DISSENTING OPINION OF JUDGE EVENSEN

1. In its request of 28 August 1984 the Committee on Applications for Review requested an advisory opinion of the Court on two questions relating to Judgement No. 333 of the United Nations Administrative Tribunal, namely:

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

Article 11, paragraph 1, of the Statute of the Administrative Tribunal provides for the following four grounds of objection, which may justify a request for an advisory opinion of the Court:

(a) the Tribunal has exceeded its jurisdiction or competence;
(b) the Tribunal has failed to exercise jurisdiction vested in it;
(c) the Tribunal has erred on a question of law relating to the provisions of the United Nations Charter;
(d) the Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice.

The application for an advisory opinion was filed within the time-limits provided for in Article 11, paragraphs 1 and 2, of the Statute of the United Nations Administrative Tribunal and in Article II of the Rules of Procedure for the Committee on Applications (doc. A/AC.86/2/Rev.3 of 25 March 1983). No substantial procedural objections exist as to the Court's competence to comply with the request for an advisory opinion. The Court has decided to do so in accordance with Article 96 of the United Nations Charter.

QUESTION 1

2. The first issue addressed to the Court, whether the Administrative Tribunal has failed "to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to further employment in the United Nations", seems to contain abstractions which may becloud

the real issue. It seems to emphasize procedural issues rather than the substantive issues involved. In a procedural sense, the Tribunal may be said to have exercised its jurisdiction. The case was pleaded before the Tribunal and the Tribunal in its Judgement dealt with a host of issues and arguments. One may agree or disagree with the Judgement on the merits. But the test as to whether there has been a failure to exercise jurisdiction "must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based and drew its conclusions therefrom . . ." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973*, p. 193, para. 56).

The answer to the issue of whether the Tribunal failed to exercise its jurisdiction in cases of this nature is in whether or not the Tribunal conscientiously and judiciously evaluated the elements of fact and law in such a manner as to use the powers and discretion vested in it as a court of law to reach a decision, both in regard to the relevant facts and the law.

In the *Fasla* Advisory Opinion of 12 July 1973 the Court held to this effect as follows:

> "this ground of challenge covers situations where the Tribunal has *either consciously or inadvertently omitted to exercise jurisdictional powers vested in it* and relevant for its decision of the case or of a particular material issue in the case" (*I.C.J. Reports 1973*, p. 189, para. 51, emphasis added).

And the Court explains this principle in some detail as follows:

> "Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, *the Court must have regard to the substance of the matter* and not merely to the form." (*Ibid.*, pp. 189-190, para. 51, emphasis added.)

This Advisory Opinion also emphasizes that the Court must:

> "appreciate in each instance, in the light of all pertinent elements, whether the Tribunal did or did not in fact exercise with respect to the case *the powers vested in it and relevant to its decision*" (*ibid.*, p. 190, para. 51, emphasis added).

The guidelines appended to this Advisory Opinion in the declaration formulated by Judges Foster and Nagendra Singh are also relevant in the present instance. It states:

> "In such cases it would be essential to consider whether in coming to its conclusion the Tribunal has remained within the margin of reasonable appreciation or what may be called a normal reasonable exercise of discretion in the evaluation of the facts and issues . . ." (*Ibid.*, p. 218.)

Consequently, the relevant question to be decided in this case is not

whether the United Nations Administrative Tribunal failed to exercise its jurisdiction; it obviously exercised its jurisdiction. The pertinent question is rather that raised in question 2, namely whether in exercising its jurisdiction, the Tribunal erred on questions of law relating to the provisions of the United Nations Charter.

I therefore agree with the findings of the Court on question 1, that the United Nations Administrative Tribunal did not 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.

QUESTION 2

3. The second question addressed to the Court is whether the Administrative Tribunal in its Judgement No. 333 erred "on questions of law relating to provisions of the Charter of the United Nations". On this issue, I feel constrained to present a dissenting opinion because I do not share the views expressed by the majority of the Court.

4. The main provisions of the United Nations Charter relevant to the present case are found in Chapter XV of the Charter dealing with the Secretariat; and especially in Articles 100 and 101.

Article 100 provides:

> "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

Article 101 provides in paragraphs 1 and 3:

> "1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
>
> 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."

