP Personnel, New York), 18 June 1969.
21. Letter from A. Aboughanem (Chief, Employment Branch, ILO, Geneva) to Birt (Chief, UNDP Personnel, New York), 23 June 1969.
22. Letter from L. Baltazzi (Chief, Recruitment Division, UNESCO, Paris) to Birt (Chief, UNDP, Personnel, New York).
23. Letter from Birt (Chief, UNDP Personnel, New York) to M. Sarfraz (UNDP, Amman), 29 July 1969.
24. Cable 213 from Sarfraz (UNDP, Amman) to Birt (UNDP, New York), 6 August 1969.
25. Memorandum from A. G. Berouti (UNICEF, Cairo) to L. P. Gendron (Director, Administrative Division, UNICEF, New York), 29 December 1972.
26. Letter from F. Gutteridge (Director, LEG, WHO, Geneva) to C. Stavropoulos (Legal Counsel, UN, New York), 11 January 1973.
27. Letter from C. H. Weitz (Director, FAO Liaison Office with the United Nations, New York) to C. Stavropoulos (Legal Counsel, UN, New York), 24 January 1973.

Note on the Appendices

Appendices 1-5 and 7-24 are taken from Mr. Fasla's Official Status File, which was available to the Administrative Tribunal.

Appendix 6 is the "full report" mentioned in Mr. Fasla's *Views* (para. 52, first line), reproduced here without the enclosures all of which are sufficiently described in Mr. Fasla's letter.

Appendices 25-27 constitute rapidly compiled comments by UNICEF, WHO and ILO on the new charges relating to these organizations raised by Mr. Fasla in his *Views* (in particular in paras. 46, 48-52, 54-55).

COMMENTS EXPRESSING THE VIEWS OF MR. MOHAMED FASLA ON THE WRITTEN STATEMENT SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE ON BEHALF OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

INTRODUCTION

1. We have presented our basic contentions as to the merits of the Applicant's claims in our Statement of Views, dated 3 December 1972. We will endeavour to avoid repeating material already covered in that earlier submission to the Court.

2. As a matter of fundamental appreciation of the character of Applicant's contentions about the handling of his employment grievances by the United Nations administrative structure two distinct points of emphasis should be borne in mind: first, the *technical* failures to accord proper treatment as required by relevant legal materials to the claims of the Applicant; secondly, the failure by the administrative review procedure to take into account *the basic circumstances of injustice* that underlie the treatment of a United Nations civil servant.

3. The inequity to the Applicant results from the interaction between technical errors and a failure to inquire into the wider context of injustice embodied in the Applicant's grievance. To clarify this wider context we include for the information of the Court a Personal Annex in which Mr. Fasla develops in his own words some of the reasons why he regards himself to be a victim of more general tendencies toward employee abuse present within the United Nations. The basic contention of the Applicant about irregularities of an exceptional character in the operation of the Yemen office of the United Nations Development Programme (UNDP) is attested to in two extraordinary letters from high officials of the Yemeni Government. These letters were made available to the Applicant only on 23 January 1973, but seem very pertinent to any understanding of the realities in this case. (For texts see Attachment 1.) The first of these letters, dated 26 April 1969 from the Hon. Ahmed K. Barakat, the Foreign Minister of the Republic of Yemen, to Paul Hoffman, then the chief administrative officer of UNDP. Mr. Barakat has the following statement in his letter:

> "Mr. Administrator, I am sure you are aware of the shortcomings which accompanied UN assistance to Yemen in the past and still continue, but I am confident that by bringing this fact to your attention, that things will fundamentally be changed for the good of the country and for the UN as well."

In his response of 28 May 1969 (see Attachment 2) Mr. Hoffman acknowledges "that UNDP is deeply aware of the problems which have affected your country in recent years and of the variety of circumstances which have caused the programme in Yemen to go through certain difficult phases". Mr. Hoffman also gives assurances that a special effort at reform of the UNDP programme will be made and indicates the appointment of Mr. Toni Hagen to review the UNDP situation in Yemen. Such an exchange of letters tends to confirm in strong terms the basic configuration of circumstances pertaining to the Yemen operations of UNDP, and raises particular doubts as a result of Mr. Hagen's positive evaluation of Applicant's effort to clean up the mess.

4. A letter from Abdul Rahman Al-Eryani, dated 2 May 1969 (see At-

tachment 3), is even stronger confirmation of Applicant's basic claim that the UNDP programme in Yemen was being ruined by the corruption of its officers and that he was victimized by these very officers because he tried to improve the deplorable situation in line with his oath as a United Nations civil servant. President Al-Eryani says in his letter:

> "The office of the United Nations Programme Resident Representative had been functioning under a system which rendered it ineffective.
>
> The United Nations experts were also operating under foreign influence, and were engaged in activities which were far from being the duties for which they had been originally assigned."

In a letter of response dated 14 May 1969 (Attachment 4) the then Secretary-General of the United Nations, U Thant, acknowledges the situation and reports on Mr. Hoffman's determination to take steps necessary "to render UNDP activities in your country truly effective and useful". For the Applicant's relationship to such a situation of extraordinary dereliction to have been excluded from consideration in earlier phases of administrative inquiry in this case, makes it very plain, it is respectfully submitted, that there was a basic failure to exercise jurisdiction vested in the Administrative Tribunal and that this underlying failure contributed to a series of fundamental errors in procedure which caused serious failures of justice as have been contended all along by the Applicant.

5. The Applicant believes that the Secretary-General's written statement seriously distorts the basic issues in contention, as we shall attempt to demonstrate; nevertheless, the Court should bear in mind that the Applicant has had to prepare his views without the benefit of any expert staff or institutional resources, such as have been available to the Secretary-General. To remedy, in part, this imbalance, we would renew in this statement the Applicant's firm belief in the critical importance of being authorized to make an oral presentation of his position before the Court. Therefore, the Applicant formally requests an opportunity to supplement this written statement by an oral presentation of his position and views this request as a matter of utmost importance.

6. It should be borne in mind by the Court that at each formal stage of this proceeding certain fundamental points in favour of the Applicant were established. In particular, the report of the Joint Appeals Board on 3 June 1970, paragraphs 45 and 46 are important to keep in mind:

> "45. The Board nevertheless feels constrained to take account of certain other aspects of this case:
>
> *(a)* It is evident that very difficult conditions prevailed in the UNDP Offices both in Syria and in Yemen. By assigning the appellant to these duty stations, UNDP put him in difficult situations. Adverse assessments of his work under these circumstances placed him in a disadvantageous position with respect to his future assignments with UNDP or other International Organizations. He thus became a victim of circumstances not entirely through his own fault.
>
> *(b)* UNDP did not follow the established administrative procedures with respect to the periodic reports in this case, since there were substantial gaps in his service not covered by reports and particularly there was no report assessing his work for the period November 1967 until his separation on 31 December 1969.
>
> *(c)* Similarly the UNDP did not follow the required practice with regard to rebuttals of periodic reports by staff members.

(d) Complimentary assessments of the appellant's work in Lebanon were neither included in his Official Status file nor mentioned on the fact sheet (attached to the letters to the United Nations and the specialized agencies proposing the Applicant's candidacy). The handling by UNDP of the periodic reports and rebuttals and the decisions as to what should or should not be placed on the file or the fact sheet was less than competent.

(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.

Recommendations

46. The Board makes the following unanimous recommendations for the consideration of the Secretary-General:

(i) UNDP should re-examine the appellant's files with the view to filling the gaps in the records in accordance with established procedures, and bringing them up to date with all required periodic reports and evaluations of work, which should then be reflected adequately in the appellant's fact sheet.

(ii) UNDP should make further serious efforts to place the appellant in a suitable post either within UNDP or with one of the other International Organizations.

(iii) If UNDP fails in these efforts, the Board recommends that an ex-gratia payment equivalent to six months' salary be made to the appellant."

On the basis of this finding, as voted by the UN Administrative Tribunal in its Judgement in Case No. 144, the Respondent referred the recommendations of the Board to the United Nations Development Programme (UNDP) "for such action as it may deem appropriate". Among these recommendations were those involved in remedying the damaging defects in the UNDP official version of the Applicant's employment record and the *correlated* subsequent obligation of the UNDP to "make further serious efforts to place [the Applicant] in a suitable post" either within the UNDP or some comparable international institution. And as Judgement No. 158 makes clear the UNDP, although acknowledging the defects in the employment record, refused to take further steps to secure the Applicant another job. In the language of the Judgement:

> "On 31 August 1970, UNDP informed the Applicant that it did not intend to offer him another appointment in the future, as all possible efforts had been made to find a suitable post for him within UNDP or with other agencies when he was under contractual status with UNDP.
>
> In addition, UNDP stated its readiness to implement the first recommendation.
>
> Thus the Respondent does not dispute that the Applicant's file did not conform to the established rules at the time when the search for an assignment was being made and that the fact sheet transmitted to prospective employers was incomplete, if not inaccurate. The Respondent refuses, however, to acknowledge that, because of this, the efforts made in 1969 were vitiated by a fundamental defect and specifically states that he will do nothing to

undertake a search for an assignment in a more correct manner. The Tribunal therefore considers that the obligation assumed in the letter of 22 May 1969 has not been performed.

VIII. In the circumstances mentioned above, the decision of UNDP to comply with the recommendation concerning the gaps in the file no longer had any real point. 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. Even assuming, therefore, that action to complete the file had been taken in a correct manner, it could not *per se* have any effect on the Respondent's obligation to find a post to which the Applicant could have been appointed."

The Judgement went on to support the Applicant's basic contention that his employment record was not appropriately corrected and continued to place him in an unfavourable position with respect to future employment prospects. The failure of the Administrative Tribunal to render appropriate relief must be understood in relation to this documented refusal of the UNDP to carry out either the substance or the spirit of the earlier recommendations of the Joint Appeals Board. In turn such a refusal has to be assessed in relation to the underlying failure of the UNDP to protect Applicant from damages that followed from assigning him the task of straightening out a situation of undisputed corruption and dereliction in the Yemen office of UNDP. It is the magnitude of this inequity in relation to the experience of the Applicant in seeking some satisfaction for his grievances that is at the centre of his contentions. It is for this reason, also, that it becomes evident that the relief and reasoning of the Administrative Tribunal in its Judgement No. 158 must be understood as "woefully inadequate"—that is, to find on the merits so clearly for the Applicant and yet to grant relief that does not begin to rectify the wrongs inflicted is to compound the injustice. The Respondent's statement confuses this problem by its contention that Applicant's complaints were directed toward the inadequacy of the award rather than, as we have made clear, the *link* between the findings and the relief, i.e., the essence of the Judgement itself. It is in this light, we respectfully submit, that it is necessary to perceive the extraordinary and unprecedented decision by the Committee on Applications for Review of Administrative Tribunal Judgements in relation to Application No. 14 to put questions to the International Court of Justice that there was "a substantial basis" for review of Administrative Tribunal Judgement No. 158. This substantial basis needs to be understood in relation to the distinction already made in paragraph 3. Furthermore, the inquiry into the exercise of jurisdiction and the possibility of "a fundamental error in procedure which has occasioned a failure of justice" needs to be understood in relation to this *lethal discrepancy* between the acknowledged wrongs endured by the Applicant and the meagre relief granted to him. The evidence of lethal discrepancy is substantiated by the stark reality that as a direct result of Applicant's UNDP experience he is at present both unemployed and unemployable, and as a consequence of such a demise a victim of continuing psychological suffering of a most intense character. This Court is the Applicant's only remaining means to mitigate the tragedy that has befallen him. And, furthermore, it is only by rectifying this situation that it will be possible to restore the morale of the United Nations civil service and provide some assurance that integrity in the course of employment will be rewarded rather than punished.

7. It is for the reasons suggested in paragraph 5 that the Secretary-General's statement is morally disappointing and legally non-responsive. However, it is

part of an overall pattern in this case in which the Secretary-General has preferred to defer to its own bureaucratic structure, in this instance the UNDP, despite the documented indications that it was this structure that was responsible for wrongs to a civil servant. This deference took extreme form as a consequence of the Secretary-General's refusal to carry out the recommendation of the Joint Appeals Board to make the Applicant an ex-gratia payment equivalent to six months' salary. Given the meagreness of such relief in relation to the severity of the hardship for the Applicant it is symbolic of a legalistic refusal of the Secretary-General to consider even the most minimal equities in this case. As such, it suggests a complete subordination of the individual to the requirements of bureaucratic deference, and as such, reinforces the worst possible tendencies by subordinate civil servants to suppress information about wrongdoing within the scope of their United Nations employment. In the Written Statement of the Secretary-General the Applicant notes with regret a complete refusal to consider the issues present in other than an ultratechnical and inadequately legalistic way. To vindicate such an approach would be very harmful, it is respectfully submitted, to the whole notion of individual responsibility within the United Nations structure. Behind the questions posed to this Court by the Committee on Applications for Review of Administrative Tribunal Judgements lies a great opportunity to require that Applicant receive fair treatment, both in relation to the *scope of inquiry* into alleged wrongs and in relation to the *quantum of relief* appropriate to the severity of the damage incurred.

8. It is impossible to assess the proper measure of relief without first assessing the underlying facts as to the UNDP response to Applicant's effort to rectify a scandalous situation of dereliction that prevailed in its Yemen office. As yet, this prior assessment has never been made at any of the various steps in this lengthy proceeding. It is both an acknowledgement of sorts and an understated euphemism to refer to Applicant's post in Yemen, as did the report of the Joint Appeals Board, as a "difficult situation(s)". It is such an understated perception of these circumstances that helps explain what we have called the lethal discrepancy between the damage done to Applicant and the relief decreed. It is the pattern of action taken cumulatively that makes the various steps taken by the UNDP, the Secretary-General, and the administrative review procedure seem, *in aggregate*, like such a gross injustice. We would reiterate that only the top of the iceberg is the subject of the questions put to this Court for an Advisory opinion, but that by responding affirmatively to the two questions it will become possible to reveal the entire structure of wrongful damage inflicted on the Applicant.

