COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

EFFET DE JUGEMENTS DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES ACCORDANT INDEMNITÉ

AVIS CONSULTATIF DU 13 JUILLET 1954

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1. LETTER FROM THE CANADIAN AMBASSADOR AT THE HAGUE TO THE REGISTRAR OF THE COURT

February 15, 1954.

Excellency,

As you know, the International Court of Justice has been asked to give an advisory opinion regarding certain decisions made recently by the United Nations Administrative Tribunal on the question of awards to staff members whose appointments were terminated.

In this connection it was thought that some governments would like to submit a written statement of their views on this question.

I am instructed by my Government to inform you that, although Canada is very interested in the questions before the Court, it does not wish to submit a written statement. The views of the Canadian Government on the legal and constitutional principles involved are summarized in the records of the Debates in the Fifth Committee, which I presume have been transmitted to the Court by the Secretary-General of the United Nations.

My Government would, however, consider it a favour if it could receive copies of the written statements made by other governments on this matter.

Please accept, etc.

(Signed) Thomas A. STONE.

2. EXPOSÉ ÉCRIT DU GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE

La demande d'avis consultatif présentée par l'Assemblée générale des Nations Unies à la Cour internationale de Justice dans la résolution du 9 décembre 1953 pose deux questions, l'examen de la deuxième question dépendant de la réponse donnée à la première.

La première question vise « le droit (pour l'Assemblée générale), pour une raison quelconque, de refuser d'exécuter un jugement du Tribunal (administratif des Nations Unies) accordant une indemnité à un fonctionnaire des Nations Unies à l'engagement duquel il a été mis fin sans l'assentiment de l'intéressé ».

En supposant ce droit reconnu, la deuxième question concerne la qualification des « principaux motifs sur lesquels l'Assemblée générale peut se fonder pour exercer légitimement ce droit ».

Avant d'examiner le problème au fond, deux observations préliminaires seront faites, afin de replacer les questions posées à la Cour dans leur contexte général.

On peut se demander d'abord comment naît ce problème de l'exécution par l'Assemblée générale des décisions du Tribunal administratif. Car l'Assemblée n'est pas normalement un organe d'exécution au sein des Nations Unies : elle est un organe délibérant. L'organe d'exécution, si on laisse de côté le Conseil de Sécurité et le Comité d'État-Major dont les compétences sont spéciales, est le Secrétaire général. Ceci ressort clairement de l'article 98 de la Charte, d'après lequel « le Secrétaire général agit en cette qualité (de plus haut fonctionnaire de l'Organisation) à toutes les réunions de l'Assemblée générale, du Conseil de Sécurité, du Conseil économique et social et du Conseil de Tutelle. Il remplit toutes autres fonctions dont il est chargé par ces organes. »

Les décisions du Tribunal administratif sont donc normalement exécutées par le Secrétaire général. Bien que pareille affirmation ne figure pas dans le statut du Tribunal, ceci résulte implicitement de l'article 9. D'après cet article, le Tribunal a, dans certains cas, le pouvoir « d'ordonner l'annulation de la décision contestée ou l'exécution de l'obligation invoquée » : bien évidemment cet ordre d'annulation ou d'exécution est donné au Secrétaire général.

D'après le même article, dans les cas où il y a lieu à indemnité, « celle-ci est fixée par le Tribunal et versée par l'Organisation des Nations Unies » : elle est donc versée par les soins du Secrétaire général, qui administre le budget de l'Organisation.

Ainsi, l'exécution des décisions du Tribunal administratif incombe au Secrétaire général. Lorsque la demande d'avis fait allusion à l'hypothèse d'un droit pour l'Assemblée « de refuser d'exécuter un jugement du Tribunal accordant indemnité », s'agit-il d'une sorte de pouvoir de revision de l'Assemblée, ou bien de la

part prise par l'Assemblée dans l'exécution des décisions du Tribunal sous la forme du pouvoir que détient l'Assemblée d'examiner et d'approuver le budget de l'Organisation (article 17 de la Charte), puisque les indemnités attribuées par le Tribunal administratif sont payées sur des crédits inscrits au budget par le Secrétaire général et approuvés par l'Assemblée générale ? Les deux hypothèses devront être étudiées.

Une deuxième observation préliminaire consiste à rappeler que le problème posé à la Cour se rattache au problème du statut des fonctionnaires des Nations Unies. Dès la création des Nations Unies, ce statut a été aménagé en vue d'assurer une certaine stabilité de la fonction internationale et de donner au personnel les garanties dont l'expérience de la Société des Nations avait montré l'importance. L'utilité d'un tribunal administratif n'a jamais été contestée ; les résultats obtenus par le tribunal de la Société des Nations et le tribunal du Bureau international du Travail étaient présents à la mémoire des auteurs du statut provisoire qui prévoyait la création du Tribunal administratif des Nations Unies. Ce tribunal constitue donc un élément de l'organisation de la fonction publique internationale.

Le Gouvernement de la République française démontrera successivement :

1° que le Tribunal administratif possède les caractères d'un véritable tribunal, avec les conséquences que cet état comporte ;

2° que les rapports existant entre le Tribunal administratif et l'Assemblée générale donnent sa juste place à la compétence financière de l'Assemblée générale sans porter atteinte à l'indépendance du Tribunal administratif.

I

Caractères du Tribunal administratif

Le régime juridique du Tribunal administratif des Nations Unies découle clairement des dispositions de son statut. En tête de ces dispositions figure la déclaration contenue dans l'article premier : « Le présent statut crée un tribunal qui portera le nom de Tribunal administratif des Nations Unies. »

Les textes de base sont ceux qui définissent les pouvoirs du Tribunal et des dispositions, telles que celle de l'article 2, paragraphe 3, du statut du Tribunal administratif (« en cas de contestation touchant sa compétence, le Tribunal décide »), ou celle de l'article 10, paragraphe 2 (« Les jugements sont définitifs et sans appel ») sont sans équivoque.

Tout tribunal, national ou international, possède certaines qualités inhérentes à la fonction juridictionnelle. Ces qualités sont la permanence, l'indépendance et l'impartialité. Or, le Tribunal administratif est constitué à l'avance et indépendamment

des affaires qu'il est amené à juger ; ses membres sont élus pour une période de trois ans et rééligibles (article 3, § 2), et un membre ne peut être relevé de ses fonctions par l'Assemblée générale que si les autres membres estiment à l'unanimité qu'il n'est plus qualifié pour les exercer (article 3, § 5). Cette dernière disposition équivaut à l'institution du principe d'inamovibilité des juges pendant la période d'exercice de leurs fonctions.

Par ailleurs, les demandes présentées au Tribunal sont appelées « requêtes » (articles 6, 7 et 9) et les actes qui sont accomplis par le Tribunal sont qualifiés de « jugements » (article 10) ou de « décisions » (article 12).

On peut ajouter que, comme l'a fait ressortir le représentant de la France à la 5me Commission, le 7 décembre 1953 (doc. A/C. 5/SR. 426 du 9 décembre 1953, texte français, p. 9), « le Tribunal administratif est le seul organe qui n'ait pas à présenter un rapport annuel à l'Assemblée générale et, par ce fait, se singularise parmi tous les organes subsidiaires des Nations Unies ».

Mais il y a plus que ces aspects extérieurs de la fonction juridictionnelle. Le Tribunal administratif dit le droit. L'article 10, paragraphe 2, du statut du Tribunal décide que ses jugements « sont définitifs ». L'article 12, concernant les cas d'extension de la compétence du Tribunal administratif à une institution spécialisée, par accord entre celle-ci et le Secrétaire général, stipule que « pareil accord prévoira expressément que cette institution sera liée par les décisions du Tribunal ».

Le règlement et le statut du personnel des Nations Unies font ressortir le contraste qu'il y a entre, d'une part la Commission paritaire de recours qui, d'après l'article 111, 1, du règlement, « est chargée d'examiner les recours (des fonctionnaires) .... et de donner au Secrétaire général des avis à leur sujet », et dont les avis font l'objet, d'après le paragraphe *l)* de l'article 111, 3, du règlement, d'une « décision finale » du Secrétaire général, et d'autre part le Tribunal administratif qui, d'après l'article 11, 2, du statut du personnel, « connaît des requêtes des membres du personnel .... et statue sur ces requêtes.... ».

Mais si cette autorité de la chose jugée est incontestable au regard des membres du personnel requérant et du Secrétaire général, l'est-elle pour autant au regard de l'Assemblée générale ? On pourrait en effet n'accorder aux jugements du Tribunal qu'un effet relatif, en limitant leur autorité aux requérants et au Secrétaire général. Si bien que, même après avoir démontré que le Tribunal administratif est un véritable tribunal dont les décisions ont l'autorité de la chose jugée, la démonstration n'est pas encore complète, car la nature exacte des relations qui existent entre ce Tribunal et l'Assemblée générale n'est pas encore apparue. C'est sur ce point fondamental qu'il convient d'insister.

Certaines délégations aux Nations Unies ont, au cours des débats, considéré que l'article 10, paragraphe 2, du statut du

Tribunal administratif d'après lequel les jugements « sont définitifs et sans appel » ne concerne pas l'Assemblée générale et ne lui est pas opposable. Le raisonnement à l'appui de cette thèse a été notamment présenté par le délégué des États-Unis à la 5me Commission, le 3 décembre 1953 (doc. A/C. 5/SR. 420 du 7 décembre, texte français, p. 8), dans les termes suivants : « On a prétendu que, si l'Assemblée revenait sur les décisions du Tribunal, les Nations Unies seraient à la fois juge et partie ; ce n'est pas exact : chaque fois que le Tribunal est appelé à connaître d'une cause, les parties en présence sont, d'une part un fonctionnaire du Secrétariat et d'autre part, non pas l'Assemblée générale, mais le Secrétaire général en sa qualité de plus haut fonctionnaire de l'Organisation ; l'Assemblée n'est pas partie aux débats .... Il est vrai que le statut du Tribunal stipule que ses décisions doivent être définitives et sans appel ; toutefois, il ne s'agit pas ici du droit d'une partie à en appeler des décisions du Tribunal : ce qui nous occupe, c'est la possibilité d'examiner à nouveau ces décisions sur l'initiative de l'autorité législative supérieure qui a créé le Tribunal.... »

Le Gouvernement de la République française reconnaît, comme l'indique le délégué des États-Unis, que l'Assemblée générale n'est pas « partie » à l'instance devant le Tribunal administratif. Mais le problème est de savoir si les décisions du Tribunal sont opposables à l'Assemblée, bien qu'elle ne soit pas partie à l'instance. Aucune disposition du statut du Tribunal ne stipule que l'autorité des jugements soit limitée au requérant et au Secrétaire général ; au contraire, le caractère général de l'autorité de la chose jugée apparaît dans deux dispositions de ce statut. C'est d'abord l'article 9, d'après lequel, si le Tribunal reconnaît le bien-fondé de la requête, il peut ordonner « l'annulation de la décision contestée » ; il est clair qu'une décision administrative ainsi annulée le sera à l'égard de tous, y compris l'Assemblée générale. C'est ensuite l'article 12, d'après lequel, lorsqu'un accord sera intervenu avec une institution spécialisée pour lui étendre la compétence du Tribunal, « cette institution sera liée par les décisions du Tribunal » ; il s'agit là d'une obligation que le texte précité ne limite pas au Secrétaire général de l'institution en cause, mais qui aura effet sur l'institution dans son ensemble.

Il n'est donc pas exact d'affirmer que l'Assemblée générale ne peut pas être liée par les décisions du Tribunal, sous prétexte qu'elle n'est pas partie à l'instance.

Pour établir que l'Assemblée générale n'est pas liée, il faudrait donc établir soit que l'Assemblée a une compétence juridictionnelle de revision par rapport au Tribunal administratif, soit qu'elle a, à l'égard des décisions du Tribunal, un droit de sanction ou de veto qu'elle peut exercer grâce au moyen d'action que lui fournit sa compétence budgétaire en vertu de la Charte. Le Gouvernement de la République française se propose de montrer qu'une telle

thèse ne représente pas la nature véritable des relations existant entre le Tribunal administratif et l'Assemblée générale.

Reconnaître un droit de revision à l'Assemblée, c'est violer l'article 10, paragraphe 2 : « Les jugements sont définitifs et sans appel. » Cette disposition reprise du statut du Tribunal administratif de la S. d. N. avait été proposée par le Secrétaire général dans son rapport du 21 septembre 1949 (doc. A/986), s'inspirant, disait-il, des vues exprimées en 1946 par le Comité consultatif restreint nommé par le Secrétaire général en application de la résolution XII *b)* du 13 février 1946, et chargé d'établir un statut de Tribunal administratif. D'après ses vues telles qu'elles ressortent des déclarations de M. Aghnidès, président du comité précité, devant la 5me Commission le 15 novembre 1946 (doc. A/C. 5/SR., p. 114), « les décisions du Tribunal administratif seraient sans appel : un appel de ces décisions retarderait le règlement définitif d'affaires déjà examinées à l'intérieur du Secrétariat par des organismes créés à cette fin ».

Pour prouver l'inopposabilité à l'Assemblée de l'article 10, paragraphe 2, du statut du Tribunal, il faudrait donc démontrer positivement que l'Assemblée est, en vertu d'une autre disposition, effectivement titulaire d'un droit de revision.

Le délégué de l'Australie disait, devant la 5me Commission le 4 décembre 1953 (doc. A/C. 5/SR. 421 du 7 décembre, texte français, p. 11), que « le paragraphe 2 de l'article .... 10 du statut du Tribunal administratif .... signifie seulement que les parties en présence ne peuvent pas faire appel d'un jugement du Tribunal administratif et n'exclut pas une revision des jugements par l'Assemblée générale, car cette revision ne saurait être assimilée à un appel ». Mais encore faudrait-il qu'une telle compétence de revision, si elle est différente de l'appel, soit prévue par le statut du Tribunal ou un autre texte. Car dès lors qu'est reconnu dans le statut même le caractère juridictionnel des décisions du Tribunal, l'existence d'une procédure de revision de ces jugements ne peut se présumer. La seule sorte de revision qui soit envisagée par le statut est celle du statut lui-même dont l'article 11 stipule qu'il « peut être amendé par décision de l'Assemblée générale ». On ne peut donc estimer, avec le délégué de l'Argentine dans sa déclaration du 4 décembre 1953 (doc. A/C. 5/SR. 421 du 5 décembre, texte français, p. 20), qu'« il n'y a dans le statut aucune disposition par laquelle l'Assemblée a renoncé à son droit inaliénable d'étudier toutes les questions qui sont du domaine de l'Organisation ». Car il ne s'agit pas ici d'« étudier une question » : il s'agit de prendre une décision d'ordre juridictionnel, de reviser un jugement.

L'Assemblée générale exercerait une certaine fonction juridictionnelle alors que rien, dans la Charte, ne permet de lui reconnaître cette faculté. Dans le cadre de ses compétences générales, en vertu des articles 10 et suivants, l'Assemblée ne peut prendre

que des recommandations, ce qu'on ne peut véritablement étendre à la notion de jugement. L'approbation du budget, prévue à l'article 17 et sur laquelle des explications seront données dans le présent exposé, ne peut non plus être considérée comme une fonction juridictionnelle, car elle ne s'applique pas à une situation contentieuse. On peut en dire autant des diverses dispositions de la Charte par lesquelles l'Assemblée a un pouvoir d'acceptation d'accords (articles 16, 17, § 3, 62, § 3, etc.).

Cela ne signifie pas d'ailleurs que l'Assemblée ne soit pas en mesure d'assurer une certaine forme de protection au personnel des Nations Unies, tout comme un parlement national peut être en mesure de protéger les intérêts des fonctionnaires nationaux. Mais cette protection est une protection d'ordre général et réglementaire, et non pas d'ordre juridictionnel. En exerçant cette compétence l'Assemblée générale restera dans le cadre de ses activités. Par contre, on voit mal comment elle pourrait exercer la fonction juridictionnelle de revision des jugements du Tribunal administratif. Le représentant de l'Inde disait le 7 décembre 1953 (doc. A/C. 5/SR. 425, 10 décembre, texte français, p. 19) : « .... les affaires soumises au Tribunal ne peuvent guère être décidées par la méthode de vote et .... l'Assemblée générale n'est pas une institution adéquate pour trancher des questions de droit et moins encore pour examiner des cas individuels du point de vue juridique ».

Pour nier l'autorité de chose jugée attachée aux décisions du Tribunal administratif, on invoque parfois un précédent tiré de l'histoire du Tribunal administratif de la S. d. N.

En fait, le principe de l'autorité des jugements du Tribunal administratif de la S. d. N. n'a pas été contesté et ce n'est qu'au moment de la liquidation de la S. d. N., en 1946, que certaines décisions du Tribunal administratif ont été écartées par l'Assemblée de la S. d. N. dans des circonstances que le Gouvernement de la République française croit devoir rappeler parce que cette intervention de l'Assemblée de la S. d. N. a été invoquée comme justifiant, par analogie, un pouvoir de revision de l'Assemblée générale des Nations Unies à l'égard des jugements du Tribunal administratif. Le précédent a été invoqué par le délégué des États-Unis dans son exposé devant la 5me Commission le 3 décembre 1953 (doc. A/C. 5/SR. 420 du 7 décembre, texte français, p. 9). Par contre, il ne fut pas mentionné lors des débats qui eurent lieu en 1949 au moment de la création du Tribunal administratif des Nations Unies. On peut se référer par exemple à la déclaration du représentant des États-Unis, le 2 novembre 1949, devant la 5me Commission (doc. A/C. 5/SR. 214 du 3 novembre 1949, § 25) : « Il est important, disait ce représentant, de comprendre clairement la relation qu'il y aura entre l'autorité du Tribunal et celle de l'Assemblée elle-même ; (la délégation américaine) tient à s'assurer que le Tribunal ne sera pas en mesure de contester l'autorité de l'Assemblée générale lorsqu'elle procédera à telles modi-

fications du règlement du personnel que l'évolution des circonstances pourrait exiger.... Il est bien entendu que le Tribunal tiendra compte de cette intention de l'Assemblée générale et ne permettra la création d'aucun droit acquis susceptible d'enlever leur portée aux mesures que l'Assemblée estimerait nécessaires. »

Cette déclaration du représentant des États-Unis est intéressante, parce qu'elle souligne, de l'avis du Gouvernement de la République française, en quoi consiste le véritable problème de la revision : ce que le représentant des États-Unis voulait éviter, c'est la création de droits acquis mettant obstacle à toute faculté de revision réglementaire de l'Assemblée générale, mais il ne faisait évidemment pas allusion aux droits créés par des décisions antérieures de l'Assemblée dont le Tribunal administratif a pour tâche d'assurer l'application ; son appréhension eût été sans objet s'il avait cru possible la revision par l'Assemblée des sentences du Tribunal.

En 1946 précisément, l'Assemblée de la S. d. N. a sanctionné ce qu'elle a pensé être une ingérence du Tribunal administratif dans le domaine du pouvoir réglementaire de l'Assemblée.

Le Tribunal administratif avait, le 26 février 1946, refusé, dans une série de jugements, l'application à des fonctionnaires de la S. d. N. d'une résolution de l'Assemblée du 14 décembre 1939 prévoyant dans le cadre des mesures de crise exigées par la guerre la suspension de certains contrats ou la démission de certains fonctionnaires et modifiant les conditions du préavis et de l'indemnité de licenciement. Ce faisant, le Tribunal administratif avait adopté la thèse des requérants d'après laquelle « les droits conférés aux fonctionnaires par les dispositions du statut sont des droits acquis qui ne peuvent pas être modifiés, même par une décision de l'Assemblée » (cf. doc. S. d. N. A 16 1946 du 22 mars 1946, p. 2). Le Tribunal avait affirmé que « les dispositions du statut du personnel constituaient, en principe, un élément contractuel de la situation des fonctionnaires » et que ceux-ci « possédaient un droit acquis à l'application des règles du statut en vigueur au moment de leur engagement » (*ibid.*, p. 5).

L'Assemblée fut amenée à examiner la question de principe incluse dans ces affaires parce que la Commission de Contrôle de la S. d. N., consultée par le Secrétaire général p. i. sur l'application des jugements en cause, invita celui-ci à ne prendre aucune mesure à ce sujet avant que la question n'ait été examinée, dans son ensemble, par l'Assemblée, parce qu'une acceptation des jugements du Tribunal administratif placerait ses décisions en dehors de l'autorité de l'Assemblée (cf. rapport général de la 2me Commission de l'Assemblée du 17 avril 1946, doc. A/32 1946, X, p. 4).

Il ressort de ces documents que la question de principe effectivement posée devant l'Assemblée fut, non pas celle du droit

de regard de l'Assemblée sur les jugements du Tribunal administratif, mais bien à l'inverse celle du droit de regard du Tribunal administratif sur les décisions de portée réglementaire de l'Assemblée. Ce n'est pas l'Assemblée qui prétendait pouvoir annuler les jugements du Tribunal mais le Tribunal qui avait annulé les effets d'une réglementation prise par l'Assemblée.

Cette même observation se trouve faite dans le rapport présenté à la 2me Commission par le sous-comité que cette commission avait institué pour examiner le problème. On trouve dans ce rapport les affirmations suivantes qui sont caractéristiques (*ibid.*, pp. 5 et 6) : « Dire que le Tribunal pouvait appliquer les décisions de l'Assemblée à des cas particuliers ne signifie pas qu'il pouvait mettre en question la validité de ces décisions elles-mêmes » (§ 1). « Il n'existe pas d'organisme extérieur qui ait qualité pour rendre exécutoire la décision rendue par le Tribunal contre l'Assemblée. » « Il n'appartenait pas au Tribunal administratif de mettre en doute la validité de la résolution de l'Assemblée en date du 14 décembre 1939, il lui incombait exclusivement de donner effet à cette décision » (§ 5). « Bien qu'il n'existe pas de moyen régulier d'en appeler de la décision du Tribunal, nous estimons qu'il est du pouvoir de l'Assemblée, laquelle est le mieux placée pour interpréter ses propres décisions, de déclarer, par voie de résolution législative, que les jugements rendus par le Tribunal sont de nul effet à la fois parce qu'ils tendaient à passer outre à l'acte législatif de l'Assemblée et en raison de leur conclusion erronée quant à l'intention de cet acte » (§ 6).

La doctrine qui émane de ces affirmations est nette : la discussion porte sur le pouvoir du Tribunal administratif vis-à-vis des décisions de l'Assemblée et il est reconnu « qu'il n'existe pas de moyen régulier d'en appeler de la décision du Tribunal ». C'est uniquement dans le cas où le Tribunal se place au-dessus de l'Assemblée que l'Assemblée peut méconnaître la décision du Tribunal. Au fond, en 1946, on a refusé d'appliquer une décision juridictionnelle entachée d'excès de pouvoir.

Les conclusions du rapport du sous-comité qui ont été adoptées par la 2me Commission et finalement par l'Assemblée font donc ressortir la différence radicale entre le problème posé en 1946 à la S. d. N. et le problème posé en 1953 aux Nations Unies. Ainsi que le soulignait le représentant de l'Uruguay le 4 décembre 1953 (doc. A/C. 5/SR. 422 du 8 décembre, texte français, p. 12) : « dans les cas en discussion le Tribunal n'a nullement essayé de substituer son autorité à celle de l'Assemblée générale et il n'a ni annulé, ni même soumis à revision l'une quelconque des décisions de l'Assemblée ». En 1953 ni le Secrétaire général, ni aucun gouvernement n'ont prétendu que le Tribunal administratif avait délibérément rejeté une décision d'ordre réglementaire prise antérieurement par l'Assemblée générale. Le Gouvernement de la République française, sans prendre position sur la doctrine exposée en 1946 par le sous-

comité, estime que cette différence est essentielle. L'analogie qui serait invoquée pour tirer de ce précédent intéressant la S. d. N. un argument concernant les Nations Unies est superficielle. La structure générale du Tribunal administratif de la S. d. N. confirme au surplus l'interprétation qui vient d'être donnée du précédent de 1946. Dans le rapport de la Commission de Contrôle qui élabora le projet de statut du Tribunal et qui fut soumis à l'Assemblée le 29 avril 1927 (cité par Siraud, *Le Tribunal administratif de la S. d. N.*, thèse, Paris, 1942, p. 24), on relève l'observation suivante : « Le statut international de la S. d. N. empêche les fonctionnaires d'intenter des actions devant les tribunaux ordinaires en vue de l'application des clauses de leurs contrats d'engagement. On ne saurait toutefois estimer satisfaisant qu'une catégorie de fonctionnaires, comptant plusieurs centaines de personnes engagées suivant des contrats qui sont nécessairement compliqués et qui peuvent donner lieu à des différends quant à leurs effets légaux précis, n'aient pas la possibilité de soumettre à la décision d'un corps judiciaire des questions concernant leurs droits. » Et commentant les caractères généraux du Tribunal administratif de la S. d. N., M. Siraud (*ibid.*, p. 31) écrivait : « Le problème à résoudre .... consistait à établir dans une société inter-étatique une organisation de la fonction juridictionnelle différenciée à la fois des organes juridictionnels étatiques et des organes inter-étatiques investis de la fonction législative ou de la fonction exécutive. »

L'étude des textes réglant la compétence du Tribunal administratif des Nations Unies, comme celle des précédents, conduit le Gouvernement de la République française à la conclusion que les décisions du Tribunal administratif ont un caractère juridictionnel.

Il faut simplement ajouter qu'un examen des travaux préparatoires, notamment des débats qui ont eu lieu en 1949 à la 5me Commission de l'Assemblée lors de la création du Tribunal administratif, conduit à la même conclusion. Au cours de ces débats, certaines délégations, telles que les délégations des États-Unis et de l'U. R. S. S., se sont montrées peu favorables à la création du Tribunal. La délégation soviétique notamment proposa de substituer au nom de Tribunal administratif qu'elle jugeait impropre, celui de conseil ou de comité administratif, ou encore celui de commission des réclamations (doc. A/C. 5/SR. 189 du 5 octobre 1949, § 13). Répondant sur ce point au délégué soviétique, M. Aghnidès, président du comité consultatif pour les questions administratives et budgétaires, fit observer « qu'il n'y aurait pas de difficulté à modifier le nom du Tribunal administratif, pourvu que le caractère de tribunal ne s'en trouve pas affecté » (*ibid.*, § 17). La délégation soviétique ayant cependant insisté, sa proposition fut repoussée le 2 novembre 1949, par 19 voix contre 5 avec 13 abstentions, et l'article 1 tel qu'il existe dans le statut fut adopté le même jour par 32 voix contre 0 avec 3 abstentions (doc. A/C. 5/SR. 214 du 3 novembre 1949, § 33).

En présence des dispositions formelles du statut et des enseignements tirés des débats de 1949, il faut bien constater que l'Assemblée générale a incontestablement voulu créer un tribunal, avec les caractéristiques habituelles que possède un tribunal dans toute société et dans tout ordre juridique, qu'il s'agisse d'un ordre juridique interne ou d'un ordre juridique international.

Certains gouvernements ont parfois mis en doute le pouvoir de l'Assemblée générale de créer un véritable tribunal, un tel tribunal n'étant pas prévu par la Charte. Le représentant des États-Unis à la 5me Commission a, par exemple, déclaré le 3 décembre 1953 (doc. A/C. 7/SR. 420 du 7 décembre 1953, p. 7 du texte français) que « les décisions (du Tribunal administratif) ne sont pas celles d'un tribunal, mais d'un organe administratif subsidiaire qui a été créé par l'Assemblée générale ». Ce représentant a insisté en particulier *(ibid.)* sur la différence qu'il y a « entre un organe principal des Nations Unies, tel que l'Assemblée générale, au sens de l'article 7, paragraphe 1, de la Charte et un organe subsidiaire, au sens des articles 7, paragraphe 2, et 22 de la Charte, destiné à remplir certaines fonctions que la Charte confie à l'Assemblée générale ».

On voit apparaître ici l'idée de délégation de compétence. En déléguant une compétence au Tribunal administratif, l'Assemblée ne s'en serait pas dessaisie définitivement, car *(ibid.)* « elle ne peut pas se soustraire à sa responsabilité » qui résulte de l'article 101. Cet article 101, en effet, stipule dans son paragraphe 1 que « le personnel (du Secrétariat) est nommé par le Secrétaire général conformément aux règles fixées par l'Assemblée générale ».

Le représentant des États-Unis en déduisait que « l'Assemblée .... de par la Charte, ne peut pas déléguer les pouvoirs dont elle est investie en matière d'ouvertures de crédits à un petit groupe de quatre personnes, quel que soit le soin qui a présidé à leur choix » (*ibid.*, p. 9).

Cette idée de « délégation » a été invoquée par d'autres représentants, au cours de ce même débat de 1953, mais comme argument en faveur d'une thèse opposée à la thèse précédente. C'est ainsi que le représentant de la Syrie, le 7 décembre 1953, a déclaré (doc. A/C. 5/SR. 425 du 10 décembre, texte français, p. 7) que le Tribunal administratif « dispose des pleins pouvoirs judiciaires qui lui ont été délégués ». Et ce représentant établissait une analogie entre la situation du Tribunal administratif des Nations Unies et celle du Conseil d'État français après la loi du 24 mai 1872 qui a substitué au régime dit de la « justice retenue », dans lequel le Conseil d'État ne statuait qu'à titre de conseiller du pouvoir exécutif, le régime dit de la « justice déléguée », dans lequel le Conseil dispose d'un pouvoir de décision propre et indépendant. Le Gouvernement de la République française ne considère pas comme pertinente l'argumentation fondée sur cette notion, que cette argumentation soit favorable ou qu'elle soit défavorable au Tribunal administratif. En effet, ainsi que l'a fait très exactement

remarquer le représentant des Pays-Bas dans son intervention du 4 décembre 1953 (doc. A/C. 5/SR. 421 du 7 décembre 1953, texte français, p. 6), « l'Assemblée générale n'a pas créé le Tribunal administratif pour l'aider dans l'exercice d'une fonction dont elle pourrait en principe s'acquitter elle-même ; au contraire, elle a créé cet organe car elle ne pouvait pas remplir des fonctions judiciaires ». Le représentant de l'Inde disait de même, le 7 décembre (doc. A/C. 5/SR. 425 du 10 décembre, texte français, p. 19), que « la création même du Tribunal, avec l'autorité dont il a été investi par l'Assemblée générale, prouve que cette dernière s'est bien rendu compte que la nature même des choses lui interdit le rôle d'organe judiciaire ». Le représentant du Liban soulignait le même jour, dans le même sens, qu'« aucune disposition de la Charte ne donne à l'Assemblée de pouvoirs judiciaires » et que, par conséquent, l'Assemblée « ne peut déléguer au Tribunal des pouvoirs judiciaires qu'elle ne possède pas » ; et s'il n'en était pas ainsi, « cela reviendrait à dire que l'Assemblée générale, qui n'a pas de pouvoirs judiciaires, a agi d'une manière illégale lorsqu'elle a créé le Tribunal en tant qu'organe subsidiaire » (doc. A/C. 5/SR. 426 du 9 décembre, texte français, p. 17).

Ainsi apparaît la difficulté qu'il y aurait à utiliser la notion de délégation, dans toute la mesure où l'Assemblée générale est un organe essentiellement politique, auquel nulle disposition de la Charte ne confère de compétence juridictionnelle, l'organe judiciaire principal des Nations Unies étant la Cour internationale de Justice, d'après l'article 92 de la Charte.

Le Gouvernement de la République française estime injustifié de donner un sens trop étroit au concept d'« organe subsidiaire » tel qu'il est prévu aux articles 7, paragraphe 2, et 22 de la Charte. Il n'est nulle part dit dans la Charte qu'un organe subsidiaire ne peut exercer qu'une compétence déjà possédée par l'organe principal qui l'a créé. Car c'est de la Charte que l'organe subsidiaire tient sa légitimité. Le mode de création est une chose, la nature de l'organe en est une autre. L'Assemblée, le Conseil de Sécurité et le Conseil économique et social peuvent créer des organes subsidiaires. La seule condition apportée par la Charte à leur création est qu'ils soient jugés « nécessaires à l'exercice des fonctions » de l'organe principal fondateur (articles 22, 29 et 68). L'Assemblée générale peut valablement créer un organe subsidiaire qui exerce une fonction judiciaire, cette création ne provenant pas d'une délégation de compétence, mais de l'exercice du pouvoir reconnu à l'Assemblée générale par la Charte de créer tout organe nécessaire à son bon fonctionnement.

Cette idée a été bien soulignée par le représentant de la Colombie le 4 décembre 1953 (doc. A/C. 5/SR. 421 du 7 décembre 1953, texte français, p. 17), lorsqu'il a précisé que « le fait qu'un organe établit un autre organe n'implique pas nécessairement que le deuxième organe est subordonné au premier », et par le repré-

sentant du Liban, le 7 décembre 1953 (doc. A/C. 5/SR. 426 du 9 décembre, texte français, p. 17), d'après lequel un organe créé par l'Assemblée générale en application de l'article 7, paragraphe 2, de la Charte, « est un organe subsidiaire des Nations Unies et non de l'organe principal auquel l'Organisation a confié la tâche de le créer », et les pouvoirs de cet organe « découlent directement de la Charte et non d'une délégation faite par l'Assemblée générale ».

Aucune disposition de la Charte n'a interdit à l'Assemblée générale de créer un tribunal pour trancher des difficultés contentieuses pouvant résulter de l'activité du Secrétariat. L'essentiel est de constater que cette création s'est révélée « nécessaire », pour reprendre l'expression de l'article 7, paragraphe 2, en particulier pour l'application de l'article 101, paragraphe 1, qui associe le Secrétaire général et l'Assemblée générale dans une responsabilité conjointe en ce qui concerne le personnel de l'Organisation.

Les constatations précédentes permettent de préciser la légitimité et le rôle du Tribunal administratif, sans qu'il soit nécessaire de faire appel à une justification doctrinale telle que la théotie de la séparation des pouvoirs, à laquelle il fut fait allusion au cours des débats aux Nations Unies ; M. Aghnidès, président du Comité consultatif pour les questions administratives et budgétaires, déclara, lorsque commença, le 29 septembre 1949, le débat sur la création du Tribunal administratif des Nations Unies (doc. A/C. 5/SR. 187 du 29 septembre 1949, § 48), que « la création d'un tel tribunal .... permettant à tout membre du personnel d'avoir recours à une juridiction impartiale dont le Secrétaire général ne faisait pas partie, le principe de la séparation des pouvoirs était ainsi mis en vigueur de façon très stricte ». Il s'agit *donc ici des pouvoirs du Secrétaire général et du Tribunal.* Le représentant du Canada, le 5 décembre 1953 (doc. A/C. 5/SR. 423 du 8 décembre 1953, texte français, p. 3), et le représentant de l'Inde, le 7 décembre 1953 (doc. A/C. 5/SR. 425 du 10 décembre, texte français, p. 19) faisaient allusion « à la séparation des pouvoirs législatif et judiciaire ».

Il suffit, dans le cadre du présent exposé, de marquer que l'intention qui a présidé à la création du Tribunal administratif a été d'instituer, à côté du Secrétaire général, un contrôle de caractère juridictionnel, dont l'exercice a été confié à un organe indépendant du Secrétaire général. Il s'agit donc de la séparation des fonctions d'administrateur et de juge. Le régime des agents internationaux, dont seuls les principes les plus généraux ont été formulés dans la Charte, n'a pas pris forme définitive dès la création des Nations Unies. Dans la première période de mise au point, par la force des choses, le personnel a été soumis à la règle de l'administration. Mais il n'y a pas de carrière sans garanties. Ces garanties ont pris une double forme, celle d'institutions consultatives, commissions de discipline et de recours, placées auprès de l'administration, et

celle d'un organe juridictionnel indépendant de l'administration active. Au moment de la création du Tribunal administratif, on a hésité entre la désignation de ses membres par la Cour internationale de Justice et leur nomination par l'Assemblée générale. Mais, à aucun moment, il n'y eut de doute sur l'utilité d'un tribunal administratif comme garant de l'indépendance des fonctionnaires internationaux, considérée comme indispensable par l'article 105, paragraphe 2, de la Charte. La complexité croissante des règlements administratifs inhérents au développement de la fonction publique internationale a rendu « nécessaire » un organe de caractère juridictionnel, pour les Nations Unies, comme plus tôt pour la S. d. N. et le B. I. T. Le président du Comité du personnel, M. Epstein, disait devant la 5me Commission, le 5 octobre 1949 (doc. A/C. 5/SR. 190, § 12) : « le fait qu'il existait des règles, des règlements et des procédures administratifs susceptibles d'être interprétés de façon erronée semble être un argument irrésistible en faveur de la création d'un organisme impartial chargé de prendre une décision au sujet de tout différend provoqué par leur application ».

De la nature juridictionnelle du Tribunal administratif découlent des conséquences naturelles, confirmées par les textes. La plus importante est que le Tribunal est juge de sa compétence. Certains représentants lors des débats de 1953 n'admettaient pas ce principe. C'est ainsi que, d'après le délégué de l'Australie, dans son exposé du 4 décembre 1953 (doc. A/C. 5/SR. 421 du 7 décembre 1953, texte français, pp. 10 et 11), l'Assemblée générale ne serait pas tenue de suivre le Tribunal administratif « si celui-ci faisait fi de son autorité, agissait de façon répréhensible ou contraire à la raison, obéissait à son seul bon plaisir, ou tolérait de la part du Secrétaire général des mesures uniquement dictées par le bon plaisir de celui-ci, s'il commettait un abus de pouvoir, s'il se laissait corrompre ou si ses décisions avaient pour résultat de créer ou d'aggraver des injustices au lieu de les redresser ».

Ces notions se ramènent en somme à l'incompétence ou l'abus de pouvoir du Tribunal. C'est là une hypothèse théorique et non actuelle que le Gouvernement de la République n'estime pas nécessaire de traiter. Mais en admettant même que les cas envisagés par le délégué de l'Australie poseraient le problème de l'excès de pouvoir du Tribunal, cet excès de pouvoir ne retirerait pas, bien au contraire, l'autorité de chose jugée aux décisions du Tribunal en dehors des cas où il serait prouvé. Or, dans la présente demande d'avis, la Cour n'est pas saisie de la question de la nature et des effets d'un excès de pouvoir du Tribunal administratif d'une organisation internationale. Le problème posé est celui de l'exécution ou du refus d'exécution d'un jugement « accordant une indemnité à un fonctionnaire » en dehors de toute considération d'excès de pouvoir du juge et de revision de cet excès de pouvoir ; le moyen dont dispose l'Assemblée pour empêcher l'exécution des jugements,

c'est de refuser le vote du crédit permettant le règlement de cette indemnité. L'Assemblée générale peut-elle le faire ?

II

Rapports entre l'Assemblée générale et le Tribunal administratif en ce qui concerne l'exécution des décisions du Tribunal

Les pouvoirs financiers de l'Assemblée sont prévus par l'article 17 de la Charte. Le principe en est énoncé par le paragraphe 1 de cet article, d'après lequel « l'Assemblée générale examine et approuve le budget de l'Organisation ». Les indemnités accordées par le Tribunal administratif devant être comprises dans les crédits budgétaires, l'Assemblée en est indirectement maîtresse par son pouvoir de vote dérivant de l'article 17.

Cette situation a été considérée comme l'expression d'un droit propre de l'Assemblée sur les décisions du Tribunal. Le représentant des États-Unis dans son intervention du 3 décembre 1953 (doc. A/C. 5/SR. 420 du 7 décembre 1953, texte français, p. 8) déclarait : « Les crédits nécessaires au versement des indemnités doivent être ouverts par l'Assemblée dans le cadre du budget de l'Organisation ; or, en vertu de l'article 17 de la Charte, c'est l'Assemblée générale qui approuve le budget de l'Organisation ; si, comme ses fonctions l'y obligent, elle veut étudier et approuver les crédits en question, l'Assemblée non seulement peut, mais doit, examiner à nouveau les décisions du Tribunal.... » De même le délégué de l'Australie disait, le 4 décembre 1953 (doc. A/C. 5/SR. 421 du 7 décembre 1953, texte français, p. 11) : « L'Organisation doit verser l'indemnité seulement si elle n'est pas déraisonnable ou discriminatoire, et si le Tribunal a exercé convenablement les pouvoirs qui lui sont confiés.... L'Assemblée n'a pas renoncé à son pouvoir d'approuver le budget et, l'aurait-elle voulu, que la Charte ne le lui permettrait pas. Il ne fait donc aucun doute que l'Assemblée a le droit de refuser l'ouverture d'un crédit s'il apparaît que le Tribunal a agi contrairement à la raison. »

Le délégué de Cuba disait, le 5 décembre 1953 (doc. A/C. 5/SR. 423 du 8 décembre, texte français, p. 5) : « L'Assemblée générale possède des pouvoirs souverains auxquels elle ne peut renoncer ; même si elle estime les jugements du Tribunal parfaitement fondés, elle doit se prononcer sur l'ouverture des crédits nécessaires au versement des indemnités. » Le délégué de la Nouvelle-Zélande disait, le 5 décembre 1953 (doc. A/C. 5/SR. 423 du 8 décembre, texte français, pp. 9 et 10) : « Seules les plus graves raisons justifieraient une décision par laquelle l'Assemblée .... refuserait d'ouvrir les crédits nécessaires au versement des indemnités. Il peut arriver que les jugements du Tribunal soient si évidemment entachés d'erreurs que l'Assemblée soit justifiée à refuser de les exécuter.... »

Enfin, le délégué du Chili disait, le 8 décembre 1953 (doc. A/C. 5/SR. 427 du 11 décembre, texte français, pp. 9-10) : « L'Assemblée générale ne peut revoir ou reviser les jugements du Tribunal administratif, mais a le droit de décider des ouvertures de crédit nécessaires pour régler les indemnités. Lorsque l'Assemblée se prononce sur les différents chapitres du budget de l'Organisation, elle peut fort bien émettre un vote négatif sur tel ou tel chapitre lorsqu'elle considère que les crédits prévus sont excessifs.... Les décisions du Tribunal ne sont pas sujettes à revision ; mais l'Assemblée générale n'est pas, de ce fait, privée de son pouvoir de trancher toute question d'ordre budgétaire. »

Les citations précédentes montrent que ceux qui admettent l'existence d'un véritable droit au profit de l'Assemblée en matière de vote des crédits n'ont pas une opinion très nette en ce qui concerne la portée de ce droit. Même les plus ardents partisans du pouvoir de l'Assemblée n'osent y voir un pouvoir discrétionnaire et estiment que ce pouvoir ne peut s'exercer que pour des motifs ou dans des cas déterminés. Le délégué des États-Unis, dans son exposé précité du 3 décembre 1953 (doc. cit., pp. 9-10), reconnaissait qu'« en règle générale l'Assemblée ne doit pas chercher à revenir sur les décisions du Tribunal administratif » et qu'« un nouvel examen des décisions par l'Assemblée générale ne devrait pas constituer un précédent qui puisse être invoqué à l'occasion de toutes les décisions futures du Tribunal ».

Mais les difficultés commencent lorsqu'on veut déterminer quels sont les motifs qui sont susceptibles de justifier un refus de crédits par l'Assemblée, et la recherche de ces motifs équivaut à un réexamen des sentences du Tribunal au gré de la majorité politique existant dans l'Assemblée.

Le Gouvernement de la République française considère que la thèse d'un droit de revision de l'Assemblée repose sur une confusion et une ambiguïté et qu'il s'agit en réalité d'un pouvoir non discrétionnaire de l'Assemblée. Ce pouvoir ne saurait en aucun cas porter atteinte aux droits légitimement acquis des créanciers des Nations Unies.

L'Assemblée examine et approuve le budget, mais c'est le Secrétaire général qui l'exécute. Il a déjà été souligné que le Secrétaire général est chargé d'appliquer les décisions du Tribunal administratif et notamment d'assurer le versement des indemnités fixées par le Tribunal. Ce versement est effectué sur les crédits du chapitre 17 du budget (dépenses communes afférentes au personnel) qui sont votés chaque année en bloc par l'Assemblée générale. D'après le règlement financier, le Secrétaire général dispose des fonds affectés à un chapitre sans avoir besoin d'une autorisation spéciale de l'Assemblée et peut procéder à des virements de poste à poste à l'intérieur d'un chapitre ; s'il veut procéder à un virement d'un chapitre à un autre chapitre, l'autorisation du Comité consultatif pour les questions administratives

et budgétaires est nécessaire. Dans la présentation du projet de budget à l'Assemblée générale, le Secrétaire général spécifie, dans le cadre de chaque chapitre, l'affectation des crédits aux différents postes, mais sans être lié par ces indications.

Il suffit donc que les crédits du chapitre 17 soient encore suffisants au moment où il y a lieu à versement des indemnités fixées par le Tribunal, ou que le Secrétaire général puisse opérer un virement de chapitre à chapitre, pour que ce versement ait lieu sans aucune intervention de l'Assemblée générale. En fait, dans les affaires antérieures à celles d'août et octobre 1953, le Secrétaire général a effectué les paiements sur les fonds faisant partie des crédits du chapitre 17 du budget.

Ainsi la procédure normale d'exécution des jugements du Tribunal administratif ne comporte aucune intervention particulière de l'Assemblée générale, après qu'elle a voté les crédits afférant au chapitre 17. L'Assemblée sera saisie du règlement des indemnités si ce règlement exige des crédits additionnels, soit que le Secrétaire général n'ait pas le moyen de procéder autrement que par une demande de tels crédits, soit qu'il ne veuille pas prendre la responsabilité d'un virement de crédits. Le pouvoir budgétaire de l'Assemblée s'exerce donc, soit à l'avance au moment du vote du budget et à propos des prévisions contenues dans le projet de budget présenté par le Secrétaire général, soit *a posteriori* si des crédits additionnels sont nécessaires.

Lors du vote du budget, le contrôle des indemnités que le Tribunal pourra décider dans l'avenir serait sans objet, puisque seules les situations particulières et concrètes résultant de chaque jugement pourraient donner lieu à contrôle. En effet, les indemnités éventuelles étant régulièrement imputées sur les crédits du chapitre 17 qui ont été votés au préalable par l'Assemblée, on peut dire, pour reprendre les termes du délégué du Liban dans son exposé du 7 décembre 1953 (doc. A/C. 5/SR. 426 du 9 décembre, texte français, p. 18), que « l'Assemblée s'est engagée d'avance à ouvrir les crédits nécessaires pour payer les indemnités fixées par le Tribunal ». Ainsi, lorsqu'il n'y a pas de demande de crédits additionnels, l'Assemblée n'a aucun moyen fondé sur son pouvoir budgétaire d'intervenir dans le règlement des indemnités.

C'est donc par accident en quelque sorte, si les crédits sont insuffisants, que l'Assemblée peut être amenée à user de son pouvoir budgétaire pour refuser les crédits additionnels nécessaires au paiement d'indemnités. Pour généraliser cette situation, il faudrait que l'Assemblée fasse disparaître de son budget les crédits prévus à l'avance pour le licenciement du personnel.

Le Gouvernement de la République française estime que ce serait détourner ce pouvoir budgétaire de sa véritable fin que d'en faire un moyen juridique de mise en échec d'une décision du Tribunal administratif qui, pour une raison ou pour une autre, déplairait à la majorité des membres de l'Assemblée.

En fait cette question a parfois été exposée en confondant divers problèmes. Une question est de savoir si, en présence d'un excès de pouvoir, l'Assemblée a le droit de considérer une décision du Tribunal administratif comme nulle et non avenue ; comme il a été indiqué plus haut, cette question n'est pas posée à la Cour. En dehors de cette hypothèse, une autre question est de savoir si l'Assemblée est compétente pour annuler les dettes de l'Organisation des Nations Unies ; à cette question on ne peut évidemment répondre que par la négative. Dès lors, un point est clair, en présence de dettes liquides et exigibles de l'Organisation des Nations Unies, aucune démarche, aucune décision de l'Assemblée des Nations Unies ne peut porter atteinte à ces droits.

Quelle est donc la nature exacte des pouvoirs budgétaires de l'Assemblée ? Le Gouvernement de la République française estime inutile de discuter la question dans son ensemble ; il suffit, aux fins de la présente demande d'avis, d'examiner la compétence de l'Assemblée en présence de dettes liquides et exigibles.

Dans cette hypothèse, l'Assemblée n'a que des pouvoirs de nature financière ; impuissante à agir sur les titres que se sont acquis les créanciers, elle ne peut que retarder financièrement leur extinction et elle n'a le droit de le faire que pour des motifs financiers.

Tout refus qui serait inspiré par le désir de faire échec aux engagements des Nations Unies serait illégitime, et le Gouvernement de la République française se refuse, en ce qui le concerne, à envisager cette hypothèse, quel que soit le créancier dont il s'agisse.

Tant les précédents que les textes conduisent à fortifier cette position.

A l'époque de la S. d. N., un comité de juristes fut institué par le président de la première commission de la 13me Assemblée pour émettre un avis sur le droit éventuel de l'Assemblée de réduire le traitement des fonctionnaires (cf. J. O. de la S. d. N., supplément spécial n° 107, p. 206). Ce comité était composé de MM. Andersen, Basdevant, Huber, sir William Malkin, et Pedroso. Dans son avis donné à l'unanimité le 8 octobre 1932, ce comité a notamment posé la question suivante : « .... L'Assemblée a-t-elle le droit de déroger (aux droits des fonctionnaires) dans l'exercice de son pouvoir budgétaire ? », et y a répondu ainsi : « Dans l'établissement de ses prévisions de dépenses, l'Assemblée est juridiquement tenue de prendre pour base les droits des fonctionnaires. » Comme l'a fait très justement remarquer le délégué de la Syrie le 7 décembre 1953 (doc. A/C. 5/SR. 426 du 10 décembre, texte français, p. 8), « dans l'argument selon lequel l'Assemblée possède l'autorité suprême en matière budgétaire .... on confondait sans doute « pouvoir » et « droit » ; nul ne songe à contester le pouvoir de l'Assemblée d'ouvrir ou de refuser des crédits, mais elle n'a certes pas le droit de se dérober à ses obligations financières.... ».

De même le délégué de l'Égypte déclarait, le 7 décembre 1953 (doc. A/C. 5/SR. 426 du 9 décembre, texte français, p. 26), que « l'Assemblée générale .... est tenue de voter immédiatement les crédits nécessaires au paiement des indemnités ». Et le délégué de la Norvège constatait le 7 décembre aussi (doc. A/C. 5/SR. 426 du 9 décembre, texte français, p. 15) qu'« en refusant d'ouvrir les crédits supplémentaires demandés par le Secrétaire général, l'Assemblée provoquerait une protestation indignée de la part des milliers de personnes fonctionnaires ou non qui ont passé un contrat avec l'Organisation ; cette réaction serait d'ailleurs parfaitement justifiée, car les intéressés, en s'engageant ainsi, ont pensé que l'Organisation des Nations Unies était, comme toute autre organisation civilisée, liée par les obligations juridiques qu'elle a elle-même énoncées.... ».

Le statut du Tribunal administratif contient deux articles qui appuient l'interprétation défendue par le Gouvernement de la République française. Ce sont les articles 9 et 12. D'après l'article 9, « lorsqu'il y a lieu à indemnité, celle-ci est fixée par le Tribunal et versée par l'Organisation des Nations Unies ». Cette phrase fait ressortir que le versement est une obligation de toute l'Organisation et que l'Assemblée générale elle-même ne dispose d'aucun pouvoir en la matière. D'après l'article 12, qui concerne l'extension de la compétence du Tribunal à une institution spécialisée, il est stipulé d'abord que « cette institution sera liée par les décisions du Tribunal », ensuite « qu'elle sera chargée du paiement de toute indemnité allouée à un de ses fonctionnaires par le Tribunal. » L'expression « toute indemnité » souligne dans ce dernier texte l'ampleur de l'obligation en cause et le fait que le principe ne supporte aucune exception. En tout cas, il résulte des articles 9 et 12, d'une part que le paiement est une simple opération matérielle qui ne permet pas de mettre en cause l'existence d'une obligation, d'autre part qu'il est la conséquence d'une obligation qui pèse, non pas sur tel ou tel organe, mais sur l'Organisation des Nations Unies ou l'institution spécialisée dans leur ensemble. Ainsi que le disait le délégué de la Pologne le 7 décembre 1953 (doc. A/C. 5/SR. 425 du 10 décembre, texte français, p. 11), « les décisions du Tribunal ont force obligatoire pour les Nations Unies ». A partir du moment où l'indemnité a été fixée par le Tribunal administratif, le règlement de cette indemnité est devenu une obligation juridique pour l'Organisation ou l'institution. Cette obligation provient des dispositions formelles du statut du Tribunal, adoptées par l'Assemblée et maintenues tant qu'elles n'ont pas été amendées conformément à l'article 11, ou des dispositions de l'accord passé entre le Secrétaire général et l'institution spécialisée, selon l'article 12 du statut.

Cette obligation ne peut faire l'objet d'un régime de défaveur discriminatoire parmi les autres obligations des Nations Unies ; elle n'est pas d'une nature inférieure aux autres.

Ce serait commettre une erreur juridique que de considérer l'Assemblée générale comme un rouage normal dans le mécanisme du règlement des indemnités, parce que, au moment où il s'agit du règlement, l'obligation juridique à la charge de l'Organisation est déjà née et ne peut plus être annulée sans le consentement du bénéficiaire de cette obligation. Il a été précédemment indiqué que l'Assemblée générale n'apparaît d'ailleurs pas nécessairement dans la procédure de règlement. Comme le disait le représentant de la Nouvelle-Zélande le 5 décembre 1953 (doc. A/C. 5/SR. 425 du 8 décembre, texte français, p. 14), « on ne peut déduire (du pouvoir budgétaire de l'Assemblée) que chaque délégation est aussi libre de voter pour ou contre le paiement d'une indemnité que de se prononcer sur d'autres propositions d'ordre budgétaire ».

Le Gouvernement de la République française estime, en conclusion, que l'Assemblée générale a eu le pouvoir de créer le Tribunal et elle a le pouvoir de le supprimer, car personne n'a de droit acquis à l'existence du Tribunal, mais que l'Assemblée n'a pas le droit de s'opposer au fonctionnement du Tribunal en mettant obstacle à l'application de l'article 9 du statut du Tribunal tant que cet article subsiste. Dès lors qu'une obligation existe à la charge de l'Organisation, le Secrétaire général est tenu de demander des crédits pour faire face à cette obligation et l'Assemblée générale est tenue de les accorder. Dans le cas des décisions du Tribunal administratif, l'Assemblée n'a pas de pouvoir d'appréciation discrétionnaire parce que l'article 9 du statut a confié au Tribunal le soin de fixer l'indemnité. Le crédit doit donc correspondre exactement à l'indemnité telle qu'elle a été fixée par le Tribunal.

Les seuls motifs sur lesquels l'Assemblée pourrait juridiquement se fonder pour refuser les crédits qui permettraient d'éteindre une dette liquide et exigible, sont d'ordre strictement financier. Dans l'hypothèse où les finances de l'Organisation des Nations Unies connaîtraient des difficultés telles qu'il ne serait pas matériellement possible de procéder à tous les paiements, il apparaîtrait que l'Assemblée est habilitée à refuser au moins partiellement et temporairement les crédits nécessaires à l'extinction de toutes les dettes. Il n'y a pas en effet de raison de refuser d'appliquer à l'Organisation des Nations Unies le bénéfice de principes que la pratique et la jurisprudence internationales ont dégagés à propos des dettes conventionnelles des États. Le Gouvernement de la République française croit toutefois absolument inutile de développer ce point qui est purement théorique, car il est notoire qu'un refus de l'Assemblée ne serait dans les présentes circonstances nullement fondé sur des motifs financiers.

3. TELEGRAM FROM THE MINISTER FOR FOREIGN AFFAIRS OF ECUADOR TO THE PRESIDENT OF THE COURT

[Translation by the Registry from the Spanish text]

Ecuador Government has knowledge invitation Court to States Members United Nations to make declaration on right General Assembly refuse to give effect decisions Administrative Tribunal. Although my Government not received said invitation wish to ratify opinion sustained in Eighth General Assembly that General Assembly has right modify decisions Administrative Tribunal. — Minister for Foreign Affairs.

3. TÉLÉGRAMME DU MINISTRE DES AFFAIRES ÉTRANGÈRES DE L'ÉQUATEUR AU PRÉSIDENT DE LA COUR

[Traduction établie par le Greffe sur le texte en espagnol]

Gouvernement Équateur a connaissance invitation de Cour à États Membres Nations Unies de présenter déclaration sur droit Assemblée générale à refuser donner effet décisions Tribunal administratif. Bien que mon Gouvernement n'ait pas reçu cette invitation crois devoir ratifier l'opinion soutenue en Huitième Assemblée générale déclarant que Assemblée générale a droit modifier décisions Tribunal administratif. — Ministre Affaires étrangères.

4. MEMORANDUM BY THE INTERNATIONAL LABOUR OFFICE

I. Introduction

The General Assembly of the United Nations on 9 December 1953 adopted a resolution requesting the International Court of Justice to give an advisory opinion on the following questions :

"(1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent ?

(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right ?"

By letter dated 14 January 1954 the Registrar of the Court notified the Director-General of the International Labour Office that, in accordance with Article 66 of the Statute of the Court, the International Labour Organization was considered by the President as likely to be able to furnish information on the matter. This memorandum prepared by the International Labour Office is submitted in response to that notification.

Relation of the International Labour Organization to the experience of the League of Nations

Until the dissolution of the League of Nations in 1946 the International Labour Organization, "as part of the organization of the League", maintained the closest relations with it in staff matters. The International Labour Office participated in the preparatory work which led to the creation of the League of Nations Administrative Tribunal, and the jurisdiction of that Tribunal was available to officials of the International Labour Office throughout its existence.

In 1946, by action of the League Assembly and the International Labour Conference, the International Labour Organization continued to maintain the Tribunal, and, with certain other modifications in its Statute, its name was changed to the Administrative Tribunal of the International Labour Organization.

The International Labour Organization has always attached the highest importance to the international character of its staff and to the administrative procedures necessary to safeguard its

status and independence. For over a quarter of a century its experience in confronting issues affecting the legal relationship between its staff, its administration and its principal organs was shared with the League of Nations. Since 1927, when the Administrative Tribunal of the League was established, the International Labour Organization has had an uninterrupted relationship with an administrative tribunal. Moreover, following the action by the Assembly of the League in 1946 in deciding not to give effect to the awards of the Administrative Tribunal in the case of 13 officials of the League and the International Labour Office who had been terminated in 1939, the Governing Body of the International Labour Office and the International Labour Conference gave legislative consideration to questions not dissimilar to the issues now before the International Court of Justice. As a consequence, the Statute of the Administrative Tribunal of the International Labour Organization was amended by the adoption of its present Article XII which provides as follows:

"*Article XII*

1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding."

This Article was designed to set at rest the perplexing difficulty that confronted the League Assembly in 1946 and to provide a clear path for the Governing Body to follow in cases where in its view the decision of the Administrative Tribunal was subject to challenge on grounds of lack of jurisdiction or fundamental procedural fault. The significance of the Article lies in the fact that such challenge is made to superior judicial authority and is not left to the decision of a representative body.

The question of the authority of any organ of the International Labour Organization in relation to decisions of its Administrative Tribunal is, of course, not before the Court. Indeed the existence of this Article in the Statute of the Tribunal makes it unlikely that that question would ever arise. For the grant of the right to the Governing Body to challenge a decision of the Tribunal and have the matter adjudicated by the highest international court was tacit recognition of the principle that the guarantee to international officials of judicial process can become illusory if review of that process is other than judicial.

Scope of this memorandum

In submitting this memorandum, the International Labour Office has restricted itself to providing the Court with factual and historical information relating to the experience of the League and the International Labour Organization which bears upon the issues before it.

The material used is limited to official records and documents. No effort has been made to search out judicial or other legal authority or analogy in national or international law, or to marshal arguments, which tend to support one conclusion or another in the case before the Court. In short, the International Labour Office in this memorandum has confined its submission to objective fact and history, which in its view will be of aid to the Court in its present inquiry.

Summary of experience of the League and the International Labour Organization related to this inquiry

The history of the right of appeal of staff members of the League of Nations and of the International Labour Office may be divided into separate phases.

The first covers the period from the First Session of the League Assembly in 1920 until the establishment of the Administrative Tribunal in 1927. In that period all members of the League Secretariat and of the International Labour Office appointed for a period of five years or more had the right in cases of dismissal to appeal to the Council of the League or the Governing Body of the International Labour Office. This right of appeal was exercised only in one instance. The Council of the League in the Monod case acted through a judicial committee appointed for the purpose, having declared in advance that it would adopt its decision as its own. The Committee found for the complainant and awarded an indemnity, and the Council instructed the Secretary-General to take the necessary action. So far as the records disclose, no question was raised by the League Assembly as to the competence of the Council to award the indemnity or the propriety of the Secretary-General's action in making the payment to the complainant out of League funds.

The second period covers the years 1927-1939, starting with the establishment by the League of its Administrative Tribunal and as a consequence the withdrawal of the right of appeal to the Council of the League and the Governing Body of the International Labour Office. In that interval, the Administrative Tribunal heard 21 complaints, and in two of them awarded compensation to the complainants. But in neither case did the Assembly of the League, against whom the awards were granted, raise question as to their payment.

During this period also, in 1932, the question of the right of the League to reduce the salaries of officials of the Secretariat, the International Labour Office and the Registry of the Permanent Court of International Justice was considered by the Supervisory Commission and the Fourth Committee. A small committee of lawyers was asked to give a legal opinion on the matter. In Commission and Committee discussion, as well as in the report of the committee of lawyers, inquiry was directed to the authority of the Administrative Tribunal to find in favour of officials in case their salaries were altered by unilateral decision of the Assembly ; and some opinion was expressed as to the obligation of the Assembly to give effect to such awards if rendered.

The third phase covers the decisions by the Administrative Tribunal of the League in 1946 which awarded compensation to officials of the League and the International Labour Office whose contracts had been terminated in 1939 as part of the necessary cut-back of staff because of the war. The League Assembly decided not to give effect to those decisions of the Tribunal and the debate in the Finance Committee and the Assembly itself was concerned with the right and power of the League to take that action.

In 1946 also the Governing Body of the International Labour Office considered whether it should give effect to the Tribunal's awards to the two officials of the International Labour Office concerned. It decided that, although it should act in conformity with the decision of the League, some provision should be made "to secure that no difficulty may arise in the future as regards the execution of any judgment the Tribunal may hand down".

The final phase covers the action taken by the Governing Body and the International Labour Conference in amending the Statute of the Administrative Tribunal by the insertion of the Article, quoted above, providing for review by the International Court of Justice ; and the operation of the Tribunal, for which the International Labour Organization assumed the responsibilities of the League, from 1946 to the present day. During that period the Tribunal awarded compensation to one official of the International Labour Office. The issue was not raised as to whether the award should be carried out.

II. Right of appeal to the Council of the League and the Governing Body of the International Labour Office

The right of appeal of members of the Secretariat of the League of Nations and of the staff of the International Labour Office against the termination of their employment by dismissal was from the outset regarded as an essential safeguard of the staff. It existed as part of the administrative machinery of the League since its inception.

Origin of right of appeal

Indeed, at the first meeting of the Fourth Committee which considered the staff and organization of the Secretariat, the Committee decided that the right of appeal should be expressly provided for [1]. Appeal lay to the Council of the League or the Governing Body of the International Labour Office. It could be brought only against a decision of dismissal and it was limited to staff members appointed for a period of five years or more [2]. The resolution granting the right of appeal adopted by the League Assembly at its First Session on 17 December 1920 provided [3]:

> "That all members of the Secretariat and of the International Labour Office appointed for a period of five years or more by the Secretary-General or the Director of the International Labour Office shall, in the case of dismissal, have the right of appeal to the Council or to the Governing Body of the International Labour Office as the case may be."

There was little discussion in the Assembly. In introducing the report of the Fourth Committee to the Assembly, the Rapporteur (Sir James Allen, New Zealand) stated that the reason for it was obvious [4].

Exercise of right of appeal to the Council—Monod case, 1925

In the years 1920-1927, while members of the staff had this right of appeal, it was only used in one instance.

In January 1925, M. Monod, a former official of the Secretariat of the League, filed a complaint that the Administration was guilty of a unilateral breach of his contract of employment. The League Council was faced with the question of the procedure to be followed in dealing with the appeal. It first requested the Supervisory Commission to undertake an enquiry [5]. On the basis of its report the question was submitted "to a body of three persons possessing judicial experience" to be designated by the acting President of the Council after consultation with the Chairman of the Supervisory Commission. The Council resolution provided that the Council "declares in advance that it will adopt the conclusions of this body as its own decision in the case" [6]. By this action the Council recognized that the guarantee to staff members of due process in contractual matters should take the

[1] L. of N., Records of the 1st Assembly, Meetings of Committees, II, pp. 7, 90 and 91.

[2] *Ibid.*, p. 91.

[3] L. of N., Records of the 1st Assembly, Plenary Meetings, pp. 663-664.

[4] *Ibid.*, pp. 655-656.

[5] Council Resolution of 9 March 1925. L. of N., *Official Journal*, 6th Year, No. 4, Minutes of the Thirty-third Session of the Council, p. 436.

[6] Council Resolution of 8 June 1925. L. of N., *Official Journal*, 6th Year, No. 7, Minutes of the Thirty-fourth Session of the Council, p. 858.

form of quasi-judicial consideration rather than decision by governmental representatives.