In these Articles the Charter lays down general principles. These have been implemented by the Staff Regulations and Staff Rules, as provided

for in Article 101, paragraph 1, of the Charter, and also by the jurisprudence of the Administrative Tribunal. The formulations contained in Section IV, paragraph 5, of General Assembly resolution 37/126, which the Respondent acknowledges to be binding on him, also belong to this corpus of law.

Therefore, the question is whether the Tribunal, in its Judgement No. 333, erred in interpreting and applying the relevant parts of this body of law to the facts of the present opinion.

5. The above principles of the Charter have been reiterated and elaborated in Article IV of the Staff Regulations. Thus, Article IV contains in Regulation 4.4 provisions which seem especially relevant for the present case. It provides:

> "Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, *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.*" (Emphasis added.)

Similar provisions are found in the Staff Rules, which contain detailed rules as to the procedures to be followed in implementing the above-mentioned provisions of the United Nations Charter and of the Staff Regulations. Rule 104.14 of these Staff Rules provides, *inter alia,* in subparagraph *(a)* (i): "An Appointment and Promotion Board shall be established by the Secretary-General to give advice on the appointment, promotion and review of staff . . ." And according to sub-paragraph *(a)* (ii), this Appointment and Promotion Board shall "in filling vacancies, *normally give preference, where qualifications are equal, to staff members already in the Secretariat* . . ." (emphasis added.)

6. To the provisions of the Charter and the Staff Regulations and Rules must be added General Assembly resolution 37/126, section IV, paragraph 5, which entails a further implementation of the aforementioned principle. This paragraph of the resolution 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."

7. It is an established fact that Mr. Yakimetz had the unqualified recommendations of his superior. His qualifications were rated excellent and the need for his continued services and extensive experience as a United Nations employee was likewise expressed and is part of the records of this case. Thus, in regard to Mr. Yakimetz's Performance Evaluation Report of 3 November 1983, the Assistant Secretary-General stated in his letter of 8 November 1983 (doc. AT/DEC/333, pp. 5-6) in no uncertain terms that:

> "I have recently signed your performance report which shows that the excellent work you performed during the first year with the Office ... has been continued to the full satisfaction of your ... supervisors. I am glad to note that you have fully met our expectation of continued professionalism, dedication to your task and hard work, which was the basis for your promotion. *I consider you a staff member whose contribution ... meets the high demands of competence and commitment* which are to be expected from a United Nations official ... I find no difficulty in recommending a further extension of your contract ...:" (Emphasis added.)

In his letter of 29 October 1983, Mr. Yakimetz applied for "a further extension of my contract" of employment or "even better a career appointment". In reply to his letter, Mr. Yakimetz received on 23 November 1983 the following, rather peculiar, answer:

> "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." (Ann. 36 to Applicant's Statement of Facts and Argument.)

The letter seems extraordinary for several reasons. In form, its *brevity* is excessive. Here, it should be borne in mind that Mr. Yakimetz had served with distinction as a staff member of the United Nations for several years, first in the period 1969-1977 as a Reviser and then for a five-year term from December 1977 to December 1982, extended with one year to 26 December 1983, as a Reviser and subsequently as a Programme Officer in the Department of International Economic and Social Affairs.

In substance the letter offers no reasons for the refusal to consider an extension of Mr. Yakimetz's employment contract. There were no indications in the letter that his request for a career appointment had been referred to the Appointment and Promotion Board established by the Secretary-General "to give advice on the appointment, promotion and review of staff in the General Service and Professional categories . . ." (Staff Rule 104.14 *(a)* (i)). Indeed it was not even acknowledged that his request for a career appointment had been registered, let alone been dealt with. No reference was made as to whether the governing provision of section IV, paragraph 5, of the General Assembly resolution 37/126 had been complied with. Furthermore, no indications were given that due consideration had been given to Staff Rule 104.14 *(a)* (ii), and to Article IV, Regulation 4.4, of the Staff Regulations, which reads:

> "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".

In response to the refusal by the Secretariat to extend Mr. Yakimetz's contract, Mr. Yakimetz's superior, the Assistant Secretary-General for Programme Planning and Co-ordination, expressed his views in a letter, dated 2 December 1983, addressed to the Assistant Secretary-General for Personnel Services (doc. AT/DEC/333, p. 7):

> "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 assignments for one of which he is in some ways uniquely well qualified . . ." (Emphasis added.)

