United Nations AT/DEC/1283

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1283

Case No. 1287 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Ms. Brigitte Stern;

Whereas, on 1 February 2005, a former staff member of the United Nations filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the interpretation and revision of Judgement No. 1192 rendered by the Tribunal on 23 July 2004;

Whereas in his Application, the Applicant requests the Tribunal:

"7. On the merits … *to find*:

(a) that the Applicant has placed before the Tribunal new facts of such a nature as to be a decisive factor …

(b) that the facts and further considerations provided in the request for interpretation and revision establish that the Respondent has misinterpreted and failed to implement in a timely fashion the decision reached by the Tribunal in Judgement No. 1192;

8. [And, therefore,] … *to order*:

(a) that the Respondent pay compensation ordered by the Tribunal within 30 days;

> (b) that the Applicant be awarded interest in the amount of 6% per annum from 30 September 2004 until the date the Judgement is fully and finally implemented, on any payments effected by the Respondent;
>
> (c) that the Respondent pay additional compensation in the amount of three years' net base pay in light of the egregious refusal of the Respondent to [honour] the Tribunal's decision;
>
> (d) [the Respondent to pay] the Applicant the sum of $5,500 in legal costs and $500 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2005;

Whereas the Respondent filed his Answer on 30 June 2005 and, in the same document, filed a request for revision of Judgement No. 1192, requesting the Tribunal to find:

> "34. [T]hat the Applicant's Request for an Interpretation of Judgement No. 1192 is without merit as the Judgement is clear and unambiguous. The Respondent also requests that the Tribunal find that the Applicant has not discovered a new fact which would render his Request for Revision of the Judgement admissible under [a]rticle 12 of its Statute, and that, accordingly, the Tribunal reject the Applicant's Request in its entirety;
>
> 35. The Respondent further respectfully requests the Tribunal to find that, at the time the Judgement was rendered, the Rwandan Government continued to regard the Applicant a fugitive from justice and actively was seeking to bring the Applicant to justice, a fact which was unknown to the Respondent and the Tribunal and not addressed by the Tribunal in its Judgement and which is of such a decisive nature as to warrant the revision of Judgement No. 1192 under [a]rticle 12 of the Tribunal's Statute.
>
> 36. As such, the Respondent respectfully requests the Tribunal to admit its Request for a Revision of Judgement No. 1192 under [a]rticle 12 of its Statute, and to revise Judgement No. 1192 so as to dismiss the Applicant's pleas and award no compensation."

Whereas, on 28 February 2006, the Applicant filed Written Observations amending his pleas as follows:

> "[The Applicant requests the Tribunal:]
>
> 6. (c) To order the production of the final review related to the case of the Applicant undertaken by [the United Nations Development Programme (UNDP)] at the request of the Administration."

Whereas, on the same date, the Applicant filed his Answer to the Respondent's request for revision of Judgement No. 1192;

Whereas, on 18 May 2006, the Respondent filed Written Observations on the Applicant's Answer to the Respondent's request for revision and, simultaneously, submitted comments on the Observations by the Applicant on the Respondent's Answer to the Application for interpretation and revision, and, on 7 June, the Applicant commented thereon;

Whereas the facts in the case were set forth in Judgement No. 1192;

Whereas the Applicant's principal contentions are:

1. Given that decisions of the Tribunal are binding on the Respondent, the Respondent should be held to the plain meaning of the Judgement.

2. In view of the Respondent's failure to implement Judgement No. 1192, the Tribunal should consider amending its decision to allow for more appropriate compensation.

3. The Respondent's request for revision of judgement does not meet the criteria of article 12 of the Statute.

Whereas the Respondent's principal contentions are:

1. The Applicant's request for interpretation is without merit as the Judgement is clear and unambiguous.

2. The Applicant has not discovered a new fact which would render his request for revision of the Judgement admissible under article 12 of its Statute.

3. The Respondent further respectfully requests the Tribunal to find that he has presented a new fact, namely that, at the time the Judgement was rendered, the Rwandan Government continued to regard the Applicant a fugitive from justice and actively was seeking to bring him to justice, which is of such a decisive nature as to warrant the revision of Judgement No. 1192.

The Tribunal, having deliberated from 27 June to 28 July 2006, now pronounces the following Judgement:

I. The present case comprises two Applications: one presented by the Applicant and another one presented by the Respondent. As both parties request revision of the same Judgement, the Tribunal has decided to deal with them in one and the same Judgement.

II. The Applicant appeals to the Tribunal for the second time. The first time was when the Tribunal delivered its Judgement No. 1192, in which he was awarded compensation. To date, the Organization has not paid that compensation and now he has filed an Application for revision and interpretation of that Judgement.

The overall case of the Applicant is connected with allegations against him that he was involved in genocide crimes in his country. It is understandable that even allegations of such grave nature might reflect badly on any administration, and even more so on an international organization like the United Nations.

However, this Tribunal is not a criminal court and cannot investigate the substance of crime allegations through a criminal law procedure. This is an administrative tribunal, dealing only with claims made by staff members against the Administration for acts of maladministration. Whenever such claims are proven in accordance with the rules of administrative law, the Tribunal is bound to pronounce itself accordingly.

