DISSENTING OPINION OF JUDGE GROS

[Translation]

I regret that I am unable to concur in the Opinion of the Court and, that being so, I set forth the grounds of my dissent below.

1. We are here concerned with an application for the review of Judgement No. 158 of the United Nations Administrative Tribunal, founded on a text, Article 11 of the Statute of the United Nations Administrative Tribunal, as amended by resolution 957 (X), which the General Assembly adopted on 8 November 1955 for the very purpose of instituting a remedy and procedure that had not existed before that date.

The nature of the exceptional remedy and procedure thus established must be clearly ascertained for, as neither the contentious application to the Court which is open to States nor an ordinary request for an advisory opinion is concerned, the first question to be resolved is whether the Court, as a judicial organ whose jurisdiction is fixed by the Statute, is able, within the conditions laid down by that Statute, to proceed to the review requested by means of the advisory opinion to which Article 11 of the Statute of the United Nations Administrative Tribunal refers.

2. There are two Advisory Opinions of the Court (13 July 1954, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*; 23 October 1956, *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*) which deal with the problem of the review of decisions of administrative tribunals, and they shed light upon the manner in which the Court, at the times in question, envisaged what conditions must be satisfied for it to be able, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character when an application for review is addressed to it. As, moreover, the explanation of the origin of the system of judicial review is to be found in part in those Advisory Opinions, it will be as well to recall certain points.

3. The Advisory Opinion of 13 July 1954 on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, requested by the General Assembly, followed normal advisory proceedings that had therefore nothing in common with the present case from the viewpoint of the referral procedure, but the Court took occasion to scrutinize the Statute of the United Nations Administrative Tribunal and noted that it was "the result of a deliberate decision that no provision for review of the judgments of the United Nations Administrative Tribunal was inserted in the Statute of that Tribunal" (*I.C.J. Reports 1954*, p. 54). The Court went on to observe, with all the discretion called for in the circumstances, that:

"In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal. *Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of the opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them—all the more so as one party to the disputes is the United Nations Organization itself.*" (*I.C.J. Reports 1954*, p. 56; emphasis added.)

4. This passage from the Advisory Opinion is important, for it constitutes a formal indication in favour of a judicial means of redress and, consequently, of the exclusion of the General Assembly from the suggested review procedure, an indication which the Court considered it was possible to give the General Assembly before the system for the review of the judgements of the United Nations Administrative Tribunal was set up in the amended Article 11. The Court, then, was adopting a certain position in regard to the "review of the awards *[jugements]*" of the United Nations Administrative Tribunal, and what it had to say regarding the powers of a "judicial organ" shows that what it had in mind was indeed the institution of a genuine review procedure, that is to say, a reconsideration of the case, for the consideration of the arguments, the appraisal of the evidence and the study of the facts before declaring the law constitute, in the above-cited passage of the Opinion, a complete description of judicial proceedings.

So far as the Court's conception in 1954 of the review of judgements of the Administrative Tribunal is concerned, one may therefore note that the Advisory Opinion of 1954 is in favour of review by a judicial organ, adjudging as such.

5. In the Advisory Opinion of 23 October 1956 the Court again evinced from the outset the cautious attitude of 1954 with regard to the procedure used as a means of reviewing the judgments of an administrative tribunal (this time, that of the ILO).

"The Court is not called upon to consider the merits of such a procedure or the reasons which led to its adoption. *It must consider only the question whether its Statute and its judicial character do or*

do not stand in the way of its participating in this procedure by complying with the Request for an Advisory Opinion.

. . . . . .

The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which has been adopted has not given rise to any objection on the part of those concerned ... The principle of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco. Finally, *although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance* in the solution of a problem ... only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials." (*I.C.J. Reports 1956*, pp. 85 f.; emphasis added.)

6. The rules are here plainly expressed, and I propose to apply them to the present case, for I see no reason to depart from them. The Court emphasized in 1956 that it was ruling on the particular case and was careful not to enunciate a general rule; each case should be considered on its merits: "The Court ... is bound to remain faithful to the requirements of its judicial character. Is that possible in the present case?" (*I.C.J. Reports 1956*, p. 84.) This question has also to be raised in the present proceedings, and I feel compelled to answer it in the negative.

7. To complete the picture of the situation at the time of the 1956 Advisory Opinion, attention should be drawn to the opposition expressed by several Members of the Court to the very principle of using advisory procedure for purposes of review, on account in particular of the absence of any oral proceedings.

Judge Winiarski, in the first place, remarked in his separate opinion that "as is noted in the Opinion, the procedure thus brought into being 'appears as serving, in a way, the object of a judicial appeal' against the four judgments of the Administrative Tribunal, and this utilization of the advisory procedure was certainly not contemplated by the draftsmen of the Charter and of the Statute of the Court" (*I.C.J. Reports 1956*, p. 106). Later he observes: "The important thing is that the oral proceedings, which constitute the means by which the Court usually obtains clarification of the issue before it, have been dispensed with beforehand." (*Ibid.*, p. 108.)

8. Judge Klaestad, likewise, in his separate opinion, declared that the Court, although jurisdiction had regularly been conferred upon it by the terms of Article XII of the Statute of the ILO Administrative Tribunal,

ought to have abstained from exercising that jurisdiction. His reasons also derived, *inter alia*, from the elimination of oral proceedings "in spite of the fact that such hearings have hitherto been fixed in all advisory cases which have been considered by this Court as being a normal and useful, if not an indispensable, part of its proceedings" (*ibid.*, p. 110).

9. Judge Sir Muhammad Zufrulla Khan took the same attitude, in the following terms:

> "By dispensing with oral proceedings the Court deprived itself of a means of obtaining valuable assistance in the discharge of one of its judicial functions. Oral proceedings were dispensed with not because the Court considered that it could not receive any assistance through that means, but because the inequality of the parties in respect of oral hearings could not be remedied in any manner." (*I.C.J. Reports 1956*, p. 114.)