8. Of course, the decision of the Secretary-General to prolong or not to prolong a contract for service in the United Nations Secretariat, or to give a staff member a career appointment, is a discretionary decision. But as stated by the Administrative Tribunal of the International Labour Organisation in the *Rosescu* case (Judgment No. 431, p. 7, para. 5):

> "Although a decision on the extension of an appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. The Tribunal will set it aside if it is *tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly* mistaken conclusions from the facts." (Emphasis added.)

With regard to the need to consult the national government concerned where a renewal of a government official's appointment is contemplated, the Administrative Tribunal made the following observation in the *Rosescu* case (*ibid.*, p. 7, para. 6):

> "if such a government official's appointment is to be extended, *it is reasonable* that the organisation should again consult the member States, which may have good reason to re-employ him. *This does not mean that a director-general must bow unquestioningly to the wishes of the government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forego taking a decision in the organisation's interests for the sole purpose of satisfying a member State.* The organisation has an interest in being on good terms with all member States, *but that is no valid ground for a*

> *director-general to fall in with* the wishes of every one of them." (Emphasis added.)

9. I shall now revert to the central question whether the Applicant was given "every reasonable consideration for a career appointment" as provided for in General Assembly resolution 37/126, section IV, paragraph 5. An additional question is: how shall the Secretary-General properly exercise his discretionary powers in this respect and what specific procedures recommend themselves in this regard?

As observed above, the Secretary-General of the United Nations exercises and must necessarily exercise a discretionary power in recruiting and retaining staff members. But his discretion must be exercised within certain bounds and accepted guidelines, both of a general nature and more specifically as provided for in regard to staff appointments.

The principal provisions governing the Secretary-General's competence to appoint the United Nations staff are contained in Article 101, paragraph 1, of the United Nations Charter. "The staff shall be appointed by the Secretary-General *under regulations established by the General Assembly.*" (Emphasis added.) It follows that his discretionary power is subject to regulations established by the General Assembly. These questions were discussed at the preparatory phases of the drafting of the Charter.

In the *Commentary* on the Charter of the United Nations by Goodrich, Hambro and Simons (3rd. and rev. edn., p. 601) it is noted that in the drafting of the Charter a proposal to share the Secretary-General's authority in this respect with governments was not accepted:

> "During the discussions concerning the organization of the Secretariat in the Administrative and Budgetary Committee . . . a proposal was submitted *under which appointments of officials of the Secretariat would require the concurrence of the governments of the candidates concerned.* In support of this proposal, it was argued that governments were in the best position to assess the qualifications of candidates, that persons appointed should command the confidence of their governments, and that once appointed their exclusively international responsibilities would be respected. The view prevailed that the suggested procedure would impinge on the exclusive responsibility of the Secretary-General under Article 101." (Emphasis added.)

10. It follows from Article 101, paragraph 1, of the Charter that not only has the Secretary-General been imbued with the power to appoint the United Nations staff, but the Secretary-General *must exercise* his discretionary power. He cannot abide by or be unduly influenced by the

orders or wishes of governments, organizations or other external forces. Secondly, and especially important, is that the Secretary-General's discretionary power *is not synonymous with unlimited or absolute powers.* Under general principles of law, this discretionary power has to be exercised in accordance with accepted governing procedures.

On the other hand, it is clear under Staff Rule 104.12 *(b)* that a fixed-term appointment does not carry any legal expectancy of renewal or conversion to a career appointment. Consequently, the discretionary power of the Secretary-General is of major importance for the appointment and composition of the Secretariat. It is equally clear that, in exercising his discretionary power, the Secretary-General must apply certain established standards and norms.

Reference may here be made to the basic requirements and standards expressed in Judgement No. 54 of the Administrative Tribunal in the *Mauch* case. The Tribunal stated (p. 272, para. 5):

> "While the measure of power here was intended to be left completely within the discretion of the Secretary-General, *this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved.*" (Emphasis added.)

Such an abuse of discretionary power might result in a wilful or negligent denial of justice not consonant with the exercise of such powers.

11. Concrete provisions in regard to the exercise of the Secretary-General's discretionary power in regard to staff appointments have been spelt out in General Assembly resolution 37/126, in the Staff Regulations, Article VI, Regulations 4.2 and 4.4, and in Staff Rule 104.4.