The present case arises from the fact that the Administration never executed the Tribunal's Judgement. From the file and the submissions it would appear that the Administration does not want to pay the Applicant the compensation awarded because Rwanda, a Member State of the United Nations, considers him as a fugitive for genocide crimes. Obviously, the United Nations, as a political Organization, is sensitive to requests of a Member State, whereas the Administrative Tribunal of the United Nations must think legally in terms of administrative law.

The Tribunal cannot but feel displeased about this situation. No matter how sensitive it is to political considerations of the Organization, it is bound to remind the Administration that the Tribunal's decisions are final, mandatory and binding. Within the parameters set out in the Statute of the Tribunal, the Administration has no right of discretion whether or not to apply the Tribunal's Judgements, as it is the final authority in the administration of justice in the Organization and must be respected.

III. The Applicant asks the Tribunal

> "to find:
>
> (a) that it is competent to hear and pass judgment upon the present application under article 2 of its Statute; and,
>
> (b) that the present application is receivable under article 12 of its Statute."

The Tribunal recalls that under article 2 of its Statute,

> "The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members",

and that, under its article 12,

> "The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence".

The Applicant, then, proceeds to ask the Tribunal to consider his claims on the merits and order what he thinks appropriate, should the Application pass the receivability test.

The Tribunal finds that the Application filed by the Applicant as a revision and interpretation case, is neither of the two. It has consistently held in its jurisprudence that article 12 should be applied rigorously: in Judgement No. 303, *Panis* (1983), it held that

> "Applications for revision of a judgement delivered by the Tribunal must be considered in the light of the standards imposed by article 12 of the Tribunal's Statute. ... The standards contained in article 12 are … relatively strict and lay a substantial burden upon a party who requests revision."

Recently, in Judgement No. 1120, *Kamoun* (2003), the Tribunal stated:

> "In accordance with the Statute and case law, in order to be able to apply for revision of a judgement it is necessary to satisfy certain formal and substantive conditions. As regards formal conditions, article 12 sets a time limit for filing the application. As regards substantive conditions, in order for an application to be admissible the Applicant must on the one hand, plead discovery of a new fact, that is to say one that was not known at the time the judgement was given, and, on the other, the new fact must be of such a nature as to be able to influence the outcome of the dispute as reflected in the judgement."

Additionally, in accordance with both the advisory opinion of the International Court of Justice of 13 July 1954 and its own jurisprudence, the Tribunal will consider applications for interpretation of judgement, where there is dispute as to the meaning or scope of the judgement. See Judgement No. 61, *Crawford et al.* (1955).

The present case is not a revision case under article 12 of the Statute, because the conditions of that article are not met. The Applicant produces no new fact which was previously unknown to the Tribunal; he only claims that the initial Judgement of the Tribunal was not executed by the Administration and, for that reason, requests additional compensation and costs. Thus, the present Application introduces new claims, for which article 12 of the Statute does not provide.

The Tribunal cannot allow that procedures are used for purposes other than the ones for which they have been introduced, as this would constitute abuse of procedure, i.e. a *détournement de procédure*. Therefore, it finds that this Application cannot find legal basis in article 12 as the Applicant invites the Tribunal to find and must, therefore, be rejected as a revision case.

Furthermore, the Tribunal also finds that this Application cannot be dealt with as an interpretation case, as the Tribunal's Judgement No. 1192, is very clear and needs no interpretation. Thus, this claim is also rejected.

IV. The Tribunal now turns to the Respondent, who, in answering the claims of the Applicant, took the initiative to submit to the Tribunal an Application for revision of his own.

The Tribunal notes the originality of the procedure by which the Respondent chose to come to the Tribunal as a concurrent Applicant. There is no need, however, under the circumstances of the case, to address the various legal points that this might raise.

In fact, the Respondent claims in his Application that there is a new fact, as a result of which, the Tribunal should revise its original Judgement and tries, on that basis, also to explain his reluctance to execute its order until now.

According to the Respondent, acting as Applicant, there is a document included in the Respondent's submissions, which was sent to the United Nations, dated 17 February 2005, the contents of which were unknown to the Tribunal at the time it rendered Judgement No. 1192.

The Tribunal notes in the first place that this document does definitively not constitute any new fact in the meaning of article 12 of the Statute, and that a careful reading of its original Judgement suffices to prove it. However, the Tribunal will not discuss this point and this for procedural reasons.

In fact, the document in question was submitted to The Legal Counsel of the United Nations on 17 February 2005, whereas the Respondent's Application submitted to the Tribunal is dated 30 June. It is stated in article 12 of the Statute that "[t]he application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement".

It is obvious that the Respondent's Application did not, under the circumstances, arrive at the Tribunal in time, as the Application was made more than thirty days after the alleged discovery. Thus, it is time-barred.

V. Further to the above, the Tribunal would like to add a few reflections, in view of the important dissenting opinion which has been appended to the present Judgement.

VI. Even if the Tribunal interprets the request made by the Applicant as a plea for execution of the order contained in Judgement No. 1192, the concept itself of an execution of its Judgements by the Tribunal seems inapplicable to the present case.

VII. The word "execution" has more than one meaning, even if strictly related to the execution of a judgement. In the present instance, however, the Tribunal submits that it can have no other meaning than that of "enforcement" of said Judgement: the Applicant has not

been paid the compensation awarded by the Tribunal and he seeks a way to obtain payment, disguising his intention with the robes of revision and interpretation. In other words, he now wants the Tribunal to render a new judgement to force the Administration to implement the original order. It is as simple as that.

