DISSENTING OPINION OF JUDGE SCHWEBEL

SUMMARY

In view of the provisions of the Statute of the Court and the Statute of the Administrative Tribunal, the Court is competent to answer the question on which its Advisory Opinion is requested (Chap. I). To do so adequately, it must pass upon the merits of the judgement of the Administrative Tribunal in the case of *Mortished* v. *the Secretary-General of the United Nations.* Judging its merits would be consistent with the Court's Statute, the terms of Article 11 of the Tribunal's Statute (paras. 8-10 of this dissenting opinion) and with the *travaux préparatoires* of Article 11 (paras. 11-30). Those terms and *travaux préparatoires* indicate that, when an objection to a judgement of the Tribunal has been lodged on the ground of error on a question of law relating to Charter provisions, the Court is to act as an appellate jurisdiction, passing upon the merits of the Tribunal's judgement. Such error need only "relate to" Charter provisions and need not directly contravene them. In view of the tenor of the *travaux préparatoires,* there even is ground for concluding that the Court is entitled to consider whether the Tribunal's judgement contains error in the interpretation of the Staff Regulations which derive from a Charter provision, Article 101 (1) (paras. 11-30). The Court's interpretation of the Statutes of the ILO and United Nations Administrative Tribunals in the *Unesco Officials* and *Fasla* cases is consonant with these conclusions (paras. 31-38).

In order to appraise the merits of the Tribunal's judgement, the origins and development of the repatriation grant must be reviewed. They demonstrate that the grant was never meant by the organs that proposed or approved or maintained it to be given to staff members who remain in the country of their last duty station (Chap. II). This is shown both by the terms of the Staff Regulations and the relevant discussions in the General Assembly and other bodies over the years (paras. 40 ff). While in practice the United Nations appears to have paid repatriation grants to non-relocating staff from an early if uncertain date, the General Assembly may not have been informed of this departure of practice from principle before 1976. It was informed of other variations in the administration of the grant and made consequential changes in the governing texts, a process which suggests that the General Assembly did not mean to permit payment to non-relocating staff (paras. 47-48, 51). When the practice was first aired in the General Assembly in 1976, it was criticized (para. 52). When the practice was thereafter re-examined by the International Civil Service

Commission, it was found to be contrary to the stated purpose of the grant and unjustifiable (paras. 54-55). In 1978, the General Assembly accordingly adopted resolution 33/119, which decided that payment of the repatriation grant shall be made conditional upon the presentation of evidence of actual relocation, subject to the Commission's establishing the terms of presentation of that evidence (paras. 58-59). Instead, the Commission recommended exempting staff members from the reach of resolution 33/119 in so far as they had accrued credit towards the repatriation grant before 1 July 1979 (paras. 60-61). The Commission in so doing relied on an opinion of the United Nations Office of Legal Affairs (paras. 62-64). Thereupon the Secretary-General issued a transitional rule which did so exempt serving staff members from the application of resolution 33/119 (para. 67). The General Assembly reacted adversely to the Commission's recommendation and the Secretary-General's action, and, in so doing, demonstrated an emphatic intent to overrule the Secretary-General's transitional rule by its adoption of resolution 34/165, an exercise of its authority under Article 101 (1) of the Charter to regulate staff relations (paras. 68-89). The Secretary-General thereupon deleted the transitional rule, and thereafter declined to pay the repatriation grant to Mortished, a non-relocating staff member, who appealed to the Administrative Tribunal.

The Administrative Tribunal held that the Secretary-General's refusal to pay the grant to Mortished injured him in disregard of his acquired rights. It ordered that Mortished be paid compensation for that injury in an amount equalling the repatriation grant. The Tribunal so concluded on the following grounds, none of which, it is submitted, are well-founded (Chap. III).

First, the United Nations had assumed special, contractual obligations towards Mortished in respect of the grant (para. 92). But the United Nations demonstrably assumed no contractual obligations whatsoever towards Mortished that bear on the question of whether he is entitled to receive the grant regardless of relocation, so this ground of the Tribunal's judgement is baseless (paras. 93-98). That conclusion is reinforced by an examination of the relevant jurisprudence of the Tribunal (paras. 99-105). That jurisprudence also shows that the United Nations is free to amend the regulatory régime governing the status of staff members as long as it does so in "statutory" terms of general application which do not trench upon the vital contractual, and hence acquired, rights of staff members.

Second, the Tribunal raised a question about whether the Secretary-General's deletion of the transitional rule retroactively effaced an entitlement of Mortished. It appears to assume an answer to this question rather than to present reasons justifying that assumption (para. 111). It also raised the question about whether nearly 30 years of practice "could generate an acquired right within the meaning of Staff Regulation 12.1" but found that "it is not required to adjudicate that question *in abstracto*" (para. 106).

Third, the Tribunal held that the repatriation grant was "earned" over the years and thus constitutes an entitlement of which Mortished could not be deprived without impairing his acquired rights (para. 113). That conclusion is based largely on the fact that the amount of the repatriation grant is calculated according to length of service. However, the drafting history of the repatriation grant shows that it was not meant to be a salary supplement progressively earned, but an end-of-service payment no more earned than is a termination indemnity. The years of continuous service which are a basis for calculating the amount of, but not entitlement to, the grant are subject to reduction or elimination, and the staff member may lose the whole of the repatriation grant on other grounds. It is thus clear that the grant is not "earned" and that entitlement is dependent upon compliance with eligibility rules at the time of separation from service. The length of a staff member's service is simply a convenient formula for calculating the amount of the grant. (Paras. 114-117.)

Fourth, the Tribunal held that the transitional rule of itself is the source of Mortished's acquired rights (para. 118). While this approach is arguable, it is not persuasive. Under the Statute of the Tribunal and its jurisprudence, an entitlement such as the repatriation grant may be exercised only in accordance with the conditions governing it as of the time its exercise is sought. Mortished sought to rely on the transitional rule when it was no longer in force. Moreover, he could be deprived of any entitlement under that transitional rule by "statutory amendment", which was precisely what resolution 34/165 required. (Paras. 119-124.)

The judgement of the Administrative Tribunal actually failed to give immediate effect to resolution 34/165 (para. 135). The justifications for the Tribunal's treatment of resolution 34/165 do not withstand analysis (paras. 132-134, 136-141). The Tribunal's judgement exceeded its jurisdiction by depriving resolution 34/165 of its regulatory effect under Article 101 (1), contrary to the resolution's terms and the demonstrated intent of the General Assembly (paras. 142-147), an intent which the Tribunal misconstrues (paras. 69-90, 109). The failure of the Tribunal to give immediate effect to resolution 34/165 also constituted, on several counts, error on questions of law relating to provisions of the United Nations Charter, most notably Article 101 (1) (paras. 147-152). The Tribunal's unfounded findings about Mortished's acquired rights did not

give it an authority it otherwise lacks to set aside resolution 34/165 (paras. 153-155).

---

1. I regret that I am unable to concur in the Opinion of the Court, essentially on two grounds. First, I take a broader view than does the Court of its competence to review the merits of a judgement of the United Nations Administrative Tribunal. Second, I find the judgement of that Tribunal in the case of *Mortished* v. *the Secretary-General of the United Nations* profoundly unpersuasive. In my view, that judgement did determine – in substance, though not in terms – that General Assembly resolution 34/165 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station. In so determining, the Administrative Tribunal erred on questions of law relating to provisions of the Charter of the United Nations, and exceeded its jurisdiction.

I. The Competence of the Court

2. The competence of the International Court of Justice to review a judgement of the United Nations Administrative Tribunal is founded on the relevant provisions of the Statute of the Court and the Statute of the Administrative Tribunal. The construction which the Court has given in earlier cases to the pertinent provisions of both Statutes, and to the analogous but distinct Statute of the Administrative Tribunal of the International Labour Organisation, has particular significance for the interpretation of the extent of the Court's authority in this case. The Court's construction of the Statute of the United Nations Administrative Tribunal took account of the *travaux préparatoires,* for they shed light on what the General Assembly intended when it amended the Statute of the Tribunal to invest the Court with its review authority. Just as the Court, in the first case which applied the amended Statute in a review of a judgement of the United Nations Administrative Tribunal, looked to the legislative history of the governing amendment, so in this case as well the Court should look to that legislative history (a point which the Court, in paragraph 63 of its Opinion, implicitly concedes, in referring to the "compromise" underlying the amended Statute of the Tribunal). It should scrutinize it in sufficient depth so as to afford the Court the full extent of the jurisdiction which, consonant with the Court's Statute, the General Assembly intended the Court to have.

1. The Provisions of the Statute of the Court and the Court's Judicial Character

3. The Court succinctly summarized the broad considerations which govern a case of this kind, and applied the most pertinent provision of its

Statute, in the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973,* pages 171-172 (hereafter referred to as the "*Fasla* case") where it held :

> "14. As to the Court's competence to give the opinion, doubts have been voiced regarding the legality of the use of the advisory jurisdiction for the review of judgements of the Administrative Tribunal. The contentious jurisdiction of the Court, it has been urged, is limited by Article 34 of its Statute to disputes between States ; and it has been questioned whether the advisory jurisdiction may be used for the judicial review of contentious proceedings which have taken place before other tribunals and to which individuals were parties. However, the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court's opinion, does not change the advisory nature of the Court's task, which is to answer the questions put to it with regard to a judgment. Thus, in its Opinion concerning *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* (*I.C.J. Reports 1956,* p. 77), the Court upheld its competence to entertain a request for an advisory opinion for the purpose of reviewing judicial proceedings involving individuals. Moreover, in the earlier advisory proceedings concerning the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954,* p. 47) the Court replied to the General Assembly's request for an opinion notwithstanding the fact that the questions submitted to it closely concerned the rights of individuals. The Court sees no reason to depart from the position which it adopted in these cases. If a request for advisory opinion emanates from a body duly authorized in accordance with the Charter to make it, the Court is competent under Article 65 of its Statute to give such opinion on any legal question arising within the scope of the activities of that body. The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute."

4. It will be observed that the Court saw no problem in its advisory jurisdiction being used for the review of contentious proceedings to which individuals were parties which had taken place before another tribunal. The fact that the Court's opinion would affect such parties to a dispute does not change the advisory nature of the Court's task, which the Court described in straightforward terms : "to answer the questions put to it with regard to a judgment". The Court so held while also holding that "the opinion given by the Court is to have conclusive effect with respect to the matters in litigation in that case" (*ibid.,* at p. 182), i.e., in the case on which the Administrative Tribunal had rendered judgment. The Court continued :

"Such an effect, it is true, goes beyond the scope attributed by the Charter and by the Statute of the Court to an advisory opinion. It results, however, not from the advisory opinion itself but from a provision of an autonomous instrument having the force of law for the staff members and the Secretary-General. Under Article XII of the Statute of the ILO Administrative Tribunal the Court's Opinion is expressly made binding. In alluding to this consequence the Court, in the *Unesco* case, observed:

> 'It in no wise affects the way in which the Court functions ; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself. Accordingly, the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with.' (*I.C.J. Reports 1956,* p. 84.)

Similarly, the special effect to be attributed to the Court's opinion by Article 11 of the Statute of the United Nations Administrative Tribunal furnishes no reason for refusing to comply with the request for an opinion in the present instance." (*I.C.J. Reports 1973,* pp. 182-183.)

5. Equally, in the instant case, the Court should "answer the questions put to it with regard to a judgement" of the Administrative Tribunal. It should not be deterred by the fact that its answers bind the Secretary-General and the Administrative Tribunal pursuant to the terms of Article 11 of the Tribunal's Statute, which purposefully, repeatedly and conclusively prescribe that the Secretary-General or the Tribunal shall act "in conformity with the opinion of the Court". (That binding effect is inferentially confirmed by Article 10 (2) of the Tribunal's Statute : "*Subject to the provisions of Articles 11 and 12,* the judgements of the Tribunal shall be final and without appeal." (Emphasis supplied.)) It should not be deterred by differences about whether, when it reconsiders a judgement of the United Nations Administrative Tribunal, it acts as a court of appeal, of cassation or of more limited review authority. It should not be deterred by the claim that its lack of "appellate" powers prevents it from examining and disposing of the merits of the Tribunal's judgement – in so far as answering the questions put to the Court requires such examination and disposition. Nor should it be deterred by the claim that the Court is limited to passing upon "constitutional" questions, a limitation expressed neither in its Statute nor that of the Tribunal.

6. There is nothing in the Charter of the United Nations or in the Statute of the Court – or in the standing, station or dignity of the Court – that

prevents it from dealing with the merits of a judgement of the United Nations Administrative Tribunal. There is nothing inherent in the judicial processes of the Court that so prevents it. If, as in the instant case, those processes ensure equality between the United Nations and Mortished in the proceedings before the Court, that suffices. "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request" (Statute of the Court, Art. 65 (1)). If, as is the case in respect of *Mortished* v. *the Secretary-General,* the Court's advisory opinion is sought on a "legal question", by a body which has been authorized in accordance with the Charter to make such a request, the Court should, as in the *Fasla* case, simply "reply to the questions put to it regarding the objections which have been raised to the Judgement of the Administrative Tribunal" (*I.C.J. Reports 1973,* p. 182). It should not find reasons why not to reply which are neither required by its Statute nor justified by the Statute of the Administrative Tribunal. It is to be regretted that, in the instant case, that is exactly what the Opinion of the Court does (see paras. 57-65).

7. Of course, the particular extent of the Court's competence to review judgements of the administrative tribunals is determined by the terms of the statutes of those tribunals. It is accordingly necessary in the instant case to consider closely the pertinent provisions of the Statute of the United Nations Administrative Tribunal. At the same time, that Statute and the Court's authority under its Statute should be interpreted in the light of the accepted jurisprudence of the Court, in which it

> "has repeatedly stated that a reply to a request for an advisory opinion should not, in principle, be refused and that only compelling reasons would justify such a refusal (see, e.g., *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956,* p. 86 ; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. 27)". (*I.C.J. Reports 1973,* p. 183.)

It is submitted that the meaning for present purposes of this axiomatic holding is that the Court should answer the question or questions asked of it – not, obviously, necessarily providing the answers which the requesting body may be thought to seek, but providing substantive answers to the questions posed. It does not comport with the Court's jurisprudence for it to acknowledge that only compelling reasons would justify the Court's refusal to reply to a request for an advisory opinion and then to offer a reply which finds questionable reasons for not answering the substance of the questions put to it. Among such questionable reasons, it is submitted, are holdings that the Court lacks "appellate" authority and that it is confined to disposing of "constitutional" objections to a judgement of the

United Nations Administrative Tribunal (see, in this regard, paras. 57-65 of the Court's Opinion in this case). It is true that, in its Advisory Opinion in the *Namibia* case, the Court recorded and held that :

> "It was argued that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions.
>
> 89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. 45.)

But that is by no means to say that, where the Court *is* entrusted with specific review authority not in respect of a principal organ of the United Nations but of its Administrative Tribunal, it lacks powers of "judicial review or appeal". On the contrary, as that passage of the Court's opinion imports, where, as in the instant case, the Court is specifically entrusted with powers of judicial review or appeal in respect of decisions taken by the United Nations Administrative Tribunal, it should exercise those powers. For the reason stated in this paragraph, it should exercise those powers to the full.

2. The Provisions of the Statute of the Administrative Tribunal

A. The terms of those provisions

8. What are the powers of judicial review of the Court as they are set out in the Statute of the United Nations Administrative Tribunal ? Article 11 (1) of the Statute provides :

> "If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal . . . objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter."

Thus the Statute specifies four grounds on which objection to a judgement of the Administrative Tribunal may be founded. Two of those grounds are

pertinent to the case before the Court, since those are the grounds on which, as the transcript of its proceedings makes clear, the Committee on Applications for Review of Administrative Tribunal Judgements relied in requesting an advisory opinion of the Court : excess of jurisdiction or competence, and error on a question of law relating to the provisions of the Charter of the United Nations. The principal focus of the Committee's concern was error of law ; in deciding that "there is a substantial basis" for the application to the Committee not only on that ground but also on the ground that the Administrative Tribunal had exceeded its jurisdiction or competence, the Committee nevertheless gave primary emphasis to the submission that the Tribunal had erred on a question of law relating to the provisions of the Charter. That emphasis will be followed in this dissenting opinion as it is in the Court's Opinion, for the judgment of the Administrative Tribunal at bar particularly poses that issue. At the same time, in this case the two grounds of error of law and excess of jurisdiction are inextricably linked. The terms of the two grounds of objection as they appear in Article 11 (1) will initially be the subject of comment ; then they will be analysed in the light of their *travaux préparatoires.*

9. On its face, the ground that the Tribunal "exceeded its jurisdiction or competence" requires only brief comment. The jurisdiction or competence of the Tribunal is set forth in its Statute, largely in Article 2, which in pertinent part states :

> "1. 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. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.
>
> . . . . . .
>
> 3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal."

Provided that the Tribunal passes judgment upon an application alleging non-observance of a contract of employment or terms of appointment of a staff member, it acts, *prima facie,* within its competence. However, that broad statement is subject to two qualifications of vital import for this case. First, "the words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force *at the time of alleged non-observance* . . .". Second, there is nothing in the Statute of the Administrative Tribunal to suggest that its competence extends so far as to authorize it to determine that a resolution of the General Assembly regulating the conditions of service of the Secretariat shall not be given immediate effect if the General Assembly intends it to have that effect.

10. The meaning of the clause respecting error on a question of law relating to the provisions of the Charter also calls for comment. It should be observed that this ground specifies "error on a question of law", which suggests that it excludes error on a question of fact. Furthermore, error on a question of law is qualified by the phrase, "relating to" provisions of the Charter. That is to say, an error of the Tribunal need not squarely and directly engage a provision of the Charter. It is sufficient if an error is "in relationship to" the Charter, "has reference to" the Charter or "is connected with" the Charter. (See the definitions found in *Webster's Third New International Dictionary,* Unabridged, 1976, p. 1916.) The phrase "the provisions" of the Charter clearly cannot mean all the provisions of the Charter, because no error of the Administrative Tribunal could possibly relate to all the provisions of the Charter ; that phrase must mean, "one or more provisions" of the Charter. But an error, if it is to furnish ground for objection to a judgment of the Tribunal, must have a relationship to or be connected with at least one provision of the Charter.

B. The travaux préparatoires *of those provisions*

(i) *Justification for recourse to preparatory work*

11. The true meaning of the terms of Article 11 (1) of the Statute of the Administrative Tribunal (and thus a proper appreciation of the scope of the review authority accorded the Court by that Article) can be best understood in the light of their *travaux préparatoires.* Thus in this case the Court should do exactly as it has done in prior cases in which the meaning of a treaty or legislative text has been at issue : examine the preparatory work which gave rise to it. If it be objected that resort to this supplementary means of interpretation is justified only where the text is not clear, it is submitted that the text's lack of clarity is sufficiently shown by the differences about its interpretation which are demonstrated as between the Court's Opinion and dissenting opinions in this case. More than this, it is instructive to recall that in the case of the Court closest to the case at bar, the *Fasla* case, the Court at three points recounts the need for resort to the *travaux préparatoires* to elucidate the meaning of Article 11 (1) of the Statute of the Administrative Tribunal. It points out that, "Although the records show that Article 11 was not introduced into the Statute of the Administrative Tribunal exclusively, or even primarily, to provide judicial protection for officials . . ." (*I.C.J. Reports 1973,* p. 183). It concludes that, "both the text of Article 11 and its legislative history make it clear that challenges to Administrative Tribunal Judgements under its provisions were intended to be confined to the specific grounds of objection mentioned in the Article" (*ibid.,* p. 188). And it goes back to the recommendations of the Committee which prepared the draft of Article 11 and to the

deliberations over that draft in the Fifth Committee of the General Assembly to state the following :

> "50. Article XII of the Statute of the ILO Administrative Tribunal speaks only of a challenge to 'a decision of the Tribunal confirming its jurisdiction', and does not make any mention of a failure of the Tribunal to exercise its jurisdiction. Similarly, in the draft of Article 11 of the United Nations Administrative Tribunal's Statute recommended to the General Assembly by the Special Committee on Review of Administrative Tribunal Judgements, a challenge on this ground was contemplated only if the Tribunal had 'exceeded its jurisdiction or competence'. The words 'or that the Tribunal has failed to exercise jurisdiction vested in it' were added at the 499th meeting of the Fifth Committee on the proposal of the Indian delegation, . . .
>
> . . . It further appears that in accepting failure to exercise jurisdiction as an additional ground of challenge the General Assembly regarded it as *euisdem generis* with cases where the Tribunal had exceeded its jurisdiction or competence ; and the Fifth Committee thus seems to have viewed both excess and failure in the exercise of jurisdiction as essentially concerned with matters of jurisdiction or competence in their strict sense. In a more general way, the comparatively narrow scope intended to be given to failure to exercise jurisdiction as a ground of challenge is confirmed by the legislative history of Article 11, which shows that the grounds of challenge mentioned in the Article were envisaged as covering only 'exceptional' cases." (*I.C.J. Reports 1973,* p. 189.)

In the light of the Court's repeated and detailed resort in the *Fasla* case to the *travaux préparatoires* of the very article at issue in the instant case, scrutiny of that same body of preparatory work is especially appropriate in this case.

(ii) *The Court suggests judicial review of Administrative Tribunal Judgements*

12. The amendments to the Statute of the Administrative Tribunal which are found in Article 11 appear to have been stimulated by the Court's Advisory Opinion on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954,* p. 56, where the Court, in addressing the possibility of review of judgements of the Administrative Tribunal, declared :

> "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 con-

> tain 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 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."

It will be observed that the Court spoke in 1954 of "review" of judgements and awards of the Administrative Tribunal and of the provision of "means of redress". It spoke of the functions of a reviewing judicial organ (which it rightly said the General Assembly is not) in broad terms : considering the arguments, appraising the evidence, establishing the facts and declaring the law.

(iii) *The General Assembly takes up the Court's suggestion*

13. That very year, the General Assembly took up the Court's suggestion, resolving that it : "Accepts in principle judicial review of judgements of the United Nations Administrative Tribunal." (Res. 888 (IX).) The text of the resolution in question initially spoke of the establishment of a procedure for "appeals against" instead of "review of" the Tribunal's judgements. In introducing an amendment (which was accepted) to substitute the term "review of", the delegate of Canada, speaking in plenary session on behalf of the co-sponsors, stated :

> "Members are aware that 'review' is a broader term which would include appeals and other judicial procedures.
>
> 12. The object of this change, therefore, ... is not to limit the special committee to the consideration of only one specific form of judicial review." (United Nations, *General Assembly Official Records, Ninth Session, 515th Plenary Meeting,* p. 542, paras. 11-12.)

Resolution 888 (IX) requested member States to communicate their views "on the establishment of procedure to provide for review of judgements of the Administrative Tribunal" and established a Special Committee on Review of Administrative Tribunal Judgements (hereafter referred to as "the Special Committee") to study the question of the establishment of such a procedure in all its aspects.

(iv) *The report of the Secretary-General on review procedures*

14. The Secretary-General assisted the Committee by submitting to it a set of memoranda and working papers. (See United Nations, *General Assembly Official Records, Tenth Session, Annexes,* Agenda Item 49 : Report of the Special Committee on Review of Administrative Tribunal Judgements, Annex II, pp. 17 ff.) He recalled the history of the adoption of the then existing and still current provision of Article XII of the Statute of the ILO Administrative Tribunal, which the International Labour Office described as a means for "appeal" to the International Court of Justice (p. 19). The Secretary-General noted that, in supporting adoption of this provision by the ILO, the Director General of the International Labour Office "explained that the article did not propose that the International Court of Justice should re-try a case, but merely that it could be asked to define the jurisdiction of the Tribunal" (*ibid.,* p. 19).

