SEPARATE OPINION OF JUDGE ODA

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1. I concur in principle with the operative paragraph of the Court's decision. Nevertheless, I feel bound to express my views, since they to some extent differ from the reasonings which have led to the formation of the Court's Opinion. In particular, I am of the opinion that question 1 was erroneously based and, with regard to question 2, while fully agreeing with B (2) of the operative paragraph, do so for different reasons than those advanced by the Opinion.

I. Concerning Question 1

A. Issue of Legal Impediment

2. I consider that the first question put to the Court by the Secretary-General, on the basis of the decision of the Committee on Applications for Review of Administrative Tribunal Judgements, was erroneously based. The first question reads:

> "In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it *by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983*?" (Emphasis added.)

3. In the case of an application for review submitted by a staff member, the Committee on Applications may refer matters to the Court only in the event that an allegation of non-observance by the Secretary-General of his or her contract of employment or of the terms of his or her appointment had been rejected by the United Nations Administrative Tribunal (UNAT), as in the present case. Failure by UNAT to exercise jurisdiction vested in it would certainly be a basis on which an advisory opinion of the Court might be sought, although it may not be easy to envisage a basis for any claim that UNAT has failed to exercise jurisdiction when it has — correctly or incorrectly (and that is a separate question) — delivered a judgement on the merits. It is certainly a fact in this case that UNAT did not refer to the question, as such, of the existence or non-existence of a legal impediment to Mr. Yakimetz's further employment. However, as a matter of a preliminary nature, the question should be asked why, in the view of the Committee on Applications, the lack of any direct reference to that question in Judgement No. 333 could have been regarded as affording a basis for asking whether the Tribunal had failed to exercise jurisdiction.

4. Mr. Yakimetz, the Applicant, asked UNAT in his pleas "to adjudge and declare that no legal impediment existed to his further United

Nations employment after the expiry of his contract on 26 December 1983", but in fact Mr. Yakimetz did not, in his pleadings, substantiate his assumption that the Secretary-General came to the conclusion of the non-renewal of the contract or the refusal of a career appointment for the reason that there was a legal impediment to further employment. The Secretary-General, the Respondent, barely mentioned the issue of legal impediment in the Respondent's Answer, apparently because the Secretary-General did not consider that the issue of legal impediment could have been a cause of the denial of the Applicant's further employment. Nor did UNAT make an issue of this question as such, apparently because in its view this question could only have been meaningful if a conclusion of a legal impediment had been a contributory cause of the Secretary-General's decision neither to renew the contract nor to give a career appointment.

5. Why then should UNAT have been required to respond to the question whether there was any legal impediment to Mr. Yakimetz's further employment — a question seemingly irrelevant to the Secretary-General's decision not to continue Mr. Yakimetz's employment? Did the Committee believe that, when refusing to extend Mr. Yakimetz's previous contract or to give him a career appointment, the Secretary-General might have failed to observe the requirements of that contract because (i) he did not make it clear that there really *was* a legal impediment or (ii) he did not explicitly mention that there was *not* such an impediment, and did it further believe that UNAT should have committed itself to one of these alternative thoughts? The fact that UNAT did not think it necessary to respond to the question whether any legal impediment to the further employment of Mr. Yakimetz did or did not exist is irrelevant to the exercise of its jurisdiction. It appears that the Committee put the first question to the Court simply upon a mere presumption that the Applicant was entitled to a specific ruling on each and every submission he had made, and that the absence of such a ruling on any one head would constitute a failure to exercise jurisdiction even if in the Tribunal's view the point raised was inessential to its findings. In this connection, it should be noted that a contention presented by the Secretary-General before UNAT and the Committee on Applications, to the effect that the existence or non-existence of legal impediment was quite irrelevant to his determination not to continue Mr. Yakimetz's employment, seems to have been completely ignored by the Committee.

6. Furthermore, UNAT did in fact deal in its Judgement with one aspect of legal impediment, namely the issue whether the terms of Mr. Yakimetz's contract might have barred Mr. Yakimetz from transferring to a career appointment following the expiry of his contract. Its handling of this issue led to the conclusion that Mr. Yakimetz could not have legally expected a career appointment. Whether UNAT was right or not in thus supporting the Secretary-General's analysis to the

effect that Mr. Yakimetz did not have a legal expectation of a career appointment is an issue to be considered under the second question put to the Court for its advisory opinion.

7. Even if it be granted that the question whether a legal impediment existed or not was not referred to, as such, in UNAT's Judgement, this cannot be sufficient reason for entertaining the conclusion that UNAT might thus have failed to exercise jurisdiction. *A fortiori,* there is no cause to argue that the silence of UNAT upon the question of legal impediment justified invocation of the ground that there was any failure on the part of UNAT to exercise jurisdiction. The first question itself was thus erroneously based.

B. Ambivalent Provenance of the Drafting of the Question in the Committee on Applications

8. It seems pertinent to examine the way in which the first question was drafted by the Committee on Applications. Mr. Yakimetz, the Applicant, urged the Committee on Applications on 21 June 1984 to request an advisory opinion of the International Court of Justice on the following four grounds which, more or less, simply repeated all the grounds on which objections to a judgement of the Administrative Tribunal can be made under the Statute of the Tribunal (UNAT Statute, Art. 11 (1)):

> "I. The Tribunal has exceeded its jurisdiction and competence.
> II. The Tribunal has failed to exercise jurisdiction vested in it.
> III. The Majority Judgement of the Tribunal errs on questions of law relating to provisions of the Charter.
> IV. The Tribunal has committed fundamental errors of procedure which have resulted in a miscarriage of justice." (A/AC.86/R.117.)