9. In the remainder of this Response, Applicant will attempt to respond on a technical level to the main arguments put forth in the Secretary-General's Written Statement.

Part I. Scope of Review Embodied in Questions Addressed to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements

10. The Respondent's contention in his Written Statement that the questions presented to the Court are restricted to three claims (damage to professional reputation, award of costs, recalculation of allowance due to early departure from Yemen) is without merit and confuses seriously the fundamental character of Applicant's complaint about procedural errors in the proceedings below.

In essence, as shown in our earlier submission, the claims of the Applicant's various pleas arise from separate facets of injury sustained. *It is only when the* underlying circumstances prevailing in the UNDP office in Yemen are taken into account that Applicant can be understood to have been the victim of a *pattern of prejudice that* has caused him vast and irreparable injury. The failures, for instance, to prepare his fact sheet properly, or to include favourable information and rebuttals in his periodic reports, or the failure to find alternative employment or to execute the recommendation of the Joint Appeals Board to make further serious efforts in this regard are not capable of proper assessment without a basic appreciation of the effort to eliminate the Applicant from the United Nations scene because he acted to clean up the mess in Yemen and might embarrass the programme by making further damaging disclosures at some point.

11. The Respondent contends on page 36, *supra*, paragraph 18, that the Applicant argued fundamental procedural errors in *connection with only three claims.*

> "In part III.D, Mr. Fasla contended that the Administrative Tribunal committed fundamental procedural errors in connection with the same *three* claims to which parts III.A-C were addressed; the legal questions he proposed to have submitted to the Court in this connection were stated in paragraphs 2 and 4 of part IV."

This argument of the Respondent is extended on the same page, paragraph 20:

> "In addressing its two questions to the Court, the Committee on Applications for Review specified their scope only by reference to the connections in the application Mr. Fasla had addressed to it. Consequently it is assumed that the Court will wish to examine both these questions with reference only to the three claims specifically referred to in parts III.A-C of the Application."

12. Continuing in this misleading vein, the Respondent argues on page 59, *supra*, paragraph 97, that:

> "The Application submitted to the Committee on Applications for Review and referred to by the latter in the questions it addressed to the Court, charges that the United Nations Administrative Tribunal failed to exercise, in its Judgement No. 158, its jurisdiction with respect to three out of seventeen claims that Mr. Fasla had submitted to it."

Applicant rejects this erroneous and misleading interpretation of the Respondent on the scope of the questions addressed to the Court by the Committee on Applications for Review and contends that the scope of the questions covers all of the claims made by the Applicant.

13. In Part IV of Applicant's application to the Committee on Applications for Review which is entitled, "Legal Questions to be Certified to the International Court of Justice" the Applicant has listed four questions. The first question asks whether the failure of the Administrative Tribunal of the United Nations to fully consider and pass "upon *all* the claims presented by an applicant that are within its jurisdiction constitute a failure to exercise jurisdiction . . ." (emphasis added). The second question asks whether the failure of the Administrative Tribunal to fully consider and pass "upon *all* claims presented by an applicant that are within its jurisdiction constitutes a fundamental error in *procedure*" (emphasis added). Question three, which the Respondent refers to, presents three specific questions with reference to the Tribunal's failure to exercise jurisdiction. Question four further stresses the totality of claims; it

asks, "Does the Administrative Tribunal of the United Nations commit fundamental errors in procedure . . . when it fails to fully consider and pass upon requests of an Applicant, not analysing and deciding *all claims properly brought before it*, with a reasoned explanation of its conclusions and factual support therefore?" (Emphasis added.)

14. In Section D.2 of the Application, the Applicant also contended:

> "Although it was properly seized of the Application and had the necessary jurisdiction and competence . . . it did not proceed to fully consider and pass upon various contentions and requests of the Applicant, contrary to its normal practice and 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 therefore." (Emphasis added.)

15. In the Report of the Committee on Applications for Review the wording of the questions for which the Committee requested an advisory opinion of the Court seems clear and decisive.

> "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? (Emphasis added.)
> 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?"

16. The Committee on Applications for Review did not intend to restrict the scope of the Court's opinion to only three claims as is argued by the Respondent. By using the phrase "as contended in the Applicant's application", the Committee could have only meant "all claims properly brought before it" which is the wording of the application.

17. As further evidence of the Committee's intent, it should be noted that the argument of the Respondent which appears on pages 36 and 59, *supra*, of his statement to the Court, was presented to the Committee on Applications for Review on page 2 (Doc. No. 4, A/AC.86/R.60, 1 June 1972), in paragraph 3. It should be clear from the language of the report of the Committee that no merit was given to this interpretation and argument by the Respondent at that time.

18. It seems evident, then, that there exists no basis on which to restrict the scope of the Court's inquiry to the three claims, as contended by Respondent. How can the Court assess the Tribunal's procedural and jurisdictional adequacy with respect to professional reputation if it did not assess the correlated, but separate, claim for compensation relating to injury as a result of prejudice (request *(j)* in Application to the Tribunal)? How can the Court evaluate the claim for award of costs without relating it to the separate claim of injuries sustained as a result of moral and psychological suffering?

19. It seems evident that Respondent's position on the scope of review is misleading. At each stage, the Applicant has taken pains to indicate why he believes himself a victim of multiple injuries giving rise to multiple claims. In this sense, then, the Committee's reference to the scope of review "as contended in the Applicant's application" seems decisive. Indeed, a principal contention of the Applicant relates to the failure by the Tribunal to consider and provide reasoned rejections of *all* of his claims.

Part II. The Basis of Fundamental Injuries Inflicted by the Failure of the UNDP, the Secretary-General, and the Administrative Tribunal to Discharge Their Legal Obligations

20. *Erroneous Analysis by Respondent of the Periodic Reports.* The Applicant relies on Staff Rule 112.6:

> "Rule 112.6
> *Service and Conduct Reports*
>
> In the professional category and lower salary levels, the service and conduct of a staff member shall be the subject of reports made from time to time by his supervisors. Such reports, which shall be shown to the staff member, shall form a part of his permanent cumulative record." (Doc. No. 15.)

This general provision is detailed in Administrative Instruction ST/AI/115 (doc. No. 16). But as the Applicant was a former staff member of UNDP Field Office, he is also subject to the rules governing the personnel of UNDP field offices (UNDP Field Manual Edition II, DP/4, Section IV-B, Title: Field Office Staff International) which provide stringent regulations of their own in relation to the preparation of periodic reports.

21. UNDP Field Manual Section IV, b-4, which governs the international staff, UNDP Field Office, states the following under subsection 13:

> "13. *Periodic Reports*
>
> Periodic performance reports are required for all internationally recruited staff below the rank of Director (D-2), including General Service staff detailed to UNDP offices from headquarters posts, and Field Operations Services staff detailed to UNDP. Reports shall be made at the following times:
>
> *(a)* on the first anniversary of the staff member's appointment or assignment, for staff serving under a fixed-term appointment, or
> *(b)* on the second anniversary of the staff member's appointment or assignment, for staff serving under a permanent appointment,
> *(c)* on the occasion of the transfer or assignment to other duties of the staff member, if a period of at least six months has lapsed since the previous performance report,
> *(d)* on the occasion of the transfer or the reassignment of the supervisor of the staff member if the staff member has served under such supervision for at least six months and at least six months have lapsed since the previous performance report,
> *(e)* if a change in the contractual status of the staff member is requested, or if he is recommended for promotion, provided that more than six months have lapsed since the previous report."

22. *Special Reports.*

In addition to the periodic reports, special reports should be made (not on the standard report form) consisting of a statement and evaluation of the relevant facts:

(a) when there is a decision to withhold the within-grade increase because of unsatisfactory service;
(b) when there is a decision or recommendation involving disciplinary action or suspension or termination.

Such reports should be brief and relate directly to the facts requiring the action.

Special reports recommending the refusal of a within-grade increase must be submitted before the increase is due.

23. *Preparation of Periodic Reports.*

"Periodic reports should be made on Form P-91 for staff in the professional category and on Form P-93 for General Service, Field Staff and Manual workers. These forms are available both in English and in French. When a report on a staff member is required, the form will normally be sent by the Personnel Branch, BAMB to the Resident Representative, who should complete and sign the first section of the report which covers in detail most aspects of a staff member's performance. With regard to periodic reports of Staff members in General Service or Field Service Level, Resident Representative, if appropriate, should consult with the immediate supervisor of the staff member when completing the first section of the report.

The second section will be completed by a supervisor next in line who is not lower in rank than Division Chief, and the third section will be signed by the Administrator, Co-Administrator or Bureau Director, who will then be able to add his comments, if any.

Instructions for completing the forms are given on the back of each copy. The staff member who is the subject of the report, whether it is a regular or interim one, shall be given a copy of it when it has been completed. He must then sign the statement on the report that he has seen it and has received a copy. If he wishes, he may make a written statement in explanation or rebuttal of part or all of the report and this must be attached to the report to which it refers. Where a staff member makes such a statement, Headquarters will investigate the case and will record his appraisal of it in writing. This record will be filed together with the report and the staff member's statement.

It is the duty of supervisors to be sure that periodic reports are prepared by them, as indicated in paragraph 13 (c) and (d) above, either when the supervisor himself is transferred, when he must report on all the staff members who have served under his supervision for six months or more, or when the staff member is transferred after six months or more of service under the same supervisor, provided in both cases that at least six months have elapsed since the previous report." (Emphasis added.)

24. Applicant contends that the Tribunal never properly assessed the claims relating to Applicant because it never assessed the obligations of the Respondent in relation to the special additional rules governing the preparation of periodic reports as these are contained in the UNDP Field Manual.

Part II/2

25. *The Obligation to Secure a Position for Applicant.* The JAB in its report of 3 June 1970 included as a unanimous recommendation that the "UNDP should make further serious efforts to place the appellant in a suitable post either within UNDP or with one of the other International Organizations". The Administrative Tribunal construes the response of the UNDP Personnel Division to this recommendation as "a formal commitment" by the Respondent to find another assignment for the Applicant. As the Tribunal's Judgement

suggests, "Such a commitment to make 'every effort' obviously implies an obligation to act in a correct manner and in good faith". And, finally, the Judgement concludes that the UNDP's refusal to make such further efforts after correcting his fact sheet did entitle Applicant to an award of a sum equal to six months' net base salary.

26. But such a disposition of the issue is insufficient because it did not respond to the well-founded contention by the Applicant that this failure to make further efforts at UNDP Headquarters was a continuation of the prejudice generated by his conscientious discharge of his duties in Yemen. It was not possible to achieve an equitable measure of relief without such a further inquiry as to the extent and seriousness of prejudice. If the alleged prejudice did exist, then the award of compensation made no sense whatsoever. Such an award could only seem reasonable if the Respondent had been negligent in discharging its obligation toward the Applicant to make further efforts. In any event, Applicant was entitled to a reasoned rejection of his contention on the prejudice issue.

27. Furthermore, there is a special obligation to maintain an employment relationship on the part of an employee in the UNDP field operations. This has been recognized in special sets of rules and regulations issued in relation to UNDP personnel.

28. Because of the nature of these considerations we refer the Court to a Personal Annex prepared by Mr. Fasla to convey his appreciation of why he has been a victim of injustice on these matters. It seems clear, however, that at minimum the failure of the Administrative Tribunal to take account of these two aspects of the UNDP's formal commitment to secure a further assignment for Applicant was a serious failure "to exercise jurisdiction", as well as a "fundamental error in procedure which has occasioned a failure of justice".

Part II/3. The Tribunal's Obligation to Award Monetary Compensation

29. On page 41, *supra*, paragraphs 32 and 33, the Respondent argues that only the Secretary-General is empowered to award compensation. Specifically Respondent contends that:

> "32. The power of the Administrative Tribunal to award compensation derives from paragraph 1 of Article 9 of its Statute (doc. No. 13). It is there specified that while the normal relief to be ordered by the Tribunal is the rescinding of the decision contested or the specific performance of the obligation invoked, the Secretary-General may decide that in the interests of the United Nations an applicant should instead receive monetary compensation. Such compensation is thus conceived of as an alternative to specific performance, to be chosen, not at the discretion of the Tribunal or of the applicant, but solely of the Secretary-General. The amount of compensation that may be granted is also limited by that provision of the Tribunal's Statute (to the equivalent of two years' net base salary), though provision is made for increasing this amount under exceptional circumstances.
>
> 33. Mr. Fasla was mistaken in arguing, in his Application to the Committee for Review, that paragraph 3 of article 9 of the Tribunal's Statute *obliges* (emphasis added) the Tribunal, without allowing it any discretion, to award compensation where a wrong cannot be remedied by the relief provided for in paragraph 1 of that article (doc. No. 3, para. A.6). Instead

it is clear from the text of paragraph 3, in particular in its French version (lorsqu'il y a lieu à indemnité, celle-ci est fixée par le Tribunal), that the only purpose of the clause in question is to specify that while it is the Secretary-General who is empowered to determine the *circumstances* under which compensation should be paid rather than specific relief granted, it is the Tribunal that determines the *amount* of such compensation. This interpretation is also supported by the history of article 9. Thus the only circumstances under which monetary compensation may be awarded by the Tribunal are those specified in paragraph 1 of article 9 of its Statute."