15. On the scope of the review and powers of the reviewing body of the United Nations Administrative Tribunal, the Secretary-General saw essentially three possibilities :

> "*(a)* the review of all aspects of the case,
> *(b)* the review of the law only, and
> *(c)* the review of certain legal issues, such for example as the question of lack of jurisdiction or fundamental defect in procedure" (*ibid.,* p. 22).

As to *(a),* the Secretary-General submitted that a review of all aspects of the case

> "would without doubt lead to a great number of unwarranted appeals, and thus would needlessly increase the burden of litigation. There would seem to be no good reason why the findings of fact by the Administrative Tribunal should not be conclusive." *(Ibid.)*

As to *(b)* the Secretary-General stated :

> "A review of the law would include the interpretation of the Staff Regulations and the Staff Rules as well as other provisions of the contract and general principles of law which might be involved. It would include the interpretation of relevant provisions of the United Nations Charter." *(Ibid.)*

As to *(c),* the Secretary-General noted :

> "Finally, there is the possibility of providing only for the review of certain important legal issues. Article XII of the Statute of the ILO Administrative Tribunal is an example of this alternative. Under this

article the International Court of Justice may be asked for an advisory opinion with respect to two types of questions : *(a)* lack of jurisdiction of the Tribunal, and *(b)* fundamental fault in the procedure followed." *(Ibid.)*

16. Turning to the possibility of review by the International Court of Justice, the Secretary-General submitted that advisory proceedings might be suitable for the review of certain legal questions in determining the validity of a judgement as is provided by the Statute of the ILO Administrative Tribunal. However, he believed that if a "broader scope of review were desired", it might be difficult to fit into advisory proceedings :

> "A re-examination of the merits of the case might involve matters which are not strictly legal questions within the meaning of Article 65 of the Statute of the Court, and might also require more active participation of the parties in the proceedings than would be considered permissible by the Court. Advisory proceedings would probably not be appropriate for such re-examination which might even be considered incompatible with the Statute of the Court." (*Ibid.,* p. 24.)

By his reference to Article 65 of the Statute, the Secretary-General seemed to suggest that, while it is appropriate to put "any legal question" to the Court in advisory proceedings, it would not be appropriate to put to the Court questions of fact, i.e., matters which "are not strictly legal questions". He concluded :

> "There is probably no absolute line between a review for which advisory proceedings would be possible and one for which they would not. Individual proposals which may be made would have to be examined in the light of the Statute of the Court and the nature of advisory proceedings." *(Ibid.)*

17. The Secretary-General transmitted the views of the United Nations Staff Council, which maintained that "only important questions of law which touch upon matters of principle should constitute ground for review" (*ibid.,* p. 32). The Staff Council submitted that : "The scope of the review should not include questions of fact ; the findings of fact by the Administrative Tribunal should be conclusive." *(Ibid.)*

(v) *The meetings and report of the Special Committee*

18. The Report of the Special Committee on Review of Administrative Tribunal Judgements is revealing, anticipating as it does questions which have been debated in the current case. Thus as to the meaning of "judicial review", it declares :

> "11. With respect to the meaning of 'judicial review' as used in General Assembly resolution 888 (IX), two possible interpretations were mentioned. On the one hand, it might be considered that the phrase referred purely to an appeals procedure in which the parties to the original action could seek reconsideration of the case or certain of its aspects before an appellate body. On the other hand, 'judicial review' could also be taken to refer to a procedure other than an appeals procedure in the technical sense of the term. It was pointed out that the draft text of resolution 888 (IX) . . . had been amended in the General Assembly . . . by replacing the words 'appeals against' by the words 'review of'. The intention of the amendment's sponsors had been to use a broader term which embraced appeals and other judicial procedures. It was the view of the majority of the members that the Committee could consider as judicial review either an appeals procedure in the narrow sense of the term or some other kind of review procedure which satisfied judicial requirements such as, for example, review of legal questions through the advisory procedure of the International Court of Justice." (Report of the Special Committee, *loc. cit.*, pp. 3-4.)

19. The Special Committee based its general discussion on the Secretary-General's working paper. On the scope of the power of review to be accorded the organ of review, the Committee's report records :

> "The members of the Committee were in general agreement that review should be limited to exceptional cases, and further, that there should be no complete review of all aspects of the case, in particular that there should not be a review of questions of fact as such. There was considerable variation of opinion, however, among the members of the Committee as to the exact grounds for which a review should be provided. One body of opinion held that review should be on all questions of law, whereas another maintained that it should be confined to the two grounds specified in Article XII of the ILO Statute of the Administrative Tribunal, namely, questions of jurisdiction and of fundamental defect in procedure. Positions in between these two views were also taken." *(Ibid.)*

The report adds that the US representative, when arguing that member States should be empowered to request activation of the review procedure, stated :

> "On important questions involving the interpretation or application of the Charter *or the staff regulations,* the views of Members should receive a full hearing and consideration." (*Ibid.,* p. 7 ; emphasis supplied.)

20. In its analysis of the specific proposals advanced on the scope of the review power, the report contains the following :

> "The proposal of France . . . and the suggestions of the Secretary-General . . . would limit the grounds for review to those stipulated in article XII of the Statute of the ILO Administrative Tribunal . . . there should be no retrial of the facts, nor of points of law generally.
>
> The proposal of China, Iraq and the United States of America . . . defined the scope of review as 'important legal questions raised by the judgement' and provided for a committee to decide whether the questions were of such importance as to warrant judicial review . . .
>
> The fundamental difference among these proposals with respect to the scope of review was, on the one hand, that the review should be strictly limited to the two grounds specified in the Statute of the ILO Tribunal and, on the other that it should cover all important questions of law." (*Ibid.*, p. 8.)

21. In an effort to bridge the foregoing differences, a joint compromise proposal was made by China, Iraq, Pakistan, the United Kingdom and the United States. In "clarification of the text" of the proposal, the British representative, Sir Vincent Evans (then the legal adviser of the British Mission to the United Nations, later the Legal Adviser of the Foreign and Commonwealth Office) explained, on behalf of the co-sponsors, the following. (Since this explanation is so important it is quoted not from the condensed report of the Committee but from the fuller summary record of its discussions.) The International Court of Justice, he specified, would have a scope of review authority limited "to three precise grounds" :

> "The first and third were substantially the same as those in Article XII of the Statute of the ILO Administrative Tribunal, on which there appeared to be general agreement in the Committee. The second ground, while attempting to meet half-way those representatives who favoured the inclusion of any substantial question of law as a ground for review, provided a safeguard against the danger that review might become a matter of course in all cases. It attempted to define with maximum precision what questions of law could be grounds for review. *The words 'relating to the provisions of the Charter' covered not only interpretations of the provisions of the Charter but also the interpretation or application of staff regulations deriving from Chapter XV of the Charter.*" (A/AC.78/SR.10, p. 3 ; emphasis added.)

22. The representative of the United States followed, stating :

> "(2) The adequacy of the joint draft with respect to the scope of the screening committee's authority to call for an advisory opinion had been a matter of serious doubt to his delegation, which still felt that there was great merit in the arguments in favour of the possibility of review of legal questions generally and of excessive awards, regardless of particular grounds or merits. (3) However, as a conciliatory gesture, his Government had decided to support the joint proposal. (4) His Government understood the second ground mentioned in paragraph 1 *to include (a)* a question under Article 101 of the Charter whether the Secretary-General's judgment should be upheld with regard to the conduct of a staff member under United Nations standards of efficiency, competence and integrity ; *(b)* a question under Article 97 whether the Secretary-General's action in giving directions to or taking disciplinary action against a staff member should be sustained ; *(c)* a question under Article 100 involving a staff member's duty to refrain from any action which might reflect on his position as an international civil servant responsible only to the Organization." (*Ibid.*, pp. 5-6 ; emphasis supplied.)

23. Reception of the compromise proposal was mixed. It was acknowledged on all sides that, under the joint compromise proposal, the advisory opinion of the Court would be binding on the parties to the Administrative Tribunal proceedings (an understanding later repeated in the Fifth Committee). But a substantial minority of the Committee questioned the propriety of the Court so settling a dispute between the United Nations and a staff member ; it opposed a member State being empowered to seek such judicial review ; and it maintained that the proposed screening committee would not be properly composed to carry out its functions. On the immediate question of the extent of the review authority to be given to the Court, relatively little was said. The Australian representative, who believed that the review body should be a judicial body other than the International Court of Justice, found, "The grounds for review provided for in the joint draft were too restrictive" (A/AC.78/SR.11, p. 6). The Pakistani co-sponsor submitted that the proposal should "be construed strictly, in a way consistent so far as possible with the spirit of Article XII of the Statute of the Administrative Tribunal of the ILO" (*ibid.*, p. 6). The representative of China associated himself with the opinions expressed by the representative of the United Kingdom. He supported inclusion of the proviso on an error of law relating to provisions of the Charter, "for an earlier decision of the Administrative Tribunal had been open to criticism on that score. The Chinese delegation attached a great deal of importance to Article 101, paragraph 3, of the Charter." (*Ibid.*, p. 7.) The Chairman, speaking as the

representative of Cuba, said his delegation would vote for the joint draft because it favoured both the limitations of the scope of review and the grant of the right to intervene to member States *(ibid.)*. The delegate of Israel had no objection to the scope of the review as provided for in the joint proposal (A/AC.78/SR.12, p. 3). The delegate of Iraq explained that he voted for the joint proposal even though his delegation would have preferred a broader scope of review (*ibid.*, p. 7).

24. No other delegate to the Special Committee commented on the question of the scope of review to be accorded to the Court. It will be observed that no one directly differed with the meaning attached by Sir Vincent Evans to the phrase, "relating to the provisions of the Charter" ; his interpretation apparently was left intact. However, the report of the Special Committee does not exactly reproduce his words. While, in Committee, Sir Vincent specified that the intention of the co-sponsors in using this phrase was to cover "not only interpretations of the provisions of the Charter but also the interpretation or application of staff regulations deriving from Chapter XV of the Charter", the report of the Committee on this key point reads as follows :

> "The co-sponsors intended by the phrase : 'a question of law relating to the provisions of the Charter' to provide for a case not only where the Administrative Tribunal might be considered to have misinterpreted the Charter, but also where the Tribunal might have interpreted and applied the Staff Regulations in a manner considered to be inconsistent with the provisions of Chapter XV of the Charter." (Report of the Special Committee, *loc. cit.*, p. 10.)

(vi) *Consideration by the Fifth Committee*

25. Consideration by the Fifth Committee of the Report of the Special Committee confirmed what the Report of the Special Committee made clear : that error "on a question of law relating to the provisions of the Charter of the United Nations" was not confined only to error relating to the Charter itself but also embraced error in interpretation or application of the Staff Regulations. Nevertheless, the Fifth Committee's debate and its resultant report does not wholly settle the scope of this ground of objection to a judgement of the Administrative Tribunal.

26. In speaking at the outset of the debate, the representative of the United Kingdom stated :

> "With regard to the scope of review, it had been generally agreed that there should be no review on questions of fact and that, as the Secretary-General himself had suggested, review should be excep-

> tional only and should not be applied to all cases as a matter of course. Opinion had been divided, however, on whether the scope of review should be confined to the two grounds set forth in Article XII of the Statute of the ILO Tribunal. The recommendation in the report was a compromise ; it adopted the two grounds in the ILO Tribunal's Statute and added a third – alleged error on a question of law relating to the provisions of the Charter. It had been felt that the third ground was adequate to cover cases where the Tribunal, in interpreting and applying some of the Staff Regulations, did so in a manner which might be considered inconsistent with the provisions of the Charter, especially of Chapter XV." (United Nations, *General Assembly Official Records, Tenth Session, Fifth Committee, 493rd Meeting,* p. 36.)

He was followed by the representative of Norway, who opposed the Special Committee's recommendations dealing with the grounds for review, because "the broad scope of the review proposed" was seemingly at variance with the objective of limiting review to exceptional cases (*ibid.,* p. 39). However, the representatives of Cuba and Pakistan maintained that inclusion of the ground of error of law "had been considered necessary in order to provide for cases in which the Tribunal's interpretation of the Charter might be challenged or in which it might be alleged to have interpreted the Staff Regulations in a manner inconsistent with Chapter XV of the Charter" (*ibid.,* pp. 39, 48). The representative of the Netherlands disagreed :

> "there would in practice be no limit set to the competence of the reviewing organ, because a judgement of the Administrative Tribunal could be challenged on the ground of an error of law relating to the provisions of the Charter, which was an instrument very wide in its scope" (*loc. cit., 494th Meeting,* p. 48).

The representative of Yugoslavia, also opposing the recommendations of the Special Committee, maintained that "the procedure proposed would tend to convert the International Court of Justice into a court of appeal for international administrative tribunals . . ." (*ibid.,* p. 49). Others, such as the representative of Argentina, replied that the procedure would be invoked

> "only in exceptional cases where a Tribunal Judgement was challenged on clearly specified grounds. The system proposed would safeguard both staff members and the General Assembly against future discussion of Tribunal judgements." (*Ibid.,* p. 50.)

The representative of the Philippines maintained that :

> "Provision had properly been made in the proposed new article 12

> for applications relating to questions of fact to be referred back to the Administrative Tribunal itself, whereas under article 11 applications based on questions of law would be referred to the International Court of Justice, the highest international judicial organ, thus promoting the development of a consistent international jurisprudence . . ." (*Ibid.*, p. 51.)

The representative of New Zealand did not object to the proposed scope of review procedure,

> "which would clearly be confined to questions of law. In cases where the Tribunal's judgements were challenged, the International Court would be the sole interpreter of the law and in those circumstances it was certain that no canons of justice would be violated. It also seemed reasonable that cases coming within the category of an 'error on a question of law relating to the provisions of the Charter' should be open to review, if any review procedure were established." (*Loc. cit., 496th Meeting,* p. 53.)

However, the representative of Sweden did object :

> "Turning to the Special Committee's recommendation that a review of an Administrative Tribunal judgement might be sought if that judgement erred on a question of law relating to the provision of the Charter, he pointed out that . . . such a recommendation would embrace all the cases enumerated in paragraph 82 of the Special Committee's report (A/2909) and would thus cover all the activities of a member of the United Nations Secretariat." (*Ibid.*, p. 57.)

The representative of Mexico also preferred limiting the grounds of review to questions of jurisdiction or procedural error. (*Ibid.*, p. 59.)

27. The delegation of India, which earlier had moved to add a fourth ground of objection to the three proposed by the Special Committee, namely, failure to exercise jurisdiction, at this stage of the Fifth Committee's debate proposed far-reaching amendments to the Special Committee's proposals which would have substituted a chamber of the Administrative Tribunal for the screening committee and the full Administrative Tribunal for the International Court of Justice. These amendments were opposed by the co-sponsors of the joint compromise proposal which the report of the Special Committee embodied. In opposing them, and in supporting adoption of the compromise proposal, the representative of the United States maintained that : *"it was fitting that the International Court of Justice should be the final authority on interpretation of the Charter or of staff regulations based thereon which might be involved in the Tribunal's decisions"* (*loc. cit., 498th Meeting,* p. 66 ; emphasis added). The amendments of India were not adopted.

28. The Report of the Fifth Committee itself to the General Assembly sheds little further light on the scope of the review authority to be afforded to the Court. It confines itself to the following statements :

> "15. The co-sponsors of the revised joint draft resolution explained that the new draft Article 11 was intended to limit review to exceptional cases. Two of the grounds for review were those provided in the statute of the ILO Administrative Tribunal, i.e., questions of competence and of fundamental error in procedure. One additional ground was provided, i.e., errors on 'a question of law relating to the provisions of the Charter'. The co-sponsors of the revised joint draft resolution referred to the statements which they had made concerning the interpretation of this phrase which were contained in the report of the Special Committee (A/2909). The opinion was expressed in the debate that the grounds provided for review were of a fundamental nature and that as such they could not be ignored, if and when they arose, in the interest of justice.
>
> 16. Under the proposed new Article 11 application for review might be made by the Secretary-General, the staff member concerned or a Member State. The supporters of the revised joint draft resolution considered that a Member State had a legitimate interest in ensuring the proper application of the Charter and the Staff Regulations, as well as a financial interest in the matter ; and it was not reasonable to assume that a Member State, in interceding in a case, would do so solely for political reasons . . .
>
> . . . . . .
>
> 18. Under the proposed new Article 11, the review of substantive legal issues was to be made by the International Court of Justice which had been selected because it was an independent, impartial judicial body of the highest standing. Supporters of the revised joint draft resolution further considered that the Court was the appropriate organ to be the final judicial arbiter on questions of Charter law and that no organ would be more competent to settle other issues arising from the grounds specified for review. Since only exceptional cases would come to the Court, it would not be over-burdened with trivial questions. It was further argued that it would be neither necessary nor economically justifiable to set up new appellate machinery. While the contentious proceedings of the International Court of Justice were limited to disputes between States, advisory opinions upon legal questions might be requested under Article 96 of the Charter by authorized organs of the United Nations." (Report of the Fifth Committee, doc. A/3016, reprinted in United Nations, *General Assembly Official Records, Tenth Session, Agenda item 49, Annexes,* p. 40.)

C. Conclusions on the scope of the Court's review authority in respect of error of law

29. In the light of the foregoing analysis of the terms and exposition of the *travaux préparatoires* of the Statute of the Administrative Tribunal, it is believed that the following conclusions may fairly be drawn about the scope of the Court's review authority, particularly in respect of error on a question of law relating to the provisions of the Charter :

– In preparing and adopting what is now Article 11 of the Statute of the United Nations Administrative Tribunal, the General Assembly contemplated the submission of requests to the Court for advisory opinions which would entail the Court's passing upon points of law raised by a judgement of the Tribunal, but not re-trying questions of fact. The Court may consider the merits of a judgement of the Tribunal on questions of law in so far as its doing so is consonant with the Court's Statute.

– However, the Court would not be requested to reconsider the merits on all points of law. It is rather restricted to the four "exceptional" grounds of objection to a judgment specified in Article 11 (1) of the Tribunal's Statute.

– Three of those four grounds are essentially procedural : excess of jurisdiction or competence, failure to exercise jurisdiction, and fundamental error in procedure which has occasioned a failure of justice.

– The fourth ground is substantive and its substance is error on a question of law relating to provisions of the Charter. Such error need not be in the interpretation or application of a provision or provisions of the Charter ; it need merely "relate to" – i.e., be connected with – such provision or provisions. That is the paramount point. The proceedings of the Special Committee and the Fifth Committee, moreover, make it clear that the scope of the Court's review authority is consistent with the extensive import of the phrase "relating to". In the most exigent interpretation found in the Report of the Special Committee and in statements in the Fifth Committee, it includes "not only where the Administrative Tribunal might be considered to have misinterpreted the Charter, but also where the Tribunal might have interpreted and applied the Staff Regulations in a manner considered to be inconsistent with the provisions of Chapter XV of the Charter". In its broader interpretation, the Court's authority covers "not only interpretations of the provisions of the Charter but also the interpretation or application of staff regulations deriving from Chapter XV of the Charter". That is the interpretation placed on the error-of-law proviso by its British co-sponsor, on behalf of the co-sponsors, when it was introduced in the Special Committee. Or it covers "interpretation of the Charter or of staff regulations based thereon which might be involved in the Tribunal's decisions". That is the interpretation placed on the error-of-law proviso by its United States co-sponsor at the

end of a detailed debate in the Fifth Committee, shortly before its adoption.

30. These narrower and broader interpretations obviously differ. Yet they can be read together in a consistent fashion ; and in support of so doing, it may be noted that the British and United States representatives, who played the leading role in the proposal of Article 11, seem to have used them interchangeably. If they are so read, it may be argued that the terms used by these principal co-sponsors inform the meaning of the text used in the Report of the Committee, especially since the United States co-sponsor re-stated the broader interpretation after the Report was introduced but before the text was adopted by the Fifth Committee. Or it can be argued that the apparently narrower scope of the rendering in the Report of the Special Committee shows that the broad interpretation of the co-sponsors should not govern – which is a conclusion that derives distinct support from the fact that the preoccupations of the United States at the time it took so prominent a part in seeking a review procedure was with what it saw as judgements of the Tribunal which conflicted with provisions of Chapter XV. If the broader interpretation is accepted, as it may reasonably be, then it is plain that the Court in the instant case is entitled to consider whether the judgement of the Administrative Tribunal in *Mortished* v. *the Secretary-General* correctly interprets the Staff Regulations. But if the narrower interpretation is accepted, then the Court in the least is entitled to consider whether that judgement correctly interprets the Staff Regulations in so far as the Tribunal might have interpreted and applied them in a manner inconsistent with the provisions of Chapter XV of the Charter. And in any event, such an inconsistency need merely "relate to" such provisions.

3. *The Court's Interpretation of the Statutes of the Administrative Tribunals in the* Unesco Officials *and* Fasla *Cases*

A. The Unesco Officials *case*

31. In so far as it may be relevant to the scope of the Court's authority in this case, the Court's Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956,* p. 77 (herein referred to as the *"Unesco Officials* case"), may be best understood for present purposes if it is considered in the context of the *travaux préparatoires* set forth above, together with the Court's interpretation of the distinguishable Statute of the United Nations Administrative Tribunal which was construed in the *Fasla* case.

32. In the *Unesco Officials* case, the Court exclusively considered the provisions of Article XII of the Statute of the ILO Administrative Tribu-

nal. It found that the challenge raised against the Tribunal's judgements "refer to the jurisdiction of the Administrative Tribunal and to the validity of the Judgments" (p. 83). It saw its advisory procedure "as serving, in a way, the object of an appeal" against the Tribunal's judgments (at p. 84). The Court held that it was not necessary for it to express an opinion on the legal merits of Article XII of the Statute (p. 85). It then turned to the first question put to it, which was whether the Administrative Tribunal was competent under its Statute to hear certain complaints. In considering the decision of the Tribunal which confirmed its jurisdiction, the Court held :

> "The Court is not confined to an examination of the grounds of decision expressly invoked by the Tribunal ; it must reach its decision on grounds which it considers decisive with regard to the jurisdiction of the Tribunal." (*I.C.J. Reports 1956,* p. 87.)

The Court continued :

> "The words 'competent to hear' used in the Request for an Opinion mean that the question is one of determining whether the Administrative Tribunal was legally qualified to examine the complaints submitted to it and to adjudicate on the merits of the claims set out therein. The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. That distinction between jurisdiction and merits is of great importance in the legal régime of the Administrative Tribunal. Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court on a Request for an Advisory Opinion emanating from the Executive Board. Errors of fact or of law on the part of the Administrative Tribunal in its Judgments on the merits cannot give rise to that procedure. The only provision which refers to its decisions on the merits is Article VI of the Statute of the Tribunal which provides that its judgments shall be 'final and without appeal'." *(Ibid.)*

33. It is plain that, in reaching the foregoing holding, the Court addressed itself to the particular "legal régime of the Administrative Tribunal" of the ILO. The distinction between jurisdiction and the merits is "of great importance" in that régime, because "Errors of fact or law . . . on the merits" by the Tribunal cannot give rise to review by the Court. The situation is demonstrably otherwise in the régime of the United Nations Administrative Tribunal, which had been freshly adopted when the Court

took up the *Unesco Officials* case. Thus, in the instant case, it would be wrong simply to carry over the holding of the Court in the *Unesco Officials* case that :

> "The Request for an Advisory Opinion under Article XII is not in the nature of an appeal on the merits of the judgment. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against the decisions of the Administrative Tribunal. A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision." (*I.C.J. Reports 1956,* p. 98.)

This is because the Court, when reviewing judgements of the United Nations Administrative Tribunal, acts, in so far as error of law relating to Charter provisions is alleged, under a review authority which is designedly and decisively wider than that which applies under Article XII of the Statute of the ILO Administrative Tribunal.

