INTERNATIONAL COURT OF JUSTICE

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The Court gives its Advisory Opinion on an Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal

The following information is made available to the press by the Registry of the International Court of Justice:

Today, 27 May 1987, the International Court of Justice delivered its Advisory Opinion in the case concerning the Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.

The Court decided that in Judgement No. 333 the United Nations Administrative Tribunal did not fail to exercise jurisdiction vested in it and did not err on any question of law relating to provisions of the Charter.

The questions submitted to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements were as follows:

> "(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?"

The Court decided as follows:

A. Unanimously, the Court decided to comply with the request for an advisory opinion.

B. Unanimously, the Court was of the opinion that the United Nations Administrative Tribunal, in its Judgement No. 333, 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 fixed-term contract on 26 December 1983.

C. By eleven votes to three, the Court was of the opinion that the United Nations Administrative Tribunal, in the same Judgement No. 333, did not err on any question of law relating to the provisions of the Charter of the United Nations.

In Favour: President Nagendra Singh; Vice-President Mbaye; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Bedjaoui, Ni Zhengyu, Tarassov.

Against: Judges Schwebel, Sir Robert Jennings, Evensen.

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The Court was composed as follows: President Nagendra Singh; Vice-President Mbaye; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Bedjaoui, Ni Zhengyu, Evensen and Tarassov.

Judge Lachs appended a declaration to the Advisory Opinion.

Judges Elias, Oda and Ago appended separate opinions to the Advisory Opinion.

Judges Schwebel, Sir Robert Jennings and Evensen appended dissenting opinions to the Advisory Opinion.

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In their opinions the judges concerned state and explain the positions they adopted in regard to certain points dealt with in the Advisory Opinion (for a brief survey of these opinions, see Annex hereto).

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The printed text of the Advisory Opinion and of the separate and dissenting opinions will become available in a few weeks' time (orders and enquiries should be addressed to the Distribution and Sales Section, Office of the United Nations, 1211 Geneva, 10; the Sales Section, United Nations, New York, N.Y. 10017; or any appropriately specialized bookshop).

An analysis of the Advisory Opinion is given below: this has been prepared by the Registry for the use of the press and in no way involves the responsibility of the Court. It cannot be quoted against the text of the Opinion, of which it does not constitute an interpretation.

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Analysis of the Advisory Opinion

I. Review of the proceedings and summary of facts (paras. 1-22)

The Court outlines the successive stages of the proceedings before it (paras. 1-9) and summarizes the facts of the case as they emerge from the reasons adduced in the Judgement of 8 July 1984 in the case concerning Yakimetz v. the Secretary-General of the United Nations, and as set out in the documents submitted to the Tribunal (paras. 10-18). The facts essential for an understanding of the decision reached by the Court are as follows:

Mr. Vladimir Victorovich Yakimetz (referred to in the Opinion as "the Applicant") was given a five-year appointment (1977-1982) as Reviser in the Russian Translation Service of the United Nations. In 1981, he was transferred as Programme Officer to the Programme Planning and Co-ordination Office. At the end of 1982, his appointment was extended for one year, expiring on 26 December 1983, and his letter of appointment stated that he was "on secondment from the Government of the Union of Soviet Socialist Republics". (Para. 10.)

On 8 February 1983, the Assistant Secretary-General for Programme Planning and Co-ordination informed the Applicant that it was his intention to request an extension of his contract after the current contract expired on 26 December 1983. On 9 February 1983, the Applicant applied for asylum in the United States of America; on 10 February he informed the Permanent Representative of the USSR to the United Nations of his action, and stated that he was resigning from his positions in the Soviet Government. On the same day, he notified the Secretary-General of his intention to acquire permanent resident status in the United States of America. (Para. 11.)

On 25 October 1983 the Applicant addressed a memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination, in which he expressed the hope that it would be found possible on the basis of his performance to recommend a further extension of his contract with the United Nations, "or even better a career appointment". On 23 November 1983, the Deputy Chief of Staff Services informed the Applicant by letter "upon instruction by the Office of the Secretary-General" that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983. On 29 November, the Applicant protested against the decision and referred to his acquired rights under General Assembly resolution 37/126, IV, paragraph 5, which provides that "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." (Para. 13.)