30. In order to clarify the issue raised by the Respondent, the Applicant draws the attention of the Court to the Applicant's application to the Committee for Review of Judgements of the United Nations Administrative Tribunal. The Applicant had then devoted eight paragraphs (A1 to A8) to this issue. Since the Respondent continues to challenge the power of the Administrative Tribunal to award compensation, the Applicant would like to remind the Court of the views he then expressed; these views have been implicitly endorsed by the Committee which proceeded to request an advisory opinion from the Court. The Applicant's application to the Committee for Review of Judgements of the United Nations Administrative Tribunal expressed clearly the basis of Applicant's contention on the award of compensation:

"A1. The Applicant contends that the Administrative Tribunal of the United Nations failed to exercise its jurisdiction within the meaning of Article 11, section 1, of the Statute of the Administrative Tribunal in that the Tribunal did not fully consider and pass upon Applicant's claim for damages for injury to his professional reputation and future employment opportunities caused by the Respondent's misuse of powers with improper motive as found by the Tribunal.

A2. Applicant asserts that the competence and jurisdiction of the Administrative Tribunal are defined in Articles 2 and 9 of the Statute of the Administrative Tribunal, and in relevant judgements handed down by the Tribunal under the powers accorded it in Article 2, section 3.

A3. Article 2 reads as follows:

Article 2

1. The Tribunal shall be competent 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. 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.

2. The Tribunal shall be open:

(a) To any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death;

(b) To any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.

4. The Tribunal shall not be competent, however, to deal with any applications where the cause of complaint arose prior to 1 January 1950.

A4. Article 9 reads as follows:

Article 9

1. If the Tribunal finds that the application is well founded it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. 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; provided that 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.

2. Should the Tribunal find that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits, order the case remanded for institution or correction of the required procedure. Where a case is remanded, the Tribunal may order the payment of compensation, not to exceed the equivalent of three months' net base salary, to the applicant for such loss as may have been caused by the procedural delay.

3. In all applicable cases, compensation shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under Article 14.

A5. Applicant argues that by the terms of Articles 2 and 9 of the Statute the Tribunal was competent and had jurisdiction to award compensation to Applicant for the injuries done by Respondent to Applicant's professional reputation and future employment opportunities (proof of which was submitted to the Tribunal, *see* Annexes 52 and 53, and *see, infra*, paras. A8-A10), and that the Tribunal failed to exercise such competence and jurisdiction in that it did not award either damages or other specific relief. For example, gaps in the Applicant's employment record which were still in existence were not completed, favourable comments and letters were not included in the dossier, and the Tribunal did not order the Applicant's fact sheet to be corrected. The award of damages granted by the Tribunal was solely in compensation for Respondent's failure to take all reasonable steps to fulfil its legal obligation to find another position for Applicant. (*See* Annex 25, para. XIII.)

A6. Article 2, section 1, of the Statute specifically permits the Tribunal to 'hear and pass judgement' upon disputes relating to employment contracts of Secretariat staff members and the terms of employment relating thereto. Applicant does not believe that there is any doubt, nor has there been any such claim, that a decision on the instant matter is within the competence of the Tribunal as stated in Article 2. However, Article 9, section 3, states that where applicable, 'compensation *shall* be fixed by the Tribunal' (emphasis added). The use of the imperative is to be noted. Applicant submits that the correct construction of section 3 of Article 9 deprives the Tribunal of any discretion to refrain from awarding compensa-

tion where the wrong cannot be remedied by the relief provided for in section 1 of Article 9; where the facts underlying the allegation of wrong have been accepted by the Tribunal; and where facts substantiating the direct injury caused by the wrongful acts have been submitted to the Tribunal. Applicant concludes that the failure of the Tribunal to provide a remedy in such case is a failure to exercise jurisdiction and that an appeal to the International Court of Justice is thus mandated by Article 11, section 1 of the Statute.

A7. Applicant further points out, in support of his allegation that the Tribunal failed to exercise its jurisdiction, that the Tribunal not only did not award compensation, but did not even discuss the claim. Nowhere in the judgement on which appeal is sought did the Tribunal deal with the merits of this particular claim for damages, although it did find that Applicant's personnel record and fact sheet (which was circulated to potential employers) had been maliciously distorted. The rejections of several employers and Applicant's still-incomplete personnel file have seriously compromised his professional reputation and employment opportunities."

31. Paragraphs A1 to A7 help establish three basic points.

(1) According to Article 2 (1), the Tribunal is competent to "hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members". Since the word "contract" includes "all pertinent regulations and rules", it also includes the responsibility of the employer to maintain working conditions under which the employee could put his capability to effective use; the employer has an underlying commitment to sustain or even enhance, but certainly not to injure, his employee's professional reputation.

(2) Furthermore, according to Article 9, paragraph 1, the Secretary-General can provide compensation only as an alternative to *specific performance* ordered by the Tribunal. He is not empowered to determine "under which circumstances compensation will be paid", as the Respondent suggests, but whether compensation *rather than specific performance* would, *under special circumstances*, best serve the interests of the United Nations. Thus, the Tribunal is obliged, if an application is well founded, to rescind the decision contested and order specific performance.

(3) Not only did the Tribunal fail to award compensation, i.e., order the performance of an obligation, but it did not even discuss the claim. Thus, on two grounds the Tribunal failed to exercise its jurisdiction.

32. The Respondent's arguments regarding the Secretary-General's discretionary power to award compensation, raise the issue of separation of judicial from executive powers. This issue was clearly settled by the International Court of Justice's decision in 1954. In that determination the International Court of Justice stated that:

"The International Court of Justice in its advisory opinion held that the Tribunal was an independent and truly judicial organ, and based this conclusion on a detailed examination of the Statute of the Administrative Tribunal. The Court rejected the view that the Tribunal was merely a subsidiary organ of the General Assembly, which the latter had established to assist it in the performance of its own functions. The Court pointed out that the Charter did not confer judicial functions on the General Assembly, and went on to say:

'By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions; it was exer-

cising a power which it had under the Charter to regulate staff relations. In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with, particular instances[1 2]".

The Court's statement was an effort to resolve a controversy between the Secretary-General and the Fifth Committee of the General Assembly on precisely the same issue that Respondent now raises.

33. The Secretary-General had then argued that compensation should be the rule rather than the exception:

"83. Experience has indicated that, particularly in cases involving termination of appointment, where the Tribunal finds that the application is well founded, the payment of compensation should be the rule rather than the exception. It is normally not in keeping with the interest of good administration to reinstate an employee whom the Secretary-General has considered it necessary to terminate. At the same time, from the point of view of the staff member, it is not desirable to require a new finding by the Secretary-General that reinstatement is 'impossible or inadvisable', administrative experience and considerations indicate that the normal reaction, in case a decision of the Secretary-General is not upheld by the Administrative Tribunal, should be the payment of compensation. In those circumstances, however, where the Secretary-General believes that it would not be disadvantageous to rescind his decision, he should have the option of offering such rescission to the Applicant in lieu of the compensation ordered[3]."

34. The Fifth Committee however, as it will be remembered, explicitly rejected this view. In its report to the General Assembly it stated that:

"51. Some representatives opposed any action on this subject because they believed it *undesirable to tamper with the Statute of the Administrative Tribunal in a way which might alter the existing balance between the power of the Secretary-General and of the Tribunal. Furthermore, it was pointed out that in many national administrations, reinstatement was the normal remedy, and that compensation was not a satisfactory substitute for the loss of employment. Other representatives agreed that compensation should be the rule but did not favour a rigid ceiling theron.* To accept the proposed amendment, they believed, might reduce the Administrative Tribunal to a body whose sole function would be to approve or disapprove the grant of previously determined indemnities. On the other hand, opposition was also expressed on the ground that it would be contrary to Article 17 of the Charter to approve in advance a limit below which awards made by the Tribunal would not be subject to budgetary review by the General Assembly.

52. There was general acceptance of paragraphs 2 and 3 of the Secretary-General's proposed revision of Article 9 of the Statute of the Administrative Tribunal, and these paragraphs were not discussed in substance

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[1] *Repertory of Practice, UN Organs.* Arts. 92-111, of the Charter, Vol. 5, p. 258, para. 140.

[2] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954.*

[3] G.A. 782B (VIII), Annexes, at 51, A/2533.

by the Committee. The view was expressed by one representative, however, that *there should be no limit on the compensation for loss caused by a procedural delay*[1]."

35. Thus, the claim that the Secretary-General alone has the discretionary power to award compensation is totally unfounded, especially if one takes into account the overall background of legal authority. It is interesting to note here, that although the Respondent argues that his views are "supported by the history of article 9" (p. 42, *supra*, para. 33), he fails to mention the debate on the issue and the International Court of Justice's Opinion of July 1954. He refers the Court only to the Secretary-General's report that was prepared at the time, which is obviously self-serving and naturally supports his own views. Furthermore, it is interesting to note that the Respondent in his written statement devotes no less than five paragraphs (27-31) to the Tribunal's decision with respect to the claim for damages; not once does he mention that the Tribunal was not empowered to award compensation of six months' salary because of the damages suffered by Mr. Fasla[2]. In paragraph 30, for example, where the Respondent analyses at length the compensation award, he assumes that the Tribunal fully exercised its jurisdiction on the subject. This contradiction should be noted by the Court.

36. In the recitation and analysis of Article 9 of the United Nations Administrative Tribunal, the Respondent insists on what he calls the usual limit of two-years' net base salary, as compensation. The Applicant contends that when the General Assembly amended Article 9, in December 1953, it did not impose a rigid ceiling on compensation. The report of the Fifth Committee to the General Assembly (G.A. 782, B (VIII) A.I.51) which has been cited above, states *inter alia*:

> "Other representatives agree that compensation should be the rule but did *not favour a rigid ceiling*, thereon. To accept the proposed amendment, they believed, might reduce the Administrative Tribunal to a body whose sole function would be to approve or disapprove the grant of previously determined indemnities. On the other hand, opposition was also expressed on the ground that it would be contrary to Article 17 of the Charter to approve in advance a limit below which award made by the Tribunal would not be subject to budgetary review by the General Assembly." (Emphasis added.)

37. Article 9 itself, despite its ambiguity, makes clear that in exceptional cases the Tribunal may consider it justified to order the payment of higher indemnity. Parenthetically, it should be noted here that Article 9, amended in 1953 under political pressure, was directed to curb the power of the Tribunal. Such a statement therefore assumes greater importance and weight if one considers the general atmosphere of the period in which Article 9 was amended.

38. Following the opinion of the International Court of Justice in July 1954, the General Assembly decided by resolution 888 (IX), on 17 December 1954, to create a Special Fund:

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[1] G.A. 782B (VIII), Annex A.I.51, A/2615, Report of the Fifth Committee to the General Assembly (emphasis added).

[2] However, the Tribunal made it clear on pp. 18f, para. XIII, of its Judgement that this compensation came "in lieu of specific performance" as had been customary in similar cases.

(a) As from 1 January 1955 there shall be established a Special Fund.

(b) Notwithstanding the provisions of Article 7 of General Assembly Resolution 359 (IV) of 10 December 1949, and the provisions of financial regulations 6, 1 and 7, 1, the Secretary-General is authorized to transfer to the Special Indemnity Fund from the income, on 1 January 1955, an amount of $250,000 and in 1 January 1956 such amount as will, when added to the balance remaining in the Fund of that date bring the credit in the fund up to an amount of $250,000.

(c) The Secretary-General is authorized to charge against the fund all payment to staff members of the UN arising out of award of compensation made in accordance with its Statute by the UN Administrative Tribunal[1]."

39. The adoption of the resolution 888 (IX), one year after the amendment of Article 9, is evidence of the willingness of the General Assembly to overcome the ambiguity of Article 9. In adopting resolution 888 (IX), the General Assembly has in effect lifted any limitation on the award of compensation; by setting up a fund of $250,000 to be annually sustained, the General Assembly implicitly recognized that the compensation award should not be limited by some arbitrary amount.

Part II/4

40. *The Obligation of the Administrative Tribunal to Explain the Basis for Its Award of Compensation.* Applicant believes that the Tribunal committed a fundamental error of procedure which has occasioned a failure of justice by its failure to explain the basis of its award of compensation. Interpretation of relevant guidelines, past practices, and considerations of elementary fairness support Applicant's basic contention on this point.

41. The Respondent on page 58, paragraph 94, argues as follows:

> "94. In interpreting the two questions addressed to the Court, account should be taken of the fact that neither the Statute of the Tribunal, nor its Rules at the time that Article 11 was formulated by the General Assembly, provided for the submission of individual pleas or claims. As already pointed out (see para. 38 above), that requirement was established by the Tribunal only many years later, so that neither the term 'jurisdiction' nor 'procedure' in paragraph 1 of Article 11 of the Statute, nor the requirement in paragraph 3 of Article 10 that judgements must state reasons, should be read in the light of the subsequent and subordinate requirement established by the Tribunal as to the formulation of pleadings. Instead, these concepts should be understood in terms of the allegations defining the Tribunal's competence under paragraph 1 of Article 2 of its Statute, and the remedies it is entitled to grant pursuant to Article 9."

And on page 43, *supra*, paragraph 38, the Respondent further asserts (including the damaging citation to Doc. No. 13 which supports Applicant's position):

> "38. In interpreting the above-mentioned provision of the Tribunal's Statute, it should be noted that that instrument nowhere requires or even provides for the submission of individual claims. The requirement to do so was established by the Tribunal itself, in September 1962, when it amended

[1] Doc. No. 34, p. 12.

Article 7 of its Rules to require specific listing of individual pleas. Thus the statutory requirement for reasoned judgements should not be read as requiring specific reasons stated with respect to every claim or plea."

42. The Respondent argues that because the provision for the submission of individual claims was added after the initial formulation of the Statutes of the Tribunal and because it was an amendment of the rules of the Tribunal, that neither the term "judgement" nor "procedure" in Article 11 (1) of the Statute, nor Article 10 (3) ". . . that judgements shall state the reasons on which they are based" should be read in the light of the subsequent and subordinate requirement established by the Tribunal as to the formulation of pleadings.

43. Respondent's reasoning leads to the conclusion that whenever *any* substantial changes in the provisions of a document occur, either by addition or deletion, that the document should be construed as if it had remained unamended.

