SEPARATE OPINION OF JUDGE DILLARD

I agree with the decision and operative clauses of the Opinion. I am prompted to add a separate opinion only because in some respects the reasons which have led me to agree do not coincide with those revealed in the Opinion. As will appear, this separate opinion is concerned less with an analysis of facts than with matters of emphasis and with certain theoretical considerations bearing on one of the two principal questions addressed to the Court.

*
* *

I agree with the view that the Court should respond to the request and is competent to do so. The only element of doubt, in my mind, attaches to the meaning to be ascribed to Article 96 (2) of the Charter. Read literally it might well invite some question as to whether the "activities" of the Committee on Applications fall within the originally intended scope of that Article. The Opinion has dealt with this matter in detail and while I believe its analysis can be fortified by certain canons of construction I see no need to elaborate upon them.

In short, it seems clear to me that the opinion is requested by an authorized organ of the United Nations on legal questions arising within the scope of its activities and that the two questions fall within the terms and scope of Article 11 of the Statute of the United Nations Administrative Tribunal. The competence of the Court thus derives from Article 96 (2) of the Charter and Article 65 of its Statute read in conjunction with Article 11 of the Statute of the United Nations Administrative Tribunal.

Under the settled jurisprudence of the Court a request for an advisory opinion should be complied with unless compelling reasons dictate otherwise. This flows from the relationship of the Court to the United Nations in performing its role as the principal judicial organ of the United Nations. Compelling reasons for refusing would, of course, exist if responding to the request would entail a weakening of the integrity of the judicial process.

Under the permissive terms of Article 65 of its Statute, this determination falls exclusively within the province of the Court and should be diligently preserved. Despite the expression of numerous doubts concerning the impact of the proceedings provided for in Article 11, especially as they may impinge on the need for preserving equality between the parties, there is not, in my view, a sufficiently compelling reason for

refusing the request in the present proceedings. At the same time it is important that the Opinion of the Court should not be considered as setting in motion a potential weakening of the judicial process. For this reason, the Court has appropriately sounded a cautionary note, as was done in the Unesco case, by stressing that its decision is strictly confined to the circumstances of the present proceedings and should not be construed as involving any other aspects of the review procedures provided for in Article 11.

I now turn to the specific problems embraced in the two questions addressed to the Court.

*
* *

After more than five years of devoted efforts in the service of the United Nations, principally on behalf of the United Nations Development Programme, the applicant found himself without a job. He attributes this, at least in part, to faulty conduct on the part of the United Nations Development Programme in failing to live up to an obligation it had undertaken. The United Nations Administrative Tribunal found that there had been fault, awarded applicant six months' net base salary and in so doing reversed a prior decision by the respondent. Applicant's contention before this Court is thus, not that the Tribunal's judgement failed to vindicate his complaint, but that it failed sufficiently to do so. In support of this contention he reads the Judgement of the United Nations Administrative Tribunal as having failed to consider fully all of his 17 pleas and to support its conclusions with adequate reasoning. This failure, he asserts, is evident from an analysis of the Judgement and is reflected in the "woefully inadequate" remedies it provided.

A conscientious probing of all the matters in the elaborate dossier supplied the Court on behalf of both the applicant and the respondent might lead a sympathetic reader to the conclusion that the applicant's contract should have been renewed by UNDP or that a new assignment should have been made available—that is to say, that any power of discretion in the matter should have been exercised in his favour. His services under admittedly hardship conditions in Yemen led to certain improving changes in that area and at no time was he charged with performing in an unsatisfactory manner. Indeed the attempts by UNDP to find him another assignment are inconsistent with the notion that he was incapable of discharging his duties in a satisfactory manner. These considerations might have even reinforced an asserted *legal right* to renewal which, under appropriate circumstances and if properly raised, would have changed the entire complexion of his case, including the amount of compensation justly due in the event renewal was not granted or a new assignment not found[1].

[1] The relevance of this seemingly digressive point will be alluded to later in connection with applicant's "principal contention".

