

INTERNATIONAL COURT OF JUSTICE

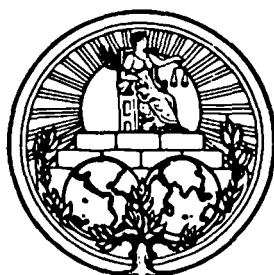
PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

APPLICATION FOR REVIEW OF
JUDGEMENT No. 158 OF THE
UNITED NATIONS
ADMINISTRATIVE TRIBUNAL

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

DEMANDE DE RÉFORMATION
DU JUGEMENT N° 158
DU TRIBUNAL ADMINISTRATIF
DES NATIONS UNIES



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WRITTEN STATEMENT

**WRITTEN STATEMENT SUBMITTED TO THE INTERNATIONAL
COURT OF JUSTICE ON BEHALF OF THE SECRETARY-GENERAL
OF THE UNITED NATIONS**

New York, September 1972.

I. BACKGROUND

A. Summary of the Facts

1. The facts relevant to the proceeding in the Administrative Tribunal of the United Nations to which Judgement No. 158 of the Tribunal relates were outlined by the Tribunal in that Judgement (AT/DEC/158—doc. No. (11), pp. 3-6). In so far as relevant to the questions addressed to the Court in the present proceeding (see para. 19 below) they may be summarized even more succinctly as follows.

2. (a) Mr. Mohamed Fasla, the applicant to whom Judgement No. 158 of the Tribunal relates, was a member of the staff of the United Nations

30 June 1964	–	29 June 1966
30 June 1966	–	31 December 1966
1 January 1967	–	31 December 1967
1 January 1968	–	1 April 1968
2 April 1968	–	1 May 1969 extended to 31 December 1969.

(b) During this entire period he was assigned to the Technical Assistance Board (TAB) and its successor, the United Nations Development Programme (UNDP). His successive functional titles and official duty stations were:

30 June 1964 to 31 December 1965	Assistant Resident Representative	Damascus, Syrian Arab Republic
1 January 1966 to 31 May 1966	Assistant Resident Representative	Beirut, Lebanon
1 June 1966 to 31 December 1966	Programme Officer	Bureau of Evaluation and Reports, New York
1 January 1967 to 31 May 1968	Area Officer	Bureau of Operations and Programming, New York
1 January 1968 to 31 March 1968	on loan to	United Nations Institute for Training and Research (UNITAR), New York
1 June 1968 to 14 September 1968	Assistant Resident Representative	Freetown, Sierra Leone
15 September 1968 to 22 May 1969	Assistant Resident Representative	Taiz, Yemen

23 May 1969 to 31 December 1969	home leave fol- lowed by special leave	Algeria California, USA (place of recruitment).
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(c) Mr. Fasla's performance was evaluated in six Periodic Reports:

Period Covered (Assignment)	Dossier doc. No. (3), Annex:	(Date of Report) Remarks
30 June 1964 to 30 June 1965 (Damascus)	9	(1 July and 15 October 1965) See Annex, para. A.1
1 January 1966 to 31 May 1966 (Beirut)	13	(September 1970) Prepared retroactively on basis of JAB recommendation; see paras. 8 and 10 below, and Annex, para. A.2
June 1966 to October 1966 (Bur. Eval. and Reports, N.Y.)	14	(9 and 14 November 1966) See Annex, para. A.4 (b)
November 1966 to November 1967 (Bur. Op. and Prog., N.Y.)	21	(21 and 24 November 1967) See Annex, para. A.5
January 1968 to March 1968 (UNITAR, N.Y.)	22	(18 September 1970) Prepared retroactively on basis of JAB recommendation; see paras. 8 and 10 below, and Annex, para. A.6
June 1968 to March 1969 (Freetown and Taiz)	60	(22 September 1970) Prepared retroactively on basis of JAB recommendation and invalidated consequent on Tribunal judgement; see paras. 8, 10 and 30 below, and Annex, para. A.8.

3. Mr. Fasla's assignment in Taiz was originally intended to last until 31 December 1969, the expiration of his then current appointment. However, on 10 May 1969 he was instructed to leave Yemen together with his family, with the assumption that he would not be returning, and to report in New York for consultations on 20 May (see doc. No. (3), Annex 48). On 20 and 21 May Mr. Fasla met with the Director of the Bureau of Administrative Management and Budget of UNDP and with the Chief of the Personnel Division of UNDP, and the latter summarized the outcome of these discussions in a letter by which Mr.

Fasla was authorized to proceed immediately on home leave. The letter also informed him that every effort would be made to secure another assignment for him in UNDP, or in the United Nations Secretariat or elsewhere in the "UN family"; since it was anticipated that this task would not be easy in the light of previous occasions on which Mr. Fasla's continued service had been in serious doubt, he was warned that on the conclusion of his home leave he might be placed on special leave with full pay until the expiration of his appointment, which would not be extended if no placement could be found (see doc. No. (3), Annex 50; also substantially reproduced in doc. No. (11), (pp. 4-5).

4. In early June 1969 the Chief of the UNDP Personnel Division, following customary procedures, dispatched communications to the United Nations Personnel Department, to several other United Nations departments and organs, to two UNDP Resident Representatives and to two specialized agencies participating in UNDP's work, informing them of Mr. Fasla's availability and attaching a "Fact Sheet" (formally entitled "Personnel Record"—see doc. No. (3), Annex 51) summarizing his education, his employment history prior to his recruitment by the United Nations and his assignments in the Organization. The first part of that Record, entitled "Evaluation", consisted of an extract of the only three Periodic Reports that had been prepared on Mr. Fasla up till then, covering the periods of 30 June 1964 to 30 June 1965 (TAB Office, Damascus), June-October 1966 (UNDP Bureau of Evaluation and Reports, New York) and November 1966 to November 1967 (principally in UNDP Bureau of Operations and Programming, New York). At that time no Periodic Reports had been prepared on Mr. Fasla covering his remaining periods of service, and the Fact Sheet neither included any evaluation for such periods nor any explanation for why such periods were not covered. No reference was made to the fact that Applicant had submitted a statement of rebuttal in respect of his first, rather unfavourable Periodic Report, and that he had also written a letter challenging the equally unfavourable third Report (see Annex, paras. A.1 and A.5).

5. On 12 September 1969 the Chief of the UNDP Personnel Division informed Mr. Fasla, who had by then completed his home leave in Algeria and had returned with his family to the place of his recruitment in California, that no new assignment had yet been found for him, that it might consequently not be possible to extend his contract after its normal expiration on 31 December 1969, and that after the exhaustion of his accumulated regular leave he would be placed on special leave, with full pay, until the expiration of his contract. On 20 November the Director of UNDP's Bureau of Administrative Management and Budget notified Mr. Fasla that it had not been possible to find a new assignment for him and that consequently no extension of his contract could be envisaged (see doc. No. (3), Annex 56).

6. The various disputes that culminated in the present proceeding related primarily to the circumstances and consequences of Mr. Fasla's recall from his last assignment in Yemen; to the efforts made to find a new assignment for him within UNDP or elsewhere in the United Nations or in a specialized agency; and to the determination that no such assignment could be found, and that consequently his contract should not be extended. The several proceedings that Mr. Fasla initiated in connection with these disputes are summarized in the next section of this Statement, together with the decisions of the instances concerned. The specific facts relevant to the questions addressed to the Court are set forth in detail in the subsequent sections relating separately to each such question.

B. The Previous Proceedings**I. THE JOINT APPEALS BOARD****(a) JAB Case No. 172**

7. After Mr. Fasla had been notified on 12 December 1969 that there was no basis for the Secretary-General to alter the position taken by UNDP in not extending his fixed-term contract past 31 December 1969, he lodged an appeal with the United Nations Joint Appeals Board, established and functioning in accordance with Staff Regulation 11.1 (see doc. No. (14) or (15)) and Staff Rules 111.1-111.3 (see doc. No. (15)). In that proceeding he principally contended that the failure to renew his appointment was motivated by prejudice, discrimination and malice on the part of UNDP, that the Periodic Reports on him were deficient and misleading in many respects, that no account had been taken of the special difficulties of several of his assignments and finally that UNDP had not fulfilled in good faith the obligation it had undertaken to attempt to find another post for him, inside or outside of UNDP, since it had done no more than to send out brief non-committal inquiries to which a biased, incomplete and misleading Fact Sheet was attached (see doc. No. (2), paras. 7-31).

8. After written and oral proceedings the Joint Appeals Board prepared a Report to the Secretary-General, in which it summarized its conclusions and made recommendations as follows (doc. No. (3), Annex 2, paras. 41-46):

"Considerations and Conclusions

41. As this was a case of non-renewal of a fixed-term appointment, the Board did not attempt to evaluate the appellant's performance but decided to determine whether the administrative decision had been motivated by prejudice or by some other extraneous factor.

42. The Board is conscious that it was not within its responsibilities to comment upon the conditions prevailing in the UNDP offices in Syria and Yemen and is of the view that the appellant's references to the Resident Representative in Yemen were relevant only if it were shown that the Resident Representative's actions had in any way reflected prejudice against the appellant.

43. The Board finds no evidence to indicate prejudice on the part of officials at UNDP Headquarters. While the Board recognizes that there may have been prejudice against the appellant on the part of the Resident Representative in Yemen, no clear-cut evidence has been submitted to substantiate this assumption.

44. The Board therefore concludes that the UNDP has not violated any Staff Regulations or Staff Rules nor the terms and conditions of appointment of the appellant in not renewing his fixed-term appointment after 31 December 1969.

45. The Board nevertheless feels constrained to take account of certain other aspects of this case:

(a) It is evident that very difficult conditions prevailed in the UNDP offices both in Syria and in Yemen. By assigning the appellant to these duty stations, UNDP put him in difficult situations. Adverse assessments of his work under these circumstances placed him in a disadvantageous position with respect to his future assignments with UNDP or other International Organizations. He thus became a victim of circumstances not entirely through his own fault.

- (b) UNDP did not follow the established administrative procedures with respect to the periodic reports in this case, since there were substantial gaps in his service not covered by reports and particularly there was no report assessing his work for the period November 1967 until his separation on 31 December 1969.
- (c) Similarly the UNDP did not follow the required practice with regard to rebuttals of periodic reports by staff members.
- (d) Complimentary assessments of the appellant's work in Lebanon were neither included in his Official Status file nor mentioned on the fact sheet. The handling by UNDP of the periodic reports and rebuttals and the decisions as to what should or should not be placed on the file or the fact sheet was less than competent.
- (e) UNDP's efforts to assign the appellant elsewhere were inadequate especially since the fact sheet was incomplete. It is the view of the Board that, as a result of these facts, the performance record of the appellant is incomplete and misleading and that this seriously affected his candidacy for a further extension of his contract or for employment by other agencies.

Recommendations

46. The Board makes the following unanimous recommendations for the consideration of the Secretary-General:

- (i) UNDP should re-examine the appellant's files with the view to filling the gaps in the records in accordance with established procedures, and bringing them up-to-date with all required periodic reports and evaluations of work, which should then be reflected adequately in the appellant's fact sheet.
- (ii) UNDP should make further serious efforts to place the appellant in a suitable post either within UNDP or with one of the other International Organizations.
- (iii) If UNDP fails in these efforts, the Board recommends that an *ex gratia* payment equivalent to six months' salary be made to the appellant."

9. The Secretary-General, to whom the report of the Joint Appeals Board constituted a recommendation¹, decided to refer the first two recommendations of the Board to the UNDP administration for such action as it might deem appropriate, and to take no action on the recommendation for an *ex gratia* payment for which he found no basis (see doc. No. (3), Annex 3).

10. In compliance with the first recommendation of the Joint Appeals Board referred to it by the Secretary-General the UNDP administration arranged to secure Periodic Reports covering Mr. Fasla's service during the periods January-May 1966 (Lebanon), January-March 1968 (loan to UNITAR, New York) and June 1968-March 1969 (Sierra Leone and Yemen). Mr. Fasla signed the first two of these but, in view of the extremely unfavourable nature of the third Report, he declined to sign and indeed attempted to submit it to the Joint Appeals Board to substantiate his charge of prejudice, on which the Board had held against him. The Board, however, advised him that its terms of reference did not permit it to reopen a proceeding as to which it had already made a report to the Secretary-General who had taken a final decision thereon; instead, the Board suggested that the Report in question be submitted to the

¹ Staff Regulation 11.1 (doc. No. (14) or (15)); Staff Rule 111.3 (1) (doc. No. (15)).

Administrative Tribunal, where Mr. Fasla had in the meantime launched an appeal (see section I.B.2 below). A revised Fact Sheet was also prepared (doc. No. (3), Annex 66), which noted that a rebuttal had been made to the Periodic Report for June 1964-June 1965 (TAB office in Damascus), indicated that a Report was on file for January-March 1968 covering a loan to UNITAR, and summarized the ratings of the controversial final Report, without, however, quoting any of the special negative comments included therein. However, the new Fact Sheet was not circulated to any prospective employer.

11. With respect to the second recommendation referred to the UNDP administration, Mr. Fasla was informed on 31 August 1970 that since all possible efforts had been made to find him a suitable post before the expiration of his contract, it was not intended to offer him another appointment in the future (doc. No. (3), Annex 58).

(b) JAB Case No. 181

12. On 12 August 1970 Mr. Fasla initiated a second proceeding in the Joint Appeals Board, dealing in part with some questions raised but not finally disposed of in the first proceeding, and in part with entirely new ones. His principal claims were:

- (a) that since his period of service in Yemen had been reduced, by his recall, to less than one year, his emoluments for that period should have been retroactively recomputed on the higher short-term basis rather than on the long-term one on which they had actually been paid (see section II.C below);
- (b) that he should have received, from the time of his recall from Yemen until the expiration of his contract, a "post adjustment" based on the higher New York rather than the Yemen rate;
- (c) that the Board should determine that his placement on special leave against his wishes was improper, and that he should therefore be appropriately compensated for this injury.

13. After holding the usual proceedings the Joint Appeals Board, in its Report to the Secretary-General dated 18 January 1971, summarized its conclusions and made recommendations as follows (doc. No. (3), Annex 67, paras. 40-42):

"Conclusions and Recommendations

40. The Board finds that the appellant's assignment as Assistant Resident Representative in Yemen was intended to continue for more than one year and that his salary and allowances were correctly determined on that basis. The Board finds further that when it was decided in May 1969 that the appellant would go on leave while a search was made for a new assignment for him, the appellant was transferred to Headquarters and his duty station was changed to New York. Consequently, the Board considers that the appellant should have been paid the New York post adjustment for the period from 23 May 1969 to 31 December 1969, and recommends that the Secretary-General authorize payment to him of the difference between the New York post adjustment for that period and the Taiz post adjustment which he received.

41. In the absence of any guidance in the Staff Regulations or Rules or in administrative instructions as to whether salary and allowances should be recalculated when an assignment for one year or more is cut short, the

Board does not make any recommendation for the readjustment of the appellant's salary and allowances for the period during which he served in Yemen. The Board recommends, however, that the Secretary-General consider making an *ex gratia* payment to the appellant in the amount of any losses that he can show that he has suffered as a consequence of his precipitate recall from Yemen.

42. Lastly, the Board finds that the Secretary-General was authorized under Staff Regulation 1.2 to recall the appellant from Yemen and under Staff Regulation 5.2 to place him on special leave with pay from 10 September 1969 to 31 December 1969. In the Board's view the special leave in question was authorized in the interests of the appellant in order to permit a search to be made for a further assignment for him. The Board finds, moreover, that the appellant accepted the benefits of this arrangement and suffered no loss in salary or allowances because of it. Accordingly, the Board makes no recommendation in support of the appellant's contentions concerning special leave."

In effect, two members of the Board agreed with Mr. Fasla's second claim, stated that they did not find a legal basis for the first one but recommended *ex gratia* payment of any demonstrated losses due to the precipitate recall, and rejected the third claim. The third member of the Board dissented on the last two points (the first and third claims), holding that the emoluments for the service in Yemen should be recomputed and that Mr. Fasla was injured by the involuntary special leave.

14. On 8 March 1971 Mr. Fasla was informed that the Secretary-General had accepted the recommendations of the majority of the Board as to all three points (see doc. No. (3), Annex 68).

2. THE ADMINISTRATIVE TRIBUNAL: CASE NO. 144

15. On 31 December 1970, after the Joint Appeals Board had reported on the first appeal and the Secretary-General had taken his final decision thereon, but before the second appeal had yet been disposed of, Mr. Fasla filed an Application with the United Nations Administrative Tribunal, requesting it to order the following measures (doc. No. (3), Annex 86, para. 8; reproduced in doc. No. (11), pp. 1-2):

- “(a) As a preliminary measure, production by the Respondent of the report by Mr. Sattrap, Chief, Middle East Area Division, UNDP on his investigation of the UNDP office in Yemen in February 1969.
- (b) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, Consultant to the UNDP Administrator, on his investigation of the UNDP office in Yemen in March 1969.
- (c) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, UNDP Special Representative in Yemen, concerning the Applicant's performance, prepared at the request of the UNDP in the summer of 1969.
- (d) Restoration of the Applicant to the *status quo ante* prevailing in May 1969, by extending the Applicant's last fixed-term appointment for a further two years beyond 31 December 1969, with retroactive pay of salary and related allowances; alternatively, payment by the Respondent to the Applicant of three years' net base salary.
- (e) Correction and completion of the Applicant's Fact Sheet which is intended for circulation both within and outside the UNDP, with all

the required Periodic Reports and evaluations of work; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

- (f) Invalidation of the Applicant's Periodic Report covering his service in Yemen, prepared in September 1970; alternatively, payment by the Respondent to the Applicant of two years' net base salary.
- (g) Further serious efforts by the Respondent to place the Applicant in a suitable post either within the UNDP or within the United Nations Secretariat or within a UN Specialized Agency; alternatively, payment by the Respondent to the Applicant of two years' net base salary.
- (h) As compensation for injury sustained by the Applicant as the result of the repeated violation by the Respondent of Administrative Instruction ST/AI/115, payment by the Respondent to the Applicant of two years' net base salary.
- (i) As compensation for injury sustained by the Applicant as the result of the continuous violation by the Respondent of his obligation to make serious efforts to find an assignment for the Applicant, payment by the Respondent to the Applicant of two years' net base salary.
- (j) As compensation for injury sustained by the Applicant as the result of prejudice displayed against him, payment by the Respondent to the Applicant of five years' net base salary.
- (k) As compensation for the emotional and moral suffering inflicted by the Respondent upon the Applicant, payment by the Respondent to the Applicant of one Yemen rial.
- (l) As compensation for delays in the consideration of the Applicant's case, especially in view of the fact that no Joint Appeals Board was in existence during the first four months of 1969 since the Respondent had failed to appoint a Panel of Chairmen, payment by the Respondent to the Applicant of one year's net base salary.
- (m) Payment to the Applicant of the sum of \$1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case necessitated the Applicant's travel from California to New York in May 1970 (see Annex 2, para. 6) as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date.
- (n) As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary."

On 11 June 1971, after the Joint Appeals Board had reported and the Secretary-General had decided on his second appeal, Mr. Fasla filed a Supplement to his Application to the Administrative Tribunal, requesting it to order the following additional measures (doc. No. (3), Annex 89, para. 7; reproduced in doc. No. (11), p. 3):

- "(a') As compensation for the further delay in the consideration of the Applicant's case early in 1971, payment by the Respondent to the Applicant of one year's net base salary.
- (b') Recalculation by the Respondent of the Applicant's salary and

allowances in Yemen on the basis of the actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.

- (c') As compensation for the illegal suspension of the Applicant from duty, payment by the Respondent to the Applicant of five years' net base salary."

16. The Secretary-General filed his Reply to the original Application on 1 June 1971 (doc. No. (3), Annexes 87 and 64-66), and a Supplement to the Reply (in response to the Supplementary Application) on 12 August 1971 (doc. No. (3), Annexes 90 and 73). Mr. Fasla filed Observations as to both Replies on 15 November 1971 (doc. No. (3), Annexes 88 and 74-84, and 91). As no request for oral proceedings had been made and as the presiding member did not decide that any should be held (Rules of the Tribunal—doc. No. (13), Art. 15), the case was decided on the written pleadings. With reference to the requests for the production of three documents as preliminary measures (see subparas. 15 (a)-(c) above), the Tribunal noted that the first of these was annexed to the Secretary-General's Reply (doc. No. (3), Annex 65), the second of these was supplied in confidence to the Tribunal which decided that only a single paragraph of it was relevant and communicated that extract to Mr. Fasla, while the third could not be located in the files of UNDP (doc. No. (11), part II of the judgement). The Tribunal deliberated on the case from 10 to 28 April 1972, and on the latter date issued the Judgement (doc. No. (11)) to which the present proceeding relates.

17. The principal part of the Tribunal's Judgement¹ deals with Mr. Fasla's interwoven claims relating to the non-renewal of his appointment and the efforts made by UNDP to find another position for him². The Judgement also deals with claims concerning delays³, for the award of costs⁴, for the recomputation of the emoluments paid in Yemen⁵, and for compensation for the allegedly illegal suspension from duty through the special leave⁶.

3. THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS: APPLICATION NO. 14

18. On 26 May 1972 Mr. Fasla, through his attorneys, filed an Application (doc. No. (3)) with the Committee on Applications for Review of Administrative Tribunal Judgements, in accordance with Article 11, paragraph 1, of the Statute of the Administrative Tribunal (doc. No. (13)). In part III.A of that Application, Mr. Fasla asserted that the Tribunal had failed to exercise its jurisdiction with respect to his claim for damages in respect of his professional reputation and career prospects (see subpara. 15 (n) above); in part III.B he made a similar assertion with respect to his claim for the award of costs in connection with the previous proceedings (*ibid.*, 15 (m)); and in part III.C he

¹ Doc. No. (11), parts III-XIII, XVIII.1,2,4 of the judgement.

² Subparas. 15 (d)-(k), (n) above; also the discussion in section II.A.1 below.

³ Subparas. 15 (l), (a') above; doc. No. (11), parts XVI, XVIII.4 of the judgement.

⁴ Subpara. 15 (m) above; doc. No. (11), parts XVII, XVIII.4 of the judgement; also the discussion in section II.B.1 below.

⁵ Subpara. 15 (b') above; doc. No. (11), part XVIII.3 of the judgement; also the discussion in section II.C.1 below.

⁶ Subpara. 15 (c') above; doc. No. (11), parts XIV, XVIII.4 of the judgement.

made a similar assertion with respect to his claim for recalculation of his emoluments in Yemen (*ibid.*, 15 (b')); the legal questions he proposed to have submitted to the Court in this connection were stated in paragraphs 1 and 3 of part IV of the Application. In part III.D Mr. Fasla contended that the Administrative Tribunal committed fundamental procedural errors in connection with the same three claims to which parts III.A-C were addressed; the legal questions he proposed to have submitted to the Court in this connection were stated in paragraphs 2 and 4 of part IV. Finally, in part III.E of the Application Mr. Fasla requested the Committee and/or the Court to award him the costs incurred in presenting that Application.

19. After the Secretary-General had submitted his Comments on Mr. Fasla's Application (doc. No. (4)), the Committee was convened to consider the Application, and met for this purpose on 8, 13, 19 and 20 June. At the conclusion of its deliberations, on which it issued a report (doc. No. (10)), it adopted the following decision (*ibid.*, para. 10):

"The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of article 11 of the Statute of the Administrative Tribunal for the application for the review of Administrative Tribunal Judgement No. 158, delivered at Geneva on 28 April 1972.

Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following questions:

1. Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?
2. Has the Tribunal committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?"

The Committee decided to express no opinion on Mr. Fasla's request for costs incurred in presenting his Application to the Committee (*ibid.*, para. 9).

II. ANALYSIS OF THE QUESTIONS ADDRESSED TO THE COURT BY THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

20. In addressing its two questions to the Court, the Committee on Applications for Review specified their scope only by reference to the contentions in the Application Mr. Fasla had addressed to it. Consequently it is assumed that the Court will wish to examine both these questions with reference only to the three claims specifically referred to in parts III.A-C of the Application (see para. 18 above). The present section therefore contains an analysis of these claims, each of the three being examined first in the context of its factual and legal background, then from the point of view of the jurisdiction the Administrative Tribunal could and did exercise with respect to it, and finally from the point of view of the Tribunal's procedure to determine whether a failure of justice might have been occasioned through any fundamental error in such procedure. The basis on which the Court might conduct such a review is discussed in section IV below.

