SEPARATE OPINION OF JUDGE ELIAS

I agree with the majority Advisory Opinion in answering in the negative the two questions put to the Court but I wish to add some three or four points of difference of emphasis and interpretation on a number of important issues raised in dealing with the answers.

It seems that the Court has now reached a stage at which it should bring to the attention of the General Assembly and of the United Nations Organization as a whole the need to reconsider the scheme of referring to this Court cases from the Administrative Tribunal for review in accordance with the present procedure established in 1955.

The Statute of the United Nations Administrative Tribunal was adopted by the General Assembly on 24 November 1949, amended on 9 December 1953 and further amended on 8 November 1955; it established the Tribunal with competence "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". Article 3 of the Statute provides that it should consist of seven members, no two of whom may be nationals of the same State and that the quorum of three must sit in any particular case. There is no stipulation about the qualifications of members, who are appointed by the General Assembly for three years; for instance, they are not required to have legal qualifications. Article 11 of the Statute is crucial; paragraph 1 stipulates that if a member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal, or the successor to such a person's rights on his death, objects to the judgement on the ground (i) that the Tribunal has exceeded its jurisdiction or competence or (ii) that the Tribunal has failed to exercise jurisdiction vested in it, or (iii) that it has erred on a question of law relating to the provisions of the Charter of the United Nations, or (iv) has committed a fundamental error in procedure which has occasioned a failure of justice, any one of these three may within 30 days make a written application to the Committee established under paragraph 4 of the same article asking the Committee, called the *Committee on Applications for Review of Administrative Tribunal Judgements,* to request an advisory opinion of the International Court of Justice on the matter. The Committee is required to decide whether or not there is a substantial basis for the application to request an advisory opinion of the Court, in which case the Secretary-General must arrange to transmit the views of the person concerned to the Court. In accordance with Article 11, paragraph 4, of

the Statute of the Tribunal the Committee is required to meet at the United Nations Headquarters, and has the power to establish its own rules. If no application to the Committee is made or if no decision to request an advisory opinion has been taken by the Committee, the Tribunal's decision would be final. Whenever, however, a request has been made for an advisory opinion the Secretary-General must either give effect to the opinion of the Court or request the Tribunal to convene specially in order to confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court.

In *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954,* p. 47), the Court held that the Tribunal was an independent and truly judicial body pronouncing final judgements without appeal within the limited field of its functions and not merely an advisory or subordinate organ, and that the Court must give an advisory opinion within the limits set in the case as asked by the Committee. In *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* where the staff member applied for the review of the Tribunal's ruling to the Committee on Applications for Review requesting the Court to give an advisory opinion on two questions, the Court decided to comply with the Committee's request and took the view that the Tribunal had not failed to exercise the jurisdiction vested in it and had not committed a fundamental error in procedure which had occasioned a failure of justice. The Court observed that

> "although [it] does not consider the review procedure provided by Article 11 as free from difficulty, it has no doubt that, in the circumstances of that case, it should comply with the request by the Committee on Applications" (*I.C.J. Reports 1973,* p. 183, para. 40);

the Committee is in fact called upon to discharge a duty *normally* given to a legal body (*ibid.*, p. 176, para. 25). Similarly, in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal,* the United States Government addressed an application for review of the judgement of the Tribunal to the Committee on Applications for Review of Administrative Tribunal Judgements, and the Committee decided to request an advisory opinion of the Court on the correctness of the decision in question. The Court, after pointing out that a number of procedural and substantive irregularities had been committed, decided nevertheless to comply with the Committee's request, which was reformulated by the Court and interpreted as really seeking a determination as to whether the Administrative Tribunal had erred on a question of law relating to provisions of the United Nations Charter or had exceeded its jurisdiction or competence. The Court pointed out that its proper role was not to retry the case already dealt with by the Tribunal, and that it need not involve itself in the question of the proper interpretation of United Nations Staff Regulations and Rules further than was strictly

necessary in order to judge whether the interpretation adopted by the Tribunal had been in contradiction with the provisions of the Charter. The Court finally found that the Tribunal had not erred on a question of law relating to the provisions of the Charter, and also considered that the Tribunal's jurisdiction included the scope of Staff Regulations and Rules, and that it had not exceeded its jurisdiction or competence.

We may also recall that Article 65, paragraph 1, of the Statute of the Court provides that it 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. It has been said on many occasions by the Court that, in giving its reply to a request for an advisory opinion, the Court is, by doing so, participating in the activities of the United Nations and that, in principle, the Court should not refuse a request; it is entirely a matter of discretion for it whether or not to reply to a request.