The judicial body found for the complainant and granted an award of £750. Their unanimous opinion went at some length into the facts of the case; and the basis of their judgment was not that there had been a failure on the part of the Secretary-General to fulfil his undertaking to the complainant, but that the interests of the complainant had been injuriously affected by the action of the Secretary-General legitimately taken in the public interest [1].

The Council of the League on 5 September 1925 passed a Resolution adopting the conclusions of the Committee's report and instructing the Secretary-General to take the necessary action [2]. No question was raised by the League Assembly as to the propriety of the Secretary-General making this payment out of League funds.

III. Creation of the Administrative Tribunal of the League of Nations

As early as 1921, the League considered the desirability of an administrative tribunal to provide "guarantees" to the staff. In discussion in the Fourth Committee the French delegate, Mr. Réveillaud, stated that he recognized that there existed the right of appeal to the Council, but asked whether "the Council, in spite of its high authority, [was] a sufficiently independent organization to settle differences of this kind" [3]. Albert Thomas, Director of the International Labour Office, pointed out that there were certain guarantees provided by the internal machinery of joint boards, but he also stressed the need of providing for the establishment of a juridical body with functions "analogous to those of the Conseil d'État in France" [4].

There appeared to be general agreement on the point in the Fourth Committee, but nothing further was done until the Monod appeal before the Council gave impetus to the question. In 1925 the first step was taken when Mr. Nederbragt, the Rapporteur of the Supervisory Commission, was asked to prepare a report.

Rapporteur's Report 1925

The Rapporteur's concept of the juridical tribunal which his report [5] proposed was of a body which would ensure to officials

[1] L. of N., *Official Journal*, 6th Year, No. 10, Minutes of the Thirty-fifth Session of the Council, pp. 1441-1447.

[2] *Ibid.*, p. 1338.

[3] L. of N., Records of the 2nd Assembly, Meetings of Committees, II, p. 71.

[4] *Ibid.*, pp. 71-72.

[5] Document C.C. 196. English translation of the passages quoted is by the I.L.O.

"the firm conviction of safety and security emanating from justice". It would provide "a judge for every dispute" and prevent one of the parties from being a "judge in his own case". It would "reduce to its proper limits the category of acts of 'government' or 'sovereignty' which are not subject to any jurisdiction". Its judgments would be final.

The Rapporteur discarded the concept of an advisory body. "An advisory body", the report stated, "dependent or independent, may be useful but can never replace a body empowered to give final decisions." The report stressed the notion that the establishment of an administrative tribunal would increase rather than diminish the authority and position of the administration. The report said :

> "1° Justice is above us all, and we are all subject to it, whoever we may be, and whatever our position and functions may be ; 2° nothing brings greater respect and authority to men, their position and functions, than the firm resolve to adhere so strictly to the principles of justice and, accordingly, to established rules of law, that they are ready, in case of doubt or dispute, to submit the question at issue to an impartial judge and to comply with his decision...."

The report outlined the general ideas for a tribunal, and was the foundation upon which the draft statute was prepared.

Legislative history of the Statute of the Administrative Tribunal of the League of Nations

The examination of the legislative history of the Statute of the Tribunal in this memorandum is confined to those articles deemed to be relevant to the issues before the Court ; namely those dealing with (1) the finality of the decisions of the Tribunal ; (2) the execution of its judgments ; and (3) the determination of its competence.

Between February 1926 and February 1927, a series of drafts of a statute was considered by the Supervisory Commission of the League. The first draft [1] provided that the "decisions of the Tribunal shall bind the League and the official without appeal". It also provided that "the budget of the Administration to which the complainant belongs shall bear .... the amount of any compensation or costs awarded to the complainant". It contained no provision providing for the determination of the competence of the Tribunal in case of dispute as to its jurisdiction.

During a discussion of the first draft by the Supervisory Commission, question was raised whether the right of appeal to the Council of the League should be maintained. If it were, Mr. Réveillaud enquired whether this meant that the Council of the League

[1] Document C.C. 200.

and the Governing Body of the International Labour Office were to be regarded as superior to the Tribunal. He stated that in his view this right of appeal should be abolished, seeing that the right of appeal to the Tribunal already provided sufficient guarantees for complainants [1]. Professor Attolico, Assistant Secretary-General, explained that the authors of the draft had not eliminated the right of appeal to the Council or the Governing Body only from a desire to be as liberal as possible. In his view, it certainly did not appear to be necessary [2]. The Chairman, Mr. Osusky, stated that it would be preferable to relieve the Council of the essentially unimportant task of settling differences between the League and its staff [3]. Finally, in connection with the discussion of the remedies which the Tribunal could grant, Mr. Butler, Deputy-Director of the International Labour Office, remarked that the decisions of the Tribunal would be binding on the competent authorities of the organizations of the League [4].

The second preliminary draft [5] omitted any reference to the right of appeal to the Council of the League or the Governing Body. This draft still provided that the decisions of the Tribunal should be "final and without appeal", but a new paragraph was added which provided for "an application for revision by the Tribunal of a decision .... based only upon a discovery of some fact of such a nature as to be a decisive factor and unknown when the judgment was given". Another article provided that "any compensation awarded by the Tribunal shall be chargeable to the budget of the Administration concerned". Finally, a new article was added which provided that "all questions as to the competence of the Tribunal in any particular case shall be decided by it".

The third draft of the Statute, submitted to the Supervisory Commission jointly by the League Secretariat and the International Labour Office [6], retained the provision that the decisions of the Tribunal should be final and without appeal but eliminated the procedure for revision on newly-discovered evidence as undesirable in the interests of finality and avoidance of vexatious proceedings. No change was made in the provision that compensation should be chargeable to the budget of the Administration concerned or that questions relating to the competence of the Tribunal should be decided by it.

A draft of a proposed report containing the Statute approved by the Supervisory Commission was circulated by the Secretary-

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[1] Supervisory Commission, Provisional Minutes of the 18th Session, Fourth Sitting, p. 56.
[2] *Ibid.*
[3] *Ibid.*, p. 57.
[4] *Ibid.*, p. 70.
[5] Document C.C. 213.
[6] Document C.C. 222.

General on 5 August 1926[1]. No changes in substance were made and the statute and draft report were finally adopted by the Commission in February 1927. The only question raised in Commission discussion related to the right of appeal to the Council, which the Commission proposed should be rescinded. Mr. Nederbragt considered the hypothesis of an official invoking his right of appeal to the Council under the Assembly Resolution of 17 December 1920. In such case he suggested that the official would be within his rights on the ground that that Resolution could be considered as an integral part of his contract of employment. Mr. Réveillaud responded by saying he did not think the case would arise. There was no further discussion on the point[2].

Report of the Supervisory Commission proposing Statute of Tribunal

The report of the Supervisory Commission commented on the establishment of the proposed Tribunal in the following terms[3]:

"*Reasons for the proposed measure*

The establishment of a tribunal such as is now proposed is expected not merely to remove a grievance which may be felt by the staff of the Secretariat and of the International Labour Office, but also to be in the interest of the successful administration of these two offices. The international status of the League prevents officials from bringing actions in the ordinary courts to enforce the terms of their appointments. It is not, however, satisfactory that a class of employees amounting to several hundreds of persons and engaged on terms which are necessarily complicated and may give rise to disputes as to their exact legal effect, should have no possibility of bringing questions as to their rights to the decision of a judicial body. It is equally unsatisfactory for the administrations to be both judge and party in any dispute as to the legal rights of their officials, or for such disputes to be referred to the Council or the Governing Body of the International Labour Office. The special position of the League makes it difficult to refer claims by its officials to the jurisdiction of national courts. The remaining possibility, namely the reference of such disputes to a body constituted *ad hoc*, although it has been adopted in one case, is open to objections on many grounds and does not furnish a solution for the general problem.

Jurisdiction of the proposed Tribunal

.... the proposed Tribunal is to be exclusively a judicial body set up to determine the legal rights of officials on strictly legal grounds.... The function of the proposed Tribunal will be to pronounce finally upon any allegation that the administration has refused to give an

[1] Document C.C. 224.

[2] Supervisory Commission, Provisional Minutes of the 22nd Session, Fourth Sitting, p. 56.

[3] L. of N., *Official Journal*, Special Supplement, No. 58, Records of the 8th Assembly, Meetings of Committees, Minutes of the Fourth Committee, pp. 250-257.

official treatment to which he was legally entitled, or has treated him in a manner which constitutes a violation of his legal rights .... the Tribunal will be the final authority for the interpretation of the terms of an official's appointment and the regulations applicable to the official...."

The report went on to say [1]: "No provision for the revision of judgments of the Tribunal is inserted in the statute. It is considered that, in the interests of finality and of the avoidance of vexatious proceedings, the Tribunal's judgments should be final and without appeal as is provided in Article VI, paragraph 1."

In respect to budgetary provision for the execution of awards of compensation granted by the Tribunal, the Commission's report stated [2]:

"Provision is already made annually in the League Budget to cover compensation payable when an official meets with an accident or incurs a disease in the course and in consequence of his service. It does not seem to the Supervisory Commission that it would be possible or appropriate to calculate and insert in the budget the amount likely to be required to pay awards of compensation made by the Tribunal in respect of breaches of officials' rights. The Commission recommends that a nominal amount of 1,000 francs be inserted in the budgets of the Secretariat and the International Labour Office so as to provide an item to which such compensation can be charged if it becomes payable, and that any sum actually required in excess of this nominal vote be provided by a transfer under the usual guarantees."

Thus the report made clear that it was not envisaged that awards of the Tribunal would be subject to review in the exercise of budgetary authority, but that they would be paid out of the nominal credit inserted in the budget, or by intra-budgetary transfer.

Finally, the report referred to the right of appeal to the Council or to the Governing Body of the International Labour Office granted by the Resolution adopted on 17 December 1920, and recommended "that the establishment of the proposed Tribunal should have as its consequence the rescinding of this resolution [3]".

Final action establishing the Administrative Tribunal

The report of the Supervisory Commission was considered by a Sub-Committee of the Fourth Committee which recommended the provisional establishment of the Tribunal as an experiment. The Sub-Committee's report was adopted by the Fourth Committee of the Assembly [4] and on 26 September 1927 the Eighth

[1] *Ibid.*, p. 254.
[2] *Ibid.*, p. 254.
[3] *Ibid.*, p. 255.
[4] *Ibid.*, pp. 35-36.

Session of the Assembly passed a Resolution adopting the Statute establishing the Administrative Tribunal, abrogating the right of appeal to the Council, and providing that the Assembly of 1931 would "consider in the light of the experience gained whether there is reason to abrogate or amend the said Statute [1]".

In 1929 a committee was established by the Tenth Assembly to enquire into the organization of the Secretariat, the International Labour Office and the Registry of the Permanent Court of International Justice [2]. In its report the Committee noted with approval the existence, composition and jurisdiction of the Tribunal as one of the safeguards enjoyed by the staff for the proper application of its terms of appointment and the regulations to which it is subject. It pointed out that, in effecting the transition from the former system to the new system which it recommended, the principle that "no acquired rights must in any way be prejudiced" should be observed. "If any doubt arises as to the nature and extent of the acquired rights, the matter should be decided by the Administrative Tribunal [3]."

On the basis of a report of the Supervisory Commission [4], the Assembly of the League in 1931 confirmed the Statute without amendment, and the Tribunal thereby became a permanent body of the League [5].

IV. Consideration by the League of its legal right to reduce salaries of officials unilaterally

In 1932, in view of prevailing economic conditions, consideration was given by the League to the possibility of making salary reductions as an economy measure. The question was considered in the first instance as a legal one, i.e. whether the Assembly, by unilateral action, could legally reduce staff salaries. This question was first referred to the Supervisory Commission [6]. The Commission took the view that it was not worth the financial saving "to disturb the staff and impair the sense of security and stability that earlier Assemblies sought to give them [or] to enter upon prolonged legal controversies as to whether the Assembly has

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[1] L. of N., *Official Journal*, Special Supplement No. 54, Records of the 8th Assembly, Plenary Meetings, pp. 478 and 201.

[2] L. of N., *Official Journal*, Special Supplement No. 75, Records of the 10th Assembly, Plenary Meetings, pp. 142-144, 166-167, 468-470.

[3] L. of N., *Official Journal*, Special Supplement No. 88, Records of the 11th Assembly, Meetings of Committees, Minutes of the Fourth Committee, p. 307.

[4] L. of N., *Official Journal*, Special Supplement No. 97, Records of the 12th Assembly, Meetings of Committees, Minutes of the Fourth Committee, p. 112.

[5] *Ibid.*, p. 43, and L. of N., *Official Journal*, Special Supplement No. 93, Records of the 12th Assembly, Plenary Meetings, p. 152.

[6] L. of N., *Official Journal*, 13th Year, No. 7, Minutes of the 67th Session of the Council, pp. 1237-1238.

power on its own authority to alter contracts which appear to belong to the realm of private law.... [1]".

Discussion in the Fourth Committee of the Assembly [2] touched not only upon the legal right of the Assembly unilaterally to reduce salaries, but also upon the power and authority of the Assembly in relation to judgments of the Administrative Tribunal of the League. The hypothesis on which discussion revolved was (1) that the Assembly, by legislative action, reduced the salaries of permanent officials; (2) that officials so affected appealed to the Administrative Tribunal; and (3) that the Administrative Tribunal rendered judgment in their favour.

One point of view [3] was that the League could set the judgment of the Tribunal aside; it undoubtedly had the power, if not the right, to do so; but to exercise that power would be contrary to the principles on which the League's strength was based; it would be an opportunistic measure and the margin between opportunism and injustice was small.

A second point of view [4] was that the legal position of League officials was most precarious; their rights were based on a kind of gentleman's agreement; the Administrative Tribunal had very limited powers and the only safeguard of officials lay in their trust in the fairness of the League.

A third approach [5] was that the Administrative Tribunal was not an illusory safeguard; it had absolute and complete power to state the law, and from this point of view there was no difference between the Administrative Tribunal and the Councils of State or Supreme Courts in a number of countries. Although in theory the League could refuse the necessary vote for the execution of an award by the Administrative Tribunal, national parliaments had the same theoretical power to take the same position with regard to the judgments of the Councils of State or the Supreme Courts. In the League, just as much as in a national State, an assumption of that kind would be so disgraceful as to imply a state of anarchy.

As a result of this discussion, a proposal was adopted that before taking any action the Committee should receive the opinion of a Committee of Jurists [6].

The debate on this question in the Fourth Committee appears to be of such pertinence to the issues presently before the Court that the relevant excerpts therefrom are attached to this memorandum as Annex I.

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[1] L. of N., *Official Journal*, Special Supplement No. 107, Records of the 13th Assembly Meetings of Committees, Minutes of the Fourth Committee, p. 129.
[2] *Ibid.*, pp. 11 ff.
[3] *Ibid.*, p. 11.
[4] *Ibid.*, p. 15.
[5] *Ibid.*, p. 34.
[6] *Ibid.*, p. 51.

The Report of the Committee of Jurists—1932

Pursuant to the decision of the Fourth Committee, the committee of jurists was established and on 8 October 1952 submitted its report [1].

The jurists were unanimously of the opinion that the League Assembly did not have the right to reduce the salaries of the Secretariat, the International Labour Office or the Registry of the Court, unless such a right had been expressly recognized in the contracts of appointment. Their opinion was based primarily on the ground that the salary of each official was individually fixed by an agreement between him and the organization he served ; that his right to his salary rested upon a contract ; and that one party cannot alter a contract without the consent of the other.

Having reached the conclusion that officials possess contractual rights in regard to the amount of their salaries, the jurists then considered whether the Assembly nevertheless possessed the right to derogate therefrom in the exercise of its budgetary authority. The jurists answered this question in the negative. Their reasoning was based on the measures taken by the Assembly to ensure respect for the legal rights of its officials as evidenced by the establishment of the Administrative Tribunal. Its Statute clearly showed that it was the conception of the League Assembly that it could not use its budgetary authority to nullify an award of the Administrative Tribunal. The report stated [2] :

> "The Assembly, moreover, has taken measures to ensure that the rights of officials are respected. This was the object with which, by a Resolution of September 26th, 1927, it adopted the Statute setting up an Administrative Tribunal having jurisdiction to hear complaints alleging non-observance of the terms of appointments of officials (Article 2). Article 10 of this Statute shows clearly that, in the conception of the Assembly, its budgetary authority is not to serve the purpose of defeating the rights of officials. The Article states that 'any compensation awarded by the Tribunal shall be chargeable to the budget of the administration concerned'. In fact, since the Tribunal was set up, the budget of each organization concerned has contained an item relating to such compensation."

The opinion concluded with the following paragraph [2] :

> "If the Assembly reduced the salaries of officials, the latter would have the right to have recourse to the Administrative Tribunal. The considerations set out above lead the Committee to think that the Tribunal would decide in favour of the officials. As a result of such a decision, and in virtue of Article 10 of the Tribunal's Statute,

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[1] *Ibid.*, pp. 206-208. The members of the committee were : Mr. Holger Andersen, Mr. Basdevant, Mr. Max Huber, Sir William Malkin, Mr. Pedroso.

[2] *Ibid.*, p. 208.

the Assembly would then require to make in the next budget provision for paying compensation.

The Committee's opinion is unanimous."

The Fourth Committee of the Assembly took note of the opinion given by the jurists and accepted the view that the Assembly was not entitled to modify unilaterally the contracts entered into with its present officials [1].

Early in 1932, new procedures of appointment were adopted by the League and provisions were inserted in the Staff Regulations to the effect that appointments made after 15 October 1932 were subject to modification by the Assembly [2].

V. Experience of the Administrative Tribunal of the League of Nations, 1929-1946

During the period from 1929 to 1946, the Administrative Tribunal of the League considered 37 complaints, of which 13, decided in 1946, related to the termination of officials of the League and of the International Labour Office after the outbreak of the war.

Until the decisions in 1946, no question was raised in the League Assembly in respect to the payment of compensation awarded by the Tribunal [3]. Nor did the Tribunal itself in any of the cases that came before it give consideration to the question of the binding effect of its judgments or the execution of its awards.

Termination of officials—1939

The outbreak of the Second World War created conditions which raised again the question of the right of the League Assembly to refuse to give effect to the judgments of the Administrative Tribunal.

In December 1939, the League Assembly took steps to make the necessary retrenchment in the staff of the League Secretariat and the International Labour Office. Large staffs were no longer necessary and steps had to be taken for a reduction in force by the fairest arrangements possible in the circumstances. Officials were offered the choice of resigning or of having their appointments suspended. If they resigned they would be given a sum amounting to either six months' or one year's salary according to their previous length of service. If they elected suspension they would be given an *ex gratia* payment of three months' salary

[1] *Ibid.*, pp. 72-73.

[2] Article 30 *bis* of the Staff Regulations of the League : Article 16 *a* of the Staff Regulations of the I.L.O.

[3] In only two of the 24 cases—*Schumann* v. *Secretariat of the League of Nations*, decided in March 1934, and *Perrasse* v. *Secretariat of the League of Nations*, decided in May 1935—did the Court award compensation to the complainant.

and would retain their membership in the Pension Fund to which the League would continue to pay both its contribution and that of the official during the period of suspension [1].

In addition to these arrangements, provision had to be made for those officials whose services were no longer needed and who would not voluntarily consent to either suspension or resignation. To take care of such cases, the Assembly amended the Staff Regulations so as to reduce the period of notice of termination of permanent officials, or payment of compensation in lieu of such notice, from six months to one month. The amendments also provided that the payment of indemnity for termination of contract should be made in instalments over a four-year period instead of in a lump sum [2].

The great preponderance of the officials concerned voluntarily accepted one or the other of the alternative arrangements offered to them. However, in the case of some officials, the Secretary-General was forced to terminate their contracts and apply the amended Staff Regulations. Eleven officials of the League and two of the International Labour Office whose contracts had been so terminated brought complaints before the Administrative Tribunal alleging that the termination of their contracts in accordance with the provisions of the December 1939 amendments was in violation of their contracts of employment. The complainants asserted that, as their contracts were entered into prior to 15 October 1932 [3], under the Staff Regulations [4] they had acquired rights which could not be modified by decision of the Assembly or the Governing Body without their consent.

The representative of the Secretary-General of the League of Nations did not present any defence on the merits. He confined his defence to contesting the competence of the Administrative Tribunal on the ground that legislative decisions of the Assembly, even those affecting the position of the staff, were not subject to its scrutiny. The representative of the Director of the International Labour Office pointed out that the International Labour Organization in 1939 had acted in pursuance of a decision of the Assembly which, in view of its financial nature, it was obliged to apply.

Judgments of the Administrative Tribunal—1946

On 26 February 1946, the Administrative Tribunal in a series of 13 judgments, which are in practically identical terms, found

[1] L. of N., *Official Journal*, Special Supplement, No. 194, Records of the 20th (Conclusion) and 21st Sessions of the Assembly, p. 245.

[2] L. of N., *Records of the 20th Assembly*, Plenary Meetings, p. 45.

[3] The Staff Regulations provided that appointments made after 15 October 1932 were subject to modifications made by decision of the Assembly (Article 30 *bis* of Staff Regulations of the League ; Article 16 *a* of Staff Regulations of the I.L.O.).

[4] Articles 18 and 73 of the League Staff Regulations and Articles 19 and 83 of the I.L.O. Staff Regulations.

for the complainants. The text of the judgment in the case of *Zoppino* v. *International Labour Office* is attached to this memorandum as Annex II.

In that case the Tribunal held that the provisions of Article II, paragraph 1, of its Statute providing for jurisdiction relating to contracts of employment "accord a plenary jurisdiction in matters relating to the carrying out of all contractual obligations undertaken by the International Labour Office with regard to its officials without any distinction being drawn between acts of the Assembly itself and of agents to whom it delegates authority over staff". By the adoption of the Statute of the Tribunal, the League Assembly "itself has authoritatively prescribed the jurisdiction of the Tribunal, thus pledging to its staff a guarantee of justice that was henceforward irrevocable".

The judgment pointed out that this position had been confirmed by the Committee of Jurists in 1932 [1]. It then stated that the Staff Regulations "in their form as it was subsisting at the date of the contract of employment of the Applicant, formed a part of this contract", and that the Applicant had "an acquired right to which amendments of the Regulations .... could not be applied without mutual agreement".

The Tribunal then held that it was "not accepted that the Assembly by Resolution of 14 December 1939 sought to infringe acquired rights without stating the same *expressis verbis*", and that the text of the Resolution adopted by the Assembly did not "even refer to Article 97 of the Staff Regulations safeguarding the sanctity of acquired rights".

On the merits, the judgment concluded that the application of the Resolution of the Assembly of 14 December 1939 "wrongfully deprived" the Applicant of the benefit of her acquired rights; that force of circumstance had been pleaded "without ground"; and that "it cannot be accepted that the League of Nations was not in a position to honour the acquired rights of its staff".

Question of payment of the awards—1946

Before taking action in respect to the payment of the awards [2], the Acting Secretary-General consulted the Supervisory Commission.

The Commission advised the administrations both of the League and the International Labour Office to take no action pending consideration by the League Assembly and directed that the amount of the awards be placed in a special suspense account. In respect to the judgments of the Tribunal the report of the Supervisory Commission stated [3]:

[1] See pp. 38-39 *supra*.

[2] Their total was 85,000 Swiss francs.

[3] L. of N., *Official Journal*, Special Supplement No. 194, Records of the 20th (Conclusion) and 21st Sessions of the Assembly, p. 162.

"The Supervisory Commission, on whose proposal the amendments in question were adopted by the 1939 Assembly, desires to confirm that it was the undoubted intention of the Assembly that the decisions therein embodied should apply to all officials of the League and not only to those whose contracts expressly reserved the possibility of their modification by the Assembly. The Secretary-General and the Director of the International Labour Office, in applying the decisions to the complainants, have therefore correctly interpreted the Assembly resolution.

. . . . . .

As an acceptance of the findings of the Administrative Tribunal would put its decision above the authority of the Assembly, the Supervisory Commission could not take the responsibility of advising the Acting Secretary-General and the Acting Director of the International Labour Office to apply the judgments of the Administrative Tribunal."

The League Assembly met in April 1946 and the matter was considered by the Second (Finance) Committee which referred it to a sub-committee of seven [1].

Conclusions of the Sub-Committee of the Finance Committee

In its report [2], the Sub-Committee, after reviewing the facts, presented arguments leading to three basic conclusions:

(1) that it was not open to the Administrative Tribunal to question the validity of a legislative act of the Assembly, namely its Resolution of 14 December 1939;

(2) that the Tribunal's interpretation that the Assembly's Resolution was intended to apply to a limited class of officials only was "manifestly contrary to the facts"; and

(3) that it was within the power of the Assembly, "by a legislative resolution, to declare that the awards made by the Tribunal are invalid and are of no effect both because they sought to set aside the Assembly's legislative act and because of their mistaken conclusion as to the intention of that act".

In arriving at the latter conclusion, the Sub-Committee pointed out that it had by "no means ignored" the opinion of the Committee of Jurists appointed in 1932. That opinion was distinguished, however, on the ground that it dealt with the question whether the League could derogate from existing contracts in the exercise of budgetary authority rather than in that of a legislative power. In the Sub-Committee's view, the jurists' opinion was not intended to express a final conclusion upon the question whether the League could, by a proper legislative act, derogate from private con-

[1] *Ibid.*, p. 123.
[2] *Ibid.*, pp. 261-263.

tractual rights. "If it was", the report stated, "we are unable to agree with it [1]."

The Sub-Committee recalled the exigencies of the situation in 1939 and the realistic necessity for the League and the International Labour Organization to reduce their staffs to an essential nucleus. Moreover, it pointed out an obvious inequity, if the awards of the Tribunal were paid, between the complainants, who had not accepted the arrangements offered in 1939 and had appealed against them, and the "great body" of officials who had accepted those arrangements and who thereby "willingly submitted to drastic infringements of their rights and interests". From an ethical point of view, the Sub-Committee said, "it is difficult to think that their right to consideration is diminished by the fact that they showed themselves willing to acquiesce, if not to co-operate, in the decision which the Assembly took".

The report of the Sub-Committee was adopted by the Finance Committee by a vote of 16 in favour, 8 against, with 5 abstentions [2].

The report of the Finance Committee to the Assembly included the full text of its Sub-Committee's report and summarized the arguments made in Committee discussion for and against the conclusions that were reached. Accordingly, it is deemed of sufficient interest to the Court to be set forth below in full text. In addition, the record of the meeting of the Finance Committee which discussed the Sub-Committee's report is attached to this memorandum as Annex III.

Report of the Finance Committee [3]

"Judgments pronounced by the Administrative Tribunal on February 26th, 1946, concerning certain officials discharged in application of the emergency measures adopted by the Assembly in 1939

In a series of thirteen judgments pronounced on February 26th, 1946, the Administrative Tribunal found that the Administrations of the Secretariat and the International Labour Office were not entitled to apply to the thirteen ex-officials who had appealed to it the amendments to Articles 18 and 73 of the Staff Regulations of the Secretariat of the League of Nations and to Articles 19 and 83 of the Staff Regulations of the International Labour Office provided for by the Assembly Resolution of December 14th, 1939, by which amendments the period of notice of termination of appointment in the case of permanent officials was reduced from six months to one month and the payment of the compensation for termination of appointment due to such officials was spread over four years.

[1] *Ibid.*, p. 262.
[2] *Ibid.*, p. 133.
[3] *Ibid.*, p. 261.

The Committee took note of a document (A.16.1946) in which the Secretary-General retraced the history of the question and set out and gave a succinct analysis of one of the thirteen judgments—the terms of all of which were practically identical.

The Committee also had before it a Report of the Supervisory Commission (document A.14.1946.X—Chapter C), which contains the following conclusion :

> 'As an acceptance of the findings of the Administrative Tribunal would put its decision above the authority of the Assembly, the Supervisory Commission could not take the responsibility of advising the Acting Secretary-General and the Acting Director of the International Labour Office to apply the judgments of the Administrative Tribunal. It has accordingly advised the two Administrations to take no action on them pending consideration of the whole question by the Assembly.'

In order to elucidate this question, the Finance Committee appointed a Sub-Committee, whose report reads as follows :

'The Sub-Committee appointed by the Finance Committee of the Assembly has taken under consideration the claims to compensation made by certain officials who were discharged from their appointments as a result of the emergency measures taken by the Assembly of the League in December 1939 and in whose favour awards have been made by the Administrative Tribunal. The relevant facts and the history of the matter are set out in document A. 16. 1946 and it is not proposed to recapitulate them in detail. It is sufficient to say that, in consequence of the grave position which faced the League in 1939, the manifest impracticability of continuing to discharge all the functions in connection with which a large staff had hitherto been engaged and the imperative necessity for making drastic reductions in expenditure, the Assembly, on December 14th, 1939, passed on Resolution the effect of which was to amend the Staff Regulations so as to permit the discharge of officials of the League subject to a shorter period of notice than had previously been prescribed. The great majority of the officials, either because they believed that the Assembly had the legal power so to alter the terms of their employment or because they loyally and patriotically accepted the decision taken as being in the interest of the League in the special circumstances existing at the time, did not question the validity of the action taken. Thirteen officials, however, claimed before the Administrative Tribunal that they had been discharged with less than the proper notice and these claims the Tribunal has now upheld, awarding sums representing what the officials would have earned had the longer period of notice been given, apparently regardless of the question whether the dismissed officials had mitigated their damages by obtaining other employment in the meantime, as no doubt some did. The Administrative Tribunal based itself on the view *(a)* that the Assembly could not have intended its Resolution to apply to all officials irrespective of the question whether a power existed in their individual contracts of service to alter the terms of their employment, and *(b)* that the Assembly had no legal power to alter a contract into which it had entered with a servant.

'The Sub-Committee disagrees with these conclusions. The delegate for Australia wishes, however, to reserve his Government's position on the whole matter.'

Majority view [1]

'1. The Sub-Committee does not question the competence of the Administrative Tribunal to consider the application and interpretation of the decisions of the Assembly or other Staff Regulations in the circumstances of any particular case. Indeed, the primary object of the Tribunal's establishment was no doubt to ensure that such decisions and regulations were applied properly and impartially to all members of the staff according to the circumstances of each particular case. It is, however, one thing to say that the Tribunal could apply the decisions of the Assembly to particular cases ; it is quite a different thing to say that it could question the validity of those decisions themselves and that it was subject to no overriding powers by the very body which had created it. We do not think this was the case.

'2. Little useful analogy can be drawn between an organization of States such as the League of Nations and the municipal or private corporations familiar in private law. It is perhaps to be observed that, in the case of private corporations, there is always a superior legislative body which in circumstances of necessity can introduce changes in the law, as, for instance, by providing that certain forms of contract shall no longer be enforceable, that a moratorium shall be instituted, and the like. No superior power exists to release the League from its contractual obligations, if such obligations exist, however grave the emergency, unless it be the League itself. But the League is not to be compared with a private company ; its status and powers are *sui generis*, although they fall to be considered in the light of those general principles of public law and administration which to a greater or lesser degree are to be found in the legislation of all States. Thus all State contracts are governed by the exigencies of the public interest, to which private and personal rights must give way, and although the manner in which it may be exercised, whether by legislative or executive action, varies greatly between different countries, all States retain the power in the last resort to alter the terms on which their officials are employed. Indeed, the supreme authority in the State must retain discretionary powers of the kind, since without them it could not ensure the supremacy of the public interest. The safeguard against their arbitrary abuse is a political rather than a legal one.

'3. We find nothing startling in the view that, whilst the relations of the League with its Member States depend upon the treaty obligations expressed in the Covenant, the League does possess, in regard to the officials with whom it contracts, what are in effect sovereign powers. No other legislative body can assist the League in this regard, and it seems to us impossible to suppose that, in no circumstances, however pressing the necessity in the interests of the peoples of the worls, could the League derogate from some contract

[1] Caption added.

to a private individual employed by it. On the contrary, we think it necessary for the proper discharge of the functions of a world organization of States that it should possess a power if necessary to set aside the vested rights of private individuals employed in its administration. Only an excessively static legal view would justify the conclusion that the League was fettered in its own administrative organization by the rules of the private law of contract applicable to the employees of a trading or commercial undertaking. Relations connected with public employment in the service of the League necessarily pre-suppose the acceptance of these principles. They are their *naturalia negotii*. These considerations were indeed cogently expressed in the Report of a Committee of Jurists presented to the Council in 1925 on the case of an official who claimed to have been wrongfully dismissed (*Official Journal*, Sixth Year, No. 10, page 1441 ; see page 1443).

'4. But, whilst we consider that the matter ought essentially to be approached from the point of view of what is politic and necessary as a matter of public administration, we do not think that our conclusions lack a firm basis in the first principles of law. In saying this, we have by no means ignored the opinion expressed by certain eminent jurists in 1932 and referred to on page 3 of document A. 16. 1946. Contrary to what happened in 1939, the Assembly at that time was not seeking to set aside contractual rights which its officials possessed. It is sufficient to say of the opinion then given that it proceeded largely upon an examination of the question whether the League could derogate from existing contracts in the exercise of a budgetary authority rather than in that of a legislative power. In our view, the opinion was not intended to express a final conclusion upon the question whether the League could, by a proper legislative act, derogate from private contractual rights. If it was, we are unable to agree with it.

'5. The Statute of the Administrative Tribunal expressly reserves the Assembly's power to abolish the Tribunal, but in the absence of this express provision, those who contend that the League has no power to alter contracts by unilateral action would, we think, be led to argue that the League, having once established the Tribunal, could not abolish it with effect on existing contracts. We entertain no doubt that, just as in 1927 the Assembly did abolish, apparently without question, the right of appeal to the Council of the League which employees previously possessed, so in 1939 the Assembly could have abolished the Tribunal. Had this course been taken, the dismissed officials would have had no court or tribunal before which they could have questioned the legality of their dismissal. Nor does the fact that the Tribunal remains significantly alter the position. No outside body exists which can enforce the decision of the Tribunal against the Assembly, and this is a not irrelevant consideration in deciding whether the Assembly is sovereign in this matter and whether the dismissed officials have any right against it. By statutory provision and diplomatic usage, no remedy is available against the League ; where, then, is the official's right against it ? *Ubi jus, ibi remedium*, and the absence of any remedy in the circumstances of this case here leads to the conclusion that there is no

legal right. If only an ethical right is claimed, the protection against its abuse is not a legal but a political one lying in the hands of the States Members of the League. Sovereignty is a question of fact from which a conclusion of law is drawn : it arises from the presence or absence of overriding and controlling powers. In the absence of such powers, the legal conclusion is that sovereignty exists ; and, although the use of the term sovereignty in connection with the present matter is not entirely apt, we think it would be an act of juristic purism to doubt that the supremacy of the League is an inherent incident implicit in its contractual relationships with its staff. We therefore conclude that it was not open to the Administrative Tribunal to question the validity of the Assembly's Resolution of December 14th, 1939. Its only duty was to give effect to it.

'6. We are entirely unable to accept the Tribunal's interpretation that the Assembly's Resolution was intended to apply to a limited class of officials only. This view seems to be manifestly contrary to the facts. Although there is no ordinary appeal from the Tribunal's decision, we think that it is within the power of the Assembly, which can best interpret its own decisions, by a legislative resolution, to declare that the awards made by the Tribunal are invalid and are of no effect both because they sought to set aside the Assembly's legislative act and because of their mistaken conclusion as to the intention of that act.

'7. We think it right to add that, if effect was given to the awards of the Tribunal, the other officials who accepted their dismissal in loyalty to the League and, no doubt, in the belief that all officials would be treated alike, are entitled to consideration. It is true that the time within which they could prosecute a legal claim (assuming such a claim exists) has long since passed. Moreover, the assessment of compensation in individual cases might be difficult, for in a number of them the earlier termination of their exployment suited the convenience of the officials concerned. But, from an ethical point of view, it is difficult to think that their right to consideration is diminished by the fact that they showed themselves willing to acquiesce, if not to co-operate, in the decision which the Assembly took.

'8. In our view, however, all the claims should be rejected, and the Assembly may be fortified in taking this course not only by the fact that—to their credit—the great body of its officials concurred in the propriety of what was done at the time, but also in the knowledge that, in the grave emergency with which the world was faced in 1939, vast multitudes of people voluntarily made or willingly submitted to drastic infringements of their rights and interests. The League of Nations was entitled to expect from all, and in fact received from the vast majority of its officials, the same devotion and self-sacrifice in the interests of the world community.

'9. We should add that we have not allowed ourselves to be influenced in the conclusion at which we have arrived by the serious effect on the League's budgetary position which the application of the Tribunal's decision and its extension to other officials would inevitably involve.

'10. In view, however, of the fact that we do not doubt that the claims were made in good faith and involved a difficult and important matter, we think it would be proper to make an *ex gratia* payment in respect of the claimants' legal costs.'

Minority view [1]

Several delegates were unable to accept the conclusions of the Sub-Committee or to agree with various arguments and conceptions set forth in its report. They pointed out, in particular, that it appeared to them to be absolutely contrary to the notion of law and the sovereignty of law that the Assembly, the organ of one of the parties to the dispute, should have the right to oppose the execution of a judgment of which it did not approve. They considered that the question was not whether the Assembly was competent to render operative a judgment of the Administrative Tribunal, but whether the Assembly was competent to prevent the execution of a judgment of the Administrative Tribunal, when the said judgment had been rendered in a matter in respect of which the competence of the Tribunal was not contested. The fact that, had it so wished, the Assembly could, as the report points out, have abolished the Administrative Tribunal did not permit them to draw the conclusion that because this did not happen the Assembly could oppose the execution of a decision given by the Tribunal. Had that been the case, there would have been no point in setting up an Administrative Tribunal. The only reason this Tribunal was set up and endowed with powers previously exercised by the Council of the League was that it was desired to replace a political organ by a judicial organ, and decisions of a political order by judicial decisions. They were of opinion that it was inaccurate to compare the Assembly of the League with the legislative authority of a State, because, in the case of the international organization, the organs of the League were dealing with non-subject individuals with whom they concluded a contract which gave rise to a legal relation. League officials were therefore not subjects but co-contracting parties. Furthermore, even in States possessing sovereignty which the Assembly did not possess, if contracts were amended by the legislative authority, no tribunal had the right to give retrospective effect to such amendments unless express provision were made therefor by the terms of the new law. To admit that, because the Administrative Tribunal declined to give retrospective effect to amendments of contract, the Assembly was entitled to refuse to execute its decision would be to admit a thesis which denied all right. Contrary to the assertion in the Sub-Committee's report that there was no law governing the case, the contract entered into between the League and its officials constituted a legal relation and the Assembly had set up a judicial body to interpret that contract—namely, the Administrative Tribunal. The contractual nature of the legal relation binding the League and its officials had, moreover, been clearly recognized in 1932 by the Committee of Jurists. Finally, they did not think the argument of necessity could be invoked to-day, though, at the time the Assembly made its decision, it may have been extremely important to effect

[1] Caption added.

economies. Admittedly there was no right of appeal or remedy against the League of Nations, but that did not justify the inference that it was governed by no law. In exactly the same way, international law provided no remedy against States, but it was to the honour of the international community that, almost without exception, States had accepted judicial or arbitral decisions, and very few had declined to accept a judgment though in certain cases they might have thought it ill-founded.

By sixteen votes for and eight against, with four [1] abstentions, the Finance Committee adopted the report of its Sub-Committee; consequently, effect will not be given to the judgment of the Administrative Tribunal."

The report of the Finance Committee was submitted to the Assembly on 18 April 1946. The delegate of Belgium, Mr. Kaeckenbeeck, made the following statement [2]:

"At the moment when the report of the Second Committee is before the Assembly, the Belgian delegation desires to recall that during the meeting held on the afternoon of April 13, it stated why it felt obliged on grounds of principle to oppose the adoption of the report submitted by the Sub-Committee on the question of the judgments pronounced by the Administrative Tribunal of the League of Nations. This report was nevertheless adopted by the Second Committee. Speaking alike for the Belgian delegation and for the delegations of Denmark, Iran, Luxemburg, the Netherlands, Sweden, and Switzerland, which have asked me to speak on their behalf also, I must express our regret that one of the last acts of the League of Nations should be the refusal to execute a judgment pronounced against it by a tribunal created by it, when in our opinion there is no unavoidable necessity for so doing.

The delegations on whose behalf I have the honour to speak represent countries which are desirous of intensifying judicial methods in the international field and which fear the consequences of such a precedent. Furthermore, the report adopted by the Second Committee is based on certain considerations which closely affect the constitution and legal foundations of the whole international organization.

By this declaration, the delegations of Belgium, Denmark, Iran, Luxemburg, the Netherlands, Sweden and Switzerland desire to express formal reservations on behalf of their Governments in respect alike of the decision and of several of the considerations on which it is based."

No other statements were made. The Assembly took note of the declaration, and adopted the Report of the Finance Committee subject to the reservation of the seven governments [2].

Accordingly, for the reasons set forth in the Finance Committee report, the compensation awarded by the Tribunal was never

[1] The Minutes of the Committee, which form Annex III to the present memorandum, show that there were, in fact, 5 abstentions.

[2] *Ibid.*, p. 61.

paid by the League of Nations. However, as therein recommended, the *ex gratia* payments to cover legal costs were made to the claimants.

VI. Consideration by the International Labour Organization of the 1946 judgments of the Administrative Tribunal

Because two of the successful complainants in the 1946 judgments of the Administrative Tribunal were former officials of the International Labour Office, the matter of the payment of their awards came before the Governing Body of the International Labour Office. The question was first considered by its Finance Committee [1].

The Chairman of the Committee suggested that it could only take note of the decision of the League Assembly, because in 1939 the Assembly had been the sovereign body with regard to financial payments. Several members of the Committee stated that they could not understand the attitude adopted by the League Assembly with regard to the Administrative Tribunal, which had been set up for the special purpose of taking decisions in cases of disputes of this kind. The representative of the Government of Belgium reminded the Committee that the Assembly decision had not been unanimous. He expressed the view that the League of Nations did not possess any actual "sovereignty". The so-called sovereignty was only assumed in a case in which the relative strength of the League of Nations was opposed by the weakness of certain officials taking isolated action against it, and thus, in arbitrary fashion, a denial of justice was perpetrated in refusing to recognize a judgment given by an Administrative Tribunal set up by the League of Nations itself. That Tribunal had found in their favour and the decisions taken by it could not be disregarded. He hoped that the Committee would decide at the appropriate time to give effect, in the case of the two ex-officials concerned, to the decisions which the Administrative Tribunal had taken.

The Finance Committee, however, took no action except to note the decision of the Assembly that effect would not be given to the judgment of the Administrative Tribunal, and to agree that, in accordance with the League decision, payment should be made in respect to the legal costs of the two International Labour Office claimants.

Governing Body discussion

There was further debate in the Governing Body itself [2]. The representatives of the Governments of Belgium, the Netherlands

[1] F.C. 98/P.V.9, pp. 5-7.

[2] *Minutes of the Private Sittings of the 98th Session of the Governing Body* (May, 1946), pp. 10 ff.

and Sweden took the position that the International Labour Organization was autonomous and not bound to act in conformity with the decision of the League. They proposed that the International Labour Organization should execute the judgments made against it by the Tribunal and pay the compensation awarded in favour of the former officials of the International Labour Office. A draft resolution to this effect was introduced in the Governing Body by the three representatives.

The basis of their position was stated to be that the Tribunal had been set up to safeguard the rights of officials ; in law, when it had given judgment the parties should abide by it ; to disregard a judgment of the Tribunal would be contrary to all principles of law, particularly in the case of an international organization such as the International Labour Organization which had the duty of observing the law and of acting in accordance with the judgments of the Tribunal.

The Chairman of the Governing Body pointed out that the League Assembly had decided that the Administrative Tribunal could not override a decision properly taken by it and therefore no action could be taken on the award of the Administrative Tribunal. There was nothing that the Governing Body could do except take note of the Assembly's decision. Only the Conference had authority to authorize an expenditure to give effect to the awards. The Chairman said that the important thing was to look to the future, and in this respect he thought all members of the Governing Body were agreed in wanting to avoid a situation of that sort arising again. He therefore proposed that "the arrangements concerning the functioning of the Administrative Tribunal" be considered by the Staff Questions Committee of the Governing Body "in order, to the fullest extent possible, to secure that no difficulty may arise in the future as regards the execution of any judgment the Tribunal may hand down". The Chairman went on to suggest that provision might perhaps be made for "a court of appeal", for example, the International Court of Justice [1].

The Belgian Government Representative then stated that he was willing to accept the compromise solution suggested by the Chairman, but only on the condition that the Governing Body should not at this time take a definite decision on the matter but should postpone its decision until after it had studied the report presented by the Staff Questions Committee. He stated that his instructions from his Government did not permit him to allow the matter to be dealt with as an administrative question, but as a question of principle which should not lightly be cast aside. He reiterated the argument that when a tribunal had given judgment "the parties should abide by it, otherwise the law would cease to be" ; moreover, an international organization was bound

[1] *Ibid.*, p. 11.

to set an example in its internal administration worthy of being followed in international relations, otherwise the "direst catastrophe" would ensue.

Mr. Jouhaux, Workers' member (French), supported the view that the International Labour Organization should abide by the judgment of the Tribunal. He stated that if the International Labour Organization had accepted the jurisdiction of the Tribunal in disputes between the Organization and the staff, "it had accepted in advance the judgments which that Tribunal might give" ; no provision had been made for a court of appeal [1].

Governing Body decision

At the next sitting, the Chairman reported that he had discussed the matter further with the representatives of the Governments of Belgium and the Netherlands. As a result, they had agreed to withdraw the draft resolution which they had submitted, with the understanding that in the report to be adopted by the Governing Body a paragraph would be inserted indicating, in effect, that the Governing Body could only take note of the decision of the Assembly with regard to judgments of the Administrative Tribunal, but that "the Governing Body felt that steps must be taken to prevent a situation which everybody regretted arising again in the future". The Staff Questions Committee was accordingly asked "to consider the arrangements concerning the functioning of the Administrative Tribunal in order to secure to the fullest degree possible that no difficulty might arise in the future as regards the execution of any future judgment the Tribunal might hand down [2]".

Modification of the Statute of the Tribunal to provide for Advisory Opinion of the International Court of Justice

In accordance with this decision of the Governing Body, the Office submitted a paper [3] to the Staff Questions Committee. It took the position that some organ apart from the Administrative Tribunal "should have the competence to reconsider the Tribunal's decisions". The power to reconsider should logically belong to the highest existing tribunal—namely, as had been proposed, the International Court of Justice. The Office therefore proposed "that the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund might be enabled to appeal to the International Court of Justice against decisions of the Tribunal on the grounds that it had exceeded its jurisdiction or where the procedure followed has been vitiated

[1] *Ibid.*, p. 13.
[2] *Ibid.*, p. 14.
[3] G.B./C.S.Q.II/D.7, Sept. 1946.

by a fundamental fault". A new article to be added to the text of the Statute was suggested in the following terms:

> "In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges the decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question as to the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.
>
> The opinion given by the Court shall be binding."

In discussion in the Staff Questions Committee, one representative said that he felt that the proposed Article would tend to weaken the authority of the Governing Body. The Chairman pointed out in reply that the Governing Body was committed to the adoption of a provision on these lines, an undertaking having been given at the last session. Another representative said that he felt that the clause would give rights of litigation to one party and not to the other. The Director of the International Labour Office explained that the Article did not propose that the International Court of Justice should retry a case, but merely that it could be asked to define the jurisdiction of the Tribunal. The International Court had no jurisdiction to hear private persons.

The proposed text was thereupon approved by the Staff Questions Committee [1] and by the Governing Body [2].

On 9 October 1946, the text was adopted by the International Labour Conference without discussion [3].

VII. Experience of the Administrative Tribunal of the International Labour Organization 1947-1954

Upon the dissolution of the League of Nations in 1946, the International Labour Organization took over the Administrative Tribunal [4]. The Tribunal was to be available to officials of the International Labour Office and to pensioners of the League, of the International Labour Office, and the Registry of the Permanent Court of International Justice. Its name was changed to "Administrative Tribunal of the International Labour Organization" and certain modifications were made in the Statute [5]. One

[1] G.B./C.S.Q.II/P.V.6.

[2] *Minutes of the Private Sittings of the 99th Session* (September 1946), pp. 15 and 37.

[3] *Record of Proceedings of the 29th Session of the International Labour Conference*, p. 229.

[4] L. of N., *Official Journal*, Special Supplement 194, Records of the 20th (Conclusion) and 21st Sessions of the Assembly, p. 281.

[5] *Record of Proceedings of the 29th Session of the International Labour Conference*, pp. 338-340.

of these modifications was the addition of the new Article providing for an advisory opinion from the International Court of Justice referred to above.

A later amendment to the Statute [1] provided for the acceptance by other intergovernmental international organizations of the jurisdiction of the Tribunal so that it would be available to members of their staffs. As a result of this modification, four other international organizations have accepted the jurisdiction of the Tribunal : the World Health Organization, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, and the World Meteorological Organization [2].

The Statute of the Administrative Tribunal of the International Labour Organization in its present form is attached to this memorandum as Annex IV.

Since the Administrative Tribunal has been maintained by the International Labour Organization, seven [3] cases have come before it. In one case the Tribunal awarded compensation to the complainant, and no question arose as to whether the Tribunal's award should be executed.

In no case has the provision permitting the request for an advisory opinion to the International Court of Justice been applied.

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[1] *Record of Proceedings of the 32nd Session of the International Labour Conference*, pp. 435-436.

[2] The United Nations Food and Agriculture Organization has decided to accept the jurisdiction of the Tribunal and formal action thereon is to be taken by the Governing Body of the International Labour Office at its session in March 1954.

[3] Not including four cases in the exercise of the Tribunal's arbitral authority in respect to officials of the International Institute of Intellectual Co-operation in accordance with arrangements made with the League of Nations.

Annex I to the Memorandum of the International Labour Office

EXTRACTS FROM THE DEBATE IN THE FOURTH COMMITTEE OF THE THIRTEENTH ASSEMBLY OF THE LEAGUE OF NATIONS CONCERNING THE RIGHT OF THE ASSEMBLY TO REDUCE SALARIES OF OFFICIALS UNILATERALLY

M. Osusky (Chairman of the Supervisory Commission)....

The Chairman of the Supervisory Commission then drew the Fourth Committee's attention to the existence of the Administrative Tribunal of the League, which dealt with questions of private law of interest to the officials and with certain other questions which might arise between the League and private individuals. The Tribunal was composed of professional judges. When the Supervisory Commission had arrived at its conclusions, but without having to decide whether the contracts of the officials were contracts in public or private law, it had asked itself, as it was bound to do, what would happen if, by a unilateral decision, the Assembly altered the salaries of the staff. In that event, the officials would no doubt refer the question to the Administrative Tribunal, and the Administrative Tribunal might decide in their favour. The League, of course, could set its judgment aside, consider it a dead letter; it undoubtedly had the power—M. Osusky would not say the right—to do so. The Supervisory Commission must, however, advise it to consider very carefully before adopting that course. Indeed, the Commission considered that the chief business of the League was to see that undertakings entered into were scrupulously observed, and in these circumstances it could hardly begin by violating its own.

Then, again, there were principles to be borne in mind. The Supervisory Commission was convinced that the League's strength was in principles. The Commission had realized for years that there were innumerable difficulties which could doubtless be avoided by opportunist measures—a pleasant and easy solution. Such opportunism would have made it appear successful and skilful, and have gained for it general admiration so long as it was successful. But the members of the Commission realized that the margin between opportunism and injustice was small, and that institutions like the League could not live by opportunism, even if it thus gained advantages for a few weeks, or even a few months. The League could only live by its principles and by faith in principles. Only by defending principles could it establish itself in the hearts and souls and confidence of the peoples. The Supervisory Commission was so convinced of the force of principles at Geneva that it had always endeavoured to establish the supreme authority of the Assembly through a system in which the liberty of all was respected. But it would point out that that liberty could only be exercised fully if the League observed the rules and principles which it had itself laid down.

(L. of N., *Official Journal*, Special Supplement No. 107, Records of the 13th Assembly, Meetings of Committees, Minutes of the Fourth Committee, p. 11.)

M. Hambro (Norway)....

The League had no legal status. It could not prosecute, nor be prosecuted by, any member of the staff. The rights of its officials were based on a kind of gentleman's agreement between the two parties. It would be difficult to say what would be the legal position should the League decide to cut down salaries, though, as a matter of fact, the officials were powerless. In 1931, the Assembly had unanimously approved a proposal to insert in the contracts of all new officials a clause enabling the Assembly to modify their salaries. That was all that could be done without prejudicing the interests of the League.

. . . . . .

The officials of the League were in a most precarious situation. They had no legal rights as had other officials. They had, it was true, an Administrative Tribunal, but this Tribunal had very limited powers. Their only safeguard lay in their trust in the fairness of the League, and it would be fatal to shake that trust.

(*Ib.*, p. 15.)

M. Réveillaud (France) .... there was only one authority which could pronounce on this matter—namely, the Administrative Tribunal. Any opinion expressed by the jurists of the First Committee would have the force of a consultation only and, in this connection, M. Réveillaud desired to rebut an argument advanced by M. Hambro. The latter had said that there was no legal bond between the League and its officials but only a kind of "gentleman's agreement". M. Réveillaud was forced to protest against such a statement. The Administrative Tribunal was not an illusory safeguard. It had absolute and complete power to state the law. From this point of view, he saw no difference between this Tribunal and the Councils of States or Supreme Courts in a number of countries.

M. Réveillaud did not forget that, in theory, the League could refuse the necessary vote for the execution of an award given by the Administrative Tribunal, but, within the national organizations, had not the Parliaments the same theoretical power to take up the same position with regard to the judgments of the Council of States or the Supreme Court ? In the League, just as much as in a national State, an assumption of that kind would be so disgraceful, it would imply such a state of anarchy, that it had better not be contemplated.

If the Administrative Tribunal were to have the last word, M. Réveillaud did not see what was the use of a committee of lawyers. Was it intended that it should give the Fourth Committee and the Assembly a certain measure of security ? That, however, would be illusory, and there was a risk that a few months later the Administrative Tribunal might declare that the measure taken was unjust, thus causing a great scandal among some who had no great affection for the League and who would say that the Assembly dit not know what it was doing or even that it had just given an example of a breach of contract. From another point of view—the budgetary standpoint—what would be the position of the League Treasurer if, during the financial period, he had to turn his budget upside down to find the million or million and a half which the Assembly, basing its decision on the opinion of the jurists, had wrongfully decided to take from salaries ?

(*Ib.*, p. 34.)

M. Hambro (Norway) had nothing to add to M. Réveillaud's statement at the previous meeting, but feared that there was some misunderstanding with regard to the Administrative Tribunal. It was no part of the constitution of the League. The Assembly had set up that Tribunal, and could abolish it. That did not in any way alter what M. Hambro had already said about the contracts of the officials, which were none the less based on a "gentleman's agreement".

It would be natural to ask the Administrative Tribunal for its opinion with regard to the conditions governing contracts and the Assembly's right to change them. Only those who were thoroughly familiar with the internal situation and with the contracts of the League could give a reasoned opinion on these questions. No jurist of any country whatsoever could settle this dispute by referring to his country's laws. The Fourth Committee should therefore be guided only by the humanitarian principles of honesty and confidence in the League.

(*Ib.*, pp. 37 and 38.)

Sir Hilton Young (United Kingdom)....

The other proposal .... consisted in asking the First Committee to invite a number of jurists to give a legal opinion as to the Assembly's right to reduce staff salaries. It was essential that the Assembly should know where it was. Otherwise it would continue to turn in circles. Was the Assembly entitled to alter the contracts or not, and, in particular, to reduce salaries? When it knew, it could act in one way or other. It had been maintained that the competent authority in this matter was the Administrative Tribunal. There was apparently some misunderstanding here as to the intentions underlying the resolution. The United Kingdom Delegation did not doubt the Administrative Tribunal's competence to settle legal questions, but that stage had not yet been reached. The exact position of the Fourth Committee and, generally speaking, the Assembly must first be settled. M. Réveillaud had said that the position would be very delicate if the Assembly reached a decision which the Administrative Tribunal then reversed. That was true, and that was the very reason why the United Kingdom resolution proposed that experts be consulted. If the jurists replied that the Assembly had power to modify the contracts, it would know exactly what it could do. If, on the contrary, they decided that it did not possess that power, it would certainly not seek to do a legal wrong.

(*Ib.*, p. 39.)

M. Osuský (Chairman of the Supervisory Commission)....

The Supervisory Commission's report touched, moreover, on a point of law, which M. Réveillaud had dealt with at length during his remarks at the previous meeting—namely, the problem of the Administrative Tribunal. The question of the Assembly's power to modify contracts was not a new one. Last year, the Assembly had decided that future contracts would contain a clause making it possible to modify salaries. That decision alone proved that previously contracts had not been modifiable. M. Osuský desired to make it quite clear that, in this matter, as indeed in all others, the Supervisory Commission was not a free agent. Its task was to interpret the will of the Assembly and to co-ordinate its decisions. If it acted in any other way, it would be accused of setting itself up against the sovereign organ of the League. It had nevertheless been said that the Assembly was entitled to abolish the

Administrative Tribunal. Did the Assembly propose to abolish the Administrative Tribunal, because it feared it, just at the time when, in matters of foreign policy, it was laying greater stress than ever on the respect for rights ?

The German delegate had referred to the Administrative Tribunal and to M. Osusky's statement that salaries were based on a principle which could not be touched. The Administrative Tribunal had been established by the League and could, of course, be abolished by an Assembly decision. But the whole life of the League was based on principles, and it was constantly insisting on the importance of arbitration. Had it shown less opportunism and greater attachment to principles it might have been more successful. How, then, could it do away with its own judges because it disagreed with their decisions ?....

The best way to settle the legal aspect would be to reduce the salary of an official, and induce him to bring a test case before the Administrative Tribunal.

(*Ib.*, pp. 41 and 42.)

The Secretary-General agreed that it was essential for the Assembly to know whether it was legally competent to modify salaries. The point was bound to be raised every year until it had been decided once and for all. Whether it was settled by a committee of legal advisers or by reference to the Administrative Tribunal was not important, but it could only be referred to the latter by an Assembly decision.

(*Ib.*, p. 43.)

M. de Modzelewski (Poland)....

The Polish Delegation proposed that this matter should be studied by a committee of lawyers appointed by the Chairman of the First Committee. Other delegations thought it would be better to have it settled by the Administrative Tribunal. There was, in reality, only a very slight difference between these two suggestions, but M. de Modzelewski thought that the Polish Delegation's proposal was both more practical and more logical. The Administrative Tribunal could not pronounce an opinion unless there was a dispute. That, fortunately, was not the case. No one thought of making a purely arbitrary reduction in salaries. All the delegates on the Fourth Committee were anxious that the League's organs should work in peace. The mere mention of a dispute would give rise to erroneous ideas outside. It would be useless to explain that the Administrative Tribunal was merely being consulted, and the public would assume that there was a real clash of opinion. Further, he did not think that the Administrative Tribunal was the right body to which to apply, since there was no legal clause under which it could settle the case that would be brought before it.

(*Ib.*, p. 46.)

M. Réveillaud (France)....

It was, he believed, generally agreed that the defect of the legal consultation suggested by the Polish and United Kingdom Delegations was that it would settle nothing, that it would have the force only of an opinion, and that the whole question would have to be reconsidered some day or other. M. Réveillaud had therefore thought that, in the interest of everybody, it would be better for the question to be brought before the Administrative Tribunal. That body, however, was not empowered to give opinions, and it would have to be given an opportunity of stating

an award. That was what M. Réveillaud was proposing. The Fourth Committee would provoke a symbolical case. It would take a decision which, without causing them any disturbance, would affect a category of officials who, acting on the advice of the Fourth Committee itself, would appeal to the Administrative Tribunal from the decision so taken. For this to be done, the Polish and United Kingdom draft resolutions would have to be dropped, and, when item 4 in the budget came up for discussion, a reduction would have to be made which might be termed a symbolical one. This reduction might, according to M. Réveillaud's idea, apply to the salaries of the Directors in the Secretariat, the Chiefs of Division in the International Labour Office and the officials belonging to the same grade in the Court.

It would amount to one per cent.

The procedure proposed above would have a two-fold advantage: *(a)* Supposing the Administrative Tribunal held that the League was bound by the contracts it had given its officials and that it would not modify their salaries, the amount to be refunded would not exceed 6,610 francs, and that would give rise to no difficulty in the execution of the Budget. *(b)* The one per cent proposed would not cause any trouble to the officials to whom the measure would apply. In M. Réveillaud's opinion, there would be only one drawback to the method he suggested—namely, that it would delay the solution of the question for a time.

(*Ib.*, p. 47.)

Sir Hilton Young (United Kingdom)....

M. Réveillaud had said that, if the question were settled by a committee of lawyers, the Administrative Tribunal would be as good as deprived of its powers. Sir Hilton Young did not share that view. In his opinion, what would happen was that, if the committee of lawyers held that the League was entitled to reduce its officials' salaries, the latter would be reduced, and the members of the staff could, if they thought fit, bring the matter before the Administrative Tribunal. In any case, the Tribunal's decision would be binding on the League. The method proposed by the Polish and United Kingdom delegations was the truly practical one. It was the custom of business men to consult a lawyer before taking legal proceedings.

(*Ib.*, p. 48.)

Mme Kluyver (Netherlands) doubted whether Sir Hilton Young's proposal would be the quickest. It was, perhaps, necessary to have a legal opinion, but since, whatever happened, the question would have to be settled by the Administrative Tribunal, it would appear wise to apply to the Tribunal at once. Indeed, the Tribunal must have an opportunity of giving its award before the Special Assembly met, since, otherwise, that Assembly would be in the same position of uncertainty as the Fourth Committee was at present. She saw great advantages in the system suggested by M. Réveillaud and associated herself with the Italian delegate's remarks. From the point of view of the spirit which should prevail among the League organizations, it would be better to follow the French Delegate's suggestion. Moreover, there were certain objections to asking two different bodies for an opinion on the question. If the committee of lawyers and the Administrative Tribunal gave different conclusions, the effect would be most unfortunate for the League's prestige.

(*Ib.*, p. 49.)

M. Osuský (Chairman of the Supervisory Commission) drew attention to the fact that the present discussion had its budgetary aspects. If the lawyers found that salaries could be reduced and the Assembly cut down the credit for salaries by a certain amount and if, in those circumstances, the Administrative Tribunal award was favourable to the officials, where would the League Treasurer find the money to give effect to it ? M. Osuský begged his colleagues on the Fourth Committee to think over this possibility.

(*Ib.*, p. 50).

M. de Modzelewski (Poland), examining the results likely to follow from the adoption of the Polish proposal, observed that, if the committee of lawyers held that salaries could not be modified, the question would be solved very rapidly and there would be no possibility of a clash. If the contrary were the case, the opinion would certainly be accompanied by very weighty and cogent considerations and would practically amount to a judgment which would command acceptance. There was, therefore, very little prospect that the reply given by the committee of lawyers would be followed by an award by the Administrative Tribunal. That being so, what was the point of complicating things ? .

(*Ib.*, p. 50.)

Annex II to the Memorandum of the International Labour Office

TEXT OF JUDGMENT No. 35 OF THE ADMINISTRATIVE TRIBUNAL OF THE LEAGUE OF NATIONS IN THE CASE OF ZOPPINO *v.* INTERNATIONAL LABOUR OFFICE

The Administrative Tribunal of the League of Nations,

Being seised of an Application dated the 24 April 1940 by Mme Andrée Zoppino against the International Labour Office ;

Whereas the Applicant specifies as follows the remedies for which she makes application :

1. For a declaration that the communications dated 20 January and 28 March 1940, by which the Director of the International Labour Office terminated her contract of employment as an official of the I.L.O. are based upon an amendment (dated 21 December 1939) to Articles 19 and 83 of the Staff Regulations which is unlawful in that it was made in contravention of Article 97 of the Regulations and that in consequence her contract of employment was cancelled in contravention both of Articles 19 and 83 of the Regulations, unconstitutionally amended for that purpose, and of the conditions of the contract of employment of the Applicant as laid down by the said Articles of the Staff Regulations ;

2. For an award that the International Labour Office pay forthwith to the Applicant :

(a) a sum equal to five months' salary as prescribed by the contract of employment of the Applicant ;

(b) the unpaid balance of the sum equal to one year's salary which is due and owing to the Applicant as indemnity for termination of

contract by virtue of Article 83 of the Staff Regulations within the meaning of that Article prior to its last amendment ;

(c) interest on these amounts at 4 per cent per annum from the dates on which they became due to the date of payment of the same ;

(d) the costs of this Application, the amount of which will be specified later ;

3. For an order for restitution of deposit.

ON THE FACTS :

Whereas the Applicant was an official of the International Labour Office, and was a member of its permanent staff under the terms of a contract of employment taking effect from 1 January 1931, replacing an earlier contract of employment which entered into force on 1 January 1926 ;

And whereas by a letter of 22 December 1939 the Applicant was requested by the Director of the International Labour Office either to ask for her contract to be suspended or to resign and was informed that in the event of her not taking such a step her name had been placed on the list of officials whose contracts would be cancelled on 31 January 1940 on the conditions presented by the Staff Regulations as amended the previous day ;

And whereas by a letter of 20 January 1940 the Applicant received notice of termination of her employment as from 31 January 1940 ;

And whereas the Applicant on 22 January 1940, under the terms of Article 19 *(d)* of the Staff Regulations, submitted her case to the Joint Committee, an internal organization within the International Labour Office, requesting it in particular to pronounce that the method of termination of her employment (with one month's notice instead of six and the payment by four instalments of the indemnity equal to one year's salary instead of by a lump sum payment) constituted a breach of her contract in particular and of the Staff Regulations in general ;

And whereas the Joint Committee made a report on 1 March 1940 in which it found on this point for the Applicant ;

And whereas the Director, by a decision of 15 March 1940, communicated to the Applicant by a letter of 28 March 1940, rejected the recommendations of the Joint Committee on the ground that it had no jurisdiction and reaffirmed his decision to terminate the employment of the Applicant on the same conditions as had been contested ;

And whereas the decisions of the Director of the International Labour Office, dated 20 January and 28 March 1940 and brought before the Tribunal by the present Application, by which decisions the employment of the Applicant is terminated with one month's notice only and by which the payment of the idemnity for termination of contract which is due to her under Article 83 *(a)* of the Staff Regulations will be made by several instalments, are based on the amendments to the Staff Regulations dated 21 December 1939 and more specifically on Articles 19 *(b)* and 83 *(b)* as altered by the said amendment.