VIII. However, the Tribunal cannot give the Applicant what he wants, because it is not in its power to do so. This lack of power is not only an immediate result from the fact - not entirely deprived of importance - that the Statute is totally silent on the subject of execution of judgements of the Tribunal: that difficulty could, perhaps, be circumvented by a reasoning such as the one so eloquently put forward in the dissenting opinion. However, there is another - and insurmountable - objection for the Tribunal to consider the Applicant's requests; it is an objection of a logical character, reflecting a factual reality.

IX. Indeed, what would be the effect of a new judgement of this Tribunal supposedly in "execution" of its previous decision? Would the new judgement have a different nature than the first and this time *really oblige* the Administration to overcome its reluctance and pay the Applicant his due? Would the new judgement carry an invisible force - different in essence from that of the previous one - putting in motion the paralyzed arms of the Administration? What legal consequences would follow a new and repeated non-compliance of the new judgement by the Administration?

X. As the Tribunal understands the situation, its Judgements are binding on the Administration, as is abundantly demonstrated in the dissenting opinion. Thus, the Tribunal must rely on the mandatory nature of its first decision and on the conscience of the Administration. The mandatory character of the Tribunal's decisions is the cornerstone of the judicial system of the United Nations. Without that, the Tribunal would have merely an advisory function, and the Secretary-General would be judge and party at the same time, which was exactly what the General Assembly wanted to avoid when it created the Tribunal. At present, the Tribunal cannot recall any order that has not been carried out by the Administration, and it hopes that it will never have such a painful experience.

XI. Where it is stated that the Tribunal must rely on the mandatory nature of its previous decision, this does not mean that the Applicant - once, one may hope, he has been paid his indemnity - may not initiate a new action for interest arising out of excessive delay. The Tribunal would not, in that case, be impeded to grant him such interest, particularly considering that the new policy of the Tribunal is to include, in all judgements containing an order to pay compensation, a clause to pay interest on such compensations if they are not paid within three

months from the date of distribution of the judgement. The Tribunal recalls in this regard its statement in its Judgement No. 1229 (2005),

> "The Tribunal realizes that to restart the appeals process as mentioned above is time-consuming and it deplores that its Statute does not allow for direct submission of requests for implementation of judgement, such as the one posed by the Applicant. In this regard, the Tribunal encourages the Administration to find ways to avoid the need for such tedious new litigation in the future. However, should this case come back to the Tribunal, it trusts that the case would be submitted on agreed facts, thereby obviating the time, delay and expense of a [Joint Appeals Board (JAB)]."

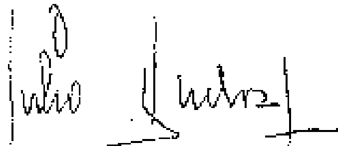
XII. Finally, the Tribunal wishes to point out that it is not closing the door for the Tribunal to take a different course of action in the future, if it is again presented with a failure to implement a judgement rendered by it, if the situation allows it. However, in the instant case, it would be useless and illogical; in this regard, it must be noted that the Tribunal held in Judgement No. 237, *Powell* (1979) that "under its Statute it [has] no competence to render an advisory opinion".

XIII. For the foregoing reasons, the Tribunal:

1. Rejects the Applicant's Application in its entirety as it is irreceivable: and,
2. Rejects the Respondent's Application in its entirety for the same reason.

(*Signatures*)

Spyridon **Flogaitis**
President



Julio **Barboza**
Member

Geneva, 28 July 2006

Maritza **Struyvenberg**
Executive Secretary

DISSENTING OPINION BY BRIGITTE STERN

I. Although I agree with a number of the statements contained in the Judgement rendered in this case, I would like to present an analysis of the Tribunal's powers that is different from the one which underlies the decision.

II. First, I would like to state my complete agreement with the Judgement's finding that the only reason this case came before the Tribunal again is that Judgement No. 1192 (2005) was not executed. As the Tribunal notes, "[t]he present case arises from the fact that the Administration never executed the Tribunal's judgement". By making this comment, the Tribunal is merely taking note of the parties' shared assessment of the situation. Indeed, according to the Applicant, "[t]he issue in this case is whether the Respondent may refuse to implement or unduly delay implementation of the Tribunal's judgements", while according to the Respondent, "[w]hat the Applicant is seeking is the implementation of the clear order of the Tribunal in its Judgement No. 1192". No other problem is raised in the case. It is obvious that the sole reason for this Application is the Administration's refusal to execute Judgement No. 1192. It is thus apparent, from the outset, that the Applicant's request must be interpreted as a request for execution, but this point will be discussed further below.

III. I would also like to state my agreement with the strong reminder in paragraph 2 of the Judgement of the imperative need for the Administration to execute the judgements of the United Nations Administrative Tribunal:

> "No matter how sensitive it is to political considerations of the Organization, it is bound to remind the Administration that the Tribunal's decisions are final, mandatory and binding. Within the parameters set out in the Statute of the Tribunal, the Administration has no right of discretion whether or not to apply the Tribunal's Judgements, as it is the final authority in the administration of justice in the Organization and must be respected".

