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## REVIEW OF THE PROCEDURE PROVIDED FOR UNDER ARTICLE 11 OF THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Report of the Secretary-General

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# I. INTRODUCTION

1. At its forty-fifth session the General Assembly, by its resolution 45/239 B of 21 December 1990, requested the Secretary-General to undertake a study of the overall system of administration of justice in the Secretariat, taking into account, inter alia, suggestions made by Member States regarding the functioning of the Committee on Applications for Review of Administrative Tribunal Judgements. In section II of its resolution 47/226 of 8 April 1993, the General Assembly requested the Secretary-General to undertake a comprehensive review of the system of administration of justice, in response to the request contained in its resolution 45/239 B.

2. At its forty-eighth session, the General Assembly, at the request of Australia, Benin, France and Ireland, decided to include in its agenda an item entitled "Review of the procedure provided for under article 11 of the statute of the Administrative Tribunal of the United Nations". Subsequently the Assembly, by its decision 48/415 of 9 December 1993, requested the Secretary-General to carry out a review of the procedure provided for under article 11 of the statute of the Administrative Tribunal of the United Nations, taking into account the views expressed during the forty-eighth session and any further views that States might submit, and to report thereon to the Assembly at its forty-ninth session, either as part of the report requested under resolution 47/226 or separately.

3. The present report is submitted in response to that decision of the General Assembly. Initially, it was planned that a review of the procedure provided for under article 11 of the statute would constitute a section of the Secretary-General's comprehensive report on the reform of the internal system of justice in the Secretariat. However, it was subsequently concluded that since the study of the review procedure basically deals with an issue which is distinct from those discussed in the report on the reform of the system of justice, it would be preferable to issue this study as a separate document. This explains the delay in submitting the study to the Sixth Committee for its consideration.

# II. PROCEDURE PROVIDED FOR UNDER ARTICLE 11 OF THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

4. In 1954, in its advisory opinion on the effect of awards of compensation made by the United Nations Administrative Tribunal, the International Court of Justice advised the General Assembly that, in the absence of any review procedure, there was no possible ground for refusing to abide by a judgement of the Tribunal. In the light of that advisory opinion, the Assembly, at its tenth session, decided to add to the statute of the Tribunal a new article 11 establishing the review procedure described below.

5. Paragraph 4 of article 11 provides for the establishment of a Committee on Applications for Review of Administrative Tribunal Judgements (hereafter "the Committee on Applications"), which is authorized by the General Assembly under paragraph 2 of article 96 of the Charter to request advisory opinions of the International Court of Justice. The Committee on Applications is a subsidiary

organ of the General Assembly. It is composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly.

6. Paragraph 1 of article 11 enables a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal to submit to the Committee on Applications a written application asking the Committee to request an advisory opinion of the International Court of Justice based on any of the following four grounds:

(a) The Tribunal has exceeded its jurisdiction or competence;

(b) The Tribunal has failed to exercise jurisdiction vested in it;

(c) The Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations;

(d) The Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice.

7. In any case in which a request has been made for an advisory opinion, in accordance with paragraph 3 of article 11, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially to confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court.

8. Up to the date of the present report, proceedings before the Committee on Applications have been initiated 92 times. However, only in three cases has the Committee decided to request advisory opinions of the Court. This occurred in connection with the following Tribunal judgements: the Fasla and Yakimetz cases (judgements Nos. 158 and 333) submitted by the respective applicants, and the Mortished case (judgement No. 273) submitted by a Member State. In all cases the Court upheld the judgement of the Tribunal.

## III. CRITICISM OF THE REVIEW PROCEDURE PROVIDED FOR UNDER ARTICLE 11 OF THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

9. In the explanatory memorandum annexed to the letter requesting the inclusion in the agenda of the forty-eighth session of the General Assembly of an additional item regarding the procedure provided for under article 11 of the statute of the Tribunal, the representatives of Australia, Benin, France and Ireland pointed out that their action was motivated by the growing dissatisfaction among Member States with that procedure. The memorandum refers to the fact that in recent years several members of the Committee on Applications had voiced criticism of the procedure under article 11, as not furnishing an adequate means for review of the judgements of the Tribunal, and that such criticism had also been voiced in the Fifth Committee of the General Assembly. It was further noted that several delegations had undertaken consultations on the issue prior to the forty-eighth session of the Assembly and that a clear majority of those delegations considered that the procedure under

article 11 should be abolished as it would not be feasible to render it adequate by adjusting article 11. However, the memorandum states that there was also unanimity among the participants in the consultations that if that procedure were to be abolished some other mechanism, which would be seen to assist practically in the resolution of staff employment problems, should be established.

