DISSENTING OPINION OF JUDGE READ

I regret that I am unable to concur in the answers given by the majority of my colleagues to the Questions submitted in the Request. In general I agree with the position taken by President Hackworth and Vice-President Badawi, but there are certain aspects of the matter, which, in my opinion, deserve special consideration.

My difficulties in concurring in the Opinion are fourfold. They concern: the nature and significance of the notion of competence or jurisdiction; and the problems of interpretation arising under Article XII, paragraph 1, of the Statute of the Administrative Tribunal, the clauses in the Judgments which purport to confirm its jurisdiction, and Question I.

My first difficulty relates to competence or jurisdiction. This notion is the principle that a Tribunal must keep within the limits imposed by law, or by the instrument under which it operates. It applies at all stages of proceedings: commencement; pleadings; oral proceedings; and, above all, at the crucial stage, delivery of judgment.

Lack of competence may be raised by preliminary objection, or during the examination of the merits. In preliminary proceedings, the tribunal may simply reject the objection to the jurisdiction, or it may decide, at that stage, that it is competent: but either finding is interlocutory. In any event, if, in the course of the examination of the merits, it is established by a party, or the tribunal finds of its own motion, that it is incompetent to adjudicate, it cannot proceed to judgment. This does not mean that the problems of competence and merits are the same. They are separate in principle, although there may be issues of fact and law that are common to both. What it does mean is that it is the duty of every tribunal—when the relationship of the parties, the essential character of the cause of action, and other matters relevant to jurisdiction have been established—to satisfy itself that it is competent to deliver the judgment and thus to complete the hearing of the case.

This confirmation of jurisdiction is a finding by the tribunal that, in adjudicating, it is acting within the scope of its authority to adjudicate, prescribed by law and by the statute under which it operates. It has nothing to do with the question whether the decision is right or wrong: that is merits. It is concerned solely with the duty of the tribunal to respect and maintain the limits imposed on its authority; the rightness or wrongness of the decision being irrelevant considerations.

My second difficulty relates to the interpretation of Article XII of the Statute, which provides that:

> "In any case in which the Executive Board ... challenges a decision of the Tribunal confirming its jurisdiction, ... the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice."

I am disregarding the provision relating to procedural fault, which was eliminated from the case by Unesco.

Four expressions present problems of interpretation: "challenges"; "decision of the Tribunal confirming its jurisdiction"; "the question of the validity of the decision"; and "shall be submitted". The first three are directly involved in this case.

There are two ways of construing a text. It can be given its ordinary and natural meaning; or, when that does not make sense, it can be given a meaning which, while not doing violence to the words used, is in conformity with the context and the general tenor of the document, and which will give effect to the general intentions of its authors, as indicated by its terms and by attendant circumstances. I shall refer to the first as literal, and to the second way of construing the text as liberal interpretation.

The expression "challenges a decision", if literally construed, would connote the fact of challenge and not its substantial quality. Unesco, acting under Article XII, did challenge the whole Judgment, in terms broad enough to constitute a challenge to the decision confirming jurisdiction. Literally construing the word "challenges", it would follow that the Executive Board was empowered to submit the validity of the decision to this Court, regardless of whether or not it could substantiate the challenge. But it has been universally accepted that Unesco can only require the Court to rule on validity if the challenge proves to be well-founded. All unite in applying a liberal interpretation.

Similarly, liberal interpretation has been given to the last two expressions referred to above. Strictly, "the question of the validity of the decision" would cover all aspects of validity, but it is universally accepted that it must, in order to give effect to the general intention of the authors, be restricted to those aspects of validity or invalidity which result from the competence or incompetence of the Tribunal. Literally, "shall be submitted" is imperative; but it is recognized that the Executive Board is under no compulsion but exercises its political judgment in deciding whether or not to submit the question to the Court.

The second expression—"decision of the Tribunal confirming its jurisdiction"—gives more difficulty. It is impossible, on the basis of literal construction, to confine the words to decisions that the Tribunals were competent to entertain the complaints, and to listen to the witnesses and counsel, i.e. to exercise the less important aspects of jurisdiction, because the authors did not choose to use the words "confirming the preliminary and relatively unimportant elements of jurisdiction, but ignoring the crucial element, the delivery of judgment". But I do not feel justified in giving a liberal interpretation to the first three expressions with which I have dealt, and at the same time imposing a literal construction on the expression now under consideration. Accordingly, I shall examine the nature and historical background of the Article and its relation to other parts of the Statute.