Sir Muhammad concluded by stating that the Court should not have complied with the request.

10. Judge Córdova said that the 1956 advisory proceedings could not be considered as anything different from a contentious case:

> "One cannot think of this case as being of two different natures, a contentious case before the Administrative Tribunal and not a contentious one when it comes before the Court." (Dissenting opinion, *ibid.*, p. 163.)

He goes on to describe the proceedings as an appeal or as a revision of a decision of a lower court (*ibid.*, p. 164).

11. It will be as well to bear these statements in mind in endeavouring to analyse the meaning of the Court's pronouncements in its Advisory Opinion of 1956 on the principles it then accepted as the basis of its reasoning with regard to its own role in the review of decisions of the administrative tribunals of international organizations.

On 12 April 1955, in the Special Committee on Review of Administrative Tribunal Judgments (A/AC.78/SR.6, p. 8 [Annexes 35-47 to the dossier]), the representative of the Secretary-General referred to a letter from the Registrar of the Court on the problems to which the revision of judgments gave rise, a document naturally known to the Court.

Considering together all these various indications as to the thinking of Members of the Court in 1954-1956, I believe it established that the Court endorsed two essential principles for the examination of its own jurisdiction in each review case that might be submitted to it; the first in order, and in my view the first hierarchically speaking—for it is a matter of whether a court is to accept any compromise touching its judicial status—, is that, in adjudicating any such case, the Court must not permit any encroachment on "the requirements of good administration of justice", the second principle being that there must be compelling reasons before the Court could refuse its collaboration in the working of a régime for the judicial protection of officials.

It is by applying these two principles that I reach different conclusions from those of the Court's Advisory Opinion as regards the exercise of its jurisdiction in the present case. Since the Court has not considered that there was any serious difficulty with regard to the requirements of good administration of justice, it is necessary for me to set forth at some length my reasons for dissenting on that point, which is the first question put in the operative clause of the Advisory Opinion.

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12. There is one preliminary observation of general scope which must be made. The procedure whereby the Court is requested to give a review decision via advisory proceedings is what it is:

> "The Court is not called upon to consider the merits of such a procedure or the reasons which led to its adoption. *It must consider only the question whether its Statute and its judicial character do or do not stand in the way of its participating in this procedure by complying with the Request for an Advisory Opinion.*" (Advisory Opinion of 23 October 1956, *I.C.J. Reports 1956*, p. 85; emphasis added.)

This sentence is a perfect summary of my position in the present case, where neither the jurisdiction conferred upon the Court nor the method of utilizing advisory procedure is in issue, but the question of the application in the present case of the principles of judicial review and of the texts which have instituted the Court's jurisdiction in the matter.

13. "The Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*I.C.J. Reports 1963*, p. 29); if, then, the procedure laid down in Article 11 of the Statute of the United Nations Administrative Tribunal encounters an obstacle in the Court's Statute and judicial character, whatever may be the merits of and grounds for this review procedure, the Court, having been established as a judicial body, must be able to act as such in the full exercise of the powers conferred upon it by its Statute; if this action is hampered by the review procedure, it is the latter which must be set aside, not the Statute of the Court or the requirements of good administration of justice.

14. The jurisdiction of the Court to give an advisory opinion derives from Article 11, paragraph 1, of the Statute of the Administrative Tribunal as amended on that point on 8 November 1955 (resolution 957 (X)). It is necessary for a State, the Secretary-General or the staff member concerned in the Tribunal's judgement to object to that judgement on the grounds that the Tribunal has exceeded its jurisdiction or competence, or has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice.

Is there no obstacle in the Statute of the Court and the essence of the Court's judicial function to this attribution to the Court of a review

jurisdiction? The provisions of the Statute concerned are Articles 34, 35, 36 and 38; on the one hand the Court is open only to States, while on the other its function is "to decide in accordance with international law such disputes as are submitted to it" and subparagraphs *(a)*, *(b)* and *(c)* of Article 38, paragraph 1, scarcely correspond to the basis upon which an application for the review of administrative tribunal judgments generally relies. The manner in which an administrative tribunal has settled the question of its jurisdiction and exercised it or not, or its commission of a fundamental error in procedure, do not raise any question of international law within the meaning of Article 38; as for the objection concerning an error of law relating to the Charter, which would raise a question of international law, it has not been taken into consideration by the Court in its Advisory Opinion. The two objections examined and not accepted by the Court have led it to decide problems of procedure and to touch upon the internal administrative law of the United Nations; these do not enter into the essential competence of the Court, which is not to settle just any legal problem but only problems of international law.

It will no doubt be replied that Article 65 of the Statute of the Court speaks in general terms of "any legal question", but that is to force the text beyond its meaning and context. It will be sufficient on this point to recall that the report of the Advisory Committee of Jurists says that it is obvious that the disputes referred to in the last sentence of Article 14 of the Covenant (the Court shall also "give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly") can only be of an international nature (Advisory Committee, *Proceedings*, p. 730).

It would not be reasonable today to wring any further meaning out of Article 65, and we must therefore take note of the existence in the Statute of the Court of an obstacle to the review of judgments of administrative tribunals. The view may be held that this obstacle is not decisive on account of the second general principle admitted by the Court, that of the assistance owed to the functioning of a régime for the protection of officials, but the objection exists. And the manner of meeting it reveals a choice as to the role of the Court.

15. The law applicable in the present case is not international law, which is the source of the jurisdiction conferred upon the Court. It is naturally no reply to say that "he who can do more can do less", for that is not the point, even allowing the validity of such a tag in the relationships between the various forms of law. The problem is that the Court's Statute and mission make of it neither a universal judge nor a universal provider of advisory opinions, and that its composition, the rules under which it operates and its habits of work are likewise based upon its role as a tribunal of international law.