On 13 December, the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond its expiration date, and again invoked his rights under General Assembly resolution 37/126. In a letter dated 21 December 1983, the Assistant Secretary-General for Personnel Services replied to the Applicant's letter of 13 December and advised him that, for the reasons stated, the Secretary-General was maintaining the decision communicated in the letter of 23 November 1983. (Para. 14.)

On 6 January 1984, the Applicant filed the application to the United Nations Administrative Tribunal in respect of which Judgement No. 333 was given. (Para. 14.)

The Applicant then made a further application for United Nations employment. (Para. 15.)

The Court notes that, at a press conference on 4 January 1984, the spokesman for the Secretary-General said that "if Mr. Yakimetz chose to apply for a position ... he would be given every consideration along with other applicants for any position". It also noted that the New York Times of the same day carried an article dealing with the non-renewal of the Applicant's contract, in which the Executive Assistant to the Secretary-General was quoted as having said that "to have the contract extended ... Soviet consent was essential. But, he said, 'the Soviets refused'." Commenting on that report in a letter to the New York Times dated 24 January 1984, the Under-Secretary-General for Administration and Management pointed out that "a person who is on loan returns to his government unless that government agrees otherwise". (Para. 16.)

Following this summary of the facts, the Opinion presents the principal contentions of the Applicant and of the Respondent as summarized by the Tribunal, and lists the legal issues which the Tribunal stated were involved in the case (paras. 17 to 19). It then gives a brief analysis of Judgement No. 333, (paras. 20 and 21), to which it returns subsequently in more detail.

II. The competence of the Court to give an advisory opinion, and the propriety of doing so (paras. 23 to 27)

The Court recalls that its competence to deliver an advisory opinion at the request of the Committee on Applications for review of Administrative Tribunal Judgements is derived from several provisions: Article 11, paragraphs 1 and 2, of the Statute of the Tribunal, Article 96 of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has already had occasion to examine the question of its competence under these provisions, whether the request for opinion originated, as in the present case, from an application by a staff member (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Fasla case, 1973) or from an application by a member State (Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Mortished case, 1982). In both cases, it concluded that it possessed competence. In the present case, its view is that the questions addressed to it are clearly legal questions arising within the context of the Committee's activities. (Paras. 23 and 24.)

As for the propriety of giving an opinion, it is clearly established, according to the Court, that the power conferred by Article 65 of the Statute is of a discretionary character, and also that the reply of the Court to a request for an advisory opinion reflects its participation in the activities of the United Nations and, in principle,

should not be refused. In the present case, it considers in any event that there is clear legal justification for replying to the two questions put to it by the Committee. It recalls that, in its 1973 Opinion, it subjected the machinery established by Article 11 of the Statute of the Administrative Tribunal to critical examination. While renewing some of its reservations as to the procedure established by that Article, the Court, anxious to secure the judicial protection of officials, concludes that it should give an advisory opinion in the case. (Paras. 25 and 26.)

In its Advisory Opinions of 1973 and 1982, the Court established the principle that its role in review proceedings was not "to retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal". That principle must continue to guide it in the present case. In particular, it should not express a view on the correctness of otherwise of any finding of the Tribunal, unless it is necessary to do so in order to reply to the questions put to it. (Para. 27.)

III. First question (paras. 28-58)

The first question put to the Court is worded as follows:

> "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[1] employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?

In his application to the Administrative Tribunal, the Applicant contended that "there was no legal bar to his eligibility for a new fixed-term contract" or to a probationary appointment leading to a career appointment. He claimed to have a "legally and morally justifiable expectancy of continued U.N. employment, and a right to reasonable consideration for a career appointment". Before the Tribunal, the Secretary-General stated that there was no legal impediment to the grant of a career appointment, and asserted that the contested decision had been taken after consideration of all the circumstances in the case. This, he contended, constituted "reasonable consideration" within the meaning of the General Assembly resolution 37/126 (see above, p. 4), given that the Applicant had no "right" to "favourable consideration for a career appointment". (Paras. 29 and 30.)

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[1]The Opinion notes a discrepancy between the English and French texts, pointing out that the words "obstacle juridique au renouvellement de l'engagement" appearing in the French version include both a case of prolongation of an existing contract, and that of an appointment distinct from the pre-existing contractual relationship (para. 28).

