DISSENTING OPINION OF JUDGE SIR ROBERT JENNINGS

I regret that I have been unable to agree with the Court on the second question put to the Court for its advisory opinion, and therefore am under some obligation to explain why I see this case differently. Before turning to the substance of the matter, however, I wish to make some observations upon the form in which questions are put to the Court, not only in the present case but also generally in this kind of review case.

THE ROLE OF THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

Not a little of the difficulty of dealing with this kind of case is that specific problems arising from the particular situation of an individual, whether he be the Applicant or not, appear before this Court in the form of questions of a general, abstracted and conceptual nature. This seems to be the consequence of the provisions of the UNAT Statute, and the Applications Committee's view of its role. Article 11 of that Statute, in the immediately relevant sections, provides as follows:

> "1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) 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.
>
> 2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1."

Thus, paragraph 1 of Article 11 of the UNAT Statute sets out four grounds of objection, each of which may justify reference to this Court:

> "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".

Article 11.1, however, is not a list of the kinds of questions that may be asked of the Court; it is a list of the grounds for a valid objection to a judgement of the Tribunal, by "a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal". In order to comprehend within a short provision all the permissible grounds for challenging a judgement, it was obviously necessary for the draftsman of the Article to express those grounds of objection in general terms (as does the comparable Statute of the ILO Administrative Tribunal). There was no other way it could have been done.

What then is the Committee's role when an objection to a judgement of the Tribunal comes before it? This is stated in paragraph 2 of the same Article, namely to "decide whether or not there is a substantial basis for the application". Presumably this means that, provided that the application raises one or more of the valid grounds of legal challenge set out in 11.1, the Committee must then decide whether the case is important enough, and sufficiently substantiated by the evidence, to justify being referred to the International Court of Justice. Such an assessment is appropriate for an essentially political body like the Committee. It is more doubtful whether it is also part of the task of the Committee to determine whether the Applicant's objection or objections to the Tribunal's Judgement properly fall within the particular categories of Article 11.1 in which he himself has expressed them. That is, ultimately at least, the task of this Court; furthermore, being an essentially juridical task and a technically difficult one at that, it would be a curious task for a committee whose procedures are neither judicial nor even quasi-judicial in character.

However that may be, the present questions seem to exhibit a tendency to assume that the questions to be put to this Court should themselves be couched in, or very nearly couched in, the language of one or more of the categories of grounds of valid objection set out in Article 11.1. The grounds of objection, expressed inevitably in the most general terms, have thus become in practice the language of permissible questions to the Court. It is rather as if, to take an analogous series of grounds of jurisdiction, an applicant to the Court's contentious jurisdiction under paragraph 2 of Article 36 of the Court's Statute were to assume that his case must not only fall within that provision, but that his submissions should

finally be reduced to the actual language of the famous list in that paragraph of Article 36.

The effect of this interpretation of Article 11 is that questions are put to this Court, not in the terms of the applicant's specific grievance, but in abstract and conceptual terms of the list of grounds of objection in Article 11.1. This manner of proceeding can easily transform a simple grievance into a jurisprudential problem of some complexity and doubt. It is instructive to read the record of the public session of the Committee in the present case, where Mr. Rosenstock of the USA (A/AC.86/XXIV/PV. 5 at p. 11) said, speaking of the first question put to the Court:

> "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."

It seems permissible to ask why it should have been thought necessary for the Committee, where the Applicant has himself pleaded *both* these grounds, to choose one and reject the other, thus pre-empting what is surely a matter more suitable for determination by this Court — and no less so if in fact they might each lead to the same conclusion. There is a further danger: that the Applicant's grievance, when thus distilled to produce the pure jurisprudential spirit of Article 11, can finally be found to have no more than a tenuous and frangible connection with the grievance the case is actually about; as will indeed be seen shortly when we look at the first question in the present case.

THE TASK OF THE COURT

In the present case the Applicant himself objected to the Tribunal's Judgement on each and all of the four grounds of objection stated in Article 11.1. The Committee, in deciding whether the Applicant's case showed a "substantial basis for the application", drafted two questions to the Court, by which in effect two of the Applicant's grounds for his application were struck out, and so two remained. There can be no doubt, however, that the Court's task, in giving an advisory opinion, is to give an answer to the two questions as they have been put to the Court by the Committee.

In order to answer the questions asked, the Court has to examine both the Judgement of the Tribunal and the pleadings before it, as well as the

arguments put directly to this Court by the Applicant and the Respondent. Indeed, its role was put in wider terms in the *Fasla* case (*I.C.J. Reports 1973*, p. 188, para. 47):

> "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."

From this passage it would seem that the decision of the Committee to select only certain of the grounds alleged by the Applicant, was indeed a work of supererogation. However that may be, it is made very clear in the immediately following passage, that:

> "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."

In order to give an advisory opinion the Court must therefore look to the juridical issues involved in the two questions upon which its advice has been requested. As the Court said in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case,

> "The Court points 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.)

What then are the legal questions really in issue in this case?

THE "LEGAL QUESTIONS REALLY IN ISSUE" IN THE PRESENT CASE

There can be little doubt what is the main legal question really in issue in the present case; it is whether the Tribunal was right or wrong in law in holding that, on the evidence before it, the Respondent had, in accordance with resolution 37/126, section IV, paragraph 5, given "every reasonable consideration" to the Applicant as a candidate for a career appointment? Indeed, the *Comments* made by the Respondent himself to the Committee on Applications (A/AC.86/R.118) said,

> "the dispute between the parties is essentially whether the Applicant

was given 'every reasonable consideration' for a career appointment pursuant to General Assembly resolution 37/126, section IV, paragraph 5".