B. The Fasla *case*

34. The *Fasla* case is pertinent to the question under discussion, and instructive in a number of other respects in regard to the case at bar. In the *Fasla* case, the request of the Committee on Applications was for an advisory opinion regarding alleged failure by the Administrative Tribunal to exercise jurisdiction vested in it and fundamental errors in procedure which it was alleged to have committed. "These are," the Court said, "questions which by their very nature are legal questions . . . within the meaning of Article 96 of the Charter" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* pp. 166, 175). The Court resorted to "the legislative history of Article 11" to show that recourse to the Court was to be had "only in exceptional cases" (p. 177). In a passage of particular interest, the Court further held that,

> "the proceedings before the Court are still advisory proceedings, in which the task of the Court is not to re-try the case but to reply to the questions put to it regarding the objections which have been raised to the Judgement of the Administrative Tribunal" (p. 182).

In the light of the legislative history of Article 11, it is submitted that, by this, the Court meant that it would not examine the facts of the case. It did not and could not have meant that it was barred from considering the merits, if the questions put to it required considering the merits. The Court noted that the Committee on Applications "is authorized to request, and the Court to give, an advisory opinion only on legal questions which may properly be considered as falling within the terms of one or more of those

four 'grounds' " (p. 184). It held, in traditional terms, that, "The Court may interpret the terms of the request and determine the scope of the questions set out in it" *(ibid.)*. It further held that : "The Court may also take into account any matters germane to the questions submitted to it which may be necessary to enable it to form its opinion." *(Ibid.)* Thus the records of the Committee on Applications in the current case may be taken into account in order to interpret the terms of the request, despite the fact that the Court is, in principle, "bound by the terms of the questions formulated in the request" *(ibid.)*. The Court found "no reason to adopt a restrictive interpretation of the questions framed in the request" (at p. 187). It then declared :

> "Under Article 11 of the Statute of the Tribunal, as already indicated, the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement. The Court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. *Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgement on one of the grounds mentioned in Article 11 is well founded.* In so doing, the Court is not limited to the contents of the challenged award itself, but takes under its consideration all relevant aspects of the proceedings before the Tribunal as well as all relevant matters submitted to the Court itself by the staff member and by the Secretary-General with regard to the objections raised against that judgement. *These objections the Court examines on their merits* in the light of the information before it." (*I.C.J. Reports 1973,* pp. 187-188 ; emphasis added.)

Once more, it is plain that what the Court meant is that it will not retry the case in the sense of finding the facts, or generally substitute its views on the merits for those of the Tribunal. But its role is to determine if the circumstances of the case, "whether they relate to merits or procedure", show that any objection made to the judgement on one of the grounds specified in Article 11 is well-founded. That is precisely the task of the Court in the instant case. Moreover, in performing that task, the Court, if it is to follow its holdings in the *Fasla* case, shall not limit itself to the contents of the challenged award in *Mortished* v. *the Secretary-General,* but shall take into account all relevant matters submitted to the Court with regard to the objections raised against that judgement. Among such matters are the terms and intent of General Assembly resolution 34/165. The Court accordingly should, in examining the objections to the *Mortished* judgement of the Administrative Tribunal, decide upon those objections – as the Court in the *Fasla* case specifies – "on their merits" in the light of the information before it – information which embraces not only the terms of the General Assembly's resolutions but the debate which led to their adoption.

35. In the *Fasla* case, the Court further held :

> "Furthermore, as the Court pointed out in its Advisory Opinion in the *Unesco* case, a challenge to an administrative tribunal judgment on the ground of unauthorized assumption of jurisdiction cannot serve simply as a means of attacking the tribunal's decisions on the merits . . .
>
> . . . . . .
>
> So too, under Article 11 of the Statute of the United Nations Administrative Tribunal a challenge to a decision for alleged failure to exercise jurisdiction of [*sic.* – this should read : 'or'] fundamental error in procedure cannot properly be transformed into a proceeding against the substance of the decision. *This does not mean that in an appropriate case, where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may not be called upon to review the actual substance of the decision.* But both the text of Article 11 and its legislative history make it clear that challenges to Administrative Tribunal judgements under its provisions were intended to be confined to the specific grounds of objection mentioned in the Article." (*I.C.J. Reports 1973,* p. 188 ; emphasis supplied.)

It also held that, "in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of the matter and not merely to the form" (pp. 189-190). Later it observed that the Court's abstention from carrying out a factual inquiry "does not mean that, in review proceedings, the Court regards itself as precluded from examining in full liberty the facts of the case or from checking the Tribunal's appreciation of the facts" (p. 207).

36. The most essential teaching of the *Fasla* case for present purposes is that, in an appropriate case which is precisely that of *Mortished,* i.e., "where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter" the Court is "called upon to review the actual substance of the decision". There is only one qualification to that charge : challenges are "confined to the specific grounds of objection" mentioned in Article 11 of the Administrative Tribunal's Statute. As has been demonstrated above, the ground of error on a question of law "relating to" the provisions of the Charter is a ground which, in undeniable measure, embraces interpretation by the Court of the Staff Regulations. The Court's competence does not extend to every such case, for the scope of the Court's review authority was meant to be "exceptional" and construction of the Staff Regulations by the Tribunal is routine. But certainly it would extend to a case such as Mortished's, in which the authorized Committee of the General Assembly requests an advisory opinion on so exceptional a question as whether the Administrative Tribunal was warranted in not giving immediate effect to a resolution of the General Assembly. Indeed, as will be shown below, that

exceptional question, and error of law in respect of it, unquestionably and in any event "relates to" Charter provisions.

37. The *Fasla* case is instructive in still another respect as well. In that case, the Administrative Tribunal found itself in the situation of having to translate the injury sustained by the applicant into monetary terms. The Court found that, under the Tribunal's Statute, the discretion afforded the Tribunal in that regard is wide. It added :

> "If the Court were acting *in this case* as a court of appeal, it might be entitled to reach its own conclusions as to the amount of the damages to be awarded, but this is not the case. *In view of the grounds of objection upon which the present proceedings are based,* . . . the Court must confine itself to concluding that there is no such unreasonableness in the award as to make it fall outside the limits of the Tribunal's discretion. This being so, the Tribunal cannot be considered as having failed to exercise its jurisdiction in this respect." (*I.C.J. Reports 1973,* p. 197 ; emphasis supplied.)

This passage plainly imports that, if the Court in another review of a judgement of the Administrative Tribunal were not proceeding on the procedural grounds of objection which were in play in the *Fasla* case but on the substantive ground of objection which is at issue in *Mortished,* the Court would indeed act "as a court of appeal".

38. This is precisely the conclusion reached as long ago as 1958 by a distinguished commentator on the subject, Professor Leo Gross. In appraising the amended version of Article 11 of the Statute of the United Nations Administrative Tribunal, Professor Gross wrote that an objection on the ground that the Tribunal has erred on a question of law relating to a provision of the Charter "relates not to the validity of the Judgment but to the merits of the Judgment". This ground, he concluded, affords the International Court of Justice "a true appellate jurisdiction". He observes that, "The inclusion of the review of substantive legal issues by the Court . . . was considered an essential feature of the compromise among the different proponents of the review procedure . . ." (L. Gross, "Participation of Individuals in Advisory Proceedings before the International Court of Justice : Question of Equality between the Parties", 52 *American Journal of International Law,* 16, 36 (1958)).

II. The Origins and Development of the Repatriation Grant

39. The judgment of the Administrative Tribunal in the case of *Mortished* v. *the Secretary-General* can be evaluated only in the context of the character of the repatriation grant and the grant's surrounding debate and development in the General Assembly. It is accordingly necessary to set out the origins and evolution of the repatriation grant, and its treatment by the General Assembly in resolutions 33/119 and 34/165, and to do so in adequate detail.

1. The Initiation and Intent of the Repatriation Grant 1949-1950

40. In 1949, the United Nations Committee of Experts on Salary, Allowance and Leave Systems proposed that a then existing expatriation allowance be abolished. Its report recommended, however, that a repatriation grant be paid to repatriating members of the staff, in the following terms :

> "It was recognized . . . that upon leaving the Organization and being repatriated to his home country, a staff member is faced with certain extraordinary expenses, and that such expenses would fully justify payment of a special lump-sum grant at that time. Such expenses would arise for example, as a result of *(a)* the loss, during United Nations service, of professional and business contacts with the home country . . . *(b)* the necessity of giving up residence and liquidating obligations in a foreign country ; and *(c)* the expenses which a staff member will normally have to meet in re-establishing himself and his home on return to his own country. The Committee was, therefore, of the opinion that in place of the present expatriation allowance there should be substituted a repatriation grant designed to assist in meeting such extraordinary expenditures. The substitution of such a grant would not only be in the interest of economy and of administrative simplicity, but equally in the interest of the staff member who would receive the payment at the time when it was really needed.
>
> It is proposed that the grant should be payable to all staff members with respect to whom the Organization is obliged to undertake repatriation to the home country. Staff members who are terminated by summary dismissal should not be eligible. The amount of the grant should vary with the length of service with the United Nations provided that payment of the grant would begin with staff who had served a minimum of two years." (A/C.5/331, p. 2.)

41. This proposal for a repatriation grant – and the reasons for and purpose of the grant – were (with modifications in its scale) accepted by the Advisory Committee on Administrative and Budgetary Questions (ACABQ), which described the grant as payable to staff members "returning to their home countries" (A/1313, para. 69). The Secretary-General supported the proposal of the Committee of Experts, which he too saw as designed to cope with "the expense [of retiring staff] incurred in settling down anew in their own countries" (A/1378, p. 82). The Fifth Committee likewise accepted the repatriation grant "in the form of a lump-sum which would be paid to staff members on their being repatriated to their home countries . . ." (A/C.5/400, p. 104). Thus the General Assembly in 1950 adopted a resolution amending the then provisional staff regulations to provide :

> "The Secretary-General shall establish a scheme for the payment of repatriation grants in accordance with the maximum rates and conditions specified in annex II [1] to the present regulations." (Resolution 470 (V).)

Annex II to the new Staff Regulation specified :

> "In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate, except those terminated by summary dismissal. Detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General. The amount of the grant shall vary with the length of service with the United Nations . . ." *(Ibid.)*

The Secretary-General accordingly put out an Information Circular which noted :

> "The principle of a repatriation grant has been established, the grant to be payable to staff members returned at United Nations expense to their home countries. The grant will not be payable to staff members who are serving at an official duty station in their home country when they are separated from the service. A staff member who is summarily dismissed will not be entitled to the grant." (ST/AFS/SER.A/72, p. 7.)

2. Departure from the General Assembly's Intent by the CCAQ in 1951-1952

42. Despite the clarity of the language and intent of all concerned, as early as 1951 the view appeared within the administrations of the United Nations and the Specialized Agencies that, notwithstanding the principle that the repatriation grant may be paid only to those who repatriate, as a matter of practice it also should be paid to those who do not. Thus a working paper of the United Nations Secretariat prepared for the Consultative Committee on Administrative Questions (CCAQ) of the Administrative Committee on Co-ordination (ACC) contains the following passage :

> "*Question 1 :* The General Assembly has stated that the repatriation grant is to be paid in those cases where the organization is 'obliged to repatriate'. Given this basic principle, should the repatriation grant be paid in cases where the staff member is not actually repatriated, i.e., *(a)* he remains in the country of the official duty station, *(b)* he travels to a country other than his home country ?
>
> *Answer :* In general, the United Nations would take the view that

[1] In later versions, what was initially entitled Annex II became Annex IV.

the General Assembly language requires payment of the grant under either circumstance, particularly since it would be impossible to control the final place of residence." (CO-ORDINATION/CC/A.12/13.)

The foregoing document, which is dated 20 March 1952 and denominated, "Restricted", is consonant with an opinion voiced the previous year at the Eleventh Session of CCAQ. The *Provisional Summary Record* of the Twelfth Meeting of that session contains this passage :

"*Question 1 :* Should repatriation grants be paid even although the staff member was not actually repatriated ?

MR. MCDIARMID (United Nations) said that the United Nations took the view that if the staff member was entitled to be repatriated he was equally entitled to the repatriation grant irrespective of whether he returned home or not. After all, it would be impossible to control his ultimate place of residence.

MR. CALDWELL (International Labour Organisation) agreed with that principle and mentioned political considerations as another argument for adopting it.

At the suggestion of MR. REYMOND (International Labour Organisation) *it was agreed* to record the view that while such a ruling was not entirely in harmony with the purposes of the grant, from an administrative point of view no other procedure was possible." (CC/A.11/SR.12 of 5 May 1951, p. 12.)

43. The Twelfth Session of the CCAQ, which met in May 1952, adopted a report, also denominated "Restricted", which contains the following passages of particular interest :

"*Repatriation grants*

This subject is considered of sufficient policy importance to warrant a full report to ACC, which is asked to concur in the principles here enumerated.

Of the agencies which have accepted the common salary and allowances scheme, only ICAO has failed to include the repatriation grant among its allowances. To provide a basis for uniformity in administration where the grant is paid, the following principles are proposed :

(a) The United Nations regulation provides that the grant is payable where the Organization is 'obligated to repatriate'. This language has been followed by FAO and Unesco. The ILO and WHO have adopted the criterion, 'serving at a duty station outside of the home country'. It is felt that the ILO-WHO formulation is more descriptive of the intent. Without proposing changes in regulations, it is proposed

that other organizations undertake to reflect this concept in their rules.

(b) In the light of *(a)*, it is believed that the grant should be paid after two years' service abroad, regardless of the conditions of separation (including resignation but excluding summary dismissal) and regardless also of whether the staff member is actually repatriated.

(c) However, the organization is not considered obligated where the staff member voluntarily assumes the nationality of the country of duty station.

. . . . . .

(g) In the case of a staff member serving away from his home country who is then transferred to duty within that country, eligibility for the grant should continue subject to a reduction factor as follows :

(i) no change in the amount of the entitlement if the separation occurs within the first three months of service in the home country ;

(ii) each month of service beyond three months would, for purposes of calculation of the grant, cancel one year of qualifying service away from the home country.

Hence the actual amount of the grant (if any entitlement remained) would depend upon how long after the transfer the separation took place." (CO-ORDINATION/R.124, pp. 6-8.)

44. It will be observed that, in the view of the CCAQ, "the intent" of the repatriation grant was that it should be paid to those serving at a duty station outside of the home country, apparently regardless of whether the staff member relocated from the country of the duty station or not. On what it based this finding of intent is not revealed. It certainly does not correspond to the intent of the Committee of Experts which proposed the grant, or of the ACABQ, the Secretary-General or the Fifth Committee in accepting such a proposal (see paras. 40-41, *supra*).

45. Two further points in respect of this report of the CCAQ should be made. First, it acknowledges that the whole of entitlement to the repatriation grant might vanish upon transfer of a staff member to duty within his home country (see subpara. *(g)* in the above quotation from the report) – an acknowledgement which is not easily reconciled with treating such entitlement as an acquired right.

46. Second, while the report asks the ACC "to concur in the principles here enumerated", no evidence has been submitted to the Court indicating that it did. It may be presumed that, if the Administrative Committee on

Co-ordination actually had concurred in these principles, and evidence so demonstrating exists, Mortished's able counsel would have presented that evidence. Moreover, a search of United Nations documentation indicates that *(a)* the above-cited documents of the CCAQ, two of which were marked as restricted, were not submitted to the General Assembly or to the Economic and Social Council and *(b)* the reports of the ACC in the years 1951-1953 give no indication whatsoever that the ACC concurred in the principles enumerated in respect of the repatriation grant ; indeed, those reports make no reference at all to the repatriation grant (cf., docs. E/1865, E/1991, E/2161, E/2203, E/2340 and E/2446).

3. The General Assembly apparently Is not Informed that Practice Departed from Principle

47. While apparently in practice the United Nations paid repatriation grants to those who remained at their last duty station, beginning at a time which is not clear in the record before the Court, it is equally unclear when before 1976 the General Assembly was informed that the practice had so far departed from the principle which it had prescribed. Thus as late as 1963, a Report of the Secretary-General on personnel questions submitted to the Eighteenth Session of the General Assembly states :

> "The repatriation grant was introduced with effect from 1 January 1951 under the terms of General Assembly resolution 470 (V). Unlike the earlier expatriation allowance, which it replaced, the repatriation grant was established as a terminal payment designed to provide compensation for the extraordinary expenditures incurred by staff members at the time of their separation from the service and re-establishment in their home country after a prolonged absence." (A/C.5/979, pp. 18-19, para. 13.)

By that same report, the Secretary-General proposed revisions of the Staff Regulation and its annex governing the repatriation allowance which are not relevant for present purposes, except in so far as they maintained the proviso : "In principle, the repatriation grant shall be payable to staff members whom the Organization is obliged to repatriate . . ." (*ibid.*, p. 20). The conjunction of these passages would surely suggest to any concerned delegate in the Fifth Committee that the principle of payment of the repatriation grant to those who are repatriated was routinely respected. Thus, for example, in discussing the Secretary-General's proposed amendments to the Staff Regulation in respect of the repatriation grant, the representative of Czechoslovakia said :

> "It should not be forgotten that the repatriation grant had been conceived as a 'terminal' benefit designed to compensate staff for the extraordinary expenditure they incurred when they left the Organi-

> zation and settled in their own countries again after a prolonged absence." (United Nations, *General Assembly Official Records, Eighteenth Session, Fifth Committee, 1043rd Meeting*, p. 202.)

In reply, Sir Alexander MacFarquhar, the Director of Personnel, in explaining the Secretary-General's proposal, spoke of "expatriate staff who returned home . . ." (*ibid.*, p. 203). There was no hint of payment of the repatriation grant to those who did not return home. None of the proposed amendments to Annex IV of the Staff Regulations concerning the repatriation allowance related to any practice of paying the grant to those who remained at their duty station or gave any indication to the General Assembly that this was the practice, if indeed at the time it was (see A/5646, p. 46). If it were the conclusion of the Secretary-General that the practice rightly did not conform to the principle and that the principle should be revised, it is difficult to understand why he did not take an opportunity such as this to propose to amend the Staff Regulations, or to amend the Staff Rules, or, at least, to air the question in the General Assembly.

4. The General Assembly Is Informed that Relocation to a Third Country Suffices

48. However, while it is far from clear when – at any rate, before 1976 – the General Assembly was informed of the practice of paying a repatriation allowance to those who remained at their last duty station, the General Assembly was informed as early as 1953 that the term "obligation to repatriate" was interpreted and defined as meaning the obligation to return a staff member to a place outside the country of his duty station. The contrast is instructive. From 1953, Staff Rule 109.5, "Repatriation Grant", in paragraph *(a)* provided :

> " 'Obligation to repatriate', as used in para. 4 of Annex IV to the Staff Regulations, shall mean obligation to return of a staff member and his dependants, upon separation, at the expense of the United Nations, to a place outside the country of his or her duty station."

This definition of the "obligation to repatriate" informed the General Assembly that the Secretary-General liberally interpreted the pertinent Staff Regulation to permit removal to a place outside the country of the staff member's duty station in addition to the home country. But equally, it may be said to have imported that a staff member who remained in the country of his or her last duty station was *not* eligible for a repatriation allowance : *expressio unius est exclusio alterius.* Viewed in this light, the stress which the Administrative Tribunal places in *Mortished* v. *the Secretary-General* (para. VII) on the 1953 break of the link between the repatriation grant and return to the home country appears misplaced.

5. The CCAQ's Rationale for the Practice

49. In 1974, the Consultative Committee on Administrative Questions undertook a review of the repatriation grant. Its Secretariat in a working paper noted that the grant was designed to deal with the "practical and financial difficulties of [the expatriate staff member] re-establishing himself in the home country as were foreseen in 1951" (CCAQ/SEC/325(PER), p. 3). It observed that : "Its object certainly was never that of facilitating establishment in retirement and certainly not in a place other than in the home country." (*Ibid.*, p. 4.) It continued :

> "The whole purpose of the grant is to assist the staff member and his family to re-establish in the *home* country and clearly there is no logical justification for paying the grant to a staff member who remains in the country of his last duty station. Applying the logic is, however, fraught with practical difficulties. The organizations have no way of knowing where a staff member actually resides after he leaves service and in fact there are a number of cases in which staff have two or more residences. The secretariat of the Pension Fund has records of the addresses to which pensions are paid but these are not necessarily the *residences* of the pensioners. One could make payment of the grant dependent upon actual repatriation travel but this would only ensure that the organization incurred the cost of such travel – the value of the grant is sufficient to induce staff to accept repatriation and pay their own fares back to the duty station or to any other place in which they intend to reside. In many cases staff at the time of leaving service do not really know where they will reside and to tie the grant to actual repatriation would lead to requests for keeping the entitlement on the books pending personal decisions of the staff member. For all these reasons, CCAQ Secretariat doubts the feasibility of attempting to make payment of the grant dependent on evidence of repatriation."

50. The foregoing rationale for what the CCAQ Secretariat here implicitly indicates is the practice of paying the repatriation grant to those who remain in the country of their last duty station is of high interest. What is most striking about the rationale is its unpersuasiveness. It appears to proceed in part on the assumption that staff members of the international secretariats cannot be trusted to tell the truth about their domicile, even though they are routinely entrusted with telling the truth about more important matters and even though sworn statements as to residence or domicile are a regular incident of the modern life of the taxpayer, spouse and litigant. It should have been obvious that the least the organizations could have done was to have made payment of a repatriation grant con-

ditional upon the staff member's signing an undertaking of removal from the country of last duty station within a given period. Indeed the International Civil Service Commission belatedly reached this conclusion. Moreover, the difficulties of monitoring performance of a pledge of removal appear to have been exaggerated, as the straightforward rule ultimately promulgated by the Secretary-General in 1979 indicates.

6. Amendments to the Staff Regulations Do not Inform the General Assembly of the Practice

51. The seven United Nations agencies which replied to a question posed by the foregoing working paper on whether payment of the repatriation grant should be conditional on actual repatriation unanimously said that it should not be (CCAQ/SEC/325(PER) Add.1, para. 2). What is of interest for present purposes is that, apparently as a result of questions discussed by the CCAQ Secretariat and then moved through the system, amendments were made in 1974 to the Staff Regulations and Staff Rules and that those amendments in fact included revision of Staff Regulation 9.4 on the repatriation grant (res. 3353 (XXIX)). But again no effort was made to amend or clarify the Regulation or consequential Rules or annexes to justify a practice of paying the repatriation grant to those who remain in the country of their last duty station. Nor was light on the practice shed by the Report of the International Civil Service Commission (ICSC) to the General Assembly of 1976, which, in so far as the record presented to the Court indicates, nowhere states that repatriation grants are paid to those who do not leave the country of their last duty station.

7. The Practice Is First Aired in the General Assembly in 1976

52. It was at the General Assembly in 1976 that the practice of payment of the repatriation grant to those who remain in the country of their last duty station was first aired. The representative of Austria in the Fifth Committee, in commenting on the Report of the International Civil Service Commission, questioned whether it was appropriate to pay the grant to a staff member who "remained in the country of the duty station after retirement" (A/C.5/31/SR.32, p. 9). The representative of Australia shared her concerns (A/C.5/31/SR.34). Consequently, the Report of the Fifth Committee noted that :

"The view was also expressed that the Commission should consider

whether staff members who did not return to their country of origin on retirement should be entitled to the grant." (A/31/449, p. 4.)

The resolution adopted by the General Assembly contains the following provision :

"*Requests* the Commission to re-examine, in the light of the views expressed in the Fifth Committee at the current session :

(a) the conditions for the provision of terminal payments (for example, repatriation grant, termination indemnities), in particular on retirement and the possibility of establishing a ceiling for the maximum aggregate of entitlements to these payments ;

(b) the possible introduction of an 'end-of-service' grant with particular attention to the conditions in which such payment might be justified" (*ibid.*, p. 6).

It should be noted that this resolution belies any contention that, in practice, the repatriation grant had evolved into a severance grant, since it speaks of no more than the "possible introduction" of an end-of-service grant.

