INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

APPLICATION FOR REVIEW OF JUDGEMENT No. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

DEMANDE DE RÉFORMATION DU JUGEMENT N° 333 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

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I. BACKGROUND

A. Summary of the Facts

1. The facts relevant to the proceedings in the Administrative Tribunal of the United Nations to which Judgement No. 333 relates were outlined by the Tribunal in that Judgement (doc. No. 9, pp. 43-49, *supra*). In so far as they are relevant to the questions addressed to the Court in the present proceeding (see para. 43 below), the facts may be summarized as follows.

2. On 20 July 1977 the Deputy Permanent Representative of the Union of Soviet Socialist Republics (USSR) recommended to the Assistant Secretary-General for Personnel Services of the United Nations that a Soviet professional, Mr. Vladimir V. Yakimetz [the Applicant to whom Judgement No. 333 of the Tribunal relates][1] be appointed to the United Nations Secretariat. The Applicant had been previously employed by the United Nations Secretariat in 1969-1974 as a reviser (P-4) in the Russian Translation Service of the United Nations Secretariat in New York.

3. On 31 October 1977 the Appointment and Promotion Board recommended, and the Officer-in-Charge of the Office of Personnel Services thereafter approved on behalf of the Secretary-General, the appointment of the Applicant.

4. On 23 November 1977 the Deputy Chief, Secretariat Recruitment Service, Office of Personnel Services, wrote to the Applicant, c/o United Nations Information Centre in Moscow, on behalf of the Secretary-General of the United Nations, offering a five-year fixed-term appointment, on secondment from the USSR Government, at step IV of the First Officer (P-4) level, as a reviser in the Russian Service, Translation Division, Department of Conference Services.

5. On the same day, the Secretariat of the United Nations sent a Note Verbale to the Permanent Mission of the USSR, informing the Mission that the Organization had offered a five-year fixed-term appointment, on secondment from the USSR Government, to the Applicant.

6. On 28 December 1977 a letter of appointment was issued on behalf of the Respondent, was accepted by the Applicant on 24 January 1978, but took effect as from 27 December 1977; the letter of appointment did not mention secondment and, under item 5 ("Special Conditions"), specified "None".

7. On 5 October 1981 the Applicant was transferred as a Programme Officer to the Programme Planning Section, Programme Planning and Co-ordination Office, Department of International Economic and Social Affairs.

8. On 22 October 1982 the Secretariat of the United Nations requested the assistance of the Permanent Mission of the USSR in securing the consent of its

[1] In the interest of uniformity of citation, Mr. Yakimetz will be referred to as the Applicant and the Secretary-General as the Respondent, since these are the terms used in Tribunal proceedings.

Government to the extension of the Applicant's secondment to the United Nations for one year, that is, up to 26 December 1983.

9. On 15 November 1982 the Permanent Mission communicated to the United Nations Secretariat its agreement to the extension of the contract of the Applicant to 26 December 1983.

10. On 6 December 1982 the Applicant was recommended for promotion to the Senior Officer (P-5) level by the Assistant Secretary-General, Programme Planning and Co-ordination Office.

11. On 8 December 1982 a Personnel Officer in the Office of Personnel Services, acting in the name of the Respondent issued a letter of appointment to the Applicant. This letter of appointment was signed by the Applicant on 9 December 1982. It provided for an extension of his appointment for one year, to take effect on 27 December 1982, specifying under item 5: "On secondment from the Government of the Union of Soviet Socialist Republics."

12. On 8 February 1983 the Assistant Secretary-General, Programme Planning and Co-ordination Office, expressed his belief to the Applicant that it would be in the interests of the Office to have his services continue, and requested him to indicate at his earliest convenience whether he would be in a position to accept such an extension.

13. On 9 February 1983 the Applicant applied for asylum in the United States of America.

14. On 10 February 1983 the Applicant advised the Permanent Representative of the USSR to the United Nations that he was thereby resigning from his position with the Ministry of Foreign Affairs of the USSR and from all other official positions that he held and that he had made an application to the Government of the United States of America requesting asylum.

15. On 10 February 1983 the Applicant advised the Respondent that he intended to acquire permanent residence status in the United States of America, that he had made an application to the Government of the United States requesting asylum, that he had resigned from all official positions he held in the Government of the USSR; he also enclosed a copy of his resignation and assured the Respondent of his continued dedication and devotion to the United Nations and of his wish and intention to continue to perform all his obligations under his employment contract.

16. On 28 February 1983 the Director, Division of Personnel Administration, Office of Personnel Services, informed Applicant of the Respondent's decision to place him on special leave with full pay, effective 1 March 1983 and until further notice, in accordance with Staff Rule 105.2 *(a)*, and informed him that any other decision pertaining to his case would be taken by the Respondent at a later stage.

17. On 1 March 1983 the Applicant requested the Director, Divison of Personnel Administration, to advise him of the precise reasons as to why he had been placed on special leave as well as the effect of the leave on: his use of United Nations facilities; his continuation as a member of the Appointment and Promotion Committee and as Vice-Chairman of its Third Working Group; the promotion which was in process for him; and his career development at the United Nations including a possible extension of his appointment, and indicated that he would look forward to receiving written answers to his questions at the Director's convenience, but that in the meanwhile he would remain actively at his post.

18. On 11 March 1983 the Director, Division of Personnel Administration, Office of Personnel Services, advised the Applicant that in the exercise of his authority and responsibility as the chief administrative officer of the Organiza-

tion, the Respondent had determined that, at that juncture, and pending further review, it was in the best interests of the Organization that he not enter the premises of the United Nations, requested him to comply with this decision of the Respondent with immediate effect and until further notice, informed him that he would be advised in due course of any modification to this instruction, assured him that the Appointment and Promotion Board would give his promotion due consideration at an appropriate time in the course of its proceedings, indicated that consideration of the possible extension of his appointment at that time would be premature, and, finally, advised him that he might also wish to refer to Staff Rule 104.12 *(b)* (relating to fixed-term appointments and quoted in para. 66 below) which was applicable to this issue.

19. On 17 March 1983 the Applicant requested the Respondent to review the decision to place him on special leave, renewed his request for a written explanation as to why it was considered in the best interest of the Organization that he not enter the premises of the United Nations and advised that, on the advice of his counsel and under protest, he would comply with the Respondent's decision.

20. The Application to the Tribunal indicates that the Applicant continued to work on his assignments off the premises and, in due course, when the Programme Planning and Co-ordination Office was relocated in the Summer of 1983 from the Secretariat building to rented accommodation across the street, he was permitted officially to rejoin his section and to resume his duties.

21. On 29 June 1983 the Applicant was promoted to the Senior Officer (P-5) level with effect from 1 April 1983.

22. On 25 October 1983 the Applicant reminded the Assistant Secretary-General, Programme Planning and Co-ordination Office, that his fixed-term contract with the United Nations was due to expire on 26 December 1983, recalled their discussions on the prospects of his continuing employment in the Office, recited the elements which could contribute to his potential usefulness to the Organization and, finally, expressed his hope that the Assistant Secretary-General would find it 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.

23. On 8 November 1983 the Assistant Secretary-General, Programme Planning and Co-ordination Office, acknowledged this reminder in connection with the expiration of Applicant's contract, commended his contribution to the work of that Office and also to the offices in which he had served before and indicated that, from his perspective as head of that Office, he found no difficulty in recommending a further extension of Applicant's contract and intended to do so at an appropriate time.

24. On 23 November 1983 the Deputy Chief, Staff Services, Office of Personnel Services, upon instruction by the Office of the Secretary-General, informed the Applicant that his fixed-term appointment would not be extended beyond its expiration date, i.e., 26 December 1983.

25. On 29 November 1983 the Applicant recalled to the Assistant Secretary-General for Personnel Services the information that the Applicant had recently received from the head of his Office and cited paragraph 5 of section IV of General Assembly resolution 37/126 which provides the 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. The Applicant requested a three-month extension of his contract in order to allow the Panel on Discrimination and Other Grievances to look into his case and advised that this request was without prejudice to his claim to a longer-term appointment in the Organization.

26. On 2 December 1983 the Assistant Secretary-General, Programme Planning and Co-ordination Office, recalled to the Assistant Secretary-General for Personnel Services that the former had recently assured the Applicant that it was intended to recommend a further extension of his contract, reiterated the view that it was in the best interest of his Office to continue to have the services of the Applicant and strongly recommended that his appointment be extended.

27. 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.

28. On 21 December 1983 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).

29. On 26 December 1983 the Applicant's fixed-term appointment expired in accordance with its terms and he was duly separated from service with the United Nations.

B. The Previous Proceedings

(i) *The Administrative Tribunal: Case No. 322*

30. On 6 January 1984 the Applicant filed an Application with the Administrative Tribunal, requesting the Tribunal:

> "A. To consider his case at the Spring 1984 session of the Tribunal.
>
> B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to *(sic)* the Applicant's United Nations service.
>
> C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> D. To adjudge and declare that he had an expectancy of further employment.
>
> E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment.
>
> F. To order that his name be forwarded to an appropriate body to give him such reasonable consideration for a career appointment.
>
> G. To order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.
>
> H. To order reimbursement of expenses, if any, reasonably incurred by

the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings." (Doc. No. 19, sec. II.)

31. On 14 March 1984 the Respondent filed his Answer in which he made the following observations on the Applicant's pleas:

"*(a)* with respect to Applicant's plea *A*, Respondent joins in Applicant's request that the Tribunal consider the case at its next ordinary session (May 1984);

(b) with respect to plea *B*, Respondent draws to the Tribunal's attention the fact that there was no administrative decision '*not to consider* an extension to the Applicant's United Nations service (emphasis supplied)';

(c) with respect to plea *C*, Respondent does not dispute that it was within the Secretary-General's authority and discretion to re-appoint the Applicant after the expiry of his contract;

(d) with respect to plea *D*, Respondent requests the Tribunal to conclude that Applicant had no legal expectancy of further employment;

(e) with respect to plea *E*, Respondent requests the Tribunal to conclude that Applicant had no 'right' to *favourable* consideration for a career appointment and did, in fact, receive such consideration as was *reasonable*;

(f) with respect to plea *F*, Respondent draws the Tribunal's attention to paragraphs 16, 18 and 24 [of doc. No. 21] and requests the Tribunal to conclude that, the Secretary-General having considered the case and having decided that further appointment was not in the Organization's interest, no further procedure was requisite and there was moreover in those circumstances no appropriate 'body' to consider him for a career appointment;

(g) with respect to plea *G*, Respondent submits that Applicant had no entitlement to employment with the United Nations after expiry of his contract and, hence, no entitlement to salary thereafter; and

(h) with respect to plea *H*, Respondent recalls the Tribunal's policy on costs as set forth in its general statement of 14 December 1950, and notes that Applicant was represented by counsel chosen from the panel of counsel comprised of United Nations staff members, and that secretarial services were provided by the Organization for purposes of the Tribunal's proceedings." (Doc. No. 21, para. 27.)

32. On 17 April 1984 the Applicant filed Written Observations on the Respondent's Answer (doc. No. 22).

33. As no request for oral proceedings had been made and as the presiding member did not decide that any should be held (Rules of the Administrative Tribunal of the United Nations: doc. No. 16, Art. 15) the case was decided on the written pleadings.

34. On 8 June 1984 the Administrative Tribunal, having deliberated from 11 May 1984, issued its Judgement No. 333 (doc. No. 9), to which the present proceeding relates.

35. The Tribunal noted the principal contentions of the parties, as follows:

"Whereas the Applicant's principal contentions are:

1. No legal impediment existed at the time of the contested decision, or exists now, to the continuation of the Applicant's service with the United Nations:

(a) the applicant was not in any legally cognizable sense on secondment;

(b) after 10 February 1983, the Respondent had neither the obligation nor the right to solicit or receive instructions as to the Applicant from any authority extraneous to the Organization;
(c) no legal constraint existed, after 26 December 1983, on the Applicant's further appointment to the United Nations.

2. The Applicant had a legally and morally justifiable expectancy of continued United Nations employment, and a right to reasonable consideration for a career appointment.
3. The Applicant was denied the reasonable consideration for further employment to which he had a right.

Whereas the Respondent's principal contentions are:

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

(a) the fixed-term contract excludes any expectancy;
(b) no circumstances outside the scope of the contract gave rise to legally cognizable expectations:

(i) the circumstances relating to secondment could not have created an expectancy. The separation from government service during period of United Nations appointment did not result in new terms of contract with the United Nations;
(ii) the commendations by supervisors did not commit the Secretary-General to extend the appointment. The pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled;
(iii) General Assembly resolution 37/126, IV, paragraph 5, did not effect a change in procedure on appointment.

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

(a) in reaching his decision, the Secretary-General took into account all the circumstances in the case;
(b) in taking his decision in the case, the Secretary-General acted in the interest of the Organization." (Doc. No. 9, pp. 49 to 50, *supra.*)

36. The Tribunal then identified the legal issues in the case, as follows:

"*(a)* whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;
(b) whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads:

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

has been carried out;
(c) the consequences of the application of United Nations rules and regulations in relation to the United Nations law on resident status and citizenship." (Doc. No. 9, p. 50, *supra*, para. I.)

37. On issue *(a)*, the Tribunal unanimously concluded that

> "all three parties (the Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being on secondment from the USSR" (doc. No. 9, p. 51, *supra*, para. III and dissenting opinion, p. 56, *supra*, para. 1)

and that

> "it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment" (doc. No. 9, p. 51, *supra*, para. VI and p. 56, *supra*, dissenting opinion, para. 1).

38. On issue *(b)*, the Tribunal majority concluded that "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" (doc. No. 9, p. 54, *supra*, para. XVI). The Statement by Mr. Ustor noted that "the Applicant was in [his] view not eligible for consideration for a career appointment" (doc. No. 9, p. 56, *supra*, Statement by Mr. Ustor, third para.). Although Mr. Kean agreed with the rejection of the Applicant's claim in so far as it was based upon expectancy of a further appointment, he considered that "the Tribunal should accept the Applicant's plea that he was illegally denied his right to reasonable consideration for a career appointment" (doc. No. 9, p. 59, *supra*, dissenting opinion, para. 12).

39. On issue *(c)*, the Tribunal concluded that "there was apparently no immediate problem" (doc. No. 9, p. 52, *supra*, para. XII).

(ii) *The Committee on Applications for Review of Administrative Tribunal Judgements: Application No. 32*

40. On 23 July 1984 the Committee on Applications for Review of Administrative Tribunal Judgements (the Committee) received an application from the Applicant (doc. No. 1), in accordance with Article 11, paragraph 1, of the Statute of the Administrative Tribunal (doc. No. 16). The Applicant alleged that the Tribunal had exceeded its jurisdiction and competence, that the Tribunal had failed to exercise jurisdiction vested in it; that the Judgement of the Tribunal had erred on questions of law relating to provisions of the United Nations Charter and that the Tribunal had committed fundamental errors of procedure which occasioned a failure of justice.

41. On 10 August 1984 the Respondent filed his comments (doc. No. 4) on the Application. The Respondent submitted that the Tribunal had properly exercised its jurisdiction and competence under Article 2 of its Statute when it heard and passed judgement on the Application (to the Tribunal) in the manner which is reflected in its Judgement in the case, that the Tribunal had correctly interpreted applicable provisions of the Charter in favour of the Respondent who properly discharged his responsibilities as chief administrative officer of the Organization and that the Tribunal had not committed an error, let alone a fundamental error of procedure which could have occasioned a failure of justice.

42. On 21 August 1984 the Committee was convened to consider the Application. The Committee met for this purpose in closed meetings on 21, 22 and 23 August 1984 (doc. No. 7, para. 7) and in a public meeting on 28 August (doc. No. 8). In compliance with the provisions of paragraph 1 of Article IX of its

rules of procedure (doc. No. 11), the Committee took a decision in respect of each of the four grounds invoked by the Applicant. Each decision was taken by a roll-call vote and the results of the voting were as follows:

"(1) Is there a substantial basis for the application on the ground that the Tribunal has exceeded its jurisdiction? There were no votes in favour; 25 members voted against: Algeria, Belgium, Bhutan, Burundi, Canada, Colombia, Czechoslovakia, France, German Democratic Republic, Guyana, Japan, Lebanon, Liberia, Libyan Arab Jamahiriya, Nepal, Norway, Panama, Sierra Leone, Singapore, Sudan, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United States and Venezuela; three members abstained: Pakistan, Swaziland and Thailand. The Committee thus concluded that there was no substantial basis for the application on the ground just stated.

(2) Is there a substantial basis for the Application on the ground that the Tribunal has failed to exercise jurisdiction vested in it? Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, the United Kingdom, the United States and Venezuela; nine members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, the German Democratic Republic, the Libyan Arab Jamahiriya, Nepal, Tunisia and the USSR; three members of the Committee abstained: Lebanon, Pakistan and Thailand. There being 16 votes in favour, 9 against and 3 abstentions, the Committee concluded that there was a substantial basis for the Application on the second ground.

(3) Is there a substantial basis for the Application on the ground that the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations? Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, the United Kingdom, the United States and Venezuela; nine members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, the German Democratic Republic, the Libyan Arab Jamahiriya, Nepal, Tunisia and the USSR; three members of the Committee abstained: Lebanon, Pakistan and Thailand. There being 16 votes in favour, 9 against and 3 abstentions, the Committee concluded that there was a substantial basis for the Application on the third ground.

(4) Is there a substantial basis for the Application on the ground that the Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice? Eleven members of the Committee voted in favour: Belgium, Canada, Colombia, France, Japan, Liberia, Norway, Panama, the United Kingdom, the United States and Venezuela; 13 members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Guyana, Libyan Arab Jamahiriya, Nepal, Sierra Leone, Singapore, Sudan, Tunisia and the USSR; four members of the Committee abstained: Lebanon, Pakistan, Swaziland and Thailand. There being 11 votes in favour, 13 against, with 4 abstentions, the Committee concluded that there was no substantial basis for the Application on the ground just stated." (Doc. No. 8, pp. 33 to 35, *supra*.)

43. At the conclusion of its deliberations on the Application, the Committee adopted the following decision:

"The Committee on Applications for Review of Administrative Tribunal Judgements at the 4th meeting of its twenty-fourth session on 23 August 1984 decided that there was a substantial basis, within the meaning of Article 11 of the Statute of the Administrative Tribunal, for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.

Accordingly, the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions:

(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?" (Doc. No. 6.)

Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, United Kingdom, United States and Venezuela; nine members voted against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia and USSR; one member abstained: Pakistan (Doc. No. 8, p. 35, *supra*). There being 16 votes in favour, 9 against and 1 abstention, the decision was adopted. After the decision the following members of the Committee made statements: Bhutan, France, USSR, United States and Czechoslovakia (Doc. No. 8, pp. 35-42, *supra*)[1].

II. THE QUESTIONS ADDRESSED TO THE COURT BY THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

1. Question: 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?

A. Introduction

44. In order to ascertain whether the Tribunal had failed to exercise its jurisdiction it is first necessary to define that jurisdiction and then to examine the actual decision on the basis of the facts and pleas presented to it.

[1] Although Panama made a Statement (doc. No. 7, para. 15), it was not recorded in the Verbatim Record (doc. No. 8) as the Statement related only to a technical correction relating to the announcement of the voting record.

(i) *Jurisdiction of the Administrative Tribunal*

45. Paragraph 1 of Article 2 of the Statute of the Administrative Tribunal (doc. No. 16) provides as follows:

> "1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of the alleged non-observance, including the staff pension regulations."

46. Paragraph 1 of Article 9 of the Statute provides, *inter alia*, as follows:

> "1. If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; . . ."

(ii) *The Court's Approach to Allegations of Failure to Exercise Jurisdiction*

47. In its Advisory Opinion of 12 July 1973, *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166) (hereinafter the "Fasla Opinion"), the Court declared that:

> "the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement. The Court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. 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." (*I.C.J. Reports 1973*, pp. 187-188, para. 47.)

48. The Court cited this statement in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 325 at p. 356, para. 58) (hereinafter the "Mortished Opinion"). Furthermore, the Court gave, in its Fasla Opinion, detailed guidance in evaluating a challenge *that the Tribunal failed to exercise jurisdiction vested in it:*

> "51. In the Court's view, therefore, 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. 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. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue. No doubt, there may be borderline cases where it may be difficult to assess whether the Tribunal has in any true sense con-

sidered and determined the exercise of relevant jurisdictional powers. But that does not alter the duty of the Court to 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." (*I.C.J. Reports 1973*, pp. 189-190, para. 51.)

The Court cautioned, however, that:

"The test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned *eo nomine* in the substantive part of a judgement: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based, and drew its own conclusions therefrom as to the obligations violated by the respondent and as to the compensation to be awarded therefor." (*I.C.J. Reports 1973*, p. 193, para. 56.)

49. In this context it ought to be noted that the jurisdiction of the Tribunal is limited to determining whether contracts or terms of appointment have been observed. The Tribunal exercises its jurisdiction if it examines the substance of an Applicant's allegations or pleas and determines whether those allegations constitute "non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members" (see para. 45 above).

B. The Issue in the Present Case

50. The facts of this case, including the Pleas and arguments submitted to the Tribunal by the Applicant together with those of the Respondent, are set out in Part I of this Written Statement (see paras. 1 to 35 above). The real issue between the parties—and that upon which the Tribunal adjudicated—was whether the Applicant's rights were violated by the decision of the Respondent not to grant him a further appointment after 26 December 1983, be it a fixed-term appointment on secondment, a fixed-term appointment or a career appointment (the essential characteristics of these appointments are described in the Appendix).

(i) *The Application to the Tribunal and the Tribunal's Judgement*

51. The Tribunal commenced its Judgement by setting out the Applicant's Pleas, including the Plea directly relevant to the first question addressed by the Committee to the Court for an advisory opinion, i.e., Applicant's Plea C, "to adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983" (Judgement, p. 43, *supra*; doc. No. 9).

52. The Tribunal summarized the Applicant's principal contentions in support of this plea as follows:

"1. No legal impediment existed at the time of the contested decision, or exists now, to the continuation of the Applicant's service with the United Nations:

(a) the Applicant was not in any legally cognizable sense on secondment;
(b) after 10 February 1983, the Respondent had neither the obligation nor the right to solicit or receive instructions as to the Applicant from any authority extraneous to the Organization;

(c) no legal constraint existed, after 26 December 1983, on the Applicant's further appointment to the United Nations." (Judgement, p. 49, *supra*; doc. No. 9.)

53. The Tribunal then assimilated the Applicant's Plea and his contentions in support thereof to its analysis of what it had identified as the legal issues involved in that Plea and supporting contentions, namely:

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

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

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

has been carried out." (Judgement, p. 50, *supra*, para. I; doc. No. 9.)

54. Pursuant to Article 2 (1) of its Statute, it was not incumbent upon the Tribunal to give an advisory opinion on the Plea, but rather to examine the Plea to determine the legal issues it contained that were relevant to the Tribunal's jurisdiction. The Tribunal did this by identifying that the Plea entailed an allegation that the Applicant had a legal expectancy for further employment and involved determining whether the Applicant had been given every reasonable consideration for a career appointment pursuant to paragraph 5 of section IV of resolution 37/126 (Judgement, p. 50, *supra*, para. I; doc. No. 9). The Tribunal carried out this function by examining and adjudicating upon those issues and concluding that the Applicant's terms of employment were not violated by the failure to offer him a further appointment.

(ii) *The Application to the Committee and Its Outcome*

55. The Application to the Committee argued that the Tribunal failed to exercise the jurisdiction vested in it by its Statute by allegedly failing to respond to the Plea to determine whether a legal impediment existed to his further employment with the United Nations after the expiration of his appointment on 26 December 1983 (Application to Committee, sec. II; doc. No. 1).

56. The Committee requested the Court to advise whether the Tribunal failed to exercise the jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment of the Applicant in the United Nations after the expiry of his contract on 26 December 1983 (Decision of Committee; doc. No. 6). Most statements made at the public meeting of the Committee were against submission of the question to the Court (doc. No. 8) and therefore are not directly relevant to interpretation of that question.

C. Response to Question Posed by the Committee

57. This Written Statement will submit: first, that the question to which the Committee referred was not in issue between the parties; second, that the Tribunal does not have jurisdiction to answer or advise on abstract questions; and third, that an answer, in terms, to the question was not required in logic or in law.

(i) *Committee's Question not at Issue between Parties*

58. At the outset, it should be noted that the question whether a legal impediment existed to the further employment of the Applicant after the expiry of his contract of employment on 26 December 1983 (Decision of Committee; doc. No. 6) was, in reality, not at issue between the parties. This is so 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" (Respondent's Answer to Tribunal, para. 27 *(c)*; doc. No. 21). Consequently, there appears to have been no call for the Tribunal to have dealt with this question explicitly.

(ii) *The Tribunal Is not Obligated to Answer Abstract Questions*

59. Consistent with the limited jurisdiction of the Tribunal (see paras. 45 to 46 above) Article 9 provides that the Tribunal may only rescind the contested decision or order specific performance of an obligation and, at the same time, must fix damages in lieu of further action if the Secretary-General decides to maintain the decision in the interests of the Organization. It follows that the Tribunal does not have the power to give advisory opinions and so does not have to—and indeed cannot—respond to all questions posed to it by Applicants but must limit itself to pass judgement upon allegations (or pleas) of non-observance of contracts and terms of appointment. The Tribunal must, therefore, analyse any pleas submitted to it to determine whether those pleas involve an allegation of non-observance and, if so, then pass judgement on those allegations.

60. In other words, the Tribunal cannot simply answer in terms questions and pleas submitted to it but must determine whether an issue exists upon which it is competent to adjudicate pursuant to Article 2 of its Statute. This is the reason why the Tribunal opened its Judgement by associating the relevant arguments with the legal issues raised by Mr. Yakimetz's Plea that it "adjudge and declare" that no legal impediment existed to his further employment by the United Nations (Judgement, p. 50, *supra*, para. I; doc. No. 9) and then adjudicating upon the Application on the basis of those legal issues.