The Committee, which had held three closed meetings to consider Mr. Yakimetz's application on 21, 22 and 23 August 1984, found, by a vote of none to 25 with 3 abstentions and by a vote of 11 to 13 with 4 abstentions, that there was not a substantial basis for the application on ground I and ground IV, respectively. On the other hand, the Committee decided, each time by the same vote of 16 to 9 with 3 abstentions, that there was a substantial basis for the application on ground II and ground III (A/AC.86/30). In other words, the Committee favoured pursuing the question whether Judgement No. 333 should be reviewed on the grounds that "the Administrative Tribunal had failed to exercise jurisdiction vested in it . . ." (*ibid.,* para. 10), and that "the Tribunal had erred on a question of Law relating to the provisions of the Charter of the United Nations . . ." (*ibid.,* para. 11).

9. The discussions held in the closed meetings of the Committee on Applications which led to the Committee's decision formulating the text of the two questions to be addressed to the Court have not been disclosed. It is known from the Report of the Committee (A/AC.86/30), however,

that, in the light of the voting on the various grounds, the Committee considered the formulation of the questions on which it would request an advisory opinion of the Court, and an informal draft proposal, submitted by the delegation of the United Kingdom, was brought by the Chairman to the attention of the members of the Committee. The questions prepared in this draft proposal read:

> "(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it *or commit a fundamental error in procedure which has occasioned a failure of justice by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983*?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter, *in particular Articles 100 and 101*?" (A/AC.86/R.120.) (Emphasis added.)

The parts of the sentences emphasized were additional to the texts previously voted and decided by the Committee. The draft proposal, referring to the commitment by the Tribunal of "a fundamental error in procedure which has occasioned a failure of justice", attempted to reintroduce ground IV from Mr. Yakimetz's original Application, which ground had previously been rejected by the Committee. It also added to ground II of the Application the words "by not responding to the question whether a legal impediment existed to the further employment . . .".

10. The final text, adopted by the Committee on Applications by a vote of 16 to 9 with one abstention, did not include the reference to ground IV (which had already once been rejected) but included instead a reference to a legal impediment which was added in the United Kingdom's informal draft proposal. It may be noted that the phrase in the first question (ground II) (as quoted in para. 2 above) on which the Court is requested to give opinions, reading "by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?" — which itself neither appeared in the text of Mr. Yakimetz's Application to the Committee nor was included in the original decision of the Committee (see the respective quotations in para. 8 above) — had been added as a result of the informal draft proposal by the United Kingdom's delegate. It is also unclear whether, in that proposal, the phrase in question was intended to qualify failure of jurisdiction as well as the commission of a fundamental error in procedure.

11. At the public meeting of the Committee on Applications held on 28 August 1984, several days after the decision was made, the Committee's decision was formally announced by the Chairman and on that occasion some delegates made statements for the record pursuant to Article VII (4)

of the Committee's Rules of Procedure. Among those registering opposition to Mr. Yakimetz's Application were the delegates from Bhutan, USSR and Czechoslovakia, while the delegates from France and the United States were the only two delegates who expressed support for the Application.

12. The delegate from France stated:

> "[M]y delegation agrees with the majority of the Committee that Mr. Yakimetz's application is based on grounds that are valid under article 11 (2) of the Statute of the Administrative Tribunal in claiming that the Tribunal did not answer the question of whether that was a legal impediment to the renewal of the Applicant's employment at the United Nations after the expiry of his contract on 26 December 1983. However, my delegation is inclined to believe that this complaint is grounded not on any failure of the Tribunal to exercise its jurisdiction, but rather on its having committed a fundamental procedual error that gave rise to a failure of justice, under article 11 (1) of the Statute. We regret that, as had been suggested, the Committee did not agree to accept either of these grounds in support of the application before the Tribunal." (A/AC.86/XXIV/PV.5, p. 6.)

The delegate from France did not substantiate his argument concerning a legal impediment so as to justify his criticism of the Committee's first question about whether the Tribunal had failed to exercise jurisdiction. The delegate from the United States did not appear to expound sufficient argument in support of the formulation of the first question. His only analysis of that question was as follows:

> "We believe that the question whether there was a legal bar to further employment is a critical one, one on which the Tribunal erred. It is separate from the question of whether there was any expectation. The separate nature of those questions is obvious, and if it were not in and of itself it would be obvious by the existence of resolution 37/126, which underlines the distinction. There would be no purpose in that resolution if that distinction did not exist . . . To those of us from the common-law tradition it appears more clearly to be a failure to exercise jurisdiction. To those from the civil-law tradition the failure apparently amounts more obviously to a procedural error occasioning a denial of justice. We believe both perceptions lead to the same conclusion." (*Ibid.*, p. 11.)