Legality and expediency must be clearly separated. Even if it were convenient to refer applications for the review of judgments to the Court for decision—which has constantly been doubted and is not in my view

borne out by the present case—, the principle that such a procedure must be in conformity with the Statute and judicial character of the Court is a principle of legality which the convenience argument is powerless to rebut.

16. The obstacle encountered is therefore a serious one, on the one hand because of the compromises called for by the system of review in respect of the statute and the nature of the Court's judicial function, and on the other hand because of the way in which it was generally affirmed when this system was set up in November 1955 that it constituted a strictly judicial remedy; that being so, it cannot be maintained that the Court can modify its rules and working-methods as a court for the sake of these special cases without a grave self-contradiction.

17. When matters are seen in that perspective, the argument that it is sufficient for Article 11 of the Statute of the Tribunal to have organized the review procedure within the framework of the powers of the General Assembly does not answer the objection. As I said in a preliminary observation (para. 12 above), it is not necessary for the Court, when such cases are referred to it, to ask itself whether the General Assembly's decision was lawful. The Court is the only judge of its own jurisdiction and if it considers that it is unable to pronounce upon a matter addressed to it because that matter stands outside its Statute or requires modifications of that Statute, it does no more than interpret the rules of its own operation, which are subject to no authority but that of the Court itself.

It is moreover sufficient to recall the jurisprudence of the Court on this aspect, more particularly as expressed in the Advisory Opinion on *Certain Expenses of the United Nations*:

> "It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; *the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.*" (*I.C.J. Reports 1962*, p. 157; emphasis added.)

Certainly, the Court, having been invested with a review jurisdiction, ought to decline to exercise it only in circumstances where it finds conclusive grounds for such refusal; but the process which resulted in this jurisdiction being exercised in the present proceedings, whether at the stage of the submission of the request or at those of its being considered by the Court, appeared to me to give rise to conclusive objections.

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18. The method instituted by Article 11 for the reference to the Court of an application for review takes the form of the intervention of a Committee, a political organ, composed of member States represented on the General Committee of the last regular session of the General

Assembly. This is, in other words, a representation of the past, the assistance of which is enlisted by the General Assembly for the sake of convenience. For the consideration of the present case, the composition of this Committee is relevant only as a factor in the problem of the seisin of the Court. As it is the Committee alone which decides whether there is occasion to request an advisory opinion, and hence to seise the Court, it is this Committee which enables the Court to exercise the judicial-review jurisdiction which it had been decided to institute.

19. This Committee, devoid as it is of permanence and of continuity in its composition, and not accumulating any experience, is merely a kind of occasional panel meeting at irregular intervals, or a conference of member States, but certainly not an organ in the proper, institutional sense of the word.

But how can even those who reject this analysis claim that the Committee has an activity regarding which it has a right under Article 96, paragraph 2, of the Charter to request the opinion of the Court on legal questions arising therefrom. That is untenable: at the most it might be said that the activity of the Committee is to transmit to the Court—or not—an application for review, but the legal questions transmitted are quite unconnected with the activity of the Committee; they are put by the applicant and must be transmitted as they are put. It is not the Committee, but the applicant, that enquires whether the judgement is vitiated within the meaning of Article 11, and it is not the Committee which is interested, for the sake of its own activities, to know whether the judgement is or is not to be reviewed. No right has been conferred upon the Committee to modify these questions; it may only find that they lack a substantial basis, but then its "activity" comes to an end and the Court is not seised; and if the Committee finds that there is a substantial basis, that "activity" is not referred to the Court, which, merely taking note that the Committee has seised it, does not concern itself with investigating how substantial the activity is, since in the present case it admits knowing nothing whatever about it and does not wish to know more.

But the theoretical origin of what I consider to be an unfounded interpretation of Article 96, paragraph 2, of the Charter must also be treated with reserve. In support of the contention that the Committee has activities of its own, the Court has stated that the General Assembly has not delegated its own power to request advisory opinions, inasmuch as Article 11, paragraph 4, of the Statute of the Tribunal specifies in terms that it is Article 96, paragraph 2, which is taken as the basis for empowering the Committee to request advisory opinions. But the Court has at the same time decided that the Committee was a subsidiary organ within the meaning of Article 22 of the Charter, thus deemed necessary for the performance of the General Assembly's functions, more particularly in this instance the function of regulating the relations between the administration and the staff, by introducing the creation of "an organ designed to provide machinery for initiating the review by the Court of judgments" (Advisory Opinion, para. 17).

It thus remains to be explained—and this is no easy matter—how a subsidiary organ of the General Assembly, with the composition described in paragraph 18 above, can exercise a judicial function which the Court, in 1954, disallowed the General Assembly in the plainest of terms. The Administrative Tribunal is a judicial body; the Committee is not. It has no particular function apart from its role as a hurdle in the path of access to the Court, and that function—if correctly discharged—cannot, intrinsically, be anything other than judicial in character. The task the Committee should undertake before deciding whether there is any substantial basis for the application, namely that of confronting the judgement with the objections submitted, necessarily connotes a consideration of the facts and of law.

20. As the Committee bars the path of access to the Court—this is what it has done in respect of 15 applications out of 16 in 17 years—, it follows that the exercise of the Court's review jurisdiction depends on the conditions under which the Committee considers each case.

The session for the consideration of Mr. Fasla's application was held from 8 to 20 June 1972 and took up four meetings and, the rapporteur excepted, there is no means of knowing whether lawyers sat on the Committee and what course this brief deliberation took (see, on this point, paras. 23 and 31 below). Now, when an application is made by one or other of the parties—or by a member State, which is not required to have any particular interest in the dispute decided by the judgement contested—, the Committee does not receive a documentation of the case for each of its members and it is impossible to know how these members form some idea of the degree to which the bases of an application for review are "substantial". In principle, the Committee might procure some information from its secretariat, but that very secretariat is provided by the administration, i.e., by one of the parties.