ON JURISDICTION :

I. Whereas the Statute of the Administrative Tribunal expressly provides in its Article II, para. 1, that the Tribunal has jurisdiction to entertain applications alleging the contravention either in substance or in form of the conditions of contracts of employment of officials ;

Whereas these provisions accord a plenary jurisdiction in matters relating to the carrying out of all contractual obligations undertaken by the International Labour Office with regard to its officials without any distinction being drawn between acts of the Assembly itself and of agents to whom it delegates authority over staff ;

Whereas the Statute of the Tribunal was submitted to the Assembly on 26 September 1927 and adopted as drafted without any amendment either in the spirit or in the letter of the Statute, and whereas therefore the Assembly itself has authoritatively prescribed the jurisdiction of the Tribunal, thus pledging to its staff a guarantee of justice that was henceforward irrevocable ;

And whereas this was confirmed by the formal opinion expressed by the Committee of Jurists set up by the President of the First Committee of the 13th Assembly, which opinion referred to the right of the Assembly to reduce the salaries of officials, and whereas this opinion affirming the jurisdiction of the Administrative Tribunal was given unanimously on 8 October 1932 by the Members of that Committee (Messrs. Andersen, Basdevant, Huber, Sir William Malkin and Mr. Pedroso) (cf. *Official Journal of the League of Nations*, Special Supplement, No. 107, page 206) ;

II. Whereas the Director of the International Labour Office acted wrongfully in applying to the Applicant by the decision now in dispute the Resolution of the Assembly of 14 December 1939 ;

Whereas the Staff Regulations of the International Labour Office, in their form as it was subsisting at the date of the contract of employment of the Applicant, formed a part of this contract and whereas the Applicant had an acquired right to which amendments of the Regulations and in particular the disputed amendments to Articles 19 and 83 could not be applied without mutual agreement ;

Whereas there was no such mutual agreement ;

Whereas it is not accepted that the Assembly by Resolution of 14 December 1939 sought to infringe acquired rights without stating the same *expressis verbis ;*

Whereas in this connection the text adopted by the Assembly leaves no ambiguity and does not even refer to Article 97 of the Staff Regulations safeguarding the sanctity of acquired rights ;

Whereas therefore the Application contests, not only in form but also in substance, a decision of the Director of the International Labour Office, which on any hypothesis gives jurisdiction implicitly to the Administrative Tribunal ;

ON THE MAIN ISSUES :

Whereas the Applicant, by virtue of her contract of employment, had acquired rights to which at the time of the termination of her employment by the decision in dispute Articles 19 and 83 of the Staff Regulations of the International Labour Office were applicable in their subsisting form at the date of making of the contract of employment ;

Whereas by the decision in dispute the Applicant has been wrongfully deprived of the benefit of these acquired rights by application of the Resolution of the Assembly of 14 December 1939 ;

Whereas force of circumstances has been pleaded without ground in justification of this application ;

Whereas it cannot be accepted that the League of Nations was not in a position to honour the acquired rights of its staff;

Whereas therefore the Applicant is entitled:

1. to six months' notice or payment of six months' salary in lieu of notice;
2. to an indemnity equal to one year's salary payable forthwith;

Whereas the fact that the payment of salary in lieu of six months' notice will be made only after a long interval and that the indemnity has been paid only after delay and by instalments on different dates entitles the Applicant to interest on overdue payments which the Tribunal fixes *ex æquo et bono* at 4 per cent per annum.

ON THE GROUNDS AS AFORESAID,

The Tribunal declares it has jurisdiction herein,

Finds for the Applicant in substance and in form,

Decides that the Applicant has a right to have applied Articles 19 and 83 of the Staff Regulations of the International Labour Office as subsisting at the date of her contract;

Therefore,

1. Orders the Respondents to pay to the Applicant the sum of 4,091.45 Swiss francs, representing five months' salary together with interest thereon at 4 per cent per annum from 1 February 1940;

2. Orders the Respondents to pay to the Applicant interest at 4 per cent per annum:

on 8,062.50 Swiss francs calculated from 1 February 1940 to 1 February 1941,
on 5,375 Swiss francs calculated from 1 February 1941 to 1 February 1942,
on 2,687.50 Swiss francs calculated from 1 February 1942 to 1 February 1943;

3. Orders the Respondents to pay to the Applicant the sum of 250 Swiss francs towards her costs of action;

4. Orders the restitution of the deposit made by the Applicant in accordance with Article VIII of the Statute of the Tribunal.

In witness of which judgment, pronounced in public sitting on 26 February 1946 by Mr. van Rijckevorsel, President, Mr. Eide, Vice-President, and His Excellency Mr. Devèze, Judge, the afore-mentioned have hereunto subscribed their signatures as well as myself, van Asch van Wijck, Clerk of the Court.

(Signed) Albert DEVÈZE.
Vald. EIDE.
A. van RIJCKEVORSEL.
W. H. I. van ASCH VAN WIJCK.

Annex III to the Memorandum of the International Labour Office

RECORD OF THE SIXTH MEETING OF THE FINANCE COMMITTEE OF THE TWENTY-FIRST ASSEMBLY OF THE LEAGUE OF NATIONS, 13 APRIL 1946

26.—ADMINISTRATIVE TRIBUNAL :

JUDGMENTS GIVEN ON FEBRUARY 26th, 1946, WITH REGARD TO CLAIMS OF CERTAIN FORMER OFFICIALS *(continuation)*: REPORT OF THE SUB-COMMITTEE TO THE SECOND COMMITTEE [1]

Sir Hartley Shawcross (United Kingdom), Rapporteur of the Sub-Committee, said that although he was a lawyer; he approached this matter on the broad basis of what was politic and right rather than on the basis of what might be strictly in accordance with the law. There was in fact no law which applied to a case like this. There was no other institution like the League of Nations ; there was no precedent for such a problem, and there were few basic principles of law which had any direct application to its solution. Fortunately, however, lawyers were not always compelled to look at matters with complete disregard of the principles of common sense. If the Committee tried to apply some strict rule of law, it would doubtless get an infinite variety of opinion and endless debate. Hence he hoped that the matter would be discussed from the broadest point of view.

The real problem was whether the Assembly, by the decision which it took in the grave emergency of December 1939 to reduce the staff and to dismiss a large number of officials, with a shorter notice than that to which they were entitled under the Staff Regulations existing at that time, acted outside its powers. If the League of Nations were a troupe of travelling actors or a tramway company, or a municipal corporation, there would be no doubt at all that this action was contrary to law. But the League of Nations was an organization of the sovereign States of the world, and as such it had an entirely peculiar status and the matter must be dealt with on that basis.

Although the League of Nations established the Administrative Tribunal which eventually gave a decision in favour of the officials who had been dismissed, there was no doubt that the League could have abolished that Tribunal without regard to the existing contracts of the League's officers. In fact, in 1927, the League had taken almost precisely similar action by doing away with the officials' right of appeal to the Council.

The League of Nations was a sovereign body, not being subject to the control of any superior body or any definite courts. Whether the Administrative Tribunal existed or not, no decision given against the League could be enforced. The conclusion was that the Assembly was entitled, by way of legislative act, to take such decisions in relation to its staff as it thought right.

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[1] For the text of this report, see L. of N., *Official Journal*, Special Supplement No. 194, Records of the 20th (Conclusion) and 21st Sessions of the Assembly, pp. 261-263.

This power was no novelty to municipal law, for in every country of the world the State had an inherent power to disregard the contracts into which it had entered if, in the interests of the State, this appeared desirable. It could pass a law to say particular contracts were no longer obligatory, and it could do so without regard to vested rights and interests. This power would not of course be used in normal circumstances, and the safeguard against abuse was the political safeguard : no Member State would allow a derogation of the rights of employees unless circumstances made it necessary. In 1939, circumstances did necessitate this, and the Sub-Committee felt that the Assembly had power to take that decision and the Administrative Tribunal was bound by the Assembly's decision.

The Administrative Tribunal had based its decision on two grounds. In the first place, it maintained that it was entitled to disregard the decision of the Assembly because the Assembly had no right to arrive at that decision. The Sub-Committee thought this fundamentally wrong and considered it a matter of importance that the status of the Assembly should be maintained. But in the second place the Tribunal fortified itself with a conclusion of fact to the effect that the resolution passed by the League in 1939 was not intended to apply to those officials in whose cases its application would have involved a breach of contract. The Sub-Committee most emphatically held the view that here the Tribunal was absolutely wrong. The resolution adopted by the League in 1939 was perfectly clear in its terms and the only possible conclusion was that the Tribunal felt that its decision on the legal aspects was so open to question that it had to fortify itself on the decision of fact.

The Chairman thanked the Sub-Committee for its prompt and careful report on a very difficult and complicated question, and particularly Sir Hartley Shawcross for the lucid explanation he had given.

M. Kaeckenbeeck (Belgium) said that, whilst admiring the luminous statement made by Sir Hartley Shawcross, he had been greatly struck by several arguments in the Sub-Committee's report with which he could not agree. First of all, there was the constitutional and legal aspect of the relations which existed, on the one hand, between two organs of the League of Nations—namely, the Assembly and the Administrative Tribunal—and on the other, between the League and its officials.

It would seem to follow from the report that, according to the Sub-Committee, the Assembly, the organ of one of the parties to a dispute, had the right to oppose the execution of a judgment of which it did not approve. That was a principle which appeared to be absolutely contrary to the notion of law and the sovereignty of law. In his opinion they should ask themselves whether the Assembly, taking the view that certain of the Tribunal's interpretations were inaccurate, had the right to oppose the execution of a judgment of the Administrative Tribunal.

The Assembly might, as Sir Hartley Shawcross had observed, have abolished the Administrative Tribunal, but advantage could not be taken of a hypothesis which had not come to pass in order to refuse to execute a judgment rendered by the Tribunal. If they were prepared to do that, there had been no object in establishing an Administrative Tribunal, and they might as well have left the League of Nations and its officials to settle matters among themselves. When the Administrative Tribunal was established, the power of interpreting questions

of law and of determining the legal relations between the League and its officials, which had previously been attributed to the Council, a political organ, had been transferred to the Tribunal, a judicial organ. If, therefore, the Tribunal was invested with the power of interpretation, it followed that its interpretations were operative.

In paragraph 5 of the report, the problem did not appear to have been stated as it ought to have been. The question was not whether the Assembly was competent to render operative a judgment of the Administrative Tribunal, but whether the Assembly was competent to prevent the execution of a judgment of the Tribunal when the said judgment had been rendered in a matter in respect of which the competence of the Tribunal was not contested.

By refusing to execute a judgment which displeased it, the League of Nations would be gravely violating the rules of law and of the sovereignty of law and such action would have extremely serious repercussions in an international organization in which constant efforts had been made to substitute law for force. The intention in transferring to the Tribunal the former judicial powers of the Council had, in fact, been to substitute judicial decisions for decisions of a political nature.

Sir Hartley Shawcross had expressed the view that, within the framework of the League of Nations, there was not really any law governing the case. That statement did not seem to be accurate, inasmuch as the contract entered into between the League of Nations and its officials constituted a legal relationship and the Assembly had established a judicial organ competent to interpret that contract—namely, the Administrative Tribunal.

It would be absurd to agree to execute only those judgments which were rendered in favour of the League of Nations ; yet that would be the result if it were admitted that the Assembly had the right and the power to decide that judgments should not be executed because it did not approve the reasons invoked by the Tribunal.

Sir Hartley Shawcross and the Sub-Committee had attached great importance to the fact that the Assembly of the League of Nations might be compared to a legislative assembly which, within a State, had the power, in certain circumstances, to modify contracts. That analogy, however, was not quite pertinent, for the Assembly was not a legislative assembly and it could not be compared with the legislature of a State. In a State there were a legislative power, a judicial power, and the subjects of the State. In the case of the international organization, the organs of the League were dealing with persons who were strangers to them, with whom they concluded a contract which gave rise to a legal relationship. The officials of the League of Nations were not the subjects of the international organization but co-contracting parties.

Even in States possessing sovereign rights which it was impossible to attribute to the Assembly, no court had the right, when the legislative power modified contracts, to interpret those modifications retrospectively, unless the new law contained express provisions to that effect.

As the Administrative Tribunal had not been prepared to apply the modifications of the contract retrospectively, the Assembly, according to the Sub-Committee, was entitled to refuse to execute the judgment. To admit that argument would be the negation of law. It was a conception which the Belgian delegation could not accept.

The question, which was very complex, had arisen largely out of a sort of conception of necessity. Necessity, however, could not be invoked at the present time even if, at the moment when the Assembly took its decision, it was extremely important to effect economies.

In conclusion, he drew the attention of his colleagues to the very serious consequences which might follow from the adoption of the principles it had critized.

After it had constituted a Secretariat which had done excellent work and at a moment when a new organization of States was being created, was the League of Nations going to run the risk of disregarding every legal rule by adopting principles which no State would adopt and which it would be impossible to enforce in any State without the general public gaining the impression that the standpoint of law was being completely abandoned in favour of political arbitrariness ? The Belgian Delegation could not vote in favour of the report submitted to the Committee.

M. Grafström (Sweden) said that he desired to state that the Swedish Delegation was in complete agreement with the views of the Belgian Delegation.

M. François (Netherlands) stated that, in the opinion of the Netherlands Government the League of Nations was bound to carry out the Administrative Tribunal's decision. International jurisdiction, indeed, made no provision for sanctions, but it was to the credit of the international community that States, almost without exception, had accepted judicial or arbitral decisions, and that very few of them had refused to bow before a final award. It would be extremely regrettable if the League of Nations, at the moment when it was about to disappear, were to figure among those exceptions. The Sub-Committee was of opinion that the Tribunal's decision was at fault, but that argument could not be advanced, because one of the first principles of justice was that nobody could be at the same time judge and party to litigation. Fortunately, the Sub-Committee had refrained from invoking the argument that the Tribunal was not competent, for incompetence had always been invoked by States, which wished to escape a decision unfavourable to themselves. The Sub-Committee was further of opinion that the action taken by the Secretary-General was justified by a decision of the Assembly and that being so the Tribunal should have dismissed the claim. It was not for the Committee to examine the merits of the award, for the League of Nations, even if it were sovereign, was itself a party to the dispute. An appeal might have been lodged of the Statute provided for such a recourse, but, in the circumstances, it only remained for the League to bow to the decision of the competent judges. The execution of the judgment would be a heavy burden on the League, but it was better to lose money than to injure not only the prestige of the League but also the cause of international jurisdiction.

If it contented itself with carrying out the Tribunal's decision, the League would keep strictly within the limits of the award, that is to say, it would pay the prescribed compensation to those to whom the decision applied. With regard to the others, the League of Nations, refraining from expressing an opinion as to the merits of the decision, was under no obligation—not even a moral one—to grant them the same treatment.

The Netherlands Delegation took the view that good sense should be applied in settling international affairs, but it was precisely good sense which demanded that an organization like the League of Nations should set an example in the matter of respecting an award, even if it considered the decision unjustified.

M. Watteau (France) said he had little to add to the very strong arguments advanced by Sir Hartley Shawcross. Those arguments were entirely in conformity with the opinion expressed by the French Delegation in the Sub-Committee. If the Administrative Tribunal's decision was recognized as being valid, equity would demand that its application should be extended to officials who had not lodged a complaint and, *a fortiori*, to officials still in the service, who might lodge a similar complaint. If that were done, it would involve very important financial consequences, and that fact constituted a subsidiary justification for the commonsense attitude recommended by Sir Hartley Shawcross. Legally, the Tribunal's judgment should not be recognized as valid. Practically, a decision to the contrary would entail consequences which it would be difficult to entertain.

Nevertheless, if, as the Report suggested, the Supervisory Commission were to consider the granting of their expenses to officials who had lodged a complaint in good faith, that solution would seem to be entirely reasonable to the French Delegation.

M. Kopecky (Czechoslovakia), Vice-Chairman, stated in his capacity as Chairman of the Sub-Committee that the fundamental question seemed to him to be the following. The Administrative Tribunal had declared itself competent to pass judgment even on decisions of the Assembly. On the other hand, it might be maintained that the Assembly had never intended to confer such a power in the Tribunal. The fact that the Statute contained no definite clause on that subject could not be interpreted in the way the Tribunal had interpreted it.

He had followed closely the statement made by the Belgian delegate, in whose view the Tribunal was competent to give judgment upon a dispute between the League and its officials, but he himself thought that the matter should be put otherwise. It was the duty of the Tribunal to deliver judgment on disputes between the Administration of the League and officials. In point of fact, the Tribunal had been constituted by the Assembly for the purpose of watching over the exact execution of its decisions. He and his colleagues on the Sub-Committee held that the competence of the Tribunal could not be extended to cover the decisions of the Assembly itself. The Assembly could change the constitution of the Tribunal and could even abolish it. The Tribunal was therefore subordinate to the Assembly and could not bind it by invoking a decision which it had taken at an earlier date. For the reasons he had given, he was able, in all conscience, to support the legal view put forward by the Rapporteur of the Sub-Committee, whilst regretting that the desires of some officials would not be satisfied.

Sir Hartley Shawcross (United Kingdom), Rapporteur of the Sub-Committee, replying to the previous speakers, said that the Sub-Committee fully recognized the importance of conferring on international officials a measure of security at least equal to that enjoyed by members of national services. The conclusion reached by the Sub-Committee did not carry the consequence that an international official had no contrac-

tual rights, but merely that the League of Nations possessed residuary powers which were supreme, that was to say, that in the last resort it was the League and not the Tribunal which was the master. But this power ought not to be exercised, and obviously would not be exercised, so as to set aside rights and vested interests, except in extreme circumstances such as those which existed in 1939. The question as to when it should be exercised was a matter of policy and not of legal power.

If he had been arguing this case in a local county court, he would have been in complete agreement with all the propositions advanced by his colleagues. But this was not the case, and he thought they were in danger of falling into the error of judging this matter by ordinary canons of municipal law as enforced in ordinary municipal courts. Such principles were largely inapplicable to a case of this kind, unless the Assembly was content to place itself on the same basis as an ordinary municipal corporation. Such a basis would be contrary to the law and to the facts. The Assembly corresponded more to the sovereign body than to the ordinary commercial trading corporation, and it was in that field of law that this matter had to be considered.

It was the inherent right of every sovereign legislature that somewhere in the Constitution there should exist the power to disregard contracts which turned out to be contrary to the interests of the State. If this were not so, some private vested right could stand in the way of the interests of the people and the State.

The Belgian Delegate had said that the law to be applied was the law of the contract between the League of Nations and its officials. But the law of contract was interpreted differently in every country. If this contract had been concluded in Britain, it would certainly have been overridden in the circumstances which had prevailed.

Another question was that of the other officials who had not appealed. When this decision was taken by the Assembly in 1939, it affected several hundred people, of whom all but twelve had loyally accepted it. They had no doubt done so in the belief that it would apply equally to all. If the Committee took the view that the twelve or thirteen officials who had challenged the decision were to be paid this considerable sum of money, it would be very difficult in equity to refuse the claims, although legally they were out of time, of the hundreds of officials who stood by the League in the times of emergency of 1939: it would cost some four million francs, but it could be done and ought to be done.

The Committee was, however, concerned not only with justice to these individuals but also with the status of the Assembly. It was of profound importance to uphold the legal and diplomatic immunity acquired both for the League and for the United Nations and to maintain their high and special status.

Professor Bailey (Australia) said that at the conclusion of a long and close discussion in the Sub-Committee, he had found it necessary to reserve the position of the Government of Australia. For that reason, he had thought it proper not to participate in the discussion in the full Committee.

M. Kaeckenbeeck (Belgium) said that he would like to clear up a passage in his previous statement which seemed to have been misinterpreted. In the course of his remarks he had said that Sir Hartley Shawcross had expressed the view that within the framework of the League

of Nations there was not really any law governing the case. His reply to that was that there was a law, and that law was the contract. Sir Hartley had then spoken of the law of the contract. That would, however, be the law according to which the contract must be interpreted. What he had meant to say was that the legal relationship in question was a contractual relationship. That was, in fact, what was said in the report of the Committee of Jurists which had considered in 1932 the right of the Assembly to make a unilateral reduction in the salaries of the officials.

M. de Blanck (Cuba) thought that the two views were already sufficiently known. They might still be discussed at length. It was time to take a vote.

The Chairman fully approved the suggestion. He asked the Committee whether it was prepared to accept the recommendations made by the Sub-Committee. He drew particular attention to paragraph 10 of the report. If the report was adopted, the suggestion contained in that paragraph might be carried out by the Board of Liquidation, the setting-up of which was contemplated.

The vote would be taken by roll-call at the request of the Belgian delegate.

The result of the voting was as follows :

4 delegations were absent (Afghanistan, Dominican Republic, Ecuador, Panama) ;

16 delegations voted in favour of the adoption of the report (Union of South Africa, Argentine, Bolivia, United Kingdom, Canada, China, Cuba, Egypt, Finland, France, India, Ireland, Mexico, New Zealand, Czechoslovakia, Turkey) ;

8 delegations voted against the adoption of the report (Belgium, Denmark, Luxembourg, Netherlands, Poland, Sweden, Switzerland, Uruguay) ;

5 delegations abstained from voting (Australia, Greece, Norway, Portugal, Yugoslavia).

The report was adopted.

Annex IV to the Memorandum of the International Labour Office

STATUTE AND RULES OF COURT OF THE ADMINISTRATIVE TRIBUNAL

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STATUT ET RÈGLEMENT DU TRIBUNAL ADMINISTRATIF

[Non reproduit [1]]

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[1] *International Labour Organization — Organisation internationale du Travail.* International Labour Office — Bureau international du Travail. Geneva, 1953 — Genève, 1953.

5. EXPOSÉ ÉCRIT DU GOUVERNEMENT DE SUÈDE

Monsieur le Président,

Par ordonnance du 14 janvier 1954, les États admis à ester devant la Cour internationale de Justice ont été invités à présenter des exposés écrits sur les questions soumises à la Cour pour avis consultatif conformément à la résolution de l'Assemblée générale des Nations Unies du 9 décembre 1953, questions concernant l'effet de jugements du tribunal administratif des Nations Unies accordant indemnité. Faisant suite à cette invitation, le Gouvernement suédois désire présenter les points de vue suivants.

La première question posée à la Cour est ainsi conçue :

> « Vu le Statut du Tribunal administratif des Nations Unies et tous autres instruments et textes pertinents, l'Assemblée générale a-t-elle le droit, pour une raison quelconque, de refuser d'exécuter un jugement du Tribunal accordant une indemnité à un fonctionnaire des Nations Unies à l'engagement duquel il a été mis fin sans l'assentiment de l'intéressé ? »

Cette question paraît demander tout d'abord l'examen d'un problème plus général : jusqu'à quel point l'organisation des Nations Unies est-elle tenue à remplir ses obligations juridiques impliquant versement de paiement ? Il n'est pas douteux que l'acquittement d'une telle obligation exige un vote de l'Assemblée générale accordant les crédits nécessaires. Il ne fait pas de doute, non plus, que les États Membres puissent donner à leurs représentants à l'Assemblée générale des instructions de voter contre de tels crédits et de rendre ainsi, en fait, le paiement impossible. En cas de vote dans ce sens, la situation serait sans issue par l'effet de l'immunité judiciaire des Nations Unies, et la partie adverse ne pourrait arriver à être payée. Toutefois, en ce qui concerne une organisation bâtie comme celle des Nations Unies sur le principe de la prééminence du droit, on ne saurait s'en tenir à la simple constatation du fait que l'Assemblée générale a la possibilité matérielle de bloquer n'importe quel paiement. L'organisation des Nations Unies qui d'ailleurs, le cas échéant, fait valoir elle-même des réclamations de nature financière, doit évidemment être considérée comme tenue, en droit, d'accomplir les obligations qu'elle a contractées. Un refus de crédits par lequel l'Assemblée générale rendrait impossible l'acquittement d'une telle obligation porterait donc atteinte au droit.

Cette manière d'envisager le problème serait applicable par exemple au cas où un fonctionnaire de l'Organisation des Nations Unies aurait, dans le cadre de sa compétence, conclu au nom de l'Organisation un achat et où l'Assemblée générale, en désapprou-

vant cet achat, serait portée à refuser les crédits qui permettraient de remplir les obligations contractuelles de l'acheteur.

Une situation analogue pourrait naître si l'organisation des Nations Unies avait conclu avec un État Membre un accord prévoyant que des différends sur l'interprétation ou l'application de l'accord seront réglés par voie d'arbitrage, comme c'est d'ailleurs le cas pour l'accord conclu avec les États-Unis concernant le siège des Nations Unies. Si un différend sur un tel accord était porté devant un tribunal d'arbitrage constitué selon les stipulations de l'accord et si le tribunal d'arbitrage donnait une sentence contre les Nations Unies condamnant cette Organisation à une prestation de nature financière, il serait également contraire au droit que l'Assemblée générale, en refusant les crédits nécessaires pour faire face à cette obligation, rendît la sentence illusoire.

La conclusion à laquelle on arrive dans ce dernier exemple est également valable pour les jugements du Tribunal administratif des Nations Unies.

L'Assemblée générale a créé ce Tribunal, dont elle a adopté le statut le 29 novembre 1949. Selon l'article 2, paragraphe 1, du statut, le Tribunal est compétent pour connaître des requêtes invoquant l'inobservation du contrat d'engagement des fonctionnaires du Secrétariat des Nations Unies ou des conditions d'emploi de ces fonctionnaires et pour statuer sur lesdites requêtes. Le paragraphe 3 du même article prescrit qu'en cas de contestation touchant sa compétence le Tribunal décide. En outre, aux termes de l'article 10, paragraphe 2, les jugements du Tribunal sont définitifs et sans appel.

Or, la situation juridique des fonctionnaires des Nations Unies est réglée et par les statuts et règlements les concernant, et par les contrats individuels qui ont été établis pour chacun d'eux et qui se réfèrent aux statuts et règlements en vigueur. Le tribunal administratif et son statut sont donc parties intégrantes des relations contractuelles entre l'Organisation des Nations Unies et ses fonctionnaires. Il s'ensuit que l'Organisation manquerait à une obligation contractuelle si elle n'observait pas le statut du Tribunal.

Tant que le Tribunal restera dans le cadre de sa compétence, l'Organisation des Nations Unies sera donc tenue en droit à exécuter ses jugements. En cas de doute concernant l'étendue de la compétence du Tribunal, il faut en outre remarquer que le Tribunal a reçu selon l'article 2, paragraphe 3, de son statut le pouvoir de décider lui-même. Il est vrai que cette disposition se trouve dans un contexte du statut où il est question de l'étendue de la compétence du Tribunal en vue de l'interprétation des termes « contrat d'engagement » et « conditions d'emploi », mais à plus forte raison le Tribunal est évidemment compétent quand il s'agit de statuer sur la question de savoir si une certaine mesure prise par le Secrétaire général contre un fonctionnaire constitue

une inobservation de son contrat. En tranchant la question de savoir si le renvoi d'un fonctionnaire a été justifié ou non, le Tribunal ne saurait donc être considéré comme placé sous la censure de l'Assemblée générale. De même, l'évaluation du dommage causé par l'inobservation d'un contrat d'engagement doit être considérée comme étant de la compétence exclusive du Tribunal. A défaut d'une règle limitant le montant de l'indemnité à accorder à la partie lésée — et une telle règle n'existait pas avant les derniers amendements au statut du Tribunal —, les décisions du Tribunal concernant fixation d'indemnités ne sont donc aucunement soumises à une revision par l'Assemblée générale.

Reste la question de l'effet que produiraient des irrégularités dans la procédure devant le Tribunal. Cette question doit être étudiée à la lumière de la jurisprudence concernant la nullité des jugements internationaux pour fautes de procédure. Le Gouvernement suédois se contente de constater qu'à son avis des irrégularités dans la procédure ne pourraient en aucun cas donner lieu à une revision des jugements par l'Assemblée générale. Toutefois, sous des conditions très restreintes, on pourrait envisager une revision par le Tribunal lui-même, comme cela a été le cas dans l'affaire de Jane Reed où les deux parties avaient fourni au Tribunal un renseignement erroné concernant une date importante pour l'évaluation de l'indemnité due à la partie demanderesse.

A la lumière de ce qui vient d'être dit, le Gouvernement suédois pense qu'il faut donner une réponse négative à la première des questions soumises à la Cour internationale de Justice, ce qui élimine la deuxième question.

En soumettant ces points de vue, le Gouvernement suédois vous prie, Monsieur le Président, d'accepter les assurances de sa très haute considération.

Stockholm, le 12 mars 1954.

(Signé) ÖSTEN UNDÉN.

6. WRITTEN STATEMENT OF THE NETHERLANDS GOVERNMENT UNDER ARTICLE 66 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE ON THE EFFECT OF AWARDS OF COMPENSATION MADE BY THE U.N. ADMINISTRATIVE TRIBUNAL

The Netherlands Government, anxious to contribute to the clarification of any question which might endanger the efficiency and the security of the Staff of the U.N. Secretariat, respectfully submits to the International Court of Justice, under Article 66 (2) of its Statute, the following statement on the request of the General Assembly for an advisory opinion on the effect to be given to awards of compensation made by the U.N. Administrative Tribunal.

1. The first question referred to the Court is as follows :

> "Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent ?"

Considering in the first place the Statute of the United Nations Administrative Tribunal mentioned in this question, it would seem that the most important of the relevant provisions are those of Article 2 and of Article 9 as in force at the time of the drafting of the question by the Fifth Committee, and of Article 9 as amended by a Resolution of the General Assembly of December 9th, 1953, effective from the date of adoption.

The texts of these articles read as follows :

> *"Article 2*
>
> 1. The Tribunal shall be competent to hear and pass judgment 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."

"*Article 9*

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; but if, in exceptional circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, impossible or inadvisable, the Tribunal shall within a period of not more than sixty days order the payment to the applicant of compensation for the injury sustained. The applicant shall be entitled to claim compensation in lieu of rescinding of the contested decision or specific performance. In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under Article 12."

"*Article 9* (as amended)

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 judgment, 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 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 12."

It follows from these provisions that if a contract of service of a staff member of the United Nations has been terminated without his consent, the Tribunal, on his application, may decide that the termination has been contrary to the contract or to the pertinent regulations and rules, and order the payment of compen-

sation if the Secretary-General decides not to reinstate the staff member in question. The Tribunal may also at once award compensation in lieu of reinstatement if the staff member should prefer this (according to the old text), and order compensation together with the remanding of the case for institution or correction of the required procedure according to the amended text. The amount awarded "shall be fixed by the Tribunal and *paid by the United Nations*". It seems logical that the General Assembly by adopting these last words in its legislative capacity cannot have meant that in its budgetary capacity it would be free to refuse to give effect to an award. If an award made by the Tribunal "shall be paid by the United Nations", it follows that every organ of the United Nations is under a legal obligation not to prevent the payment of this award by the United Nations. No qualifications of this obligation can be found anywhere in the Statute of the Tribunal, nor in any other relevant instruments. From the moment an application under Article 2 of the Statute has been filed, no other body is competent, the Tribunal deciding all disputes as to its own competence (Article 2, paragraph 3; *vide infra* paragraph 4) and delivering final judgments without appeal (Article 10, paragraph 2).

2. If any organs besides the Tribunal either could challenge a decision of the Tribunal confirming its jurisdiction, or would be free to refuse on any grounds to give effect to an award of compensation (which would actually mean a limitation of the Tribunal's powers), the Statute or any other relevant instruments would explicitly have provided so. For in that case it would have been established beyond doubt which organs are meant, the grounds they may act on, and the effect of their decisions. Other international organizations, wishing to have an appellate tribunal of a more limited capacity, have laid down this limitation in the statute of the tribunal in question. For instance, the Statute of the Administrative Tribunal of the International Labour Organization, as adopted by the International Labour Conference on October 9th, 1946, and modified by the said Conference on June 29th, 1949, which—apart from a number of minor alterations—was also in force as the Statute of the League of Nations Administrative Tribunal until October 31st, 1946, provides in Article XII:

> "1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.
> 2. The opinion given by the Court shall be binding."

Other intergovernmental organizations, according to the Annex to the Statute of the Administrative Tribunal of the International

Labour Organization, may recognize the jurisdiction of the Tribunal subject to some adjustments including one with regard to Article XII which, in cases affecting any one of these organizations, is then *mutatis mutandis* applicable *without* the addition of paragraph 2. Thus, in these cases, and apart from any specific provisions to the contrary, it is not the International Court of Justice which has the last word in matters of jurisdiction and fundamental faults in the procedure, but apparently the Executive Board of the international organization concerned.

In the light of these diverging arrangements it seems justified to conclude that if the General Assembly of the United Nations should have wished to reserve to itself the right to review judgments of the Tribunal, it would have included a provision to that effect in the Tribunal's Statute.

3. The conclusion that a true delegation of power by the General Assembly to the Administrative Tribunal has taken place, is confirmed by the legislative history of the Tribunal's Statute.

It is this history which Question 1, referring to all the relevant records, wishes to be taken into account as well. When the Administrative Tribunal of the League of Nations was established, it was from the very outset the intention that the Tribunal should be a true judicial body. In this respect the United Nations Tribunal has been a continuation of the same principles, as shall be proved later on.

The only experience gained so far in respect of an appeal to a political body (viz. the case of Mr. M. F. Monod, who, in 1925, as a staff member had appealed from a decision of the Secretary-General to the League of Nations Council, in accordance with a Resolution adopted by the Assembly on December 17th, 1920) proved unsatisfactory. Already at this occasion the Council felt obliged to refer the matter to an *ad hoc* commission of jurists, stating in advance that it would adopt the conclusions of this commission as its own decision on the case.

The conception of the Administrative Tribunal as it was held by the majority of a special sub-committee of the Fourth Committee of the Assembly, and eventually adopted by the Assembly itself (Resolution of September 27th, 1927), appears from the following quotations from the Sub-Committee's Report (League of Nations, *Official Journal*, Special Supplement No. 58, Records of the 8th Ordinary Session, Fourth Committee, 1927, p. 251 ff.):

> "The international status of the League prevents officials from bringing actions in the ordinary courts to enforce the terms of their appointments. It is not, however, satisfactory that a class of employees amounting to several hundreds of persons and engaged on terms which are necessarily complicated and may give rise to disputes as to their exact legal effect should have no possibility of bringing questions as to their rights to the decision of a judicial body. It is equally unsatisfactory for the administrations to be

> both judge and party in any dispute as to the legal rights of their officials, or for such disputes to be referred to the Council.... Except in one class of cases, which is discussed below, the proposed Tribunal is to be exclusively a judicial body set up to determine the legal rights of officials on strictly legal grounds.... The function of the proposed Tribunal will be to pronounce finally upon any allegation that the administration has refused to give an official treatment to which he was legally entitled, or has treated him in a manner which constitutes a violation of his legal rights under his appointment or of the regulations applicable to his case, or, finally, has taken in an irregular or improper manner a decision which was within his competence.... It will be seen that the Tribunal will be the final authority for the interpretation of the terms of an official's appointment and the regulations applicable to the official.... The Supervisory Commission has considered the possibility of composing the Tribunal of nominees of the staff and of the administration concerned, with a neutral Chairman. It has also considered the possibility of attaching to it assessors or judges nominated by the administration and by the staff. The first of these plans has been rejected because it was felt that the Tribunal should be an entirely independent and *strictly judicial* body (the italics are in the report). Although the second plan may have advantages, the Commission felt that there were decisive reasons against its adoption.... No provision for the revision of judgments of the Tribunal is inserted in the Statute. It is considered that, in the interest of finality and of the avoidance of vexatious proceedings, the Tribunal's judgments should be final and without appeal, as is provided in Article VI, paragraph 1...."

The minutes of the discussion of the Report in the Fourth Committee (*op. cit. supra*, pp. 35 f.) do not reveal any departures from this conception. The representative of India drew the attention to the psychological aspect of the problem, observing that the League of Nations was an organization endeavouring to encourage arbitration in the international field whereas its own employees had at present no tribunal to which they could appeal in disputes controversial between them and the Secretary-General. However, it does not appear from this remark—considered in connection with the Report—that the Delegate was convinced, or succeeded in convincing the Committee, that the Assembly was going to create some machinery for arbitration in that special sense, which has from time to time been accepted in the past and which leaves it to the final decision of any of the parties to determine whether or not the Tribunal has departed from the terms of submission by lack of jurisdiction or excess of jurisdiction, has misinterpreted its function, has failed to apply the law prescribed, or has made errors in the application of this law, etc. On the contrary, the idea of a tribunal after the model of comparable institutions in some national administrations, making final and unchallengeable decisions, was already suggested in the Assembly at an early stage when during the 2nd Session the first Director-General of the International Labour Organization, Albert Thomas, proved the necessity

of establishing a judicial body on the analogy of the Conseil d'État in France.

4. The same analogy was mentioned by the Chairman of the Advisory Committee on Administrative and Budgetary Questions of the United Nations, Mr. Aghnides, when he opened the discussion on the establishment of an administrative tribunal in the Fifth Committee of the General Assembly of the United Nations during its 4th Session in 1949. Presenting the views of a special advisory committee of which he himself had been Chairman and which had completed a Report and Draft Statute as early as 1946, Mr. Aghnides observed that the very idea of an administrative tribunal was of European origin, recalling in that connection the part played in France by the *Conseil d'État.* On the other hand, the Anglo-Saxon countries had never been very much in favour of the establishment of an administrative tribunal, because it was an institution which was unfamiliar to them (Summary Records, 187th meeting, paragraph 47). Mr. Aghnides further recalled that such a tribunal functioned in the League of Nations for twenty years and that it had certainly increased the prestige and authority of the Secretary-General of the League by making it possible for any member of the staff to have recourse to an impartial judicial body on which neither the Secretary-General nor the staff were represented. The principle of the separation of powers had thus been very strictly applied. Such were the ideas in the minds of the members of the advisory committee when considering the question, Mr. Aghnides stated. In this connection it may be recalled what Mr. Aghnides declared again during the 6th Session at the 333rd meeting of the Fifth Committee (January 22nd, 1952) when the Permanent Staff Regulations of the United Nations were being discussed (Summary Records, paragraph 4) :

> "The Secretariat was the executive which implemented the decisions of the legislative body, namely the General Assembly. The judiciary was the International Court of Justice, but it dealt only with conflicts between nations, not individuals. Its parallel, for the staff, was the Administrative Tribunal, which was based on a European conception comparable to that of the *Conseil d'État* in France."

The same conception of the tribunal, recalling the arguments from the League period, had already been laid down in the Advisory Committee's report. The last paragraph of this report (Doc. A/91 of October 16th, 1946 ; see also General Assembly, 4th Session, Committee V, Annex to the Summary Records, Vol. I, 1949, p. 151) reads as follows :

> "The success of the League of Nations Administrative Tribunal leads the advisory committee to believe that a United Nations administrative tribunal, established along the lines proposed, would be a useful body for safeguarding harmony between the United

> Nations and its officials. Without in any way embarrassing the authorities responsible for the conduct of administration, it would give assurance to officials as to the protection of their contractual rights. The United Nations is not suable in any national court without its consent ; nor can it be sued by an official in the International Court of Justice. By creating a tribunal to serve as a jurisdiction open to its many officials of various nationalities, the United Nations will be acting not only in the interest of efficient administration, but also in the cause of justice."

The reluctance, already mentioned by the Chairman of the Advisory Committee on Administrative and Budgetary Questions, of some Anglo-Saxon countries to accept the authority of an administrative tribunal, became evident during the further discussions in the Fifth Committee. The United States Delegation, particularly, while recognizing the value of European legal systems, was not entirely convinced of the necessity of establishing an administrative tribunal at that stage. For that reason the Delegation requested that the examination of the proposal to that effect should be postponed *sine die*. The U.S. Delegation reserved the right to suggest some amendments to the draft statute if the Committee should decide otherwise (*op. cit. supra*, Summary Records, pp. 19 f.). Because the Committee as a whole did not show any hesitation in its work on the administrative tribunal, the United States Delegation actually moved amendments aiming at a modification of the judicial character and of the capacity of the Tribunal and supported other relevant proposals. It proposed an amendment to the draft of paragraph 5 of Article 3, to the effect that a member of the tribunal could be dismissed for unsuitability by a decision of a two thirds majority of the General Assembly instead of by a unanimous decision of the other members of the Tribunal, as provided in paragraph 1 of Article 18 of the Statute of the International Court of Justice (if a member of the Court "has ceased to fulfil the required conditions"). The United States proposal was accepted in the Fifth Committee by 16 votes to 14 with 11 abstentions. As stated in the Report of this Committee (Doc. A/1127 of November 22nd, 1949, p. 6) :

> "A number of delegations expressed strong objection to this amendment on the grounds that it was a well-recognized principle that such decisions should be exclusively within the power of the judicial organ concerned. Moreover, the amendment might have the effect of giving the Tribunal a political character. The representative of Norway, being of the opinion that this amendment affected the entire structure of the Tribunal's statute, reserved the right to raise the question again at the plenary meeting of the General Assembly."

Actually a five-Power amendment, adopted in the plenary meeting of the General Assembly by 27 votes to 15 with 8 abstentions, restored the original principle : no dismissal without a unanimous opinion of the other members of the Tribunal.

Apart from the question of the membership of the Tribunal, the United States Delegation, during the discussion in the Fifth Committee, also repeatedly emphasized that the Tribunal should have no competence in disciplinary matters.

As far as questions of terminology may throw light on the Fifth Committee's conception of the Administrative Tribunal, the attention is drawn to an observation of the United States Representative in the Fifth Committee during the 8th Session in 1953, when the Committee was discussing the question of the effect of awards of compensation made by the United Nations Administrative Tribunal. The United States Representative stated as follows (United States Delegation to the General Assembly, Press Release No. 1847, December 2nd, 1953, p. 3):

> "In this connection, it is of interest to note that the persons who serve on the Tribunal are 'members' and that a proposal to call them 'judges' was rejected by a vote of 22 to 9, with 7 abstentions, when the Tribunal was established in 1949. Thus we are not dealing with the binding decisions of a court of co-ordinate authority, such as the International Court of Justice. If we were, the situation would of course be completely different."

The rejected proposal to which the United States Representative referred had been a Netherlands amendment, in keeping with another rejected Netherlands amendment suggesting to call the Executive Secretary of the Tribunal "Registrar". The restoration of the term "judge", as used in the original draft of 1946, had been opposed by the United States Representative in 1949 (not for the purpose of emphasizing) that the decisions of the Tribunal were no "binding decisions of a court of co-ordinate authority", but because, as this representative had stated expressly, his Delegation considered that membership of the Administrative Tribunal should be open to persons with administrative experience and it should not be thought that only jurists were capable of performing those duties (Summary Records, 214th Meeting, paragraphs 115 and 122). The U.S. Delegation had proposed an amendment to that effect, which was subsequently withdrawn after it had been decided that the members of the Tribunal would be appointed by the General Assembly instead of by the International Court of Justice as originally proposed. Nowhere, however, does it appear from the Summary Records of the Fifth Committee that the majority, in following the United States oppositon to the use of the word "judge", had in mind to change the fundamental conception of an Administrative Tribunal as accepted in the League of Nations (the Statute of that Tribunal did use the word judges) and as reaffirmed in the preparatory documents of the Fifth Committee. An amendment of the U.S.S.R. to replace the term Administrative Tribunal by the "less pretentious" name of "Staff Claims Board" had already been rejected by 19 votes to 5, with 13 abstentions. (*Op. cit. supra*, paragraph 33.)

The provision, which is now paragraph 3 of Article 2 of the Statute—"In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal"—and which in similar terms is to be found in Article 11, paragraph 7, of the Statute of the Administrative Tribunal of the League of Nations (in the latter case subject to Article XII, mentioned hereinbefore)—now the Statute of the Administrative Tribunal of the International Labour Organization—was criticized twice in the Fifth Committee during the 4th Session of the General Assembly. At the 189th meeting the Representative of the U.S.S.R. observed, according to the Summary Records (paragraph 15):

> "Article 2, paragraph 3, of the draft statute provided that, in the event of a dispute, the Tribunal should itself be competent to decide the matter. The question of the limits of its competence seemed hardly for the Tribunal itself to decide, but for the body which had set it up, namely the General Assembly; if necessary the duty might be delegated to a subsidiary body, such as the Advisory Committee."

The Chairman of the Advisory Committee on Administrative and Budgetary Questions, preferring to speak in his capacity as Chairman of the committee which had drafted the Statute, replied to the U.S.S.R. Representative as follows (paragraph 18):

> "The suggestion that the Tribunal would not be the proper authority to judge the limits of its own competence was difficult to understand, since even committees normally established their own rules of procedure and competence. Moreover, should a claimant declare the Tribunal not competent to hear his case, a long delay might result before a decision could be obtained from the General Assembly, which, in any case, should not be bothered with such details. He hoped that the U.S.S.R. Representative would not press the point."

Indeed the U.S.S.R. Representative did not press the point. Again the matter of competence came up when, during the 214th meeting, the Representative of Canada, referring to paragraph 3 of Article 2 of the Draft Statute, remarked that he would have preferred such decisions to have been made by the General Assembly rather than by the Administrative Tribunal. The following discussion is quoted from the Summary Records (214th meeting, paragraphs 73-77):

> "*Mr. Lebeau* (Belgium) was astonished at the suggestion of the representative of Canada. The United Nations had decided to set up a judicial organ and it would be inconceivable, according to regular legal procedure, for a political organ to decide on the competence of a judicial one. In the event of a dispute, it was undoubtedly for the Administrative Tribunal itself to settle the question. Moreover, the Secretary-General had considered that the Appeals Board—an organ with less prestige than the proposed Administrative

Tribunal would have—had already been given authority to settle the question of its own competence in the event of a dispute. At the request of the Chairman, Mr. Feller (Secretariat) explained that it was an established rule in law that any tribunal was entitled to settle the question of its competence itself. It was also an established rule that all the organs of the United Nations should decide on their own competence in the first instance. It would, therefore, be difficult to reserve that power to the General Assembly and, if the Assembly were to wield it effectively, its agenda would be greatly overloaded.

Mr. Aghnides (Chairman of the Advisory Committee on Administrative and Budgetary Questions) asked the representative of Canada not to press for the amendment of paragraph 3, which simply applied a long-established principle to the particular case of the Administrative Tribunal.

Mr. Andren (Sweden) said that, if the Canadian suggestion were followed, it would be essential to set up complicated machinery which had not yet been needed.

Mr. Jutras (Canada) said that he would not press his point."

Apparently the Committee, in dealing with the matter of competence in connection with the proposed wording of paragraph 3 of Article 2 had specially in mind the case of a preliminary objection. Nevertheless, the repeated contrasting of the Tribunal as the judicial body with the Assembly as the political body makes it clear that on the whole the Committee did not consider the Assembly fit for a typical judicial function, either in respect of settling preliminary disputes as to the competence of the Tribunal, or as regards reviewing final decisions of the Tribunal because of alleged lack of competence. This had been the established opinion since the days when in the League of Nations the Council as a political organ for settling disputes between the Organization and the individual staff members had been replaced by an Administrative Tribunal.

5. Considering now the text of the Statute in the light of its legislative history, the conclusion seems unavoidable that it has been the will of the Legislature—in the present case the General Assembly—to set up a true judicial body as it is understood in the constitutional law of civilized nations. The examples derived from national public law and referred to throughout the discussion, as well as the general principles mentioned, such as the separation of powers, give this conclusion sufficiently support. There is no reason to assume that international organizations, because they are created by treaties and because their Statutes are products of international law, in their internal functioning could not be governed by a kind of law whose structure bears the closest resemblance to certain parts of national public law.

The Rules of Procedure of the General Assembly of the United Nations, for instance, do not constitute an international treaty

(though created by a body which derives its power from an international treaty), but an administrative regulation brought about by a majority vote according to normal parliamentary practice and only to be understood and applied with parliamentary patterns in mind. Procedures in the matter of budget have likewise followed the development which occurred in many national States. In the same manner a public body like the United Nations employing thousands of officials has not got away from developing administrative law governing the relations between the Organization—in this instance mainly embodied in the authority of the Secretary-General—and the individual officials. As was stated above (paragraph 4), Anglo-Saxon tradition only reluctantly accepted this development. On the other hand, it was recognized that not only the weak position of the international official because of his being prevented from bringing actions in the ordinary courts, but also the absence of a political protection comparable with such existing in some national States, should lead to special measures of judicial recourse. To quote from the statement by the Representative of the United Kingdom during the 8th Session of the General Assembly in the 423rd meeting of the Fifth Committee on December 9th, 1953, when the Committee considered supplementary estimates for the financial year 1953 relating to the payment of awards of compensation ordered by the Administrative Tribunal in the case of some eleven staff members whose appointments had been terminated during 1953 (United Kingdom Delegation to United Nations, Speech by Sir Alec Randell in the Fifth Committee, Administrative Tribunal Awards, pp. 2 f.) :

> "In the event, however, all doubts and hesitations expressed at that time were overcome, and after the Soviet proposal that 'the present Statute may be amended by decisions of the General Assembly' had been passed by 33 votes to 1, the whole Statute was approved by 39 votes to 2 with 2 abstentions. Interesting though these historical reflections may be, this is the most important fact, that practically the whole Assembly agreed on setting up the Tribunal and giving it the functions defined in its Statute.... I am bound to admit that subsequent events have revived some of the earlier doubts or uncertainties.... To this, Mr. Chairman, I feel we must accommodate ourselves in such a young organization, which must, so to speak, make up its own traditions as it goes. Perhaps I could make clearer what I mean if I could be allowed to refer to our own government in Great Britain. I think it may fairly be claimed that in no other country do permanent public servants feel greater security, and yet there is no judicial or legal recourse for them from the decisions of their superiors. They rely on the wisdom and experience of those superiors, and in the last resort on the fact that those superiors will invariably associate their political chiefs with them in any important administrative decisions they may make; and the political chiefs can, of course, be questioned and attacked in Parliament."

These and similar were the considerations conducive to the establishment of a true and independent judicial organ passing binding judgments in the last instance, the Administrative Tribunal of the United Nations. It follows that there is no reason to give a narrow interpretation to the Statute, where it has conferred power on the Tribunal, and to assume that other, particularly political, organs, to which such power has not been explicitly granted, would be entitled for some reason to reject the judgments of the Tribunal. For this would make the United Nations both judge and party in its own case, a position which was repeatedly repudiated during the preparatory discussions. It is well known and has already been recalled here (*supra*, para. 3) that in the long history of international arbitration parties from time to time have brought themselves in that position by rejecting an award they did not like. It does not seem necessary to enter here into the question in how far any legal grounds for doing so are generally recognized. In this connection one need only draw the attention to the most recent contribution to the problem as contained in the Report of the International Law Commission of the United Nations, covering the work of its 5th Session in 1953 (Doc. A/2456). In its Draft Convention on Arbitral Procedure, the International Law Commission mentions three grounds on which the validity of an award may be challenged by either party, namely excess of powers, corruption and serious departure from a fundamental rule of procedure, on the part of the tribunal (Article 30). But there would be little point in recognizing these grounds if not at the same time machinery would be provided in order to decide whether or not in a certain case these grounds are invoked rightly ; leaving this to either party would deprive the award of its binding and final character. This is what the International Law Commission says in its comments, while proposing in Article 31 the International Court of Justice as the competent judicial body to declare, on the application of either party, the nullity of the award on any of the mentioned grounds (paragraph 25) :

> "However, as past experience has shown, these essential remedies —unless accompanied by machinery ensuring the impartial ascertainment of the existence of the reasons invoked for the revision or the declaration of the nullity of the award—may render ineffective the legal obligation of a final settlement of a dispute through arbitration."

This argument is even more applicable to the final settlement of administrative disputes between the United Nations and its individual officials. Here the protection of State sovereignty by way of a narrow interpretation of the powers conferred on the Tribunal may be left out of consideration. No dominating interests of States were involved when the Members of the United Nations established the Administrative Tribunal as a court of final and

binding decision in the last instance. No modern constitution would permit the legislature to impair the work of a judicial body by passing legislation having retrospective effect. It would be a departure from a general principle of law, recognized even in countries without a written constitution rigidly defining the respective competence of the courts and the legislature. This was rightly observed by the Representative of New Zealand during the discussion in the Fifth Committee in 1953, previously mentioned (New Zealand Delegation to the General Assembly of the United Nations : Statement on Personnel Policy by Mr. J. V. Wilson in the Fifth Committee, 5 December 1953, pp. 2 f.) :

> "There is of course nothing to prevent the Assembly deciding to amend the powers of the Tribunal if they are found to be excessive. Indeed we have been doing this during the past few days. Nevertheless any interference with awards that have already been made is, it appears to us, save in the most exceptional cases, a denial of justice and a departure from principle.
>
> The principle that legislation should not be retroactive is one which is firmly entrenched in most municipal systems of law. May I compare the relationship between Assembly and Tribunal with the situation in those countries which do not have a fixed constitution rigidly defining the respective competence of the courts and the legislature. In my own country, for instance, Parliament is sovereign ; it can make or unmake any law past or future. It can change the composition and competence of our courts overnight. But it would be a most grave decision for Parliament to use that power to pass legislation having retrospective effect and depriving individuals of the benefit of judgments they had been given in the courts."

Indeed, the General Assembly has the right to abolish the Tribunal just as it had the right to establish it, it has the right to change the law which the Tribunal has to apply including the Statute itself, but a right the General Assembly does not enjoy is the right to detract from the law as applied by the Tribunal. This has nothing to do with the question in how far the Tribunal, because it has been established by the Assembly, may be considered a subsidiary organ as distinct from the principal organs of the United Nations in the sense of Article 7 of the Charter. The Assembly appoints the members of this "subsidiary organ", but it cannot dismiss these members on its own accord and without amending the Statute. The irremovability of judges has long been considered an implication of the principle of the separation of powers, in the present case between the Assembly and its "subsidiary organ", the Administrative Tribunal of the United Nations. Moreover, if the Tribunal were only a subsidiary organ of the General Assembly in the usual sense, it could not be understood how it could function at the same time as an Administrative Tribunal of some Specialized Agencies.

It seems difficult, therefore, to apply to the judgments of the Administrative Tribunal of the United Nations principles which are different from those applied to the final judgments of national courts. No grounds have been found on which the General Assembly could base the right to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. Nor are such grounds mentioned in the Statute of the Tribunal and in any other relevant instruments they were not considered by the General Assembly in setting up the Tribunal, as far as appears from the relevant records.

6. Not having found anything but a negative answer to question (1), the Netherlands Government do not feel obliged to make many observations as to question (2), which is as follows:

> "If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?"

During the above-mentioned discussion in the Fifth Committee in 1953, it was asked what to do if the Tribunal should have awarded compensations amounting to millions of dollars. We do not think that it has been the intention of the General Assembly to confront the International Court of Justice with absurd suppositions. They might as well be put forward in connection with national courts without actually promoting the understanding of the functioning of legal institutions. The real problem is how conflicts as to the interpretation and the application of the law, as they occur in normally functioning constitutional organizations, are solved in justice and good faith. Therefore we cannot accept as a relevant law-making precedent what happened during the 21st Session of the Assembly of the League of Nations in 1946 where the League was dissolved and where the Assembly refused to give effect to 13 judgments of the Administrative Tribunal of the League (16 delegations voted in favour, 8 against, 5 abstained and 4 were absent).

As far as the facts are concerned, the situation is well characterized in the statement of the Representative of France speaking after the Representative of the United States at the 420th meeting of the Fifth Committee during the 8th Session of the General Assembly of the United Nations (Summary Records, December 5th, 1953):

> "*Mr. Ganem* (France), while disclaiming any capacity to pronounce upon the legal aspects of the United States Representative's statement, wished to correct him on a matter of history. The United States Representative had referred to the 'precedent' established by the decision of the final Assembly of the League of Nations, meeting in 1946, not to give effect to the decisions of the League of Nations Administrative Tribunal. In fact there could be no comparison

between the circumstances in which the League of Nations Assembly's decision had been taken in 1946 and those in which any decision might be taken by the United Nations General Assembly at its current session. A special Assembly of the League of Nations, convened three months after the war had started, in December 1939, by which time it had become quite clear that not enough contributions would be received to make it possible to maintain a full Secretariat, had requested the Secretary-General to reduce his staff and had taken a special decision reducing the requisite period of notice of dismissal from six months to one month and extending the period over which compensation might be paid from one year to four years. The majority of the members of the League Secretariat affected had bowed to that decision. A mere handful had appealed against the Assembly's decision as a violation of their rights. The Administrative Tribunal had met to consider that appeal only in 1946, and then only in very special circumstances, for the Secretary-General of the League had contended that the Tribunal was not competent to override an Assembly resolution. The League's Secretary-General had not attended the session of the Tribunal at which the latter had decided in favour of the staff members concerned. Its decision had in effect challenged the Assembly's decision and the latter had accordingly voted not to give effect to the Tribunal's decision."

As to the legal provisions involved, reference is made to the recapitulation contained in the Report of the Supervisory Commission on the work of its 99th Session (League of Nations, *Official Journal*, Special Supplement No. 194, 1946, p. 162):

"By a Resolution taken on December 14th, 1939, the Assembly decided to reduce from six months to one month the period of notice of termination of contract in the case of permanent officials, provided for in Article 18 of the Staff Regulations of the Secretariat and Article 19 of the Staff Regulations of the International Labour Office, and to spread over a period of four years the payment of the compensation due on termination of appointment (Article 73 of the Secretariat Regulations and Article 83 of the International Labour Office Regulations). Twelve officials of the Secretariat and one official of the International Labour Office, whose contracts were terminated and to whom the two Administrations applied the above decisions, complained to the Administrative Tribunal, maintaining that it was not applicable to them, as they held contracts granted before October 15th, 1932, which were not subject to the provisions of Article 30 *bis* (Secretariat) and of Article 16 *a* (International Labour Office) of the Staff Regulations and could not therefore be modified by the Assembly.

In a series of judgments delivered on February 26th, 1946, the Administrative Tribunal pronounced that the Administrations of the Secretariat and of the International Labour Office had wrongfully applied to the 13 complainants the amendment to the Staff Regulations contained in the Assembly Resolution of December 1939, since 'it is impossible to entertain the assumption that the Assembly intended by its Resolution of December 14th, 1939, to

affect acquired rights without expressly so stating'. The Supervisory Commission, on whose proposal the amendments in question were adopted by the 1939 Assembly, desires to confirm that it was the undoubted intention of the Assembly that the decisions therein embodied should apply to all officials of the League and not only to those whose contracts expressly reserved the possibility of their modification by the Assembly. The Secretary-General and the Director of the International Labour Office, in applying the decisions to the complainants, have therefore correctly interpreted the Assembly resolution.

. . . . . .

As an acceptance of the findings of the Administrative Tribunal would put its decision above the authority of the Assembly, the Supervisory Commission could not take the responsibility of advising the Acting Secretary-General and the Acting Director of the International Labour Office to apply the judgments of the Administrative Tribunal. It has accordingly advised the two Administrations to take no action on the pending consideration of the whole question by the Assembly."

So what had happened was that the Tribunal, following a method often used in reconciling conflicting provisions, had applied a principle of construction ("it is impossible to entertain the assumption that the Assembly intended to affect acquired rights without expressly so stating") and had given an interpretation to the contracts, regulations and resolutions, particularly the Assembly Resolution of December 1939, which differed from the one the Assembly was prepared to accept after the Supervisory Commission and a sub-committee, especially selected to study the problem, had given their opinion. The majority of the Assembly, under the stress of necessity, followed this mode of reasoning: we have been the creators of the applicable law, so we better than anyone else know what our real intention was. "An acceptance of the finding of the Administrative Tribunal would put its decision above the authority of the Assembly." It is the considered opinion of the Netherlands Government that the majority of the League Assembly in 1946 made an error, not in the substance of its interpretation but in putting its interpretation above that of the Tribunal. For it was the specific function of the Tribunal, as of all tribunals, to decide on conflicts of interpretation as adopted by various interested quarters. That the Assembly would be wrong in rejecting the judgments was stated already at that time by the Netherlands Representative in the 6th meeting of the Second (Finance) Committee of the Assembly on April 13th, 1946 *(op. cit.*, p. 131):

"*M. François* (Netherlands) stated that, in the opinion of the Netherlands Government, the League of Nations was bound to carry out the Administrative Tribunal's decision. The Sub-Committee was of opinion that the Tribunal's decision was at fault, but that argument could not be advanced, because one of the first principles of

justice was that nobody could be at the same time judge and party to litigation. Fortunately, the Sub-Committee had refrained from invoking the argument that the Tribunal was not competent, for incompetence had always been invoked by States which wished to escape a decision unfavourable to themselves. The Sub-Committee was further of opinion that the action taken by the Secretary-General was justified by a decision of the Assembly and that being so the Tribunal should have dismissed the claim. It was not for the Committee to examine the merits of the award, for the League of Nations, even if it were sovereign, was itself a party to the dispute. An appeal might have been lodged if the Statute provided for such recourse, but, in the circumstances, it only remained for the League to bow to the decision of the competent judges. The execution of the judgment would be a heavy burden on the League, but it was better to lose money than to injure not only the prestige of the League but also the cause of international jurisdiction.

. . . . . .

The Netherlands delegation took the view that good sense should be applied in settling international affairs, but it was precisely good sense which demanded that an organization like the League of Nations should set an example in the matter of respecting an award, even if it considered the decision unjustified."

The relevant records and reports sometimes give the impression that the real issue in 1946 was the question whether or not the Assembly had the right to modify, or in any way affect, the terms of older appointments in which no proviso reserving such right had been made. But this was not the question the Tribunal had to answer. The Tribunal only examined the question whether the Resolution of December 1939 had affected the older contracts not containing the said proviso. The Tribunal came to the conclusion that it had not, and its answer may be interpreted in this way that the Assembly in 1939 in its legislative capacity did ineffective work, though it was not invalid. That the legislature in a modern international organization can modify in principle the statutory elements in its relations with its staff members is another confirmation of the opinion explained hereinbefore (para. 5) that such organizations in their internal functioning are often governed by a kind of law whose structure bears the closest resemblance to certain parts of national public law. It is with approval, therefore, that one passage from the majority part of the report of the Sub-Committee of the Second Committee of the Assembly can be quoted (*op. cit.*, p. 262):

"No superior power exists to release the League from its contractual obligations, if such obligations exist, however grave the emergency, unless it be the League itself. But the League is not to be compared with a private company; its status and powers are *sui generis*, although they fall to be considered in the light of those general principles of public law and administration which to a greater or lesser degree are to be found in the legislation of all States."

The unassailable character of a court like the Administrative Tribunal of the League of Nations or of the United Nations is also to be considered in the light of these general principles of public law and administration.

The decision of the League Assembly at its final session not to give effect to the judgments of the Administrative Tribunal cannot be taken as a law-making precedent because, apart from certain legal considerations, the majority of the Assembly was led by extra-legal motives. This is well illustrated by the explanation of the majority view at the beginning of the discussion in the Second (Finance) Committee (Minutes of the 6th meeting, *op. cit.*, p. 130) :

> "*Sir Hartley Shawcross* (United Kingdom), Rapporteur of the Sub-Committee, said that although he was a lawyer he approached this matter on the broad basis of what was politic and right rather than on the basis of what might be strictly in accordance with the law. There was in fact no law which applied to a case like this. There was no other institution like the League of Nations ; there was no precedent for such a problem, and there were few basic principles of law which had any direct application to its solution. Fortunately, however, lawyers were not always compelled to look at matters with complete disregard of the principles of common sense. If the Committee tried to apply some strict rule of law, it would doubtless get an infinite variety of opinion and endless debate. Hence he hoped that the matter would be discussed from the broadest point of view."

7. There have been no indications, so far, that a majority of the General Assembly of the United Nations is prepared to take the decision of the League Assembly of 1946 as a precedent on which the General Assembly might base the right to refuse to take action on judgments of the Administrative Tribunal.

