

## SEPARATE OPINION OF JUDGE ONYEAMA

I have voted on the merits of the Opinion notwithstanding that I do not agree with the Opinion on the view it takes on the question of jurisdiction: in my view, it is for the Court, under Article 36, paragraph 6, of the Statute of the Court, to settle the question of jurisdiction. Its decision on this question concludes the matter in the particular case and is binding on the Court as a whole, subject to the right of Members of the Court under Article 57 of the Statute to express their separate opinions. Having expressed their separate opinions, they should then approach the rest of the case on the footing that the Court's decision on jurisdiction is the right one.

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I am in agreement with the Opinion that the questions put to the Court should be answered in the negative contrary to the contentions of Mr. Fasla.

There can be no failure to exercise jurisdiction when a tribunal whose judgment is attacked on the ground that it had failed to exercise a jurisdiction vested in it had directed its mind to the issues raised and decided them. A failure to exercise jurisdiction will arise when the tribunal decides, erroneously, that it has no jurisdiction on the issue submitted, or when it neglects or fails to decide such an issue. A decision on the merits which could be overturned on appeal cannot properly be described as a failure by the trial court to exercise jurisdiction. "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 <sup>1</sup>." Similarly, a complaint that there has been a failure to exercise jurisdiction is not made out by demonstrating that the tribunal concerned had reached a wrong decision on the merits or erred in its interpretation of the law applicable to the merits.

On the question of a fundamental error in procedure which has occasioned a miscarriage of justice, I have nothing to add to the Opinion in the present case with which, on this issue, I fully concur.

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I add this separate opinion because I have grave doubts whether the ques-

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<sup>1</sup> *I.C.J. Reports 1956*, p. 98.

tions put to the Court are receivable from the body which purported to request them; namely the Committee on Applications for Review of Administrative Tribunal Judgements (hereinafter referred to as the Committee).

By resolution 957 (X) on procedure for review of United Nations Administrative Tribunal judgements, the General Assembly established the Committee, and authorized it under Article 96 (2) of the Charter of the United Nations to request an opinion of this Court if the Committee decided that there is substantial basis for an application for review of a judgement of the Tribunal.

The relevant portion of the Statute of the Administrative Tribunal of the United Nations as adopted by the General Assembly by resolution 957 (X) on 8 November 1955 is Article 11 which provides:

“1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal 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, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.

2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.

3. If no application is made under paragraph 1 of this article, or if a decision to request an advisory opinion has not been taken by the Committee, within the periods prescribed in this article, the judgement of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court.

4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request

advisory opinions of the Court. The Committee shall be composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. The committee shall meet at United Nations Headquarters and shall establish its own rules.

5. In any case in which award of compensation has been made by the Tribunal in favour of the person concerned and the Committee has requested an advisory opinion under paragraph 2 of this article, the Secretary-General, if satisfied that such person will otherwise be handicapped in protecting his interests, shall within fifteen days of the decision to request an advisory opinion make an advance payment to him of one-third of the total amount of compensation awarded by the Tribunal less such termination benefits, if any, as have already been paid. Such advance payment shall be made on condition that, within thirty days of the action of the Tribunal under paragraph 3 of this article, such person shall pay back to the United Nations the amount, if any, by which the advance payment exceeds any sum to which he is entitled in accordance with the opinion of the Court.”

It is clear from this Article that the Committee was set up for the sole purpose of deciding whether or not an advisory opinion should be requested of the Court. No other functions were assigned to it by the General Assembly in the Article or elsewhere.

In the Article reference is made to paragraph 2 of Article 96 of the Charter which provides:

“2. Other organs of the United Nations and specialized agencies which may at any time be so authorized by the General Assembly may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”

It is this provision of the Charter which enables the General Assembly to authorize other organs of the United Nations to request advisory opinions of the Court.

In authorizing other organs to request advisory opinions of the Court the General Assembly must in my view adhere strictly to this Article of the Charter which seems to me in this respect, to lay down the following conditions:

1. The authorization must be to an organ of the United Nations.
2. The organ must be engaged in the performance of certain functions, or be engaged on some activity assigned to it by the General Assembly.
3. The authorization must be limited to requesting advisory opinions on *legal questions arising within the scope of the activity of the organ authorized.* (Emphasis added.)

It seems to me that if any or all of these conditions are not met the

authorization would be ineffective for its purpose and the organ "authorized" would in law be incompetent to request an advisory opinion of the Court.

The power of the General Assembly to establish subsidiary organs derives from Article 22 of the Charter of the United Nations which provides that the General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

The term "subsidiary organ" has not been defined in the Charter and, in practice, appears to have been used interchangeably with such expressions as *commissions*, *committees*, *subsidiary bodies* and subordinate bodies<sup>1</sup>. But by whatever name it is called a characteristic feature of a subsidiary organ is that it has been established to carry out certain functions in aid of the principal organ establishing it—functions embraced within the overall functions of the principal organ and closely corresponding to the legitimate activities of the principal organ.

I am of the opinion that the General Assembly cannot legally establish a subsidiary body to perform functions which were not specifically assigned to the Assembly itself, or within the range of its functions.

Thus the Committee on International Criminal Jurisdiction established by the Assembly by resolution 489 (V) to prepare preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court, stated in its report:

"Under the Charter, the Court could only be established as a subsidiary organ. The principal organ would presumably be the General Assembly, *but a subsidiary organ could not have a competence falling outside the competence of its principal, and it was questionable whether the General Assembly was competent to administer justice* 2." (Emphasis added.)