21. Mr. Fasla's application for the review of Judgement No. 158 is contained in A/AC.86/R.59, an essential document in the proceedings, for it indicates the reasons for the application and sets forth the objections on which the applicant relies for the purpose of securing a review within the framework of Article 11 of the Statute of the Administrative Tribunal. It is on the basis of this document and of its 92 annexes that the Committee took its decision to request an opinion of the Court, considering as it did that there was a "substantial basis" for a review of Judgement No. 158 of 28 April 1972. For the scope of the Committee's role in the present case to be grasped, it is necessary briefly to recall the manner in which the application made to the Committee on behalf of Mr. Fasla was presented by his counsel at that time.

22. It is argued in the application that the Tribunal "failed to exercise its jurisdiction within the meaning of Article 11 . . . in that the Tribunal did not fully consider and pass upon Applicant's claim for damages for injury to his professional reputation and future employment opportunities caused by the respondent's misuse of powers with improper motive as found by the Tribunal" (para. A.1, p. 5).

All the important terms for the definition of the objections raised are to be found in this quotation; they are enlarged upon in paragraphs A.5, A.6, A.9, A.12 (misuse of powers), B.5, C.3, D.1 (fundamental errors in procedure which have occasioned a failure of justice), D.2 and D.3 (failure to consider every claim). Be it noted that the explanations are of a summary nature and are sometimes replaced by mere assertions without any mention of evidence.

23. The comments of the Secretary-General on the applicant's written statement take up no more than one page and a half (A/AC.86/R.60). The report of the Committee (A/AC.86/14) is of like exiguity and simply indicates the voting on the two questions transmitted to the Court, without conveying anything of the discussion which occupied four meetings. It will be noted that only the States composing the Committee are mentioned and that it is therefore impossible to know who in fact sat.

Article VII of the Committee's Provisional Rules of Procedure (A/AC. 86/2/Rev. 1) enables the Committee to enquire into the case by inviting additional information or views, but nothing of that kind was done.

24. Given the extreme reticence of the Committee, are we to suppose that the ten or so pages of the application could in themselves have sufficed to convince its members that there existed a substantial basis for a review? That is hard to believe and, in all objectivity, the document is not decisive. There are, it is true, its 92 annexes, of which many are relevant, but these were not distributed to the members of the Committee, who were simply informed that they were "available for consultation . . . in the Office of the Committee's Secretary" (A/AC.86/R.59, p. 22). Similarly, the case-file of the Administrative Tribunal is merely deposited in the office of the Secretary of the Committee. How many members spent in that office the time required for reading and annotating the case-file or those 92 annexes which add up to a considerable documentation? It was legitimate to wonder, and well one might; the question has remained unanswered.

25. On 29 March 1973, exercising the right of every Member of the Court to put to parties the questions he would like answered for his own information, I requested the Secretariat to communicate to the Court the recordings of the four meetings of the Committee on the present case. On 5 April I received the following reply:

> "Tape recordings exist of four meetings of Committee on Applications for Review in Fasla case, but no transcript has been made from these tapes as Committee did not request a transcript nor did it authorize release of tapes. Unlike verbatim records and summary records in final form, tapes have never been considered official records as they have not been subject to right of correction by delegations which is exercised in relation to verbatim or summary records. Moreover, in this instance statements recorded on tapes were made by delegations in closed meeting with belief on their part

that no disclosure would be made without their permission. We are thus compelled to conclude that these tapes do not constitute an official record and that they possess a confidential character."

26. My first observation is that the elimination of the oral proceedings in this case prejudiced the right of Members of the Court to obtain information. Unwillingness to open the door of oral argument for the staff member concerned has led to its being closed not only to the administration—which obviously did not mind—but also to the judge. A prolonged written exchange would have had little effect, since the Court, adopting a different view on the substantive aspect of the case no less than on the conduct of the Committee, was not interested in taking cognizance of anything other than the file in its possession. That is why other questions were not put, by other judges and myself, who refrained out of deference to the views of the Court.

This situation impels me to explain why I am unable to accept the Secretariat's argument as to the confidential character of the Committee's meetings where the Court is concerned, in the case of an application for review being referred to it. I note incidentally that the reply does not appear to emanate from the Committee on whose behalf it is given, which confirms one's doubts as to the Committee's organic and permanent character.

27. On the most indulgent hypothesis, the Committee is in the same position as the General Assembly itself would be in examining a draft request for advisory opinion; but nobody would imagine that such a discussion could be "confidential" and its contents admissibly withheld from the Court. In every case when an advisory opinion has been requested by the Security Council or the General Assembly, the records of all the discussions have been transmitted to the Court. But where the opinion requested concerns the review of a judgment, it is even more abnormal to suppose that the General Assembly, had it conferred upon itself the power to decide whether the request should be transmitted to the Court, could have operated in secret. In 1954 the Court said in plain terms why the General Assembly could not have any place in a judicial procedure for the review of judgments (para. 3 above), and this pronouncement embraced the whole of the procedure, i.e., not only the final decision concerning the review but also whatever led up to it. Yet the Secretariat's reply has shown us a secret committee with, potentially, discretionary power to decide the question of revision by the Court, and this is something which nobody would have dreamed of suggesting in 1955 when, in the case of the General Assembly itself, there had been no question of entrusting it with any role whatever in the organization of a means of redress which, according to the express wish of all, should be judicial.

28. I cannot accept that any secrets should be kept back from the

judge in a system intended to be judicial, a system in which the preliminary examination on which the exercise by the Court of its review jurisdiction depends has been made subject to stipulated legal conditions, and it is, I regret, my duty to say that the refusal to communicate information deemed necessary for the satisfactory consideration of the present application for the review of Judgement No. 158 not only encroaches upon the prerogative of Members of the Court under the Statute and the judicial character of the Court but suggests that if the Committee were to ignore the criteria imposed upon it by its own Statute and decide for reasons, say, of mere expediency, entirely unconnected with the notion of a substantial basis, it would escape any form of control.