This firm stance, which I endorse, echoes the similar position of the International Labour Organization Administrative Tribunal (ILOAT), as expressed, for example, in Judgment No. 1361, *In re* Ahmad (No. 4) (1994):

> "The Tribunal reaffirms that its rulings have the force of res judicata and are binding on the organizations that have recognised its jurisdiction. Any organization that offends against that rudimentary principle by refusing to give effect to judgments it does not care for is disregarding the rights of staff and its own interests and is acting in breach of the obligations that it has assumed by recognizing the Tribunal's jurisdiction."

The obligation to execute the judgements of international administrative tribunals is absolute and no political consideration can be allowed to call into question the principle that their judgements have the force of res judicata. The ILOAT recalled this fact again in a recent judgement:

> "Internal debates and discussions in the Conference of the States Parties are irrelevant to its obligation faithfully and promptly to execute the Tribunal's judgments. In Judgment 2328 also delivered this day, the Tribunal deals with the merits of the application for review *but there can be no excuse for the Organization doing as it has and taking the law into its own hands*. It must execute Judgment 2232 and must pay interest on all sums due at 8 per cent, compounded semi-annually and calculated from the due date to the date of payment." (Judgment No. 2327 (2004), emphasis added.)

IV. Of course, as indicated by the majority Judgement, the Application was filed as a request for interpretation and revision. Adopting a formalistic approach, the Tribunal first finds that the request for interpretation is not receivable because the Judgement "is very clear and needs no interpretation" (paragraph. III). It then analyses the case as a request for revision and, adopting a literal and formalistic reading of the conditions that must be met for a revision, rightly states that a revision is not possible unless a new fact is presented that existed at the time the Judgement was rendered but was unknown to the parties and to the Tribunal and that may have an influence on the decision taken. I do not disagree with the Tribunal's analysis of the conditions that must be met in order for a request for revision to be considered. In other words, I share the Tribunal's view that the Application is not receivable under article 12. But I do not agree with the decision to analyse the Applicant's request, clumsily presented though it may be, as a request for interpretation and revision, as I consider it without a doubt to be a request for execution.

V. Nor does the Application seem to fall under article 2, under which the Tribunal is competent to hear disputes arising from the Organization's non-observance of the terms of employment of staff members, which would require the exhaustion of internal remedies. Rather, the Application falls under the inherent powers of the Tribunal, as evidenced by ILOAT Judgment No. 649, *In re* Ali Khan (No. 4) (1985), which involved a request for execution of a prior judgement:

> "Claim (1) is for immediate performance of Judgment 565.
>
> The ILO pleads that the claim is irreceivable on the grounds that the complainant has failed to exhaust the internal means of redress provided for in Article 13.2 of the Staff Regulations.
>
> This plea is unsound.

> Failure to execute a judgment does not constitute breach of the Staff Regulations or of the contract of employment or unjustifiable or unfair treatment and therefore cannot come under 13.2.
>
> What the complainant is asking for is neither more nor less than execution of a decision by the Tribunal on a matter within its competence, and the Tribunal may determine whether due effect has been given to that decision".

VI. It appears to me that the fact that it is within the power of tribunals to reclassify a request that has been poorly presented is not at issue. For examples of this, one need only look at the approach of the Permanent Court of International Justice (PCIJ) or the International Court of Justice (ICJ). Suffice it to recall here the particularly eloquent terms used by the ICJ in the *Nuclear Tests* cases involving France:

> "Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; *this is one of the attributes of its judicial functions*" (*Nuclear Tests* case *(New Zealand v. France), Judgment, I.C.J. Reports 1974*, paragraph. 30, p. 13, emphasis added).

The Court further found that:

> "In the circumstances of the present case, as already mentioned, the Court must ascertain the *true subject of the dispute*, the object and purpose of the claim (cf. *Interhandel, Judgment, I.C.J. Reports 1959,* p. 19; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, pp. 33-34)". (Idem, paragraph. 31, p. 14, emphasis added).

VII. As is well known, the Court quite broadly reformulated the request filed in this case. This same inherent power was recently recalled unequivocally in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *(I.C.J. Reports 2004*, paragraph 38):

> "In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court's opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the 'true legal question' under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89, paras. 34-36). The Court noted in one case that 'the question put to the Court is, on the face of it, at once infelicitously expressed and vague' (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).
>
> Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8; Admissibility of*

> *Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956,* p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* pp. 157-162)".

VIII. It is clear from these excerpts that it is within the power of a tribunal to determine what the "true legal question" is - be it a contentious or an advisory case - and to reformulate requests that do not express it adequately. Thus, it appears that the Tribunal can exercise the power to reformulate poorly expressed requests, which is undeniably within its powers.