(iii) *Question Was not Relevant to the Tribunal's Adjudication*

61. A determination by the Tribunal on the existence or otherwise of a legal impediment to the Applicant's further employment would be necessary *if* he had a legal expectancy for further employment and *if* he had not been given "every reasonable consideration" for a career appointment pursuant to paragraph 5 of section IV of resolution 37/126. If those premises were true the legal rights of the Applicant would have been violated and he would have been entitled to the remedies provided in Article 9 of the Tribunal's Statute, unless the Tribunal determined that there was a legal impediment to his further employment. However, as discussed in turn below, the Tribunal found that neither of these pre-conditions existed that would have required an answer in terms to the question posed by the Applicant. Since neither of these pre-conditions existed it follows logically that no answer is required.

(a) *The Tribunal found no expectancy for further employment*

62. The Tribunal rejected the contention of the Applicant that he was not on secondment by finding that "it can be concluded that all three parties (the

Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being on secondment from the Government of the USSR" (Judgement, p. 51, *supra*, para. III; see also p. 51, *supra*, para. VII; doc. No. 9).

63. The Tribunal then considered whether the Applicant had a legal expectancy to a renewal of that fixed-term appointment *on secondment* and concluded that such expectancy did not exist:

> "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 accords with the analysis of secondment in the Tribunal's Judgement No. 92 *(Higgins)* as requiring the agreement of the 'three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned' (para. VI) and with the decision of the Tribunal in paragraph V of Judgement No. 192 *(Levcik)* that 'any subsequent change in the terms of the secondment initially agreed on, for example, its extension, obviously requires the agreement of the three parties involved'." (Judgement, p. 51, *supra*, para. IV; doc. No. 9.)

64. The Tribunal thereupon examined the Applicant's contentions that his resignation from the service of the Government of the USSR on 10 February 1983 created a new contractual relationship between himself and the United Nations, which relationship was accepted by the latter (Judgement, p. 52, *supra*, para. VIII; doc. No. 9). After reviewing the circumstances surrounding his resignation (Judgement, pp. 52 to 53, *supra*, paras. X to XII; doc. No. 9), the Tribunal reached the following findings of fact:

> ". . . the Tribunal concludes that during the period of his service with the United Nations the Applicant was under secondment which, as already stated, could not be modified except with the consent of all three parties and that no tacit agreement existed between the Applicant and the Respondent between 10 February 1983 and 26 December 1983 changing the character of their relationship" (Judgement, p. 53, *supra*, para. XIII; doc. No. 9).

65. Having reached the conclusion that extension of the fixed-term appointment on secondment was not possible without the consent of all three parties —which conclusion is not disputed by the Applicant—the Tribunal examined whether the refusal to grant the Applicant a further appointment constituted a non-observance of his contract of employment or violated the terms of his appointment.

66. The Applicant's final fixed-term appointment provided, *inter alia*, as follows:

> "You are hereby offered a FIXED-TERM APPOINTMENT in the Secretariat of the United Nations, in accordance with the terms and conditions specified below, and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules . . .
>
> . . . . . .
>
> 3. *Tenure of appointment*
>
> This temporary appointment is for a fixed-term of one year from the

effective date of appointment shown above. It therefore expires on the twenty-sixth day of December 1983.

. . . The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations." (Letter of Appointment; doc. No. 20, Annex 19.)

67. This language is based on Staff Rule 104.12 which provides, in relevant parts, as follows:

"Rule 104.12

TEMPORARY APPOINTMENTS

On recruitment staff members may be granted one of the following types of temporary appointments: probationary appointment, fixed-term appointment, or indefinite appointment.

(a) Probationary appointment

. . . . . .

(b) Fixed-term appointment

The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including persons temporarily seconded by national Governments or institutions for service with the United Nations. The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.

(c) Indefinite appointments

. . ." (See UN Staff Rules, doc. No. 18.)

68. The appointment also specified, under Special Conditions, that the appointment was "On secondment from the Government of the Union of Soviet Socialist Republics" (Letter of Appointment; doc. No. 20, Annex 19).

69. The Applicant's contract of employment thus clearly stated that no legal expectancy to further employment existed. However, the Tribunal's jurisprudence recognizes that despite such unequivocal contractual terms, circumstances may arise which create a legally enforceable expectancy to further employment (Judgement, p. 51, *supra*, para. VI (doc. No. 9) citing Judgement No. 142 *(Bhattacharyya)* (doc. No. 23) and Judgement No. 205 *(El-Naggar)* (doc. No. 24)).

70. The Tribunal examined all the circumstances of the case and concluded that, in the present case, no circumstances existed to create a legal expectancy of future employment:

"Applying the principles followed in Judgements Nos. 142 *(Bhattacharyya)* and 205 *(El-Naggar)*, it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment." (Judgement, p. 51, *supra*, para. VI; doc. No. 9.)

71. The separate statement of Mr. Ustor, which is not part of the majority Judgement, did not dispute the finding that, in accordance with the Tribunal's jurisprudence on legal expectancy, the Applicant did not have a legal expectancy

to a further appointment. The statement, however, noted that Applicant was not in any event entitled to a career appointment because of the special nature of a fixed-term appointment on secondment (Judgement; p. 56, *supra*, statement by Mr. Ustor; doc. No. 9).

72. Mr. Kean, although delivering a dissenting opinion, agreed with the majority that the Applicant was on secondment during his last appointment and that renewal of a fixed-term appointment *on secondment* would require consent of all parties. Mr. Kean also agreed with the majority that there was no expectancy of further employment (Judgement, p. 56, *supra*, dissenting opinion of Mr. Arnold Kean, para. 1; doc. No. 9). Mr. Kean differed with the majority on whether the Applicant received "every reasonable consideration" for a further appointment (see paras. 78 to 79 below).

73. The Tribunal concluded that the Applicant had no enforceable legal right to further employment in the United Nations. It necessarily follows that the failure by the Respondent to offer him further employment did not violate his terms of appointment and that, therefore, the question of a possible legal impediment to such appointment did not arise.

(b) *The Tribunal found that every reasonable consideration was given the Applicant for a career appointment*

74. The plain terms of the Applicant's appointment were also affected by paragraph 5 of section IV of General Assembly resolution 37/126 (doc. No. 12) which provides 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". The Tribunal held that the Applicant was entitled to the benefit of that resolution and concluded that this consideration had, *in fact*, been given (Judgement, pp. 53 to 54, *supra*, paras. XIV to XVIII; doc. No. 9).

75. The Tribunal then examined the manner in which the Respondent exercised his discretion and found as a fact that:

> ". . . there has been no allegation, and far less any evidence, that the Respondent sought instructions from any member States, or that he had in any manner let the wishes of a member State prevail over the interests of the United Nations and thus disregarded his duties under Article 100, paragraph 1, of the Charter. Indeed, he states all throughout that the measures he took were in the interests of the United Nations taking into account all the facts, 'together with the representations to diverse effect by the permanent missions of two member States'." (Judgement, p. 55, *supra*, para. XIX; doc. No. 9.)

76. The Tribunal concluded by expressing 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 and he is therefore not entitled to any monetary relief." (Judgement, p. 55, *supra*, para. XX; doc. No. 9.)

77. Mr. Ustor implicitly agreed with the factual conclusion of the majority that "every reasonable consideration" for a career appointment mandated by

resolution 37/126 had been given to the Applicant. Mr. Ustor was, however, of the opinion that such consideration was not required by resolution 37/126, which resolution he considered inapplicable to fixed-term appointments on secondment (Judgement, p. 56, *supra*, separate statement; doc. No. 9).

78. Mr. Kean agreed that paragraph 5 of section IV of resolution 37/126 applied to the Applicant, who was thus entitled to "every reasonable consideration" for a career appointment (Judgement, p. 56, *supra*, dissenting opinion of Mr. Kean, paras. 2 and 3). Mr. Kean, however, differed from the majority in that he interpreted the letter of 21 December 1983 from the Assistant Secretary-General for Personnel Services to the Applicant (doc. No. 20, Annex 40) as establishing that the Secretary-General was of the opinion that the Applicant was not entitled to be considered for a career appointment because he had been on secondment (Judgement, p. 57, *supra*, paras. 4 to 7; doc. No. 9).

79. Having found, as a fact, that the Applicant had been accorded "every reasonable consideration" for a career appointment, albeit accompanied by an expression of dissatisfaction that appropriate written records of such consideration were not kept, the Tribunal therefore was not obliged to go on to speculate on whether the Respondent had the legal power to appoint the Applicant, had Respondent been so inclined to do so.

D. Conclusions

80. First, there was no call for the Tribunal to respond in terms to the question whether a legal impediment existed to the further employment of the Applicant after 26 December 1983 since this question was not at issue between the parties (see para. 58 above).

81. Second, the question to which the Committee referred was an abstract one, to which the Tribunal was not obliged to reply explicitly, as long as it adjudicated upon Applicant's claim that the terms of his appointment or his contract had been violated by the failure to re-appoint him (see paras. 59-60 above).

82. An answer to the question would have been required only if the Tribunal held that there was a legal expectancy for further employment but that due consideration had not been given thereto. As the Tribunal found as a matter of fact that Applicant had no such expectancy it was not necessary, in order to judge the claim submitted to it, to determine whether the Respondent could have declined to appoint Applicant without violating his rights on the basis that a legal impediment to any further employment existed (see paras. 61 to 73 above).

83. Furthermore, the Tribunal also found as a matter of fact that Applicant had received "every reasonable consideration" for a career appointment pursuant to resolution 37/126. This finding too made irrelevant an enquiry into whether a failure to give such consideration could have been justified on the basis that a legal impediment to future employment existed (see paras. 74 to 79 above).

84. Thus, in making those determinations the Tribunal exercised the jurisdiction vested in it by Article 2 of its Statute to adjudicate upon allegations of non-observance of contracts or terms of employment. The question of whether that determination might be contested is immaterial to the issue of exercise of jurisdiction.

2. Question: 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?

A. Introduction

85. The question presented to the Court by the Committee does not specify the provisions of the Charter upon which the Tribunal may have erred. The Application submitted by the Applicant to the Committee (doc. No. 1), however, referred to five specific provisions in detail and mentioned a sixth provision. Therefore, this Written Statement will consider the Tribunal's Judgement in relation to each of those provisions, after first duly taking into account the approach of this Court in relation to errors on questions of law relating to provisions of the Charter and, secondly, after briefly reviewing the Judgement in relation to the Charter as a whole.

(i) *The Court's Approach to Questions concerning Error of Law relating to Provisions of the Charter*

86. In its *Mortished* Opinion the Court set forth a definition of its role in examining this ground of objection by observing that it must determine

> "the scope of the enquiry to be conducted by the Court in order that it may decide whether the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations" (*I.C.J. Reports 1982*, p. 357, para. 62).

The Court then defined this task as follows:

> "64. In any event, the Court clearly could not decide whether a judgement about the interpretation of Staff Regulations or Staff Rules has erred on a question of law relating to the provisions of the Charter, without looking at that judgement to see what the Tribunal did decide. While to that extent the Court has therefore to examine the Tribunal's decision on the merits, it is not the business of the Court, after making that examination, itself to get involved in the question of the proper interpretation of the Staff Regulations and Staff Rules, as such, further than is strictly necessary in order to judge whether the interpretation adopted by the Tribunal is in contradiction with the requirements of the provisions of the Charter of the United Nations.
>
> 65. This conclusion, dictated by the considerations of principle noted above, is also in accord with the actual words of the ground of objection mentioned in Article 11 of the Tribunal's Statute which speaks, not of 'error of law' but of error 'on a question of law relating to the provisions of the Charter of the United Nations', and these latter words cannot be other than words of qualification. It is true that the regulations and rules applied by the Administrative Tribunal must derive their validity from the provisions of the Charter. Indeed, all valid regulations and rules adopted by a United Nations organ cannot be other than based on the provisions of the Charter. It does not follow, however, that every question of the interpretation or application of those regulations and rules is a question of law relating to the provisions of the Charter. Nor indeed would the words of Article 101 of the Charter ordinarily be of any assistance or pertinence in the task of interpreting a rule or regulation. Accordingly, it would be

quite mistaken to suppose that, because the law applied by the Tribunal, or indeed the law applied by any organ of the United Nations, derives its ultimate validity from the Charter, the ground of Article 11 now under examination means that an objection to any interpretation by the Tribunal of staff rules and regulations is a matter for an advisory opinion of the Court." (*I.C.J. Reports 1982*, p. 358, paras. 64-65.)

(ii) *Relationship between the Judgement and the Charter*

87. The Pleas submitted by the Applicant to the Tribunal do not refer explicitly to provisions of the Charter (para. 30 above). The only ones that could conceivably involve any questions of law relating to provisions of the Charter are Pleas B, C and E, which provide as follows:

"B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to the Applicant's United Nations service.

C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.

E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment." (Judgement, p. 43, *supra*, doc. No. 9.)

88. The Tribunal, after determining the legal issues raised by the Pleas, concluded that the non-renewal of the Applicant's appointment and the failure to convert his appointment to some other type of appointment did not violate his rights on the following grounds:

(a) the Applicant's fixed-term appointment on secondment, which the Tribunal found expired on 26 December 1983, would have required, as a matter of law, consent of all three parties to it for its renewal (Judgement, p. 53, *supra*, para. XIII; doc. No. 9);

(b) the Applicant did not have an expectancy of renewal because it did not appear that the Applicant had produced evidence of circumstances sufficient to establish that he had such an expectancy following the end of his fixed-term appointment (Judgement, p. 51, *supra*, para. VI; doc. No. 9);

(c) the Applicant received "every reasonable consideration" for a career appointment to which he was entitled under paragraph 5 of section IV of General Assembly resolution 37/126 during the process whereby the Respondent decided not to grant him a career appointment (Judgement, pp. 53 to 55, *supra*, paras. XIV to XVIII; doc. No. 9).

89. It is submitted that these conclusions of the Tribunal, in support of its decision, do not explicitly or even implicitly relate to questions of law involving provisions of the Charter.

(iii) *The Application to the Committee and Its Outcome*

90. The Application to the Committee alleged that the Tribunal's Judgement conflicts with the following provisions of the United Nations Charter: Article 101, paragraph 1; Article 100, paragraph 1; Article 101, paragraph 3; Article 8; and Article 2, paragraph 1, together with Article 100, paragraph 2 (Application to Committee, paras. 17 to 33; doc. No. 1).

91. The Committee requested the Court to advise whether the Tribunal erred

on questions of law relating to provisions of the Charter (doc. No. 6). Most statements made at the public meeting of the Committee were against submission of the question to the Court (doc. No. 8) and therefore are not directly relevant to interpretation of the question.

B. The Judgement in Relation to the Charter Provisions Cited in the Application to the Committee

(i) *Article 101, Paragraph 1, of the United Nations Charter*

92. Article 101, paragraph 1, of the Charter provides as follows: "1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

93. The Application to the Committee argued that the Tribunal's Judgement was "inconsistent" with this provision of the Charter because the Tribunal did not find that the Secretary-General had disregarded the General Assembly's sovereign role because he had failed to provide administrative instructions to create machinery to implement paragraph 5 of section IV of resolution 37/126. The Application also argued that the Judgement erred by concluding, without supporting evidence, that the Respondent personally considered the Applicant's case (see doc. No. 1, paras. 17 to 19).

94. This argument is misconceived because it suggests, incorrectly, that the Respondent explicitly or implicitly asserted that he could disregard resolution 37/126 and also that the Tribunal's Judgement, in some way, upheld such a position. In fact, the Respondent asserted that he had complied with the resolution and the Tribunal determined that he did so.

95. The Respondent does not dispute that he has a responsibility to implement General Assembly resolutions (see *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954*, p. 60). However, as was pointed out by this Court in the *Mortished* Opinion, the mere fact that a resolution "decides" a particular point of personnel policy does not give to any individual staff member the right to have the resolution applied by way of any particular machinery or in any particular way (*Mortished* Opinion, *I.C.J. Reports 1982*, pp. 359-360, paras. 66-68). The Respondent is, of course, obliged to apply the resolution in substance but in implementing it, until he provides otherwise, is entitled to adopt informal procedures rather than use the formal advisory machinery established by the Staff Rules such as the Appointment and Promotion Board (see para. 28 above and see Staff Rule 104.14; doc. No. 18). In the present case, the Tribunal found, as a fact, that the Respondent had considered the Applicant for a career appointment under resolution 37/126 and consequently not only had the Applicant's rights been respected but the Respondent had respected the sovereign rule-making power of the General Assembly.

96. Indeed, resolution 37/126 did not affect the Respondent's discretionary power of appointment but merely obliged him to give "every reasonable consideration" for a career appointment to staff on fixed-term appointments with more than five years of continuous good service. In other words, the Respondent must exercise his discretion as chief administrative officer of the Organization and give "every reasonable consideration" to such staff, having regard to the interests of the Organization for which he plays that role (Art. 97 of the Charter), to the qualities of the staff member (Art. 101, para. 3, of the Charter and Staff Regulation 4.2), to the need to recruit staff on as wide a geographical basis as possible (Art. 101, para. 3, of the Charter and Staff Regulation 4.2) and

to the qualities of existing staff and the need to secure fresh talent (Staff Regulation 4.4). Such decision had, of course, to be made without distinction as to race, sex or religion (Art. 8, para. 2, of the Charter and Staff Regulation 4.3). This is precisely what occurred in relation to the Applicant. The Tribunal found that all the circumstances were considered and that the Respondent had properly concluded that any further appointment of the Applicant would not be in the interests of the Organization.

97. The Applicant also argues with respect to Article 101, paragraph 1, that the Tribunal was in error in finding, "without supporting evidence", that he had been given every reasonable consideration for a career appointment (Application to the Committee, para. 18; doc. No. 1). This assertion, however, aside from raising merely a procedural and not a Charter question, overlooks the statement of the Respondent that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case" (Respondent's Answer to Tribunal, para. 24; doc. No. 21). The dissenting opinion evaluated the facts differently but such finding, even if it had been a finding of the Tribunal, also does not raise a question of law relating to Article 101, paragraph 1, of the Charter.

(ii) *Article 100, Paragraph 1, of the United Nations Charter*

98. Article 100, paragraph 1, of the United Nations Charter provides as follows:

> "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."

99. The Application to the Committee argued that this provision, although permitting the Secretary-General to consider the views of governments, precludes him from being bound by them and alleged that the Respondent in this case was merely carrying out the instructions of a government when he refused to offer a new appointment to the Applicant and argued that the Tribunal committed an error of law relating to the Charter by not so holding (Application to Committee, paras. 20-22; doc. No. 1).

100. This argument is misconceived in fact and in law. It is misconceived in fact because the Secretary-General did not take instructions from a member State (see para. 75 above). It is misconceived in law because it suggests that the Secretary-General is precluded from taking into consideration formal representations made to him in his official capacity by member States, and also because it suggests that if the Secretary-General, in the interests of the United Nations, took a decision that was in accord with representations made by a member State in connection with the secondment of a government official, this implies or constitutes an improper taking of instructions from that member State.

101. It has never been in dispute between the parties that the Respondent cannot seek or receive *instructions* from any government or from any other authority external to the Organization. However, as the head of a principal organ of the United Nations (see Art. 7, para. 1, and Art. 97 of the Charter) the Respondent is entitled to receive and consider representations from member States on matters of concern to the United Nations. Just as official representations by member States cannot be considered to constitute violations of Article 100, paragraph 2, of the Charter, their receipt and the conclusions drawn from

them by the Secretary-General do not violate paragraph 1 of that Article, which is designed to preclude *ad personam* pressures on members of the Secretariat.

102. Even in the case of appointments on secondment, the Respondent is free to decide whether such particular appointment is in the interests of the Organization. If he considers it to be so, the Respondent needs to obtain the consent of the government (or other permanent employer) because secondment is, of necessity, a tripartite affair (see the Appendix, sec. III). The obtaining of such consent or the failure to implement a secondment in the absence of such consent is, of course, not receipt of or compliance with an instruction (as Applicant asserts: doc. No. 1, para. 20).

103. It is submitted that the law on this point was succinctly described by the Administrative Tribunal of the International Labour Organisation in the case of *In re Rosescu* as follows:

> "The executive head of an organisation is bound at all times to safeguard its interests and, where necessary, give them priority over others. One area in which the rule applies is staff recruitment. If a director-general intends to appoint to the staff someone who is a government official in a member State he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organisation should again consult the member State, 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 forgo 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." (Judgment No. 431, para. 6; doc. No. 34.)

This point of view is shared by the Respondent and was submitted to the Administrative Tribunal in this case (Respondent's Answer to the Tribunal, paras. 21 to 26; doc. No. 21).

104. The Application to the Committee sought specifically to dispute the Tribunal's conclusion of fact that the Applicant did receive appropriate consideration for further employment by referring to the letter dated 21 December 1983 sent to the Applicant by the Assistant Secretary-General for Personnel Services (doc. No. 20, Annex 40) and to press reports and press statements submitted to the Tribunal concerning the motivation of the Respondent's decision not to re-appoint him (Application to Committee, para. 21; doc. No. 1, and doc. No. 22, Annexes 43 to 45, for the press statements).

105. However, the Tribunal's Judgement (doc. No. 9, pp. 54 to 55, paras. XVIII to XX) accepted the Respondent's submission to the Tribunal that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case" (Respondent's Answer to Tribunal, para. 24; doc. No. 21). Such a finding of fact does not involve a question of law, let alone a question of law relating to provisions of the Charter. The only issue for adjudication between the parties was whether the Applicant actually received every reasonable consideration for a career appointment.

106. The dissenting opinion found that the writer of the 21 December letter assumed that there was a legal impediment to any consideration of the Applicant for a career appointment and found, as a result, that such an assumption

would contravene the Charter. As was noted in Respondent's observations to the Committee (doc. No. 4):

> "15. . . . The Respondent submits that the dissenting member of the Tribunal misunderstood Respondent's position which was, and is, that 'the decision (now) contested was taken by the Secretary-General after consideration of all the circumstances in the case, including the Applicant's service record, together with the estimation of his supervisors and representations on his behalf by counsel, and the events of 10 February 1983 and thereafter, together with the representations to diverse effect by the permanent missions of two member States' and that 'additional consideration thereafter in the Appointment and Promotion Board was not required, and would, moreover, have been manifestly inappropriate in view of the established procedures under Staff Rule 104.11 *(f)* (i) with respect to proposed appointment' (para. 24 of the Respondent's answer to the Tribunal).
>
> 16. The Respondent further submits that, in considering all the circumstances in the case, the Secretary-General was not unduly influenced by the views of one or another Government, and certainly did not entertain the belief, as suggested by the dissenting member of the Tribunal, that the Applicant was precluded from consideration for re-appointment, but rather examined the case on all its merits before reaching an independent determination in the interest of the Organization."

107. The Statement of Mr. Ustor does not involve a question of law on the interpretation of the Charter since it does not state that the Respondent must obey instructions from a government but only takes the view that, if he decides that an immediate re-appointment, not on secondment, of a seconded official is desirable, the agreement of the government to that re-appointment must be obtained. Failure to do so, in the opinion of Mr. Ustor, would violate the terms of the contract of secondment or the intent of resolution 37/126; these views, however, do not involve a question of law on the interpretation of Article 100, paragraph 1, of the Charter.

(iii) *Article 101, Paragraph 3, of the United Nations Charter*

108. Article 101, paragraph 3, of the United Nations Charter provides as follows:

> "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."

109. The Application to the Committee argued that the Tribunal erred on a question of law relating to Article 101, paragraph 3, of the Charter because it did not find that the Respondent should have considered whether to offer the Applicant a new appointment principally on the basis of his high standards of efficiency, competence and integrity (Application to Committee, paras. 23 to 25; doc. No. 1).

110. This argument suggests that, under Article 101, paragraph 3, of the Charter, the Respondent should, in deciding whether to offer the Applicant a further appointment, in practice only take into consideration his personal qualities.

111. The Applicant's interpretation of Article 101, paragraph 3, is not sup-

ported by its text and is inconsistent with Article 97 of the Charter, which makes the Secretary-General the chief administrative officer of the Organization who is obviously required to take decisions in the overall interests of the Organization, as recognized by the Administrative Tribunal of the International Labour Organisation in *Rosescu* (Judgment No. 431, para. 6; doc. No. 34; quoted at para. 103 above).

112. Furthermore, Article 100, paragraph 1, gives—as recognized by this Court in 1954 (see para. 95 above)—the General Assembly power to direct and guide the Secretary-General in questions relating to staff appointments. According to the Assembly's directives—which do not seek to detract from Article 101, paragraph 3—other factors (for example, age, nationality, prior inconsistent employment[1]) may legitimately lead to a decision not to appoint a person in spite of his or her outstanding efficiency, competence and integrity.

113. The Applicant also contends that the Tribunal's Judgement errs because

> "clearly implicit in the Tribunal's decision is the notion that the Applicant's resignation from his Government's service is a disabling and prejudicial factor which must be given primacy over the qualities enumerated in Article 101.3" (Application to the Committee, para. 24; doc. No. 1).

This argument appears to refer to paragraph XII of the Tribunal's Judgement wherein Judgement No. 326 *(Fischman)* is referred to, which cited a 1953 Fifth Committee report to the General Assembly that:

> "International officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." (Report of Fifth Committee, para. 70; doc. No. 14.)

114. This Report was concerned with the many difficulties that arise for the United Nations if a staff member on a G-IV visa in the United States (as was the case of the Applicant) takes steps to change his nationality by becoming a permanent resident in the United States, for example, waiver of the Organization's privileges and immunities and liability to United States taxes with consequent claims to reimbursement (doc. No. 14, paras. 61 to 72). Such a change with its inherent problems for the United Nations, as was stated in the 1954 Circular issued to staff by the Respondent "in no way represents an interest of the United Nations" (doc. No. 15, para. 12) and thus is obviously a matter that may be taken into account in connection with appointment decisions. In any event, the Tribunal, immediately after referring to these matters made it clear that they were not in issue since private legislation was to be introduced into the United States Congress to avoid these problems (Judgement, p. 52, *supra*, para. XII; doc. No. 9) and the Respondent does not dispute this.

115. Consequently, the Judgement of the Tribunal does not involve an error on a question of law relating to Article 101, paragraph 3, of the Charter.

116. It may, however, be useful to refer briefly to the dissenting opinion, which cited Article 101, paragraph 3, and took the view that the Respondent could not, in the light of that provision, have become party to an arrangement

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[1] For example, Article 6 (2) of the Statute of the International Civil Service Commission provides that a member of the Commission shall not serve as an official or consultant of a member organization during his or her term of office or within three years of ceasing to be a member of the Commission. (There is a similar provision in the Statute of the Joint Inspection Unit.)