It is clear that the Court may sometimes find itself in a strait-jacket if it follows closely the limit set in Article 11; nevertheless, to allow the Court to raise any legal issue analogous, but not strictly relevant, to the ones specifically asked of it by the Committee might not always give satisfaction. A flexible procedure is, therefore, called for which enables the Court to raise *all* legal issues considered by it to be relevant and necessary for the proper disposal of the problem at issue, so long as it satisfies the requirement of the judicial process.

A sensible way out will be for the preliminary problems arising in a given case to be dealt with first by a tribunal of first instance and then for legal issues to be raised later on appeal to the Administrative Tribunal in the normal system of adjudication, which the latter would be obliged to deal with as a court of appeal. The whole question would then turn on the judicial rather than on the present almost non-judicial manner of the Committee on Applications for Review. The political overtone of the Committee's deliberations would be minimized, if not completely eliminated, because the present composition of the Committee does not lend itself to strictly legal adjudications of issues. At present, the framing of questions to be put to the Court is often tinged with meta-legal conceptions of particular State Members of the Committee, which are often reflected in the manner of the categorization of the questions to be asked of the Court. The result has often been to make the question in the end either irrelevant or patently obscure. The Court has accordingly been put to the trouble of having to find out what the Committee did in fact mean by the questions as put to it, thereby wasting judges' time and effort, before coming round to the real issues involved in a particular case. The new procedure of using a tribunal of first instance would entail a recast of the present Statute of the Administrative Tribunal, *inter alia,* to require its members to possess legal qualifications. The present Article 11 would in particular need to be modified. The body operating at this level should do so as a court. For the purpose the General Assembly might establish

a study group to submit necessary changes, which must allow appeals to the Administrative Tribunal, the functions of which might have to be suitably modified.

A second aspect regarding the powers of the Court in dealing with a request for an advisory opinion is that relating to its power in proper cases to determine the real meaning of the question it has to answer. In *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* the Court pointed out that

> "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request" (*I.C.J. Reports 1980,* p. 88, para. 35).

In that case, the Court found it necessary to reformulate the question submitted for advisory opinion but insisted that such reformulation must remain within any limit set on the powers of the requesting body since the Court could not, by reformulating the question put, respond to a question which that body could not have submitted if, for example, it was not on a legal question "arising within the scope of the activities of the requesting body". It will be recalled that, in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal,* the Court in reformulating the question put by the Committee, emphasized that its "jurisdiction under Article 11 of the Tribunal's Statute is limited to the four specific grounds of objection there specified" and pointed to its previous dictum (in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 184, para. 41) that

> "Consequently, the Committee 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'".

Where necessary, the Court must of course have regard to the intentions of the requesting body as they emerge from the records leading up to the decision to request the opinion in question. This was done by the Court itself in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (*I.C.J. Reports 1980,* pp. 85-88, paras. 28-34). In the present case, the Court decided, after due consideration, that it was not open to it to enter into all four of the grounds mentioned in Article 11 of the Statute, by reformulating the question put to it or otherwise, because it could not be said that the Committee intended to ask the Court to give its opinion on such points for the proper determination of the case. The Court has emphasized, as previously noted above in this separate opinion, that its proper role in review proceedings is not to retry

the case "and to attempt to substitute its own opinion on the merits for that of the Tribunal", but has nevertheless said that it

> "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" (*I.C.J. Reports 1973*, p. 188, para. 48).

In its Advisory Opinion on the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 355, para. 57), the Court reiterated that the answer to the question must depend "not only upon the terms of Article 11, but also upon several other factors including, first of all, the Court's Statute, the case-law of the Court, the general requirements for the exercise of the judicial function" as well as "upon the terms of the particular question asked of the Court by the Committee". In this last passage, the Court made it abundantly clear that the several qualifications surrounding the application of Article 11 of the Statute for proper judicial purpose are overwhelming. It argues well for the reform of the Statute as a whole as suggested above in this separate opinion.

