

## DISSENTING OPINION BY JUDGE LEVI CARNEIRO

[*Translation*]

Having, to my regret, given an answer different from that of the Court to the questions submitted to it, I must set out very briefly the grounds for my opinion.

In order to resolve these questions, it seems to me that the system of the United Nations regarded as a whole is of more importance than the literal meaning of a few words taken from the Statute and the Regulations. Indeed, even with regard to literal interpretation, this Court has already affirmed a principle laid down by the Permanent Court of International Justice :

“... words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd” (Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950, p. 8).

I. The United Nations Organization is based on “the principle of the sovereign equality of all its Members” (Charter, Article 2 (1)), and the General Assembly is its only organ established by the Charter which is made up of representatives of all Member States.

(a) The General Assembly is the first of the six “principal organs” mentioned in Article 7 of the Charter.

(b) The General Assembly dominates the whole Organization, decisively intervening in the formation of the other principal organs, with a considerable control, varying in degree, over their activities and exercising an ever-widening influence in relation to the aims of the United Nations.

(c) The Assembly cannot surrender its prerogatives, nor can it irrevocably delegate them. This principle was recognized when the “Little Assembly” or “Interim Committee” was set up. The Assembly, moreover, possesses certain implied powers (Charter, Article 11 (4)).

(d) In order to lighten its burden, the Assembly can merely “establish such subsidiary organs as it deems necessary for the performance of its functions” (Charter, Article 22). The meaning of the word “subsidiary” is “anything which is of assistance to something which is of a principal order” (“*subsidaire : qui vient en aide à quelque chose de principal*”—Litttré, *Dictionnaire*). The functions assigned to the subsidiary organ always remain functions of the Assembly.

(e) In respect of the staff of the Secretariat, the Assembly “establishes” the Regulations under which this staff is appointed by the Secretary-General (Charter, Article 101). Consequently, it

also regulates the conditions in which these officials must leave. It supervises the application of these Regulations.

II. The "Administrative Tribunal" was given its name in the days of the League of Nations, possibly as a result of the influence of Albert Thomas, who was himself inspired by the terminology of French public law.

(a) "Administrative Tribunals"—whatever may be the binding force of their decisions—are not, and never have been, regarded in France as judicial organs: they are administrative organs (Laferrière, *Contentieux administratif*, Vol. I, p. 619; Louis Renault, *Précis de droit administratif*, pp. 38-40).

(b) The United Nations Administrative Tribunal was established by the General Assembly in accordance with the principles referred to above (I, c, d and e), and belongs to the system of the Organization.

(c) The terminology of the Statute does not justify the view that the United Nations Administrative Tribunal is a true and entirely independent judicial organ. The appellation "tribunal" has been applied to other organs of the United Nations which are not judicial bodies—"the Tribunal for Libya", "the Tribunal for Eritrea". When it is said that the "judgments" of the Tribunal shall be "final and without appeal" (Statute, Article 10 (2)), the reference is merely to the procedure to be followed: it did not prevent the Tribunal, in special circumstances, from reviewing its own previous decision, and it is not sufficient to prevent the General Assembly from refusing to give an effect to an award of compensation made by the Administrative Tribunal, an organ which is subsidiary in relation to it. The Statute provides that the Administrative Tribunal may "order the rescinding of the decision or the specific performance of the obligation", but at the same time it permits the Secretary-General to refuse to give effect to the decision, compensation being in that event awarded to the official. The decisions of *Conseils de préfecture*, which are likewise administrative tribunals, are referred to as "judgments" in recent French legislation. The provisions (Statute, Articles 9 (3) and 12), in accordance with which the compensation fixed by the Tribunal is to be paid by the United Nations or by a specialized agency, merely indicate by whom the compensation is to be paid, but they do not imply an unconditional obligation to make immediate and complete payment. Any other interpretation of these words would lead to "something unreasonable or absurd".

(d) Moreover, there is no requirement that members of the Administrative Tribunal should have any specialized training or, in particular, any legal qualification; they are not called "judges", they do not enjoy salaries which cannot be reduced, for the General Assembly can in fact fix and alter these salaries at its pleasure;

they are elected by the General Assembly for the short term of three years. A member of the Tribunal can be dismissed by the Assembly if "the other members are of the unanimous opinion that he is unsuited for further service" (Statute, Article 3 (5)). Decisions are taken by three members of the Tribunal—less than half of its total membership—and the majority may consist of only two votes.

(*e*) When it established the Administrative Tribunal in 1949, the General Assembly of the United Nations could not have forgotten what had happened in 1946 with regard to certain decisions of the Administrative Tribunal of the League of Nations. Nothing was, however, done to prevent a further refusal by the General Assembly to give effect to a decision of the Tribunal: the provisions of the former Statute were retained; indeed, the word "member" was adopted to designate those who in the earlier Statute had been referred to as "judges".

(*f*) The General Assembly could only establish a subsidiary organ which was not a true judicial tribunal, for the General Assembly itself has no judicial functions for the reasons mentioned below (II *h*).

(*g*) Even for the purpose of governing the external relations of the Organization—that is, with regard to questions arising with a State or with third parties—in the Conventions of February 13th, 1946, June 11th, 1946, July 1st, 1946, and June 26th, 1947, the United Nations merely provided for arbitral bodies which were not to be organs of the United Nations and whose decisions were to be subject to an Advisory Opinion of the International Court of Justice, or whose third arbitrator was to be appointed by the President of the International Court of Justice.