8. The CCAQ Does not Mention the Practice

53. In response to the General Assembly's request that the International Civil Service Commission re-examine the conditions for payment of the repatriation grant, studies were undertaken. In a paper submitted to the Commission by the Consultative Committee on Administrative Questions dated 6 February 1978, under "Conditions of Entitlement", the following description of the repatriation grant is found :

"Grants designed to assist the staff member and his dependents, to re-establish themselves in the home country upon completion of his service with the organization (repatriation grant and grant on death) (CO-ORDINATION/R.1263/Add.3, p. 3).

The paper continues as follows :

"(b) *Repatriation Grant*

13. Unlike the termination indemnity, the conditions of entitlement for which have been extensively reviewed and most recently revised, those governing the repatriation grant have remained essentially unchanged since they were first laid down with effect from 1 January 1951 . . .

14. The grant is payable to staff members whom the organization is obligated to repatriate at the end of their service, except in cases of summary dismissal and abandonment of post. The obligation to

repatriate is interpreted to mean the obligation which the organization assumes when it recruits a staff member who is a national of a country other than that of the duty station to return him or her at the expense of the organization to the home country recognized for purposes of home leave, the place from which he or she was recruited or, exceptionally, such other country as the executive head may determine in the light of the circumstances affecting the staff member's status at the time of separation. The purpose of the grant, . . . is to assist the staff member in meeting the extraordinary expenses he or she is faced with on leaving the organization and returning to the home country . . .

15. In one particular respect [not relevant to the issue of relocation], the purpose of the grant has undergone some modification since it was first defined . . .

16. Entitlement to the grant is further determined by the staff member's personal status . . . In the case of the single staff member, the grant is half the amount payable to the married staff member. The rationale behind this sharp distinction, . . . is the assumption that the expenses of re-establishing a family after an extended absence from the home country are substantially higher than those of a single person.

17. The organizations believe that the concept of the grant, as evolved over the years and as currently applied in the varying circumstances under which the grant is paid adequately responds to employment policies laid down by their respective governing organs." (CO-ORDINATION/R.1263/Add.3, pp. 4-6.)

This is an extraordinary statement. It is longer and more detailed than the foregoing quotations indicate. It accurately sets out the original and continuing rationale for payment of the repatriation grant. It summarizes the changes that have been made in eligibility for the grant. It purports to set out, presumably exhaustively, the terms of entitlement to the grant. It says that only in "one particular respect" has the purpose of the grant undergone some modification since it was first defined. Yet scrutiny of this statement demonstrates that it contains no indication that in fact United Nations officials were being paid the grant even if outside the terms it describes as those of "entitlement".

9. The Revealing Report of the ICSC of 1978

54. The International Civil Service Commission, in its Report to the General Assembly in 1978, recites the facts which are summarized in the foregoing quotation (United Nations, *General Assembly Official Records, Thirty-Third Session,* Supplement No. 30 (A/33/30), pp. 59-60), and then continues :

"181. The Commission's examination in 1978 centred on two questions :

(a) the justification for the progressive scale of amounts of the grant ;

(b) the appropriateness of paying the grant to a staff member who, upon separation, does not return to his home country.

182. If the purpose of the grant was to meet exceptional expenses incurred in resettling oneself in one's own country, it could be questioned why the amount should increase with the number of years of service (up to a fixed maximum). It could be argued that the expenses in question were no greater after 20 years' expatriation than after one year's ; indeed, they might be less if the separation and repatriation had been foreseen and planned for some time than if they occurred unexpectedly as might be the case in the first few years of service. By its progressive character, the grant undoubtedly had some of the characteristics of an earned service benefit, as well as of an *ad hoc* subsidy. The Commission recognized this duality, due, no doubt, to the fact that the grant was introduced to replace a previously existing expatriation allowance and also to the influence of the progressive pattern of many other such indemnities (e.g., the termination indemnity or the severance pay of the United States civil service ; the same pattern was found in the repatriation or resettlement grants of a number of national foreign services) . . . The Commission believed there would be logic in standardizing the repatriation grant as a flat amount or as the equivalent of a number of days' daily subsistence allowance at the rate applicable to the place to which the former staff member moved (so as to reflect differences in cost of living) ; at the same time, it doubted the wisdom of eliminating entirely from the salary system all trace of a separation benefit reflecting length of service . . ."

This quotation is significant, for it places in appropriately modest context any contention that the staff member "earns" the repatriation allowance which thus is an accrued and vested right. As to the immediate issue of the case, the Commission made the following extremely important statement :

"183. Having regard to remarks made in the discussion in the Fifth Committee at the thirty-first session of the General Assembly, the Commission considered the question of whether it was appropriate that a repatriation grant be paid to a staff member who did not, in fact, return to his or her home country upon separation from the organization. Strictly speaking, it was clear that to do so would be inconsistent with the stated purpose of the grant. The staff member who

remained in the country of the last duty station incurred none of the expenses of dislocation and reinstallation which the grant was intended to meet (or none more than would be incurred by a non-expatriate staff member, who would not be entitled to the grant in any case). The staff member who removed to a country other than the home country, either to work there or to retire there, did incur expenses of relocation and installation, but the strict purpose of the grant was not complied with. To say that the staff member had earned the entitlement to the grant through having been expatriate during his service and should receive it upon separation wherever he went, then, would be to change the nature of the entitlement and to make it a kind of deferred expatriation allowance, so raising the question of possible duplication with that part of the margin included in base salary which is defined as compensation for expatriation.

184. The representatives of the organizations, while recognizing the problem, pointed out to the Commission the practical difficulties they would have in keeping track of the movements of a former staff member after he had left the service. The fact that he had used his entitlement to repatriation travel would not be conclusive, since he might travel to his home country but return immediately afterwards to settle in his last duty station country or go to some third country. (Some members, however, believed that if a more rigorous control was exercised over repatriation travel than appeared to be the case at present, it could provide considerable indications as to where former staff members had gone on separation.)

185. The Commission acknowledged these practical difficulties and had no desire to see an international information network set up to keep track of the movements of former staff members. It did believe, however, that to pay repatriation grant to a person who remained permanently in the country of his last duty station was incompatible with the purpose of the grant and could also be seen as discriminatory by non-expatriate staff members. The expatriate staff member's choice to remain in the duty station country certainly meant that he had, for some time, intended to make that country his home and so had, to some extent, ceased to be truly expatriate.

186. The Commission considered the possibility that the grant be paid only to a staff member who supplied evidence that he had settled in his recognized home country. It rejected that solution because it would penalize those staff members who, during service, had acquired family or other ties with a country other than that from which they were originally recruited, those who on leaving United Nations service were obliged to go to a third country in order to find work and those

> who, for political or other reasons were unable to return to their home country. It considered nevertheless that the grant should not be paid to a staff member who, on separation, remained permanently in the country of his last duty station and so incurred none of the expenses of dislocation and relocation which the grant was intended to meet. The Commission recognized the difficulties of exercising administrative control over the movements of former staff members after they had left the organizations. Considering that the proportion of staff members who did not return to their home country on separation was in any case very small, the Commission was of the opinion that the setting up of cumbersome watertight controls would not be warranted. It believed that the staff member's good faith should be sufficient guarantee of his intentions. It recommends, therefore, that payment of the repatriation grant should be made conditional upon signature by the staff member of a declaration that he does not intend to remain permanently in the country of his last duty station. That requirement should come into effect from 1 January 1979 for new staff members. If the organizations consider that some period of grace should be allowed to serving staff members who may already have planned the place where they will reside after their separation on the assumption that they will receive the grant, CCAQ should agree on a common transitional measure." *(Ibid.)*

This statement is notable in several respects, especially in that :

– it affirms, in 1978, that payment to non-repatriating staff is, strictly speaking, "inconsistent with the stated purpose of the grant" ;

– it recognizes that, in 1978, there is a case, in terms of the grant's purposes, for payment to a staff member who relocates to a third country, but no such case for the staff member who remains in the country of the last duty station ;

– it recognizes that to make payment to staff who remain in the country of the last duty station "would be to change the nature of the entitlement", which would raise question of duplicating payments already made ;

– it notes the practical difficulties of monitoring the movement of retiring staff and suggests that reliance be placed on the good faith of the staff member in undertaking to move as a condition of payment ;

– it suggests that if the organizations consider that "some period of grace" should be allowed to serving staff members who have made their retirement plans, a common transitional measure should be agreed upon.

It will be observed that the Commission's exposition and analysis made

little room for the contention that serving staff members have an acquired right to payment of the repatriation grant ; it spoke, in tentative terms, of a "period of grace".

55. In introducing the Commission's report to the Fifth Committee, the Chairman of the International Civil Service Commission stated that :

> "The Commission had made a careful study of the entitlement . . . it believed that the repatriation grant should not be paid when the staff member, at the end of his service, remained in the place of his last duty station and accordingly did not incur the removal and reinstallation expenses which the grant was intended to meet." (A/C.5/33/SR.32, p. 11.)

10. Fifth Committee Response to the ICSC Report

56. In the discussion that ensued in the Fifth Committee, the following views were expressed. The representative of Italy uniquely opposed requiring the retiring staff member to sign a declaration that he did not intend to remain permanently in the country of his last duty station "because it would infringe the right of an individual to move freely from one place to another" (A/C.5/33/SR.37, p. 17). The representative of Japan, while approving the Commission's proposal, considered that signature of such a declaration was not a "sufficient guarantee against its abuse" (*ibid.*, p. 22). The representative of Austria maintained that the grant was designed to assist a staff member in re-establishing himself or herself in the country of origin long before reaching retirement age ; payment to a retiring official who remained at the last duty station was "wasteful", the more so since Pension Fund arrangements permitted drawing one-third of the capital value of a pension in a lump-sum to cover costs of relocation. Her Government would accept the Commission's recommendation for a declaration on a provisional basis "to avoid continuing the current practice . . ." (A/C.5/33/SR.38, p. 6). The representative of Belgium maintained that the repatriation grant, "which had been $5,000 in 1963, had grown out of all proportion . . . The grant should be strictly limited to staff members who resettled in their home countries and, despite the arguments in . . . the Commission's report, administrative control of their movements was warranted." (A/C.5/33/SR.40, p. 5.) The representative of the United States accepted "without question" the condition which the ICSC recommended be imposed with respect to the repatriation grant. The condition was "completely in accord with the spirit and letter of the Staff Regulations, which represented the final authority for interpreting conditions of service" (A/C.5/33/SR.40, p. 8). The representative of France declared that his delegation was, on the whole, against all special grants paid at the end of service and believed that the existing repatriation grant should be "strictly limited" (*ibid.*, p. 11). The representative of Trinidad and Tobago found that a declaration of intent was not sufficient to ensure payment of

the repatriation grant in the circumstances for which it was intended (A/C.5/33/SR.41, p. 9). The representative of Canada agreed with the Commission that the grant should not be paid to a staff member who remained in the country of his last duty station ; a declaration did not seem a sufficient guarantee against abuse (*ibid.*, p. 13).

57. In reply to these remarks, the Chairman of the Commission stated that its proposed reliance on the good faith and word of honour of international civil servants should be sufficient "as a first step in introducing administrative control". In its study, the Commission had found that "in a few cases" grants had been paid to non-relocating staff and the Commission's proposal "was intended to eliminate what was considered to be an unjustifiable and anomalous payment in such cases" (A/C.5/33/SR.42, p. 17).

11. The General Assembly Bars Payment to Non-Relocating Staff by Resolution 33/119

58. Thereafter, a resolution on the Report of the International Civil Service Commission was introduced – the resolution which was to become resolution 33/119. In introducing the resolution on behalf of the sponsors, the representative of Japan declared :

> "On the question of the repatriation grant, paragraph 4 made it clear that evidence of actual relocation would be required, in addition to a signed declaration by the staff member. It would be the Commission's task to establish the exact terms." (A/C.5/33/SR.56, p. 10.)

This statement is important, for it indicates that all the Commission and the Secretary-General were to do in implementing resolution 33/119 was to establish the exact terms of provision of evidence of relocation. It thus inferentially indicates that what the Commission and the Secretary-General actually did – to promulgate the transitional provision at issue in Staff Rule 109.5 *(f)* – conflicted with the clear intent of General Assembly resolution 33/119.

59. In the debate on the resolution, Mr. Davidson, Under-Secretary-General for Administration and Management, stated :

> "32. Where payment of the repatriation grant was concerned, he took it that the Commission would show some flexibility in imple-

> menting the practice proposed in section IV, operative paragraph 4. Since acquired rights were involved, it might prove necessary to refer the matter to the Administrative Tribunal, and that could create problems unless the Commission could find some means of resolving the difficulty." (A/C.5/33/SR.56, p. 10.)

Moments later, the representative of Barbados stated that his delegation "would have preferred the deletion of the phrase 'subject to the terms to be established by the Commission' " in Section IV, paragraph 4, of the draft resolution ; "unless repatriation was established, he saw no occasion for payment of the repatriation grant" (*ibid.*, p. 11). The representative of Belgium followed with this statement :

> "As for section IV, paragraph 4, he agreed with the representative of Barbados that the essential phrase was that referring to the need for presentation by the staff member of evidence of actual relocation, rather than the mention of terms to be established by the Commission." (*Ibid.*, p. 14.)

This exchange then took place :

> "MR. AKASHI (Japan) explained that the final phrase of paragraph 4 was considered necessary because certain ambiguous circumstances could arise in which more specific guidelines would prove necessary. For example, would a staff member who presented evidence of relocation years after his repatriation still be entitled to a grant ? Or, should a staff member who needed the grant to pay for tickets to return to his country be required to submit evidence of relocation ? Many such situations could arise, but he trusted that the Commission would be able to draw up appropriate conditions and terms. However, he assured the representative of Belgium that the phrase in question in no way diluted the thrust of the decision in paragraph 4 but merely provided for its administrative implementation. Moreover, the Commission would inform the Fifth Committee of the terms and procedures it established.
>
> 52. MR. PIRSON (Belgium) said that, if that was the case, he would not object to the wording of the paragraph." (*Ibid.*, p. 14.)

Apart from the foregoing inferential rejection of the Under-Secretary-General's assumption that the Commission would "show some flexibility" in implementing the resolution, nothing was said of his claim that acquired rights were involved. Thereupon resolution 33/119 was adopted by which the General Assembly :

> "4. *Decides* that payment of the repatriation grant to entitled staff

members shall be made conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the Commission."

12. The Frustration of Resolution 33/119

A. The Secretary-General's circular

60. After the adjournment of the Thirty-third Session of the General Assembly, the Secretary-General issued an Information Circular of 22 January 1979 to members of the staff on the Assembly's action on personnel questions. On the repatriation grant, the Circular declared :

> "20. The General Assembly decided that payment of the repatriation grant to entitled staff members should be made conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the Commission. It will, therefore, remain for the International Civil Service Commission to determine the specific terms in implementation of that decision, including their applicability to staff members in service as of the end of 1978." (ST/IC/79/5, pp. 6-7.)

On what basis the Secretary-General ventured to transmute the clear charge of the relevant paragraph of resolution 33/119, as explained on behalf of its co-sponsors, from that of ensuring no payment to retiring staff who do not relocate to making an exception from that rule in favour of "staff members in service as of the end of 1978" is not apparent. He could rely solely on the statement of his Under-Secretary, which no delegation had supported and which three delegations had pointedly not supported.

B. The ICSC recommends a transitional rule

61. Thereafter, the International Civil Service Commission took up its charge under resolution 33/119 to establish terms to make payment of the repatriation grant "to entitled staff members" conditional upon the presentation by the staff member of evidence of actual relocation. It describes its performance of that task in these terms :

> "23. Finally, the Commission recalled that in its proposal to the General Assembly it had foreseen the possibility that some special provision would be needed regarding staff members who had an expectation of receiving the grant under the existing rule but would no

longer be entitled to it under the new rule. The Commission was informed that the legal advisers of several organizations had studied the question and come to the conclusion that any entitlement already earned by a staff member could not be affected retroactively by the changing of the rule ; but the exercise of further entitlements accruing after the date of the change would be subject to compliance with the new condition. That view was supported by the jurisprudence of the United Nations Administrative Tribunal as quoted by the Tribunal in paragraph XVI of its judgement *AT/DEC/237.*

24. Some members questioned whether any acquired right could be said to exist to payment of the repatriation grant to a staff member who did not repatriate or relocate himself. In their view, such acquired rights as might be deemed to exist could only be in respect of persons who had retired and could not accrue to the benefit of existing employees whose rights must rest on a true interpretation of the existing staff regulations rather than an administrative practice contrary to the regulation which expressly related repatriation grant to those employees whom the organizations had an obligation to repatriate. The Commission sought an opinion from the Office of Legal Affairs of the United Nations Secretariat, which indicated that, in so far as the United Nations Organization itself was concerned, there was no express or implied provision that only those who actually made use of the travel entitlement should receive the grant ; the relevant Staff Rules had been reported to and noted by the General Assembly, which must accordingly have deemed the rule to be consistent with the intent and purpose of the Regulations which it had itself approved. On the basis of the advice received the Commission decided that the requirement of relocation should apply only to that part of a staff member's entitlement which was earned after the date on which the rule was changed." (Report of the International Civil Service Commission, A/34/30.)

C. The opinion of the Office of Legal Affairs

62. It may be useful to consider the cited legal opinion of the United Nations Office of Legal Affairs in conjunction with the foregoing passages of the Commission's Report and appraise them together, since the latter so heavily relies upon the former. The whole of the legal opinion, which is undated but apparently was given to the ICSC in the first quarter of 1979, reads as follows :

"Advice has been requested on the question whether United

Nations Staff Rules and the practice within the common system under which repatriation grants are paid to certain staff members, even if they remain in the country of their last duty station after separation, has been consistent with staff regulation 9.4 and annex IV. It has been suggested that if such payment had not been within the then applicable Regulations, then a new regulation discontinuing such grants would simply constitute a discontinuance of an erroneous practice which by its nature could not have given rise to any legally cognizable expectancy.

The history of the repatriation grant as well as the wording and schedule contained in annex IV of the Regulations suggest that the number of years of expatriate service was considered by the General Assembly to be the most significant element of the entitlements. Although the General Assembly defined the recipients of the grant by reference to the definition of those entitled to repatriation travel, there is no express or implied provision to the effect that only those who actually made use of the travel entitlement should receive the grant.

In annex IV of the Regulations, the General Assembly specifically left it to the Secretary-General to establish the conditions for payment of the repatriation grant, and the Secretary-General did this by promulgating staff rule 109.5 and also by establishing a practice in an agreement within the Consultative Committee on Administrative Questions. Staff rule 109.5 *(f),* which even provided for discretion to pay the grant to persons whose final service is within their home country and who could not therefore be entitled to repatriation travel, was – like all Staff Rules – reported to and noted by the General Assembly, which must accordingly have deemed the rule to be consistent with the intent and purpose of the Regulation.

It is therefore clear from the legal viewpoint (and indeed unquestionable under recent United Nations Administrative Tribunal Judgements) that the Staff Rules and payment practices hitherto governing entitlement to the repatriation grant were within the Secretary-General's authority ; and, although subject to change to the same extent as other conditions of appointment of staff, they gave rise to valid and enforceable entitlements and obligations." (A/C.5/34/CRP.8.)

D. The texts of Staff Regulation 9.4, Annex IV and Staff Rule 109.5

63. In order to analyse the opinion of the Office of Legal Affairs and the reliance of the ICSC upon it, it is necessary to set out the texts of the pertinent Staff Regulation and Rule as they then were. They read :

> *"Regulation 9.4 : The Secretary-General shall establish a scheme for the payment of repatriation grants within the maximum rates and under the conditions specified in annex IV to the present regulations."*

> *"Annex IV*
>
> REPATRIATION GRANT
>
> *In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate. The repatriation grant shall not, however, be paid to a staff member who is summarily dismissed. Detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General. The amount of the grant shall be proportional to the length of service with the United Nations, as follows :*

Years of continuous service away from home country	*Staff member with a spouse or dependent child at the time of separation*	...
	(Weeks of pensionable remuneration less staff assessment, where applicable)	
1	4	...
...	...	...
12 or more	28	..."

> "Rule 109.5
>
> REPATRIATION GRANT
>
> Payment of repatriation grants under regulation 9.4 and annex IV to the Staff Regulations shall be subject to the following conditions and definitions :
>
> *(a)* 'Obligation to repatriate', ... shall mean the obligation to return a staff member and his or her spouse and dependent children, upon separation, at the expense of the United Nations, to a place outside the country of his or her duty station.

(b) 'Home country', ... shall mean the country of home-leave entitlement ...

. . . . . .

(d) Payment of the repatriation grant shall be calculated on the basis of the staff member's pensionable remuneration ...

(e) Payment shall be at the rates specified in annex IV to the Staff Regulations.

(f) No payments shall be made to local recruits under rule 104.6, to a staff member who abandons his or her post or to any staff member who is residing at the time of separation in his or her home country while performing official duties, provided that a staff member who, after service at a duty station outside his or her home country, is transferred to a duty station within that country may be paid on separation a full or partial repatriation grant at the discretion of the Secretary-General.

(g) A dependent child, for the purpose of repatriation grant, shall mean a child recognized as dependent ... at the time of the staff member's separation from service. The repatriation grant shall be paid at the rate for a staff member with a spouse or dependent child to eligible staff members regardless of the place of residence of the spouse or dependent child.

. . . . . .

(i) Loss of entitlement to payment of return travel expenses under rule 107.4 shall not affect a staff member's eligibility for payment of the repatriation grant.

(j) In the event of the death of an eligible staff member, no payment shall be made unless there is a surviving spouse or one or more dependent children whom the United Nations is obligated to return to their home country ..."

E. Analysis of the opinion of the Office of Legal Affairs

64. The opinion of the Office of Legal Affairs makes, in its fourth and last paragraph, an important point which, to the extent that the judgement of the Administrative Tribunal in *Mortished* v. *the Secretary-General* can be sustained, is vital to that judgement : "the Staff Rules and payment practices hitherto governing entitlement to the repatriation grant were within the Secretary-General's authority". But much of the remainder of the opinion does not withstand analysis, for these reasons :

– The opinion assumes, and repeats the assumption, that the pertinent United Nations Staff Rules and "the practice within the common system" were consistent, and, after so assuming, asks whether those rules and that

practice have been consistent with Staff Regulation 9.4 and its Annex IV. The opinion, by so assuming, takes a large step towards the conclusion which the opinion reaches. But the assumption is unjustified. The practice within the common system was not (and is not) consistent with the Staff Rules of the United Nations. To the extent that the specialized agencies had different staff rules from those of the United Nations, as certainly they did, the practice may have been consistent with the rules of those agencies. But to treat the United Nations situation as the same as that of the specialized agencies is inaccurate, because of their differing rules. The Staff Rules of the United Nations were indeed consistent with its Staff Regulations, as the opinion of the Office of Legal Affairs correctly concludes. By the terms of Rule 109.5 *(a)*, the "obligation to repatriate", as used in Annex IV of the Staff Regulations, shall mean the obligation to return a staff member to a place outside the country of his or her duty station. This rule is consistent with Regulation 9.4 and its Annex IV, in so far as it excludes payment of repatriation grants to non-relocating staff. But the practice has been to the contrary.

– The opinion, in its second paragraph, states that the most significant element of the entitlement to the repatriation grant was considered by the General Assembly to be the number of years of expatriate service. In view of the history of the grant (see, in particular, paras. 54 and 116), that is a questionable conclusion. (The ICSC re-stated the questionable character of that conclusion at another point in its 1978 report in addition to that quoted in para. 54 : see A/33/30, para. 191.) The number of years of service appears to have been taken primarily as a convenient formula for calculating the amount of, rather than entitlement to, the grant.