44. It seems more sensible to interpret the amendments of the rules of the Tribunal so as to permit submissions of individual claims as being covered by the original working of the Statute of the Tribunal that requires that judgements state the reasons on which they are based. If this were not intended then presumably the amendment would have so indicated.

45. The past behaviour of the Tribunal supports the Applicant's argument. He would here like to cite examples where the judgements "state the reasons on which they are based". The Applicant refers to Judgement 37 of August 1953, Judgement 77 of August 1959, Judgement 92 of November 1964; these Judgements were in favour of successful applicants. For the case where an unsuccessful applicant was involved, and many pleas were included, the Applicant, without going further, gives as evidence Judgement 102 *Fort*, of 10 October 1966.

46. Concerning the erroneous contentions of the Respondent, on the Tribunal's obligation to explain the basis on which it fixes the amount of compensation to be paid, here again the Applicant finds the contention of the Respondent contrary to any principles of elementary law.

47. The Applicant wants to refer the Court to various judgements of the Administrative Tribunal where this obligation has been acknowledged, e.g., Judgements Nos. 36, 37, and there are others as well.

Part III. Claim to Be Reimbursed for Costs Incurred in Proceedings

48. The Applicant has submitted an explanation of the basis of his claim to the Committee on Applications for Review of Administrative Tribunal Judgements. This explanation is also set forth in paragraphs 84-95 of the Applicant's statement of views. Nevertheless, we would like to respond to the contention in paragraph 49 of Respondent's Written Statement to the effect that "counsel was assigned" to Mr. Fasla in such a way as to provide all necessary assistance for *gratis*.

49. The Applicant has stated that he received the assistance of a member of the Panel of Counsel. However, such a case as this necessarily incurs other expenses. Contrary to paragraph 49 of the Respondent's reply, the Applicant did not receive "gratis" all of the necessary secretarial and other supporting services which a case of this type necessitates. The Applicant provides the following case in point. Frequent consultation between the Counsel and the Applicant was necessary due to the complexity of the case. When it became too

costly for the Applicant to maintain temporary residence on the east coast as well as a permanent residence on the west coast, the Applicant returned to his permanent residence. The Applicant wishes to make it clear to the Court that frequent consultation and correspondence was still required. The Applicant cites two instances in which the Counsel contacted the Applicant by telephone. Contrary to the Resident's argument vis-à-vis the Applicant's receiving gratis such a service, the Applicant was informed in a letter from his Counsel that "I was under the impression that I had made these calls collect, and you will pay for them at your end." (See attachment 5.) The Applicant also incurred costs for typing and copying, services which the Respondent claims he was entitled to gratis.

50. Contrary to the allegations of the Respondent, the Applicant's statement of costs was "reasonable". The Respondent uses the example that the expenses for "long-distance telephone calls ($680 claimed) are, ... three times the amount allocated for such calls to the ... Office of Legal Affairs of the United Nations for a year". The Applicant wishes to point out that the Office of Legal Affairs possesses a telex which obviates the necessity of making long-distance telephone calls. The Applicant claimed his expenses were $680 when in fact they were over $700 as verified by the receipt of the telephone company.

51. The Tribunal, itself, decided that it was in its jurisdiction to award costs where such costs "are demonstrated to have been unavoidable, reasonable in amount and in excess of the normal expenses of litigation before the Tribunal". The Applicant submits that his plea for reimbursement was, indeed, within the jurisdiction of the Tribunal. Evidence to this fact accompanied the Applicant's plea.

52. The Applicant wishes to point out that it has been the standard practice of the Tribunal to reimburse successful applicants for legal fees *and* other expenses incurred in presenting their cases to the Tribunal. The Tribunal's decision, in the instant case, that "Since the Applicant has assistance of a member of the Panel of Counsel, the Tribunal finds this request unfounded and rejects it" is contrary to its prior judgements in similar cases (see Judgement 2, *Aubert* et al.). Because of its decision in the *Roy* case (Judgement 123, *Roy*, October 1968) the Applicant did not request payment of costs for the assistance of outside counsel for representation before the Tribunal, however, the Applicant *did* request reimbursement of expenses which were "unavoidable, reasonable in amount and in excess of normal litigation costs" due to the lengthy documents involved, the necessity of long-distance communication and the transportation costs of travel between New York and California.

53. In the instant case, which was not extraordinary with respect to its request of the Tribunal, the Tribunal failed to exercise the very jurisdiction of which it deemed itself capable of exercising. The Applicant, therefore, concludes that by not exercising the jurisdiction vested in it, the Tribunal committed a fundamental error in procedure which occasioned a failure of justice.

54. The Respondent's reference to the Tribunal's rejection of 11/12ths of the Applicant's claims would imply that the Applicant has no bases for substantiating his claim because he was not a "successful applicant". If, as the Respondent would have us believe, whether or not an applicant is "successful" is determined by the number of claims which the Tribunal accepts, then the very criteria by which the Respondent judges an applicant is, in the instant case, in question. The Applicant, therefore, contends that whether or not an applicant is "successful" is immaterial. The issue is, did the Tribunal exercise the jurisdiction vested in it?

Part IV. Claim Relating to Recalculation of Salary and Allowances for Service in Yemen

55. The Applicant has presented his basic contention in his previous submission, paragraphs 107-110 in support of plea *(p)* in its application to the Administrative Tribunal, and in its earlier presentation to the JAB.

56. The Applicant wishes to make clear to the Court that the Administrative Tribunal, by rejecting his claim, reached a decision only on the basis of the prior ruling of the JAB. The Applicant reiterates that he had questioned the ability of the JAB to pass judgement on his case because of its composition. The JAB was composed of staff from the United Nations Secretariat, while the Applicant was a member of the staff of the UNDP. He wishes to state that the working conditions of the UNDP and Field staff are not similar to those of the United Nations Secretariat. The Staff Rules that govern the regulations are specially supplemented by directives. The staff from the Secretariat would be ignorant of the directives applicable to the Applicant's case.

57. The United Nations has recently acknowledged this by appointing only staff from the UNDP to the JAB which are concerned with questions about UNDP employment conditions.

58. The Applicant challenges the Respondent's statement in paragraph 79 that:

> ". . . the statement in question was not meant to assert that the Secretary-General had an obligation to make such a recalculation, but rather that he might do so, if circumstances warranted, on an *ex gratia* basis . . . which is substantially the approach endorsed by both the JAB and the Tribunal".

This implies that recalculation could be made only on an *ex gratia* basis. The Applicant wishes to clarify the issue. The statement referred to by the Respondent was made by the Representative of the Secretary-General to the JAB. He was quite explicit when he said that the UNDP *would have* recalculated the Applicant's salary and allowance if he had been assigned to another post within one year of his assignment to the Yemen Post (doc. No. 3, Annex 67, para. 34). (The Applicant repeats that the rules under which the UNDP operates are not similar to those of other United Nations employees because they are supplemented by directives.) He maintains that the United Nations Secretary-General's representative's statement constitutes conclusive evidence as to the standard practice of UNDP in such cases and that the Applicant is entitled to be treated in accordance with such standard practices. The United Nations Administrative Tribunal therefore failed to exercise the jurisdiction vested in it in not recognizing the standard practice of the UNDP. The JAB did find that the Applicant had been *reassigned* to the UNDP in New York. Neither the JAB nor the Tribunal ordered recalculation; *instead* they ordered the Secretary-General to pay the Applicant a sum equal to expenses incurred by his precipitate recall to New York.

59. The Applicant wishes to make clear that there is no comparison between the Applicant's assignment in Sierra Leone which lasted under one year and his assignment in Yemen. Or else the Applicant would have requested recalculation of his salary for the time spent in Freetown. In the first place, the Applicant was receiving his salary at the New York post adjustment, second, he was without dependants in Sierra Leone, and was awarded under one of the discretional powers that the Administrator of the UNDP and the Resident Representative have, per diem allowances for a period of 40 days (the standard

United Nations practice is to provide a flat basis of 15 days per diem), while he was receiving his subsistence allowance. Proof of this disposition of Applicant's earlier transfer is available in the Office of the Controller of the United Nations. This experience of reassignment is in no way comparable to the conditions bearing on the claim for recalculation arising out of recall from Yemen. The Applicant also calls attention to the Hagen report on adversity affecting living conditions in Yemen. (See Attachment 6.)

60. We refer the Court here, too, to Mr. Fasla's Personal Annex which supplements the presentation in Applicant's Response. As with earlier contentions, it seems clear that Applicant was entitled to a reasoned explanation of why he was not entitled to a recalculation of salary and allowances, especially given the special framework of personnel practices applicable to UNDP operations in view of their special character. Here again a failure by the Tribunal to exercise the jurisdiction vested in it constituted a serious error that resulted in a hardship to the Applicant.

61. The Applicant wishes in particular to draw the attention of the International Court to the following. Concerning the circumstances surrounding the Applicant's consultation at New York on 20 and 21 May 1969, and his subsequent placement on special leave, see the Respondent's reply, paragraph 11, document 3, Annex No. 87. The Applicant also wishes in this connection to draw the attention of the Court to his application of 31 December 1970 to the United Nations Administrative Tribunal and especially paragraphs 94 and 95 (doc. 3, Annex 85). For the JAB's finding that in May 1969 the Applicant had been assigned to the UNDP in New York, see Annex 67, document 3, paragraph 33, a finding subsequently accepted by the Respondent that the Applicant had been appointed to New York.

62. The Applicant specifically rejects as unfounded the Respondent's contention that the reduction of the period of the Applicant's assignment in Yemen of one year to less than one year gave rise to no obligation to readjust the allowance that had been paid to him. The Applicant would like also to refer to Staff Rule 103.22 *(c)* which provides:

> "*(c)* When the staff member is assigned to a duty station for less than one year, the assignment allowance will normally not be paid. However, appropriate subsistence payments will be made where no assignment allowance is payable." (Doc. 5.)

With regard to which the Tribunal in paragraph XV (doc. No. 1, Annex No. 11) 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."

63. For the rest, the Respondent has in his written statement before this Court resorted to abstract legal arguments based on rules applicable to United Nations Secretariat staff. These rules fail to take into account that the administrative practices of the UNDP (which has a special character and whose personnel have often had to operate under conditions of hardship) have been established by

various directives and by the discretionary power extended to the Administrator of the UNDP as defined in the CM. Field Manual.

Part V. Claim that the Court Has Authority to Award Costs

64. In paragraphs 86-90 of the Secretary-General's Written Statement an argument is advanced against the authority of the Court to award costs to a litigant in a proceeding of this sort. Applicant contends that the Court has not yet resolved this issue and that the Respondent's basic line of contention is impersuasive.

65. The merit of awarding costs is very strong in a case of this sort. A litigant in the situation of the Applicant is dependent upon independently selected counsel and ample preparation in a case of this sort where the integrity and fairness of the United Nations and its highest administrative officers might be called into question. Often such an individual is so crushed by his grievance, as in this instance, that he can barely afford to maintain himself at a subsistence level, much less incur the financial liabilities of litigation of this complex character. At a minimum, then, the Court should have normal discretion, at least, to award costs in this litigation. Indeed, a strong equity and institutional argument could be made in support of providing a party with automatic reimbursement, up to some reasonable level, in any instance where the Committee on Applications for Review of Administrative Tribunal Judgements was sufficiently impressed by the contentions of the Applicant to recommend review in an advisory opinion of the International Court of Justice.

66. Surely if such a recommendation is made it is important that opposing positions be competently and equivalently developed. Under present circumstances this is impossible as Applicant lacked funds for a competent presentation of his views and, furthermore, was unable to put either the time or resources to work that were routinely available to the Secretary-General. A minimum rectification of this imbalance would require, it is respectfully maintained, at least an award of costs actually incurred by the Applicant. It would also require, as part of an effort to overcome this imbalance in technical presentation, an opportunity to make an oral statement. The General Assembly recommendation in resolution 957 (X) is entitled to consideration, but it is not binding on the Court which has an independent right and duty to establish its own procedural framework appropriate for the just disposition of questions before it. In this instance, Applicant contends no such just disposition is possible without an oral statement.

67. In sum, the Court must make a determination on the issue of costs and an oral statement that corresponds to the requirements of justice, takes full account of the fact that no comparable questions for review have ever been presented, and gives some attention to the importance of achieving competent and balanced presentation of contending legal positions on a case that arises within the structure of the United Nations as a grievance between an employee and his bureaucratic superiors.

Part VI. The Impingement of Prejudice on the Proceedings of the Tribunal

68. The Applicant contends that the procedural errors committed by the Tribunal did, in fact, "prejudice, in a fundamental way, the requirements of a just procedure".

69. The Applicant cites the instance in which he requested the production of the report by Mr. Hagen, consultant to the UNDP Administrator, on his investigation of the UNDP office in Yemen in March 1969. The UNDP denied this letter's existence for several months. Yet, after the Applicant requested this letter's production for a second time, the UNDP complied with his request. However, acceding to the request of the UNDP, the Tribunal decided that "all except one paragraph were irrelevant to the case", and, therefore, could be withheld from the Applicant. The Applicant had requested production of the *entire* letter because he felt it was crucial to the understanding of his case. Therefore when the Tribunal failed to insist upon production of the letter in total, it failed to exercise its jurisdiction. The result of this error in procedure was to withhold evidence supportive of the Applicant's case.

70. The Applicant cites another case that is quite similar to the above one. The Applicant had requested that the Respondent produce the report by Mr. Hagen, UNDP Special Representative in Yemen, concerning the Applicant's performance, which was prepared at the request of the UNDP in the summer of 1969. The Tribunal possessed a document which made reference to this letter, a copy of which was supposed to be in the Applicant's Status File. The UNDP maintained that it did not have this letter in its files. Despite evidence that raised a "presumption of the letter's existence" the Tribunal observed that it "can only take note of the statement" that the letter in question did exist as the Applicant had requested but could not be produced. The Applicant strongly believed that production of this letter would have further enlightened the Tribunal as to the Applicant's situation. The Tribunal did not make inquiries subsequent to this occurrence, when it could have insisted upon this letter's production.