The seisin of the Court cannot be left to chance; it is not a lottery. The exercise of a competence for judicial review, which is the kind of jurisdiction that the General Assembly decided to introduce, cannot be dependent on a political committee appropriating—and in secret, at that—the Court's role of rendering justice, which is what it in fact did on the 15 occasions when it refused review. When, in municipal systems, leave to appeal is refused without giving reasons, the decision in question is rendered by judges who are members of the appellate judiciary; there is no comparison.

One cannot have it both ways: either the discussions of the Committee are exchanges of views showing that the applications are properly considered—in which case the Court, which is not an organism foreign to the United Nations, should be allowed to know as much—, or they demonstrate the reverse and the hurdle in question does not correspond to the intentions expressed when Article 11 was drafted. The manner in which the Court is seised is a matter of direct concern for the Court, which, as the Advisory Opinion of 1956 pointed out, has the right to find that its judicial character is thereby prejudiced.

29. It has been argued that the impairment of justice cannot lie in a case where the hurdle of the Committee was cleared and that it is hypothetical at the most in the 15 cases where review was refused. This argument is misdirected, for the problem is whether the Court considers that its judicial character has or has not suffered in one way or another, in relation to the only application which the Committee has found to have a substantial basis. The fact that the Court has not followed the Committee in the only case it has referred to it is no reason for supposing that the Committee went astray in refusing one or other of the 15 other applications. Neither, on the other hand, is there any presumption as to the correctness of the Committee's decisions. But in any case, such a committee, having a pre-judicial task entrusted to it, must discharge that task as a judge would. And it would not be acceptable for a judge to call secrecy in aid.

30. In sum, one cannot have a political committee, discretionary and secretive in operation, set up a hurdle, and at the same time claim to have provided "machinery" for initiating a procedure of judicial review.

If the consideration to which the Committee proceeds is not directed to the ascertainment of the existence of any substantial bases for review, as is required by Article 11, which founds and is the warrant for the jurisdiction of the Court, if it is not an examination carried out from a judicial viewpoint, rather than a mere discussion of the expediency of the application, it has nothing to do with the judicial means of redress which it had been undertaken to establish, and the Court owed it to itself to make a finding in that sense—especially as it has accepted the mere rules of procedure of a committee as a valid rejoinder and those very rules, at the beginning, had provided for the discussions to be minuted.

31. The documents made available provide a blatant confirmation of the foregoing views and shed light upon the functioning of the Committee as the "machinery" of a procedure for reference to the Court. Among the parsimonious indications furnished to the Court in regard to the four meetings of the Committee there were two very brief documents. The first, entitled "Note by the Secretariat" (A/AC.86/R.61), dated 13 June 1972, indicates that at the second meeting of the Committee, held that day, a request was made for the examination of four questions corresponding to the grounds of objection listed in Article 11, and that the Committee decided "in connexion with the application under consideration, to vote only on questions 2 and 4", those which were finally put to the Court. The report of the Committee, only two pages long, says nothing of this meeting of 13 June. The second document, of 19 June 1972, comprises a suggestion by Zambia providing for three questions to be put to the Court, the third in addition to those eventually put being: "Any other question relevant to the judgement of the Administrative Tribunal" (A/AC.86/R.63). The report of the Committee does not indicate what became of this proposal at the meeting of 19 June. But it does show that the Committee, on that date, first voted on each of the two questions finally put to the Court, just as if it were the Court, and then only on the question: "Is there a substantial basis for the application of Mr. Mohamed Fasla under the terms of article 11 . . .?" (para. 7). The same report, in paragraph 10, inverts the order of the problems and begins with the Committee's decision on the existence of a substantial basis. Though one would not wish to attach undue importance to this contradiction, these were the only documents of which the Court was given knowledge and they show, on the one hand, how the Committee deliberately restricted to two the proposed questions laid before it, which covered all the grounds of objection provided for in Article 11, and, on the other hand, how the Committee, instead of considering, discussing and finding upon the question of substantial bases, voted on the actual merits of the questions now before the Court. Whatever explanation it may be sought to provide, the Committee, in its voting, acted like a court of first instance.

32. The Court has but partly corrected this situation by interpreting the request in such a way as to include the complaint of misuse of powers; but it has refused to contemplate any supervision of the Committee's

activity, even though the Committee behaved like a court. Thus viewed, the Committee becomes a judge whose decisions are without appeal and whose discretionary power is absolute. That is a disfigurement of the system of judicial review instituted in 1955 and entrusted to the Court.

33. While I agree that the Court has jurisdiction under Article 11 to judge review cases, the reasons indicated in paragraphs 12-32 left me no other choice but to return a negative reply to the first question put by the Court.

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34. At the time when the draft of Article 11 was being considered by the General Assembly and in the Special Committee, doubts were quite openly expressed as to the possibility of the Court's accepting the role proposed for it; this I mention by way of recalling the atmosphere, for, as the Court once indicated, it is not always necessary to enlist the proceedings of the General Assembly for the purpose of interpreting a resolution (*Certain Expenses of the United Nations, I.C.J. Reports 1962*, p. 156). Following the guideline given by the Court in 1956 as to the necessity of making sure in each case of review that there is nothing in the Statute or the judicial character of the Court to prevent it from giving an advisory opinion, I consider that the right application of the Statute and observance of the judicial character of the Court necessitated a different approach to both the investigation and the disposition of the present application for review.

35. In the first place, once the Court has decided not to accept any oral statements, the investigative stage of any proceedings for review is limited by that very fact so far as the means of action left to the Court are concerned. Nevertheless such means do exist, as it happens, in Articles 48, 49 and 50 of the Statute; the Court did not agree that these means should be employed, whereas I consider them an indispensable condition for any proper investigation of the case.