General Assembly resolution 37/126 provides in section IV, paragraph 5:

> "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*" (emphasis added).

Section IV, paragraph 4, of the resolution provides that the organizations:

> "should establish their needs for permanent and fixed-term staff on a continuing basis in conjunction with the human resources planning process . . ."

In addition to General Assembly resolution 37/126, the rather firm commitments made in the Staff Regulations, Article IV, Regulation 4.4,

and in the Staff Rules, Rule 104.14, would make it highly irregular to disregard the Applicant for a career appointment. However, in view *inter alia* of the correspondence that passed between the Secretary-General and Mr. Yakimetz, I feel compelled to assume *that every reasonable consideration for a career appointment was not given to the Applicant* according to the terms and spirit of General Assembly resolution 37/126.

12. In the letter of 13 December 1983 to the Secretary-General (Ann. 39 to the Applicant's Statement of Facts and Argument), Mr. Yakimetz's counsel refers to General Assembly resolution 37/126 (sec. IV, para. 5), Staff Regulation 4.4, and Staff Rule 104.14, as well as to Article 101, paragraph 3, of the United Nations Charter. In that letter it is correctly maintained that Mr. Yakimetz's application for an extension of employment or a new career appointment should be given "every reasonable consideration"; furthermore, that extraneous factors could not be used to deny him such "fair and reasonable consideration".

The reply letter of 21 December 1983, signed by Mr. Nègre of the Secretariat on behalf of the Secretary-General (Ann. 40 to Applicant's Statement of Facts and Argument), reveals that "every reasonable consideration" was not given to Mr. Yakimetz's application because of serious flaws in the underlying legal reasoning. This letter, on the contrary, gives unequivocal expression to the erroneous assumption that Mr. Yakimetz could not benefit from the principle of "every reasonable consideration" for continued employment because his situation was: "not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of secondment from your national civil service" *(ibid.)*.

In passing, it may be mentioned that even the factual assertions here quoted seem to be incorrect or at least tendentious. Furthermore, Mr. Nègre's letter seems to assume that because of this original secondment, it would follow that a staff member, who initially worked in the Secretariat on a secondment basis, should be barred from obtaining a career contract "without the involvement of all the parties originally involved". This seems to imply that a career appointment in such cases would inherently be a kind of secondment contract in disguise. The fact that a secondment contract "does not carry *any expectancy* of renewal or of conversion to another type of appointment" is not intended to bar a possible renewal thereof or a conversion to a career appointment. On the contrary, this formulation envisages the possibility of renewal or conversion when it is reasonable and expedient in the concrete case.

An assumption to the effect that a career appointment would not be possible unless such appointment was seconded, or at least met with the approval of the previously seconding State, entails an error of law relating

to provisions of the United Nations Charter. Nor would it serve the best interests of the United Nations Organization, the Secretariat or its individual members. Further somewhat bizarre developments seem to confirm the impression that Mr. Yakimetz's application was not given due consideration.

13. Thus, on 28 February 1983 the Applicant received "a memorandum" from Mr. Sadry, Director of the Division of Personnel Administration, informing him that Mr. Sadry had:

> "been requested to communicate to you the decision by the Secretary-General to place you on special leave with full pay, effective 1 March 1983 and until further notice" (Ann. 26 to Applicant's Statement of Facts and Argument).

This unusual step was couched in harsh language. It took immediate effect and it was for an indefinite period of time. Even more remarkable is the fact that no reasons were given for this unusual step. Staff Rule 105.2 *(a)* on Special Leave was quoted, but no explanations were given as to why this provision was invoked. In this context, it should be noted that in addition to special leave "for advanced study or research in the interest of the United Nations, in cases of extended illness", special leave can also be given "for other important reasons". It seems to follow from the drafting of the provisions of Staff Rule 105.2 that these reasons must be spelt out, especially when no request for special leave has been made. The duration of this involuntary leave of absence was also left in the air, viz., "until further notice".

When such extraordinary measures were summarily taken against a respected staff member, it seems to follow from ordinary decency and the very nature of things that full and detailed reasons should have been given for such steps.