A. Claim for Damages in Respect of Professional Reputation and Career Prospects

1. FACTUAL AND LEGAL ISSUES

21. The final claim in the original Application submitted by Mr. Fasla to the Administrative Tribunal read as follows (doc. No. (3), Annex 86, para. 8 (n)):

“(n) As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary.”

22. This claim was not one that had been submitted to or considered by the Joint Appeals Board. Rather it appears to be an extension of a number of other claims in the Application to the Tribunal concerning the means and diligence with which the UNDP had tried to place Mr. Fasla with one of its own offices, or within other United Nations organs or some specialized agencies; these related claims demanded that Mr. Fasla's appointment be extended at least two years, that further serious efforts be made to place him within UNDP or the United Nations or a specialized agency, that the Fact Sheet with the aid of which such a search would be undertaken be corrected and completed, that one of the Periodic Reports summarized in the latest version of the Fact Sheet be invalidated, and that compensation be paid for the previous failure to make a serious effort at placement and the several violations committed by the UNDP in respect of the Periodic Reports on Mr. Fasla.

23. Since the asserted damage to Mr. Fasla's professional reputation and career prospects appears to derive almost solely from the circulation of the Fact Sheet prepared by the UNDP in June 1969 on the basis of the three Periodic Reports about Mr. Fasla then in existence (see para. 4 above), it is desirable to explain the legal basis for the preparation of such Reports as well as of the effort at placement undertaken by the UNDP.

(a) The obligation to prepare Reports on staff members is specified in Staff Rule 112.6 (doc. No. (15)):

“Service and Conduct Reports

In the Professional category and lower salary levels, the service and conduct of a staff member shall be the subject of reports made from time to time by his supervisors. Such reports, which shall be shown to the staff member, shall form a part of his permanent cumulative record.”

(b) This general provision is detailed in Administrative Instruction ST/AI/115 (doc. No. (16)), the pertinent parts of which are:

“

Staff to be reported on and periodicity of reports

2. Reports will be made on all staff below the level of Director (D2) on temporary or permanent appointments. They will be made at the end of each year of service on staff serving under temporary appointments. . . . The reporting period shall be based on the date of the staff member's first appointment to continuous service.

The new forms and their use

5. The first section, which covers in detail most aspects of a staff member's performance, will be completed by the immediate responsible supervisor, who will sign this section. There is a second section which will be completed by the next supervisor in line who is not lower in rank than Chief of Section. All reports will be seen by the Head of the Department or Office or by a Director designated by him. He will have space to add his comments, if any.

Interim and special reports

7. In addition to the regular periodic reports, interim reports written on the ordinary periodic report form will be made:

- (a) on the transfer or reassignment of a staff member (whether at Headquarters or to a Mission) when such service exceeds or is expected to exceed a period of six months;
- (b) whenever feasible, when the immediate supervisor is about to leave.

No interim report will be required if the supervisor has made a regular report on the staff member in question within the last three months.

9. While interim reports under paragraph 7 (a) above will only be required if the service has been of more than six months' duration, a staff member may request a special report, for submission to his own reporting officer, in respect of any assignment of less than six months in another Department, Office, Unit or Section.

Reports to be shown to staff member

11. Each staff member reported on in a regular or interim or special report shall be given a copy of the report *after* it has been completed by the appropriate reporting officers. As soon as possible thereafter he shall sign a statement on the original that he has seen it and has received a copy.

13. If the staff member so desires, he may make a written statement in explanation or rebuttal of part or all of any report, which statement shall be joined to the report to which it refers. Where a staff member makes such a statement, the Head of the Department will investigate the case and will record his appraisal of it in writing. This record will be filed together with the report and the staff member's statement."

- (c) No rule or administrative instruction exists regarding the preparation of Fact Sheets used in summarizing information about staff members for whom it is desired to seek another post in the Organization. While there is no general obligation to effect or to attempt to effect such placement, Staff Regulation 4.4 (doc. No. (14) or (15)) does oblige the Secretary-General to consider the merits of existing staff in filling any vacancies:

"Regulation 4.4: Subject to the provisions of Article 101, Paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite

qualifications and experience of persons already in the service of the United Nations. This consideration shall also apply on a reciprocal basis to the specialised agencies brought into relationship with the United Nations."

- (d) In addition, in respect of Mr. Fasla, the Administrative Tribunal determined that UNDP's letter of 22 May 1969 (doc. No. (3), Annex 50) created a formal commitment to try to find another assignment for him (doc. No. (11), part IV of the judgement).

24. Fact Sheets used in placing staff members are designed to summarize the record of their employment by the United Nations. Though such record does not consist solely of the Periodic Reports (Staff Rule 112.6 specifies merely that these reports constitute *part* of the permanent cumulative record), these necessarily constitute an important ingredient of each such Sheet. As Mr. Fasla's charges of injury to his reputation and career rest almost exclusively on his complaints concerning the Periodic Reports that were, or according to him should have been, summarized in the Fact Sheet that was circulated in July 1969 (doc. No. (3), Annex 51), his objections are analysed in the Annex hereto, in the light of all relevant points of which the Tribunal could take account in evaluating the merits of these complaints. In summary it would appear that while a number of technical departures from the applicable Administrative Instructions could be established, Mr. Fasla cannot show convincingly that these faults substantially prejudiced him; moreover, he was aware of the practices of which he belatedly complains and did not object to them currently, even to the extent of failing to utilize certain procedures prescribed for this purpose in the Instructions.

25. Moreover, the one report with serious prejudicial implications, which in 1970 belatedly covered Mr. Fasla's service from June 1968 in Sierra Leone to March 1969 in Yemen and whose invalidation the Tribunal directed (see para. 30 below), was necessarily not included in the June 1969 Fact Sheet, the only one that circulated outside of UNDP. Thus the only paper as to which the Tribunal reached a strongly negative conclusion (which Mr. Fasla interpreted as a finding of "malicious distortion"—doc. No. (3), para. A.7) was not one that could have affected his reputation or career. The several gaps in the evaluation of Mr. Fasla's service record in the 1969 Sheet, while perhaps not satisfactory to a personnel officer seeking information about a potential candidate, certainly could not suggest that the omitted periods were in any way less satisfactory than those reported on, since unfavourable reports were summarized as well as favourable ones. Thus an incomplete record, while not suitable for the purpose for which it was circulated—to stimulate offers of employment—would not by itself leave a negative impression.

26. In his Application to the Administrative Tribunal, Mr. Fasla briefly and in a somewhat different context (i.e., to establish prejudice) touched on two more points that might be considered as bearing on his claim for damage to professional reputation. In April 1967 his supervisor recommended him for a post with FAO, but after some initially promising correspondence the FAO indicated that the positions for which Mr. Fasla might be considered were no longer open (doc. No. (3), Annexes 16-19); he suggested to the Tribunal, without any proof at all, that this rather routine contretemps in any personnel office indicated some malevolent intervention on the part of the United Nations (*ibid.*, Annex 86, paras. 31 and 147).

Secondly he asserted, again without submitting any proof to the Tribunal, that a senior UNDP official had made derogatory and discriminatory comments about him and had even shown misleading items from his Official Status File

in order to discourage an offer of employment from the Yemen Planning Board (*ibid.*, para. 72); however, aside from failing to substantiate this incident in any way. Mr. Fasla asserted (*ibid.*, para. 147) that it constituted a violation of Staff Regulation 1.5 (doc. No. (14)), which prohibits staff members from communicating "any information known to them by reason of their official position which has not been made public, except in the course of their duties or by authorization of the Secretary-General". Thus, even if this incident actually did take place, Mr. Fasla himself conceded that the UNDP official acted privately and improperly, rather than by authorization of the Secretary-General.

2. DID THE TRIBUNAL EXERCISE ITS JURISDICTION WITH RESPECT TO THE CLAIM FOR DAMAGES?

(a) *The Tribunal's Decision with Respect to the Claim for Damages*

27. The Administrative Tribunal took account of Mr. Fasla's claim for damages in respect of his professional reputation and career prospects, as it included that claim in its recitation at the beginning of its Judgement No. 158 (doc. No. (11), p. 2).

28. In its lengthy analysis of the case the Tribunal dealt briefly with certain procedural and peripheral matters (see para. 17 above). But the bulk of the Judgement (doc. No. (11), pp. 15-20) is devoted to the principal issue in the case: the nature and extent of UNDP's responsibility to assist Mr. Fasla in finding a new position, the appropriateness of the means used by UNDP to carry out such responsibility, the harm suffered by Mr. Fasla through any deficiencies in these means, and finally the compensation to which he should be entitled by reason of any such harm. In making this analysis the Tribunal was obviously not assisted by the fact that the relevant claims made or measures requested by Mr. Fasla to a considerable extent duplicated or at least substantially overlapped each other: thus he requested the invalidation of a Periodic Report or alternatively payment of two years' salary (see subpara. 15 (*f*) above), and also compensation amounting to two years' pay for UNDP's violation of the Administrative Instruction regarding Periodic Reports (*ibid.*, 15 (*h*)), as well as correction and completion of his Fact Sheet with all the required Periodic Reports or once more two years' salary as damages (*ibid.*, 15 (*e*)); he also requested a retroactive two-year extension of his fixed-term contract or three years' net salary (*ibid.*, 15 (*d*)), plus further serious efforts to place him elsewhere (*ibid.*, 15 (*g*)) or two years' salary, plus two years' salary as compensation for the previous failure to make a serious effort (*ibid.*, 15 (*i*)) plus five years' salary as compensation for the prejudice that had been displayed against him (*ibid.*, 15 (*j*)), plus symbolic compensation for emotional and moral suffering (*ibid.*, 15 (*k*)), plus compensation for the damage inflicted on his professional reputation and career prospects as a result of the use of an incomplete and misleading Fact Sheet (*ibid.*, 15 (*n*)). Thus requests for specific remedies (always with an alternative of compensation) were admixed with demands for damages for alleged injuries. Altogether, Mr. Fasla claimed a total of 30 years' net base salary (plus additional amounts under the claims listed in subparagraphs 15 (*k*), (*m*) and (*b'*) above), of which no less than 23 years would pertain to the interrelated complex of the principal claims.

29. Faced with this web of inseparable and largely duplicative requests for monetary and other relief, the Tribunal, as is its wont and duty, analysed the substantive issues raised by Mr. Fasla's application in terms of "allegations of

non-observance" made pursuant to paragraph 1 of article 2 of its Statute, and of the remedies requested and available under article 9. In parts III-XIII of the Judgement it discussed the various questions of responsibility, fault and damage, and attempted to fashion appropriate remedies within the limits of its jurisdiction. In doing so it did not give a point-by-point analysis of each heading under which a different relief was claimed. Indeed, Mr. Fasla's Application to the Tribunal also did not attempt such an exercise, but instead concentrated, as did the Tribunal later, on the validity of the Periodic Reports, the effort to provide further employment, and the evidence of prejudice; thus no specific mention is made in his explanatory statement (doc. No. (3), Annex 86, paras. 124-156) of the claim that Mr. Fasla now asserts the Tribunal disregarded.

30. The Tribunal thus evaluated all the issues as to which evidence and/or arguments were presented by Mr. Fasla, and concluded that the belated Periodic Report for June 1968 to March 1969 (Sierra Leone and Yemen) be invalidated and that compensation of six months' salary be awarded. In fixing this compensation it took into account the type and amount of harm that Mr. Fasla was able to demonstrate he had suffered or might suffer, including the considerations discussed in paragraphs 24-26 above. To the extent that Mr. Fasla's claims exceeded what the Tribunal considered proper, it explicitly decided that these "requests are rejected" (doc. No. (11), part XVIII.4 of the Judgement). It thus fully exercised its jurisdiction in respect of the claims presented to it.

31. Even if, by applying a different measure of damages than that used by the Tribunal, the award were considered as not fully compensatory, this would still not constitute a failure on the part of the Tribunal to exercise its jurisdiction, as that term is normally understood and especially as the General Assembly understood it in formulating article 11 of the Statute of the Tribunal (see paras. 95-96 below).

(b) *The Tribunal's Obligation to Award Monetary Compensation*

32. The power of the Administrative Tribunal to award compensation derives from paragraph 1 of article 9 of its Statute (doc. No. (13)). It is there specified that while the normal relief to be ordered by the Tribunal is the rescinding of the decision contested or the specific performance of the obligation invoked, the Secretary-General may decide that in the interests of the United Nations an applicant should instead receive monetary compensation. Such compensation is thus conceived of as an alternative to specific performance, to be chosen, not at the discretion of the Tribunal or of the applicant, but solely of the Secretary-General. The amount of compensation that may be granted is also limited by that provision of the Tribunal's Statute (to the equivalent of two years' net base salary), though provision is made for increasing this amount under exceptional circumstances.

33. Mr. Fasla was mistaken in arguing, in his Application to the Committee for Review, that paragraph 3 of article 9 of the Tribunal's Statute obliges the Tribunal, without allowing it any discretion, to award compensation where a wrong cannot be remedied by the relief provided for in paragraph 1 of that article (doc. No. (3), para. A.6). Instead it is clear from the text of paragraph 3, in particular in its French version ("*Lorsqu'il y a lieu à indemnité, celle-ci est fixée par le Tribunal*"), that the only purpose of the clause in question is to specify that while it is the Secretary-General who is empowered to determine the *circumstances* under which compensation should be paid rather than specific relief granted, it is the Tribunal that determines the *amount* of such compensa-

tion. This interpretation is also supported by the history of article 9¹. Thus the only circumstances under which monetary compensation may be awarded by the Tribunal are those specified in paragraph 1 of article 9 of its Statute.

3. DID THE TRIBUNAL COMMIT ANY FUNDAMENTAL ERROR IN PROCEDURE WHICH HAS OCCASIONED A FAILURE OF JUSTICE WITH RESPECT TO THE CLAIM FOR DAMAGES?

(a) *The Tribunal's Procedure*

34. The Administrative Tribunal considered Mr. Fasla's Application in general and the claim relating to damages in respect of professional reputation and career prospects in particular, strictly according to its Statute and Rules (doc. No. (13)). Mr. Fasla was represented by counsel provided to him by the United Nations. He presented lengthy statements in support of his Application and the Supplement thereto, and later in commenting on the Replies by the Secretary-General, and these statements were considered by the Tribunal in formulating its Judgement. No request for oral proceedings or for the examination of witnesses or experts was made, nor did the Tribunal consider any such steps necessary. Mr. Fasla has raised no objection with respect to these aspects of the Tribunal's consideration of his appeal.

35. Mr. Fasla requested the Tribunal to order the production of three documents (subparas. 15 (a)-(c) above). Of these one was submitted in full, one in relevant extract, while one could not be located by UNDP (doc. No. (11), part II of the Judgement). The missing document, as described by Mr. Fasla, is at best marginally relevant to his claim for damages in respect of his professional reputation, since it merely would provide some support for a possible favourable assessment of Mr. Fasla's service in Yemen—as to which no evaluation, and in particular not the unfavourable one later prepared by his supervisor, was included in the Fact Sheet circulated by UNDP. In any event, in his Application to the Committee for Review, Mr. Fasla did not raise any question or objection in this regard.

(b) *The Tribunal's Obligation to Explain the Basis on Which It Fixes Amounts of Compensation to Be Paid*

36. As appears from his Application to the Committee for Review (doc. No. (3), part III.D), Mr. Fasla's complaint that the Tribunal committed a fundamental error in procedure rests principally on his assertion that the Tribunal did not fully consider his claim for damages in respect of professional reputation. This assertion is answered in section II.A.1 above, which indicates that the Tribunal plainly intended to and did exercise its jurisdiction with respect to that claim. It remains to consider whether the fact that the Tribunal, while referring to the claim at the beginning of its Judgement, failed to mention

¹ See in particular the Report of the Secretary-General explaining the first draft in which substantially the present language appears, A/986, para. 5 (b) and Annex I, draft Article 10, reproduced in *Official Records of the General Assembly, Ninth Session, Annexes*, agenda item 44, p. 146, and included as document No. (60) in Part I of the dossier presented to the Court in relation to the Advisory Opinion of 13 July 1954 (*I.C.J. Reports 1954*, p. 47).

it explicitly in the concluding portion thereof, constituted a fundamental error in procedure which has occasioned a failure of justice.

37. Paragraph 3 of article 10 of the Tribunal's Statute (doc. No. (13)) requires that: "The judgements shall state the reasons on which they are based." The Tribunal did comply with this requirement, in analysing at considerable length the various claims of Mr. Fasla, including in particular the complex of which the claim for damages in respect of professional reputation constituted a part (see paras. 17 and 29-30 above). Neither the Statute of the Tribunal nor any general principle of law requires that a Judgement mention and deal explicitly with every claim, question or argument included in an application; a reasoned statement indicating the Tribunal's understanding and disposition of the issues presented to it is amply sufficient.

38. In interpreting the above-mentioned provision of the Tribunal's Statute, it should be noted that that instrument nowhere requires or even provides for the submission of individual claims. The requirement to do so was established by the Tribunal itself, in September 1962, when it amended Article 7 of its Rules¹ to require specific listing of individual pleas. Thus the statutory requirement for reasoned judgements should not be read as requiring specific reasons stated with respect to every claim or plea.

39. In particular, the Tribunal is not required to explain explicitly the basis on which it fixes amounts of compensation to be paid. Such a requirement is only specified, in paragraph 1 of Article 9 of its Statute, for the contingency that it should order, in a case it considers exceptional, an indemnity payment higher than the usual limit of two years' net base salary specified by that paragraph. The fact that such a statement is explicitly required for that circumstance suggests that the General Assembly did not consider it necessary or appropriate for cases in which lesser amounts of compensation are fixed.

40. But even if it were considered that the Tribunal did not explain its disposition of the claim in question in sufficient detail, it cannot be asserted that this "occasioned a failure of justice" within the meaning of paragraph 1 of article 11 of its Statute. To come within the purview of that provision a fault must be one that prevents one or both of the parties from effectively presenting their case, or permits the introduction into the processes of the Tribunal of some external, prejudicial element. In this connection it might be noted that if the General Assembly had wished to make a failure to state sufficiently the reasons for a Judgement a ground for review, it could have done so by including this as an appropriate ground in the list included in paragraph 1 of article 11 of the Tribunal's Statute—as the Executive Directors of the International Bank for Reconstruction and Development did in article 52 (1) (e) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations, *Treaty Series*, Vol. 575, p. 159).

(c) *The Adequacy of the Award*

41. Mr. Fasla also asserts that the Tribunal's failure "to utilize its established procedure and method of dealing with applications" resulted in a "woefully inadequate judgement" (doc. No. (3), para. III.D.1). While it is true that compared to his total claims for up to 30 years' net base salary, the six months' actually awarded by the Tribunal appears "woefully" small, questions of the

¹ Doc. No. (13), an earlier version of which appears as doc. No. (18) in Part I of the dossier presented to the Court in relation to its Advisory Opinion of 13 July 1954.

adequacy of the Tribunal's judgement do not involve any question of its procedure, nor are they otherwise reviewable under article 11 of its Statute.

42. In this connection it should be recalled that the General Assembly itself incorporated in the Statute a standard to limit and guide the Tribunal in awarding monetary compensation. The Assembly established a normal maximum limit of two years' net base salary. Only in cases that the Tribunal considers exceptional may it exceed that limit, and it must support its reason for doing so by a special statement. The Tribunal's award in the instant case thus appears to have been properly guided by the standard established by the General Assembly, rather than by the formidable demands of Mr. Fasla.

(d) *Summary*

43. The Tribunal's procedure in dealing with Mr. Fasla's claim for damages in respect of his professional reputation and career prospects complied fully with its Statute and Rules, as well as with the general principles governing the conduct of judicial organs. It stated the reasons for the Judgement in question at considerable length, and any failure to deal sufficiently specifically with the claim in question could in no event have occasioned a failure of justice. While the amount awarded may have disappointed Mr. Fasla, this issue is not one as to which the General Assembly has authorized a request for an advisory opinion—particularly since the amount in question appears to be proportionate to guidelines established by the Assembly itself.

B. Claim for Award of Costs Incurred in the Previous Proceedings

1. FACTUAL AND LEGAL ISSUES

44. On 18 May 1970, after the Joint Appeals Board had taken Mr. Fasla's first appeal under advisement but before it issued its Report on Case No. 172, Mr. Fasla's counsel called the Board's attention to the fact that Mr. Fasla had incurred about \$500 in expenses in presenting that appeal: \$300 for roundtrip travel from San Francisco to New York to be present at the hearings of the Board on 11 and 13 May, \$120 for hotel and meals in New York, and \$80 for long-distance telephone calls from California to the Secretary of the Board and to his counsel. While recognizing that there was no provision for the United Nations to cover such costs, counsel suggested that if the Board should find in favour of Mr. Fasla on the substance of his appeal, it *might also recommend* that UNDP reimburse these expenditures for reasons of equity. The Board did not, however, make any recommendation on this subject.

45. In his Application to the Administrative Tribunal, Mr. Fasla included the following claim (doc. No. (3), Annex 86, para. 8 (m)):

“(m) Payment to the Applicant of the sum of \$1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case necessitated the Applicant's travel from California to New York in May 1970 (see ANNEX 2, para. 6) as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date.”

He did not, however, support this claim through any evidentiary annexes, or through any arguments in the text of the Application.

46. In his Reply, the Secretary-General opposed this claim on the ground that no rule or regulation provided for such reimbursement, no agreement had been concluded concerning such expenses, and no administrative practice would support such payments (doc. No. (3), Annex 87, para. VII.1).

47. The Tribunal concluded that (doc. No. (11), part XVII of the Judgement):

“XVII. The Applicant requests payment of one thousand dollars for exceptional costs in preparing the case. Since the Applicant had the assistance of a member of the panel of counsel, the Tribunal finds this request unfounded and rejects it.”

48. In his Application to the Committee for Review, Mr. Fasla indicated that he had spent \$1,530 from December 1969 to 28 April 1972 in preparation for the Joint Appeals Board and the Administrative Tribunal (doc. No. (3), Annex 92, part A). In the supporting breakdown of costs he indicated \$250 expended for typing and copying, \$360 for the round-trip from California to New York, \$240 for eight days of living expenses in New York in April-May 1970 while consulting counsel, and \$680 for telephone calls from California to New York, Rome, Beirut, etc., for legal consultations and the collection of documents.

49. Except at the initiation of his first appeal in the Joint Appeals Board, Mr. Fasla was represented throughout both proceedings in the Board and before the Administrative Tribunal by a lawyer chosen by him from the Secretariat's Panel of Counsel in Disciplinary and Appeals Cases. Consequently that counsel was assigned to do so as part of his official duties, and received the necessary secretarial and other supporting services. This assistance was available to Mr. Fasla *gratis*.

2. DID THE TRIBUNAL EXERCISE ITS JURISDICTION WITH RESPECT TO THE CLAIM FOR COSTS?

(a) *The Tribunal's Jurisdiction to Award Costs*

50. No provision of the Tribunal's Statute (doc. No. (13)) explicitly authorizes it to award costs. The only provision for it to fix amounts of compensation to be paid to applicants under certain circumstances (i.e., article 9) neither mentions nor is applicable to the award of costs.

51. Consequently, when the Tribunal awarded costs in its very first substantive judgements¹, the Acting Secretary-General requested the Tribunal to hear arguments on the question of its authority to assess costs and on the nature and amount of such costs (doc. No. (19)). The Tribunal thereupon considered the matter in plenary session, taking into account a document reciting two precedents for such awards by the League of Nations Tribunal (doc. No. (20)), a memorandum by the Legal Department of the United Nations (doc. No. (21)), and a note by the Vice-President of the Tribunal (doc. No. (22)).