IX. It is interesting to note that the ICJ in particular reformulated the question submitted to it in the request for an advisory opinion on the review of Judgement No. 273, *Mortished* (1981) rendered by this Tribunal. (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal,* Advisory Opinion, *I.C.J. Reports 1982,* p.350.) In this case, the Court considered the very question on which it had been asked to give an advisory opinion and sought to determine whether, in view of its wording, it was a question which the Court could properly address. Considering that it was poorly written and did not seem to reflect the true intentions of the Committee on Applications for Review of Administrative Tribunal Judgements, the Court interpreted this question in light of the debates unfolding in the Organization. The question called upon the Court to determine whether UNAT had "erred on a question of law relating to the provisions of the Charter" or "exceeded its jurisdiction or competence". Notwithstanding the opinion of the Court, it seemed that another question was somehow hidden between the lines of the text submitted to the Court: had the Tribunal prevented the decisions of the General Assembly from taking full effect, thereby erring on a question of law relating to the provisions of the Charter or exceeding its jurisdiction or competence? This seemed to be, in the Court's opinion, the question that was at the core of the objection against the Tribunal's judgement. It is evident, then, that the reformulation of questions and requests submitted to a tribunal is quite common.

X. The Tribunal itself has not hesitated to reformulate requests for execution by regarding them as requests for interpretation; there is no reason why the opposite should not be possible. Thus, in Judgement No. 1225 (2005), the Applicant had presented a dual request for interpretation and execution. The Tribunal considered the request only as a request for interpretation:

> "The Tribunal will consider the interpretation issues first, then the implementation problems referred to by the Applicant, before concluding that no

> real application for revision has been specifically formulated, the title of the Application notwithstanding". (Paragraph I.)

Likewise, in Judgement No. 1255 (2005), in which the Applicant filed a request for interpretation, but in fact seemed to invoke a failure to execute a prior judgement, the Tribunal did not hesitate to seek the true question:

> "The Tribunal notes that, although the Applicant presents his Application as a request for interpretation, in it he invokes the 'failure to comply with the Tribunal's judgement', which would be more in keeping with a request for implementation. Having carefully examined the content of the Applicant's various pleas, the Tribunal concludes that the main issues raised do in fact relate to diverging interpretations of Judgement No. 1132. Since the only plea that relates to implementation is no longer relevant, as will be explained in paragraph X, it is appropriate to treat the entire case as a matter of interpretation." (Paragraph V; see also Judgement No. 1283, rendered at this session, paragraph. IX).

XI. I will now turn to the present Application, which was of course filed as a request for interpretation and revision, but is obviously a request for execution, and I consider that the Tribunal should have reformulated it as such. Indeed, the way in which the Applicant presents his requests cannot be considered legally rigorous. What he is requesting, in fact, is for the Judgement to be "interpreted", in order to remind the Respondent of its unambiguous meaning, and "revised" to reflect a new fact, which is the Administration's refusal to execute it; the "revision" consists of the award of additional damages and interest to take this non-compliance into account, as well as the additional costs which the Applicant had to unduly incur in order to obtain the execution:

> "The question of *interpretation* is a straightforward one. Given that decisions of the Tribunal are binding on the Respondent, should the Respondent be held to the plain meaning of the judgement ... The question of *revision* of the judgement consists of determining whether, in light of all the Respondent's actions, the Tribunal should consider amending its decision in order to allow for more appropriate compensation." (Emphasis added.)

However, it is evident when reading the Application that the Applicant raises problems of execution, and only problems of execution; more precisely, he complains that the Judgement has not been executed, which should, in my view, be considered as a request for execution. More exactly, the Applicant claims that the Administration has not executed the Judgement for political reasons, in particular pressure from his country of origin.

XII. In my view, the Applicant cannot be reproached for having attempted to present his request in such a way that it comes under those powers of the Tribunal which are uncontested and which the Tribunal has explicitly recognized. Although the Tribunal has at times agreed in practice to examine a request for execution, as will be clarified below, it has never clearly affirmed its power to enforce its own Judgements. But if one considers what the Applicant is truly seeking, beyond the formal presentation of his Application, which can be explained by his fear that it will be declared irreceivable, there is no doubt about the motive for his request and what he is truly seeking, as witnessed by the following extracts from his submissions:

> "The question of revision of the Judgement consists of determining whether, in light of all the Respondent's actions, the Tribunal should consider amending its decision in order to allow for more appropriate compensation in light of Respondent's *refusal to honor the ruling* in good faith.
>
> ...
>
> The question before the Tribunal is whether or not the Respondent may postpone indefinitely or unduly *delay or ignore the implementation* of its Judgement based on political considerations.
>
> ...
>
> This further Application has been brought solely as a result of the Respondent's wilful dereliction". (Emphasis added.)

The concluding remarks in his Application are equally unambiguous:

> "CONCLUSION
>
> The Applicant seeks *through this request for interpretation and revision of judgement to bring to the Tribunal's attention that failure to implement the Tribunal's decisions occasions a failure of justice* and erodes the credibility of the entire system of recourse. In the event that the Respondent wilfully or inadvertently ignores its obligations, the responsibility of the Organization should be entailed." (Emphasis added.)

How could the Application have been better presented? As the Applicant clearly explains, what he is seeking, through the procedures currently deemed "safe" in the light of the Tribunal's jurisprudence, is for the Tribunal to penalize the failure to execute its prior Judgement.

XIII. I am perfectly aware that there is no particular provision in the Statute concerning the possibility of a request for execution. I would add that there is no particular provision concerning the power of interpretation either. But, as the Tribunal

has recognized that it implicitly has an inherent power to interpret its own Judgements, I consider that the Tribunal implicitly has an inherent power to examine such a request for execution, under the Statute. Indeed, it is specified in article 11, paragraph 2, of the Statute that "[s]ubject to the provisions of article 12 [on revision of a judgement], the judgements of the Tribunal shall be final and without appeal", which means that they are binding in nature. If this binding nature is called into question by the Administration's refusal to execute a Judgement or by the poor execution of a Judgement, it is the task of the Tribunal to guarantee the integrity of its judicial function, as recalled by the ICJ:

> "[T]he 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" (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1954*, p. 53).