71. If part of the Applicant's contention is that he is enmeshed in a complicated web of undertakings designed to prevent the extraordinary derelictions present in the UNDP operation in Yemen from coming to light, then it becomes clear that it is inappropriate to rely on the good faith of UNDP Headquarters as to production of documents bearing on Applicant's case. How else can the Applicant, with no independent access to evidence, possibly establish the validity of his basic contentions? American judicial practice consistently protects litigants in this sort of situation, giving institutions of government the choice between producing the documents needed or conceding the claims set forth. Here, the Tribunal displayed customary deference to UNDP despite the very substantial indications of prejudice against Applicant and despite their strong institutional interest in suppressing the real facts. Applicant regards the Tribunal's treatment of potential evidence in the case as "a fundamental error in procedure which has occasioned a failure of justice".

72. The Applicant wishes to state that the term "just" implies unbiased or not prejudiced. Therefore, the Applicant feels that the above examples clearly show that, by not exercising its jurisdiction and thereby causing a fundamental procedural error, the Tribunal allowed prejudice or bias to enter into the case. By not making further inquiries into the existence and production of evidence possibly supportive of the Applicant's case the Tribunal, intentionally or unintentionally, aided the Respondent's case.

Part VII. Conclusions

73. The Applicant is a civil servant who feels that he has been victimized as a result of prejudice. There are many independent grounds on which to suppose

that such prejudice existed and was a significant factor in ending his career as a United Nations civil servant. It is indisputable that the abrupt termination of Applicant's career has brought him great grief and has made it very difficult for him to find gainful, appropriate employment outside the United Nations.

74. In the course of reviewing the Applicant's grievances he never really had the resources to present his case adequately. Such handicaps, as we have already stated, have greatly hampered the presentation of Applicant's position to the Court. Despite the handicaps, however, a substantial part of Applicant's argument has been accepted by the reviewing agency at each of the three stages in this proceeding. Such success is particularly notable in light of the failure by the JAB or Administrative Tribunal to look into the prima facie connection between corrupt operations in the Yemen office of UNDP, Applicant's assignment to end corruption, and Applicant's subsequent career difficulties.

75. We believe, in this sense, that the various errors by the Administrative Tribunal that were the occasion of failures to exercise jurisdiction and of serious procedural error were all compounded by this underlying refusal of the Administrative Tribunal to assess the wider facts of prejudice which underlay the separate wrongs done to the Applicant. In this context, the failure to prepare properly Applicant's report or fact sheet, the refusal to compensate appropriately, the unwillingness to find Applicant another job seem to form a pattern of abuse consistent with the underlying claim of prejudice and wilful dereliction. As such, it renders more serious each failure and both makes comprehensible why the Administrative Tribunal granted such inadequate relief and shows why this inadequate relief flowed from this basic failure to exercise jurisdiction vested in it.

76. Also, it is worth noting in closing that the Secretary-General has abused his discretion to the extent that its responses to earlier findings completely ignored the underlying circumstances. Nowhere in his Written Statement does the Respondent take issue with the Applicant's claims about the facts or equities at stake.

77. It may be apt to quote from Dag Hammarskjöld's Congregation Lecture (*The International Civil Servant in Law and in Fact*, Oxford Press, 1961) in which he places great stress on the special and critical imperatives of conscience and integrity that must guide the work and judgments of the international civil service. In particularly suitable language, although intended to bear on the problem of nationalistic influences, Mr. Hammarskjöld urges that a civil servant be—

> "... guided solely by the common aims and rules laid down for, and by the Organization and by recognized legal principles, then he has done his duty ... the final test is a question of integrity, and if integrity in the sense of respect for truth were to drive into positions of conflict with this or that interest ... then it is in line, not in conflict with his duties as an international civil servant" (p. 27).

The Applicant's ordeal, in a sense, boils down to suffering adverse personal and professional consequences from daring to put his sense of integrity into conflict with various bureaucratic interests within the United Nations. The pressures generated by these interests, together with the weakness of an insolvent litigant, have resulted in a failure to ferret out the underlying facts that make the various specific contentions fall into place. Unless that primary jurisdictional precondition is fulfilled justice cannot be done in this case.

78. And if justice is not done, then its failure will be seen by others in the international civil service. The message will be clear enough. The message will

be to go along with corrupt operations or else a personal disaster might ensue. In this case the message will be underscored by the fact that Applicant was assigned with a specific mission to correct the abuses. The gravity of these abuses was sufficient to generate a letter from the President of the Republic of Yemen. To shut the door on this Applicant's search for adequate review of his case would culminate in a personal tragedy with a great blow at the institutional character of the United Nations.

Response submitted on behalf of
Mr. Mohamed Fasla

(Signed) Richard A. FALK,
Albert G. Milbank Professor
of International Law and Practice,
Princeton University

Date: 30 January 1973.

LIST OF ATTACHMENTS TO THE COMMENTS EXPRESSING THE VIEWS OF MR. MOHAMED FASLA[1]

1. Letter from Mr. Sloan to Mr. Fasla, 23 January 1973
   Letter from H.E. Mr. Barakat to Mr. Hoffman, 26 April 1969
2. Letter from Mr. Hoffman to H.E. Mr. Barakat, 28 May 1969
3. Letter from H.E. Mr. Al-Eryani to U Thant, 2 May 1969
4. Letter from U Thant to H.E. Mr. Al-Eryani, 14 May 1969
5. Letter from Mr. Valters to Mr. Fasla, 23 September 1970
   Letter from the Pacific Telephone and Telegraph Company to Mr. Fasla, 8 November 1972
6. Note by Mr. Hagen on living conditions in the Yemen Arab Republic, 23 March 1969

[1] Attachments not reproduced. *[Note by the Registry.]*

Personal Annex of Mr. Mohamed Fasla

[Note: The comments on some basic issues in this case of Mr. Fasla, in his language, are included here as bearing on wider aspects of this appeal. Mr. Fasla's comments are offered here as part of a wider response to the Written Statement of the Secretary-General.]

ANNEX A TO PART II

The Respondent has submitted to the Court only Administrative Instruction ST/AI/115, Periodic Report, but has deliberately failed to mention that this Administrative Instruction is supplemented by Personnel Directive No. 8/60, of 2 September 1960. The directions appearing in UNDP Field Manual of 15 December 1966 (Annex, Attachment No. 1) contain two even more authoritative instructions concerning the timing of periodic reports and the responsibility of the Administration to ensure the completion of such reports within the timing prescribed by Administrative Instruction ST/AI/115 of 11 April 1956.

In Personnel Directive 8/60, Document No. 17, which has already been transmitted to the Court in another context, paragraph 7 states:

"*Administrative Responsibilities of Personnel Officers:*

> It will be the responsibility of the Personnel Officer concerned to ensure that a periodic report is completed on the staff member up to the date of transfer and, if required, sent to the Administrative Officer at the new duty station. It will not be necessary to complete a periodic report at the time of the staff member's transfer if one has been completed *within four months* prior to his departure." (Emphasis added.)

Under subtitle 8, it continues:

"*Administrative Responsibilities of the Executive Officers:*

> He will also be responsible to ensure that the staff member has completed any periodic reports which may be due on the staff under his supervision."

By employing the Applicant the Administration obtained the rights to his services, within the high standards outlined in the Charter and in the Staff Rules and Regulations. At the same time, the Applicant was entitled to working conditions under which he could put his capabilities to full use. He was also entitled to fair and complete evaluation of his performance by the Administration at regular intervals and in accordance with the rules and Administrative Instructions of the United Nations and United Nations Development Programme. The Court is aware that the entitlement of a staff member to periodic reports is established in the Staff Rules and forms part of the employment contract. The Applicant had the right to expect that the Administration would fulfil its obligations towards him in good faith and without malice, prejudice or discrimination.

As indicated in his statement to the Tribunal, the Applicant feels that his knowledge of the situation in Syria was used against him. The applicant is willing to challenge the Respondent publicly or privately about what he witnessed in Syria. He suspects now more than before that his evaluation report was used to intimidate him and restrain him from revealing the shameful

situation in Syria which the UNDP Administration was only too well aware of. The Applicant at this stage has nothing to add, but would like to refer to the rebuttal he submitted in accordance with Administrative Instructions, paragraph 13:

> "If the applicant so desires, he may make a written statement in explanation or rebuttal of part or all of any report, which statement shall be joined to the report to which it refers. Where a staff member makes such a statement, the Head of the Department will investigate the case and will record his appraisal of it in writing. This record will be filed together with the report and the staff member's statement."

Considering the situation he encountered in Syria and the circumstances under which he had to fulfil his obligations, the Applicant has received a surprisingly good report. It contains middle-ratings in 9 out of 13 categories, below-average ratings in 3 categories, and above-average in one category. It is the kind of report where the middle-rating from the second reporting officer is fully justified, in accordance with the practice of the United Nations, in view of the fact that the Applicant considers himself part of the people of the area and as such especially concerned about the local mission of the United Nations; because of this affiliation, more was expected from him as well. Furthermore, the Resident Representative had, besides his appointment at D2 level, other prevailing interests. The UNDP should have taken all this into consideration, as well as making allowances for the extremely difficult situation in the UNDP Office. It should be noted that the Resident Representative who was Ambassador, and was imposed on the United Nations by his own country for this assignment, was shortly afterwards terminated. The same Resident Representative was actually under watch by the Resident Representative of a neighbourhood country. The Applicant himself was twice requested to proceed to Beirut, without the knowledge of the Resident Representative, to brief secretly Sir David Owen, who was aware of the situation of UNDP in Syria.

Despite this situation, the second officer at the Headquarters, whom the Tribunal has found guilty of prejudice against the Applicant, rated the applicant below average. As already stated, the Applicant had never met him before, since he had assumed his position at the Headquarters only one month before he signed the Applicant's report.

When the Applicant signed this report, in accordance with paragraph 13 of Administrative Instruction ST/AI/115, he added a written reservation to the effect that he did not consider this an objective assessment of his work. Despite the Administrative Instruction cited earlier no investigation was ever undertaken in the case of the Applicant. No reference to the Applicant's rebuttal was placed in the official status file of the Applicant. Only during the proceedings of the JAB on 11 May 1970, five years later, did the Respondent produce for the JAB a letter from the Resident Representative which reversed the bad impression created by the first letter. The Respondent stated that the rebuttal of the Applicant was in fact investigated. In accordance with the Instruction cited earlier a rebuttal is to be investigated by the head of the department who "will record his appraisal of it in writing. This record will be filed together with the report and the staff member's statement."

In the present instance, the appropriate UNDP officer in New York made no investigation and recorded no appraisal of the case. No mention of this rebuttal appeared in the Fact Sheet of April 1970. In fact not even the Resident Representative comments on the Applicant's rebuttal which the Respondent erroneously presents as fulfilling the requirement of investigation and appraisal by the head

of the department. Their comments were filed with the periodic reports, and included the statement:

> "I am glad to say that Mr. Fasla's performance has definitely improved over the past few months. He has shown increasing interest in his work. He takes his responsibilities seriously. With the departure of Mr. Furst with whom he found it difficult to co-operate Mr. Fasla has also calmed down and has shown greater control over his disposition. He still has his limitations, of course, and I would think that research or information work would suit his temperament better than Programme Officer, although he surely has today a much greater grasp of technical assistance programming problems than six months ago." (Doc. 3, Annex 10.)

The action of the Respondent in withholding this favourable comment from the Applicant's file, in addition to being irregular, under the Respondent's own argument, is aggravated by the subsequent failure of the Respondent to request a second periodic report at the end of 1965, when the Applicant left Syria, and the Resident Representative's employment was terminated.

The Applicant is glad that the Respondent, in paragraph *(b)*, page 62, *supra*, claims that: "No final appraisal was made by the department head and no investigation was initiated." This contradicts what the Respondent maintained in the proceedings of the JAB, and in his statements to the United Nations Administrative Tribunal, that the Applicant's rebuttal was investigated. (See Annex 87, para. 3.)

July to December 1965: Damascus

As of today, the Respondent still has not provided the Applicant with a performance report of his work for the period under consideration. The Respondent has violated paragraph 7 of the relevant Administrative Instruction, paragraphs *(c)* and *(d)* of the instrument governing field office staff, and the following provision of this instrument which states that:

> "It is the duty of supervisors to be sure that periodic reports are prepared by them, as indicated in Paragraph 13 *(c)* and *(d)* above, either when the supervisor himself is transferred, when he must report on all the staff members who have served under his supervision for six months or more, or when the staff member is transferred after six months or more of the service under the same supervisor, provided in both cases that at least six months have elapsed since the previous report."

In addition he has violated paragraphs 7 and 8 of Personnel Directive No. 8/60 (Annex 17).

It is evident from the previously quoted comments of the Resident Representative that such a second report would have been considerably more favourable to the Applicant than the previous one. There is the periodic report covering the period from 1 July to December 1965, and the Respondent's heavy reliance on his own argument is entirely misplaced and prejudicial.

Lebanon

In the case of Lebanon, violation exists of all of Staff Rules 112.6, Administrative Instruction ST/AI/115, Personnel Directive No. 860, paragraphs 7 and 8, and all provisions in the UNDP Staff Field Manual governing the periodic reports.

Even if we only considered the outdated Administrative Instruction ST/AI/115 which, under paragraph *(a)*, applies to transfer or assignment when "such service exceeds, or is expected to exceed a period of six months", it is clear that the six-month limit covers the next and not just the current assignment as, for example, when the Applicant departed from Lebanon for New York, there was no doubt that his services in New York would be for longer than six months.