– The opinion, in its second paragraph, declares that there is no express or implied provision to the effect that only those who actually made use of the travel entitlement should receive the grant. The inference seems to be that those who receive the grant need not travel. Any such inference is unwarranted. First, the definition of "obligation to repatriate" of Rule 109.5 *(a)* clearly imports returning to a place outside the country of the last duty station. Second, the provision of Rule 109.5 *(g)* – to which the opinion does not refer – that the repatriation grant shall be paid to eligible staff members "regardless of the place of residence of the spouse or dependent child" infers that it shall *not* be paid to the staff member regardless of the place of his or her residence. Third, if there is no express or implied provision to the effect that only those who actually made use of the travel entitlement should receive the repatriation grant, it does not follow that those receiving the grant need not travel. Any such implication is disposed

of by the terms of Staff Rule 107.4 *(b),* which provides, "Entitlement to return travel expenses shall cease if travel has not commenced within six months after the date of separation", when those terms are read together with the practice of treating a staff member as eligible for payment of the repatriation grant for a longer period. (That practice was codified in August 1979, with the issuance of Staff Rule 109.5 *(e)* : "Entitlement to repatriation grant shall cease if no claim for payment of the grant has been submitted within two years after the effective date of separation.")

– The second sentence of the third paragraph of the legal opinion relies on the Staff Rule 109.5 *(f)* (as it then was) "which even provides for discretion to pay the grant to persons whose final service is within their home country and who could not therefore be entitled to repatriation travel . . .". This rule, the opinion notes, was "reported to and noted by the General Assembly, which must accordingly have deemed the rule to be consistent with the intent and purpose of the Regulation". This is a remarkable reading of what was Rule 109.5 *(f).* That paragraph then provided that,

> "No payments shall be made to . . . any staff member who is residing at the time of separation in his or her home country while performing official duties, provided that a staff member who, after service at a duty station outside his or her home country, is transferred to a duty station within that country may be paid on separation a full or partial repatriation grant at the discretion of the Secretary-General."

That is to say, a staff member who has *already* been repatriated may be paid, at the discretion of the Secretary-General, either a full or partial repatriation grant. To infer from this that the Secretary-General is free – still less obliged – to make repatriation payments to those who never repatriate but who remain indefinitely abroad at their last duty station is extraordinary. Any implication that this discretionary authority of the Secretary-General gave non-repatriating staff members "valid and enforceable entitlements" would seem unsustainable. The fact that Rule 109.5 *(f)* was communicated to the General Assembly which must have viewed it as consistent with Regulation 9.4 proves nothing for the issue which the legal opinion addresses, and for the opinion to suggest that it does is profoundly questionable.

– The last sentence of the opinion conjoins a correct statement about the scope of the Secretary-General's authority with a conclusion about "valid and enforceable entitlements and obligations" which is not wholly correct or complete. Once again the Staff Rules and the practice are

assumed to be consistent. The opinion acknowledges that what it views as valid and enforceable entitlements are "subject to change to the same extent as other conditions of appointment of staff", which of itself is no affirmation of any acquired right. The opinion does not expressly state that any such entitlements are valid and enforceable only while in force, though this may be taken for granted. But where it enters upon questionable ground is in its inference that the Staff Rules and practice gave rise to valid and enforceable entitlements and obligations in respect of payment of the repatriation grant without provision of evidence of relocation. As has been shown, the arguments it advances to support that conclusion do not support it, certainly not sufficiently. Arguments which have been elsewhere advanced to support the more far-reaching – and even less sustainable – conclusion that such entitlements constitute an acquired right will be addressed in their place.

13. The Failure to Apply Staff Rule 104.7

65. It is noteworthy that Staff Rule 104.7 does not figure in the opinion of the Office of Legal Affairs, in the practice of the Secretary-General in respect of the repatriation grant in so far as the Court has been informed of it, or in the judgement of the Administrative Tribunal in *Mortished* v. *the Secretary-General.* That rule in pertinent part provides :

> "Rule 104.7
>
> INTERNATIONAL RECRUITMENT
>
> *(a)* Staff members other than those regarded under rule 104.6 as having been locally recruited shall be considered as having been internationally recruited. The allowances and benefits in general available to internationally recruited staff members include : payment of travel expenses upon initial appointment and on separation for themselves and their spouses and dependent children, removal of household effects, non-resident's allowance, home leave, education grant and repatriation grant.
>
> . . . . . .
>
> *(c)* A staff member who has changed his or her residential status in such a way that he or she may, in the opinion of the Secretary-General, be deemed to be a permanent resident of any country other than that of his or her nationality may lose entitlement to non-resident's allowance, home leave, education grant, repatriation grant and payment of travel expenses . . . if the Secretary-General considers that the continuation of such entitlement would be contrary to the purposes for which the allowance or benefit was created . . ."

66. The rule is relevant in more than one respect. In paragraph *(a)*, it lists the repatriation grant as an "allowance and benefit" which is "in general available". That is not language suggestive of an acquired right. Paragraph *(c)* does speak of an "entitlement" to the repatriation grant, but provides that that entitlement may be lost – again, not a proviso suggestive of an acquired right. The entitlement may be lost if, in the opinion of the Secretary-General, a staff member is "deemed to be a permanent resident" of a country other than his or her nationality. That is to say, such a staff member need not have been granted permanent residence as a matter of the law of the country of the duty station ; if the Secretary-General deems the staff member to have become a permanent resident, that suffices. The Secretary-General could reasonably conclude that a staff member who declines to provide evidence of relocation from the country of last duty station, and who indeed affirms an intention to live indefinitely in the country of the last duty station, is to be deemed a permanent resident of that country and that, in that circumstance, continuation of entitlement to payment of the repatriation grant "would be contrary to the purposes for which the allowance or benefit was created". As the 1978 Report of the International Civil Service Commission puts it,

> "to pay repatriation grant to a person who remained permanently in the country of his last duty station was incompatible with the purpose of the grant . . . The expatriate staff member's choice to remain in the duty-station country certainly meant that he had, for some time, ceased to be truly expatriate." (A/33/30, p. 62.)

And in view of the fact that the Secretary-General possesses such express discretionary authority in respect of the repatriation grant, it is the more difficult to regard entitlement to the grant as an acquired right.

14. The Secretary-General Issues Transitional Rule 109.5 (f)

67. The Secretary-General issued a Bulletin of 22 August 1979 which, "with effect from 1 January 1979", amended the Staff Rules "as a consequence of the changes to . . . the repatriation grant . . . adopted by the General Assembly in its resolution 33/119 of 19 December 1978". It specified that Rule 109.5 on the repatriation grant "is amended to make the payment of the grant conditional upon presentation of actual evidence of relocation with respect to periods of eligibility arising after 1 July 1979" (ST/SGB/Staff Rules/1/Rev.5). Rule 109.5 as amended in pertinent part provided :

"*(d)* Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station. Evidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station.

(e) Entitlement to repatriation grant shall cease if no claim for payment of the grant has been submitted within two years after the effective date of separation.

(f) Notwithstanding paragraph *(d)* above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation with respect to such qualifying service."

15. Reaction in the General Assembly Against the Interpretation of Resolution 33/119 by the ICSC and the Secretary-General : the Adoption of Resolution 34/165

68. Reaction in the General Assembly in 1979 to the interpretation of resolution 33/119 by the ICSC and the Secretary-General was critical. That reaction will be set forth *in extenso,* because the construction of it by the Administrative Tribunal is important to its judgement in *Mortished* v. *the Secretary-General* and because the question of whether or not the judgement of the Administrative Tribunal gave effect to or derogated from General Assembly resolution 34/165 is central to the question before the Court.

69. The representative of Australia, referring to the pertinent paragraph of the ICSC report, expressed interest in the opinion of the Office of Legal Affairs which, "surprising as it might seem . . . made the repatriation grant appear to be an acquired right" (A/C.5/34/SR.38, p. 16). The representative of the United States then declared :

"65. In establishing the conditions for entitlement to repatriation grants, . . . ICSC had stipulated that staff members already in service before 1 July 1979 should retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they had already accrued at the date without the necessity of production of evidence of relocation . . . The United States Government strongly believed that that decision distorted the General Assembly's original intent at the time when the repatriation grant had been instituted. Nor was it in accordance with the provisions of resolution 33/119 . . .

66. Because the United Nations administration had failed to provide adequate internal controls to ensure that the grant was paid only to individuals who actually left their last country of assignment, the General Assembly had decided to include in resolution 33/119 the requirement that payment of the repatriation grant should be 'conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the Commission' . . . As a sponsor of that resolution, the United States believed that all member States had understood that the phrase 'subject to the terms to be established by the Commission' meant solely establishing the documentation which a former staff member must submit in order to qualify for a repatriation grant. The United States was unable to accept the reasoning that the absence of United Nations internal controls entitled an expatriate employee to receive a repatriation grant for service prior to the institution of such controls, even though they were not in fact repatriated outside the country of last service." (A/C.5/34/SR.46, pp. 13-14.)

70. The representative of Italy followed. He advocated that without precluding staff's freedom of movement, "a system should be evolved for determining fulfilment of the conditions for entitlement to the relocation grant". His delegation had misgivings about the terms of entitlement promulgated which "required the approval of the General Assembly" (*ibid.*, p. 15).

71. The representative of Japan stated :

"His delegation was prepared to support the decision of ICSC appearing in paragraph 25 of its report concerning the repatriation grant in the case of present staff members. The repatriation grant should be paid in accordance with the rules in force at the time of repatriation. His delegation regretted, therefore, that the Commission had approved different treatment for services performed before 1 July 1979." (*Ibid.*, p. 19.)

72. The representative of Australia then declared :

"3. . . . his delegation supported the proposal . . . whereby in future the repatriation grant would be paid only to staff members who were indeed repatriated. That proposal, if adopted, would override the legal opinion referred to in paragraph 24 of the report of ICSC.

4. As indicated in the note by the Secretariat . . . staff rule 109.5 had been reported to and noted by the General Assembly, which must accordingly have deemed the rule to be consistent with the intent and purpose of the staff regulation. His delegation noted, however, that

nowhere in the document was it stated that the repatriation grant was payable whether or not the staff member was repatriated. Staff rule 109.5 *(f)* indeed gave the opposite impression, in that it gave the Secretary-General discretion to pay a grant to a staff member who at the time of separation resided in his home country. In effect, the rule appeared to permit the payment of travel costs of, for example, a United States staff member whose home was in Honolulu and who, after long service in Tokyo, had been transferred and served for a few years in New York prior to retirement. That in no way implied endorsement of the idea of paying a repatriation grant to a person who was not repatriated.

5. The legal opinion, in fact, appeared to assume that the repatriation grant was equivalent to something like the payment of travel costs on retirement . . . however . . . It was impossible to interpret the rule as meaning that the repatriation grant would be paid to any staff member who was entitled to be repatriated, irrespective of whether or not he was repatriated. For reasons of language, common sense and even law, the opinion given by the Office of Legal Affairs was wrong." (A/C.5/34/SR.47, pp. 3-4.)

73. He was followed by the representative of the Syrian Arab Republic, who stated :

"15. His delegation supported the view of a number of delegations that the repatriation grant should be paid only to staff members who returned to their country of origin." (*Ibid.,* p. 5.)

74. The representative of the Federal Republic of Germany concluded :

"With regard to the repatriation grant, the major question in that connection appeared to be acquired rights, because in order to protect acquired rights to the repatriation grant the interpretation that had been used in the past would have to be maintained. However, in the event that an unduly liberal interpretation had prevailed, to continue to use the same criterion would be tantamount to carrying the principle of the protection of acquired rights too far ; his delegation therefore supported the view of the representative of the United States that the repatriation grant should be given only to those who really were repatriated." (*Ibid.,* p. 7.)

75. The representative of the United Kingdom held that :

"34. With regard to the repatriation grant, his delegation . . . did not agree with the opinion of the Office of Legal Affairs. Although the wording of the Staff Regulation was somewhat ambiguous, it should

be recognized that the grant in question was a repatriation grant, not a resettlement grant or an extra lump-sum received on retirement. It could not be claimed that the repatriation grant should be paid in all cases, irrespective of whether or not the staff member in question returned to his country of origin. The grant should be given only to those who actually made use of their travel entitlement in order to return to their own country. His delegation would support the draft resolution to be submitted by the United States delegation, since it believed that the draft resolution reflected the correct interpretation of the Staff Rules and Regulations and that no acquired rights could be deemed to exist." (*Ibid.*, p. 8.)

76. He was followed by the representative of Spain, who stated :

"38. ... In addition to measures in conformity with the mandate given in General Assembly resolution 33/119, that document also provided that 'staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant...'. In connection with that striking exception to the provisions of the rest of the document, his delegation wished to make it quite clear that the relevant Spanish word *'repatria'* was defined by the Dictionary of the Spanish Academy as 'to return one to his homeland'. Therefore his delegation shared the view of the ICSC members who,... had 'questioned whether any acquired right could be said to exist to payment of the repatriation grant to a staff member who did not repatriate or relocate himself'. His delegation did not understand the motivation for what was stated... concerning the conditions fixed by ICSC for the repatriation grant, regarding it as a partial distortion of the clear mandate contained in General Assembly resolution 33/119,... and believing that in the face of that unequivocal requirement there could be no distinction of retroactivity..." (A/C.5/34/SR.47, p. 9.)

77. The representative of the Union of Soviet Socialist Republics declared :

"9. The Soviet delegation was also concerned about the way in which the provisions relating to the repatriation grant were applied. Under a General Assembly decision, the grant was to be paid only to persons who returned to their own countries. Non-adherence to the principle had resulted in unjustified expenditure and showed the inadequacies of the internal control system." (A/C.5/34/SR.55, p. 9.)

78. The Chairman of the International Civil Service Commission defended the action of the ICSC in these terms :

"39. In its report to the General Assembly at its thirty-third session... ICSC had stated that it had formed the view that the repa-

triation grant should not be paid to staff members who, on separation remained in the country of their last duty station and so incurred no expenses of relocation. The Fifth Committee had endorsed the Commission's view and had included in General Assembly resolution 33/119 a paragraph . . . which read : 'Decides that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the Commission.' That paragraph called for two comments. Firstly, the General Assembly had clearly mandated the Commission to establish the terms under which the grant would be paid. Secondly, the resolution, like the Commission's own report, referred to 'relocation'. The reasons why the Commission had concluded that the grant should be paid only to a staff member returning to his own home country were explained in . . . the 1978 report.

40. The Commission . . . considered the extent to which the restriction now placed on the enjoyment of the grant could be made applicable to serving staff members . . . the relevant provisions of the Staff Rules and Regulations referred explicitly not to staff members who returned to their home country but to 'staff members whom the Organization is obligated to repatriate'. It was on that basis that the practice of paying the grant to staff members who did not leave their duty station had been established. The majority of members of the Commission had felt that that practice was in conformity with the provisions of the Staff Rules and Regulations. Consequently, the Commission had ruled that the staff members concerned had in fact earned an entitlement, since the repatriation grant was calculated on a progressive scale . . .

41. The Commission had taken heed of the legal advice given it, not only by the Legal Counsel of the United Nations but also by the legal advisers of a number of other organizations ; it had also taken into account a judgment by the Administrative Tribunal of ILO which stated categorically that 'benefits and advantages accruing to a staff member for service rendered before the entry into force of an amendment cannot be prejudiced'. The Commission, which did not claim to be a legal committee, had taken a pragmatic decision in the interests of economy, judging that it would be unreasonable to impose upon organizations a measure which would certainly be appealed by staff members and which, given its jurisprudence, at least one of the administrative tribunals would reject as being contrary to the fundamental principles of labour law. The General Assembly was, of course, free to overrule the Commission, but it should be noted that the governing bodies of the majority of the other organizations in the common system had, since July 1979, approved the incorporation of the measures announced by the Commission into their organizations' staff regulations." (*Ibid.,* pp. 9-10.)

79. The Under-Secretary-General for Administration, Finance and Management followed. He stated :

> "59. . . . he considered it his duty to stress that the decisions taken by ICSC under its mandate in General Assembly resolution 33/119 were already being implemented by all the agencies belonging to the common system with effect from 1 July 1979, which was the date stipulated by ICSC in its decision. Moreover, it should be mentioned that, in a number of agencies, the ICSC decision had been considered and accepted by the respective legislative organs when they had adopted the revisions to their respective staff rules and regulations. In the United Nations, the ICSC decision had already been incorporated into the Staff Rules. The provisions contained in part II of draft resolution A/C.5/34/L.23 would have the effect of revoking a decision which was in process of implementation by the agencies of the common system.
>
> 60. Thus, the most important consideration to be borne in mind was that the proposed decision would raise serious doubts as to whether ICSC would be able to discharge authoritatively the highly important task entrusted to it, namely to regulate and co-ordinate the conditions of service applied by the United Nations and the specialized agencies . . . Such a decision would also inevitably be viewed by the United Nations staff as discriminatory treatment and would undoubtedly lead to appeals to the Administrative Tribunal with all the potential consequences that such action might entail.
>
> 61. Finally, it should be noted that it had been the long-standing practice in the Organization to implement policy change in the least disruptive manner, either in order to respect acquired rights or simply to ensure a smooth transition from one set of arrangements to another . . . It was in the same spirit that the Secretary-General and his colleagues in ACC believed that the Fifth Committee should accept the transitional arrangments reflected in the ICSC decision regarding the requirement for evidence of relocation as a condition for payment of the repatriation grant." (A/C.5/34/SR.60, pp. 11-12.)

80. When the representative of Sierre Leone asked for a clarification of the draft resolution before the Fifth Committee, the Under-Secretary-General made the following important statement about the intent and effect of what came to be General Assembly resolution 34/165 :

> "draft resolution A/C.5/34/L.23 derogated from the ICSC decision in stipulating that, with effect from 1 January 1980, staff members would not be entitled to any repatriation grant unless they provided evidence of relocation away from the country of their last duty station. In effect, that meant that no period of service by staff members prior to 1 January 1980 would be taken into account unless they also fulfilled the conditions required to establish their entitlement to the repatriation grant. Hence, the ICSC decision not to apply the new provisions to any period of service prior to 1 July 1979 would simply be revoked." (*Ibid.*, p. 23.)

81. An exchange then ensued among the representatives of Syria, Morocco and the Federal Republic of Germany, in which the former two representatives advocated restricting payment of the repatriation grant to those who return to their home country while the latter supported the provision of the draft resolution before the Committee which provided that the repatriation grant should be paid to any staff member who relocated away from the country of the last duty station, no matter what the country. The Under-Secretary-General then spoke for a third time, declaring that :

> "he did not agree with the statement by the representative of the Federal Republic of Germany that resolution 33/119 made no provision for transitional measures similar to those submitted in the ICSC report. In fact, resolution 33/119 stated that 'payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of evidence of actual relocation' and it went on to say 'subject to the terms to be established by the Commission'. ICSC had taken a decision on the matter and had set 1 July 1979 as the date after which those concerned should provide evidence of their relocation." (*Ibid.*, p. 14.)

82. The representative of the Federal Republic of Germany replied :

> "74. ... that the intention of the sponsors of the draft resolution was not to change the terms of payment of the repatriation grant but simply to specify that staff members should provide evidence of relocation away from the country of the last duty station and to set a date for the implementation of that provision" (A/C.5/34/SR.60, p. 15).

83. The representative of Morocco then asked what documentary evidence of relocation should be produced *(ibid.)*. The representative of Algeria cautioned that more study was needed before a decision was taken

on the repatriation grant *(ibid.)*. But the Chairman indicated that he did not agree with the Algerian representative *(ibid.)*.

84. The Under-Secretary-General then intervened on the issue for the fourth time, in a statement which once again is significantly revealing of the intent of the draft resolution then before the Fifth Committee :

> "78. MR. DEBATIN (Under-Secretary-General for Administration, Finance and Management) recalled that at the previous session, the General Assembly had decided that the repatriation grant should be made conditional upon the presentation by the staff members of evidence of actual relocation, subject to the terms to be established by ICSC. ICSC had subsequently decided that, with effect from 1 July 1979, payment of the repatriation grant would be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station. As for the evidence of relocation, ICSC had decided that it would be constituted by documentary evidence furnished by certain authorities of the country, by the senior United Nations official in the country, or by the former staff member's new employer. The effect of the draft resolution would be that staff members who, by virtue of the ICSC decision, would be entitled to part of the repatriation grant for periods of service prior to 1 July 1979 without providing evidence of relocation would be unable to receive that part of the repatriation grant." (*Ibid.*, pp. 15-16.)

85. The representative of the United States made this immediate reply :

> "79. . . . when the General Assembly had adopted resolution 33/119, it had wanted to make sure that the repatriation grant would be paid only to staff members relocating away from the country of the last duty station, and it had asked ICSC to specify what documentary evidence of relocation that staff members should provide, but not to set dates on which the new provisions would come into effect" (*ibid.*, p. 16).

86. The representative of Sierre Leone then proposed deletion from the draft resolution before the Committee of the passage concerning the repatriation grant (which was the very passage adopted in what came to be resolution 34/165 and which is at issue in the *Mortished* proceedings) *(ibid.)*. His proposal was opposed by the representative of Tunisia *(ibid.)*. The representative of the USSR supported an amendment which would make clear that those receiving a repatriation grant must return to their countries of origin *(ibid.)*. That, the representative of Morocco observed was what the Arabic version of the document said *(ibid.)*.

87. At the next meeting, the representative of the Federal Republic of Germany made the following statement :

> "after holding consultations on draft resolution A/C.5/34/L.23 the sponsors still believed that paragraph 2 of part II was valid in substance, but recognized that new facts had emerged. The principal fact was that several agencies had already adopted the ICSC recommendations, so that adoption of the paragraph might lead to divergencies in the system. As the sponsors considered that the matter was a relatively minor one, they had decided to delete paragraph 2 of part II and to renumber paragraph 3 accordingly." (A/C.5/34/SR.62, p. 2.)

88. An untidy exchange then ensued. The United States reintroduced what the sponsors had just withdrawn, proposing to add to the draft resolution the provision :

> *"Decides* that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of last duty station is provided." *(Ibid.)*

In substance, the position of the United States was opposed by the representatives of Sierre Leone, Nigeria and Peru and supported by the representatives of Canada, the Syrian Arab Republic, the USSR, Morocco, apparently India, Australia, Japan, New Zealand, Yugoslavia, Uruguay and Spain. Some of these representatives also supported a subamendment to the US amendment introduced by the representative of the Syrian Arab Republic which would have confined payment of the repatriation grant to those returning to their country of origin. That subamendment was defeated by a vote of 45 to 18, with 26 abstentions (*ibid.*, p. 5). The United States amendment was thereupon adopted by 59 votes to 5, with 24 abstentions. Thereafter, the whole draft section was adopted by a vote of 87 to none, with 3 abstentions, and later, the resolution as a whole was adopted with no negative votes in Committee and in plenary session.

16. The Intent of the General Assembly in adopting Resolution 34/165

89. The debate in the Fifth Committee has been so fully reproduced because it is critical to an understanding of what the General Assembly intended in adopting resolution 34/165. It is believed that that record demonstrates the following :

– the large majority of the General Assembly was of the view that payment of the repatriation grant to staff members who remain in the country of their last duty station was not consistent with the Staff Regulations and Rules as they existed before the promulgation of the transi-

tional Staff Rule 109.5 *(f)* and as they would be with the repeal of that transitional rule (see paras. 52, 56, 59, 69-77, 82-83, 85-88, *supra*) ;

– the large majority of the General Assembly was of the view that, in issuing the transitional rule, the ICSC and the Secretary-General acted in derogation of the terms and intent of resolution 33/119 (see paras. 68-77, 81-88, *supra*) ;

– the responsible United Nations Under-Secretary-General recognized and affirmed that, if resolution 34/165 were to be adopted (in the terms in which it was adopted), it would manifest the intent of the General Assembly to deny *all* staff members any part of the repatriation grant unless they provided evidence of relocation away from the country of their last duty station, and would have that effect ; that no period of service prior to 1 January 1980 would be taken into account unless staff members fulfilled this evidentiary condition of entitlement ; and that the ICSC recommendation and the transitional rule implementing it would "simply be revoked". "The effect of the draft resolution would be that staff members who, by virtue of the ICSC decision, would be entitled to part of the repatriation grant for periods of service prior to 1 July 1979 without providing evidence of relocation would be unable to receive that part of the repatriation grant" (see paras. 80, 84, *supra*) ;

– the General Assembly heard, understood and accepted these conclusions of the Under-Secretary-General and adopted resolution 34/165 with a view to assuring that these conclusions would be given effect as of 1 January 1980.