But the procedures just examined resulted in an attempt to embody this issue in two questions formed from the wording of two of the grounds of objection taken from Article 11.1 of the Tribunal's Statute. In this way, a simple and narrow point of law is transformed into two questions at a high level of abstraction, and involving juridical concepts of no little difficulty. In this way also the Applicant's simple grievance has been transformed into questions which *per se,* and independently of the Applicant's grievance, raise matters upon which differences of opinion are not only possible but likely. The Court thus finds itself in an unenviable position. It can see the main point of the case very clearly, but is asked nevertheless to attempt to answer these different questions, which may indeed be said to arise from the Applicant's grievance, but also present quite different and more difficult problems. It is entirely possible to have a clear view on the main point of the case, yet be extremely doubtful on the answers to be given to the questions in the form in which they are put to the Court for resolution. Take, for example, the first question asked of the Court, whether the Tribunal "failed" to exercise its jurisdiction in regard to the matter of a "legal impediment". After anxious contemplation of the kaleidoscopic changes in the appearance of this teasing question, according as to whether one sees it one way or another, it becomes after a time tolerably clear that, even though the existence or not of a legal impediment is highly relevant to the second question, it is quite possible to give either a positive or alternatively a negative answer to the first question, irrespective of what is concluded to be the right answer to the second question. The first question must nevertheless be answered one way or another, and to this we may now turn.

* *

THE FIRST QUESTION ASKED OF THE COURT

"(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 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?"

One can appreciate why the first question was constructed around the matter of a legal impediment; whether there existed a legal impediment — in the sense of a legal bar — to the further employment of the Applicant in a career appointment is central to the interpretation of the Respondent's

correspondence with the Applicant in late 1983; which again is central to the answer to be given to the second question. All three members of the Tribunal were apparently in agreement that there might have been legal impediments to the further employment of the Applicant by way of extension or renewal of a fixed-term appointment. The question is, was there a legal impediment to the further employment of the Applicant by way of a new career appointment? Here opinions have been divided. Mr. Ustor went out of his way to emphasize that in his opinion there was still an impediment because the agreement of the seconding government was needed even for a career appointment. Mr. Kean was clear that there was no legal impediment. The Respondent himself, in his pleadings before this Court, is now entirely clear that there was not only no legal impediment but that he had indeed given the matter of a career appointment "every consideration".

It might be thought that the Tribunal's Judgement is less than perspicuous on this question of a legal impediment. In fact it is not easy, even after careful study of the text, to collect from it any clear, unambiguous view on the matter, even though there are several passages that touch on it. It is interesting to note, however, that the Committee on Applications, judging by its wording of the first question, was simply assuming as beyond argument that the Tribunal failed to deal with the question of a legal impediment; and moreover that the Respondent himself seemingly has no doubts about the Tribunal's failure to deal with the question of the legal impediment. In his written statement to this Court he makes it plain that in his opinion the Tribunal's Judgement did not address the question of a legal impediment to a further appointment; and he attempts to explain this omission by arguing that the matter was not an issue between the parties before the Tribunal, because the Respondent had himself conceded that there was indeed no legal impediment to a career appointment. So, in paragraph 58 he states that this question:

> "was . . . not at issue between the parties . . . because the Respondent indicated to the Tribunal that he did 'not dispute that it was within the Secretary-General's authority and discretion to re-appoint the Applicant after the expiry of his contract'. Consequently, there appears to have been no call for the Tribunal to have dealt with this question explicitly." (See also paras. 80 ff., which summarize the Respondent's conclusions on Question 1.)

It is evident, therefore, that the Respondent himself by no means agrees with the ultramontane views of Mr. Ustor on this question. Yet the Respondent's concession before the Tribunal, and before this Court, that in his view there was no legal impediment does not dispose of the point; the significant question — which we shall examine below — is whether the

Respondent's dealings with Mr. Yakimetz himself display a sufficient awareness *at that time* that there was no legal impediment to a further employment of the Applicant by way of a career appointment.

But the first question as it is put to the Court is not itself directly coupled with these questions of substance. Having been pressed into the conceptual language of Article 11.1 of the Tribunal's Statute, it emerges as an inquiry whether the Tribunal's alleged lack of a clear, explicit decision on this point, amounts to a "failure to exercise the jurisdiction vested in it". To pursue this question is to be side-tracked into a different inquiry peripheral to the central issue. The members of the Tribunal were obviously aware of the point about a legal impediment, for otherwise it is difficult to see why Mr. Ustor, though forming part of the majority, felt it necessary to make a separate declaration manifestly intended to go further than the Tribunal's Judgement on this very point. Whether the Judgement's lack of a readily identifiable and quotable pronouncement on the matter amounts to a "failure to exercise the jurisdiction vested in it", is an academic question on which opinions might differ irrespective of the view held on the main point of substance. What is clear is that there is absolutely no need to pursue this academic by-road in order to arrive at a solution of the main point of the case.

Accordingly, I have been content to agree, or at any rate not to disagree, with the Court's opinion on this question, and will pass now on to the second question.

* *

THE SECOND QUESTION ASKED OF THE COURT

> "(2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to the provisions of the Charter of the United Nations?"

The relevant provisions of the Charter are to be found in Chapter XV, and in Articles 100 and 101; but these Charter provisions lay down general principles. They are not expressed in self-executing language, but need to be implemented by the Staff Regulations and Rules, and indeed by the jurisprudence of the Administrative Tribunals acting under the terms of their statutes. Moreover it is clear from the preparatory work of the UNAT Statute that

> "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" (statement on behalf of the sponsors of the text; see A/AC.78/SR.10, p. 3, and also *I.C.J. Reports 1982,* p. 469).