The fact that the applicant was employed under a fixed-term contract does not automatically exclude the possibility of a legal right to renewal. This conclusion can be abundantly demonstrated by the manner in which this Court has interpreted such contracts and by the jurisprudence of the United Nations Administrative Tribunal. Such a legal right can be grounded on the reasonable expectations aroused by implicit as well as explicit assurances that a renewal is to be granted or may be expected. Much, of course, depends on the nature and scope of the assurance and the context in which it was made in light of all the circumstances of the case[1].

In his application to the United Nations Administrative Tribunal applicant requested the Tribunal to order the respondent to restore him to the *status quo ante* prevailing in May 1969 by extending his fixed-term appointment for a further two years beyond 31 December 1969. He did not, however, allege or attempt to demonstrate that he was possessed of an acquired legal right to a renewal of his contract, a fact to which the Judgement itself called attention in paragraph III. The point is important because no explicit assurance of such renewal was ever made. Furthermore, the available facts fail to indicate that it might have been implied[2].

The commitment which respondent made in its important letter of 22 May 1969 was a limited one and was couched in language cautiously calculated to dampen rather than stimulate an expectation that its undertaking to use "every effort" to "secure another assignment" for applicant would necessarily prove successful. Nevertheless it was a formal commitment, "obviously" implying, as the United Nations Administrative Tribunal Judgement itself stated, "an obligation to act in a correct manner and in good faith" (para. IV). It was the failure to perform this obligation in a reasonable manner by disseminating "incomplete if not inaccurate" fact-sheets which constituted the basis for the United Nations

---

[1] It is unnecessary to elaborate on this point in the main body of this Opinion. It was thoroughly argued by counsel and discussed in the Unesco case (*I.C.J. Reports 1956*, pp. 90-97), where the facts revealed an explicit assurance, and in many cases before UNAT where the assurance was implicit.

[2] Whether such an assurance might have been implied would depend on an analysis of all the circumstances of the case. In *Dale* (Judgement No. 132), the applicant argued that *Yánez* (Judgement No. 112) recognizes the possibility of the Tribunal undertaking an examination of the reasons for a discretionary decision when such decision affects a right or legitimate expectation of renewal. Respondent had argued that the conclusion of a new contract was within his discretionary power. Relying on *Yánez* he asserted the Tribunal could not inquire into the reasons or grounds for the decision not to renew the contract.

The Tribunal, however, following the argument of applicant stated that it must "consider whether in the circumstances of the case, the Respondent was under an obligation to renew the Applicant's contract upon its expiration". Under the circumstances of the case, it assessed Dale's frustrated expectations in the amount of a one-year contract.

Administrative Tribunal's Judgement awarding applicant relief (paras. VII and VIII).

The Opinion has addressed itself to the consequences flowing from this finding of fault with great thoroughness, and in paragraphs 56 and 57 it sought to demonstrate that a single act, *viz.*, the dissemination of faulty fact-sheets, was both the *cause* for the inadequate performance of the obligation by the respondent and the *basis* for the claim that the applicant had suffered injury to his professional reputation and career prospects. I do not agree. In my view, it does not follow that a single source need have a single consequence; on the contrary, the damage to reputation and career prospects is sufficiently distinct to fall in a different category from that attributable to the failure to act in a correct manner and in good faith in the effort to secure another assignment for the applicant. Theoretically at least, the former may have already occurred and may have persisted even if the latter had been ultimately remedied by the respondent. True, the *method* used by the respondent contributed to the injury caused to the applicant's professional reputation and career prospects but that is not to say that the double consequences flowing from it need be linked together[1].

The matter, which involves certain analytical refinements, need not, however, be pressed since, in my view, the Opinion has correctly concluded that there had been no failure to exercise jurisdiction. As will appear later, I rest this conclusion not on "a single fault and consequence theory" but on the very narrow scope correctly attributed by the Opinion to that ground of objection, *viz.*, "failure to exercise jurisdiction" vested in the Tribunal, specified in Article 11 of its Statute and relied upon by the applicant.

*
* *

In the written statements before this Court, applicant's newly assigned counsel in a forceful, earnest and even eloquent fashion, attempted to shift the focus of the argument in order to provide a new perspective on the case which, allegedly, was insufficiently apprehended by the United Nations Administrative Tribunal.