The first time, since 1949, that the discussions of the General Assembly touched the question of the authority of the Tribunal, was in connection with the drawing up of the Permanent Staff Regulations in 1952. The Administrative Tribunal in its Judgment No. 4 in the case of Howrani and 4 others (September 14th, 1951 ; AT/DEC/4) had decided, as far as the power of the Secretary-General with respect to the termination of temporary-indefinite contracts was concerned, that "a statement of cause, if requested by the terminated employee, in terms sufficiently specific to facilitate proceedings before the Appeals Board and the Administrative Tribunal, is an essential element of due process in the termination of temporary-indefinite contracts...." and that "while it is not for the Tribunal to substitute its judgment for that of the Secretary-General with respect to the adequacy of the grounds for termination stated, it is for the Tribunal to ascertain that an affirmative finding of cause which constitutes reasonable grounds for termination has been made, and that due process has been accorded in arriving at such an affirmative finding" (p. 17). In

view of that decision the Secretary-General altered his original draft of the Permanent Staff Regulations as contained in annex B of document A/1360 to this effect that temporary-indefinite appointments might be terminated by the Secretary-General at any time, if, in his opinion, such action would be in the interest of the United Nations (as now provided in Article 9.1 *(c)* of the Staff Regulations). It is clear that the Secretary-General did not agree with the Tribunal's interpretation of the intention of the General Assembly, when in the Provisional Staff Regulations it gave the Secretary-General the right to terminate temporary appointments. In his Memorandum of January 16th, 1952 (Doc. A/1912/Add.1, paragraph 6), the Secretary-General observes in connection with his altered proposal of Regulation 9.1 : "It is evident from the records of the General Assembly and the Advisory Committee that it was always intended that the Secretary-General has the right to terminate temporary appointments freely and in his discretion...." Apparently the Chairman of the Advisory Committee and some delegations agreed with the implied opinion of the Secretary-General that the Tribunal had given an erroneous interpretation to the Assembly's intention. Nevertheless, during the whole discussion of the item of the Permanent Staff Regulations in the Fifth Committee no suggestion was made to put the Assembly's interpretation of its own intention above the interpretation of the Tribunal. On the contrary, several speakers in the debate felt the need of expressly confirming the unassailable authority of the Tribunal in interpreting the texts. As quoted from the *Official Records* of the Fifth Committee during the 6th Session, the Representative of Canada said in opening the discussion (p. 273) :

> "With reference to certain cases considered by the Administrative Tribunal in the summer of 1951, everyone should try to remember that the Tribunal had been created by the General Assembly as a body against whose judgments there was no appeal. If those judgments where questioned now, the Committee would so lower its prestige and weaken its position. The Canadian Delegation had full confidence in the Tribunal, in its good judgment and in the integrity of its members. At the same time, it should be pointed out that although the Tribunal's task was to interpret past decisions of the General Assembly it had not the power to bind the Assembly for the future. It would be no slight to the Tribunal if experience led the Fifth Committee to conclusions at variance with the Tribunal's past rulings. It would, however, be harmful to reopen past cases or to interject into the Committee's discussions consideration of cases which might now be pending before the Tribunal. He felt sure that the principles which had always been the foundation of an effective, independent and respected judiciary would be borne in mind by the members of the Fifth Committee. He urged the Committee to express its confidence in the judicial machinery which had been set up and leave it to function unhampered in its own field."

The representative of Columbia observed (p. 274):

> (The Tribunal) "would not be in a position to give correct and impartial decisions unless it was in possession of all the relevant information. If the Secretary-General felt unable to disclose his reasons in certain cases, he must be prepared to run the risk of decisions against himself. It would then be for the General Assembly to decide whether or not to vote the necessary appropriations to carry the Tribunal's decisions into effect. The Columbian Delegation was always prepared to vote for such appropriations, considering that any other course was incompatible with the elementary principles of justice and morality."

The representative of the Union of South Africa (p. 277)

> "supported the Canadian Representative's remarks concerning the Administrative Tribunal. It was clear from the statute of the Tribunal that it was a body whose authority should not be questioned. However, as in any national system, when a clash occurred between the legislative and the judiciary authorities, it was the duty of the legislative body—in the present case the Fifth Committee —to decide whether the interpretation given by the judiciary was consistent with the meaning of the rules as intended by those who had framed them. If not, the legislative body should take steps to bring the rules into line with what had originally been intended."

The representative of India said (p. 288):

> "With regard to regulation 9.1 India was fully in agreement with the opinion expressed at the previous meeting by the Canadian Representative. To alter the present provisions concerning the Administrative Tribunal would not in any way discredit the latter's work. It was simply a question of making clear that in the last resort it was for the Tribunal to interpret the intentions of the General Assembly."

The Secretary-General (p. 292)

> "wished to clear up a misunderstanding that appeared to have arisen. He had never challenged the decisions of the Administrative Tribunal and had no intention of doing so. He had, on the contrary, endeavoured to apply them, even down to the smallest detail. Respect for judicial decisions was strongly entrenched in the Nordic countries' traditions and was likewise the policy followed by the Secretary-General. But he had occasionally had doubts, both in his ministerial capacity and as Secretary-General of the United Nations, as to the interpretation of certain legal provisions. His approach to the General Assembly was precisely in order to obtain the requisite clarification and guidance."

The Chairman of the Advisory Committee, in a statement from which an earlier passage has already been quoted (paragraph 6), recalled that (p. 296)

> "he had consistently defended the principle of a tribunal which must judge in accordance with laws established by the General Assembly and against whose judgments there must be no appeal. Perhaps the

> Indian Representative had misunderstood some of his statements, for the Chairman of the Advisory Committee agreed with the views concerning the Tribunal, expressed by the Canadian Representative, with whom the Indian Representative apparently also agreed."

These were all the remarks during this discussion in the Fifth Committee made in direct relation to the position of the Administrative Tribunal. They were summarized in the Report of the Committee as follows (Doc. A/2108, paragraph 7):

> "A number of references were made to the importance of the Administrative Tribunal in connection with staff rights and, while the independence of the Tribunal and the binding nature of its judgments were underlined, it was generally agreed that it was for the General Assembly to fix, and if necessary clarify, the basic regulations and conditions of staff appointments which the Tribunal, in accordance with its statute, might then be called upon to interpret."

It may be observed that the representative of the United States in his main statement at the 332nd meeting did not make any objections to the views contained in the passages quoted.

The second time since 1949 the General Assembly had an opportunity to pronounce on the question of the authority of the Administrative Tribunal was in connection with a series of judgments in the case of some eleven staff members whose appointments had been terminated during 1953 (AT/DEC/18 and following). The Secretary-General and the Advisory Committee had proposed to vote the supplementary estimates for the financial year 1953 as they related to the payment of awards of compensation ordered by the Administrative Tribunal, but this was opposed by the Representative of the United States in the Fifth Committee during the 8th Session of the General Assembly. In his statement, opening a discussion which occupied the Committee during several meetings, he developed the following points:

1. The General Assembly has the legal right and responsibility to review and to refuse to give effect to decisions of the Administrative Tribunal.
2. The Tribunal has misconstrued its role and has exceeded its proper powers.
3. The Tribunal has made serious errors of law in its application of the Staff Regulations.
4. The Tribunal has made errors of judgment and fact in calculating the amount of the awards.

The discussion, thus started, did not yield any definite results because at a certain stage the Committee decided to submit to the General Assembly a proposal to request an advisory opinion of the International Court of Justice on some general legal questions involved. These are the questions with which the present statement is dealing. Nevertheless, 30 delegations besides the United States

delegation took the opportunity to pronounce on the legal principles involved, particularly as to the relation between the Assembly and the Tribunal. Of those 30 delegations 7 agreed that the General Assembly had the legal right to review and to refuse to give effect to decisions of the Tribunal on similar grounds as developed by the United States delegation under points 2-4 (China, Australia, Argentina, Cuba, Liberia, Dominican Republic, Turkey). The other 23 delegations (Netherlands, Columbia, Uruguay, Canada, United Kingdom, New Zealand, Yugoslavia, Syria, Poland, India, U.S.S.R., Belgium, Sweden, Denmark, Brazil, Czechoslovakia, France, Nicaragua, Lebanon, Mexico, Pakistan, Egypt, Chile) denied the alleged right of the Assembly, partly because they did not agree that any of the grounds mentioned under 2-4 were relevant, partly because they denied that, even if these grounds had presented themselves, the Assembly would have the alleged right.

Therefore, in this discussion no indications are to be found that a majority of the General Assembly is prepared to consider the decision of the League Assembly of 1946 a precedent, as suggested by the United States Representative in his opening statement. Some delegations expressly rejected the 1946 case as a precedent. However, it did not always become clear for what reasons the precedent was rejected : because of the abnormal situation existing in 1946, because the Tribunal in 1946 really had gone beyond its powers in contrast to the situation in 1953, or because the League Assembly in 1946 had been wrong. Thus the French rejection, as appears from the statement quoted *supra* paragraph 6, was based on the first and the second reason. The rejection by the Netherlands was based during the discussion in the Fifth Committee as well as in this document on the first and the third reason.

From the above it may be concluded :.

1. that no qualifications can be found to the legal obligation of the General Assembly, not to prevent the payment of an award made by the Tribunal ;

2. that if the General Assembly should have wished to reserve the right to review judgments of the Tribunal, it would have included a provision to that effect in the Tribunal's Statute ;

3. that the League of Nations conceived its Administrative Tribunal as an entirely independent and strictly judicial body, pronouncing final judgments without appeal ;

4. that the debates on the Statute of the Administrative Tribunal of the United Nations make it clear that the General Assembly was not considered fit for a typical judicial function—either in respect of settling preliminary disputes as to the competence of

the Tribunal, or as regards reviewing its decisions on the substance, because of an alleged lack of competence ;

5. that within the organization of the U.N. a natural development of administrative law has led to special measures of judicial recourse to which the same principles should be applicable as to the final judgments of national administrative courts ;

6. that after the above-mentioned negative conclusions as to question 1, question 2 does not give rise to special observations—only that the Netherlands Government cannot accept as a binding precedent the refusal of the League Assembly of 1946 to give effect to 13 judgments of the Administrative Tribunal of the League of Nations ;

7. that the debates in the United Nations confirm the unassailable authority of the Tribunal to interpret resolutions of the General Assembly, which the latter could only modify for the future if it disagrees with the interpretation given by the Tribunal.

7. EXPOSÉ DU GOUVERNEMENT HELLÉNIQUE SUR LA QUESTION DES EFFETS DE JUGEMENTS DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES ACCORDANT INDEMNITÉ

I. — Les questions posées par l'Assemblée générale des Nations Unies à la Cour de Justice internationale sont les suivantes :

a) L'Assemblée générale a-t-elle le droit, pour une raison quelconque, de refuser d'exécuter un jugement du Tribunal administratif, accordant une indemnité à un fonctionnaire des Nations Unies à l'engagement duquel il a été mis fin sans l'assentiment de l'intéressé ?

b) En cas de réponse affirmative à la question susmentionnée, quels sont les principaux motifs sur lesquels l'Assemblée générale peut se fonder pour exercer légitimement ce droit ?

II. — Pour répondre à ces questions, il convient d'examiner tout d'abord la *condition juridique* du Tribunal administratif des Nations Unies dans le cadre de cette Organisation.

Le Tribunal administratif en question a été créé par une résolution de l'Assemblée générale des Nations Unies (résolution 351 (IV) du 24 nov. 1949). Il est compétent pour connaître « des requêtes invoquant l'inobservation du contrat d'engagement des fonctionnaires du Secrétariat des Nations Unies ou des conditions d'emploi de ces fonctionnaires, et pour statuer sur lesdites requêtes ».

Étant donné que l'organe en question n'a pas été créé par une convention internationale mais par une *résolution* de cette dernière, sa création doit, nécessairement, être fondée sur l'exercice d'une des fonctions de l'Assemblée générale. Or, il n'existe qu'un *seul* article dans la Charte permettant à l'Assemblée générale de créer des organes. Il s'agit de l'article 22, qui expressément confère à celle-ci le droit « de créer les organes subsidiaires qu'elle juge nécessaires à l'exercice de ses fonctions ». Le Tribunal administratif des Nations Unies est donc, pour ce qui est de sa condition juridique, un *organe subsidiaire* de l'Assemblée générale des Nations Unies, constatation d'où résulte pour l'Assemblée générale le droit de faire dépendre l'existence et le mode de fonctionnement du Tribunal de sa propre volonté exprimée par des résolutions adéquates.

III. — Les jugements du Tribunal administratif peuvent-ils être infirmés par l'Assemblée générale des Nations Unies ? Le problème ne rentre pas dans les questions posées à la Cour de Justice internationale, mais son examen permet de constater mieux les droits exercés par l'Assemblée générale à l'égard des

jugements du Tribunal administratif. Aussi convient-il de lui consacrer quelques brèves observations :

L'article 10 du statut du Tribunal administratif dit expressément que les jugements du Tribunal sont « *définitifs et sans appel* ». En effet, du fait que l'Assemblée générale, elle-même, par sa résolution du 24 novembre 1949 (art. 10, § 2) a caractérisé les jugements en question comme « définitifs et sans appel », il résulte qu'une *infirmation* des jugements du Tribunal administratif ne semble pas, en principe, possible.

Ce que nous venons de dire n'est cependant vrai que pour autant que l'article 10 de la résolution du 24 novembre 1949 continue à être en vigueur.

Mais étant donné que l'Assemblée générale peut, à n'importe quel moment, par de nouvelles résolutions, modifier ses résolutions précédentes, elle peut, en revisant l'article 10 du statut du Tribunal administratif, permettre par exemple l'*appel* contre des jugements de ce Tribunal, qu'il s'agisse de jugements déjà rendus ou de jugements futurs.

IV. — Les considérations qui précèdent ont pour but d'illustrer la portée de l'article 10, paragraphe 2, du statut du Tribunal administratif quant au caractère définitif des jugements de ce Tribunal. Elles ne s'appliquent pas, nous l'avons dit, au cas d'espèce, étant donné que la question posée à la Cour internationale de Justice n'est pas celle de savoir si l'Assemblée générale a, oui ou non, le droit d'infirmer un jugement du Tribunal administratif mais plutôt la question de savoir si elle peut *refuser*, pour une raison quelconque, d'exécuter un jugement du Tribunal administratif accordant une indemnité à un fonctionnaire des Nations Unies. Quant à cette question — et c'est celle-ci qui intéresse la Cour —, il convient de faire les remarques suivantes :

L'article 9 du statut du Tribunal administratif prévoit que, lorsqu'il y a lieu à indemnité, celle-ci est fixée par le Tribunal et « *versée par l'Organisation des Nations Unies* ».

Ainsi qu'il résulte de ce texte, l'Assemblée générale, en adoptant la résolution du 24 novembre 1949, a engagé l'Organisation des Nations Unies à verser aux fonctionnaires intéressés les indemnités accordées par le Tribunal administratif. Or, pour que l'Organisation des Nations Unies puisse exécuter l'obligation résultant d'un jugement du Tribunal administratif, il faudra que l'Assemblée générale approuve les montants inscrits dans le budget de l'Organisation, destinés aux indemnités fixées par le Tribunal administratif. Cependant, étant donné que l'exécution du jugement du Tribunal administratif dépend de l'approbation, par l'Assemblée générale, des montants en question, il s'ensuit que l'Assemblée générale, en adoptant la résolution du 24 novembre 1949, *s'est imposée l'obligation* (auto-obligation) d'approuver les montants

du budget affectés aux indemnités accordées par le Tribunal administratif.

La question se pose maintenant de savoir si, malgré l'obligation constatée plus haut des Nations Unies de respecter les décisions du Tribunal administratif, il n'existe pas, pour l'Assemblée générale, de possibilité juridique *de ne pas exécuter* un jugement du Tribunal administratif, en n'approuvant pas, pour une raison quelconque, les parties du budget se référant à l'indemnité.

En pure logique, l'Assemblée générale possède la capacité juridique de ne pas approuver les sommes accordées par le Tribunal administratif si tel est son désir, les résolutions de l'Assemblée générale étant, en principe, juridiquement valables si elles ont été adoptées conformément aux règles établies par l'article 18 de la Charte. Cependant, une résolution de l'Assemblée qui, *sans des motifs sérieux*, ne respecterait pas les droits acquis par des fonctionnaires en application de la résolution du 24 novembre 1949 (c'est-à-dire de l'art. 10, § 2, du statut du Tribunal) — et le jugement du Tribunal a créé pour les fonctionnaires des *droits acquis* —, bien qu'en théorie juridique *valable*, constituerait un acte *arbitraire*.

Un des principes fondamentaux du droit, principe ayant trouvé sa place aussi dans la Charte, est que les obligations doivent être exécutées de bonne foi. Les Membres de l'Assemblée générale ont — il est vrai — un *pouvoir discrétionnaire* quant à l'approbation ou la non-approbation de telle ou telle catégorie du budget de l'Organisation, mais cette liberté de voter pour ou contre une somme prévue au budget *doit toujours être exercée de bonne foi*. La non-approbation par les Membres de l'Assemblée générale *sans raison sérieuse* de l'indemnité accordée à des fonctionnaires par un jugement du Tribunal administratif des Nations Unies, constituerait une *violation* du principe de la *bonne foi* et une méconnaissance du principe des droits acquis.

V. — Le fait qu'il existe, pour l'Assemblée générale, l'obligation de pourvoir à l'exécution des jugements du Tribunal administratif des Nations Unies ne signifie, cependant, pas que les Membres de l'Assemblée générale *n'ont aucune possibilité* de ne pas approuver les parties du budget se référant à des indemnités accordées par un jugement du Tribunal administratif.

Ainsi que nous l'avons déjà indiqué, les Membres de l'Assemblée générale — et ceci s'applique également à l'Assemblée générale comme telle —, dans l'exercice de leur droit de vote sur le budget, possèdent un pouvoir discrétionnaire ; si, malgré l'obligation qui existe pour l'Organisation des Nations Unies d'exécuter, de bonne foi, les jugements du Tribunal administratif, il y a des *raisons sérieuses*, permettant de considérer le refus d'approuver la partie du budget se référant à des indemnités accordées par le Tribunal administratif comme *justifiées*, ce refus doit être considéré comme *légitime en droit*.

VI. — Reste à savoir quels sont les motifs qui pourraient justifier la non-exécution d'un jugement du Tribunal administratif.

A cette question on ne saurait donner qu'une réponse générale. Il est difficile, sinon impossible, d'établir une *liste des motifs* justifiant la non-exécution d'un jugement en question par l'Assemblée générale. Ce n'est qu'à titre d'exemple que nous mentionnons comme une raison justifiant la non-exécution d'un jugement du Tribunal administratif le caractère *défectueux* d'un jugement.

On sait que dans les rapports internationaux, la sentence d'un tribunal arbitral, bien que définitive et sans appel, est considérée comme *nulle* lorsqu'il y a eu excès de pouvoir de l'arbitre, corruption d'un membre du tribunal et, d'après quelques auteurs, lorsqu'il y a eu erreur essentielle dans l'application du droit (voir p. ex. le projet de convention sur la procédure arbitrale élaborée par la Commission du Droit international (art. 30) dans le Rapport de la Commission de Droit international de l'année 1953).

Les mêmes principes s'appliquent en général lorsqu'il s'agit de sentences de tribunaux arbitraux de droit interne, où les cas de nullité de la sentence sont mentionnés expressément par la loi (voir p. ex. art. 22 du code de procédure civile grecque).

L'hypothèse d'un jugement *défectueux* du Tribunal administratif ne saura qu'influencer la décision à prendre par l'Assemblée générale à l'égard de montants du budget affectés à des indemnités accordées à des fonctionnaires des Nations Unies. Ainsi, par exemple, lorsque le Tribunal administratif a commis une erreur grave quant à ses *pouvoirs de juridiction*, il ne saurait exister d'obligations juridiques (ou morales) pour les Membres de l'Assemblée générale et, partant, pour l'Assemblée générale elle-même d'approuver les montants nécessaires à l'exécution de la sentence du Tribunal administratif.

Ceci à titre d'exemple. De façon générale, on peut dire que les motifs sur lesquels l'Assemblée générale pourrait se fonder pour refuser d'approuver les montants affectés à l'indemnité due aux fonctionnaires des Nations Unies ne peuvent pas être — nous l'avons déjà dit plus haut — fixés d'avance de façon limitative. Ceux-ci peuvent appartenir aux domaines les plus divers, tels que la morale, la justice, l'ordre public, etc. Ainsi, pour ne mentionner, de nouveau, qu'un seul exemple si l'octroi d'une certaine indemnité à des fonctionnaires déterminés a comme effet de placer ceux-ci dans une situation essentiellement plus avantageuse par rapport à d'autres fonctionnaires se trouvant dans des situations analogues, et si cette situation paraît aux yeux de l'Assemblée générale comme *manifestement injuste*, le refus de l'Assemblée générale d'exécuter en totalité ou en partie un jugement du Tribunal administratif ne saura être que *légitime*.

VII. — Résumant nos conclusions quant au pouvoir de l'Assemblée génerale de ne pas approuver les parties du budget de l'Orga-

nisation des Nations Unies se référant à des indemnités accordées par le Tribunal administratif à un fonctionnaire des Nations Unies à l'engagement duquel il a été mis fin sans l'assentiment de l'intéressé, le refus éventuel de l'Assemblée générale d'exécuter un jugement du Tribunal administratif, en l'occurrence, doit être considéré comme *légitime* chaque fois que la décision en question de *l'Assemblée générale se fonde sur des motifs sérieux et ne paraît pas comme une méconnaissance arbitraire du principe de la bonne foi et du principe du respect des droits acquis.*

8. WRITTEN STATEMENT OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

I. INTRODUCTION

By a Resolution dated December 9, 1953, the General Assembly of the United Nations decided to request an Advisory Opinion from the International Court of Justice on certain questions relating to the United Nations Administrative Tribunal; and by an Order dated January 14, 1954, the Court fixed March 15, 1954, as the date for the deposit of any Written Statements from Governments on these questions. The Government of the United Kingdom of Great Britain and Northern Ireland accordingly desire to present the following observations.

2. The questions, on which the Court is requested to give an advisory opinion, are the following:

"(1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?

(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?"

3. These two questions are closely related to one another. They represent in substance two stages in the consideration of a single problem, which arose in a debate in the Fifth Committee of the General Assembly upon the request by the Secretary-General for a supplementary appropriation to enable him to satisfy certain awards previously made by the Tribunal [1]. In the view of the United Kingdom Government, the advisory opinion of the Court should be based primarily on the Statute of the Tribunal and the Staff Regulations and Rules as they stood at the time of the debate. Accordingly, the present statement, except where otherwise indicated, refers to the Statute, Regulations and Rules in force before December 9, 1953. The United Kingdom Government, however, do not consider that the amendments to the Statute and

[1] See the Summary Record of the debate in the Fifth Committee leading to the adoption of the Resolution of December 9, 1953: 420th to 423rd and 425th to 427th meetings between December 3 and December 8, 1953.

Regulations adopted by the General Assembly on that date would, if taken into account, materially affect the legal issues raised by the questions addressed to the Court.

4. The questions before the Court are solely questions of law. They have no reference to the merits of any particular case; neither, in consequence, have the comments that follow. Nevertheless, the Court will be acquainted with the circumstances which gave rise to the present request for its advisory opinion and the relevant debate in the Fifth Committee. In the view of the United Kingdom Government, the questions, especially the second question, if it should require to be answered, should be considered against that background. The General Assembly has refrained from asking the Court for an exhaustive list of the grounds on which it can lawfully refuse to give effect to an award of the Administrative Tribunal. It has, however, asked the Court to indicate the "principal grounds".

II. General considerations

5. (1) The question at issue is whether the Assembly is under a legal obligation to give effect to an award by the Tribunal or whether it is legally entitled to refuse to do so. In the view of the United Kingdom Government, a clear distinction must be drawn between the powers of the General Assembly and its legal rights and duties—a distinction that was not always drawn in the speeches in the Fifth Committee. It is apparent that the Assembly has power to refuse to give effect to an award by the Tribunal. By Article 17 of the United Nations Charter, the Assembly is given power to consider and approve the budget of the Organization. If an award is for a sum of money as compensation, an appropriation by the Assembly to pay the whole or part of the sum may be necessary. It is in fact possible that the majority vote in the Assembly required to make the appropriation might not be forthcoming. In that event, the money needed to satisfy the award would not be made available to the Secretary-General. In that sense, the Assembly has the power to refuse, or at least to fail, to give effect to an award.

(2) The point is, however, the legal obligation of the Assembly to give effect to an award, and, in the view of the United Kingdom Government, failure or refusal by the Assembly to provide money to satisfy an award by the Tribunal would in principle (subject to certain qualifications) be a refusal or failure to discharge the legal obligations on the United Nations that flow from such an award.

6. (1) It has been said that the General Assembly is in the position of a sovereign body—that, within the United Nations, it has a status comparable to that of a national legislature. It is argued from this proposition that the Assembly cannot, therefore, be bound by the decisions of an organ which it has established,

because no sovereign legislature can bind its successor. Even if, for the moment, it were assumed that the Assembly's status was comparable to that of a national legislature, the conclusion suggested would not follow.

(2) In many countries, courts and tribunals have been established or given powers to try and to pronounce judgment in proceedings against the Government. Once an award is made against the Government it creates a legal obligation on the Government to satisfy the award. The legislature may have the technical power to refuse to vote the required funds: it may have the power to abrogate the judgment by legislative act. Nevertheless, so long as the judgment stands there is a legal obligation to give effect to it.

(3) In any case, analogies with national institutions are likely to be misleading. In the opinion of the United Kingdom Government, the rights and powers of the General Assembly and its relation to the Administrative Tribunal should be judged not on the basis of analogy with national institutions but on the basis of the Charter, the Statute of the Tribunal and any other relevant instruments and records. The Assembly is not in fact granted the status and power of a legislature by the Charter. In the view of the United Kingdom Government, it only possesses such status and powers as are granted to it by the Charter.

7. The Administrative Tribunal is an organ set up by the General Assembly—and in that sense subsidiary. This relationship, however, does not of itself confer on the Assembly an absolute right to ignore or—in effect—to nullify the findings of the Tribunal. The Assembly has set up the Tribunal with judicial functions and with the status and independence normally attached to such a body, and to its decisions.

8. (1) The Statute adopted by the Assembly *inter alia* provides that the judgments of the Tribunal shall be final and without appeal and that compensation awarded by the Tribunal shall be paid by the United Nations. The obligation of the United Nations to pay compensation implies an obligation on the part of the General Assembly to provide the money needed for that purpose, and these obligations exist so long as the relevant provisions of the Statute remain in force.

(2) The rights and duties of the General Assembly, like those of its parent body, the United Nations Organization itself, depend upon its purposes and functions as specified or implied in its constituent documents [1], and if, under a Resolution duly passed by the Assembly, certain of its functions are delegated to a subsidiary organ for certain purposes and under certain conditions, the rights and duties of the Assembly in regard to that subsidiary

[1] See Advisory Opinion of International Court of Justice on Reparation for Injuries suffered—April 11, 1949, p. 180.

organ will depend on the conditions subject to which it was set up. This is so whether the Tribunal be regarded as a subsidiary organ established under Article 22 of the United Nations Charter or as having been established pursuant to the powers given to the Assembly by the Charter for the regulation of appointments to the Staff of the Secretariat.

III. The specific questions addressed to the Court

9. As already indicated, in the view of the United Kingdom Government, the two questions quoted in paragraph 2 above should be examined together. The United Kingdom Government consider that the Assembly is under a legal obligation to give effect to any award of the Tribunal which has been made in a regular manner in accordance with the Tribunal's Statute, whether or not the Assembly agrees with the conclusions on which the award is based. They consider that, although the Assembly has the power to refuse to give effect to an award made by the Tribunal, the only cases in which it has the right to do so are those in which it is evident that the Tribunal has acted in excess of the powers conferred on it by the Statute, i.e. has acted *ultra vires*, or has been guilty of misconduct, e.g. in allowing itself to be influenced by considerations of a venal character, or of conduct which amounts to a denial of justice.

10. The United Kingdom Government consider that the Assembly does not stand in relation to the Administrative Tribunal either as a court of appeal or as a reviewing authority ; nor can it re-try cases decided by the Tribunal. Only a superior judicial organ would be competent to do this. In setting up a tribunal, such as the Administrative Tribunal, and in providing that its judgments should be final and without appeal, the Assembly accepted the risk that the decisions of the Tribunal would not necessarily coincide with the views of the Assembly.

IV. Competence of the Administrative Tribunal

11. The competence of the Administrative Tribunal is regulated by Article 2 of its Statute. Paragraph (1) of this Article provides :

> "The Tribunal shall be competent to hear and pass judgment 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 [1] in force at the time of alleged non-observance, including the staff pension regulations."

[1] These regulations and rules are hereinafter referred to as the Staff Regulations and Rules.

12. In the view of the United Kingdom Government, this Article undoubtedly gives the Tribunal power to hear and pass judgment upon any application based on the ground that the termination of an appointment was not effected in accordance with the Staff Regulations and Rules [1].

13. This may be illustrated by consideration of the grounds on which temporary and permanent contracts may be terminated without the assent of the staff member. In the case of the holders of temporary contracts, Staff Regulation 9.1 *(c)* provides that "the Secretary-General may at any time terminate the appointment, if, in his opinion, such action would be in the interest of the United Nations". In such cases, the Tribunal is not entitled to substitute its opinion for the opinion of the Secretary-General but, in the view of the United Kingdom Government, it is within the competence of the Tribunal to determine, in any given case, whether termination was in fact based on the opinion of the Secretary-General that such termination was in the interest of the United Nations.

14. In the case of those holding permanent contracts, the Staff Regulations provide for termination of appointment without the assent of the staff member on the following grounds: if the necessities of the Service require abolition of the post, or reduction of the staff; if the services of the individual concerned prove unsatisfactory; or if he is, for reasons of health, incapacitated for further service (Staff Regulation 9.1 *(a)* [2]) and the only ground for summary dismissal of any member of the staff is serious misconduct (Staff Regulation 10.2).

15. In order to adjudicate on the question whether an applicant's appointment has been properly terminated on one or other of the grounds specified in Regulation 9.1 *(a)*, the Tribunal must, in the view of the United Kingdom Government, have power to consider whether the alleged ground or grounds for termination in fact existed and if they did, whether such grounds came within the Regulation. For this purpose, the Tribunal must consequently be entitled to interpret the provisions of the Staff Regulations and Rules.

16. A Regulation may provide that in certain events the contract of service may be terminated at the discretion of the Secretary-General. In such a case, the Tribunal would have to decide whether those events had occurred and would be entitled to determine whether the Secretary-General had exercised his discretion. The Tribunal would not, however, be entitled to review the exercise

[1] See Staff Regulations 9 and 10 and the corresponding Staff Rules, 109 and 110.

[2] By a Resolution adopted by the General Assembly on December 9, 1953, new grounds were added, but they are not material for the purposes of the present Statement.

of discretion by him and, for instance, substitute in place of termination some lesser penalty.

17. If there were any doubt about the competence of the Tribunal to interpret the Staff Regulations and Rules, it would, in the view of the United Kingdom Government, be within the powers of the Tribunal to resolve that doubt. Article 2 (3) of the Tribunal's Statute provides, "In the event of any dispute as to whether the Tribunal has competence the matter shall be settled by the decision of the Tribunal." It may be contended that this Article relates only to a dispute between the parties before it, i.e. the applicants and the Secretary-General. An alternative interpretation, however, is that the Assembly had delegated to the Tribunal power to determine its own competence and that the Assembly is bound to accept its judgments on questions of competence as well as on the substance of any claim. Both these interpretations are possible and, in the opinion of the United Kingdom Government, the latter is the better one, subject to the application of the well recognized principle that, although a tribunal must have the power to determine its competence on the basis of the instrument which is the source of its jurisdiction, an award rendered in excess of the powers conferred by that instrument can be regarded as null and void.

V. Finality of the Tribunal's judgments and awards

18. Article 9 of the Tribunal's Statute, in force before December 9, 1953, provides[1]:

[1] By a Resolution adopted by the General Assembly on December 9, 1953, Article 9 of the Statute of the Administrative Tribunal was amended to read as follows:

"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 judgment, 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 12."

"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 ; but if, in exceptional circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, impossible or inadvisable, the Tribunal shall within a period of not more than sixty days order the payment to the applicant of compensation for the injury sustained. The applicant shall be entitled to claim compensation in lieu of rescinding of the contested decision or specific performance. In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under Article 12."

19. Article 10 (2) of the Statute provides :

"The judgments shall be final and without appeal."

Article 12, which provides for the extension of the competence of the Tribunal to specialized agencies of the United Nations upon terms established by a special agreement made with each such agency, stipulates that

"Each such special agreement shall provide that the agency concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency."

20. In the opinion of the United Kingdom Government, the above-cited provisions of the Statute of the Tribunal clearly mean that, in respect of any judgment or award given in good faith within the scope of the competence of the Tribunal, and in the regular exercise of its functions, there shall be no appeal or review. A refusal or failure by the Assembly to give effect to any awards made by the Tribunal by not making appropriations for payment of the awards would, in effect, amount to such a review.

21. Moreover, if the United Nations Organization, through the General Assembly, were to avoid payment of compensation awarded by the Tribunal in the normal exercise of its functions, this would be tantamount to a breach of the terms of service of the staff members concerned. This is so because Staff Regulation 11.2 in effect makes the right to enjoy the benefit of judgments and awards by the Tribunal part of the contract of service of each staff member [1]. Regulation 4.1 and Annex II of the Staff Regulations provide that the letter of appointment of each staff member is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question. The Staff Regulations, including Regulation 11.2, are thus made part of the contract of service. It is true that Annex II *(a) (i)* also provides that the letter of appointment is to state that the appointment is

[1] Staff Regulation 11.2 provides : "The United Nations Administrative Tribunal shall, under conditions prescribed in its Statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment."

subject to such changes as may be made in the Regulations and Rules from time to time, and that the General Assembly is, therefore, entitled to amend the Staff Regulations and Rules and the Statute of the Tribunal; but, so long as they remain in force, they are part of the contract between the staff member and the Organization and it is the legal duty of the Assembly to honour that contract.

VI. The practice of the former League of Nations

22. It has been suggested that a precedent exists which establishes that the General Assembly is not bound to give effect to the awards of the Administrative Tribunal and that it can, in effect, in all cases review those awards. This precedent is the action taken by the League of Nations in 1946, when the Assembly of the League of Nations refused to give effect to awards of the League of Nations Administrative Tribunal [1]. The Administrative Tribunal had found that the Secretariat of the League of Nations and the International Labour Office were not entitled to apply to thirteen ex-officials of the League of Nations and the I.L.O., respectively, amendments made to the League of Nations and I.L.O. Staff Regulations by a League of Nations Assembly Resolution of December 14, 1939, and had awarded compensation to the ex-officials concerned. A Sub-Committee of the Finance Committee of the League of Nations were asked to look into these findings of the Administrative Tribunal, and found that the awards made by the Tribunal were invalid and of no effect because they sought to set aside the Assembly's legislative act.

23. In the opinion of the United Kingdom Government, what was decided in that case was not that the Assembly of the League of Nations had a general right to review the judgments and awards of the Administrative Tribunal, but only that the Assembly was not obliged to satisfy an award in a case in which the Tribunal had declined to give effect to a Resolution of the Assembly. What was in issue in 1946 was the Tribunal's right to question the validity of a Resolution of the League of Nations Assembly which had the effect of altering the League of Nations and I.L.O. Staff Regulations, and the discussion in 1946 in the League Assembly centred round the powers of the League Assembly in the exceptional circumstances which existed at the outbreak of war to alter by its own resolutions the contractual rights of the League of Nations employees and not round the right of the Assembly to review, in all cases and in all circumstances, the findings and awards of the Administrative Tribunal.

[1] See pages 4-7 of the General Report of the Finance Committee to the Assembly of the League of Nations, and pages 130-133, 245-249, 261-264, of the Records of the Twentieth and Twenty-First Sessions of the Assembly.

24. (1) In this connection, attention may be drawn to an opinion given in 1932 by an *ad hoc* Committee of Jurists set up to enquire into the power of the League Assembly to reduce the salaries of officials of the League of Nations. The Committee found, *inter alia*, that :

> "If the Assembly reduced the salaries of officials, the latter would have the right to have recourse to the Administrative Tribunal. The considerations set out above lead the Committee to think that the Tribunal would decide in favour of the officials. As a result of such a decision, and in virtue of Article 10 of the Tribunal's Statute, the Assembly would then require to make in the next budget provision for paying compensation [1]."

(2) The 1932 Committee, unlike that set up in 1946, reached the conclusion that the Assembly had no power to reduce the salaries of officials of the League of Nations. What is relevant in the present connection, however, is the Committee's undoubted opinion that Article 10 of the Tribunal's Statute, which provided that "any compensation awarded by the Tribunal should be chargeable to the budget concerned", placed on the Assembly an obligation, which could not be contested, to make budgetary provision for paying the compensation awarded.

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[1] Records of the 13th Ordinary Session of the Assembly of the League of Nations—Minutes of the Fourth Committee, p. 206.

9. WRITTEN STATEMENT OF THE UNITED STATES OF AMERICA

ON

THE QUESTIONS SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE UNITED NATIONS GENERAL ASSEMBLY BY RESOLUTION DATED DECEMBER 9, 1953, RELATING TO THE POWER OF THE GENERAL ASSEMBLY REGARDING AWARDS OF COMPENSATION MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

CONTENTS

I. INTRODUCTION

The General Assembly of the United Nations, at its Eighth Session, by Resolution dated December 9, 1953 (UN Official Records, General Assembly, 8th Session, A/194, 11 December 1953), decided to submit to the International Court of Justice for an advisory opinion certain legal questions concerning awards of the United Nations Administrative Tribunal.

First, the General Assembly put the general question of its right to refuse to give effect to an award of compensation made by the Administrative Tribunal; and second, it inquired as to the principal grounds upon which such a right could lawfully be exercised. The Resolution of December 9, 1953, reads as follows:

> "*The General Assembly,*
>
> *Considering* the request for a supplementary appropriation of $179,420, made by the Secretary-General in his report (A/2534) for the purpose of covering the awards made by the United Nations Administrative Tribunal in eleven cases numbered 26, and 37 to 46 inclusive,
>
> *Considering* the concurrence in that appropriation by the Advisory Committee on Administrative and Budgetary Questions contained in its twenty-fourth report to the Eighth Session of the General Assembly (A/2580),
>
> *Considering*, nevertheless, that important legal questions have been raised in the course of debate in the Fifth Committee with respect to that appropriation,
>
> *Decides*
>
> To submit the following legal questions to the International Court of Justice for an advisory opinion:
>
> (1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?
>
> (2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?"

These two questions were put to the International Court of Justice in order that the General Assembly in its further deliberations concerning certain awards made by the United Nations Administrative Tribunal in 1953 might be advised by an opinion from the principal judicial organ of the United Nations on the legal questions formulated in the Assembly's Resolution. Before proceeding to state views on the questions submitted by the

General Assembly, it is essential to consider the exact import of those questions. They speak of the Assembly's "right" to follow a given course of action.

It is necessary to understand this term in the sense of *legal power* on the part of the Assembly. Otherwise, there is not a "legal question" on which an advisory opinion can be sought and rendered under Article 96 of the Charter. The Charter does not provide here, and the Court is not constituted, for the rendering of advisory opinions on other than legal questions: for example, on political or moral questions. Accordingly, there must be excluded from the meaning of the term "right" in the Assembly's questions any elements other than legal considerations; the question is not whether there is a moral right, an ethical right or any kind of right other than a legal right or power.

The questions submitted by the General Assembly, therefore, require that one consider what legal dispositions there are under the Charter of the United Nations and other relevant law, as drawn from the sources recited in Article 38 of the Statute of the Court, which relate to the Assembly's giving or refusing to give effect to awards of compensation made by the United Nations Administrative Tribunal. Article 38 of the Statute, in setting forth the sources of law to be applied by the Court, places first "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states". Under Article 68, the Court is authorized, if not indeed encouraged, to follow such provisions as Article 38 in the exercise of its advisory functions. In view of the nature of the Charter as the treaty under which the General Assembly was established, there could scarcely be another point of departure than the Charter in dealing with the questions which have been submitted by the General Assembly. As the Court said in its advisory opinion concerning *Conditions of Admission of a State to Membership in the United Nations:*

> "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution." [1948] I.C.J. 57, 64.

The Charter, as it applies to the General Assembly, does not speak of "rights" of the Assembly. Its language is that usual in most constitutional documents; "shall", "may", and similar terms are used where scope and content are given to the Assembly's "functions and powers" in Chapter IV of the Charter. "Right" is used with reference to States, Members, peoples, and individuals. Articles 1 (2); 2 (2), (5); 13 (1) *(b)*; 18 (2); 40; 43 (1); 51; 55; 62 (2); 68; 76 *(c)*; 80 (1); *cf.* Articles 31 (1) and 63 (2) of the Statute of the International Court of Justice. In the language of the

Charter, therefore, the questions now before the Court must be understood as whether and how the General Assembly is empowered in the execution of its functions to give or to refuse to give effect to awards of the Administrative Tribunal, and what, if any, limitations are imposed on the Assembly's exercise of such a power. To reject those meanings of "right" which relate to political and moral propriety or to individual as distinguished from governmental "right", and to understand the word in the sense of legal power, is to conform to "a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd". See *Polish Postal Service in Danzig*, [1925] P.C.I.J. Ser. B, No. 11, 39.

Before leaving the question of the scope and content of the Assembly's questions, it may be worthwhile to consider the phrase "refuse to give effect" as used in the questions. Its meaning seems clear as importing any course of action other than simple appropriation of funds by the General Assembly to pay the Administrative Tribunal's monetary awards. Thus, the General Assembly, like the League Assembly in 1946, where the same term ("refuse to give effect") was used, might adopt a report by its Fifth Committee disapproving the awards for stated reasons and not appropriate the money to pay them. The Assembly might, as it has done in the present case, not appropriate the money at the session at which the item was placed on the agenda for consideration, or even indefinitely postpone voting on payment. It might vote on a proposal to pay and not adopt it at one or at several sessions. It might, as it has done in the present case, refer one or more legal questions to the International Court of Justice. It might create a special tribunal to review Tribunal cases *ad hoc*. It might adopt a report approving payment of a different amount on grounds differing from those of the Tribunal. It might simply appropriate a part of the amount named by the Tribunal. It might appropriate the whole amount, but on the basis of a report expressly rejecting the *ratio decidendi* of the Tribunal and the authority of its judgment.

Would any or all of these actions, or other possible variants, constitute refusal to give effect ? It is submitted that they would.

The intention of the first question submitted by the General Assembly would seem to be to ask the Court whether the Statute of the Tribunal, the Charter, or other relevant instruments or records constitute a legal bar to every course of action other than full and prompt payment and acceptance by the General Assembly of the Administrative Tribunal's judgments. The second question appears legally answerable, as will be developed later, only in terms of Charter limitations on action by the Assembly.

II. Summary of argument

The responsibility and power of principal organs are superior to those of subsidiary organs. This principle dominates the relationship between General Assembly and Administrative Tribunal

The General Assembly under the Charter bears exclusive responsibility for considering and approving the budget by a two-thirds majority vote. It cannot by delegation avoid the requirement of a two-thirds vote following its own full and adequate consideration of budgetary appropriations.

The Charter does not permit the General Assembly to create an organ capable of usurping the Charter power of the Secretary-General or its own function of final review and decision in matters arising out of its concern with the administration of the Secretariat pursuant to Article 101 (1) of the Charter. Establishment of an Administrative Tribunal might be an implied power of the General Assembly, but establishment of an organ whose decisions must be regarded as legally binding upon the Assembly, or, in all cases, upon the Secretary-General, is not necessary to the discharge of the Assembly's functions and would indeed be contrary to the provisions of the Charter.

Articles 7 and 22 provide the only categories of United Nations organs, and these are "principal" and "subsidiary". The Tribunal is not a principal organ. Article 22 authorized the General Assembly to establish it as a subsidiary organ. The Tribunal cannot assume the role of a body legally capable of compelling the acquiescence of the General Assembly.

The interpretation of the Charter in regard to the Assembly's functions, and the interpretation of its own resolutions, is a matter which must remain the primary and final responsibility of the General Assembly. Not even the International Court of Justice can bind the Assembly to a given interpretation; a subsidiary organ is plainly incapable of such legal power.

Under the Charter, it is not possible to construct a theory of separation of powers as between the General Assembly and the Administrative Tribunal. Even if it were, however, the logical consequences would be, not that the General Assembly would have no right or power to exercise its powers in a fashion disapproved by the Tribunal, but rather that the Tribunal would lack legal authority to control how the General Assembly should perform its tasks.

Nothing in the Statute of the Administrative Tribunal can be considered to have diminished the responsibilities and power of the General Assembly or to have prejudiced its rights or power to refuse to give effect to awards of the Tribunal.

In creating the Administrative Tribunal, the General Assembly did not seek or purport to endow the Tribunal with power to bind

the Assembly. The work of the Preparatory Commission of the United Nations and the Drafting Committee for the Tribunal's Statute evidence predominant concern in securing the highest standards of efficiency, competence and integrity among the Staff, as required by the Charter, and respect for the discretion vested by the Charter in the Secretary-General to permit establishment and maintenance of these standards. It was in this context, and with full appreciation of the fact that in 1946 the Assembly of the League of Nations exercised the right to refuse to give effect to awards of the League's Tribunal, that the present Statute was modeled upon that of the League and used the League Statute's language that judgments should be "final and without appeal".

Administrative Tribunals in the field of international law are new institutions, are *sui generis*, and necessarily lack both the established substantive law, and the constitutional safeguards, such as a mature appellate structure with internal checks and balances, which may afford an immeasurably greater assurance in any given municipal system that exhaustion of remedies within a judicial framework will result in substantial justice in all cases. Even in mature municipal systems, there can be no ultimate legal sanction depriving the supreme legislative body of its lawful authority over the matter of budgetary appropriations.

In a fully debated decision in 1946, the League of Nations Assembly authoritatively settled the question whether awards of the League Tribunal must be given effect by the League Assembly. The answer was that the Assembly had the right and exercised the power to refuse to give them effect.

The conclusion follows that the General Assembly has the right to refuse to give effect to awards of the Administrative Tribunal. As to grounds upon which it might do so, the Charter requires that the General Assembly shall make a policy decision, taking account of the relevant factors, based on the Charter principle of paramount consideration for maintaining the highest standards of efficiency, competence and integrity in the Secretariat. Any one or combination of a series of factors might create a situation in which the Assembly would judge that its Charter responsibility called for refusal to give effect to a Tribunal award.

III. The responsibilities and powers of principal organs under the Charter are superior to those of subsidiary organs, and under the provisions of the Charter this principle dominates the relationship between the General Assembly and the Administrative Tribunal

The Charter vests rights and duties, powers and responsibilities, in the principal organs of the United Nations, the exercise and fulfilment of which must as a matter of law prevail over any conflicting dispositions purportedly made by organs other than

the principal organs. The fact that an organ other than a principal organ deems such dispositions to be consistent with authority delegated by the principal organ and with the rights and duties, powers and responsibilities vested in the principal organ, cannot exclude consideration and decision of these questions by the principal organ itself, in accordance with the terms of the Charter.

Foreseeing the possibility of conflict between Charter obligations and those arising from other international agreements, the drafters provided in Article 103 :

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

If supremacy of Charter obligations is the rule for sovereign States, it cannot very well be doubted that it applies to organs of the United Nations whose very existence derives from the Charter. Thus, in considering whether the United Nations enjoyed international personality such that the General Assembly would be competent to authorize the Secretary-General to bring international claims to compensate United Nations agents for personal injuries suffered by them in line of duty, the Court said, "The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that *the situation is dominated by the provisions of the Charter* considered in the light of the principles of international law." (Underscoring supplied.) *Reparation for Injuries suffered in the Service of the United Nations*, [1949] I.C.J. 174, 182.

(A) *Provisions regarding the United Nations budget*

The most explicit and immediately relevant Charter provisions dominating the giving effect to awards of compensation are Articles 17 and 18. They provide, in part :

> *"Article 17*
>
> 1. The General Assembly shall consider and approve the budget of the Organization.
>
> . . . . . .
>
> *Article 18*
>
> . . . . . .
>
> 2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include .... budgetary questions."

The financial implications of decisions of the Administrative Tribunal may be negligible or they may be very great. They are

factors to be weighed in deciding whether the interest of the Organization is best served by refusing or agreeing to examine into the merits of a case or by refusing or agreeing to give effect to the award. This type of consideration is required by Article 17 to be undertaken by the General Assembly. Article 18 requires that the questions be resolved by a two-thirds majority vote of the General Assembly.

These Articles are expressed in most mandatory fashion. They permit of no assumption that General Assembly approval of the Statute of the Tribunal could constitute advance consideration and approval of every award the Tribunal might make. To conclude that the General Assembly has no legal alternative to adopting the decision of the Administrative Tribunal or paying the award the Tribunal may have made is to diminish the power and function of the Assembly to the vanishing point of a mere ministerial act. Article 17, on the contrary, requires, not only that the General Assembly shall "approve" the budget, but that it shall "consider" it. Such language negates any notion that appropriating money may be merely a ministerial job. The existence of a power to limit the amount of awards in advance, and failure to have exercised this power prior to the Eighth General Assembly, could not constitute thorough and adequate "consideration", in the sense of Article 17, of all future budgetary implications of the Statute of the Administrative Tribunal.

Not only is the budgetary power substantive, but its existence and exercise by any organ always imports the possibility of an extension of function or aggrandizement of competence beyond what was intended in the original grant of power. The device of a qualified majority is an established method of protecting against this danger. The Permanent Court of International Justice, in an advisory opinion upholding the competence of the International Labor Organization to propose labor legislation incidentally affecting work performed by an employer, noted that the requirement of two-thirds approval for the inclusion of an item on the International Labor Organization's agenda was itself, and independently of the power to refer questions to the Court, a "means of checking any attempt on the part of the Organization to exceed its competence. In this way", the Court observed, "the High Contracting Parties have taken precautions against any undue expansion of the sphere of activity indicated by the preamble." *International Labor Organization and the Personal Work of the Employer*, [1926] P.C.I.J. Ser. B, No. 13, 17-18. The requirement in the Charter of a two-thirds vote on important matters would appear to have had a similar function. To remain a guaranty, the requirement must not itself be susceptible of being whittled away. Invention or implication of special grounds purportedly warranting an inhibition on its application is inconsistent with its purpose and importance.

In summary, then, Articles 17 and 18 make it very clear that, consistently with Article 101, the budgetary power is intended to be substantive, not just ministerial, and is specifically enumerated among those powers which the Charter designates "important" and for the exercise of which it requires a two-thirds majority.

(B) *Provisions regarding administration*

In discussing the budgetary provisions of the Charter it was assumed that the General Assembly had the power to establish an Administrative Tribunal. It is necessary, however, to examine more closely into the source and the extent of this power. As will be brought out later, the power is specifically conferred by the Charter and is the power to establish subsidiary organs. However, since it is closely related to the powers conferred under Articles 101 (1) and 97 of the Charter, it is convenient to examine first the possibility that it is to be implied from these Articles.

(1) *Articles 97 and 101*

Articles 97 and 101 are those most directly related to the internal administrative structure of the United Nations. They read, in part :

"*Article 97*

> The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 101

> 1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
>
> . . . . . .
>
> 3. 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."

In vesting the power to appoint the staff in the Secretary-General "under regulations established by the General Assembly", the Charter charges not only the Secretary-General but also the Assembly with a responsibility to the Organization and its members—the parties to the treaty—to assure that "*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". (Underscoring supplied.) Article 101 (3). The importance of this injunc-

tion was emphasized at San Francisco when the Soviet Union moved for deletion of an addition which Canada had originally proposed to Chapter X of the Dumbarton Oaks Proposals. The addition read :

> "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly. The paramount consideration in the employment of the staff and in the determination of 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 staff on as wide a geographical basis as possible." 7 UNCIO Doc. 177.

The Soviet delegation argued that this language should not be in the Charter because it related to minor technical details. The conference committee rejected the Soviet motion and voted for the Canadian proposal. The committee debate on this point is summarized as follows :

> "A number of delegates agreed that the Charter should not contain excessive details, but contended that the paragraph in question was concerned with matters of principle and not of detail ; that in fact *the paragraph contained* no more than *general principles to guide the Assembly when it established the detailed regulations governing the staff of the Secretariat. Four important principles are contained in the paragraph : the selection of the staff by the Secretary-General in his capacity as chief administrative officer, the establishment by the Assembly of the regulations concerning employment, provision for the highest standards of efficiency, competence and integrity, and provision for recruiting staff on as wide a geographical basis as possible.*" (Underscoring supplied.) 7 UNCIO Doc. 176.

Does the power to establish regulations under Article 101 to govern the staff of the Secretariat imply power

(a) to establish machinery for hearing and decision on staff grievances ?

(b) to set up the necessary bodies for hearing and decision, prescribe their jurisdiction, designate the point at which a final decision is made so that no further appeal can be taken as of right under the machinery so set up ?

(c) to create in the staff vested or acquired rights to the appropriation of whatever awards the bodies so set up may make ?

(d) to make decisions of the bodies so set up binding in law on the General Assembly itself ?

(e) to endow the bodies so set up with the power of a judiciary independent of and co-ordinate with the International Court of Justice, the General Assembly and the Secretariat ?

When the Charter empowers an organ to achieve an objective, it is to be held to imply such capacities, privileges or powers as are *necessary* or *essential* to the attainment of the objective and as

are consistent with and not excluded by other provisions of the Charter. In its opinion on the *International Labor Organization and the Personal Work of the Employer,* the Permanent Court of International Justice found it inconceivable that the parties to the Treaty of Versailles, in setting up the Organization, intended "to prevent the Organization from drawing up and proposing measures essential to the accomplishment" of the ends for which it was created. [1926] P.C.I.J. Series B, No. 13, 1, 18. In its opinion on *Reparation for Injuries suffered in the Service of the United Nations,* the International Court of Justice stated, "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." [1949] I.C.J. 174, 182. In that opinion, the capacity to exercise a measure of functional protection of its agents was found to arise "by necessary intendment out of the Charter". *Id.* at 184.

The Court took pains to examine other means of achieving legal protection and found them inadequate because they would depend upon the attitude that a single State (Member or non-member) might assume, and because there might be no State legally competent to act. Moreover, it found that it was "essential" that the agent of the Organization be able to look to the Organization itself for protection. *Ibid.*

Applying the principles just cited to the questions set out above, the answers to *(a)* and *(b)* would seem to be "yes"; the answers to *(c), (d)* and *(e)* would seem to be "no". The Secretary-General, under the Charter, appoints the staff. Article 101 (1). He directs their work and in general performs all functions appropriate to "the chief administrative officer of the Organization". Article 99. The general "conditions of service" are determined and laid down by the General Assembly in the Staff Regulations, and are given effect by the Secretary-General and his subordinates through the Staff Rules, practices, and day-to-day decisions made within the Secretariat. In any public administration, the need for a fair-hearing procedure is soon felt. Initially, it was met in the United Nations by the establishment of bodies to which the staff member could appeal and whose opinions were advisory to the Secretary-General.

In 1949 the Assembly established the Administrative Tribunal and provided that its judgments should be "final and without appeal". As will be brought out below, this meant that neither the staff member nor the Secretary-General was given any right of appeal to another tribunal or agency and that the remedies accorded each under the system established by the Statute had been exhausted. But let us assume, for the moment, that it had been intended to prevent the General Assembly, either at the instance of Members of the United Nations or at the instance of

the Secretary-General, from reviewing the propriety of the action of the Tribunal. Let us assume that the effects outlined above as *(c)*, *(d)* or *(e)* had been intended. Could it be said that the General Assembly possessed the implied power to make such legal dispositions? Are they "necessary" or "essential" to any of the "four important principles" contained in the Canadian proposal at San Francisco, as quoted previously, and as now embodied in Articles 97 and 101?

To recapitulate, the principles are:

1. Selection of the staff by the Secretary-General as the chief administrative officer.
2. Establishment by the General Assembly of regulations concerning employment.
3. Provision for the highest standards of efficiency, competence and integrity.
4. Provision for recruiting staff on as wide a geographical basis as possible.

Neither the first nor the fourth principle even hints, much less requires, that staff members be vested with an acquired right to the benefits of a decision by an independent Administrative Tribunal in effect co-ordinate with the International Court of Justice and beyond the reach of the General Assembly. As for the other two principles, the only hypothesis on which it could plausibly be asserted that such an acquired right could be vested in staff members is the hypothesis that there is a high degree of probability that a subsequent General Assembly will act without sense of responsibility and seek to do harm to its own regulations or to undermine the efficiency, competence and integrity of the Secretariat, and that the existence of an acquired or vested right would prevent such dire happenings. This hypothesis does not deserve serious attention.

It is submitted that the General Assembly has ample power, means and disposition to adopt and establish confidence in a *practice* of general acceptance of the decisions and awards of the Administrative Tribunal, without legally tying its hands in the face of unforeseen and essentially unpredictable developments which may demand its corrective action to strengthen the efficiency, competence or integrity of the Secretariat, to ensure that the regulations established by the General Assembly are truly applied, or for other equally lawful purposes under the Charter. And should the General Assembly feel the need of consistent, authoritative legal advice, it can always, of course, secure such advice from the International Court of Justice in the only form provided by the Charter in such situations, namely, an advisory opinion. It is worth noting in this connection that the Assembly has already established a firm tradition of respect for the advisory opinions of the International Court of Justice.

There is an additional reason why an implied power to give binding effect to awards of the Tribunal in the sense discussed cannot be attributed to the General Assembly, or indeed to any organ of the United Nations. The reason is the very simple one that no organ, be it the Assembly or the Secretary-General, is free to honor or obey the purported commands of some other body where such commands are contrary to the provisions of the Charter itself.

By virtue of Article 97 of the Charter, the Secretary-General is the chief administrative officer of the United Nations. Articles 97 and 101 are very clear and precise in vesting the power to employ and manage the Secretariat in the Secretary-General. Since this authority is given to the Secretary-General by the Charter itself, it is impossible to transfer it elsewhere, to the Administrative Tribunal, for instance, by resolution of the General Assembly. To empower the Tribunal to substitute its judgment for that of the Secretary-General in matters directly involving the discharge of his power to employ and manage the Secretariat and thus his responsibility for the staff and its discipline, would be a serious infringement of the Secretary-General's Charter powers. Yet to imply a power under which the Tribunal may bind the General Assembly and the Secretary-General by Tribunal decisions is to permit the assertion of power by the Tribunal to substitute its judgment for that of the Secretary-General without a parallel corrective power in the General Assembly or the Secretary-General. Such a result is contrary to the Charter. Because of the presumption of legality in favor of Assembly action, the Assembly should not be held to have intended that the Administrative Tribunal should have unconstitutional powers. The question of the General Assembly's intention will be adverted to later.

The General Assembly can, of course, empower a subordinate body to render legal opinions as to the proper application of the Staff Regulations and give decisions for the correction of legal errors made by the Secretary-General—through arbitrary action or action outside his authority. But no such body may revise acts of the Secretary-General done within the scope of his authority; for this would violate the Charter. A subordinate body may not be allowed to decide irrevocably whether action of the Secretary-General was authorized or not in the discharge of his Charter responsibilities.

Examination of the record in the present cases would demonstrate that the Tribunal has attempted to reverse the Secretary-General in respect to matters within his Charter authority and beyond the authority of the Tribunal. The very possibility of such a development—whatever the cases in which it should be found to arise—clearly indicates that the Charter does not merely allow but *requires* the existence of power to set aside Tribunal action as void where it runs counter to the Charter.

From these considerations, the conclusion would appear to be that an implied power of the General Assembly to establish an administrative tribunal may be both necessary and essential, but that an implied power in addition to impose legal limitations upon the General Assembly's (or the Secretary-General's) own express Charter powers is not necessary or essential, and is not legally admissible.

(2) *Articles 7, 8 and 22*

We have proceeded up to the present on the basis of the General Assembly's possessing power to establish an administrative tribunal, without inquiring too particularly as to the source of the power. In the preceding section we considered the possibility that this power was implied through the presence of Article 101 of the Charter. It was seen that any such implication did not reach so far as to enable the General Assembly to create a tribunal whose decisions and awards must as a matter of law automatically be accepted and given effect by the Assembly.

We now come to those provisions of the Charter which specifically empower the Assembly to create other organs. These provisions are general in the sense that they cover all types of organs. They are, however, specific and limiting in making it clear that any organs set up by the Assembly are subsidiary in character. In other words, the General Assembly is empowered to establish organs which remain under the Assembly's authority. The Charter dispositions are such as to exclude the possibility of the Assembly's establishing any non-subordinate or co-ordinate United Nations organs—either under specific grants in the Charter or through any implied grants.

The provisions referred to are Articles 7, 8, 22 and 29. They read:

"*Article 7*

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

"*Article 22*

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions [1]."

[1] Article 68 of the Charter provides:

"The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

"*Article 29*

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

Articles 7 and 8 show very clearly that the Charter contemplated a system composed of "*principal*" and "*subsidiary*" organs. These are the only two categories named, and the provision for subsidiary organs is obviously designed to permit sufficient flexibility for the discharge of all *necessary* tasks, while at the same time assuring that the organs enumerated as "principal" shall continue to be so and that no provisions of the Charter shall be overridden by the establishment of the "subsidiary" organs. Article 8 confirms the objective of a single and co-ordinated system by stating that the United Nations' rule of equal rights for men and women applies "in its principal and subsidiary organs", and not, as would have been the case if organs of some other categories were contemplated, "in principal, subsidiary *and any other* organs".

Article 7 names all the "principal organs" of the United Nations. No more can be created, except by Charter amendment. Any organs established by principal organs must be subsidiary organs.

The interrelationship of Articles 7, 8, 22 and 29 was clearly recognized at the San Francisco Conference, and the task of considering whether all these provisions should remain or only some, and if so how, was finally entrusted to the Advisory Committee of Jurists. Recommendations were formulated at the fourth meeting of the Committee by Messrs. Hackworth (Chairman), Hsu Mo, Colunsky, Malkin, Basdevant and Robles. UNCIO, WD 268, CO/110, June 10, 1945. These recommendations subsequently received approval of the Co-ordination Committee and of the Conference itself.

The Advisory Committee of Jurists had the following texts to work from :

1. In the first place, it had Article 7, as approved by the Co-ordination Committee on May 30 and June 4, 1945, and Article 8, as approved by Committee I/2 on June 6, both preserving the distinction between "principal" and "subsidiary" first established by Chapter IV of the Dumbarton Oaks Proposals (3 UNCIO Doc. 4) :

"*Article 7*

1. There are established as the *principal* organs of the (name to be inserted) : a General Assembly, a Security Council, an Economic and Social Council, an International Court of Justice, and a Secretariat.

2. The (name to be inserted) may in accordance with the Charter establish such *subsidiary* organs as may be found necessary." (Underscoring supplied.) UNCIO WD 111, CO/35(2), June 5, 1945.

"*Article 9* [now 8]

. . . . . .

The (name to be inserted) shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in the principal and subsidiary organs." UNCIO WD 252, CO/37(2), June 10, 1945.

2. Next, it had Article 22, as revised and still under consideration by the Co-ordination Committee:

"*Article 22*

The General Assembly may create such bodies and agencies as it deems necessary for the performance of its functions." UNCIO WD 129, CO/75(1), June 3, 1945.

Finally, it had the text of present Article 29, as revised and approved by Committee III/1 on May 22, 1945:

"2. The Security Council should be empowered to set up such bodies or agencies as it may deem necessary for the performance of its functions." UNCIO WD 131, CO/71, June 3, 1945.

At its Fourth Meeting on June 9, 1945, the Advisory Committee of Jurists settled on the recommendations it believed proper, as appears from the following note by the Secretariat:

"The Advisory Committee of Jurists considered Articles 22 and 32 [now 29] in connection with paragraph 2 of the above article [Article 7] and agreed that all three should remain in the Charter. The Jurists recommended certain changes in Articles 22 and 32 [now 29] in order to bring the language of the three Articles into conformity...." UNCIO WD 253, CO/35(3), June 10, 1945; see, also, UNCIO WD 268, CO/110, June 10, 1945.

In this discussion of Articles 7 and 22 the Advisory Committee of Jurists evidenced complete awareness that inclusion of the phrase "in accordance with the present Charter" was intended to refer forward to Articles 22 and 29, and to require that subsidiary organs should not only be generally "subsidiary" to the "Organization", but specifically subsidiary organs established by the General Assembly or the Security Council to assist in performing their respective functions. UNCIO, Advisory Committee of Jurists, (unpublished) verbatim minutes, June 9, 1945, 64-71. A suggestion was made that "bodies and agencies" should be maintained in Article 22, but the decision was to substitute "subsidiary organs". *Id.* at 124-125.

The texts recommended by the Jurists were approved by the Co-ordination Committee and by the Conference and are the present texts of Articles 7, 22 and 29. Thus, it will be observed, the Advisory Committee of Jurists recognized and gave effect to

the thought that the Charter should provide for only two types of organ, principal and subsidiary, and made explicit the application to the latter of Articles 22 and 29.

The Advisory Committee's action respecting Article 8 tends in addition to confirm the conclusion above deduced from the plain text that a constitutional structure was established composed exclusively of principal and subsidiary organs. At one point, in suggesting a shortened form of Article 8, the Advisory Committee of Jurists used the phrase "any of its organs" in order to give effect to the meaning expressed by Committee I/2 in the phrase "its principal and subsidiary organs". UNCIO WD 252, CO/37 (2), June 10, 1945. The Committee thereby indicated that it considered "principal and subsidiary" as including all possible organs.

It follows from the inclusiveness of Article 7 and use of the word "subsidiary" in juxtaposition with "principal" that it is impossible to find authority for the creation of a body whose voice could legally control future acts of the principal organ which created it. The tautologies involved in "subsidiary independent organ", "subsidiary superior organ", "organ subsidiary to and controlling over its parent, the principal organ", are not lightly to be read into a legal document like the Charter. If, as a matter of law, the General Assembly were not free to refuse to give effect to awards of the United Nations Administrative Tribunal, the General Assembly would be a "principal organ subordinated to its subsidiary".