10. In the course of the deliberations in the Fifth Committee during the forty-fifth and forty-seventh sessions and in the Sixth Committee during the forty-eighth session of the General Assembly, as well as in the public meetings at the thirty-seventh and thirty-ninth sessions of the Committee on Applications, the views set out below were expressed regarding the existing review procedure provided for under article 11 of the statute of the Tribunal.

11. Written observations submitted by Member States pursuant to General Assembly decision 48/415 are contained in document A/49/258.

## A. Terms of reference of the Committee on Applications

12. It was pointed out by most of the representatives that the Committee on Applications did not play a useful role in the adjudication of staff disputes, owing to the restrictive nature of its terms of reference set out in paragraph 1 of article 11 of the statute.

13. In this connection, some representatives were of the view that, in cases where the Committee discovers certain deficiencies in Tribunal judgements which do not fall under one of the four grounds mentioned in paragraph 1 of article 11 of the statute, the Committee should be entrusted with the authority to correct those deficiencies (Egypt, United Arab Emirates, Lebanon, United Republic of Tanzania; see A/C.5/45/SR.27 and 28, A/AC.86/XXXVII/PV.3, A/AC.86/XXXIX/PV.5).

14. In the light of the foregoing comments, it was suggested by some representatives that either the work of the Committee should be brought to an end or the Committee should be given the capacity to perform judicial or quasi-judicial functions (Syrian Arab Republic, United Republic of Tanzania, United Arab Emirates). It was proposed in this regard to empower the Committee, in the cases where it finds that there is miscarriage of justice, to refer such cases back to the Tribunal, so that the Tribunal could review the judgements, in effect functioning as an appellate mechanism (Egypt, United Arab Emirates, Lebanon).

15. With reference to the issue of the competence of the Committee, the view was also expressed that staff members did not appreciate the strictly limited scope of the review procedure and that there was an increasing tendency on the part of staff members to apply to the Committee in cases where there was no prospect whatsoever of success (United Kingdom of Great Britain and Northern Ireland; see A/C.6/48/SR.36).

## B. Composition of the Committee on Applications

16. Most of the representatives expressed the view that the composition of the Committee constituted another serious problem. It was noted that the Committee was a political body, consisting of Member States, which was asked to perform quasi-judicial functions by taking decisions which had clear legal implications (Ireland, France, United Kingdom of Great Britain and Northern Ireland, Ecuador). Furthermore, as a political body, the Committee had a potential for politicization of the cases (Australia). In this regard, the opinion was expressed that, owing to the political composition of the Committee, its votes were sometimes explainable more in terms of geographic solidarity than on grounds of legal logic (France). In addition, it was mentioned that not all representatives attending sessions of the Committee were persons with legal training and, consequently, even from the practical point of view, the Committee was not equipped with the necessary expertise to perform its functions adequately (Ecuador, Ireland, United Kingdom of Great Britain and Northern Ireland). Reference was also made to the fact that the composition of the Committee as a political body made applications of staff dependable on the will of a political body (France).

17. With reference to the issue of composition, it was suggested by some delegations that, since the current structure of the Committee was not adequate, consideration might be given to whether the Committee should be abolished or could be replaced by a body structured so as to exercise a kind of judicial or quasi-judicial function (Syrian Arab Republic, United Republic of Tanzania, Ecuador, Ireland). It was suggested that such a body could be composed of a selected group of jurists appointed for this purpose by the Sixth Committee (United Republic of Tanzania, Ecuador).