Before the Tribunal, the Applicant made no reference to the recognition by the Secretary-General that there was no legal impediment, but took issue with the statement that "reasonable consideration" had been given. He argued that if the Secretary-General was under the impression, as the letter of 21 December 1983 and the statements made by certain senior officials indicated (see above, pp. 4 and 5), that any extension of the Applicant's appointment without the consent of the government which had seconded him was beyond the scope of his discretionary power, this would have prevented him from giving every reasonable consideration to a career appointment. The Applicant therefore requested the Tribunal to find that the view which actually was held at that time - that a secondment did give rise to a legal impediment to any further employment - was incorrect, so that no "consideration" on that basis could be "reasonable" within the meaning of resolution 37/126, and requested it to find that there was no legal impediment to his further employment after the expiry of his contract on 26 December 1983. The Applicant held that the Tribunal had not responded to his plea on that point, and the Court is now requested to state whether in that regard it failed to exercise jurisdiction. (Paras. 31 and 32.)

The Court considers that the Tribunal's handling of the question of the "legal impediment" is not entirely clear. The reason for this, according to the Court, is that it was obliged to deal first with other contentions set out by the Applicant. As a matter of logic, the Tribunal dealt first with the question whether the Applicant had a "justifiable expectancy of continued United Nations employment" - in other words, whether there was a "legal expectancy" in that connection, since if such an expectancy existed the Secretary-General would have been obliged to provide continuing employment to the Applicant within the United Nations. The Tribunal found that there was no legal expectancy. On the one hand, the consent of the national government concerned would have been required for the renewal of the previous contract, which was a secondment contract, and on the other hand, according to Staff Rule 104.12 (b), fixed term appointments carry no expectancy of renewal or of conversion to any other type of appointment. The Tribunal also held that the Secretary-General had given reasonable consideration to the Applicant's case, pursuant to section IV, paragraph 5, of General Assembly resolution 37/126, but without saying so explicitly. (Paras. 33 to 37.)

An analysis of the judgement therefore shows that, for the Tribunal, there could be no legal expectancy, but neither was there any legal impediment to "reasonable consideration" being given to an application for a career appointment. According to the Tribunal there would have been no legal impediment to such an appointment if the Secretary-General, in the exercise of his discretion, had seen fit to offer one. (Paras. 38-41.)

The Court notes that the real complaint of the Applicant against the Tribunal was, rather than failing to respond to the question whether there was a legal impediment to his further employment, that it paid insufficient attention to the indications that the Secretary-General had thought that there a legal impediment, so that the "reasonable consideration" either never took place or was vitiated by a basic assumption - that there was an impediment - which was later conceded to be incorrect. Here the Court recalls that in appropriate cases it is

entitled to look behind the strict terms of the question as presented to it (Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980), provided its reformulation remains within the limits of the powers of the requesting body. In the present case, without going beyond the limits of the ground of objection contemplated by Article 11 of the Tribunal's Statute and upheld by the Committee (failure to exercise jurisdiction), it is open to the Court to redefine the point on which it is asserted that the Tribunal failed to exercise its jurisdiction, if this will enable it to give guidance on the legal question really in issue. It thus seems to the Court essential to examine not only whether the Tribunal failed to examine the question of the legal impediment to the Applicant's further employment - as it is requested to do - but also whether the Tribunal omitted to examine the Secretary-General's belief in that regard, and the possible impact of that belief on his ability to give "every reasonable consideration" to a career appointment. If it can be established in this case with sufficient certainty that the Tribunal addressed its mind to the matters on which the Applicant's contentions were based, there was no failure to exercise jurisdiction in that respect, whatever may be thought of the conclusion it reached in the light of the information available to it. (Paras. 42 to 47.)

The Court refers first to the actual text of the Tribunal's Judgement, which did not deal specifically with the question of the existence of a "legal impediment". It does not however conclude from this that it failed to address its mind to this question. What the Judgement states is that, in the Tribunal's view, the Secretary-General could take the decision to offer the Applicant a career appointment, but was not bound to do so. It follows from this that the Tribunal was clearly deciding, though by implication, that there was no absolute legal impediment which had supposedly inspired the decision not to give the Applicant a career appointment. In so doing the Tribunal therefore responded to the Applicant's plea that it should be adjudged that there was no legal impediment to the continuation of his service. (Para. 48.)

The Court then refers to a statement by the President of the Administrative Tribunal, Mr. Ustor, appended to the Judgement, and to the dissenting opinion of another member of the Tribunal, the Vice-President Mr. Kean. It seems to the Court impossible to conclude that the Tribunal did not address its mind to the issues which were specifically mentioned by Mr. Ustor and Mr. Kean as the grounds for their disagreement with part of the judgement relating to the "legal impediment" and to the "reasonable consideration". The Tribunal, as a body represented by the majority which voted in favour of the Judgement, must have drawn its own conclusions on these issues, even if these conclusions were not spelt out as clearly in the Judgement as they ought to have been. (Paras. 49 to 57.)