(i.e., the secondment agreement) with a member State that would preclude all future employment of an official who changed his nationality (Judgement, p. 57, *supra*, dissenting opinion, para. 8; doc. No. 9). The dissenting opinion, however, differs from the Tribunal's Judgement on a simple question of fact. The Respondent, in his own view, gave "every reasonable consideration" to offering the Applicant a career appointment. The Tribunal found that this had been done even though it criticized Respondent for failing to adequately record this in writing (Judgement, p. 55, *supra*, para. XX; doc. No. 9). The dissenting opinion found that such consideration had not been given (Judgement, p. 57, *supra*, dissenting opinion, paras. 7 and 8; doc. No. 9). Whether the Tribunal's Judgement or the dissenting opinion is correct is not a question of law relating to Article 101, paragraph 3, of the Charter.

(iv) *Article 8 of the United Nations Charter*

117. Article 8 of the Charter provides as follows:

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

118. The Application to the Committee argued that the Judgement violates Article 8 of the Charter because it placed a number of restrictions on appointment to the United Nations Secretariat (Application to Committee, paras. 26 to 28; doc. No. 1).

119. This argument appears to rest on a misconception as to the scope and meaning of Article 8 of the Charter, as well as on the mistaken assumption that the Tribunal had determined that there were any restrictions on the eligibility of the Applicant to be considered for a career appointment.

120. Actually the scope of Article 8 is entirely different from that suggested by the Applicant: it is solely concerned with discrimination on the basis of sex and directs that men and women shall be eligible to participate under conditions of equality in the principal and subsidiary organs of the United Nations (including the Secretariat). No issue in this case and no part of the Judgement in any way, explicitly or implicitly, refers to the capacity of men and women to serve in the United Nations Secretariat under conditions of equality.

121. The prohibition of "restrictions" in Article 8 of the Charter is plainly intended solely to preclude any form of gender-related discrimination, and not to prevent restrictions that may apply equitably to men and women[1]. Any other interpretation would drastically curtail the powers of the General Assembly to regulate recruitment pursuant to Article 101, paragraph 1, of the Charter.

122. In any event, the Tribunal did not find that there were restrictions on the eligibility of the Applicant to be considered for a career appointment. On the contrary, the Tribunal found that paragraph 5 of section IV of resolution 37/126 applied to the Applicant but that the Secretary-General, in the light of all the circumstances, had properly decided not to grant him a career appointment (Tribunal's Judgement, paras. XIV-XVIII; doc. No. 9). Furthermore, the Tribunal's Judgement did not hold that the Applicant was ineligible to serve in the Secretariat, the decision simply upheld a discretionary decision by the Secretary-General not to offer him a career appointment at a particular time.

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[1] See Leland U. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations* (3rd ed., 1969), pp. 104-105; Hans Kelsen, *The Law of the United Nations* (1950), pp. 152-153.

(v) *Article 2, Paragraph 1, and Article 100, Paragraph 2, of the United Nations Charter*

123. Article 2, paragraph 1, of the Charter provides as follows: "1. The Organization is based on the principle of the sovereign equality of all its Members." Article 100, paragraph 2, provides as follows:

> "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."

124. The Application to the Committee argues that the fact that some Governments expect to be consulted prior to the appointment of their nationals to the Secretariat and require those nationals to accept only fixed-term appointments violates Article 2, paragraph 1, and Article 100, paragraph 2, of the Charter (Application to Committee, paras. 30-33; doc. No. 1).

125. This argument mistakenly assumes that the Tribunal's Judgement had condoned the granting of such special rights to particular member States to be consulted on the employment of their nationals.

126. It is difficult to see how the Tribunal's Judgement could have done this and how it could be viewed as involving a question of law in respect of either Article 2, paragraph 1, or Article 100, paragraph 2, of the Charter. The Judgement has nothing to do with these provisions but concerns the application of paragraph 5 of section IV of resolution 37/126, in particular, whether the Applicant received "every reasonable consideration" for a career appointment, which consideration the Tribunal found as a fact had been given to him.

127. The Application also alleges that the requirement of the Soviet Government that its nationals accept only fixed-term appointments violates Article 2, paragraph 1, of the Charter. However, the policies of any individual government in respect of the employment of its own nationals by the United Nations can hardly violate the principle of sovereign equality of all member States.

128. The Application also implies that the fact that a member State makes its views on appointments known to the Secretary-General violates Article 100, paragraph 2, of the Charter. This argument is without foundation since member States are entitled to make their views known to the Respondent who, as the head of a principal organ of the United Nations and without being bound by them, may consider those views when reaching his own independent decision in the interests of the Organization (see also paras. 99 to 107 above).

III. CONCLUSION

129. This Written Statement has submitted that the Tribunal exercised the jurisdiction vested in it by Article 2 of its Statute "to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members". The finding in the Tribunal's Judgement that the Respondent observed the Applicant's contract and terms of appointment was a full and proper exercise of the Tribunal's jurisdiction and did not require an explicit answer to abstract questions posed by the Applicant.

130. This Written Statement also submitted that, in holding that the Respondent complied with General Assembly resolution 37/126, the Tribunal did not deal with questions of law relating to provisions of the Charter and that, in fact,

the Tribunal's Judgement was in accord with all provisions of the Charter cited in the Application to the Committee.

131. It is submitted that the Secretary-General properly discharged his responsibilities as chief administrative officer of the Organization by deciding not to offer the Applicant another appointment upon the expiration of his last fixed-term contract on secondment, after considering *all the relevant* circumstances including representations made by the Applicant, his counsel, his supervisor and member States.

132. This Court is, therefore, respectfully requested to respond negatively to both of the questions submitted to it by the Committee.

(Signed) Carl-August FLEISCHHAUER,

The Legal Counsel
of the United Nations.

26 February 1985.

Appendix

Outline of Essential Characteristics of Career Appointments, Fixed-Term Appointments and Fixed-Term Appointments on Secondment[1]

I. Career Appointment

1. A career appointment—which is the most prevalent appointment in the United Nations—is a permanent appointment which has no specific expiration date but is subject to review at the end of the first five years of service (Staff Rule 104.13 *(a)* (ii); doc. No. 18). At the present time, grant of a permanent appointment is limited to staff holding probationary appointments (Staff Rule 104.13 *(a)* (ii); doc. No. 18). However, paragraph 5 of section VI of General Assembly resolution 38/232 recommended to the Secretary-General

> "that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts" (doc. No. 13).

II. Fixed-Term Appointment

2. A fixed-term appointment is defined by Staff Rule 104.12 *(b)* as being an appointment "having an expiration date specified in the letter of appointment" which appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment" (doc. No. 18). This means that the Staff Rules do not give the holder of a fixed-term appointment any right to further employment. However, the Tribunal has held that the circumstances surrounding such an appointment may create an expectancy for further appointment (Tribunal Judgements Nos. 142 *(Bhattacharrya)* and 205 *(El-Naggar)* (docs. Nos. 23 and 24)).

3. Section IV of General Assembly resolution 37/126 of 17 December 1982 modifies these principles by providing, in its paragraph 5, 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" (doc. No. 12).

4. The Secretary-General is bound by and has complied with this resolution. However, this resolution does not entitle the staff to which it refers to a career appointment. The decision to grant a career appointment is solely within the discretion of the Secretary-General, which decision is to be made after having given "every reasonable consideration" to staff concerned.

III. Fixed-Term Appointment on Secondment

5. Staff Rule 104.12 *(b)* (doc. No. 18) provides as follows:

> "The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years

[1] See also doc. No. 36, Annex VII.

to persons recruited for service of prescribed duration, *including persons temporarily seconded by national governments or institutions for service with the United Nations.* The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment." (Emphasis added.)

6. The term secondment is not defined in the Staff Rules but, in practice, means that a staff member has been given a fixed-term appointment with the consent of his permanent employer and on the understanding of all three parties to the arrangement that the service at the United Nations will be limited in duration and that the staff member has a right to return to his former employment at the end of his fixed-term appointment.

7. The duties of each of the three parties to the secondment arrangement are well established and have been conveniently summarized as follows by Tribunal Judgement No. 192, *Levcik* (doc. No. 28, paras. IV and V):

"IV. The substantive law governing the secondment of a staff member of the United Nations to the Secretariat of the Inter-Governmental Maritime Consultative Organization has been applied by the Tribunal in the *Higgins* case (Judgement No. 92). In that case, after taking cognizance of the rules contained in various documents from the Consultative Committee on Administrative Questions concerning the transfer, secondment or loan of officials between organizations applying the common system of conditions of employment in the United Nations, the Tribunal, having held that those rules were not binding on the parties, had to seek some other legal basis for its decision. The basic principles set out by the Tribunal in Judgement No. 92 are generally applicable to secondment, and particularly to cases envisaged in Staff Rules 104.12 *(b)*.

According to that judgement,

'IV. There is no legal definition of the term "secondment" in the Staff Regulations and Rules of either IMCO or the United Nations. Nevertheless, the term "secondment" is well known in administrative law. It implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits . . .

VI. . . . there are really three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned . . .'

V. The principles stated in Judgement No. 92 imply that in a case of secondment the situation of the official in question must be defined in writing by the competent authorities in documents specifying the conditions and particularly the duration of the secondment. These documents must be brought to the knowledge of the official concerned and his consent must be obtained. Any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously requires the agreement of the three parties involved. When a government which has seconded an official to the Secretariat of the United Nations refuses to extend the secondment, the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the government.

Bearing in mind the provision in Article 100 of the Charter that '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', the Tribunal considers that in the absence of a secondment agreed to by all parties concerned in conformity with the above-mentioned principles, the Respondent cannot legally invoke a decision of a Government to justify his own action with regard to the employment of a staff member."

STATEMENT ON BEHALF OF THE APPLICANT MR. VLADIMIR YAKIMETZ WITH RESPECT TO JUDGEMENT No. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

May it please the Court:

1. to accept jurisdiction in this case under Article 65.1 of its Statute; and
2. to find and declare, based on the statement of facts and arguments set out hereunder and otherwise before the Court, that Tribunal Judgement No. 333 was flawed by fundamental errors of law and should be reversed; and
3. to render an advisory opinion for the guidance of the Secretary-General regarding the issues raised by the Applicant in the case.

The views of Mr. Vladimir Victorovitch Yakimetz, hereinafter referred to as the Applicant, are set forth in accordance with Article 11, paragraphs 1 and 2, of the Statute of the Tribunal, for transmission to the Court by the Secretary-General. This statement contains the following headings:

A. Request to the Court to Accept Jurisdiction

1. In the two previous cases in which the Court has been called upon to consider a request for an advisory opinion under the procedure laid down in Article 11 of the Statute of the Administrative Tribunal (Judgements No. 158, *Fasla* and 273, *Mortished*) the Court has expressed misgivings about certain features of the review procedure. The Applicant shares those misgivings, particularly as to the inequality of parties, the absence of a record of the proceedings, and the denial to his counsel of the right to be present, even as an observer. The sole choice, however, lies between "judicial control of the kind exemplified by the present proceedings, and no judicial control at all" (President Lachs, *I.C.J. Reports 1973*, at p. 214). The Court concluded, in *Fasla*[1], that the Committee on Applications for Review of Administrative Tribunal Judgements was an "organ of the United Nations", duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96.2 of the Charter to request advisory opinions of the Court. The Court is therefore competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Tribunal's Statute.

2. Despite the permissive character of Article 65, the Court has consistently held that "a reply to a request for an opinion should not, in principle, be refused" (*I.C.J. Reports 1951*, at p. 19, *I.C.J. Reports 1973*, at p. 183).

> "In the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials." (Advisory Opinion, *I.C.J. Reports 1956*[2] at p. 86; also Advisory Opinion, *I.C.J. Reports 1971*[3], at p. 27; and Advisory Opinion, *I.C.J. Reports 1962*[4], at p. 155.)

> "The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are however of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation." (Advisory Opinion, *I.C.J. Reports 1982*[5], at p. 26.)

3. Recourse to the International Court of Justice was intended only for "exceptional cases". The case at bar is, by any reasonable definition, an "exceptional case". It is, moreover, singularly appropriate for examination by the highest judicial body of the United Nations. It presents, in the form of a concrete case or controversy, many issues that have long plagued the Organization. No other organ of the United Nations has the authority, the freedom or the will to provide clear legal guidance on these problems, although their effects on the functioning of the Secretariat have been the subject of considerable comment, both scholarly and popular. From time to time in the history of any organiza-

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[1] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1973*.

[2] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco.*

[3] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).*

[4] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter).*

[5] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal.*

tion it is necessary for appropriate authority to stand above politics and to reaffirm principles. The Administrative Tribunals of both the United Nations and International Labour Organisation stood almost alone in defence of basic legal principles in the 1950s. Their competence and decisions were upheld by the Court *(Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954, Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956.)* This case presents issues of principle no less fundamental, and which lie at the heart of the malaise affecting the United Nations today.

4. If allowed to stand, the Judgement of the Administrative Tribunal in this case effectively rewrites the Charter. It replaces the principle of merit with political influence as the paramount consideration for appointment and promotion of staff. It sanctions practices that are opposed to the values and the purposes articulated by the Preparatory Commission and the United Nations Conference on International Organization. It fails to uphold the concept of an independent career service as the "core" and backbone of the Secretariat. It widens the discretionary powers of the Secretary-General at the expense of both the staff and the General Assembly. It interjects considerations of nationality and loyalty that have no place in an organization devoted to internationalism. It glosses over the gap that exists between the legal code of conduct and the operational code, permits a double standard and ignores the obligations imposed by the oath of office and the Staff Regulations.

5. Therefore, since the Court has competence, since the request was properly framed in accordance with established procedures by the duly authorized organ, since the case is an "exceptional" one and the issues of utmost importance, the Applicant respectfully requests the Court to render an Advisory Opinion herein.

B. Explanatory Statement

6. The Applicant's early career in the USSR was in Physics. Between 1956 and 1966 he took an undergraduate degree and a Ph.D. at the Moscow Institute of Physics and Engineering, and did research and postgraduate work at the Institute of Nuclear Physics, Novosibirsk. From 1966 to 1969 he taught theoretical physics at the Moscow Institute of Physics and Engineering, and published a number of studies based on his research, some in international journals. Although employed by the Ministry of Education, his post, as senior teacher, was not a permanent or "tenured" one, but rather subject to election every two years. A teacher who fails to gain re-election has to look for another position.

7. In 1969 he applied, as an independent candidate, to the United Nations language recruitment service in Moscow. He passed the competitive examination, qualifying for a post in translation. He was cleared by his Government for foreign service, and proposed for a post as Translator Trainee at the Associate Officer (P-2) level. He signed a two-year release from the Ministry of Education. He was not asked to sign another and had no further dealings with the Ministry.

8. The Applicant's first United Nations P-11 (Personal History) form, dated 5 June 1969, was completed in Moscow and delivered, not to the United Nations, but to the USSR Ministry of Foreign Affairs who proposed his candidacy. Under Item 29, which asks "Are you now, or have you ever been, a permanent civil servant in your Government?" he answered "No". Under Item 28, which asks "Have you any objections to our making inquiries of your present employer?" he again answered "No" (doc. 20, Annex 1).

Neither the offer from the United Nations, nor his acceptance, mentioned the term secondment. His Letter of Appointment, for a five-year fixed-term contract, was signed in November 1969. Under Item 5, *Special Conditions*, it specified "None" (Annex 3).

9. On 10 December 1969, the Applicant took the oath to perform his duties and regulate his conduct exclusively in the interests of the Organization, and to neither solicit nor accept instructions from any government or any other authority external to the Organization.

10. In 1970 his entry-level was corrected to P-3. In 1972 he was promoted to P-4. In 1974, five weeks before the end of his five-year contract ended, he resigned from the United Nations in order to pursue further studies, in economics and international relations at the State Academy for Foreign Trade, Moscow. He graduated in June 1977. At the same time, as part of his studies, he underwent training—from November 1974 to June 1976—at the Moscow Institute of Mathematical Economics, and from September 1976 to June 1977 at the Institute of Systems Analysis.

11. On 19 June 1977 he submitted another P-11 form to the Ministry of Foreign Affairs, which transmitted it to the United Nations with a covering letter recommending his candidacy. Once again, in answer to the question "Are you now, or have you ever been, a permanent civil servant in your Government?" (Item 29) he answered "No" (Annex 6).

12. On 11 November 1977 the Appointment and Promotion Board approved his appointment as Russian Reviser at P-4 "on a fixed-term secondment basis for a period of five years". On 23 November 1977 the United Nations offered him a "five-year fixed-term appointment, on secondment from the USSR Government". On the same date the USSR Mission was informed that this offer had been made. The Applicant's Letter of Appointment, however, signed on 24 January 1978, did not mention secondment and once again, under Item 5, *Special Conditions*, specified "None" (Annex 10).

13. The Applicant's performance in the Language Service was very highly rated—two Performance Evaluation Reports described him as "one of the best translators and revisers in the Service". In 1980 his name was put forward by the USSR authorities for the Appointment and Promotion Committee and he served as Administration Candidate during 1981, 1982, and again in 1983, when he was elected Vice-Chairman.

14. During 1980 the USSR authorities recommended him for substantive posts outside the Language Service enclave. He was put forward unsuccessfully, for a post in Geneva. He was also 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.

15. The Office plays a central role in the preparation of the medium-term plan, according to regulations mandated in General Assembly resolution 37/234. This plan is the principal policy directive of the United Nations, and sets out the objectives and strategies to be followed by the United Nations in the six-year period it covers. The programme budgets of the Organization must be formulated within the framework of the plan. The programme narratives in the budget set out the commitments the Organization undertakes in exchange for the resources appropriated by the General Assembly. Programme performance reports set out the actual performance of the Organization in relation to the commitments made in the budget.

The Office, therefore, requires not only special skills but also a high degree of continuity of service from its staff. Programme Officers must be familiar

with the economic, social and technological issues of development in which the organization is involved through its many organs (special centres, regional commissions, UNEP, UNCTAD, UNIDO, etc.). They must monitor and interpret the intergovernmental debate during the review process. The medium-term plan covers six years. The programme budget cycle (including the formulation and the review periods) is close to four years. No matter how academically qualified, it takes at least two years for an officer to learn all phases of the relevant special procedures.

The Office must invest considerable time in training and therefore prefers candidates who would be available long enough to be useful. Nevertheless, the Assistant Secretary-General for Programme Planning and Co-ordination, Mr. Peter Hansen, agreed to try out the Applicant.

16. The trial period convinced the Office of the Applicant's capacity to meet their requirements. When a post became available in September 1981, the Department formally requested his transfer, even though he had, at the time, only a little more than one year to go on his contract. Mr. Hansen, who wished to increase the number of economists from Socialist countries on his staff, discussed his intentions with the Soviet Mission, to whom he expressed the hope and expectation that it would be possible to retain the Applicant for a long enough period to make effective use of his newly acquired training and experience. He received the impression that it could be worked out.

17. The Applicant's Performance Evaluation Report for the period remaining on his fixed-term contract was excellent. In September/October Mr. Hansen discussed a two-year contract extension with the Chief of Personnel Services in the USSR Mission and was told that for technical reasons it was easier to propose extensions for one year at a time. The Department therefore requested a year's extension—to 26 December 1983—on the understanding that further extensions would be granted.

On 22 October 1982 the United Nations requested the Permanent Mission of the USSR to help "in securing the consent of its Government in the extension of Mr. Yakimetz's secondment to the United Nations through 26 December 1983". The Permanent Mission responded on 15 November 1982. The letter communicates the Permanent Mission's "agreement to the extension of the contract of Mr. Vladimir Yakimetz . . ." with no reference to secondment (Annex 17).

In December 1982 he was recommended for promotion to P-5.

18. The Letter of Appointment as P-4 Programme Officer, DIESA, signed by the Applicant on 9 December 1982 says under 5, *Special Conditions*, "On secondment from the Government of the Union of Soviet Socialist Republics" (Annex 19).

19. 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 that 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. He was told that he must secure Mr. Hansen's acceptance for a substitute they would propose.

In January 1983 he was told to take leave in Moscow in February to help prepare a substitute candidate—who had already been selected—for his post. The Applicant requested leave. Mr. Hansen refused, because of pressure of work.

20. In late January 1983 the Applicant learned from a Russian colleague that the USSR authorities had selected and were going to propose a replacement for him on the Appointment and Promotion Committee (a purely internal

Secretariat body). This increased his apprehension that he would not be permitted to return to his United Nations post if he were to obey his Government's order to go to Moscow.

21. Mr. Hansen, who at the time knew nothing of the dilemma in which the Applicant had been placed, wrote him a memorandum on 8 February 1983, as follows:

> "Our discussions on your leave schedule for the next few months have prompted me to inform you of my intention to request an extension of your contract after your current contract expires on 26 December 1983. As you know it would be only at the end of 1983 that you would have received full training in all aspects of the biennial programme planning cycle so that, as I had indicated to you last year, I believe that it would be in the interests of the Office to have your services continued.
>
> I would appreciate it if you could let me know at your earliest convenience whether you would be in a position to accept such an extension." (Annex 21.)

22. On 9 February the Applicant applied for asylum in the United States. On 10 February he submitted to the Ambassador and Permanent Representative of the USSR to the United Nations his resignation from the Ministry of Foreign Affairs and from all other official positions in the Soviet Government (Annex 22). He also wrote to the Secretary-General of the United Nations informing him, pursuant to Staff Rule 104.4 *(c)* of his intention to acquire permanent residence status in the United States of America. He added:

> "For personal reasons, including my obligations to the United Nations as expressed in Staff Regulations 1.3 and 1.9, I have made an application to the Government of the United States requesting asylum.
>
> I have resigned from all official positions I hold in the Government of the Soviet Union and a copy of my resignation, delivered today to the Soviet Mission to the United Nations, is enclosed.
>
> I wish to insure *(sic)* you of my continued dedication and devotion to the United Nations and my wish and intention to continue to perform all my obligations under my employment contract." (Annex 23.)

23. On February 10 he also requested a few days annual leave. This was granted. The Applicant reported back to work on 22 February 1983. On 23 February he was told by his supervisor that a member State had objected to his presence in the Headquarters cafeteria and the 2nd-floor coffee shop.

24. On 28 February Mr. Sadry, the Director, Division of Personnel Administration, Office of Personnel Services, delivered to the Applicant a memorandum, as follows:

> "I have been requested to communicate to you the decision of the Secretary-General to place you on special leave with full pay, effective 1 March 1983 and until further notice. This action is taken in accordance with the provisions of Staff Rule 105.2 *(a)*, which reads as follows:
>
> > *(a)* Special leave, with full or partial pay or without pay, may be granted for advanced study or research in the interest of the United Nations, in cases of extended illness or for other important reasons for such period as the Secretary-General may prescribe.
>
> Any other decision pertaining to your case will be taken by the Secretary-General at a later stage." (Annex 26.)

25. On 1 March the Applicant, in a letter to the Director, Division of Personnel Administration, pointed out the difficulties such special leave would cause for his workload. He wrote, *inter alia*:

> ". . . Perhaps I might have a better understanding of the significance of the Secretary-General's memorandum if I could have written answers to the following points:
>
> 1. I should appreciate being advised of the precise reasons as to why the leave has been granted. I do not consider the mere statement of the language of Rule 105.2 *(a)*, 'for other important reasons', satisfactory to advise me as to why this action has been taken.
>
> 2. What would be the effect of the proposed leave on the following:
>
> *(a)* my free use of any and all United Nations facilities without having to seek permission in each instance;
>
> *(b)* my continuation as a member of the Appointment and Promotion Committee and as Vice-Chairman of the Third Working Group;
>
> *(c)* the promotion which is in process for me;
>
> *(d)* my career development at the United Nations including a possible extension of my present appointment.
>
> I shall look forward to receiving written answers to my questions at your convenience. In the meantime, I shall remain actively at my post." (Annex 27.)

26. On 3 March the Director of the Branch in which the Applicant worked wrote to Assistant Secretary-General Hansen:

> "Mr. Yakimetz indicated that he had not requested any leave.
>
> The Office is currently engaged, with all available resources being tapped, in the process of budget formulation. Mr. Yakimetz is in charge of a few Budget Sections in the Economic and Social Sector, and has been working very actively on them.
>
> His unavailability for an undetermined period is a major inconvenience for the work of the Office. Reassigning his tasks to other programme officer will delay the whole process, and probably make it impossible to respect the deadlines for the budget submission to CPC.
>
> Mr. Yakimetz has indicated to me his willingness to continue to work, unless his current status would prevent him from so doing. Your guidance will be very much appreciated." (Annex 28.)

27. On the same date the Director, Division of Personnel Administration, responded to the Applicant's letter of 1 March. He wrote, *inter alia*:

> "2. As to your request to be advised of the reasons for the decision in question, I wish to point out that in the exercise of his authority and responsibility as the Chief Administrative Officer of the Organization, the Secretary-General has determined 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. I would ask you therefore to comply with this decision of the Secretary-General with immediate effect and until further notice. You will be advised in due course of any modification to this instruction.
>
> 3. The above also replies, I believe, to the questions you raised in paragraph 2 *(a)* and *(b)* of your letter. Concerning the recommendation which was made for your promotion, I am sure that the Appointment and

Promotion Board will give it due consideration at an appropriate time in the course of its proceedings. Finally, as regards your question as to the possible extension of your appointment, I would wish to point out that consideration of this matter at this time would be premature. You may also wish to refer to Staff Rule 104.12 *(b)* which is applicable to this issue." (Annex 29.)

28. On 17 March the Applicant requested a review under Staff Rule 111.3 *(a)* of the decision to place him on special leave. His letter concluded:

"I again request a written explanation as to why it is considered 'in the best interest of the Organization' that I 'do not enter the premises of the United Nations' but, on the advice of my counsel and under protest, I will of course comply with your decision." (Annex 30.)

29. The Applicant *de facto* continued his assigned work on the programme budget in offices in New York City where United Nations departments were temporarily quartered during construction of the new Headquarters complex. In due course, when the new DC-2 Building was opened, he was permitted to rejoin his section and serve out his contract. His promotion to P-5, retroactive to 1 April 1983, was implemented. The ban on entering the main Secretariat building, however, was never withdrawn.