A precedent was established in 1946 when the Assembly of the League of Nations refused to give effect to certain judgments of the Administrative Tribunal, on grounds of nullity. Some of the officials were from the International Labour Organisation and when the Organisation was taking over the League Tribunal and Statute, it became necessary to cope with the problem presented by the precedent. This was a serious matter, because it imported into the relation between official and organization an arbitrary element, and destroyed security of tenure. It was, however, impossible to reverse the precedent, because many members were not prepared to accept a position in which a judgment of the Tribunal which was null and void would be binding on the Organisation. A compromise was reached and embodied in Article XII.

Prior to the adoption of Article XII, the officials were at the mercy of the Organisation, because there was no legal sanction against possible action in treating a judgment as a nullity. Under Article XII, provided that it is liberally construed, the Organisation can only treat a judgment as invalid if it has been found to be so by this Court.

For ten years, the provisions of Article XII have stood out as the only safeguard giving effective protection to officials from arbitrary action by the Organizations. Restrictive construction of the expression under consideration, confining the effect of this safeguard to cases in which there can be found a decision of the Tribunal limited to the preliminary and relative unimportant elements of jurisdiction, would narrow the scope of the safeguard, and enlarge the field in which officials were at the mercy of the Organizations. I am compelled to give a broad and liberal interpretation to a remedial measure, designed to ensure justice and to prevent arbitrary action.

Apart from the historical background, which so strongly indicates the need for broad and liberal construction, the context suggests the same need, with equal force. Here I shall mention only one

point: Article VIII. The scope of the judgment to be given by the Tribunal was rigidly confined. It was given competence to "order the rescinding of the decision impugned or the performance of the obligation relied upon". In the event that these courses proved to be impossible or inadvisable, competence was given to "award compensation for the injury caused...". The language was imperative, and it is clear beyond argument that the authors of the Statute intended to confine the Tribunal to these forms of redress. There was no way in which an Organization could know that the Tribunal was delivering a judgment which, in the matter of redress, was beyond its competence, until after the judgment had been delivered. That would be too late for argument, too late for anything but the procedure under Article XII.

Restrictive construction would thus render nugatory the limitations imposed by Article VIII and it is therefore unacceptable to me.

It thus appears that a literal examination of the words "decision of the Tribunal confirming its jurisdiction", a survey of the historical background, and the context, all unite in compelling me to adopt a broad and liberal construction. I am convinced that the authors of the Statute had in mind all elements of jurisdiction and that they did not intend to exclude the crucial element, the delivery of judgment.

My third difficulty in concurring in the Opinion relates to the interpretation of the clauses in the Judgments of the Tribunal which deal with jurisdiction.

The first is the seventh clause appearing under the heading "ON COMPETENCE", which reads:

> "that by virtue of Article II, paragraph 1, of its Statute, the Tribunal is competent to hear the said dispute;"

The reference to paragraph (1) is an obvious clerical error. It must be treated as referring to paragraph (5), but this is of no importance as the link with Article II of the Statute was abandoned in the dispositive. To avoid confusion I shall refer to this clause as the tentative finding on competence.

The second clause, to which I shall refer as the decision confirming jurisdiction, is in the dispositive. Together with the preceding and following clauses, it reads :

> "ON THE GROUNDS AS AFORESAID
>
> THE TRIBUNAL,
>
> Rejecting any wider or contrary conclusions,
>
> Declares the complaint to be receivable as to form;
>
> *Declares that it is competent;*
>
> Orders the decision taken to be rescinded and declares in law

that it constitutes an abuse of rights causing prejudice to the complainant ;

In consequence, should the defendant not reconsider the decision taken and renew the complainant's appointment, orders the said defendant to pay to the complainant the sum of $15,500, together with interest at 4 per centum from 1 January 1955 ;

Orders the defendant Organisation to pay to the complainant the sum of $300 by way of participation in the costs of her defence ; ..."

(I have italicized the decision confirming jurisdiction.)

There can be no doubt as to the meaning. This clause was an integral and operative part of the dispositive. Read with the following clause, it was an unequivocal decision by the Tribunal confirming its jurisdiction to render judgment based, not on the provisions of Article II, paragraph 5, but on abuse of rights, a very different matter.