In my respectful opinion, the Secretary-General should, in conformity with principles of justice and equity, also have stipulated a time-limit for a reply of the Applicant and should not have enforced the measures until such time-limit had expired and the Applicant had had the opportunity to respond, to protest or to request negotiations in regard to this sudden and unexpected curtailment of his employment prospects.

In my opinion, the Secretariat did not follow a reasonable procedure when placing the Applicant on an involuntary and indefinite leave of absence. Certain minimum procedural standards should have been complied with in the exercise of such discretionary power.

Certain statements in Judgement No. 333 of the Administrative Tribunal seem pertinent in this context. On page 18, paragraph XX, the Judgement states:

> "The Tribunal would however express *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. *However, this omission on the part of the Respondent has not caused any discernible injury* to the Applicant..." (Emphasis added.)

The statement that such omission on the part of the defendant has not caused any discernible injury seems surprising in light of the fact that Mr. Yakimetz's appointment was not renewed and his request for a career appointment passed over in silence.

14. One question that arises is how the proper exercise of the discretionary power by the Secretary-General is to be implemented in the absence in the Staff Regulations of any specified procedure, and without an indication of the process by which the decision of the Secretary-General has been arrived at, and the reasons therefor. Neither the Staff Regulations nor the Staff Rules contain provisions as to the procedure to follow. Nevertheless, the Secretary-General is not entitled to act without due process.

In my opinion, the absolute lack of formality in the decision-making procedure in the *Yakimetz* case, as well as the lack of reasons which would substantiate the operative conclusions of the decision, border on a denial of justice. Thus, in connection with the question of the exercise of the Secretary-General's discretionary power, *serious abuse* of this *discretionary* power may have been committed when, in a memorandum of 11 March 1983 by the Secretary-General's office, the Applicant was prohibited from *entering the premises of the United Nations "until further notice"* (Ann. 29 to Applicant's Statement of Facts and Argument). No reasons were given therefor. Furthermore, according to the available information, Mr. Yakimetz was also prohibited from visiting the United Nations cafeteria. *Yet, it should be borne in mind that Mr. Yakimetz still had a valid contract of employment.* The legal basis for these steps was and is tenuous. No factual or legal grounds were given for this extraordinary decision other than the unrevealing statement that:

> "at this juncture and pending further review, it is in the best interest of the Organization that you do not enter the premises of the United Nations" (Ann. 30 of Applicant's Statement of Facts and Argument).

But what about the justified interests of the Applicant? Such an exceptional ban must have been been felt by Mr. Yakimetz — and regarded by others in the staff and elsewhere — as demeaning.

15. It follows from basic principles of justice and reasonable behaviour in dealings with the members of the Secretariat that adequate reasons should have been given in writing to Mr. Yakimetz, spelling out why he was not accorded a career appointment.

As a matter of fact, the Applicant did not receive an answer to his appli-

cation for a career appointment, and has not up to this day received any communication in response to it.

The above chain of unusual events seems to me to indicate that Mr. Yakimetz's application for a career appointment did not receive the reasonable consideration required under General Assembly resolution 37/126. It is furthermore unlikely that due regard was paid to the provisions of Article IV, Regulations 4.2 and 4.4, of the Staff Regulations, and to Staff Rule 104.14. Further developments seem to confirm this conclusion.

Although he was refused permission to work in his established office in the Headquarters building for unspecified reasons, later Mr. Yakimetz was allowed to work in quarters across the street, in the Chrysler Building and then in the Burroughs Building. When the new CD-2 Building was opened, he was permitted to rejoin his section and serve out his contract in that building.

The Court does not possess adequate information about the underlying reasons for these steps. But at least they also seem to throw a rather revealing light on the question whether the Applicant was given "every reasonable consideration for a career appointment" according to General Assembly resolution 37/126. Whatever the underlying reasons may have been, they cannot have been lack of qualifications for the job or lack of personal integrity as Mr. Yakimetz was promoted to P-5 on 29 June 1983, obviously in recognition of his qualifications and his dedication to his work in the service of the Organization.

I feel compelled to deduce also from these occurrences that "every reasonable consideration for a career appointment" was hardly accorded to the Applicant.