30. Throughout this period his American attorney, Mr. Orville Schell, had been discussing the Applicant's future with the Executive Assistant to the Secretary-General, who suggested that further United Nations employment would pose fewer problems if the Applicant could obtain United States citizenship. The Applicant had been granted temporary residence status, with permanent residence assured in one year. In order to comply with the Executive Assistant's advice, Mr. Schell decided to forego the application for permanent residence, and seek citizenship instead. A private bill in Applicant's behalf, to waive the five-year statutory residence period, was introduced in the United States House and Senate in October 1983.

31. On 25 October 1983 the Applicant addressed a memorandum to Assistant Secretary-General Hansen on the subject of his future.

"My fixed-term contract with the United Nations is due to expire on 26 December 1983.

As you will recall we have had several discussions on the prospects of my continuing employment in the Office for Programme and Co-ordination. I would like to state once again that I have always considered it to be a special privilege to serve the United Nations. It is my sincere belief that during the eleven years that I have been serving the Organization I have always tried to perform my duties to my fullest, however limited, abilities. I also believe that the intense training in all aspects of programme planning and budgeting in the United Nations that I received over the past two years while working in the Office for Programme Planning and Co-ordination has substantially increased my potential usefulness to the Organization.

In view of the above, let me express my hope that you will find it possible on the basis of my performance to recommend a further extension of my contract with the United Nations, or even better a career appointment." (Annex 32.)

32. A Performance Evaluation Report, which Applicant signed on 7 November 1983, rated his overall performance "Excellent". The report emphasized that he had

"now worked on all aspects of the programme planning cycle and has acquired the technical knowledge and skills needed to supervise junior professionals in this work. It is rare for someone to learn these technicalities as rapidly and thoroughly as he has done."

Under Item 15, the staff member's attitude to the United Nations, the Chief, Programme Planning Section, wrote:

"He is strongly committed to the principles of the United Nations Charter and in particular to an independent international civil service." (Annex 32.)

33. On 8 November Mr. Hansen wrote:

"In your memorandum of 25 October 1983 to me you remind that your current contract with the United Nations expires on 26 December 1983.

In this connection I have recently signed your performance report which shows that the excellent work you performed during the first year with the Office for Programme Planning and Co-ordination has been continued to the full satisfaction of your immediate 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 over the past two years to the work of this Office, and undoubtedly also to the Offices in which you have served before, meets the high demands of competence and commitment which are to be expected from a United Nations official.

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." (Annex 34.)

34. On 16 November 1983 the Applicant's American attorney, Mr. Orville Schell, wrote to the Executive Assistant to the Secretary-General to say that despite all efforts the private bill to waive the statutory waiting period for United States citizenship might not pass before Congress adjourned (Annex 35.)

35. On 23 November 1983 the Deputy Chief, Staff Service, Office of Personnel Services, wrote to the Applicant:

"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." (Annex 37.)

36. On 29 November 1983 the Applicant wrote to the Assistant Secretary-General, Office of Personnel Services, Mr. Nègre, requesting a three-month extension so that he could resort to the internal recourse procedures.

37. On 2 December the Assistant Secretary-General for Programme Planning and Co-ordination wrote to Mr. Nègre, saying:

"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 Appointments 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 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.

Apart from such matters of principle I wish to place on record the fact that this decision if allowed to stand would create severe problems for my Office over the next few months. Since, as you know, Mr. Yakimetz is barred from entering the Secretariat building the three other professional officers in the Programme Planning Section have had to assume Mr. Yakimetz's responsibilities for several sections of the 1984-1985 programme budget during the Assembly period. Mr. Yakimetz was therefore assigned full and sole responsibility for two important reports that must be completed in the next three months for the April 1984 meeting of CPC and has been working on them for the past several months. To reassign these reports at this stage would mean significant delays in their issuance and a loss in their quality.

It is in the best interest of the Office to continue to have the services of Mr. Yakimetz. Considering Mr. Yakimetz's long and outstanding record within the United Nations, I strongly recommend that his appointment be extended." (Annex 38.)

38. On 13 December the Applicant requested a review under Staff Rule III.2 of the administration decision not to extend his contract. The letter stated:

". . . 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, paragraph 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 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 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." (Annex 39.)

39. The reply of the Secretary-General, dated 21 December 1983, was signed by Mr. Nègre. It rejected the request for an extension and declined to reconsider the challenged decision. The pertinent paragraphs state:

"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.

Should you wish to pursue your appeal, the Secretary-General is prepared to agree to the direct submission of your case to the Administrative Tribunal." (Annex 40.)

40. On 26 December 1983, the Applicant's contract expired and he left the service of the United Nations.

41. On 3 January 1984, Mr. Yakimetz filed an Application with the United Nations Administrative Tribunal. In his Pleas he requested the Tribunal:

> "A. To consider his case at the Spring 1984 session of the Tribunal.
>
> B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to the Applicant's United Nations service.
>
> C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> D. To adjudge and declare that he had an expectancy of further employment.
>
> E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment.
>
> F. To order that his name be forwarded to an appropriate body to give him such reasonable consideration for a career appointment
>
> G. To order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.
>
> H. To order reimbursement of expenses, if any, reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings."

At the conclusion of the Argument he asked the Tribunal to find (p. 28):

- that no legally valid secondment took place; and
- that the "Special Conditions" in his contract signed on 9 December 1983 were amended by agreement between the parties on or after 10 February 1983; resulting in a new contractual arrangement; and
- that after his contract expired on 26 December 1983 no legal impediment existed to the continuation of his United Nations appointment; and
- that he had an expectancy of continued United Nations service; and
- that his right to reasonable consideration for a career appointment was illegally denied; and
- that the Applicant suffered damage as a result of this denial;

and therefore:

- to find that the contested administrative decision was illegal; and
- to order that the Applicant's candidacy for a United Nations post be given reasonable consideration; and
- to award damages to the Applicant in the amount of the salary he would have received had his services been continuous. (Document 19.)

42. On 4 January 1984, at the Daily Press Briefing, Mr. J. Sills, the spokesman for the Secretary-General, responded to reporters' questions, as follows:

> "Mr. Sills said in reply that the process of seconding people to the United Nations was not a violation of the Charter. It was done by a number of States, not just the Eastern European countries. As examples, he cited Jean Ripert, Director-General for Development and International Economic Co-operation, who was seconded from the French Government, and Yasushi Akashi, Under-Secretary-General for Public Information, who was seconded from the Japanese Government. He said the United States

had specific legislation permitting secondment of United States officials to international organizations. He added that as Representative of the Secretary-General on Cyprus, Javier Pérez de Cuéllar, had been seconded from the Peruvian Government to the United Nations.

In response to a question, Mr. Sills said Mr. Yakimetz's contract had expired at the end of 1983 and had not been renewed *because the Soviet Government had not renewed the secondment.* (Emphasis added.) If Mr. Yakimetz chose to apply for a position with the United Nations, he would be given every consideration along with other applicants for any position, including his old position." (Annex 43.)

43. The *New York Times* of the same day, 4 January 1984, carried an article on the non-renewal of Mr. Yakimetz's contract. In the article the Executive Assistant to the Secretary-General, Mr. Emilio de Olivares, is quoted as saying: "We didn't extend it because we can't." "To have the contract extended", Mr. Olivares said, "Soviet consent was essential. But, he said, 'The Soviets refused'." (Annex 44.)

44. Responding specifically to the above newspaper report, Mr. Patricio Ruedas, Under-Secretary-General for Administration and Management, wrote a letter to the *New York Times*, which was published on 25 January 1984. He, too, recited other eminent officials who had been seconded and United States legislation permitting secondment, and concluded:

> "The United Nations endeavours to obtain qualified staff from every one of its member States. Direct employment as well as loans from governments have been used, and continue to be used, as normal recruitment procedures. The main difference between the two is that a person who is on loan returns to his government unless that government agrees otherwise—a principle applicable in all cases, and not only those involving the USSR." (Annex 45.)

45. On 9 January 1984, Mr. Yakimetz forwarded a new P-11 Personal History Form to the Division of Recruitment, Office of Personnel Services, applying for a job at the United Nations. Under Item 4 (Nationality(ies) at birth), he wrote "USSR". Under Item 5 (Present nationality(ies)), he wrote "USA, pending". Under Item 16 (Have you taken up legal permanent residence status in any country other than that of your nationality? If answer is "yes", which country?), he wrote "Yes. USA". Under Item 17 (Have you taken any legal steps towards changing your present nationality? If answer is "yes", explain fully:), he wrote "I have applied for US citizenship. The bill No. S.1989 is now before U.S. Senate."

Although his old position remained unencumbered, he received no acknowledgement of his application.

46. On 14 March 1984, the Respondent filed his Answer with the Tribunal. The Applicant filed written observations on 13 April 1984, attaching the statements of Mr. Sills, Mr. de Olivares and Mr. Ruedas, quoted *supra*, which had been made after his Application was filed. The Judgement of the Tribunal, against which the present appeal is directed, was dated 8 June 1984. The majority Judgement found that his pleas could not be sustained but expressed "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". The concurring statement denied that he was eligible for

such consideration. The dissenting opinion found that he was illegally denied his right to reasonable consideration for a career appointment.

47. On 20 July 1984, Mr. Yakimetz made an application to the Committee on Applications for Review of Administrative Tribunal Judgements. He argued that:

"I. The Tribunal exceeded its jurisdiction and competence.
II. The Tribunal failed to exercise jurisdiction vested in it.
III. The Tribunal Judgement erred on questions of law relating to several provisions of the Charter.
IV. The Tribunal committed fundamental errors of procedure which resulted in a miscarriage of justice. (Doc. 1.)"

The comments of the Secretary-General on the Applicant's Written Statement were circulated on 10 August 1984 (doc. 4).

48. On 20 August 1984, the United Nations Staff Union issued a statement in respect of the case (Annex A hereto). It said:

"The Staff Union has followed very closely the case brought by a former staff member, Vladimir Yakimetz, challenging the decision of the Secretary-General not to consider a further extension of his contract as well as the possibility of a career appointment following the expiration of his previous contract which was based upon secondment from his national government.

The Staff Union feels that this case has substantial implications for the independence and integrity of the international civil service. It views with alarm the failure of the United Nations administration to defend the rights of this individual staff member and the apparent political influence which has interfered with the proper adjudication of this case.

The staff are further alarmed by the implications that support of this decision would have for the career international service. It apparently ignores the General Assembly's statement in resolution 35/210 'that no post should be considered the exclusive preserve of any member State or group of States . . .' and the clear principle of the independence of the Secretariat outlined in Article 100 of the Charter.

In accepting his appointment, the Secretary-General stated on 15 December 1981:

'I am to head a Secretariat which must preserve its basic sense as an authentic international civil service so as genuinely to serve the interests of the international community. In accordance with the Charter, this necessarily entails strict independence with respect to the national interests of the States which are part of the Organization.'

He further stated, in an address to the staff on 12 January 1982:

'As part of my effort to maintain the independent status of the Secretariat, I shall see to it that the career service of the staff will not be adversely affected by any considerations unrelated to merits. Specifically, I wish to reassure the staff that in matters related to career development, nationality as such will not be considered as a relevant factor. As much as any organization, and perhaps more than most, the United Nations needs to reward merit and put a premium on good performance.'

The staff member's qualifications and merit have never been disputed. The sole question relates to his status and in particular to his nationality.

In the view of the staff, should any government be permitted to raise objections to continued employment on the basis of internal political considerations, the entire concept of an independent international civil service is thrown into jeopardy.

Apart from the question of his nationality, there was no impediment for his being considered for further employment. Article 101, paragraph 3, of the Charter is explicit in stating that 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.'

The contested decision would clearly thwart the purpose of the General Assembly's resolution 37/126 which decided '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'. In this instance, a legal expectancy of continued employment was created, an expectancy which has been explicitly recognized in prior tribunal decisions.

If this principle is to be upheld, it cannot be made subject to exceptions based upon purely political considerations.

Given the implications that such a precedent will have, we feel it incumbent upon all concerned to assure that the final decision rests upon a valid and impartial legal determination. For this reason we support the applicant's request to the General Assembly's Committee on Applications for Review of Administrative Tribunal Decisions with a view to requesting an advisory opinion from the International Court of Justice."

49. The Committee deliberated during four closed sessions starting on 20 August 1984. Counsel for the Applicant made a written request to be present, as an observer; which was denied. On 28 August 1984, an open meeting was held at which the Chairman announced the decision, and at which several members made statements for the record. The Committee decided that there was a substantial basis, within the meaning of Article 11 of the Statute of the Administrative Tribunal, for the Application for review of Judgement No. 333; and requested an advisory opinion of the International Court of Justice on the following questions:

"(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?" (Doc. 6.)

C. The Legal Issues

Preliminary Observations on the Scope of Review

50. The narrowness of the grounds on which a judgement of the Tribunal may be challenged under Article 11 reflects the considerable difficulties experienced by the General Assembly, in three years of vigorous debate from 1953 to 1955, in finding a satisfactory solution to the question of judicial review of

Tribunal decisions. Conscious of these difficulties, the Court has concluded that the function of the Committee on Applications for Review of Administrative Tribunal Judgements is "merely to make a summary examination of any objections to judgements of the Tribunal" to determine whether there was "a substantial basis for the application" (*I.C.J. Reports 1973*, p. 176). Its affirmative decision,

> "based only on a prima facie appreciation of the objections, is merely a necessary condition for the opening of the Court's advisory jurisdiction. It is then for the Court to reach its own, unhampered, opinion as to whether the objections which have been raised against a judgement are well founded or not and to state the reasons for its opinion." (*I.C.J. Reports 1973*, p. 177.)

> "The Court may interpret the terms of the request and determine the scope of the questions set out in it. The Court may also take into account any matters germane to the questions submitted to it which may be necessary to enable it to form its opinion." (*I.C.J. Reports 1973*, at p. 184.)

A negative vote on any of the grounds should not be interpreted as a directive to the Court to exclude any of the issues of the case from its deliberations:

> "It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions: the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (Advisory Opinion, *I.C.J. Reports 1962*[1], at pp. 156-157.)

51. The Tribunal's judgements are *res judicata* as to the parties and binding on the General Assembly. They affect not only the rights of the particular staff member who is the Applicant, but all other present and future staff members similarly situated. They affect the attitudes and practices of the Administration of the Secretariat, and sometimes—as in this case—its relationship with member States. They affect the subsequent jurisprudence of the Tribunal itself and that of the other international administrative tribunals. They can have a profound effect on the morale and therefore the efficiency of the staff. It is therefore of the utmost importance that the judgements of the Tribunal be able to withstand the most rigorous judicial scrutiny for consistency with the letter and spirit of the Charter, and with general principles of law and fundamental fairness, both substantive and procedural.

52. The Applicant therefore respectfully requests the Court to interpret the scope of its advisory review so as to give weight to these broader considerations.

I. Did the United Nations Administrative Tribunal Fail to Exercise the 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, 26 December 1983?

(i) *The standard to be applied*

53. The Court in the *Fasla* case shed light on the kind of defects that could be considered fatal and the juridical tests to be applied:

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[1] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter).*

"In the Court's view, therefore, 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. 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. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough; it must in fact have applied them to the determination of the issue." (*I.C.J. Reports 1973*, at p. 190.)

". . . the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based, and drew its own conclusion therefrom as to the obligations violated by the respondent . . ." (*I.C.J. Reports 1973*, at p. 193.)

54. Judges Forster and Nagendra Singh endorsed and amplified this view:

"'Failure to exercise jurisdiction' would certainly cover situations where the Tribunal has either deliberately but erroneously omitted to consider a material issue in the case or has inadvertently forgotten to do so.

The Tribunal may also be said to have failed to exercise jurisdiction if it has palpably and manifestly caused injustice, since such an exercise of jurisdiction would tend to amount to a failure of that exercise. This interpretation would be applicable only if the exercise of jurisdiction was so blatantly faulty as to render it invalid." (*I.C.J. Reports 1973*, at p. 218.)

There is

"nothing to prevent the Court from analysing the conclusions reached by the lower Tribunal to determine whether or not the basic interests of justice are served in so far as there is adequate, proportionate or balanced relationship between the findings of the Tribunal and the conclusions reached in its Judgement" (*I.C.J. Reports 1973*, at p. 218).

55. Justice Dillard, in his separate opinion, cautions against too strict and narrow an interpretation of the provision, since it "was presumably inserted for the benefit of applicants rather than the reverse" (*I.C.J. Reports 1973*, at p. 236). The Court must determine not only whether the Tribunal has "applied its mind" but also whether it "omitted a particular material issue" or treated it "in such a perfunctory manner as to constitute an omission" (*I.C.J. Reports 1973*, at p. 240).

56. The Court also recalled (*I.C.J. Reports 1973*, at p. 207) its previously stated principle, that it is the duty of an international tribunal

"not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not indicated in those submissions (*I.C.J. Reports 1950*, p. 402)".

57. One of the standards that might be applied to test for a jurisdictional failure would be the standard set by the Tribunal itself. As an "independent and truly judicial body" the Tribunal has established a history of healthy and at times courageous scepticism. Its strength, in the past, has been its refusal to accept without examination the statements, reasoning, practices or conclusions of any other entity. Implicit in its judicial character is that it must pronounce independently on the legal issues submitted to it: independently of the Secretary-General, independently of the General Assembly, independently of

member States, independently, in 1954, of the Commission of Jurists. A lapse from its own standards or from its own previously established jurisprudence could be considered as a failure to exercise the jurisdiction vested in it.

(ii) *The issues before the Tribunal*

58. The Applicant did not ask the Tribunal to order his reinstatement. He did not ask the Tribunal to determine his "suitability as an international civil servant". He did not ask the Tribunal to substitute its Judgement for that of the substantive department, the Appointment and Promotion Board, or the Secretary-General. He asked the Tribunal to make a legal determination as to whether an impediment existed to his further United Nations service after his contract expired on 26 December 1983. Did his contractual status impose a legal impediment to further service? Or did a legal impediment inhere in the nature of the Secretary-General's duties and obligations towards the Applicant or towards member States? Such a determination was a necessary preliminary to deciding whether the terms and conditions of his contract had been violated, and whether remedy was due.

59. The terms and conditions of his contract included mandates of the General Assembly. Under resolution 37/126, paragraph IV.5 (which was not yet part of the Staff Rules but which the Tribunal accepted as being binding on the Respondent) he was entitled, after five years of continuous good service, to reasonable consideration for a career appointment. Staff regulation 4.4 (also part of the terms and conditions of his contract) 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 (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".

60. The Applicant's excellence was undisputed. He occupied a permanent post, one that, by its nature, required a long-term commitment. His substantive department had requested his continuation in service. Under such circumstances any other staff member with the requisite five years on fixed-term contracts would have, not only the right of reasonable consideration for a career appointment, but also an expectancy that such consideration would be favourable. Yet he was notified on 23 November 1983 that his fixed-term appointment would not be extended. In response to his request for a review of that decision, Mr. Nègre, the Assistant Secretary-General for Personnel Services, wrote:

> "Your situation, . . ., 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 expec-

tancy 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 of any other type of appointment'."

61. In the mind of Mr. Nègre, therefore, there were at least three legal impediments to his consideration for further service. In the mind of Mr. Nègre he was ineligible for "every reasonable consideration" without an expectancy of renewal. He was also ineligible "without the involvement of all the parties originally concerned", and the Organization had a duty to limit the duration of his United Nations career no matter how valuable his services might be. Mr. Nègre's letter indicates that he believed a secondment contract bestows a right on a government to veto further employment under any other form of contract and thus taint the seconded employee in perpetuity.

In the weeks that followed, it became clear that other high officials shared this view (paras. 42 to 44, *supra*). On 4 January 1984, the spokesman for the Secretary-General, Mr. J. Sills, said at the Daily Press Briefing: "Mr. Yakimetz's contract had expired at the end of 1983 and had not been renewed because the Soviet Government had not renewed the secondment." Mr. Emilio de Olivares, Executive Assistant to the Secretary-General, in his 4 January 1984 interview with the *New York Times*, is quoted as saying, "We didn't extend because we can't". "To have the contract extended, Mr. Olivares said, Soviet consent was essential. But, he said, 'The Soviets refused'." Mr. Patricio Ruedas, Under-Secretary-General for Administration and Management, in his letter to the *New York Times*, published on 25 January 1984, wrote:

". . . a person who is on loan returns to his government unless that government agrees otherwise—a principle applicable in all cases, and not only those involving the USSR".

62. Despite the unequivocal and public statements by senior officials that the impediment in the way of further employment for the Applicant was the requirement of USSR Government agreement and the refusal of that agreement ("The Soviets refused") the Secretary-General, in his legal persona as the Respondent before the Tribunal, denied that this was the case. In paragraph 21 of the Respondent's Answer before the Tribunal, he said that the explanation of Mr. Nègre (quoted in para. 66, *supra*) was merely a paraphrase of the principles set out in Judgement No. 92, *Higgins*. He went on to state:

"Applicant appears to allege that consent of government was regarded by the Secretary-General as the *sine qua non* in this case and that lack of consent of government was the reason why Applicant's case was not put forward for consideration by the Appointment and Promotion Board: Respondent denies this allegation." (Doc. 21.)

In paragraph 22 of his Answer, he states:

". . . Applicant's resignation and request for asylum . . . obviated any necessity to consult any government for consent, since further appointment on the basis of secondment was obviously out of the question".

The Respondent, therefore, in his submission to the Tribunal, effectively admitted that the reasons given by Mr. Nègre in his rejection of the Applicant's

request for review, as well as the reasons given publicly by senior officials and agents of the Secretary-General, were based on a mistake of law, since no further secondment was contemplated by any of the three parties involved.

(iii) *Did the Tribunal "apply its mind" to the questions put by the Applicant, and exercise its jurisdictional powers in its resolution?*

63. In order to resolve the questions before it, it was necessary for the Tribunal to make a determination of the Applicant's rights and contractual status; of the effects on that status of his resignation from his government on 10 February 1983; and of his rights and status at the end of his one-year contract on 26 December 1983.

It was also necessary to determine the nature of the Secretary-General's obligation towards the Applicant; under General Assembly resolution 37/126, IV, paragraph 5, and whether he fulfilled that obligation.

A. Concerning the Applicant's contractual status

(a) The Applicant's Arguments

64. The Applicant contended that he was never in any legally cognizable sense on secondment. All of his United Nations P-11 Personal History forms, forwarded and endorsed by the USSR authorities, stated that he was not, nor had ever been, a "permanent civil servant in [his] government's employ". His first two Letters of Appointment, in 1969 and in 1977, for five years each, made no mention of secondment and contained no "Special Conditions". There is no indication from the documents available, that the USSR authorities used the term "secondment". They merely presented his candidacy, in 1977, and in November 1982 agreed "to the extension of the contract of Mr. Vladimir Yakimetz". Since the five-year contract immediately preceding this extension carried no mention of secondment, the extension introduced a new term. The Applicant signed the contract because at the time he had no alternative. The mentions of secondment appear to emanate unilaterally from the United Nations, as though the Administration assumed that all candidates from Eastern European countries were permanent civil servants.

65. Even if a legally cognizable secondment took place, the Applicant contended that it ended with his resignation from the USSR Government on 10 February 1983. His contract of employment, being between himself and the United Nations, remained in force, and the only effect of his resignation was to relieve his Government of any obligation it might have had to keep a post for him, and to relieve the Secretary-General of any obligation he might have had to inform, consult or secure the consent of the USSR authorities in any future dispensation concerning him.

He argued that his one-year contract signed on 9 December 1982 was modified by agreement between the parties on or after 10 February 1983. On that date he notified the Respondent of a change in his status inconsistent with the *Special Conditions*. The Respondent, by forbidding his entry to United Nations premises, introduced his own amendment. Thus modified by both sides, the Applicant continued to work, and the Respondent to assign him duties and pay him, under the basic contract of employment.

66. If any obligation to consult his Government survived the Applicant's resignation from that Government, the Applicant argued that no such obligation could have survived the contract itself.

He contended that even if the Respondent had bound himself to seek the consent of the USSR authorities for an extension of secondment, no legal constraint existed after the expiry of his contract since there could be no question of another secondment. His status after 26 December 1983 was therefore just like any other fixed-term employee with an excellent service record, with the same right to reasonable consideration for further employment.

(b) The Previous Jurisprudence of the Tribunal

67. The jurisprudence on which the Applicant relied in advancing these arguments was the Tribunal's own. In Judgement No. 92 *(Higgins)* the Tribunal distinguished three kinds of staff migrations: "transfer", "loan" and "secondment". "Transfer" is "the movement of a staff member from one organization to another, with the agreement of both organizations and the staff member concerned, on the understanding that the releasing organization will be under no obligation to accept his return to it." "Loan" is "the assignment of a staff member from one organization to another for a limited period, during which he will be subject to the administrative supervision of the receiving organization but will continue to be subject to the staff regulations and rules of the releasing organization." Under a "secondment" a staff member is "subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization". The receiving and releasing organizations cannot vary the terms of the secondment without the consent of the staff member concerned.

68. The *Higgins* case, however, concerned an interagency secondment, in which both the releasing and the receiving organization applied basically the same rules and were guided by common principles. The relationship of an employee to a national government is different in fundamental ways from the relationship between an international civil servant and an international organization. Therefore, because of Article 100 of the Charter and Staff Regulations 1.1, 1.2, 1.3 and 1.9 a secondment from a government must be more strictly construed than an interagency secondment. The Tribunal made clear, in Judgement No. 192 *(Levcik)*, the strictness of the standards to be applied where a government is involved. It conducted careful scrutiny of the correspondence and memoranda to satisfy itself that the requirements of secondment had been met. It distinguished between a standard formula used by the Office of Personnel services and an expression of legal intent. It demanded that the consent of the staff members be real rather than nominal. Judgement No. 192, in paragraph V, held that:

> ". . . in the absence of a secondment agreed to by all parties concerned . . . the Respondent cannot legally invoke a decision of a government to justify its own action with regard to a staff member".

The ILO Tribunal, in Judgment No. 431, *In re Rosescu*, applied the same strict standards, and found that to "defer to the will of the Romanian authorities", where an employment relationship between the complainant and his Government had ceased to exist, was a misuse of authority.