The Respondent violated not only ST/AI/115, but also all other directives, including the UNDP requirement that a Resident Representative before leaving his post must report on each staff member. In fact, the Resident Representative did make out a special report on the Applicant, but this report has been withheld intentionally from the status file, as found by the JAB. (Doc. No. 3, Annex 2.)

In a letter dated 8 April 1966 (Doc. No. 3, Annex 11) the Resident Representative states:

> "For me he was a godsend, because Fasla arrived at a time when I was in full activity negotiating the EPTA Programme, and I really had my doubts as to whether this office was equipped to do the job properly. The Project Sheets were not in order and to carry out negotiations and discussions with every single Department in the Ministries on the EPTA Programme in a country where there is no powerful, efficient co-ordinating body, is indeed a strenuous affair. I immediately put Fasla into the job and he accompanied me to all the meetings and finally almost single-handed, he prepared the EPTA Programme. It is true that he needs supervision from time to time, but he is hard working and would be able to do a good job if he is properly orientated."

It was only at the request of the JAB in June 1970 that UNDP provided a report which summarizes the Applicant's services as showing a good standard of efficiency. As stated by the Respondent himself (para. A3 on p. 62, *supra*, of the Respondent's statement), this report had not been circulated with the original Fact Sheet either inside the UNDP or outside it.

The Applicant would like to state that he achieved in Lebanon the preparation of the Programme of Technical Assistance, which normally requires a larger team and one year of negotiation and preparation. Although the post in Lebanon was fully staffed with three officers of higher status than the Applicant, assigned specifically for such work, the work required could not be done as the Resident Representative specified in the letter pre-cited. In omitting to request at that time a performance report of the work of the Applicant in Lebanon the Respondent has demonstrated once more not only his violation of rules, but also his discriminatory attitude. This is evident if one takes into account that in both instances (both in Syria and Lebanon) the same person who has been found guilty of prejudice against the Applicant, Mr. Vaidyanathan, had sent two confidential cables to the new Resident Representative biasing him against Mr. Fasla, even before the latter's arrival. In fact, Mr. Vaidyanathan (Annex 74) had already written in November 1965 that he "was not planning to renew the contract of the Applicant".

November 1966 to November 1967

The Applicant would like to direct the attention of the Court to the irregularities committed by the Respondent during the period under consideration, not only by the violation of paragraph 5 of ST/AI/115 and paragraph 13, but also by the violation of the principles of the United Nations.

The Applicant, before going any further on the subject, would like to state again that the officer who filled out the first section for the evaluation report was not his immediate supervisor. Although his title was Deputy Director of Technical Assistance, from May to December 1967 he was on special assignment writing a document for the Government Council on Rules for Technical Assistance that was necessitated by the consolidation of the merging of the former TAB and the Special Fund into UNDP. The Applicant states that evidence of the assignment of this officer to this special task is consigned in the files of the organization.

Contrary to the rules, the Applicant never worked for the senior officer who filled out the Applicant's evaluation, sections 1 and 2. The Applicant states that his next supervisor in line was intentionally bypassed for discriminatory reasons. Contrary to the Respondent's insistence that he was not available at the time, he was present. If the Respondent persists in this claim, it can be refuted by evidence obtained from the United Nations, since absence from UNDP even for one day or for travel is recorded routinely. In fact the bypassing of the Director of Technical Assistance had at the time serious consequences in view of the fact that the Director of Technical Assistance was not on speaking terms with the Director of the Bureau of Administration and Management on the basis of arrogance and discrimination toward people from TAB, who were transferred to the Bureau and were mainly from the developing countries. Many of these people were terminated through the use of the performance report whereas other staff, as the Applicant has witnessed and can state under oath, were themselves filling out their performance reports.

The Applicant states that these irregularities have been reported by his Director and direct supervisor, Yuri Filippov, to David Owen, to Mr. Kraczkievitch and to a member of the Algerian mission.

Before going further, the Applicant states that the Respondent does not consider the Applicant's rebuttal as constituting a formal rebuttal. The Applicant would like to known if the Respondent has another definition for a rebuttal. The Respondent who violated the Applicant's rights was aware that no official form for a rebuttal exists and is using semantics to justify his illegal and discriminatory action.

The Applicant, in order to enable the Court to assess the situation in the period being considered, would like to state that this report covers only the period from January to November 1967, since in November and December 1967 the Applicant was working in the Bureau of Evaluation of the Report, under another jurisdiction, and then was transferred to the Bureau of Operation and Programming only in January 1967, together with all the staff of the former TAB.

From January 1967 to November 1967, the Bureau, due to administrative inefficiency which the Respondent himself has recognized, was reorganized not less than three times. The Bureau was under severe criticism, not only from UNDP in the United Nations, but also from the Government Council of UNDP, a representative of a member State, and the media.

The same conclusion has been reached by Sir Robert Jackson in his authoritative study on the capacity of the UNDP system:

> "Today the UN system seems to be disproportionally old in a democratic organization. Many Governments, steeped in much longer tradition, are far more progressive and ready to respond to modern conditions. One reason advanced for this is the lack of enlightenment of Personnel Policy. Another, is the uneven quality of staff management demanded by such a

complex group of Organizations . . . Virtually, all of the outstanding people involved in the present UN development operation are now subject to stress . . . Many of them admit that they are unable to give their best under present conditions." (UN doc. DP/5, Vol. 1, paras. 144 and 146.)

In January 1967, when the Applicant was transferred with his division, the Bureau of Technical Assistance was in charge of UNDP Regional European Projects as well as of UNDP projects in Albania, Bulgaria, Cyprus, Greece, Hungary, Iceland, Malta, Poland, Portugal, Romania, Spain, Turkey and Yugoslavia.

Within a month-and-a-half, without any explanation, without consultation with the Applicant's director, the Bureau of Operational Programming decided to shift some of the responsibility for these projects to a staff member from the former Special Fund and to reduce the responsibility of the Applicant by cutting down his assignment for UNDP projects to seven African countries: Comoro Islands, Dahomey, Ivory Coast, Madagascar, Mauritius, French Somaliland and Togo.

This limitation of responsibility applied not just to the Applicant, but to all staff who were transferred from TAB and brought to the Organization by Sir David Owen. This period was one of the most critical in the history of UNDP.

The case of this unjustified assignment has been discussed at high levels. It is in this period that the Director of TAB wrote a letter of protest against discrimination to various senior officers of UNDP (see Annex 15).

"When Mr. Fasla was working under my direction he was assigned as area officer for the following countries: Albania, Bulgaria, Cyprus, Greece, Hungary, Iceland, Malta, Poland, Portugal, Romania, Spain, Turkey and Yugoslavia and for regional Europe.

Mr. Fasla is conscientious and hard working and I was very satisfied with his work. On EPTA Programming and some evaluation for the Special Fund sector I was also pleased to note the great interest he took in collecting and studying available national economic plans and other background documents, which assisted him in performing his work with intelligence. He built up necessary records which were virtually not existent before for these countries and developed contacts with delegations which had avoided contact with his predecessors.

Following the transfer of the area division to the Bureau of Operation and Programming, transfer of staff from other divisions, a number of new appointments were made to the area division. I was neither consulted on this, nor on the subsequent reassignment of duty within the area division. But note that Mr. Fasla has been given the following countries, Comoro Islands, Dahomey, Ivory Coast, Madagascar, Mauritius, French Somaliland and Togo. This is the size and the type of responsibility normally given to a junior or new area officer. I am very concerned at seeing this substantial cut in his work and his responsibility . . .

The present secretary arrangement [the Applicant's was reassigned] made without due consideration of his wishes is unsatisfactory. In addition his new office is much worse than that of more junior and younger members of the division. The latter two points are perhaps not much in themselves. The cut in responsibilities is. Added together they give me the impression that Mr. Fasla has not been given a fair chance or treatment and that premature decision against him has been made. I strongly oppose the situation and wish to record my objections on file.

Mr. Fasla was brought to New York from the field in order that he

> could demonstrate his capability at the Headquarters. As chief of his division I received no complaints against Mr. Fasla and I had absolutely no cause for dissatisfaction in his work. As mentioned already, I was not consulted in his reassignment and I am surprised by the later development. As I hope that there is a personnel policy in UNDP for all staff to be treated fairly and equally, I should welcome your full co-operation in ensuring fair treatment of this staff member. I shall also be discussing with Mr. Cohen ways of improving this present situation." (Doc. No. 3, Annex 15.)

Similar objections by the Chief of Division have been made on behalf of other staff from developing countries, who have been terminated illegally probably because their nationality was not acceptable to the Bureau.

Numerous reorganizations occurred in this new assignment. A chief of section was replaced following criticism that the appointment of the chief of section was fixed only because the nationality of this chief of section was the same as that of the Director of Bureau. This situation had dispersed all the staff of the African Branch that could not bear the situation.

Another reorganization occurred so that the Applicant had full responsibility for UNDP projects in the French-speaking African countries and was reporting directly without intermediary to the Director of Division who was bypassed for the preparation of the evaluation report.

Following a new reorganization, the Applicant's function at UNDP was extended to cover UNDP Technical Assistance operations in 26 African countries, in addition to East African communities and interregional projects. This was the largest assignment given to any officer in UNDP Division of Technical Assistance operations. The Applicant would like to emphasize that prior to his reassignment in February, four staff members and one chief of section were in charge of these countries for which he alone now had responsibility.

The Applicant would like to state that the action taken against him by the use of performance reports was rooted in the disagreement between senior officers over the treatment of staff from developing countries. During the period under consideration, a considerable political tension in the Bureau of Operation and Planning arose stemming from strongly held personal views on the part of a number of UNDP officials with regard to East-West ideological conflicts. This tension was greatly intensified as a result of the 1967 conflict in the Middle East. The Applicant who was the only Algerian professional in UNDP, though he carefully refrained from expressing any political views of his own, was placed in a very difficult position through no fault of his own. The Applicant would like to state here that from January to September he did not deal often enough with the senior officer who filled out the first section of the evaluation report, nor the senior officer who signed sections 2 and 3 of the performance report.

The Applicant states in addition that only two weeks before the preparation of this report he had difficulties which he would like to report in order to assist the Court in evaluating the situation. Under the terms of reference of the Applicant, it was his responsibility to recommend or to turn down on the basis of economic considerations any requests for projects to be financed through a special fund for emergencies.

In November the Applicant had been requested by Mr. Paul Marc Henri to recommend financing from the contingency fund a post of senior economist in Madagascar.

After examination, he found that the appointment of this senior officer would be highly irregular since under the terms of reference and regulations prevailing,

the financing of this project from the contingency fund would be detrimental to the principle on which the TAB of the United Nations has been created. In fact the request by Mr. Henri was motivated by the following situation: the daughter of a member of the Government of Madagascar was married without the consent of her family to a German traveller in Madagascar. In order to save the position of the father threatened by this mixed marriage, and to give social status to the groom in Madagascar, the member of the Government, who was on friendly terms with Mr. Henri, requested him to create in his office the job of senior economist of the United Nations, for his son-in-law.

In refusing to recommend financing from the revolving fund, the Applicant was guided also by the decision of his director who agreed with him that UNDP finances should not be utilized for such things since Madagascar was provided already with a programme based on real need.

This refusal created in November 1967 (only several weeks before the evaluation of the Applicant) a disturbance in the Department to the extent that the Applicant's director also recorded his objections when it was learned that the project had ultimately been financed by other means from UNDP funds.

January to March 1968: UNITAR

The Applicant states again that the Respondent violated the provisions of the Administrative Instruction by not providing a performance report, since UNDP was aware of the progress of the Applicant's work each week. However, as in Syria in 1965 and in Lebanon in 1966, UNDP failed once more in its responsibility to request an evaluation of the Applicant's work.

A periodic report with regard to the Applicant's service with UNITAR was eventually sent to him in 1970 after a delay of two and a half years, pursuant to the recommendation of the JAB. The report contains the following:

> "As far as I had been able to observe and evaluate the work of Mr. Fasla, I have the impression that he was willing to carry through the work assigned to him and submit the material gathered for comments of an eventual use by the supervisor who was preparing the research study. His relations with the few colleagues with whom he came in contact during his limited period of stay in UNITAR were pleasant and cordial. By the very nature of his assignment he had to spend most of his time in the library searching for documentation. I may also state that the information collected by him was found useful." (See Annex 22.)

December 1967 to June 1968: UNDP UNITAR, New York

The Applicant states that in accordance with the procedure in the United Nations and UNDP, the omission of the evaluation performance report on the fourth anniversary of his original appointment is the most important, since at that point, in accordance with the practice and rules, the Applicant should have been granted a permanent contract, or if his services were unsatisfactory, should have been terminated. The Respondent intentionally did not make such a performance report for his fourth anniversary.

June 1968 to May 1969

The Applicant refers the Court to the decision of the United Nations Administrative Tribunal that his performance report for this period was motivated by prejudice and should be declared invalid.

The Applicant states that before writing the periodic report, the Respondent tried to harm the Applicant in Sierra Leone, by producing a document signed by an officer with whom the Applicant never worked. In fact, it is only thanks to the integrity of a senior officer from the United Nations Headquarters who provided the Applicant with a handwritten letter favourable to the Applicant, that evidence was given in favour of the Applicant. The respondent kept silent on this issue. The Applicant respectfully requests the Court to refer to paragraphs 20, 21, 22, 25, 26, 27, 28, 29, 30, 31 and 32 of his statement to the Tribunal, Annex 88, for evidence of the extent to which the Applicant was discriminated against.

The Applicant is still waiting for an honest performance report on his assignment in Taiz, from September 1968 to May 1969. The Applicant directed the Tribunal to all evidence presented about his situation in Yemen, his work, testimony by Mr. Hagen in his letter to Mr. Cohen, which the Tribunal declared irrelevant. It is the hope of the Applicant that this Court will request the production of the whole of this letter, since the Applicant considers that without it the Court will be unable to understand the situation in Yemen.