## C. Role of the International Court of Justice

18. Several representatives raised serious doubts about the appropriateness of involving the International Court of Justice in staff disputes. It was stated in this regard that the matters which were subject to the Tribunal's judgements did not seem to be such as to justify involvement of the Court (Ireland, United Kingdom of Great Britain and Northern Ireland). It was pointed out that application of the review procedure provided for in article 11 resulted in the Court being seized of questions of civil service law which lay outside its usual purview (France). It was felt that such matters ought not to be assigned the level of significance which the Court customarily deals with, namely, primarily matters between States. It was further noted that the advisory procedure envisaged by the statute of the Court did not provide an appropriate adversary procedure necessary for an appeals tribunal, which is the Court's present role in this process (the Nordic countries).

### D. General trend developed during the deliberations in the Sixth Committee at the forty-eighth session of the General Assembly

19. It appears from the deliberations in the Sixth Committee during the forty-eighth session of the General Assembly that, as noted in the aforementioned explanatory memorandum by Australia, Benin, France and Ireland, most of the representatives no longer believe that adjustments of the review procedure provided for in article 11 of the statute of the Tribunal will meet the need for change to an adequate system. They are of the view that the Committee on Applications should be abolished and that it should not be replaced with another mechanism. Thus, the judgements of the Tribunal shall be final and without appeal. At the same time, most of the representatives are also of the view that the existing system of resolution of staff employment problems requires improvement and that this could be done through the establishment of an office of ombudsman dealing with potential conflicts at a preliminary stage, namely, prior to their submission to a judicial body.

## IV. BACKGROUND TO THE ESTABLISHMENT OF THE COMMITTEE ON APPLICATIONS

20. In order to determine whether the review procedure provided for in article 11 of the statute of the Tribunal should be abolished or modified, it is worth reviewing the considerations that prompted the initiation of the procedure.

### A. Administrative Tribunal of the League of Nations

21. In accordance with article VI of the statute of the Administrative Tribunal of the League of Nations, which was established by a resolution of the Assembly of the League on 26 September 1927, judgements of the Tribunal, were final and without appeal. The Supervisory Commission, which was responsible for the preparation of the statute of the Tribunal made it clear that the omission of a review procedure was deliberate. The Commission stated in its report that no provision for the revision of judgements of the Tribunal was inserted in the statute because it was considered that, in the interests of finality and of the avoidance of vexatious proceedings, the Tribunal’s judgments should be final and without appeal.

22. At its final session the Assembly of the League of Nations decided not to pay compensation awarded by the Tribunal in cases which involved 11 former employees of the League of Nations and two former employees of the International Labour Organization on the ground that the Tribunal had exceeded its jurisdiction in examining decisions of the Assembly itself. In the absence of any method of judicially reviewing those judgements, the decision of the Assembly prevailed. Thus, the Assembly as a political body refused to comply with a decision of its judicial body.

## B. Administrative Tribunal of the International Labour Organization

23. Until the dissolution of the League of Nations, the jurisdiction of its Administrative Tribunal was available to officials of the International Labour Organization (ILO). Upon the dissolution of the League, that Tribunal was taken over by and maintained by ILO.

24. Mindful of the experience of the League of Nations and in order to ensure that no difficulty would arise regarding the execution of judgements of the ILO Tribunal, the International Labour Conference decided on 9 October 1946 to amend the statute of the ILO Tribunal by including a new article providing for a review procedure. The Assembly concluded that the power to reconsider the Tribunal judgements should belong to the highest existing judicial authority, namely, the International Court of Justice. That amendment, which is contained in article XII of the statute, reads as follows:

"Article XII

"1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pension Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.

"2. The opinion given by the Court shall be binding."

25. When the statute of the Administrative Tribunal of ILO was amended to permit the extension of its jurisdiction to other organizations, the executive boards of specialized and similar agencies were empowered to request review of Tribunal judgements by the Court on a similar basis.