(c) The Tribunal's Analysis in Judgement No. 333

69. The Judgement concludes, in paragraph III, that "all three parties (the Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being

on secondment from the Government of the USSR". What the parties "considered" is a subjective standard, capable of much elasticity[1], and not one of the "requirements" articulated in *Higgins* or *Levcik*. The Applicant had answered "No" on two Personal History forms, eight years apart, forwarded and endorsed by the USSR Ministry of Foreign Affairs, to the question "Are you now, or have your ever been, a permanent civil servant of your Government?" The Judgement notes that he had once been a teacher at the Moscow Physical Engineering Institute—a non-tenured position relinquished some eight years before the signing of the contract in question. The Judgement also notes his letter of resignation from the Ministry of Foreign Affairs. The relationships of *all* Russian staff members with international organizations are handled by the Ministry of Foreign Affairs, no matter who their previous employers had been.

70. The departure from its own previous jurisprudence is more striking in the Tribunal majority's examination of the Applicant's status after his resignation on 10 February 1983. Whereas the Tribunal in *Higgins* and *Levcik*, and the ILO Tribunal in *Rosescu*, had held the consent of the staff member to be an essential requirement of secondment, the Judgement concluded, in paragraph XIII, that the status of secondment persisted after the Applicant had withdrawn his consent by resignation. Under the *Higgins* definition a seconded staff member is "subject to the staff regulations and rules of the receiving organization", retaining only a right of re-employment in the releasing organization. However, in this case, the Tribunal majority implies that a seconded staff member is denied certain rights, and the Respondent relieved of certain obligations specified by those regulations and rules. In particular, in paragraph XII the Judgement concedes that but for secondment the Applicant "could, in the jurisprudence of the Tribunal, have . . . expectation of one kind or another for an extension . . .". Paragraph XVIII implies that a "background of secondment" excludes a staff member from existing procedures of appointment and disables him from receiving a probationary appointment. Paragraph XI, which notes that his request for leave to return to Moscow to train a successor "was refused by the United Nations", and the conclusion that "he must necessarily face the consequences of his actions", imply that a secondment nullifies the staff member's oath of office and the Staff Regulations requiring him to act in the interests of the United Nations and not to receive instructions from any external authority. The concurring statement's prohibition of any further appointment "without the consent of the government concerned" implies that a secondment relieved the Respondent of his obligation to recruit staff on the principle of merit, and erased his duty not to seek instructions from any external authority.

71. Only the dissenting opinion examined the status of the Applicant after his contract expired on 26 December 1983, and concluded that since there was no possibility and no desire, either on the part of the USSR Government or on the part of the Applicant, that he rejoin the service of that Government, there was no impediment implied by the nature of secondment to prevent his further employment.

> "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; how-

[1] Thus for example, Mr. Patricio Ruedas, Under-Secretary-General for Administration and Management, in his letter to the *New York Times* (para. 44, *supra*) apparently "considered" that secondment was synonymous with "loan".

ever 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 . . ." (Para. 10.)

B. Concerning the obligation of the Secretary-General towards the Applicant under General Assembly resolution 37/126, IV, paragraph 5

(a) The Applicant's Arguments

72. The Applicant argued that, having rendered six continuous years of service highly rated by his supervisors, he came under the terms of General Assembly resolution 37/126, IV, paragraph 5, and had a right to "every reasonable consideration" for a career appointment. Since his substantive department had several times indicated its entire satisfaction with his services and intention to propose his continued employment, he had a reasonable expectation that such consideration, unless precluded by some legal impediment, would be favourable. He argued, in his *Observations upon the Answer of the Respondent*, that the General Assembly did not make consideration for a career appointment conditional upon expectancy of renewal. Indeed the resolution had made obsolete the Tribunal's previous jurisprudence on expectancy, except for periods of four years or less under fixed-term contracts.

(b) The Previous Jurisprudence of the Tribunal

73. In determining what constituted full and fair consideration, the Tribunals have always demanded procedural rectitude. Thus, for example, in Judgement No. 158 *(Fasla)* the Tribunal found that the circulation of an incomplete fact-sheet "seriously affected [Mr. Fasla's] candidacy for a further extension of his contract". In Judgement No. 310 *(Estabial)* the Tribunal held that the Charter and the staff rules demanded that consideration be real rather than nominal. In that case the Administration went through the motions of considering Mr. Estabial. The Tribunal found those motions unpersuasive, and held that due to an error of law the Respondent had in fact failed to give full and fair consideration to his candidacy.

(c) The Tribunal's Analysis in Judgement No. 333

74. The concurring statement denies that the Applicant was eligible for consideration for a career appointment. The majority Judgement, despite its conclusion that consent of his Government was a requisite for further employment and hence that without that consent, any consideration would be pointless, nevertheless finds that he was entitled to consideration, and got it.

75. The opinion finds evidence that reasonable consideration was in fact given in Mr. Nègre's letter of 21 December 1983 which states that the Respondent had "given careful consideration to the issues raised in your request for administrative review". The issues in question were raised by the Applicant in his letter of 13 December, nearly three weeks after the Deputy Chief, Staff Services, had written to the Applicant:

> "Upon instructions 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 Judgement holds, in paragraph XVIII, that "the Respondent had the sole authority to decide what constituted 'reasonable consideration' "—a departure from the Tribunal's insistence, in previous Judgements, on procedural rectitude based on full and complete information. In paragraph XX the Tribunal expresses

> "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",

thus implying that it would have been satisfied, in this case, with standards far less exacting than those laid down in Judgement No. 310, *Estabial*. The dissenting opinion finds that he was illegally denied consideration.

(iv) *Conclusion*

76. The Applicant respectfully submits that the Tribunal failed to "apply its mind" to the determination of his rights and contractual status, and the Secretary-General's obligations towards him. The Judgement held that he was on secondment from the Government of the USSR after his resignation from that Government, although the only role of the releasing organization, according to the *Higgins* analysis, is to preserve a right of re-employment. The Judgement, in paragraph IV, endorsed Mr. Nègre's view that "since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible under the circumstances", although the Respondent had specifically withdrawn that statement in his submission to the Tribunal, since no further secondment was contemplated. And, having determined that "renewal was impossible", the Judgement then concluded that he was given "reasonable consideration for a career appointment" by the Secretary-General himself.

77. Whatever consideration was given to the request for review, consideration for a career appointment could not have been reasonable if the Respondent, under an error of law, believed that he was unable to offer a career appointment without the consent of the USSR Government. It could not have been reasonable if he understood that consideration was conditional on an expectancy of renewal. It could not have been reasonable if he believed he was obliged to limit the duration of the Applicant's service to one year. It can scarcely have been reasonable if the head of the substantive department concerned was taken entirely by surprise, and if, moreover according to his Assistant Secretary-General, "the decision if allowed to stand would create severe problems for [the Programme Planning and Co-ordination] Office over the next few months" (para. 37, *supra*). And if the Secretary-General found himself under pressure "to diverse effect by the permanent missions of two member States", any decision he took may not have been in the untrammelled exercise of his discretionary powers.

78. Wherefore the Applicant respectfully prays the Court to find that the conclusions reached by the Tribunal as to his status and rights after his contract expired on 26 December 1983 were internally contradictory and inconsistent with the Staff Rules; and that its conclusions as to the nature of the Respondent's fulfilment of those obligations were not supported by the evidence before it. Further, the Tribunal did not abstain from deciding points not indicated in the submissions before it, such as the Applicant's "suitability" (see paras. 88 to 98, *infra*). And, in so far as it concluded that "no discernable injury" was

caused by the Respondent's omissions, the Applicant respectfully requests the Court to find that the basic interests of justice were not served; and that Judgement No. 333 should be set aside under this ground of challenge.

II. 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

(i) *The scope of review*

79. No previous application for review of a Tribunal Judgement has raised so squarely a question of Charter interpretation, and therefore the Court has not had the opportunity to lay out the parameters of this ground of challenge. The Court has since 1948 strongly affirmed its competence to exercise an interpretive function in regard to the constituent treaty of the United Nations as "within the normal exercise of its judicial functions", and as part of its role "in the renewal and development of international law" *(Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), I.C.J. Reports 1948).*

> ". . . It is very much the business of this Court to judge whether there is a contradiction between a particular interpretation or application of Staff Regulations and Rules by the Tribunal and any of the provisions of the Charter" (*I.C.J. Reports 1982*, at p. 359).

80. In its jurisprudence the Court has repeatedly invoked the spirit, as well as the letter of the Charter. Thus, for example, the majority in the first of the *Membership* cases:

> "Moreover, the *spirit* as well as the terms of the paragraph preclude the idea that considerations extraneous to those principles and obligations can prevent the admission of a State which complies with them . . ." (*I.C.J. Reports 1948*, at p. 63.) (Emphasis added.)

Judge Lauterpacht, in *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*:

> "There is only limited merit in a judicial interpretation intent upon extracting every ounce of rigidity from a written constitution or in simplifying the issue by concentrating exclusively on extreme solutions. Thus, while unanimity, absolute or qualified, may be entirely alien to the *spirit* of the Charter and as such inconsistent with it, this does not apply to alternative solutions falling short of unanimity." (*I.C.J. Reports 1955*, at p. 113.) (Emphasis added.)

And, most eloquently, Judge Alvarez throughout his dissenting opinion in the *Anglo-Iranian Oil Co.* case *(Jurisdiction)*, e.g.:

> "Then it is necessary to avoid slavish adherence to the literal meaning of legal or conventional texts; those who drafted them did not do so with a grammar and a dictionary in front of them; very often, they used vague or inadequate expressions. The important point, therefore, is to have regard to the *spirit* of such documents, to the intention of the parties in the case of a treaty, as they emerge from the institution or convention as a whole, and indeed from the new requirements of international life." (*I.C.J. Reports 1952*, at p. 126.) (Emphasis added.)

81. In the two advisory opinions rendered since Article 11 of the Tribunal's Statute was adopted, the Court has made clear that this ground of challenge considerably widens the scope of review to include matters of substance.

> ". . . in an appropriate case, where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may . . . be called upon to review the actual substance of the decision" (*I.C.J. Reports 1973*, at p. 188).

In the *Mortished* case, the majority opinion found that

> "the Court clearly could not decide whether a judgement . . . has erred on a question of law relating to the provisions of the Charter, without looking at that judgement to see what the Tribunal did decide . . . to that extent the Court has therefore to examine the Tribunal's decision on the merits . . ." (*I.C.J. Reports 1982*, at p. 358).

In his dissenting opinion, Judge Lachs agreed as to the scope of review:

> "The requirement of 'connecting up' with the Charter, which is necessary for the Court to be able to examine the possibility of legal error, is thus a broad one, relating to the subject-matter of the Tribunal's deliberations, not necessarily to its actual analysis of Charter provisions." (*I.C.J. Reports 1982*, at p. 417.)

He added that the "business of this Court to interpret" implies a duty to reach a "conclusion as to what an alternative interpretation or application might have been. Any other approach would be self-defeating . . ." and that "the Court has the choice either of refusing the procedure or, if it accepts it, of trying to make it work" (*ibid.*, at p. 416).

82. The Applicant respectfully submits that Tribunal Judgement No. 333 violates the letter of a number of Charter provisions, and is inconsistent with the spirit of the Charter as a whole; and prays that the Court render an advisory opinion as to what an alternative application might have been.

(ii) *The Charter provisions at issue*

83. The Applicant, in his request for review of the administrative decision not to offer him further employment, raised explicitly two Charter principles: the principle of merit (Art. 101.3 reflected in Staff Regulations 4.2 and 4.4), and the principle of neutrality (Art. 100, which involves also Art. 2.3, and which is reflected in most of the Regulations in Art. 1 of the Staff Rules). In asking to be treated like "most staff members" he raised implicitly the principle of non-discrimination or equality (Preamble, Art. 1.2 and 1.3, Art. 8, and Staff Regulation 4.3). In seeking compliance with General Assembly resolution 37/126.IV, paragraph 5, he raised implicitly Articles 101.1 and 97, the administrative principles of the Charter, reflected in numerous Regulations and Rules. In seeking a career appointment, he raised the whole career concept which lies at the heart of Article XV of the Charter.

84. The Court, the General Assembly, and the Tribunal itself have all stated in the clearest possible terms that the Charter is one of the sources of law the Tribunal must apply. Thus, for example, the majority opinion in *Mortished* placed the Charter above all other legal norms: "It is true that the regulations and rules applied by the Administrative Tribunal must derive their validity from the provisions of the Charter" (*I.C.J. Reports 1982*, at p. 358). Judge Morozov, in dissent, wrote:

> "Instead of being guided by the resolutions of the General Assembly, and by its own Statute as adopted by the General Assembly, and by the provisions of the Charter, *which ultimately is the only source of law for the Tribunal* . . ." (Emphasis in the original.) (*I.C.J. Reports 1982*, at p. 444.)

The fact that the General Assembly, framing Article 11 of the Tribunal's Statute, regarded errors of law relating to the provisions of the Charter as ground for challenge to the International Court (but not errors of law relating to the Staff Regulations or its own resolutions), is evidence that the Assembly regarded the Charter as the dominant source.

85. The Applicant submits that a failure to reconcile its conclusions with principles of the Charter constitutes no less of an error of law than an erroneous interpretation of a Charter provision.

(iii) *In regard to the principle of merit*

86. In Judgement No. 333, only the dissenting opinion refers to the principle of merit, finding the majority's conclusions inconsistent with the Secretary-General's obligations under Article 101.3. The majority opinion makes no reference whatever to the Applicant's strong claim for consideration by virtue of his excellence, attested to in his performance reports under different supervisors in two tours of duty in the language service, and under the totally different demands of his substantive department, DIESA. Yet the Court, in 1954, found the safeguarding of the principle of merit to be one of the main *raisons d'être* of the Tribunal:

> ". . . the Court finds that the power to establish a Tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter." (*I.C.J. Reports 1954*, at p. 57.)

Similarly, in 1956, the Court interpreted the jurisdiction of the ILO Tribunal in complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations:

> "In so doing the Court has relied on the working of the texts in question as well as on their spirit, namely, the purpose for which they were adopted. That purpose was to ensure the Organization the services of a personnel possessing the necessary qualifications of competence and integrity and effectively protected by appropriate guarantees . . ." (*I.C.J. Reports 1956*, at p. 98.)

87. The Tribunal had itself, only a year previous to Judgement No. 333, forcefully upheld the principle of merit against the demand—frequently asserted in the General Assembly—for more equitable geographical distribution. In Judgement No. 310, *Estabial*, the Tribunal found the Respondent to be acting under an error of law when he limited candidatures for a vacant post to nationals of French-speaking African States:

> "In so doing, he believed he was applying correctly the last sentence of Article 101, paragraph 3, of the United Nations Charter, which provides that:

'Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible',

a provision which is reiterated in Staff Regulation 4.2. The Tribunal attaches very great importance to these provisions. But while they allow the Secretary-General to invite candidatures in order to implement them he cannot refuse to consider the candidatures of United Nations staff members for a vacant post. This is so because the Charter itself (first sentence of Article 101, paragraph 3) provides that:

'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',

while Staff Regulation 4.2 (first sentence) provides that:

'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.'

It was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a 'paramount' consideration the search, however legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount consideration set by the Charter in the interests of the service." (Judgement No. 310, *Estabial*, at para. XIV.)

88. The majority opinion in the case at bar, and more especially, the concurring statement, appears to raise as a new "paramount" consideration the Applicant's refusal to obey orders from his Government regarding his United Nations employment, and his consequent election "to break his ties with his country", which, they consider, disabled him from consideration for a career appointment. Resignation from government service, far from being a disabling factor, is a normal pre-requisite to seeking a career appointment. Since efficiency and competence are obviously not affected by a change of nationality or visa status, can it be that the majority regarded this election as reflecting on the Applicant's integrity?

89. Nothing in the Staff Rules precludes an election to change nationality. Staff members do so without incurring opprobrium. The Personnel Data Unit routinely compiles an "Annex to Nationality Statistics: Changes which have occurred in Staff in Posts Subject to Geographical Distribution", in which changes of nationality or visa status appear as "Gain" or "Loss" in the appropriate country quota. Some eight to ten changes are recorded each year. A change of nationality in no way disqualifies a candidate from consideration for a post; indeed the standard P-11 Personal History form contains a separate box for "Nationality(ies) at birth" and "Present Nationality(ies)", as well as boxes for "Have you taken up legal permanent residence status in any country other than that of your nationality?" and "Have you taken any legal steps towards changing your present nationality?" A candidate who answers "Yes" to the two latter questions is not rendered ineligible thereby. Staff Members who carry a passport other than that of their birth are not normally considered as lacking in integrity, and to the extent that they often bring linguistic abilities and multi-cultural understanding to their work, may be thought of as desirable employees in an international organization.

90. During their tenure, the measure of staff members' integrity must be their oath of office. When, during the 1950s, the Staff Rules were amended to allow

for termination when facts anterior to appointment, which would indicate lack of integrity, came to the notice of the Secretary-General, the Tribunals narrowly construed this provision. In the series of cases concerning non-renewals by Unesco of fixed-term contracts, the ILO Tribunal firmly rejected as self-evident any suggestion that integrity was synonymous with national loyalty:

> "Considering in relation hereto that it is necessary expressly to reject all uncertainty and confusion as to the meaning of the expression 'loyalty towards a State' which is entirely different from the idea of 'integrity' as embodied in the Staff Regulations and Rules; and that this is evident and requires no further proof;" (ILOAT Judgment No. 17, *In re Duberg*, p. 6.)

and:

> "That it does not therefore appear that the complainant placed his own interests above the true interest of the Organization, which interest consists above all in safeguarding *erga omnes* its own independence and impartiality." (*Ibid.*, p. 10.)

91. In the present case, the majority and the concurring opinion rely on language from Judgement No. 326 *(Fischman)*, which in turn relies on a 1956 Judgement, *Khavkine*, No. 66[1]. Both Khavkine and Fischman based their Tribunal appeals on the Universal Declaration of Human Rights, under whose provisions the United Nations, as an "organ of society" falls, and both raised questions about the Respondent's interpretation of the 1953 Fifth Committee proceedings, which are the source of the language quoted in Judgement No. 333.

92. Because of the decisive importance of *Fischman* in Judgement No. 333, it warrants closer examination. The 8th Session of the General Assembly, where the language quoted in Judgement No. 333, paragraph XII, and in *Fischman*, was used, was an extremely stormy session with a number of controversial issues on the agenda. The overwhelming bulk of the Fifth Committee's debate was concerned with Secretary-General Hammarskjöld's Report on Personnel Policy (A/2533) dealing with political activities by staff members; with the effects of the United States Executive Orders of 1953 establishing an International Organizations Employees Loyalty Board; with amendments to Staff Regulations 9.1 *(a)*, 1.4, 1.7, and 9.3 giving new grounds for termination; with revision of Article 9 of the Tribunal's Statute; and with the payment of indemnities to terminated staff ordered by the Tribunal. The United States Immigration and Nationality Act of 24 December 1952, requiring a written waiver of all rights, privileges, exemptions and immunities from an employee of an international organization on permanent residence status, was passed in the political climate of the period. Its effects on personnel policy were discussed at one meeting, the 419th, under great pressure of time.

93. The Report of the Advisory Committee, from which comes the phrase that "a decision to remain on permanent residence in no way represented an interest of the United Nations", dealt largely with tax reimbursement which at that date would have constituted a burden on the budget of the Organization[2]. There was also, at that time, concern over over-representation of the United

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[1] Both Fischman and, three decades ago, Khavkine, appealed to the Committee on Applications for Review of Administrative Tribunal Judgements, but because of the absence of either representation by counsel or records, only those present know on what grounds both applications were rejected.

[2] The introduction of the Tax Equalization Fund has since eased the burden.

States in the Secretariat. If the view, quoted in paragraph XII of the Judgement, was widely shared, it was shared in private and not reflected in the debate. The representative of Egypt said that:

> "International officials should be true representatives of the culture and personality of the country of which they were nationals and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." (*GAOR*, 8th session, A/C.5/SR.419, at p. 274.)

He also spoke of geographical distribution and objected to tax reimbursement. The Indian representative "supported the remarks of the Egyptian delegate", but whether he referred to "culture and personality" or geographical distribution in general is not clear. All the other speakers were concerned about tax reimbursement, about the principle of equality among staff members and equity among member States in financial matters, and about the country quota to which permanent residents should be assigned. A Czechoslovak proposal that permanent residents be excluded from their country's quota and included in the United States quota was rejected. A Lebanese proposal that they be "considered as being in a special category" was adopted. Neither the Czechoslovak nor the Lebanese proposals were consistent with the view that those who opted for permanent residence "could no longer claim to fulfil the conditions governing employment in the United Nations". The will of the General Assembly, to the extent that it was reflected by the debate or the vote, simply does not sustain the proposition that the Tribunal, in paragraph XII, held "to provide an essential guidance in this matter".

94. An Information Circular, bearing hallmarks of hasty preparation, conveyed a summary of these deliberations to the staff. ST/AFS/SER.A/238, of 19 January 1954, entitled "*Visa Status of Non-United States Staff Members Serving in the United States*", records the language of the Egyptian delegate about culture and personality; but also the Special Category. Far from forbidding a change of visa status, the Circular said:

> "Requests for permission to sign the waiver of privileges and immunities in order to change from non-immigrant to permanent residence status will be considered individually, with attention given as to how such a change may ultimately affect the principle of geographic distribution[1]." (Doc. 15.)

No Administrative Instruction was issued at the time. The Staff Regulations and Rules continued to reflect—and still continue—the procedure for changing residence status, requiring, under Rule 104.4 *(c)*, notification to the Secretary-General "before the change in residence status or in nationality becomes final".

95. On 16 August 1982, before the Tribunal considered the *Fischman* application, the 1954 Information Circular on Visa Status was superseded and cancelled by a new Administrative Instruction, ST/AI/294. The new instruction omitted mention of the Special Category[2]. It omitted entirely the view of the

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[1] Language service posts are specially excluded from geographical distribution. Fischman, unlike Khavkine, was in a language service post.

[2] The 1984 Report of the Secretary-General on the Composition of the Secretariat (A/39/453), however, continues to reflect, in Table 12, a Special Category, and mentions in paragraph 4 that:

> "Excluded from geographical distribution are: . . . staff who have permanent resident status in, but not the nationality of the country of their duty station . . ."

Egyptian representative quoted by the Tribunal (para. 93, *supra*). It also restored the original language from the Fifth Committee and ACABQ Report that was misquoted in several respects in the 1954 Information Circular. For example, the Fifth Committee had in 1954 endorsed the ACABQ view that a decision to "remain on" permanent residence status in no way represented an interest of the United Nations (clearly referring to the existing situation). The 1954 Circular had added "or acquire" permanent residence, giving prospective effect to the stricture. Both the quotations in Tribunal Judgement No. 333 are from the earlier, superseded, Circular.

96. The 1982 Administrative Instruction, in force at the time Mr. Yakimetz made his decision, provides in paragraph 20:

> "Exceptions to the policy that internationally recruited staff members must apply for G-4 visa status and give up their permanent resident or other visa status in the United States on appointment may be made in cases of: . . .
>
> *(b)* newly-appointed staff members who have applied for citizenship by naturalization, when such citizenship will be granted imminently; . . ."

The Respondent may well have had this provision in mind when he advised the Applicant, in March 1983, to seek naturalization. The only way to do this quickly was through the complex and arduous process of a private bill, in both Houses of Congress and their Judiciary Committees, to waive the statutory waiting period. This was the course on which the Applicant's United States Attorney, Mr. Orville Schell, embarked [1].

97. Paragraph 23 of the 1982 Administrative Instruction (ST/AI/294) gives the reason why staff are required to sign the waiver of privileges and immunities:

> "23. The signing of the waiver by staff members who are already in permanent resident status or acquired it after entry on duty places them in a position of parity with the staff of United States nationality with respect to their United Nations status . . ."

Thus the strictures about permanent residence status are placed in a context, not of exclusion from consideration, but of equal treatment of staff.

98. The 1982 Instruction specifically discarded the language about "culture and personality" and the statement that those who "elected to break ties . . . could no longer claim to fulfil the conditions governing employment in the United Nations". These views did not prevail in the Fifth Committee. They are inconsistent with Articles 15 (2) and 13 of the Universal Declaration of Human Rights and with the human rights provisions of the Charter, which refer to "people" rather than citizens or nationals, and speak of "the dignity and worth of the human person". They imply a cultural test for nationality, which comes dangerously close to a political criterion; which is unrealistic in the many countries which have multiple cultures and which would be impossible to administer in practice. And, they are manifestly inconsistent with Article 101.3 of the Charter, in which "the necessity of securing the highest standards of efficiency, competence and integrity" is couched in imperative terms, while recruitment on "as wide a geographic basis as possible" is in relative terms.

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[1] The Applicant was granted United States citizenship only on 16 January 1985.

99. Therefore the Applicant respectfully submits that the Judgement fails to take into account the principle of merit, and raises *sua sponte* obstacles inconsistent with that principle; obstacles whose legal foundation is tenuous and whose application, in this context, is arbitrary and prejudicial.

(iv) *In regard to the principle of neutrality*

100. Many of the delegations at the Preparatory Commission had before them a memorandum by C. Wilfred Jenks, based primarily on his ILO experience, which said:

> ". . . Experience has shown that the effectiveness of international secretariats depends largely on the extent to which they are genuinely international in character and consist of persons whose sole allegiance is to the international organization which they serve. There is a clear cut functional incompatibility between the international duties of the officials of such secretariats and the responsibility for upholding the national interests and policies of the countries of which they are nationals, and it is desirable that this incompatibility of function should be explicitly recognized by definite rules which are binding on officials and governments alike. A recognition of the importance of the matter born of a decade of experience led the Assembly of the League of Nations to require all League officials to make a solemn declaration that they would discharge their functions and regulate their conduct with the interests of the League alone in view, and would not seek, or receive instructions from any government or other authority external to the League. League experience showed these arrangements to be seriously defective in that under them the obligation of officials to exercise the functions entrusted to them with the interests of the League alone in view was not paralleled by any corresponding explicit obligation of the governments concerned not to seek to influence their nationals in the discharge of international duties. In the case of some of the organizations now being created the matter has been dealt with in a more satisfactory manner by including in their constituent instruments provisions on the subject which will be binding on officials and governments alike. Important as this principle is in the case of the specialized United Nations organizations for which it has already been adopted, it is still more vital in the case of the proposed general organization." (C. Wilfred Jenks, *Some Comments on the Dumbarton Oaks Proposals*, para. 19.)

