

SEPARATE OPINION OF JUDGE JIMÉNEZ DE ARÉCHAGA

While concurring entirely in the reasoning and the operative part of the Court's advisory opinion I wish to state certain additional considerations which show why it would be unjustified, in my view, for the Court to refuse to comply with the request.

The system of judicial review established by the General Assembly in 1955 was to a certain degree inspired by certain general observations which were made by the Court in its 1954 Advisory Opinion on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. In that Advisory Opinion the Court interpreted the question put to it as directed to awards "made within the limits of the competence of the Tribunal", and not referring to those awards "which may exceed the scope of that statutory competence" (*I.C.J. Reports 1954*, p. 50). It was with respect to the former awards that the Court advised that "the Organization becomes legally bound to carry out the judgment", and that "the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment" (*ibid.*, p. 53).

After reaching that conclusion the Court examined the question "whether the General Assembly would in certain exceptional circumstances be legally entitled to refuse to give effect to awards of compensation made by the Administrative Tribunal" (*ibid.*, p. 55).

After recalling that "the first Question submitted to the Court asks, in fact, whether the General Assembly has the right to refuse to do so 'on any grounds' ", the Court stated:

"When the Court defined the scope of that Question above, it arrived at the conclusion that the Question refers only to awards of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence, and the previous observations of the Court are based upon that ground. If, however, the General Assembly, by inserting the words 'on any grounds', intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award, there would arise a problem which calls for some general observations." (*I.C.J. Reports 1954*, p. 55.)

The Court's "general observations", following this paragraph, were therefore addressed to those cases in which the validity of an award had been challenged on the ground of its being in excess of the Tribunal's competence or having other serious defects capable of vitiating it.

The Court said in this respect:

“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 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.” (*Ibid.*, p. 56.)

It was in this context, then, that the Court made in 1954 its thinly veiled suggestion for the establishment of a system of judicial review which would have the consequence of excluding such a review by the General Assembly itself. In making these observations the Court must have taken into account the fact that in 1946 a decision was adopted in the Assembly of the League of Nations and in 1953 arguments were advanced in the General Assembly of the United Nations which presupposed that these political bodies had the power to refuse to comply with awards which they considered to exceed the competence of an administrative tribunal.

The basic purpose of the 1955 amendments to the Statute of the Administrative Tribunal thus appears to have been to deal with the question raised in the general observations of the Court which have been cited above in the way suggested therein. This explains why the system of judicial review established in 1955 is confined to certain specific grounds upon which the validity of a judgment may be challenged: excess of or failure to exercise jurisdiction or a fundamental error in substantive law or in procedure. This also explains why the amendments adopted exclude the possibility that the General Assembly may itself pronounce on the validity of an award which has been challenged.

The essential feature of the system of judicial review as adopted in 1955 is that a judgement the validity of which has been challenged may only be treated as invalid by the United Nations or any other international organization concerned if the Court has found, in an advisory opinion, that the challenge is well founded.

The system of judicial review thus adopted by the General Assembly amounts to a self-denial of any unilateral power of annulment or of refusal to comply with a judgement of the Administrative Tribunal the validity of which has been challenged. Therefore, this system, viewed as a whole, constitutes a definite step forward in the establishment of guarantees for the judicial determination of the validity of contested international awards, and by entrusting to the Court the responsibility for such a determination, it enhances the judicial role of the Administrative Tribunal and the judicial nature of its awards.

The fact that an organ such as the Committee on Application for Review is called upon to screen the applications and seise the Court cannot be considered to be such a serious defect as to counteract the progressive step taken, and still less to justify the adoption by the Court of a negative position which would frustrate the purpose of the system of judicial review established in 1955.

The need for some screening organ designed to avoid frivolous or unjustified objections being brought before the Court cannot be denied. Nor would criticism of this screening organ appear to be justified on the ground that it has taken a strict or even a rigorous view as to the existence of "substantial basis" for requesting an advisory opinion from the Court. Such an attitude cannot be presumed to result from any deliberate policy or improper instruction but from the fact that, as the Court itself indicated in 1954, those cases in which the validity of an award, and not its justice, is challenged, constitute, *ex definitione*, "exceptional circumstances" (*I.C.J. Reports 1954*, p. 55).

Despite the rarity of the occasions for the exercise of such a review the mere existence of the system has beneficial effects, because of the care which must be exercised by the Administrative Tribunal in each of its judgements. An organ of first instance does not know in advance which of its decisions is going to be scrutinized later by a higher tribunal.

As to the political composition of the Committee on Applications, this criticism may be exaggerated and the negative consequences which are deduced from it are in my view unjustified. We are, after all, concerned with international awards affecting member States, since those member States are finally bound to pay, directly or indirectly, any amounts awarded.

In respect of international awards in general, the States affected by them possess under international law an undeniable right to challenge their validity, if they consider that there are grounds justifying such a challenge, subject of course to a general obligation to submit the dispute to methods of peaceful settlement. No criticism has ever been voiced in this respect on the ground that the challenge emanates from a political body—which the State undoubtedly is.

In the case of awards of the Administrative Tribunal, some progress has been made as a result of Article 11 of the Statute of the Administrative Tribunal. Instead of each State concerned retaining its individual power

of challenge, it is an organ of the United Nations which is called upon to decide by a majority vote whether or not there is a substantial basis for the challenge which is requisite to seise the Court of the matter. It has also been formally provided that the review procedure may be initiated by an application from any of the parties to the dispute to which the award refers, thus giving those parties the additional guarantee of being able to set in motion the review proceedings. (Incidentally, in Art. XII of the Statute of the ILO Administrative Tribunal—on the basis of which the Court gave its 1956 Advisory Opinion—while the Executive Board of the international organization concerned, composed of member States, is empowered to challenge the judgments, it has not been found necessary to give the same additional guarantee to the parties of the original dispute.) There is further an obligatory submission of the challenge to the advisory jurisdiction of the Court followed by an opinion of the Court to which binding force has been accorded.

The suggestion that the Court should refuse to comply with the request because of the composition of, or the strict policy followed by, the Committee in dealing with applications would lead to practical consequences that could only aggravate the supposed defects.

The situation would not be changed with respect to those cases in which no substantial basis has been found; for them the judgement of the Administrative Tribunal would remain final and unreviewable. The only difference arising in this respect from a negative position of the Court would be that the beneficial preventive effects of the mere existence of a review system on administrative tribunals' judgements in general would be eliminated.

In those cases where it has been found by a majority decision of the Committee on Applications that there is substantial basis for the challenge, the situation (should the Court take a negative position) would be much worse: there would be no judicial review of a judgement in respect of which at least a majority of a body composed of 25 States had considered it should be referred to the Court. It may be feared that the disappearance of the system of judicial review established in 1955 might again resurrect, in the event of a repetition of certain circumstances, those ideas and proposals which prevailed in 1946 and were forcefully advanced again in 1953 advocating the power of the General Assembly to refuse to comply with, or to pronounce the invalidity of, awards challenged by member States as being *ultra vires*.

(Signed) E. JIMÉNEZ DE ARÉCHAGA.