He seems to have held the view, like the French representative, that procedural error could be an issue presented before the Court on the ground that the Tribunal had failed to state whether there was a legal impediment to further employment of Mr. Yakimetz. Neither the French delegate nor the United States delegate suggested that UNAT might have failed to

exercise jurisdiction vested in it by reason of the absence of an answer to the question concerning legal impediment. It may be noted in particular that the delegates of France and the United States, together with the United Kingdom delegate, were among those who voted unsuccessfully for ground IV.

13. The ambivalent provenance of the drafting of the first question in the Committee on Applications may lead us to conclude that the introduction of the concept of legal impediment in connection with the first question resulted from inadequate examination of the question on the part of the Committee.

II. Concerning Question 2

A. The Court as an Appellate Court to the United Nations Administrative Tribunal in Certain Specific Circumstances

14. If the Court is to give an advisory opinion in this particular case, only the second question may be relevant, and I quote it:

> "Did the United Nations Administrative Tribunal, in the... Judgement No. 333, err on questions of law relating to the provisions of the Charter of the United Nations?"

This question arose from the fact that UNAT in its Judgement did not uphold an allegation by Mr. Yakimetz that the Secretary-General might not have observed Mr. Yakimetz's "contract[s] of employment... or... the terms of appointment" (UNAT Statute, Art. 2).

15. As the Statute of UNAT provides that an advisory opinion may be sought of the Court because of the objection of a staff member to the Tribunal's judgement on four grounds, including ground III that "the Tribunal . . . has erred on a question of law relating to the provisions of the Charter of the United Nations" (Art. 11 (1)), I would suggest that the Court is expected in this case to function *in substance* similarly to an appellate court vis-à-vis UNAT, to review the actual substance of the Secretary-General's decision and, if necessary, to substitute its own opinion on the merits for that of UNAT.

16. In fact, when the United Nations General Assembly, under resolution 957 (X), adopted the idea of requesting an advisory opinion on UNAT judgements by the insertion of Articles 11 and 12 into UNAT Statute, ground III, unlike the other three grounds mentioned in Article 11 (1), was introduced in order that UNAT's judgements be subjected to review by this Court as a kind of appellate court, but only in *limited* cases in which UNAT could be argued to have erred on a question of law

relating to the provisions of the Charter. I made an extensive survey of this particular ground for justifying the seeking of advisory opinions of the Court in my separate opinion attached to the Advisory Opinion in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (I.C.J. Reports 1982,* pp. 393-397), and I do not need to repeat this survey.

17. In my view, consonant to what I had occasion to indicate in my separate opinion appended to the 1982 case, the Court, in replying to the second question (ground III of UNAT Statute, Art. 11 (1)) in the request for an advisory opinion, is expected to review whether UNAT, by upholding the Secretary-General's decision, did or did not err on questions of law relating to the provisions of the United Nations Charter, and thus inevitably to form in practice a judgment as to whether the Secretary-General, whose decision was upheld by UNAT, did or did not err on such a question. I take quite a different view from the present Advisory Opinion with regard to the functions of the Court in this respect.

18. Quoting the 1973 Opinion in the case concerning an *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* and the 1982 Opinion in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal,* the Court repeatedly emphasizes its limited role by stating that "the Court's proper role is not to retry the case" (paras. 27, 62 and 89), and it states:

> "[The Court] will... not necessarily have to deal with the problems raised by certain administrative steps taken, or which should have been taken, by the Secretariat, and which have been the subject of criticism, at the same time as the Tribunal's Judgement No. 333. Taking into account the limits of its competence set by the applicable texts, the Court should not express any view on the correctness or otherwise of any finding of the Tribunal in Judgement No. 333, unless it is necessary to do so in order to reply to the questions put to it." (Para. 27.)

Yet it appears to me that the Court in fact *admits,* for example, in paragraphs 63 to 66, that it *inevitably* has to deal with the correctness or otherwise of the Secretary-General's decision. The Court's Opinion is unable to avoid stating:

> "The decision was that of the Secretary-General; and it was not for the Tribunal, nor indeed for the Court, to substitute its own appreciation of the problem for that of the Secretary-General. The Court could only find that the Tribunal had in this respect 'erred on a question of law relating to the provisions of the Charter' if it found that the Tribunal had upheld a decision of the Secretary-General which could not be reconciled with the relevant article of the Charter. That

does not appear to the Court to be the case. The decision of the Secretary-General cannot be said to have failed to respect the 'paramount' character of the considerations mentioned in Article 101, paragraph 3 . . ." (Para. 82.)

B. UNAT Judgement No. 333

19. The clear fact, as summarized from what the Court's Opinion spells out, is that Mr. Yakimetz's fixed-term contract on secondment was due to expire on 26 December 1983, and in spite of Mr. Yakimetz's request for a further extension of his contract with the United Nations or even better a career appointment on 25 October 1983, the Secretary-General did not intend, on 23 November 1983, to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983. Mr. Yakimetz, on 13 December 1983, requested that the administrative decision not to extend his appointment beyond its expiration be withdrawn and his name forwarded to the appropriate appointment and promotion body for reasonable consideration for career appointment. The Secretary-General responded on 21 December 1983 that he had given careful consideration to the issues but was not in a position to agree to his request. Whether the decision of the Secretary-General not to extend Mr. Yakimetz's contract further, and not to offer a career appointment as Mr. Yakimetz had wished, constituted a non-observance of "a contract of employment" or "the terms of an appointment (including all pertinent rules and regulations in force)" on the part of the Secretary-General was a critical issue before UNAT.