101. Few Charter principles are as jealously guarded as the principle of neutrality. In the case of the Secretary-General and the staff, the obligations imposed by Article 100.1 are backed by their oaths of office and by Article 105. In the case of member States, Article 100.2 is reinforced by their undertaking under Article 2.2 to "fulfil in good faith the obligations assumed by them in accordance with the present Charter".

102. A large number of international instruments and agreements, as well as the Staff Regulations, afford specific protections to staff members in order to give substance to the principle of neutrality. Thus under section 18 *(a)* of Article V of the Convention on the Privileges and Immunities of the United Nations staff members have functional immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity". This immunity extends to official duties in the country of which they are nationals. Section 18 *(b)* exempts staff members from national taxation on the salaries and emoluments paid to them by the United Nations. This provision is

intended, at least in part, to insulate officials from national pressures which might be applied through their pockets. Staff members are exempt, under section 18 *(c)* of Article V of the Convention from national service obligations in their own or other countries, in the interest of freedom "from interference by national authorities and free(dom) to perform their duties". Staff members are enjoined, under Staff Regulation 1.6, from accepting any honour, decoration, favour, gift or remuneration from any government, and under Regulation 1.7 from engaging in any political activity, other than the right to vote, "which is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants". Staff members travel, not on their national passports, but on a United Nations laissez-passer which makes no mention of the nationality of the holder.

103. Staff members may not rely, in matters relating to their employment, on the protection of their national laws (UNAT Judgement No. 67, *Harris*, ILOAT Judgment No. 28, *Waghorn, inter alia*) and the Secretary-General is not bound by action taken by national authorities (UNAT Judgements No. 62, *Julhiard* and No. 72, *Radspieler*; ILOAT Judgments No. 13, *McIntire*, No. 47, *Giuffrida*, No. 122, *Chadsey, inter alia*). The salaries and pensions of United Nations officials are immune from attachment by national courts (*United Nations Juridical Yearbook*, 1980, at p. 200, also UNAT Judgement No. 245, *Shamsee, inter alia*).

104. In accepting a United Nations position, a person loses many of the attributes as well as the protection of national citizenship and becomes an agent of the Organization.

> "In order that the agent may perform his duties satisfactorily he must feel that this protection is assured him by the Organization, and that he may count on it. To ensure the independence of an agent, and consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And, lastly, it is essential that—whether the agent belongs to a powerful or weak State; to one more affected or less affected by the complications of international life; to one in sympathy with or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is all the more necessary when the agent is stateless." (*Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, at pp. 183-184.)

105. "In the total absence of any tradition of impartiality", Akehurst points out,

> "legal rules have to take the full strain of protecting this principle. Moreover, an international civil servant is in a much more vulnerable position than his national colleague, and therefore requires more extensive legal protection."

The greater vulnerability comes from the absence of any means of recourse outside the international system: not to public opinion, not to an elected Parliament, not to municipal courts. Staff Associations remain relatively powerless.

The specialized nature of international work, and the interruption of professional contacts in home countries, make it hard to find another job.

> "If an official is not guaranteed sufficient protection by law, he will be tempted to try to enlist the support of his national government or of other member States—and this will have disastrous results on his impartiality, as well as exposing the whole Secretariat to the most undesirable pressures." (M. B. Akehurst, *The Law Governing Employment in International Organizations*, pp. 4-10.)

106. The risks to the principle of neutrality inherent in secondment were evident to the Preparatory Commission, which observed that

> "members of the staff [cannot] be expected fully to subordinate the special interest of their countries to the international interest if they are merely detached temporarily from national administrations and remain dependent upon them for their future" (UN Preparatory Commission: doc. PC 20, at 92).

The 11th Session of the General Assembly, faced with a demand for greater representation on the Secretariat from countries which preferred not to put forward their nationals for career appointments, raised the possibility of a conflict of loyalties. The Secretary-General reassured them that experience had shown that no serious problem of divided loyalties need arise, and, indeed, "the conditions of the Charter and the oath of office were safeguards in this" (*GAOR*, 11th Session Annexes, doc. A/3558, para. 126).

107. Secretary-General Hammarskjöld, in his 1961 Oxford address, said:

> "A risk of national pressure on the international official may also be introduced, in a somewhat more subtle way, by the terms and duration of his appointment. A national official, seconded by his government for a year or two with an international organization, is evidently in a different position psychologically—and one might say, politically—from the permanent international civil servant who does not contemplate a subsequent career with his national government." (Dag Hammarskjöld, *The International Civil Servant in Law and in Fact*, Clarendon Press, 1961, at p. 18.)

Hammarskjöld believed that a certain "critical mass" of secondments could threaten the functioning of the entire Organization.

> "To have so large a proportion [one-third] of the Secretariat staff in the seconded category would be likely to impose serious strains on its ability to function as a body dedicated exclusively to international responsibilities. Especially if there were any doubts as to the principles ruling their work in the minds of the governments on which their future might depend, this might result in a radical departure from the basic concepts of the Charter and the destruction of the international civil service as it has been developed in the League and up to now in the United Nations." (*Ibid.*, at p. 19.)

In addition to the effect on seconded officials themselves, there is a danger of infection, as Schermers has pointed out,

> "when the officials of some nationalities are dependent on their governments while others are not. Inequality damages the harmonious functioning of the Secretariat. In addition, the (sometimes erroneous) impression that some officials are dependent on their governments may encourage

others to establish closer contacts with their governments in order to offset this presumed advantage[1]".

Secondments were sanctioned by the General Assembly to benefit the Organization—to provide special skills required for limited periods, to improve geographical representation—and only incidentally for the benefit of member States. They were never intended as a device for blacklisting former staff members or giving States a right to veto appointments. The necessity to construe strictly the limits of a government involvement arises not only from the interests of the Organization, not only from the legally protected rights of officials, but also from Article 100 of the Charter. An official who comes in with the consent of a government may not expect, nor may the Organization bestow, special treatment. Still less may the Tribunal suggest that special treatment would be proper.

108. Tribunal Judgement 333 failed to find impropriety in a staff member being barred from entering Headquarters in order to avoid offence to a member State. The Judgement finds no impropriety in a member State "contemplating replacing the Applicant by another person whom they had already selected", or "suggesting to him that he should leave for Moscow" soon after he had undertaken programme duties under a new contract, thus sanctioning a higher allegiance to his country than to the United Nations. The Judgement finds no inconsistency with Article 100—and indeed endorses—Mr. Nègre's statement that no further employment could be contemplated "without the involvement of all the parties originally concerned", although any further secondment was clearly out of the question. In the statements of Mr. de Olivares, Mr. Sills and Mr. Ruedas, the Judgement sees no illegal delegation of the power of appointment. "The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences of his actions", said the majority Judgement, failing to note that he was under an obligation to act for the duration of his contract in the interests of the United Nations and not in the interests of his Government, and that, in difficult circumstances, he upheld that obligation.

109. Therefore the Applicant respectfully submits that the Judgement fails to apply the principle of neutrality, and reaches conclusions inconsistent with the principle; denying to the Applicant the assurance, required by the Court, that he may count on the protection of the Organization in the independent performance of his duties.

(v) *In regard to the principle of equality*

110. The Charter, unlike the Covenant of the League, gives explicit expression to the principle of equality. The Preamble invokes the equal rights of men and women and of nations large and small. Articles 1.2 and 1.3 declare respect for the principle of equality to be one of the Purposes of the United Nations; second only to the prevention of war. Article 2.1 applies the principle of sovereign equality to all member States; Article 8 brings the principle to the internal governance of the Organization. Indirectly the Charter gives wider application to the concept. Article 13 (1) *(b)* empowers the General Assembly to initiate studies and make recommendations for "assisting in the realization of human rights". Article 55 *(c)* says the United Nations shall promote: "univer-

[1] H. G. Schermers, *International Institutional Law*, Sijthoff, 1980, at p. 477. See also, H. Herzog, *Doppelte Loyalität*, Dunker & Humblot, 1975.

sal respect for an observance of . . . human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Articles 62 (2) and 68 charge the Economic and Social Council with responsibilities in the field of human rights. Article 76 *(c)* defines as one of the basic objectives of the trusteeship system "to encourage respect for human rights".

111. The Charter speaks for, and to, people as individuals rather than citizens or nationals. The Charter begins: "We, the peoples . . .", and refers to "men and women" and "the dignity and worth of the human person". Similarly, the Universal Declaration of Human Rights, the substantive articles of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and most other international instruments of general application, refer to the equal rights of "all people", "all nations", "all individuals", "all persons" and "all human beings". Article 101.3 speaks of recruiting staff, not by nationality, but "on as wide a geographical basis as possible".

112. If the United Nations is to promote equal rights,

> "it is obviously bound to proclaim and practice the same principles within its internal legal system: not only to avoid but to bar all types of discrimination among those serving this Organization" (*I.C.J. Reports 1982*, diss. op. Lachs, at p. 419).

It would be an error of law to give "a more privileged position to some and [to place] others on a disadvantageous level". It would be an error of law in terms of Article 8 if restrictions were placed on the eligibility of some to participate in any capacity and under conditions of equality in any organ of the United Nations. It would be an error of law in terms of Article 2.1 if any member State demanded, or received, special or differential treatment of its nationals. The principle of equality is implicit in, and closely intertwined with, the principles of merit and neutrality.

113. In a 1969 Legal Opinion, the Legal Counsel responded to a question from the General Counsel, International Bank for Reconstruction and Development, whether the Secretary-General could agree to a request by a member State that its nationals be appointed only on a temporary basis and with the prior approval of the governmental authorities:

> "The Secretary-General could not, in my opinion, agree to limit appointments of nationals of the member State concerned to fixed-term appointments and thus exclude them as a group from other types of appointments, including career appointments, provided for in the Staff Regulations and Rules. Nor would it be proper for him to condition appointment of such nationals on their Government's approval.
>
> This does not preclude consultations with the Government about appointments or the consideration of Government views. The United Nations has in the past for example recognized the need, particularly of developing countries, to retain within their country or their government services scarce technical and professional personnel; consideration of such interests when exercising appointment power is entirely consistent with the Charter. Similarly, the Secretary-General may take into account, when considering appointments, information from governments relating to suitability. Receipt of such information may assist him in securing the standards of efficiency, competence and integrity referred to in the Charter. We have, however, had occasion to reject requests that the Secretary-General undertake as an obligation to consult a government on appoint-

ments, although governments receiving assistance are by some UNDP Agreements entitled to be consulted on technical assistance experts to be assigned to projects within the country." (*Juridical Yearbook*, 1969, at p. 228.)

114. United Nations practice appears to diverge markedly from the views expressed in this Opinion. The 1984 Report of the Secretary-General on the Composition of the Secretariat (*GAOR*, 39th Session, A/39/453) shows in Table 10 the percentage of staff on fixed-term appointments by country and by region. Only one region, Eastern Europe, has virtually all staff on fixed-term. (Of the Eastern European countries, 73.7 per cent of Yugoslav nationals are on fixed-term; 84.6 per cent of Bulgarian nationals, and the rest have 100 per cent on fixed-term, except for Albania with no nationals on the staff.) The People's Republic of China, also Socialist, does not restrict its nationals to fixed-term or secondment contracts. The only countries in other regions with 100 per cent of their nationals on fixed-term appointments have only one national on the staff.

115. Normally, according to General Assembly resolution 35/210, paragraph 1 (3), "no post should be considered the exclusive preserve of any member State or group of States", but paragraph 1 (4) permits "replacement by candidates of the same nationality . . . in respect of posts held by staff members on fixed-term contracts . . . to ensure that the representation of member States whose nationals serve primarily on fixed-term contracts is not adversely affected". This exception, according to the figures above, is for the benefit of the Eastern European countries only.

116. The Tribunal in Judgement No. 192, *Levcik*, recognized that "almost never is an application from an Eastern European received directly", but rather through the national missions of their governments [1]. The Russian language service is the only exception to the system of world-wide competitive language examinations, all candidates coming through a single institution in Moscow. The ILO Tribunal in Judgment No. 431, *In re Rosescu*, heard testimony about the requirement of certain Eastern European countries that their nationals turn over part of their emoluments to their governments [2]. (See also T. Meron, 167 *Recueil des cours* 289 (1980-XI); and A. Pellet, 106 *J. Droit international* 570 (1979).)

117. No State can evade its Charter obligations by claiming that different social realities entitle it to exceptional treatment. The ILO Committee of Experts on the Application of Conventions and Recommendations has consistently rejected arguments that a different approach to the application of labour conventions could be followed in the Socialist States. The Committee felt that its duty was

> "to examine . . . from a legal point of view, to what extent countries which have ratified Conventions give effect in their legislation and practice to the

[1] The Representative of Czechoslovakia to the Committee on Applications for Review of Administrative Tribunal Judgements, in the public meeting of that Committee on 28 August 1984, distinguished between the Secretary-General's obligation under Article 100 (1) of the Charter, and "the legitimate right of any government to convey to the Secretary-General its views on matters relating to its interests . . . These matters naturally include questions related to the employment of nationals of member States whether or not a staff member or an applicant for employment has chosen to sever relations with his government." (A/AC.86/XXIV/P.V.5, at p. 14.)

[2] Certain other governments supplement the United Nations salaries of their nationals. The Staff Union is on record as opposing both practices.

obligations which derive therefrom, irrespective of their political, social and economic systems. The Committee's observations are the conclusions drawn by it from a uniform application of this objective approach." (UN doc. E/1978/27, at 10.)

118. Judgement No. 333 notes, in paragraph XI, that

"evidence was available that the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant. It was suggested to him that he should leave for Moscow early in 1983 for this purpose . . ."

The Tribunal makes no attempt to reconcile this with the principle of Article 2.1. The Judgement accepts without demur the special treatment implicit in this statement; the indication that some nationals might be exempt from normal recruitment procedures, or that some governments imposed conditions on their nationals that were inconsistent with their obligations under the Charter or under their contracts.

Moreover in paragraph VII the Judgement appears to assume that even the normal precondition of secondment—a permanent employment in the releasing entity—need not be strictly applied. And the concurring statement seems to dispense with the requirement of consent by the staff member, requiring only consent by the government.

119. Article 8 imposes in the plainest words an obligation to treat equally all staff members; to impose no restrictions on eligibility of all to participate in any capacity in any organ of the United Nations. Resolution 37.126 imposes no restrictions on eligibility, save continuity of service and merit. The Judgement does not challenge the extraordinary restriction placed on the Applicant's participation by his banishment from the Headquarters building so as to avoid offence to a member State. It implies that his impending change of nationality restricted his eligibility to participate. It imposes a requirement of government consent. It exempts him from the normal operation of resolution 37/126, by means of a supposed preclusive agreement whose only effect would be to deny him consideration from United Nations employment, no matter how valuable his services.

Other staff members, many others, have at one time or another resigned from the service of their governments. Others have changed nationality, or "broken ties", sometimes not by their own choice. The Tribunal not only endorses Mr. Nègre's view that the Applicant could not be treated "like most staff members", but also says that he could not be treated like most seconded staff members, who are permitted to resign and seek a career appointment.

120. Therefore, the Applicant respectfully submits that the Judgement fails to take into account the principle of equality, either of nations or of individuals; and sanctions a double standard under which certain nationals are deprived of rights which should be theirs under the Charter, and certain governments are endowed with privileges which should not be theirs under the Charter.

(vi) *In regard to the administrative principles of the Charter*

121. The Respondent, in his Answer before the Tribunal, conceded that "Applicant's resignation and request for asylum . . . obviated any necessity to consult any government for consent, since further appointment on the basis of secondment was obviously out of the question" (para. 22). He accepted that

"there was no contractual or otherwise legally based prohibition on the Secretary-General, either to grant or withhold another appointment" (para. 23). He accepted, indirectly, that the Applicant had a legal claim to "every reasonable consideration for a career appointment". The Respondent's argument ultimately rested on the discretionary powers of the Secretary-General, in the exercise of his authority and responsibility under the Charter. He claimed, in paragraph 25, that "the decision . . . was legitimately motivated by the Secretary-General's perception of the interests of the Organization to which he properly gave precedence over competing issues" (doc. 21).

122. In his Comments on the Applicant's written statement before the Committee on Applications for Review of Administrative Tribunal Judgements the Respondent argued that

> "The Tribunal did not ignore General Assembly resolution 37/126 but in fact applied it and concluded that the Secretary-General properly exercised his discretion to consider the Applicant for a career appointment." (Para. 7.)
>
> "The Tribunal held that the Secretary-General had the sole authority to decide whether the Applicant *should* be granted a career appointment (emphasis added) and, after examining all the circumstances which the Secretary-General had taken into account, concluded that the Secretary-General properly exercised his discretion when he personally decided in the interest of the Organization not to offer the Applicant a further appointment." (Para. 12, doc. 4.)

123. What the Tribunal actually said was:

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

The concurring statement found no need even to exercise any discretionary powers, since the Applicant was exempt from the provisions of resolution 37/126 and "not eligible for consideration for a career appointment".

124. What the Judgement appears to be saying is that only in the case of a probationary appointment need a candidate be referred to the Appointment and Promotion machinery for consideration. For any other type of appointment the Secretary-General has sole authority to employ whatever method of consideration he chooses. In this case, he chose to give consideration himself, but "in the background of secondment" of his final one-year contract, decided he "*could* not be given a probationary appointment". Having decided earlier (para. XIII) that the background of secondment required the "consent of three parties" for any modification, the Tribunal is not clear what criteria the Secretary-General could have used for this consideration except to note, in paragraph XIX, that he took into account "representations to diverse effect by the permanent missions of two member States". Nowhere does the Judgement indicate that in its views the Secretary-General did in fact—as the Respondent claimed in his statements—give "consideration to all the circumstances in the case, including the Applicant's service record, together with the estimation of his supervisors . . .".

Indeed if he *could* not be given a probationary appointment, consideration of his service record and the estimation of his supervisors would be entirely pointless. The concurring statement is quite clear on this point.

125. The Secretary-General's powers of appointment are limited, under Article 101 (1) of the Charter, by the obligation to carry out the "regulations established by the General Assembly". The Court in *Mortished* held that the General Assembly has the power itself to make detailed regulations, leaving, sometimes, to the Secretary-General "a measure of discretion" in the actual drafting (*I.C.J. Reports 1982*, p. 359). Where the General Assembly lays down a principle it is left to the Secretary-General to give effect to it, first, by an administrative instruction, and eventually in a new version of the Staff Rules.

126. The General Assembly, having established in resolution 37/126, IV.5, a regulation in the clearest possible terms, the Secretary-General's discretion under this analysis extended to drafting an administrative instruction or rule to give effect to it, but not to carving out exceptions to it. He may retain a discretionary veto on who *should* be granted a probationary or career appointment, but not on who *could* be given every reasonable consideration, since the General Assembly had imposed no restrictions on eligibility.

127. Moreover, once the General Assembly has established a regulation, it becomes part of the terms and conditions of the Applicant's contract, even though not yet incorporated in the Staff Rules (UNAT Judgement No. 249, *Smith*). The discretionary powers of the Secretary-General do not extend to unilateral amendment of a staff member's conditions of service. Both the United Nations and the ILO Tribunals have in the past recognized these limits and set aside discretionary decisions if tainted by an error of law or based upon materially incorrect facts, or if essential material elements have been left out of account, or if obviously wrong conclusions have been drawn from the evidence. The Court, in *Fasla*, saw this as a fundamental part of the Tribunal's role:

> ". . . the jurisdiction developed by this judicial organ constitute(s) a system of judicial safeguards which protects officials of the United Nations against wrongful action of the administration, including such exercise of discretionary powers as may have been determined by improper motives, in violation of the rights or legitimate expectations of the staff member" (*I.C.J. Reports 1973*, at p. 205).

128. Discretionary power may be defined as "the situation in which the Administration is free to act or not to act, according to its own sense of policy; it is authorized, but not obliged to act, and has a free choice in the matter" (M. B. Akehurst, *The Law Governing Employment in International Organizations*, at p. 115; also S. A. de Smith, *Judicial Review of Administrative Action*, at p. 171; M. Waline, *Droit administratif*, at p. 449). Many municipal systems provide a remedy for

> "failure to exercise a discretion as a consequence of delegation of powers, acting under dictation, fettering a discretion by self-created rules of policy, bargaining away a discretion or misconstruing the scope of the discretion by reason of an error of law" (C. W. Jenks, *The Proper Law of International Organizations*, at p. 100).

Both English and French administrative law impose a duty to exercise a discretion (de Smith, *supra*, at p. 187, and Waline, *supra*, at pp. 489-490.) Akehurst describes the failure to exercise discretion as: "if the Administration is empowered to do A or B and does A because it believes it is not allowed to do B, . . ." (Akehurst, *supra*, at p. 131).

129. All the available contemporary evidence—Mr. Nègre's letter, the statements of Mr. Sills, Mr. de Olivares and Mr. Ruedas—indicate, not a decision in the exercise of his discretionary powers that the Applicant *should* not be offered an appointment, but rather a failure to exercise discretionary powers in the sense described above: that he believed he was not allowed to do so without the consent of a government. The dissenting opinion in Judgement No. 333 examines a second self-imposed fetter on the Secretary-General's discretionary powers—that of a supposed agreement "to limit the duration of [the Applicant's] United Nations service". Vice-President Kean concludes that "it cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement".

130. The Secretary-General is described in Article 97 of the Charter as the "chief administrative officer of the Organization", a phrase not found in the Covenant. Read together with Articles 100 and 101 it creates for the Secretariat a position of full political and managerial independence. As chief administrative officer the Secretary-General is bound to act, at all times, in the interests of the Organization. Because the Charter envisages a continuing commitment to "succeeding generations", the chief administrative officer has an obligation to put the long-term interests of the Organization ahead of the short-term interests, where they conflict.

> "He may not forego taking a decision in the Organization's interests for the sole purpose of satisfying a member State. The Organization 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." (ILOAT, No. 431, *In re Rosescu.*)

The long-term interests of the Organization are served by upholding the principles of the Charter and, where necessary, asserting them.

131. Wherefore the Applicant respectfully submits that the Judgement fails to draw a line between the proper limits to the Secretary-General's discretionary powers, under Article 97, and his obligations under Article 101 (1) of the Charter to carry out the regulations established by the General Assembly; permitting, under an error of law, an unlawful delegation of his power of appointment in violation of the Applicant's rights.

(vii) *In regard to Chapter XV*

132. Chapter XV of the Charter reflects the decision, taken at San Francisco, that the United Nations Secretariat should be an international and not an intergovernmental body. Each of the Articles in Chapter XV implies, and reinforces, all of the others. In his *Report to the President on the Results of the San Francisco Conference* 26 June 1945 the United States Secretary of State explained:

> "The intent of the proposals made at San Francisco was to make it perfectly clear that the nationals of member States serving as the staff of the Secretariat could not, in any sense of the word, be considered as agents of their governments. It was also deemed important to provide that member States accept an obligation to refrain from seeking to influence the Secretary-General or any member of the staff of the Secretariat. These provisions were considered essential to assure that the Secretary-General and the staff would constitute a truly *international* civil service . . . The proposed Secretariat will be, in effect, an *international* civil service. It will be

recruited on the basis of competence, promoted on the basis of merit, and selected with the due reference to linguistic and geographical consideration." (Dept. of State, *Publication No. 2349*, at p. 150.) (Emphasis added.)

133. The concept of a career service is central to the notion of an independent, competent, politically neutral international civil service responsible only to the Secretary-General, who in turn is responsible to the General Assembly, both subject to the Charter. The Preparatory Commission made explicit this connection. In order to "serve the advantages of experience" and establish "sound administrative traditions", the bulk of the staff should be career officials. This was both in the interests of quality—without assurance of career prospects "many of the best candidates will inevitably be kept away"—and neutrality, since "members of the staff [cannot] be expected fully to subordinate the special interest of their countries to the international interest if they are merely detached temporarily from national administrations and remain dependent upon them for their future" (*Report of the Preparatory Commission of the United Nations* (1945), PC/20 at 92).

134. Proposals by Yugoslavia that the staff be "selected from nationals belonging to Members of the United Nations", and that "the appointment of officials of the Secretariat should be made with the consent of the member government of which the candidate is a national", were rejected. A large majority of delegations argued that the latter proposal would impinge on the exclusive responsibilities of the Secretary-General under Article 101, would threaten the freedom, independence and truly international character of the Secretariat, and would defeat the spirit and the letter of Article 100. Not only were governments not always qualified to pronounce on a candidate but they might be reluctant to consent to the appointment of a member of the political opposition. Nothing should be allowed to "give national governments particular rights in this respect, or permit political pressure on the Secretary-General" (PC/AAB/66, at 51).

135. The Preparatory Commission envisaged limited exceptions to permanent career appointments. The principal higher officers could be appointed under fixed-term contracts not to exceed five years, subject to the possibility of renewal. The Secretary-General must be able to offer temporary appointments to specialists in technical fields as well as persons with special political qualifications. Temporary appointments should be used to accommodate persons from geographical regions inadequately represented. And officials from national services should be able to serve the Organization to strengthen personal contacts between the Secretariat and national administrations and to build up a body of national officials with international experience. Such appointments, in the opinion of the Preparatory Commission, should be for not longer than two years under a system of secondment or leave without pay (PC/20 at 93).

136. The 1982 Report of the International Civil Service Commission (*GAOR*, 37th Session, Supplement No. 30 (A/37(30)) relied directly on these convictions of the Preparatory Commission in its recommendations on the career service which were accepted by the General Assembly in resolution 37/126. The same principles have been affirmed and reaffirmed throughout the Organization's history by successive Secretaries-General, by expert committees, by representatives of the organizations in the common system, and representatives of the staff.

137. The permissible proportion of non-career to career staff has however remained the subject of vigorous debate. At the 11th Session, the Report of the Salary Review Committee, established by General Assembly resolution 975 (X),

1955, while endorsing the concept of a career service, felt that greater use could be made in the United Nations Secretariat of "fixed-term staff obtained largely by secondment from government services, universities and similar institutions" to avoid "complacency and bureaucracy".