There must also be included in this corpus of applicable law the General Assembly's decision in paragraph 5, section IV, of resolution 37/126, which the Respondent acknowledges to have been binding on him at the material time. The question is, therefore, whether the Tribunal in its Judgement No. 333, erred in interpreting and/or applying the relevant parts of this body of law to the facts of the present case? In so adjudging the Court is entitled to render an opinion which "is to have a conclusive effect with regard to matters in litigation in that case" before the Administrative Tribunal (*I.C.J. Reports 1973,* p. 182, para. 39).

It will be convenient first to consider two provisions of the Charter which have been prominent in the Applicant's arguments both before the Tribunal and before this Court: Article 101, paragraph 1:

> "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly",

and Article 101, paragraph 3:

> "The paramount consideration in the employment of the 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."

This paramount consideration appears again in Regulation 4.2 of Article IV of the Staff Regulations:

> "The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity for 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 correct procedures for giving effect to Staff Regulations are to be found in the Staff Rules; where relevant Staff Regulations are set out, as the governing principles, in the rubric to the relevant chapter of the Rules. Thus Regulation Article IV appears as the rubric of corresponding Chapter IV of the Rules, which is entitled "Appointment and Promotion". But Rule 104.14 *(a)* (ii) refers not only to Regulation 4.2, but also back to Article 101, paragraph 3, of the Charter itself thus demonstrating how these provisions of the Charter, the Staff Regulations and the Staff Rules, belong to each other and form a single corpus of law. This Staff

Rule 104.14 *(a)*(ii) also incorporates a related Rule, established in Regulation 4.4, and which is clearly conceived as part of the governing, "paramount" principle, according to which, where qualifications are equal, preference shall be given to staff members already in the secretariat or in other international organizations.

To these Staff Regulations and Rules must be added General Assembly resolution 37/126, section IV, paragraph 5, which is clearly made in further implementation of this same paramount principle, and binding upon the Respondent as he has readily conceded, and reads as follows:

> "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."

Having assembled the Charter provision Article 101.3 together with the Regulations, Rules, and the resolution which look to its implementation, we may now turn to the question whether the Tribunal erred on a question or questions of law relating to it.

* *

As concerns paragraph 1 of Article 101 of the Charter, it is entirely clear that it is the Secretary-General, under the appropriate regulations, to whom alone is given the competence to appoint staff. The decision in a particular case is in his discretion and subject to his judgment of the matter. Neither the Tribunal, nor this Court, may usurp that discretion. It was without doubt for the Secretary-General to decide whether to give further employment to Mr. Yakimetz or not.

Yet this discretion must be exercised within and in conformity with "regulations established by the General Assembly", and any failure to conform to the legal requirements of the exercise of the discretion is a matter which comes within the jurisdiction of the Tribunal, and where accordingly it is possible that the Tribunal in its Judgement may commit an error relating to the provisions of the Charter, which error is subject to review and reformation by this Court. Is there then, in the case of Mr. Yakimetz, evidence of any such failure to act in accordance with the corpus of Charter law and derivatory regulations adopted by the General Assembly; and if so did the Tribunal's Judgement err in not detecting such a failure? This is the question to which this Court has to address itself.

First it is necessary to dispose of the argument that the effect of paragraph 3 of Article 101 — certainly a provision of the greatest possible importance for the efficiency and integrity of the United Nations staff — has the effect that a person with reports indicating that he has displayed the highest standards of efficiency, competence and integrity, can hardly

be refused further employment. Thus the Applicant, in his letter of 13 December to the Secretary-General, avers that:

> "To deny me the right to reasonable consideration for a career appointment for any reason unrelated to merit — efficiency, competence, integrity — would, I believe, be a violation of Article 100 [? 101] of the Charter."

This is to go too far (quite apart from the interpolation of the notion of "merit", which does not appear in Article 101.3). Efficiency, competence and integrity are surely a paramount consideration but this does not mean that this is the *only* consideration permitted by the Charter; in fact the very word "paramount" implies that there are other relevant and permissible grounds. And if considerations other than efficiency, competence and integrity, may sometimes have to be taken into acount besides the paramount consideration, it must be assumed that there can be cases where considerations other than the paramount consideration may prevail.

There remains, however, the single narrow point crucial for the determination of this case; a point of mixed fact and law. Did Mr. Yakimetz's candidature for a career appointment, Mr. Yakimetz having given five years "excellent" service, receive "every reasonable consideration" as the General Assembly's decision in paragraph 5 of section IV of resolution 37/126 requires? For this purpose it is now necessary once again to look at the events against which this question must be judged.

The Background Events

The facts are stated systematically in the Court's Opinion (paras. 10 to 16), so there is no need in the present opinion to go over the same ground. But for the purposes of this opinion I shall call attention to certain facts, or alleged facts, and their inter-relation, which seem to me essential for a proper comprehension of the crucial correspondence of the latter part of 1983.

Mr. Yakimetz was at first employed by the United Nations in the language service. It appears however that during 1980 the USSR authorities recommended him for posts outside the language service. He was, *inter alia*, put forward for a post in the Programme Planning and Co-ordination Office of the Department of International Economics and Social Affairs (PPCO/DIESA), where at the time there was only one national from a Socialist country amongst over 30 professional posts. It appears (from the "Applicant's Statement of Facts and Argument" before the Administrative Tribunal, of 3 January 1984, and not demurred to by the Respondent) that PPCO was reluctant to take him on because the work required a specialized training and therefore continuity in the work was essential.