52. On 14 December 1950 the Tribunal decided (as recorded in its Statement of Policy of 18 December 1950—doc. No. (23)), that by creating the Tribunal the General Assembly must be assumed to have granted it the powers necessary to carry out the objectives of the Assembly, including the power to preserve the equitable rights of the interested parties by granting compensation for necessary,

¹ Judgements Nos. 2 and 3, *Aubert and 14 Others and Hall against The Secretary-General of the United Nations* (AT/DEC/1 to 70, pp. 3 and 7).

reasonable and unavoidable costs of litigation. However, in view of the simplicity of the proceedings of the Tribunal, it would consider awarding costs only in cases presenting special difficulties, to the extent such costs are demonstrated to have been:

- (a) unavoidable;
- (b) reasonable in amount; and
- (c) in excess of the normal expenses of litigation before the Tribunal.

The Tribunal thus acknowledged that its authority to award costs is at best strictly circumscribed.

53. Shortly afterwards the Board of Auditors of the United Nations took note of the award of costs in the *Aubert et al.* case (cited in footnote on p. 45) and of the Tribunal's subsequent general decision; the Board concluded that costs awarded by the Tribunal within the stated limitations might be treated by the Secretary-General as *ex gratia* payments¹. The Advisory Committee on Administrative and Budgetary Questions (ACABQ), in its second report to the General Assembly in 1951, concurred in the view expressed by the Board of Auditors as to the *ex gratia* nature of such payments, but expressed the further view that these payments should have been deferred pending specific authorization of the General Assembly². By resolution 571 (VI) of 7 December 1951 (summarized in doc. No. (24), para. 3) the General Assembly accepted the report of the Board of Auditors and explicitly concurred in the observations of ACABQ. To the extent that this concurrence confirmed the authority assumed by the Tribunal in respect of the award of costs, it also reinforced the limitations stated by the Tribunal and noted by the Auditors.

54. Though article 6 of its Statute authorizes the Tribunal to establish rules, it never promulgated its decision of 14 December 1950 in that form. Nevertheless (as discussed in para. 56 below), the Tribunal has frequently cited this decision in explaining particular awards made in respect of claims for costs.

(b) *The Decision in the Instant Case*

55. The Tribunal, in the instant case, did not fail to exercise jurisdiction with respect to the claim for costs. It took explicit cognizance of the claim and rejected it as unfounded (see para. 47 above). In this rejection the Tribunal neither explicitly stated nor implied that it considered that it lacked competence to decide in Mr. Fasla's favour; it decided against him on the merits, as the Tribunal saw them, and following the considerations discussed in the section below.

3. DID THE TRIBUNAL COMMIT ANY FUNDAMENTAL ERROR IN PROCEDURE WHICH HAS OCCASIONED A FAILURE OF JUSTICE WITH RESPECT TO THE CLAIM FOR COSTS?

(a) *The Tribunal's Practice in Awarding Costs*

56. In stating its decision on whether or not to award costs in a given case, the Tribunal has frequently referred, explicitly or by implication, to its decision of 14 December 1950 and to the limitations set forth therein (see, for example, Judgement Nos. 11, 12, 15, 18, 28-38, 76 and 123).

¹ A/1800, paras. 17-19, reproduced in doc. No. (24), para. 1.

² A/1853, para. 369, reproduced in doc. No. (24), para. 2.

57. Except for statements relating to its competence in this area, the Tribunal has not felt obliged to give lengthy explanations of the reason for making a particular award or refusing to make one at all¹. In one instance it explicitly held that its mere failure to award (i.e., even to mention) costs in an earlier judgement should be deemed as a refusal of such a claim².

58. Because of the brevity of the Tribunal's discussions concerning the award of costs, the principles on which these awards have been based must, apart from conformity to the 1950 policy statement, largely be determined inductively from the awards themselves. The Tribunal makes no award when the applicant is unsuccessful in his principal claim³. Even when the applicant was partially or fully successful, costs were not awarded where the criteria established on 14 December 1950 were not deemed met⁴. Finally, it appears that the Tribunal does take into account the extent to which the applicant was successful in his principal claim, though in this respect monetary amounts are not the only relevant consideration.

(b) *The Factors in the Instant Case*

59. It is clear from the practice, summarized above, that the Tribunal takes most seriously its determination of 14 December 1950 that if costs are to be awarded they must be demonstrated "to have been unavoidable", "reasonable in amount", and in excess of "the normal expenses of litigation before the Tribunal". Plainly it is for the applicant to establish that his claim falls within each of these criteria. But in the instant case, except for the statement of the claim (see para. 45 above), Mr. Fasla made no attempt to establish these points, and especially not the reasonableness of the claim.

60. Mr. Fasla's Statement of Costs submitted to the Committee on Applications for Review (doc. No. (3), Annex 92, Part A) suggests that with respect to at least a substantial part of his claim he would have had difficulty in establishing reasonableness. His expenses for long-distance telephone calls (\$680 claimed) are, for instance, over three times the amount allocated for such calls to the entire Office of Legal Affairs of the United Nations for a full year. Nor does he explain the increase in the claim for travel and subsistence for the April-May 1970 trip from California to New York, from \$420 as originally submitted to the Joint Appeals Board (see para. 44 above) to \$600 (see doc. No. (3), Annex 92, paras. A.2 and 3).

61. Nor has Mr. Fasla sought to establish that his \$250 costs for "typing and copying" were unavoidable, since his counsel had access to the necessary secretarial and printing services of the Secretariat (see para. 49 above).

62. More importantly, it was already clear from Mr. Fasla's claim, as presented to the Tribunal, that the expenses claimed did not relate primarily to the proceeding before the Tribunal, which was initiated only in October 1970, but to the first proceeding in the Joint Appeals Board in the spring of that year. This is even more evident in the Statement of Costs presented to the Committee on Applications for Review (doc. No. (3), Annex 92, paras. A.2-4), considered

¹ See, for example, Judgement Nos. 2, 3 (where some detail had to be given since the award related to 16 separate applicants), 11, 19, 28-38, 48, 52, 76 and 123.

² See Judgement No. 73, para. 6 of the judgement, relating to a request to revise Judgement No. 68, *Bulsara* against *The Secretary-General of the United Nations*.

³ See, for example, Judgement Nos. 19, 48, 50, 52, 54, 60 (by implication), 66 (by implication), 71 (by implication), 81 (by implication) and 129.

⁴ See, for example, Judgement Nos. 11 and 12.

in conjunction with the original request to the Joint Appeals Board (see para. 44 above), from which it appears that no less than \$680 of the claim related to the Board proceeding, even on the doubtful assumption that \$600 for telephone calls and \$250 for typing and copying were all incurred in the Tribunal proceeding. Neither the Tribunal's decision of 14 December 1950 nor its subsequent practice suggests that it is prepared to make any awards for expenses incurred in stages of a proceeding that did not relate to the Tribunal itself, and indeed such awards would depart from the principles on which the general decision was founded (see doc. No. (32), paras. 3 (c), 4 and 5). Therefore the Tribunal has repeatedly refused to award costs incurred in other stages of a proceeding¹.

63. Finally, Mr. Fasla asserted, in presenting this claim to the Committee on Applications for Review, that "The Tribunal in this case substantiated in large measure the claims of the Applicant" (doc. No. (3), para. III.B.7). But an examination of Judgement No. 158 reveals that this is not so: in his various substantive claims Mr. Fasla requested various types of relief from the Tribunal with the alternative of compensation, or he requested straight compensation, amounting in all to the equivalent of 30 years' of net base salary (see subparas. 15 (d)-(j), (l), (n), (a'), and (c')); of these claims the Tribunal in effect allowed one (the invalidation of a Periodic Report, for which Mr. Fasla had stated the alternative measure of two years' salary), plus an additional six months' salary—in effect rejecting 27½ years' of salary claimed as direct or alternative compensation, amounting to a rejection of 11/12ths of the claims quantified in terms Mr. Fasla established himself; in addition, the Tribunal in substance rejected the remaining substantive claims (*ibid.*, 15 (k) and (b') (as to the latter, see section II.C. below)).

(c) Summary

64. The Tribunal's brief dismissal (doc. No. (11), part XVII of the Judgement) of Mr. Fasla's claim for the award of costs is consistent with its practice, adopted in the light of its limited competence in this area, of making such awards only when the expenses to which they relate are demonstrated by the applicant to meet three stringent criteria. As the United Nations had supplied Mr. Fasla with counsel who had access to secretarial assistance, and as only a small fraction of the substantive claims raised in the application were accepted by the Tribunal, the denial of the claim for expenses is consistent with the Tribunal's practice. Most of these expenses were in any event ineligible for submission to the Tribunal because they had been incurred at a previous stage in the proceeding, and other portions were plainly unreasonable.

C. Claim for Recalculation of Salary and Allowances

1. FACTUAL AND LEGAL ISSUES

65. The third claim as to which Mr. Fasla requested the Committee on Applications for Review to address the Court, related to his salary and allowances during his period of service in Yemen (see subpara. 15 (b') above or para. 71

¹ See Judgement No. 75, *Davidson against The Secretary-General of the United Nations* (AT/DEC/71 to 86, p. 28, at p. 34, para. 9); Judgement No. 114, *Khederian against The Secretary-General of the United Nations* (AT/DEC/114, p. 23, part XVIII); see also Judgement No. 15, *Robinson against The Secretary-General of the United Nations* (AT/DEC/1 to 70, p. 43, at p. 53, para. 29 (4)).

below). For an analysis of this claim it is useful to understand the basis on which the pertinent United Nations (including UNDP) salaries and allowances are normally calculated for Professional category staff members:

- (a) All staff members in the Professional category receive, wherever they may serve, a base salary dependent on their level (P-1 to P-5) and step within that level, in accordance with a scale set forth in the Staff Regulations (doc. No. (14), Annex I, para. 3), subject to staff assessment (*ibid.*, Regulation 3.3).
- (b) In order to adjust the income of staff members serving in various posts to the varying costs of living at such posts, a system of adjustments has been established: each post is from time to time classified according to the level of its then prevailing cost-of-living index in relation to that which prevailed in the city that served as the base point for the base salary determination; for each such classification a Post Adjustment is determined, depending on the level and step of the staff member, and on whether or not he has dependants (*ibid.*, Annex I, para. 9).
- (c) In addition, certain payments are made or benefits granted according to the length of a staff member's appointment and assignments to a given post:
 - (i) if the appointment and assignment (or extensions thereof) are expected to be of a long duration (generally a minimum of two years), the United Nations will usually arrange for the transportation of a staff member's household goods and personal effects to such post, and for their removal at the end of the assignment (*ibid.*, Staff Regulation 7.2 and Staff Rule 107.27-107.28, doc. No. (15));
 - (ii) if the assignment is expected to be of intermediate duration (generally from one to two years, but possibly shorter or longer, up to five years), and no payments are made for moving household goods, an Assignment Allowance is paid (at a rate depending on the staff member's grade and dependency status, Staff Rule 103.22) to compensate him, in effect, for the non-availability of his normal furnishings by enabling him to make arrangements, commensurate with the expected length of his stay at the post, for securing other necessary furnishings (e.g., by renting a furnished apartment);
 - (iii) if the assignment is expected to be of a short duration (generally less than a year), then instead of the Assignment Allowance a staff member receives Subsistence Payments (Staff Rule 103.7 (c) (ii)) to enable him to make more expensive arrangements on such a basis (e.g., by staying in a hotel).
- (d) Also, on moving to a new post on an intermediate or long-term basis an Installation Grant (Allowance) is paid (Staff Rule 107.20) to cover the extraordinary living expenses incurred by a staff member when arriving at a new post (e.g., stay in a hotel) while he makes his arrangements for his longer residence; no such payment is made in case of short-term assignments for which Subsistence Payments are made, since there is no expectation that the initial expenses will differ markedly from those during the remaining period.

66. Naturally these general principles are expressed in precise and to some extent rather detailed rules, the most pertinent ones of which are set out in full below. In addition, because the circumstances of individual staff members

differ so widely in respect of their precise expectations on entering on a particular post, the place to which they expect to move from there and the basis of such move, the number and types of their dependants and whether any or all of them join them at a post or for some reason live separately in a more or less expensive location, etc., no rigid set of rules can adequately cover all contingencies and thus a wide measure of discretion has been left to or reserved by the Secretary-General.

67. In the instant case, Mr. Fasla was as of 15 September 1968 reassigned from Sierra Leone to Yemen for a term that was not expected to end before the expiration of his then current appointment: 31 December 1969, some 15½ months hence. Consequently he received:

- (a) an Installation Allowance pursuant to Staff Rule 107.20 (a) (doc. No. (15));
- (b) an Assignment Allowance, at the dependency rate of \$1,200 per annum, pursuant to Staff Rule 103.22 (a) (i):

"Assignment Allowance"

(a) Subject to the provisions of Rules 103.21 and 107.27, an assignment allowance shall be paid to a staff member in the Professional category and above who is appointed or assigned to a duty station outside his home country for a specified period of service under the following circumstances:

- (i) The allowance will be authorized when the fixed-term appointment or temporary assignment is for a period of one year or more but less than two years;

(ii)

- (c) Post Adjustment, still continuing at the New York rate where he had been stationed before his assignment to Sierra Leone and where his family was then still staying, pursuant to Staff Rule 103.7 (e) (i). However, when his family joined him, his Post Adjustment was, as of 1 December 1968, reduced, pursuant to Personnel Directive PD/8/60/Add.1 (doc. No. (18)), to the rate appropriate for Yemen (approximately 15 per cent. lower than the New York rate), in accordance with Staff Rule 103.7 (a):

"Post Adjustment"

(a) Subject to paragraphs (d) and (e) below, post adjustments under Annex I, paragraph 9, of the Staff Regulations shall be applied in accordance with the schedules provided below in the case of staff members in the Professional category and above who are assigned to a duty station for one year or more."

68. After his recall from Yemen in May 1969, Mr. Fasla asserted, *inter alia*, that since his stay in Taiz had in fact amounted to only some eight months, the various payments made to him under the above headings should have been recalculated as if the assignment had from the beginning been a short-term one, to which the following provisions would have applied:

- (a) Staff Rule 103.7 (e) (ii):

"(e) While the salary of a staff member is normally subject to the post adjustment of his duty station during assignments for one year or more, alternative arrangements may be made by the Secretary-General under the following circumstances:

- (i)
- (ii) When a staff member is assigned to a duty station for less than one year, the Secretary-General shall decide at that time whether to apply the post adjustment applicable to the duty station and, if appropriate, to pay installation grant under Rule 107.20 and assignment allowance under Rule 103.22, or, in lieu of the above, to authorize appropriate subsistence payments.
- (iii)

(b) Staff Rule 103.22 (c):

"(c) When a staff member is assigned to a duty station for less than one year, the [assignment] allowance will normally not be paid. However, appropriate subsistence payments will be made where no assignment allowance is payable."

69. UNDP refused to accede to this demand, primarily on the ground that Mr. Fasla had not formally been reassigned from Yemen but during the continuation of his home and special leaves was still maintained at that duty station (as is customary when staff members are on leave). Mr. Fasla thereupon filed his second appeal with the Joint Appeals Board (see paras. 12-13 above). The Board summarized the contentions of the parties in its Report of 18 January 1971 to the Secretary-General (doc. No. (3), Annex 67) and held in pertinent part (*ibid.*, paras. 40 and 41):

"40. The Board finds that the appellant's assignment as Assistant Resident Representative in Yemen was intended to continue for more than one year and that his salary and allowances were correctly determined on that basis. The Board finds further that when it was decided in May 1969 that the appellant would go on leave while a search was made for a new assignment for him, the appellant was transferred to Headquarters and his duty station was changed to New York. . . .

41. In the absence of any guidance in the Staff Regulations or Rules or in administrative instructions as to whether salary and allowances should be recalculated when an assignment for one year or more is cut short, the Board does not make any recommendation for the readjustment of the appellant's salary and allowances for the period during which he served in Yemen. The Board recommends, however, that the Secretary-General consider making an *ex gratia* payment to the appellant in the amount of any losses that he can show that he has suffered as a consequence of his precipitate recall from Yemen."

One of the three members of the Board dissented on this point (*ibid.*, p. 11, para. 2):

"2. However, I cannot agree with the majority view of the Board, recorded in paragraph 41 of its report, that no recommendation should be made in favour of retroactive adjustment of the appellant's salary in Yemen. In my opinion, a clear case for such an adjustment has been established by the statement of the representative of the Secretary-General which affirms that the UNDP would have recalculated the appellant's salary and allowances if he had been assigned to another post within one year of his assignment to the Yemen post (paragraph 34 of the report). I am supported in this opinion by the fact that the UNDP has not attri-

buted to the appellant the responsibility for his abrupt recall. Under the circumstances, I must regard the Board's recommendation of a conditional *ex gratia* payment as neither adequate nor equitable to the appellant."

70. The Secretary-General accepted the recommendation of the majority of the Joint Appeals Board and decided that "sympathetic consideration be given to such claims as [Mr. Fasla] may be able to substantiate for financial losses... which occurred as a result of [his] recall to Headquarters on short notice in May 1969" (doc. No. (3), Annex 68).

71. Mr. Fasla, dissatisfied with this decision, submitted his Supplementary Application to the Administrative Tribunal, which in pertinent part (doc. No. (3), Annex 89, para. 7 (b)) reads:

"(b) Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received."

72. The Tribunal concluded (doc. No. (11), part XV of the Judgement):

"XV. The Applicant maintains that the allowances he received in Yemen should be recalculated on the basis of the subsistence allowances which he contends are payable because, owing to the Respondent's action, his stay in that country was less than one year, contrary to the original intention.

According to Staff Rule 103.22 (c), 'When a staff member is assigned to a duty station for less than one year, the allowance will normally not be paid. However, appropriate subsistence payments will be made where no assignment allowance is payable'. The Tribunal observes that this text leaves the Respondent a margin of discretion with respect to the payment of an assignment allowance: it is possible for the allowance to be paid for a stay of less than one year. In addition, the text lays down a very strict rule: the subsistence allowance is payable only where an assignment allowance has not been paid. In the present case, however, the Applicant received an assignment allowance and is therefore not entitled, under the Staff Rules, to a subsistence allowance.

Following the second report of the Joint Appeals Board, the Respondent agreed to make the Applicant an *ex gratia* payment in the amount of any losses that he could show he had suffered as a result of his precipitate recall from Yemen. Since the Applicant maintained his claim to a subsistence allowance, he did not avail himself of that opportunity. The Tribunal considers that, in view of the above decision concerning the subsistence allowance, the Applicant is entitled to take advantage of the possibility offered by the Respondent within a reasonable period of time from this judgement, and that this period must be fixed at two months."

It accordingly decided (*ibid.*, part XVIII, para. 3):

"3. Any requests for payment made in accordance with paragraph XV above shall be submitted, together with the necessary supporting evidence, by the Applicant to the Respondent within a period of two months from the date of this judgement;"

2. DID THE TRIBUNAL EXERCISE ITS JURISDICTION
WITH RESPECT TO THE CLAIM FOR RECALCULATION?

(a) *The Tribunal's Conclusions with Respect
to the Claim for Recalculation*

73. The Administrative Tribunal gave extensive consideration to Mr. Fasla's claim for the recalculation of his salary and allowances, and held against him on the ground that it found that the pertinent Staff Rules left the Secretary-General a sufficient margin of discretion to decide as he did, and hence no recalculation was called for (see para. 72 above). Nowhere did the Tribunal suggest that it lacked authority to direct the Secretary-General to make such a recalculation. Rather, it held that no obligation to make such a recalculation existed, and therefore none would be ordered by it.

(b) *The Correctness of the Tribunal's Conclusions
with Respect to the Claim for Recalculation*

74. In challenging the Tribunal, Mr. Fasla asserts (doc. No. (3), para. III.C.3) that the Secretary-General had an obligation to recalculate his emoluments upon the recall from Yemen. This argument is actually not addressed to the jurisdiction of the Tribunal but to the correctness of its conclusions, which, not being among the reviewable issues listed in paragraph 1 of article 11 of its Statute (doc. No. (13)), are by reason of paragraph 2 of article 10 of that instrument "final and without appeal". Nevertheless, in view of the earnestness with which this point is argued in the Application to the Committee on Applications for Review (doc. No. (3), part III.C), it is analysed briefly herein.

(i) *The Secretary-General's Discretion in Determining
Emoluments Applicable to an Assignment*

75. For the reasons indicated in paragraph 66 above, the Staff Regulations and Rules leave the Secretary-General an ample area of discretion in determining the types of emoluments payable to staff members on various lengths of assignments. With reference to the payments here at issue, Staff Rule 103.7 (e) (ii) (reproduced in subpara. 68 (a)) clearly specifies that on assignments of less than one year the Secretary-General shall decide *whether* to apply the Post Adjustment of the new post and pay Installation and Assignment Allowances, or to authorize Subsistence Payments. Moreover, Rule 103.22 (c) (reproduced in subpara. 68 (b) above)—on which the Tribunal specifically relied—provides that on assignments of less than one year, appropriate Subsistence Payments will *normally* (i.e., not necessarily) be substituted for the Assignment Allowance.

76. Against the clear language of these two rules indicating discretion, Mr. Fasla asserts that nevertheless the practice of granting the higher payments has become so fixed that the margin of discretion found by the Tribunal has disappeared. To reinforce this argument he asserts that if he had initially been offered the lower payments for an eight-month assignment, he might have refused it (doc. No. (3), Annex 69, para. 17); but to have done so would have brought him into conflict with Staff Regulation 1.2 (doc. No. (14)), according to which "staff members are subject . . . to assignment by [the Secretary-General]

to any of the activities or offices of the United Nations". In this connection he also recalls the fact that on his short-term (five months) transfer from Damascus to Beirut he was asked to sign a waiver of his Subsistence Allowance (doc. No. (3), Annex 72); however, that very incident indicates that the type of emoluments to be paid in respect of a short-term assignment are not rigidly determined by the Staff Rules or by practice, but are subject to accommodation in particular circumstances.

(ii) *The Secretary-General's Obligation to Recalculate
Emoluments for a Foreshortened Assignment*

77. The actual issue in the present case was not, however, the determination of emoluments on initial assignment, but rather the possible need to recalculate them if the originally expected length of the assignment should change.

78. As the Joint Appeals Board determined (doc. No. (3), Annex 67, para. 34), there is no Staff Regulation or Rule, or any administrative instruction that provides for such recalculation or gives guidance about how and when it should take place. Instead, the applicable Staff Rules all appear to provide plainly that emoluments are determined on the basis of the nature of the assignment and its expected duration, rather than on the basis of its actual length as ultimately determined. Thus Rule 103.7 (a) (reproduced in subpara. 67 (c) above) provides for the payment of Post Adjustment to staff members "who are assigned to a duty station for one year or more", rather than to persons "stationed" for the requisite period. Staff Rule 103.7 (e) (ii) (reproduced in subpara. 68 (a) above) is even more explicit: "When a staff member is assigned to a duty station for less than one year, the Secretary-General shall decide *at that time*" the pattern of emoluments to be paid. Similarly Rule 103.22 (reproduced in part in para. 68 (b) above) makes it clear that the payment of Assignment Allowances depends on the length of the "assignment" or "appointment". Finally, Rule 107.20 makes the Installation Grant payable "on an assignment expected to be of at least one year's duration".

79. Mr. Fasla relies, in the face of these clear statements in the Staff Rules that emoluments depend on the expected length of assignment, on a statement by the representative of the Secretary-General in the Joint Appeals Board that if Mr. Fasla had been regularly reassigned from Yemen after a stay of less than one year, his emoluments would have been recalculated (doc. No. (3), para. C.4, and Annex 67, para. 34). That statement was not, however, sufficient to convince the majority of the Board of the existence of the practice asserted. As explained in the Supplementary Reply submitted to the Tribunal¹, the statement in question was not meant to assert that the Secretary-General had an obligation to make such a recalculation, but rather that he might do so, if the circumstances warranted, on an *ex gratia* basis—which is substantially the approach endorsed by both the Joint Appeals Board and the Administrative Tribunal. Indeed, Mr. Fasla's assertion of a regular practice of such recomputation is refuted by his own experience in Sierra Leone: originally assigned there for a period of over a year, he was granted the usual Installation and Assignment Allowances; when he was transferred from Freetown to Taiz after only three and a half months (see subpara. 2 (b) above) he neither claimed nor was he

¹ Doc. No. (3), Annex 90, para. 21.

offered any recalculation of emoluments or a Subsistence Allowance for the time spent in Freetown.