90. Despite the clarity and vigour of this record, the Administrative Tribunal took another view of it which will be shortly examined.

III. The Administrative Tribunal's Judgement in *Mortished* v. *the Secretary-General*

91. In its judgement in *Mortished* v. *the Secretary-General of the United Nations* the Administrative Tribunal concluded that,

> "By making payment of the Applicant's repatriation grant conditional on the production of evidence of relocation, the Respondent failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 *(f)*." (Para. XVI.)

In so deciding, the Tribunal reached certain anterior conclusions, which will be addressed in the turn in which the Tribunal proffered them. Then the Tribunal's main conclusion will be analysed.

1. Were Special, Contractual Obligations of Relevance Assumed Towards Mortished ?

92. In paragraph VI of its judgement, the Tribunal held :

> "The Tribunal must now consider whether the Applicant has rights on which he may rely as regards the repatriation grant.
>
> The Tribunal notes that at the time of his appointment to the United Nations on 30 July 1958, the Applicant, who had started work with ICAO on 14 February 1949, received from the Office of Personnel a personnel action form which expressly stated : 'Service recognized as continuous from 14 February 1949' and 'Credit towards repatriation grant commences on 14 February 1949.'
>
> Although these statements do not appear in the letter of appointment itself, they nevertheless unquestionably constitute the explicit recognition by the United Nations of entitlement to the repatriation grant, and validation for that purpose of more than nine years' service already completed with ICAO.
>
> In the Applicant's case, a formal reference was thus made at the time of appointment to the repatriation grant and to the principle of the relationship between the amount of that grant and length of service. As a result, the Applicant is in the position noted by the Tribunal in Judgements Nos. 95 and 142 cited above, namely, that special obligations towards him were assumed by the United Nations."

It is submitted that the conclusions which the Administrative Tribunal draws from its analysis of the personnel action form are unfounded for several reasons.

93. The "Letter of Appointment" of Mortished to which the Tribunal makes reference in general terms in paragraph II of its judgement begins :

> "You are hereby offered a *permanent appointment* in the Secretariat of the United Nations, in accordance with the terms and conditions specified below and subject to the provisions of the Staff Regulations and Staff Rules together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules . . ."

The letter dated 5 August 1958 describes Mortished's initial assignment and salary but says nothing of the various allowances to which Mortished is entitled except that the salary specified does not include such allowances. Mortished accepted appointment on 15 August 1958 in these terms :

> "I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and the Staff Rules. I have been made acquainted with these Regulations and Rules, a copy of which has been transmitted to me with this letter of appointment." (*Mortished* v. *the Secretary-General of the United Nations,* Respondent's Answer, Annex 14.)

A letter to Mortished of 21 March 1958 (negotiations about Mortished's proposed transfer took some time) attaches an Annex which sets out his various allowances. Specification is extensive : the Annex covers travel expenses, movement of household goods, excess baggage, costs of installation, dependency allowances, education grant, non-resident's allowance, pension fund rights, and home leave entitlements. Nothing whatsoever is said of a repatriation grant. (*Ibid.,* Ann. 15.)

94. When Mortished was about to enter upon duty at the United Nations, he received from the Office of Personnel a personnel action form which contained footnoted notations to his designation of a "Permanent Appointment", among which were the following :

> "Service recognized as continuous from 14 February 1949.
>
> *Entitled* to Installation Grant and Dependency Rate. *Credit* toward repatriation grant commences on 14 February 1949.
>
> *Entitled* to transportation of household effects. Next home leave *entitlement* in 1960."

(Emphasis supplied.) (As quoted in *I.C.J. Pleadings, Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Written Statement of the United States of America,* II, A.)

It is understood that, in United Nations contractual usage, a personnel action form such as this is not regarded as part of the contract between a staff member and the United Nations. However, even if it is treated as part of the contract – and the Tribunal infers that it is, for this is the whole basis of its concluding that "special obligations" were assumed by the United Nations towards Mortished in respect of the repatriation grant – the notation does not sustain the conclusion which the Tribunal reaches. On the contrary, the notation belies the Tribunal's conclusion, for two reasons :

– The personnel action form itself specifies that Mortished is "entitled to an installation grant and dependency rate, "entitled" to transportation of household effects, that he enjoys home leave "entitlement", but only that, "Credit toward repatriation grant commences on 14 February 1949".

The Administrative Tribunal disregards this distinction by concluding that the notation constitutes "the explicit recognition" by the United Nations of "entitlement" to the repatriation grant. Yet the distinction between an entitlement and a credit is considerable. One has a rightful claim to an entitlement but a "credit toward" something is or may be merely computative.

– But, if one overlooks the distinction made in the personnel action form on which the Tribunal relies between "entitlements" to various benefits and "credit" toward the repatriation grant, *what* does the notation about the repatriation grant say ? From the weight which the Tribunal assigns to this notation – that by reason of it "special obligations towards" Mortished "were assumed by the United Nations" – one would suppose that special *relevant* obligations were so assumed. In fact, this is not the case. The notation simply speaks of "repatriation grant". It says nothing whatsoever about the conditions of that grant. It sheds no light whatsoever on whether, as a condition of entitlement to the grant, Mortished would or would not have to leave the country of his last duty station, or furnish evidence in that regard. Thus, in regard to the question at issue, at issue before the Administrative Tribunal and now before this Court, the notation on which the Tribunal relied to show that the United Nations assumed special obligations towards Mortished shows no such thing.

95. The Tribunal's reliance on the notation on the personnel action form is the less persuasive since the Tribunal does not cite and cannot cite any evidence to sustain the claim that Mortished in 1958 understood that notation to mean that he would be entitled to a repatriation grant regardless of whether he left the country of his last duty station. That is understandable, for any such claim would be inherently implausible, and for more than one reason. First, the question of a repatriation grant was not brought to Mortished's attention in the annex to the letter of 21 March 1958 which listed his various allowances and said nothing of it. Second, if Mortished's reading of the Staff Regulations and Rules brought the subject to his mind, nothing in them would have given any suggestion that he would be entitled to the repatriation grant were he to remain at his last duty station. Third, it would be hard to believe that, in 1958, Mortished, in Montreal, contemplated retiring some 20 years later in New York or Geneva in which he was yet to work and that this contemplation was a material consideration in his agreement to his contract with the United Nations. Fourth, there is no evidence that the terms and conditions to be met in order to receive the repatriation grant were the subject of discussion or correspondence with Mortished at the time he transferred to the United Nations ; if there were any such evidence, it can be assumed that his counsel would have produced it.

96. The Administrative Tribunal states that Mortished "is in the posi-

tion noted by the Tribunal in Judgements Nos. 95 and 102 . . . namely, that special obligations towards him were assumed by the United Nations". But this is just the position in which Mortished was *not,* for no special obligations towards Mortished were assumed by the United Nations in respect of the issue at bar, i.e., entitlement to a repatriation allowance *regardless of relocation.* The contrast with the cases relied upon by the Tribunal is instructive. In Judgement No. 95 *Sikand* v. *the Secretary-General of the United Nations,* the Tribunal, while rejecting the Applicant's claim, held that its

> "jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances" (para. III)

and it held that, in that case, there was correspondence which upheld one of the Applicant's claims. But in this case, no correspondence, conversation, paper or surrounding fact can be cited, apart from the notation on the personnel action form which, for the reasons set forth above, hardly provides support for the conclusion that the United Nations assumed any special obligations towards Mortished on the matter at issue. In Judgement No. 142, *Bhattacharyya* v. *the Secretary-General of the United Nations,* the Tribunal relied on the quoted passage from the *Sikand* case and held that conversations and correspondence with the Applicant at the time he was engaged about the prospects of renewal of a fixed-term contract created in the Applicant's mind "a legitimate expectancy of continued employment with UNICEF . . ." (para. IV). But in this case, relevant conversations, correspondence, memoranda, etc., running between the United Nations and Mortished are lacking. Nor are the surrounding circumstances at the time of the transfer of Mortished in 1958 probative. There was no evidence before the Tribunal that, as early as 1958, it actually was the practice of the United Nations to pay repatriation grants to those who remained at their last duty station. If it be presumed that that was the practice, which may be a reasonable presumption, there is no evidence that Mortished knew or cared about any such practice. There was no reduction of any such practice to a Staff Regulation, Rule, Information Circular or other administrative paper of general distribution of which Mortished would have had the benefit whether or not he knew of it. Thus the cases cited by the Administrative Tribunal appear to derogate from rather than support Mortished's claim.

97. Does the Tribunal hold in paragraph VI of its judgement that Mortished had a contractual right to a repatriation grant and one which obtains regardless of his remaining at his last duty station ? A passage from paragraph XV of the judgement so infers :

"The Tribunal has been required to consider on a number of occasions whether a modification in the pertinent rules could affect an acquired right. It has held that respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract. The Tribunal pointed out, in paragraph VI above, that entitlement to the repatriation grant has been explicitly recognized at the time of the Applicant's appointment, together with the relationship between the amount of the grant and the length of service. The Tribunal also pointed out in paragraph VII above that at the time of the Applicant's entry on duty, payment of the grant did not require evidence of relocation to a country other than that of the last duty station."

98. For the reasons set out above, it is submitted that any claim that Mortished has a special, contractual right to payment of a repatriation grant regardless of his failure to present evidence of his relocation from the country of his last duty station cannot be sustained. Not only cannot it not be sustained under the facts of this case ; it appears difficult to sustain under the jurisprudence of the Administrative Tribunal.

2. Case-Law of the Administrative Tribunal's Cuts Against Mortished's Claim

99. A number of cases are in point. In Judgement No. 19, *Kaplan against the Secretary-General of the United Nations,* the Tribunal held that :

"In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements :

All matters being contractual which affect the personal status of each member – e.g., nature of his contract, salary, grade.

All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning – e.g., general rules that have no personal reference.

While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members.

. . . . . .

With regard to the case under consideration the Tribunal decides that a statutory element is involved and that in fact the question of the termination of temporary appointments is one of a general rule subject to amendment by the General Assembly and against which acquired rights cannot be invoked." (Para. 3.)

If the terms of termination of temporary appointments are subject to "statutory" amendment by the General Assembly, terms which though of general application have the most immediate effect on particular individuals, is the General Assembly less free to legislate on evidence of eligibility for a repatriation grant ? Conditions for entitlement to the repatriation grant apply to all staff members equally and therefore would seem to be "statutory" as that term is used in the *Kaplan* case. Moreover, as the Administrative Tribunal points out in its Judgement in *Mortished* v. *the Secretary-General of the United Nations*,

> "The summary provisions contained in the letter of appointment are supplemented by documents of general application which are much more detailed. The letter of appointment refers to these in stipulating that the appointment is offered 'subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules'. Thus, by virtue of that provision, documents of general application are made an integral part of the contract and the staff member accepts in advance any amendments which may be made to them." (Para. II.)

100. In Judgement No. 202, *Quéguiner* v. *the Secretary-General of the Inter-Governmental Maritime Consultative Organization*, the issue at bar was dealt with by the United Nations Administrative Tribunal in the following way :

> "The question posed by the present case is thus to determine whether the Applicant has an acquired right to the education grant system as established when he entered upon his duties, an acquired right which cannot be prejudiced unless compensation is paid.
>
> At the time when the Staff Rules were amended, the Applicant was bound by a contract whose terms, set out in a letter from the Secretary-General dated 2 April 1971, were accepted by the Applicant on 30 April 1971. This letter, which extended a previous contract, contains a number of provisions concerning the Applicant personally : post, duration of contract, administrative status, salary, obligation to subscribe to IMCO accident insurance. It also refers to the conditions of employment and fundamental rights, and the duties and obligations, laid down in the Staff Regulations and Staff Rules of the Organization, 'due account being taken of any subsequent amendments to those texts'.
>
> This latter provision expressly records an essential element in the Applicant's contractual situation. He agreed in advance that amendments to the Staff Regulations and Staff Rules would be applicable to him. Thus, the competent authorities of the Organization may in

principle amend unilaterally the conditions of employment and fundamental rights and the rights and obligations laid down in the Staff Regulations and Staff Rules.

The limitation of the right of amendment set out in Staff Regulation 12.1 obviously concerns the rights of the staff member expressly stipulated in the contract. In Judgement No. 19 *(Kaplan),* the Tribunal stated that all matters were contractual which affected 'the personal status of each member – e.g., nature of his contract, salary, grade'. In the present case, no benefit accruing to the Applicant, apart from his salary, was mentioned in his contract.

Respect for acquired rights also means that the benefits and advantages accruing to a staff member for services rendered before the entry into force of an amendment cannot be prejudiced. An amendment cannot have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment to the Staff Rules where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment (Judgement No. 82, *Puvrez*).

The Applicant contends that the education grant, although it constitutes additional remuneration, is of a personal nature, and hence contractual, and that it constitutes a determining consideration in acceptance of the contract which binds a staff member to the Organization.

. . . . . .

The legality of comparable measures concerning the non-resident's allowance (Judgment No. 51, *Poulain d'Andecy,* ILO Tribunal) and the allowances payable under the definition of dependency (Judgements No. 82, *Puvrez* and No. 110, *Mankiewicz*) has been recognized, and the Tribunal sees no valid reason for treating the education grant differently." (Paras. IV-VI.)

If IMCO is free to alter the conditions of payment of an education allowance, why is not the United Nations free to alter the conditions of payment of a repatriation grant ? Why is it not the more free since in the *Mortished* case the rights of the staff member were *not* "expressly stipulated in the contract" ? (There is the distinct argument, noted in *Quéguiner,* that benefits and advantages accruing to a staff member for services rendered before the entry into force of the amendment cannot be prejudiced ; that is an argument which will be addressed in the *Mortished* context below.)

101. Further light on the contractual bounds of acquired rights of international civil servants is shed by the recent decision of the ILO Administrative Tribunal in *In re de los Cobos and Wegner,* Judgment No. 391, where it was held :

"6. A right is acquired when he who has it may require that it be respected notwithstanding any amendments to the rules. A right is acquired, for example, in one or other of the following circumstances. First, a right should be considered to be acquired when it is laid down in a provision of the Staff Regulations or Staff Rules and is of decisive importance to a candidate for appointment. To impair that right without the official's consent is to impair terms of appointment which he expects to be maintained.

Alternatively, a right will be acquired if it arises under an express provision of an official's contract of appointment and both parties intend that it should be inviolate. Thus not all rights arising under a contract of appointment are acquired rights, even if they relate to remuneration : it is of the essence that the contract should make express or implied provision that the rights will not be impaired. Thus there may be an acquired right to application of the principle that an allowance will be paid, but not necessarily to the method of calculation – in other words, to the actual amount – of that allowance." (At pp. 7-8.)

Can it be maintained in the *Mortished* case that Mortished's right to a repatriation allowance regardless of remaining at his last duty station was laid down in a provision of the Staff Regulations or Rules and was of "decisive importance" – or any importance – to that candidate for appointment ? Can it be maintained that that right arises "under an express provision" of Mortished's contract which both parties intended to be "inviolate" ? If there is an acquired right to an allowance, but not necessarily to the method of its calculation, can it not be said that, at most, Mortished has an acquired right to a repatriation grant but not to the conditions of eligibility for its payment ?

102. Similar reasoning was advanced by the ILO Administrative Tribunal in *In re Elsen and Elsen-Drouot,* Judgment No. 368, p. 7, where it held :

"7. It is quite clear that expatriation, education and leave expense allowances are matters of importance to someone who joins the staff of an international organization. The question therefore arises whether the outright abolition of such allowances would in principle violate an acquired right. There is, however, no acquired right to the amount and the conditions of payment of such allowances. Indeed the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organization reforms its structure, or even finds itself in financial difficulty. Hence the reduction in the expatriation allowance paid to the complainants does not infringe any right which was of decisive importance to them in accepting appointment and which may be regarded as acquired. Moreover, there is no clause in their contract

which even tacitly guaranteed them any such right. The plea that acquired rights were infringed therefore fails."

103. Another case of special relevance is that of *Ho* v. *the Secretary-General of the United Nations,* Judgement 125. In that case, Ho complained that he had been wrongfully deprived of his entitlement to home leave. He had previously enjoyed home leave when he held the status of internationally recruited official. However, he opted to change his status to that of a permanent resident of the United States. The Secretary-General, exercising his authority under Rule 104.7 (quoted *supra* in para. 65), decided that *Ho* had lost his entitlements to all international benefits, including home leave, because he had acquired permanent US residence status. The Administrative Tribunal relied on Rule 104.7, and held that, in accordance with it, Ho, "by acquiring permanent resident status, lost his home leave entitlement" from the date on which the United States Immigration and Naturalization Service made effective his permanent residence (at p. 122). It held that,

> "The decision taken ... on behalf of the Secretary-General ... constitutes a legally unassailable application of Staff Rule 104.7, which authorizes a decision that the 'continuation of such entitlement ... would be contrary to the purposes for which the allowance or benefit was created'. The Tribunal considers that, generally speaking, to authorize a staff member to benefit from home leave when as a permanent resident he is considered as having been recruited locally would be an anomaly contrary to the spirit – that is, the meaning and purpose – of home leave as established and regulated by the Staff Regulations and Rules." *(Ibid.)*

The Tribunal continued :

> "In order to determine whether all the conditions laid down in the Staff Rules (Rules 104.7 and 105.3) are fulfilled and whether home leave entitlement exists, it is necessary to consider the staff member's legal status at the time when that entitlement should have been exercised.
>
> Hence there cannot be a question of home leave entitlement acquired previously nor of a possible restoration of that entitlement : even assuming that a staff member has fulfilled all the other conditions required for the possible existence of that entitlement, the entitlement can only exist in law if the staff member, at the time when he is to begin exercising that entitlement, meets all the requirements laid down in the Staff Rules, particularly the rule which provides that he must have been recruited internationally." (Pp. 122-123.)

104. The applicability of the *Ho* case to *Mortished's* is striking. In both cases, the "entitlements" of home leave and the repatriation grant are referred to, together, in the same way and on the same plane, in Rule 104.7. In both cases, the matter of residential status is paramount, and, in both cases, Messrs. Ho and Mortished opted to change their residential status so as to take up permanent residence in the country of their duty station, in Ho's case, *de jure,* in Mortished's case, apparently *de facto.* Consequently, by the terms of Rule 104.7, in both cases the Secretary-General was and is free to consider that Mortished as well as Ho became a permanent resident of a country other than that of his nationality. (If he could not reasonably reach that opinion, the point of Mortished's claim is questionable : he cannot at once argue that he wishes to buy a house in and live on in Switzerland indefinitely and wishes neither to return to Ireland nor go to a third country and yet maintain that he cannot be "deemed" to have changed, in fact if not in law, the residential status he originally enjoyed as an internationally recruited official ; see para. 66, *supra.*) In any event, even if Mortished, unlike Ho, is not deemed to have changed his permanent residence, in both cases whether the "entitlement exists" must be decided "at the time when the entitlement should have been exercised" – "the entitlement can only exist in law" if the staff member, "at the time when he is to begin exercising that entitlement", meets all the requirements laid down by the Staff Rules. Thus Mortished, like Ho, having chosen to exercise an entitlement when the entitlement on which he relies no longer exists, as a matter of law must fail. And finally, to deny Ho his home leave while granting Mortished the repatriation grant "would be an anomaly contrary to the spirit – that is, the meaning and purpose" of the repatriation grant as established and regulated by the Staff Regulations and Rules.

105. However, it may be argued that, if paying Mortished is contrary to "the spirit – that is, the meaning and purpose" of Staff Rule 109.5 as it existed before 1979 and is contrary to it as it exists today, it is not contrary to the spirit or terms of Staff Rule 109.5 *(f)* as that transitional rule existed in 1979. That is quite true. However, a difficulty with that argument is that, in fact, Mortished exercised his claimed entitlement to a repatriation grant when that entitlement no longer existed, that is to say, he relied upon the transitional rule when the transitional rule had transited and was no longer in force.

3. The Tribunal's Summary of the Evolution of Practice concerning the Repatriation Grant

106. The Tribunal turns after its conclusion about "the special obligations" assumed towards Mortished to a description of the evolution of the repatriation grant. It notes in paragraph VII that the link between the repatriation grant and return to the home country was broken in the Staff Rules as early as 1953. "The literal meaning of the term 'repatriation' was abandoned." It cites in paragraph VIII the recommendations submitted in

1952 by the Consultative Committee on Administrative Questions to the Administrative Committee on Co-ordination, and concludes :

> "However, the Tribunal observes that the document produced in 1974 [by the CCAQ] proves that the system proposed by the Consultative Committee on Administrative Questions as early as 1952 was in effect followed to the benefit of staff members, even though it was not explicitly embodied in any United Nations regulation. The Parties considered the question whether a practice followed consistently for nearly 30 years could generate an acquired right within the meaning of Staff Regulation 12.1. In view of the particular situation of the Applicant, the Tribunal finds that it is not required to adjudicate that question *in abstracto*."

Thus the Tribunal does not pass in its judgement on whether the practice of paying repatriation grants to those remaining in their last duty station "could generate an acquired right".

107. The Tribunal proceeds to describe the respective spheres of competence of the General Assembly and the Secretary-General in respect of the repatriation grant (paras. IX and X). It concludes that the Staff Regulations "expressly acknowledge that the repatriation grant scheme falls within the scope of the rule-making authority of the Secretary-General . . ." (para. IX).

108. The Tribunal then turns to the pertinent ICSC reports and to the discussions of the General Assembly, particularly in adopting resolution 33/119. In describing the adoption of resolution 33/119, the Tribunal acknowledges that, when Japan proposed that "payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the Commission", the terms the Japanese representative had in mind related to the provision of evidence. But it then quotes from the intervention of the Under-Secretary-General (see para. 59, *supra*) in which "some flexibility" was suggested since "acquired rights were involved", and states : "The Tribunal notes that these arguments [of the Under-Secretary-General] were not challenged and that at no point in the discussion was the nature of the terms to be established by ICSC specified." (Para. XI.)

109. It is submitted that, in concluding the arguments of the Under-Secretary-General were not challenged, the Tribunal did not construe the record accurately. As is pointed out above in paragraph 59, right after the Under-Secretary-General spoke, three representatives replied in terms which demonstrate that they wished no "flexibility" to be shown. No one expressly referred to the Under-Secretary-General's reference to acquired rights, but the tenor of the remarks of the three representatives gives no trace of acquiescence in that argument. Moreover, the Tribunal is impre-

cise in stating that at no point in the discussion was the nature of the terms to be established by the ICSC specified, for the representative of Japan, as sponsor, spoke explicitly to that point (he is quoted in para. 59, *supra*). These are points of importance, because they bear on whether, in issuing the transitional Rule 109.5 *(f)*, the ICSC and the Secretary-General acted within the scope of the authority afforded them by resolution 33/119. The Tribunal maintains (in para. XIV) that the transitional rule was adopted by the Secretary-General "in accordance with a procedure laid down by the General Assembly in its resolution 33/119 . . .". But in truth the Secretary-General acted in derogation of the terms of resolution 33/119 and the intent of the General Assembly in adopting those terms.

110. The Tribunal then proceeds to recall the action of the ICSC in 1979 in promulgating the transitional rule, noting that it relied on the advice received from the Office of Legal Affairs of the United Nations. The Tribunal itself does not dissect the legal opinion which contained that advice. It notes that the Secretary-General, "exercising the authority vested in him by Staff Regulation 9.4 and Annex IV to the Staff Regulations", inserted into Staff Rule 109.5, subparagraphs *(d)* and *(f)*, which provided for evidence of relocation and for the transitional provision waiving that requirement for staff members in service before 1 July 1979 (para. XII). The Tribunal observed that this was "the first time that a provision of the Staff Rules acknowledged that entitlement to the repatriation grant might exist without evidence of relocation being provided" (para. XIII).