36. In all cases, whether contentious or advisory, the Court acquires its information through the dual form of both written and oral proceedings, and through the fact that the investigation is generally taken care of in contentious proceedings by the parties themselves, who have nothing to gain by leaving areas of vagueness in their case, and in advisory proceedings by the organizations and States whose participation serves to enlighten the Court. In a review case, the Organization is one of the parties and, both before the Administrative Tribunal, which rebuked it on this point, and before the Court, the information it provided in the present instance, remained incomplete. How, on the other hand, can one expect the former staff member to be able to provide the Court with all the facts and factors in a dispute the parties to which are not equal? That is a point with which all administrative tribunals are familiar, and the Court itself showed more indulgence in 1956 when it said—

"The Court cannot attach to this provision [Article II, paragraph 5, of the Statute of the ILO Administrative Tribunal] any purely formal meaning so as to require that the official should expressly indicate in his complaint the particular term or provision on which he intends to rely. In the first place, what must be alleged, according to Article II, paragraph 5, is non-observance, namely, some act or omission on the part of the Administration; in the present case, the complainant invoked the refusal to renew his contract. Secondly, the Tribunal is entitled to ascertain and to determine what are the texts applicable to the claim submitted to it. In order to admit that the Tribunal had jurisdiction, it is sufficient to find that the claims set out in the complaint are, by their nature, such as to fall within the framework of Article II, paragraph 5, of the Statute of the Administrative Tribunal in the sense indicated in another part of this Opinion." (*I.C.J. Reports 1956*, p. 88.)

37. It was therefore conceded that the staff member, being less well informed of a file of which he could know only the documents addressed to himself, less well armed for the contest than the Organization itself, was in sum in a position of relative inferiority which one should avoid aggravating by formalistic requirements. This is another way of recognizing the absolute necessity of equality, in law and in fact, between parties. And when the Court held that the Administrative Tribunal was entitled to ascertain the law applicable to the claim submitted to it, however presented, it was simply recalling a constant principle of all judicial organization, namely the obligation that lies upon a judge to acquire knowledge of the law and the facts involved in a case by whatever means are at his disposal.

I consider that it has been impossible for the Court to conduct a satisfactory investigation into Mr. Fasla's claim, for want of an oral phase during which questions could have been put to the Organization and the applicant, and failing any enquiry or request for explanations during the deliberation of the Court. In the proceedings prior to the Advisory Opinion of 21 June 1971, ten judges put 33 questions, which shows, or so it seems to me, that there is some point in the system *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970))*.

38. It must indeed be clearly realized that, once oral proceedings are refused, the effect of the Court's own rules of internal procedure is a total merger of the enquiry stage with the study of the case-file for the purpose of deliberation and decision on the whole, that is to say that there would have been an investigation as a phase separate from the adjudication only if the Court had considered, as I did, that an enquiry and additional explanations were required before going ahead.

The matter was settled for the present proceedings by the refusal to admit that the Court would be in any way served by explanations

supplementing the case-file already laid before it. I nevertheless persist in believing that such a decision not to use Articles 48, 49 and 50 of the Statute give rise in the present proceedings to a *de facto* and *de jure* inequality from which the staff member suffered. For want of information, it is not in my power to enlarge hereon; I ought however to add, in order to show in regard to what point there was occasion to make an enquiry, that the reason for the attitude of the administration to the applicant is not sufficiently clear from the file. An investigation of the case was therefore essential if the inequality between the parties was to be redressed; for this the Statute made provision and provided the means. Once again, the Advisory Opinion of 1956 takes the same line:

> "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." (*I.C.J. Reports 1956*, p. 87; emphasis added.)

"With regard to the jurisdiction" covers the notion, introduced in Article 11 of the Statute of the United Nations Administrative Tribunal, of failure to exercise jurisdiction, subsequent to those of lack of jurisdiction and action in excess of jurisdiction.

This is where my path sharply diverges from that taken by the Court in its answers to Questions II and III in the present Advisory Opinion. How is it possible to find any other decisive reasons if the Court restricts its examination on principle to those it finds in the Judgement of the Tribunal, which is what the Court has unswervingly and deliberately done? It is this essential difference of approach to the problem which underlies my dissent as to the way in which the Court should have set about investigating and judging this application for review.

39. The Court has decided that within the role of review instituted by Article 11 it is not its task "to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement" (Advisory Opinion, para. 47). For this the Court finds authority in a passage from the Advisory Opinion of 1956, cited in paragraph 48 of the present Opinion, the essential part of which is that "A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision"—which is in effect another way of saying that one may not retry the case (cf. also para. 65 of the present Advisory Opinion).

40. The 1956 Advisory Opinion, both in general and, more particularly, in the passage cited in paragraph 48 of the present Opinion, applies to Article XII of the Statute of the ILO Administrative Tribunal, which provides only for challenges to decisions of the Tribunal confirming jurisdiction and cases of fundamental fault of procedure. It applies in other words to two situations—lack of jurisdiction and formal defect—which in fact are detachable from the substance of any case and, as the

Court said in 1956, cannot be "transformed" into a procedure concerning the substance of the decision. Today, if there were an application for review based upon Article XII of the ILO Administrative Tribunal, it would still be necessary to say the same.

But Article 11 is not Article XII, nor is the procedure for the review of the judgements of the United Nations Administrative Tribunal the same as that for review of the judgments of the ILO Administrative Tribunal. This is perhaps regrettable, but here again the Court must consider each system of redress for what it is. Is it then possible to apply the pronouncement of 1956, unchanged, to Article 11?