The major thrust of this contention as revealed in his last two statements before this Court (December 1972 and January 1973) may be crisply described as a "vendetta" or conspiracy charge combined with a "link" theory. The former is asserted to stem from prejudice on the part of some of the hierarchy of UNDP and the latter links this prejudice to the efforts of applicant in "cleaning up the mess in Yemen" and in

[1] It should be added that the capacity of the United Nations Administrative Tribunal to award compensation for injury to professional reputation and career prospects, even if not mandated by Article 9 of its Statute, is permitted by it. Furthermore the fact that the damages appropriate to such injury cannot be ascertained with certainty does not entail the consequence that they are merely speculative. In *Higgins* (Judgement No. 92) damages were awarded for mental suffering.

exposing corruption, to the great embarrassment of his superiors. It was the failure of the United Nations Administrative Tribunal to appreciate and even investigate the latter and to link it to the former that, in applicant's view, constituted both a fundamental error in procedure which has occasioned a failure of justice and a failure to exercise jurisdiction vested in the Tribunal.

Thus in his corrected statement of December 1972 (para. 122, p. 42) applicant asserted:

> "In other words, the acknowledged failures to maintain Applicant's file in fair condition or to make an adequate search for further employment must be *linked* to the underlying factual claim of the Applicant... In a more technical vein, it is the failure of the Administrative Tribunal to investigate *the link between Applicant's response to corruption in the Yemen office of the UNDP and the subsequent treatment of him at Headquarters that constitutes the main basis for an affirmative response to the two questions* put to this Court for an Advisory Opinion." (Emphasis added.)

The same note was sounded in his comments of January 1973 (para. 6 at pp. 6 and 7):

> "The failure of the Administrative Tribunal to render appropriate relief must be understood in relation to this documented refusal of the UNDP to carry out either the substance or the spirit of the earlier recommendations of the Joint Appeals Board. In turn, such a refusal has to be assessed in relation to the underlying failure of the UNDP to protect Applicant from damages that followed from assigning him the task of straightening out a situation of undisputed corruption and dereliction in the Yemen office of UNDP. It is the magnitude of this inequity in relation to the experience of the Applicant in seeking some satisfaction for his grievances that is at the center of his contentions. It is for this reason, also, that it becomes evident that the relief and reasoning, of the Administrative Tribunal in its Judgement No. 158 must be understood as 'woefully inadequate' that is, to find on the merits so clearly for the Applicant and yet to grant relief that does not begin to rectify the wrongs inflicted is to compound the injustice. *The Respondent's statement confuses this problem by its contention that Applicant's complaints were directed toward the inadequacy of the award rather than, as we have made clear, the link between the findings and the relief*, i.e., the essence of the Judgement itself." (Emphasis added.)

The respondent's response to this particular contention submits two points. The first is simply that it has not been adequately established and the second is that, in so far as it would have entailed an independent investigation by the United Nations Administrative Tribunal, the latter body is neither charged with such a responsibility nor equipped to handle it.

The applicant, on the contrary, contends that the contention has been established by a necessary inference flowing from the documented facts[1]. Furthermore he asserts that it furnishes the underlying motif for the more specific pleas addressed to the United Nations Administrative Tribunal and justifies the contention that *each* of them should have been considered in light of the fundamental prejudice animating the actions of UNDP. So viewed, the gross *disproportion* between the injury suffered and the compensation awarded would be seen in proper perspective. This, he asserts, is particularly true of pleas *(d)* and *(g)*, which he claims were summarily dismissed by the Tribunal.

The Opinion has described and analysed this contention in paragraphs 79 through 87. I agree with this analysis as applied to the present case but am moved to sound a cautionary note.

In my view this particular contention of the applicant is related less to the facts, though they are obviously important, than to the "perception" of those facts by the United Nations Administrative Tribunal. It is a question of the failure of the Tribunal to act not so much as an investigating body but as a body which has been put on notice of the facts and has failed to react by either drawing the proper inferences from them or "seeing" their relevance to the pleas advanced by the applicant[2].

It should be borne in mind that a reviewing body, responding to a request for an advisory opinion in the exercise of what is presumably a non-appellate function, is not strictly confined to the record sent up from below. As stated in the Unesco case (*I.C.J. Reports 1956*, p. 87):

> "The Court is not confined to an examination of the grounds of decision expressly invoked by the Tribunal; it must reach its decision on grounds which it considers decisive with regard to the jurisdiction of the Tribunal."