20. In his pleas dated 3 January 1984, the Applicant requested UNAT to adjudge and declare on three points that:

(i) "C . . . no legal impediment existed to his further United Nations employment after the expiry of his contract on December 26, 1983."

(ii) "D . . . he had an expectancy of further employment."

(iii) "E . . . he was illegally denied his right to reasonable consideration for a career appointment." (Applicant's Statement of Facts and Argument, p. 2.)

Apart from the first point, which as I previously submitted (paras. 4 and 5, above) appears to be irrelevant as not affecting the decision of the Secretary-General, the Applicant elaborated the remaining two points as indicated in the subtitles in the Applicant's Statement of Facts and Argument:

"II. The Applicant had a legally and morally justifiable expec-

tancy of continued U.N. employment, and a right to reasonable consideration for a career appointment."

"III. The Applicant was denied the reasonable consideration for further employment to which he had a right."

The non-observance by the Secretary-General of the terms of Mr. Yakimetz's contract was not at issue, but the Applicant argued that his contract should have been interpreted in view of the terms of appointment, first, to allow him to expect continued service with the United Nations and, secondly, to entitle him to reasonable consideration for a career appointment.

21. In his Respondent's Answer on 14 March 1984 the United Nations Secretary-General requested UNAT to conclude on the Applicant's pleas, D and E, respectively, that:

"*(d)* . . . Applicant had no legal expectancy of further employment;

(e) . . . Applicant had no 'right' to *favourable* consideration for a career appointment and did, in fact, receive such consideration as was *reasonable*. . ." (Respondent's Answer, p. 13.)

The Secretary-General's position may be summarized in the terms of the subtitles of the Respondent's Answer:

"I. Applicant has no entitlement, including any legally cognizable expectancy, as regards continued employment on expiry of his fixed-term contract."

"A. The fixed-term contract excludes any expectancy."

"B. No circumstances outside the scope of the contract gave rise to legally cognizable expectations."

"II. The Secretary-General's decision against re-appointment was within his sole authority under the Charter and the Staff Regulations."

"A. In reaching his decision, the Secretary-General took into account all the circumstances in the case."

"B. In taking his decision in the case, the Secretary-General acted in the interest of the Organization."

22. In its Judgement No. 333 of 8 June 1984, UNAT, being of the opinion that "[i]n this case the legal issues involved are interspersed with political considerations", made it clear that it could deal only with the legal issues (AT/DEC/333, p. 11, para. I). The legal issues referred to were analysed as three in number, and the respective explanations given in the Judgement which had led the Tribunal to hold that the Applicant's pleas could not be sustained were as follows:

(a) *"Whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations."*

UNAT, while upholding the decision of the Secretary-General, noted that Mr. Yakimetz's contract had been *on secondment* from the Government of the USSR and, referring to Staff Rule 104.12 *(b)*, which provided that a fixed-term appointment did "not carry any expectancy of renewal or of conversion to any other type of appointment", stated that:

> "[i]t does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment" (*ibid.*, p. 12, para. VI).

UNAT expressed the view that "none of the actions [the Applicant] took could bring about any legal expectancy of renewal of his appointment" (*ibid.*, p. 14, para. XII). The Tribunal considered however that:

> "[i]f his fixed-term appointment were not based on secondment he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension, but such a situation did not arise" *(ibid.)*.

UNAT concluded that:

> "during the period of his service with the United Nations the Applicant was under secondment which . . . could not be modified except with the consent of all three parties and that no tacit agreement existed between the Applicant and the Respondent between 10 February 1983 and 26 December 1983 changing the character of their relationship" (*ibid.*, p. 15, para. XIII).

(b) *"Whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads*

> *'Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'

has been carried out."

UNAT, having considered the Applicant's plea that he was entitled to, but was denied, the right to receive "every reasonable consideration" under General Assembly resolution 37/126 of 17 December 1982 and referring also to General Assembly resolution 38/232 of 20 December 1983, stated:

"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 . . ." (*Ibid.*, p. 17, para. XVIII.)

(c) *"The consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship."*

I would suggest that it was imperative for the Court to note that UNAT did not address this last issue, in its entirety, despite its having itself set it up and defined it as legal in character. In particular UNAT failed to deal with the question of the uncertainties of Mr. Yakimetz's personal status which fell within the discretion of the Secretary-General in his implementation of the personnel policy. UNAT simply stated that: "Another consequence of his actions raised the question of his suitability as an international civil servant." (*Ibid.*, p. 14, para. XII.)

23. In order to examine whether UNAT erred on a question of law relating to the provisions of the United Nations Charter, it is pertinent for the Court, as I have already stated in paragraphs 14 to 18 above, to function as an appellate court and to examine how UNAT viewed the decision of the Secretary-General in the light of the three legal issues that it had raised and also to examine whether the Secretary-General himself had erred on questions of law relating to the provisions of the United Nations Charter. If he had, and UNAT failed to reprove his mistake, the Tribunal itself would have become a party to his error.