80. More fundamentally, a recalculation such as demanded by Mr. Fasla would run counter to the pattern of these emoluments as explained in paragraph 65 above. The transfer of household goods on long-term assignments, the payment of an Assignment Allowance on intermediate-term ones and of a high Subsistence Allowance on short-term ones is meant to enable a staff member to adopt a certain style of living depending on the *expected* length of his stay—a point explicitly conceded by Mr. Fasla in his final written statement to the Tribunal (doc. No. (3), Annex 91, para. 87). If these expectations are disappointed for any reason, it is futile to ask: what arrangements would have been made had it been known from the beginning that the stay at the post would be longer or shorter (i.e., would the staff member have stayed in a hotel, rather than buying and furnishing a house?); rather the question is: what damage was suffered through the disappointed expectation (i.e., the need to terminate a lease prematurely) and whether, under the circumstances, the Organization should compensate the staff member for such losses—which might be much larger or smaller than would result from a retroactive recalculation of emoluments, based on hindsight.

81. It is this reasoning that moved a majority of the Joint Appeals Board to recommend an *ex gratia* settlement based on losses Mr. Fasla can show he had suffered as a result of his sudden recall from Yemen. The Secretary-General accepted this recommendation, and so did the Tribunal, rejecting thereby Mr. Fasla's plea that to expect him to demonstrate his losses would be "highly inequitable" (doc. No. (3), Annex 89, para. 23, and Annex 91, para. 88).

(c) Summary

82. The Administrative Tribunal carefully examined Mr. Fasla's claim that his emoluments for his unexpectedly abbreviated service in Yemen should be retroactively recalculated. In doing so it exercised its jurisdiction to pass judgement on this claim. Its failure to grant the relief demanded did not constitute a failure to exercise its jurisdiction, but resulted from its unreviewable, and legally correct, decision that Mr. Fasla's claim was not maintainable.

3. DID THE TRIBUNAL COMMIT ANY FUNDAMENTAL ERROR IN PROCEDURE WHICH HAS OCCASIONED A FAILURE OF JUSTICE WITH RESPECT TO THE CLAIM FOR RECALCULATION?

83. Mr. Fasla's charges regarding procedural faults of the Tribunal rest wholly on his assertion that the Tribunal failed to consider, analyse, decide or even mention all the claims he submitted to it (doc. No. (3), part III.D). None of these charges are at all applicable to the claim for the recalculation of his emoluments, which was specifically considered and discussed at length in the Judgement of the Tribunal (doc. No. (11), parts XV and XVIII.3 of the Judgement). As pointed out above (see para. 74), Mr. Fasla's actual complaint in respect of this aspect of the Judgement is that it is not correct (a charge analysed in paras. 75-81 above), and not that the procedure was in any way defective.

III. REQUEST FOR THE AWARD OF COSTS

A. Claims for Costs

1. IN CONNECTION WITH THE APPLICATION TO THE COMMITTEE ON APPLICATIONS FOR REVIEW

84. As part of his Application to the Committee on Applications for Review, Mr. Fasla presented a Statement of Costs Incurred from 28 April to 6 May, 1972: Preparation of Application for Certification to the International Court of Justice (doc. No. (3), Annex 92, part B). The expenses listed totalled \$3,135, of which the major part was for legal fees: \$2,400, and for 15 days of living expenses in New York (on visit from Montreal) in May 1972: \$450.

85. The Application to the Committee on Applications for Review requested *"the Committee and/or the International Court of Justice"* to award Mr. Fasla the costs incurred in its presentation for certification. The Committee, after considering its powers under article 11 of the Statute of the Administrative Tribunal and the financial provisions of paragraph 5 thereof, as well as Article 64 of the Statute of the Court, decided to express no opinion on the request for costs (doc. No. (10), para. 9).

2. IN CONNECTION WITH THE PROCEEDING BEFORE THE COURT

86. To assist him in preparing the views to be presented to the Court pursuant to paragraph 2 of article 11 of the Tribunal's Statute, Mr. Fasla has again chosen to be assisted by the same lawyer, from the Panel of Counsel maintained by the Organization, who represented him before the Joint Appeals Board and the Administrative Tribunal (see para. 49 above). That staff member has therefore been assigned to do so as part of his official duties, and is receiving the necessary secretarial and other support. Though Mr. Fasla has not yet submitted any claim with reference to expenses incurred in connection with the present proceeding in the Court, since he has presented such claims at each earlier stage of the proceeding (see paras. 44, 45 and 85 above), it may be expected that he will also do so at this stage.

B. The Court's Authority to Award Costs

87. Neither the Statute nor the Rules of the Court provide explicitly for the award of costs in proceedings in regard to advisory opinions. In contentious proceedings, Article 64 of the Statute authorizes the Court to decide which party is to bear the costs, and Rules 74 (1) and 77 (1946) version add appropriate details. The question therefore is whether this Regulation and these Rules may be held applicable to advisory proceedings pursuant to Article 68 of the Statute and Rule 82 (1).

88. In deciding whether to consider the provisions as to contentious cases applicable to a proceeding pursuant to article 11 of the Statute of the Administrative Tribunal, the Court might take account of the fact that, as Rule 82 (1) indicates, that Rule, and presumably Article 64 of the Statute on which the Rule is based, are meant to apply to situations in which the request for an advisory opinion relates to a question "pending between two or more States"—that is, to situations in which, for some reason, the advisory procedure is substituted for the contentious one between parties that could utilize the latter.

89. In considering the applicability to the present proceeding of Article 64 of its Statute and of Article 82 (1) of its Rules, the Court might also take account of the fact that the General Assembly clearly intended to create a *sui generis* procedural framework for review proceedings under article 11 of the Statute of the Administrative Tribunal:

- (a) In its resolution amending the Tribunal's Statute, the Assembly also recommended that no oral statements be made (resolution 957 (X), para. 2, doc. No. (60), pp. 44-45);
- (b) In paragraph 2 of article 11 of the Tribunal's Statute, it directed the Secretary-General to transmit to the Court the views of the person in respect of whom the judgement under review has been rendered;
- (c) By paragraph 3 of that article it in effect assigned binding force to the opinions of the Court;
- (d) In paragraph 5 of that article it authorized special financial arrangements to prevent a person concerned from being handicapped in presenting his interests, but these arrangements clearly do not involve the possible award of costs.

90. In carefully formulating article 11 of the Tribunal's Statute, the Assembly sought to define precisely the function of each participant in the procedure: the Secretary-General, the Tribunal, the Committee on Applications for Review and the Court. It also sought to define carefully the nature of the proceeding, which it deliberately denominated as one for "review" rather than as an appellate one. It narrowly defined the issues that might be presented to the Court, and it made financial provisions, not involving the participation of the Court, to deal with the impact of the proceeding on the staff member concerned. While these provisions may not be such as would apply in other kinds of judicial proceedings, it does not appear that the General Assembly expected the Court to supplement or supersede them.

IV. CONCLUSIONS

A. The Nature of the Review by the Court

91. The questions as to which an advisory opinion was requested by the Committee on Applications for Review were addressed to the Court pursuant to article 11 of the Statute of the Administrative Tribunal (doc. No. (13)), which article also established the Committee. Consequently the Court, in rendering the opinion requested, will no doubt follow the principle it enunciated in declining to respond to Question II addressed to it by the United Nations Educational, Scientific and Cultural Organization in relation to certain judgements of the Administrative Tribunal of the International Labour Organisation¹, and will interpret the questions now addressed to it strictly within the context of the cited article of the Statute of the United Nations Tribunal.

92. In establishing the procedure for review by formulating and adopting article 11 of the Tribunal's Statute, those participating in the debate in the General Assembly and its organs repeatedly emphasized the desire, indeed the necessity in view of the purposes for which the Tribunal was established, of

¹ *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion of 23 October 1956, *I.C.J. Reports* 1956, p. 77, at p. 99.

limiting review to exceptional cases¹. While these strictures might in the first instance be considered as addressed to the Committee on Applications for Review as the organ charged with regulating the review process, they may also be considered relevant by the Court in deciding whether any aspect of the instant case is of the exceptional nature foreseen by the General Assembly in establishing the review procedure.

B. Issues for Review

93. The issues with respect to which a review of judgements of the Administrative Tribunal may be requested of the Court are stated precisely in paragraph 1 of article 11 of the Tribunal's Statute. In all other respects such judgements remain "final and without appeal", pursuant to paragraph 2 of article 10 of the Statute, as confirmed by the Court in its advisory opinion of 13 July 1954². Of the four possible questions listed in article 11, the Committee for Review addressed two to the Court in respect of the instant case.

94. In interpreting the two questions addressed to the Court, account should be taken of the fact that neither the Statute of the Tribunal, nor its Rules at the time that article 11 was formulated by the General Assembly, provided for the submission of individual pleas or claims. As already pointed out (see para. 38 above), that requirement was established by the Tribunal only many years later, so that neither the term "jurisdiction" nor "procedure" in paragraph 1 of article 11 of the Statute, nor the requirement in paragraph 3 of article 10 that judgements must state reasons, should be read in the light of the subsequent and subordinate requirement established by the Tribunal as to the formulation of pleadings. Instead, these concepts should be understood in terms of the allegations defining the Tribunal's competence under paragraph 1 of article 2 of its Statute, and the remedies it is entitled to grant pursuant to article 9.

1. FAILURE TO EXERCISE JURISDICTION

95. The possibility of requesting an opinion of the Court on whether "the Tribunal has failed to exercise jurisdiction vested in it" was proposed by a representative to the Fifth Committee at the tenth session of the General Assembly, with the explanation that this should constitute a counterpart of the question whether the Tribunal had exceeded its jurisdiction or competence—a ground already specified in the Statute of the ILO Tribunal and previously proposed for incorporation into the Statute of the UN Tribunal³. It was accepted by the sponsors of the principal resolution⁴, apparently with the expectation that it would seldom be used⁵.

¹ See, in particular, the observations of the Secretary-General, recorded by the Special Committee on Review of Administrative Tribunal Judgements, in its report to the General Assembly, A/2909, doc. No. (60), p. 1, at p. 4, para. 13, and again referred to by the Fifth Committee in its report to the Assembly, A/3016, doc. No. (60), p. 38, at p. 39, para. 9 (a); the consensus of the members of the Special Committee recorded in A/2909, doc. No. (60), p. 1, at p. 4, para. 19; and the concurring view of the sponsors in the Assembly of the proposals for a review procedure, recorded by the Fifth Committee, A/3016, doc. No. (60), p. 40, para. 15.

² *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, I.C.J. Reports 1954, p. 47.

³ A/C.5/SR.496, doc. No. (51), para. 25.

⁴ A/C.5/SR.499, doc. No. (54), para. 11.

⁵ See remarks by the representative of the United Kingdom, A/C.5/SR.498, doc. No. (53), para. 3.

96. In view of both the plain meaning of the term "jurisdiction" and the circumstances of its inclusion in the relevant clause of the Tribunal's Statute, it is appropriate for the Court to interpret it in the same sense as in its decision in relation to the ILO Tribunal (cited in para. 91 above), and to draw the same distinction, as it did there, between questions relating to the jurisdiction of the Tribunal and the decision of the Tribunal on the merits of the dispute submitted to it. In effect, the same severe standard should apply to an assertion that the UN Tribunal in a judgement failed to exercise jurisdiction vested in it, as the Court applied to the assertion by Unesco that the ILO Tribunal in its judgements exceeded the jurisdiction vested in it (*ibid.*, p. 100).

97. The Application submitted to the Committee on Applications for Review, and referred to by the latter in the questions it addressed to the Court, charges that the United Nations Administrative Tribunal failed to exercise, in its Judgement No. 158, its jurisdiction with respect to three out of seventeen claims that Mr. Fasla had submitted to it. These charges have been examined at length in section II above.

98. As to the first of these claims, relating to alleged damage inflicted by UNDP on Mr. Fasla's professional reputation and career prospects, the Tribunal gave adequate consideration to the issues raised in its lengthy analysis of the numerous claims relating to the means used by UNDP to locate a suitable position for Mr. Fasla within the United Nations or the organizations related to it. The Tribunal did not assert or imply any lack of jurisdiction, nor did it fail to exercise such jurisdiction.

99. The second of these claims related to the award of costs, as to which the Tribunal has at most a strictly circumscribed jurisdiction. The Tribunal measured the sparse assertion relating to this claim against its established standards, and found the claim unpersuasive. It thus fully exercised its jurisdiction in respect of the claim.

100. The third claim, for the recalculation of certain emoluments pertaining to Mr. Fasla's final period of active service, was explicitly examined at length by the Tribunal, which rejected the substantive legal assertion made by Mr. Fasla that the Secretary-General was under an obligation to make the desired recalculation; for this reason the Tribunal rejected the remedy demanded. Its decision thus raises no question of jurisdiction, but merely one of the interpretation of the pertinent regulations and rules, as to which the judgements of the Tribunal are not reviewable.

2. FUNDAMENTAL ERRORS IN PROCEDURE

101. The possibility of requesting an opinion of the Court on whether the Tribunal had "committed a fundamental error of procedure which has occasioned a failure of justice" was adapted by the General Assembly from paragraph 1 of article XII of the Statute of the ILO Tribunal¹. However, the words "which has occasioned a failure of justice", which do not appear in the ILO Tribunal's Statute, were added at the proposal of a representative to the Fifth Committee at the tenth session of the General Assembly, "to make the intention clearer" that it "was intended to preclude review on account of trivial errors of procedure or errors that were not of a substantial nature"². Thus, the

¹ See report of the Special Committee on Review of Administrative Tribunal Judgements, A/2909, doc. No. (60), p. 1, at p. 10, para. 71.

² A/C.5/SR.496, doc. No. (51), para. 26.

standard set by the General Assembly for review on the ground of procedural errors is intended to be even more strict than that specified in the Statute of the ILO Tribunal.

102. In particular, a failure by the Tribunal to state the reason on which every part of its judgement is based is clearly not a ground that the General Assembly wished to include among serious departures from a fundamental rule of procedure (see paras. 36-40 above), for although the Secretary-General explicitly mentioned the possibility of including this among the grounds for review¹, no action to that effect was taken.

103. Mr. Fasla's assertions regarding alleged fundamental errors of procedure committed by the Tribunal and occasioning a failure of justice in respect of the same three claims, appear from his Application to the Committee on Applications for Review to be merely derivative from his assertions regarding the Tribunal's alleged failure to exercise jurisdiction with respect to the same three claims.

104. Mr. Fasla does not assert that the Tribunal failed to receive any evidence or arguments he desired to submit or that any prejudicial influences impinged on the proceedings of the Tribunal. In effect, he suggests that the Tribunal did not correctly consider the three claims in question, and in any event awarded only inadequate damages. But these assertions are again addressed to the unreviewable conclusions of the Tribunal, rather than to any aspect of its procedure. And even if the Tribunal's failure to mention explicitly each and every one of the many arguments included in the several extensive pleadings he submitted to it were to be deemed a procedural fault it would not be one that could reasonably be held to have occasioned a failure of justice.

105. Whatever procedural faults the Tribunal may have committed, these did not, as the Court has held in a different context in its most recent judgement², prejudice in any fundamental way the requirements of a just procedure.

3. OTHER ISSUES

106. As indicated in section II above, most of the challenges included in Mr. Fasla's application to the Committee on Applications for Review (doc. No. (3), part III.A-D) do not actually pertain to the jurisdiction or procedure of the Tribunal, but to the correctness of its decisions. As the Court has pointed out in its Advisory Opinion of 23 October 1956, "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" (*I.C.J. Reports 1956*, pp. 98-99).

107. Questions of the correctness of decisions of the UN Tribunal are perhaps even less appropriate for review than similar questions with respect to the ILO Tribunal, for the General Assembly explicitly considered the extent to which errors of law might be subject to review by the Court of the UN Tribunal's judgements; the Assembly decided that such a review might be undertaken only in respect of whether the Tribunal "has erred on a question of law relating to the provisions of the Charter of the United Nations" (doc. No. (13), article 11, para. 1). However, in the instant case no error in relation

¹ A/AC.78/L.1, reproduced as Annex II.A to A/2909, doc. No. (60), p. 1, at pp. 22-23, para. 53.

² *Appeal Relating to the Jurisdiction of the ICAO Council*, I.C.J. Reports 1972, para. 45 of the Judgment.

to the Charter has been alleged, and the Committee on Applications for Review therefore did not formulate any question in these terms.

108. The gravamen of Mr. Fasla's complaint to the Committee on Applications for Review was of course his allegation of "a woefully inadequate judgement" (doc. No. (3), para. III.D.1). But the adequacy of the awards made by the Tribunal is not a question as to which the General Assembly has authorized a review of Tribunal judgements, nor is it a ground on which an appeal can normally be taken even in national administrative jurisdictions.

Annex

ANALYSIS OF ALLEGATIONS CONCERNING MR. FASLA'S
PERIODIC REPORTS¹A.1. 30 June 1964 to 30 June 1965 (*Damascus*)

- (a) With respect to the regular Report for his initial period of service from 30 June 1964 to 30 June 1965 in Damascus (doc. No. (3), Annex 9), on which he was rated as maintaining "only a minimum standard", Mr. Fasla complains that although he filed a rebuttal (*ibid.*, p. 5), the head of his department, in violation of paragraph 13 of the relevant Administrative Instructions (doc. No. (16), quoted in subpara. 23 (b) of the Statement), did not investigate the matter and file an appraisal, nor was the rebuttal itself filed with the Report or referred to in the original Fact Sheet.
- (b) Though it is correct that no final appraisal was made by the department head, an investigation was initiated by querying Mr. Fasla's supervisor as to the allegations in the rebuttal. From the supervisor's response (doc. No. (3), Annex 10) it appears that while he saw some improvement in Mr. Fasla's performance subsequent to the reporting period, he was able to support the ratings he had originally given by detailed analysis.

A.2. 1 July to 31 December 1965 (*Damascus*)

- (a) With respect to the remainder of his service in Damascus until 31 December 1965, Mr. Fasla complains that no interim Report was filed, even though one would seem to have been required by paragraph 7 of the relevant Administrative Instructions on his transfer to Beirut or on his supervisor's transfer from Damascus, nor was a favourable appraisal by that supervisor (doc. No. (3), Annex 10, final paragraph) included in his records or reflected on the Fact Sheet.
- (b) The cited Instruction requires interim Periodic Reports only when the relevant period is in excess of six months—but Mr. Fasla's service in Damascus was just six months and his remaining period of service, until the expiration of his first contract, would be just short of six months; thus there was no violation of the rule. Moreover, if Mr. Fasla had desired an interim report he might have requested one or complained about the failure to receive one. The favourable appraisal by his supervisor was in the context of a letter (see para. A.1 (b) above) in which the latter justified his originally low evaluation of Mr. Fasla during the first reporting period, and merely indicated that there had been some improvement since.

A.3. 1 January 1966 to 31 May 1966 (*Beirut*)

- (a) With respect to the five-months service in Lebanon, Mr. Fasla complains that no regular or interim Report was prepared contemporaneously, even though such a report was required by paragraph 2 of the relevant Administrative Instructions at the end of the second year of his appointment, and perhaps also, under paragraph 7 of the Instructions, on his transfer to New York. On the basis of the Joint Appeals Board's recommendation accepted by the Secretary-General (see paras. 8-10 of the Statement), a Report was

¹ See paras. 2 (c) and 23-24 of the Statement above.

later prepared which summarized his service as maintaining "a good standard of efficiency" (doc. No. (3), Annex 13), but this had of course not been included in the original Fact Sheet.

- (b) Again, the five months Mr. Fasla served in Lebanon was close to the minimum period considered essential for any useful appraisal, and again it should be noted that he did not request a Report until he initiated the current set of proceedings.

A.4. 1 November 1966 to 30 June 1967 (UNDP, New York)

- (a) Mr. Fasla complains that no Report was made at the end of June 1967, on the third anniversary of his original appointment, as required by paragraph 2 of the relevant Administrative Instructions.
- (b) The Instructions foresee that appointments of staff members are normally granted in multiples of a year, and thus anniversary reports are useful devices in considering renewals or extensions of appointments. But Mr. Fasla's first extension (see para. 2 (a) of the Statement) was for six months, and then for a year, so that it became more useful to prepare reports on him in the months before the expiration of his appointment. Indeed a Report had been prepared in November 1966 covering the first five months of Mr. Fasla's service in UNDP's Bureau of Evaluation and Reports in New York (June-October 1966, doc. No. (3), Annex 14), rating him as "an efficient staff member giving complete satisfaction"; this Report was summarized on the Fact Sheet. Another Report (see para. A.5 below) was prepared in November 1967, some weeks before his latest appointment was due to expire.

A.5. November 1966 to November 1967 (New York)

- (a) Mr. Fasla objects that in preparing the Periodic Report covering his service in UNDP's New York office (for the most part in the Bureau of Operations and Programming) from November 1966 to November 1967 (doc. No. (3), Annex 21), paragraph 5 of the relevant Administrative Instruction was violated in that the regular second reporting officer, his next supervisor in line, was by-passed, and instead the department head completed both the second and third parts of the Report; Mr. Fasla also asserts that a personal letter that he addressed to the department head at the time (*ibid.*, Annex 76) constituted a rebuttal within the meaning of paragraph 13 of the Instructions, which should have been investigated and treated as required by that paragraph.
- (b) Though the second reporting officer (who may not have been available at the time) did not sign the Report, the essential first part was completed by Mr. Fasla's immediate supervisor, with whom he was in most frequent contact and whose evaluation is therefore of the greatest significance; again, Mr. Fasla raised no contemporaneous objection on this point. His "personal" letter could not be considered as constituting a formal rebuttal, nor does its language suggest that it was originally intended to serve that purpose. In any event, aside from vague charges of prejudice, Mr. Fasla merely asserted therein that he had once more been placed in work for which he was not particularly suited, and that he could do better in another assignment—hardly an argument that would persuade a reviewing authority to give him a significantly higher rating for the period covered.

A.6. January to March 1968 (UNITAR, New York)

- (a) Mr Fasla complains that no interim Report was initially made for his three-months service on loan to UNITAR from January to March 1968;

later, in response to the Joint Appeals Board's recommendation, such a Report was filed (doc. No. (3), Annex 22)—which could no longer be complete since his immediate supervisor had meanwhile left the service of the United Nations; naturally, this belated Report was not reflected on the original Fact Sheet.

- (b) Ordinarily no interim Reports are prepared for periods of service as short as three months, but Mr. Fasla could have requested a special Report under paragraph 9 of the Instructions—a step that he failed to take.

A.7. December 1967-June 1968 (UNDP and UNITAR, New York)

- (a) Mr. Fasla also complains that no Report was made on the fourth anniversary of his original appointment.
- (b) The reason for this omission is that stated in paragraph A.4 (b) above.