It is submitted that this observation is more compelling when the issue centres not on the jurisdiction of the Tribunal but on its "failure to exercise jurisdiction" and when the provisions of Article 11 contemplate that the Tribunal should conform its Judgement to the opinion of the Court.

---

[1] While this contention runs like a thread throughout applicant's many statements it is made particularly explicit in Annex 86, para. 147.

[2] It is appreciated that one of the difficulties in any review proceeding consists in determining the line to be drawn between the exercise of non-reviewable discretionary power on the one hand, and the misuse of that power on the other hand. Occasionally this turns less on the actual facts than on the way they are apprehended and characterized in light of applicable legal standards. In my view applicant's major contention, while not sufficiently established, could not be said to be irrelevant.

Nevertheless there is an obvious limit to the extent to which arguments advanced *de novo* can be effectively employed to alter completely the case as presented before the Tribunal. As previously noted, applicant's case was not rested on the assumption that an *acquired right* to renewal was in issue or that the fault attributed to respondent was an invasion of that right. Furthermore the argument rested largely *on inferences from facts which were not adequately supported by the record.* At the theoretical level the argument also failed adequately to take into account the limited scope of the two grounds for review embraced in Article 11 of the Tribunal's statute which were in issue before the Court. It is to a consideration of these grounds that I now turn.

*
* *

I agree with the reasoning of the Opinion and its conclusion that the present proceedings fail to reveal "a fundamental error in procedure *which has occasioned a failure of justice*" (emphasis added).

It might have been supposed that, to avoid redundancy, the italicized clause qualified in some way the meaning of the antecedent clause and by so doing extended the range of inquiry into an area inviting an analysis of complex problems of "justice" including concepts of "proportionality" so much debated since the time of Aristotle. It is abundantly clear from the legislative history of Article 11, however, that no such consequence was intended but, on the contrary, that the clause, which does not appear in the comparable provision of the ILO Administrative Tribunal, was added merely to reinforce the notion that the error must be a fundamental one. It is true that the reason supplied to justify the amount of the award appears to be cryptic, but nevertheless the Judgement was sufficiently reasoned to avoid the implication of a fundamental error in procedure within the meaning correctly ascribed to this concept by the Opinion.

*
* *

The meaning and potential application of the second ground of objection, *viz.*, that the Tribunal "has failed to exercise jurisdiction vested in it" is more difficult to analyse. The Opinion, in paragraph 50, has drawn from the legislative history of this provision the conclusion that it has a "comparatively narrow scope, i.e., as concerned essentially with a failure [of UNAT] to put into operation the jurisdictional powers possessed by it—*rather than with a failure to do justice to the merits on the exercise of those powers.* It is thus concerned with matters of jurisdiction or competence in their *strict* sense" (emphasis added).

While I do not think this conclusion is necessarily compelled, inasmuch as the provision was presumably inserted for the benefit of applicants rather than the reverse, it is yet, in my view, sufficiently supported by the

legislative history of Article 11 to constitute an authoritative interpretation of the provision.

So viewed, it may be contrasted with the third ground of possible objection to a judgement embraced in Article 11 which, while not formally included in the questions put to the Court, may serve to illuminate the limited scope of those that were so included. Although the meaning and scope of the third ground must await possible future interpretation, it yet seems clear, on the face of it, that the contention that the Tribunal has "erred on a question of law relating to the provision of the Charter of the United Nations" would not call directly into play the issue of whether the Tribunal has exceeded its jurisdiction or has failed to exercise it, but rather that of *whether it has correctly applied the law it is competent to administer.* This would appear to require a review of substantive legal issues, and, as such, to constitute a challenge to the judgement on the merits[1].

In striking contrast, the scope of review in the present proceedings, as previously noted, is strictly confined to a jurisdictional issue even when the applicable norm is stated to be a failure to exercise jurisdiction. Such issues are primarily concerned with the proper allocation or distribution of the power to decide the merits of a controversy in the face of competing claims to the exercise of such power by another organization or agency. Only incidentally are they concerned with the merits themselves. It is precisely this factor, in the absence of competing claims to authority, which makes a review proceeding directly involving individual rights appear to be, if not utterly illusory, at least, highly inappropriate. In a normal case, as in the present one, the individual is obviously less concerned with the power of the tribunal to hear the case, whose jurisdiction he has himself invoked, than with the way it exercises it. And, even if substantial equality between the parties is preserved, as was contemplated by Article 11, a decision on purely jurisdictional grounds is likely to arouse a feeling of frustration on the part of the individual to the extent that the merits embraced in his objections remain undetermined by the reviewing body.