The use of the present tense, "*is* competent", places the construction beyond doubt. The words cannot possibly be construed as meaning: "Declares that it *was* competent". The tentative finding on competence was part of the expositive, and it must give way to the decisive clause which appears in the dispositive. The decision by which the Tribunal actually confirmed its decision, the decision which was challenged by Unesco, and the decision which must be taken into account in answering the Questions in the Request, is the actual decision which is contained in the dispositive and not the tentative finding on competence.

My fourth difficulty relates to the interpretation of Question I of the Request. In putting the question of jurisdiction to the Court, Unesco used the expression "Was the Administrative Tribunal competent ... to hear the complaints...". The words used suggest that Unesco wanted the Court's Opinion as to the Tribunal's competence *to hear the complaints* in the widest sense. The expression "to hear the complaints", if given the ordinary and natural meaning of the words used, would extend to both the reception and the disposition of the complaints. But the French text, which is the original, is, perhaps, less free from doubt in this regard.

Accordingly, it becomes necessary to consider the attendant circumstances, and to ressort to liberal interpretation. In this way the true position emerges.

In the first place, the Question should be considered in relation to the scope of Article XII, under which it was put to the Court; and also in relation to the scope of the clauses in the Judgments confirming competence. Both the former and the latter extended

to both the reception and the disposition of complaints. It would not be unreasonable to interpret the question as extending to the whole field of competence, as included within the Judgments and the Article.

In the second place, Unesco has throughout made it clear that it was intended to raise the question of jurisdiction in the widest sense. This was done in paragraph 93 of the Written Statement, and reasserted in the letter from the Legal Adviser to the Registrar of the Court, dated June 20th of this year.

In the Written Statements, not only Unesco but also the Governments have discussed the issues on the assumption that the issue of competence, in the widest sense, was raised by the Questions. The only doubt arises from some remarks by Unesco, both in paragraph 93 of the Written Statement and in the letter of June 20th. It was there suggested that the issue of competence in one aspect (competence to entertain the complaints) was being raised by Question I, and that competence in its other aspect (competence to dispose of the complaints) was covered by Question II.

To me the question whether the issue of competence to deliver judgments on matters over which jurisdiction had not been conferred by the Statute should be regarded as arising under Question I or II is a matter of slight importance. The important thing is that the issue has arisen, and must be dealt with.

In my opinion, the proper course to be followed would be to revise the Questions by striking out Question II, and by giving to Question I a liberal interpretation, so as to cover both the reception and the disposition of the complaints. That is the course which the Permanent Court, and also this Court, invariably followed, when there was possible discrepancy between the Questions as framed and the actual legal questions as developed by the Written and Oral Proceedings.

* * *

Examination of these four matters has led me to the following conclusions:

1st. That Article XII contemplates a decision by the Tribunal confirming its jurisdiction in its entirety.

2nd. That the clauses in the Judgments confirming competence must be construed as confirmation based on the actual position as established in the proceedings, and as confirming the competence of the Tribunal to deliver the Judgments of which they are parts.

3rd. That Question I of the Request should be construed as raising the issue of competence of the Tribunal to deliver the judgment.

Accordingly, I am unable to confine my examination of the case to the seven clauses which come under the heading "ON COMPETENCE", but find it necessary to look at the whole judgment. In so doing, I shall not consider whether the Tribunal was right or wrong in any conclusions which it reached concerning the merits. I shall not consider whether there was or was not, in fact or law, non-observance of the terms of appointment or of provisions of the Staff Regulations; or whether there was or was not, in fact or in law, an abuse of rights. I shall confine myself to the single question: did the Tribunal keep within the limits of its competence, as prescribed by the law and by the Statute? I shall begin with the limitations on the competence of the Tribunal, and then examine the course actually followed in delivering the Judgments and end with my own opinion as to the answers that should be given to the questions.

As regards limitation, I shall begin with two which were imposed by the Statute.

By Article II, paragraph 5, the competence of the Tribunal was restricted to hearing "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations...".

There are three possible constructions to be placed on these words. The first, based on literal interpretation, is that the Tribunal is competent to entertain a complaint, provided that there has been an allegation of non-observance of the terms and provisions, and notwithstanding that there is no substantial basis for the allegation.