The proper meaning of "subsidiary" is further clarified by the organization of the Charter itself. Article 22 falls under the heading of "procedure". Article 29 falls under the heading of "procedure". Neither is intended to qualify the scope of the "powers and functions" previously conferred. Both are concerned with the means to implement powers, functions and responsibilities of the principal organ.

The only other use of the term "subsidiary" in the Charter and the Statute of the Court is in Article 38 (1) *(d)* of the latter, where reference is made to judicial decisions and teachings of publicists as "subsidiary means" for the determination of rules of law. Here, subsidiary, of course, means that where there is conflict between the principal sources and the subsidiary sources it is the principal sources which must prevail under the Statute.

Finally, the phrase "for the performance of *its* functions" in Article 22 excludes the possibility of creating an independent organ with functions or powers not inherent in the General Assembly. Again, it is the plain language of the Charter that must prevail over any assertion that there is power in the General Assembly to establish an organ endowed with judicial power and functions from the exercise of which the General Assembly is legally excluded.

Before the Administrative Tribunal was established in 1949, the General Assembly had explored and confirmed the meaning of the Charter words "subsidiary organ". This it had done when estab-

lishing the Interim Committee of the General Assembly by Resolution of November 13, 1947. The views expressed at that time and the precedent of the Interim Committee itself bear forthright witness to the meaning of "subsidiary organ" as it has been deduced above from its use in the Charter and the records of the San Francisco Conference.

In explaining the purpose of the proposal for the Interim Committee, Secretary of State Marshall said for the United States:

> "The attitude of the United States towards the whole range of problems before the United Nations is founded on a very genuine desire to perfect the Organization so as to safeguard the security of States and the well-being of their peoples.
>
> These aims can be accomplished only if the untapped resources of the United Nations are brought to bear with full effect through the General Assembly and in other organs. *The Assembly cannot dodge its responsibilities; it must organize itself effectively, not as an agency of intermittent action, but on a continuous basis.* It is for us, the members of the Assembly, to construct a record of achievement in dealing with crucial problems which will buttress the authority of the Organization and enable it to fulfil its promise to all peoples." (Underscoring supplied.) UN, Off. Rec., Gen. Ass., 2d Sess., I PV 26.

Mr. Dulles, who represented the United States in the discussion of the proposal in the First Committee, clarified the scope of authority to be entrusted to the new subsidiary organ:

> "To avoid raising constitutional doubts, the United States proposal did not contemplate any delegation by the Assembly of a substantive discretionary authority given by the Charter. The interim committee would be only an internal organ of the Assembly, similar to others already created to study questions, and to report and make recommendations to the Assembly, and not to Member States or any organs of the United Nations. The only novel authority proposed was that of prior study of possible future agenda items for a plenary session.
>
> The authority of a body to equip itself to discharge its responsibilities was a clearly accepted juridical principle. To implement its broad power to recommend, the Assembly could organize its work and set up procedures to enable it to recommend intelligently. If the proposed committee was more than a 'committee' and was a new 'organ', such an organ was authorized by Article 22 of the Charter." UN, Off. Rec., Gen. Ass., 2d Sess., 1st Comm., SR 131-2.

As Mr. Dulles pointed out, the Interim Committee was called upon to act in a field (political, security and co-operation) where the power of the General Assembly could be exercised only by recommendation to Members. *Id.* at 130. When the General Assembly exercises its power to establish regulations for the Secretariat, it necessarily takes action directly affecting the rights and duties of the staff—action which is controlling on the staff and not merely recommendatory. With this difference in mind,

attention is called to the record of the second session of the General Assembly.

The USSR was opposed to establishment of the Interim Committee. With its general formulation of the legal situation regarding subsidiary organs, no serious issue was taken :

> "It was clear that it was the provisions of Article 7, paragraph 2, concerning subsidiary organs that might be established in accordance with the Charter, that were referred to in Articles 22 and 29 and rules 100 and 101. Those Articles, as he had already stated, did not give the right to establish subsidiary organs encroaching upon the functions of the principal organs of the United Nations." *Id.* at 136.

Mr. Dulles, speaking after the debates in the First Committee had been concluded, indicated that disagreement lay in application of the principle to the facts of the case.

> "The test must be to define what is meant by 'subsidiary' and then to apply that definition to the actual proposal before you. There could, of course, be differences of opinion as to how to define the word 'subsidiary'. However, we have available here a definition by Mr. Vyshinsky which is good enough for present purposes. In the debate before the First Committee he stated with regard to the subsidiary organs that : 'They are such as will help the Assembly to carry out its functions.... Their functions—that is, the functions of subsidiary organs—can only be to render assistance to the General Assembly.' I submit that in accordance with the afore-mentioned definition this proposed interim committee is clearly a subsidiary body.
>
> .... The resolution before you, which establishes this interim committee, clearly limits its activities to assisting the General Assembly. The committee is not able to make any substantive decisions of its own. The committee is not able to make any recommendations to anybody else. The committee can only consider and report to the next plenary session in order to enable the Assembly during that session to discharge its duties better in this field." UN, Off. Rec., Gen. Ass., 2d Sess., II PV 756-57.

The record shows that in establishing the Interim Committee (with only six opposed and six abstaining), the General Assembly did so because it believed that it had provided safeguards sufficient to ensure that the Interim Committee would indeed be subsidiary to the General Assembly and would not exceed General Assembly competence vis-à-vis another principal organ, in this case the Security Council. It is significant that the formal factors taken into account were principally that the power of decision of the General Assembly itself, for example in budgetary matters, would not be impaired, and that the role of the Interim Committee was to be the role of a disciple—to prepare the way and to ease the path, and at all times to observe the word of the master. On the practical side, a guaranty of incontrovertible strength was the fact that the same Member States were capable of the same

respective voting strength in both the principal and the subsidiary organ. Where, as in the case of the Administrative Tribunal, there is no such organic correspondence to the principal, the guaranties of legal control by the principal organ are doubly indispensable.

The words of those who spoke in the second session of the General Assembly establish clearly the very general understanding, however they inclined on the policy, that respect for the Charter demanded a guaranty that the Interim Committee could not become a voice controlling upon its creator, the General Assembly, or upon another principal organ, such as the Security Council.

Among the first to speak in Committee I was Sr. Manini y Rios, representing Uruguay. He said, as the Summary Record shows, that :

> "Moreover, it was certain that under Article 22 of the Charter the General Assembly could set up temporary or permanent bodies for the purpose of exercising its functions. Hence the problem of the constitutionality of the interim committee did not arise, and the only question to be settled was a political one regarding the expediency of setting up that organ.
>
> .... That committee's functions would, in fact, consist only in study and preparatory work, the conclusions of which would have to be referred to the General Assembly. It would not have the right to make recommendations to the Security Council, *would not be able to approve the United Nations budget,* and would not deal with elections to the various organs of the United Nations. The only point in the United States draft resolution that remained doubtful was the power given to the interim committee to decide certain matters itself." (Underscoring supplied.) UN, Off. Rec., Gen. Ass., 2d Sess., 1st Comm., SR 140.

It is difficult indeed to see that a subsidiary organ can be subsidiary if it controls the United Nations budget, in matters within its orbit, by denying the right or power of the General Assembly to refuse to give effect to its awards, no matter what grounds the Assembly might have for rejecting them. If the difference between principal and subsidiary depends not upon who, in law, sets the amount to be appropriated, but upon who, in form only, gives the approval referred to in Article 17, then surely the guaranties of the Charter are rendered academic. Other members, in committee and in plenary, in arguing for the constitutionality of the Interim Committee, showed a large degree of reliance on the fact that the General Assembly retained the final power of decision and control over the actions of the Interim Committee.

China :

> ".... The interim committee's opinions or recommendations would in no way commit the Assembly." *Id.* at 140-141.

Netherlands :

> ".... The powers and functions of the interim committee would in no way duplicate or interfere with those of the Security Council nor

would they infringe upon the powers of the General Assembly itself." *Id.* at 152.

Philippines :

".... the interim committee .... would not be able to take any decision and would have to limit itself to making recommendations to the General Assembly on the basis of its findings". *Id.* at 156.

United Kingdom :

"That committee would in a way represent world conscience, and its resolutions, though lacking legal executive force, would undeniably carry great moral weight." *Id.* at 157.

Argentina :

"The interim committee would, in point of fact, be equivalent to a combination of the present six committees of the General Assembly in a single body. .... the Committees were working bodies in which solutions were discussed and prepared for subsequent submission to the General Assembly." *Id.* at 159.

France :

".... the Assembly could not delegate its powers to a subordinate authority ; for, if it had certain powers, it was in virtue of the guarantees provided by its constitution.... The interim committee was not to have powers of its own, not even the power to make recommendations to Governments, but simply the duty of drawing up proposals for the use of the Assembly itself." *Id.* at 162-163.

".... the Committee would be subordinate to the Assembly and therefore a subsidiary organ within the provisions of Article 22". *Id.* at 325.

What are the "guaranties provided by its constitution" ? Do they not include a two-thirds majority for appropriation of funds, complete control of the acts and decisions of a subsidiary, injunctions on competence entrusted to the vigilant and effective protection of all members of the body, the power to consult the International Court of Justice and be guided by its opinion on any issue presented involving a legal question ?

Canada :

".... the interim committee should be given clearly defined responsibilities. It should be a committee of the whole of the Assembly and should have the right to discuss fully any subject which came on its agenda, to conduct investigations and report to regular or special sessions of the General Assembly ; but it should not have any other powers." *Id.* at 166.

Mexico :

"The interim committee as a subsidiary organ in accordance with Article 22, should not be given powers of initiative." *Id.* at 167.

India :

"Mr. Setalvad (India) said that his delegation had tried, in the Sub-Committee, to ensure that the proposal for an interim committee would not infringe the Charter .... the subsidiary character of the committee was stressed by its main function, which was to report its conclusions to the General Assembly." *Id.* at 317.

Norway :

".... the committee would give the [a] matter preliminary consideration and report on it". *Id.* at 325.

El Salvador :

".... the final decision would in all cases rest with the General Assembly". *Id.* at 332.

Views were again expressed in Plenary debate :

Australia :

"The resolution is clear. There is no ambiguity about any portion of it. The body is subsidiary ; it is ancillary to the General Assembly. It cannot decide ; it must report." UN, Off. Rec., Gen. Ass., 2d Sess., II PV 788.

France :

"A subsidiary organ is characterized by the nature of the powers which are conferred on it. The powers conferred on the interim committee in the text which is before us are extremely limited.... The interim committee can only submit a report to the General Assembly. Of course this report, like all good reports, should be of some use and may contain conclusions ; but I do not think this in any way affects the purely preparatory character of its work." *Id.* at 810-811.

United Kingdom :

"This committee is certainly not intended to be a means by which the General Assembly can avoid discussion and decision on matters which may be inconvenient or complicated." *Id.* at 791.

A word remains to be said of the role of the General Assembly in connection with the establishment of international bodies referred to in the Charter as "specialized agencies" (Articles 57, 59, 63). Article 59 provides :

"The Organization shall, where appropriate, initiate negotiations among the States concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55."

Under Article 60, responsibility for the discharge of the function set forth in Article 59 is vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council.

Thus as relates to the creation of specialized agencies, which are capable of independent decisions not subject to General Assembly approval or revision, the General Assembly must proceed by negotiation, and depends upon agreement, evidenced by a treaty or convention, among all States concerned to confer powers of decision on the new body. The international community was not ready in 1945, and is no more so to-day, to give blanket advance approval to uncontrolled proliferation of independent or quasi-independent agencies of international control. It is only if an organ is to be truly subsidiary that advance authorization for its establishment is found in the Charter of the United Nations.

(C) *Provisions regarding legal interpretation and judicial organs*

Decisions of the Security Council in its special field of responsibility are expressly binding, and the Council's priority in this field is given procedural effect by Article 12. Otherwise, while the General Assembly's interpretation of the Charter would not be conclusive upon another principal organ, it is perfectly clear that the interpretation adopted by another principal—let alone subsidiary—organ cannot bind the General Assembly. This matter received considerable attention at the San Francisco Conference. Proposals to give final power of interpretation to this or that body were rejected, after due consideration. Instead, Commission IV adopted the following report on the matter drafted by Committee IV/2 on Legal Problems :

> "In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.
>
> Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two member States are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or to the Security Council, in appropriate circum-

stances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an *ad hoc* committee of jurists might be set up to examine the question and report its views, or recourse might be had to a joint conference. In brief, the members or the organs of the Organization might have recourse to various expedients in order to obtain an appropriate interpretation. It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients.

It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment." 13 UNCIO Doc. 709-710 (text) ; 13 UNCIO Doc. 68 (approval).

It must be obvious that this was an extremely pragmatic approach. It is also obvious that it was premised on the existence of unfettered power of interpretation in only the principal organs. No one could have contemplated with equanimity an indefinite multiplication of organs capable of maintaining conflicting views with equal voice. Finally, great reliance was placed on the practical effect of being able to refer legal questions to the International Court of Justice. In so far as there was to be approach toward a "highest court", it would be toward the International Court of Justice, "the principal judicial organ of the United Nations".

It would be a great anomaly if a subsidiary organ, lacking attention from the drafters of the Charter, and without any express grant of Charter authority, should, by implication (where no implication is necessary), be found to possess the power of binding a principal organ while such power was granted to the Security Council only by express language and in a limited and very clearly defined manner, and was denied to all other principal organs, including the only principal judicial organ. Indeed, vis-à-vis other organs of the United Nations, the International Court of Justice is capable of giving only *advisory* opinions, and then only at the request of the General Assembly or Security Council, or at the request of another organ or a specialized agency authorized by the General Assembly to make such a request. Art. 96. Nor can a contentious case between States involving construction of the Charter or other interests of the United Nations result in a decision binding on the General Assembly. Although a judgment of the Court is "final and without appeal", Statute, Art. 60, this does not mean the General Assembly or the Security Council can be bound, since "The decision of the Court has no binding force except between the parties and in respect of that particular case." Statute, Art. 59.

Even if there were no Articles 17 and 18; no established legal principle that to imply a power it must be a necessary or essential power; no Articles 7, 8, 22 and 29; no Articles 57, 59 and 63—it is manifest that Articles 92 and 96, in the light of the purposes they are intended to serve, and the objects to be achieved, would require that no body could be set up by General Assembly resolution with legal power to compel the General Assembly to a decision involving a legal question without possibility of modifying its decision—in the light, perhaps, of an advisory opinion of the International Court of Justice.

(D) *Consideration of doctrine of separation of powers*

The Charter, and the considerations above taken into account, appear clearly to establish that the Administrative Tribunal is not to be regarded as a principal organ or as part of an independent judicial branch of the international organization. It is appropriate, however, to note that, even on the wholly unsupportable hypothesis that the Administrative Tribunal were to be so regarded, the answer to question one would be "yes".

Nothing is more elementary in the law of constitutional systems than that independence of the branches of government—where independence exists—is a mutual independence by virtue of which the functions of each branch remain for the exclusive performance, discretion, and decision of each. The doctrine of separation of powers cannot logically be invoked to accomplish legal amalgamation of powers. If it should operate to make a judicial decision unreachable by the legislature, it would also operate to make legislative decisions, especially a budgetary decision, unreachable by the judiciary. The law invoked to protect a judicial decision from legislative revision is the law of the constitution, and it is that same law which endows the legislative branch with right and power to its parallel independence. If there is a right to reach a final judicial decision, if there is an untouchable *res judicata*, there is equally a right to refuse to give effect to that decision where the action sought is one within the legislative or budgetary power, such as the act of appropriation to pay an award.

Although constitutional systems based on separation of powers usually operate in such a fashion that the impasse capable of arising from the separation seldom actually occurs in practice, there can be no doubt that the possibility of such an impasse is a necessary element in the legal premises of such a system.

IV. Nothing in the Statute of the United Nations Administrative Tribunal can be considered to have diminished the responsibilities and powers of the General Assembly or to have prejudiced its right or power to refuse to give effect to awards of the Tribunal

In establishing the United Nations Administrative Tribunal by Statute adopted in Resolution 351 (IV) of 24 November 1949, the General Assembly did not diminish its responsibility and power to consider and approve the budget, to establish and to fix the meaning of the Staff Regulations, to consider and take action regarding work of its subsidiary organs, or to seek advisory opinions on legal questions from the International Court of Justice; the General Assembly has consequently reserved its right and power to refuse to give effect to awards of the Administrative Tribunal.

Indeed, under the Charter of the United Nations, as has been shown by the preceding discussion, it would have been a futile act for the General Assembly to have purported, by resolution adopting the Statute of the United Nations Administrative Tribunal, to purport to legislate away the power and right of the General Assembly to consider, discuss and determine what effect to give to awards of the Tribunal. What the General Assembly could and did do was to provide a method for the resolution of disputes concerning contracts of employment and terms of appointment between the "Administration" and the members of the staff. It created an organ subsidiary to the General Assembly affording a new and additional method of appeal from decisions of the Administration, an organ not merely advisory to the Secretary-General, its awards not subject to revision by him, and surrounded by certain safeguards intended to assure the availability in all cases of appeal to a body capable of impartial inquiry and judgment. Implicit in the Statute and explicit in the debates was the expectation that the usual course of events would be acceptance by the General Assembly of the work of its subsidiary organ. To have provided specifically in the Statute for the unusual occasion requiring critical appraisal of the work of the Tribunal appeared at once unnecessary and unwise, since the Rules of Procedure of the General Assembly fully cover the consideration of such matters. What is more, further express reference would have been inconsistent with the hope and expectation of the General Assembly that occasion for the exercise of its corrective power should not be presented by the work of its subsidiary.

The Statute of the Administrative Tribunal is to be read as a whole, and this whole, in turn, as a part of a consistent body of law including, *inter alia*, the Charter and the Staff Regulations. The provisions of the Statute that are of primary concern are the following:

"Statute of the Administrative Tribunal of the United Nations

Adopted by the General Assembly on 24 November 1949
Resolution 351 (IV) with amendments effected by
General Assembly Resolution 782B (VIII) of 9 December 1953

Article 1. A tribunal is established by the present Statute to be known as the United Nations Administrative Tribunal.

Article 2. (1) The Tribunal shall be competent to hear and pass judgment 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.

. . . . . .

(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.

. . . . . .

Article 3. (1) The Tribunal shall be composed of seven members, no two of whom may be nationals of the same State. Only three shall sit in any particular case.

(2) The members shall be appointed by the General Assembly for three years, and they may be re-appointed ;

. . . . . .

(5) No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service.

. . . . . .

Article 5. (2) The expenses of the Tribunal shall be borne by the United Nations.

. . . . . .

Article 7. (1) An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.

Article 9 (351(IV))

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 ; but if, in exceptional

Article 9 (782B (VIII))

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

circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, impossible or inadvisable, the Tribunal shall within a period of not more than sixty days order the payment to the applicant of compensation for the injury sustained. The applicant shall be entitled to claim compensation in lieu of rescinding of the contested decision or specific performance. In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under article 12.

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 judgment, 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 12.

Article 10. (2) The judgments shall be final and without appeal.

. . . . . .

(5) A copy of the judgment shall be communicated to each of the parties in the case. Copies shall also be made available on request to interested persons.

Article 11. The present Statute may be amended by decisions of the General Assembly.

Article 12. The competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Each such special agreement shall provide that the agency concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency and shall include, *inter alia*, provisions concerning the agency's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal."

The Administrative Tribunal is thus a subsidiary organ deriving its authority from a General Assembly resolution capable of being rescinded or amended by the General Assembly. Its Statute regulates the composition, servicing, and operations of the Tribunal, and leaves its financing for annual action of the General Assembly. As with most subsidiary organs, the "members" are chosen by the General Assembly itself, for limited terms. They are subject to removal by the Assembly with the concurrence of their fellow members.

The Tribunal's competence is defined by the Assembly, which has left it to the Tribunal to decide questions of competence in disputes between the parties. These parties are the Administration, headed by the Secretary-General as the chief administrative officer, and the members of the staff, or those entitled to claim through them. No right of appeal is given to the parties from the decisions of the Tribunal, which are final in the sense that no further remedies are accorded by the Statute or the Regulations, except—and the point is an important one—that the pre-existing final review by the Secretary-General remains, narrowed, however, under Article 9, to the power to refuse, in his discretion, to give effect to a judgment calling for rescission or specific performance. The question of compensation is out of his hands and left with the Tribunal.

While it is provided that the United Nations shall meet the regular budget of the Tribunal, payment of compensation is the responsibility of the United Nations or of the specialized agency concerned, depending on the parties involved. This Statute would not, even if it could, impair the right and power of the General Assembly to abolish the Tribunal, to amend its Statute, to regulate the application of its judgments, or to refuse to give effect to its awards of compensation. The supporting legal precedents, historical material and other documentary matter will be reviewed under three heads :

(A) Preparatory Commission and Drafting Committee
(B) The League of Nations model
  (1) Position in history

(2) Statute of the League of Nations Administrative Tribunal: 1946 precedent and its background

(C) Decisions of the United Nations General Assembly

(A) *Preparatory Commission and Drafting Committee*

On 12 November 1945 the Executive Committee of the Preparatory Commission of the United Nations submitted its Report to the Commission. UN, Off. Rec., PC/EX/113/Rev. 1. It assigned priority and importance to the matter of securing confidence of the Member States in the efficiency, competence and integrity of a staff who would discharge their functions and regulate their conduct with the interests of the United Nations only in view:

> "*Considering* that the degree in which the objects of the Charter can be realized will be largely determined by the manner in which the Secretariat performs its task, and that the Secretariat cannot successfully perform this task unless it enjoys the confidence of all the Members of the United Nations;
>
> *Recommends:*
>
> 1. That appropriate methods of recruitment be established in order that a staff may be assembled which is *characterized by the highest standards of efficiency, competence and integrity*, due regard being also paid to its recruitment on as wide a geographical basis as possible;
>
> 2. That all officials, upon assuming their duties, make an oath or declaration that they will discharge their functions and regulate their conduct *with the interests of the United Nations only in view;* ...." (Underscoring supplied.) *Id.* at 71-72; 10-11.

A very different order of priority was assigned, by the 76th paragraph of the Executive Committee's Report, to the establishment of an Administrative Tribunal. It read:

> "76. Early consideration should be given to the advisability of establishing an Administrative Tribunal to adjudicate on any complaint lodged against the Organization by an official in connection with the fulfilment of the terms of his contract." *Id.* at 83.

The Preparatory Commission adopted as its own with minor changes the recommended principles emphasizing integrity and confidence. *Report of the Preparatory Commission of the United Nations*, UN, Off. Rec., PC/20, 81. In elaboration it also said:

> "All officials of the United Nations must recognize the *exclusive* authority of the Secretary-General and submit themselves to rules of discipline such as are normally enforced in national civil services...." (Underscoring supplied.) *Id.* at 85.

The Commission's draft Provisional Staff Regulation made no provision for a Tribunal; instead they provided for internal machinery for settling complaints:

"*Regulation 23.* The Secretary-General shall establish administrative machinery for enquiry and appeal in disciplinary and termination cases. This machinery shall provide for staff participation." *Id.* at 97.

On December 15, 1945, the Sub-Committee on Staff Regulations of Committee 6 of the Preparatory Commission submitted a revised text for paragraph 76 of the Executive Committee's Report which was approved by Committee 6 on December 21. UN, Off. Rec., PC/AB/45; UN, Off. Rec., PC/AB/56/Rev. 2, para. 68; UN, Off. Rec., PC/AB/67, 3. The new text read:

"68. An Administrative Tribunal should be established at an early date. It should be competent to adjudicate on any dispute arising in connection with the fulfilment of an official's contract. The Secretary-General should be authorized to appoint a small advisory committee, possibly including representatives of the staff, to draft a statute for the Administrative Tribunal for submission to the Assembly. The Tribunal might include an expert on relations between employers and employed in addition to jurists."

According to the summary record of Committee 6,

Paragraph 68: Administrative Tribunal. The question was raised as to whether the Administrative Tribunal or the Secretary-General should have the last word on disputes submitted to the Tribunal. The general sense of the Committee was that the Administrative Tribunal was a Supreme Court and that its decisions were final. A proposal to say in the second sentence that the Tribunal should be competent to adjudicate on any *legal* dispute was rejected on the ground that it might lead to endless discussion as to whether any particular dispute was a legal one. It was recognized that the title 'Administrative Tribunal' might give rise to misapprehension as to the scope of its functions, but it was made quite clear that the Tribunal would deal only with questions of the interpretation of an official's contract and with the claims of officials for non-observance of the contract, and not with matters of internal administration which would go before internal bodies within the Secretariat and in which the Secretary-General's decision would be final." PC/AB/67, 3.

On December 28, 1945, in his report to the Plenary on the work of Committee 6, Mr. Aghnides, its Chairman, did not mention the Administrative Tribunal. UN, Off. Rec., Preparatory Commission, 27 Journal 11-16. The Commission approved the Report of Committee 6 without further discussion of the matter. *Id.* at 16.

In its final Report, the Preparatory Commission included the following recommendation concerning the organization of the Secretariat:

"4. The Secretary-General should be authorized to appoint a small advisory committee, possibly including representatives of the staff, to draft for submission to the General Assembly a statute for an Administrative Tribunal." UN, Off. Rec., PC/20, 81.

This recommendation derived from the final report of Committee 6 (UN, Off. Rec., PC/AB/71, 2 ; PC/AB/65) and was supported by paragraph 74 of Section 2 of Chapter VIII of the Preparatory Commission's Report, which reproduced paragraph 68 of the Report of Committee 6. *Id.* at 94. See text quoted at p. 141, *supra.*

When the General Assembly convened for the first time, the situation was that the Preparatory Commission, in its recommendations concerning the Secretariat, had assigned primary emphasis to the importance of enabling the Secretary-General to achieve the highest standards of efficiency, competence and integrity in the staff. The Commission had recommended provisional staff regulations under which internal appeals machinery would be established, and the Commission had recommended an authorization to the Secretary-General to arrange for the drafting of a statute for an administration tribunal.

The Preparatory Commission itself had not discussed the project for an administrative tribunal, nor had it approved the summary record of the discussion in its Committee 6 on paragraph 68. The summary record expressed, as "The general sense of the Committee", "that the Administrative Tribunal was a Supreme Court and that its decisions were final." However, it was made explicit in the Committee discussion that "the Tribunal would deal only with questions of the interpretation of an official's contract and with the claims of officials for non-observance of the contract, and not with matters of internal administration which would go before internal bodies within the Secretariat and in which the Secretary-General's decision would be final". Moreover, the summary record shows that Committee 6 meant by its expression to indicate that *as between the Administrative Tribunal and the Secretary-General* the Tribunal should have the last word on disputes submitted to it. There was no question of creating an administrative tribunal as a new judicial organ co-ordinate with the principal organs of the United Nations. The General Assembly's powers clearly were not at issue.

General Assembly Resolution 13(I).11 of 13 February 1946 authorized "the Secretary-General to appoint a small advisory committee, possibly including representatives of the staff, to draft, for submission to the second part of the first session of the General Assembly, a statute for an administrative tribunal". UN, Off. Rec., A/64, 15. Pursuant to this Resolution, the Secretary-General appointed a Committee which met at Lake Success September 16 to 26, 1946[1]. The Committee prepared a report and draft statute. In the former it stated, *inter alia :*

[1] The members were Hon. Th. Aghnides, Chairman ; Judge Manley O. Hudson ; Joseph Nisot (formerly Registrar of the League's Administrative Tribunal) ; Ladislav Radimsky ; Jean Herbert (Chairman, Permanent Staff Committee—alternate : Frank Begley) ; M. Perez-Guerrero (Secretariat—alternate : J. G. Stewart) ; Marc Schreiber (Permanent Staff Committee—alternate : E. Ranshofen-Wertheimer) ; Mrs. Isobel Wallace (Secretariat) ; David M. Levitan (Secretariat), Secretary and technical consultant to Committee.

"The nature of the Administrative Tribunal envisaged in the General Assembly's Resolution was indicated in the summary record of meetings of Committee 6 of the Preparatory Commission. It was intended to 'deal only with questions of the interpretation of an official's contract and with the claims of officials for non-observance of the contract, and not with matters of internal administration which go before internal bodies within the Secretariat and in which the Secretary-General's decision would be final'. The Committee has been guided by this indication, and in its deliberations it has held before itself the two objectives of a simple organization and an expeditious procedure. The draft presented is therefore quite short, and it is not burdened with provisions of detail.

For the most part, international organizations in the past have had but small staffs, and therefore they have not felt a need for a special jurisdiction for handling disputes. This was not true, however, of the Secretariat of the League of Nations and the International Labour Office, and since 1927 these organizations have maintained the League of Nations Administrative Tribunal which has functioned with very considerable success.

The committee has sought to take full advantage of this experience. The League Tribunal decided twenty-one cases in the period from its organization in 1928 down to 1939, and sixteen cases in 1946...." UN, Off. Rec., Gen. Ass., 4th Sess., 5th Comm., SR, I Annex 150.

From this text, and from the background of the Committee members, two things are clear. First, the drafters envisaged their authority as limited to the Assembly Resolution, which they construed in the light of the work of the Preparatory Commission to mean that the tribunal was not to deal with matters in which the Secretary-General's decision would be final. Second, the Committee hewed closely to the League model and expressly acknowledged its admiration for it:

"The success of the League of Nations Administrative Tribunal leads the advisory committee to believe that a United Nations Administrative Tribunal, established along the lines proposed, would be a useful body for safeguarding harmony between the United Nations and its officials. Without in any way embarrassing the authorities responsible for the conduct of administration, it would give assurance to officials as to the protection of their contractual rights. The United Nations is not suable in any national court without its consent; nor can it be sued by an official in the International Court of Justice. By creating a tribunal to serve as a jurisdiction open to its many officials of various nationalities, the United Nations will be acting not only in the interest of efficient administration, but also in the cause of justice." *Id.* at 151-152.

When Mr. Aghnides explained the report and draft statute developed by the Secretary-General's Committee to the Fifth Committee on November 15, 1946, he stressed that the Tribunal would offer a guaranty of independence *from the Secretary-General*

lacking in the system of internal advisory or "paritative" committees :

> "The Rapporteur, who had acted as chairman of the Advisory Committee that had been set up to prepare the report on the Administrative Tribunal (document A/91), explained that the international organization which had preceded the United Nations had had an administrative tribunal, and that the introduction of such a tribunal was not intended to influence the Secretary-General in matters of policy, nor to interfere with his administration of the staff. The tribunal would deal only with possible violations of staff regulations and of the terms of contracts. The Secretary-General's own legal advisory bodies, or 'parity commissions', would not serve the same purpose as such a tribunal *since they would not be independent of the Secretary-General.*
>
> To take an example, an official who had a grievance regarding violations of terms of contract or staff regulations would approach the administrative tribunal only, of course, after having gone through all channels of internal jurisdiction. He would be able to appeal to the administrative tribunal only if he could prove that a violation of staff regulations or terms of contract had been perpetrated by the Secretary-General." (Underscoring supplied.) UN, Off. Rec., Gen. Ass., 1st Sess., 2d Part, 5th Comm., SR 112-113.

Since, as will be brought out immediately below, Belgium had taken a leading role in the minority's unsuccessful effort to sustain the decisions of the League Tribunal in the same year, and the United Kingdom had led the majority, it is not surprising to find each concerned with the issue of final authority. The Summary Record, of course, cannot give the precise words, but it seems clear enough on the net result : no change was made in the existing situation. No statement was made warranting construction of the new statute differently from the old. The United Kingdom delegate said :

> "Unless some other satisfactory means of assuring fair and impartial judgments were proposed, the United Kingdom delegation would support the establishment of the administrative tribunal, but it would propose an amendment to ensure that the authority of the General Assembly was final in cases involving its own decisions." *Id.* at 115.

Since the Belgian delegate had good reason to be aware of the distinction between an appeal as of right in ordinary cases and a review or rejection by the General Assembly, his failure to follow up on the colloquy quoted below would seem to indicate either an acquiescence in the limited definition of the "no appeal" feature of the Statute given by Mr. Aghnides, or caution in avoiding a rounding out of the statement by specific reference to the basic Charter powers and responsibilities of the General Assembly :

> "*Mr. Daufresne de la Chevalerie* (Belgium) asked the Rapporteur whether the decisions of the administrative tribunal would be final

or whether they would be subject to a revision by the General Assembly.

The Rapporteur replied that according to the draft statute as prepared by the Advisory Committee, there could be no appeal from the administrative tribunal. The Advisory Committee feared an adverse effect on the morale of the staff if appeal beyond the administrative tribunal *delayed the final decision* in a case which had already been heard before organs within the Secretariat created for that purpose." (Underscoring supplied.) *Id.* at 114.

There was no extended discussion of the draft statute. The Committee decided unanimously to postpone consideration, pending further study by the Secretary-General. *Id.* at 117.

(B) *The League of Nations model*

To understand the establishment of the Administrative Tribunal as a subsidiary organ of the United Nations General Assembly, it is important to understand the function of an administrative tribunal in the framework of the League of Nations and United Nations, and particularly the history of the League Tribunal whose Statute was the model for that of the present Tribunal.

(1) *Position in history and comparative jurisprudence*

Administrative tribunals in the field of international administration are relatively new and clearly in their formative stage. Administrative law, and more particularly the law governing the terms of public employment, in the States Members of the United Nations reflects differences in policy, background and institutions, and is in various stages of development. The Administrative Tribunals and Staff Regulations of the League of Nations and of the United Nations represent an experiment in compromise among national traditions and in the evolution of an international system which is necessarily *sui generis,* and in which an important consideration has been to allow room for the development of the new system.

Writing of the League of Nations Administrative Tribunal, Egon F. Ranshofen-Wertheimer succinctly stated the position of both the League and United Nations organs :

> "The whole evolution which found its conclusion with the establishment of the Tribunal may perhaps best be characterized as a fair and workable compromise between the concepts of Anglo-Saxon law with respect to civil service tradition and Latin and Germanic concepts of civil service rights and safeguards." *The International Secretariat* (Washington, 1945), 262.

The factors making the new institutions *sui generis* were clearly apprehended in a scholarly study, written in 1931 by the present President of the United Nations Administrative Tribunal. Suzanne Basdevant, *Les Fonctionnaires internationaux* (Paris, 1931). The

author discussed at some length the novel responsibility of the Administrative Tribunal established by the League of Nations to apply a set of legislative rules without benefit of any single accepted body of administrative law. Thus :

> "The Statute of the Administrative Tribunal contains no provision analogous to that of Article 32 [38 ?] of the Statute of the Permanent Court, determining what should be the principles of law applicable by that jurisdiction. Of course they should be, above all, the personnel regulations and recruitment contracts, since it is chiefly a matter of settling difficulties arising out of the contractual situation of officials ; but what will happen when such regulations or contracts prove to be inadequate : it is worthy of note that before this international tribunal the principles of interstate law will be of no assistance, since it is a matter of regulating relations between individuals one of whom represents the international public service. It is obvious that one will be tempted to apply principles of public municipal law, of administrative law, since that is where one will find a situation presenting the closest analogy with that of the officials in Geneva. But which municipal administrative law should be applied ? Will there be a sufficiently established ordinary law on the point under consideration ? All this may be extremely difficult to resolve.
>
> In the decisions it has handed down, the Tribunal has already been led to consider this problem. On January 16, 1929, it laid down as a principle that it must apply the municipal law of the League of Nations, formulated either by a general statute or by decisions and texts envisaging certain specific cases, as well as the conditions agreed on between the administration and its officials, and that it is only in the absence of positive law in the case in point that it would be proper for the Tribunal to have recourse to the general principles of law and equity." *Id.* at 283 [1].

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[1] Translation. The French text reads :

"Le Statut du Tribunal administratif ne contient aucune disposition analogue à celle de l'article 32 du Statut de la Cour permanente et déterminant quelles doivent être les *règles de droit* applicables par cette juridiction. Bien entendu, ce doit être avant tout les statuts du personnel et les contrats d'engagements, puisqu'il s'agit essentiellement de trancher des difficultés résultant de la situation contractuelle des fonctionnaires ; mais qu'adviendra-t-il lorsque ceux-ci se montreront insuffisants : il est remarquable que devant cette juridiction internationale, les règles du droit interétatique ne seront d'aucun secours, puisqu'il s'agit de régler des rapports entre individus dont l'un représente la chose publique internationale. Il est évident que l'on sera tenté d'appliquer des règles de droit public interne, de droit administratif, puisque c'est là que l'on trouvera une situation présentant le plus d'analogie avec celle des fonctionnaires de Genève. Mais quel droit administratif interne appliquer ? Existera-t-il sur le point considéré un droit commun suffisamment établi ? Tout ceci peut être extrêmement difficile à résoudre.

Le Tribunal a déjà été amené dans les décisions qu'il a rendues à envisager ce problème. Le 16 janvier 1929, il posait en principe qu'il est tenu d'appliquer le *droit interne* de la Société des Nations, formulé, soit par un statut général, soit par des décisions et textes envisageant tels cas déterminés, ainsi que les stipulations intervenues entre l'administration et ses fonctionnaires et que ce n'est qu'à défaut de l'existence dans telle espèce d'un droit positif qu'il y aurait lieu pour le Tribunal de s'en référer aux *principes généraux du droit* et *à l'équité*."

As the author observed, "this question of, so to speak, accessory law might give rise to serious difficulties". *Id.* at 284 [1].

Only 23 years have intervened since the above study was written, and these have been interrupted by the events of World War II. Professor Hudson remarked of the League Tribunal: "As affirmative relief was given in only eight cases, the jurisprudence did not establish an extensive body of case law." Hudson, *International Tribunals* (Washington, 1944), 221. Almost twice that many individual cases were decided by the Tribunal in 1946 and were reversed by the Assembly of the League. Since the establishment of the United Nations Administrative Tribunal about four years ago, there have been only 46 cases, of which 21, almost half, are the cases out of which stems the present request for an advisory opinion. The jurisprudence of international administration is, to say the least, lacking in the traditions and long legal background of such an institution as the Conseil d'État.

Indeed, any assumption that the legal relationship of the Administrative Tribunals of the United Nations or the League to their respective Assemblies is to be explained in terms of the legal system of any Member State rather than of the Charter of the United Nations would be unfounded. This is so because of a number of relevant factors.

In the first place the several municipal systems are the product of their own particular history and circumstances. In France, for example, administrative law was born out of fortuitous political circumstances rather than logical necessity. The revolutionary leaders of 1789, fearful that the judiciary would frustrate the purposes of the new legal order, denied to the courts any power of supervision over the administration. The necessity of stopping arbitrary actions by the executive later led to the doctrine that the administration should not be its own judge, but should be bound by the decisions of specialized and independent administrative courts. See Waline, *Traité de Droit administratif* (5th ed., 1950), 40-45. Not only have different results been produced in the same and among different countries by different political problems, but there is no automatic correspondence of United Nations problems—international organization problems—and those of particular municipal systems. Thus, France sought to solve the constitutional impasse resulting from a practice of division of powers based on distrust of the judiciary by developing in the Conseil d'État powers at least equal to those of the courts of law.

However, in the United Nations the original of the Administrative Tribunal was very different. It was not established as a court to uphold the rights of all the citizens, including the civil

[1] Translation. The French:

"cette question du droit accessoire, pour ainsi dire, à appliquer, puisse donner lieu à de sérieuses difficultés".

servant, against illegal acts of the Administration. It was a body specially established to add to existing protections afforded the staff by regulations of the General Assembly that of a forum not directly responsible to the Administration. The Administrative Tribunal is as little comparable to the Conseil d'État as it is to the United States Federal Courts, a judicial system headed by a Supreme Court, founded in the Constitution itself as an independent judiciary, and dedicated to the protection of all the people of the country.

Not only must national and international historical factors and constitutional frameworks show widest divergencies, but the basic character and guaranties of judicial bodies must vary with their own particular historical place and their organizational pattern. Thus, the Conseil d'État, the Administrative Court at Vienna, the Administrative Courts of the German or Belgian systems, the Federal Courts in the United States, are all institutions with a multitude of safeguards against error or arbitrary action which are, in turn, the product of many years of tradition, legal development and, significantly, of internal judicial checks and balances. It is upon the wisdom and good will of the constituent bodies of the international organization and its Member States that the fledgling institution must depend for timely correction, and sound political guidance in its important but necessarily uncertain growth. Even in a municipal system, like the French, an authority like Professor Jèze, while noting the fundamental principle that "The jurisdictional act, properly made, has the force of legal truth *erga omnes*, for all individuals, as well as for all public agents of any type, [and] for any type of court" (Gaston Jèze, *Les principes généraux du Droit administratif* (Paris, 1925), 259 [1]), goes on to observe :

> "Where the chances for error are very *small*, it is fit to adhere to the fundamental principle. Where the chances of error are great, it is proper to reject the fundamental principle and to hold that, by exception, the binding effect of a judgment shall be only relative." (Italics in text.) *Id.* at 261 [2].

Absent a mature body of law, a long judicial tradition, a developed appellate structure, a wide jurisdictional base and corresponding responsibility for balance of all interests of the community, a new quasi-judicial organ is subject, it is submitted, to very considerable chance of error.

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[1] Translation. The French :

"L'acte juridictionnel régulier a force de vérité légale *erga omnes*, pour *tous* les particuliers, comme pour *tous* les agents publics de tout ordre, pour les tribunaux de tout ordre."

[2] Translation. The French :

"Là où les chances d'erreur sont très *faibles*, il y a lieu de s'en tenir au principe fondamental. Là où les chances d'erreur sont grandes, il conviendra d'écarter le principe fondamental et de décider que, *par exception*, la chose jugée n'aura qu'une force *relative*."

Finally, it is observable that even in highly developed municipal systems, finality of judgments is a strong tradition, but is not, as a matter of law, capable of diminishing the legal rights and powers of parliamentary bodies. The same principle which upholds the power of the judicial organ to pronounce a "final" judgment upholds that of the legislative organ to make a "final" budgetary decision. This matter has been referred to before, but it may be worth noting the observations of Jèze on the subject :

> "In France no tribunal—whether it may be an administrative tribunal or a court of law—can enjoin the budgetary authority—whatever it may be (Parliament, local assembly, etc.)—to write a credit in the budget." *Id.* at 286 [1].

Similarly, the principle of separation of powers runs also to non-budgetary decisions. For example,

> "Does the Parliament have a juridical duty to bow to court decisions ? Does it commit an abuse of power in formulating a general rule which is declared applicable notwithstanding judicial decisions already *res adjudicata ? In organizing a process of review and in declaring it applicable even as against decisions already res adjudicata ?*
>
> The fundamental principle of the absolute binding effect of decisions should lead, according to some, to an affirmative answer. *Certain writers teach that such is indeed the rule in French public law.*
>
> But the practice is not that way." (Underscoring supplied.) *Id.* at 274-275 [2].

There are, of course, very numerous and respected authorities who assert the legally binding effect of judgments upon parliaments in municipal systems. In their view the departure of deliberative bodies from their usual policy of forbearance is an "incredible" disregard of fundamental legal principle. This was the attitude of Professor Scelle, for example, toward the 1946 League Assembly decision which is discussed below. See Langrod, *Le Tribunal administratif des Nations Unies*, LXVII, Revue du Droit public et de la Science politique (1951), No. I, 71, 80 (note 38 quoting

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[1] Translation. The French :

"En France, aucun tribunal — quel qu'il soit, administratif ou judiciaire — ne peut *enjoindre* à l'autorité budgétaire — quelle qu'elle soit (Parlement, assemblée locale, etc.) — d'inscrire un crédit au budget...."

[2] Translation. The French :

"Le Parlement a-t-il l'obligation juridique de s'incliner devant les décisions de justice ? Commet-il un abus de pouvoir en formulant une règle générale, déclarée applicable nonobstant toute décision de justice, même passée en force de chose jugée ? en organisant un recours en revision et en le déclarant recevable même contre les décisions passées en force de chose jugée ?

Le principe fondamental de l'autorité absolue de la chose jugée conduirait, d'après certains, à la solution affirmative.

Certains auteurs enseignent que telle est bien la règle du droit public français. Mais la pratique n'est pas en ce sens."

with approval from Professor Scelle, *Cours de Droit international public*, manuel polygraphié (1948), 568). The point is that even as to municipal systems "l'autorité de la chose jugée" rests on policy and as far as law goes, is an ideal, a slogan, and a starting point for profound philosophical differences of opinion. These differences need not intrude themselves into the legal problem of the United Nations Administrative Tribunal, however. Enough has been said to show that this relatively important but secondary international organ serves ends and is established in a legal and political framework in which "l'autorité de la chose jugée", particularly where the judging is by a subsidiary organ, cannot operate in law to inhibit the power, right and responsibility of the United Nations General Assembly.

Another important area of difference between the United Nations Administrative Tribunal and the tribunals of general or specialized competence dealing with the grievances of civil servants in municipal systems is the relative importance attached under the relevant laws to "acquired rights" as a condition of service. Although, as has been shown above, it is at least debatable whether there is anywhere an "acquired right" to a particular judgment legally compelling upon the law-making body itself, it is certain that there is none in the United Nations, and even the presumption of a legislative intent to respect other rights as "acquired" has much less standing in the United Nations than in a municipal legal system. For example, there is no provision in the Charter comparable to Article 33, paragraph 5, of the Constitution of the German Federal Republic under which the "principle" of acquired rights is written even inferentially into the United Nations Charter, let alone express inclusion, as in Article 129 of the Weimar Constitution.

The United Nations system emphasizes reasonable rather than absolute security of tenure, accompanied by stronger inducements of an intellectual and monetary nature then would ordinarily be found in municipal systems. The conditions of employment of the international service were at the outset established on a liberal basis. Benefits represented the best features of the many national systems. Thus, the Preparatory Commission recommended that the salary and allowance scales "should compare favorably with those of the most highly-paid home and foreign services, due account being taken of the special factors affecting service in the Secretariat". UN, Off. Rec., PC/20, Report of the Preparatory Commission of the United Nations, 93-94. This was done not only to attract the best talent but also to compensate for the fact that other considerations would prevent the United Nations from providing the same tenure guaranties and promotion opportunities as national services. These considerations were the need for flexibility in a pioneer organization ; and the recognition that the interests of the organization required a conscious policy of continuous

recruitment of new talent at all levels—talent which was also widely representative on a geographical basis.

At the very least, then, it must be stated that in the period of the early development of an international public service it was to be expected that when new and thorny problems arise as to which there are sharply conflicting views, so that they transcend the power of a meagre jurisprudence to resolve, and when they rise to the level of questions of major and general importance, solution must, as a matter of law, be by a body with legal and actual power to reconcile the conflicting views of Member States and to pool the combined efforts of their consideration and experience—the General Assembly.

(2) *Statute of the League of Nations Administrative Tribunal: 1946 precedent and its background*

The Statute of the United Nations Administrative Tribunal was essentially modeled on the Statute of the League Tribunal; authoritative construction of the old League Statute has particular relevance where the General Assembly chose to maintain its provisions in the new United Nations Statute.

The Covenant of the League vested appointive power for the Secretariat in the Secretary-General acting with the approval of the Council. Art. 6 (3). In practice, the League Council's role was a passive one; it never actually vetoed an appointment. Ranshofen-Wertheimer, *op. cit. supra*, 43. The provision of the United Nations Charter that "regulations" are "established by the General Assembly" reflects formal adoption of the system which evolved under the Covenant, which was itself silent on the matter of staff regulations. The League Assembly, in reliance on its broad powers under Article 3 (3) of the Covenant (and in discharge of its special responsibility for the budget under Article 6 (5) of the Covenant, after adoption of this amendment in 1924), assumed an active role in relation to the Staff Regulations of the League. Although it was the Secretary-General who "adopted" all regulations, they were actually subject to approval by the Assembly, whose decisions were the work of the Assembly's Fourth Committee. *Id.* at 21-31, 256 ff.; André Cagné, *Le Secrétariat général de la Société des Nations* (Paris, 1936), 44. Furthermore, the Supervisory Commission of the League, responsible to, and appointed by, the Assembly in its later years, had a major part in this evolution. *Ibid.*

The Statute of the Administrative Tribunal of the League of Nations was adopted by the Assembly in 1927 after favorable action by its Fourth Committee. L. of N., O.J., Sp. Supp. No. 54, 201; L. of N., O.J., Sp. Supp. No. 58, 35-36. The Statute of the League Tribunal provided in Article VI:

"The Tribunal shall take decisions by a majority vote; judgments shall be final and without appeal."

Article II (4) provided:

"Any dispute as to the competence of the Tribunal shall be decided by it."

It will be recognized that these provisions were maintained in Articles 10 and 2 of the Statute of the United Nations Administrative Tribunal.

Did these provisions evidence an intention by the League Assembly to foreclose review by it of the work and decisions of the Tribunal? Did they deprive the Assembly of right and power to refuse to give effect to awards of the League Tribunal? The legislative history strongly urges, and the precedent of the thirteen decisions rejected by the Assembly in 1946 compels, negative answers. The Report of the Supervisory Commission of the League of Nations, which drafted the Statute of the Tribunal, stated these reasons for the proposed measure:

"The establishment of a Tribunal such as is now proposed is expected not merely to remove a grievance which may be felt by the staff of the Secretariat and of the International Labour Office but also to be in the interest of the successful administration of these two offices. The international status of the League prevents officials from bringing actions in the ordinary courts to enforce the terms of their appointments. It is not, however, satisfactory that a class of employees amounting to several hundreds of persons and engaged on terms which are necessarily complicated and may give rise to disputes as to their exact legal effect should have *no possibility of bringing questions* as to their rights *to the decision of a judicial body*. It is equally unsatisfactory *for the administration* to be both judge and party in any dispute as to the legal rights of their officials, or for such disputes to be referred to the Council or the Governing Body of the International Labour Office. The special position of the League makes it difficult to refer claims by its officials to the jurisdiction of national courts. The remaining possibility, namely, the reference of such disputes to a body constituted *ad hoc*, although it has been adopted in one case, is open to objections on many grounds and does not furnish a solution for the general problem." (Underscoring supplied.) L. of N., C.J., Sp. Supp. No. 58, 251.

It is particularly to be noted that it was "the administration", not the Council or Assembly, which was regarded as a "party". Therefore, the administration is not the right body to sit in judgment on disputes between itself and staff members.

The reasons counselling against a procedure regularizing appeals to the Council or governing body of the International Labor Office were not made explicit. They are familiar, however: such appeals would be vexatious and would in any event involve the possible establishment of special bodies to advise on the law. There were

fears and objections, then as in 1949. But the opposition did not—as it surely would have done had it detected such an intention in the Statute—object on the ground that the Assembly would be abdicating its powers and responsibilities. The objections were of a different order as will be seen from the summary appearing in the Report of the Sub-Committee of the Fourth Committee of the League of Nations Assembly which considered and approved the draft of the Supervisory Commission :

> "Against the proposal it was argued that the Tribunal does not seem to be really needed. The present system provides two successive courts of appeal—a paritative committee on which the staff is represented on a basis of equality, and the Council of the League, which has only had two cases before it since the League was founded.
>
> It was also pointed out that the Tribunal, as competent to judge of the facts of each case, would necessarily find itself called upon to estimate the expediency of the action taken by the Secretary-General, whose duty it is to consult the general interests bound up with the realization of the aims of the League. To restrict the Secretary-General's powers in this direction would involve a serious encroachment on his indispensable freedom of action.
>
> Attention was also drawn to the difficulties in the ascertainment of the exact law applicable to each case and to the absence of any real sanctions.
>
> As a method more suitable to the general policy of the League, attention was likewise drawn to the possibility of submitting disputes of the kind contemplated to a court of arbitration consisting of two arbitrators selected from a list drawn up by the Council, one to be chosen by the administration concerned and the other by the other party to the case. The Court would be presided over by a chairman whom the two arbitrators would be left to designate." *Id.* at 250.

Thus, when the Supervisory Commission remarked that "The Tribunal will be the final authority for the interpretation of the terms of an official's appointment and the regulations applicable to the official", its remark must be read in context—final under the procedure established and as between the parties. *Id.* at 251.

The Statute itself gave internal evidence that the term "final" was used with a particular meaning and that "appeal" was intended to mean "appeal" in the ordinary sense of a *right* to be heard by superior authority. Thus, it was provided that the Tribunal could take jurisdiction only where there had been a "final decision" by the administration. In addition, the person involved must have exhausted his remedies under the Staff Regulations. Article VII read, in part :

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations." *Id.* at 256.

In the context of the Statute, then, "final" was not meant to deprive any organ of an inherent power of review. Indeed, in the case of the Administrative Tribunal, the prior existence of a final decision was a condition precedent to review of that decision by the parent body. Nothing in the legislative history shows a contrary intention. In fact, the opening statement of the Chairman and the remarks of the Delegate of India, who presented the Sub-Committee's report, both stressed the nature of the Tribunal's role as one of arbitration ; the Indian Delegate emphasized that the parties were the administration and the staff member. According to the summary record, the Chairman said :

> "The courts of arbitration sat but rarely and exercised, nevertheless, a preventive influence which was considerable. The Administrative Tribunal would probably be called upon to play this preventive role, judging from the excellent explanatory statement which accompanied the draft." *Id.* at 36.

The Indian Delegate said :

> ".... that it was obvious that it was a compromise. One of the principal elements in the decision of the Sub-Committee had been what might be called the psychological aspect of the problem. The League of Nations was an organization which endeavoured to encourage arbitration in the international field, and it had been pointed out that its own employees had at present no tribunal where appropriate relief could be claimed regarding matters in controversy *between them and the Secretary-General.*" (Underscoring supplied.) *Id.* at 36.

Thus, the new tribunal, being an institution of international law, would necessarily be subject to the established rule and practice that an award of a tribunal which is *ultra vires* is null and void, and would, in addition, be subject to the plenary power of the organ creating it, the Assembly. The parties as to whom it provided no appeal and who should not be judges in their own case were the Secretary-General (the Administration) and the staff member. The powers of the Assembly remained undiminished.

It is in this context that the report of the Supervisory Commission must be read, which stated simply that :

> "No provision for the revision of judgments of the Tribunal is inserted in the Statute. It is considered that, in the interests of finality and of the avoidance of vexatious proceedings, the Tribunal's judgments should be final and without appeal, as is provided in Article VI, paragraph 1." *Id.* at 254.

"No provision .... is inserted in the Statute." This did not say or mean that revision possible under the powers of the General Assembly was foreclosed where considerations of justice and good administration might outweigh considerations counselling for respect of the Tribunal and against vexatious proceedings.

In view of the nature of the Administrative Tribunal of the League of Nations, its relationship to the League Assembly, and the available evidence concerning the proper significance of the phrase "final and without appeal", the decision of the Assembly of the League in 1946 to review and not to give effect to certain judgments of the Tribunal is seen to have been well founded. The Assembly's decision was unanimous, as required by the Covenant. Seven delegations recorded an expression of formal reservations. The decision of the Assembly, however, was determinative, not only of the disposition of the cases, but of the meaning of "final and without appeal" and of the power and responsibility of the Assembly. Since this decision was taken a scant three years before establishment of the United Nations Administrative Tribunal, and at a time when the preparatory work on the Statute of that Tribunal had already begun, it deserves most careful attention as evidence of the intent of the General Assembly in preserving in the new Statute the precise formula contained in the Statute of the League Tribunal.

At its Session of February 26, 1946, the League's Tribunal rendered fourteen judgments in cases involving the competence of the Tribunal and the interpretation of a Resolution of the League Assembly adopted in 1939 amending the Staff Regulations of the League and of the International Labor Organization to reduce from six months to one month the period of notice required for discharge. L. of N., O.J., Sp. Supp. No. 194, 245 ; Judgments Nos. 24-37 of the Administrative Tribunal of the League of Nations. In all fourteen complaints, the Tribunal found it possessed competence, and that the Secretary-General of the League and Director of the International Labor Office had wrongly construed the Resolution of the Assembly. In thirteen complaints, it awarded damages. In one (No. 37) it ordered further proceedings on the question of damages. In argument of the cases, the Administration premised its contention that the Tribunal lacked competence upon a construction of the disputed resolution of the Assembly which the Tribunal in its opinion subsequently rejected. The Tribunal chose to construe the resolution so as to protect rights it deemed vested in the staff. Although the Secretary-General's arguments were of no avail before the Tribunal, they were respected by the Supervisory Commission of the League and finally prevailed through the action of the League Assembly.

The action of the Assembly of the League in these cases followed upon almost twenty years in which no judgment of the Tribunal had been disapproved by the Assembly of the League. Moreover, the Tribunal's awards were denied effect in spite of the existence of a much-quoted and respected opinion rendered in 1932 by a Committee of Jurists appointed by the Chairman of the First Committee of the League Assembly. This Committee had advised the Assembly that the Assembly "does not have the right to reduce

the salaries of the officials .... unless such a right has been expressly recognized in the contracts of appointment", and that "If the Assembly reduced the salaries of officials, the latter would have the right to have recourse to the Administrative Tribunal." L. of N., O.J., Special Supplement 194, 248; quoting L. of N., O.J., Special Supplement 107, 208.

The issues presented by the judgments of the League's Tribunal were reviewed with care by a Sub-Committee of the Finance (Second) Committee of the League Assembly, which adopted the report of its Sub-Committee and decided that effect should not be given to the judgments of the Administrative Tribunal. *Id.* at 130-133, 261-264. The vote in Committee was as follows:

> "4 delegations were absent (Afghanistan, Dominican Republic, Ecuador, Panama);
>
> 16 delegations voted in favour of the adoption of the report (Union of South Africa, Argentina, Bolivia, United Kingdom, Canada, China, Cuba, Egypt, Finland, France, India, Ireland, Mexico, New Zealand, Czechoslovakia, Turkey);
>
> 8 delegations voted against the adoption of the report (Belgium, Denmark, Luxembourg, Netherlands, Poland, Sweden, Switzerland, Uruguay);
>
> 5 delegations abstained from voting (Australia, Greece, Norway, Portugal, Yugoslavia)." *Id.* at 133.

The Report of the Sub-Committee, which was adopted, is carefully reasoned, and because of its importance it is quoted at length below:

> "1. The Sub-Committee does not question the competence of the Administrative Tribunal to consider the application and interpretation of the decisions of the Assembly or other Staff Regulations in the circumstances of any particular case. Indeed, the primary object of the Tribunal's establishment was no doubt to ensure that such decisions and regulations were applied properly and impartially to all members of the staff according to the circumstances of each particular case. It is, however, one thing to say that the Tribunal could apply the decisions of the Assembly to particular cases; *it is quite a different thing to say that it could question the validity of those decisions themselves and that it was subject to no overriding powers by the very body which had created it. We do not think that this was the case.*
>
> 2. *Little useful analogy can be drawn between an organization of States such as the League of Nations and the municipal or private corporations familiar in private law....* No superior power exists to release the League from its contractual obligations, if such obligations exist, however grave the emergency, unless it be the League itself. But the League is not to be compared with a private company; its status and powers are *sui generis*, although they fail to be considered in the light of those general principles of public law and administration which to a greater or lesser degree are to be found in the legislation of all States. Thus all State contracts are governed by the exigencies of the public interest, to which

private and personal rights must give way, and although the manner in which it may be exercised, whether by legislative or execution action, varies greatly between different countries, *all States retain the power in the last resort to alter the terms on which their officials are employed.* Indeed, the supreme authority in the State must retain discretionary powers of the kind, since without them it could not ensure the supremacy of the public interest. The safeguard against their arbitrary abuse is a political rather than a legal one.

3. We find nothing startling in the view that, whilst the relations of the League with its Member States depend upon the treaty obligations expressed in the Covenant, the League does possess, in regard to the officials with whom it contracts, what are in effect sovereign powers .... we think it necessary for the proper discharge of the functions of a world organization of States that it should possess a power if necessary to set aside the vested rights of private individuals employed in its administration.... Relations connected with public employment in the service of the League necessarily presuppose the acceptance of these principles. They are their *naturalia negotii.* These considerations were indeed cogently expressed in the report of a Committee of Jurists presented to the Council in 1925 on the case of an official who claimed to have been wrongfully dismissed (Official Journal, Sixth Year, No. 10, p. 1441; see p. 1443).

4. But, whilst we consider that the matter ought essentially to be approached from the point of view of what is politic and necessary as a matter of public administration, we do not think that our conclusions lack a firm basis in the first principles of law. In saying this, we have by no means ignored the opinion expressed by certain eminent jurists in 1932 and referred to on page 3 of document A.16.1946. Contrary to what happened in 1939, the Assembly at that time was not seeking to set aside contractual rights which its officials possessed. It is sufficient to say of the opinion then given that it proceeded largely upon an examination of the question whether the League could derogate from existing contracts in the exercise of a budgetary authority rather than in that of a legislative power. In our view, the opinion was not intended to express a final conclusion upon the question whether the League could, by a proper legislative act, derogate from private contractual rights. If it was, we are unable to agree with it.

5. The Statute of the Administrative Tribunal expressly reserves the Assembly's power to abolish the Tribunal, but in the absence of this express provision, those who contend that the League has no power to alter contracts by unilateral action would, we think, be led to argue that the League, having once established the Tribunal, could not abolish it with effect on existing contracts. We entertain no doubt that, just as in 1927 the Assembly did abolish, apparently without question, the right of appeal to the Council of the League which employees previously possessed, so in 1939 the Assembly could have abolished the Tribunal. Had this course been taken, the dismissed officials would have had no court or tribunal before which they could have questioned the legality of their dis-

missal. Nor does the fact that the Tribunal remains significantly alter the position. No outside body exists which can enforce the decision of the Tribunal against the Assembly, and this is a not irrelevant consideration in deciding whether the Assembly is sovereign in this matter and whether the dismissed officials have any right against it. *By statutory provision and diplomatic usage, no remedy is available against the League ; where, then, is the officials' right against it ? Ubi jus ibi remedium, and the absence of any remedy in the circumstances of this case here leads to the conclusion that there is no legal right.* If only an ethical right is claimed, the protection against its abuse is not a legal but a political one lying in the hands of the States Members of the League. Sovereignty is a question of fact from which a conclusion of law is drawn : it arises from the presence or absence of overriding and controlling powers. In the absence of such powers, the legal conclusion is that sovereignty exists ; and, although the use of the term sovereignty in connection with the present matter is not entirely apt, we think it would be an act of juristic purism to doubt that the supremacy of the League is an inherent incident implicit in its contractual relationships with its staff. We therefore conclude that it was not open to the Administrative Tribunal to question the validity of the Assembly's Resolution of December 14th, 1939. Its only duty was to give effect to it.

6. We are entirely unable to accept the Tribunal's interpretation that the Assembly's Resolution was intended to apply to a limited class of officials only. This view seems to be manifestly contrary to the facts. *Although there is no ordinary appeal from the Tribunal's decision, we think that it is within the power of the Assembly, which can best interpret its own decisions, by a legislative resolution, to declare that the awards made by the Tribunal are invalid and are of no effect both because they sought to set aside the Assembly's legislative act and because of their mistaken conclusion as to the intention of that act.*

7. We think it right to add that, if effect was given to the awards of the Tribunal, the other officials who accepted their dismissal in loyalty to the League and, no doubt, in the belief that all officials would be treated alike, are entitled to consideration. It is true that the time within which they could prosecute a legal claim (assuming such a claim exists) has long since passed. Moreover, the assessment of compensation in individual cases might be difficult, for in a number of them the earlier termination of their employment suited the convenience of the officials concerned. But, from an ethical point of view, it is difficult to think that their right to consideration is diminished by the fact that they showed themselves willing to acquiesce, if not to co-operate, in the decision which the Assembly took.

8. In our view, however, all the claims should be rejected, and the Assembly may be fortified in taking this course not only by the fact that—to their credit—the great body of its officials concurred in the propriety of what was done at the time, but also in the knowledge that, in the grave emergency with which the world was faced in 1939, vast multitudes of people voluntarily made or willingly submitted to drastic infringements of their rights and interests. The

League of Nations was entitled to expect from all, and in fact received from the vast majority of its officials, the same devotion and self-sacrifice in the interests of the world community.

9. We should add that we have not allowed ourselves to be influenced in the conclusion at which we have arrived by the serious effect on the League's budgetary position which the application of the Tribunal's decision and its extension to other officials would inevitably involve....

10. In view, however, of the fact that we do not doubt that the claims were made in good faith and involved a difficult and important matter, we think it would be proper to make an *ex gratia* payment in respect of the claimants' legal costs." (Underscoring supplied.) *Id.* at 262-263.

It is not possible to limit the significance of the Assembly's action to an argument that it decided that where the Administrative Tribunal based its judgment on a finding that the Assembly had attempted in 1939 to exceed its powers, that judgment could not bind the Assembly. Such a narrow theory of the case is contradicted by the Report itself. The Report envisaged—indeed, the very judgments reviewed compelled it to meet—the argument that the Tribunal did not necessarily find the Assembly's 1939 action *ultra vires*, but merely construed the Assembly's Resolution to conform with the Tribunal's theories of proper administration, imputing these theories to the Assembly itself. On the question of who interprets with greater authority the words of the Assembly, the Report was emphatic and unambiguous: "we think it is within the power of the Assembly, which can best interpret its own decisions, by a legislative resolution, to declare that the awards made by the Tribunal are invalid and are of no effect....".

It will be noted, of course, that in affirming this legislative power of the Assembly, the Report made it perfectly clear that, in distinguishing the 1932 Opinion of the Jurists on the ground that "it proceeded largely upon an examination of the question whether the League could derogate from existing contracts in the exercise of a budgetary authority rather than in that of a legislative power", there was no thought that the Assembly lacked power, after considering an award on its merits, to declare the award of no effect.