A.8. June 1968 to March 1969 (Freetown and Taiz)

- (a) Mr. Fasla complains that no Report was originally filed covering his brief (abbreviated due to illness) service in Sierra Leone or his service in Yemen from September 1968 until May 1969. Later, consequent on the Joint Appeals Board's recommendation, a report was obtained from his supervisor, who had meanwhile retired from the United Nations, covering Mr. Fasla's service in Sierra Leone and Yemen until the supervisor's departure (doc. No. (3), Annex 60), in which Mr. Fasla was rated "on the whole, an unsatisfactory staff member"; it was this Report that Mr. Fasla attempted to present to the Joint Appeals Board as evidence of prejudice (para. 10 of the Statement) and whose invalidation he then successfully demanded of the Tribunal (para. 30 of the Statement), whereupon the Secretary-General directed its withdrawal from Mr. Fasla's files.
 - (b) The original reason for the failure to file a timely report on Mr. Fasla's service in Sierra Leone and Yemen was the illness of his supervisor, which forced him to leave Taiz in February 1969—thus precipitating the chain of events that lead to Mr. Fasla's recall. The belated Report that the Tribunal considered to be prejudicial was included in the revised Fact Sheet (doc. No. (3), Annex 66), which however was never circulated and was suppressed after the Tribunal's Judgement; it thus could not have injured Mr. Fasla's reputation or career in any way. Incidentally, in considering the extent to which his supervisor may have been motivated by prejudice, account should be taken of the fact that while Mr. Fasla's relations with his supervisor became so unsatisfactory in their last post that the latter was finally unwilling or unable to write a balanced evaluation, the relationship had not always been so strained or the supervisor so prejudiced: during Mr. Fasla's brief stay in Sierra Leone he served under the same Resident Representative, and both seemed to have found the collaboration sufficiently satisfactory to agree to continue it in Yemen; as a matter of fact, Mr. Fasla was able to submit to the Tribunal copies of three private manuscript letters that his supervisor had written from Sierra Leone to the UNDP Personnel Chief and which contained basically favourable reference to Mr. Fasla (doc. No. (3), Annexes 81-83)—by means of which the latter attempted to refute a very poor evaluation privately communicated to headquarters by the Acting UNDP Resident Representative in Sierra Leone (doc. No. (3), Annex 64).
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**CORRECTED STATEMENT
OF THE VIEWS OF MR. MOHAMED FASLA
SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE
BY THE SECRETARY-GENERAL OF THE UNITED NATIONS**

1. The following views of Mr. Mohamed Fasla with respect to Judgement No. 158 of the United Nations Administrative Tribunal, are set forth in accordance with Article 11, paragraphs 1 and 2, of the Statute of the Tribunal. The text of those provisions is as follows:

“Article 11

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.*” (Emphasis added.) (Doc. No. (13)).

2. In the following pages, the views of the Applicant are presented under the following headings: General Background and Brief Statement of Facts (pp. 65-70); Applicant's Arguments (pp. 70-97) and Conclusions (pp. 97-99).

General Background

3. In presenting the views of Mr. Mohamed Fasla to the International Court of Justice it is desirable to keep in mind the basic policy context of the controversy. We believe larger issues are at stake than the recomputation of damages or the review of the proper role of the United Nations Administrative Tribunal in an employment grievance of this type. We believe that underneath this appeal is the entire question of moral integrity within the international civil service as it has been evolved by the United Nations. It seems important to view the Applicant's technical complaints, substantial as they are for the proper functioning of justice, in this larger perspective.

4. What stands out in the voluminous record that has been built up in this case is that Mr. Fasla was assigned to a post in the United Nations Development Programme (UNDP) in the Yemen with a specific mission to clear up a shocking mess that had been allowed to grow up in that office. United Nations

officials and facilities were being abused in the most flagrant ways involving personal corruption, blackmarketeering, illicit currency exchanges, and narcotics traffic. As a consequence, the UNDP was a symptom of Yemeni misery and degradation rather than part of any cure. The highest officials in Yemen confirmed this view by expressing their disappointment with the way UNDP was functioning in their country. No one denies the fact that Mr. Fasla tried to clean up the mess and to get the Yemen UNDP programme back on the track of economic and technical assistance. As a consequence of his efforts, which necessarily included challenging the veracity and morality of his bureaucratic superiors, Mr. Fasla was effectively ruined as a United Nations civil servant. In other words, having been sent on precisely the mission he tried to carry out under conditions of distress, possibly even danger, Mr. Fasla deserved to be rewarded and thanked for his efforts. Instead he was punished in a way particularly insidious because it was disguised beneath the forms of bureaucratic routine.

5. This prime fact has an importance that extends beyond Mr. Fasla's own misfortune, serious as this is. How can any employee in the United Nations not learn from Mr. Fasla's experience that it is better to reach an accommodation with corruption and incompetence than to rectify it? If Mr. Fasla suffers as he has, despite his clear mandate to act, who in the future would be foolish enough to interfere with even the grossest abuses of United Nations functions of the sort going on in the Yemen office of UNDP? Civil servants are notoriously subservient to begin with, normally willing to subordinate all scruples to the imperatives of careerism. These institutional impulses toward subservience are now in danger of being strongly reinforced in relation to Mr. Fasla in the most extreme of circumstances, and such an endorsement will constitute a message that *will be heeded by the United Nations civil service as a whole.*

6. It is for this reason that official United Nations responses to Mr. Fasla's grievances have been so disappointing. Clearly this is a case where one would have expected the Administrator of the UNDP or even the Secretary-General to make a special effort to find Mr. Fasla another job, if for no other reason than to nullify any possible impression that he was being "sacked" because he tried to stop corruption during his Yemeni assignment. In this respect, any contentions about Mr. Fasla's earlier mediocre employment record, even if they were reliable (which they are not) are dramatically beside the point. If Mr. Fasla was good enough to warrant the Yemeni assignment with all its difficulty and he was honest and dedicated enough to carry it out as well as *he could, then he certainly was good enough for a further routine job assignment in the UNDP or elsewhere in the United Nations civil service.* Therefore, the minimal efforts, if indeed they were efforts at all, to find Mr. Fasla a further assignment implicate the higher bureaucracy, however unwittingly, in the failings in the Yemen. How else are we to interpret the Headquarters' response to Mr. Fasla's experience?

7. In this regard, the Secretary-General's response has been deeply regrettable as well. It has been at all times technical and aloof from the human and policy issues at stake. There is no indication at any stage of the dispute that the Secretary-General was disposed to unravel the procedural and bureaucratic tangle and so come to terms with the elemental issue of integrity and fairness raised by the plight of Mr. Fasla. In the current papers to the International Court of Justice one searches in vain for any acknowledgement by the Secretary-General that Mr. Fasla was a tragic victim of circumstances over which he had no control and was, accordingly, deserving of a special effort by the Organization after his return from the Yemen. Large institutions have a way of becoming

impersonal, and it is important for this Court, in approaching these facts that underlie the question before it, not to abet this tendency by viewing this unprecedented proceeding as *merely* raising technical issues.

8. It is clear that at every stage in Mr. Fasla's proceedings there has been uneasiness on the part of the reviewing authorities about the way in which his situation has been handled. The Joint Appeals Board, the Administrative Tribunal, and the Committee for Review of Judgements all seemed to accept a large part of Mr. Fasla's basic contention about the circumstances of his Yemeni assignment and the failure of the Headquarters organization to treat him fairly and reasonably, and yet at none of these administrative review stages was there a willingness to follow through with a decision that in any sense was commensurate with the wrongs done to Mr. Fasla. Instead there has been a retreat into traditions of bureaucratic deference and conservatism, a refusal to confront the issue squarely. As a result Mr. Fasla is today a broken man, impoverished and denied his chosen career. This Court is Mr. Fasla's last chance. It is also a final opportunity to avoid the deepening impression that a personal career disaster is the result of standing in the way of corruption, even of a criminal kind, if one is a subordinate employee in the United Nations bureaucracy. Given the role of the United Nations in human affairs, it would seem even more important than for national or corporate bureaucracies to protect an employee who made Mr. Fasla's kind of effort to correct official misconduct.

9. The facts concerning Mr. Fasla's employment with the United Nations are described in sufficient detail in the documents contained in the dossier and supplementary folder transmitted to the Registrar of the International Court of Justice by the Director of the General Legal Division in charge of the Office of Legal Affairs, United Nations, on 24 August 1972, and more particularly in the two reports of the United Nations Joint Appeals Board (doc. No. 3, Annexes 2 and 67) and in the Applicant's application and supplementary application to the United Nations Administrative Tribunal (doc. No. 3, Annexes 86 and 89). For that reason, the Applicant does not intend to recount to the International Court of Justice all the particulars of his case but merely wishes to highlight, by way of general background, certain of its more outstanding features.

10. Mr. Fasla, an Algerian national, joined the service of the United Nations in June 1964, at the age of 39. He did so at the invitation of the Chairman of the United Nations Technical Assistance Board and relinquished both his permanent residency status in the United States and his long-term employment with the Stanford Research Institute in Menlo Park, California, where he held the position of Industrial Economist.

11. From August 1964 until July 1968, Mr. Fasla worked in various capacities as a professional officer for the United Nations Development Programme in Syria, Lebanon, New York and Sierra Leone. Subsequently, the United Nations Joint Appeals Board unanimously found that, already during these initial four years of Mr. Fasla's service, the United Nations Development Programme failed to provide him with several required service reports, denied him the protection of the required investigation of his rebuttals to certain other service reports, and withheld certain complimentary assessments of his work from his official status file (doc. No. 3, Annex 2, para. 45).

12. In September 1968, Mr. Fasla was reassigned to the office of the United Nations Development Programme in the Yemen Arab Republic, on the explicit understanding that this assignment would be for one year or longer. Prior to his departure, Mr. Fasla was briefed by several high officials of the

United Nations Development Programme about the very deplorable situation prevailing there with regard to the Programme's work in the Yemen Arab Republic. The Co-Administrator of the United Nations Development Programme specifically asked Mr. Fasla to exhibit "a missionary spirit" and to "clean up the mess".

13. Upon his arrival in the Yemen Arab Republic, Mr. Fasla soon found that the situation there exceeded even his worst fears. For example, United Nations diplomatic pouches and official vehicles regularly were used to smuggle contraband into and out of the country. United Nations funds were being routinely misapplied or misappropriated. United Nations personnel repeatedly engaged in illegal currency transactions. Indispensable office files and records were completely missing.

14. Under the circumstances, the work of the United Nations Development Programme in the Yemen Arab Republic was at a virtual standstill. In fact, at about the same time, the Minister for Foreign Affairs of the Yemen Arab Republic found it necessary to make the following statement to the General Assembly of the United Nations, which reflected their particular disappointment with the UNDP effort:

"The United Nations was expected to assist our people in their striving for peace and security and for the prevention of external intervention in our internal affairs, as well as to assist them in the task of reconstruction and development. It pains me to have to mention here in this connexion that the role of this international organization has been minimal and is at present almost non-existent." (United Nations, *GA, OR, 23rd Session, 1706th Meeting, 25 October 1968.*)

15. Mr. Fasla attempted, to the extent possible, to eliminate some of the worst outrages that were being committed under the umbrella of the United Nations Development Programme in the Yemen Arab Republic. However, in this endeavour Mr. Fasla immediately aroused the active hostility of his supervisor, the Resident Representative of the United Nations Development Programme in the Yemen Arab Republic. It became abundantly clear to Mr. Fasla that the Resident Representative, who was approaching retirement, placed considerations of personal gain above any United Nations interest, regularly engaged in a considerable number of illegal transactions, and showed no concern whatever for improving the performance of the United Nations Development Programme in the Yemen Arab Republic (doc. No. 3, Annex 86, paras. 45-59).

16. Against this background, Mr. Fasla was confronted by the need to make a difficult choice. The United Nations Charter required of him "the highest standards of efficiency, competence and integrity" (Article 101 (3)). By accepting an appointment with the United Nations, he had pledged himself to discharge his functions and to regulate his conduct "with the interests of the United Nations only in view" (doc. No. 14, Staff Regulation 1.1). On the other hand, Mr. Fasla was aware that action to correct abuses in the UNDP office in the Yemen would be resisted by the Resident Representative and might even jeopardize Mr. Fasla's own future with the United Nations.

17. Mr. Fasla chose to carry out his original assignment and to uphold his conception of duty to the United Nations and on 17 January 1969 forwarded a comprehensive report in the form of a letter about the derelictions of the Resident Representative to the headquarters of the United Nations Development Programme in New York.

18. Remarkable as it may seem, the record of the present case makes it

appear that, upon receipt of this letter, the Director, Bureau of Administrative Management and Budget, United Nations Development Programme, virtually decided then and there to dispense with Mr. Fasla's further services. Thus, in subsequent months, the United Nations Development Programme in New York virtually ceased to communicate with Mr. Fasla, although the Resident Representative had by that time left the Yemen Arab Republic, and Mr. Fasla was effectively in charge of the UNDP office in that country (doc. No. 3, Annex 86, paras. 66, 84-88). A senior official of the UNDP who visited the Yemen Arab Republic late in February 1969 told Mr. Fasla, making reference to his complaint about the Resident Representative, that Mr. Fasla would be "finished for this" (doc. No. 3, Annex 86, para. 69). Another senior official of the UNDP, after visiting the Yemen Arab Republic in March 1969, reported in writing to New York that "Mr. Fasla is running the office well and is trying hard to bring some efficiency to the office and to straighten out certain unlawful activities of United Nations personnel", however, and consistent with the Headquarters pattern, that favourable report was withheld from the Applicant's official status file, and for months the UNDP even denied to the United Nations Administrative Tribunal that the report even existed (doc. No. 11, paras. II (b) and XII). The Resident Representative of the UNDP in Turkey, who had access to information concerning planned personnel movements in the area, wrote to Mr. Fasla on 1 April 1969, expressing the hope that the letter "will reach you wherever you may be" (doc. No. 3, Annex 43). Finally, at a later stage, when the former Resident Representative in the Yemen Arab Republic prepared a periodic service report concerning Mr. Fasla which was subsequently deemed by the United Nations Administrative Tribunal to have been manifestly motivated by prejudice, the Director, Bureau of Administrative Management and Budget, UNDP, endorsed the report's contents without any reservation or personal comment on his part and thus abetted the prejudice displayed against the Applicant (doc. No. 11, para. XII). Such an endorsement must be understood against the background of Mr. Fasla's earlier complaints about the Resident Representative and the UNDP's awareness of irregularities in the Yemen office.

19. The silence which the UNDP maintained toward Mr. Fasla was broken by a cable which arrived in the Yemen Arab Republic on 14 May 1969 and instructed Mr. Fasla to report to New York on the morning of 20 May 1969 for consultations, "on assumption that you will not return to Yemen" (doc. No. 3, Annex 48). Mr. Fasla was left with only two working days during which he was to wind up his affairs, including closing down his household which he had established in the expectation that his assignment in the Yemen Arab Republic would last for one year or longer.

20. In New York, Mr. Fasla was informed by the Director, Bureau of Administrative Management and Budget, UNDP, that he was being placed on special leave and that "every effort will be made to secure another assignment for you" (doc. No. 3, Annex 50). However, no further assignment was subsequently offered to Mr. Fasla by the UNDP and his fixed-term appointment was not renewed when it expired on 31 December 1969.

21. As a result of appellate proceedings initiated by Mr. Fasla, both the United Nations Joint Appeals Board and the United Nations Administrative Tribunal found that in its search for a new assignment for him the UNDP had circulated an "incomplete and misleading" performance record of the Applicant which "seriously affected his candidacy for a further extension of his contract or for employment by other agencies" (doc. No. 3, Annex 2, para. 45 (e), and doc. No. 11, para. V). The United Nations Administrative Tribunal reached

the conclusion that "the Respondent did not perform in a reasonable manner the obligation which he had undertaken to seek an assignment for the Applicant" and awarded to the Applicant six months' net base salary (doc. No. 11, para. XIII). Apart from the invalidation of the prejudiced periodic service report, and from the setting of a deadline for the submission of a specific claim, this was the only award made by the Tribunal to Mr. Fasla.

22. Mr. Fasla has been without gainful employment since the expiration of his appointment with the UNDP. This sustained period of unemployment is directly attributable to his service with the United Nations.

23. Regrettably, the problems encountered by Mr. Fasla in his search for alternative employment did not end at that point. Although Mr. Fasla requested late in 1969 the issuance by the UNDP of a certificate of service as provided for in Staff Rule 109.11 (doc. No. 15) the UNDP so far has failed to furnish him with such a certificate. In fact, the UNDP is unable to issue the requested certificate since the United Nations Administrative Tribunal ruled as early as 1953 that certificates of service should "use the very words which have been put in the periodic reports by the superior which comment as to overall rating" (Judgement No. 49 of the United Nations Administrative Tribunal, 11 December 1953, para. 11). Such issuance is impossible because the UNDP has so far failed either to investigate Mr. Fasla's contentions in rebuttal of certain of his periodic reports or to provide Mr. Fasla with a new periodic report covering his service in the Yemen Arab Republic in place of the prejudiced periodic report which was declared invalid by the United Nations Administrative Tribunal. The consequence of this state of affairs is that, as a direct consequence of unfair and negligent actions by the UNDP, Mr. Fasla today is unable to provide any suitable evaluation of his six-year period of employment with the United Nations to a prospective employer. In addition, Mr. Fasla has evidence to support his belief that the Bureau of Administrative Management and Budget of the UNDP actively discourages prospective employers from hiring him.

24. After six years of service to the United Nations, a period during which he acted conscientiously and in harmony with the purposes and principles of the Organization and with constant regard to the clear requirements of the United Nations Charter, Mr. Fasla today finds himself unemployed and virtually unemployable. At the age of 47, Mr. Fasla is unable to provide support for his family and has no reasonable prospect of continuing his career in the international civil service. His only remaining hope for vindication lies in this recourse to the International Court of Justice.

Applicant's Arguments

25. In his submissions to the United Nations Administrative Tribunal, the Applicant requested the Tribunal to order the following measures:

- (a) As a preliminary measure, production by the Respondent of the report by Mr. Satrap, Chief, Middle East Area Division, UNDP, on his investigation of the UNDP office in Yemen in February 1969.
- (b) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, Consultant to the UNDP Administrator, on his investigation of the UNDP office in Yemen in March 1969.
- (c) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, UNDP Special Representative in Yemen, concerning the

Applicant's performance, prepared at the request of the UNDP in the summer of 1969.

- (d) Restoration of the Applicant to the *status quo ante* prevailing in May 1969, by extending the Applicant's fixed-term appointment for a further two years beyond 31 December 1969, with retroactive pay of salary and related allowances; alternatively, payment by the Respondent to the Applicant of three years' net base salary.
- (e) Correction and completion of the Applicant's Fact Sheet which is intended for circulation both within and outside the UNDP, with all the required periodic reports and evaluations of work; alternatively, payment by the Respondent to the Applicant of two years' net base salary.
- (f) Invalidation of the Applicant's periodic report covering his service in Yemen, prepared in September 1970; alternatively, payment by the Respondent to the Applicant of two years' net base salary.
- (g) Further serious efforts by the Respondent to place the Applicant in a suitable post within the UNDP or within the United Nations Secretariat or within a United Nations Specialized Agency; alternatively, payment by the Respondent to the Applicant of two years' net base salary.
- (h) As compensation for injury sustained by the Applicant as the result of the repeated violation by the Respondent of Administrative Instruction ST/AI/115, payment by the Respondent to the Applicant of two years' net base salary.
- (i) As compensation for injury sustained by the Applicant as the result of the continuous violation by the Respondent of his obligation to make serious efforts to find an assignment for the Applicant, payment by the Respondent to the Applicant of two years' net base salary.
- (j) As compensation for injury sustained by the Applicant as the result of prejudice displayed against him, payment by the Respondent to the Applicant of five years' net base salary.
- (k) As compensation for the emotional and moral suffering inflicted by the Respondent upon the Applicant, payment by the Respondent to the Applicant of one Yemen rial.
- (l) As compensation for delays in the consideration of the Applicant's case, especially in view of the fact that no Joint Appeals Board was in existence during the first four months of 1969 since the Respondent had failed to appoint a Panel of Chairmen, payment by the Respondent to the Applicant of one year's net base salary.
- (m) Payment to the Applicant of the sum of \$1,000 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case necessitated the Applicant's travel from California to New York in May 1970 as well as frequent trans-continental telephone calls to the Applicant's counsel before and after that date.
- (n) As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary.
- (o) As compensation for the further delay in the consideration of the Applicant's case early in 1971, payment by the Respondent to the Applicant of one year's net base salary.
- (p) Recalculation by the Respondent of the Applicant's salary and allowances

in Yemen on the basis of the actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.

- (q) As compensation for the illegal suspension of the Applicant from duty, payment by the Respondent to the Applicant of five years' net base salary. (Doc. No. 11.)

26. As far as the three preliminary pleas are concerned, namely pleas (a) through (c), the UNDP complied fully only with plea (a) (doc. No. 11, para. 11 (a)). Mr. Satrap's letter was annexed to the Applicant's file. However, inexcusable confusion surrounded the production of Mr. Hagen's letter of 9 March 1969. After an initial denial of several months that such a letter existed at all, the UNDP finally complied with the second request of the Applicant; however, the entire letter was never shown to the Applicant. Following the UNDP's instructions, the Tribunal decided that all paragraphs except one were "irrelevant to the case", and could be withheld from the Applicant¹.

The Applicant has reason to believe that the paragraphs contained in this letter are highly relevant to the Court's understanding of the nature of the case and would respectfully request that the production of the whole letter would establish this belief. As a preliminary measure, the Applicant would also request production of a letter dated 26 April 1969 from the President of the Yemen Arab Republic to the Secretary-General of the United Nations. The reply to this letter by the Administration UNDP is dated 28 May 1969 under the symbol DP/310/Yemen. Although this request was originally made before the Joint Appeals Board, the UNDP did not comply with it. The production of these two letters would help greatly to clarify the issues at stake and disclose the extreme pressure inflicted upon the Applicant during his stay in Yemen.

26a. With regard to plea (c), the UNDP Headquarters maintained to the very end of the administrative proceedings that it did not have the letter in question in its file, leading the Administrative Tribunal to observe that it "can only take note of the statement" (doc. No. 11, para. 11 (c)). In fact, the Tribunal was in possession of a document which made reference to this letter, raising a presumption of its existence and a suspicion, at least, in view of the pattern of irregularity in relation to Mr. Fasla, that it had been suppressed or removed from the file. Evidence on this point can be submitted to this Court. The point of importance, however, is that the Administrative Tribunal was in a position to enquire further about the treatment of Mr. Fasla's situation and its determination not to do so, given information at its disposal, involved a failure to exercise the jurisdiction conferred upon it and, hence, contributed to a substantial failure of justice flowing out of this procedural error.

27. As far as the 14 substantive pleas are concerned, namely, pleas (d) through (q), the United Nations Administrative Tribunal fully granted the Applicant's request only with regard to plea (f), concerning the invalidation of the prejudiced periodic report covering the Applicant's service in the Yemen Arab Republic (doc. No. 11, paras. IX-XII). The Tribunal also partially accepted the Applicant's plea (i), requesting compensation for injury sustained by the Applicant as the result of the continuous violation by the Respondent of its obligation to make serious efforts to find an assignment for the Applicant; the Tribunal awarded the Applicant six months' net base salary in place of the two years' net base salary requested (*ibid.*, para. XIII). The Tribunal partially considered in its Judgement pleas (l) and (o) concerning compensation for

¹ Attachment 1.

delays in the consideration of the Applicant's case (*ibid.*, para. XVI), plea (*m*) concerning the Applicant's expenses in the preparation of his case (*ibid.*, para. XVIII), plea (*p*) concerning recalculation of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the Applicant's assignment there (*ibid.*, para. XV), and plea (*q*) concerning compensation for the illegal suspension of the Applicant from duty (*ibid.*, para. XIV).

The Applicant believes that the Tribunal did not fully address itself to the questions presented by the above five pleas. Furthermore, the United Nations Administrative Tribunal did not even consider the merits of the Applicant's remaining seven pleas, namely, plea (*d*) concerning the restoration of the Applicant to the *status quo ante* prevailing in May 1969, plea (*e*) concerning correction and completion of the Applicant's Fact Sheet, plea (*g*) concerning further serious efforts by the Respondent to find suitable employment for the Applicant, plea (*h*) concerning compensation for injury sustained by the Applicant as the result of the repeated violation by the Respondent of Administrative Instruction ST/AI/115 dealing with periodic reports, plea (*j*) concerning compensation for injury sustained by the Applicant as the result of prejudice displayed against him, plea (*k*) concerning compensation for the emotional and moral suffering inflicted by the Respondent upon the Applicant, and plea (*n*) concerning compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects. The concluding paragraph of the Tribunal's Judgement No. 158, rendered in respect of the Applicant, reads as follows:

"The Tribunal accordingly decides that:

1. The Respondent shall pay the Applicant a sum equal to six months' net base salary;
2. The periodic report prepared for the period June 1968-March 1969 is invalid and shall be treated as such;
3. Any requests for payment made in accordance with paragraph XV above shall be submitted, together with the necessary supporting evidence, by the Applicant to the Respondent within a period of two months from the date of this judgement;
4. The other requests are rejected." (Doc. No. 11, para. XVIII.)

Paragraph 3 of Article 10 of the Tribunal's Statute (doc. No. 13) requires that: "The judgements shall state the reasons on which they are based."