(*h*) For the purpose of governing the internal relations of the Organization—such as disputes between officials of the Secretariat and the Secretary-General—if the Assembly had established a judicial organ, that organ would inevitably be directly subordinated to the International Court of Justice, which is the "principal judicial organ of the United Nations" (Charter, Article 92). The decisions of the Administrative Tribunal of the International Labour Organisation are, by virtue of an express provision of its Statute, subject in certain cases to an Advisory Opinion of the International Court of Justice which is binding.

(*i*) The General Assembly is not a party to disputes decided by the Administrative Tribunal; it is only the Secretary-General who is the defendant. He is not referred to in terms—at least in the cases which I have seen—as the representative of the United Nations (see III, *e*).

(*j*) The decisions of an "administrative tribunal" thus constituted and functioning in this way (II, *d*) cannot have the weight

of *res judicata* (see Georges Scelle, *Manuel de droit international public*, 1948, p. 665).

(k) The "United Nations Administrative Tribunal" is not independent; nor is it a judicial organ; it merely exercises "quasi-judicial" functions. The General Assembly likewise exercises functions of this sort (Kelsen, *The Law of the United Nations*, p. 194).

III. The relationship between the Administrative Tribunal and the General Assembly, of which it is a "subsidiary organ", is clearly indicated by the powers of the General Assembly, and the conditions in which that body functions, which have been referred to above. The General Assembly may, as it has already done, modify the jurisdiction of the Tribunal, or it may abolish it. A number of rules which have already been adopted have limited the action of the Tribunal and the scope of its decisions.

(a) Changes of rules governing judicial organization and judicial procedure—even when truly and completely judicial—are applicable to earlier cases.

(b) The officials of the United Nations are bound by a "public law contract". In such a case, "a convention, whatever its provisions may be, cannot have the legal effect of limiting the competence of the Administration"<sup>1</sup> (Jèze, *Principes généraux de droit administratif*, 1926 ed., Vol. III, p. 430).

(c) The Assembly is technically able—and under a duty—to control the action of the Administrative Tribunal, an organ which it has established to assist it in the performance of its functions. Although without judicial competence *stricto sensu*, it can, in respect of legal questions raised by decisions of the Administrative Tribunal, call upon the collaboration of its Sixth Committee (Legal Committee), of the International Law Commission and—as it has done in the present case—of the International Court of Justice.

(d) The decisions of the Administrative Tribunal are decisions of first instance: as a rule, the dispute must first be submitted to the Joint Appeals Body; this is, however, merely an advisory body and its opinion may be dispensed with, it then being possible to submit the application directly to the Administrative Tribunal (Statute of the Administrative Tribunal, Art. 7).

(e) Decisions of the Administrative Tribunal, if not subject to control by the General Assembly, would have greater binding force than the judgments of the International Court of Justice itself: the General Assembly would have to give effect to them without question. The Tribunal could at its pleasure define the limits of the disciplinary powers of the Secretary-General, could

<sup>1</sup> Translation by the Registry.

interpret, apply or refuse to apply rules adopted by the General Assembly. The decisions of this "subsidiary organ" would be binding upon two "principal organs"—the General Assembly and the Secretary-General—even on matters within their own competence.

IV. In the present case, in accordance with the terms of the request for advisory opinion, what is in fact involved is the General Assembly's refusal to give effect to an award of compensation made by the Administrative Tribunal in favour of a dismissed official. The exercise of the Assembly's budgetary power is thus involved.

(a) It is for the General Assembly alone to approve the budget of the Organization (Charter, Art. 17 (1)). "Budgetary questions" are "important" and must be decided "by a two-thirds majority of the members present and voting" (Charter, Art. 18 (2)).

(b) Every increase in the expenditure of the Organization necessarily involves an increase of the contributions by Member States and must consequently affect the national budget of each of these States.

(c) I cannot conceive that the General Assembly can be obliged automatically to give effect to decisions—and to lay upon Member States the ensuing financial burden—which may have been taken by only two members of one of its subsidiary organs, the Administrative Tribunal.

(d) The General Assembly "must" respect a legal obligation of the United Nations which has duly arisen or been validly recognized; but a decision of the Administrative Tribunal does not give rise to or amount to final recognition of an obligation of the United Nations.

(e) Payment of compensation awarded by the Administrative Tribunal may be made—as has been done in almost all cases—by the Secretary-General when there are funds provided by the budget which he may use for this purpose; this he can do without any examination of the matter by the General Assembly, where the General Assembly itself has expressly or impliedly authorized such a course. In other cases, the General Assembly may refuse payment entirely or may allow only a part of the award, if it considers the decision of the Administrative Tribunal to have been ill-founded.

V. The rights, and indeed the interests, of officials must be guaranteed and respected. But in truth these rights and interests will not be any less guaranteed and respected by the deliberations of the direct representatives of the sixty Member States than by the Administrative Tribunal as at present organized. This is particularly true since: (1) the very existence of the Tribunal

and the scope of its decisions are dependent upon decisions of the General Assembly, and (2) the General Assembly must always respect the presumption in favour of the legality and the validity of decisions of the Administrative Tribunal, thus exercising in good faith, discretion, and imbued with the spirit of justice, its prerogative of refusing to give effect, either in whole or in part, to any given decision.

*(Signed)* LEVI CARNEIRO.

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