XIV. The theory of implicit powers, set forth by the Court in regard to the capacity of the United Nations to exercise functional protection in respect of its agents in case of damage caused by a wrongful act of a State, should be adopted here:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being *essential to the performance of its duties*". (*Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion*, I.C.J. Reports 1949*, p. 182, emphasis added).

It seems to me that UNAT, whose Judgements have been recognized as final and without appeal, must be considered as having an inherent power to take a decision on the failure to execute one of its Judgements, which is essential to the exercise of its judicial function, as it guarantees the integrity of administrative justice.

XV. The ILOAT did not hesitate to declare itself competent in such cases, where applicants complain of a failure to execute a prior judgement. It should be noted that article VI of the Statute of the ILOAT, like that of UNAT, provides that "judgments shall be final and without appeal". No recourse is provided for, not even the power of entertaining a request for revision, but this has not prevented the ILOAT from considering that its powers include the power to examine requests for interpretation, for revision and for execution. One of the first cases in which it exercised this power is the *Lindsey* case, dating back to the 1960s, and it has not departed from this approach since then:

> "The three points of the complaint as defined above are aimed at remedying the damage suffered by Mr. Lindsey through the delay on the part of [the International Telecommunications Union] in giving effect to item 7 of the operative part of the aforementioned judgment. They thus bear upon the rights devolving directly from this judgment, delivered within the bounds of the competence of the Tribunal. The Tribunal is therefore competent to examine the new complaint submitted by Mr. Lindsey and, in particular, to judge whether it is appropriate to award compensation to remedy the damage caused by an infringement of those rights." (Judgment No. 82, *In re* Lindsey (1965), paragraph 1).

In a more recent judgement, *In re* Moreno de Gómez (No. 2), the ILOAT adopted the very same analysis and awarded damages and interest for a failure to execute a prior judgement, even though internal means of redress had not been exhausted and such exhaustion had not been requested:

> "The complainant filed this application on 29 October 1996 seeking the execution of point 2 of those rulings, damages for failure to execute it and damages for the exceptionally grave material and moral injury she had suffered by reason of the deliberately delayed execution of points 3 and 4. She also asks for costs.
>
> ...
>
> In point 2 of its ruling the Tribunal allowed sixty days for the Organization to decide whether to reinstate the complainant or pay her damages. There is nothing in the evidence to indicate that the period of sixty days was too short. The complainant is therefore entitled to damages for the Organization's delay since 10 September 1996 in executing point 2. The Tribunal will award her 50,000 French francs under this head. It also awards her 10,000 French francs in costs. Furthermore, if the Organization fails to execute point 2 or to pay the complainant those two amounts within thirty days of the date of delivery of the present judgment, it shall pay her a penalty of 25,000 French francs for each further month of delay." (Judgment No. 1620 (1997)).

Other decisions of the ILOAT can be cited as well, but there are too many to cite them all (however, for some particularly explicit formulations, see Judgment No. 82, *ibid*.; Judgment No. 553, *In re* Gatmaytan (No. 2) (1983); and Judgment No. 1362, *In re* Bluske (No. 4) (1994).) In one of them, the Tribunal examined a request for execution filed even before the deadline given to the Administration to execute the Tribunal's judgement:

> "The complainant considered that the Federation was late in honouring its obligations and less than two months after the delivery of Judgment 2090 he filed an application for execution with the Tribunal on 27 March 2002 seeking payment ... The Federation raises the question of whether under these circumstances the application for execution is receivable. *However, the Tribunal's case law shows a constant line of precedent on this issue: any serious*

> *difficulty concerning the execution of a judgment can validly be brought before the Tribunal by means of an application for execution.* In the present case, it is to be regretted that the difficulties could not be overcome by the parties through discussion in good faith, but the Federation may not object to the receivability of the complainant's application. The relevance of his claims must therefore be examined." (Judgment No. 2178 (2003).)

XVI. Likewise, it is vital to consider UNAT competent to examine applications in which the applicant invokes a failure to execute a judgement that it has rendered; otherwise, the Tribunal's Judgements risk losing their force of res judicata. Of course, to date, the Tribunal's scant jurisprudence in this area is ambiguous, even contradictory, and leans more towards the opposite direction, at least in a recent case. But it seems to me that it would be advisable to reverse this tendency.