The Tribunal's decision (4.) that "the other requests are rejected" constitutes a violation of Article 10 (3). Rejection of a plea is defective without a statement of reasons. No such statement is provided despite, as will be shown, fundamental aspects of the Applicant's grievances that were embodied in the unconsidered pleas.

28. Against this background, the Applicant applied to the Committee on Applications for Review of Administrative Tribunal Judgements, arguing that in his case the United Nations Administrative Tribunal, by failing to consider fully and pass upon all the claims presented by the Applicant, and by failing to compensate adequately the Applicant for damage suffered by him, failed to exercise the jurisdiction vested in it and furthermore committed a fundamental error in procedure which had occasioned a failure of justice; accordingly, the Applicant asked the Committee to request an advisory opinion of the International Court of Justice (doc. No. 3).

29. In an unprecedented decision, the Committee on Applications for Review of Administrative Tribunal Judgements held that there was "a substantial

basis" within the meaning of Article 11 of the Statute of the Administrative Tribunal for the Applicant's request. For that reason, the Committee requested the International Court of Justice for an advisory opinion (doc. No. 10).

30. Before addressing himself briefly to each of the substantive pleas which had been submitted by Mr. Fasla to the United Nations Administrative Tribunal, the Applicant wishes to draw the attention of the International Court of Justice to two points, each of which, in his view, by itself fully justifies an affirmative response by the Court to the questions asked of it.

31. Earlier in the present submission, it was emphasized that the problems that arose between the Applicant and the UNDP were a direct consequence of the Applicant's faithful fulfilment of his obligation, under Article 101 (3) of the United Nations Charter and under United Nations Staff Regulation 1.1, to display the highest standards of integrity and to conform his conduct with the interests of the United Nations (para. 16 above). It is an elementary principle of law and equity that this obligation of the Applicant gave rise to a corresponding right, namely, the right to be fully and appropriately protected by the Organization, and more particularly by the Secretary-General as the chief administrative officer of the United Nations, against any negative effects that might arise as a consequence of fulfilling his statutory obligations as a United Nations staff member. Such a principle is an illustration of "... general principles of law recognized by civilized nations", which is affirmed as a suitable basis for decision in Article 38 (1) (c) of the Statute of this Court.

32. The United Nations Administrative Tribunal utterly failed to recognize and uphold this fundamental legal principle as it applies to employment relations within the international civil service. As a result, while explicitly recognizing that the Applicant had been the victim of prejudice during his association with the United Nations, the United Nations Administrative Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure by not basing its Judgement on the inherent right of the Applicant not to be penalized for the faithful performance of his duties as prescribed by the United Nations Charter and the United Nations Staff Regulations. The Applicant respectfully submits that this consideration, by itself, fully justifies the rendering of an affirmative response by the International Court of Justice to the questions posed in the present litigation.

33. A second general, overall basis for reaching a decision in favour of the Applicant, that is, an affirmative response to the questions put in the request for an advisory opinion, involves the failure of the United Nations Administrative Tribunal to uphold Article 10 (3) of its Statute which provides: "The judgments shall state the reasons on which they are based" (doc. No. 13). In fact, half of Mr. Fasla's pleas were rejected without any statement of reasons, even though, as we shall demonstrate, these pleas each rested on a substantial basis that was developed by the Applicant in his presentations before the United Nations Administrative Tribunal. The Applicant respectfully submits that this failure to give reasons constitutes by itself *prima facie* evidence of the Tribunal's failure to exercise jurisdiction and of the Tribunal's commission of a fundamental error in procedure which has occasioned a failure of justice. Such a contention is supplementary to the Applicant's arguments that the Tribunal *also* failed to exercise its jurisdiction and committed a fundamental error of procedure which has occasioned a failure of justice by its insufficient and inadequate enquiry in relation to those pleas for which it did provide a reasoned statement in accordance with Article 10 (3) of its Statute.

34. The Applicant, to facilitate consideration of the case requests the production of the dossier of the Administrative Tribunal as required by Article 12,

section 2, of the Statute and Rules of the United Nations Administrative Tribunal which states:

"The Executive Secretary shall make for each case a dossier which shall record all actions taken in connection with the preparation of the case for trial, the dates thereof, and the dates on which any document or notification forming part of the procedure is received in or dispatched from this office."

The Applicant also requests the production of the minutes of the Tribunal involving the proceedings of his case.

35. The Applicant will now review briefly each of the unanswered pleas he submitted to the Administrative Tribunal, i.e., pleas (d) through (q). The emphasis will be put on these pleas that the Applicant believes have been given inadequate consideration. The contention that the Administrative Tribunal failed to exercise jurisdiction on these pleas, thereby committing a fundamental error in procedure, can, hopefully, be adequately established. This failure has been recognized at least as a substantial possibility, by the Committee on Applications for Review of Administrative Tribunal Judgements through its unprecedented determination to request this advisory opinion from the International Court of Justice.

Plea (d)

36. Under this plea, the Applicant requested the Administrative Tribunal to order his restoration to the *status quo ante* prevailing in May 1969, by extending the fixed-term appointment of the Applicant for a further two years beyond 31 December 1969, with retroactive payment of salary and related allowances; alternatively, the Applicant requested payment to him of three years' base salary.

37. The attention of the International Court of Justice is respectfully drawn to the fact that this plea was formulated on 31 December 1970, in the expectation that the Administrative Tribunal would consider it during the course of 1971. Through no fault of the Applicant, this has not been the case. Accordingly, the restoration of the *status quo ante* would now entail a retroactive extension of the Applicant's last fixed-term appointment by at least four years, until 31 December 1974, the alternative plea of compensation is similarly amended to cover payment of six years' net base salary.

38. The Applicant wishes to emphasize that he attaches the highest importance to restoring him to the *status quo ante*. In fact, he regards it as the only conceivable procedure by means of which justice can begin to be done in his case. The acknowledged gaps in the periodic reports that reduced the Applicant's chances for further employment at the time; the damages to the reputation of the Applicant caused by the circulation of such incomplete reports; the abrupt recall from Yemen and the imposed leave, are among the charges that can never be entirely offset by monetary compensation. Monetary compensation cannot alter the fact that the Applicant's reputation among higher officials affiliated with the United Nations has been effectively ruined and his future destroyed, through no fault whatsoever on his part. No amount of compensation can alter the fact that the Applicant has lost the possibility of making a positive contribution to the international community through his participation in the international civil service. Restoration to the *status quo ante* is the only way that partial justice can be given for the basic injustice inflicted upon the Applicant. Furthermore, restoration to the *status quo ante* has been an accepted

principle in the practice of the national civil services whenever wrongs of this magnitude have been demonstrated.

39. In the paragraphs that follow the Applicant will set forth some of the circumstances that existed in Yemen with a view to providing this Court with a sense of why a miscarriage of justice has taken place. This recital of circumstances is presented in an informal and incomplete way, but it is the best that can be done given the time and resources available to the Applicant. The Applicant believes that, at least, it should become clear that an authoritative investigation can come to terms with the *fundamental contention* that he has been victimized by calling attention to and opposing a pattern of corruption, negligence, and even criminality in which United Nations personnel and facilities were deeply implicated. To ignore this set of background conditions is to render no appropriate relief whatsoever, especially when the record amply and incontestably demonstrates that the UNDP Headquarters staff behaved in a most irregular way toward the Applicant. The emphasis on plea (d) reflects Applicant's basic contention that he has been punished for rendering constructive and conscientious service and that it is essential for symbolic and substantive reasons that this punishment be effectively repudiated. It is the Applicant's *further contention* that such a repudiation, at this stage, can only be accomplished by restoring him economically at least to a condition corresponding to the *status quo ante*. This cannot be done in a complete sense because of the grief sustained by the Applicant, but at least full monetary restoration can be accorded.

40. The Applicant respectfully wishes to draw attention to his situation in Yemen to emphasize the extreme difficulties of that period and the cost to himself of his attempt to correct fundamental irregularities in United Nations operations. Only in this way can the Court grasp the extent to which the United Nations Administrative Tribunal's failure to render Applicant satisfaction under this plea or even to state its reasons for not doing so constituted a procedural error resulting in a fundamental failure of justice. Prior to his departure from New York to Paris, the Applicant had been briefed by several high UNDP officials on the situation obtaining in Yemen. The UNDP Co-Administrator, in particular, asked the Applicant to show "a missionary spirit" and to "clean up the mess". (Doc. No. 3, Annex 86, paras. 38-44.) In Cairo en route to his assignment the Applicant was given further background information concerning the situation in Yemen. He was told that it had been found necessary to dismiss a UNDP Administrative Officer for smuggling, misappropriation of funds, currency irregularities, and the like. The Applicant was also informed that United Nations experts in Yemen were still engaged in illicit activities and were bribing their government counterparts with misappropriated United Nations goods and with a percentage of their earnings from illegal currency transactions (such transactions were facilitated by the existence of three different rates for conversion of currency: the official rate, a preferential rate for United Nations officials and experts, and the black market rate). The Applicant was shown copies of numerous confidential reports which had been sent to the UNDP in New York concerning this state of affairs. What he had already learned in his briefing in New York about the situation in Yemen and the two Sarfraz missions which had gone to Yemen at a cost of \$67,000 was fully in evidence upon his arrival.

41. Proceeding in the company of the Resident Representative-designate to Yemen, the Applicant encountered there a truly chaotic situation the full dimensions of which had been indicated to him only in part during his pre-assignment briefings. Files in the UNDP office in Taiz either were incomplete

or did not exist at all. The New York-Yemen UNDP pouch (routed via Cairo) as well as a special Cairo-Yemen UNDP pouch were regularly used to smuggle currency into Yemen and gold watches and jewellery out of Yemen. United Nations experts neglected their assignments since they were preoccupied with other ventures; indeed, the acting FAO Country Representative regularly sold UNDP-financed farm produce on the market for his personal profit. A store had been established in Taiz dealing solely in smuggled goods. Experts frequently undertook private travel to Cairo or Aden for which they subsequently claimed and received UNDP subsistence payments.

42. The Applicant was not successful in all his endeavours aimed at improving the scandalous situation pertaining to the United Nations activities in Yemen. The primary reason for this failure was lack of support as well as outright opposition on the part of the Resident Representative who was approaching retirement and, in any event, consistently placed considerations of personal gain above any United Nations interest and was not in the least concerned with improving either the UNDP performance in Yemen or the relationship between the Organization and the Yemen Government. Even when the Resident Representative was in Taiz, he usually did not appear in the office. The number of days on which he was present in the office, though never more than for 1 or 2 hours during which he abused the United Nations staff in violent language, were as follows: 8 days in October 1968, 6 days in November 1968, 7 days in December 1968, 12 days in January 1969, and 1 day in February 1969 (doc. No. 3, Annex 86, paras. 45-58).

43. In view of these circumstances, relations between the United Nations and the Yemen Government were characterized by bitterness and even hostility. As further evidence of this deteriorating situation Mr. Hagen, a UNDP Headquarters official, said in a brief summary draft report on his mission in Yemen dated 23 March 1969, *inter alia*:

"Quite unexpectedly I ran into a rather hot situation here. Whenever I had discussions with the Government they complained about the UNDP and the agencies. Unfortunately I had to convince myself, that many of the complaints are justified. (What I have heard here and seen myself is shameful for the United Nations family and I prefer not to write anything about this but to report verbally only.) I consider the situation as rather severe. The Foreign Minister even suggested to make a case against UNDP at the International Court of Justice in The Hague for betrayal and misleading the Republic. He said that if all the money which the country has spent for the United Nations since its membership with the United Nations were spent on development of the country some results would at least be visible now. But the fact is that many of the high level United Nations officials did nothing but make the best personal use of their position here.

And it is really tragic that the first UNDP project which will be implemented here (Wadi Zabid) is hopelessly ill-conceived and will be a sure failure if carried out." (Doc. No. 3, Annex 42.)

The entire situation in Yemen can be clarified by the production by Respondent of the Hagen letter to Mr. Cohen dated 9 March 1969 which the Administrative Tribunal has incorrectly ruled that all its paragraphs except one are "irrelevant to the case" (doc. No. 11, para. II, p. 18), and by the production by Respondent of the letter from the President of the Yemen Arab Republic dated 26 April 1969 (the reply to this letter from the UNDP Administrator is filed under the symbol DP/310/Yemen).

44. The Applicant further forcefully reaffirms all the statements which he

made in the Application concerning the use of UNDP pouches and UNDP vehicles for the purpose of smuggling, concerning the improper activities of various UNDP experts, concerning the manifold illicit and fraudulent dealings of the Resident Representative, concerning the resultant breakdown in the UNDP operation in Yemen, and concerning the total silence of UNDP Headquarters when confronted with Applicant's repeated urgent requests for advice and assistance. Attention of the Court is respectfully, but forcefully, drawn to the fact that not a single sentence of the Applicant's account has been contested by the Respondent, nor could it be.

45. At the time of Applicant's presentation to the Administrative Tribunal it was expected that the United Nations Administrative Tribunal would ascertain the true nature of the situation in Yemen and the reasons underlying the recall of the Applicant, as well as other features of his subsequent mistreatment. In fact, no attempt was made by the Administrative Tribunal to enquire into the basis of Applicant's recall from Yemen. As a consequence, the Tribunal excluded from its enquiry the only possible basis for assessing the magnitude of the wrongs done to the Applicant, and hence, by such a procedural foreclosure was naturally led to under-estimate the damages done to the Applicant. The Applicant now presents some uncontested material to clarify the circumstances surrounding his recall and to lend support to his basic claim that he was a scapegoat who was being used to cover up the improprieties, negligence, and illegal dealings of various UNDP and other United Nations officials. This contention is basic to Applicant's argument that the United Nations Administrative Tribunal failed to exercise the jurisdiction vested in it and by such a failure rendered a grossly unjust decision which made Applicant an award of damages that was trivial in relation to the real losses suffered. The factual background is given as Applicant appreciates it only to demonstrate before this Court that the Tribunal could not respond to plea (d) without considering these wider contentions and the specific claim by the Applicant that adequate relief requires a restoration of the *status quo ante*.

46. Applicant was under fire from various agencies in the United Nations system which evidently sought to eliminate him from service in order to protect staff members against exposure. As an example, on 21 April 1969 he learned that an entire shipment of the World Food Program for its school feeding programme was going directly to the black market with the connivance of United Nations officials and Yemeni officials, both Republican and Royalist. The international agencies involved in this project were FAO and WFP. During Applicant's assignment on both occasions when a shipment would arrive the officer in charge of the WFP arranged to be out of the country and asked the UNDP office to be represented for the delivery of the shipment by the acting FAO representative. On 21 April 1969 a revolutionary situation broke out in Hodeida. Many students were injured and arrested and Applicant was informed by a high military official that this disturbance started following accusations by high school students that there was a plot to divert to the black market an entire food shipment, consisting of a loaded cargo ship, and sent as part of World Food Program. Many high-level officials in Hodeida were co-operating with United Nations officials in an effort to hide this plot. In a letter of 9 April 1969 from the UNDP Administrator (doc. No. 3, Annex 44) Applicant's authority had been expanded to cover a situation of this kind:

"You are hereby authorized to sign on behalf of the Organizations participating in the United Nations Development Programme, the Agreement entitled: 'Standard Agreement on Operational Assistance'

between

the United Nations, the International Labour Organisation, the Food and Agricultural Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the International Civil Aviation Organization, the World Health Organization, the International Telecommunications Union, the World Meteorological Organization, the International Atomic Energy Agency, the Universal Postal Union, the Inter-Governmental Maritime Consultative Organization and the United Nations Industrial Development Organization

and

The Government of the Yemen Arab Republic."

Acting upon his responsibilities as Officer in Charge of the UNDP operation, Applicant requested in a meeting on 21 April with the Officer in Charge of the WFP a full account of the situation. After a full investigation, the Applicant found, in fact, that people from the United Nations in co-operation with high-level Yemeni officials did, beyond any doubt, intend to divert the shipment. A somewhat similar incident had occurred some two months earlier when an entire shipment of arms from the Soviet Union, including 13 tanks and much ammunition, had been diverted without the Government's awareness. Applicant had a meeting with the WFP officer and insisted upon a written explanation of why this official arranged to be out of the country at the time when major shipments were scheduled to arrive. Because there were so many people involved in this situation the Applicant went himself to begin negotiations with the Government at Sanaa, the military commander at Hodeida, and even with the Royalist tribes of the area to see if the shipment of food could be redirected to its proper destination. At some personal risk to himself, Applicant entered into an area where no one else had been able to travel to begin negotiations with the chief of a Yemeni Royalist tribe, who was persuaded to assist the Applicant and did so by ordering a meeting of the officials in Hodeida and securing the proper disposition of the shipment. The Applicant believed that the WFP officer himself was an honest man who had been victimized by other organized groups and, hence, did not report on his behaviour at the time, expecting to be able to solve the problem by himself, without causing embarrassment to the United Nations or its personnel. Upon his return to Taiz an attempt was made on Applicant's life. Although it was unsuccessful, it seems reasonable that this assassination plan was connected with Mr. Fasla's subsequent peremptory recall from his position in Yemen. The Applicant is submitting seven documents¹ covering the period from the beginning of the incident until the successful clearing of the entire shipment to support his interpretation of these extraordinary occurrences.

47. Within a few hours of Applicant's return to Taiz after the successful completion of this operation he sent a cable jointly addressed to the Director, Bureau Administration, Management and Budget and to the Director, Bureau of Programming Operation requesting an opportunity to visit Headquarters "for consultations for 24 hours", to discuss "*programme coverage of our operations in YAR which cannot be discussed by communications*". (Doc. No. 3, Annex 45, 24 April 1969.) The cable solicited no response and the matter was treated as routine. Applicant, however, was criticized because he sent the

¹ Attachments 2, 3, 4, 5, 6, 7 and 8.

cable jointly to the two Directors. Applicant had requested this consultation because he felt that the situation was of the utmost gravity and delicacy, and that it was far too sensitive to discuss in written communication due to the possibilities of a scandal arising from these happenings resulting in bad publicity for the United Nations. Two days following this incident the President of the Arab Republic, who was aware of the situation because his office had assisted in obtaining the eventual clearance of the shipment, sent a letter to the Secretary-General complaining about all of the activities of the United Nations in his country. This letter is one of those which the Applicant has requested the production of by Respondent in order to emphasize the plausibility of his construction of the facts.

48. A further illustrative incident reinforces Applicant's basic claim that his recall from Yemen was designed to cover up the deplorable condition of the UNDP and that the termination of the Applicant's assignment in Yemen was motivated by similar considerations. Sometime in October 1969 the UNDP office in Taiz received a letter from the Director-General of FAO informing him that the Government had requested that Mr. Badran, Locust Control Expert, be removed from the project by 31 December 1969. The Director-General of FAO requested the assistance of the UNDP office in intervening with the Government to allow Mr. Badran to remain. If the Government insisted upon his removal we were to report that FAO would terminate Mr. Badran. The Applicant was surprised by receipt of this letter since the Government, a few days earlier, had informed the Applicant that they felt that Mr. Badran was one of the few honest and trustworthy experts in Yemen. The Applicant began negotiations with the Ministry of Foreign Affairs which was also surprised since the request had not been initiated by them. Applicant was assured that the situation could be settled and that careful consideration would be given the matter. Within days, despite a letter of the Director-General, the Applicant received an unexpected and unannounced visit from Beirut by a Mr. Lubani, Regional Locust Control Expert, who had come from Beirut solely for the purpose of handing him a letter informing him that on behalf of his department the Applicant should request clearance from the Government for the appointment of a Mr. Muafa as Locust Control Expert to replace Mr. Badran and to expand the new appointee's jurisdiction to cover Southern Yemen as well as the Yemen Arab Republic. In view of the content of this letter and of the insistence by Mr. Lubani that this matter would have to be done in his presence, the Applicant dictated a letter to the Government informing them of the request of FAO for the appointment of Mr. Muafa as Locust Control Expert.

49. Because Applicant was relatively new in Yemen, it was impossible for him to know immediately everything involved in the situation. He was later informed by reliable sources that there was a well-organized contraband operation in the process of being established stretching from Aden to Saudi Arabia and relying on United Nations vehicles. During his investigation Applicant discovered that not only was Mr. Muafa, a Yemeni national, entirely without education, but also that politically he was a large risk for the United Nations because he and his brother were working with the Royalists who had occupied the territory around Sanaa. His brother was, in fact, deputy to General Kassem Monnasser. During this period, Applicant obtained written evidence that Mr. Giurdas Singh from FAO had met with Mr. Muafa in Asmara, Ethiopia, during a Locust Control meeting to decide the termination of Mr. Badran and his replacement by Mr. Muafa. Considering the rumours, which were confirmed in Yemen, that a deal had been made between Mr. Singh and Mr. Muafa to use the huge automobile park of the United Nations Locust Control Project at

Hodeida, and supported by a network of short-wave radios, for illicit traffic, Applicant initiated an investigation of these allegations.

50. Applicant discovered that Mr. Singh had also tried through the Resident Representative in Aden to extend the responsibility of the proposed expert to Southern Yemen. Before the Yemeni Government responded officially to the letter concerning Mr. Muafa, the Applicant was subjected to unusual pressure in the form of urgent cables and letters sent by various FAO officials to urge the prompt approval of the appointment and to seek explanation of why the approval of Mr. Muafa had not been received. All correspondence from FAO dealt only with this case. In the meantime, Applicant learned that Mr. Muafa had already been using United Nations trucks and jeeps for personal use even for trips to the dangerous borders of Saudi Arabia in an area that was still occupied by Royalist tribes. Applicant proceeded to Aden to ask the Resident Representative there about the appointment of Mr. Muafa. He was very cautious about responding to any of Applicant's questions but confirmed that Mr. Singh was pressuring him to obtain clearance from the Government of Aden for the appointment of Mr. Muafa in Aden and to extend his jurisdiction to Southern Yemen. The Resident Representative informed Applicant, however, that if Mr. Muafa had come to Aden the Government would have put him in gaol. He also informed the Applicant that many of the United Nations Locust Control jeeps were coming into Aden, for no reason he knew about.

51. There was another Locust Control meeting in Baghdad between Mr. Singh and Mr. Muafa. After this the UNDP office learned from FAO that Mr. Muafa had withdrawn his candidacy for the post. The UNDP was asked to seek the approval of the Yemeni Government of an Egyptian expert, named Mr. Hosni, for appointment to the post. This proposal caused even greater puzzlement since the Government had made it clear that it did not want any Egyptians as experts in the country at that time due to the difficult relations between Egypt and Yemen. By Presidential decree the Ministry of Foreign Affairs had been designated as the only government agency to initiate requests to any United Nations organization and any such request was to be co-ordinated through the UNDP office.

52. In April 1969 Applicant sent to Headquarters a full report with evidence and supporting documents sufficient to enable any responsible official to understand that something unusual was occurring and to suggest the need for an effort by the UNDP to contact the FAO with specific reference to this problem. One copy of Applicant's report was sent to the Director of the Bureau of Operational Programming and another to the Chief of the Field Service Division. This report was sent first to the Director of the Bureau of Operational Programming because Applicant knew him to be a man of principle who would grasp the gravity of the situation. Applicant now knows that this report never reached the Director but was instead placed in a file by the Chief of the Middle East Division in the Bureau of Programming as if it were a routine matter. At this time the FAO Locust Control discovered that Applicant had already initiated a serious investigation which threatened to reveal one of the darkest chapters in the history of the United Nations—organized traffic of contraband goods carried in United Nations vehicles from Aden to Saudi Arabia and facilitated because the jurisdiction of the Locust Control Project extended across the relevant borders. Applicant received a visit from a member of Mr. Singh's department in Rome requesting him to support the recommendation for more equipment and vehicles for the Locust Control Project to be financed by UNDP. While, in the meantime, two officers from Mr. Singh's department, Mr. Lubani and Mr. Skaff, were dispatched by Mr. Singh from FAO Rome to

Beirut to seek the removal of Applicant from Mr. Paul Marc Henry, Associate Director, Bureau of Programming Operations, who was travelling to Turkey with the Chief of the Middle East Division in the Bureau of Operational Programming. Undoubtedly, Mr. Paul Marc Henry was already distressed, and likely antagonized by the Applicant's request to postpone the Wadi Zabid project as being ill-conceived (doc. No. 3, Annexes 39 and 42) and by the Applicant's repeated complaints about mismanagement of programming for Yemen at UNDP Headquarters. The Applicant had complained particularly about approval by UNDP Governing Council of the extension of projects that even the Yemeni Government wanted terminated, but whose extension was insisted upon by the United Nations agencies involved, solely for the purpose of maintaining work for experts too gravely compromised to be relocated. Mr. Henry, while unaware of the criminal aspects of the deplorable situation in Yemen, was evidently willing to allow the organizational incompetence he was apprised of to continue. He apparently regarded it as essential to remove the Applicant from the scene as soon as possible, and used his authority to obtain Applicant's removal from Yemen.