Nevertheless the Assistant Secretary-General for PPCO, Mr. Hansen (whose later letters about the Applicant were to be so important) eventually tried him out, partly with voluntary work undertaken at home or after office hours. The upshot of all this was that, as soon as a post became vacant, in September 1981, Mr. Hansen formally requested Mr. Yakimetz's transfer; at a time when he had little more than a year to go of his existing fixed-term contract. Mr. Hansen, finding Mr. Yakimetz's work excellent, and therefore desirous of keeping him on, in September and October of 1982 discussed with the chief of Personnel Services of the USSR Mission the possibility of a two-year extension of the Applicant's fixed-term contract; but was advised that "for technical reasons" it was easier to propose extensions of one year at a time. So, the Department requested a year's extension — to 26 December 1983 — and this was in the event to prove Mr. Yakimetz's last appointment at the United Nations. According to the Applicant's statement before the Tribunal:

> "While the new contract was being prepared, and the old contract was still in force, the Applicant was told by his Mission that although they had agreed to an extension, he must understand it was only so that the post would be held for a Russian, and he would actually stay only until the middle of the year."

In January 1983, Mr. Yakimetz was, again according to his own statement to the Tribunal, told to take a vacation in Moscow in February in order to help prepare a substitute candidate — who had already been selected — for his United Nations post. It is a fact that the Applicant did request leave, but was refused by Mr. Hansen because of pressure of work.

It was on 8 February that Mr. Hansen (see Court's Opinion, para. 11) wrote to the Applicant indicating his intention of seeking an extension of his contract (i.e., his existing fixed-term contract), and asking whether he would be in a position to accept it. It was on 9 February, the day following the date of this letter, that Mr. Yakimetz applied for asylum in the United States. Then there is a short interval until 28 February when the Applicant was notified by Mr. Sadry that the Secretary-General had decided to place him "on special leave with full pay, effective 1 March 1983 and until further notice". On 11 March, Mr. Sadry further conveyed to Mr. Yakimetz the Secretary-General's decision "in the best interest of the Organization", that "you do not enter the premises of the United Nations".

There must be some explanation for these stormy developments in respect of an officer the reports on whose work continued to be glowing,

and who enjoyed throughout the backing of his head of department, and who indeed was promoted to P-5 during his banning from the United Nations premises. No explanation appears in the documents or has been vouchsafed to the Court or indeed to the Tribunal. But there are here no doubt matters which the Respondent might have needed to be able to take into account, one way or the other, in later decisions about the further employment of the Applicant. All the Court can do is to note that, behind these dramatic events of February and March 1983, there must be other considerations of which the Court cannot have any knowledge.

Against this background we may now turn to the exchanges concerning the possible further appointment of Mr. Yakimetz.

THE OFFICIAL CORRESPONDENCE OVER MR. YAKIMETZ

It is a curiosity of this case that although the Respondent, in his pleadings before the Tribunal and before this Court, avers that he did give every consideration to Mr. Yakimetz for a career appointment, in contradistinction to the wholly different matter of a possible extension of his fixed-term appointment, he is apparently unable or unwilling to provide any evidence of when this was done, or of the reasons for his decision resulting from this consideration. The only indications of what transpired are in the various letters to or from the Applicant, or between officials about him. Accordingly, it is essential to an understanding of this case, to have an appreciation of the content of these letters; and of how they relate to each other, because, for example, Mr. Nègre's crucial letter of 21 December 1983 to Mr. Yakimetz, cannot be properly understood unless it is appreciated that it is not only a reply to Mr. Yakimetz's letter of 13 December to the Secretary-General, but that part of Mr. Nègre's actual phraseology is taken from Mr. Yakimetz's letter. So it will be convenient at this point to set out, in their chronological order, the important passages. The aim of the present analysis, therefore, is to bring together those letters which are directly concerned with the question of any further appointment of the Applicant, so that their relationship to each other can be appreciated.

The first of these letters was a letter of 8 February 1983 from Mr. Hansen, Mr. Yakimetz's head of department, informing Mr. Yakimetz that Mr. Hansen was minded to request an extension of Mr. Yakimetz's contract, "after your current contract expires on 26 December 1983"; and asking whether Mr. Yakimetz would be in a position to accept an extension of his contract.

The next is dated 29 October 1983, and is from Mr. Yakimetz to Mr. Hansen, "through" Mr. Curzon, Chief of the Programme Planning Section. The subject of the letter is "Extension of contract", and in it the

Applicant expresses the hope that he may be recommended for "a further extension of my contract with the United Nations, or even better a career appointment". Thus the Applicant at a relatively early moment raised the alternative of a career appointment and expressed a clear preference for it. This letter led to a reply from Mr. Hansen of 8 November, saying that "from my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time". He did not refer to the suggestion of a career appointment.

The Applicant must have been surprised therefore to receive the next letter in the series: one of 23 November, from Mrs. Tsubota-Gruson, Deputy Chief, Staff Service, which may be cited in full:

> "Upon instruction by the Office of the Secretary-General, I wish to inform you that it is not the intention of the Organization to extend your fixed-term appointment beyond its expiration date, i.e., 26 December 1983."

The wording of this letter is important because it is referred to in later letters from the Secretariat. It will be noted that it makes no reference whatsoever to any consideration of, or decision about, a career appointment for Mr. Yakimetz.

This provoked Mr. Yakimetz to write on 29 November to Mr. Nègre, Assistant Secretary-General, Personnel Services; and this bringing of Mr. Nègre onto the stage is important because it is Mr. Nègre's eventual reply that is the key to the proper understanding of the case. In this letter, Mr. Yakimetz refers to his having been informed by his head of department that he intended to recommend him for an extension, asks to be told the reasons for the decision not to grant an extension, and complains that the procedure followed had been in any case "irregular and arbitrary and contravenes the legal expectancy of renewal which I have as well as my acquired rights under the General Assembly resolution 37/126, IV, paragraph 5"; and he then quotes paragraph 5 of section IV of that resolution.