As to the question whether "every reasonable consideration" was in fact given, the Tribunal decided this in the affirmative. The Court, considering that it is not entitled to substitute its own opinion for that of the Tribunal on the merits of the case, does not find it possible to uphold the contention that the Secretary-General did not give "every reasonable consideration" to the Applicant's case, in implementation of resolution 37/126, because he believed that there was a "legal impediment".

The Court, after due analysis of the text of Judgement No. 333 of the Tribunal, considers that the 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. Accordingly, the answer to the first question put to it by the Committee must be in the negative. (Para. 58.)

IV. Second question (paras. 59 to 96)

The question is worded as follows:

> "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?"

Concerning the nature of its task, the Court recalls that the interpretation, in general, of Staff Regulations and Rules is not its business, but that it is the business of the Court to judge whether there is a contradiction between a particular interpretation or application of them by the Tribunal and any of the provisions of the Charter of the United Nations. It is also open to the Court to judge whether there is any contradiction between the Tribunal's interpretation of any other relevant texts such as, in this case, General Assembly resolution 37/126, and any of the provisions of the Charter. (Paras. 59 to 61.)

The first provision of the Charter in respect of which the Applicant contends that the Tribunal made an error of law is Article 101, paragraph 1, which provides that "The staff [of the Secretariat] shall be appointed by the Secretary-General under regulations established by the General Assembly". More specifically, the Applicant's complaint bears upon the role which ought to have been played by the Appointment and Promotion Board, but which was unable to play because no proposal ever reached it, with the result that it never had a chance to consider his case. The Applicant presented this as one element of the denial of "reasonable consideration" of his case. The Tribunal found that it was "left to the Respondent to decide how every reasonable consideration for a career appointment should be given to a staff member" and that the Respondent had "the sole authority to decide what constituted 'reasonable consideration'". On the basis of this passage the Applicant contends that this is a question of law relating to Article 101, paragraph 1, of the Charter. (Paras. 62 to 69.)

The Court interprets the above-quoted passage as meaning that it was for the Secretary-General to decide what process constituted "reasonable consideration", and not that the only test of reasonableness was what the Secretary-General thought to be reasonable. Indeed the Tribunal has nowhere stated that the Secretary-General possesses unfettered discretion. Nevertheless, the Tribunal did accept as sufficient a statement by the Secretary-General that the "reasonable consideration" required by resolution 37/126 had been given. It did not require the Secretary-General to furnish any details of when and how it was given, let alone calling for evidence to that effect. Because the texts do not specify which procedures are to be followed in such a case, the Court is unable to regard this interpretation as in contradiction with Article 101, paragraph 1, of the Charter. (Paras. 70 to 73.)

The Secretary-General has also asserted that the decision taken in this case was "legitimately motivated by the Secretary-General's perception of the interests of the Organization to which he properly gave precedence over competing interests". The Tribunal need not have accepted this; it might have regarded the statements quoted by the Applicant as evidence that the problem of secondment and the lack of government consent had been allowed to dominate more than the Secretary-General was ready to admit. That was not however the view it took. It found that the Secretary-General "exercised his discretion properly". Whether or not this was an error of judgment on the Tribunal's part, what is certain is that it was not an error on a question of law relating to Article 101, paragraph 1, of the Charter. The essential point is that the Tribunal did not abandon all claim to test the exercise by the Secretary-General of his discretionary power against the requirements of the Charter. On the contrary, it re-affirmed the need to check any "arbitrary or capricious exercise" of this power. (Paras. 74 and 75.)

* *

The Applicant claims that the Tribunal committed an error of law relating to Article 100, paragraph 1, of the Charter, which provides:

> "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."

The Applicant does not allege that in refusing him further employment the Secretary-General was merely carrying out the instructions of a government, but considers that the statements made by senior officials as mentioned above (pp. 4 and 5) indicated that the Secretary-General believed that further employment was impossible without the consent of the Applicant's government - which has been shown to be untrue - and that the Tribunal concluded that this was indeed the belief of the Secretary-General. The Court does not find it possible to uphold this contention, since it does not consider the Tribunal to have reached that conclusion. (Paras. 76 to 78.)