If this construction is accepted, the inevitable conclusion is that the Tribunal was without jurisdiction; because the complainants made no such allegation. They did not allege non-observance of the terms of appointment, or of provisions of the regulations.They put their cases on an entirely different basis, which was described by the Tribunal in the following words:

> "Having had referred to it a complaint submitted against the United Nations Educational, Scientific and Cultural Organisation of 5 February 1955 by Mr. Peter Duberg, an official of that Organisation, asking that the Tribunal be pleased to rescind the decision taken by the Director-General on 13 August 1954 and to enjoin the Director-General to renew the contract of the complainant and to pay him the sum of one franc in respect of damages and legal costs;".

There is nothing there about non-observance.

However, I am unable to accept this literal construction, for the same reasons that led to the universal rejection of a similar construction of "challenges", in Article XII.

The second possible construction is neither literal nor liberal. It is that, to sustain jurisdiction, the complainant must make out a *prima facie* case, but need not prove that the case is, in reality, based on non-observance within the meaning of Article II, paragraph 5. That course has its proper place when an objection is taken to the jurisdiction in preliminary proceedings. But then, the decision of the Tribunal is interlocutory, and subject to reversal, as regards competence when, in dealing with the merits, the Tribunal finds that the actual cause of action is not based on "non-observance".

I am unable to accept this construction. There is nothing in the words used to justify its adoption. I do not think that the authors of the Statute intended that the Tribunal should be competent to entertain a complaint, based on a *prima facie* case of "non-observance"; and that, after that *prima facie* case had been disproved or abandoned, it would be competent to proceed to deal with different causes of action which they had attempted to exclude from the jurisdiction of the Tribunal by the terms of Article II, paragraph 5. I am of the opinion that it must be established that the cause of action is based on "non-observance" before the Tribunal can be regarded as competent to render judgment. It is noteworthy that there is not even a tentative finding of "non-observance" in the expositive and that it was abandoned in the dispositive.

The second limitation was imposed by Article VIII; and I do not need to repeat what I have said with regard to it. The Tribunal's competence in regard to the contents of its judgment was subject to the most stringent limitation. It could not award damages, punitive or otherwise, it could not impose fines or imprisonment or order equitable reparation; it could only grant the redress for which Article VIII made express provision: rescission, specific performance or competence to "award compensation for the injury caused".

The third limitation is imposed by positive law. It is a general principle of law, recognized in national legal systems and by international jurisprudence, that a tribunal must base its decision on the legal rights of the parties. In the absence of a special provision in its statute, a tribunal is not competent to base its judgment *ex aequo et bono*.

* * *

Keeping these limitations in mind, it is necessary to look at the course actually followed by the Tribunal in dealing with the cases. In sor far as the Judgments appeared to be dealing with the question

of non-observance of the terms and provisions, I shall refrain from comment, as I am concurring generally with the views expressed by President Hackworth and Vice-President Badawi. But, after touching lightly on these matters, the Tribunal was not content to rely on the grounds set fourth in the Statute. It proceeded to base its judgment on an entirely different cause of action: "*détournement de pouvoir*" and "abuse of rights" [1]. I do not need to discuss the propriety of attempting, without statutory authority, to introduce these notions into international administrative law. It is sufficient to point out that the adjudication of a cause of action based on them was beyond the competence of the Tribunal under Article II, paragraph 5, of the Statute. Further, they were not merely beyond the scope of this paragraph. They were completely inconsistent with "*non-observance*". Both notions were based on the assumption that the Director-General was *observing* the terms of appointment and the provisions of the Staff Regulations, and exercising the legal rights of the Organization, but that he was exercising the rights unconscionably, or for motives different from those which the framers of the Regulations had in mind.

Further, in dealing with the problem of redress, the Tribunal proceeded in disregard of the limits on its competence imposed by the Statute, and by positive law. It abandoned the idea of awarding compensation in pursuance of the provisions of Article VIII, and decided to award "equitable reparation", a course which was precluded by the Statute. It abandoned legal considerations, and decided "That redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below;".

Finally, when it came to the dispositive, the Tribunal jettisoned the entire cause of action in so far as it was based on "non-observance", and relied solely on the cause of action based on "abuse of rights". The dispositive began with the provision: "Rejecting any wider or contrary conclusions". Assuming that this provision has any meaning at all, it must mean that the Tribunal was rejecting the contrary conclusions, i.e. the complainant's objection dealt with in section "D" under the heading "ON THE SUBSTANCE" and the respondent's contentions; and also the wider conclusions i.e. contentions based on any ground other than abuse of rights, such as a claim based on "non-observance".