XVII. First, there have been a certain number of cases, cited in the Respondent's submissions, in which problems in the execution of a judgement of the Tribunal have been effectively addressed through internal means of redress. The applicability of these Judgements to the present case, however, is very relative in that the various precedents cited concerned the failure to execute judgements requiring not an act but a given behaviour on the part of the Administration, which required a precise and minute evaluation of the subsequent facts to determine whether the Judgement had effectively been executed, and it may, possibly, be conceivable that in such situations justice can better be served if the factual examination is done first by a joint appeals board. All but one of the precedents invoked by the Administration fit this description: in Judgement No. 678, *Lukas* (1995), the Applicant requested the Tribunal to "implement Administrative Tribunal Judgement No. 544", in which the Administration was requested to use all means available to find a suitable post for the Applicant; in Judgement No. 706, *Elahi* (1995), the Tribunal had to determine whether the Administration had correctly implemented the operative part of a preceding Judgement, notably containing a recommendation that the Applicant should be considered for all available posts in a certain category; in Judgement No. 723, *Bentaleb* ((1995), the Applicant requested the Tribunal "to find that the Respondent has failed to implement Judgement No. 539 of the Administrative Tribunal", in particular the expectation that the Applicant would be fully and fairly considered for a promotion. It should also be noted that, in all these cases mentioned by the Respondent, the question of whether the Tribunal could consider a request for execution presented to it directly was never raised strictly speaking, since the Applicants had chosen to avail themselves of the internal review procedure.

XVIII. There is, however, a decision in which, without raising any theoretical issues, the Tribunal did address a request for execution as such: Judgement No. 517, *Van Branteghem* (1991). In this case, the Applicant's pleas were the following:

> "The Applicant respectfully requests the Tribunal to enforce the Judgement No. 439 ... The Applicant further requests the Tribunal to find that the delays in implementing the above mentioned Judgement No. 439 constitute an obstruction of justice which has brought financial disadvantage to the Applicant. The Applicant requests the Tribunal to award an indemnization of US$ 5,000 to the Applicant for moral and financial injuries sustained by the Applicant as a consequence of the unreasonable delays in the implementation of the Tribunal's Judgement No. 439."

The Tribunal carefully examined how the Administration had executed the Judgement and concluded that the Respondent was "bound to comply with Judgement No. 439, which precluded him from withholding amounts from the payments adjudged due to the Applicant". Furthermore, since the Judgement had been executed after excessive delay, the Tribunal

> "considers that a delay of more than two years cannot be ... justified ... The Tribunal finds that the Applicant suffered injury from a certain degree of negligence on the part of the Administration, which caused an unreasonable delay in even the partial implementation by the Respondent of Judgement No. 439 ...".

Having thus examined how the Administration had discharged its obligations to execute the Judgement, without the issues of non-compliance and delay in execution having been brought before the Joint Appeals Board, the Tribunal awarded the Applicant additional compensation of $500.

XIX. Of course, there remains the recently adopted decision in Judgement No. 1229 (2005), which simply concerned the Administration's non-payment of compensation awarded by the Tribunal.

It must be noted that that Application was also filed as an Application for revision and interpretation and that the Tribunal did not hesitate to treat it *de facto* as a request for execution, without however discussing the issue theoretically. On this point, I agree with the approach taken. However, the Tribunal considered, in an extremely restrictive interpretation of its own powers, that it could not act on such a request. The Tribunal in effect analysed the request for implementation of the previous Judgement, accompanied by a request for damages and interest, as a new request that had to go through all internal procedures again:

> "He requests the Tribunal to spell out what consequences fall on the Respondent for not having complied with that requirement.
>
> The question presented by the Applicant, then, is not a question of interpretation; in the view of the Tribunal it is a new question and should be the subject matter of a new case if it is to be decided by it. Consequently, the Applicant should follow the normal appeals procedure; that is, request a review of the administrative decision and, if the request is denied, appeal to the … JAB".

It merits noting, however, that while the Tribunal adopted this decision, it seemed to regret it, as demonstrated by the following excerpt from the Judgement:

> "The Tribunal realizes that to restart the appeals process as mentioned above is time-consuming and it deplores that its Statute does not allow for direct submission of requests for implementation of judgement, such as the one posed by the Applicant. In this regard, the Tribunal encourages the Administration to find ways to avoid the need for such tedious new litigation in the future. However, should this case come back to the Tribunal, it trusts that the case would be submitted on agreed facts, thereby obviating the time, delay and expense of a JAB".

Rather than encouraging the Administration "to find ways to avoid the need for such tedious new litigation in the future", it seems to me that it is the task of the Tribunal to find these ways and to exercise all its powers - inherent in any jurisdiction - to the fullest extent precisely in order to avoid this result that the Tribunal itself regards as undesirable.

XX. Indeed, it does not seem in keeping with the efficient functioning of international administrative justice to state that a request for execution should be regarded as a new request and, as such, required to go through internal appeals bodies again. It seems to me that such a solution should be ruled out both on principle and for practical reasons.

XXI. The principle may be stated as follows: who better than the Tribunal can assess whether one of its Judgements has been executed? How can this task be entrusted to administrative entities, which are an integral part of the Administration, when the issue of whether or not a Judgement has been executed is fundamental for guaranteeing the integrity of the Tribunal's functions? Such reasoning seems all the more necessary in that the issue of non-execution requires only a finding that a simple act of the Administration - such as the payment of compensation - has not been executed, as opposed to subjective conduct that could require the facts at issue to be re-examined through internal procedures. There is furthermore an underlying logic to such an approach, as pointed out by the ILOAT:

> "[A] dispute of the kind Article II refers to is not resolved until the Tribunal's judgment has been duly executed. So its competence is not exhausted when it passes judgment. Pending full execution the dispute remains unresolved and the Tribunal remains competent to rule on any issues that execution may raise. Thus it may rule on such issues as the interpretation, execution or review of a judgment. The present complaint falls indisputably within the ambit of the Tribunal's competence as so defined." (Judgment No. 1328, *In re* Bluske (No. 3) (1994).)