53. During the same period Applicant received a letter (*ibid.*, Annex 43) from the Resident Representative in Turkey who, without doubt, was aware of the situation and of Applicant's pending removal. In it he said, *inter alia*, that he hoped that the letter "will reach you wherever you may be" and continued, "Toni told me that you had done an excellent job in Yemen and I was glad indeed to hear this but you must take care of your health and not allow the buffoons at Headquarters to get you down".

54. Applicant would like to emphasize that his recall may also have been motivated by an investigation that he had undertaken to uncover behaviour that was of a grave criminal character. In February 1969 the Applicant received a visit from the Administrative Officer, a Swedish national, of the Children's hospital financed by the Swedish organization "Save the Children Fund". This Administrator, accompanied by two Swedish volunteer nurses, before returning to the country, reported to the Applicant that a criminal action had been covered up by United Nations officials. Various medicines provided as aid by WHO and UNICEF found their way on to the shelves of pharmacists instead of having been delivered to the appropriate facilities. The Swedish official, supported by the two nurses, stated that if this medicine had been directed to the proper channels and not to the black market, the lives of many children could have been saved.

55. Within a month a similar complaint was made by a French doctor from the French Medical Mission. In April, after the departure of the WHO Country Representative, a young doctor from the Soviet Union who had just been assigned by WHO, informed the Applicant of the discovery of an important inventory of medicines provided by WHO and UNICEF, which had not been delivered to the Government of Yemen. By the time of his discovery of this shocking waste the medicines were useless as their expiration date was a whole year earlier. If this medicine had been delivered, as intended, many lives might have been saved as severe shortages hampered treatment in Yemen.

56. Applicant would emphasize that this incident had been one of the matters which he had hoped to discuss with Headquarters in his cable on 24 April 1969, which had referred to "programme coverage of our operations in YAR which cannot be discussed by communications" (doc. No. 3, Annex 45).

57. Article 101 of the Charter of the United Nations requires that the "paramount consideration in the employment of the staff and in the determination of conditions of service shall be the necessity of securing the highest standards of

efficiency, competence, and integrity". In attempting to meet these standards of integrity and to fulfil the oath Applicant took as an employee of the United Nations, Applicant has been penalized, his personal and professional reputation has been destroyed, he and his family have suffered severe financial and emotional damage; but perhaps most importantly, the ideal of service to the United Nations has been tarnished. Representatives of the United Nations must place fidelity to the ideals of that Organization above considerations of personal prudence, let alone gain.

58. As a representative of the United Nations, Applicant was bound by the provisions of the Charter and by the Convention of Privileges and Immunities of the United Nations adopted 13 February 1946. Section 21 of that Convention requires that:

"The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities, and facilities mentioned in this article."

Instead of ensuring that "the highest standards of efficiency, competence, and integrity" would be maintained, the Respondent actually, even if unintentionally, penalized Applicant for his effort to uphold a standard of service that one would expect of representatives of the United Nations in circumstances where shocking derelictions were a daily aspect of United Nations operations.

59. Accordingly, the International Court of Justice is respectfully requested to find that the United Nations Administrative Tribunal, by its failure to enquire into the underlying circumstances and by its failure to explain its denial of the Applicant's plea, failed to exercise its jurisdiction and committed a fundamental error in procedure which has occasioned a failure of justice. Applicant has presented, with as much documentation as possible given his difficult circumstances of destitution, an account of the conditions in Yemen that he was confronted by and of his efforts to rectify this situation by securing the assistance of Headquarters officials in UNDP. It is in this context of routine dereliction by the United Nations operation in Yemen that the treatment of the Applicant as unworthy of further assignment at his post in Taiz and as unsuitable for employment within the United Nations system as a whole becomes so shocking and is likely to have, may already have had, a demoralizing impact on other conscientious employees in the United Nations system. It is for these basic reasons that a request to restore the basic condition of the Applicant to the *status quo ante* involves a reasonable plea and one that, alone, conveys the sense that Applicant is not being penalized for what he has done. The Applicant realises that the Respondent may wish to contest or qualify the account of the facts, and would welcome such an exchange, but feels confident that the accuracy of his interpretations, given the extremity of the derelictions, would be upheld by any impartial investigation, and that the failure to conduct such an investigation was perhaps the most fundamental jurisdictional failure in the proceedings before the United Nations Administrative Tribunal.

Plea (e)

60. Under this plea, the Applicant requested the Administrative Tribunal to order the correction and completion of the Applicant's Fact Sheet which is circulated both within and outside the United Nations Development Programme,

with all the required periodic reports and evaluations of work; alternatively the Applicant requested payment to him of two years' net base salary.

61. The attention of the International Court of Justice is respectfully drawn to the fact that, in response to the unanimous recommendation of the United Nations Joint Appeals Board dated 3 June 1970 (doc. No. 3, Annex 2, para. 46 (i)), the UNDP formally agreed, on August 1970, to "re-examine the appellant's files with the view to filling the gaps in the records in accordance with established procedures, and bringing them up-to-date with all required periodic reports and evaluations of work which should then be reflected adequately in the appellant's fact sheet" (doc. No. 3, Annex 58). However, the Administrative Tribunal explicitly noted in its Judgement that the UNDP has not fulfilled the obligation voluntarily accepted by it:

"... following the Joint Appeals Board's recommendation the UNDP prepared additional reports in order to cover all the Applicant's service. The Tribunal however notes that this new fact sheet produced by the Respondent has gaps. . . . No report is mentioned for the period June 1965-June 1966." (Doc. No. 11, para. VIII.)

62. Given these circumstances, it is totally incomprehensible why the Tribunal should have passed over in silence the Applicant's plea. Accordingly, the International Court of Justice is respectfully requested to hold that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice. Although the injustice done here is of far less consequence than the recital under plea (d), it still represents an important failure to treat equitably a United Nations employee who was faced with a personal matter of great urgency. Inadequate periodic reports create a bad impression and make it virtually impossible to secure alternative employment within the United Nations system.

Plea (f)

63. Under this plea the Applicant requested the invalidation of the Applicant's periodic report covering his service in Yemen, prepared in September 1970; alternatively, payment by the Respondent to the Applicant of two years' net base salary. Since the Tribunal ordered the invalidation of this periodic report, Applicant has no further comments on this plea, and accepts the relief granted.

Plea (g)

64. Under this plea, the Applicant requested the Administrative Tribunal to order further serious efforts by the UNDP to place the Applicant in a suitable post within the UNDP, or within the United Nations Secretariat, or within a United Nations Specialized Agency; alternatively, the Applicant requested payment to him of two years' net base salary.

65. Plea (g) should not be confused with plea (d) which refers to the restoration of the Applicant to *status quo ante* of May 1969. By extending the Applicant's fixed term appointment for a period of two years beyond 31 December 1969 (plea (d)) only compensation for the period 1969 to 1971 would be covered. The Applicant sought to pursue a United Nations career as a matter of his life work. Given his recall from Yemen under such circumstances there seems to be a basic right to have the best possible opportunity to receive a new assignment within the United Nations system. The failure to place the Applicant in another suitable United Nations job constitutes a permanent liability to him

that can be partially offset by the payment sought. Plea (g) refers to the period which would have followed the legal termination of the Applicant's employment on a fixed-term basis.

"On 31 August 1970, the UNDP informed the Applicant that it did not intend to offer him another appointment in the future, as all possible efforts had been made to find a suitable post for him within UNDP or with other agencies when he was under contractual status with UNDP."

The Applicant wishes to stress that the claim of "all possible efforts" had been made on the basis of an incomplete and misleading Fact Sheet. Although the Tribunal argued that "the preparation of a corrected Fact Sheet becomes meaningless once UNDP decided not to take the necessary further steps to find the Applicant a new assignment" (doc. No. 11, para. VIII, p. 16), the Tribunal did not exercise its jurisdiction and order further meaningful efforts with a corrected Fact Sheet. Instead, the Tribunal confined itself to making the totally unfounded and unsupported statement that "it is not possible to remedy the situation by rescinding the contested decision, by ordering performance of the obligation contracted in 1969" (doc. No. 11, para. XIII, pp. 18-19). It should be appreciated that the Tribunal reached the conclusion that the Respondent "did not perform in a reasonable manner the obligation which he had undertaken". Accordingly, the International Court of Justice is respectfully requested to advise that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice. Here again the UNDP behaviour seems so unreasonable that it is, at minimum, necessary for the Administrative Tribunal to investigate Applicant's argument and explain why it is unfounded.

Plea (h)

66. The Applicant would here like to state that whereas plea (e) pertained to the pending corrections, plea (h) pertains to injuries sustained by the Applicant for inadequate correction of his file in the past. A brief review of the violations already committed by the Respondent on this issue is provided for the Court.

The Respondent violated paragraph 13 of Administrative Instruction ST/AI/115 (Doc. No. 16) by not undertaking the required investigation of the Applicant's statement of rebuttal to his periodic report covering his service in Syria from 30 June 1964 to 30 June 1965.

The Respondent violated paragraph 7 of the above Administrative Instruction by not providing the Applicant with an interim periodic report upon the Applicant's reassignment to Lebanon in December 1965. Under the terms of paragraph 7 of Administrative Instruction ST/AI/115, such an interim periodic report was also required in view of the fact that Applicant's immediate supervisor in Syria left his post at about the same time.

The Respondent violated paragraph 7 of the above Administrative Instruction by not providing the Applicant with an interim periodic report upon the Applicant's reassignment from Lebanon to New York in June 1966. Independently of the requirements of paragraph 7 of Administrative Instruction ST/AI/115, a periodic report in June 1966 was also called for under the terms of paragraph 2 of the same Administrative Instruction.

The Respondent violated paragraph 2 of the above Administrative Instruction by not providing the Applicant with a periodic report in June 1967.

The Respondent violated paragraph 5 of the above Administrative Instruction by his erroneous choice of the Second Reporting Officer in the case of the periodic report covering the Applicant's service from November 1966 to November 1967.

The Respondent violated paragraph 7 of the Administrative Instruction by not providing the Applicant with an interim periodic report upon the conclusion of the Applicant's assignment with UNITAR in March 1968.

The Respondent violated paragraph 2 of the above Administrative Instruction by not providing the Applicant with a regular periodic report in June 1968.

The Respondent violated paragraph 7 of the Administrative Instruction by not providing the Applicant with a periodic report upon the Applicant's recall from Yemen in May 1969. Alternatively, the Respondent violated paragraph 2 of the above Administrative Instruction by not providing the Applicant with a regular periodic report in June 1969.

Since the Applicant served on a fixed-term appointment, the extension of which obviously depended largely on his periodic reports, these repeated violations of the Applicant's right to receive regular and interim periodic reports on the occasions specified in Administrative Instruction ST/AI/115 were particularly harmful.

67. The aforementioned violations by the Respondent necessarily constituted injuries for the Applicant. The Administrative Tribunal's silence concerning plea (h) is, therefore, all the more incomprehensible as the Tribunal explicitly accepted the Applicant's contention that repeated violation by the UNDP of the Administrative Instruction ST/AI/115 had occurred (doc. No. 11, para. IV).

68. Accordingly, the International Court of Justice is respectfully requested to advise that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (i)

69. Under plea (i) the Applicant requested the Administrative Tribunal to order payment to him of two years' net base salary as compensation for injury sustained by the Applicant as the result of the continuous violation by the UNDP of its obligation to make serious efforts to find an assignment for the Applicant. Plea (i) represents an effort by the Applicant to identify the separate ingredients of injury that he believes have been incurred. Plea (i) is closely linked with plea (g) yet the two pleas are not one and the same. Plea (g) refers to further serious efforts for employment or the payment to the Applicant of two years' net base salary. Plea (i) refers to the compensation for injuries already sustained by the Applicant. The Tribunal by using the word "compensation" to describe the sum of six months' payment which they apparently viewed as overlapping plea (g) is a serious and unwarranted confusion. (Doc. No. 11, para. XIII, p. 18.)

70. The failure of the Respondent to fulfil his obligation to make serious efforts for the re-employment of the Applicant resulted in the Applicant's being thrust into a state of flux, of insecurity, and confusion. Furthermore, the Applicant lost all opportunity for gainful employment during this period, and at least deserves a reasoned denial by the Tribunal of this plea.

71. Accordingly, the International Court of Justice is respectfully requested to advise that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (j)

72. Under plea (j) the Applicant requested the Administrative Tribunal to order payment to him of five years' net base salary, as compensation for injury sustained by the Applicant as the result of prejudice displayed against him.

73. Once more, the Tribunal, while coming to the unprecedented conclusion for the first time in the history of the United Nations that the Applicant had been the victim of prejudice displayed against him by two senior officials of the UNDP, passed over in complete silence the Applicant's plea for compensation. This failure of enquiry and explanation is all the more blatant given the Tribunal's finding. Referring to the periodic report on the Applicant's performance submitted by the Resident Representative in September 1970, the Tribunal concluded that "the ratings and the hand-written comments, made after an interval of more than one year, can be due only to a violence of feeling and lack of self-control which, in this case, reveal prejudice on the part of the first reporting officer against the staff member who was the subject of the report". (*Ibid.*, para. XI, p. 18.) Referring to the second reporting officer's comments, the Tribunal concluded:

"... that the prejudice shown by the first reporting officer towards the Applicant was in no way corrected by the superior officer required to participate in the drafting of the report which the Respondent had agreed to prepare, as he was obliged to do under the Staff Rules" (*ibid.*, para. XII, p. 18).

74. After considering the whole of the report, the Tribunal acceded to the Applicant's plea (f) and ordered the invalidation of the previously mentioned prejudiced report. According to the Tribunal's own statements, two senior officials of the UNDP displayed prejudice against the Applicant. This was not the first time in the Applicant's career that he had been exposed to prejudice. Evidence of prejudice against the Applicant abounds throughout the history of the Applicant's association with the UNDP. In November 1965, despite the circumstances, the Applicant received a surprisingly good periodic report. Under Section I, the Resident Representative gave to the Applicant average ratings in nine categories, below-average ratings in three categories, and an above-average rating in one category. Nevertheless, the second reporting officer (at United Nations Headquarters) rated the Applicant as being over-all below average. It should be noted that during the entire period covered by the report, the second reporting officer had been Deputy Resident Representative in Malaysia; he had at no time exercised any supervisory authority over the Applicant and, in fact, had never even met the Applicant. This second reporting officer was the same man who had signed the periodic report ordered invalidated by the Tribunal, the report covering the period of service in Yemen.

75. When the Applicant signed the report in November 1965, he appended to it a written statement of rebuttal. Having been informed of the rebuttal, the Resident Representative wrote to UNTAB/Special Fund in New York, *inter alia*:

"I am glad to say that Mr. Fasla's performance has definitely improved over the past few months. He has shown increasing interest in his work. He takes his responsibilities seriously." (Doc. No. 3, Annex 10.)

However, these favourable comments which effectively constituted a modification of the Applicant's periodic report were not joined to the report nor inserted in the Applicant's Official Status File in any other manner. It was only

four years later that they were made available to the Joint Appeals Board. Nor did UNTAB/Special Fund take further action with regard to Applicant's rebuttal. Although the Applicant remained in Syria for another six months beyond the period covered in his first periodic report, no further report was issued to him concerning his performance in the service of the UNTAB/Special Fund office in Damascus. It is evident from the Resident Representative's modified views quoted above that such a further report would have been favourable to the Applicant.

76. There was also the concealment of two favourable assessments of the Applicant's performance in Lebanon (doc. No. 3, Annex 86), followed immediately by the failure to request a periodic report from the authors of those assessments (*ibid.*). There is the lack of consultation with the Applicant's supervisor with regard to the Applicant's reassignment within the UNDP in New York in January 1967 (*ibid.*). There is the mystery surrounding the acceptance and subsequent rejection of the Applicant's candidacy by the FAO (*ibid.*). There is the circumvention of the Applicant's second supervising officer with regard to the periodic report late in 1967 (*ibid.*). There is the failure to request a periodic report from UNITAR (*ibid.*). There is the assignment of the Applicant to Yemen under a Resident Representative whose character seems to have been well known to the UNDP. There is the request to the Resident Representative in Yemen in January 1969 to seek the Applicant's resignation (*ibid.*). There is the concealment of the report of the senior UNDP official who visited Yemen in February 1969. There is the release of prejudicial information about the Applicant to the Permanent Representative of Yemen to the United Nations, in violation of Staff Regulation 1.5 (*ibid.*). There is the apparent blaming of the Applicant for errors committed by high-level officials in the UNDP and at FAO, as well as the apparent decision to remove Applicant from the scene to accommodate pressures from the FAO (*ibid.*). There is the concealment of the favourable assessment of the Applicant's performance by the Consultant to the UNDP Administrator in March 1969 (*ibid.*). There is the apparent decision taken by UNDP in March 1969 to dispense with the Applicant's services (*ibid.*). There is the almost total rupture of contact between the UNDP and the Applicant during the period March-May 1969 (*ibid.*). There are the perplexing "consultations" with the UNDP in New York (*ibid.*). There is the concealment of a further favourable assessment of the Applicant's performance by the new UNDP Special Representative in Yemen (*ibid.*). There are the so-called efforts to find another assignment for the Applicant which were conducted in such a way as to assure their failure. In light of this pattern of abuse, the Tribunal's bypassing of plea (j) constitutes a serious failure of enquiry with damaging results for Applicant's basic contention.

77. Accordingly, the International Court of Justice is respectfully requested to advise that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (k)

78. Under plea (k) the Applicant requested the Administrative Tribunal to order payment to him of the symbolic amount of one Yemen rial, as compensation for the emotional and moral suffering inflicted by the UNDP upon the Applicant. It is, admittedly, an unorthodox plea, but it does arise out of a very special set of circumstances.

79. Plea (k) is of extreme symbolic value to the Applicant. It involves an acknowledgement of the emotional and moral suffering that was inflicted upon

him during the period of his stay in Yemen. During this period the Applicant made continuous efforts to combat the corruption that he encountered in Yemen while trying to fulfil the humanitarian mission of the United Nations. Failure of the Tribunal to even consider this plea implies the legal irrelevance of the moral and emotional suffering experienced by the Applicant. How can this denial be reconciled with the Tribunal's explicit acknowledgement that the Applicant has been the object of prejudice on the part of the Resident Representative in Yemen? How can it be reconciled with the fact that the difficult conditions prevailing in the UNDP office in Yemen were well known to several officials of the UNDP and explicitly recognized by the Joint Appeals Board? (doc. No. 3, Annex 2, para. 45). The symbolic amount of one Yemen rial as requested relief was selected to underscore the fact that due to the illegal currency exchange operations engaged in by several UNDP officials that the UNDP was at the time a symptom of Yemeni misery and degradation rather than part of its rectification.

80. The International Court of Justice is respectfully requested to advise that the Tribunal, by failing to even consider this plea, failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (l)

81. Under plea (l) the Applicant requested the Administrative Tribunal to order payment to him of one year's net base salary, as compensation for delays in the consideration of the Applicant's case, especially in view of the fact that no Joint Appeals Board was in existence during the first four months of 1969 because the Respondent had failed to appoint a panel of chairmen.

82. The Administrative Tribunal failed to consider fully this plea. It confined itself to noting certain dates and to stating the conclusion "that no abnormal delay attributable to the Respondent can be found in the conduct of this case, and that the request must be rejected" (doc. No. 11, para. XVI). The Tribunal neither defined its criteria for "abnormal delay" nor commented on the Applicant's argument that no United Nations Joint Appeals Board was in existence during the first four months of 1969 contrary to the rule established. The Applicant wishes to reiterate that the non-availability of the appellate machinery delayed consideration of his case for several months, and that such delay certainly is "abnormal" in view of the requirement in Staff Rule 111.3 that the Joint Appeals Board "shall act with the maximum of dispatch" and "shall submit its report to the Secretary-General within three weeks after undertaking consideration of an appeal". (Doc. No. 3, Annex 15.) As to the Tribunal's statement that the Applicant himself "requested extensions of the time limits on several occasions" (doc. No. 11, para. XVI) the Applicant wishes to point out that such requests were motivated by the need to submit the two Joint Appeals Board cases to the Tribunal jointly rather than separately, as requested by the Executive Secretary of the Administrative Tribunal, and that, in any case, the Applicant never asked to be compensated for delays caused by himself.

83. Under the circumstances, the International Court of Justice is respectfully requested to advise that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (m)

84. Under plea (m) the Applicant requested the payment to the Applicant of the sum of \$1,000 for expenses in view of the fact that, although the Ap-

plicant was represented by a member of the panel of counsel, the complexity of the case necessitated the Applicant's travel from his place of residence in California to New York in May 1970 as well as frequent trans-continental telephone calls to the Applicant's counsel before and after that date. Concerning this plea, the Tribunal merely stated: "Since the Applicant had the assistance of a member of the panel of counsel, the Tribunal finds this request unfounded and rejects it." (Doc. No. 11, para. XVIII.)

85. It is true that the Applicant benefited from the assistance of a staff member on the list of counsel and he gratefully expressed his appreciation for the diligence and competence of that staff member. Yet, the complexity of the case which caused the Applicant to incur reasonable and unavoidable expenses far in excess of normal litigation costs can be attested to by the tremendous number of documents necessary to support the Applicant's basic contentions. The Tribunal itself needed 24 single-spaced pages to give a bare outline of the facts and did not even deal with several of the Applicant's pleas.

86. After the termination of the Applicant's employment, he moved his family back to California, where they had ties, and from where he had been initially recruited. Not wishing to be separated the whole time from his family, and naturally wishing to avoid the substantial expenses involved in maintaining himself in New York separate from the family residence, the Applicant returned to California.

87. As the inevitable questions arose in the course of this complex and involved litigation, it was necessary for the Applicant to place several trans-continental telephone calls and, on one occasion, to fly to New York to consult with his counsel. Anyone acquainted with complex litigation would recognize the necessity of frequent consultation between counsel and client, and the impossibility of consulting solely through correspondence. The Applicant would also note that his claimed expenses would have been considerably higher had he remained in New York for the duration.

88. Under these circumstances, it seems evident that these expenses were reasonable and that they could not have been avoided except by an extremely inefficient and ineffective client-counsel relationship (thereby prejudicing the Applicant's chances of success). The Applicant's costs were in excess of normal litigation costs before the Administrative Tribunal, which for most applicants involve only paper, copying, typing and other incidentals.

89. The Tribunal has failed to exercise the jurisdiction and competence that it has declared applicable on numerous occasions to cases decided by it. From its very inception, it has laid down a consistent pattern of awarding costs to successful applicants. In Judgement No. 2, *Aubert and 14 Others*, the Tribunal awarded costs for stenography, typing, translating, and outside attorney's fees. In Judgement No. 15, *Robinson*, the Tribunal also awarded reimbursement of costs. However, a fuller explanation of the criteria to be applied to requests for the reimbursement of costs was given in Judgement No. 18, *Crawford*, where the Tribunal stated:

"15. Whereas the Tribunal having received from the Applicant a request for reimbursement of legal costs . . . notes, with regard to its power to pronounce on such requests, that Article 12 of its Rules authorizes applicants to be represented by counsel, and that accordingly costs may be incurred in submitting claims. It recalls in a general statement of 18 December 1950 it pointed out that it could grant compensation for such costs if they are reasonable in amount and if they exceed the normal expenses of litigation before the Tribunal. Recalling the case law of the

League of Nations Tribunal (Judgements No. 13 of 7 March 1934 and No. 24 of 26 February 1946), 'il n'y a aucune raison pour déroger au principe général de droit, que les dépens, sauf compensation, sont payés par la partie qui succombe', the Tribunal considers that it is competent to pronounce upon the costs." (Emphasis added.)