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[1] The expression "*détournement de pouvoir*", in the unofficial translation furnished to the Court by Unesco, has been mistranslated as "wrongful exercise of powers". While, ordinarily, it has been used as the equivalent, in public law, of the notion of abuse of right in private law, the four Judgments treat them as synonymous and interchangeable terms.

But even if the first provision, quoted above, has no meaning, the matter is put beyond all doubt by the central operative clause of the dispositive, which reads:

> "Orders the decision taken to be rescinded and declares in law that it constitutes an abuse of rights causing prejudice to the complainant ;".

The words used in this, the crucial clause of the dispositive, leave no room for doubt that the Tribunal had abandoned the complaint, in so far as it was based on any consideration other than abuse of rights.

Before leaving the dispositive, it is necessary to refer to the declaration which immediately precedes this clause:

> "Declares that it is competent ;".

It is unnecessary to repeat the comments already made with regard to this declaration. It is sufficient to point out that the actual decision confirming jurisdiction challenged by the Executive Board of Unesco and presented to this Court for consideration was a declaration by the Tribunal that it was competent to render a judgment based, not on non-observance of the terms of appointment of officials and of provisions of the Staff Regulations, but on abuse of rights, a matter which was plainly beyond the competence of the Tribunal as established by the provisions of its Statute.

It has been suggested that the foregoing considerations are part of the merits, and not relevant to the competence of the Tribunal. But I am unable to accept this view because it does not take full account of what really happened when the four Judgments were rendered.

Before there had been a position, under the Constitution, the Staff Regulations and Rules, and the Statute of the Administrative Tribunal, in which there was an orderly distribution of authority and functions among the Organs of Unesco as regards staff matters. Sovereign power was reserved to the Member States, but, subject to this reservation, general and paramount power was given to the General Conference and, to a more limited extent, to the Executive Board.

By recognizing the jurisdiction of the Administrative Tribunal of the International Labour Organisation, a field was established within which disputes between officials and Unesco were to be dealt with by the Tribunal. But this field, while broad and extensive, was strictly limited. The Tribunal could not go beyond « non-observance ... of the terms of appointment of officials and of provisions of the Staff Regulations...", and there was no authority to disregard the legal rights of either officials or Organization.

The Director-General, under the Constitution, was "the chief Administrative officer of the Organization". The Constitution was

based on the principle of separation of the powers, and his task was simply to give effect to the common will of Unesco, as expressed by the General Conference and Executive Board. That common will, as regards staff matters, was largely embodied in the Regulations and Rules, in which some discretionary powers were conferred on the Director-General. The General Conference did not choose to submit these discretionary matters to judicial review, but retained them within its own authority. They were matters in which the exercise, by the Director-General, of his discretionary powers was neither absolute nor arbitrary, but subject to control through the political organs, the General Conference and the Executive Board.

Henceforth, and as a result of the four Judgments, the orderly distribution of authority and functions among the Organs—as established under the Constitution, the Regulations and the Statute —has been destroyed. By its assertion of competence to proceed *ex aequo et bono*, the subjective appreciation of the Tribunal has been substituted for the rule of law in deciding disputes between officials and Organization. By asserting its competence to base its judgments on abuse of rights, the Tribunal has substituted its own notions of "the good of the service" and "the interest of the Organisation" for the control by the General Conference and Executive Board over the exercise by the Director-General of discretionary powers conferred on him by the General Conference.

In my opinion the bringing about of such a revolutionary change went far beyond the disposition of the cases on the merits, and transcended the competence conferred on the Tribunal by the provisions of Article II, paragraph 5, of its Statute.

* * *

Having dealt with the limitations imposed on the competence of the Tribunal, and the course actually followed in delivering judgment, it is necessary for me to give my own opinion as to the answers that ought to be given to the Questions set forth in the Request.

I have interpreted Question I as raising the issue of the competence of the Tribunal to deliver the Judgments, as well as its competence to deal with the less important parts of the hearing. Accordingly, my answer is in the negative.

The problem of dealing with Question II does not arise for me. But if Question I is not interpreted as raising the issue of the competence of the Tribunal to deliver the Judgments, it follows that

this issue would be raised by Question II. In that event, my answer to Question II, clauses *(a)* and *(b)*, would be in the negative.

My answer to Question III is that the decisions given by the Administrative Tribunal are invalid, by reason of lack of jurisdiction under the Statute.

(Signed) J. E. READ.