* *

The Applicant alleges a failure to observe Article 101, paragraph 3, of the Charter, which provides:

> "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."

He asserts that the Tribunal's Judgement failed to weigh the mandate of that Article against other factors, and that it made merit subservient to other considerations. It is clear that the expression "the paramount consideration" is not synonymous with "the sole consideration", and it is for the Secretary-General to balance the various considerations. It was not for the Tribunal, nor is it for the Court, to substitute its own appreciation of the problem for his. The Secretary-General's decision cannot be said to have failed to respect the "paramount" character of the considerations mentioned in Article 101, paragraph 3, simply because he took into account all the circumstances of the case in order to give effect to the interests of the Organization. (Paras. 79 to 82.)

In taking his decision, the Secretary-General had taken account of "the events of 10 February 1983" (the date of the Applicant's communication informing the Soviet Government that he was resigning from its service) "and thereafter". The Tribunal examined this matter in the context of the new contractual relationship "which, according to the Applicant, had been created between himself and the United Nations on that date". For his part, the Secretary-General denied that "a continuing relationship with a national government is a contractual obligation of any fixed-term staff member - seconded or not" and that the Applicant's continued employment did not imply that a new contractual relationship had been created. The Tribunal comments on the significance of national ties, and expresses disapproval of the Secretary-General's above-quoted remarks. It does not apparently consider them consistent with the ideas found shortly beforehand in Judgement No. 326 (Fischman) which referred to a "widely-held belief" expressed in a report to the Fifth Committee of the General Assembly, to the effect that staff members who break their ties with their home countries can no longer claim to fulfil the conditions governing employment in the United Nations. The Tribunal adds that this position must continue to provide an essential guidance in this matter. The Court here observes that this "widely-held belief" amounts to the views expressed by some delegates to the Fifth Committee in 1953 at the Eighth Session of the General Assembly, and never materialized in an Assembly resolution. (Paras. 83-85.)

The Court also notes that the relevant passage in Judgement No. 333 is not essential to the reasoning of the decision, but that the Court has a duty to point out any error "on a question of law relating to the provisions of the Charter of the United Nations" whether or not such error affected the disposal of the case. However, having considered the relevant passage of the Judgment, (para. XII), the Court is unable to find that the Tribunal there committed an error of law "relating to the provisions of the Charter". For the Secretary-General, the change of nationality was an act having no specific legal or administrative consequences. The Tribunal upheld the Secretary-General's main contention, but at the same time pointed out that according to one view, the change of nationality was not necessarily such an act, but one which in some circumstances may adversely effect the interests of the United Nations. This is very far from saying that a change or attempted change of nationality may be treated as a factor outweighing the "paramount consideration" defined by Article 101, paragraph 3, of the Charter; this is what the Applicant accuses the Secretary-General of having done, but the Tribunal did not agree with him, since it established that "reasonable consideration" had taken place. (Paras. 86 to 92)

The Applicant asserts that the Tribunal erred on a question of law relating to Article 8 of the Charter, which is worded as follows:

> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

The Applicant propounds a novel view of that Article, that it prohibits "any restriction on the eligibility of any person". The Court explains why it is not called upon to deal with this contention, so that Article 8, even in the wide interpretation contended for by the Applicant, has no relevance whatever. (Para. 93.)

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The Applicant asserts that the Tribunal erred on a question of law relating to Article 2, paragraph 1, of the Charter, namely: "The Organization is based on the principle of the sovereign equality of all its Members", coupled with Article 100, paragraph 2:

> "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."

The complaint here examined appears to be that a certain government brought pressure to bear on the Secretary-General contrary to Article 100, paragraph 2, of the Charter. In that event, even if there had been evidence (which there was not) that a member State had behaved in violation of that Article of the Charter, the Tribunal would not have been justified in making any finding in that respect, and could not therefore be criticised for not doing so. The Court can therefore see no possibility of an error of law by the Tribunal relating to Article 2 and Article 100, paragraph 2, of the Charter. (Paras. 94 to 96.)

In respect of the second question put to it in this case, the Court concludes that the Tribunal, in its Judgement No. 333, did not err on any question of law relating to the provisions of the Charter. The reply to that question also must therefore be in the negative. (Para. 96.)