XXII. The practical reason is based on an examination of the real consequences of the position adopted by the Tribunal. The view that a request for execution or a request for a finding of non-compliance accompanied by a request for compensation for such non-compliance does not fall within the Tribunal's competence has the effect of postponing, with great prejudice to the Applicants, the settlement of their cases. Considering that some cases before internal bodies drag on for years and years, it does not seem to me in keeping with good administration of justice to require that an Applicant who has obtained a Judgement in his favour, but which the Administration refuses to execute, must start over again with the entire procedural cycle provided for under article 7 of the Statute, which provides for a decision, or an omission, then a procedure before a joint appeals board:

> "Article 7
> An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.
>
> ...
>
> An application shall not be receivable unless it is filed within ninety days reckoned from the respective dates and periods referred to in paragraph 2 above, or within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant."

What purpose could submission to internal procedures serve, since the fact of non-execution is established and is not even denied by the Administration in this case? The uselessness of such a procedure is why the ILOAT has explicitly stated that such an appeal is unnecessary. Thus, its Judgment No. 1887, *In re* Argos et al. (1999), states that "[t]he Tribunal's case law has it that exhausting all internal remedies is not in fact necessary in cases which involve determining whether the authority responsible for executing a judgment has respected its terms".

XXIII. What is more, in case of bottlenecks in the conduct of internal procedures (the more political the case, the more likely such delays become), the Applicant would be left with no way to refer the case back to the Tribunal as long as the internal review process had not been completed. This poses a serious risk that justice may be denied. Using only the example of this case, the Applicant's request for reinstatement into the Organization and compensation for the fact that the United Nations Interim Administration Mission in Kosovo (UNMIK) had failed to assist him was filed on 26 June 2001, the Judgement was rendered on 23 July 2004 and this decision was communicated to the Applicant on 30 September 2004; the procedure thus lasted three years, but the Tribunal often witnesses much longer delays. If a request for execution is not accepted as such, the only remedy available to the Applicant would be to contest the refusal to execute the Judgement by going through the entire set of internal appeals procedures again, which could delay the execution of the Judgement by another three years.

XXIV. Of course, there is the question of the procedure to follow for its implementation. An examination of the Tribunal's jurisprudence on the power of interpretation demonstrates that the Tribunal does not seem to have explicitly taken up this problem. It has been implicitly recognized that a request for interpretation can be submitted directly to the Tribunal, without having to go through the usual stages of administrative appeal. This seems logical; who better than the Tribunal can interpret what it has said? With regard to the time limit for the submission of a request for interpretation, no position of principle has been expressed; the Tribunal, however, notes that the compensation awarded to the Applicant in *Crawford* was paid by the Administration in February 1955, and that the request for interpretation claiming that the compensation paid was not the amount that should have been paid - which is in fact a request for execution - was filed in October 1955, or eight months later. It seems to the Tribunal that, by analogy with the maximum time limit for the submission of a request for revision to the Tribunal, and to implement the principle of res judicata, it would be appropriate to also limit to one year the time in which a request for interpretation and execution can be filed. In this case, it should be noted that the Applicant is well within the time limit, since the Judgement was communicated to him on 30 September 2004, there were further exchanges of correspondence between the parties with respect to the execution of the Judgement between 30 December 2004 and 5 January 2005, and the request for interpretation and revision was filed in February 2005.

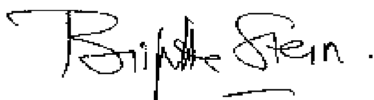
XXV. Of course, the Tribunal is also aware of the limits on the exercise of its competence to supervise the execution of its Judgements, insofar as it does not have coercive powers. In exercising this competence, in effect, it can only confirm that its initial Judgement has the force of res judicata and award damages and interest for the delay or failure to execute its Judgement. Such damages and interest are often granted by the ILOAT. For example, Judgment No. 1427, *In re* Sharma (No. 5) (1995), explains the reasoning according to which damages and interest are due because its legitimate interest in seeing the Judgment implemented has been thwarted:

> "Yet the Organization did not execute Judgment 1313 as promptly as it should have ... The complainant has suffered no financial loss because he has been paid ... But he is entitled to moral damages for the injury due to the thwarting of his legitimate expectation of prompt and correct execution of the Tribunal's judgment."

The execution of this new Judgement, as well as the previous one, depends on the Administration's respect for the Judgements of UNAT, as the latter does not have - as is the case in internal administrative justice systems - coercive powers of execution. However, in the event of successive and repeated refusals by the Administration to execute the Tribunal's Judgements, it is not out of the question for internal jurisdictions to find that the Organization, having failed to implement an effective system of administrative justice, should lose the benefit of its immunity from jurisdiction, and to order the execution of the unheeded Judgements.

XXVI. For all these reasons, it seems that the Tribunal should not have refused, based on procedural arguments, to rule in this case, especially since the Administration's non-compliance was not contested between the parties.

(*Signatures*)



Brigitte **Stern**
Member

Geneva, 28 July 2005

Maritza **Struyvenberg**
Executive Secretary