As to the "procedure" followed, the next letter on the file is from Mr. Hansen to Mr. Nègre, on 2 December, in which he says he has just become aware of Mrs. Tsubota-Gruson's letter of 23 November, and goes on to add:

> "I find it extraordinary that such a decision should be taken without consulting the head of the Office concerned, especially in the case of an officer with eleven years of excellent service to the Organization, who has received a personal evaluation report with the highest rating only four weeks ago, was promoted to the P-5 level and was elected Vice-Chairman of the Appointment and Promotion Committee earlier this year and is currently in the midst of important assign-

ments for one of which he is in some ways uniquely well qualified and which are regarded as of considerable importance by Member States. Bearing all these factors in mind I had assured Mr. Yakimetz, shortly after signing his latest performance evaluation report, that I intended to recommend a further extension of his contract."

Next, on 13 December 1983, Mr. Yakimetz wrote (the letter is signed by his counsel but speaks in the person of the Applicant) to the Secretary-General himself asking for a review of the administrative decision conveyed to him in Mrs. Tsubota-Gruson's letter of 23 November. He refers to several staff rules and regulations, and cites General Assembly resolution 37/126, IV, paragraph 5, as well as his excellent performance report. Several paragraphs of this letter are so important that they should be cited *verbatim* as it appears in the documents submitted to the Court:

"General Assembly resolution 37/126, IV, paragraph 5, states 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'. Staff regulation 4.4 requires that . . . 'the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations'. Staff Rule 104.14 *(a)* (ii) says that 'subject to the criteria of Article 101, para. 3, of the Charter, and to the provisions of staff regulations 4.2 and 4.4, the Appointment and Promotion Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat . . .' Article 101 (3) of the Charter and staff regulation 4.2 give as the 'Paramount consideration' . . . 'the necessity for securing the highest standards of efficiency, competence and integrity'.

My Department has made it clear to me that in their view I have met those standards. My performance was rated 'excellent' in my most recent Performance Evaluation Report. I was recently promoted to P-5. I was given to understand on many occasions, both verbally and in writing, that my Department intended to recommend a further extension of my appointment or conversion to a career position. The most recent assurance was a memorandum to me dated 8 November 1983 from the Assistant Secretary-General for Programme Planning and Co-ordination, who wrote:

'From my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time.'

I understand that such a recommendation has been made. I have at all times tried to govern my conduct in accordance with the letter and the spirit of the Staff Rules and the terms and conditions of my contract with the United Nations. My Performance Evaluation Report indicates that I enjoy harmonious relationships with my colleagues. I was elected Vice-Chairman of the Appointment and Promotion Committee earlier this year, a Chairman of the Appointment and Promotion Committee earlier this year, a position of some trust.

Given this service record and these assurances, and after six years of continuous service, most staff members would have an expectancy that their candidacy for a career appointment would be 'given every reasonable consideration', as General Assembly resolution 37/126 IV requires. The contested administrative decision appears to preclude such reasonable consideration. The interests of good administration cannot be served by the interruption of the work with which I have been entrusted by my Department. I can think of no impediment to the forwarding of my name to the Appointment and Promotion Board except factors extraneous to my performance. The quoted General Assembly resolution places no restrictions as to eligibility, nor do staff regulations 4.2 and 4.4 nor staff rule 104.14 *(a)* (ii). Extraneous factors may not be used as a consideration in promotion, extension, transfer or in any of the areas where the paramount consideration must be the necessity of securing the highest standards of efficiency, competence or integrity. Extraneous factors may not be used to deny a candidate for a post fair and reasonable consideration, a position upheld in Tribunal Judgement No. 310 *(Estabial).*

To deny me the right to reasonable consideration for a career appointment for any reason unrelated to merit — efficiency, competence, integrity — would, I believe, be a violation of Article 100 [? 101] of the Charter.

Therefore, I respectfully request that the Administrative decision be withdrawn and my name forwarded to the appropriate Appointment and Promotion body for reasonable consideration."

It will be noted that the Applicant in this letter, whilst protesting about and asking for a review of the decision conveyed to him in Mrs. Tsubota-Gruson's letter of 23 November, is expressly asking to be "given every reasonable consideration" for a *career* appointment, as resolution 37/126 "requires"; and he refers twice to that resolution, and also to Article 100 [? 101] of the Charter, though he leaves the reason for this latter reference to be inferred.

Finally comes the most important letter of all, Mr. Nègre's of 21 December 1983, to Mr. Yakimetz, which letter is the official answer to Mr. Yakimetz's letter of 13 December to the Secretary-General. Let us recall that in that letter Mr. Yakimetz had asked for a review of the decision conveyed on 23 November not to renew his fixed-term appointment; but had principally asked for every consideration for a career appointment, twice quoting the terms of resolution 37/126, IV, paragraph 5. Again the more pertinent of the paragraphs of Mr. Nègre's 21 December letter need to be cited *verbatim*:

> "The Secretary-General has given careful consideration to the issues raised in your request for administrative review dated 13 December 1983 (signed by Ms. Diana Boernstein as your counsel), as well as in your earlier letter dated 29 November 1983, in connection with the communication, dated 23 November 1983, that 'it is not the intention of the Organization to extend your fixed-term appointment beyond its expiration date, i.e., 26 December 1983'."
>
> In your letters, after referring to your service record and the evaluations of your supervisors, you state that under such conditions 'most staff members would have an expectancy that their candidacy for a career appointment would be "given every reasonable consideration", as General Assembly resolution 37/126 IV requires'.
>
> Your situation, however, is not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.
>
> Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in staff rule 104.12 *(b)* and reiterated

in your letter of appointment, 'does not carry any expectancy of renewal or of conversion to any other type of appointment'.