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The complete text of the operative paragraph (para. 97) will be found below:

THE COURT,

A. Unanimously,

Decides to comply with the request for an advisory opinion;

B. Is of the opinion

(1) with regard to Question I,

Unanimously

That the United Nations Administrative Tribunal, in its Judgement No. 333 of 8 June 1984 (AT/DEC/333), 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 fixed-term contract on 26 December 1983;

(2) with regard to Question II,

By eleven votes to three,

That the United Nations Administrative Tribunal, in the same Judgement No. 333, did not err on any question of law relating to the provisions of the Charter of the United Nations.

IN FAVOUR: President Nagendra Singh; Vice-President Mbaye, Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Bedjaoui, Ni and Tarassov

AGAINST: Judges Schwebel, Sir Robert Jennings and Evensen.

Summary of declaration, opinions and dissenting opinions appended to Advisory Opinion

Declaration of Judge Lachs:

Judge Lachs recalls that when in 1973 the Court first had occasion to give an Advisory Opinion concerning a judgement of the United Nations Administrative Tribunal, he appended as President of the Court a declaration expressing the hope that new procedures would be introduced so as to improve and harmonize the administrative protection offered staff members of international organizations. Note was taken of his remarks in the General Assembly and the International Civil Service Commission, so that steps were taken towards harmonizing the procedures of the Administrative Tribunals of the United Nations and the International Labour Organisation and the eventual establishment of a single tribunal to cover all staff in the United Nations family. After expressing gratification that the remarks of a Member of the Court should have begun to bear fruit in this way, Judge Lachs utters the hope that this year the General Assembly will cease postponing examination of the Secretary-General's latest report on the subject and will take some concrete steps towards the envisaged goal.

Separate opinion of Judge Elias:

In his separate opinion, Judge Elias urges the General Assembly to reconsider the system of referring Administrative Tribunal cases to the Court for review. After examining the texts and the previous cases of this kind, he emphasizes the need for a flexible procedure to enable the Court to raise all legal issues considered relevant and necessary for the proper disposal of the problem before it. He outlines a possible system comprising a Tribunal of First Instance and the Administrative Tribunal sitting as a court of appeal, which would entail a recast of the present Statute of the Administrative Tribunal. Judge Elias also comments on the Court's power in advisory cases to determine the real meaning of the questions it has to answer, and on the problems raised in the case as to "reasonable consideration" under General Assembly resolution 37/126, secondment, and the discretion to be exercised by the Secretary-General in matters of this kind.

Separate opinion of Judge Oda:

Judge Oda thinks that question 1 has been erroneously based in the light of the ambivalent provenance of the drafting of the question in the Committee on Applications. If the United Nations Administrative Tribunal did not respond to "the question whether a legal impediment existed to further employment ..." to Mr. Yakimetz's further employment in the United Nations, this did not appear to him to be relevant to the issue of whether the Tribunal failed to exercise jurisdiction.

With...

With regard to question 2, Judge Oda thinks that on the issue of whether the Tribunal erred on a question of law relating to the provisions of the United Nations Charter, the present Court is expected, in the light of the process of amending the Tribunal's Statute in 1955, to function as an appellate court vis-à-vis the Tribunal and the Court should have examined the merits not only of the Judgement as such but also of the decision of the Secretary-General not to continue Mr. Yakimetz's contract. From this point of view Judge Oda holds that, in view of the Staff Rules and the relevant General Assembly resolutions, Mr. Yakimetz did not have a legal expectancy for further service with the United Nations towards the end of 1983 at the expiry of his contract, while the uncertainties of his status, caused by his application for asylum in the United States and his alleged resignation from any post in the Soviet Government in February 1983, could legitimately have been a factor considered by the Secretary-General in exercising his discretion regarding the employment of United Nations staff. Judge Oda states that the Tribunal did not err on any point of law relating to the provisions of the United Nations Charter in so far as the Tribunal did in fact uphold the decision of the Secretary-General which can be justified in the light of the latitude given to him in this respect.

Separate opinion of Judge Ago:

Judge Ago explains in his separate opinion why, despite certain reservations, he did not dissociate himself from the negative answers given by the Court to both the first and the second questions. He states the reasons for the relative dissatisfaction he feels in this case, and on each occasion when the Court is called upon to give an advisory opinion in the context of proceedings for review of a decision of an Administrative Tribunal. While recognizing the necessity in principle, of a review procedure, he does not believe that the existing system is the most appropriate one for the particular ends in view. This system relies upon a committee of which the extremely broad composition, and the type of procedure followed do not correspond very closely to those of a body entrusted with judicial, or at least quasi-judicial functions. Its competence is moreover confined to certain clearly-defined legal aspects, with the result that the judgements of the Administrative Tribunal are ultimately beyond the reach of any genuine judicial review, not only as regards their legal aspects but also as regards their factual aspects, which are often of great importance. It cannot therefore be claimed that the existing system fully safeguards both the overriding interests of the United Nations as an organization and the legitimate claims at law of its staff members.