4. The Question of Retroactive Effacement of Mortished's Entitlement

111. The Tribunal next poses the question of retroactive effacement in these terms :

> "XIV. The question therefore arises whether the entitlement as described in the provision quoted above, which came into force on 1 July 1979, having been adopted by the Secretary-General in accordance with a procedure laid down by the General Assembly in its resolution 33/119, can have been effaced retroactively by the Secretary-General's deletion of subparagraph *(f)* in pursuance of resolution 34/165."

This statement about retroactive effacement appears to assume a position rather than to justify it. Resolution 34/165 is prospective in effect. It applies to staff members retiring after 1 January 1980. It does not purport to require staff members who earlier retired, and who received the repatriation grant even though they remained within the country of their last duty station, to return their grants. Thus resolution 34/165 can be reasonably regarded as retroactively effacing an acquired right of those who retire after 1 January 1980 only if there was such an acquired right. That is

the paramount issue at bar. But posing the question in terms of retroactive effacement adds nothing to the analysis of the problem one way or the other.

5. The Tribunal's Construction of the Intent of the General Assembly in Adopting Resolution 34/165

112. The Tribunal's Judgement continues by reciting the action in the General Assembly leading to the adoption of resolution 34/165, and makes the following surprising statements in that regard :

> "The Tribunal notes that at no time did the General Assembly contemplate supplementing or amending the provisions relating to the repatriation grant contained in the Staff Regulations. Nor did the Assembly examine the text of Staff Rules in force since 1 July 1979, and it never claimed that there was any defect in the provisions introduced on that date which diminished their validity. The Assembly simply stated a principle of action which the Secretary-General acted upon in establishing a new version of Staff Rule 109.5 which, from 1 January 1980, replaced the version previously in force on the basis of which the Applicant could have obtained the repatriation grant."

The Tribunal might have noted that the General Assembly did not supplement or amend the Staff Regulations because it was of the view that they said what the General Assembly had always intended them to say ; in the General Assembly's view, they were not legitimately open to a construction which permitted payment of the repatriation grant to those remaining at their last duty station. As for the Tribunal's statement that the General Assembly did not examine the text of the Staff Rules in force since 1 July 1979 and never claimed that there was any defect in the provisions introduced on that date which diminished their validity, it is difficult to reconcile with the record. In a literal sense, it is true that General Assembly resolution 34/165 does not expressly criticize the ICSC and the Secretary-General for misconstruction and misapplication of resolution 33/119 ; that is not the way in which General Assembly administrative resolutions are customarily cast. But a review of the record of the Fifth Committee in adopting resolution 34/165 (see paras. 68-90, *supra*) demonstrates that, contrary to what the Tribunal says, the Committee energetically and critically examined the text of the pertinent Staff Rules in force since 1 July 1979, and that the large majority of those who spoke (and presumably of those who voted for) the United States amendment to what became resolution 34/165 believed that those Rules contained a glaring departure from resolution 33/119 – the transitional clause. If it is correct to infer, as the Tribunal appears to do, that the General Assembly did not go further to hold that the transitional clause was invalid even during the period when it was in force, that hardly supports construing resolution 34/165 to permit

payment, whether direct or indirect, to those who thereafter claim the repatriation grant without providing evidence of relocation.

6. The Tribunal's Holding that the Repatriation Grant Was Earned

113. The Tribunal comes to the heart of its Judgement in paragraphs XV and XVI. Paragraph XV reads :

> "The Tribunal has been required to consider on a number of occasions whether a modification in the pertinent rules could affect an acquired right. It has held that respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract. The Tribunal pointed out, in paragraph VI above, that entitlement to the repatriation grant had been explicitly recognized at the time of the Applicant's appointment, together with the relationship between the amount of the grant and the length of service. The Tribunal also pointed out in paragraph VII above that at the time of the Applicant's entry on duty, payment of the grant did not require evidence of relocation to a country other than that of the last duty station. Further, the Tribunal held that respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected. The repatriation grant is calculated according to length of service. The amount of the grant is 'proportional to the length of service with the United Nations', as stated in Annex IV to the Staff Regulations. This link was explicitly reaffirmed in Staff Rule 109.5 *(f)*, which refers to 'the years and months of service qualifying for the grant which [staff members] already had accrued' as of 1 July 1979. Consequently, the link established by the General Assembly and the Secretary-General between the amount of the grant and length of service entitles the Applicant to invoke an acquired right, notwithstanding the terms of Staff Rule 109.5 which came into force on 1 January 1980 with the deletion of subparagraph *(f)* concerning the transitional system. As in the case of Judgement No. 266 *(Capio)*, it is incumbent upon the Tribunal to assess the consequences of any failure to recognize an acquired right."

114. The foregoing conclusions are open to question on more than one count. The Tribunal begins with restating its reliance on the rights of the staff member "expressly stipulated in the contract". But, as noted above, it does not point out that Mortished's contract as such says nothing about a repatriation allowance, expressly or otherwise, and that the "credit" re-

ferred to in the personnel action form says nothing of whether it goes to a repatriation grant that does or does not require relocation as a condition of its payment.

115. The Tribunal then reaffirms that, at the time of Mortished's entry on duty, payment of the grant did not require evidence of relocation to a country other than that of the last duty station. It does not state what is the factual basis for the conclusion that, as early as 1958, the United Nations actually was paying repatriation grants to those who remained at the last duty station. It is not a supposition lightly to be made because, in 1958, the number of officials who had retired was still relatively small in view of the fact that the Organization had been in existence only for some 12 years. But there is no evidence to the contrary. It then proceeds to maintain that "respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected". To show that the repatriation grant is compensation for services rendered, the Tribunal argues that it is "calculated according to length of service" and concludes : "Consequently, the link established by the General Assembly and the Secretary-General between the amount of the grant and length of service entitles the Applicant to invoke an acquired right . . ."

116. It is submitted that the foregoing analysis is unpersuasive for the following reasons. The drafting history of the repatriation grant shows that the purpose of the grant was not a salary supplement progressively earned, but rather an end-of-service payment to help meet the costs which a repatriating staff member would incur after service abroad (see para. 54, *supra*). Such end-of-service payments are no more "earned" during service than a termination indemnity is "earned" during service. Terminal or separation payments are meant to assist a staff member to cope with circumstances arising on separation, they are not a reward for current service. The amount payable on separation, but not the entitlement as such, is determined by reference to years of service abroad. The Secretary-General's answer in the proceedings before the Administrative Tribunal in the *Mortished* case correctly summarizes the situation :

> "39. Annex IV to the Staff Regulations contains a table which indicates how repatriation grant benefits are calculated. The criteria used in determining the amounts of the benefits are 'years of continuous service away from home country', the status of the staff member at the time of separation (i.e., the staff member's category and whether he or she has spouse or dependants) and the pensionable remuneration of the staff member at the time of separation. *The crucial time of assessment is always the time of separation.*
>
> 40. The 'years of continuous service away from home country' may

be reduced or even totally eliminated if a staff member, after service away from the home country, is transferred back to a duty station within his or her own country. In 1964, the CCAQ agreed that entitlements in years of continuous service away from the home country should be reduced by one year in respect of each six months of completed service in the home country and that in the event of a reposting abroad credit should be restored at that rate until the full previous credit is restored and thereafter credit should increase at the normal rate . . . Since a staff member is always subject to assignment to any duty station in the interest of the Organization (Staff Regulation 1.2) it follows that the number of 'years of continuous service away from home country' that has been accumulated may always be subject to reduction (or at least until six months prior to separation). As this 'credit balance' of years of continuous service is subject to reduction or elimination during service it is submitted that it is not correct to maintain . . . that a staff member has during his career an 'acquired right' to the amount of repatriation grant calculated by reference to the 'credit balance' of years of continuous service away from the home country available to the staff member at any point of time prior to separation.

41. A staff member may lose all rights to obtain payment of the repatriation grant if he is summarily dismissed (Annex IV to the Staff Regulations) or if he abandons his post (Staff Rule 109.5 *(i)*, or if he dies and leaves no surviving dependants (Staff Rule 109.5 *(m)*). The benefit may be reduced if there is a change in the staff member's status (Staff Rule 109.5 *(j)*) or by demotion (Annex IV to the Staff Regulations).

42. It is submitted that when the legislative components of the scheme, which can reduce, increase or even eliminate the benefit during service, are examined in their total context it is apparent that no right to payment of the repatriation benefit or to any part of it can be 'earned' during a staff member's service. Entitlement to the grant is dependent upon all the circumstances existing at the time of separation and necessarily depends upon fulfilling the eligibility rules in force at the time of separation.

. . . . . .

45. It might be remarked that the Applicant's contention that entitlement to the repatriation grant and all its eligibility conditions are 'earned' during service would constitute a far-reaching definition of 'acquired rights' which would substantially derogate from the authority of the General Assembly under Article 101.1 of the United Nations Charter to establish conditions of service for United Nations staff and would practically destroy the significance of the provisions for amendment made in the regulations themselves as well as in letters

of appointment." (*Mortished* v. *the Secretary-General of the United Nations*, Respondent's Answer, pp. 17-19.)

117. In short, the most reasonable interpretation of the link between the amount of a repatriation grant and the length of a retiring staff member's service is that it is simply a convenient formula for calculating the amount of the grant. The question of whether a staff member is entitled to the grant at all need not and should not be determined by the existence of the link.

7. The Tribunal's Conclusion that the Transitional Rule of Itself Is the Source of an Acquired Right

118. It will be observed that the judgement of the Administrative Tribunal, before it reaches its principal, conclusory holding, bases its finding of an acquired right on two grounds : first, that the United Nations assumed special, contractual obligations towards Mortished of relevance to the issue in the case ; and second, that Mortished "earned" the repatriation allowance. The first ground has been shown to be baseless. The second ground has been shown to be unconvincing. The Tribunal also raised the possibility of a third ground – generation of an acquired right through practice – but it retreated from that ground without developing it, presumably conscious of the difficulties of so doing. Let us turn to the Tribunal's remaining argument, which is stated in paragraph XVI of its Judgement in these terms :

> "By making payment of the Applicant's repatriation grant conditional on the production of evidence of relocation, the Respondent failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 *(f)*.
>
> The stand taken by the Respondent has had the effect of depriving the Applicant of payment of the repatriation grant. Recognizing that the Applicant was entitled to receive that grant on the terms defined in Staff Rule 109.5 *(f)*, despite the fact that that rule was no longer in force on the date of the Applicant's separation from the United Nations, the Tribunal finds that the Applicant sustained injury as the result of a disregard of Staff Regulation 12.1 and Staff Rule 112.2 *(a)*. The Applicant is thus entitled to compensation for that injury. The injury should be assessed at the amount of the repatriation grant of which payment was refused. Accordingly, the Tribunal rules that the Respondent shall pay to the Applicant, as compensation, a sum equal to the amount of the repatriation grant calculated in accordance with Annex IV to the Staff Regulations."

119. It is striking that the Tribunal's most substantial argument is presented in a few conclusory sentences. The second sentence of the Tribunal's holding is inaccurate, in stating that : "The stand taken by the Respondent has had the effect of depriving the Applicant of payment of the repatriation grant." The fact is that Mortished was entitled to receive payment of the repatriation grant within two years of his retirement, on provision of evidence of relocation of his residence outside Switzerland. Staff Rule 109.5 *(e)* provided as of 1 July 1979 and thereafter that : "Entitlement to repatriation grant shall cease if no claim for payment of the repatriation grant has been submitted within two years after the effective date of separation." Thus Mortished could have received payment of the repatriation grant on presentation of evidence of relocation until any time before 30 April 1982. When his case was heard by the Administrative Tribunal, Mortished had approximately still one year within which to relocate in order to qualify for the grant (see the dissenting opinion of Mr. Herbert Reis in *Mortished* v. *the Secretary-General*, para. 1). But the essence of the Tribunal's judgement is in the first sentence of paragraph XVI : Mortished's "acquired right" was held "by virtue of the transitional system in force from 1 July to 31 December 1979 . . .". That this is indeed the core of the Tribunal's reasoning is confirmed by paragraph XIV, where the Tribunal declares that Mortished's "entitlement . . . came into force on 1 July 1979 . . .".

120. The inarticulate essence of this argument may be said to be this. Whether or not practice in paying the repatriation grant was consistent with the Staff Regulations and Rules, and whether or not issuance of the transitional rule was consonant with resolution 33/119, the facts are that the practice was followed for some 30 years and the transitional rule was issued. Acting in pursuance of his delegated and apparent authority, the Secretary-General's practice gave rise to an expectation on the part of Mortished and others similarly situated that they would be paid the repatriation grant whether or not they relocated from the country of their last duty station. That expectation was confirmed and entrenched in 1979 by the issuance of the transitional rule. Mortished accordingly is entitled to rely on the transitional rule, which vested in him an acquired right which survives the deletion of that rule from the Staff Rules. The authority to which the staff member must look is the Secretary-General. He cannot be charged with challenging the regularity of the Secretary-General's interpretation of the Staff Regulations or the resolutions of the General Assembly. If the General Assembly is dissatisfied with the Secretary-General's interpretations, it may take appropriate measures but those measures may not trench upon the acquired rights of innocent bystanders such as Mortished.

121. There is substance in this approach. If the Judgement of the Administrative Tribunal in *Mortished* v. *the Secretary-General* can be sus-

tained, it is only on this basis. It is certainly reasonable to assume that Mortished and others similarly situated, having informally heard about the practice of payment of the repatriation grant to those who did not relocate, and perhaps having witnessed examples of that practice, expected that they too would be similarly treated. Yet the Judgement of the Administrative Tribunal rightly and expressly eschews basing itself on the contention that the acquired right was generated by practice. Equitable considerations in favour of Mortished remain, but the practice of itself does not create the right. What, in the last analysis, the Tribunal maintains is the source of the acquired right is the fact that, for some seven months, transitional Rule 109.5 *(f)* was on the books. That rule was indeed on the books ; clearly it was in force in the brief period before the General Assembly in effect directed the Secretary-General to delete it. Is it sufficient to endow Mortished with an acquired right which extends beyond the period when that rule applied ?

122. It is believed that the transitional rule is not sufficient to endow Mortished with an acquired right which otherwise he would not have, for two reasons. First, under the Statute of the Administrative Tribunal and its jurisprudence, an entitlement such as the repatriation grant may be exercised only in accordance with the conditions governing the entitlement as of the time its exercise is sought. Second, under the Statute of the Administrative Tribunal and its jurisprudence, the General Assembly retains the right to issue or require "statutory" amendments to the governing Staff Regulations or Rules which, even though they impinge upon benefits accorded to staff members, are not regarded as giving rise to payment of compensation because of derogation from acquired rights.

123. Mortished could have retired at any time between 30 April 1980 and 30 April 1982 and received the repatriation grant upon presentation of evidence of relocation. He could have retired and received the grant without evidence of relocation when transitional Rule 109.5 *(f)* was in force ; he was offered that opportunity but declined. From the viewpoint of his personal interest, it is understandable that he did decline but his personal interest does not give him an immunity from the operation of the law. Under the interpretation which the Administrative Tribunal itself has given to the law "the entitlement can only exist in law if the staff member, at the time when he is to begin exercising that entitlement, meets all the requirements laid down in the Staff Rules . . ." (*Ho* v. *the Secretary-General of the United Nations, loc. cit.* See also *Majid* v. *the United Nations Joint Staff Pension Board,* Judgement No. 141, para. IV.) The terms of the Statute of the Administrative Tribunal itself are drafted consistently with this rule, for Article 2 provides that the Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of the contracts of staff members or their terms of appointment and the words "contracts" or "terms of appointment" include all pertinent regulations

and rules "in force at the time of alleged non-observance...". (Not only did Mortished fail to exercise his rights under the transitional rule at a time when the rule was in force. That rule also was not in force when Mortished transferred to the United Nations in 1958. And it was not in force in 1963 when, after 12 years' service in the United Nations system, Mortished accumulated his maximum allowance under the repatriation grant.)

124. Moreover, any right with which Mortished was invested by reason of the transitional rule was subject to divestment. Regulation 12.1 of the Staff Regulations provides :

> "These Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."

It is not a sufficient answer to say that Mortished had an acquired right by reason of the transitional rule and that therefore provision for amendment of the Regulations (or consequential Rules) cannot prejudice that acquired right. For the amendment to the Staff Rules which the Secretary-General made in implementation of the directive contained in General Assembly resolution 34/165 to delete Rule 109.5 *(f)* was an amendment of a statutory and not a personal character. The amendment generally affected the conditions of eligibility for the repatriation grant. It did not affect a contractual element of the relations running between Mortished and the Secretary-General. Rather, because conditions of eligibility for the repatriation grant apply to all staff members equally and therefore are, in the words of the United Nations Administrative Tribunal "matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning" (the *Kaplan* case, quoted above at para. 97), these eligibility conditions "may always be changed at any time through regulations established by the General Assembly, and these regulations are binding on staff members" *(ibid.)*.

8. The Balance of Equitable Considerations

125. It is clear that Mortished had reason to expect that he would be paid the repatriation grant regardless of provision of evidence of relocation ; the equitable considerations running in his favour are substantial. At the same time, it would be implausible to conclude that Mortished did not gain an acquired right by reason of his contract, did not by reason of administrative practice, but did gain an acquired right not to provide evidence of relocation by reason of a transitional rule in force for seven months but not in force when he sought to exercise the right allegedly acquired, when it is also considered that :

– the administrative practice did not conform to the letter or the spirit of Rule 109.5, notably Rule 109.5 *(a),* as that Rule has stood since 1953 ;

– the administrative practice did not conform to the letter or the spirit of Rule 104.7 *(c),* which, as far as is known, was in force at all relevant times ;

– there is no evidence that the General Assembly was informed of, still less approved, the administrative practice before 1976 and, from the time at which it clearly was informed of the practice, it grew increasingly critical of it, passing two resolutions expressly designed to overrule it ;

– the transitional rule was issued in clear conflict with the terms and intent of the General Assembly resolution governing it, resolution 33/119 ;

– the General Assembly overturned the transitional rule with unusual speed and decisiveness as soon as it could possibly do so.

126. Room remains for a difference of opinion as to which way the balance of equities in this case inclines. It may well be said that Mortished should not be penalized for the actions of the Secretary-General's associates. But the equities are not one-sided.

9. Was the Administrative Tribunal Entitled to Apply Resolution 34/165 ?

127. It might be maintained that the Administrative Tribunal was not entitled to apply resolution 34/165 on the ground that that resolution did not amend the Staff Regulations or expressly and in terms direct the Secretary-General to issue a Staff Rule. The competence of the Tribunal is defined by Article 2 of its Statute, which provides that it shall hear and pass judgement upon applications alleging non-observance of staff contracts or terms of appointment. Article 2 defines "contracts" and "terms of appointment" to include "all pertinent regulations and rules in force at the time of the alleged non-observance . . .". It does not refer to resolutions of the General Assembly which do not contain amendments to those Staff Regulations or Rules. Hence, it may be argued, if the Administrative Tribunal did not give immediate effect to resolution 34/165, its judgement was warranted for it was not competent to give any effect to that resolution.

128. Such an argument would be unsound. As this Court in the *Fasla* case has "pointed out . . . under Article 101, paragraph 1, of the Charter the General Assembly is given power to regulate staff relations . . ." (*I.C.J. Reports 1973,* p. 173). This holding mirrors that of the Court in *Effect of*

Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, pp. 47, 58, 61, where the Court also held that, "The General Assembly could at all times limit or control the powers of the Secretary-General in staff matters by virtue of the provisions of Article 101" (*ibid.,* p. 60). "In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations . . . There is no lack of power to deal effectively with any problem that may arise . . ." (*Ibid.,* p. 61.) There is no prescription that the Assembly's power to regulate must be exercised solely in the form of the Staff Regulations and amendments thereto. No provision of the Charter or resolution of the General Assembly or article of the Staff Regulations so indicates. As the Court earlier held, it must be acknowledged that its Members, by entrusting certain functions to the United Nations, "have clothed it with the competence required to enable those functions to be effectively discharged" (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 179). "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." (*Ibid.,* p. 182.)

129. The General Assembly has not infrequently adopted resolutions which are meant to regulate and do regulate staff relations but have done so in a form which does not prescribe or amend the Staff Regulations or direct changes in the Staff Rules. Among such resolutions are : 976 (X) on cost-of-living adjustment and dependency allowances for Headquarters personnel ; 1310 (XIII) on pensionable remuneration of staff ; 2480 (XXIII) on composition of the Secretariat ; 2736 (XXV) on composition of the Secretariat ; 3198 (XXVIII) on standards of accommodation for official travel of United Nations staff ; 3418 (XXX) on the United Nations Salary system ; 31/26 on composition of the Secretariat ; 31/193 (B), on Joint Inspection Unit (Salaries and Conditions of Service for Members of the Secretariat) ; 33/143 on personnel questions ; and 35/210 on personnel questions. Examination of these resolutions demonstrates how significantly and in what varied ways the General Assembly has chosen to exercise its authority to regulate staff relations while at times not choosing to do so by way of amendment of the Staff Regulations or consequential Rules. Examples of such resolutions are referred to in the next paragraph, in which precedents for the Administrative Tribunal taking account of such resolutions are cited.

130. The Administrative Tribunal of the United Nations has amassed ample precedent for taking account in its judgements of resolutions of the General Assembly which regulate the staff without amending the Staff Regulations or necessarily entailing revision of the Staff Rules. For exam-

ple, in Judgement No. 67, *Harris* et al. v. *the Secretary-General of the United Nations,* the Tribunal held as follows :

> "5. It is therefore necessary to consider whether, as the Applicants maintain, their claim to tax reimbursement receives any support from the resolutions of the General Assembly.
>
> These resolutions have not been embodied in the Staff Rules, but the Respondent does not dispute that the resolutions, together with the Secretary-General's circulars by which they were put into effect, are, with respect to the staff members to whom they apply, part of the terms of appointment which it is the Tribunal's duty to take into account under Article 2 of the Statute.
>
> Until 1955 the Assembly did not adopt any resolution making permanent provision for the reimbursement of national taxes ; but as a result of the permanent staff assessment scheme and the unaltered position of the United States, the reimbursement system was carried over from year to year without being embodied in the Staff Rules." (*Judgements of the United Nations Administrative Tribunal,* AT/DEC/ 1 to 70, p. 395.)

In *Powell* v. *the Secretary-General of the United Nations*, Judgement No. 237, the Administrative Tribunal recalled that :

> "It was not until the tax reimbursement system had been established on a permanent basis that the provisions relating to staff assessment and to tax reimbursement were introduced by General Assembly resolution 1095 (XI) into the Staff Regulations as Regulation 3.3" (P. 14.)

There is no suggestion that the Administrative Tribunal regarded such provisions as any the less effective or in any measure beyond its competence in the period before they were introduced into the Staff Regulations.

131. One further case, among a number which could be cited, establishes that, in the case-law of the Administrative Tribunal, the Tribunal is entitled to take account of and apply General Assembly resolutions which affect the status of the staff but do not necessarily amend the Staff Regulations or require amendment of the Staff Rules :

> "The Tribunal has consistently maintained that the Resolutions of the General Assembly constitute, as far as the staff members to whom they apply are concerned, conditions of employment to be taken into account by the Tribunal (Judgements No. 67, *Harris* et al., para. 5 ; No. 236, *Belchamber,* para. XVI ; No. 237, *Powell,* para. XI). The Tribunal therefore holds that resolution 31/193 B II could be relied upon as a basis for the non-payment of salary in circumstances such as those of the present case, even before being incorporated in the Staff Regulations pursuant to General Assembly decision 33/433.