24. The *first* question is whether the Secretary-General, in his decision not to extend the terms of Mr. Yakimetz's contract and not to give him a career appointment, did or did not comply with "regulations established by the General Assembly" under which he may appoint the staff of the United Nations (United Nations Charter, Art. 101 (1)). This certainly is essential to Mr. Yakimetz's claims to legal expectancy of further service with the United Nations and to the alleged denial of Mr. Yakimetz's right to reasonable consideration for a career appointment. The *second* question is whether the Secretary-General, in his above-mentioned decision, did or did not give "paramount consideration" as required in the case of the employment of staff (United Nations Charter, Art. 101 (3)). This relates to the scope of the Secretary-General's discretion in the exercise of his competence where personnel policy is concerned. In spite of its

hesitation to retry the case and make a judgement on the correctness or incorrectness of the Secretary-General's decision, the Court's Opinion *in fact* gave responses to these two questions, and I am in general agreement with the conclusions the Court has reached. However, I would like to expand my argument further in the following two sections from the viewpoint of my opinion that this Court should in certain respects function as an appellate court.

C. Legal Expectancy for Further Service and Reasonable Consideration for a Career Appointment

25. In spite of what Mr. Yakimetz asserts, there is no doubt that prior to 26 December 1983 he had been employed by the United Nations under a fixed-term contract on secondment. The concept of secondment for appointment as United Nations staff is found in the Staff Rules as follows:

> "Rule 104.12 — Temporary Appointments
>
> . . . . . .
>
> (b) *Fixed-term appointment*
>
> The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, *including persons temporarily seconded by national governments or institutions for service with the United Nations.* The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment." (Emphasis added.)

Appointment on secondment is widely utilized by the United Nations to recruit qualified persons from different countries. As is clearly indicated in the letter of 22 April 1987 written by Mr. C.-A. Fleischhauer, the Legal Counsel of the United Nations in reply to questions put on the Court's behalf, professional staff with a fixed-term contract on secondment are many in number and almost all of the staff from Eastern Europe have been appointed solely under fixed-term contracts based upon secondment from their releasing countries. Secondment implies the detachment of a specific person from the releasing country or institution with the condition that he is guaranteed a post at home which he retains during his service with the United Nations or at least which he is assured of having upon completion of that service. However, secondment seems to be often used in reality by some governments to push their own nationals into the United Nations Secretariat, without any guarantee of a post after service with the United Nations has been completed. A person may not even

have held any official post dependent on the government deemed to have seconded him. This is Mr. Yakimetz's case. In this regard, secondment may mean little more than that a particular person had been recommended by a government to the United Nations and has been given an appointment by the latter. The practice which the United Nations has followed is such that in the case of a renewal of contracts or a change to another type of contract, the approval of the releasing or seconding government of the official sought.

26. I am not suggesting that the approval of the releasing or seconding government must always be obtained for the Secretary-General's granting of further employment to the applicant. Yet the following statement by Mr. Yakimetz is irrelevant:

> "Many currently serving staff members have resigned from their government service; many carry passports other than those of the country of their birth; a number have made the transition from secondment to another type of appointment." (A/AC.86/R.117, para. 24.)

It may be true that many serving staff members had resigned from their government service, but Mr. Yakimetz was not in that position (as I explain in para. 34, below). It may also be true that "many carry passports other than those of the country of their birth", but whether Mr. Yakimetz carried any valid passport since he applied for "asylum" on 9 February 1983 is not known. It may also be true that "a number have made the transition from secondment to another type of appointment", but it is not stated whether this transition was made with the consent of the releasing or seconding government or even against the intention of that government. What one can say is that there certainly could not be any reason in the light of Staff Rule 104.12 for Mr. Yakimetz legally to expect a renewal of his contract or conversion to a career appointment.

27. The question remains whether there was anything which should or could suspend or call a halt to such practice on the part of the United Nations administration. In this respect it is pertinent to consider certain General Assembly resolutions which were repeatedly referred to by the Applicant, such as resolutions 37/126 and 38/232. The following is a brief summary of the drafting of these two resolutions.

(1) In 1980 the General Assembly, in its resolution 35/210 (Personnel Questions: 17 December 1980), requested the International Civil Service Commission (ICSC) and the Joint Inspection Unit (JIU) to study further and submit reports on the subjects of the concepts of career, types of

appointment, career development and related questions (sec. IV, paras. 1 and 2). In response to this request the JIU submitted a report on Personnel Policy Options (A/36/432: 14 September 1981) with later an addendum (A/36/432/Add.1: 29 October 1981). The Secretary-General submitted his comments on this report (A/36/432/Add.2: 27 November 1981). Meanwhile the ICSC had submitted in its report of 15 September 1981, an Annex 1 entitled "Study requested by the General Assembly on the concepts of careers, types of appointments, career development and related questions" (A/36/30). In 1981 the General Assembly, in its resolution 36/233 (Report of the International Civil Service Commission: 18 December 1981), requested the ICSC to give high priority to the completion of the studies, *inter alia*, on:

> "The broad principles for the determination of conditions of service with particular reference to the concept of career, types of appointment, career development and related questions, taking into account the views expressed by delegations in the Fifth Committee, all related studies and the relevant reports of the Joint Inspection Unit",

and in its Decision 36/457 (Concept of career, types of appointment, career development and related questions)

> "Decided to discuss at its thirty-seventh Session the subject of the concept of career, types of appointment, career development and related questions as requested in Section IV of its resolution 35/210."