Indeed, it would be a mistake to search for the ultimate legal basis of the power to make the Report, and for the power to refuse to give effect to the awards of the Tribunal, in the words of the Report itself. The Report was the opinion of the Assembly of the League. It was a political, not a judicial, opinion. It was premised on the legal right and power of the Assembly to consider and refuse to give effect to awards of the Tribunal. The reasons upon which it relied in deciding whether and how to exercise its right and power were *political reasons* relating to the legal responsibilities vested in the Assembly by the Covenant. The Assembly

had been responsible for adjustments in the administration of the League to meet the exigencies of a second world war. It remained responsible for the wise-carrying through of the adjustments. It regarded the decision and awards of the Administrative Tribunal as seriously at odds with what it believed the proper conduct of civil servants and the best policy for the international organization in the face of the problems growing out of the war, and as capable of creating grave iniquities as well as involving a view of the intention of earlier Assembly action in which the Assembly itself could not concur.

Thus, the legal significance of the Assembly's action, when objectively viewed, has the following chief aspects :

1. It settled once and for all the meaning of "final and without appeal". In using the League Tribunal as a model, the United Nations General Assembly unequivocally assumed its own legal right and power to refuse effect to awards of the United Nations Administrative Tribunal.

2. It settled finally the question of "acquired rights". Not only was the power of the Assembly to amend the terms of employment an implied term of all contracts ; it was also true that there was no implied "acquired right" to the benefits of an administrative tribunal award.

3. It conformed to the legal requirement that the Assembly exercise its power to refuse effect to awards of the Tribunal for reasons it must itself find politically sound in the light of its responsibilities under its constituent instrument.

The fact is that representatives of both prevailing and minority view in the Assembly were in agreement as to the basic significance of the action of the League Assembly. Mr. Kaeckenbeeck (Belgium) said :

> "In his opinion they (his colleagues on the 2d Committee) should ask themselves whether the Assembly, taking the view that certain of the Tribunal's interpretations were inaccurate, had the right to oppose the execution of a judgment of the Administrative Tribunal." *Id.* at 131.

As Sir Hartley Shawcross (United Kingdom) had said :

> ".... The conclusion was that the Assembly was entitled, by way of legislative act, to take such decisions in relations to its staff as it thought right." *Id.* at 130.

The representative of France, M. Watteau, was even more succinct :

> "Legally, the Tribunal's judgment should not be recognized as valid." *Id.* at 132.

When the report of the Second Committee was unanimously adopted by the Seventh Plenary Meeting of the League Assembly on April 18, 1946, the Delegate of Belgium, while expressing formal reservations on behalf of his own country and of Den-

mark, Iran, Luxembourg, the Netherlands, Sweden, and Switzerland, did not assert that the Assembly lacked legal power to adopt the Sub-Committee's Report and to decide not to give effect to the Tribunal's judgments. He stated his regret for the Assembly's decision, and he noted that it established a precedent. *Id.* at 61.

(C) *Decisions of the United Nations General Assembly*

By his Report of 21 September 1949, the Secretary-General submitted to the Fourth Session of the General Assembly a draft statute for a United Nations Administrative Tribunal, which, with some revisions, was adopted by Resolution 351 (IV) of 24 November 1949, to come into force 1 January 1950. UN, Off. Rec., Gen. Ass., 4th Sess., 5th Comm., SR, I Annex 146, 148.

Amendment of the text to avoid or limit the construction placed upon its model, the League Statute, regarding the relationship between the Tribunal and the Assembly and the responsibility of the latter for review of the actions of the former was never a real issue. The real debate, the important decisions of the Assembly, related primarily to preserving the discretion of the Secretary-General in areas where his decisions should be respected by the Tribunal and where his judgment, not the Tribunal's, should be controlling. It is, of course, true that the debates on this issue relate indirectly to the power and responsibility of the General Assembly, since they give strong evidence of such need for effective checks upon the Tribunal that they could hardly be reconciled with abdication of General Assembly responsibility for the Tribunal's work.

The Secretary-General suggested no modifications in the Advisory Committee's redraft of the League Statute which could insulate the Tribunal's decisions from the critical scrutiny and power of review of the General Assembly. Indeed, his addition of Article 12 was a reminder of the latter's ultimate power and responsibility. As the Report states:

> "In drafting the attached statute, the Secretary-General has relied heavily upon the views expressed and the draft statute submitted in 1946 by the Advisory Committee appointed by the Secretary-General under the terms of resolution 13 (I)....
>
> . . . . . .
>
> Article 12 has been added to make it clear that the statute may be amended by the General Assembly or such other organ of the United Nations as the General Assembly may designate." *Id.* at 146.

As the Secretary-General was at pains to point out, his principal changes were to exclude from the Tribunal's competence causes of complaint arising prior to its establishment, to ensure that the Secretary-General, not the Tribunal, should be the one to decide upon the advisability of rescission or specific performance

rather than payment of damages, and to make explicit the General Assembly's power of amendment. *Id.* at 146.

During the General Assembly's consideration of the draft Statute, there was no proposal made which would have rendered decisions of the Tribunal beyond the reach of General Assembly review. Indeed, the only change from the League Statute considered which would have had the effect of increasing practically the independence of the Tribunal from the Assembly, even though it did not go so far as to prevent review, was rejected. This was the proposal of the Drafting Committee in 1946, supported by the Netherlands, France and others, that the International Court of Justice participate in the selection of members of the Tribunal. In explanation of this support of this provision, the representative of the Netherlands

> ".... urged the Committee to keep the original text of paragraph 2. *The Administrative Tribunal would be a judicial organ and should be independent of both the Secretariat and the Assembly. It would be regrettable if the members were elected by the General Assembly, for such a procedure would place them in a dependent position that would greatly detract from their prestige.*" (Underscoring supplied.) UN, Off. Rec., Gen. Ass., 4th Sess., 5th Comm., SR, 185-186.

The Advisory Committee on Administrative and Budgetary Questions proposed instead that the General Assembly appoint the members. As Mr. Aghnides pointed out:

> ".... If the Advisory Committee's amendment was adopted, the method for appointing the members of the Tribunal would, as the representative of Poland had suggested, be that which governed the appointment of members of the Advisory Committee and of the Committee on Contributions." *Id.* at 187.

The Advisory Committee's amendment carried by a vote of 33 to 4, with 2 abstentions. *Ibid.* The term of a member was set at three years, thus assuring frequent check by the General Assembly. An effort by the United States to give express sanction to removal by the Assembly at any time gave rise to strong objections and, by decision of the Plenary, removal was permitted only if the other members of the Tribunal concurred in the propriety of such removal. UN, Off. Rec., Gen. Ass., 4th Sess., PV 360-362.

It has been brought out previously that "final", as that word was used in the League Tribunal's Statute, meant no more than that the Secretary-General or the Tribunal had fully considered and decided a matter so that it was ripe for whatever next step might be appropriate, including, in the case of the former, proceedings before the Tribunal, and, in the case of the latter, action (which might be unfavorable) by the Assembly. The same phrase about finality of Tribunal decisions was preserved in the United Nations Tribunal Statute. However, the word "final" as to the Secretary-General was dropped out when, in the course of revising Article 7,

the Fifth Committee spelled out with greater precision the remedies that must have been exhausted or mutually waived prior to action by the Tribunal. UN, Off. Rec., Gen. Ass., 4th Sess., 5th Comm., SR 14, 16, 20, 180 ; UN, Off. Rec., Gen. Ass., 4th Sess., 5th Comm., I Annex 162 ; see especially remarks of the Belgian and Netherlands representatives, and of Mr. Feller ; also paras. 10 and 12 of Staff Committee Proposals, Annex, *op. cit. supra*, 154-155.

Not only did the word "final" in Article 10 (2) retain its original limited meaning ; its limitation was further spelled out in Article 9. Article 9, quoted above, provided explicitly that the Secretary-General need not give effect to a judgment of rescission or specific performance where in his opinion it is inadvisable so to do. Under the League Statute, this was a decision for the Tribunal to make. Present Article 9 makes it the Secretary-General's decision. At the end, it simply provides a further step in which the Tribunal, whose "final judgment" remains unexecuted, then fixes proper compensation.

The last sentence of Article 9 needs further analysis. It provides : "In any case involving compensation, the amount shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under Article 12." Article IX of the League Statute provided merely that ".... The Tribunal shall award the complainant compensation for the injury caused to him." Article X, however, added that "Any compensation awarded by the Tribunal shall be chargeable to the budget of the administration concerned." Thus, it appears that the purpose of the final sentence of Article 9 is to assure that the United Nations will not be expected to pay awards to employees of the specialized agencies. Since the actual appropriation must in any event be subject to agreement as to which is the "appropriate" administration or agency, and in the case of a jointly operated undertaking the matter might be in some doubt, it is apparent that this question, like many others, must be left to the normal processes of consideration and decision in the competent plenary organs involved.

Article 12 of the Statute of the Tribunal, quoted above, *authorizes* the Secretary-General to enter into agreements with specialized agencies under which they would use the Tribunal, contribute to its expenses, *be "bound"* by its decisions, and be responsible for payment of its awards. The agreements must conform to Articles 57 and 63 of the Charter, and they remain subject to the future approval of the General Assembly and the agency concerned. No such agreement has been made. Analysis of the article leads to two observations : *(a)* the language used to assure that the agencies will be bound by the decisions and bound to give effect to the awards is in contrast to that found in Articles 10 (2) and 9. If binding effect had been intended in Articles 10 (2) and 9, a mere statement in Article 12 that the arrangement should not derogate from Articles 10 (2) and 9 would have been both better drafting

and sufficient. Instead, we have a new and a very specific formula. *(b)* Article 12 is in legal effect merely authority to make an offer. It could not compel acceptance of the offer without full consideration by the principal organs of the specialized agencies. It is, to say the least, a highly debatable matter whether their constituent instruments, particularly those provisions vesting budgetary and administrative responsibilities in their respective organs, could be found to permit acceptance of the offer. Certainly none has been so construed and applied.

Nothing was introduced into the Statute to reverse the effect of the old Statute in making the Administration and the applicant the parties to a case. Indeed, in its own Rules of Procedure, the United Nations Administrative Tribunal has expressly named the "parties" to a case. They are "the applicant" and "the Administration concerned". Articles 7, 8, 9, 16 and 17 of the Rules. There is no reason whatsoever to suppose that "the Administration" is equivalent to "the United Nations", including its principal organs other than the Secretariat. Indeed, the very existence of the Tribunal, set up as a subsidiary organ of the General Assembly to help settle the personnel disputes of "the Administration", is eloquent testimony to the contrary.

Several delegations, of course, echoed the concern expressed in 1947 by the United Kingdom that the powers and responsibilities of the General Assembly must not be impaired. UN, Off. Rec., Gen. Ass., 4th Sess., 5th Comm., SR 21 (UK), 20 (USSR), 190 (USSR), 15-16 (US). Nothing happened to upset the 1946 League precedent. The idea of *formalizing a procedure* for appealing competence questions was opposed by Belgium, which revived its 1946 line of argument. The idea was successfully discouraged by the Secretary-General's representative, by Mr. Aghnides, and by Mr. Andren (Sweden) on the policy ground that it would lead to vexatious appeals, and had not been needed. *Id.* at 183. What was needed was there: the power of the General Assembly to act to correct error by its subsidiary organ where the facts might warrant exercise of that power.

That the "independence" sought and achieved in the Fifth Committee was independence from the Secretary-General rather than from the General Assembly was further evidenced by the statements of various representatives. Thus, Mr. Andren (Sweden), in opposing provision for advisory opinions, "wished the principle of division of powers to be applied so that the administration would remain entirely independent of the Administrative Tribunal". *Id.* at 183. In his discussion of Article 9, Mr. Lebeau properly limited his construction of the finality of the Tribunal's decision to concurrence with Mr. Feller that *the Secretary-General* had no power to reverse or modify. *Id.* at 193. Messrs. Aghnides, Hambro, Lebeau, and Andren agreed in connection with Article 3, paragraph 4, that "The Tribunal was to be completely independent *of the*

Secretary-General." Id. at 187. Both the representatives of Norway and of Australia made it quite clear that the decisions of the Secretary-General and of the Tribunal, while taken *independently of each other,* were to continue to be subject to corrective action by the General Assembly. Mr. Hambro

> ".... urged that the significance of possible budgetary repercussions should not be exaggerated, and in that connection referred to the experience of the International Labour Organization and the League of Nations, which indicated that cases involving substantial compensation in lieu of reinstatement were likely to be exceedingly rare. There had, however, been several cases concerning the right of the General Assembly to abolish posts without paying compensation. The United Nations was making its first attempt to introduce the system of an Administrative Tribunal and if experience showed that the budget required more careful safeguards in connection with compensation, *action could be taken by the General Assembly.* He *pointed out, however, that Article 9 should not be drafted in the expectation of a deluge of dismissals, but with the object of ensuring effective administration."* (Underscoring supplied.) *Id.* at 195.

As has been pointed out earlier, the power of the General Assembly effectively to cope with a decision seriously impairing the power of termination in a substantial category of cases could fairly and properly be exercised only if the action of the Assembly were taken to affect all cases of this category. Mr. Shann said that

> ".... The Administrative Tribunal itself provided a safeguard; moreover, if any unjust action were to be taken, criticism would doubtless be heard and the Fifth Committee would have the matter brought to its attention by virtue of the fact that it would be requested to provide the necessary amounts for any monetary compensation decided upon. Furthermore, he was sure the Committee could place its confidence in the sound judgment of the Secretary-General." *Id.* at 194.

No one could seriously have believed that merely talking about unjust action in the Fifth Committee would meet the problem unless the powers of the Fifth Committee, especially regarding the budget, were preserved.

V. *Conclusions*

(1) *Question (1)*

For the reasons above discussed, it is submitted that Question (1) should be answered in the affirmative.

(2) *Question (2)*

Question (2) reads:

> "If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?"

It will be recalled that in its advisory opinion concerning *Conditions of Admission of a State to Membership in the United Nations*, the Court said :

> "To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution." [1948] I.C.J. 57, 64.

In that case, the Court found such terms expressly stated in the immediately relevant Charter Article 4. *Id.* at 6. In Part III of the present statement the articles immediately relevant to the present case—Articles 17, 18, 101, 7 and 22—have been examined, and they contain, it is submitted, as comparable express criteria only the provisions of Article 101 (3) that

> "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."

In the *Admissions* case, the criteria of Article 4 were exclusive. In the present case, the criteria of Article 101 (3) are "paramount" but not exclusive. The area for the operation of factors of sound political discretion is necessarily wide and is the domain, not of a court of law, but of the competent political organs. The Court could, if asked, render advice on the legal "meaning" of the factors stipulated. It could scarcely advise on which ones or which combinations of express and non-express factors should be applied in a particular case to achieve a particular result.

Such considerations appear so fundamental, and already have been so clearly elaborated by the Court itself, as to preclude the need for more extensive treatment. It would not seem helpful to attempt a generalized treatment of such Charter provisions as Articles 103, 95, 55, 56, 48, or 2 (7), for although they might conceivably, in some fashion, limit the area of General Assembly discretion in some particular case, they do not themselves expressly or inferentially establish grounds for decision of the type of problem here considered.

The following are illustrative of some of the types of situations which might give rise to careful review by the General Assembly and, in its discretion, to refusal to give effect to awards of the Administrative Tribunal :

Mistaken reliance by the Tribunal upon false representations of a party in a case ;

Interpretation and application of Regulations established by the General Assembly with effect contrary to the express or reiterated intent and object of the General Assembly, such as : awards made in flagrant disregard of the Statute or Rules, to the prejudice of either party ; *ultra vires* awards ; decisions premised

on serious misconstruction of the Charter, particularly in regard to the powers and responsibilities of the principal organs, such as : decision invading Charter powers or discretion of the Secretary-General, or decision violative of Article 101 (3) of the Charter ;

Decision contrary to an advisory opinion of the International Court of Justice ;

Awards arbitrary or unreasonable on their face ;

Important and inconsistent decisions giving rise to serious uncertainties in the administration of the Secretariat ;

Awards entailing impossible financial consequences for the Organization. Needless to say, duress exercised upon the Tribunal, corruption of the Tribunal, or action evidencing prejudice and improper motives of any of its members would call for similar action by the General Assembly.

The weight to be accorded to any one or combination of these factors would have to be determined by the General Assembly in discharging its responsibilities as a principal organ of the United Nations under the Charter. This is an essentially political responsibility of the Assembly.

It is submitted that the answer to Question (2) is that, as a matter of law, the General Assembly must rely upon policy grounds in refusing to give effect to awards of the Tribunal, acting with due regard for relevant Charter provisions, such as the express stipulation of a "paramount consideration" in Article 101.

10. WRITTEN STATEMENT BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

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INTRODUCTION

1. On 9 December 1953 the General Assembly of the United Nations, by a vote of 41 to 6 with 13 abstentions, adopted Resolution 785 A (VIII) requesting an advisory opinion from the International Court of Justice on certain legal questions concerning awards of compensation made by the United Nations Administrative Tribunal. Thus, for the seventh time, the General Assembly determined to seek the assistance of the Court on legal aspects of an important question with which it had been seized.

2. The text of this Resolution, adopted at the 471st meeting of the General Assembly, is as follows :

> "*The General Assembly,*
>
> *Considering* the request for a supplementary appropriation of $179,420, made by the Secretary-General in his report for the purpose of covering the awards made by the United Nations Administrative Tribunal in eleven cases numbered 26, and 37 to 46 inclusive,
>
> *Considering* the concurrence in that appropriation by the Advisory Committee on Administrative and Budgetary Questions contained in its twenty-fourth report to the eighth session of the General Assembly,
>
> *Considering*, nevertheless, that important legal questions have been raised in the course of debate in the Fifth Committee with respect to that appropriation,
>
> *Decides*
>
> To submit the following legal questions to the International Court of Justice for an advisory opinion :

(1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent ?

(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right ?"

3. The Secretary-General is submitting the present statement, in his capacity as Chief Administrative Officer of the United Nations, in the hope that it may be useful in throwing light on the above questions, and in facilitating their consideration by the Court. The statement contains an historical survey and factual summary of matters covered in the documentation submitted to the Court under Article 65 of its Statute, and as such it is intended to serve as a guide to these documents. It also contains an historical survey and factual summary of materials relating to the Administrative Tribunal of the League of Nations.

4. The statement is not intended to be in any way an expression of the views of the Secretary-General. Certain views of the Secretary-General relating to the subject were presented to the General Assembly and will be found in the documents before the Court. The Secretary-General, with the permission of the Court, may present an oral statement at a subsequent stage in the proceedings.

5. The present statement is divided into three main parts : *Part One* concerns the request for an advisory opinion made by the eighth session of the General Assembly ; *Part Two* contains an historical survey of the Administrative Tribunal of the League of Nations ; and *Part Three* deals with the establishment of the United Nations Administrative Tribunal. Relevant documents of the League of Nations are contained in Annexes 1 to 12.

Part One : Request for the Advisory Opinion by the Eighth Session of the General Assembly

I. Historical survey

A. *Judgments of the Administrative Tribunal*

6. The Court has not been asked to review the judgments of the Administrative Tribunal, and in fact, as will be noted subsequently, the Fifth Committee of the General Assembly intentionally refrained from asking the Court, after it had formulated general principles, to apply these principles to the cases under consideration by the General Assembly. Consequently, this statement will contain only a brief account of the essential facts antecedent to the consideration of the subject by the General Assembly at its eighth session. It will not attempt to summarize

the arguments presented by Counsel before the Administrative Tribunal or the opinions of the Tribunal. All judgments of the Tribunal, as well as the records of the written and oral proceedings in those cases of immediate interest, have been sent to the Registry for the background information of the Members of the Court. (See Background Documents—Group I—Judgments and Records of the Administrative Tribunal of the United Nations.)

7. On 21 August 1953 the Administrative Tribunal rendered judgments (Nos. 18-38) in the cases of twenty-one former United Nations staff members who had been discharged by the Secretary-General, and who had contested their discharge as illegal. Ten of these cases related to the termination of temporary appointments, ten to the termination of permanent appointments, and one to the summary dismissal for serious misconduct of a staff member who held a permanent appointment.

8. The Tribunal sustained the termination action of the Secretary-General in nine cases involving temporary appointments. (Judgments Nos. 19-27.) It decided in favour of the terminated staff members in one case concerning a temporary appointment (Judgment No. 18) and in ten cases concerning permanent appointments (Judgments Nos. 29-38). In four of the cases decided in favour of the applicant the Tribunal ordered reinstatement (Judgments Nos. 18, 30, 32, 38), and in the remaining seven cases ordered the payment of compensation in lieu of reinstatement (Judgments Nos. 29, 31, 33, 34, 35, 36, 37). It decided, with respect to the summary dismissal, that the proceedings of the Joint Appeals Board in the case had not been valid and that it should be re-submitted to the Joint Appeals Board (Judgment No. 28).

9. In the exercise of his powers under Article 9 of the Statute of the Administrative Tribunal, the Secretary-General decided not to reinstate the applicants in the four cases where reinstatement had been ordered. Consequently, on 13 October 1953 the Tribunal handed down four judgments (Nos. 39-42) determining the amounts of compensation to be paid in these cases in lieu of reinstatement.

10. In all cases where the applicants were successful, the Tribunal awarded full salary up to the date of judgment less the amount paid at termination in lieu of notice and less also the amount of termination indemnity; it also awarded $300 for legal costs in each of these cases. In addition it awarded the following amounts of compensation.

Judgment No. 29	$ 6,000	
Judgment No. 31	40,000	
Judgment No. 33	20,000	
Judgment No. 34	27,500	
Judgment No. 35	12,000	
Judgment No. 36	7,000	
Judgment No. 37	10,000	plus pension rights
Judgment No. 39	16,000	
Judgment No. 40	20,000	
Judgment No. 41	7,500	
Judgment No. 42	4,730	
Total :	$170,730	plus pension rights in one case

11. It may also be of interest to note, with respect to one of these judgments (No. 37—Miss Jane Reed), that a request was made by Counsel for the Secretary-General on 5 October 1953 for a revision of the award based on the correction of an error of fact. This error related to the age of Miss Reed, a factor which had been taken into account in determining the amount of compensation. The question of error was not in dispute but was in fact recognized by both parties. The Tribunal on 11 December 1953 handed down Judgment No. 51 correcting the award. The Statute of the Administrative Tribunal contains no reference to the reconsideration of a case or the revision of a judgment by the Tribunal. In the present instance the correction of material error rested on a finding by the Tribunal that it was entitled to rectify figures computed on the basis of a date submitted by both parties and recognized by both after the judgment as erroneous. There have been no other judgments which relate to the reconsideration of a case or the revision of a judgment by the Administrative Tribunal.

B. *Relevant instruments*

12. While materials on the foregoing judgments have not been included in the Dossier transmitted to the Court under Article 65 of its Statute, there have been included in this Dossier the Statute of the Administrative Tribunal and other relevant instruments (Documents 18-31) [1]. In addition to the Statute and Rules of the Tribunal, the Staff Regulations and the Staff Rules, as well as examples of appointment forms, are contained in the Dossier.

13. The Court will note that the letters of appointment make reference to the Staff Regulations and to the Staff Rules. For example, the Permanent Appointment form (Document 27)

[1] Reference in this and similar citations which follow is to the numbers stamped on the documents in the Dossiers submitted to the Court under Article 65 of its Statute.

contains the following: "You are hereby offered a permanent appointment in the Secretariat of the United Nations, in accordance with the terms and conditions as specified, as amended by or as otherwise provided in the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules. A copy of the Staff Regulations and Staff Rules is transmitted herewith." The same letter of appointment also provides that a permanent appointment may be terminated by the Secretary-General in accordance with the relevant provisions of the Staff Regulations and Staff Rules. Similar provisions are also contained in the other letters of appointment.

14. With respect to the Staff Regulations (Documents 21 and 22), the most pertinent provisions are the following: Article 1 (Regulations 1.1 to 1.10), which deals with the duties, obligations and privileges of staff members; Article 9 (particularly Regulation 9.1), which deals with separation from service; and Article 10 (Regulations 10.1 and 10.2), which deals with disciplinary measures, including summary dismissal for serious misconduct.

15. In addition to the above, Regulation 11.2 provides that the United Nations Administrative Tribunal shall, under conditions provided in its Statute, hear and pass judgments upon applications from staff members alleging non-observance of the terms of their appointment including all pertinent regulations and rules.

C. *Request by the Secretary-General for appropriation of funds for payment of awards, and concurrence of the Advisory Committee on Administrative and Budgetary Questions*

16. The Secretary-General, in his Report to the General Assembly on Supplementary Estimates for the Financial Year 1953 (Document 10, A/2534) [1], proposed that the General Assembly should appropriate the funds necessary to cover all indemnities determined by the Administrative Tribunal. In making his proposal the Secretary-General stated that as Chief Administrative Officer of the Organization he was obviously bound by the decisions of the Tribunal and it was not for him to discuss the findings of the Tribunal either as concerned the facts or as concerned the interpretation given to the relevant rules.

17. He also pointed out that the Administrative Tribunal, while it was not set up by the Charter but by special decision of the General Assembly, introduced an important element in the contractual relations between the Organization and its employees. For that reason the decisions of the Tribunal had as their basis not

[1] In this and in similar citations which follow, the first reference "Document 10" is to the numbers stamped on the documents in the Dossiers submitted to the Court under Article 65 of its Statute. The second reference "A/2534" is to the official United Nations symbol of the document in question.

only the unilateral decision of the General Assembly by which the Tribunal was set up, but the present contractual relationship between the Organization and its employees as established by that decision. He further stated that although from the point of view of pure form it was the Secretary-General who was a party before the Administrative Tribunal, from the point of view of substantive interest the General Assembly, which alone could appropriate funds, must be considered a party to the decisions of the Administrative Tribunal. (On this last point see statements of the Chairman of the Advisory Committee on Administrative and Budgetary Questions and of the Secretary-General, Document 1, Fifth Committee, 420th meeting, paras. 20-21.)

18. The views of the Secretary-General were also presented to the Fifth Committee at its 425th meeting on 7 December 1953 (Document 5, paras. 7-14).

19. The Advisory Committee on Administrative and Budgetary Questions in its Twenty-fourth Report to the Eighth Session of the General Assembly (Document 11, A/2580) noted that the Secretary-General had included in his Supplementary Estimates the sum of $179,420 to cover the awards of compensation made by the Tribunal and expressed its concurrence in this appropriation on the grounds that the Secretary-General's action had been taken in accordance with the Statute of the Administrative Tribunal.

D. *Consideration by the Fifth Committee and by the General Assembly*

20. The Fifth Committee considered the question of Supplementary Estimates for 1953 at its 420th to 423rd, 425th to 427th and 429th meetings from 3 to 9 December 1953 (Documents 1-8). By far the greater part of the discussion on Supplementary Estimates was directed to the Secretary-General's proposal for the appropriation of funds necessary for the payment of the awards of compensation.

21. Consideration was opened by the representative of the United States, who presented a detailed argument in opposition to the appropriation of the funds in question (Document 1, Fifth Committee, 420th meeting, paras. 23-70). In the discussion which followed, a variety op opinions emerged.

22. A number of representatives who spoke in the Fifth Committee were of the opinion that the General Assembly was obligated to pay the awards. Those favouring the appropriation were :

Netherlands (Document 2, 421st meeting, paras. 12-20) ;
Colombia (Document 2, 421st meeting, paras. 39-49) ;
Uruguay (Document 3, 422nd meeting, paras. 38-48) ;
Canada (Document 4, 423rd meeting, paras. 1-8) ;
United Kingdom (Document 4, 423rd meeting, paras. 18-24) ;
New Zealand (Document 4, 423rd meeting, paras. 25-40) ;
Yugoslavia (Document 4, 423rd meeting, paras. 41-45) ;

Syria (Document 5, 425th meeting, paras. 15-26) ;
Poland (Document 5, 425th meeting, paras. 30-36) ;
India (Document 5, 425th meeting, paras. 40-50) ;
Union of Soviet Socialist Republics (Document 5, 425th meeting, paras. 53-58) ;
Belgium (Document 5, 425th meeting, paras. 59-62) ;
Sweden (Document 5, 425th meeting, paras. 67-71) ;
Denmark (Document 5, 425th meeting, paras. 72-73) ;
Brazil (Document 5, 425th meeting, paras. 74-75) ;
Czechoslovakia (Document 6, 426th meeting, paras. 30-33) ;
France (Document 6, 426th meeting, paras. 37-49) ;
Norway (Document 6, 426th meeting, paras. 51-56) ;
Lebanon (Document 6, 426th meeting, paras. 57-65) ;
Mexico (Document 6, 426th meeting, paras. 66-70) ;
Egypt (Document 6, 426th meeting, para. 92).

23. Many of these representatives believed that awards of compensation by the Tribunal could in no circumstances be subject to review and refusal of payment by the General Assembly. Some representatives (the Netherlands, United Kingdom, New Zealand, India) who favoured the payment of the awards, however, indicated that in exceptional circumstances, which they did not believe existed in the cases under consideration, the General Assembly might have a right to review decisions and withhold payment, and the remarks of some other representatives were open to a similar inference.

24. On the other hand, certain representatives believed not only that the General Assembly had the right to review awards of the Administrative Tribunal, but that it should refuse payment of the awards in question. Representatives maintaining this position in the Fifth Committee were as follows :

United States (Document 1, 420th meeting, paras. 23-70) ;
China (Document 2, 421st meeting, paras. 1-11) ;
Argentina (Document 2, 421st meeting, paras. 50-53) ;
Cuba (Document 4, 423rd meeting, paras. 9-17) ;
Dominican Republic (Document 4, 423rd meeting, paras. 51-57) ;
Turkey (Document 5, 425th meeting, paras. 37-39).

25. The representatives of Australia (Document 2, Fifth Committee, 421st meeting, paras. 21-38) and Liberia (Document 4, Fifth Committee, 423rd meeting, paras. 46-50) believed the amount of the awards should be revised by the General Assembly before payment.

26. Finally, some representatives, although believing that the awards should be paid, nevertheless considered that the General Assembly should not take a hasty decision but should first seek assistance on legal questions from the International Court of Justice. It was this last view which formed the basis for the proposals submitted by delegations to the Fifth Committee.

27. There were two lines of thought concerning the formulation of the questions to be submitted to the Court which found expression in these proposals. The first view was that incorporated in the joint draft resolution (Document 12, A/C.5/L.263) submitted by Canada, Colombia and the United Kingdom, which was introduced by the representative of the United Kingdom at the 425th meeting of the Fifth Committee on 7 December 1953 (Document 5, paras. 63-66). The text of this joint draft resolution which was adopted without change is the same as that of Resolution 785 A (VIII) reproduced in paragraph 2 above.

28. The United Kingdom representative in introducing this draft resolution pointed out that "the questions were of a general character, strictly legal in nature and limited in scope and were designed to elicit the maximum guidance from the Court without calling upon it actually to retry the cases which had been adjudicated by the Administrative Tribunal" (Document 5, Fifth Committee, 425th meeting, para. 63; see also Document 4, Fifth Committee, 423rd meeting, para. 24).

29. He also explained that the draft resolution made no provision for the supplementary appropriation requested, and it was to be assumed that if it were adopted a decision on the appropriation would be deferred until the ninth session of the General Assembly (Document 5, Fifth Committee, 425th meeting, para. 64).

30. There were very few statements in the course of the discussion which were directly related to the interpretation of the questions. The representative of the United States referred to the "legal question of the General Assembly's power" and said that "if the draft resolution were adopted and when the Court had given its Advisory Opinion, the General Assembly would have an authoritative answer regarding the relationship between the General Assembly and the Administrative Tribunal, an answer defining the General Assembly's power in relation to awards given by the Tribunal" (Document 6, Fifth Committee, 426th meeting, paras. 78 and 79).

31. The representative of Brazil (Document 5, Fifth Committee, 425th meeting, para. 75), in discussing the reference of the question to the Court, spoke of the problem of "the constitutional powers of the General Assembly", and the representative of Pakistan (Document 6, Fifth Committee, 426th meeting, para. 76) referred to "the nature of the relationship between the General Assembly and the Administrative Tribunal".

32. The representative of Argentina, while he did not believe that the proposed questions covered the particular cases with which the Assembly was concerned, was "prepared to accept the draft resolution submitted by the three delegations provided that it was interpreted to mean that the Court, in considering the first question, would also take the two following questions

into account : *(a)* could a subsidiary organ impose final decisions upon the General Assembly ; and *(b)* was the General Assembly empowered to deal with the form and substance of any appropriation to be included in the United Nations budget". (Document 6, Fifth Committee, 426th meeting, para. 91 ; Document 7, Fifth Committee, 427th meeting, para. 11.)

33. The representative of India (Document 5, Fifth Committee, 425th meeting, para. 50) believed that the reference to the Court should not be made in such a way as to imply that the Committee was submitting the Tribunal's decisions to review by the International Court of Justice. (See also on this point statement by the Secretary-General, Document 5, Fifth Committee, 425th meeting, para. 10.)

34. The second view, embodied in amendments proposed by France (Document 13, A/C.5/L.267), accepted the questions of a general character in the joint draft resolution, but proposed that the Court should apply the principles which it might formulate to the cases in question. The first proposed amendment was the deletion of the words "on any grounds" from question (1) in the joint draft resolution. The representative of France considered that these words "were far too wide" (Document 6, Fifth Committee, 426th meeting, para. 74). Subsequently he explained that this proposed amendment affected only the wording. (Document 9, 471st Plenary Meeting, para. 70.)

35. The second French amendment proposed the addition of the following to question (2) of the joint draft resolution :

> "Do these grounds apply to decisions which have led to a request for appropriations ? [1]"

36. At the suggestion of the representative of Colombia, this question was rephrased to read as follows :

> "Do these grounds, whatever they may be, apply to any of the decisions which have led to the request for the appropriation ?" (See Document 6, Fifth Committee, 426th meeting, paras. 72, 113 and 114.)

37. The representative of France explained in Plenary Meeting that his Delegation had proposed this addition because it "considered it desirable that the application to those cases of the general grounds which the Court might give should not provoke another debate in the Assembly, and that the Court itself should be asked to make the practical deductions relevant to the cases

[1] This text, originally proposed by France, was contained in the Provisional Document A/C.5/L.267 circulated in the Conference Room at the 426th meeting of the Fifth Committee. It is this provisional document A/C.5/L.267 to which reference is made during that meeting : see particularly Document 6, paras. 72, 73, 74, 113 and 114. The text of A/C.5/L.267 which will be found in Document 13 is the finalized text incorporating changes accepted by the representative of France in the course of the meeting.

in question from whatever principles it might have formulated". (Document 9, 471st Plenary Meeting, para. 70.)

38. The representative of Israel, in explaining his vote in favour of the French amendments, said that they would give greater precision to the question that was to be put to the Court, and would provide some guidance for the General Assembly when it discussed the matter (Document 7, Fifth Committee, 427th meeting, para. 17).

39. In a separate proposal (*Document* 14, A/C.5/L.268/Rev.1) for amendment of a draft resolution previously approved by the Fifth Committee concerning unforeseen and extraordinary expenses for the financial year 1954 (Document 15, A/C.5/L.264), France also proposed that the General Assembly should authorize the Secretary-General to pay the awards from funds provided for unforeseen and extraordinary expenses, in the event that the Court should find that the General Assembly was not entitled to refuse to give effect to the awards. In introducing this proposal the representative of France stated that in his opinion the Secretary-General should be in a position to pay out the compensation immediately after the Court had given its Advisory Opinion, if that was the action recommended (Document 6, Fifth Committee, 426th meeting, para. 49).

40. A few representatives who favoured payment of the awards opposed any reference of the matter to the Court. The representative of Czechoslovakia did not feel that the General Assembly should submit to the Court questions which had been settled once and for all by the Tribunal (Document 6, Fifth Committee, 426th meeting, para. 33). The representative of the Union of Soviet Socialist Republics believed there were no grounds for reference to the Court, because the Statute was abundantly clear on the issues. The General Assembly could not challenge the judgments of the Tribunal. (Document 5, Fifth Committee, 425th meeting, para. 57 ; Document 7, Fifth Committee, 427th meeting, para. 21.)

41. Likewise a few representatives opposing the appropriations, although abstaining in the vote on the joint draft resolutions, spoke against a request to the Court. The representative of Turkey thought it unnecessary to ask the Court whether the General Assembly had a right to review the Tribunal's awards (Document 5, Fifth Committee, 425th meeting, para. 39). The representative of China considered that there was no doubt of the General Assembly's rights and that the questions contemplated in the joint draft resolution were not really legal questions (Document 6, Fifth Committee, 426th meeting, para. 93).

42. The representative of Australia did not believe that reference to the Court would serve a useful purpose. The Court had no competence to review the cases, determine issues of fact, or give

instructions to the General Assembly. He thought it was uncertain whether the Court, even if requested, would undertake the task, as it was not obliged to do so. A further doubtful point, he believed, was whether the claimants would be entitled to be heard by the Court. The procedure would also involve delay and justice should not be tardy. He did not believe the General Assembly would surrender its sovereign judgment to an outside authority by accepting in advance the Advisory Opinion, and if it were not prepared to act upon the opinion there would be no purpose in consulting the Court. (Document 2, Fifth Committee, 421st meeting, paras. 36-37.)

43. Many delegations which had expressed a preference for an immediate decision by the General Assembly, either for or against the appropriation, agreed, in view of the diversity of opinion and the complexity of the problem, either to support the request to the Court or, at least, to abstain from opposing it. (See for example the following statements in the Fifth Committee by the representatives of: New Zealand, Document 4, 423rd meeting, para. 38; India, Document 5, 425th meeting, para. 50; Belgium, Document 5, 425th meeting, para. 62; Document 7, 427th meeting, para. 27; Brazil, Document 5, 425th meeting, para. 75; United States, Document 6, 426th meeting, para. 78; Egypt, Document 6, 426th meeting, para. 92; Netherlands, Document 6, 426th meeting, para. 94; Dominican Republic, Document 7, 427th meeting, para. 12; Uruguay, Document 7, 427th meeting, para. 26.)

44. Finally, there may be noted the positions taken with regard to the French amendments to the joint draft resolution, and the French proposal for authorizing payment should the Court's opinion uphold the validity of the Tribunal's decisions. Some representatives who did not wish to see the question reopened at the ninth session of the General Assembly, stated that if the French amendments were not adopted they could not support the reference to the Court. (See for example the statements of the representatives of Mexico, Document 6, Fifth Committee, 426th meeting, para. 70; Document 9, 471st Plenary Meeting, paras. 76-80; Belgium, Document 6, Fifth Committee, 426th meeting, para. 95; New Zealand, Document 7, Fifth Committee, 427th meeting, para. 18.)

45. On the other hand, some representatives considered that the adoption of the French amendments would completely alter the nature of the draft resolution, since the Court itself would be asked to decide the question of payment. They did not believe it should be asked to review individual cases. (See for example the statement by the representative of the United States, Document 6, Fifth Committee, 426th meeting, para. 82.)

46. Those opposing the French proposal (Document 14, A/C. 5/L.268/Rev.1) considered that the General Assembly could not

bind itself in advance to accept an Advisory Opinion. The final decision would have to rest with the General Assembly which would take its decision in the light of the Court's opinion. It would be improper and unconstitutional to anticipate that decision. (See statements in the Fifth Committee by representatives of the United States, Document 6, 426th meeting, para. 82 ; Australia, Document 6, 426th meeting, para. 108 ; Argentina, Document 7, 427th meeting, para. 10 ; Dominican Republic, Document 7, 427th meeting, para. 12.)

47. In support of the French proposal it was argued that justice and humaneness dictated such a decision, for the appeal to the Court would be wholly justified only if its opinion was unanimously accepted, precluding the possibility of reconsidering the findings made and of prolonging the waiting period of the staff members involved for another year or more. While as a general rule Advisory Opinions should not be binding, it was sometimes useful to make an exception to that rule. (See statements of the representative of France, Document 6, Fifth Committee, 426th meeting, para. 104, and Document 9, 471st Plenary Meeting, para. 72.)

48. The final position assumed by each delegation on the various proposals is best shown in the record of the vote which in each instance was taken by roll call. (See Document 7, Fifth Committee, 427th meeting, paras. 4-9, and Document 9, 471st Plenary Meeting, para. 91.)

49. At the 427th Meeting on 8 December 1953, the Fifth Committee proceeded to vote on the proposals before it. A proposal by the representative of the Union of Soviet Socialist Republics that the Committee should first vote on the proposal of the Secretary-General and the Advisory Committee for the appropriation of the funds in question was rejected. (Document 7, Fifth Committee, 427th meeting, para. 3.)

50. The Committee rejected the two French amendments (Document 13, A/C.5/L.267) and the French proposal (Document 14, A/C.5/L.268/Rev.1). It approved the joint draft resolution of Canada, Colombia and the United Kingdom, and accordingly recommended its adoption in its Report to the General Assembly (Document 16, A/2624), approved at its 429th meeting on 9 December 1953 (Document 8, para. 5).

51. The General Assembly at its 471st Plenary Meeting on 9 December 1953 adopted, by roll call vote, the resolution recommended by the Fifth Committee by 41 votes to 6, with 13 abstentions. The text of this resolution (785 A (VIII)) may be found in Document 17, and is also reproduced in paragraph 2 above.

II. Summary of views relevant to questions submitted to the Court

52. In the course of the general discussion in the Fifth Committee, and prior to the decision to consult the Court, many delegations expressed views on issues which are relevant to a consideration of the two questions submitted to the Court. A summary of these views will be found in the following sections.

A. *Question (1). Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent ?*

1. *Arguments for the right of the General Assembly to refuse to give effect to awards of compensation*

(a) *Meaning of term "final and without appeal"*

53. Representatives of Member States that opposed the payment of the awards of compensation were of the view that the General Assembly did have the right to refuse to give them effect. They believed that the General Assembly had the right to review decisions of the Administrative Tribunal. The provision of Article 10, paragraph 2, of the Statute of the Tribunal that "Judgments shall be final and without appeal" meant that judgments were final between the parties and that the parties could not appeal. The parties to a case before the Administrative Tribunal, they considered, were the Secretary-General on the one hand, and the staff member concerned on the other. The General Assembly was not a party, and review of the Tribunal's decisions by it in its capacity as supreme legislative and budgetary authority of the Organization was not excluded by this provision. Such a review was not an appeal by either party. (United States, Document 1, Fifth Committee, 420th meeting, paras. 36-37 ; China, Document 2, Fifth Committee, 421st meeting, para. 9 ; Australia, Document 2, Fifth Committee, 421st meeting, para. 27 ; Argentina, Document 2, Fifth Committee, 421st meeting, paras. 51-52 ; Cuba, Document 4, Fifth Committee, 423rd meeting, para. 12 ; Liberia, Document 4, Fifth Committee, 423rd meeting, para. 46 ; Dominican Republic, Document 4, Fifth Committee, 423rd meeting, para. 54.)

54. The representative of Australia (Document 2, Fifth Committee, 421st meeting, para. 27) added that the General Assembly by Article 10, paragraph 2, had indicated that it would not normally interfere with the Tribunal's exercise of its powers. However, the paragraph in question should be interpreted as if it were followed

by the words "provided that the Tribunal properly exercises its powers". If the provision had meant that the General Assembly could not interfere with a finding of the Tribunal, then the Statute of the Tribunal would have been *ultra vires*.

(b) *Relationship of the General Assembly to the Administrative Tribunal—Nature of the Tribunal*

55. The right of the General Assembly to review decisions of the Administrative Tribunal was based, in the first place, on an analysis of the relations of the General Assembly to the Administrative Tribunal and on the concept which these Delegations had of the nature of the Tribunal. The Administrative Tribunal was a subsidiary organ established by the General Assembly under Article 22 of the Charter. (United States, Document 1, Fifth Committee, 420th meeting, paras. 32-33; Document 6, Fifth Committee, 426th meeting, para. 84; China, Document 2, Fifth Committee, 421st meeting, para. 4; Argentina, Document 2, Fifth Committee, 421st meeting, para. 50; Liberia, Document 4, Fifth Committee, 423rd meeting, para. 46; Dominican Republic, Document 4, Fifth Committee, 423rd meeting, para. 53.) As such they considered it subject to the control of the General Assembly which at any time could abolish it or amend its Statute, and could therefore take the lesser step of reviewing its decisions. (United States, Document 1, Fifth Committee, 420th meeting, para. 35; China, Document 2, Fifth Committee, 421st meeting, para. 9.)

56. The General Assembly, by creating a subsidiary organ, could not strip itself or the Secretary-General of their powers under the Charter (Australia, Document 2, Fifth Committee, 421st meeting, paras. 22 and 26), and the subsidiary organ could not create obligations binding on the General Assembly (Cuba, Document 4, Fifth Committee, 423rd meeting, para. 11).

The purpose of the Administrative Tribunal was to assist the General Assembly in performing its functions with regard to personnel policy (China, Document 2, Fifth Committee, 421st meeting, para. 4). It was in fact an administrative body with responsibility to watch on behalf of the General Assembly the application and interpretation of the terms of appointment of staff members. (Australia, Document 2, Fifth Committee, 421st meeting, paras. 22-24.) The General Assembly could not relinquish the power of review even if it wished. (Dominican Republic, Document 4, Fifth Committee, 423rd meeting, para. 54.)

57. The Administrative Tribunal was not to be considered a court of co-ordinate authority. The General Assembly had intentionally decided to call the persons who served on the Tribunal "members" and it rejected a proposal to call them "judges". (United States, Document 1, Fifth Committee, 420th meeting, para. 32.) It was doubtful if the General Assembly had a right to create a

Court with power to enter judgments against it, and it was clear that the Assembly had no intention of doing so (Australia, Document 2, Fifth Committee, 421st meeting, para. 24). The relationship between the General Assembly and the Administrative Tribunal was not analogous to the relationship between the legislature and judiciary of a State. For international organizations in general, the International Court of Justice was the judiciary. The principle of separation of powers did not apply to the Administrative Tribunal. (China, Document 2, Fifth Committee, 421st meeting, paras. 8-9; United States, Document 1, Fifth Committee, 420th meeting, para. 34.)

(c) *Budgetary powers of the General Assembly*

58. The second basis for a right of review, it was argued, was to be found in the budgetary powers of the General Assembly. Under Article 17 of the Charter the United Nations budget had to be approved by the General Assembly and the funds for the payment of the awards had to be approved as a part of that budget. The General Assembly could not relinquish its power to make appropriations to a small group of individuals no matter how carefully chosen they might be. Under the Charter not even the Councils had authority to appropriate funds. This right was reserved to the General Assembly meeting in Plenary Session and voting by two-thirds majority. (United States, Document 1, Fifth Committee, 420th meeting, para. 38; Australia, Document 2, Fifth Committee, 421st meeting, para. 28; Cuba, Document 4, Fifth Committee, 423rd meeting, para. 14; Dominican Republic, Document 4, Fifth Committee, 423rd meeting, para. 55.)

59. The representative of Turkey (Document 5, Fifth Committee, 425th meeting, para. 38) believed that it was implicit in Article 9 of the Statute of the Administrative Tribunal that it was for the Tribunal to decide whether or not any award was justified, but the fixing of the precise monetary compensation and terms of payment was a matter for the General Assembly to decide, on the recommendation of the Tribunal. Any negation of the power to revise decisions in their budgetary aspects would be contrary to the provisions of the Charter and would derogate from the sovereign rights of the States Members of the United Nations. The representative of Argentina (Document 2, Fifth Committee, 421st meeting, para. 52) stated that as with all other budget estimates, the function of the Fifth Committee was to consider not only the form but also the substance and the supporting evidence.

60. The representative of Chile (Document 7, Fifth Committee, 427th meeting, para. 29) believed that the General Assembly was not entitled to review or revise the judgments of the Administrative Tribunal, but had the right to decide on the necessary budgetary appropriations to cover the awards.

(d) *Precedent of the League of Nations*

61. The action of the Assembly of the League of Nations in 1946 in refusing to pay compensation awarded to certain staff members by the Administrative Tribunal of the League (see Part II of the present statement) was cited by some representatives in support of the right of the General Assembly of the United Nations to review decisions of the United Nations Administrative Tribunal. (United States, Document 1, Fifth Committee, 420th meeting, paras. 39-40; China, Document 2, Fifth Committee, 421st meeting, para. 9.)

62. The representative of the United States pointed out that although the Statute of the League's Tribunal had also provided that its decisions were final and not subject to appeal, the Assembly of the League at its 1946 session had decided "that it was empowered to review the Tribunal's decisions, that the Tribunal had been mistaken not only in its interpretation of its role, but also of the law to be applied and of the staff regulations and that no compensation whatsoever should be paid to the dismissed employees". (Document 1, Fifth Committee, 420th meeting, para. 40.) The representative of China also referred to this decision of the League of Nations as the best precedent on the right to refuse to pay compensation awarded by the Tribunal. (Document 2, Fifth Committee, 421st meeting, para. 9.)

2. *Arguments against the right of the General Assembly to refuse to give effect to awards of compensation*

(a) *Judgments "final and without appeal"*

63. Representatives of Member States that were in favour of the payment of the awards argued that the General Assembly either had no right to review judgments of the Administrative Tribunal under any circumstances, or would have that right only in the most exceptional cases. These representatives, speaking in the Fifth Committee, pointed to the provisions of the Statute of the Tribunal, and particularly to Article 10, paragraph 2, which provided that judgments of the Administrative Tribunal should be final and without appeal. (Netherlands, Document 2, 421st meeting, para. 12; Colombia, Document 2, 421st meeting, para. 44; Yugoslavia, Document 4, 423rd meeting, para. 42; Syria, Document 5, 425th meeting, para. 19; Poland, Document 5, 425th meeting, paras. 32-33; India, Document 5, 425th meeting, paras. 44, 46-47; Union of Soviet Socialist Republics, Document 5, 425th meeting, para. 53; Brazil, Document 5, 425th meeting, para. 74; Czechoslovakia, Document 6, 426th meeting, paras. 30-31; Lebanon, Document 6, 426th meeting, para. 63.) By virtue of this Article the General Assembly had given the Tribunal the authority of a final court. (Uruguay, Document 7, Fifth Committee, 427th meeting, para. 25.) The word "final" must mean that the

decision could not be re-examined by any organ of the United Nations. (Yugoslavia, Document 4, Fifth Committee, 423rd meeting, para. 42.) It could not be taken to mean "open to review". (Brazil, Document 5, Fifth Committee, 425th meeting, para. 74.) Once a judgment had been delivered the case was closed. (Netherlands, Document 2, Fifth Committee, 421st meeting, paras. 12 and 14.)

64. Article 2, paragraph 3, of the Statute provided that in the event of a dispute as to whether the Tribunal had competence, the matter should be settled by the decision of the Tribunal. The General Assembly, it was asserted, could not arrogate to itself the right to settle a dispute regarding the competence of the Tribunal. (Netherlands, Document 2, 421st meeting, para. 12; Canada, Document 4, 423rd meeting, para. 3; Yugoslavia, Document 4, 423rd meeting, para. 43; Union of Soviet Socialist Republics, Document 5, 425th meeting, para. 54; Brazil, Document 5, 425th meeting, para. 74; Czechoslovakia, Document 6, 426th meeting, para. 30.)

65. Furthermore, the General Assembly must abide by Article 9 which provided that compensation, if awarded, was to be fixed by the Tribunal and paid by the United Nations. (Yugoslavia, Document 4, Fifth Committee, 423rd meeting, para. 44.) The General Assembly had drafted the Statute and until the text was amended it must uphold decisions taken in accordance with its provisions. (Union of Soviet Socialist Republics, Document 5, Fifth Committee, 425th meeting, para. 55.)

66. The United Nations, after accepting the jurisdiction of the Tribunal, could not refuse to pay the indemnities awarded by it. It could not choose which judgments it should execute and which it would not, without failing in its obligations as a contracting party. (Belgium, Document 5, Fifth Committee, 425th meeting, para. 61.)

67. The representative of Norway (Document 6, Fifth Committee, 426th meeting, para. 54) considered that the very fact that the General Assembly had adopted the Statute of the Administrative Tribunal, had made it a party for all matters dealt with by the Tribunal. The idea that the Secretary-General, not the General Assembly, was a party was not justified by any provision of the Statute. Article 9 stipulated that it was the Organization, not the Secretary-General, which was to carry out the Tribunal's decisions giving rise to the payment of indemnities. The representative of Lebanon (Document 6, Fifth Committee, 426th meeting, para. 62) also considered that the budgetary powers of the General Assembly made it a party to the dispute and argued that it could not be both a judge and a party in the same case. Other representatives implied that they considered the United Nations itself to be one of the parties. (See statement

of the representative of Belgium, Document 5, Fifth Committee, 425th meeting, para. 61.)

(b) *Nature of the Tribunal*

68. Those delegations which believed that the General Assembly had no right to review decisions of the Tribunal considered it an independent judicial body. The representative of Syria (Document 5, Fifth Committee, 425th meeting, paras. 18 and 23) referred to it as a body independent of both the General Assembly and the Secretary-General, with "full power of delegated judicial authority". The representative of the Union of Soviet Socialist Republics (Document 5, Fifth Committee, 425th meeting, para. 53) said that the purpose of the Statute had been to establish an independent, impartial legal organ to hear complaints of staff members. To the representative of Canada (Document 4, Fifth Committee, 423rd meeting, para. 7) it was "an independent organ for staff protection". The representatives of Belgium, Sweden and Mexico (Document 5, Fifth Committee, 425th meeting, paras. 60 and 68; Document 6, Fifth Committee, 426th meeting, para. 67) referred to the Tribunal as a "judicial organ" or "judicial body", and the representative of Denmark (Document 5, Fifth Committee, 425th meeting, para. 72) stressed the "independence" of the Tribunal. The representative of Brazil said the Tribunal had been set up by the General Assembly as an independent body with full judicial powers. (Document 5, Fifth Committee, 425th meeting, para. 74.)

69. Although established by the General Assembly, these delegations did not consider the Tribunal to be either an advisory body or a mere committee of the Assembly. (Netherlands, Document 2, Fifth Committee, 421st meeting, para. 16; Uruguay, Document 3, Fifth Committee, 422nd meeting, para. 43; India, Document 5, Fifth Committee, 425th meeting, para. 48; Belgium, Document 5, Fifth Committee, 425th meeting, para. 60; Brazil, Document 5, Fifth Committee, 425th meeting, para. 74; France, Document 6, Fifth Committee, 426th meeting, paras. 37-38.)

70. Some representatives believed the Tribunal was not a subsidiary organ. The representative of Colombia (Document 2, Fifth Committee, 421st meeting, para. 45) argued that it had not been set up under Article 22 of the Charter, but in accordance with the General Assembly's powers and responsibilities in personnel matters. He argued that the fact that one body was established by another did not necessarily imply that the former was subordinate. The representative of Lebanon (Document 6, Fifth Committee, 425th meeting, paras. 60-61) thought that the Administrative Tribunal was not a subsidiary organ of the General Assembly but of the United Nations. He considered that its powers were not delegated from the General Assembly, which had no judicial powers,

but were received in order that it might exercise functions of a judicial organ in the service of the United Nations.

71. Other delegations, while considering that the Tribunal was a subsidiary organ of the General Assembly, said that that did not mean that the General Assembly had overriding powers in all respects. (Mexico, Document 6, Fifth Committee, 426th meeting, para. 67.) They believed that it was not established to assist the General Assembly in performing functions which the Assembly could in principle perform itself, but had been established because the General Assembly could not perform judicial functions. (Netherlands, Document 2, Fifth Committee, 421st meeting, para. 16.) While the General Assembly could abolish the Tribunal or amend its Statute, it could not review its judgments. (Netherlands, Document 2, Fifth Committee, 421st meeting, para. 16 ; Uruguay, Document 3, Fifth Committee, 422nd meeting, para. 36 ; New Zealand, Document 4, Fifth Committee, 423rd meeting, para. 28 ; Syria, Document 5, Fifth Committee, 425th meeting, para. 24 ; Union of Soviet Socialist Republics, Document 5, Fifth Committee, 425th meeting, para. 55 ; Lebanon, Document 6, Fifth Committee, 426th meeting, para. 63 ; Mexico, Document 6, Fifth Committee, 426th meeting, para. 67.)

72. With respect to the judicial nature of the Tribunal, it was pointed out by the representative of Uruguay (Document 3, Fifth Committee, 422nd meeting, paras. 36-43) that while the General Assembly had decided to speak of "members" rather than "judges", it had also decided to call the body "Tribunal" and not "Staff Claims Board". The Charter did not debar the General Assembly from setting up a judicial body. He considered it a universally recognized constitutional principle that legislative bodies were empowered to set up judicial tribunals for which no provision had been made in the constitution. Such a tribunal would be just as independent in its particular field as a tribunal established by the constitution. Its decisions could be reviewed only by other judicial bodies.

73. The representative of Uruguay further believed that the nature of the Tribunal was reflected in its functions and by its hierarchical position. The functions defined under its Statute were judicial and its hierarchical position was that of an independent body. It was not connected with or subject to the Secretary-General. The General Assembly could not dismiss a member unless the other members were of the unanimous opinion that he was unsuited for further service. (Uruguay, Document 3, Fifth Committee, 422nd meeting, para. 40 ; France, Document 6, Fifth Committee, 426th meeting, para. 38.)

74. The representative of France (Document 6, Fifth Committee, 426th meeting, paras. 37-38) considered that although the Administrative Tribunal in many respects had the characteristics of a

subsidiary organ, the General Assembly had endowed it with special characteristics. It did not have to submit an annual report to the General Assembly ; its competence extended to the Specialized Agencies who were bound by its judgments, and so it was not linked solely to the General Assembly.

75. The General Assembly, if it were to review judgments of the Administrative Tribunal, it was argued by other representatives in the Fifth Committee, would be violating the principle of separation of judicial from administrative and legislative powers. Issues determined by the Tribunal were not appropriate to submit to the process of voting in the General Assembly. (Canada, Document 4, 423rd meeting, para. 5 ; Syria, Document 5, 425th meeting, para. 18 ; India, Document 5, 425th meeting, para. 49 ; Sweden, Document 5, 425th meeting, para. 67 ; Norway, Document 6, 426th meeting, para. 55 ; Lebanon, Document 6, 426th meeting, paras. 59-62 ; Mexico, Document 6, 426th meeting, para. 67 ; Chile, Document 7, 427th meeting, para. 29.)

(c) *Budgetary powers—contractual obligations*

76. Many representatives stated that they could not accept the view that the General Assembly could refuse payment on the basis of its budgetary powers. Some considered that this argument involved a confusion between a "power" and a "right". (Syria, Document 5, Fifth Committee, 425th meeting, para. 21 ; Norway, Document 6, Fifth Committee, 426th meeting, para. 52.) Although the General Assembly had the power to refuse to appropriate the money, it would be a denial of justice if it were to do so. (New Zealand, Document 4, Fifth Committee, 423rd meeting, paras. 27-28, see also para. 39; Lebanon, Document 6, Fifth Committee, 426th meeting, para. 62.) As a juristic person the Organization was legally obligated to the applicants. (Netherlands, Document 2, Fifth Committee, 421st meeting, para. 17 ; India, Document 5, Fifth Committee, 425th meeting, paras. 46-47 ; Lebanon, Document 6, Fifth Committee, 426th meeting, paras. 59 and 64.)

77. The budgetary powers must be exercised in the best interests of the United Nations. By Article 9 of the Statute of the Administrative Tribunal, the General Assembly had committed itself beforehand to provide the credits needed to pay the compensation awarded (Lebanon, Document 6, Fifth Committee, 426th meeting, para. 62 ; Norway, Document 6, Fifth Committee, 426th meeting, para. 54). In establishing the Administrative Tribunal and deciding that its decisions were final, the General Assembly had divested itself of part of its rights in favour of an independent body created by itself (Syria, Document 5, Fifth Committee, 425th meeting, para. 23). Refusal to pay the awards would impair the status of the Tribunal, imperil staff morale (Canada, Document 4, Fifth Committee, 423rd meeting, para. 7 ; India, Document 5, Fifth Com-

mittee, 425th meeting, para. 48 ; Sweden, Document 5, Fifth Committee, 425th meeting, para. 68 ; Brazil, Document 5, Fifth Committee, 425th meeting, para. 74) and undermine the prestige of the United Nations. (Colombia, Document 2, Fifth Committee, 421st meeting, para. 48 ; Union of Soviet Socialist Republics, Document 5, Fifth Committee, 425th meeting, para. 58 ; Belgium, Document 5, Fifth Committee, 425th meeting, para. 61 ; Uruguay, Document 7, Fifth Committee, 427th meeting, para. 25.)

78. A further result of the acceptance of the view that the General Assembly could use its budgetary powers to opt out of a contractual obligation would be that no confidence could be placed in any contracts signed on behalf of the organization by the Secretary-General or other organ. (Sweden, Document 5, Fifth Committee, 425th meeting, para. 69 ; Norway, Document 6, Fifth Committee, 426th meeting, para. 54.)

79. The representative of France (Document 6, Fifth Committee, 426th meeting, para. 41) pointed out that up to the present time, if the Tribunal disagreed with a decision to terminate a staff member and asked that it should be reversed, the Secretary-General could refuse to reinstate the staff member concerned and he might be awarded compensation instead. If the committee refused to vote funds requested by the Secretary-General it would deprive him of the means of paying such compensation. Consequently the Secretary-General, as a man of honour, would consider himself morally bound to reinstate the staff member concerned if he were not certain of being able to award him compensation.

(d) *League of Nations "precedent"*

80. With reference to the action of the League of Nations in 1946 cited by certain representatives as a precedent for the right of the General Assembly to refuse to give effect to the awards of the Administrative Tribunal, the representative of the Netherlands considered that the League action had been incorrect and should not be a basis for action by the General Assembly. (Document 2, Fifth Committee, 421st meeting, para. 18.) Other representatives believed that while the action of the League in special circumstances may have been proper, the cases were distinguishable from those before the General Assembly. The League cases involved a refusal of the Administrative Tribunal of the League to recognize as valid a change in the Staff Regulations made by the Assembly of the League of Nations. These representatives considered the League action involved special circumstances and could not serve as a precedent. (France, Document 1, Fifth Committee, 420th meeting, para. 71 ; Colombia, Document 2, Fifth Committee, 421st meeting, para. 46 ; United Kingdom, Document 4, Fifth Committee, 423rd meeting, para. 22 ; New Zealand, Document 4, Fifth Committee, 423rd meeting, para. 29 ; Mexico, Document 6, Fifth Committee,

426th meeting, para. 68.) The representative of Sweden (Document 5, Fifth Committee, 425th meeting, para. 71) agreed both with the representative of the Netherlands that the action of the League had been mistaken, and with the representative of France that the case was not similar to those before the General Assembly.

81. As will be noted, some representatives who had favoured payment and had joined in many of the foregoing arguments against the right of review of decisions by the General Assembly, stated or implied that in exceptional circumstances, which they did not believe existed in the cases under consideration by the General Assembly, the Assembly might have a right to refuse payment of the awards. (See paragraphs 95-101 following.)

B. *Question (2). If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such right ?*

82. During the discussion in the Fifth Committee, a number of representatives suggested various grounds which they believed might justify the General Assembly in refusing to give effect to awards made by the Administrative Tribunal. Some of these grounds were put forward in support of their position by representatives of Member States who opposed payment. In other instances certain representatives who favoured the appropriation, nevertheless suggested that in special circumstances the General Assembly might be justified in withholding payment.

1. *Grounds for refusing to give effect to awards, suggested by representatives opposing payment*

83. The representative of the United States (Document 1, Fifth Committee, 420th meeting, paras. 30, 42 and 70) suggested that the General Assembly should refuse to pay the compensation awarded for the following reasons :

(1) The Tribunal had misconstrued its role and exceeded its proper powers.
(2) The Tribunal had made serious errors of law in its application of the Staff Regulations.
(3) The Tribunal had made errors of judgment and fact in calculating the amounts of the awards.

84. With respect to the first point, the representative of the United States stated that the Tribunal had misconstrued its role and exceeded its proper powers by substituting its judgment in certain areas of administration for that of the Secretary-General. (Document 1, Fifth Committee, 420th meeting, para. 31.) Specifically, he believed that, contrary to the intention of the General Assembly, the Tribunal had, in the field of disciplinary action, usurped the functions of the Secretary-General under the Charter.

He considered that it had acted as though its function was to try cases *de novo*, had ignored the function of the Secretary-General to prescribe standards of conduct and service, and had substituted its evaluation of the facts and its assessment of the gravity of the offence for those of the Secretary-General. His Government "could not view lightly an infringement by a subordinate administrative body of the General Assembly of the powers granted to the Secretary-General under the Charter". (Document 1, Fifth Committee, 420th meeting, paras. 27, 43-59, see particularly paras. 50, 58 and 59.)

85. With respect to the second point, the representative of the United States believed that among serious errors of law made by the Tribunal in the application of the Staff Regulations were, first, the reversal of the Secretary-General's decision on the effect of the refusal of certain staff members, on the basis of the provision against self-incrimination in the Fifth Amendment to the Constitution of the United States, to answer questions concerning subversive activities which had been put to them by the authorities of their Government (Document 1, Fifth Committee, 420th meeting, paras. 60-66) ; and second, the decision in one case which ignored the intention of the General Assembly to give the Secretary-General complete discretion in terminating temporary-indefinite contracts under Staff Regulation 9.1 *(c)*. (Document 1, Fifth Committee, 420th meeting, paras. 67-68.)