Also the Applicant is providing to the Court additional evidence that was not used by the Tribunal. A favourable report on his performance was sent to New York by Mr. Hagen. Instead of requesting it, the Tribunal only noted that no record of this report existed. The Applicant is sending correspondence between the Chief of the Registry and Mr. Hagen, concerning this report, and also copies of cables addressed by the Director of the Bureau of Administration and Management to Mr. Hagen.

To corroborate his achievement in Yemen the Applicant would like to refer the Court to a telegram received from the Minister of State, Personal Representative of the President of the Republic, which states:

> "Your departure . . . created vacuum in UNATIONS presence in Yemen as well as in the Yemini hearts. Your work and achievement in Yemen created prestige for UNATIONS and optimism which we hope will not perish by your departure. We pray and plan for your early return to Yemen for the benefit of both Yemen and UNATIONS. Regards and best wishes to you and yours. Yahya H. Geghman, Minister of State, Personal Representative of the President." (Doc. No. 3, Annex 49.)

ANNEX B TO PART II

To support the arguments presented to the Court on other occasions, the Applicant would like to devote a few extra paragraphs in this Personal Annex to the contractual relationship that he had with the Respondent, to the legal instrument governing his association with UNDP, and to the practice of employment in UNDP. It is correct, of course, that the Applicant was under fixed-term contract, and that the Applicant at the time he presented his statement to the Tribunal was not aware of all rules governing his employment with UNDP; the Tribunal, however, was fully aware of the rules governing employment in UNDP. A fixed-term appointment is governed by Rule 104.12 *(b)*:

> "(b) *The Fixed-Term Appointment*
>
> The Fixed-Term Appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including persons temporarily seconded by national governments or institutions for service

with United Nations. The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment." (Doc. No. 15.)

The Applicant, however, was not only governed by the Staff Rules of the United Nations, but also by the Field Manual of UNDP. (See Field Manual for International Staff.) This instrument which has been recognized by the Tribunal in other instances, as well as by the Respondent as part of his contractual obligations, reads as follows (Annex, Attachment No. 1):

"1. *General*

Members of the United Nations Development Programme field establishment individually and collectively represent the Programme in the 'theatre of operations'. As such, they have particular responsibility in adhering to the principles set forth in the United Nations Charter, Article I of the United Nations Staff Regulations, and in the Report on Standards of Conduct in the International Civil Service. Members of the staff are selected for field assignments on the basis of both professional and personal qualifications, and in the awareness that they all become, officially or unofficially, and regardless of grade, representatives of the United Nations organizations in their countries of assignment.

UNDP field staff and their agency colleagues may become the only contact or link between nationals of the host country whom they meet and the United Nations, and thus inevitably, through their official and personal behaviour, influence local attitudes towards the Organization as a whole.

The experience of sixteen years has shown that successful careers in the field establishment have been characterized by diligent adherence to the standards of conduct enumerated above; efforts to know the countries of assignment, their peoples, histories, cultures, and languages; continuing attempts to see and understand the development assistance programmes in the context of the country's needs; devotion to the service assistance, and hard work.

2. *Applicability of the rules*

UNDP Staff are governed by the United Nations Staff Regulations and the 100 series of Staff Rules. These Regulations and Rules apply to all staff appointed by the Administrator or Co-Administrator and staff who are transferred or seconded to the UNDP from an Executing Agency. In exceptional cases a staff member may be assigned, for a very limited period, 'on loan' from an Executing Agency. In such cases, and if it is so stated in the loan agreement, the staff member will be subject to the administrative supervision of UNDP but may continue to be subject to the staff rules and regulations of the releasing organization.

Project personnel are governed by the Rules and Regulations of their own organizations.

The transfer, secondment or loan of staff members to or from the UNDP secretariat will be arranged within the framework of the provisions of the 'Memorandum of understanding among organizations applying the United Nations common system of salaries and allowances concerning inter-organization transfer, recruitment or loan of staff'[1]. Departures from the

[1] Otherwise known as the "inter-agency transfer agreement", Appendix G to CCAQ report Co-ordination/430.

terms of the memorandum may be made in cases of agreement between the UNDP, the staff member and the organization concerned, provided that such departures are within the staff rules and regulations.

This section of the Field Manual is intended to amplify and supplement certain rules, but in no case should it be considered as replacing or modifying the staff rules and regulations. It should be noted that United Nations staff rule 206.4 *(a)* to *(g)* also applies to UNDP field staff.

3. *Administration of the rules*

Subordinate staff are directly responsible to the Resident Representative and through him to the Administrator of the UNDP. The Secretary-General has delegated to the Administrator certain authorities for the administration of UNDP personnel, including the authority:

(a) to appoint, promote and terminate their staff, provided that staff on secondment from the United Nations may be promoted only for the period of their secondment and terminated only in agreement with the United Nations;

(b) to determine their entitlement to allowances and benefits in accordance with the UN staff regulations, staff rules and related directives;

(c) to grant certain benefits through the exercise of discretionary authority as envisaged by the rules, provided such decisions are in conformity with the general policy applied by the United Nations.

This delegation of authority excludes:

(a) award of compensation in the event of death, injury or illness attributable to service with the United Nations (Rule 106.4 and Appendix D to the Staff Rules);

(b) disciplinary measures and appeals involving recourse to the joint advisory bodies established under Rules 110.1 and 111.1;

(c) interpretation of the staff regulations and staff rules in cases involving general policy;

(d) exceptions to the staff rules (Rules 112.2).

4. *Type and duration of appointments*

International staff may be detailed from UNDP Headquarters, seconded from the United Nations or an Executing Agency, or appointed directly for service in field offices under a Letter of Appointment signed by the Administrator or on his behalf.

Appointments are normally granted on a fixed-term basis and are renewable. Normally, permanent UNDP appointments are granted only after at least a total of four years' service in two separate duty stations or at least under two different supervisors. However, permanent UNDP appointments may be granted to staff members transferred from Executing Agencies where they already hold permanent appointments.

There is no fixed rotation period for field staff, but normally assignments to a particular duty station will be for not less than two years or more than five years." (Emphasis added.)

The Applicant would also like to mention a provisional statement of Policy Guidelines for Personnel Management Field Offices. Section 1, paragraph 5 (Annex, Attachment No. 2), states:

"For all these reasons the present policy of considering staff members for the grant of permanent appointments only towards the end of their

fourth year of service in UNDP will be maintained at least for some time to come. The possibility, however, of mitigating the requirement of a relatively long preliminary service will be kept in mind in individual cases especially where the Staff Member concerned had a sufficient period of relevant experience in another international organization prior to joining UNDP or in the case of well-qualified junior staff possessing the required educational and linguistic qualifications."

The Applicant would like to argue here that there is a difference between the fixed-term appointment described in Staff Rule 104.12, and the fixed-term appointment offered by UNDP and described in CM Field Manual which supplements Staff Rules. This is due to the working conditions and the specialization of work in the field, not encountered in the United Nations Secretariat. The fixed-term contract covered by the United Nations Staff Rule deals with work contracts whose termination date is reasonably ascertainable, and the nature of which justifies the use of this type of contractual instrument. It is used for programmes with budgetary limitations and for projects of technical assistance that are designed to have a limited duration. It is used also for UNDP staff at Headquarters and, more generally, in situations where personnel are recruited by the Organization under some political pressure.

However, the fixed-term contract used by UNDP, especially *for its field managers*, is *renewable* in accordance with the CM Field Manual; members of the staff holding this contract are specially selected and after four years should be either granted a *permanent contract or terminated.*

The fixed-term contract offered by UNDP for its field personnel gives rise to feelings of permanency, or to expectations of tenure, despite the fact that fixed date of termination is incorporated in the letter of appointment. In fact, in UNDP, the letter of appointment is given to the staff only a month before the legal termination of their duties.

The Applicant would like to submit as evidence the letter of appointment he received. Although it appears that it is signed in 1968, the form on which it is printed dates from 1969. (Please see the left corner where the date of the form is printed.) (Annex, Attachment No. 3.)

It must also be noted that UNDP would not require a staff member to convert his United States Permanent Resident visa to a G4 visa if the staff member was not expected to remain with the Organization, as it was in the case of the Applicant, who joined the Organization at the request of Sir David Owen, at that time Chairman of the Board of TAB.

The Applicant therefore requests the Court to consider the contractual relationship between the Respondent and the Applicant as a contractual relationship between UNDP and a former staff member of UNDP's Field Office. The Applicant contends that after four years of association with UNDP he should have been granted either a permanent contract or terminated if his services were unsatisfactory. In fact, in accordance with the rules established in the United Nations, the granting of within-grade salary increment has been recognized by the United Nations Joint Appeals Board and the Respondent as evidence of satisfactory services (see UN Administrative Tribunal Judgement).

The Applicant contends that the United Nations Administrative Tribunal has committed a fundamental error in procedure and/or failed to exercise a jurisdiction vested in it, in omitting to consider fully the special contractual relationship governing the Applicant as a former UNDP staff member of Field Office, and the Respondent, especially in view of the fact that all legal instruments presented above should have been known to the Tribunal and to its legal

adviser, the Bureau of Legal Division of the United Nations, which drafted them.

Furthermore, the Applicant contends that the United Nations Administrative Tribunal has committed a fundamental error in procedure and failed to exercise jurisdiction vested in it, in not considering the obligation of the Respondent to find the Applicant a position in view of the fact that the Applicant was the only Algerian professional staff member of UNDP at the time; furthermore, the Applicant was the only African, French-speaking staff member at UNDP Headquarters. These considerations should have been taken into account in accordance with paragraph 3 of Article 101 of the Charter, which states:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

Regulation 4.3 also states:

> "In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selections shall be made on a competitive basis." (Staff Rules.) (Doc. No. 15.)

Given the above regulations, it is interesting to note that the majority of UNDP staff during the period of the Applicant's employment were of three or four nationalities; actually, most of them were of the nationality of the Director of Bureau of Administration and Management of UNDP, Mr. Vaidyanathan; the latter, as it is known to the Court, was found guilty by the United Nations Administrative Tribunal of prejudice against the Applicant.

The Applicant contends that the Tribunal committed a fundamental error of procedure and failed to exercise jurisdiction vested in it in failing to look into the circumstances under which the Applicant was employed and failing to give any consideration to General Assembly resolution 153 (II), which states:

> "Whereas, in view of its international character and in order to avoid undue predominance of national practices, the policies and administrative methods of the Secretariat would reflect, and profit to the highest degree from, assets of the various cultures and technical competence of all Member nations . . ."

The Applicant refers also to resolution 2241 (XXI) (Annex. Attachment No. 4) adopted at the 1501st plenary meeting of 20 December 1966, and to resolution 153 (II) (Annex, Attachment No. 5) which emphasizes the necessity of a more equitable distribution of posts at Headquarters, and makes a strong recommendation that in the recruitment of staff members, preference will be given to a professional candidate from *inadequately represented countries*.

The Applicant also contends that prejudice and discrimination have abounded in the recruiting practices of the United Nations and more specifically those of the UNDP, which enjoys considerable freedom in matters of personnel, and is not subject to control in this matter by the General Assembly.

The Applicant thus contends that although nationality, origin, race, ethnic group, religious or linguistic restrictive covenants are no longer judicially or administratively enforceable in the United Nations and especially in UNDP, in matters of personnel they are still used, and the pattern they helped to create

still persists. They appear to be reinforced by the Judgement of the Tribunal concerning the Applicant.

In UNDP, national, religious and linguistic nepotism is an unwritten rule. It was legitimated by Secretary-General U Thant when he stated in his address to the Conference on Human Survival at the United Nations Secretariat:

> "We need to develop a second allegiance . . . First of all our own state and secondly the international community represented by this great organization."

The first allegiance of a staff member was thus to be directed to his nation or to his group and then to the United Nations (especially important for a staff member).

The Applicant to further emphasize his point would like to refer the Court to chapters of the book *Play within the Play* by Mr. De Sa, former Under-Secretary-General of the United Nations. More recently, an article concerning UNDP Personnel policy was published in New York by the *Delegate World Bulletin* under the headline: "UNDP Staff Recruitment Questioned", 18 December 1972 (see Annex, Attachment No. 6).

The Applicant contends that the United Nations Administrative Tribunal committed a fundamental error of procedure and failed to exercise a jurisdiction vested in it in omitting from its consideration the existence of Rule 104.14 (ii), which forms part of the contractual obligation of the Respondent:

> "(ii) Subject to the criteria of Article 101.3 of the Charter, and to the provisions of the Staff Regulations 4.2 and 4.4, the Appointment and Promotion Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat, and staff members in other international organizations." (Rule enforced in UNDP.) (Doc. No. 15.)

In fact, the Applicant has reasons to believe that the Appointment and Promotion Board has never been consulted for the Applicant's reassignment.

Legally, before any reassignment of a staff member, the members of the Appointment and Promotion Board are informed, either over the telephone or at a formal meeting, about the intention of the Headquarters to assign a staff member to a specified post. Following this procedural requirement UNDP should theoretically inform the Resident Representative of the intention of the Headquarters to appoint a staff member under his jurisdiction. Document, Annex, Attachment No. 7 demonstrates to the Court how under normal circumstances, UNDP assigns staff members to various posts. Following the acceptance of the Appointment and Promotion Board, UNDP, for example, sent the following cable to the UNDP Office in Sierra Leone:

> "Undevpro Freetown (Sierra Leone)
>
> Confidential Faruqi re your Hotsprings conversation with Vaidyanathan concerning Guruns Replacement please confirm we can proceed assignment Mohamed Fasla Algerian national as Assistant Resrep. Birt." (Annex, Attachment No. 7.)

To this cable the Resident Representative of UNDP in Sierra Leone answered:

> "Undevpro New York
>
> 25 Birt your 26 accept Mohamed Fasla kindly send CV etc. Faruqi." (Annex, Attachment No. 8.)