16. In rounding off the examination of what should be the standard for the exercise of his discretionary power conferred upon an administrative officer, mention may be made of the following additional elements: the requirement laid down in the United Nations Charter, Article 100, to the effect that neither the Secretary-General nor his staff shall "seek or receive instructions from any government or from any authority external to the Organization" must be complied with. Article 101, paragraph 3, must likewise be borne in mind, stipulating that the Secretary-General must provide for a staff with "the highest standards of efficiency, competence, and integrity"; furthermore, that the Secretary-General must pay attention to "the importance of recruiting the staff on as wide a geographical basis as possible".

Mention should also be made of the following elements:

(a) the obligation to act in good faith and with reasonable regard for accepted standards of reasonable behaviour;

(b) the obligation to take into reasonable consideration the rights and obligations of the staff in general and the staff member involved in particular;

(c) in applying the standard of reasonable consideration, the possibility of a career appointment should obviously have been evaluated, and a reasoned reaction to Mr. Yakimetz should have been given without undue delay.

17. In dealing with the question whether the United Nations Administrative Tribunal in Judgement No. 333 "erred on questions of law relating to provisions of the Charter of the United Nations", the legal nature of the concept of secondment must briefly be touched upon.

The application and legal consequences of the rather elusive concept of secondment must be undertaken in the light of the principles briefly examined above. Thus, Article 100 of the United Nations Charter provides that in the exercise of their duties, the members of the United Nations Secretariat "shall not seek or receive instructions from any government or from any other authority external to the Organization". The staff members shall furthermore "refrain from any action which might reflect on their position as international officials responsible only to the Organization". These basic obligations are further elaborated in Article 1 of the Staff Regulations.

18. Neither the United Nations Charter nor the Staff Regulations and Staff Rules contain provisions on secondment. On the contrary, the very principle of secondment may raise certain questions in regard to Article 100 of the United Nations Charter and to the above-mentioned provisions of the Staff Regulations.

One conclusion to be drawn from these provisions is that, if a seconded person later applies for a renewal of his appointment and especially a career appointment, *his earlier secondment appointment should in principle not act as a legal impediment against such renewal or career appointment.* It may be in the interest of the Organization to secure for its Secretariat staff members who have demonstrated their qualifications and have acquired valuable experience as previously seconded appointees.

In its Judgement No. 333 the Administrative Tribunal stated that:

> "IV. In his letter of 21 December 1983 addressed to the Applicant, the Respondent concluded, that, since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible in the circumstances."

This statement of the Tribunal is a simplification so severe as to make it untenable. The possibility of a career appointment, independent of secondment, seems to have been neglected or disregarded by the Administrative Tribunal. Secondment may be a useful tool inasmuch as a person seconded by his Government may be presumed to have the personal and professional qualifications for the appointment in question. Career-appointees will, of course, also frequently have some official recommendations short of official secondment.

In Mr. Yakimetz's Application for Review of the Administrative Tribunal Judgement No. 333 (doc. A/AC.86/R.117, p. 5, para. 9) one problem of secondment was succinctly summed up as follows:

> "did the Respondent err in his belief that having once served under a contract labelled 'secondment', the Applicant was thereby permanently disabled from further United Nations service under any other form of contract or appointment".

In my opinion, this is a basic issue in the case which the Administrative Tribunal seems to have obscured.

One essential aspect *of this issue* was dealt with by Judge Arnold Kean in his dissenting opinion as follows (Judgement No. 333, p. 23, para. 10):

> "there was in the circumstances no possibility, and no desire on the part of the Government or of the Applicant, that he should rejoin the service of that Government, from which he had recently resigned. The only effect, therefore, of a supposed preclusive agreement (expressed or implied) would have been to prevent the Applicant from being employed, then or at any future time, by the United Nations, however valuable or necessary his services might be. It cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement, bearing in mind the provision of Article 101.3 of the Charter . . . that '*the paramount consideration* in the employment of the staff . . . shall be the necessity of securing the highest standards of efficiency, competence, and integrity'. (Emphasis added.)"

19. My conclusions on this brief examination of the concept of secondment are the following:

There may exist an inherent conflict between the provisions in Article 100 of the United Nations Charter on the independence and integrity of the Secretariat and the practice of secondment if the principle of secondment is too rigidly applied. At least in cases of career appointments, lack of secondment *cannot* constitute a legal impediment for further employment in the United Nations. In my opinion, it must also be open to a staff member, whose appointment is based on a contract of secondment, to apply for a new stint in the Secretariat on the basis of a career contract.