## C. Administrative Tribunal of the United Nations

26. The Administrative Tribunal of the United Nations was established in 1949 by General Assembly resolution 351 A (IV). The statute of the Tribunal had no provision for review of its judgements. Article 10 of the statute stated that the judgements were final and without appeal.*

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* It is worth mentioning in this regard that when, at the meeting of the Fifth Committee on 15 November 1946, the representative of Belgium asked the Rapporteur of the Fifth Committee (Greece), who had acted as Chairman of the Advisory Committee that had been set up to prepare the report on the Administrative Tribunal, whether the decisions of the Tribunal would be final or whether they would be subject to a revision by the General Assembly, the latter replied that, according to the draft statute, there could be no appeal from the judgement of the Tribunal.

27. In 1953 certain members of the General Assembly questioned the correctness of several judgements rendered by the Tribunal and proposed that the awards made by the Tribunal should not be paid. In response to those proposals the General Assembly, by its resolution 785 A (VIII) of 9 December 1953, decided to request an advisory opinion of the International Court of Justice on the questions whether the General Assembly had the right on any grounds to refuse to give effect to an award of compensation made by the Tribunal and what were the principal grounds on which the Assembly could lawfully exercise such a right.

28. In its advisory opinion, adopted on 13 July 1954 by nine votes to three, the Court concluded that the General Assembly had no right, on any grounds, to refuse to give effect to an award of compensation.

29. The Court made the following important observations, which were subsequently taken into consideration by the Assembly when it decided in 1955 to approve the review procedure contained in article 11 of the statute of the Tribunal:

> "This examination of the relevant provisions of the statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.
>
> "According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is res judicata and has binding force between the parties to the dispute. It must therefore be examined who are to be regarded as parties bound by an award of compensation made in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.
>
> "Such a contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of that Organization as its representative. When the Secretary-General concludes such a contract of service with a staff member, he engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts. If he terminates the contract of service without the assent of the staff member and this action results in a dispute which is referred to the Administrative Tribunal, the parties to this dispute before the Tribunal are the staff member concerned and the United Nations Organization, represented by the Secretary-General, and these parties will become bound by the judgment of the Tribunal.
>
> ...
>
> "The General Assembly could, when it adopted the statute, have provided for means of redress, but it did not do so. Like the Assembly of the League of Nations it refrained from laying down any exception to the rule conferring on the Tribunal the power to pronounce final judgments without appeal.

...

"In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the statute of the Administrative Tribunal by virtue of article II of that statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal. Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of the opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ - considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them - all the more so as one party to the disputes is the United Nations Organization itself." (I.C.J. Reports 1954, pp. 53, 55 and 56)

30. In essence the Court advised the General Assembly that, in the absence of a review procedure, there was no possible ground for the Assembly to refuse to abide by a judgement of the Tribunal. In response to this advisory opinion the Assembly, at its tenth session, decided to add article 11 to the statute of the Tribunal, containing the review procedure referred to above.

31. It should be pointed out that, in the course of the consideration of the establishment of a review procedure in 1955, some representatives expressed reservations similar to those made during the recent discussions in the Fifth and Sixth Committees of the General Assembly regarding the establishment of a review procedure. However, the overwhelming majority of the Sixth Committee and, subsequently of the Assembly, believed that cases which had arisen in the League of Nations, in the specialized agencies and in the United Nations had indicated a need for a judicial review procedure if a representative organ of the United Nations believed that the Organization's interests demanded such a review.

## V. ANALYSIS BY THE INTERNATIONAL COURT OF JUSTICE OF ITS COMPETENCE TO GIVE AN ADVISORY OPINION AT THE REQUEST OF THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

32. In the light of the reservations expressed by some representatives regarding the appropriateness of the use of the Court's advisory opinions in reviewing decisions of an administrative nature, it is worth examining the position taken in this connection by the Court itself.

