SEPARATE OPINION OF JUDGE RUDA

I have voted in favour of paragraphs 2 A and 2 B of the operative clause of the Advisory Opinion, which contains the decisions of the Court on the merits ; but, since I voted against paragraph 1, on the preliminary point as to whether or not the Court should comply with the request, I feel myself obliged to explain, in an individual opinion, the reasons for my vote.

In its 1973 Advisory Opinion on the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973,* p. 166), the Court, for the first time, dealt with a request from the Committee on Applications for Review of Administrative Tribunal Judgements, the origin of which was an objection raised by a person in respect of whom a judgement had been rendered by such Tribunal. I was among the judges who voted in favour of the decision to render the Opinion in that case. In the present proceedings, the circumstances differ from those of 1973 on a fundamental legal aspect, because now the application to the Committee was submitted by a member State, which was not a party to the litigation before the Administrative Tribunal. This new situation gives rise to some legal problems different from those that confronted the Court before.

The Court already took note, in 1973, of some important observations that were raised in the General Assembly, in 1955, during the discussions on the review procedure, on the possibility of a member State to initiate such proceedings. The Court said :

> "31. The Court does not overlook that Article 11 provides for the right of individual member States to object to a judgement of the Administrative Tribunal and to apply to the Committee to initiate advisory proceedings on the matter ; and that during the debates in 1955 the propriety of this provision was questioned by a number of delegations. The member State, it was said, would not have been a party to the proceedings before the Administrative Tribunal, and to allow it to initiate proceedings for the review of the judgement would, therefore, be contrary to the general principles governing judicial review. To confer such a right on a member State, it was further said, would impinge upon the rights of the Secretary-General as chief administrative officer and conflict with Article 100 of the Charter. It was also suggested that, in the case of an application by a member State, the staff member would be in a position of inequality before the Committee. These arguments introduce additional considerations which would call for close examination by the Court if it should

receive a request for an opinion resulting from an application to the Committee by a member State. The Court is not therefore to be understood as here expressing any opinion in regard to any future proceedings instituted under Article 11 by a member State. But these additional considerations are without relevance in the present proceedings in which the request for an opinion results from an application to the Committee by a staff member. The mere fact that Article 11 provides for the possibility of a member State applying for the review of a judgement does not alter the position in regard to the initiation of review proceedings as between a staff member and the Secretary-General. Article 11, the Court emphasizes, gives the same rights to staff members as it does to the Secretary-General to apply to the Committee for the initiation of review proceedings." (*I.C.J. Reports 1973*, p. 178.)

The three objections mentioned by the Court in this paragraph were, therefore, the following :

(a) to allow a member State, which had not been a party to the proceedings before the Administrative Tribunal, to initiate proceedings for review, would be contrary to the general principles governing judicial review ;

(b) such right would impinge upon the authority of the Secretary-General as chief administrative officer ; and

(c) the staff member would be in a position of inequality before the Committee.

As to the first objection, it is true that the member State which has initiated the review proceedings was not a party to the proceedings before the Administrative Tribunal, the parties thereto having been the staff member and the Secretary-General ; but the right to initiate the review proceedings does not mean that the State becomes a party to the litigation. Article 11 of the Statute of the Tribunal does not give the member State the right to request an advisory opinion, but only the right to invite the Committee to make the request, which is, therefore, submitted by an organ duly authorized by the General Assembly. The fact that a member State has the power to initiate the review procedure does not transform the State into a party to the dispute. But the Secretary-General is an organ of the United Nations and the Committee is also an organ of the United Nations ; therefore, the system provides for the contradictory situation that one organ of the Organization gives his acquiescence to the judgement of the Administrative Tribunal and another organ of the same Organization, on the initiative of a third entity not party in the litigation, decides to put into operation a review proceeding of an already accepted judgement. To my mind, the system of Article 11 of the Statute of the Tribunal goes against the elementary requirements of a judicial process, because a party to the dispute, in this case the United Nations, cannot accept a judgement

and, at the same time, open a procedure for its review. This inherent contradiction in the system is, for me, a very "compelling" reason to refuse to render the Advisory Opinion.