41. Article 11 allows for the possibility of review if "the Tribunal has exceeded its jurisdiction or competence or ... has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice". Here we again encounter the notions of lack of jurisdiction and formal defect, but in the latter case a complication is already present in the reference to an error which has occasioned a failure of justice, since there we have an additional factor in comparison with Article XII. Above all, there are two new hypotheses, that of failure to exercise jurisdiction and that of error on a question of law, and in respect of these I cannot conceive how it is possible to say, as if it were still a question of Article XII of the Statute of the ILO Administrative Tribunal, that they have no connection whatever with the substance of the case, as judged by the Tribunal, and that the Court may not re-open the case on any part of the merits. The reasons for the pronouncement of 1956 being no longer applicable, it must be re-examined, and if it is still correct to say that an allegation of lack of jurisdiction does not authorize an inspection of the merits, it is incorrect to apply the same prohibition when it is alleged that there has been an error on a question of law. What judge, *ex hypothesi*, could ever decide whether there has been an error on a question of law without re-opening the merits?

42. That disposes of the unqualified application of the Advisory Opinion of 1956 in the doctrine of the review of judgements under Article 11. One inference from the earlier proceedings has, however, persisted, namely that the Court is not entitled to retry the case because it is a question of review. That is nevertheless what Article 11 provides for, not, it is true, in a general way and on any ground, but in the event of allegations concerning failure to exercise jurisdiction, error on a question of law and failure of justice.

43. An opinion which has left the Court unconvinced should be limited to essentials; I have shown how the Court was led by its choice of rule to effect a kind of artificial separation between jurisdiction and substance, which is necessary for the interpretation of Article XII of the Statute of the ILO Administrative Tribunal but is incorrect for the interpretation of Article 11 of the Statute of the United Nations Administrative Tribunal. Another consequence of this attitude is that the Court,

having forbidden itself to retry, has had to content itself with the case-file as considered by the Administrative Tribunal and with the documents the Tribunal deemed relevant, as also with its consideranda and decisions. On that basis, therefore, if review was to have been possible at all, it would have had to be the Tribunal itself which provided the evidence. That is a great deal to ask.

44. That being so, it is obviously impossible for me to re-examine the case and in that way to assemble the elements of a different decision, because my requests for additional information remain unsatisfied. I can only say, briefly, why the Court is entitled, when seised with an application for review, to request further information whenever it thinks fit, and to what extent such additional knowledge was necessary in the present case.

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45. The review provided for in Article 11 may be founded on formal illegalities and on illegalities in respect of or affecting the merits, as in the case of failure to exercise jurisdiction, error on a question of law or failure of justice occasioned by fundamental error. These grounds of objection, though specific, are much wider in scope than those indicated in Article XII of the Statute of the ILO Administrative Tribunal. I maintain that, if the review system thus instituted is to function properly, the Court, when examining and deliberating upon a case, is not restricted to the contents of the case-file as transmitted to it, or by the way in which the questions put by the Committee have been formulated. On the latter point, as it has been conceded by the Court, I shall add nothing. There remains the problem of the case-file, i.e., of the evidence.

46. Reviewing in the judicial sense is an exacting task and one which, in the framework of a legally constituted institution like an international organization, should be performed with the interests of all concerned in mind and as unformalistically as possible. The society consisting of the administration, the staff and States is, in this sense, a closed world with its own laws; into this world it was decided to introduce justice and, as it happens, a procedure for the judicial review of the judgements of the Administrative Tribunal. Somewhere between the rule adopted by the Court of not retrying the case and the impossibility of performing the task of review without some form of re-examination there ought to lie a good solution.

47. The Court's rejection of the application is based on an analysis of the Tribunal's Judgement and only of that Judgement; it represents a verification of the legal soundness of a judgment viewed from within. I feel this to have been a basic mistake. Every court of first instance lends the solution of the problem put to it a character of certainty through its decision, which would be definitive if there were no possibility of challenge. The mere fact of a challenge removes this character of certainty

from the decision, which the review judge has to confront with the application for review. If one sets out from the idea that the judgement impeached is regular on principle, the equality of the parties before the Court becomes non-existent, because the Tribunal, *ex hypothesi*, has found, in whole or in part, in favour of one party or the other. Before the Court, the judgement criticized and the application for review have to be examined on the same level. Had the Court not refused to hold oral proceedings, this aspect of the matter would have been very clear; the adversary nature of all forensic debate is an essential guarantee, for it alone enables the causes and effects of the positions adopted in the case to be grasped. Every judicial decision has its light and its shade, and an adversary oral debate in the proceedings for review would have lighted up the darker corners.

48. As in the case of any other application to the Court, it is the application for review which itself defines the object thereof, i.e., the intentions of the applicant. "What is really sought?"—it is this classic question that arises. In a review case internal to the United Nations, formalism should, I feel, be restricted to the minimum. It is of course necessary that the submissions should clearly specify the nature of the underlying claim and that the successive pleas should all apply to that same claim; more I see no reason to demand, and in this regard I find Mr. Fasla's application for review to be entirely clear and to meet these requirements without calling for any interpretation. New pleas are admissible, provided they are relevant to the claim submitted to the lower tribunal. To adopt any other attitude would impel litigants formally and systematically to raise all the grounds of objection allowed for in Article 11 from their very first challenge to an administrative decision prejudicial to themselves, lest they be deemed precluded at a later stage. When most disputes are settled without judicial intervention, that would not be a good system, and it is one which the Court expressly condemned in 1956, in the dictum cited above in paragraph 36:

> "The Court cannot attach to this provision any purely formal meaning so as to require that the official should expressly indicate in his complaint the particular term or provision on which he intends to rely." (*I.C.J. Reports 1956*, p. 88.)

49. Nor do I find it possible to assert that a court in review proceedings is prohibited from appraisal of the facts. The Administrative Tribunal exercises a certain supervision over the discretionary power of the administration; when, as in the present case, a problem concerning misuse of powers is raised in the application for review and the Court considers it, it may verify the lower tribunal's interpretation of the facts if not sure of its correctness. The Court having proceeded from a different premise, no inspection of the kind took place. But I consider that its possibility is necessary in principle to a system of judicial review, for if all the Tribunal's appraisals of facts are held exempt from control it would not be

possible to review any judgement which had decided a question of misuse of powers.