33. The Court originally addressed the issue of its competence and the question of the appropriateness of the procedure provided for in article 11 of the statute of the Tribunal in 1973, when it considered the first request for an

advisory opinion submitted pursuant to the provisions of article 11 in the Fasla case (judgement No. 158). The position taken by the Court in that case was subsequently repeated in the Mortished and Yakimetz cases. Having examined its competence the Court concluded in those cases that:

> "The Committee on Applications for Review of Administrative Tribunal Judgements is an organ of the United Nations, duly constituted under articles 7 and 22 of the Charter, and duly authorized under article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of article 11 of the statute of the United Nations Administrative Tribunal. It follows that the Court is competent under article 65 of its statute to entertain a request for an advisory opinion from the Committee made within the scope of article 11 of the statute of the Administrative Tribunal." (I.C.J. Reports 1973, p. 175, para. 23)

> "That conclusion presupposes that in any specific case the conditions laid down by the Charter, the statute [of the Court], and the statute of the Administrative Tribunal are complied with, and in particular that a question on which the opinion of the Court is requested is a 'legal question' and one 'arising within the scope of (the) activities' of the organ." (I.C.J. Reports 1987, p. 30, para. 24)

34. With reference to the role played by the Court in the review procedure the Court observed that the Committee was a "political organ", vested with functions that were "normally discharged by a legal body" and were to be regarded as "quasi-judicial in character". However, as the Court explained, "there is no necessary incompatibility between the exercise of these functions by a political body and the requirements of the judicial process ... the compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system" (I.C.J. Reports 1973, p. 176, para. 25).

## VI. GENERAL OBSERVATIONS

35. As was stated in the 1984 report of the Secretary-General on the feasibility of establishing a single administrative tribunal (A/C.5/39/7), the review procedures for Tribunal judgements were not established primarily for the purpose of giving applicants, or even executive heads, another level of appeal. Its purpose was rather to enable States to challenge judgements that they considered for some reason as unacceptable and to do so before the principal judicial organ of the United Nations, rather than in a representative body such as the General Assembly of the United Nations in which the decisions of a subsidiary organ such as a tribunal might well be set aside on essentially political considerations. It was further stressed in the report that any proposal to eliminate or seriously limit the right of States to initiate the review process would seem contrary to the purpose for which this process was originally instituted and, if nevertheless accepted, might in the long run

endanger the authority of the tribunals* themselves. On the other hand, it does not appear to be essential that a review procedure that may be initiated by States be the same as that open to the applicant and to the executive head, or that it extend to all of these the same grounds for review. These observations remain valid today.

36. It is evident from the debate in the Sixth Committee during the forty-eighth session of the General Assembly that the overwhelming majority of representatives strongly believe that the present review procedure should be abolished. They also do not favour the creation of any new costly procedure, providing for the establishment of another judicial body that will be empowered to review judgements of the Administrative Tribunal and which would further complicate an already elaborate appeals system. They are of the view that judgements of the Tribunal should be final and without appeal.

## VII. CONCLUSIONS

37. It appears from the foregoing that the present review procedure, provided for under article 11 of the statute of the Administrative Tribunal of the United Nations, has not proved to be a constructive and useful element of the appeal system available within the Secretariat. On the contrary, this procedure has caused confusion and criticism which supports the view that the best solution would be to abolish the current procedure. Thus, judgements of the Tribunal would be final and there would be no procedure which would allow the parties to the proceedings before the Tribunal to challenge its judgements.

38. It could be argued, however, that, in the light of the 1954 advisory opinion of the International Court of Justice, it would not be in the best interests of the Organization to abolish the procedure completely which could allow Member States to seek an advisory opinion of the International Court of Justice in cases where they have reason to believe that the Tribunal has exceeded its jurisdiction or competence, which jurisdiction and competence were defined by the General Assembly in promulgating the Tribunal's statute (resolution 351 A (IV)), or if a Member State has reasons to consider that the Tribunal has erred on a question of law relating to the provisions of the United Nations Charter. These two grounds do not relate to the merits of the dispute between the staff member and the Organization but relate to fundamental constitutional issues of division of powers between legislature and judiciary which is a legitimate concern of Member States. It is, however, not a matter that can be the subject of appeal between the staff and the Secretary-General.

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* An analogous procedure exists in respect of judgements of the Administrative Tribunal of the International Labour Organization (article XII of its statute).

39. These two grounds seem appropriate since Member States have an interest in ensuring that the Charter is respected and that the Tribunal does not exceed the jurisdiction conferred upon it by the Assembly. At the same time, it should be noted that the chances of a judicial body such as the Tribunal deviating from the Charter or exceeding its jurisdiction are slim - as evidenced by the 40-year history of the Committee.

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