> "It has sometimes been argued that non-career staff cannot have the same international loyalties or independence as career staff. The evidence does not support this view. The Committee was impressed with the assurances of the Secretary-General that seconded staff were in his experience extremely zealous in avoiding any tendency toward divided loyalties. [The Committee] could see no objection, either on financial or personnel grounds, if the proportion to be filled on a fixed-term basis, whether by secondment or otherwise, were brought up to say 20 per cent as opportunity offered . . ." (*GAOR*, 11th Session Annexes, Agenda Item 51, doc. A/3209 at paras. 53 and 54.)

The figure of 20 per cent was approved by the General Assembly by resolution 1095 (XL) in February 1957.

138. The decade from the mid-1050s to the mid-1960s saw explicit challenges to the whole concept of a career service. At the 15th General Assembly, the USSR advocated the equal representation on the Secretariat of three groups of member States; the "Socialist" States, the "neutralist" States, and "States members of Western military blocks". A corollary to this proposal was the reduction or phasing out of career appointments and their replacement by fixed-term or seconded staff. A Committee of Experts was appointed in 1959 by General Assembly resolution 1446 (XIV) under the chairmanship of Mr. G. Georges-Picot to review this and other problems of the organization of the Secretariat. The Soviet expert on the Committee, Mr. A. A. Roschin (who replaced Mr. A. A. Fomin) urged, as a matter of priority:

> "*(a)* to put an end immediately to the practice of granting permanent contracts to members of the Secretariat regardless of their nationality . . . that permanent contracts for Under-Secretaries and Directors (D-2 level) be eliminated entirely, that the number of permanent contracts for staff members at the D-1 level be reduced to not more than 30 per cent of the total of such posts and that the number of permanent contracts for staff members in the Professional category be reduced to not more than 40 per cent of the total number of posts in that category" (*GAOR*, 16th Session, Annexes, Agenda Item 61, doc. A/4776, para. 90).

He went on to propose a radical programme of terminations of existing staff.

139. The majority of the Committee rejected this view and reaffirmed the Preparatory Commission's recommendations on a career service. To accommodate demands for greater geographical distribution, however, it contemplated an increase in the proportion of fixed-term staff,

> "to as much as 25 per cent by the end of 1962. The majority of the Committee does not regard this as an excessive proportion. While it is convinced that the bulk of the staff should consist of persons who intend to make service in the Secretariat a career and that the efficiency of the Secretariat is dependent on the existence of a substantial core of career officials, the majority of the Committee agrees that a suitable proportion of officers on fixed-term contracts serves a useful purpose in introducing new blood and new ideas. The majority of the Committee would not recommend the

adoption of the drastic action suggested by the Soviet expert." (*Ibid.*, at para. 92.)

140. In the Fifth Committee debate considering the Report of the Committee of Experts,

> "many delegations felt that it would not be wise to exceed the proportion of 20 per cent for fixed-term staff in relation to career staff . . . The security of tenure inherent in a career appointment constituted a factor of importance in ensuring the independence and the efficiency of Secretariat officials . . . Admittedly, a limited recruitment of fixed-term staff—for example, on secondment from national services or analogous services—served a useful purpose . . . But to exceed 20 per cent would not be wise. Short-term service with the United Nations, if carried much beyond that point, might weaken the concept of the Secretariat as a truly international body . . ." (*GAOR*, 16th Session, Annexes, Agenda Item 64, doc. A/5063.)

A resolution incorporating the 25 per cent limit failed to gain a majority.

141. At the 18th General Assembly, Secretary-General U Thant explained the steady rise in the proportion of fixed-term staff by recruitment efforts in countries who could not spare candidates for career appointments. By converting some fixed-term appointments to career positions he expected to maintain the proportion at about 25 per cent (*GAOR*, 18th Session, Annexes, Agenda Item 66, doc. A/C.5/987).

By the 20th Session the proportion was 28.1 per cent, and the Fifth Committee once again debated both the added expense and the effect on efficiency, continuity and experience of so high a proportion of non-career posts (*GAOR*, 20th Session, Annexes, Agenda Item 84, doc. A/6215).

By 1968, with the proportion at 31.8 per cent, close to 1 in 3, the Secretary-General warned the General Assembly that the continuing decline in the relative strength of career staff had "reached a stage where it could no longer be regarded as a development of limited significance" (*GAOR*, 23rd Session, Annexes, Agenda Item 81, at 14-15). In 1969 the General Assembly, by resolution 2539 (XXIV), recognized that "long-term service is conducive to greater efficiency in certain posts entailing complex duties and responsibilities". A limited guideline was set out in 1970 by resolution 2736 (XXV), which said, *inter alia*, that for posts "involving complex duties and responsibilities" preference should be given to those willing to accept a career appointment or a fixed-term appointment of not less than five years.

142. A table in the 1982 ICSC Report showed the rapid increase in the percentage of fixed-term to career staff: 34 per cent in 1975, 36 per cent in 1978, 39 per cent in 1981. It has now topped 40 per cent. It was against this background, and specifically with reference to the recommendations of the Preparatory Commission, that the ICSC made the proposal that was incorporated in General Assembly resolution 37/126, IV. The ICSC recognized the difficulties, including that

> "some member States do not wish their nationals to serve in international organizations for more than limited terms; such staff usually serve on secondment from their country's own career service" (*GAOR*, 37th Session, Supplement No. 30 (A/37/30), at p. 114).

Evidently, however, it concluded that at some point the percentage of fixed-term appointments might reach the "critical mass" of with Hammarskjöld had

warned, at which time the nature of the Secretariat would change from an international organization into something like an inter-governmental one, contrary to the Charter.

143. The other consideration, strongly urged by FICSA and recommended by ICSAB, the predecessor of the ICSC, was the basic inequity of having two classes of staff, often doing jobs of similar responsibility, but with different career expectancies, different benefits and different degrees of security.

144. In recommending every reasonable consideration for a career appointment upon completion of five years of service, the Commission specifically included seconded staff.

> "With regard to staff on secondment, the majority of the members of the Commission stressed the need for each organization, in situations where it wished to retain the services of the staff member beyond the period of the initial agreement, to take fully into account the views of the releasing government. The other members, while not objecting to this, felt that this should not in any way prejudice the individual rights of the staff member." (*Ibid.*, p. 92, para. 33 and p. 120, para. 66.)

As the dissenting opinion in Judgement No. 333 points out, "this paragraph makes it quite clear that the government's view was not to be decisive but was to be fully taken into account together with all other relevant factors".

145. The Report sets out some of the factors that would be relevant, *inter alia*: "the nature of the functions to be performed, whether continuing or non-continuing; the structural pattern of the organization; and the source of funding of posts" (*ibid.*, p. 96, para. 6). Factors *not* relevant would include nationality.

> "The nationality of a serving staff member should not be a criterion in the decision whether or not to grant permanent status; the nationality factor is taken fully into account at the time of recruitment and should not thereafter be a factor in the determination of the staff member's career, which should be decided solely on grounds of the organization's needs and the staff member's merits." (*Ibid.*, p. 115, para. 49.)

National pressures, in the view of the Commission, may not be factors in any recruitment decision:

> "(xi) Executive heads, chiefs of personnel, career development and placement specialists and managers should resist pressures from any national government to show favouritism in the development of careers of its citizens. The executive head should appeal to the member States . . . to refrain from exerting such pressures;
>
> (xii) Positions within an organization should not be designated (either formally or informally) as the specific domain of any country or group of countries." (*Ibid.*, p. 98.)

146. The General Assembly, at its 37th Session, "welcomed" the ICSC report and recorded no objections to any material part of it. The following year it reaffirmed the decision and, in resolution 38/232, VI, paragraph 5, recommended:

> "that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts".

The passage of the resolution under which the Applicant claimed a right to reasonable consideration, therefore, was not a casual expression of good will

but a conscious decision on the part of the General Assembly to reassert the concept of a career service as the only way of giving effect to Chapter XV of the Charter. The General Assembly had never abandoned the concept of a career service, as the foregoing historical record shows, and had defeated all proposals to alter the nature of the Organization. But previous attempts to draw the line at a certain ratio of fixed-term to permanent appointments had foundered under pressures for more equitable geographical distribution and other desiderata. This resolution placed a limit, not on the percentage of fixed-term staff, but on the length of the fixed-term contract itself.

147. The Applicant fell within the terms of the resolution as to both merit and continuity. Moreover, he fell within the General Assembly's and the ICSC's profile of relevant factors: he occupied a permanent, budgeted post, whose functions were continuing, and which involved "complex duties and responsibilities", for which preference should be given to those willing to accept a career appointment.

148. The Tribunal's Judgement defeats the very purpose which the ICSC and the General Assembly intended to promote: the reaffirmation of the primacy of the career service, open to all, on the basis of merit, who have demonstrated their ability to do the job. It carves out a great swath of exceptions. It permits a government to veto otherwise qualified candidates, and it limits the ability of the Secretary-General to offer a career open to talent, wherever in the world such talent may be found.

149. Wherefore the Applicant respectfully submits that the Judgement's conclusions are contrary to the letter of the ICSC report accepted by the General Assembly, and are alien to the spirit of Chapter XV of the Charter.

(viii) *Conclusion*

150. Wherefore the Applicant respectfully requests the Court to find that the Tribunal, in Judgement No. 333, erred on questions of law relating to the Charter, by placing considerations of nationality above the "paramount" principle of merit; by sanctioning involvement of a government in internal procedures of staff appointment in disregard of the principle of neutrality; by placing restrictions on eligibility in violation of the principle of equality; by endorsing a delegation of the power of appointment and an abuse of discretionary powers offensive to the administrative principles of the Charter; and by undermining the concept of a career international service as intended by the Organization's founders, and as reaffirmed, over the years, by its constituent bodies. The Applicant respectfully prays that the Court advise that Judgement No. 333 should be set aside under this ground of challenge.

(Signed) Diana BOERNSTEIN,

Counsel for Vladimir Yakimetz.

22 February 1985.

Annex A

STATEMENT OF THE UNITED NATIONS STAFF UNION IN RESPECT OF JUDGEMENT NO. 333 (*Yakimetz* v. *the Secretary-General of the United Nations)*

The Staff Union has followed very closely the case brought by a former staff member, Vladimir Yakimetz, challenging the decision of the Secretary-General not to consider a further extension of his contract as well as the possibility of a career appointment following the expiration of his previous contract which was based upon secondment from his national Government.

The Staff Union feels that this case has substantial implications for the independence and integrity of the international civil service. It views with alarm the failure of the United Nations administration to defend the rights of this individual staff member and the apparent political influence which has interfered with the proper adjudication of this case.

The staff are further alarmed by the implications that support of this decision would have for the career international service. It apparently ignores the General Assembly's statement in resolution 35/210 "that no post should be considered the exclusive preserve of any member State or group of States . . ." and the clear principle of the independence of the Secretariat outlined in Article 100 of the Charter.

In accepting his appointment, the Secretary-General stated on 15 December 1981:

> "I am to head a Secretariat which must preserve its basic sense as an authentic international civil service so as genuinely to serve the interests of the international community. In accordance with the Charter, this necessarily entails strict independence with respect to the national interests of the States which are part of the Organization."

He further stated, in an address to the staff on 12 January 1982:

> "As part of my effort to maintain the independent status of the Secretariat, I shall see to it that the career service of the staff will not be adversely affected by any considerations unrelated to merits. Specifically, I wish to reassure the staff that in matters related to career development, nationality as such will not be considered as a relevant factor. As much as any organization, and perhaps more than most, the United Nations needs to reward merit and put a premium on good performance."

The staff member's qualifications and merit have never been disputed. The sole question relates to his status and in particular to his nationality. In the view of the staff, should any government be permitted to raise objections to continued employment on the basis of internal political considerations, the entire concept of an independent international civil service is thrown into jeopardy.

Apart from the question of his nationality, there was no impediment for his being considered for further employment. Article 101, paragraph 3, of the Charter is explicit in stating that 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."

The contested decision would clearly thwart the purpose of the General Assembly's resolution 37/126 which decided "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". In this instance, a legal expectancy of continued employment was created, an expectancy which has been explicitly recognized in prior tribunal decisions.

If this principle is to be upheld, it cannot be made subject to exceptions based upon purely political considerations.

Given the implications that such a precedent will have, we feel it encumbent upon all concerned to assure that the final decision rests upon a valid and impartial legal determination. For this reason we support the Applicant's request to the General Assembly's Committee on Applications for Review of Administrative Tribunal Decisions with a view to requesting an advisory opinion from the International Court of Justice.

Issued 20 August 1984.

(Signed) George IRVING,

President,
Staff Committee.

2. WRITTEN STATEMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS

In reply to letters No. 72530 and No. 72531 dated 28 September 1984 from the Registrar of the International Court of Justice of the United Nations, containing questions submitted to the International Court of Justice for advisory opinion, the Soviet side communicate the following.

Question: 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 Applicant after the expiry of his contract on 26 December 1983?

Answer: In examining the case referred to it the Administrative Tribunal assesses it in a comprehensive manner. The Tribunal is under no obligation automatically to follow all the points in the applicant's claim, but, as a judicial body, it must itself determine in every specific instance the scope of its jurisdiction, as is clearly stated in Article 2, paragraph 3, of its Statute.

Following this principle, which is generally accepted in judicial practice, the Tribunal in paragraph I of its Judgement correctly pointed out that it could concern itself only with the juridical aspect of the case and formulated the legal issues which constitute the substance of the case. In this connection it pointed out that the issues "are not independent of each other; sometimes conclusions reached on any of them influence those on others".

In its Judgement the tribunal provided answers to all legal aspects of the case, including the question, raised in Applicant's claim, concerning the existence of legal impediments to his further employment with the United Nations. This question implies examining, first, a possible extension of a one-year contract after its expiry on 26 December 1983; second, its conversion to a career appointment; third, the conclusion of a new contract. As is evident from the Tribunal's materials, it examined the three possibilities and came to appropriate conclusions.

Paragraph II of the Judgement points out that Applicant worked "on secondment from the USSR Government", which was a "special condition" in his contract. It is important to note in this regard that Applicant's appointments of 28 December 1977 and 8 December 1982 were considered by all the three parties involved—the defendant, the USSR Government and Applicant—as secondment from the USSR Government. Proceeding from its previous practice of examining cases involving secondment, the Tribunal in paragraph IV concluded that "any subsequent change in the terms of the secondment initially agreed on, for example, its extension, obviously requires the agreement of the three parties involved". It is therefore clear that the absence of such trilateral agreement constitutes a legal impediment to the extension of Applicant's fixed-term contract.

The question of a possible conversion of the appointment of a United Nations employee working on a fixed-term contract is regulated by Rule 104.12 *(b)* of the Staff Rules which states that a fixed-term appointment "does not carry any expectancy of a renewal or of conversion to any other type of appointment". The applicability of this rule to the case in question is examined in paragraph IX of the Judgement, which points out that Applicant's attention was specifically drawn to this rule in a letter by the Secretary-General dated 11 March 1983 in connection with Applicant's request for an extension of his contract.

The Tribunal also examined the question of the possibility of Applicant's further employment in the United Nations on the basis of concluding with him a separate new contract. Applicant was seconded for employment with the United Nations by the Government of the Union of Soviet Socialist Republics and therefore his statement that he resigned "from all official positions" which he had held "in the Soviet Government" and his request that the United States Government grant him asylum naturally raised the question of his acceptability as an international civil servant. The Tribunal was guided by the generally accepted opinion, reflected in the report of the Fifth Committee (doc. A/2615), that

> "international officials should be true representatives of the cultures and the personality of the country of which they are nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations".

The Tribunal followed this premise in its previous practice, in particular, in its Judgement No. 326 *(Fischman)*. This premise reflects the established practice of applying the principle laid down in Article 101, paragraph 3, of the United Nations Charter, which calls for "recruiting the staff on as wide a geographical basis as possible". It is precisely in this context that this premise is referred to in the report of the Fifth Committee.

The Tribunal also made reference to the information circular ST/AFS/SER.A/238. In paragraph 12 of that circular, which, as stated in its preamble, should serve as guidance for the Secretary-General, it is stated, in particular, that

> "the decision of a staff member to remain on or require permanent residence status in . . . [the] country [of his 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 and it is particularly undesirable in the case of staff members recruited on the geographical basis."

Thus, the Tribunal gave comprehensive consideration to the juridical side of the question of the possibility of Applicant's further employment in the United Nations. Its decision clearly sets forth the specific legal impediments to Applicant's further employment in the Organization in light of the Staff Rules and other relevant documents of the United Nations.

Question: 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?

Answer: The provisions resorted to by Applicant were Article 101, paragraph 1, Article 100, paragraph 1, and Articles 8 and 2, paragraph 1, of the Charter of the United Nations.

In accordance with Article 101, paragraph 1, "the staff shall be appointed by the Secretary-General under regulations established by the General Assembly". This provision of the Charter gives the Secretary-General of the United Nations as the chief administrative officer of the Organization exceptional powers in appointing staff within the framework established by the Staff Rules as well as by relevant subsequent resolutions of the General Assembly, specifically by Rule 104.12 *(b)* and resolution 37/126, IV, paragraph 5. The applicability of Rule 104.12 *(b)* has been discussed above in the context of the question of the legal impediments to Applicant's further employment in the United Nations.

Resolution 37/126, IV, paragraph 5, provides that "staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment".

In paragraphs XIV-XVIII the Tribunal, on the basis of the analysis of the steps taken by the Secretary-General to consider Applicant's requests concerning the extension of his contract or giving him a career appointment, concludes that in this specific instance only the Secretary-General is empowered to decide what is the meaning of the phrase "every reasonable consideration". The Secretary-General clearly determined that, taking into account that Applicant had been seconded for a one-year period—from 27 December 1982 to 26 December 1983,—he could not be appointed on a probation basis for the purpose of subsequently offering him a contract on the basis of a career appointment. Thus, he has duly exercised his discretionary powers.

In accordance with Article 100, paragraph 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."

Applicant's assertion that the Secretary-General violated the aforementioned provision is groundless, with no arguments adduced to support it. Quite correctly, the Tribunal in paragraph XIX qualified this assertion by Applicant as unfounded and concluded that the Secretary-General's actions in exercising his discretionary powers "cannot be impugned on any of the grounds stated above".

Article 8 states that 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". It is obvious that Article 8 is not at all relevant to the case in question.

Article 2, paragraph 1, provides that the United Nations "is based on the principle of the sovereign equality of all its Members". This provision has no relevance to the case either and any reference to it is totally pointless.

Thus in its Judgement No. 333 the Tribunal assessed the case in a comprehensive manner and produced the decision regarding all the legal issues involved, taking into account the relevant provisions of the United Nations Charter. The submission of the two aforementioned questions to the International Court of Justice of the United Nations is legally inappropriate and has no grounds in law whatsoever.

3. EXPOSÉ ÉCRIT DU GOUVERNEMENT ITALIEN

1. Le jugement n° 333 du Tribunal administratif des Nations Unies a une signification tout à fait particulière, en raison de la complexité des aspects juridiques qu'il comporte et de ses possibles retombées sur le bon fonctionnement du Secrétariat des Nations Unies, dont l'indépendance d'action est pour l'Italie d'importance fondamentale.

La pratique consistant dans le détachement aux Nations Unies d'employés appartenant aux administrations nationales des Etats Membres devient toujours plus fréquente et a pris des dimensions telles pouvant faire naître certains doutes sur sa compatibilité avec le Statut de l'ONU. La situation actuelle s'aggraverait encore si les employés détachés, en raison de l'incertitude créée par le susdit jugement, devaient craindre que, au cas où cesserait leur lien avec l'administration nationale — du fait de révocation ou n'importe quelle autre raison —, toute possibilité d'un emploi aux Nations Unies, à un titre autre que celui du détachement, leur serait interdite.

Les administrations nationales auraient ainsi un instrument de pression qui pourrait amener les employés détachés à sacrifier les intérêts de l'Organisation en faveur de ceux de leur administration nationale.

2. Dans les cas précédents où l'avis consultatif de la Cour avait été requis, la Cour, dans l'exercice du pouvoir discrétionnaire qui lui permet de décider librement si rendre ou non l'avis demandé, a effectué un examen préliminaire des différentes circonstances. Dans le cas en étude, puisque la procédure de requête d'avis n'a pas été démarrée par un Etat, ne sembleraient pas exister les circonstances qui, dans le cas *Mortished*, avaient amené la Cour à s'interroger avec les plus grands scrupules sur l'opportunité de rendre un avis; en revanche a une importance particulière la considération qui, aussi dans le cas précédent, a enfin amené la Cour à se prononcer, à savoir que «la stabilité et l'efficacité des organisations internationales, dont l'Organisation des Nations Unies représente l'exemple suprême, sont d'une importance si fondamentale pour l'ordre mondial que la Cour ne saurait manquer d'aider un organe subsidiaire de l'Assemblée générale des Nations Unies à asseoir son fonctionnement sur des bases fermes et sûres»[1].

3. Dans les avis consultatifs rendus au cours d'occasions précédentes, la Cour a précisé que sa tâche n'est pas celle d'une instance d'appel pour les jugements du Tribunal administratif, qui devrait revoir toutes les questions de fait et de droit examinées par le Tribunal; par conséquent de part italienne, on se limitera à exposer quelques considérations relatives aux deux points pour lesquels le Comité des demandes de réformation a décidé, conformément à l'article 11 du statut du Tribunal, de demander l'avis consultatif de la Cour, à savoir:

4. «Dans son jugement n° 333 du 8 juin 1984, le Tribunal administratif des Nations Unies a-t-il omis d'exercer sa juridiction, ne répondant pas à la demande relative à l'existence d'un obstacle juridique à la continuation de l'emploi du requérant aux Nations Unies, à l'échéance de son contrat le 26 décembre 1983?»

C'est là en effet la question principale qui avait été soumise au Tribunal par le requérant Yakimetz. Il s'agissait de décider si le fait que Yakimetz avait servi jusqu'en 1983 aux Nations Unies en tant que détaché de son administration

[1] *C.I.J. Recueil 1982*, p. 347.

nationale, lui empêchait d'obtenir, sans le consensus de son administration, à l'échéance du contrat de détachement, une nomination à un autre titre aux Nations Unies, et par conséquent si le manque dudit consensus représentait une entrave juridique rendant impossible un nouvel emploi du réquérant aux Nations Unies.

Dans sa requête au Tribunal du 6 janvier 1984, Yakimetz demande au Tribunal, en premier lieu, «de juger et déclarer qu'il n'y avait aucun obstacle légal à la continuation de son contrat, le 26 décembre 1983».

Cette question était citée en premier lieu par le réquérant, non seulement parce qu'il s'agissait de celle dans laquelle était contenu le problème juridique le plus important, mais aussi parce que d'un point de vue logique cette question devait être décidée la première: en effet, à sa solution, dans un sens ou l'autre, était subordonnée la possibilité de passer à examiner les deux autres requêtes adressées au Tribunal par le requérant, à savoir: «juger et déclarer que lui avait été illégalement refusé le droit à être pris en considération raisonnable pour une nomination fixe» et «juger et déclarer qu'il avait une expectative légitime à être nouvellement employé».

Si en effet, au terme de l'examen de la question relative à l'existence ou non d'un obstacle juridique empêchant toute forme de nouvel emploi, le Tribunal avait conclu que l'obstacle existait, il aurait été impossible de passer à examiner les deux autres questions. En effet, ayant décidé l'inadmissibilité d'un engagement au point de vue juridique, on ne peut qu'en tirer la conclusion qu'il est impossible de prendre en considération l'opportunité d'un tel engagement et d'en peser le pour et le contre; quant à l'existence d'une «expectative légitime» à l'égard du renouvellement du contrat, il n'y aurait pas eu de sens d'examiner cette question, après avoir conclu que le renouvellement du contrat était *impossible* du point de vue juridique. Il est évident que, si après avoir décidé qu'il existait un obstacle juridique, rendant impossible la continuation de l'emploi, le Tribunal avait omis d'examiner les deux autres points, le manque d'un tel examen n'aurait pas été une «omission de juridiction», mais seulement la conséquence inévitable de la conclusion atteinte sur le premier point.

Ce n'est qu'après avoir décidé qu'il n'y avait pas d'obstacles juridiques que le Tribunal aurait pu passer à examiner si, outre à l'absence d'obstacles, existait aussi le droit à une «considération raisonnable» pour «un engagement permanent», de même qu'une «expectative légitime» pour le renouvellement du contrat.

Le Tribunal néanmoins, au lieu d'examiner tout d'abord le premier point, de la solution duquel dépendait la possibilité de passer à examiner les deux autres, a tranché avant tout le deuxième point, a traité le troisième d'une manière qui a ressenti du manque d'examen du premier point et a complètement omis de décider au sujet du premier point.

Pendant les discussions du Comité des demandes de réformation, est ressorti un clivage d'opinions entre les juristes de formation latine, qui constataient dans la façon de procéder du Tribunal «une erreur essentielle de procédure, qui a donné lieu a un maljugé», et ceux de formation anglo-saxonne, pour lesquels il s'agissait plutôt d'une «omission de juridiction». En réalité, du fait que le Tribunal ait omis de se prononcer sur la première question fondamentale relative à la présence ou non d'un obstacle juridique, sont nées des distorsions également sur la façon dont le Tribunal a affronté et tranché les deux autres points, et par conséquent outre au deuxième des motifs de revision prévus par l'article 11 du statut du Tribunal (omission de juridiction), est valable aussi le dernier (erreur essentielle de procédure ayant donné lieu à un maljugé). Néanmoins, puisque le Comité de réformation n'a pas demandé l'avis de la Cour au sujet de ce dernier

point, on ne s'y attarde pas plus longuement, quoique la Cour ait estimé, dans son avis du 20 juillet 1982 relatif au cas *Mortished*, de pouvoir librement interpréter les questions formulées par le Comité, en vue de tous les possibles motifs de revision prévus par l'article 11. Les considérations ci-dessus servent de toute façon à faire ressortir que le fait que le Tribunal ait omis de se prononcer sur l'existence d'un obstacle légal ne saurait être considéré comme une omission moindre, et que la question omise était justement la principale, soit parce que à elle étaient rattachés les problèmes juridiques les plus importants, soit parce que de sa solution, dans un sens ou l'autre, dépendait la possibilité de passer à un examen des points successifs, et donc tout le cours ultérieur de la procédure.