In view of the foregoing, the reasons advanced by you in your memorandum of 13 December do not require the Secretary-General to alter the decision communicated to you by letter of 23 November 1983. That decision is maintained and, therefore, the Secretary-General is not in a position to agree to your request 'that the Administrative decision be withdrawn and [your] name forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for career appointment."

In construing these words, Mr. Nègre's lumping together of the question of a legal expectancy of an actual appointment — and all members of the Tribunal and of this Court agree there was none — and the expectancy of "every consideration" under resolution 37/126, which Mr. Yakimetz was saying he was entitled to, need not detain us, though it should be noted and is not without significance (and is important in Vice-President Kean's dissent). The crucial point is that, in reply to Mr. Yakimetz's request for "every consideration" for a career appointment, Mr. Nègre, speaking for the Respondent, did *not* say, as the Respondent does now, that "every consideration" *had* been given before coming to a comprehensive negative decision. On the contrary, he seems clearly to be saying that because Mr. Yakimetz was on secondment, it followed, "as you yourself were aware", that he could not be considered *for a career* appointment "without the involvement of all the parties originally concerned". I fail to see how this passage in Mr. Nègre's letter can be construed in any other way. He is, after all, picking up Mr. Yakimetz's own phrase, about the position of "most staff members". Let us recall that, in Mr. Yakimetz's letter the phrase is, "most staff members would have an expectancy that their candidacy *for a career appointment* would be given 'every reasonable consideration', as General Assembly resolution 37/126 IV requires" (emphasis added). Thus Mr. Nègre is, in the passage about secondment difficulties and the organization's agreement to limit the duration of Mr. Yakimetz's United Nations service, replying specifically to Mr. Yakimetz's particular plea for "every consideration" for a career appointment; and Mr. Nègre is saying that, unlike most staff members, he enjoys no expectancy of such consideration.

If there were any lingering doubt about this being what Mr. Nègre was saying, he puts the matter beyond doubt in his paragraph to the effect that

the reasons advanced by Mr. Yakimetz do not require any alteration of the decision "communicated to you by letter of 23 November 1983". There is, therefore, clearly stated to have been no further or other decision, after that of 23 November concerning the fixed-term appointment; apparently because of a belief that no further decision was possible, since Mr. Yakimetz *could* not be considered for a career appointment. There is, therefore, no suggestion that *any* consideration had been given to a career appointment. On the contrary, the clear suggestion is that there could not be; see also Mr. Nègre's concluding statement that the Secretary-General "is not in a position to agree to" Mr. Yakimetz's request to forward his name "to the appropriate Appointment and Promotion body for reasonable consideration for career appointment". If there had in fact been any "reasonable consideration" of a career appointment as such, Mr. Nègre would surely have both said so, and also conveyed the decision, whatever it might have been, resulting from it. The reason he did not is inescapable: no consideration was given because it was believed in the administration, at that time, that a career appointment could not legally be made without the agreement of the USSR. In fact, at that time, the view of the Secretariat appears to have coincided with the view later expressed by Mr. Ustor in his separate declaration appended to the Tribunal's Judgement.

Mr. Yakimetz did, even after the commencement of the submission process, apply once more for consideration for a career appointment, on 9 January 1984, having been encouraged to do so by the Respondent's spokesman, at his press conference (see paras. 15 and 16 of the Court's Opinion). No acknowledgement was ever made of this further application. The first time the Secretary-General specifically mentions consideration of a career appointment in the light of the General Assembly resolution, as an issue separate from an extension of the fixed-term appointment and governed by different factors, was in the presentation of his case first to the Tribunal and then to this Court. It is then, under pressure of preparing a case for adversarial presentation, that the Respondent displays consciousness that a career grade appointment was legally possible without the co-operation of the formerly seconding Government; and that, accordingly, there was a legal necessity to have given every consideration to the possibility of such a career appointment separately from consideration of an extension of the fixed-term contract.

No wonder that the Tribunal in its Judgement wished that the Respondent had, in his dealings with Mr. Yakimetz, declared plainly to him that the Respondent had indeed given "reasonable consideration" to a career appointment. The rebuke, however, implies the assumption that the

Respondent had indeed, as the Tribunal found, already given every reasonable consideration to a career appointment, and had come to a negative conclusion nevertheless on this question as well as on that of an extension of the fixed-term appointment; and had merely omitted to mention this second and separate point to the Applicant. But, as shown above, the letter of 21 December from Mr. Nègre, far from justifying such a comfortable assumption, indicates unambiguously that the Respondent had *not* done so because he believed he was not in a position to do so.

* *

THE TRIBUNAL'S DECISION

One can readily agree with the Court's Opinion that the Tribunal saw the problem, and in a way dealt with it; though it is not at first reading of the Judgement easy to disentangle the *ratio decidendi* from many different ideas that are lightly adumbrated but not pursued. The reason that seems to emerge as the *ratio decidendi* of the Tribunal's decision on the key question whether the Respondent had complied with paragraph 5 of section IV resolution 37/126, is a very simple one, and the paragraph of the Judgement where this argument is reached is worth setting out in full:

> "XVI. However, even if the Applicant did not draw sufficiently early the Respondent's attention to the resolution under discussion, the Respondent was bound nonetheless by its terms and the Tribunal has to decide how and to what extent he carried out his obligations under it.
>
> The Respondent's letter dated 21 December 1983, addressed to the Applicant in reply to his counsel's letter of 13 December 1983, states that he has 'given careful consideration to the issues raised in your request for administrative review', and since these issues are particularly related to the provision of the General Assembly resolution in question, the plain and simple inference is that the Respondent had given the required (i.e., 'every reasonable') consideration for a career appointment for the Applicant. This is further elaborated in the Respondent's answer to the application when he states:
>
> 'Respondent notes that the General Assembly only stated a desideratum, namely, that fixed-term appointees be given reasonable 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, remain applicable.'"