(2) Annex 1 to the ICSC report to the 37th Session bore the same title as its predecessor and stated:

> "33. The Commission *recommends* that, upon completion of five years of service, each employee be given every reasonable consideration by the employing organization for a career appointment." (A/37/30, p. 92.)

At that Session, the Fifth Committee devoted many meetings to agenda items 111 (Personnel Questions) and 112 (Report of the International Civil Service Commission), and some discussion took place concerning the concept of career and types of appointment, etc., from 1 to 24 November 1982 (A/C.5/37/SR.23-44). The delegate of Canada wondered whether the recommended period of five years' employment as a basis for deciding whether to award a staff member a permanent contract was not too long (A/C.5/37/SR.43, para. 13). The Chairman of the ICSC pointed out that:

> "A large number of delegations, including those of Canada, the members of the European Economic Community, the Nordic countries and the Philippines, had spoken in favour of granting a career appointment to long-term staff. While some delegations might have reservations in principle on career appointments, ICSC hoped that the Committee would endorse its recommendation to the organizations of the common system that, after five years of service, each employee should be given every reasonable consideration for a career appointment." (A/C.5/37/SR.44, para. 16.)

Otherwise there was not much discussion on this particular point in the Fifth Committee.

(3) On 9 December 1982 Canada, Finland, Ghana, Norway, Pakistan, Panama and Sweden submitted a draft resolution (A/C.5/37/L.38) which the next day was replaced by a revised text (A/C.5/37/L.38/Rev.1), with Denmark added to the sponsoring nations. This lengthy resolution contained a paragraph which is often quoted in the case before the Court, namely:

> "*The General Assembly* . . .
>
> IV
>
> . . . . . .
>
> 5. *Decides* that staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment."

In introducing it, the delegate of Canada stated that:

> "With regard to paragraph 5, staff in continuing jobs who were considered to provide good service should have every reasonable consideration for career appointments but organizations with fixed-term technical requirements would continue to need fixed-term staff." (A/C.5/37/SR.63, para. 15.)

There was no further discussion on this particular paragraph and the draft resolution itself, which was slightly revised through oral amendment, was put to vote and adopted by 79 to 10 with 6 abstentions on 13 December 1982. The delegate of the Federal Republic of Germany, speaking in explanation after the vote, said that:

> "In section IV, paragraph 5, it would have preferred the word *'Recommends'* instead of the word *'Decides'*, since the interests of under-represented States, such as his own country, should be regarded as overriding concerns." (A/C.5/37/SR.67, para. 8.)

The delegate of Japan also stated "that his delegation had abstained in the vote because it had reservations with respect to . . . section IV, paragraph 5

(together with 2 others)" (*ibid.*, para. 9). This draft resolution of the Fifth Committee was adopted by a recorded vote of 123 to 11 with 6 abstentions at the plenary meeting of 17 December 1982 as General Assembly resolution 37/126, and I again quote the relevant paragraphs:

> "*The General Assembly* . . .
>
> IV
>
> 1. *Welcomes* the study on the concept of career, types of appointment, career development and related questions submitted by the International Civil Service Commission,
>
> . . . . . .
>
> 5. *Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment; . . ."

(*Note:* How the words "fixed-term contracts" in para. 5 in the draft resolution adopted by the Fifth Committee came to be replaced by those of "fixed-term appointments" in the Plenary is not known.)

(4) The section IV, paragraph 5, of resolution 37/126, which starts with the phrase "decides", was interpreted by the Applicant, as well as by Mr. Kean, the dissenting judge of the Administrative Tribunal, as directly binding the Secretary-General for his observance forthwith, or even as having an effect superior to, or overriding, the Staff Regulations or Rules. I submit, however, that the word "decide" in this context can hardly be construed thus to heighten the usual legal effect of a resolution of the United Nations General Assembly. Actually, the resolution as a whole was drafted mainly in order to improve the efficiency of the work of the Organization by officializing the mere *possibility* of staff on fixed-term appointments continuing their work under more stable conditions. This is corroborated by the fact that all the General Assembly decided was simply that *reasonable consideration* should be given to an application for a career appointment, terms which also preclude any interpretation of this paragraph which would place any new limit on the Secretary-General's discretion. Of course, even Mr. Yakimetz himself did not suggest that a career appointment should have been guaranteed by a "decision" of the General Assembly under this resolution. In fact no particular revision has been made in either the Staff Regulations or the Staff Rules to incorporate the relevant substance of this resolution.

(5) On 15 November 1983, at the 38th Session of the General Assembly, the delegate of Canada, who had taken the initiative behind the resolution of the previous year, addressed agenda item 117 (United Nations Com-

mon System: Report of the International Civil Service Commission) and stated that:

> "His delegation continued to support the concept of a permanent career international civil service and believed that detailed consideration should be given to the possibility of offering a permanent contract, without a probationary term, to any staff member who had completed five years of continuing satisfactory service on a fixed-term contract." (A/C.5/38/SR.38, para. 73.)