Judge Ago takes the view that the only remedy for this situation would be the introduction of a second-tier administrative court with competence to review the decisions of the first-tier court in all their legal and factual aspects. This second-tier court could exercise jurisdiction with regard to all the existing administrative tribunals, and thus achieve the unified jurisdiction which has proved difficult to create at the lower level.

Dissenting...

Dissenting opinion of Judge Schwebel:

In dissenting from the Court's opinion, Judge Schwebel disclaimed the Court's position that its proper role in this class of case is not to substitute its own opinion on the merits for that of the Administrative Tribunal. On the contrary, the United Nations General Assembly, in investing the Court with the authority to review judgements of the Administrative Tribunal on the ground of error of law relating to provisions of the United Nations Charter, had intended that the Court should determine the merits of the case, and do so with binding force. The General Assembly had empowered the Court to act as the final authority on interpretation of the Charter and of staff regulations based thereon. One such regulation - enacted by General Assembly resolution 37/126, IV, paragraph 5 - was precisely in issue in this case.

By the terms of that regulation, the Secretary-General was bound to have given Mr. Yakimetz "every reasonable consideration" for a career appointment. In fact, Mr. Yakimetz was given no such consideration. The terms of the Secretary-General's correspondence with Mr. Yakimetz demonstrate that the Secretary-General took the position at the operative time that Mr. Yakimetz's candidacy for a career appointment could not be considered because his contract "was concluded on the basis of a secondment from ... national civil service," accordingly having "no expectancy ... of conversion to any other type of appointment". Thus Mr. Yakimetz's name could not be forwarded "'for reasonable consideration for career appointment'". In Judge Schwebel's view, the inference which the Administrative Tribunal purports to find in this correspondence supporting its conclusion that the Secretary-General nevertheless did give Mr. Yakimetz's candidacy every reasonable consideration is fanciful.

Two surrounding circumstances emphasize how insupportable the Administrative Tribunal's conclusion is. First, shortly after Mr. Yakimetz resigned his positions with the Soviet Government, the Secretary-General barred him from entering United Nations premises. It is difficult to believe that, at one and the same time, during a period for all of which Mr. Yakimetz remained barred from his office and the United Nations corridors and cafeteria, he was being given every reasonable consideration for a career appointment at the end of the period which he was debarred from serving out on United Nations premises.

The second factor is that the Secretary-General failed to acknowledge, let alone act upon, the application for a permanent appointment which Mr. Yakimetz submitted on 9 January 1984, days after the expiration of his fixed-term appointment. That lack of reaction suggests that no consideration was given to his application. If there is another explanation of the Secretary-General's failure to respond, it has not been forthcoming.

The resultant errors of law are three:

1. The Secretary-General was bound to give Mr. Yakimetz's career appointment "every reasonable consideration" pursuant to a General Assembly regulation binding upon him, enacted in pursuance of the

Assembly's authority providing that the staff shall be appointed "under regulations established by the General Assembly" (Art. 101, para. 1). He did not, but the Tribunal erred in finding - without factual basis - that he did. By not requiring the Secretary-General to act in accordance with a regulation, the Tribunal committed an error of law relating to a Charter provision.

2. The Administrative Tribunal indicated that "the question of his suitability as an international civil servant" was raised by Mr. Yakimetz's attempted change of nationality. It held that "essential guidance" is provided by the "widely held belief" expressed in a United Nations committee that international officials who elect "to break their ties with [their] country could no longer claim to fulfil the conditions governing employment in the United Nations". However, Article 101, paragraph 3, of the Charter provides that the paramount consideration in the employment of staff shall be securing the highest standards of efficiency, competence and integrity. Nationality is not a Charter criterion. The Tribunal's holding that Mr. Yakimetz's attempted change of nationality put into question his suitability for continued United Nations service transgressed a Charter provision, since it invests nationality with an essentiality or paramountcy which conflicts with the terms of Article 101, paragraph 3. Beliefs expressed in United Nations committees are not sources of law; still less may they derogate from the terms of the Charter.