This determinative paragraph of the Judgement must now be considered.

It is difficult to understand the Respondent's purpose in his suggestion, which the Tribunal here seems to be accepting, that the General Assembly's resolution "only stated a desideratum, namely, that fixed-term appointees be given reasonable consideration". The resolution did not in fact require "reasonable consideration" but "every reasonable consideration"; and it was clearly not a *desideratum* but a decision. The resolution's many paragraphs are variously introduced: *Requests, Welcomes, Approves, Calls Attention, Notes, Considers,* etc. — only three paragraphs, namely 3 and 4 of section III (to do with childrens' allowances and education allowances), and paragraph 5 of section IV, are introduced by the word *"Decides"*. In any event the Respondent has pleaded both that he was bound by the decision and has complied with it, and the Tribunal has so held. So this suggestion of a *desideratum* seems in any event to be without point.

Turning now to what seems to be the actual *ratio decidendi* of the Tribunal's Judgement, what it amounts to is simply this: the Respondent has stated to the Tribunal that he gave every reasonable consideration, in accordance with the resolution, to the possibility of a career grade appointment of the Applicant, and if the Respondent says he has done so, his assertion must be accepted to be true, at least in the absence of proof to the contrary. To this way of deciding the matter there are two objections: the first is one of juridical principle; and the second is that the Respondent's assertion is irreconcilable with the documents presented to the Tribunal.

The objection of juridical principle may be very shortly stated. The UNAT Statute — itself an enactment of the General Assembly in pursuance of the relevant provisions of the Charter — establishes a system of judicial control of administrative discretions of the sort familiar in administrative law generally. The essence of such a system is that the judicial tribunal's task is to ensure that administrative decisions are made within the applicable legal framework. Thus, in the present case, whilst it is no part of the Tribunal's functions to usurp the discretion which the Respondent alone can exercise, it is for the Tribunal to ensure that, in

making his decision, the Respondent did comply with the law; which everybody agrees included the resolution 37/126, IV, paragraph 5.

Such a system of judicial control of administrative discretion is subverted if the Tribunal simply accepts the assertion of the administrator, after the event, that his decision was made in accordance with the legal requirements. There is no purpose in having an administrative tribunal at all if it accepts as sufficient the administrator's assurances, made not even to the objecting applicant at the material time, but subsequently, and to the Tribunal; and, moreover, in the absence of evidence at the material time that the law was indeed complied with, and in the absence of reasons for the decision. This situation is incompatible with a system of judicial control of administrative discretion.

For the Respondent it has been pleaded that the resolution 37/126, IV, 5, provided no set procedure for carrying it into effect; did not require that fixed-term appointments be deemed to have been probationary appointments thus ensuring that the Appointment and Promotion Board should be brought into the matter; and that the resolution generally left the procedures of implementation to the discretion of the Respondent. All this is true. One can imagine a number of questions about the implementation of the resolution which could only be solved by leaving the Respondent to decide what to do. But leaving the decisions about the procedure or procedures to be followed in the discretion of the Respondent, even perhaps to the extent of allowing different procedures to be used in different cases, cannot mean that a mere assertion, made to the Tribunal but not to the Applicant, that a decision was made after proper consideration, will suffice. Some procedure or other must be seen to have been followed. The absence of any particular required procedure should indeed make it easier for the Respondent to be able to tell the Applicant when and how a decision, after consideration, has been made. That no particular procedure is required cannot mean that the process can be purely subjective and notional.

* *

Here, however, — and quite apart of the question of juridical principle — we come to the further difficulty, or rather, as it seems to me, the impossibility, of reconciling the Respondent's present assertion that every consideration of a career appointment had been given, with what was said to the Applicant in the administration's letters to him. To some extent this difficulty has already been indicated above in the analysis of the exchanges of late 1983 concerning the Applicant's, up till then, twice repeated express application for a career appointment (the third applica-

tion was the one on 9 January 1984). Concerning the crucial letter of 21 December from Mr. Nègre, it is really not possible to construe that letter as saying anything other than that even a career appointment would require the consent of the USSR Government, and since this is not forthcoming no such appointment could be considered at all. In short, the plain documentary evidence is that no consideration was given to the Applicant for a career appointment because such an appointment was not thought legally possible.

Now, it may well be that, had the seeming misapprehension of the legal position not been present, and had every consideration been given to the Applicant's career appointment as an issue separate from that of an extension of his fixed-term contract and strictly in accord with the resolution, the Respondent's decision would still have been not to offer Mr. Yakimetz a career appointment. What the Tribunal and this Court have to be concerned with, however, is not whether the Respondent's decision was the right one, but whether the manner of its making was in accordance with the requirements of the law. In so far as it objectively has the appearance of having been made under a legal misapprehension, the decision must be invalid, whether or not the same decision might have been made if the law *had* been complied with. The argument is not that Mr. Yakimetz should have been granted a career appointment; it is to say that the Tribunal was wrong in holding that the question had been given every consideration as required by the General Assembly's resolution, when there was no evidence at the material time that this was the position, and there was compelling evidence that at the material time this was not the position.

The plain meaning of Mr. Nègre's letter of 21 December 1983 to the Applicant would in itself be sufficient in my view to dispose of this case. But there is, oddly enough, corroboration of this conclusion to be found in the Tribunal's Judgement itself, in the Tribunal's curious reproof of the Respondent in the following terms (see para. XVIII of the Judgement):

> "He [the Respondent] thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 [i.e., the date of the termination of the Applicant's fixed-term appointment] that he had given 'every reasonable consideration' to the Applicant's career appointment."