This consequence would be particularly telling if the lower tribunal could be deemed always to have exercised jurisdiction by the simple device of listing all pleas, considering some and disposing of all that remained through the comprehensive and usual formula employed by the Tribunal that "the other requests are rejected". If one of applicant's pleas

[1] The point is made with admirable clarity and characteristic thoroughness by Professor Leo Gross in connection with the problem of equality of the parties. Gross, "Participation of Individuals in Advisory Opinions before the International Court of Justice: Questions of Equality Between the Parties", 52 *A.J.I.L.* 16 (1958).

were obscured by being included within the scope of such a formula, how could he effectively challenge the exercise of jurisdiction by the Tribunal? By hypothesis, it has assumed jurisdiction over *all* pleas; hence none is neglected. A challenge based on a failure to exercise jurisdiction over a plea rejected in the collective formula would then invite the curious contradiction that although the Tribunal had exercised jurisdiction, it had yet failed to do so. An objection based on this ground would then appear to be stripped of all decisive legal and practical significance.

The above observation is not intended to imply any criticism of the Tribunal's methods in analysing and disposing of the numerous pleas in the many cases it is called upon to consider and decide. It is merely intended to direct attention to one of the peculiar difficulties which inhere in the very concept of a failure to exercise jurisdiction when invoked by an individual applicant as a ground of objection to the Tribunal's judgement.

Considerations of this kind underlie, in my view, the significance and purport of paragraph 51 of the Opinion. That paragraph makes it abundantly clear that the Administrative Tribunal must have regard to the substance of the matter and not merely the form; that a mere purported exercise of jurisdiction is insufficient and that the Tribunal must in fact have applied its jurisdictional powers to the determination of the material issues.

Nevertheless it remains true that this ground of objection concerns *only* a failure to put into operation *jurisdictional* powers "rather than a failure to do justice to the merits on the exercise of those powers". This does not rule out an analysis by the Court to determine whether the judgement *omitted* a particular material issue or treated a particular plea in a purely perfunctory manner. The Opinion has addressed itself to this matter with manifest thoroughness. It does mean that once it is determined that the Tribunal has "applied its mind" to the material issues, the Court's reviewing role is strictly limited. It is thus apparent that both legally and practically the scope allowed this ground of objection is so narrowly confined as to leave little, if any, room for the Court to deal with the merits.

*
* *

This concededly theoretical analysis leads up to an additional aspect of the Opinion with which I am not in full agreement although I agree with the conclusions stated in the operative clauses. It concerns the *relationship* between an alleged failure to exercise jurisdiction and the remedies provided by the Judgement.

In the *Factory at Chorzów* case, the Permanent Court of International

Justice announced a general principle governing reparation in the following terms:

> "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." (*P.C.I.J., Series A, No. 17*, p. 47.)

The question therefore arises as to whether a ground of objection based on "failure to exercise jurisdiction" may be based on an alleged failure to provide adequate relief. Bearing in mind that the Tribunal will have normally addressed its mind to the matter, may the "adequacy" of the compensation awarded in lieu of specific performance be the object of legitimate challenge?

The reach of this question is obviously important viewed both theoretically and practically. In the Opinion (para. 64) the question is located in the context of the exercise by the Administrative Tribunal of "reasonable discretion". It is there stated that "the *obvious unreasonableness* of the award could be *taken into account* in determining whether there had been a failure to exercise jurisdiction within the meaning given to this term by the Court in paragraphs 50 and 51 above" (emphasis added). It will be recalled that this meaning was a very restricted one keyed to the concept of jurisdiction in the strict sense. The Opinion cautiously indicates that only in an extreme case may it be considered that there had been a failure to exercise jurisdiction. Its view that such an instance would be highly exceptional is reinforced by ascribing to the Tribunal a "wide margin of discretion" within the broad principle of reparation announced in the *Factory at Chorzów* case.