In accordance with the practices of the UNDP, the Resident Representative is not in a position to refuse any staff member designated to work under him. The Resident Representative is unable and even in some cases unqualified to make any such judgment since his own appointment is more political than professional. In fact, it is the Assistant Resident Representative or the Deputy Resident Representative who runs the Office.

The timing of request for a new assignment usually coincides with the visit of a senior officer who actually determines the outcome of the decision.

In his statement to the Tribunal the Respondent stated that the Applicant's candidacy was rejected by the Resident Representative in Jordan and by the Resident Representative in Morocco. The Applicant would like to contend that neither of these two Resident Representatives was in a position to refuse his candidacy. The first one was not only newly appointed, but even though he had been allotted more than $60,000 to study the situation in the Yemen Arab Republic, he was unable to prepare the Programme because he had little knowledge of economic development. The Applicant was subsequently sent to correct the errors that had been recognized by the Headquarters, and rectified through the Applicant's efforts.

To prove the discriminatory nature of what the Respondent calls "efforts to assign the Applicant", the Applicant would like to give further evidence of prejudice against him: on *30 June 1969*, the UNDP Office in New York received the following cable from Mr. Vaidyanathan, Director of the Bureau of Administrative Management who met Mr. Sarfraz in Geneva:

"Undevpro New York

602 Grafteaux from Vaidyanathan. Your letter nineteenth June Jordan needs good experienced Assistant Resrep. Doubt the two candidates you mention meet these criteria. Will advise further if I have any suggestions. Undevpro Geneva." (Annex, Attachment No. 9.)

This contradicts the evidence produced by the Respondent according to which UNDP wrote only on *29 July 1969* to Mr. Sarfraz, Resident Representative of the UNDP in Jordan:

"Fasla, M.
3.1.02. Jordan 29 July 1969.

Personal and confidential

Dear Mr. Sarfraz,

Regrettably, our efforts to fill the additional professional post for your office have so far been unsuccessful.

I am, however, enclosing the fact sheet of Mr. Mohamed Fasla (Algeria), who happens to be available immediately, and I shall be glad to learn whether you would like Mr. Fasla to be assigned to your office.

Looking forward to hearing from you.

(Signed) (for) John BIRT, Chief, Personnel Division
Bureau of Administrative Management and Budget."

(Annex, Attachment No. 10.)

to which Mr. Sarfraz answered by cable, received 6 August:

"Undevpro New York

213 Confidential Birt your let twentynine July assignment Fasla Amman. Regret his qualifications do not correspond Amman requirements. Grateful continuing efforts for early assignment arr this Office *(Signed)* Sarfraz." (Annex, Attachment No. 11.)

The Applicant draws respectfully the attention of the Court to the falsehood and bad faith shown by the Respondent regarding this matter and ignored by the Tribunal in spite of the fact that all these documents were in the hands of the United Nations Administrative Tribunal and unknown to the Applicant until now.

It is important for the Applicant to emphasize that the Director of the Administrative Bureau of Management, whom the Tribunal found guilty of prejudice against the Applicant, had already met Mr. Sarfraz in Geneva. Thus, the latter was under Mr. Vaidyanathan's influence and had decided *in advance* to reject the candidacy of the Applicant; therefore, when a letter was sent to him regarding the Applicant, he reported back that Mr. Fasla was not qualified for this position and following "accepted" practices of UNDP, sent a cable to the Headquarters which could be used in the Applicant's file to show that UNDP had made every effort to find a job for the Applicant.

The UNDP also claims that it fulfilled its obligations to pursue a job opening for the Applicant in Morocco (Annex, Attachment No. 12) where in fact the same scenario had been played.

Although in accordance with the practices of UNDP, an acting representative cannot refuse assignment, the Applicant was informed by former colleagues that when UNDP submitted the Applicant's fact sheet and application to Morocco, Mr. Paul Marc Henri who was behind the decision of the precipitous recall of the Applicant from Yemen, had been instructed to urge the acting Resident Representative to refuse the Applicant's candidacy. Should the Respondent deny this, the Applicant requests the production from the Office of the Controller of travel claim of Mr. Paul Marc Henri's travel schedule in Morocco during this period. The Applicant contends that within a few weeks before or after the Applicant's candidacy had been presented to the acting Resident Representative in Morocco, Mr. Henri had also visited Morocco.

The Applicant would like to refer again to the unanimous decision of the Joint Appeals Board, which unanimously recommended that UNDP make serious efforts to place the appellant in a suitable post either within UNDP or within one of the other international organizations. Following the Secretary-General's decision, the Applicant, by a letter dated 12 August 1970, requested Mr. Paul Hoffman's opinion and decision regarding this recommendation.

The Applicant has learned that his letter never reached Mr. Hoffman. It was directed instead to Mr. Narasimhan, Chief of Cabinet of the Secretary-General, and Deputy Administrator of UNDP. Mr. Fasla actually received an answer to his letter on 26 August 1970; it informed him that all possible efforts had been made to find him a suitable post when he was under contract statute with UNDP and accordingly there would be no further appointment in the future. Actually in the Applicant's original letter addressed to Mr. Hoffman of 12 August 1970 and circulated to Mr. Narasimhan, there was a note near the paragraph stating that UNDP should make serious efforts. It read: "This is not envisaged in view of the UN Chief of Personnel's comment on this report."

Applicant draws the attention of the Court to the fact that the alleged decision of the Secretary-General to pursue the issue, as recommended by the Joint Appeals Board, was unfounded and could not be implemented since in the meantime the Chief of Personnel in a confidential report, destroyed all chances for a fair re-evaluation of the Applicant's qualifications.

The Applicant feels that the Secretary-General failed to fulfil his moral obligation, not only as Chief of the United Nations, but as a person presiding over an important matter dealing with the humanitarian role of the United Nations.

The Applicant further contends that the United Nations Administrative

Tribunal committed a fundamental error of procedure and failed to exercise jurisdiction vested in it by not considering the legal and moral obligation of the Secretary-General to find a position for the Applicant despite the fact that the evidence was available to it.

SUPPLEMENT TO PART IV

It is customary in UNDP for the Administration to request a waiver from the staff member assigned to an area less than one year, in order to avoid paying him per diem allowance. This is applicable where the staff member is assigned to an area not considered a hardship assignment. During the Applicant's short six-month assignment in Lebanon, he was officially requested to sign such a waiver, so that he would not request per diem allowance. This standard practice is unknown to the United Nations Secretariat (doc. No. 3, Annex 72).

The Applicant would respectfully like to draw the attention of the Court to the fact that his assignment in Yemen subjected him to conditions which were, indeed, as difficult as anywhere in the world. The Applicant had been provided with incorrect and misleading written information about housing, schools, health services, which facilities had existed only temporarily in the country during United States AID operations, and which were terminated three years before the Applicant's assignment. This leads the Applicant to think that this incorrect information was intentionally planned, or else that the Headquarters was very badly informed. At the time the Applicant arrived in Yemen, he was maintained at his New York salary until the end of the year. This is contrary to the Rules of the United Nations, but such consideration has been taken in UNDP standard practice.

Contrary to the rules regarding the matter of household removal as stated by the Respondent, it is Rule 107.21 which is used by the UNDP to determine the payment of subsistence allowance as claimed by the Applicant.

"107.21 *(f)*

On appointment, transfer or separation, where no entitlement to removal costs exists under Rule 107.27, and on travel to or from a mission assignment of one year or more under Rule 103.21, a staff member may be reimbursed expenses in transporting personal effects and household goods by land and/or sea up to a maximum, including the weight or volume of packing crates, etc., of

300 kgs (660 lb. or 66 cubic feet) for the staff member
300 kgs (660 lb. or 66 cubic feet) for the first dependant and
100 kgs (220 lb. or 22 cubic feet) for each additional

dependant authorized to travel at the expense of the Organization provided that the total weight or volume shall not exceed 900 kgs (1,980 lb. or 198 cubic feet) for the staff member and his dependants.

(g) Reasonable costs of packing, crating, cartage, unpacking and uncrating of shipments within the limits of authorized weight or volume will be reimbursed, but storage charges, other than those directly incidental to the shipment, and costs for servicing of appliances, dismantling or installation of fixtures or special packing shall not be reimbursed.

(h) On appointment, transfer or separation, where entitlement to removal costs does exist under Rule 107.27, a staff member may be reimbursed expenses in transporting a reasonable amount of excess baggage by land and/or sea provided that such shipment shall not exceed the maximum

weight or volume allowable under paragraph *(f)* of this rule and that the weight or volume of such shipment shall be deducted from the maximum weight or volume allowance under paragraph *(d)* of Rule 107.27."

The Applicant was not authorized to have his household moved, due to the fact that the difficulty in making shipping arrangements made transport at the time impossible. Therefore, the Applicant and his family arrived in Yemen with only hand luggage. The Applicant was assured that a furnished house would be provided at minimal cost, as stated in the Sarfraz report. Upon arrival the Applicant found that he had to rent a house, which was more costly than the apartment he had in New York. He, himself, made considerable repairs in order to bring it to an acceptable standard of habitability. He had to buy all the household furnishings at high cost, since all his household furniture was in storage in New York and could not be removed. The Applicant respectfully encourages the Court to read the Hagen report on living conditions in Yemen (Attachment No. 6 to main text), in order to corroborate the Applicant's statement of the hardship imposed on him by this assignment.

The Applicant had to be separated from his eight-year old daughter in order for her to continue her education which was made possible thanks to the kindness of an American family and to the special authorization of the Director of the United States Military Children's School in Asmara, Ethiopia. This arrangement necessitated frequent costly trips to Asmara by his wife so as to maintain a close relationship with the young child, for whom the separation was very painful.

In view of the fact that the Applicant was only given two working days to leave Yemen, he was unable to transport all the investment he had made because removal authorization was not provided and because of the lack of a facility for transport. It was impossible to sell or store his purchases so he had to abandon all of his investment. The Applicant reiterates that the alternative offered by the Secretary-General to reimburse the Applicant for substantial losses that he could show were suffered as a result of the Applicant's precipitate recall from Yemen is highly inequitable since the Applicant had no reason to preserve any receipts required, even assuming that receipts were available in Yemen.

The United Nations Administrative Tribunal confirmed the decision (doc. 1 in Annex 11):

"33. 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 Applicant, in accordance with the timing prescribed in the judgement, has submitted a claim for payment in accordance with paragraph XV of the judgement, but still has received no payment from the UNDP. The Applicant is entitled to payment not only in regard to the claim for recalculation of salary and allowance, but also for the losses occasioned by his sudden recall from Yemen.

The Applicant contends that the Respondent has deliberately misled the highest Court in the world with his assertion in paragraph 79 on page 54, *supra*, of his statement where he claims that:

"Indeed, Mr. Fasla's assertion of a regular practice of such recomputation is refuted by his own experience in Sierra Leone: originally assigned there for a period of over a year, he was granted the usual Installation and Assignment Allowances; when he was transferred from Freetown to Taiz,

after only three and a half months he neither claimed nor was he offered any recalculation of emoluments or a Subsistence Allowance for the time spent in Freetown."

The Applicant would like to give again evidence of falsehood on the part of the Respondent and to state certain facts about his stay in Freetown. In the first place, the Applicant was receiving his salary at the New York post adjustment, second, he was without dependants in Sierra Leone, and was awarded under one of the discretional powers that the Administrator of UNDP and the Resident Representative have, and in accordance with the UNDP practice known by the Respondent, per diem, not for the regular period of 15 days, but closer to 40 days while receiving his subsistence allowances. Evidence of receipt can be easily traced by the Respondent either through the vouchers of disbursement which are in the hands of the Bureau of Management and Budget, or in the Office of the Controller of the United Nations, or the journal of account of UNDP office during his stay in Sierra Leone.

Third, the per diem ceased on the day UNDP provided the Applicant with a house partly subsidized by the Sierra Leone Government, and partly by the fund of stabilization managed by the UNDP office.

The house had been rented for the Applicant in the free market for the amount of $500 per month. The house had been completely furnished by the Department of the Establishment of the Government of Sierra Leone, in accordance with an agreement between UNDP and the governments of various developing countries.

It is for this reason that the Applicant did not request for his stay of three and one half months in Sierra Leone a recalculation of his salary and allowances. If the Applicant had been provided with these facilities in Yemen, which were available at other posts, he would not have requested a recalculation of his allowance.

The Applicant contends also that the living conditions in Yemen were not comparable to the living conditions in Sierra Leone, where no hardship of living conditions was experienced. Reasonableness with respect to such costs and allowances depends on the specific circumstances. The peculiar hardship associated with a precipitate return from Yemen are what make it so unfair and arbitrary to deny the Applicant the relief he seeks under plea *(p)*, or to explain why such a denial is reasonable.

LIST OF ATTACHMENTS TO THE PERSONAL ANNEX OF MR. MOHAMED FASLA[1]

1. Extract from UNDP Field Manual, 15 December 1966
2. Provisional statement of Policy Guidelines for Personnel Management in UNDP Field Offices, 30 August 1966
3. Amended letter of appointment, 5 June 1968
4. UN General Assembly resolution 2241 (XXI), 20 December 1966
5. UN General Assembly resolution 153 (II), 15 November 1947
6. Extract from *The Delegates World Bulletin*, 18 December 1972
7. Cable from Mr. Birt to Mr. Faruqi, 10 April 1968
8. Cable from Mr. Faruqi to Mr. Birt, 17 April 1968
9. Cable from Mr. Vaidyanathan to Mr. Grafteaux, 30 June 1969
10. Letter from Mr. Birt to Mr. Sarfraz, 29 July 1969
11. Cable from Mr. Sarfraz to Mr. Birt, 6 August 1969
12. Letter from Mr. Fasla to Mr. Hoffman, 12 August 1970

[1] Attachments not reproduced. *[Note by the Registry.]*