In view of the foregoing, I find that the Administrative Tribunal in its Judgement No. 333 of 8 June 1984 erred on questions of law relating to provisions of the Charter of the United Nations. It erred in acquiescing in the Secretary-General's apparent failure to apply regulations binding upon him under Article 101, paragraph 1, of the Charter. It erred in not finding that the administrative measures taken against Mr. Yakimetz were inconsistent with Article 100 of the Charter. And it erred under Arti-

cle 101, paragraph 3, of the Charter in treating government consent to Secretariat appointments as a paramount consideration.

Since I disagree with the Advisory Opinion in regard to question 2, I am constrained to file this dissenting opinion.

20. In concluding, may I add some observations on an issue relating both to question 1 and question 2, namely what are the legal consequences, if any, of the fact that Mr. Yakimetz changed his permanent residence and opted for United States' nationality.

Judge Ustor stressed in his opinion in Judgement No. 333 of the Administrative Tribunal (p. 19) that:

> "the Applicant was . . . not eligible for consideration for a career appointment. In any event, the Applicant, in view of the circumstances in which he elected to break his ties with his country, 'could no longer claim to fulfil the conditions governing employment in the United Nations' and could not expect that any consideration would lead to his career employment."

This statement seems too absolute to be tenable. In the foregoing, I have examined the requirement laid down in General Assembly resolution 37/126 that "every reasonable consideration shall be given to a staff member's application for a career appointment".

In his statement, Judge Ustor seems to turn this principle upside down in actually claiming that no consideration whatever should be given to a "Yakimetz category" application for a career appointment. I am likewise concerned that Judge Ustor's absolutism comes very close to infringing upon the principles underlying Article 100 of the Charter of the United Nations concerning the independence and integrity of staff members, and also close to infringing upon basic principles of law spelt out in the Universal Declaration of Human Rights of 10 December 1948, *inter alia,* the principles laid down in Articles 13 and 15 thereof to the effect that: "Everyone has the right to leave any country, including his own, and return to his country" (Art. 13, para. 2), and the provisions of Article 15, paragraph 2, that: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

Of course, a change in nationality may create certain complications, both in view of the need and effects of secondment and of the provisions in the United Nations Charter, Article 101, paragraph 3, to the effect that: "Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

But the "paramount consideration", expressed in Article 101, paragraph 3, of the Charter, refers to "the necessity of securing the highest standards of efficiency, competence, and integrity" in appointing staff

members. These qualifications Mr. Yakimetz *undoubtedly* possessed. It may be said that the Applicant upheld his loyalties to the United Nations Organization in spite of certain pressures and adversities. In my opinion, the question of breaking ties with a government is a two-way street. Possibly, a government may break its ties with a citizen in various ways. Should this situation have an absolute impact on his chances of a career appointment? In my opinion, the answer must be in the negative.

To what extent mere change of residence should have adverse effects seems even less obvious. The fact that a person serves for a great number of his adult years in a country or city where that organ of the United Nations is situated, might often make it natural for a staff member to establish his residence there. *Hypersensitivity from the national government in such cases should not be encouraged.* In such cases, *a first secondment* should be sufficient for the continued service of such staff member and if difficulties arise, a career appointment might ease the situation. The Staff Rules do not preclude changes of residential status.

In its Judgement No. 326 (p. 8, para. VII), the *Fischman* case, the Administrative Tribunal entertained a somewhat different view in referring to an Information Circular of 19 January 1954 to the following effect:

> "The decision of a staff member to remain on or acquire permanent residence status in . . . [the] country [of their duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the Professional category . . ."

This formulation seems to me much too categorical. Such restrictions on the essential freedom of highly qualified professional persons may, for many reasons, adversely affect the interests of the United Nations in preventing the Organization from obtaining qualified personnel or in losing seasoned personnel who have worked with the United Nations Organization for a long time, and have thus acquired invaluable expertise in and for the United Nations.

These views, applied to the present case, indicate that Mr. Yakimetz's establishment of permanent residency in New York and his application for United States citizenship could not be regarded as a bar to his application for a career appointment.

(Signed) Jens EVENSEN.