The sluice gate this opens to a possible review may be a narrow one, nevertheless it permits an opening and in one sense, at least, it appears inconsistent with the purely "jurisdictional" concept attributed to an objection based on a failure to exercise jurisdiction. This follows because it allows the "obvious unreasonableness" of the award to constitute an *independent* ground of review distinct from the *omission* by the Tribunal, either through inadvertence or design, to address itself to one or more material issues in the case as indicated in paragraph 51[1].

---

[1] A measure of support for this approach may be gathered from the structure of the Statute of the Administrative Tribunal. Paragraph 5 of Art. 11 clearly contemplates the *possibility* that an award by the Administrative Tribunal might be excessive and, if so, a rebate by the person to whom a one-third advance had been made, based on the award would be required to be made to the extent that the sum advanced exceeds the amount to which he is entitled "in accordance with the opinion of the Court". While the matter is not altogether free from doubt, it would appear that if the Court is invested with some control over an excessive award, it might, by parity of reasoning, also have some control over an "obviously unreasonable one" running in

In my view an approach more consistent with the antecedent analysis would compel the conclusion that the *amount* of the award, in and of itself, is not sufficient for holding that the Tribunal has gone beyond the exercise of reasonable discretion and, further, that *standing alone* it does not constitute a failure to exercise jurisdiction within the strict, jurisdictional meaning ascribed to that term. Nevertheless, it is distinctly *relevant* in determining whether the Administrative Tribunal has, in fact, omitted to consider one or more material issues or that it has considered one or more of them in such a perfunctory manner as to amount to an omission.

Applied to the present case the argument would be that the amount of the award indicated that the Tribunal either had not "applied its mind" to the question of the injury to the applicant's professional reputation and career prospects or that the Judgement revealed in paragraph XIII that it had done so in such a perfunctory manner as to constitute an omission. This argument would be fortified by the not altogether unreasonable assertion that while the award could be logically related to the failure to use reasonable good faith efforts to find applicant another assignment, it bore no sufficient relation to the damage to his professional reputation or career prospects.

In my view this is the most plausible single argument which might have proved effective at the trial level in the present case. The Opinion has addressed itself to it with great care and the reasons for rejecting it at the review level need not be repeated in this opinion. As previously indicated I do not agree entirely with the reasons advanced in so far as they relate to a "single consequence" approach[1]. However I agree that the Administrative Tribunal did address itself to the problem, that its margin of discretion includes an appreciation of the facts and that the very narrow scope accorded the concept of a "failure to exercise jurisdiction" leaves very little room for the Court to say that the Tribunal has failed "to put into operation its jurisdictional powers". Inasmuch as it has done so, the conclusion follows that it has not failed to exercise its jurisdiction.

---

the other direction. In other words, paragraph 5 may indicate that a consideration of the *relationship* between the findings of the Tribunal and the amount of the award may fall within the province of this Court on review. However, as indicated, the matter is not free from doubt and need not be analysed in this opinion. Conceivably an excessive award might have resulted from the fact that the Tribunal had exceeded its jurisdiction.

It is hardly necessary to add that the Court would, in no instance, be called to define the exact extent of a "failure to exercise jurisdiction" or to fix the *amount* of compensation that is appropriate. The latter function falls within the province of those charged with carrying out the provisions of Art. 11 (3) of the Tribunal's Statute.

[1] I am impelled to add that I cannot subscribe also to the view expressed in para. 63 of the Opinion that the "circulation among the recipients of the original letters would have provided specific relief for the harmful effects resulting for the applicant from the previous circulation of the incomplete fact-sheet".

By way of conclusion, I venture to make one additional observation. The fact that an advisory opinion affects the rights of an individual may not be sufficient, in itself, to question the propriety of rendering it. It should be appreciated, however, that when the request for the opinion is generated by a dispute between two parties and the dispute is not, itself, keyed to a jurisdictional issue, while, at the same time, a principal ground for review, relied upon by the applicant, is limited to such an issue, a certain element of artificiality attends the reviewing process. This, in my view, is the principal lesson to be drawn from the present request for an advisory opinion.

(Signed) Hardy C. DILLARD.