This passage clearly shows that the Tribunal itself was uneasy about Mr. Nègre's letter of 21 December 1983 not so much, it seems, for what it said as for what it did not say; and an applicant ought not to have to take his case to the Tribunal in order to find out what the respondent had decided. The unspoken assumption of this passage of the Judgement

appears to be that, although the letter of 21 December did not state *explicitly* that the Respondent had given "every reasonable consideration" to the Applicant's career appointment, such a message must have been somewhere implicit in the letter. Indeed, the Judgement purports to find no difficulty over such a "plain and simple inference" (para. XVI). But it must be said again, even at the risk of labouring the point, that Mr. Nègre's letter simply leaves no room for any such inference, for the reason that it deals with the question in explicit terms, to the effect that, because of the secondment, the Secretary-General was not in a position to consider a career appointment.

Now, then, we see the full significance of the terms of the Tribunal's reproof. The Tribunal itself knew full well that there *ought* to have been, before 26 December, an explicit statement that a career appointment had been considered. It was troubled because it could find no such "explicit" statement in the letter of 21 December. So it fell back on an assertion that it must have been possible to infer it. Unfortunately, the terms of the letter do not admit of any such inference, because the career question *is* dealt with in explicit, but legally mistaken, terms.

* *

If further collaboration of this conclusion were needed, it is now found in the Legal Counsel's letter of 22 April 1987, replying to questions put by the Court (see the Court's Opinion, para. 3). The first question asked, "what has so far been the practice with regard to the implementation within the Secretariat of the United Nations of paragraph 5 of Section IV of resolution 37/126 adopted by the General Assembly on 17 December 1982?" The answer shows that, even though the decision of the General Assembly has not yet been "transformed into a formal procedure for inclusion in the Staff Rules", there has in practice been a recognized procedure for its implementation, including examination of cases "on their own merits" by the Office of Human Resources Management. The answer continues:

> "If the examination by OHRM leads to a negative result, the case is not referred to the appointment and promotion body. However, even in such situations, the matter may be considered by the Secretary-General himself. This happens rarely, but occurred in the case of Mr. Yakimetz: see paragraph 28 of the written statement submitted on behalf of the Secretary-General."

There is no evidence that Mr. Yakimetz's case was ever before the OHRM; but let us look at paragraph 28 of the Secretary-General's statement to which we are referred. This paragraph is a short, but accurate,

summary of the effect of the Assistant Secretary-General's letter of 21 December 1983 to Mr. Yakimetz, and it may be quoted in full:

> "the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General had given careful consideration to his request of 13 December 1983, distinguished his situation from that of 'most staff members' with comparable service records in connection with his claim to an expectancy, cited Staff Rule 104.12 *(b)* and the terms of his appointment, maintained the position stated on 23 November 1983, declined to forward his case to the Appointment and Promotion Board and agreed to the direct submission of any appeal to the United Nations Administrative Tribunal (the Administrative Tribunal)".

To understand this summary it is necessary to consult the preceding paragraph 27 of the Secretary-General's Statement which summarizes Mr. Yakimetz's letter of 13 December 1983, to which the Assistant Secretary-General's letter was a reply. Again, it had better be cited in full:

> "On 13 December 1983 the Applicant's United Nations counsel, chosen by him from the panel of counsel comprised of United Nations staff members, wrote to the Secretary-General citing paragraph 5 of Section IV of General Assembly resolution 37/126, Staff Regulations 4.2 and 4.4, Staff Rule 104.14 *(a)* (ii) and Article 101, paragraph 3, of the Charter, recalled his service record and the evaluations of his supervisors, claimed an expectancy that he would be given every reasonable consideration for a career appointment, postulated a violation of Article 100 of the Charter and finally requested that his name be forwarded to the appropriate Appointment and Promotion body for reasonable consideration."

One thing stands out from the careful and accurate summaries in those two paragraphs of the two most important letters. Mr. Yakimetz had asked, precisely in the terms of the resolution, that, like "most staff members" (perhaps in not saying "all staff members" he was being overcautious as Legal Counsel's statement shows) in his position, he should be given "every reasonable consideration for a career appointment". In the Respondent's answer, Mr. Yakimetz's case is distinguished from that of "most staff members", by referring solely to the terms of his fixed-term appointment, and the manifest impossibility of renewing that without the assent of the seconding government; and it refers to Staff Rule 104.12 *(b)*

(which provides that "The fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment") and so distorts Mr. Yakimetz's letter by treating it as if the expectancy he had expressed was not an expectancy of every reasonable consideration for a career appointment, but an expectancy of appointment.

The question this Court has to ask is not whether the Respondent should or should not have granted the Applicant a career appointment — that is for the Secretary-General to decide in his discretion and in accordance with the provisions of the Charter and regulations enacted by the General Assembly in pursuance of those provisions. The question is whether the Respondent gave the Applicant every reasonable consideration for an appointment. The only evidence before the Court consists of the Respondent's own written words, and they all — not only the letters exchanged with Mr. Yakimetz, but the Respondent's own summary statement of their effect — say that he did not, because he believed that a career appointment was not legally possible.

* *

For all these reasons I have had to conclude that the Court's answer to the second question ought to have been "yes", because the Tribunal's Judgement did err on questions relating to the Charter of the United Nations, in finding that the Respondent had given every reasonable consideration to a career appointment for the Applicant as required by resolution 37/126, IV, paragraph 5.

(Signed) Robert Y. JENNINGS.