As to the second objection, concerning the impact upon the authority of the Secretary-General, my conclusions are based on the juridical situation just described. The Secretary-General, "the chief administrative officer of the Organization", according to Article 97 of the Charter, acquiesces in a judgement of the Administrative Tribunal, in a case where "the parties to the dispute before the Tribunal are the staff member concerned and the United Nations represented by the Secretary-General" (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954,* p. 53). Later, another organ of the United Nations, subsidiary to the General Assembly, the Committee on Applications, submits a request to the Court for an advisory opinion, in a review proceeding, at the initiative of a third entity, a member State, which was not a party before the Administrative Tribunal. The decision of the Committee has its juridical effect on a judgement already acquiesced in by the Secretary-General. This attitude seems to me very clearly to impinge on the authority of the Secretary-General, precisely in the administrative field where he is the chief authority. The relationship between the Secretary-General and the staff member is undoubtedly administrative in character, including the decision whether or not to open a review procedure. I see this impact upon the administrative authority of the Secretary-General as another "compelling" reason to refuse to give the advisory opinion.

We come now to the third objection ; i.e., that the review procedure places the staff member in a position of inequality before the Committee, when the application is submitted by a member State. The Court rightly points out, in paragraph 30 of the Advisory Opinion, that the requirements of equality before the Court are fully satisfied in the present instance, as they were in 1973, when the review procedure originated in an application submitted by a staff member. The problem, therefore, is not the inequality before the Court, but before the Committee.

I find this inequality evident, when the member State submitting the application is a member of the Committee, as is the case here, for the simple reason that such State is allowed to vote on its own proposal ; the inequality arising from this fact does not need any further elaboration. Moreover, it has been the practice of the Committee that the staff member or his representative is not permitted to participate in the debates, but the delegate of the State, as a member of the Committee, is present and of course submits arguments in favour of its application. This additional fact makes the inequality before the Committee even more evident.

I agree, therefore, with the Court when it states in paragraph 32 of the Advisory Opinion, that "it can conclude at once that on the theoretical level inequality exists". I go a step further and I find this theoretical inequality as another "compelling" reason to refuse to render the Opinion.

To sum up, I conclude that when the application is submitted to the Committee by a State, and more particularly, when such State is a member of the Committee, the objections mentioned in paragraph 31 of the 1973 Advisory Opinion are valid and consequently *in abstracto* the necessary compatibility of the review procedure with the requirements of a judicial process is not fulfilled.

Moreover, in the Advisory Opinion, the Court indicates *in concreto,* in the particular circumstances of the case, a series of irregularities related to the composition of the Committee, to the formal defects of the application submitted by the United States Government, and to the inequality before the Committee emerging from the fact that such organ refused to allow Mr. Mortished's counsel to participate in the deliberations. The analysis of the Court of these irregularities is detailed and convincing ; I would only put perhaps more emphasis on some points.

I would like, on the composition of the Committee, to highlight the conclusion of the Court in paragraph 38 that it was "unquestionably irregular" for the Sierra Leone Chairman of the Sixth Committee to nominate the Vice-Chairman, a Canadian representative, to sit in the Committee on Applications, instead of a member of his own delegation. I fully share this conclusion and I find it sufficiently important to be by itself a "compelling" reason to decline to give the Opinion ; the Court cannot act on the basis of a request from a Committee that has not been properly constituted.

It seems to me equally important that the United States application did not clearly set forth in detail the grounds upon which it was based, as is provided for in Article II, paragraph 3 *(c),* of the Provisional Rules of Procedure of the Committee ; moreover, this lack of a clear statement on the ground of objections has particular importance in regard to the second objection invoked by the Committee, i.e., excess by the Tribunal of its jurisdiction or competence.

When Mr. Mortished submitted his comments on the United States application, although he did not fail to point out that the United States statement did not fall within the terms of Article 11, paragraph 1, of the Statute of the Tribunal, he developed his arguments, however, on the assumption that the objection appeared to be based on the existence of an error on a question of law relating to the provisions of the Charter. But no comments were submitted by Mr. Mortished on the ground that there has been an excess of jurisdiction or competence ; his position was fully justified because Mr. Mortished simply did not know, and had no way of knowing, that the United States application was supposedly based on the allegation of an excess of jurisdiction or competence. It should be remembered, furthermore, that the United States delegate, during the debates in the Committee, developed the idea that the objection based on an excess of jurisdiction or competence was "subsumed" (see A/AC.86/PV.2, p. 46) by the concept of "error of law relating to the provisions of the Charter", but Mr. Mortished or his counsel did not participate in the proceedings of the

Committee and, consequently, had no opportunity to present his views on the subject. Hence, as far as the ground based on an excess of jurisdiction or competence is concerned, there has been an evident inequality in the procedure within the Committee in contradiction also with the most elementary requirements of a judicial process.