3. The Secretary-General acted in the apparent conviction that Mr. Yakimetz could not be considered for a career appointment in the absence of the consent of the Soviet Government, and thereby gave such consent a determinative weight. He accordingly failed to fulfil his obligation under Article 100, paragraph 1, of the Charter to "refrain from any action which might reflect" on his position as an international official "responsible only to the Organization" because, in effect, he ceded responsibility in this respect to a "government ... or authority external to the Organization". The failure of the Administrative Tribunal to assign this error constitutes an error of law relating to a Charter provision.

Dissenting opinion of Judge Sir Robert Jennings:

Judge Sir Robert Jennings, in his dissenting opinion, was of the view that the question really in issue in the case was whether the Tribunal was right in holding that the Secretary-General had given every reasonable consideration to Mr. Yakimetz's application for a career appointment with the United Nations, as the Secretary-General agreed he was bound to do under General Assembly resolution 37/126, IV, paragraph 5.

As to the first question asked of the Court for its advisory opinion, Judge Jennings was content to agree, or at least not to disagree, with the majority opinion that the Tribunal had not failed to exercise its jurisdiction over whether there was any legal impediment to Mr. Yakimetz's appointment; this, however, for the reason that different views on so abstract and conceptual a problem might be held without necessary commital one way or the other to the answer to be given to the question the Court was really called upon to decide.

On...

On the second question for the Court's opinion, which directly raised the central issue of the case, Sir Robert felt bound to dissent because, in his view, the Tribunal was wrong in finding that the Respondent had given every reasonable consideration to the question of a career appointment for Mr. Yakimetz; and this for two reasons. First, the Respondent had provided no evidence of the way in which his decision had been made, or of any reasons for it. Simply to accept his statement that proper consideration had been given, without objective evidence of its having been done, was subversive of a system of judicial control of administrative discretion. Second, such evidence as there was pointed the other way, because the Respondent's letter, of 21 December 1983, to Mr. Yakimetz simply did not allow of any supposed "plain inference" that "reasonable consideration" had been given; on the contrary it stated explicitly, though erroneously, that because Mr. Yakimetz had been on secondment by the USSR Government it was not possible to consider him for any further appointment without that Government's agreement.

In holding, therefore, that the Secretary-General had given reasonable consideration to such an appointment, the Tribunal had erred in relation to provisions of the United Nations Charter, because the General Assembly's resolution 37/126 was part of the corpus of law intended to implement the Charter provisions concerning the status and independence of the international civil service.

Dissenting opinion of Judge Evensen:

In his dissenting opinion Judge Evensen agrees with the Advisory Opinion in regard to the first question addressed to the Court by the United Nations Committee on Applications. The United Nations Administrative Tribunal did not fail to exercise jurisdiction by not responding to the question whether a legal impediment existed for the further employment of Mr. Yakimetz.

In regard to the second question Judge Evensen holds the opinion that the Administrative Tribunal in its Judgement No. 333 erred on questions of law relating to the provisions of the United Nations Charter. Although the United Nations Secretary-General exercises discretionary powers in the appointment of the United Nations staff, certain criteria must be reasonably complied with. Among these conditions are those laid down in General Assembly resolution 37/126 to the effect that a staff member, upon completion of a fixed-term appointment of five years of continuing good service, shall be given "every reasonable consideration for a career appointment". Nor has sufficient attention been paid to the requirements contained in the Staff Rules and Staff Regulations to the effect that in filling vacancies the fullest regard shall be had to the qualifications and experience of the persons already in the service of the United Nations. Mr. Yakimetz had the unqualified recommendation of his superior for a career appointment.

In spite thereof Mr. Yakimetz was placed on involuntary and indefinite leave of absence. He was denied access to the premises of the United Nations including his office and the United Nations cafeteria while he was still holding a valid contract of employment.

In...

In Judge Evensen's opinion the Administrative Tribunal erred in acquiescing in the Secretary-General's failure to apply the administrative rules and regulations binding upon him according to Article 101, paragraph 1, of the Charter. The Tribunal further erred in not finding that the administrative measures taken against Mr. Yakimetz were inconsistent with Article 100 of the Charter; and it erred under Article 101, paragraph 3, of the Charter in treating - at least where career appointments are concerned - government consent as a paramount consideration.