In its Advisory Opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*<sup>3</sup> the Court, dealing with a view which had been expressed about the binding effect on a principal organ of the judgment of a subsidiary organ which it had itself created, said:

"In the third place, the view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgments cannot bind the General Assembly which established it.

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<sup>1</sup> *UN Repertory I*, p. 224.

<sup>2</sup> GA (VII), Suppl. No. 11 (A/2136), para. 21.

<sup>3</sup> *I.C.J. Reports 1954*, pp. 60-61.

This view assumes that, in adopting the Statute of the Administrative Tribunal, the General Assembly was establishing an organ which it deemed necessary for the performance of its own functions. But the Court cannot accept this basic assumption. The Charter does not confer judicial functions on the General Assembly and the relations between staff and Organization come within the scope of Chapter XV of the Charter. In the absence of the establishment of an Administrative Tribunal, the function of resolving disputes between staff and Organization could be discharged by the Secretary-General by virtue of the provisions of Articles 97 and 101. Accordingly, in the three years or more preceding the establishment of the Administrative Tribunal, the Secretary-General coped with this problem by means of joint administrative machinery, leading to ultimate decision by himself. By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations. In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with, particular instances.”

I understand this Opinion to mean that the General Assembly, in establishing the United Nations Administrative Tribunal, could not have been acting under Article 22 of the Charter as the Charter does not confer judicial functions on the General Assembly, but, that it was exercising a power which it had to regulate staff relations under Chapter XV of the Charter.

In view of the foregoing, it does not appear to me that the Committee, which is charged with a very limited judicial function, is such a subsidiary organ as is contemplated in Article 22 of the Charter.

The Court appears to equate the establishment of a subsidiary organ by the General Assembly to delegation of the performance of its own functions by the Assembly. (*I.C.J. Reports 1954*, p. 61.)

The Court in the present opinion takes the view, however, that the validity of the establishment of the Committee is saved on the ground that “the General Assembly’s power to regulate staff relations also comprises the power to create an organ designed to provide machinery for the review of judgments of the [the United Nations Administrative] Tribunal”.

In my opinion the General Assembly in establishing the Committee set up a judicial or at least a quasi-judicial body, to screen applications for advisory opinions for the Court as provided in Article 11 of the Statute of the United Nations Administrative Tribunal, and to decide, on each application, if a substantial basis for the application exists. There is thus such a link between the Committee and the Administrative Tribunal, as is sufficient to justify the view of the Court

that the establishment of the Committee was a valid exercise of the power to regulate staff relations.

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The functions of the Committee are set out in Article 11 of the Statute of the Administrative Tribunal of the United Nations, and are: (1) to receive the written application of a member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal, asking the Committee to request an advisory opinion of the Court; (2) to decide within 30 days whether or not there is a substantial basis for the application; and if there is: (3) to request an advisory opinion of the Court.

The Committee is not charged with the duty of reviewing the judgement of the Tribunal. It is only concerned with the application made to it, and studies the judgement of the Tribunal only for the purpose of deciding if there is substance in the objections contained in the application.

These functions set the limit and define the scope of the activities of the Committee, and it is out of the scope of these activities that the legal questions on which the advisory opinion of the Court can properly be requested under Article 96 (2) of the Charter must arise.

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The purpose of a request for an advisory opinion seems to be to enlighten the body requesting it, and enable it more confidently to deal with legal questions which may present difficulties to it in the performance of its functions. Thus in resolution 171A (II) entitled "Need for Greater Use by the United Nations and its Organs of the International Court of Justice", the General Assembly recommended that the organs of the United Nations and the specialized agencies, if duly authorized in accordance with Article 96, should refer to the Court for an advisory opinion points of law within the jurisdiction of the Court "*which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled . . .*" (emphasis added).

In its Advisory Opinion given on 23 October 1956<sup>1</sup> the Court stated:

"The question put to the Court is a legal question. It arose within the scope of the activities of Unesco when *the Executive Board had to examine the measures to be taken as a result of the four judgments.*

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<sup>1</sup> *I.C.J. Reports 1956*, p. 84.

The answer given to it will affect the result of the challenge raised by the Executive Board with regard to these Judgments. *In submitting the Request for an Opinion the Executive Board was seeking a clarification of the legal aspect of a matter with which it was dealing.*" (Emphasis added.)

The Committee has an extremely narrow compass of activities, and the four grounds on which it is "authorized" to request an advisory opinion from the Court cannot possibly arise within the scope of its own activities. The sole purpose of the Committee's existence seems to be to request advisory opinions on legal questions arising within the scope of the activities of the United Nations Administrative Tribunal. It forms no part of this tribunal and is in no way involved in its activities except, as has been noted, to request advisory opinions on legal questions arising out of those activities.

The advisory opinion requested, and the grounds on which the request can be founded, can in no way affect the manner in which the Committee will perform its function which essentially is to decide whether or not a substantial basis exists in a given case for an application for a review of the judgement of the United Nations Administrative Tribunal by way of an advisory opinion from the Court, and request the opinion. In other words, the legal questions on which it is authorized to request an advisory opinion have no relevance to its own activities.

In my view, an authorization under Article 96 (2) of the Charter in circumstances which enable an organ of the United Nations to request an advisory opinion on legal questions not arising out of the scope of its activities, does not accord with Article 96 (2) of the Charter; and this being the case with the Committee, I am of the opinion that although the Court has jurisdiction to answer a request for an advisory opinion, the present request does not come from a body legally authorized to make it and cannot be received by the Court.

(Signed) Charles D. ONYEAMA.

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