VIII. The Applicant contends further that the Respondent was estopped by his own conduct and by the conduct of his representatives from relying on resolution 31/193 B II. She argues that the Respondent, by failing to take any steps for two years to incorporate resolution 31/193 B II into the Staff Regulations, demonstrated his intention not to act on it . . .

IX. The Tribunal, having determined that a resolution of the General Assembly was binding on the Applicant, observes that the fact that the Respondent did not press for General Assembly action to incorporate the text into the Staff Regulations did not affect his right to apply the resolution to the Applicant." (*Smith* v. *the Secretary-General of the United Nations,* Judgement 249, pp. 17 to 18.)

10. Did the Administrative Tribunal Determine that Resolution 34/165 Could not Be Given Immediate Effect ?

132. It has been maintained that the judgement of the Administrative Tribunal in *Mortished* v. *the Secretary-General* did not determine that resolution 34/165 could not be given immediate effect in requiring, for payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station. It thus is suggested that the question put to the Court for an advisory opinion misconstrues the Tribunal's judgement. This conclusion is indeed shared by the Opinion of the Court (see para. 55).

133. The reasons that may be advanced in support of this conclusion are several, and not wholly consistent. One is that the Tribunal barely referred in its judgement to resolution 34/165 and made no express determination that it could not be given immediate effect. A second is that the Tribunal did give immediate effect to resolution 34/165 in so far as it could be given such effect without impairing acquired rights. A third is that not only did the Tribunal give immediate effect to resolution 34/165 but that its so doing is the precondition of its judgement. These reasons will be considered in turn.

134. It is true that the judgement of the Administrative Tribunal in *Mortished* v. *the Secretary-General* does not extensively refer to resolution 34/165, and it contains no express refusal to apply that resolution. That hardly shows that the Tribunal did not fail to give that resolution immediate effect. In any event, what is essential is the real effect of the Tribunal's judgement, however modest its references to resolution 34/165 and however lacking the judgement is in an express determination that resolution 34/165 could not be given immediate effect. As the Court put it in the *Fasla* case, ". . . the Court must have regard to the substance of the matter and not merely to the form" (*I.C.J. Reports 1973,* pp. 189-190). If in substance, if in reality, the judgement of the Administrative Tribunal in the *Mortished*

case did not give immediate effect to resolution 34/165, then the Committee on Applications did not misconstrue that judgement in requesting an Advisory Opinion on whether the Tribunal's determination was warranted.

135. It is perfectly plain that, in fact, the judgement of the Administrative Tribunal in the *Mortished* case does not give immediate effect to resolution 34/165, except, arguably, in a marginal fashion. It is a fact that the judgement of the Administrative Tribunal actually determined that General Assembly resolution 34/165 could not be given substantial immediate effect. This is so because Mortished and staff members similarly situated may rely on the transitional rule so as to avoid the requirement of providing evidence of relocation to a country other than that of their last duty station. For some years, virtually every retiring or resigning staff member eligible for a repatriation grant will rely, in the computation of the amount of the grants claimed to be due, on years and months of service rendered before 1 July 1979. By reason of the judgement of the Administrative Tribunal, they

> "shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they had already accrued at that date without the necessity of production of evidence of relocation with respect to such qualifying service" (former Rule 109.5 *(f)*).

By sustaining the Tribunal's judgement, as the Court's Opinion does, it is difficult to see what, if any, immediate effect resolution 34/165 will have, except as regards the odd staff member who will shortly retire or resign but who did not accrue service before 1 July 1979. As time passes, more and more of those leaving the Organization will not have accrued some or all of their credit towards the repatriation grant before that date ; accordingly, resolution 34/165 will have increasing effect. But its immediate effect is modest. Moreover, resolution 34/165 prescribes that "no" staff member shall be entitled to "any part" of the repatriation grant unless evidence of relocation is provided. For years, virtually every retiring or resigning staff member will seek credit for some part of the repatriation grant which accrued before 1 July 1979. By reason of the Tribunal's judgement in the *Mortished* case, staff members not providing evidence of relocation will be entitled to that part of the grant that accrued before 1 July 1979, a result which cannot be reconciled with giving immediate effect to resolution 34/165.

136. If it be argued that the Tribunal's *Mortished* judgement gave immediate effect to resolution 34/165 in so far as it could be given such effect without impairing acquired rights, and therefore, that the judgement was warranted (see, in this regard, paras. 75-76 of the Court's Opinion), it can

only be so if the finding of acquired rights is warranted. For the reasons which have been set out in this dissenting opinion, a finding of acquired rights was not warranted and, as just shown, by reason of its finding of acquired rights, the practical, immediate effect given by the Tribunal to resolution 34/165 is so slender as to justify a request for an advisory opinion in the stated terms. It may be observed that this argument for the conclusion that the Tribunal did give effect to resolution 34/165 requires the Court to look at the merits of the Tribunal's holding on acquired rights, for, if acquired rights do not obtain in this case, then the claimed basis for the Tribunal's treatment of resolution 34/165 vanishes. Resolution 34/165 can have been rightly reconciled by the Tribunal with acquired rights only if there were such rights. The Court's Opinion appears to recognize this, yet it shrinks from appraisal of the validity of the Tribunal's holding on acquired rights which this recognition demands by taking shelter in its claim that the business of the Court is not to pass upon the merits of that holding (paras. 74, 76).

137. The third argument is the subtlest. In maintains that the very existence of resolution 34/165 was the precondition of the Tribunal's judgement in the *Mortished* case and, that being so, the Tribunal necessarily gave effect – indeed, immediate effect – to it. On what ground, this line of reasoning asks, did the Tribunal arrive at the conclusion that Mortished should be paid compensation for an injury assessed in a sum equal to the amount of the repatriation grant ? On the ground that it recognized that the Secretary-General had given effect to resolution 34/165 in denying Mortished his repatriation allowance ; that this denial injured Mortished by violating his acquired rights ; and that compensation must be paid for the injury. So there is no reason to complain that the Tribunal failed to give immediate effect to resolution 34/165 ; on the contrary, its judgement is posited on its having done so. The Court's Opinion takes such an approach (see paras. 55-56).

138. This reasoning is both logical and unpersuasive. Rather than giving genuine effect to the terms and intent of resolution 34/165, it stands that resolution on its head. This argument in actuality says to the General Assembly : resolution 34/165 admittedly provides and means to provide "that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided". Thus no staff member shall be paid any part of the repatriation grant without provision of such evidence. However, such staff members shall be paid a sum equal to the amount to which they would have been entitled had not resolution 34/165 been adopted. That fact does not mean that resolution 34/165 is not given immediate effect. Why not ? Because the sums paid to the staff members are not payment of the repatriation grant, but payments in compensation for the denial of payment of the repatriation grant.

139. Simply to state this argument is to declare its disability. The General Assembly had an object in view in adopting resolution 34/165, namely, to require that any staff member leaving the Organization who seeks to receive a sum of money calculated on the basis of the repatriation grant shall receive any part of that sum only if he or she provides evidence of relocation. That object is in no way given immediate or any effect by paying the whole of that very sum to a staff member who does not provide that evidence, not as a repatriation grant but as compensation for its denial. On the contrary, such a process defeats the terms of resolution 34/165 and the intent of the General Assembly in adopting that resolution.

140. But it may be said, the General Assembly is not a judicial body and it is not for it to judge whether such staff members had an acquired right to payment of the repatriation grant regardless of relocation ; the General Assembly did not by resolution 34/165 or otherwise purport to override acquired rights ; on the contrary, Staff Regulation 12.1 remains in force, in general and accordingly with reference to the repatriation grant ; thus the General Assembly – which had been warned by the United Nations Under-Secretary-General and the legal counsel of the various United Nations agencies of the existence of an acquired right – must be deemed to have left it to the Administrative Tribunal to decide whether or not an acquired right obtains. The Administrative Tribunal has decided that staff members do have an acquired right to payment of the repatriation grant, and that should be the end of the matter.

141. It is true that the General Assembly is not a judicial body ; it is also true that it did not decide to override acquired rights ; and it is true that it left the initial judicial decision over whether there is an acquired right to the repatriation grant to the Administrative Tribunal. But the authorized organ of the General Assembly has requested this Court to review that judgement of the Administrative Tribunal because it has concluded that there is substantial basis for challenging it on the grounds that that judgement embodies error on a question of law relating to the provisions of the Charter of the United Nations and constitutes an excess of jurisdiction or competence. That challenge cannot be disposed of by a kind of legal legerdemain, which suggests to the General Assembly that all is definitively and well settled because Mortished will be paid the exact sum of money in controversy from one account rather than another.

11. The Tribunal's Judgement Erred on Questions of Law Relating to Provisions of the Charter and Exceeded the Tribunal's Jurisdiction

142. When measured against the grounds of objection listed in Article 11 of the Statute of the Administrative Tribunal which have been invoked by the Committee on Applications, the Tribunal's judgement in the *Mortished* case presents essentially these questions :

– Did the Administrative Tribunal have the jurisdiction or competence not to give immediate effect to resolution 34/165 ?

– Was the exercise of such authority error on a question of law relating to provisions of the United Nations Charter ?

– Did the Tribunal's finding of acquired rights afford it an authority to avoid giving effect to resolution 34/165 which it otherwise lacks ?

143. It is submitted that it has been shown above (paras. 132-139) that what the Administrative Tribunal actually did by the force of its judgement in *Mortished* v. *the Secretary-General* was to deprive of substantial, immediate effect a resolution of the General Assembly by which the Assembly meant to regulate and did regulate an aspect of staff conditions of service as of 1 January 1980. In so doing, the Administrative Tribunal exceeded its jurisdiction. That jurisdiction is defined by the Tribunal's Statute. The Court has rightly treated the Tribunal's "acting within the limits of its statutory competence" (as well as its being a "properly constituted Tribunal") as preconditions of its rendering a valid award (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954,* pp. 50, 51). The definition of the Tribunal's jurisdiction in Article 2 of its Statute does not provide for or imply a power to override resolutions of the General Assembly. Indeed, the *travaux préparatoires* indicate the contrary. The report of the Fifth Committee on the establishment of the Administrative Tribunal states, in respect of Article 2 of the Statute :

> "the tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the Staff Regulations as circumstances might require. It was understood that the Tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary . . . No objection was voiced in the Committee to those interpretations, subject to the representative of Belgium expressing the view that the text of the Statute would be authoritative and that it would be for the Tribunal to make its own interpretations." (United Nations, *General Assembly Official Records, Fourth Session, Annexes,* Agenda Item 44, p. 166.)

144. To posit an authority of the Administrative Tribunal to set aside or overrule decisions of the General Assembly is to invest the Tribunal with a power of judicial review vis-à-vis the Assembly. But the Tribunal does not enjoy that extraordinary power. Broadly speaking, the General Assembly itself lacks legislative authority ; its resolutions are recommendatory. But in the very restricted sphere of its law-making competence, which includes establishing conditions of service of the staff pursuant to Article 101 (1) of the Charter, the law laid down by the General Assembly binds not only the Secretary-General and the staff but the Administrative Tribunal as well.

Accordingly, when the Administrative Tribunal in substance sets aside that law, it exceeds its jurisdiction.

145. The Court's Opinion holds otherwise. The Court's conclusion that the Tribunal's judgement does not override resolution 34/165 and hence exceed the Tribunal's jurisdiction appears to be based on the following holdings : the Tribunal acted within the limits of Article 2 of its Statute ; and, even if the Tribunal's judgement on acquired rights with which the Tribunal gave effect to rather than overrode resolution 34/165 is wrong on the merits, that judgement on the merits has nothing to do with an excess of jurisdiction (para. 80). The Court avoids the question of whether the Tribunal's judgement misconstrues the intent of the General Assembly in adopting resolution 34/165.

146. It is submitted that the Court's reasoning is unpersuasive, for these reasons. First, there is no justification for avoiding the intent of the General Assembly in adopting resolution 34/165 (see para. 89, *supra*). The language of the resolution is plain ; and the tenor of the debate which preceded its adoption even plainer. The Under-Secretary-General of the United Nations understood perfectly the meaning of resolution 34/165 before its adoption – i.e., complete revocation of the transitional rule – and explicitly warned the Assembly against adopting it for that very reason (*supra,* paras. 79, 80, 81, 84). It is accordingly the harder to credit the failure of the Court to recognize what the record so emphatically demonstrates. Second, it is perfectly true that the Tribunal acted, *prima facie,* within its jurisdiction or competence in ruling on Mortished's claim. But that is not the issue. The issue rather is : did it act within its jurisdiction in not giving immediate effect to resolution 34/165 ? The Court deals with that issue by advancing arguments designed to show that actually the Tribunal did give effect to resolution 34/165. But, since, as this dissenting opinion has endeavoured to demonstrate, those arguments do not withstand analysis, it is believed that this endeavour of the Court fails. Third, the Court's conclusion that, even if the Tribunal's holding on acquired rights was erroneous, such error would not constitute an excess of jurisdiction, is a conclusion which is, it is submitted, unduly simplistic. The essence of the defence of the Tribunal's judgement to the charge of excess of jurisdiction is that there was no excess but simply a reconciliation of resolution 34/165 with pre-existing and continuing acquired rights. But if there were no acquired rights, then there could not have been such a reconciliation. The Court itself does not pass upon whether there were acquired rights ; it contents itself with reciting the reasoning of the Tribunal's judgement and stating that it is not its business to judge it. But when the merits of the Tribunal's judgement are examined, it is clear that its judgement on this critical question is predominantly unpersuasive. If it is accepted that the Tribunal's holding on acquired rights is unsound, then it follows that the Tribunal did not give effect to resolution 34/165, from which it follows that it exceeded its jurisdiction by failing to do so. Its not giving effect to resolution 34/165 also constituted an error on a question of

law relating to provisions of the United Nations Charter, but that fact does not weaken the conclusion about jurisdictional excess. It may be said to make that conclusion unnecessary, because, on the ground of error on a question of law alone, the Tribunal's judgement in *Mortished* v. *the Secretary-General of the United Nations* should not be sustained.

147. The question of whether the Administrative Tribunal exceeded its jurisdiction – the question of the relative powers of the General Assembly and the Administrative Tribunal and the interplay of their exercise in this case – also is a question of law relating to provisions of the United Nations Charter. That question engages primarily Article 101 (1), for it is by that provision that, as the Court has more than once held, "the General Assembly is given power to regulate staff relations . . ." (see para. 128, *supra*). But the question relates or may relate to other Charter articles as well : to the authority of the Secretary-General as chief administrative officer of the Organization under Article 97, to the budgetary authority of the General Assembly under Article 17 and to the General Assembly's power to establish subsidiary organs under Article 22. It may relate to the distribution of implied powers which arise by intendment from the Charter. But for present purposes, all that need be recalled is that neither under Article 101 nor any other Charter article, nor under its Statute, is the Administrative Tribunal authorized to vitiate a resolution adopted by the General Assembly.

148. The failure of the Administrative Tribunal to give immediate effect to a binding resolution of the General Assembly constituted error on a question of law relating to provisions of the United Nations Charter. Article 101 (1) provides that the staff shall be appointed by the Secretary-General under regulations established by the General Assembly – regulations which "embody the fundamental conditions of service . . . of the United Nations Secretariat" (Staff Regulations, scope and purpose). "Under Article 101, paragraph 1, of the Charter, the General Assembly is given power to regulate staff relations . . ." (*I.C.J. Reports 1973,* p. 173). Resolution 34/165, while it did not amend the Staff Regulations, constituted a regulation of the conditions of service of the Secretariat, a regulation which the Administrative Tribunal was bound to apply by reason of Article 101 (1) (and its own jurisprudence interpreting that article ; see paras. 130-131, *supra*). By not giving effect to that resolution, the Administrative Tribunal acted in derogation of Article 101 (1) and so erred on a question of law *"relating to"* a provision of the Charter. That is all that is required by Article 11 of the Tribunal's Statute. The Tribunal need not have acted in direct contravention of a Charter provision ; it need merely err in relation to a Charter provision. That it did by failing to give effect to an exercise of the General Assembly's regulatory

authority under Article 101 (1) by reason of unfounded reliance on acquired rights.

149. While the essential error of law relating to a Charter provision is the Tribunal's failure to give effect to an exercise of the General Assembly's regulatory authority under Article 101 (1), that error embraces more particular errors. Regulation 11.2 of the Staff Regulations provides that the Administrative Tribunal shall, "under conditions prescribed in its Statute", pass judgement upon applications from staff members alleging non-observance of their terms of appointment, including "all pertinent regulations and rules". The conditions of the Statute, in Article 2, prescribe that the Tribunal shall apply "all pertinent regulations and rules in force at the time of the alleged non-observance . . .". The Tribunal erred in applying in favour of Mortished a rule *not* in force at the time of the alleged non-observance, namely, the deleted Rule 109.5 *(f)*, which had been deleted by reason of the application of resolution 34/165. Its applying that deleted rule thus conflicted with an exercise of the General Assembly's authority under Article 101 (1). The Tribunal also may have erred in failing to apply a pertinent rule which *was* in force at the time of the alleged non-observance, namely, Rule 104.7 *(c)*. Its interpretation of Annex IV to the Staff Regulations – "In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate" – also erred in derogating from the General Assembly's authority to regulate staff relations under Article 101 (1) because it failed to give adequate weight to the reiterated intent of the General Assembly in adopting and maintaining that provision. Moreover, in so far as the Administrative Tribunal deflected the incontestable intent of the General Assembly in adopting resolutions 33/119 and 34/165, and construed those resolutions in a fashion inconsonant with that intent, it erred on a question of law relating to a provision of the Charter, namely, the authority of the General Assembly to regulate the staff under Article 101 (1).

150. The Court's Opinion makes no room for the conclusion that the judgement of the Administrative Tribunal erred on a question of law relating to provisions of the United Nations Charter. It agrees that the Tribunal must "accept and apply the decisions of the General Assembly made in accordance with Article 101 of the Charter". It concludes that the Tribunal did. Why ? Because it

> "was faced . . . not only with resolution 34/165 . . . but also with Staff Regulation 12.1 . . . it had therefore to interpret and apply these two sets of rules . . . The question is not whether the Tribunal was right or wrong in the way it performed this task . . . the question – indeed, the only matter on which the Court can pass, – is whether the Tribunal erred on a question of law relating to the provisions of the Charter of the United Nations. This it clearly did not do when it attempted only to apply to Mr. Mortished's case the relevant Staff Regulations and Rules made under the authority of the General Assembly." (Para. 76.)

151. It is submitted that this is the central error of the Court's Opinion. For the reasons advanced in the preceding paragraphs, precisely what the Tribunal did in purporting to reconcile resolution 34/165 with non-existent acquired rights was to commit an error of law in relation to provisions of the Charter, notably, Article 101 (1). By resolution 34/165 the General Assembly, acting under Article 101 (1), regulated the terms of eligibility for the repatriation grant ; by its judgement, the Tribunal avoided giving immediate effect to the Assembly's regulation ; on this count above all but on others as well (*supra,* paras. 147-149), the Tribunal thereby erred on a question of law relating to a provision of the Charter, since it frustrated the express and intended effect of an exercise of the Assembly's Charter-given regulatory power. It avails the Court nothing to take refuge in the conclusion that it cannot properly resolve whether or not the Tribunal's holding on acquired rights was right but that "clearly" whether the Tribunal was right or wrong did not constitute an error of law relating to Charter provisions. That conclusion is not clear at all. It takes not merely a narrow construction of the Court's authority which is questionable (paras. 19-29, *supra*). Even on the Court's own constrained construction of its jurisdiction, it is unsupportable because the Tribunal's conclusions so clearly derogate from the regulatory authority of the General Assembly.

152. It may be added that the question of whether Mortished has an acquired right in this case relates not only to Article 101 (1), but, arguably, to Articles 101 (3) and 100 of the Charter as well. It has been maintained, and reasonably maintained, that the implementation of acquired rights where justified bears upon the realization of the staff's efficiency, competence and integrity for which provision is found in Article 101 (3), and that it relates as well to the maintenance of the exclusively international responsibility of the staff under Article 100. It is worth emphasizing that the *Mortished* case does not deal with questions of acquired rights in the abstract or in the many contexts in which they may arise. It rather concerns the very particular question of the acquired rights of international civil servants, a question which must be considered in the singular context of

international organizations and in the light of the jurisprudence concerning acquired rights which has developed in the international administrative tribunals. Thus, while what those tribunals and this Court may say about acquired rights in this context may have little or no application to acquired rights in other contexts, it may certainly "relate to" those Charter articles that are the foundation of the international legal character of the United Nations Secretariat. Even if a narrow view of the Court's jurisdiction under Article 11 of the Tribunal's Statute is taken, there accordingly may be ground for examining the merits of the Tribunal's holding of acquired rights in this case in addition to that so clearly provided by Article 101 (1). If the Tribunal's holding is found to be flawed, if it is found to extend the doctrine of acquired rights to an unreasonable extent, its so doing may be said not only to prejudice the regulatory powers of the General Assembly under Article 101 (1), but to bear adversely on Articles 101 (3) and 100 in so far as undue extension of acquired rights may weaken those rights within their proper limits, rights which, when so limited, reinforce the effectiveness of those articles. For the reasons set out in this dissenting opinion, it is submitted that the holding of the Administrative Tribunal in the case of *Mortished* v. *the Secretary-General of the United Nations* is seriously flawed and does extend the doctrine of acquired rights unreasonably.

153. Did the Administrative Tribunal's finding of Mortished's acquired rights afford it an authority to avoid giving effect to resolution 34/165 which it otherwise lacks ? As noted, it has been maintained that the Tribunal did not so much fail to give immediate effect to resolution 34/165 as to weigh against that resolution Mortished's acquired rights. It is maintained that what the Tribunal did was to reconcile resolution 34/165 with his pre-existing and continuing acquired rights ; since it upheld those rights, it could give effect to resolution 34/165 only in so far as it was consistent with them.

154. As submitted above, this approach can be persuasive only in so far as the holding that Mortished had acquired rights is soundly based. It is believed that it has been shown above that it is not soundly based. Thus in so far as the Tribunal's finding of acquired rights is the justification for not giving immediate effect to resolution 34/165 in accordance with its terms and the intent of the General Assembly, that justification fails, i.e., the finding of acquired rights is the source of the Tribunal's error in frustrating the Charter-given authority of the General Assembly to regulate staff relations pursuant to Article 101 (1). Of course, this conclusion can be reached only by an analysis of the merits of the Tribunal's holding that Mortished had an acquired right to a repatriation grant without provision of evidence of relocation. For this reason of itself, it is submitted that the Court could not and should not avoid evaluating the merits of the

judgement of the Administrative Tribunal in *Mortished* v. *the Secretary-General.*

155. Finally it may be noted that the Tribunal's judgement on acquired rights relates not only to Article 101 (1) by reason of its frustrating the exercise of the Assembly's authority under that article. If the broader view of the jurisdiction of the Court under Article 11 of its Statute is taken (*supra,* paras. 18-29), the Court then has an additional jurisdictional ground for consideration of the merits of the Tribunal's judgement, namely, that it is entitled to review on its own merits the Tribunal's interpretation of the Staff Regulations that derive from Article 101 (1) – provided that review is of an "exceptional" case. The *Mortished* case, the first case brought to the Court under Article 11 at the initiative of a member State, clearly is exceptional, because it raises extraordinary issues of the relations and relationships between the General Assembly on the one hand, and, on the other, the Secretary-General, the International Civil Service Commission, the Advisory Committee on Co-ordination, the Consultative Committee on Administrative Questions, and, most of all, the Administrative Tribunal. Should the Court exercise that jurisdiction, it cannot, for the reasons set forth above, conclude that the Tribunal's interpretation of acquired rights in the *Mortished* case is consistent with the Staff Regulations as that concept has been developed in the jurisprudence of the Administrative Tribunals of the United Nations System.

(Signed) Stephen M. SCHWEBEL.

TABLE OF CONTENTS