50. Misuse of powers is use of a power for a purpose other than that for which it was conferred. A court has therefore to ascertain the motives of the authors of the act, and it is usually the enquiry into a case which provides such information. The Court did not look behind the considerands of the Tribunal in order to form its own view. Here again, it seemed to me that the judge ought to have been entirely free in his quest for information and was entitled to examine all relevant elements in order to form his view.

51. It seems to me that in the present Opinion (para. 64) the Court admits the existence of this problem when it outlines a theory of "obviously unreasonable" compensation which authorizes verification of the correspondence between the facts and the reparation. But it is in my view necessary that whenever the Court feels a doubt it should check the interpretation of all the facts from which the lower tribunal drew—or refused to draw—conclusions, and not merely in relation to the character of the compensation.

52. Such, in brief, should be the principles to be applied in the procedure of judicial review established by the provisions of Article 11. In 1954 Judge Winiarski had no doubt as to the meaning attached by the Court to the review procedure which the Advisory Opinion envisaged in the passage quoted in paragraph 3 above, and even then he wrote that what was contemplated was possibly "an established system of review, review in the sense of a further consideration of the case". And indeed no other meaningful construction could be placed on the Court's 1954 formula, for to appraise the evidence, establish the facts and declare the law applicable to them is to carry out an unfettered examination of the case.

One need hardly add that in applying these principles the review court should evince both understanding for the problems of the administration and complete independence of it, finding on the sole basis of law.

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53. The Tribunal based its solution on the obligation assumed by the administration in May 1969 to find Mr. Fasla another post, an obligation which it "did not perform in a reasonable manner" (Judgement, para. XIII)—an understatement, for the Tribunal had already more drily found "that the obligation assumed in the letter of 22 May 1969 has not been performed" (Judgement, para. VII). That being so, it is impossible, in the absence of any stated ground, to see how the award of only six months' salary was justified. An obligation to do something was assumed in May 1969 (and on 20 and 21 May, before the letter of 22 May, Mr. Fasla had had with the UNDP Director of the Bureau of Administrative Management and Budget and Chief, Personnel Division, two conversations of which the Court knows nothing) and not only did nothing come of that

obligation but its performance was undertaken in such a way that nothing could come of it; the attitude thus evinced inflicted on the applicant a lasting injury, one that persists to this day. The Tribunal drew only the ordinary contractual conclusions from the non-performance of this obligation to act, and failed to exercise its jurisdictional right under Article 9, paragraph 1, of its Statute to enquire whether the circumstances were sufficiently exceptional to justify awarding a higher indemnity than the limit of two years' salary. It would be an exaggeration to say that in referring to the general principle of just compensation enunciated by the Court in its Advisory Opinion of 23 October 1956, without any individualization of this principle in relation to the case in hand, the Tribunal "exercised its jurisdiction" in the question of exceptional circumstances, even to the degree necessary to determine its lack of pertinence.

54. As for the objection of fundamental error in procedure having occasioned a failure of justice, the manner in which some of Mr. Fasla's requests are rejected in paragraph 4 of the operative clause of the Judgement without even the briefest statement of reasons seems to me to raise the same problem of inadequate substantiation. I will simply observe that, given the thesis of the Court that the review tribunal's supervisory powers are strictly limited to the content of the judgement impeached, it is impossible to see how the examination for the purpose of review can be carried out if the judgement in question contains no adequate statement of reasons. It therefore appears to me that the inadequacy or omission of stated reasons must be treated as a fundamental error in procedure.

In the present case, that omission does not allow it to be said with certainty that there was an error "having occasioned a failure of justice". It is possible that the silences of the Judgement are no more than reticence on the part of the Tribunal and that adequate grounds of decision were considered during the deliberation. But as those grounds are not apparent, the Court should have said as much and sought to have the defect cured, which was technically possible even if it meant sending the Judgement back to the Tribunal on that score.

55. For the reasons indicated in paragraphs 34-54 of this opinion, I am impelled to vote for a negative answer likewise to Questions II and III of the operative clause.

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56. If this case has been dealt with at considerable length, that is because it represents the first application for review before the Court based on Article 11 and because the Court has been confronted with all the questions of principle raised at the outset and never resolved. But I would find it an overstatement to say that the protection of United Nations staff members depends on the Court's jurisprudence in matters of review. That would be forgetting that the very notion of reviewing the Administrative Tribunal's judgements, when the procedure was introduced, was not allied to that of the protection of the staff—far from it;

that when the new Article 11 was in preparation the Secretary-General submitted a paper on judicial review which concealed none of the difficulties involved, especially where the jurisdiction of the Court was concerned (A/2909, 10 June 1955, pp. 17-25; see paras. 66-71) and that the United Nations Staff Council, on that same occasion, did not desire implementation of the principle of judicial review, or at any rate not in the sense of a procedure involving the plenary Court (*ibid.*, pp. 31 and 33; para. 2—cf. also paras. 7-10). The impression conveyed by the course of events since the beginning of the United Nations in the matter of relations between the administration and the staff is rather that the latter has managed to secure, within the system itself, the provision of the necessary safeguards and of supervisory institutions in which the staff participate in such a way that a judicial presence is required solely for the purpose of preventive action on rare occasions. Rather than the first steps of an international administrative justice, it is possible that what we here witness is the development of a form of staff-union protection, satisfactory for all concerned, in which the intervention of the Court plays, likewise, no more than a preventive role. From this standpoint the developments of the present case can be seen in their proper perspective, and it would be sufficient in future to ensure that this role of the Court, if valued, was not restricted in such a way as to preclude the proper exercise of its judicial function.

(Signed) André GROS.