On 7 December 1983 nine countries including Canada submitted a draft resolution which read:

> "*The General Assembly* . . .
>
> VI
>
> . . . . . .
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> 5. *Recommends* that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts." (A/C.5/38/L.17.)

This paragraph was no longer challenged, and the draft resolution, as amended by a United States proposal without affecting this particular point, was adopted by 91 votes to 9 with 5 abstentions on 15 December 1983 (A/C.5/38/SR.66, para. 41). This resolution was finally adopted by the Plenary Meeting of 20 December 1983 as General Assembly resolution 38/232.

28. Resolutions 37/126 and 38/232 were together intended to open a door to career appointments for those staff members who had satisfactorily served with the United Nations for the previous five years under fixed-term contracts and sought career appointments, and to exempt them from the probationary appointment which would otherwise be a prerequisite. But I repeat that these resolutions, in themselves, neither guaranteed nor even conferred a legal expectancy of any appointment. At most, the staff are assured of "every reasonable consideration" by the Secretary-General. Is it conceivable that, when making a determination not to give a career appointment to Mr. Yakimetz, the Secretary-General carelessly overlooked these resolutions or intentionally disregarded them? Certainly not. On the contrary, the Respondent's Answer submitted by the Secretary-General before UNAT made repeated reference to resolution 37/126. The Secretary-General is absolutely justified in the interpretation which he offered in the following terms:

> "Respondent notes that the General Assembly only stated a desideratum, namely, that fixed-term appointees be given reason-

> able consideration; the Assembly did not specify new procedures for effecting such consideration, or suggest that existing procedures not be utilized, and did not convert fixed-term appointments to probationary appointments, whose holders must, as a matter of right, be reviewed by the Appointment and Promotion Board before being separated after two years of probationary service. Respondent therefore submits that, in the absence of such specification, suggestion or conversion, the existing procedures under the Staff Regulations and Rules, which form an integral part of all staff members' terms of appointment, including Applicant's, remained applicable." (Para. 17.)

The contention that the Secretary-General might not have given every reasonable consideration to Mr. Yakimetz's case in the light of resolution 37/126 is groundless.

29. Here I would like to add a few words to what UNAT in its Judgement expressed in connection with:

> "its dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment 'every reasonable consideration' as enjoined by the General Assembly resolution" (AT/DEC/333, p. 18, para. XX).

In my view, UNAT here makes too much of the Respondent's omission to specify "sufficiently early and in specific terms" that he had given the Applicant's request "every reasonable consideration"; whether the Secretary-General gave every consideration or not is a matter rather to be presumed, and whether that consideration was reasonable or not is a matter to be considered in connection with his competence to exercise his discretion. (This part will be enlarged upon in the next section.) It is surely mistaken to suggest that silence on the point in the Respondent's initial reply constituted a "failure", with all the overtones of dereliction of duty that this implies in the context. To my mind, therefore, UNAT had no grounds for "dissatisfaction".

D. Latitude for the Secretary-General's Exercise of Discretion

30. Whether in a concrete case the Secretary-General's exercise of discretion in his appointment of staff is "reasonable" or not, or whether the consideration given by the Secretary-General is "reasonable" or not may be tested by the light of Article 101 (3) of the United Nations Charter, which reads:

> "The paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity

of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

The idea behind the first sentence is not peculiar to the United Nations but is a universal rule of personnel policy, designed to maintain the efficiency of an institution's functioning. It means that no factors which are not relevant to efficiency, competence and integrity should be allowed any importance detrimental to the overriding consideration of those which are. Nevertheless, an overriding or paramount consideration is not, implicitly, the sole consideration, as witness the immediate reference in the same provision to another factor which deserves "due regard". Hence the provision does not mean that all other factors should be left out of consideration in the employment of staff.

31. It is presumed that UNAT came to the conclusion that the decision of the Secretary-General, unfavourable to Mr. Yakimetz in spite of the latter's apparently outstanding service with the United Nations, was yet justified as an exercise of the former's discretion. An important factor which could presumably have affected the Secretary-General in the exercise of his discretion was the uncertainty of Mr. Yakimetz's personal status at the time of his application for further employment with the United Nations towards the end of 1983. In fact the Tribunal, in reaching its decision, did not place any emphasis on this point — the question of his suitability as an international civil servant — despite having raised it as one of the three important legal issues (see para. 22 above), presumably because neither Mr. Yakimetz nor the Secretary-General addressed this issue in their arguments.

32. The most crucial aspect of this issue, and one which should surely have been dealt with by UNAT, was whether or not consideration of the personal uncertainties of Mr. Yakimetz caused by his application for "asylum", and his alleged resignation from any post in the Soviet Government in February 1983, fell within the latitude of the Secretary-General's discretion in matters of staff appointment. It seems that UNAT failed to spell out the justification it had for its evaluation of the reasonableness required for the exercise of the Secretary-General's discretion. This particular omission might arguably have been represented as a fundamental error in procedure or failure to exercise jurisdiction on the part of UNAT; but this was not the possibility which the Court was asked to address. Yet the Court should, on its own initiative, have examined the status of Mr. Yakimetz after February 1983, in other words, the question related to the third legal issue which UNAT raised but did not answer.