86. With respect to the third point, the representative of the United States believed that the Tribunal had made errors of judgment and fact in calculating the amounts of the awards, as he considered its reasons given for the variations in the amounts of these awards to be conflicting, inconsistent, and often merely capricious. Certain of the reasons given, he believed, did not correspond with known facts. (Document 1, Fifth Committee, 420th meeting, para. 69.)

87. The representative of Australia (Document 2, Fifth Committee, 421st meeting, para. 29) argued that certain of the awards should be reduced for the following reasons :

(1) Some of the awards were manifestly excessive.
(2) If the awards were given effect, serious inequality of treatment among the applicants would be produced.
(3) The Tribunal had in many cases allowed its awards to be influenced by wrongful considerations of what was called "expectancy of employment" and by erroneous interpretation with respect thereto.
(4) The Tribunal had allowed its assessment of compensation to be influenced by quite irrelevant considerations.
(5) The Tribunal had in certain cases been under a misapprehension regarding certain facts.

(For discussion by the representative of Australia of specific cases illustrating the foregoing points, see Document 2, Fifth Committee, 421st meeting, paras. 30-34.)

88. The representative of Australia (Document 2, Fifth Committee, 421st meeting, para. 26) also suggested that the General Assembly would not be bound to accept decisions of the Administrative Tribunal in the following hypothetical cases :

(1) If the Tribunal were to flout the authority of the General Assembly.
(2) If it were to act perversely or unreasonably.
(3) If it were to act capriciously or were to condone capriciousness on the part of the Secretary-General.
(4) If it were to exceed its jurisdiction.
(5) If it were to act with venality.
(6) If its decisions or its awards were to produce or accentuate an injustice rather than to correct it.

89. In addition, the representative of Australia said the United Nations should pay compensation only if it was not unreasonable or discriminatory and if the Tribunal had not exercised its power improperly. (Document 2, Fifth Committee, 421st meeting, para. 28.)

90. The representative of the Dominican Republic (Document 4, Fifth Committee, 423rd meeting, para. 56) opposed payment of awards on the following grounds :

(1) They were contrary to fundamental principles of law.
(2) They trespassed on the disciplinary powers of the Secretary-General.
(3) They exposed the host country to serious risks and obliged it to contribute to payment of compensation to persons lacking the impartiality and integrity required of international civil servants.

91. The representative of China believed that the General Assembly could refuse to pay compensation awarded by the Administrative Tribunal if it considered that the Tribunal had exceeded its competence. (Document 2, Fifth Committee, 421st meeting, para. 9.) He considered that the Tribunal had entered the field of disciplinary action which lay within the exclusive competence of the Secretary-General. (Document 2, Fifth Committee, 421st meeting, paras. 3-8, particularly para. 6.)

92. The representative of Cuba opposed the payment of awards as he believed the Tribunal's judgments infringed the powers of the General Assembly and of the Secretary-General. (Document 4, Fifth Committee, 423rd meeting, para. 10.) The Tribunal had fixed the amount of the awards arbitrarily and they were punitive rather than compensation for damages sustained. (Document 4, Fifth Committee, 423rd meeting, para. 15.)

93. The representative of Liberia (Document 4, Fifth Committee, 423rd meeting, para. 49) believed that the General Assembly should review and adjust the awards of the Administrative Tribunal before making payment because of serious inequalities which he believed existed in these awards.

94. The representative of Argentina (Document 2, Fifth Committee, 421st meeting, para. 52) "opposed the appropriation of funds to be used for the payment of indemnities to staff members terminated, not for administrative reasons, but for considerations which concerned a Member State".

2. *Possible grounds for refusing to give effect to awards, suggested by representatives favouring payment*

95. Certain representatives of Member States who favoured giving effect to the awards, nevertheless indicated the possibility that certain grounds might exist on which the General Assembly in other cases would be justified in withholding payment.

96. The representative of India (Document 5, Fifth Committee, 425th meeting, paras. 44 and 49) believed that even if in theory the General Assembly had a right to review decisions of the Tribunal, it would not or should not exercise this right in practice except for the gravest reasons. His delegation had not found such reasons in the present case. The Tribunal had not acted on false evidence, misinterpreted the Staff Regulations, or substituted its decision for that of the Secretary-General.

97. The representative of New Zealand said that nothing short of the clearest proof of the Administrative Tribunal's failure to discharge its duties in a responsible way would justify the General Assembly in declining to approve the awards. (Document 4, Fifth Committee, 423rd meeting, para. 39.) As an illustration of what the representative of New Zealand would consider gravest reasons justifying the decision to set aside a judgment of the Administrative Tribunal, he said that a decision of the Tribunal might be so demonstrably wrong that the General Assembly would be justified in refusing to give it effect : such as in the case proposed by the United States representative of an award of compensation amounting to several million dollars ; or a decision similar to that which had come before the League of Nations in 1946. In the cases in question, however, he considered that the Tribunal was competent and that the compensation was not so excessive that the General Assembly ought to refuse to pay it. (Document 4, Fifth Committee, 423rd meeting, para. 29.)

98. The representative of the Netherlands (Document 2, Fifth Committee, 421st meeting, para. 19) called attention to the fact that many arbitral awards had been rejected in the past because the parties to the awards considered that the court had exceeded its terms of reference. He also referred to the draft Convention on

Arbitral Procedure submitted by the International Law Commission and discussed in the Sixth Committee (A 2456). Article 30 of that draft provided that the validity of an award could be challenged by either party on one or more of the following grounds: that the Tribunal had exceeded its powers, that there had been corruption on the part of a member of the Tribunal, or that there had been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award. On any of these grounds the International Court of Justice was to be competent to void the arbitral award. (Article 31.) The representative of the Netherlands was of the opinion, however, that none of these grounds were applicable in the particular cases in question.

99. The representative of Mexico (Document 6, Fifth Committee, 426th meeting, para. 68), referring to the decision taken by the League of Nations in 1946, stated that the League Assembly had refused to implement the decisions of its Tribunal on the ground that the latter, instead of confining itself to the study of particular cases, had encroached on the legislative competence of the League Assembly. The position of the League Assembly had therefore been perfectly sound. The present case was different. The Administrative Tribunal had not encroached on the General Assembly's legislative domain. (See also statements of representatives of France, Document 1, Fifth Committee, 420th meeting, para. 71; Colombia, Document 2, Fifth Committee, 421st meeting, para. 46; the United Kingdom, Document 4, Fifth Committee, 423rd meeting, para. 22.)

100. The representative of the United Kingdom (Document 4, Fifth Committee, 423rd meeting, para. 22) believed that the General Assembly was not always bound by the judgments of the Administrative Tribunal. He said, however, that "It might have been expected that all delegations would agree that, if the Tribunal had acted within its competence and had interpreted and applied the Staff Regulations correctly, the General Assembly ought to vote the appropriations required to pay the compensation." The representative of Uruguay (Document 3, Fifth Committee, 422nd meeting, para. 47) said that "In the particular cases under discussion the Tribunal had by no means tried to substitute its authority for that of the General Assembly, nor had it overruled nor even reviewed any of the General Assembly's decisions." Neither the representative of the United Kingdom nor the representative of Uruguay stated precisely what they considered the effect would be if the position had been different.

101. The representative of Chile (Document 7, Fifth Committee, 427th meeting, para. 29), although believing the General Assembly was not entitled to review judgments of the Administrative Tribunal, and while not expressing his views on the particular cases in question, considered that in voting on the various sections of the United Nations budget, it was possible to cast a negative vote on a

certain section because it was considered to be excessive without in any way contesting the legality of the purpose for which the funds were intended.

3. *"Grounds" considered as not justifying refusal to give effect to awards by representatives favouring payment*

102. Certain representatives who favoured payment of the awards directed their remarks to certain grounds which had been put forward by other representatives as justifying a refusal by the General Assembly to give effect to the awards, and stated that they did not agree that such grounds would justify the Assembly in withholding payment.

103. With respect to the argument concerning excessive awards, the representative of Belgium (Document 5, Fifth Committee, 425th meeting, para. 61) stated that the United Nations could not refuse to pay indemnities on the grounds that the sums fixed were too high. The representative of Mexico (Document 6, Fifth Committee, 426th meeting, para. 69) said that he appreciated the view that the amount of compensation awarded was excessive. His delegation had approved the amendment to Article 9 of the Statute limiting the amount of compensation which might be awarded. That amendment, he believed, could not be retroactive and the General Assembly was bound to authorize payment in the amount fixed by the Tribunal. (See also statements by the representatives of Colombia, Document 2, Fifth Committee, 421st meeting, para. 40, and Canada, Document 4, Fifth Committee, 423rd meeting, para. 4.)

104. With respect to the question of interpretation, the representative of the Netherlands (Document 2, Fifth Committee, 421st meeting, para. 19) said that quite possibly the Tribunal might not construe the pertinent articles of the Statute or the Staff Regulations in the same way as the Secretary-General, the General Assembly or certain Member States, but that did not mean that it had exceeded its powers.

105. As to alleged mistakes of fact, the representative of New Zealand (Document 4, Fifth Committee, 423rd meeting, para. 37) suggested that "If, as had been suggested, certain relevant facts had not been put before the Tribunal, there would be no objection to the Secretary-General's communicating the additional information to the Tribunal so that it could, if it chose, reconsider the amount of compensation."

4. *Additional comments of representatives concerning competence*

106. Among the grounds suggested for refusal to give effect to awards, the question of competence was most widely discussed. As has been noted above, the representatives of the United States, Australia, Dominican Republic, China, Cuba, New Zealand, Netherlands and Mexico referred to lack of competence or excess of power

either as a grounds or as a possible grounds on which awards might be set aside. In addition to those references already cited (see paras. 64, 83-84, 88-92, 97-100 above), note may be taken of the following. The representative of New Zealand (Document 4, Fifth Committee, 423rd meeting, paras. 30-35) discussed the particular issues in detail and concluded that in the cases in question the Tribunal had been competent. A number of other representatives stated that the Administrative Tribunal had been competent in the cases under consideration by the General Assembly. (Colombia, Document 2, Fifth Committee, 421st meeting, para. 44 ; Uruguay, Document 3, Fifth Committee, 423rd meeting, para. 47 ; Sweden, Document 5, Fifth Committee, 425th meeting, para. 70 ; Denmark, Document 5, Fifth Committee, 425th meeting, para. 72.)

107. The representative of Canada (Document 4, Fifth Committee, 423rd meeting, para. 3) said that under Article 2, paragraph 3, of the Statute, disputes concerning competence were to be settled by decision of the Tribunal. In the cases under discussion, the question of competence did not arise, and had not been raised by the Secretary-General. The representative of India (Document 5, Fifth Committee, 425th meeting, paras. 44-45) considered that the Statute conferred on the Tribunal the competence it had exercised in the cases in question. The Tribunal was the judge of its own competence.

108. The representative of the Union of Soviet Socialist Republics (Document 5, Fifth Committee, 425th meeting, paras. 53-55) stated that the Tribunal was the sole judge of its competence, and the Fifth Committee could not discuss the issue.

109. The representative of Brazil (Document 5, Fifth Committee, 425th meeting, para. 74) considered that as the Tribunal alone was authorized, by paragraph 3, of Article 2 of its Statute, to settle disputes as to its competence, the allegation that it had exceeded its competence was without force.

110. The representative of Yugoslavia (Document 4, Fifth Committee, 423rd meeting, para. 43) referring to Article 2, paragraph 3, of the Statute, said that even if anyone raised doubts regarding the competence of the Tribunal—and the Yugoslav delegation certainly did not—the General Assembly could not arrogate to itself the right to settle a dispute regarding the competence of the Tribunal.

111. The representative of the Dominican Republic (Document 4, Fifth Committee, 423rd meeting, para. 54) on the other hand, also referring to Article 2, paragraph 3, of the Statute, stated that this provision, for the same reasons (i.e. it was only meant to apply to the parties), did not imply that the General Assembly could not review a decision of the Tribunal concerning its competence.

112. Finally, the representative of Mexico (Document 6, Fifth Committee, 426th meeting, para. 70) stated, with reference to the

joint draft resolution proposed by Canada, Colombia and the United Kingdom, that "If the Court were asked not to re-examine each case but to say whether or not, in its opinion, the Administrative Tribunal had exceeded its competence, his delegation would support the draft resolution."

Part Two : Historical survey of the Administrative Tribunal of the League of Nations

I. Establishment of the League of Nations Administrative Tribunal

113. The League Tribunal was created by a Resolution of 26 November 1927 of the League Assembly (League of Nations Official Journal, 9th Year, No. 5 (May 1928), p. 751; Annex 1) [1]. Before that time the right of appeal of staff members of the League and of the International Labour Office was governed by a Resolution of 17 December 1920 of the League Assembly (Records of the 1st Assembly, Plenary Meetings, pp. 663-664) which provided :

> "That all Members of the Secretariat and of the International Labour Office appointed for a period of five years or more by the Secretary-General or the Director of the International Labour Office shall, in the case of dismissal, have the right of appeal to the Council or to the Governing Body of the International Labour Office as the case may be."

114. This provision was invoked only once, in 1925, when the Council appointed an *ad hoc* commission of jurists to deal with the case of M. François Monod, a member of the League Secretariat. Shortly thereafter the League Supervisory Commission initiated steps which led in 1927 to the creation of the Administrative Tribunal and the abrogation of the Resolution of 17 December 1920.

115. The Supervisory Commission submitted a report and a draft statute (ultimately adopted with one minor change) to the Assembly at its eighth ordinary session in 1927. (Records of the 8th Ordinary Session of the Assembly, Fourth Committee (League of Nations Official Journal, Special Supplement No. 58), pp. 250-257 ; Annex 2.) The report stated that in the course of 1925 attention had been directed to the fact that "officials of the League cannot enforce the terms of their employment by any form of legal procedure", and that the establishment of a Tribunal was expected "not merely to remove a grievance which may be felt by the staff" but also to be in the interest of successful administration. It was not satisfactory that several hundred employees "should have no possibility of bringing questions as to their rights to the decision of a judicial body". It was equally unsatisfactory "for the administrations to be both judge and party in any dispute as to the legal

[1] Relevant extracts from the documents of the League of Nations are reproduced as annexes to the present statement.

rights of their officials, or for such disputes to be referred to the Council or the Governing Body of the International Labour Office".

116. The report then went on to explain the jurisdiction of the proposed Tribunal as follows :

> "Except in one class of case [relating to ill health and service incurred injury] .... the proposed Tribunal is to be exclusively a judicial body set up to determine the legal rights of officials on strictly legal grounds.... The function of the proposed Tribunal will be to pronounce finally upon any allegation that the administration has refused to give an official treatment to which he was legally entitled, or has treated him in a manner which constitutes a violation of his legal rights under his appointment or of the regulations applicable to his case, or, finally, has taken in an irregular or improper manner a decision which was within its competence. An official, for example, who has been dismissed for inefficiency under a proviso in the terms of his appointment which entitles the administration to dismiss him if it is satisfied that he is inefficient will not be able to ask the Tribunal to enquire whether he was really inefficient ; but he will be able to bring any alleged irregularity in the decision (for example, failure to cause a proper enquiry to be made by the competent paritative committee) before the Tribunal with a view to the rescinding of the decision on this ground. It will be seen that the Tribunal will be the final authority for the interpretation of the terms of an official's appointment and the regulations applicable to the official."

117. The Supervisory Commission stated that in considering the composition of the Tribunal it had been guided by the principle that "the Tribunal should be an entirely independent and *strictly judicial* body".

118. In connection with its explanation of remedies which could be given by the Tribunal, the report stated :

> "No provision for the revision of judgments of the Tribunal is inserted in the Statute. It is considered that, in the interests of finality and of the avoidance of vexatious proceedings, the Tribunal's judgments should be final and without appeal, as is provided in Article VI, paragraph 1."

119. As to the financial arrangements for the payment of judgments, the report recommended that a nominal amount of 1,000 francs be inserted in the budgets of the Secretariat and of the International Labour Office "so as to provide an item to which such compensation can be charged if it becomes payable, and that any sum actually required in excess of this nominal vote be provided by a transfer under the usual guarantees".

120. The report and draft statute prepared by the Supervisory Commission were referred to the Fourth Committee of the Assembly, which in turn referred them to a sub-committee (Records of the 8th Ordinary Session of the Assembly, Fourth

Committee (League of Nations Official Journal, Special Supplement No. 58), p. 11 ; Annex 3). The sub-committee's report *(ibid.*, p. 250 ; Annex 2) set out certain arguments against the creation of an Administrative Tribunal (including lack of need for such a Tribunal, the resulting restriction on the powers of the Secretary-General, the difficulty in ascertaining the applicable law, "the absence of real sanctions", and the preferability of a system of arbitration), but concluded that

> "Having carefully weighed the arguments on both sides, the majority of the Sub-Committee came to the conclusion that the provisional establishment of the Tribunal was to be recommended as an experiment."

121. It was recommended that after three years the Assembly should consider whether the Tribunal should remain in being or whether the Statute should be amended.

122. The report of the sub-committee was discussed at the fifth meeting of the Fourth Committee on 17 September 1927 (Records of the 8th Ordinary Session of the Assembly, Fourth Committee (League of Nations Official Journal, Special Supplement No. 58), pp. 35-36 ; Annex 4). The Chairman of the Committee, in opening the debate, said that the proposal for the creation of a Tribunal was an interesting one, "for the League of Nations, which aimed at improving justice in international relations, must also ensure the reign of justice in the relations between the Secretary-General and the Director-General of the International Labour Office and their subordinates". The representative of India, in submitting the report, stated that it was a matter of compromise, and that there had been two currents of opinion. He continued :

> "One of the principal elements in the decision of the Sub-Committee had been what might be called the psychological aspect of the problem. The League of Nations was an organization which endeavoured to encourage arbitration in the international field, and it had been pointed out that its own employees had at present no tribunal where appropriate relief could be claimed regarding matters in controversy between them and the Secretary-General."

123. The Fourth Committee submitted a brief report (Records of the 8th Ordinary Session of the Assembly, Plenary Meetings (League of Nations Official Journal, Special Supplement No. 54), p. 478 ; Annex 5) to the Assembly, which, at its 21st plenary meeting on 26 September 1927, adopted the resolution and draft statute without discussion (*ibid.*, p. 201 ; Annex 6).

124. The resolution provided as follows :

> "Subject to the amendment of form suggested by the Fourth Committee, the Assembly adopts the annexed Statute establishing a League of Nations Administrative Tribunal.

The Assembly of 1931, however, will consider in the light of the experience gained whether there is reason to abrogate or amend the said Statute.

The Assembly's Resolution of December 17th, 1920, giving to certain officials, in case of dismissal, a right of appeal to the Council or to the Governing Body of the International Labour Office is abrogated as from January 1st, 1928."

II. The Statute of the League of Nations Administrative Tribunal

125. The Statute of the League Tribunal (League of Nations Official Journal, 9th Year, No. 5 (May 1928), p. 751 ; Annex 1) is in many respects similar to that of the United Nations Tribunal, for which it served as a basis. Article II (1) of the League Tribunal's Statute provided that :

> "The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the Secretariat or of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case."

126. Article II (2) gave the Tribunal an additional competence to deal with certain claims in case of dismissal on grounds of ill-health or of accident or disease in consequence of employment. Article II (4) provided that :

> "Any dispute as to the competence of the Tribunal shall be decided by it."

127. Article VI provided in part that "judgments shall be final and without appeal". Article IX provided that :

> "In cases falling under Article II, paragraph 1, the Tribunal, if satisfied that the complaint was well-founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him."

128. Article X (3) provided that :

> "Any compensation awarded by the Tribunal shall be chargeable to the budget of the administration concerned."

III. Refusal by the Assembly of the League of Nations to pay awards of compensation made by the League of Nations Administrative Tribunal

129. On 14 December 1939 the Assembly of the League of Nations, to meet the situation resulting from the outbreak of hostilities, adopted amendments to the Staff Regulations of the

League and of the International Labour Office. By these amendments the period of notice of termination of appointment in the case of permanent officials was reduced from six months to one month, and the payment of the compensation for termination of appointment due to such officials was spread over four years. Thereafter, most of the officials who were notified that it would be impossible to retain their services chose either to resign or to have their appointments suspended ; a few, however, refused to take either course, and their appointments were terminated under the amended Staff Regulations. Fourteen officials thus terminated (twelve being League staff members and two being staff members of the International Labour Office) appealed against their terminations.

130. On 26 February 1946 the Administrative Tribunal of the League pronounced judgments in thirteen of these cases, holding that the complainants were entitled to six months' notice, or the payment of six months' salary in lieu thereof ; to compensation equal to one year's salary, payable immediately ; and to four per cent interest on these sums. The total amount of the judgments (excluding costs) was 85,000 Swiss francs. The reasoning of the Tribunal was that the amendments to the Staff Regulations could not be applied to the complainants without their agreement. They had been appointed prior to 15 October 1932, on which date a Staff Regulation was first adopted which made appointments subject to such changes as the Assembly might decide on, and consequently they had an acquired right to be terminated only in accordance with the Staff Regulations in force at the date of their contracts of appointment. The Tribunal found it "impossible to entertain the assumption that the Assembly intended, by its Resolution of December 14th, 1939, to affect acquired rights without expressly so stating". The argument that reasons of *force majeure* justified the application of the 1939 amendments to the complainants was rejected on the ground that "it is in fact impossible to entertain the idea that the League of Nations was not in a position to respect the acquired rights of its staff". Consequently it was held that the Secretary-General had wrongfully applied the 1939 amendments to the complainants (League of Nations Official Journal, Special Supplement No. 194, pp. 245-249 ; Annex 7).

131. The Acting Secretary-General of the League consulted the Supervisory Commission, which dealt with the matter in the report on the work of its ninety-ninth session (League of Nations Official Journal, Special Supplement No. 194, p. 162 ; Annex 8). The report stated in part :

> "The Supervisory Commission, on whose proposal the amendments in question were adopted by the 1939 Assembly, desires to confirm that it was the undoubted intention of the Assembly that the decisions therein embodied should apply to all officials of the League and not only to those whose contracts expressly reserved

the possibility of their modification by the Assembly. The Secretary-General and the Director of the International Labour Office, in applying the decisions to the complainants, have therefore correctly interpreted the Assembly resolution....

As an acceptance of the findings of the Administrative Tribunal would put its decision above the authority of the Assembly, the Supervisory Commission could not take the responsibility of advising the Acting Secretary-General and the Acting Director of the International Labour Office to apply the judgments of the Administrative Tribunal. It has accordingly advised the two Administrations to take no action on them pending consideration of the whole question by the Assembly."

132. The report of the Supervisory Commission (Annex 8) and a note by the Acting Secretary-General explaining the background of the situation (Annex 7) were submitted to the Assembly, which referred the matter to its Second (Finance) Committee. That Committee at its third meeting on 11 April 1946 in turn set up a sub-committee to consider it (League of Nations Official Journal, Special Supplement No. 194, p. 123 ; Annex 9). The sub-committee's report (League of Nations Official Journal, Special Supplement No. 194, pp. 261-263 ; Annex 10) disagreed with the conclusions of the Administrative Tribunal, and recommended that effect should not be given to the awards of compensation, but that an *ex gratia* payment should be made in respect of the complainants' legal costs. The report stated :

"We are entirely unable to accept the Tribunal's interpretation that the Assembly's Resolution was intended to apply to a limited class of officials only. This view seems to be manifestly contrary to the facts. Although there is no ordinary appeal from the Tribunal's decision, we think that it is within the power of the Assembly, which can best interpret its own decisions, by a legislative resolution, to declare that the awards made by the Tribunal are invalid and are of no effect both because they sought to set aside the Assembly's legislative act and because of their mistaken conclusion as to the intention of that act."

133. The sub-committee also stressed that while the Tribunal was competent to consider the application and interpretation of the decisions of the Assembly, it could not question the validity of those decisions themselves. The League in effect possessed sovereign powers in regard to the officials with whom it contracted, and thus its contracts, like those of States, were governed by the exigencies of the public interest, to which private and personal rights must give way. It was "necessary for the proper discharge of the functions of a world organization of States that it should possess a power if necessary to set aside the vested rights of private individuals employed in its administration". The 1939 amendments, unlike some earlier ones, were intended to set aside contractual rights of its officials, and hence were the exercise of a legislative

power. The Assembly could have abolished the Administrative Tribunal, and thus have removed any remedy for dismissed officials ; and the fact that the Tribunal remained did not significantly alter the position.

134. The sub-committee's report added :

> "No outside body exists which can enforce the decision of the Tribunal against the Assembly, and this is a not irrelevant consideration in deciding whether the Assembly is sovereign in this matter and whether the dismissed officials have any right against it. By statutory provision and diplomatic usage, no remedy is available against the League ; where, then, is the officials' right against it ? *Ubi jus ibi remedium*, and the absence of any remedy in the circumstances of this case here leads to the conclusion that there is no legal right. If only an ethical right is claimed, the protection against its abuse is not a legal but a political one lying in the hands of the States Members of the League."

135. The report of the sub-committee was discussed at the sixth meeting of the Second Committee on 13 April 1946 (League of Nations Official Journal, Special Supplement No. 194, pp. 130-133 ; Annex 11). It was presented by the rapporteur of the sub-committee, the representative of the United Kingdom, who repeated the main arguments of the report, but stated that "although he was a lawyer he approached this matter on the broad basis of what was politic and right rather than on the basis of what might be strictly in accordance with the law". In his view, there was in fact no law which applied to a case like this. He urged the Committee to concern itself not only with justice to the former staff members, but also with the status of the Assembly ; he thought that "It was of profound importance to uphold the legal and diplomatic immunity acquired both for the League and for the United Nations and to maintain their high and special status."

136. The representative of France agreed with the report ; he stated that legally the Tribunal's judgments should not be recognized as valid, and practically a decision to the contrary would entail financial consequences which it would be difficult to entertain. The representative of Czechoslovakia also agreed with the report, and stressed that the Administrative Tribunal was not competent to pass judgment on the decisions of the Assembly ; the Tribunal was subordinate to the Assembly and could not bind it by invoking earlier decisions.

137. On the other hand, several representatives believed that the Assembly was legally obligated to pay the awards of compensation made by the Administrative Tribunal. The representative of Belgium, with whom the representatives of Sweden and the Netherlands agreed, declared that the Assembly, as an organ of one of the parties to the dispute, had no legal right to oppose the execution of a judgment of the Tribunal ; such an action

would be absolutely contrary to the notion of law and the sovereignty of law, and would have extremely serious repercussions in an international organization in which constant efforts had been made to substitute law for force. He said that though the Assembly might have abolished the Tribunal, this had not been done. In his view,

> "When the Administrative Tribunal was established, the power of interpreting questions of law and of determining the legal relations between the League and its officials, which had previously been attributed to the Council, a political organ, had been transferred to the Tribunal, a judicial organ. If, therefore, the Tribunal was invested with the power of interpretation, it followed that its interpretations were operative."

138. He considered that the question was not whether the Assembly was competent to render operative a judgment of the Administrative Tribunal, but whether the Assembly was competent to prevent the execution of a judgment rendered in a matter in respect of which the competence of the Tribunal was not contested.

139. The representative of the Netherlands added that since the League was a party to the cases, it was not for the Second Committee to examine the merits of the awards. No appeal was provided in the Statute of the Tribunal, and consequently the awards had to be accepted. States almost without exception accepted judicial or arbitral decisions, and it would be extremely regrettable if the League did not do likewise.

140. The representative of Belgium contested the assertion that there was no law governing the case. The contract entered into between the League and its officials constituted a legal relation, and the Assembly had set up the Tribunal as a judicial body to interpret that contract. There was no analogy between the legislative authority of a State, which in certain circumstances could modify contracts, and the Assembly, which did not possess sovereignty but was dealing with League officials who were not subjects but co-contracting parties. Moreover even in States possessing sovereignty, if contracts were amended by the legislative authority, no tribunal had the right to give retrospective effect to such amendments unless the new law made express provision therefor. The absence of a remedy against the League of Nations did not mean that it was governed by no law. Furthermore, reasons of necessity could not at that time be invoked as a ground for refusal to execute the judgments.

141. The report of the sub-committee recommending that the awards should not be paid was adopted by the Second Committee by a vote of 16 to 8, with 5 abstentions. The report was then incorporated in Chapter IV of the report of the Second Committee to the Assembly, together with a summary of the arguments made

by the minority of the Committee (League of Nations Official Journal, Special Supplement No. 194, pp. 261-264; Annex 10).

142. During the discussion of Chapter IV of the report at the seventh plenary meeting of the Assembly on 18 April 1946 (League of Nations Official Journal, Special Supplement No. 194, p. 61; Annex 12), the representative of Belgium recalled his arguments against the adoption of the sub-committee's views. Then, speaking for his own delegation and for those of Denmark, Iran, Luxembourg, the Netherlands, Sweden and Switzerland, he expressed regret at the refusal to execute the judgments and made formal reservations in respect alike of the decision and of several of the considerations on which it was based. The report of the Second Committee was then adopted, and consequently effect was not given to the awards of compensation.

Part Three: Legislative history of the establishment of the United Nations Administrative Tribunal

I. HISTORICAL SURVEY

A. *Preparatory Commission of the United Nations*

143. The question of the establishment of an Administrative Tribunal for the United Nations was considered as early as the autumn of 1945 by the Preparatory Commission of the United Nations and by its Executive Committee. The Report of the Executive Committee to the Preparatory Commission dated 12 November 1945 (Document 32, PC/EX/113/Rev. 1) recommended in paragraph 76 that early consideration should be given to the advisability of establishing an Administrative Tribunal to adjudicate on any complaint lodged against the Organization by an official in connection with the fulfilment of the terms of his contract (Document 32, para. 76).

144. A revised text of this paragraph of the Executive Committee Report was submitted to Committee Six (Administrative and Budgetary Committee) of the Preparatory Commission on 15 December 1945 by its Sub-Committee on Staff Regulations (Document 35, PC/AB/45). This revised text was discussed by Committee Six and approved without change. (Document 38, Summary Record of 24th meeting of Committee 6; Document 36, PC/AB/56; Document 37, PC/AB/56/Rev. 2.)

145. The Report of the Preparatory Commission (Document 33, PC/20, para. 74) dated 23 December 1945 recommended as follows:

> "An Administrative Tribunal should be established at an early date. It should be competent to adjudicate on any dispute arising in connection with the fulfilment of an official's contract. The Secretary-General should be authorized to appoint a small advisory committee, possibly including representatives of the staff, to draft

for submission to the Assembly a statute for this Tribunal. The Tribunal might include an expert on relations between employers and employees in addition to legal experts."

B. *First part of the First Session of the General Assembly*

146. The section of the Report of the Preparatory Commission on the Organization of the Secretariat which contained the above reference to the Administrative Tribunal, was considered by the Fifth Committee (Administrative and Budgetary Committee) of the General Assembly during the first part of the first session. The records, however, contain no discussion on the subject of an Administrative Tribunal. The General Assembly gave effect to the recommendation of the Preparatory Commission concerning an Administrative Tribunal by authorizing, in Resolution 13 (I) adopted on 13 February 1946 on the recommendation of the Fifth Committee, the Secretary-General to appoint a small advisory committee, possibly including representatives of the staff, to draft for submission to the second part of the first session of the General Assembly, a statute for an Administrative Tribunal (Document 39/A/41 and Document 40).

C. *Advisory Committee on a Statute for a United Nations Administrative Tribunal*

147. Pursuant to General Assembly Resolution 13 (I), a Committee was appointed which met at Lake Success from 16 to 26 September 1946. The membership of the Committee was: Thanassis Aghnides, Chairman; Manley O. Hudson; Joseph Nisot; Ladislav Radimsky; and the following staff members: Jean Herbert; Frank Begley (alternate); M. Perez-Guerrero; J. G. Stewart (alternate); Marc Schreiber; E. Ranshofen-Wertheimer (alternate); and Isobel Wallace. The Committee on the completion of its work submitted a Report containing a Draft Statute for an Administrative Tribunal. This report and draft statute will be found as Annex III of Document 60, A/986.

D. *Second part of the First Session of the General Assembly*

148. The Report of the Advisory Committee on a Statute for the United Nations Administrative Tribunal was submitted by the Secretary-General to the second part of the first session of the General Assembly and was referred to the Fifth Committee which discussed the question at its Twenty-fifth and Twenty-sixth Meetings on 15 and 16 November 1946 (Documents 41 and 42). Certain representatives expressed the view that it was undesirable to establish a Tribunal at that time, and the Delegation of the United States presented a proposal that an Administrative Council, composed of representatives of the staff and the Administration, should be created by the Secretary-General as an alternative to an Administrative Tribunal (Document 45, A/C.5/56). The Com-

mittee decided, rather than taking a vote on the principle of whether or not a Tribunal should be established, to invite the Secretary-General to make a study of the matter and, meanwhile, to postpone the question until the next session of the General Assembly (Document 42, Fifth Committee, 26th meeting).

E. *First part of the Third Session of the General Assembly*

149. The question of an Administrative Tribunal was not included in the agenda of either the second or third sessions of the General Assembly, as conversations were in progress on the subject between the Specialized Agencies and the United Nations. However, at the first part of the third session, in the course of the consideration by the Fifth Committee of other items on its agenda, the representatives of Belgium and Poland asked that the General Assembly consider the immediate establishment of a Tribunal (Document 46, Fifth Committee, 107th meeting; Document 47, Fifth Committee, 159th meeting; Document 48, Fifth Committee, 168th meeting). The representative of Poland submitted a request for the inclusion of this subject in the agenda of the third session of the General Assembly. (Document 49, A/755.) The representative of Belgium, on the other hand, submitted a draft resolution to the Fifth Committee which would have invited the Secretary-General to submit a plan for an Administrative Tribunal to the fourth session of the General Assembly. (Document 50, A/C.5/261.) The Secretary-General informed the Fifth Committee at its 168th Meeting on 29 November 1948 (Document 48) that he planned to submit a full report on the subject to the fourth session of the General Assembly. In the light of this statement the draft resolution of the representative of Belgium was withdrawn, and the item proposed by the representative of Poland was not included in the agenda of the third session.

F. *Fourth Session of the General Assembly*

150. The Secretary-General submitted his Report on the Establishment of the United Nations Administrative Tribunal to the fourth session of the General Assembly on 21 September 1949 (Document 60, A/986). Annex I of this Report contained the Secretary-General's proposal for a Statute of the United Nations Administrative Tribunal, for the preparation of which he had relied heavily on the views expressed and the draft statute submitted in 1946 by the Advisory Committee on a Statute for a United Nations Administrative Tribunal. The principal departures of the Secretary-General from the earlier draft are explained in paragraph 5 of his Report (see Document 60, A/986, para. 5).

151. Annex II of the Secretary-General's Report contained his proposal for an amendment to the Staff Regulations consequential

to the establishment of a Tribunal. Annex III contained the Report and Draft Statute prepared by the Advisory Committee on a statute for a United Nations Administrative Tribunal; and an expression of the views of the Staff Committee was attached as Annex IV. Other views of the Staff Committee are to be found in Document 61, A/986/Add.1, and in an oral statement by the Chairman of the Staff Committee to the 190th Meeting of the Fifth Committee (Document 54, paras. 7-26).

152. The General Assembly at its 224th Meeting on 22 September 1949 (Official Records of the Fourth Session of the General Assembly, Plenary Meetings, p. 23), referred the Secretary-General's Report to the Fifth Committee. The Fifth Committee also had before it the views of the Advisory Committee on Administrative and Budgetary Questions contained in its Fifth Report of 1949 (Document 62, A/1003).

153. The Fifth Committee conducted a general discussion on the subject at its 187th to 190th meetings from 29 September to 5 October 1949. (Documents 51-54.) After adjourning consideration of the subject until 2 November 1949 (Document 65, A/C.5/L.5; Document 54, Fifth Committee, 190th meeting, paras. 29, 30, 37), the Fifth Committee proceeded to an article by article discussion and vote on the Statute at its 114th to 116th meetings (Documents 55, 56, 57) from 2 to 4 November 1949, and at its 221st meeting (Document 58) on 8 November 1949.

154. As a basis for this consideration, the Committee had before it a document (Document 64, A/C.5/L.4/Rev.2) submitted by the Secretary-General which contained a revised draft of the Statute which had been prepared by the Secretary-General after further consultation with the Staff Committee and in the light of amendments proposed by Delegations. The document also listed the amendments to each article proposed by the Advisory Committee and by various Delegations. The Secretary-General had been informed by the Staff Committee that the revised draft was acceptable from the staff point of view.

155. The Fifth Committee, at its 221st meeting on 8 November 1949, approved the Draft Statute as a whole by 39 votes to 2, with 2 abstentions (Document 58, para. 35), and recommended it for adoption in its Report to the General Assembly (Document 68, A/1127 and Corr. 1). The history of the consideration of this question by the Fifth Committee, with a summary of views and a record of decisions, is contained in this report.

156. The Report of the Fifth Committee was considered by the General Assembly at its 255th meeting on 24 November 1949 (Document 59). The Assembly accepted certain amendments proposed jointly by Belgium, Egypt, France, the Netherlands and Venezuela to Article 3 of the Statute, which dealt with the membership of the Tribunal (Document 69, A/1132).

157. Resolution 351 (IV) establishing the Administrative Tribunal was adopted by the General Assembly by 48 votes to none, with no abstentions (Document 59, para. 41). The text of this Resolution will be found in Document 70.

G. *Amendment of Article 9 of the Statute at the Eighth Session of the General Assembly*

158. The Statute of the United Nations Administrative Tribunal, as adopted by the fourth session of the General Assembly, remained unchanged at the time that the cases which gave rise to the present questions were decided. Subsequent to the judgments in these cases, however, the Secretary-General recommended to the eighth session of the General Assembly the revision of Article 9 of the Statute as he considered such revision desirable in the light of experience.

159. The General Assembly records relating to the amendment of Article 9 of the Statute of the Administrative Tribunal have not been included in the Dossier submitted to the Court under Article 65 of its Statute, but are contained in the Background Documents (Group II), two copies of which have been made available to the Court. For a brief account of the amendment of Article 9, reference is made to Background Documents (Group II), Document 20, A/2533, Report of the Secretary-General on Personnel Policy, paras. 81-87, and Document 29, A/2615, Report of the Fifth Committee, paras. 48-53. The text of the amendment to Article 9, adopted by the General Assembly, is found in Background Documents (Group II), Document 30, General Assembly Resolution 782 B (VIII) of 9 December 1953.

160. Views expressed by representatives of Member States during the discussion of the Secretary-General's Report on Personnel Policy in the Fifth Committee will be found in Background Documents (Group II), Documents 1-18, 406th to 422nd and 426th meetings, 18 November to 7 December 1953. The paragraphs in these documents relating to the Administrative Tribunal are given in the list accompanying Background Documents (Group II) [1]. The specific consideration of and voting on the revised Article 9 of the Statute of the Administrative Tribunal by the Fifth Committee is contained in Background Documents (Group II), Document 13,

[1] Statements made by the representatives in the Fifth Committee which are contained in Background Documents (Group II) and which particularly relate to the payment of awards of the Administrative Tribunal are as follows: Sweden, Document 2, 407th meeting, para. 27; United States, Document 2, 407th meeting, paras. 35-51; Argentina, Document 3, 408th meeting, paras. 34-35; Uruguay, Document 3, 408th meeting, para. 70; Cuba, Document 4, 409th meeting, para. 7; Egypt, Document 4, 409th meeting, paras. 8 and 17; Denmark, Document 4, 409th meeting, para. 50; Poland, Document 5, 410th meeting, para. 6; France, Document 5, 410th meeting, para. 22; Czechoslovakia, Document 6, 411th meeting, para. 54; Indonesia, Document 6, 411th meeting, para. 62; Lebanon, Document 7, 412th meeting, para. 57; Australia, Document 8, 413th meeting, para. 76; India, Document 9, 414th meeting, para. 6; Turkey, Document 9, 414th meeting, para. 10.

418th meeting, paras. 1-21. The approval by the General Assembly of the Resolution containing the revised Article 9 of the Statute will be found in Background Documents (Group II), Document 19, 471st Plenary Meeting, 9 December 1953.

II. Summary of views which may throw light on questions submitted to the Court

161. It is not intended in the following sections to summarize all issues which were discussed in connection with the establishment of the United Nations Administrative Tribunal. A summary of the views expressed in the Fifth Committee during the fourth session, as has already been noted, will be found in the Fifth Committee Report (Document 68, A/1127 and Corr. 1), and a more complete account is to be found in the summary records. The following summary will be confined to those views which relate to matters which were referred to in the discussion at the eighth session of the General Assembly of the proposal of the Secretary-General for the appropriation of funds necessary for the payments of the awards of the Administrative Tribunal, and which may be of interest in connection with the questions submitted to the Court.

A. *Article 10, paragraph 2—"Final and without appeal"*

162. There was little direct discussion of the meaning of the provision in Article 10, paragraph 2, of the Statute of the Tribunal that "the judgment shall be final and without appeal". The text of this paragraph appeared in its present form in the draft statute originally submitted by the Advisory Committee on a statute for the United Nations Administrative Tribunal (Document 60, A/986, Annex III, Article 11 (2)). In fact, an identical provision will be found in Article 6 of the Statute of the Administrative Tribunal of the League of Nations (see Annex I) and in Articles 60 of the Statutes of the Permanent Court of International Justice and of the International Court of Justice. The wording of this paragraph underwent no change during the course of its consideration by the General Assembly, and Article 10 was approved without discussion of this paragraph by a vote of 32 to none, with 1 abstention, at the 221st meeting of the Fifth Committee. (Document 58, paras. 6-7.)

163. Perhaps the nearest approach to a discussion of the subject matter of this paragraph came in the preliminary consideration of the establishment of the Tribunal at the second part of the first session of the General Assembly. The representative of Belgium, at the 25th meeting of the Fifth Committee on 15 November 1946 (Document 41), asked the Rapporteur of the Fifth Committee whether the decisions of the Administrative Tribunal would be final or whether they would be subject to a revision by the General

Assembly. The Rapporteur (Mr. Aghnides of Greece, who had served as Chairman of the Advisory Committee on a statute for a United Nations Administrative Tribunal) replied that, according to the Draft Statute as prepared by the Advisory Committee, there could be no appeal from the judgment of the Administrative Tribunal. The Advisory Committee feared an adverse effect on the morale of the staff if an appeal beyond the Administrative Tribunal delayed the final decision in a case which had already been heard before organs within the Secretariat created for that purpose.

164. Previously the question had been raised before the Sixth Committee of the Preparatory Commission as to whether the Administrative Tribunal or the Secretary-General should have the last word on disputes submitted to the Tribunal. "The general sense of the Committee was that the Administrative Tribunal was a Supreme Court and that its decisions were final" (Document 38).

165. The only mention in the fourth session of the General Assembly of paragraph 2 of Article 10 of the Statute came during the discussion of the preceding article. The representative of Haiti believed that the provision of Article 9, giving the Secretary-General the right to decide that a decision for specific performance of an obligation was impossible or inadvisable and to ask the Tribunal to fix compensation in lieu thereof was "contradictory to the second paragraph of Article 10, as it implied that the Secretary-General would have power to determine the nature of the Tribunal's decision". (Document 57, Fifth Committee, 216th meeting, para. 30.) The representative of China agreed that the phrase "in the opinion of the Secretary-General" in Article 9 was unfortunate as implying that the Secretary-General could veto the Tribunal's decision. (Document 57, Fifth Committee, 216th meeting, para. 31 ; see also statements of the representatives of Brazil and Poland, Document 57, Fifth Committee, 216th meeting, paras. 1 and 20.)

166. On the other hand, the representative of Israel expressed the view that there was no necessary inconsistency between Article 9 (which gave the Secretary-General a choice between payment of compensation and specific performance) and Article 10 (which provided that judgments of the Tribunal should be final and without appeal). The "exercise of the option, he said, would be reflected in the judgment of the Tribunal by the time the judgment would be rendered, since the Tribunal had no discretion but was bound under Article 9 to give effect to an exercise of option properly made. Once the judgment was given, it was, therefore, indeed 'final' within the meaning of Article 10, and thus that Article appeared reconcilable with Article 9." (Document 57, Fifth Committee, 216th meeting, para. 39 ; see also statements of representatives of the Secretary-General and of Belgium, Document 57, Fifth Committee, 216th meeting, paras. 8 and 11.)

167. Other statements were made to the effect that the judgments were final, but without discussion of the meaning of the term. (See statements of the Chairman of the Advisory Committee on Administrative and Budgetary Matters, Document 52, 5th Committee, 188th meeting, para. 75 ; Document 53, Fifth Committee, 189th meeting, para. 17.)

B. *Article 2, paragraph 3—Tribunal decides competence*

168. There was more discussion of paragraph 3 of Article 2 of the Statute, which provides that "in the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by decision of the Tribunal". The text of this paragraph also appeared in its present form in the original draft submitted by the Advisory Committee on a statute for a United Nations Administrative Tribunal (Document 60, A/986, Annex III, Article 2 (3)) and underwent no alteration during its consideration by the General Assembly. It likewise was based on a similar provision in Article 2, paragraph 4, of the Statute of the Administrative Tribunal of the League of Nations, and similar provisions are found in the Statutes of the Permanent Court of International Justice (Article 36, para. 4) and of the International Court of Justice (Article 36, para. 6).

169. During the general discussion of the question of the establishment of an Administrative Tribunal by the Fifth Committee at the fourth session of the General Assembly, the representative of the Union of Soviet Socialist Republics, in commenting on Article 2, paragraph 3, stated that the question of the limits of its competence seemed hardly for the Tribunal itself to decide, but for the body which set it up, namely the General Assembly. If necessary, the duty might be delegated to a subsidiary body such as the Advisory Committee. (Document 53, Fifth Committee, *189th meeting, para. 15.)*

170. The Chairman of the Advisory Committee on Administrative and Budgetary Questions thought that the suggestion that the Tribunal would not be the proper authority to judge the limits of its own competence was difficult to understand, since even committees normally established their own rules of procedure and competence. Moreover, should a claimant declare the Tribunal not competent to hear his case, a long delay might result before a decision could be obtained from the General Assembly, which in any case should not be bothered with such details. (Document 53, Fifth Committee, 189th meeting, para. 18.)

171. During the discussion of Article 2, at the 214th meeting of the Fifth Committee, on 2 November 1949, the representative of Canada, referring to paragraph 3, remarked that he would have preferred that such decisions be taken by the General Assembly rather than by the Administrative Tribunal. (Document 55, para. 72.)

The representative of Belgium expressed astonishment at this suggestion: he said that the United Nations had decided to set up a judicial organ and it would be inconceivable, according to regular legal procedure, for a political organ to decide on the competence of a judicial one. In the event of a dispute, it was undoubtedly for the Administrative Tribunal itself to settle the question. He pointed out that the Appeals Board—an organ with less prestige than the proposed Administrative Tribunal would have—had been given authority to settle the question of its own competence in the event of a dispute. (Document 55, para. 73.)

172. At the request of the Chairman, Mr. Feller (Secretariat) explained that it was an established rule in law that any tribunal was entitled to settle the question of its competence itself. It was also an established rule that all the organs of the United Nations should decide on their own competence in the first instance. It would, therefore, be difficult to reserve that power to the General Assembly and, if the Assembly were to wield it effectively, its agenda would be greatly overloaded. (Document 55, para. 74.) The representative of Sweden said that if the Canadian suggestion were followed, it would be essential to set up complicated machinery which had not yet been needed. (Document 55, para. 76.)

173. The Chairman of the Advisory Committee on Administrative and Budgetary Questions asked the representative of Canada not to press for the amendment of paragraph 3 which simply applied a long-established principle to the particular case of the Administrative Tribunal. (Document 55, para. 75.) The representative of Canada agreed not to press his point. (Document 55, para. 77.) Article 2 was then approved by the Fifth Committee by 38 votes to none, with 1 abstention. (Document 55, para. 82.)

C. *Nature of the Tribunal*

174. It will be recalled that during the discussion at the eighth session of the General Assembly of the Secretary-General's proposal for the payment of the awards, considerable attention was given to the question of the nature of the Administrative Tribunal. In the records relating to the establishment of the Tribunal there are various statements which may be of interest in this regard.

1. *References to the nature of the Tribunal*

(a) *Court and judicial body*

175. The Tribunal was at times referred to as a court. Thus the summary record of the 24th meeting of Committee 6 of the Preparatory Commission of the United Nations, as noted in paragraph 164 *supra*, states that the general sense of the Committee was that the Administrative Tribunal was a Supreme Court and that its decisions were final (Document 38). The representative of Israel, during the fourth session of the General Assembly, referred

to the Tribunal as a "court of appeal" (Document 56, Fifth Committee, 215th meeting, para. 88). The Chairman of the Advisory Committee on Administrative and Budgetary Questions referred to it as a court whose awards would be final and without appeal. (Document 53, Fifth Committee, 189th meeting, para. 17.) The representative of France spoke of "a tribunal responsible for enforcing the rules of that public service". (Document 59, 255th plenary meeting of the General Assembly, para. 22.)

176. There were also a number of references to the Tribunal as a "judicial body" (Chairman of the Advisory Committee on Administrative and Budgetary Questions, Document 51, Fifth Committee, 187th meeting, para. 48 ; Chairman of the Staff Committee, Document 54, Fifth Committee, 190th meeting, para. 21), or a "judicial organ" (Chairman of the Advisory Committee on Administrative and Budgetary Questions, Document 52, Fifth Committee, 188th meeting, para. 75 ; Israel, Document 54, Fifth Committee, 190th meeting, para. 36 ; Belgium, Document 55, Fifth Committee, 214th meeting, para. 73, and Document 56, Fifth Committee, 215th meeting, para. 78 ; Netherlands, Document 55, Fifth Committee, 214th meeting, para. 120 ; Norway, Document 56, Fifth Committee, 215th meeting, para. 22. See also Document 68, A/1127 and Corr. 1, Report of the Fifth Committee, para. 10 (vi)). There were other references to the Tribunal as a legal body (see statement of the representative of Belgium at the First Part of the Third Session of the General Assembly, Document 47, Fifth Committee, 159th meeting). The representatives of Israel and the Netherlands referred to the legal character of the Tribunal during the Fourth Session of the General Assembly (Document 55, Fifth Committee, 214th meeting, paras. 34 and 38).

(b) *Administrative organ*

177. On the other hand, the representative of Poland, during the fourth session of the General Assembly, stated that the Administrative Tribunal would be "an administrative and not a judicial organ". (Document 55, Fifth Committee, 214th meeting, para. 131.) The administrative character of the Tribunal was also stressed by the representative of the United States, who proposed that in the choice of members of the Tribunal, administrative training and experience should be recognized on a par with legal training and experience and judicial service. (Document 64, A/C.5/L.4/Rev.2, United States amendments to Article 3 ; Document 55, Fifth Committee, 214th meeting, para. 122.) This proposed amendment was withdrawn on the understanding that it would be mentioned in the Report of the Fifth Committee. (Document 56, Fifth Committee, 215th meeting, paras. 9 and 10 ; Document 68, A/1127 and Corr. 1, para. 10 (iii).)

(c) *Impartial body*

178. A number of references were made to the Administrative Tribunal as an "impartial body" or "impartial authority" (United Kingdom, Second Part of First Session, Document 41, Fifth Committee, 25th meeting ; Chairman of the Advisory Committee on Administrative and Budgetary Questions, Fourth Session, Document 51, Fifth Committee, 187th meeting, para. 48 ; Chairman of the Staff Committee, Document 54, Fifth Committee, 190th meeting, para. 12 ; France, Document 59, 255th Plenary Meeting of the General Assembly, para. 19).

(d) *Independence*

179. A number of references were made to the "independence" of the Tribunal during the discussion at the fourth session of the General Assembly. The representative of the Netherlands (Document 55, Fifth Committee, 214th meeting, para. 120) stated that the "Administrative Tribunal would be a judicial organ and should be independent of both the Secretariat and the Assembly" (see also statement of the representative of the Netherlands, Document 52, Fifth Committee, 188th meeting, para. 46). The representative of Belgium stated that once it was established, the Administrative Tribunal became independent of the General Assembly. (Document 56, Fifth Committee, 215th meeting, para. 19 ; see also statement of the representative of Belgium, Document 57, Fifth Committee, 216th meeting, para. 9.)

180. The Chairman of the Advisory Committee on Administrative and Budgetary Questions (Document 56, Fifth Committee, 215th meeting, para. 15) stated that the Tribunal would be "completely independent of the Secretary-General", and the representatives of Poland (Document 53, Fifth Committee, 189th meeting, para. 41) and Brazil (*ibid.*, para. 43) referred to it respectively as "an independent body" and "an independent organ".

181. The independence of the Tribunal was particularly mentioned during the discussion of the paragraphs of Article 3 dealing with the appointment and the removal of the members of the Tribunal. With respect to the appointments, the Fifth Committee discussed whether the members should be appointed by the International Court of Justice or by the General Assembly. The Fifth Committee decided in favour of appointment by the General Assembly and approved the paragraph in question (paragraph 2 of Article 3) by 34 votes to none, with 7 abstentions. (Document 56, Fifth Committee, 215th meeting, paras. 6-10.)

182. With respect to the question of removal of members, the Fifth Committee considered whether the right of removal should rest with the Tribunal itself or with the General Assembly. An amendment proposed by the United States to provide that the dismissal of a member of the Tribunal could take place only on

a two-thirds majority vote of the General Assembly was accepted by the Committee, by 16 votes to 14, with 11 abstentions. (Document 56, *Fifth Committee, 215th meeting, paras. 18-24.*) However, an amendment proposed jointly by the representatives of Belgium, Egypt, France, Netherlands and Venezuela, was adopted by the General Assembly at its 255th plenary meeting (Document 59, para. 40), which provided that no member of the Tribunal could be dismissed by the General Assembly *unless the other members* were of the unanimous opinion that he was unsuited for further service. (Document 69, A/1132.)

183. Also, with reference to the independence of the Tribunal, it may be noted that, in discussing Article 6 of the Statute which concerned Rules of Procedure, it was pointed out by the Chairman of the Advisory Committee on Administrative and Budgetary Questions that the Tribunal would establish its rules without having to submit them for approval to any organ of the United Nations. (Document 56, Fifth Committee, 215th meeting, para. 29.)

(e) *Other references to nature of Tribunal*

184. The following characterizations of the Tribunal may also be noted. The Chairman of the Advisory Committee on Administrative and Budgetary Questions referred to it as an "august body". (Document 53, Fifth Committee, 189th meeting, para. 17.) The representative of Sweden referred to it as "a special kind of organ". (Document 55, Fifth Committee, 214th meeting, para. 126.) The representative of Poland, at the 214th meeting of the Fifth Committee, in comparing the Tribunal to the Appeals Board, referred to it as a "superior organ" (Document 55, para. 56), but at the 259th plenary meeting of the General Assembly, in speaking of the Tribunal and the Assembly, he referred to it as a "subsidiary organ". (Document 59, para. 35.) The representative of the Union of Soviet Socialist Republics referred to the Administrative Tribunal as an "auxiliary organ set up by the General Assembly" (Document 55, Fifth Committee, 114th meeting, para. 123) and as a "subsidiary organ of the United Nations". (Document 56, Fifth Committee, 215th meeting, para. 44.)

2. *Decisions concerning titles*

185. With reference to the question of the nature of the Tribunal, certain decisions concerning the names to be applied to the Tribunal, to its members and to its executive secretary, may be noted.

186. As early as the discussion of the subject in the Preparatory Commission of the United Nations, the Sixth Committee of that Commission referred to the question of the name to be given to the organ to be established. "It was recognized that the title 'Administrative Tribunal' might give rise to misapprehension as

to the scope of its functions, but it was made quite clear that the Tribunal would deal only with questions of the interpretation of an official's contract and with the claims of officials for non-observance of the contract, and not with matters of internal administration which would go before internal bodies within the Secretariat and in which the Secretary-General's decision would be final." (Document 38.)

187. During the consideration in the fourth session of the General Assembly, the representative of the Union of Soviet Socialist Republics proposed that the name of the body should be more closely related to its functions : he said that an Administrative Tribunal might be thought to be essentially concerned with disciplinary matters, yet the draft statute made no provision for the Tribunal to deal with disciplinary cases. Some name such as "The Administrative Board (or committee) to consider claims by staff members" or "Complaints Committee", he believed, would more accurately reflect the structure and competence of the proposed body. The word "Tribunal", he thought, was inappropriate and some less pretentious word should be used. (Document 53, Fifth Committee, 189th meeting, para. 13.)

188. The representative of Israel thought that the very name "Administrative Tribunal" was unfortunate. He thought the Tribunal should be a purely judicial organ. (Document 54, Fifth Committee, 190th meeting, para. 36.)

189. At the 214th meeting of the Fifth Committee, when consideration of individual articles of the Statute was begun, the representative of the Union of Soviet Socialist Republics recalled the reasons why he had proposed that the title of the draft statute should be amended. The question of an Administrative Tribunal did not arise in the Charter, and such a title was too ambitious. In some countries the Administrative Tribunal had to be competent to take disciplinary steps. The aim of the Union of Soviet Socialist Republics' proposal was to avoid ambiguity. (Document 55, para. 33.)

190. Following a vote, at which the Union of Soviet Socialist Republics' amendment proposing that the title "Administrative Tribunal" should be replaced by "Staff Claims Board" had been rejected by 19 votes to 5, with 13 abstentions, and the title "United Nations Administrative Tribunal" approved by 32 votes to none, with 3 abstentions, the representative of Israel explained that he had abstained in both votes because he felt it would be wrong to describe as an Administrative Tribunal a body which his delegation regarded as being essentially legal in character. (Document 55, Fifth Committee, 214th meeting, para. 34.)

191. The representative of the Netherlands proposed that members of the Administrative Tribunal should be referred to as "Judges" and not as "Members". This amendment was rejected

by 22 votes to 9, with 7 abstentions. (Document 55, Fifth Committee, 214th meeting, paras. 113-115.) The companion proposal by the representative of the Netherlands to replace the words "Executive Secretary" by the word "Registrar" was rejected by 17 votes to 9, with 8 abstentions. (Document 56, Fifth Committee, 215th meeting, para. 13.)

D. *Separation of powers*

192. A few references were made to the concept of separation of powers. During the second part of the first session of the General Assembly, the representative of France emphasized that "neither the General Assembly, which was an organ of control, nor the Secretariat, which was an organ of action, could perform judicial functions. The Administrative Tribunal would, on the other hand, have no executive powers, but would confine itself to interpretation of regulations or contracts in the making of which it had no part. The governments of many nations, including that of the United States of America, were based on the principle of separation of powers." (Document 41, Fifth Committee, 25th meeting.)

193. During the fourth session of the General Assembly, the Chairman of the Advisory Committee on Administrative and Budgetary Questions stated, in reference to the Administrative Tribunal of the League of Nations, that the principle of separation of powers had been very strictly applied. (Document 51, Fifth Committee, 217th meeting, para. 48.)

194. At the time that the Fifth Committee discussed, and decided to delete, paragraph 5 of Article 2, which would have authorized the Tribunal to give advisory opinions, reference was made to the desire that the principle of the division of powers be applied so that the administration would remain entirely independent of the Administrative Tribunal. (See Statement of the representative of Sweden, Document 55, Fifth Committee, 214th meeting, para. 70.)

E. *Administrative and budgetary powers of the General Assembly*

195. With respect to the subject of the administrative and budgetary powers of the General Assembly, another point which was discussed at length at the eighth session, the following statements may be of interest.

196. The United States proposed, at the second part of the first session of the General Assembly, that an Administrative Tribunal should not be established. The establishment of such a tribunal, it believed, might impinge on the final authority over administrative matters which the Charter granted to the General Assembly. (Document 45, A/C.5/56, para. 4.) At the 25th meeting of the Fifth Committee (Document 41), the representative of the United States said that an Administrative Tribunal would dangerously undermine the

authority of the Secretary-General and the sovereignty of the General Assembly. The representative of France, at the same meeting, however, said it was important to have a tribunal to guard a sovereign institution from the ever present danger of abusing its sovereignty. It was the duty of the United Nations to set an example of willingness to accept such a check on its sovereignty.

197. At the fourth session of the General Assembly, a few representatives expressed fears that the statute of the Administrative Tribunal had been drawn up in such a way as to curtail the rights of the General Assembly. (Union of South Africa, Canada, Document 55, Fifth Committee, 214th meeting, paras. 37 and 39.) The representative of the United Kingdom stated that the sovereign rights of the General Assembly, particularly in connection with staff employment and emergencies or conditions of exceptional difficulty, did not seem adequately safeguarded, in view of the wide financial powers to be invested in the Tribunal. (Document 53, Fifth Committee, 189th meeting, para. 33.)

198. The representative of Uruguay pointed out that if a staff member succeeded in an action before the Administrative Tribunal against the decision of the Secretary-General, it was the United Nations which would have to bear the charge. (Document 56, Fifth Committee, 215th meeting, para. 72.)

199. There was some discussion of the budgetary powers of the General Assembly in connection with the question of compensation at the time that Article 9 [1] was considered by the Fifth Committee. The discussion related particularly to the question whether the Secretary-General should have the option of paying compensation in lieu of rescission or specific performance. (See Document 56, Fifth Committee, 215th meeting, paras. 104-116, and Document 57, Fifth Committee, 216th meeting, paras. 1-70.)

200. The text proposed by the Advisory Committee on a Statute for a United Nations Administrative Tribunal provided that, if the rescinding of a decision or specific performance of an obligation was impossible or inadvisable, the Tribunal should order the payment of compensation. It did not, however, specify who would determine whether such rescinding or specific performance was impossible or inadvisable. In submitting a draft statute to the fourth session of the General Assembly the Secretary-General explained his proposed change in this article as follows :

> ".... it has been made clear that the Secretary-General should decide whether it is impossible or inadvisable to rescind a previous decision or invoke a specific performance. This should be an administrative and not a judicial decision : besides, only the Secretary-General is in a position to make such a decision. Where the Secretary-General's decision is in the affirmative, compensation for the injuries sustained

[1] Article 9 of the Statute as adopted was based on Article 10 of the preliminary drafts. (Documents 60, 63, 64.)

shall, of course, be fixed by the Tribunal and paid by the United Nations." (Document 60, A/986, para. 5.)

201. The text proposed by the Secretary-General with a minor amendment accepted by him was approved by the Fifth Committee by 29 votes to 4 with 8 abstentions. (Document 57, 216th meeting, para. 70.)

202. The statement of the representative of Brazil may be noted, to the effect that such a right of the Secretary-General "would constitute an added financial burden on the United Nations, which would then have to make provision for such compensation in cases where the Secretary-General disagreed with the Administrative Tribunal's findings". (Document 57, Fifth Committee, 216th meeting, para. 3.) The statement of the representative of Poland may also be noted that "as a member of the Administrative and Budgetary Committee, he would not be prepared to approve any appropriations for such purposes". (Document 57, Fifth Committee, 216th meeting, paras. 19 and 20.)

203. The representative of Norway said that "the United Nations was making its first attempt to introduce the system of an Administrative Tribunal, and if experience showed that the Budget required more careful safeguards in connection with compensation, action could be taken by the General Assembly [1]". (Document 57, Fifth Committee, 216th meeting, para. 36.)

204. With respect to the question of the size of awards, the representative of the Secretary-General, Mr. Feller, recalled that he had been asked by the Canadian representative to explain the phrase "compensation for injury sustained" because the representative of Canada had been concerned over the possibility that the Administrative Tribunal might be able to give very large monetary awards. Mr. Feller stated that the phrase had been deliberately chosen by those who had drafted the article in order to make the award compensatory, and the Administrative Tribunal would have no latitude to grant punitive damages. He believed that an amendment suggested by Uruguay to replace the word "compensation" by "indemnity" would make rather vague the standard according to which damages should be awarded by the Tribunal and might open the way for the Tribunal to give much larger awards than the members of the General Assembly would wish it to give. (Document 57, Fifth Committee, 216th meeting, para. 50.)

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[1] The representative of Colombia commented on this statement during the eighth session of the General Assembly as follows: "It was true that at the General Assembly's fourth session (216th meeting) the Norwegian representative in the Fifth Committee had said that the General Assembly should give a decision in any case in which awards made by the Tribunal had important financial implications; this remark referred to decisions the General Assembly would take in the future." (Document 2, Fifth Committee, 421st meeting, para. 46.)

F. *1946 decision of the Assembly of the League of Nations*

205. Another point which may be noted is the reference made by the United States Delegation during the second part of the first session of the General Assembly (Document 45, A/C.5/56) to the decision taken by the Assembly of the League of Nations at its last meeting in 1946. (See Part Two of this Statement.) In proposing that an Administrative Tribunal should not be set up, the United States memorandum stated that the League Assembly had set aside certain awards of its Administrative Tribunal on the following grounds :

> "*(a)* The Assembly was sovereign *vis-à-vis* the tribunal since the tribunal was not competent to consider the legality of acts which were within the authority of the Assembly ;
>
> *(b)* The Assembly itself was the best judge of what its intentions were in adopting resolutions. It should be noted in this connection that at its twenty-ninth general conference, the International Labour Office added an article (Article 13) to the statute of its tribunal providing that any dispute as to the competence of the tribunal to render a decision involving an action taken by the General Conference shall be submitted for adjudication by the International Court of Justice whose decision shall be final."