Apart from the considerations just mentioned, I must deal in more general terms with the refusal by the Committee to let Mr. Mortished's counsel be present and participate in the deliberations. The theoretical inequalities referred to above find a good example in the practical inequalities in the present case. This inequality simply results from the participation of the applicant State in the debate, without Mr. Mortished being given the opportunity to let his views be heard on the position that such State developed during the deliberation, which was not exactly the same as the one it took in the application, but also on the views of other representatives on the Committee who commented on the United States application. Furthermore, the applicant State is permitted to vote, and voted, on its own application. I agree with the Court that, taking into account the quasi-judicial functions of the Committee on Applications, the non-participation of Mr. Mortished in the deliberations accentuated the irregularity of the proceedings (para. 44).

It is clear that up to this point of my reasoning I am in full agreement with the Advisory Opinion of the Court, with some shades of difference as to the emphasis to be put on some issues. But the final conclusion that the Court reaches, despite all these important legal objections, is different from my own. I find these objections, both on the theoretical and on the practical level, "compelling reasons" to justify not giving the Advisory Opinion ; the Court, on the contrary, decides to render the Opinion.

The Court bases its main reason for delivering the opinion on the need "to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation" (para. 45). I have no doubt that this is a very important value that the Court ought to preserve. The main purpose of the advisory competence of the Court is precisely to assist, on legal questions, organs of the United Nations and the specialized agencies in the fulfilment of their functions ; such assistance partakes of the very nature of the advisory competence. But, as the Court has always remembered, and as it does also in the present instance, such competence is discretionary, according to the clear terms of Article 65 of the Statute. The discretionary power to give or not to give an advisory opinion could have only one purpose, to leave to the Court the power to fix by itself the limits of the assistance to be given. Discretionary power means also, by its very nature, that there are limits beyond which the assistance should not be given. It is for the Court to fix those limits. These limits arise from the fact that the Court, even when exercising its advisory competence, remains a tribunal and, as such, is primarily bound to safeguard the requirements of a judicial process, in every stage of this review process. This is, for me, the paramount consideration to be taken into account, the very nature of the functions of the Court cannot be sacrificed because of

the need of assistance to a United Nations organ. Since the delivery of the opinion is within its discretionary power, the Court has to choose, in the present case, which value is more important, the assistance to another organ of the United Nations or the safeguarding of the requirements of the judicial character of the review procedure. I believe that such requirements are so affected in the present case, as much *in abstracto* as *in concreto* in the stage of the review before the Committee on Applications, that the Court should refuse to give this Advisory Opinion.

Moreover, if the Court wants to assist the General Assembly, as is said in paragraph 79 of the Opinion, "to reconsider its present procedure related to review of the Administrative Tribunal's Judgements", it is sufficient to call attention to the failures of the system ; perhaps precisely the best method to call such attention is to refuse to give the Advisory Opinion, on the basis that the established system, when the application to the Committee is submitted by a member State, is contrary to the requirements of a judicial process.

According to the final part of paragraph 45, the Advisory Opinion has two other objectives in view, first, not to "leave in suspense a very serious allegation against the Administrative Tribunal, that it had in effect challenged the authority of the General Assembly" and, second, to dispose of the "important legal principles involved". As to the first objective, I do not regard the allegation made against the Administrative Tribunal as a reason to give the Advisory Opinion ; I cannot see the role of the Court as being to clear the Administrative Tribunal from this kind of allegation, especially, when the review procedure followed goes against the requirements of a judicial process. The same rationale could be applied to the second objective ; whatever the importance of the legal principles involved, the main consideration that the Court should always have in mind is to safeguard its functions as a tribunal.

I will end this separate opinion by adding that I share the arguments put forward by the Court at paragraph 26 of the Advisory Opinion, when it rejects the conclusions of the United States statement that

> "if the Court declined to give an opinion, that would 'put in question the status of Judgement No. 273 of the Administrative Tribunal', with manifest implications for the Court's discretion to give or to refuse the opinion requested".

It is juridically impossible for the General Assembly to establish a review procedure of judgements of the Administrative Tribunal, which would compel the Court to give an advisory opinion against the clear permissive character of its advisory functions, in accordance with Article 65 of the Statute. The General Assembly cannot oblige the Court to find "compelling reasons", in order to give an advisory opinion. That cannot be the intention of the General Assembly.

(Signed) J. M. RUDA.