See also Bastid, "Les Tribunaux administratifs internationaux et leur jurisprudence", 92 Hague *Recueil des cours*, 347 at 503 (1957-II).

90. The Tribunal awarded costs in that case and in Judgements Nos. 28-38, *Wallach, Gordon, Svenchansky, Harris, Eldridge, Glassman, Older, Bancroft, Elveson, Reed, Glaser*. Costs were also allowed to the successful Applicants in Judgements 76-80, *Champoury, Coffinet, Ducret, Fath and Snape*.

91. Even after the Tribunal evidently changed its practice of awarding costs for outside attorney fees because there was provision for representation of applicants by United Nations staff members who were on the list of counsel, the Tribunal has continued to consider itself competent to assess costs in favour of successful applicants. (See, e.g., Judgement No. 92, *Higgins*, and Judgement No. 123, *Roy* [31 October 1968].)

92. Applicant here did not request the payment of costs for the assistance of outside counsel for representation before the Tribunal, such costs were disallowed in the *Roy* case. However, he incurred costs, exclusive of counsel fees, which were necessary, unavoidable and in excess of normal litigation expenses before the Tribunal.

93. The Tribunal itself has previously found that it had jurisdiction to award such costs to a successful applicant and that such a practice was supported by the jurisprudence of the League of Nations Tribunal, considerations of fairness and equity, and by general principles of law. (Applicant would also note that the Administrative Tribunal of the International Labour Organisation likewise considers itself competent to award substantial costs to successful applicants. See Judgement No. 191, *in re Ballo*, 15 May 1972.) The Tribunal thus rejected the argument of the Legal Department of the United Nations that such general principles do not exist. (See Memorandum of the Legal Department 13 December 1950 [A/CN.5/5].)

94. The Applicant submits that the Administrative Tribunal clearly failed to consider his plea for the reimbursement of costs which were necessary, unavoidable and in excess of normal litigation expenses before the Tribunal.

95. Accordingly, the International Court of Justice is respectfully requested to advise that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (n)

96. Under plea (n) the Applicant requested the Administrative Tribunal to order payment to him of five years' net base salary, as compensation for the damage inflicted on the Applicant's professional reputation and career prospects as the result of the circulation by the UNDP, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant.

97. Once more, the Tribunal not only did not award compensation but totally ignored the plea in its Judgement, although it did not challenge the Applicant's basic contentions concerning the facts underlying his plea. In particular, the Tribunal found that an "incomplete and misleading" fact sheet concerning the Applicant's performance record was "circulated" by the UNDP "to the competent departments of UNDP, the United Nations and

specialized agencies", and that this circumstance "seriously affected his candidacy for a further extension of his contract or for employment by other agencies" (doc. No. 11, paras. IV and V).

98. Applicant believes that Articles 2 and 9 of the Statute give the Tribunal legal competence to award compensation to the Applicant for injuries inflicted by the Respondent upon the Applicant's professional reputation and future employment opportunities. Article 9 (3) states that where applicable, "compensation *shall* be fixed by the Tribunal". (Emphasis added.) The use of the imperative "shall" is significant. The Applicant submits that the correct construction of section 3 of Article 9 removes from the Tribunal any discretion to refrain from awarding compensation where the wrong cannot be remedied by the relief provided for in section 1 of Article 9 and where there has been no refutation of the facts underlying the claim and where the claimant has demonstrated the extent of injury sustained in a reasonable way.

99. The validity of the Applicant's claim that damages were inflicted to his professional reputation and career prospects as the result of misleading information can be substantiated by the letter of the Chief, Secretariat Recruitment Service, United Nations Office of Personnel to UNDP. He wrote, "Quite frankly, Mr. Fasla's periodic reports as summarized on his fact sheet do not encourage me to pursue his candidature". (Doc. No. 3, Annex 52.) Moreover, the UNDP Acting Resident Representative in Morocco, who received Mr. Fasla's report, wrote, "I am sorry not to be able to be more positive on Mr. Fasla's candidature, but the ratings of my colleagues at Headquarters and in the field prevent me from doing so". (Doc. No. 3, Annex 53.)

100. Regarding the award of damages, the Tribunal has stated:

"... in awarding damages [the Tribunal] has to be satisfied that the damages claimed follow naturally as a consequence of the action contested. It is a well-established rule of law that damages which are remote and contingent cannot be recovered." (Judgement No. 92, *Higgins*, para. XXI.)

It is clear that damage to professional reputation and employment opportunities claimed by the Applicant follow naturally from the actions of the Respondent in this case. This is not an instance of tortious acts having little or no bearing upon the damage and injury claimed. Rather, the acts attributable to the Respondent concerning falsification and distortion of the Applicant's employment record and its circulation could not possibly bear more directly upon his career prospects. That the damage is neither remote nor contingent is suggested by the two letters quoted above. (Doc. No. 3, Annexes 52 and 53.)

101. The Applicant would like to point out that there was no justification for the Tribunal's action by reason of the fact that there was no underlying wrongful act. The Tribunal itself declared that the Applicant's file had been distorted with the tacit approval, if not the actual connivance, of the Director, Bureau of Administrative Management and Budget, UNDP (doc. No. 11, para. XII). This is *prima facie* evidence of misuse of power with improper motive, it being quite apparent from the findings of the Tribunal that the actions of the Director, Bureau of Administrative Management and Budget, UNDP, were motivated by prejudicial considerations. Despite having recognized the wrongful acts attributable to the Respondent (doc. No. 11, paras. VIII, IX, X, XI, XII), the Tribunal failed to provide a remedy.

102. Therefore, the International Court of Justice is respectfully requested to advise that the Administrative Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (o)

103. Under this plea, (o), the Applicant requested the Administrative Tribunal to order payment to him of one year's net base salary as compensation for the further delay in the consideration of the Applicant's case early in 1971.

104. This delay was caused by the failure of the Respondent to present his decision concerning the second Appeal of the Applicant by mid-February 1971. The sequence of events was as follows:

On 17 September 1970, the Applicant submitted through his counsel a second Appeal to the Joint Appeals Board concerning the financial and legal implications of his recall from Yemen by the UNDP in May 1969. The Joint Appeals Board met to consider the case in November and December 1970, and transmitted its report to the Secretary-General on 16 January 1971. On 19 January 1971 the Applicant's counsel wrote a memorandum to the Chief, Staff Services, Office of Personnel, drawing attention to the fact that the Administrative Tribunal would not be able to consider the Application, together with the supplementary material at its session in March/April 1971 unless the Secretary-General's decision concerning the second Appeal was made known by mid-February at the latest. On 25 January 1971, the Chief, Staff Services, Office of Personnel, replied that he had checked with the Acting Chief of Rules and Procedures of the Office of Personnel and had been *assured* that the final recommendation would be submitted to the Secretary-General at the earliest possible date. (Doc. No. 3, Annex 71, emphasis added.) However, the Secretary-General's decision on the second appeal was communicated to the Applicant only in March 1971 by means of a letter from the Director of Personnel dated 8 March 1971, which reached the Applicant on 11 March 1971. Accordingly, it was not possible to complete the written proceedings concerning the supplementary material prior to the opening of the Tribunal's session on 29 March 1971. This delay was caused by the Respondent and resulted in the postponement of the Tribunal's decision until April 1972.

105. The Applicant contends that this delay on the part of the Respondent was either deliberate or wrongfully negligent and delayed unreasonably a decision on this case. To establish this contention, Applicant respectfully requests the Court to order the production of the dossier of the Administrative Tribunal, as required by Article 12, section 2, of the Statute and Rules of the United Nations Administrative Tribunal which states:

"The Executive Secretary shall make for each case a dossier which shall record all actions taken in connexion with the preparation of the case for trial, the dates thereof, and the dates on which any document or notification forming part of the procedure is received in or despatched from this office" (doc. No. 1, Annex 13).

Applicant also requests the production of the minutes of the Tribunal involving the proceedings of his case.

106. The Applicant was entitled to have the merits of this plea considered by the Tribunal. Thus the Applicant respectfully requests the International Court of Justice to advise that the Administrative Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (p)

107. Under plea (p) the Applicant requested the Administrative Tribunal to seek recalculation by the UNDP of the Applicant's salary and subsistence al-

allowances in the Yemen Arab Republic on the basis of the actual duration of the Applicant's assignment there, and to order payment to the Applicant of the difference between the recalculated amount and the amount the Applicant actually received while in the Yemen Arab Republic.

108. The Administrative Tribunal rejected this plea (doc. No. 11, para. XV) without giving any evident consideration to the essential fact that in the proceedings before the Joint Appeals Board, the representative of the Secretary-General stated that the UNDP would have recalculated the Applicant's salary and allowances if he had been assigned to another post within one year of his assignment to the Yemen post (doc. No. 3, Annex 67, para. 34). However, the Respondent based the refusal to recalculate on his argument that the Applicant had never been reassigned after his recall from Yemen, implying that the Applicant was in some "floating" capacity until the date of his separation (*ibid.*, para. 24). Since the Joint Appeals Board subsequently found that the Applicant's duty station had, in fact, been changed from Yemen to New York in May 1969 (*ibid.*, para. 40), and since this finding was accepted by the Secretary-General (doc. No. 3, Annex 68), it would appear that the Administrative Tribunal should have ordered the UNDP to treat this set of circumstances as equivalent to a reassignment ordered within one year. Applicant would like to draw attention to the dissenting opinion by the member elected by the staff, attached to the report of the Joint Appeals Board of 18 January 1971 (doc. No. 3, Annex 67):

"I concur completely with the Board's finding, in paragraph 40 of its report, that in May 1969, the appellant was transferred to Headquarters and his duty station was changed to New York. Accordingly, I support the Board's recommendation, made in the same paragraph, that the appellant should receive the difference between the New York and Taiz post adjustments for the period from May to December 1969.

However, I cannot agree with the majority view of the Board, recorded in paragraph 41 of its report, that no recommendation should be made in favour of retroactive adjustment of the appellant's salary in Yemen. In my opinion, a clear case for such an adjustment has been established by the statement of the representative of the Secretary-General which affirms that the UNDP would have recalculated the appellant's salary and allowances if he had been assigned to another post within one year of his assignment to the Yemen post (para. 34 of the report). I am supported in this opinion by the fact that the UNDP has not attributed to the appellant the responsibility for his abrupt recall. Under the circumstances, I must regard the Board's recommendation of a conditional *ex gratia* payment as neither adequate nor equitable to the appellant."

109. Applicant believes this statement to be persuasive. In any event, the Tribunal had an obligation to at least provide Applicant with a reasoned rejection of his plea.

110. The International Court of Justice is therefore respectfully requested to advise that the Administrative Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

Plea (q)

111. Under plea (q) the Applicant requested the Administrative Tribunal to order payment to him of five years' net base salary as compensation for an illegal suspension from duty. Applicant contends that he was placed on special

leave with pay from 10 September 1969 until 31 December 1969 against his will, and that this action was tantamount to a suspension from duty as envisaged in Staff Rule 110.4 (doc. No. 1, Annex 15):

"Suspension Pending Investigation

If a charge of misconduct is made against a staff member, and the Secretary-General so decides, the staff member may be suspended from duty, with or without pay, pending investigation, the suspension being without prejudice to the rights of the staff member."

Since the UNDP brought no charges against him, this suspension was impermissible, and, moreover, injured Applicant's prospects for obtaining a further appointment. As such, the suspension constituted a separate wrong.

112. Applicant asserts that he neither had requested permission to go on home leave nor became a party to any agreement concerning such leave. He was ordered to proceed on home leave on the original basis of his request made in April 1969 from Yemen to report in person on very delicate field circumstances. The imposed and unplanned nature of his home leave may be seen from the text of his cable from Algiers dated 17 June 1969 (doc. No. 3, Annex 54).

113. The Applicant asserts that terms contained in a legal document must be interpreted according to "their natural and ordinary meaning in the context in which they occur" (*I.C.J. Reports 1950*, p. 8). The ordinary meaning of the key operative term in Staff Rule 105.2 (a), "granted" supports the Applicant's contention. The text of Staff Rule 105.2 (a) (doc. No. 1, Annex 15) is as follows:

"Special Leave

(a) Special leave, with full or partial pay or without pay, may be granted for advanced study or research in the interest of the United Nations, in cases of extended illness, or for other important reasons for *such period* as the Secretary-General may prescribe." (Emphasis added.)

Accordingly, the special leave referred to in Staff Rule 105.2 (a) is a leave requested by the staff member on his own initiative and in his own interest. This interpretation is strongly implied by the list of purposes in the statement of the rule for which special leave may be granted. As the Applicant never requested special leave, and had no reason to do so, the special leave conferred by the UNDP fiat clearly does not fall under the provisions of Staff Rule 105.2 (a).

114. The Tribunal rejected this plea, stating that the Applicant's placement on special leave in 1969 was correct in view of the wide discretion given the Secretary-General under Regulation 5.2 of the Staff Regulations which provides: "Special leave may be authorized by the Secretary-General in exceptional cases."

115. The Applicant respectfully submits that the Tribunal's reasoning completely ignores the difference in meaning between authorization and imposition, and he would draw the attention of the International Court of Justice to paragraph 3 of the dissenting opinion by the member elected by the staff, attached to the report of the Joint Appeals Board of 18 January 1971 (doc. No. 3, Annex 67):

"Finally, I am unable to subscribe to the majority view of the Board, stated in paragraph 42 of its report, that the placement of the appellant on leave represented a valid exercise of administrative authority under the Staff Rules and Regulations of the United Nations. In my opinion, the

right to perform one's functions is a fundamental right under any contract of employment. That right must not be abridged by the imposition of special leave under Staff Rule 105.2 which applies to an altogether different situation. In the present case, the arbitrary nature of this action was aggravated by the failure of the UNDP to substantiate to the Board the alleged urgency of this exceptional measure, as well as by the failure of the UNDP to employ the appellant at Headquarters while a new assignment was being sought for him. It is also obvious to me that the barring of the appellant from the functions for which he had been recruited diminished his prospects of obtaining an extension of his fixed-term contract."

The Tribunal also maintained that "the Applicant raised no objection to the granting of special leave with full pay when he was informed on 22 May 1969 that he would be placed in that situation after the end of his home leave, if there was no possibility of employing him" (doc. No. 11, para. XIV). The Tribunal's statement is misleading in view of the fact that the Applicant had no opportunity to object to a proposed administrative decision before it was formally made. After the decision was made the Applicant did protest on 12 September 1969.

116. In view of this evidence and of the evidence presented in plea (d), the International Court of Justice is respectfully requested to advise that the Tribunal failed to exercise its jurisdiction and/or committed a fundamental error in procedure which has occasioned a failure of justice.

117. In considering these various pleas the Applicant has tried to show his basic rationale for each one to make it clear that he was the victim of a series of separate injuries. The Applicant also emphasizes in this presentation the fundamental character of plea (d) from which the other injuries are all, in a sense, derivative. The Applicant did sustain multiple injuries arising from multiple wrongs and believes that justice would be served by their reimbursement. The limited access of Applicant to the documentary record and his absence of financial resources has made the factual recitals less authoritative than is desirable. Nevertheless, Applicant believes that a fair consideration of the whole record in this case would sustain his basic contentions about the deplorable role of the UNDP operation in Yemen and about his subsequent treatment by the Headquarters office in New York. In any event, Applicant believes there is ample basis for this Court to conclude that the United Nations Administrative Tribunal "failed to exercise jurisdiction vested in it" and "committed" several fundamental errors "in procedure which has occasioned a failure of justice" with respect to Applicant.

118. Prior to the conclusion of the Applicant's statement the Applicant would like to oppose as unacceptable the position taken by the Respondent regarding the status of the General Committee and the production of documents in the case by referring this Court to "Documentation relating to the formulation of Article 1 of the Statute of the Administrative Tribunal", "Documentation of the Special Committee on Review of Administrative Tribunal Judgements", "Documentation of the Tenth Session of the General Assembly" and "Documentation of the Twelfth Session of the General Assembly". Applicant feels that the Respondent seeks to shift the emphasis from the two questions for which the advisory opinion was requested to a determination of the legitimacy of the General Committee and the extent and nature of its powers.

119. The attention of the International Court of Justice is also drawn to the following consideration: in the Secretary-General's Bulletin (ST/SGB/131)

of October 1966 on page 13, the General Legal Division of the Secretariat is expected to "represent the Secretary-General before the Administrative Tribunal and, on request, advise the Tribunal on legal questions". One must question the adequacy of such representation in cases, such as the present one, involving the Secretary-General as Respondent. An advisor is assumed to serve in the capacity of a disinterested third party. How can the "advisor" simultaneously be the Respondent and at the same time be impartial?

Conclusions

120. The Applicant respectfully submits that the prime public issue before the International Court of Justice centres around his contention that the United Nations failure to renew the Applicant's fixed-term contract with the UNDP, which ran out in December 1969, was an intentional or negligent consequence of his efforts to deal with the deplorable conditions in the Yemen office.

121. Other issues, some of general importance others of particular interest, are presented by the dispute between the Applicant and the Respondent:

- (1) whether some high officials of the UNDP acted with prejudice toward the Applicant;
- (2) whether the abuses of the United Nations' practice of including periodic reports in an employee's personal status file (including rebuttals) were a factor in the non-renewal of his contract;
- (3) whether the Applicant is entitled to independent damages for the loss of his professional reputation because of the employment consequences of the Respondent's negligent or malicious failures to maintain the Applicant's file in good order; the suppression of favourable material is particularly suspicious in this regard;
- (4) whether the Applicant is entitled, under the relevant Staff Rules, to readjustments in certain allowances because his tenure in Yemen was suddenly and prematurely terminated before the lapse of a year;
- (5) whether the Secretary-General has the power to impose "special leave" under the cited Staff Rules in a case of this sort where general interests are at stake;
- (6) whether or not there should be some reimbursement to Applicant of the extraordinary costs of the appellate proceedings in this case.

122. All these issues relate to whether the United Nations Administrative Tribunal properly discharged its functions in the proceedings below. On the other hand, the Applicant appreciates the obligation of this Court to respond to the question put to it by the General Assembly's Committee for the Review of the Administrative Tribunal Judgements. At the same time Applicant respectfully believes that, important as these issues and terms are, the Court must shape that response in light of the wider concerns of justice in this case that arise from the denial of any opportunity by the Applicant, so far, to have his main grievance evaluated. So far, on this bigger concern, the Applicant has failed to secure a hearing from either of the two lower bodies before which he has previously put his case. These tribunals, perhaps understandably for specialized administrative tribunals, have viewed the basic facts of mistreatment arising out of United Nations dereliction in Yemen as beyond their ken. Thus, both the Joint Appeals Board and the Administrative Tribunal, each of which nevertheless rendered responses somewhat favourable to the Applicant in some respects (including, for instance, vindicating his claims on the important

prejudice issue) refrained from determining whether the non-renewal of the Applicant's contract was a direct consequence of his effort to mitigate and end corruption and irregularity in the United Nations operations in the Yemen Arab Republic and whether Applicant's actions to clear up the Yemen mess had "embarrassed" his superiors and organization at Headquarters. In other words, the acknowledged failures to maintain Applicant's file in fair condition or to make an adequate search for further employment must be linked to the underlying factual claim of the Applicant. It is this alleged linkage that gives this case its peculiar significance and has caused the Applicant to become so disillusioned with the United Nations. In a more technical vein, it is the failure of the Administrative Tribunal to investigate the link between Applicant's response to corruption in the Yemen office of the UNDP and the subsequent treatment of him at Headquarters that constitutes the main basis for an affirmative response to the two questions put to this Court for an advisory opinion.

123. The Joint Appeals Board, for instance, addressing itself to the issue of the prevalence of corruption among some high United Nations officials in the Yemen Arab Republic during the Applicant's period of service there, pleaded its inability to pronounce on it thus:

"42. The Board is conscious that it was not within its responsibilities to comment upon the conditions prevailing in the UNDP offices in Syria and Yemen and it is of the view that the appellant's references to the Resident Representative in Yemen were relevant only if it were shown that the Resident Representative's actions had in any way reflected prejudice against the appellant."

The Applicant submits that the focus of his case before the International Court of Justice, the world's highest judicial tribunal, must now necessarily shift to the question of obtaining guidance as to the *relevance* of this issue. The issue is important not merely because upon its determination depends the dispensation of justice or injustice to the Applicant, but its resolution bears, indeed, on the entire question of how United Nations officials should conduct themselves whenever confronted by a conflict between their solemn oath to serve the Organization in accordance with its high ideals of integrity and honour and their narrower concern with career prospects and bureaucratic loyalty.

124. So far the tribunals in this case have not touched on this underlying question which must be dealt with as the only proper basis on which to assess the quantum and character of damages in monetary terms. It is for this reason exceedingly disappointing that the United Nations, a supra-national bureaucracy dedicated to the highest human ideals, has so far failed utterly to vindicate the Applicant's efforts to vindicate elimination of corruption in a small but important corner of its operations, and has instead effectively destroyed his career as an international civil servant. The Applicant has knowledge that, following his exposures of the scandalous state of affairs in UNDP operations in the Yemen Arab Republic, a high-level team of investigators from the Organization looked into and reported on the situation that confirmed his portrayal. Such a report should be obtained to enable this Court to confirm for itself the accuracy of Applicant's depiction of circumstances. It should be pointed out that despite the UNDP's own effort to rectify its errors in line with and in response to Applicant's disclosures, there was, nevertheless, no impulse or willingness to reconsider the treatment of the Applicant. It may be, although this is speculation, that the Applicant was viewed like the ancient messengers who brought bad news to the king, and were punished for the news, rather than being rewarded for their service.

125. If, in the light of this central reality in the controversy, this Court were to uphold the Respondent's case on some narrow, technical or legal ground, it would, in effect, be sending a signal to the men and women who serve in the United Nations Organization that they dare not expose any corruption or irregularities in their Organization or they will risk losing their jobs, ruining their careers and subjecting their families to the traumas of financial insecurity, possibly for an indefinite period of time.

126. This brief explanation of Applicant's pleas seeks to demonstrate the various categories of damage inflicted upon the Applicant in these circumstances of recall and non-renewal of his contract. The Applicant wishes to stress that, at this point in time, after three years of litigation, material compensation without some provision for reinstatement, including a rehabilitation of Applicant's reputation, is not satisfactory relief. Very important issues of principle that touch on the Charter, on the integrity and morale of the international civil service, and on fundamental questions of human rights are at stake.

127. Applicant also requests that his counsel, Professor Richard A. Falk of Princeton University, be given an opportunity to supplement this written statement with an oral presentation. Because of time limitations on counsel and the absence of any financial resources for the legal preparation, this written statement does not provide as strong a presentation of Applicant's position as is possible. Applicant, therefore, requests this exceptional grant of an opportunity for oral presentation by his counsel.

*Statement prepared and submitted on
behalf of Mr. Mohamed Fasla*

(Signed) Richard A. FALK,

Albert G. Milbank Professor
of International Law
Princeton University.

Date: 3 December 1972.

LIST OF ATTACHMENTS TO THE CORRECTED
STATEMENT OF THE VIEWS OF MR. MOHAMED FASLA¹

1. Cable from Mr. Hardy to Mr. Taff, 24 April 1972
Cable from Mr. Taff to Mr. Hardy, 21 April 1972
Statement by Respondent, 17 April 1972
 2. Letter from Mr. Hersi to Mr. Fasla, 21 April 1969
 3. Letter from Mr. Hersi to Mr. Fasla, 21 April 1969
 4. Letter from Mr. Fasla to Mr. Hersi, 21 April 1969
 5. Letter from Mr. Hersi to Mr. Fasla, 21 April 1969
 6. Cable from Mr. Hersi to Mr. Fasla, 24 April 1969
 7. Cable from Mr. Hersi to Mr. Fasla, 24 April 1969
 8. Cable from Mr. Hersi to UNDEVPRO, Taiz, 24 April 1969
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¹ Attachments not reproduced. [*Note by the Registry.*]