G. *Competence of the Tribunal*

206. As was noted in Part One of this statement, considerable discussion occurred at the eighth session of the General Assembly concerning the competence of the Tribunal with respect to possible grounds on which the General Assembly might refuse to give effect to its awards. Special attention was given by some representatives, in discussing specific cases, to the competence or lack of competence of the Tribunal to consider the subject of disciplinary action.

207. This same question was also a subject to which frequent reference was made during the consideration of the establishment of the Administrative Tribunal. The Report of the Preparatory Commission (Document 33, PC/20) had recommended that the Administrative Tribunal should be competent to adjudicate on any dispute arising in connection with the fulfilment of an official's contract. In the discussion in the Sixth Committee of the Preparatory Commission, "it was made quite clear that the Tribunal would deal only with questions of the interpretation of an official's contract and with the claims of officials for non-observance of the contract, and not with matters of internal administration which would go before internal bodies within the Secretariat and in which the Secretary-General's decision would be final". (Document 38.)

208. The Advisory Committee on a statute for a United Nations Administrative Tribunal was guided by this indication in preparing

its draft Statute. (Document 60, A/986, Annex III, Report of the Committee, para. 4. See also statements of the Rapporteur (Mr. Aghnides of Greece) and the representative of the Union of Soviet Socialist Republics at the first part of the first session, Document 41, Fifth Committee, 25th meeting.)

209. The Secretary-General, in his Report to the fourth session of the General Assembly in 1949 (Document 60, A/986, para. 7), recalled the position of the Preparatory Commission and of the Advisory Committee on a statute for a United Nations Administrative Tribunal, and added :

> "In this connection there are three areas of decision in which the Secretary-General's judgment should be final—namely, a decision as to whether a particular staff member's services are satisfactory or unsatisfactory, the decision of fact in disciplinary cases where non-observance of the terms of the staff member's appointment cannot reasonably be alleged, and decisions of fact in cases of serious misconduct. The authority of the Secretary-General to decide the facts in these three areas is made clear in provisional staff regulations 19 and 21. His responsibility under the Charter as Chief Administrative Officer of the Organization can be satisfactorily discharged only if his judgment on the facts in the cases indicated above is considered final. This responsibility could not be effectively discharged if an independent administrative tribunal were given authority to reconsider the facts in such cases, in the absence of any reasonable allegation that the terms of an appointment had been violated, and to reverse the decision of the Secretary-General."

210. The Staff Committee, on the other hand, proposed that the Tribunal should be given specific competence "to hear and pass judgment upon applications concerning a disciplinary action". (Document 63, A/C.5/L.4/Rev.1 and Corr. 1, Amendments proposed to Article 2; see also Document 60, A/986, Annex IV, paras. 4-8 ; Document 61, A/986/Add.1 and Document 54, Fifth Committee, 190th meeting, paras. 13-17.) This proposal, however, was withdrawn after a revised text of Staff Regulation 23, acceptable to the Staff Committee, concerning joint administrative machinery with staff participation, had been proposed by the Secretary-General. (Document 64, A/C.5/L.4/Rev.2, paras. 1 and 2. See revised text of Staff Regulation 23 on final page of Document 64.)

211. The World Health Organization submitted a memorandum (Document 67, A/C.5/L.21) stating that since Article 2 of the draft statute placed disputes arising out of disciplinary action outside the competence of the Tribunal, WHO would find difficulty in making use of the Tribunal. This memorandum was noted by the Fifth Committee at its 215th meeting. (Document 56, paras. 3-5.)

212. The following statements made during the discussion in the Fifth Committee at the fourth session of the General Assembly are of interest on the subject of competence in disciplinary matters :

Belgium (Document 52, 188th meeting, para. 20 ; Document 53, 189th meeting, para. 22) ; Netherlands (Document 52, 188th meeting, para. 47 ; Yugoslavia (Document 53, 189th meeting, para. 8) ; exchange of questions and answers between the representative of the United States and the representative of the Secretary-General (Document 53, 189th meeting, paras. 26-29) ; United Kingdom (Document 53, 189th meeting, paras. 35-36) ; Brazil (Document 53, 189th meeting, para. 43) ; France (Document 53, 189th meeting, para. 45) ; Secretariat (Document 53, 189th meeting, paras. 46-47) ; United States (Document 55, 214th meeting, paras. 23-26). Other statements of interest concerning the authority of the Secretary-General may also be noted as follows : Union of Soviet Socialist Republics (Document 56, Fifth Committee, 215th meeting, para. 67) ; Chairman of the Advisory Committee on Administrative and Budgetary Questions (Document 56, 215th meeting, para. 69) ; and Union of South Africa (Document 56, 215th meeting, para. 76).

213. During the specific consideration of Article 2 which concerned the competence of the Tribunal (Document 55, Fifth Committee, 214th meeting, paras. 36-83), the subject of competence with respect to disciplinary action was not mentioned, the Staff Committee amendment on the subject already having been withdrawn. The discussion at this time concerned the points which were decided by the Fifth Committee as follows : (1) The Tribunal should not be competent to deal with applications where the cause of complaint arose prior to 1 January 1950 ; (2) The Tribunal should not have competence with respect to members of the staff of the Registry of the International Court of Justice ; (3) The Tribunal should not be competent to give advisory opinions, and (4) Disputes concerning whether the Tribunal had competence should be settled by decision of the Tribunal. (On this last point see paras. 168-173 above.)

214. Article 2 as amended was approved by the Fifth Committee at its 214th meeting by 38 votes to none with 1 abstention. (Document 55, para. 82.) In its Report (Document 68, A/1127, and Corr. 1, para. 9), the Fifth Committee made the following comment :

> "In connection with Article 2, as amended, two points were made in the course of the discussion regarding the Tribunal's competence :
>
> *(a)* That the Tribunal would not have jurisdiction in disciplinary cases unless such cases came within the terms of paragraph 1 of Article 2 ; and
>
> *(b)* That the tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require. It was understood that the Tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary. It was understood also that the Secretary-General would retain freedom

to adjust *per diem* rates as a result, for example, of currency devaluations or for other valid reasons.

No objection was voiced in the Committee to those interpretations, subject to the representative of Belgium expressing the view that the text of the statute would be authoritative and that it would be for the Tribunal to make its own interpretations."

12 March 1954.

ANNEXES

Annex 1

STATUTE AND RULES OF COURT OF THE ADMINISTRATIVE TRIBUNAL OF THE LEAGUE OF NATIONS [1]

[Not reproduced]

Annex 2

REPORT SUBMITTED TO THE FOURTH COMMITTEE OF THE ASSEMBLY BY THE SUB-COMMITTEE ON THE ADMINISTRATIVE TRIBUNAL [2]

[Not reproduced]

Annex 3

APPOINTMENT OF SUB-COMMITTEES ON CONTRIBUTIONS IN ARREARS AND ON THE ADMINISTRATIVE TRIBUNAL [3]

[Not reproduced]

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[1] League of Nations—Official Journal, 9th Year, No. 5, May 1928, pp. 751-756.—Statute and Rules of Court of the Administrative Tribunal of the League of Nations (T. A. 4).

[2] League of Nations—Official Journal, Special Supplement No. 58, pp. 250-257.—Records of the Eighth Ordinary Session of the Assembly. Report submitted to the Fourth Committee of the Assembly by the Sub-Committee on the Administrative Tribunal. (A.IV/5.1927.)

[3] League of Nations—Official Journal, Special Supplement No. 58, p. 11.—Records of the Eighth Ordinary Session of the Assembly. Minutes of the Fourth Committee (Budget and Financial Questions), Second Meeting, 12 September 1927 (extract).

Annex 4

ESTABLISHMENT OF AN ADMINISTRATIVE TRIBUNAL [1]

[Not reproduced]

Annex 5

ESTABLISHMENT OF AN ADMINISTRATIVE TRIBUNAL [2]

[Not reproduced]

Annex 6

ESTABLISHMENT OF AN ADMINISTRATIVE TRIBUNAL: REPORT OF THE FOURTH COMMITTEE: RESOLUTION [3]

[Not reproduced]

Annex 7

NOTE BY THE ACTING SECRETARY-GENERAL ON THE JUDGMENTS PRONOUNCED BY THE ADMINISTRATIVE TRIBUNAL ON FEBRUARY 26th, 1946, CONCERNING CERTAIN OFFICIALS DISCHARGED IN APPLICATION OF THE EMERGENCY MEASURES ADOPTED BY THE 1939 ASSEMBLY (A. 16. 1946), 22 MARCH 1946 [4]

[Not reproduced]

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[1] League of Nations—Official Journal, Special Supplement No. 58, pp. 35-36.—Records of the Eighth Ordinary Session of the Assembly. Minutes of the Fourth Committee (Budget and Financial Questions), Fifth Meeting, 17 September 1927 (extract).

[2] League of Nations—Official Journal, Special Supplement No. 54, p. 478.—Records of the Eighth Ordinary Session of the Assembly. Establishment of an Administrative Tribunal. Report of the Fourth Committee to the Assembly. (A. 72. 1927. V.)

[3] League of Nations—Official Journal, Special Supplement No. 54, p. 201.—Records of the Eighth Ordinary Session of the Assembly, Plenary Meetings. Twenty-first Plenary Meeting, 26 September 1927 (extract).

[4] League of Nations—Official Journal, Special Supplement No. 194, pp. 245-249.—Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly.

Annex 8

JUDGMENTS PRONOUNCED BY THE ADMINISTRATIVE TRIBUNAL ON FEBRUARY 26th, 1946, CONCERNING CERTAIN OFFICIALS DISCHARGED IN APPLICATION OF THE EMERGENCY MEASURES ADOPTED BY THE 1939 ASSEMBLY [1]

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Annex 9

ADMINISTRATIVE TRIBUNAL: JUDGMENTS GIVEN ON FEBRUARY 26th, 1946, WITH REGARD TO CLAIMS OF CERTAIN FORMER OFFICIALS [2]

[Not reproduced]

Annex 10

JUDGMENTS PRONOUNCED BY THE ADMINISTRATIVE TRIBUNAL ON FEBRUARY 26th, 1946, CONCERNING CERTAIN OFFICIALS DISCHARGED IN APPLICATION OF THE EMERGENCY MEASURES ADOPTED BY THE ASSEMBLY IN 1939 [3]

[Not reproduced]

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[1] League of Nations—Official Journal, Special Supplement No. 194, p. 162.—Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly.—Report of the supervisory commission on the work of its Ninety-Ninth Session (A. 14.1946.X), 22 March 1946 (extract).

[2] League of Nations—Official Journal, Special Supplement No. 194, p. 123.—Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly. Minutes of the Second (Finance) Committee, Third Meeting, 11 April 1946 (extract).

[3] League of Nations—Official Journal, Special Supplement No. 194, pp. 261-264.—Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly. Financial and Administrative Questions: General Report of the Second (Finance) Committee to the Assembly (A. 32 (I). 1946. X.), 18 April 1946, approved by the Assembly on 18 April 1946. Rapporteur: Madame C. A. Kluyver (Netherlands) (extract).

Annex 11

ADMINISTRATIVE TRIBUNAL: JUDGMENTS GIVEN ON FEBRUARY 26th, 1946, WITH REGARD TO CLAIMS OF CERTAIN FORMER OFFICIALS (CONTINUATION): REPORT OF THE SUB-COMMITTEE TO THE SECOND COMMITTEE [1]

[Not reproduced]

Annex 12

SEVENTH PLENARY MEETING OF THE ASSEMBLY, 18 APRIL 1946 (EXTRACT) [2]

[Not reproduced]

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[1] League of Nations—Official Journal, Special Supplement No. 194, pp. 130-133.—Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly. Minutes of the Second (Finance) Committee, Sixth Meeting, 13 April 1946 (extract).

[2] League of Nations—Official Journal, Special Supplement No. 194, p. 61.—Records of the Twentieth (Conclusion) and Twenty-First Ordinary Sessions of the Assembly.

11. WRITTEN STATEMENT OF THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES

New York, 11 March 1954.

Sir :

I have the honor to refer to your communication of 14 January 1954, addressed to the Secretary of Foreign Affairs of the Republic of the Philippines, in which you invite my Government to avail itself of the right, under Article 66 of the Statute of the International Court of Justice, to present a written statement on the case, entitled "Effect of awards of compensation made by the United Nations Administrative Tribunal". In compliance with said communication, I am instructed by my Government to submit the following statement.

The facts and the issue.—By a Resolution adopted on 9 December 1953, in connection with the case of eleven staff members of the United Nations whose appointments were terminated in 1953, and in whose favor the Administrative Tribunal had ordered awards of compensation, the General Assembly, having in mind what it regarded as "important legal questions" with respect to the appropriation of funds to satisfy the awards, decided to request the International Court of Justice to give an advisory opinion on the following questions :

> 1. Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent ?
>
> 2. If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right ?

From the construction of the first question, it is reasonable to assume that the General Assembly attaches, and rightly, more than ordinary importance to the Statute of the Administrative Tribunal. Four questions arise from the fact that this Statute, which is of the Assembly's own making, remains valid and in force :

First, how consistently can the Assembly revoke or ignore a decision based on one of the Statute's main provisions ?

Second, in a case where the Secretary-General should find separation with compensation to be in the best interest of the

United Nations, must he reinstate the staff member concerned rather than see him denied the benefit of a remedy widely accepted in private law ?

Third, what further use would staff members have for the Administrative Tribunal itself if the remedy of compensation provided in the Statute is rendered nugatory ?

Fourth, considering that one of the aims of the Tribunal is ostensibly to substitute for the diplomatic protection of staff members by the States of which they are nationals, would the United Nations be in a position to have that protection invoked in all cases of redress of grievances ?

Contractual relationship between the United Nations and staff members.—As early as 1945, in San Francisco, the Preparatory Commission and, later, the General Assembly, at its first session in 1946, recognized the desirability of a contractual basis upon which the United Nations Organization on the one hand, and its staff members on the other, could carry out the aims of the Organization. Thus the Commission recommended to the Assembly that an Administrative Tribunal be established "to adjudicate on any dispute arising in connection with the fulfilment of an official's contract" (Report of the Preparatory Commission, par. 74, p. 94). The Secretary-General forthwith was requested by the Assembly to appoint a committee to draft a statute for an administrative tribunal.

On 13 February 1946, the Assembly adopted Resolution 13 (I), together with the Provisional Staff Regulations attached thereto. By the same Resolution, the Assembly transmitted to the Secretary-General for his consideration the draft Provisional Staff Rules drawn up by the Commission to amplify the Regulations. The Rules were approved and promulgated by the Secretary-General on 9 March 1946 (Doc. SGB/3).

Rule 2 of the Staff Rules provided that, upon appointment, the staff member should receive a letter of appointment signed by the Secretary-General or his authorized deputy, and that the appointee should in turn write a letter of acceptance addressed to the Secretary-General. Furthermore, it was specified that "the letter of appointment and the letter of acceptance shall constitute the contract of employment". Since then the Regulations as well as the Rules have formed part of the terms of appointment of every staff member. The Regulations, adopted by General Assembly Resolution 590 (V) on 2 February 1952, have been amended by Resolution 781 A (VIII) and Resolution 782 (VIII).

A clear contractual relationship was thus established between the United Nations and the staff members of its Secretariat by virtue of which the rights of the latter may not be altered without their consent.

The basis of the compensation right.—The authority to pay compensation stems from the provisions of Article 9 of the Statute of the Tribunal, in its original as well as in its amended text. The Article provides that, when an application is well founded, the Tribunal may rescind a decision or order the specific performance of the obligation invoked, and that, should the Secretary-General, within thirty days of the notification of the judgment, decide, in the interest of the United Nations, that the applicant should be compensated without further action being taken in his case, the Tribunal shall fix the amount of compensation for the injury sustained by the applicant. The Article further provides that "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 12".

On the other hand, Regulation 9.1 *(a)* of the Staff Regulations gives to staff members the right to contest a termination order of a permanent appointment by the Secretary-General. In addition, Regulation 11.2 explicitly states that the Tribunal "shall, under conditions prescribed in its Statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules". Then, under Article 9 of the Statute, should the Secretary-General decide not to reinstate a staff member whom he considers better out than in, the Tribunal has the unavoidable duty to fix the amount of compensation. Furthermore, Regulation 9.3 *(a)* specifically provides for indemnity payment, and *(b)* for the amount which may be paid in certain cases.

The status and competence of the Administrative Tribunal.—The Tribunal was established by the General Assembly to guarantee the right of appeal to staff members of the United Nations who allege non-observance of their contracts of employment or of the terms of their appointments by the Secretary-General. Like the Administrative Tribunal of the League of Nations, its mission is to provide legal protection for the members of the United Nations Secretariat. It will be recalled that the League had provided that its Assembly would, in the light of the experience gained, decide later on whether there was reason to abrogate or amend the Tribunal's Statute. However, this possibility did not materialize, because it was shown that the Tribunal "served a useful purpose" especially "toward the end, when dismissals created hardships or were not considered legally justified by individual members of the Secretariat staff who had been subject to sanctions" (*The International Secretariat*, Carnegie Endowment, 1945, p. 261). The same motives behind the creation of the League's Administrative Tribunal led to the establishment of the present one and there is reason to believe that the latter has proved equally useful to the Secretariat of the United Nations.

The fact, however, that the Tribunal is a creature of the Assembly does not necessarily imply that the latter has an untrammeled right to modify, reverse or rescind the decisions of the Tribunal.

Article 101, paragraph 1, of the Charter of the United Nations provides that the Secretary-General shall appoint the staff of the Secretariat "under regulations established by the General Assembly".

In accordance with Article 22 of the Charter, which empowers the General Assembly to establish such subsidiary organs as it deems necessary for the performance of its functions, the General Assembly adopted and promulgated the Statute of the Administrative Tribunal under Resolution 351 (IV). Together with the Staff Regulations, this Statute thus forms part of the "regulations" mentioned in Article 101 of the Charter.

Article 2, paragraph 1, of the Statute provides that the Tribunal "shall be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations of the terms of appointment of such staff members".

In the event of a dispute concerning the competence of the Tribunal, paragraph 3 of the same Article provides that "the matter shall be settled by the decision of the Tribunal".

Finally, Article 10, paragraph 2, of the Statute provides:

> "The judgments (of the Tribunal) shall be final and without appeal."

These positive and unambiguous provisions rule out an interpretation which, basing itself on the doctrine of inherent powers, would hold that the General Assembly nevertheless reserved to itself the right to modify, reverse or revoke the judgments of the Tribunal on certain grounds in specific cases. In effect, the General Assembly, by approving Article 10, paragraph 2, of the Statute, divested itself of the right to review the judgments of the Tribunal.

It may be said that the General Assembly cannot, under the Charter, renounce its authority. While a total *renunciation* of authority would indeed be improper and perhaps unconstitutional, the act of the General Assembly in approving the Statute of the Administrative Tribunal was a legitimate *delegation* of authority, which is a different matter altogether.

The delegation of authority to the Tribunal is as fully justifiable in administrative practice as it is defensible in law. By stating that the "judgments of the Tribunal shall be final and without appeal", the General Assembly clearly recognized the impractical and even dangerous situation that could arise if any and all judgments of the Tribunal were to be brought before the General Assembly as to a court of last resort. Recognizing this possibility, the General

Assembly wisely decided to place the contentious specific cases that could arise in regard to the conditions of service of the Secretariat staff members exclusively within the competence of the Tribunal and outside its own. It was thus the clear intention of the General Assembly to place these cases on a stable basis of quasi-judicial determination, instead of subjecting them to the shifting winds of political sentiment in the General Assembly. This is both good law and sound administrative practice.

Moreover, the doctrine of the final and unappealable character of the judgments of the Tribunal does not leave the General Assembly without adequate remedial power in case of need. The General Assembly may :

1. Change the membership of the Administrative Tribunal ;

2. Modify or repeal the regulations governing the employment conditions of service, and separation of staff members ;

3. Amend the Statute of the Administrative Tribunal ; or

4. Abolish the Administrative Tribunal.

Some of these remedies are radical in nature, but there is no doubt that the General Assembly would be fully justified in seeking recourse to them in order to prevent abuse.

The will of the General Assembly.—In the debates that have taken place in the General Assembly on the question of compensation, the best view ever to crystallize against the remedy was that it was not a "satisfactory substitute for the loss of employment" (Report of Fifth Committee, Doc. A/2615, 7 December 1953, p. 17). In voting on the amended text of Article 9 of the Statute of the Tribunal, the Committee stood 55 to none, with no abstentions, in favor of the first part of paragraph 1 giving the Tribunal the right to fix compensation in lieu of reinstatement ; 32 to 17, with 5 abstentions, on the second part fixing compensation at not more than two years' base salary of the applicant (the Advisory Committee had recommended only one year) ; and 34 to 13, with 6 abstentions, on giving the Tribunal the right to award a greater amount in exceptional cases. On paragraph 3 of the Article, giving the Tribunal the right to fix the compensation "in all applicable cases", the vote was *unanimous* (*ibid.*, p. 18).

Conclusions.—In the light of the foregoing considerations, the following conclusions appear to be clearly established :

1. The Statute of the Tribunal provides that it shall fix the compensation for the injury sustained when the Secretary-General decides against reinstatement ;

2. The payment of termination indemnity is one of the remedies specified in the Staff Regulations ;

3. It is clear from the debates in the General Assembly that there was unanimous agreement on the principle of awarding compensation in lieu of reinstatement in case of termination ;

4. Both the Statute of the Tribunal and the Staff Regulations as approved by the General Assembly form part of the terms of appointment of staff members ;

5. There is a contractual relationship between the United Nations and its Secretariat members which makes it obligatory on the part of the former to respect the acquired rights of the latter ;

6. The Tribunal, whose members are elected by the General Assembly, was established to give staff members their day in court when they are aggrieved ;

7. The Statute of the Tribunal categorically states that its judgments are final and without appeal ;

8. It would harm the morale of the Secretariat if a decision of the Tribunal, which stands for the rule of law over expediency, should be repudiated by the General Assembly ; and

9. So long as the Tribunal has legitimately acted within the authority delegated to it by the General Assembly, it follows that the latter would be bound to sustain the decisions of the former.

The power of the General Assembly, in contrast to its legal right, to refuse to give effect to an award of compensation made by the Administrative Tribunal in favor of a staff member whose contract of service has been terminated without his assent, is not disputed. Article 17 of the Charter gives the Assembly control of the budget of the United Nations and it would be quite simple not to appropriate the funds to cover any award. Indeed, this power can be exercised by the Assembly in almost any case involving appropriation of money. It must be noted, however, that the Court is being asked not whether the General Assembly has the *power* but whether it has the *right* to refuse to give effect to an award. The distinction makes it perfectly plain that, while the Assembly is certain it has the power, it doubts whether it has the right.

Even if the use of the power were the issue, there would still be this distinction to make : Is the use of the power just, or is it arbitrary ? It is obvious that to exercise the power contrary to the letter and spirit of the Statute of the Administrative Tribunal and the Staff Regulations, would be to exercise it arbitrarily.

For the reasons above stated, my Government is of the opinion that the answer to question (1) of the General Assembly Resolution, now before the International Court of Justice, must be in the negative.

This position precludes the necessity of answering question (2).

I have the honor, etc.

(Signed) SALVADOR P. LOPEZ,
Acting Permanent Representative.

12. LETTRE DE L'AMBASSADEUR DE L'UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES A LA HAYE AU GREFFIER DE LA COUR

N° 40.

La Haye, le 15 mars 1954.

Monsieur le Greffier de la Cour,

En réponse à votre lettre du 14 janvier 1954, j'ai l'honneur de communiquer que le point de vue du Gouvernement de l'URSS à propos d'un avis consultatif concernant des jugements du Tribunal administratif des Nations Unies relativement à des indemnités de compensations à 11 fonctionnaires du Secrétariat des Nations Unies, relevés de leurs fonctions, a été énoncé par la délégation de l'URSS à la VIII^me^ Session de l'Assemblée générale des Nations Unies pendant la discussion de cette question par l'Assemblée générale.

Veuillez agréer, etc.

(Signé) KIRSANOV.

13. EXPOSÉ DU GOUVERNEMENT DU MEXIQUE

Mexico, D. F., le 1er mars 1954.

I. Par lettre du 24 décembre 1953, le Greffier de la Cour a communiqué au Gouvernement du Mexique copie certifiée conforme de la résolution par laquelle l'Assemblée générale des Nations Unies demande à la Cour internationale de Justice un avis consultatif sur la force exécutoire des jugements accordant indemnité, rendus par le Tribunal administratif des Nations Unies.

Par lettre du 14 janvier 1954 le Greffier de la Cour a, de plus, fait savoir que la Cour serait disposée à recevoir de la part du Gouvernement mexicain, Membre des Nations Unies, un exposé écrit sur cette question, et que l'expiration du délai pour l'admission des exposés écrits a été fixé, par ordonnance du Président, au 15 mars 1954.

C'est en réponse à cette lettre que le Gouvernement du Mexique a l'honneur de présenter à la Cour les considérations ci-dessous :

II. Le Gouvernement mexicain estime que la question posée à la Cour pour avis, devait faire prendre position par celle-ci, sous les aspects suivants :

A) La nature de la *situation* juridique des membres du personnel des Nations Unies.

B) La nature du *recours* juridique que les membres du personnel peuvent être recevables à intenter.

Ces deux aspects doivent être considérés à la lumière des Statuts du Personnel et du Tribunal administratif des Nations Unies respectivement.

Ces deux corps statutaires impliquent la reconnaissance, dans le domaine international, du contentieux administratif.

Il en résulte que la Cour est d'abord appelée à examiner quelle est l'application des règles de droit international administratif au cas concret.

L'activité de la Cour comporte en première ligne l'étude des rapports entre la personne morale constituée par les Nations Unies et les membres du personnel de l'Organisation.

III. De l'analyse de la situation juridique des membres du personnel des Nations Unies, le Gouvernement du Mexique conclut que, dans le droit administratif international, cette situation juridique des fonctionnaires apparaît, au premier abord, contractuelle. Cependant, le contrat qui s'établit entre les membres du personnel et les Nations Unies est éminemment un contrat de droit public, en

tant que les droits et les obligations de l'administration internationale, vis-à-vis ses fonctionnaires et autres membres de son personnel, ont été déterminés, en forme absolument unilatérale et en exercice de sa faculté réglementaire par l'Assemblée qui, à travers ses résolutions, a donné vie juridique au Statut du Personnel et au Statut du Tribunal administratif, lesquels peuvent être à tout moment modifiés de la même façon.

Ainsi, c'est sur cette base qu'ont été conclus entre l'administration et les membres de son personnel des accords générateurs d'obligations réciproques qui consistent à se conformer aux dispositions statutaires ou réglementaires qui les concernent.

Les fonctionnaires contractent des obligations quant à l'exercice de leurs fonctions ; et l'administration le fait quant à la situation du fonctionnaire et aux garanties accordées à cette situation — parmi lesquelles se trouve le recours juridictionnel que les membres du personnel peuvent être recevables à intenter devant le Tribunal administratif, dont les arrêts sont définitifs et irrévocables et doivent être respectés et mis en exécution par les Nations Unies.

La nature contractuelle des rapports qui existent entre l'administration et les fonctionnaires a été expressément reconnue par le Statut du Tribunal à l'article 2.

Aux termes de l'article 2 du Statut, « le Tribunal est compétent pour connaître des requêtes invoquant l'inobservation *du contrat d'engagement* des fonctionnaires du Secrétariat des Nations Unies ou des conditions d'emploi de ces fonctionnaires, et pour statuer sur lesdites requêtes ».

La nature contractuelle desdits rapports a été, elle aussi, reconnue par la résolution de l'Assemblée générale n° 352 (IV) du 24 novembre 1949 qui explicitement se rapporte aux « contrats et conditions d'emploi ».

Mais les rapports juridiques existant entre les Nations Unies et les fonctionnaires ne constituent pas un simple contrat de louage de services du droit privé ; il faut y voir aussi un rapport d'emploi public. En effet, la situation des membres du personnel est réglée par le Statut du Personnel.

Pourtant, la situation juridique des fonctionnaires est non seulement contractuelle mais elle est aussi statutaire, c'est-à-dire qu'elle est déterminée par les conventions normatives et par les statuts et règlements de personnel, *sans porter atteinte aux droits acquis*.

Nier que ces contrats soient de droit public parce que dans ceux-ci on trouve toujours qu'une partie doit être l'État, équivaudrait à nier la personnalité en droit public des Nations Unies, que la Cour a déjà reconnue.

Même si l'on n'admet pas la nature contractuelle en droit public de la nomination et emploi des fonctionnaires et des autres membres du personnel des Nations Unies, et si l'on admet une autre interprétation juridique diverse à celle de l'acte subjectif, comme l'est celle de l'acte-condition et l'acte-union, rien ne changerait

les conclusions auxquelles le Gouvernement du Mexique arrive. En effet, dans l'acte-condition et l'acte-union également, les droits acquis des fonctionnaires et des autres membres du personnel des Nations Unies doivent être respectés et garantis en forme juridiquement obligatoire tant par l'Assemblée, comme par les Organismes spécialisés ou par un autre organe quelconque des Nations Unies. D'autre part, si le Statut du Personnel et le Statut du Tribunal administratif sont valables par des résolutions de l'Assemblée et peuvent être modifiés par elle-même, l'Assemblée, par contre, ne peut pas appliquer, *ex post facto* ou rétroactivement, aucune amende ou réforme auxdits statuts, au préjudice des droits acquis des membres du personnel.

IV. Le Gouvernement du Mexique a la conviction que la nature juridique du recours devant le Tribunal doit être interprétée à la lumière des principes de droit public et de la législation administrative qui constitue la raison d'être de ce recours. C'est pour garantir les fonctionnaires internationaux qu'on a établi un organe qui protège leurs intérêts légitimes contre l'arbitraire des chefs et directeurs du service administratif international.

Ce recours ne protège pas seulement les intérêts des employés publics internationaux mais garantit surtout fondamentalement les intérêts du service public international.

Dans cette double protection se trouve la justification du recours devant le Tribunal administratif dont les arrêts sont définitifs et irrévocables, comme le reconnaît expressément le Statut du Tribunal à l'article 10, et en conséquence lesdits arrêts constituent « *res judicata* ».

L'indépendance, l'efficacité et la stabilité des services publics des Nations Unies ne pourraient être obtenues si l'Assemblée prétendait révoquer les arrêts du Tribunal administratif ou se refusait à les exécuter ou par quelque autre moyen s'abstenait de les mettre en exécution ou de les rendre effectifs.

Le recours devant le Tribunal administratif implique non seulement la reconnaissance du contentieux administratif dans le domaine international, mais il implique aussi la séparation de l'administration contentieuse de l'administration active et l'application du principe de la distribution des pouvoirs, propre de toute organisation juridique démocratique.

Cette instance, qui a la faculté d'examiner et décider des questions de droit, est le Tribunal administratif, et sa création, comme on a vu, répond tant à l'exigence technique d'appliquer le principe de la séparation et distribution des pouvoirs, comme à celle d'obtenir des services publics internationaux efficaces en protégeant les droits acquis des employés publics, en les préservant contre l'abus d'autorité et en rendant sa situation indépendante des considérations et jugements politiques propres de l'Assemblée.

V. L'existence même du Tribunal administratif doit être envisagée sous deux aspects : l'aspect organique du Tribunal et l'aspect fonctionnel de cette instance.

Sous l'aspect organique, il est vrai que le Tribunal administratif est un organe subsidiaire de l'Assemblée, dans le sens que sa création se doit à une résolution de celle-ci par laquelle elle a délégué l'acquittement de ses fonctions relatives à l'administration contentieuse au Tribunal, en application de l'article 22 de la Charte des Nations Unies.

Mais sous son aspect fonctionnel, le Tribunal est une instance indépendante de l'Assemblée dans le sens que ses propres fonctions ne sont point politiques, puisqu'il s'acquitte de celles d'organe juridictionnel ou judiciaire, en matière contentieuse administrative ; et il est aussi indépendant de l'administration active internationale dont le chef suprême est le Secrétaire général.

L'Assemblée générale, par résolution 351 (IV) du 24 novembre 1949, modifiée par la résolution 782 B (VIII) du 9 décembre 1953, a également considéré le besoin qu'un organe juridictionnel indépendant acquitte les fonctions de connaître le contentieux administratif.

Le Gouvernement du Mexique arrive à la conclusion que si ces résolutions ne sont pas abrogées par l'Assemblée, celle-ci doit respecter la juridiction du Tribunal administratif, et qu'elle est, également, obligée d'exécuter ses arrêts. En tout cas, l'Assemblée doit respecter les droits acquis des fonctionnaires et des autres membres du personnel des Nations Unies, par leurs adhésions aux conditions établies dans les Statuts du Personnel et du Tribunal administratif respectivement.

Le Gouvernement du Mexique, finalement, affirme, avec Paul Negulesco quand il établit dans ses « Principes de Droit international administratif », que :

> « Le Tribunal administratif peut annuler l'acte administratif ou ordonner l'exécution de l'obligation. Au cas où l'exécution du jugement est impossible en fait, ou inopportune, le Tribunal peut accorder au demandeur des dommages-intérêts pour la réparation au préjudice causé. »

14. LETTRE DU MINISTRE DE YOUGOSLAVIE A LA HAYE AU GREFFIER DE LA COUR

N° 105.

La Haye, le 14 mars 1954.

Monsieur le Greffier de la Cour,

En réponse à votre estimée lettre n° 19758 en date du 14 janvier 1954 se rapportant aux jugements accordant indemnité rendus par le Tribunal administratif des Nations Unies et à la résolution de l'Assemblée générale des Nations Unies du 9 décembre 1953, j'ai l'honneur, au nom de mon Gouvernement et en conformité avec l'article 66, paragraphe 2, du Statut de la Cour internationale de Justice, de me référer et d'attirer l'attention de la Cour sur l'attitude prise par le Gouvernement yougoslave lors de la discussion de cette affaire dans le sous-comité et lors du vote de la résolution A/194 du 9 décembre 1953 en session plénière de la 8me Assemblée générale des Nations Unies.

Veuillez agréer, etc.

(Signé) Milan RISTIC.

15. EXPOSÉ ÉCRIT DU GOUVERNEMENT DE LA RÉPUBLIQUE DU CHILI

Par résolution adoptée par l'Assemblée générale des Nations Unies à sa VIII^me^ période de séances, il a été décidé de soumettre à la Cour internationale de Justice une requête pour avis consultatif concernant la valeur obligatoire des jugements du Tribunal administratif des Nations Unies accordant indemnité pour résiliation de contrat de service dans des cas déterminés.

I. *Questions posées par l'Assemblée*

Le Greffe de la Cour, conformément aux dispositions de l'article 66 de son Statut organique, s'est adressé à tous les États Membres pour leur faire connaître le texte de la demande d'avis et leur manifester que la Cour recevrait des exposés par écrit sur la matière avant le 15 mars 1954 pour la discussion ou examen de la question.

Le texte des questions posées est le suivant :

> « 1° Vu le Statut du Tribunal administratif des Nations Unies, et tous autres instruments et textes pertinents, l'Assemblée générale a-t-elle le droit, pour une raison quelconque, de refuser d'exécuter un jugement du Tribunal accordant une indemnité à un fonctionnaire des Nations Unies à l'engagement duquel il a mis fin sans l'assentiment de l'intéressé ?
>
> 2° Si la Cour répond par l'affirmative à la question 1), quels sont les principaux motifs sur lesquels l'Assemblée générale peut se fonder pour exercer légitimement ce droit ? »

II. *Antécédents de la demande d'avis*

Des antécédents existants il s'ensuit que la décision de solliciter un avis consultatif de la Cour internationale de Justice a été provoquée par un jugement du Tribunal administratif des Nations Unies lequel a déclaré illégale une décision du Secrétaire général des Nations Unies et, cet acte illégal ayant été commis, il a ordonné, sur cette base, qu'une indemnité de deux cent mille dollars soit payée aux demandeurs.

La décision du Tribunal administratif a été prise au sujet d'une réclamation présentée par des fonctionnaires des Nations Unies qui avaient été renvoyés pour avoir été considérés liés à des activités communistes, situation qui, d'après le Secrétaire général des Nations Unies, empêchait ces fonctionnaires de remplir les conditions nécessaires d'indépendance, loyauté ou intégrité exigées du personnel.

III. *Dispositions applicables au cas dont il s'agit*

Dans le Statut organique du Service du Secrétariat général des Nations Unies, approuvé à la VI^me^ Séance de l'Assemblée générale

et qui est entré en vigueur le 1er mars 1952, sont contenues les dispositions qui règlent le cas examiné et permettent de juger sur l'admissibilité de la demande, aussi bien que sur la compétence du Tribunal administratif.

Le chapitre IX du Statut, ayant rapport à la cessation de l'emploi et au licenciement, confère compétence au Secrétaire général des Nations Unies pour mettre fin aux services du personnel, soit pendant la période de stage, ou, cette période d'épreuve ayant pris fin, soit que l'intéressé occupe un poste permanent, ou ait un contrat pour une période fixe, à condition, néanmoins, que le Secrétaire général estime que, pour les besoins du service, ce poste doit être supprimé, ou si les services de la personne n'étaient pas satisfaisants, ou si les conditions de santé l'empêchent de continuer son service, ou enfin, pour d'autres raisons spécifiées dans la nomination. (Art. 9. 1 *(a)*, *(b)* et *(c)*.)

Le chapitre I, relatif aux devoirs, obligations et privilèges des fonctionnaires, établit dans son art. 1.9, l'obligation des fonctionnaires de souscrire un serment ou une promesse en ces termes :

Je jure solennellement (ou : je prends l'engagement solennel, je fais la déclaration, ou la promesse solennelle) d'exercer, en toute loyauté, discrétion et conscience, les fonctions qui m'ont été confiées en qualité de fonctionnaire international de l'Organisation des Nations Unies, de m'acquitter de ces fonctions et de régler ma conduite en ayant exclusivement en vue les intérêts de l'Organisation sans solliciter ni accepter d'instructions d'aucun gouvernement ou autre autorité extérieure à l'Organisation, en ce qui concerne l'accomplissement de mes devoirs.

L'article 9.3 du chapitre IX, annexe III, établit qu'il n'est pas versé d'indemnité pour résiliation de contrat en plusieurs cas, entre lesquels celui du « renvoi sans préavis » est compris. *(Summarily dismissed.)*

L'article 2 du Statut du Tribunal administratif des Nations Unies fixe la compétence de cet organisme dans les termes suivants : « Le Tribunal est compétent pour connaître des requêtes invoquant l'inobservation du contrat d'engagement des fonctionnaires du Secrétariat des Nations Unies ou des conditions d'emploi de ces fonctionnaires et pour statuer sur lesdites requêtes. « Les termes « contrats » et « conditions d'emploi » comprennent toutes dispositions pertinentes du Statut et du Règlement en vigueur au moment de l'inobservation invoquée, y compris les dispositions du Règlement des pensions du personnel.

Finalement, l'article 10, n° 2, du Statut du Tribunal administratif dispose que les décisions du Tribunal sont définitives et sans appel.

IV. *Considérations sur le problème posé*

Les antécédents qu'on vient de signaler et les dispositions légales transcrites, permettent d'analyser la situation créée par la décision du Tribunal administratif des Nations Unies.

En premier lieu, il faut mettre en évidence que le Secrétaire général des Nations Unies, en renvoyant les fonctionnaires demandeurs, a exécuté un acte de sa compétence exclusive, conformément à l'article 9.1 *(a)*, *(b)* et *(c)* du chapitre IX du Statut organique dont il a été fait mention antérieurement. Cet acte-là n'est pas soumis à revision de la part d'une autre autorité ou tribunal.

La compétence octroyée par la loi au Secrétaire général est du type discrétionnaire et reste, par là, soumise dans son exercice à l'appréciation du fonctionnaire qui l'applique. Il n'y a, en conséquence, aucune raison pour estimer que le renvoi des fonctionnaires est illégal, ce qui pourrait seulement avoir lieu si la compétence du Secrétaire général aurait été du type réglementé et qu'il y aurait une infraction aux conditions que la loi elle-même signale pour son exercice.

Le Secrétaire général a estimé, probablement, que les fonctionnaires liés au communisme commettent une infraction au serment — dont le texte a été transcrit plus haut — en tant qu'il signifie une promesse de se consacrer, dans l'exercice de ses obligations, seulement aux intérêts des Nations Unies et de ne pas accepter des instructions d'aucun gouvernement ou autorité étrangère à l'Organisation. Ce serment ou promesse est une condition requise pour entrer au service des Nations Unies et, en conséquence, s'il n'est pas respecté par les fonctionnaires, ils manquent à une condition ou circonstance préalable sans laquelle ils n'auraient pu être admis au service. Donc, le Secrétaire général a pu estimer qu'un fonctionnaire, se trouvant dans de telles circonstances, n'est pas en conditions de continuer au service.

Ce critérium ou appréciation pourrait, naturellement, être discuté, mais le fait qu'il existe un ou plusieurs autres critériums pour juger ce point, ne veut pas dire que le fonctionnaire, revêtu par la loi de la compétence nécessaire pour le cas, ait procédé illégalement en renvoyant ou destituant les employés.

Le Tribunal administratif, en qualifiant d'illégal, en ce cas-ci, l'exercice de la compétence discrétionnaire octroyée par la loi au Secrétaire général, a exécuté un acte qui reste ouvertement hors de sa compétence, et qui est par là privé de toute valeur juridique ou obligatoire. En effet, la disposition qui établit la compétence de ce Tribunal — article 2, transcrit plus haut — la circonscrit au jugement des demandes dans lesquelles on invoque l'inobservation des conditions stipulées dans un contrat de travail et au cas où l'on discute le sens et la portée des stipulations ou conditions dudit contrat.

Nulle part le Tribunal n'a reçu la compétence nécessaire pour juger la façon dont les autorités au service des Nations Unies exercent la compétence qui leur incombe. Maintenant, le fondement de la décision qui ordonne de payer l'indemnité aux fonctionnaires renvoyés ou destitués, serait l'illégalité supposée de la décision du Secrétaire général ordonnant ce renvoi ou cette destitution. En

d'autres mots, l'indemnité ne pourrait être allouée parce que la loi dispose que les fonctionnaires destitués n'y ont pas droit *(summarily dismissed)* (art. 9.3, chapitre IX, annexe III, signalé plus haut).

Le jugement soumis à examen n'a pas, en conséquence, une valeur juridique et ne peut pas être exécuté puisque le Tribunal, ou n'importe quelle autre autorité, peut seulement réaliser des actes d'une valeur juridique dans la limite de la compétence que la loi lui assigne. Si l'on exécutait le jugement du Tribunal — et qu'on peut seulement appeler décision ou jugement en raison de son aspect formel —, tout ordre juridique possible serait détruit, du moment qu'on permettrait à chaque autorité d'altérer les limites de sa compétence, c'est-à-dire de passer au terrain de l'arbitraire qui est l'opposé du droit.

Le Gouvernement du Chili considère que l'Assemblée générale des Nations Unies qui créa la compétence et l'octroya au Tribunal administratif en lui fixant les limites de son exercice, est qualifiée pour examiner le cas soumis pour avis consultatif et pour décider si le Tribunal a agi ou non dans les limites de la compétence qu'elle lui a fixée.

16. TÉLÉGRAMME DU MINISTRE DES AFFAIRES ÉTRANGÈRES DE LA RÉPUBLIQUE TCHÉCOSLOVAQUE AU GREFFIER DE LA COUR

Le 18 mars 1954.

Monsieur le Greffier me référant à votre communication en date du 14 janvier 1954 n° 19758 concernant la procédure d'avis consultatif introduite conformément à la résolution de l'Assemblée générale des Nations Unies du 9 décembre 1953 devant la Cour internationale de Justice j'ai l'honneur de porter à votre connaissance que l'attitude adoptée par la Tchécoslovaquie sur la question de l'effet juridique des jugements rendus par le Tribunal administratif des Nations Unies a été exposée par la délégation tchécoslovaque à la fin 8me Session à l'Assemblée générale des Nations Unies et reste sans modification. Le 7 décembre 1953 à la 426me Séance de la Cinquième Commission de l'Assemblée générale le représentant de la Tchécoslovaquie a souligné que le Gouvernement tchécoslovaque considérait les jugements du Tribunal comme étant rendus en conformité avec la compétence que lui confère le Statut comme définitifs et sans appel et ne pouvant être revisés par l'Assemblée générale. Le Gouvernement tchécoslovaque se réserve le droit de décider à une date ultérieure de sa participation à la procédure des avis consultatifs dans la phase des exposés oraux. Veuillez agréer Monsieur le Greffier les assurances de ma haute considération. — Vaclav DAVID Ministre des Affaires étrangères de la République tchécoslovaque.

17. WRITTEN STATEMENT OF THE GOVERNMENT OF IRAQ

1. The Administrative Tribunal was set up by the General Assembly under the broad terms of Article 7 (2) and the more specific provisions of Article 22, as a subsidiary body of the General Assembly, with the object of carrying out certain functions which the Charter assigned to the General Assembly and which the latter deemed necessary to entrust, under certain limitations, to the Administrative Tribunal. It follows from this that the General Assembly possesses the power to amend or altogether abolish the statute of the Tribunal. Consequently it must be admitted even more readily that the General Assembly is at least equally as competent to undertake what is in truth a lesser step—that of refusing, in the light of justifying reasons, to give effect to an award of compensation given by the Tribunal under circumstances specified in question (1). The above argument would, it is submitted, gain further strength and added credence when viewed in the light of an important privilege, and indeed an onerous obligation, of the General Assembly, namely, its responsibility, under Article 17 of the Charter, to consider and approve the budget of the Organization. This carries with it the necessary corollary of capacity to review the work of the Organization as a whole and to control its activities. It must be pointed out, therefore, that since even the other principal organs of the United Nations are subject to this power of review and control, it could scarcely be said that the Administrative Tribunal, which is admittedly a subsidiary organ of the General Assembly and a creature of it, must be immune from the exercise of that power, Article 10 of its statute, expressing the finality of its judgments, notwithstanding. It must be emphasized, moreover, that the General Assembly is in no position to waive at its own pleasure the budgetary function assigned to it. The relevant article is quite clear in imposing an obligation on the General Assembly, which, it is needless to say, must be performed with the general good of the Organization in view.

2. As to question (2), it is submitted that since it is conceded that in principle the General Assembly possesses the right to refuse to give effect to an award of compensation given by the Administrative Tribunal, it must be equally conceded that, as a necessary inference thereof, the General Assembly is the sole judge of the circumstances that would justify such a course. It is to be assumed, however, that the General Assembly will use this right with moderation, and only if the vital interests of the United Nations would necessitate resort to it. It is suggested, however, that the following

would constitute reasonable grounds for such a course of action on the part of the General Assembly :

(1) If the Tribunal, in awarding the compensation, has acted *ultra vires ;*

(2) If it has committed serious errors of judgment or fact ; or,

(3) If the compensation awarded is obviously unjustifiable.

18. WRITTEN STATEMENT OF THE GOVERNMENT OF THE REPUBLIC OF CHINA

Taipei, March 11, 1954.

The Government of the Republic of China has the honor to submit to the International Court of Justice the following statement on the binding character of awards of compensation made by the United Nations Administrative Tribunal, on which question a request for advisory opinion has been transmitted to the Court under the Resolution of the General Assembly of the United Nations of December 9, 1953.

The Government of the Republic of China is of the opinion that the General Assembly of the United Nations has the right to refuse to give effect to an award of compensation made by the United Nations Administrative Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent, if the General Assembly finds that the award is made in error.

The principal grounds upon which the General Assembly could lawfully exercise such a right are the following :

(1) Under Article 10 of the Charter of the United Nations, the General Assembly is given wide powers to "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter" ;

(2) The Administrative Tribunal is an organ created by, subsidiary to, and consequently subject to the supervision of, the General Assembly ; and

(3) Although Article 10 (2) of the Statute of the Administrative Tribunal provides that "the judgments shall be final and without appeal", this provision is only binding on the Secretary-General and the staff member or staff members of the United Nations affected but does not preclude a review by the General Assembly on its own initiative of the judgments rendered by the Administrative Tribunal.

The Government of the Republic of China further wishes to bring the following pertinent facts to the attention of the Court :

The power of laying down and executing a personnel policy of the United Nations is clearly vested in the Secretary-General in his capacity as the Chief Administrative Officer as provided in Chapter XV of the Charter. The exercise of such power by the Secretary-General is only subject to the review and approval of the General Assembly. The consideration by the General Assembly at its seventh

and eighth sessions of the Secretary-General's reports on personnel policy (documents of the United Nations A/2364 dated January 30, 1953, and A/2533 dated November 2, 1953) furnishes material proof of this point. The Secretary-General is not legally obligated to subject his personnel policy to the review of any other organ than the General Assembly. Any interference in this field by any other organ would presuppose a right of review on the part of that organ of the personnel policy of the Secretary-General.

Prior to the rendering of the judgments by the Administrative Tribunal in the eleven cases which led to the request for advisory opinion, the Secretary-General had laid down a policy, on the basis of a recommendation made by the Commission of Jurists, to the effect that "staff members should be dismissed for violation of their fundamental obligations, particularly under Article 1.4 of the Staff Regulations, when they have used the privilege against self-incrimination in official inquiries concerned with subversive activities and espionage". This policy was included in his report of January 30, 1953 (paragraph 91 of document A/2364 of the United Nations) submitted to the General Assembly which considered it and adopted a resolution (No. 708 (VII) dated April 1, 1953) on it. The staff members in question were dismissed in accordance with this policy. In reversing the decisions made by the Secretary-General in this regard, the Administrative Tribunal was intervening in a matter which fell within the province of the Secretary-General and which the Tribunal had no competence to question.

The powers of the Administrative Tribunal had been very far stretched particularly in one of the cases relating to temporary appointments (the Ruth E. Crawford case). Staff Regulation 9.1 *(c)* stipulates, in regard to temporary appointments, that "the Secretary-General may at any time terminate the appointment, if, in his opinion, such action would be in the interest of the United Nations". No other conditions are prescribed. Such being the case, the Administrative Tribunal, in seeking a ground on which to base its decision to reverse such a termination, had to rely on the allegations of improper motive and misuse of power (paragraphs 2 to 5 of judgment No. 18 (AT/DEC/18) dated August 21, 1953) on the part of the Secretary-General, which were only based on presumptive evidences.

Under such circumstances, the Government of the Republic of China believes that the General Assembly could, and should, exercise the right to refuse to give effect to the awards of compensation made by the Administrative Tribunal in favor of the staff members of the United Nations in question.

[Seal: Ministry for Foreign Affairs of the Republic of China.]

19. LETTRE DU MINISTÈRE DES AFFAIRES ÉTRANGÈRES DE LA RÉPUBLIQUE DU GUATEMALA AU GREFFIER ADJOINT DE LA COUR

Guatemala, le 13 mars 1954.

Monsieur le Greffier :

J'ai l'honneur de vous faire parvenir ma réponse à votre communication du 14 janvier 1954, numéro 19758, dans laquelle vous avez bien voulu vous référer à votre communication du 24 décembre 1953 concernant la consultation présentée, conformément à la résolution des Nations Unies du 9 décembre 1953, numéro 785 (VIII), par l'Assemblée générale des Nations Unies à la Cour internationale de Justice sur la question de la force exécutoire des jugements rendus par le Tribunal administratif des Nations Unies accordant des indemnités. Conformément aussi à l'article 66, alinéa 2, du Statut de la Cour, votre communication contient des références relatives au délai fixé aux États Membres et aux autres organisations pour l'exercice de la faculté de présenter des déclarations écrites relatives à la matière qui est l'objet de l'avis consultatif ci-dessus indiqué.

Bien que mon Gouvernement ait déjà exprimé son opinion sur la question : « Politique relative au personnel des Nations Unies », à la Cinquième Commission de l'Assemblée générale, il a décidé de considérer spécifiquement l'affaire qui constitue l'objet de la consultation en présentant un sommaire des points les plus importants de la position qu'il a adoptée vis-à-vis de cette question et qui constitue la déclaration prévue dans le Statut de la Cour.

1. Le Gouvernement du Guatemala, en qualité d'État Membre des Nations Unies, a approuvé en 1949 la résolution 351 (IV) relative à la création du Tribunal administratif qui constituerait l'organisme juridique chargé de connaître — en plus des autres fonctions déterminées par le Statut — les appels présentés en vue de discuter les résolutions adoptées par le Secrétaire général des Nations Unies, qui affectent les membres du personnel en raison des infractions aux contrats ou conditions du travail. L'objectif poursuivi par la majorité des États Membres était la création d'un tribunal de telle nature qu'il serait en mesure d'instituer des principes universaux de justice et d'équité favorisant le bien-être et la sécurité des membres du personnel des Nations Unies, dans les cas où les résolutions adoptées par le Secrétaire général pourraient leur causer des dommages et préjudices en raison d'infractions aux contrats de travail. La fonction finale du Tribunal administratif est l'accord des indemnités réparatrices des actions accomplies par le Sécretaire général soit

exerçant ses facultés propres soit « a fortiori » quand ces actions représentent une application abusive desdites fonctions.

2. L'Assemblée générale, par la résolution déjà indiquée (numéro 351, IV), a renoncé à considérer les cas ultérieurs soumis au Tribunal administratif en affirmant dans la dernière partie de l'article 9 du Statut : « dans tous les cas où il serait question d'indemnité, le montant de celle-ci sera fixé par le Tribunal administratif et payé par les Nations Unies ou par l'organisation spécialisée qui est partie conformément à l'article 12 ». Une fois fixée l'indemnité correspondante par le Tribunal, il ne reste qu'à faire effectuer son payement par les Nations Unies ou l'agence spécialisée.

3. Ce point de vue a été précisé par la déclaration de l'Assemblée générale dans l'alinéa 2 de l'article 10 du Statut du Tribunal admettant que les jugements rendus par le Tribunal sont « définitifs et sans appel possible ». En conséquence, l'Assemblée générale, elle-même — tout en étant la plus haute représentation de la partie obligée à payer l'indemnité, étant dépourvue par sa propre décision de facultés pour demander la revision de cette obligation —, ne pourrait s'adjuger, contrairement à tous les principes de droit, la faculté de reviser les cas jugés qui n'admettent pas d'appel possible.

4. Une fois que le jugement du Tribunal a été établi, il n'y a plus de base pour la faculté de revision de l'Assemblée générale, pas même en invoquant son pouvoir souverain dans l'Organisation.

5. Le Guatemala, en sa qualité d'État Membre des Nations Unies, reconnaît les pouvoirs souverains qui appartiennent à l'Assemblée générale et qui sont uniquement limités par les plus élevés principes de justice. Comme illustration de cette limitation, il faut rappeler que l'article 11 du Statut du Tribunal administratif formulé par l'Assemblée générale, en établissant les pouvoirs souverains dudit organisme par la déclaration : « le présent Statut peut être modifié par décision de l'Assemblée générale », envisage plutot les cas qui pourraient être présentés à l'avenir, puisque l'alinéa 2 de l'article 10 déjà indiqué limite évidemment les facultés de l'Assemblée générale en disant : « les jugements rendus sont définitifs et sans appel possible ».

6. Finalement, on ne peut pas invoquer comme un antécédent favorable, pour fonder la prétendue faculté de revision des jugements du Tribunal administratif par l'Assemblée générale des Nations Unies, le fait historique de la résolution adoptée par l'éteinte Société des Nations concernant son refus d'exécuter les jugements du Tribunal administratif de cette organisation. Du point de vue juridique les deux cas sont absolument différents, puisqu'il est facile de constater la réduction faite par l'Assemblée de la Société des Nations à cette époque-là, réduction par laquelle le délai de notification concernant les destitutions était fixé à un mois au lieu de six mois, comme il l'était auparavant, et on sait que les rares employés qui n'ont pas

accepté la situation ont fait appel au Tribunal et ont obtenu de cette façon une résolution favorable à l'accord des indemnités, mais ils n'ont pas agi conformément à son Statut, puisque le Secrétaire général, représentant d'une des parties, était absent, ce qui a donné comme résultat la déclaration d'incompétence du Tribunal en ce qui concernait la revision d'une résolution adoptée par l'Assemblée générale. Vu que le jugement du Tribunal s'opposait effectivement à la décision de l'Assemblée, celle-ci a donc adopté une résolution suspendant l'exécution du jugement rendu par le Tribunal.

Dans la situation actuelle qui est l'objet de la consultation présentée par l'Assemblée générale des Nations Unies à la Cour internationale de Justice, le Tribunal administratif a agi conformément au Statut en vigueur ; il n'existe aucune résolution de l'Assemblée générale qui constitue une modification dudit Statut ou une impugnation faite par le Tribunal dans ses jugements accordant des indemnités ; le Secrétaire général a participé à toutes les procédures verbales et finalement il n'a pas discuté la compétence du Tribunal. En relation avec ce dernier cas le Statut stipule, dans son article 2, alinéa 3 : « dans le cas d'une dispute relative à la compétence du Tribunal, celle-ci sera réglée par décision du Tribunal ».

Dans tous les cas jugés jusqu'à présent par le Tribunal administratif des Nations Unies, le Secrétaire général non seulement n'a discuté la compétence du Tribunal, mais il a accepté ses jugements et a demandé son exécution et, avec la recommandation du Comité consultatif, l'inclusion dans le budget de l'Organisation des fonds correspondants.

En conclusion, le Gouvernement du Guatemala, considérant le Statut du Tribunal administratif des Nations Unies, les antécédents historiques de la question et les principes universaux de droit, déclare que l'Assemblée générale n'a pas faculté pour refuser l'exécution des jugements rendus par le Tribunal accordant des indemnités à faveur des membres du personnel des Nations Unies qui ont été renvoyés sans son agrément.

Veuillez agréer, etc.

20. EXPOSÉ ÉCRIT DU GOUVERNEMENT DE LA RÉPUBLIQUE TURQUE

Avant de donner une réponse à la question de savoir si l'Assemblée générale des Nations Unies a le droit de refuser ou non l'exécution d'une sentence rendue par le Tribunal administratif, il serait nécessaire d'examiner si cette Assemblée peut discuter une décision du Tribunal administratif.

D'après l'article 10 de la Charte des Nations Unies, l'Assemblée générale peut discuter toutes questions ou affaires rentrant dans le cadre de la Charte ou se rapportant aux pouvoirs et fonctions de l'un quelconque des organes prévus dans cette Charte.

Le Tribunal administratif est un organe créé par l'Assemblée générale, conformément à l'article 22 de la Charte.

Or, du moment que l'Assemblée générale peut discuter toutes questions rentrant dans les attributions des organes créés par la Charte même, excepté les questions prévues au premier paragraphe de l'article 12 de la Charte, il est tout naturel qu'elle puisse, et à plus forte raison, examiner et discuter les questions qui tombent dans la compétence d'un organe institué par elle pour l'assister dans l'accomplissement d'une partie de sa tâche et pour gérer les affaires rentrant dans ses attributions, un organe que, en somme, l'Assemblée peut, en tout état de cause, abolir ou dont elle peut modifier la structure.

D'autre part, dans l'exercice de sa juridiction, un Tribunal administratif des Nations Unies doit toujours s'inspirer des principes admis par la majorité des membres de l'Assemblée générale qui l'a constitué. Il est de toute évidence que l'Assemblée générale puisse constater si les principes appliqués par un tribunal créé par elle sont conformes à ses propres principes, ce qui ne serait possible que si l'Assemblée pouvait, le cas échéant, discuter les actes accomplis et les jugements rendus par le Tribunal. Le droit et le pouvoir de l'Assemblée de discuter ces questions étant ainsi établis, la question de savoir si l'Assemblée peut ou non mettre en exécution les décisions du Tribunal se trouve résolue d'elle-même.

A notre avis, l'Assemblée générale a le droit de refuser l'exécution de toute décision du Tribunal, en tant qu'instance supérieure, si elle juge ces décisions pertinemment contraires aux principes juridiques admis par la majorité de ses membres. Autrement, l'on pourrait aboutir à cette conclusion absurde de reconnaître à un organe auxiliaire de l'Assemblée générale le droit d'appliquer des principes juridiques non admis par elle.

21. WRITTEN STATEMENT OF THE GOVERNMENT OF ECUADOR

No. 80-DL.

Quito, April 21, 1954.

Mr. Registrar:

I have the honour to acknowledge receipt of your letter dated the 12th March of the current year and enclosed copy of a letter of January 14th, 1954, sent to me and which I unfortunately did not receive in due course. By this letter you invite the Government of Ecuador to file a written statement regarding the legal right of the General Assembly to refuse to give effect to awards by the Administrative Tribunal of the United Nations, as it appears from Resolution 785 (VIII) of December 9th, 1953.

Considering your letter of January 14th, 1954, the special and direct communication referred to by Article 66, paragraph 2, of the Statute of the International Court of Justice, and in accordance with my telegrams of March 9th and March 20th of the current year, I have the honour to file with you a statement relating to the question referred by the General Assembly to the International Court of Justice for its advisory opinion. Pursuant to Article 39, paragraph 1, of the Statute of the International Court, I am using the English language for my statement sent to you within the time-limit fixed in the second paragraph of your letter of March 12th, 1954.

This statement confirms the vote given by the Ecuadorean delegate, on instructions of my Government, at the Fifth Committee of the General Assembly when it discussed the appropriation of 179,420 requested by the Secretary-General of the Organization for the payment of the awards made by the Administrative Tribunal on the basis of its decisions in eleven controversial cases.

Our point of departure for this written statement is Article 22 of the Charter of the United Nations which reads:

> "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."

This provision is reproduced textually by the first part of rule 150 of the Procedure of the General Assembly.

On the grounds of both articles the General Assembly established several subsidiary organs, such as the Advisory Committee on Administrative and Budgetary Questions, the expert Committee on Contributions and the Administrative Tribunal. The powers of these organs do not extend beyond the limits set by the General Assembly which reserved the right of enlarging or restricting them, as provided for by rules 150 and 152 of the Procedure of the General Assembly.

The legal construction of the Government of Ecuador is clear and simple, and is based upon general rules of law. For the better performance of its functions the General Assembly deemed it necessary to divide its work among various subsidiary organs, each of which has a specific task. Thus, we can assert that the General Assembly delegated the conduct of some business to these subsidiary organs, chiefly owing to the fact that the General Assembly meets in regular annual sessions and has intervals of recess. They submit reports on their work to the General Assembly —admittedly, with the exception of the Administrative Tribunal —which is bound by their recommendations and decisions in so far as it approves and adopts them. Moreover, the General Assembly may establish new organs or suppress one or more of the existing ones, reorganize or merge them, as it deems more expedient.

Whatever its statute may provide, the Administrative Tribunal is not placed on a higher position than the other subsidiary organs, as far as powers and functions are concerned. The Administrative Tribunal does not derive its powers and functions from the Charter of the United Nations but only from a statute approved by the General Assembly. This is tantamount to say that the sphere of action of the Administrative Tribunal is confined to what the General Assembly may prescribe and that the existence itself of the Tribunal depends on the decision of the Assembly.

If the substantive aspect of the Administrative Tribunal rests entirely on the General Assembly, the procedural aspect must be considered along the same lines. Under rule 141 of the Procedure, the General Assembly shall establish regulations for the financial administration of the United Nations. For the discharge of these functions, the General Assembly established various organs. Notwithstanding its judicial tasks, the Administrative Tribunal is closely related to the financial administration of the United Nations, since its judgments entail the consideration and approval of appropriations by the General Assembly, in order to pay the amounts of compensation fixed by the Tribunal. The General Assembly reserves the right of approving or reversing the decisions of the subsidiary organs, and the Administrative Tribunal cannot be excepted, because in our conception of administrative law, it is subordinate to the General Assembly, inasmuch as it owes its existence to the Assembly.

My Government does not agree on the view expressed by the Secretary-General of the Organization in Section 17, (ii) of his report (document A/2534), according to which, when a staff member whose contract has been terminated without his assent, appeals from the decision of the Secretary-General, the parties appearing before the Administrative Tribunal are the General Assembly and the staff member concerned. The staff of the Organization is appointed by the Secretary-General under regulations established by the General Assembly (Article 101, para-

graph 1, of the Charter, and Article 50 of the Staff Rules of the United Nations). Accordingly, the Secretary-General must be regarded as the employer and the staff member as the employé. If the contract of a staff member has been terminated without his assent and he appeals from the decision to the Administrative Tribunal, the parties appearing before it will be the member and the Secretary-General. The origin of the funds has nothing to do with the parties to the dispute. The Administrative Tribunal is representing the General Assembly which reserves the right to accept the decision of the Tribunal or refuse to give effect to it.

Thus, if the General Assembly reversed the action of the Administrative Tribunal in eleven controversial cases by denying the appropriations requested by the Secretary-General, it was exercising its rights and powers, regardless of other implications of the cases which are not relevant to the points submitted to the International Court of Justice, since its Statute does not provide for the rendering of advisory opinions on other than legal questions.

I have endeavoured to state the views of my Government on the question as a whole, instead of analyzing each of the two points submitted to the International Court of Justice because, in this way, the Court will better understand our legal construction of the relationship between the General Assembly and the Administrative Tribunal avoiding, at the same time, other than legal considerations about the right of the Assembly to refuse to give effect to the awards of the Tribunal in eleven controversial cases, which are the background of Resolution 785 (VIII) of December 9, 1953.

My Government believes that the present written statement will furnish the information required under Article 66, paragraph 2, of the Statute of the International Court of Justice, on the question of the powers of the Administrative Tribunal, referred to the Court for its advisory opinion under Article 65 of said Statute.

I have, etc.,

(Signed) Luis. Ant. PEÑAHERRERA,
Minister of Foreign Affairs,
Republic of Ecuador.