33. The facts, as affirmed in UNAT's Judgement and in the present Opinion, may be summarized as follows. On 9 February 1983 Mr. Yakimetz applied for asylum in the United States. On the next day (on 10 February 1983) Mr. Yakimetz informed the Permanent Representative of the USSR to the United Nations that he was "resigning" from his position with the Ministry of Foreign Affairs of the USSR and from all other official positions he had held in the Soviet Government and that he had made an application to the United States Government requesting asylum. On that day Mr. Yakimetz likewise informed the United Nations Secretariat of his intention to acquire permanent residence status in the United States and stated further that he had applied for asylum to the United States and that he had resigned from all official positions he had held in the Government of the Soviet Union.

34. No document indicates the way in which the asylum was sought or whether it was granted by the United States. In the personal history form dated 10 June 1977 attached to a letter to the Assistant Secretary-General for Personnel Services from the Deputy Permanent Representative of the USSR to the United Nations, Mr. Yakimetz answered "No" on the questionnaire where it asked: "Are you, or have you ever been a permanent civil servant in your government's employ?" Mr. Yakimetz does not appear to have held any post in the Soviet Government in February 1983 from which he could resign. Whether Mr. Yakimetz was relieved of his Soviet nationality under Soviet law simply by his letter addressed to the Permanent Representative of the Soviet Union to the United Nations of 10 February 1983 is not confirmed. Bill S-1989 to obtain permanent residence in the United States for Mr. Yakimetz was pending before the Senate when his contract was about to expire, but whether United States immigration law is so flexible as to give permanent residence to those who simply wish to remain in the country without going back to their own country is not known to us, and the requirement under United States law for acquiring the status of a permanent resident was not conveyed to the Court. Thus no fact was mentioned and no information was given either by Mr. Yakimetz or by any organization concerning Mr. Yakimetz's personal status on the termination of his previous contract.

35. On the face of such information as the Court had, it looks doubtful, in spite of what Mr. Yakimetz asserted, whether any precondition of asylum had been realized in his case. Granting asylum to an individual certainly falls within the competence of the State, but was there, for instance, any reason for the United States to believe that Mr. Yakimetz should be granted asylum in view of the provision of the Universal Declaration of Human Rights reading that "Everyone has a right to seek and enjoy another country's asylum from persecution"? Aside from a long-standing debate as to whether an individual's right of asylum is an institution of international law, asylum is not, in fact, generally granted even by the most generous countries unless there is a well-

grounded fear of the applicant's being persecuted for reasons of religious or political opinion and belief, etc.

36. What may be gathered from the arguments and documents before the Court is that in January 1983 Mr. Yakimetz was told, apparently by the Soviet authorities, to take a vacation in Moscow in February to help prepare a substitute candidate for his post and his apprehension was increased that he would not be permitted to return to the United Nations to fulfil the term of his contract which was to expire in December. The possibility of persecution for reasons of political opinion or religion, etc., is quite irrelevant in that case. Whether the Soviet authorities' instructions were in conformity with Article 100 of the United Nations Charter is another problem. Yet is it conceivable that the concept of seeking "asylum" in its strict sense under international law, which is generally conditional on a genuine risk of persecution, should apply in this case? Is the United States so generous as to grant asylum, which is a highly privileged position in international law, to any person of any nationality who simply wishes to continue his work with the United Nations located on its territory and doesn't want to return to his own country? Has the United States even the right so to act under international law? In spite of the contention by Mr. Yakimetz, the present case does not relate to the issue of asylum.

37. It may be desirable that any individual in the world be free to choose any nationality and able to move freely without the barrier of national borders and obtain a job or practise his profession anywhere he wishes. It may be possible to argue that such rights of the individual should be fully protected. I am aware of the merits of these arguments but we cannot close our eyes to the realities of there being sovereign nations, and the individual in principle must have one nationality. The effects of change of nationality cannot take place simply by the wish of the individual, and the freedoms of movement and exercise of profession are thus somewhat restricted. In the light of this, Mr. Yakimetz's personal status towards the end of 1983 was extremely uncertain. This status of Mr. Yakimetz, I profess, is certainly a factor which may reasonably be taken into account in determining any personnel policy in any institution. The situation concerning Mr. Yakimetz is different from that of any person who is settled in any foreign country as a naturalized person, a permanent resident or a person to whom asylum has been granted.

38. I do not intend to imply that Mr. Yakimetz, because of his personal status, should not have been eligible for a career appointment or an extension of contract. (In other words, he might still have been permitted further employment in spite of his uncertain personal status.) Nor am I suggesting that Mr. Yakimetz should be refused employment with the United Nations for ever. However, I would suggest that, if the Secretary-General nevertheless took a negative decision, this remained within the latitude of the discretion and competence of his office with regard to the appoint-

ment of the United Nations staff as recognized in Article 101 (3) of the United Nations Charter.

39. Probably UNAT should have stated more clearly that the Secretary-General's decision not to give a career appointment to Mr. Yakimetz might well be justified in view of the discretion which he is entitled to exercise in pursuance of United Nations personnel policy. However the absence of an explicit statement does not imply that the Court should have found that UNAT erred on any point of law relating to the provisions of the United Nations Charter in so far as the Tribunal did in fact uphold the decision of the Secretary-General which can be justified in the light of the latitude given to him in this respect.

(Signed) Shigeru ODA.