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Another issue requiring comment in the present Advisory Opinion concerns the criticism that the Secretary-General has not given "every reasonable consideration" thought to be necessary to the case of the Applicant before the decision was taken not to renew his contract. A good deal has been said in the statements submitted by the United States and by Italy on this issue; but very careful reflection on what resolution 37/126 of the General Assembly requires shows that it does not go as far as the critics would insist upon or suggest. It is absolutely clear that the resolution in question does not prescribe a particular procedure which the Secretary-General must follow in order to show that he has in fact given every consideration to the Applicant. There is no requirement of statute or other regulation that the Secretary-General should follow a particular course, nor has that particular course been ignored or deviated from. There is, however, abundant evidence from more than five letters exchanged on the subject between the Secretary-General and the Applicant showing that the Secretary-General told him *expressis verbis* and almost *ad nauseam* that the Applicant's contract would *not* be renewed or in any way extended beyond the five-year period. Neither the Applicant nor any one else in the whole war of words has even suggested that the non-renewal of the Applicant's employment has not been made sufficiently clear by the Secretary-General and any of his officials. We need to ponder over paragraphs 10 to 17 of the present Advisory Opinion for the bulk of the correspondence dealing with this matter. One cannot but endorse the Tribunal's conclusion, quoted in paragraph 37 of the

Opinion, regarding reasonable consideration having been given by the Secretary-General to the Applicant's repeated requests in dealing with the case:

> "In the present case, the Respondent had the sole authority to decide what constituted 'reasonable consideration' and whether the Applicant could be given a probationary appointment. He apparently decided, in the background of secondment of the Applicant during the period of one year from 27 December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment. He thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 that he had given 'every reasonable consideration' to the Applicant's career appointment." (Para. XVIII of the Judgement of the Administrative Tribunal.)

Nothing is gained by the further argument as to whether the Secretary-General or one of his officials has by necessary implication claimed that the non-renewal of the appointment has been based on a "legal impediment". Even the further argument that the Secretary-General had been induced to reach his decision not to renew by the intervention, direct or otherwise, of the Soviet Union, has been shown to be utterly insupportable and groundless. There is no shred of evidence to support this suspicion on the part of the critics.

It is strange that the whole argument about the existence of any legal impediment has been erected as a legal dogma which somehow has the force of law not yet specified or even hinted at. All we have is the asseveration that the Secretary-General must not, even through any of his officials, have been led to refuse the Applicant the renewal of his employment by the supposed existence of a legal impediment. Whether or not this has operated on the mind of the Secretary-General when he made it clear oftentimes that he would not in any case renew the Applicant's contract, does not affect the question. He told the Applicant in no uncertain terms that he had given careful consideration to his case and that his employment had come to an end.

* * *

A third question is the sterile argument about whether the Applicant was on a secondment from the Soviet Government and about what indeed constitutes a "secondment". What was beyond a shadow of doubt was that the Applicant came as a government servant from the Soviet Union, and not as a private individual joining the United Nations by his own effort or act; and the extensions granted were undertaken by the Secretary-General with reference to the Soviet Government up to and including the termi-

nation of his employment with the United Nations. It seems clear that the issue of secondment, which has been over-argued in the statements of the critics, sounds like an argument of semantics, like the contention that to give "reasonable consideration" must mean only calling the Applicant and telling him in precise words that his appointment would not be renewed.

* * *

A fourth contention is that the Administrative Tribunal erred in law for not substituting its own *discretion* for that of the Secretary-General when his decision was taken that the Applicant's employment would not be renewed. In this matter of the exercise of discretion vested in the Secretary-General there can be no doubt at all that no one else except the Secretary-General has indubitable rights to take the final decision whether or not to employ the Applicant. There can be no doubt that neither this Court nor the Administrative Tribunal can substitute its own discretion in this matter for that of the Secretary-General. We may consider that the discretion should have been exercised in a particular way different from that adopted by the Secretary-General. There is no doubt that he has the prerogative to do it in his own way. There is no rule of law for him to follow apart from the one consideration of justice and fair play which the situation requires, and which no one has suggested to be unfair. The criticism therefore is not judicial; it is only a matter of opinion.

One can hardly escape the feeling that the criticism that the Administrative Tribunal has too easily accepted the decision of the Secretary-General in approving the exercise of his discretion seems to imply that the Tribunal, and even this Court, should substitute its own discretion for that of the Secretary-General in concluding that the Applicant's employment should not be renewed. This would of course amount to requiring the Court to go into the merits of the entire case under the guise of the review asked of it under the present Statute. As we have pointed out earlier in this opinion the Court should not do that. In *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 356, para. 58), the Court warns against the procedure when it said that its proper role in the review proceedings is not to retry the case or "to attempt to substitute its own opinion on the merits for that of the Tribunal".

The Court, therefore, has no other choice than to affirm the judgement of the Administrative Tribunal and to answer the two questions put to it by the Committee in the negative.

(Signed) T. O. ELIAS.