Après avoir mis en évidence l'importance fondamentale de la question faisant l'objet de l'omission de juridiction, puisque au cours des discussions auprès du Comité de réformation certains des intervenants ont observé à raison que « le fait que le Tribunal ait décidé différemment qu'il n'avait été souhaité par le requérant, ne saurait être considéré une omission de juridiction », il faut examiner si le Tribunal a en effet complètement omis de trancher sur l'existence ou non d'un empêchement juridique à la continuation de l'emploi.

Alors que Yakimetz, en énumérant les questions qu'il soumettait à la juridiction du Tribunal, posait en premier lieu celle relative à l'existence d'obstacles juridiques qui auraient empêché la continuation de son emploi, de son côté, le Tribunal, au début du jugement, écrit:

> « Dans cette affaire, les questions juridiques se mêlent à celles politiques. Néanmoins, le Tribunal peut traiter exclusivement les questions juridiques, qui sont les suivantes:
>
> *a)* si l'emploi du requérant auprès des Nations Unies en différentes périodes ait créé une expectative légitime pour la continuation de l'emploi auprès des Nations Unies;
>
> *b)* si, et en cas affirmatif, en quelle mesure, ait été appliqué le paragraphe 5 de la résolution de l'Assemblée générale 37/1266 (IV) du 17 décembre 1982, qui dit: « Décide que le personnel employé sur la base de nominations à échéances fixes, ayant complété cinq années de suite de service louable, sera pris en considération raisonnable pour un engagement fixe »;
>
> *c)* les conséquences de l'application des normes et règlements des Nations Unies par rapport à la loi des Etats-Unis sur la résidence et la nationalité. »

Il paraît évident que dans cette énumération des questions sur lesquelles il doit se prononcer, le Tribunal a omis celle relative à l'existence d'un obstacle juridique rendant impossible toute continuation de l'emploi. Le caractère incomplet de l'énumération n'aurait par ailleurs pas de valeur déterminante si le Tribunal avait en effet examiné et décidé aussi la question omise par l'énumération, mais on ne constate nulle part dans le jugement le développement de cette question. Il faut cependant observer qu'au paragraphe IV du jugement le Tribunal se réfère à la lettre du Secrétaire général des Nations Unies, dans laquelle on constate que:

> « la participation de toutes les trois parties en cause (ONU, employé et administration nationale d'origine) étant nécessaire pour le renouvellement de l'affectation du réquérant, ledit renouvellement, compte tenu des circonstances, est impossible ».

Le Tribunal reprend cette constatation du Secrétaire (dont il résulte clairement qu'on affirme l'existence d'un obstacle juridique rendant impossible le renou-

vellement de l'emploi), sans par ailleurs motiver en aucune façon cette conviction, mais en se bornant à citer deux prononcés précédénts (n° 92, cas *Higgins*, et n° 192, cas *Levcik*), qui concernent un problème bien différent: ni le réquérant ni personne d'autre a jamais mis en doute que le rapport d'emploi à titre de détachement ne peut être prolongé, *toujours à titre de détachement*, qu'avec le consensus des trois parties en cause (et c'est à cela que se réfèrent les précédents sus-cités). Dans le cas en étude néanmoins, il ne s'agissait pas de prolonger, pour une nouvelle période de détachement, le contrat de détachement échu en décembre 1983 (prorogation qui n'aurait pas été possible sans le consensus de l'administration nationale), mais de mettre sur pied, à son échéance, un noveau rapport d'emploi *qui ne serait plus à titre de détachement*: la nécessité ou non, à cette fin, du consensus d'une administration dont la personne à employer ne faisait plus partie était justement la question sur laquelle le Tribunal aurait dû se prononcer. Le Tribunal, au lieu d'examiner et de décider cette question cruciale, se borne à accepter d'emblée la nécessité du consensus — et partant l'existence, faute d'un tel consensus, d'un obstacle empêchant toute continuation d'emploi aux Nations Unies — sans motiver en aucune façon cette conviction et omettant par conséquent d'exercer la juridiction qui lui avait été demandée sur ce point fondamental. Comme conséquence logique de cette conviction — juste ou erronée qu'elle soit — le Tribunal aurait dû conclure, en examinant si au réquérant avait été refusé le droit à la «considération raisonnable» pour la continuation de l'emploi, que l'entrave juridique réprésentée par le manque de consensus de l'administration nationale empêchait de prendre en considération la prorogation de l'emploi même à un autre titre que le détachement. C'est là du reste la position prise par le Secrétaire général des Nations Unies dans sa lettre en date du 21 décembre 1984, de même que dans la déclaration dissidente du président du Tribunal.

Dans la lettre du Secrétaire général au réquérant on affirme:

> «dans vos lettres, en référence à votre ancienneté de service et aux évaluations exprimées par vos supérieurs, vous affirmez que « en conditions analogues, la plupart des employés s'attendraient à ce que leur candidature soit prise en considération raisonnable pour une nomination permanente, comme cela est prescrit par l'Assemblée générale dans sa résolution 37/126 (IV). *Votre situation cependant n'est pas la même que celle des autres employés avec ancienneté de service analogue à la vôtre, puisque votre contrat actuel a été stipulé sur la base d'un détachement par votre administration nationale.* Vous-même étiez conscient de cette situation qui ne saurait donner lieu à aucune attente de renouvellement *sans l'implication de toutes les parties intéressées à l'origine.*»

D'après cette lettre, il est évident que le Secrétaire général estimait que, contrairement aux autres employés avec ancienneté et mérites de service analogues qui auraient eu le droit à être pris en «consideration raisonnable» pour une nomination permanente, le requérant au contraire, en raison du manque de consensus de l'administration nationale, ne pouvait être pris en considération pour cette nomination.

La même conviction ressort dans la déclaration du président du Tribunal. Il s'agit d'une conviction qui, quoique partant d'une prémisse (existence d'une entrave juridique, empêchant toute continuation de l'emploi) que l'Italie estime sans fondement, a du moins l'avantage d'arriver à une conclusion (impossibilité de prendre en considération la demande du requérant de continuer à être employé à l'ONU) tout à fait logique et cohérente avec la prémisse.

On chercherait en vain la même cohérence dans le jugement du Tribunal

lequel, après avoir observé au paragraphe IV que le consensus de l'administration nationale est indispensable pour permettre à un employé qu'elle avait détaché à l'ONU de continuer, la période de détachement ayant pris fin, à travailler à l'ONU à titre différent (et donc qu'en l'absence dudit consensus il y aurait un obstacle juridique empêchant toute prise en considération), affirme pourtant que le requérant *avait le droit* d'être pris en considération pour l'emploi, qu'il y a eu une prise en considération, et que le Secrétaire général de l'ONU, après avoir considéré toutes les circonstances, conformément au Statut et aux Règlements de l'ONU, dans l'exercice de son pouvoir discrétionnaire avait conclu qu'il n'était pas de l'intérêt de l'ONU de continuer à employer Yakimetz. Par ailleurs, ce même Tribunal, se rendant compte qu'il n'était pas possible de soutenir que le Secrétaire général avait donné « toute la considération raisonnable qu'il était possible » à la demande d'emploi du réquérant sans se mettre en opposition avec ce que le Secrétaire lui-même avait affirmé (à savoir que la demande du réquérant n'avait pas été prise en considération du fait de l'existence d'un obstacle juridique qui empêchait cette prise en considération), ressent le besoin de chercher à réparer à cette contradiction évidente et reproche au Secrétaire *général de n'avoir pas affirmé* clairement qu'à la demande d'emploi du réquérant avait été donnée toute la considération raisonnable qu'il était possible, et conclut le jugement en exprimant sa désapprobation au Secrétaire général pour

> « n'avoir pas précisé en temps utile et en termes spécifiques qu'à la question de l'engagement du réquérant avait été accordée toute la considération raisonnable possible, comme requis par la résolution de l'Assemblée générale ».

Il est significatif que le président du Tribunal ait estimé nécessaire de se dissocier d'un tel reproche, affirmant que, compte tenu de l'*impossibilité juridique* d'employer à un autre titre un ex-détaché sans le consensus de l'administration nationale, l'emploi du réquérant ne pouvait être pris en considération, et le Secrétaire général ne méritait donc aucun reproche pour n'avoir pas précisé de façon explicite que la demande du réquérant avait été prise en considération, vu qu'au contraire la prise en considération n'avait pas eu lieu, en raison de l'entrave juridique qui l'empêchait.

Des considérations sus-exposées il paraît clairement qu'il n'est pas possible de soutenir que le Tribunal, puisqu'il a décidé que Yakimetz avait le droit d'être pris en considération raisonnable, a par cela même décidé de façon implicite qu'il n'y avait aucun obstacle juridique pouvant empêcher cette prise en considération, et que par conséquent il n'y a eu aucune omission de juridiction relativement à la question de l'existence ou non d'un obstacle.

Tout d'abord il ne paraît pas possible de décider « implicitement », sans aucune motivation, d'une question explicitement soumise à la juridiction du Tribunal, et ensuite on observe que le Tribunal, après avoir affirmé (paragraphe IV du jugement) qu'un obstacle juridique empêchait toute prise en considération, a pu conclure que le réquérant avait été pris en considération uniquement en raison de l'ajustement ci-dessus (reproche au Secrétaire général pour avoir précisé de façon seulement « implicite » que la prise en considération avait eu lieu avec une issue négative, alors que le Secrétaire avait au contraire dit bien explicitement au réquérant qu'il ne pouvait être pris en considération).

En conclusion, de part italienne on est de l'avis que le jugement en discussion est le fruit d'un essai de compromis entre les membres du Tribunal qui affirmaient l'existence d'un obstacle juridique et ceux qui le niaient.

Dans cet essai de compromis, le clivage d'opinions a été réglé d'une part en omettant toute décision de fond sur ce point fondamental et d'autre part en

essayant d'amalgamer l'opinion de qui estimait que le requérant avait le droit d'être pris en considération pour la continuation de l'emploi et de qui estimait cette prise de considération impossible. Il est évident que les essais de compromis, si appliqués à un jugement, ne peuvent que conduire à des résultats absolument insatisfaisants du point de vue de la cohérence juridique. L'incohérence évidente du jugement en étude est une des raisons pour lesquelles l'Italie, en tant qu'Etat adhérent à l'ONU et donc vivement intéressé au bon fonctionnement du Tribunal administratif des Nations Unies, a été amenée à présenter un exposé.

4. «Le Tribunal a-t-il commis une erreur sur une question de droit relative aux dispositions du Statut des Nations Unies?»

Les considérations de l'Italie au sujet de ce deuxième point sur lequel l'avis de la Cour a été demandé seront bien plus brèves que celles relatives au premier point, parce que le Tribunal, en omettant d'exercer sa juridiction sur ce qui était le point fondamental en discussion, s'est également soustrait aux observations qui auraient pu lui être adressées, du point de vue de la conformité aux dispositions du Statut de l'ONU, s'il avait rendu sur cette question un jugement motivé.

Au cas ou le Tribunal avait décidé qu'un employé qui a travaillé aux Nations Unies en tant que détaché de l'administration nationale d'origine ne pourrait à la fin de la période de détachement continuer son emploi aux Nations Unies à un autre titre sans le consensus de l'administration nationale à laquelle il appartenait, de part italienne on aurait estimé cette décision en opposition avec l'article 8, l'article 100, paragraphes 1 et 2, et l'article 101, paragraphes 1 et 3, du Statut des Nations Unies.

Cependant, il ne paraît pas utile de développer d'autres considérations à ce sujet. En effet, faute des motivations que le Tribunal aurait adoptées à l'appui de sa décision s'il avait exercé sa juridiction sur ce point, il est impossible de critiquer, en fondant toute critique sur de simples hypothèses, l'interprétation du Statut que le tribunal aurait pu donner. Il est d'autre part évident que les critiques possibles relatives à la conformité au Statut, auxquelles le Tribunal s'est soustrait en omettant de décider le point fondamental soumis à sa juridiction, ne peuvent qu'être ajoutées à celles déjà formulées au sujet de cette omission. Il est important à présent de réparer à l'omission du Tribunal moyennant l'avis consultatif de la Cour.

Quant à la compatibilité avec le Statut de l'ONU de la façon dont le Tribunal a tranché la question du droit à une considération raisonnable pour un engagement permanent, compte tenu du fait que, comme dit ci-dessus, la décision sur ce point a été déformée par l'omission de juridiction sur la question de l'existence d'un obstacle juridique, on exprime les considérations suivantes.

Le Tribunal estime que la «considération raisonnable» indiquée à la résolution 37/126 de l'Assemblée générale ne devait pas forcément être effectuée par la «Commission pour les nominations et les promotions» des Nations Unies, mais pouvait aussi être effectuée par le Secrétaire général. On pourrait à la rigueur convenir sur cette conclusion; ce qu'on estime inacceptable, c'est l'interprétation du Tribunal au sujet de l'étendue du pouvoir discrétionnaire relevant du Secrétaire général lorsqu'il effectue cette considération raisonnable. Pour être véritablement «raisonnable», cette considération devrait avant tout être effectuée aux termes de l'article 101 du Statut de l'ONU, selon lequel

> «la considération dominante pour le recrutement et la fixation des conditions d'emploi du personnel doit être la nécessité d'assurer à l'Organisation les services de personnes possédant les plus hautes qualités de travail, de compétence et d'intégrité».

Dans le texte du jugement, les capacités professionnelles du requérant — qui

aux termes de l'article 101 auraient dû être considérées en premier lieu — ne sont même pas mentionnées. Les seuls éléments explicitement mentionnés comme étant la cause de l'issue négative de la prise en considération sont le manque de liens entre le réquérant et son pays d'origine et le manque de consensus de ce pays pour la continuation de l'emploi.

On est par conséquent de l'avis que le Tribunal, lorsqu'il a estimé correct un exercice de pouvoir discrétionnaire par lequel on a attribué à des éléments non mentionnés à l'article 101 du Statut une valeur prédominante par rapport à ceux qui, selon cet article, auraient dû avoir une importance prédominante (ou plutôt, lorsqu'il a pris en considération uniquement des éléments non prévus par l'article 101, sans tenir aucun compte des éléments qui — selon cet article — doivent primer), a fait erreur au sujet d'une question de droit relative aux dispositions du Statut des Nations Unies.

4. WRITTEN STATEMENT OF THE GOVERNMENT OF CANADA

Pursuant to the provisions of Article 66 (2) of the Statute of the International Court of Justice, and in response to the invitation addressed to the Government of Canada by the Registrar of the International Court of Justice on 28 September 1984, the Government of Canada wishes to submit certain general comments on Judgement No. 333 of the United Nations Administrative Tribunal.

The International Court of Justice has been requested by the Committee on Applications for Review of Administrative Tribunal Judgements to provide an advisory opinion in response to two questions:

(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?

It is the intention of the Government of Canada to submit comments solely with respect to issues arising from question number 2. Further, the Government of Canada does not intend to make any comments on the facts or merits of the case heard by the Administrative Tribunal, but rather to present its views with respect to the scope and proper interpretation of Articles 100 and 101 of the United Nations Charter.

Articles 100 and 101 of the United Nations Charter are based in large measure on amendments proposed by the Canadian delegation to the United Nations Conference on International Organization held in San Francisco in 1945. At the time these articles were adopted, Ambassador Pearson, speaking on behalf of Canada, made the following statement:

> "We have laid down provisions for an international secretariat—provisions which may prove to be of greater consequence in the development of international co-operation than certain other more exciting and controversial paragraphs of our Charter. We have, in fact, drawn up a charter for an international civil service, and done it in such a way as to ensure, in so far as we can by any written provisions, that this service will be based on the independence, integrity and efficiency of its members." (*Documents of the United Nations Conference*, Vol. VI, doc. 1186, p. 14.)

To ensure the independence of the Secretary-General in staffing matters, and to ensure that questions of merit were the paramount consideration in such matters, Article 100 of the United Nations Charter expressly enjoins the Secretary-General or his staff from seeking instructions from any authority external to the United Nations. Concomitantly, member States are to refrain from seeking to influence the Secretary-General and his staff in such matters. Staff appointments are the sole preserve of the Secretary-General, subject only to regulations established by the General Assembly and to the paramount consideration of securing the highest standards of efficiency, competence, and integrity. Considerations of geographical distribution are subordinate to this principle.

To the extent that the request for an advisory opinion from the Court raises, in part, the question of the proper application of the United Nations Charter in cases of secondment, the Government of Canada wishes to submit its views on the nature of a secondment.

The Government of Canada recognizes that secondments may be a useful tool to encourage a wider selection of staff both geographically and in terms of experience. This tool, however, must be carefully regulated and must comply with the principles of the Charter.

The Government of Canada submits that the only interpretation of secondment that is consistent with the terms of the Charter is that in such an arrangement an individual makes his services available to the United Nations Secretariat, while the member State concerned grants the individual a right to return to his previous employment. Any interpretation that seeks to provide member States with a veto power over any staffing decision of the Secretary-General is contrary to the Charter.

The Secretary-General undoubtedly has a legitimate interest in consulting with member States on staff appointments in the interests of securing the highest standard of efficiency, competence and integrity, or to seek out staff to improve the geographical distribution of employees in the Secretariat. Indeed, the relationship of an employee with his or her country of nationality may be a factor in determining the extent to which an individual fulfills the requirements of Article 101. The views of the member State, in this regard, may be a relevant factor but cannot be the sole criterion in decisions of the Secretary-General with respect to secondments.

If the appointment or re-appointment of an employee were refused solely for want of the consent of the country of the employee's nationality, or indeed of any other member State, such decision would be contrary to Articles 100 and 101 of the United Nations Charter.

The Government of Canada trusts that the Court will take into account this interpretation of the United Nations Charter in making its decision with respect to whether the United Nations Administrative Tribunal erred in law on a question relating to provisions of the Charter of the United Nations.

5. WRITTEN STATEMENT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

A. Questions Presented

On 23 August 1984, the Committee on Applications for Review of Administrative Tribunal Judgements (Committee) requested an advisory opinion of the International Court of Justice (Court) with respect to the following two questions:

> "(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?"

B. The Court's Jurisdiction

The authority for invoking the jurisdiction of the Court to render an advisory opinion is found in the Statute of the Court, which provides in Article 65 (1):

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

The General Assembly, pursuant to Article 96, paragraph 2, of the Charter of the United Nations (Charter), so authorized the Committee in Article 11 of the Statute of the Administrative Tribunal (Tribunal) (resolution 957 (X) (1955)).

The Committee considered an application submitted by the Applicant, Mr. Vladimir V. Yakimetz, on 23 July 1984 (A/AC.86/R.117), and a response by the Respondent, the Secretary-General of the United Nations (A/AC.86/R/118). On 23 August 1984 the Committee found that a substantial basis existed for two of the Applicant's contentions: that the Tribunal had failed to exercise jurisdiction vested in it by neglecting to address the question of whether the Applicant was legally barred from further employment with the United Nations; and that the Tribunal had erred with respect to questions of law relating to the Charter of the United Nations. The Committee accordingly requested the Court's advisory opinion on these two questions (A/AC.86/R.121).

C. The Court's Discretion

The Court has considered the question of whether to exercise the discretion granted to it by Article 65 of its Statute to render an advisory opinion in two previous cases arising under Article 11 of the Statute of the Administrative Tribunal, and in both cases it decided that it should render the advisory opinion

requested (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1973*, p. 183 (hereinafter: *Fasla*); *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1982*, p. 347 (hereinafter: *Mortished*)). The *Fasla* case is procedurally identical to the instant case, being a request for an advisory opinion by the Committee arising from the objections of an employee of the United Nations Secretariat to a decision by the Tribunal (*I.C.J. Reports 1973*, pp. 169-170). The United States submits that there is no compelling reason for the Court to refuse to render an advisory opinion in the instant case, and that to fail to render such an opinion in this case would be inconsistent with its jurisprudence [1]. The United States accordingly urges the Court to render its opinion as requested.

II. SUMMARY OF THE FACTS

The Applicant, Mr. Yakimetz, was last employed by the Secretariat of the United Nations under a fixed-term contract concluded on 9 December 1982. This was the latest in a series of contracts under which the United Nations had employed the Applicant for a total of about 11 years. This final contract, like all the previous contracts, consisted of a letter of appointment granting the Applicant a fixed-term appointment. In this case, the appointment ended on 26 December 1983. The letter of appointment contained in the section entitled "Special Conditions" the statement "On secondment from the Government of the Union of Soviet Socialist Republics". The letter of appointment for the Applicant's immediately previous term of service, dated 27 December 1977, had contained no reference to secondment. Prior to beginning that penultimate term of service, the Applicant had been a student of economics.

On 9 February 1983 the Applicant began the process of changing his nationality.

On 10 February 1983 the Applicant informed the Soviet Government that he was severing whatever ties he had with it.

On 23 November 1983 the Repondent informed the Applicant "that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983" [2]. This decision was not made in response to any application by the Applicant to the officials responsible for personnel policy asking that his employment with the United Nations be extended [3].

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[1] In *Fasla*, the Court stated that it "has no doubt that, in the circumstances of the present case [which were identical to the case now before the Court], it should comply with request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion" (*I.C.J. Reports 1973*, p. 183).

[2] In fact, it is not the practice of the United Nations to "extend" fixed-term appointments. As may be seen by examining the history of the Applicant's employment with the Respondent in this case, when the Organization wishes to continue employing an employee whose fixed-term contract is expiring, the practice is to make a new, and completely separate, contract (whether fixed-term or career) based upon a new letter of appointment that becomes effective at the end of the expiring appointment.

[3] In his letter of 1 March 1983 to the Respondent asking for the Respondent's views concerning the effect of placing the Applicant on administrative leave, the Applicant had referred to "the possible extension of his appointment". This tentative and hypothetical reference, coming some eight months prior to the Respondent's decision not to extend the Applicant's employment on a fixed-term basis, cannot be considered an application in any formal sense.

Nor does the record show that the Applicant's supervisor, Mr. Hansen, at that time recommended to the responsible officials of the personnel service that the Applicant's employment be extended, though as early as 8 February 1983 he had communicated in writing to the Applicant his intention to recommend an extension of his employment on a fixed-term basis (i.e., the conclusion of a new fixed-term contract) [1]. In his letter of 2 December 1983 to Mr. Nègre, the Assistant Secretary-General for Personnel Services, Mr. Hansen reiterated his desire to have the Applicant continue his employment with the United Nations, stating that "[i]t is in the best interest of the Office to continue to have the services of Mr. Yakimetz".

On 13 December 1983 the Applicant requested the Joint Appeals Board to reverse the decision of the Respondent not to continue to employ him on the basis of a new fixed-term contract. In his request, the Applicant notes that:

> "I was given to understand, both verbally and in writing, that my Department intended to recommend a further extension of my appointment or conversion to a career position . . . I understand that such a recommendation has been made . . . 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 foregoing indicates unambiguously that the Applicant wished to be considered for a career appointment and, if that were not available, for another fixed-term appointment. There was no mention of secondment.

On 21 December 1983 the Respondent replied to the Applicant's request of 13 December. That reply states in pertinent part:

> ". . . 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 deci-

[1] That no recommendation had been made as of 23 November 1983 seems apparent from the letter sent by the Applicant's supervisor to the Assistant Secretary-General, OPS, on 2 December 1983 which states: "I find it extraordinary that such a decision should be taken *without consulting the head of the Office concerned.*" (Emphasis added.)

> sion 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.*" (Emphasis added.)

The foregoing shows that, at the time it took the action complained of by the Applicant, the Respondent believed it had "agreed" with the Government of the USSR to limit the Applicant's service with the United Nations to a period coterminous with the expiry of the letter of appointment concluded on 9 December 1982. It shows that the Respondent believed that the Applicant had been seconded from his "national civil service" to the United Nations in the contract of 9 December 1982, that the so-called "agreement" arose from that secondment relationship, and that the Applicant had been made aware of it.

Finally and most importantly, the Respondent's letter of 21 December 1983 establishes the Respondent's belief that the "agreement" with the Soviet Government precluded it not only from "extending" the Applicant's *fixed-term* appointment, as had been indicated in its letter of 23 November, but, in addition, to allowing the Applicant's name to be "'forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for *career* appointment". (Emphasis added.)

That the Respondent in fact held these views and based its actions with respect to the Applicant's request for continued employment upon them is not only made clear by the contents of the letters of 23 November and 21 December 1983. It is made clear, as well, by what the letters *did not* contain (i.e., any independent rationale for the Respondent's extraordinary course of conduct after 10 February 1983). It is consistent, in addition, with three contemporaneous considered statements by United Nations officials. The United Nations press spokesman said on 4 January 1984 that the Applicant's contract "had not been renewed because the Soviet Government had not renewed the secondment" (UN Daily Press Briefing, 4 January 1984). The *New York Times* of 4 January 1984 reported an interview with Mr. de Olivares of the Secretary-General's Office and included the following passage: "To have the contract extended, Mr. Olivares said, Soviet consent was essential. But, he said, 'The Soviets refused'." Finally Mr. Ruedas, the Under-Secretary-General for Administration and Management, wrote to the *New York Times* on 4 January 1984, stating in pertinent part that "a person who is on loan returns to his government unless that government agrees otherwise—a principle applicable in all cases, and not only those involving the USSR"[1,2] (*New York Times*, 25 January 1984).

On 6 January 1984 the Applicant filed his application with the Tribunal.

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[1] In his *Answer*, written several months after the events in question, the Respondent seeks to distance itself from the letter of 21 December and the statements made by responsible officials of the Secretariat, claiming that the Respondent had not perceived itself bound by an agreement with the Soviet Government, and that its decision not to offer the Applicant continued employment was based entirely upon an unfettered exercise of discretion. The *Answer* claims that the Respondent believed at that time that the agreement of the Soviet Government was needed only with respect to an extension of secondment, but not with respect to continued employment on any other basis. The Respondent asserts that

> "in its third paragraph, [the letter] merely paraphrases the principles enunciated by the Tribunal at paragraph VII of *Higgins, op. cit.*, in denying that Applicant could

III. THE TRIBUNAL'S DECISION

A. The Questions Presented to the Tribunal by the Applicant

In his application to the Tribunal, the Applicant asked it to rule on three questions of law:

> "To adjudge and declare that no impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> To adjudge and declare that he had an expectancy of further employment.
>
> To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment." (Judgement, *supra*, p. 43).

B. The Issues as Defined by the Tribunal

The Tribunal identifies at paragraph I of its Judgement three "legal issues" in the case. They are:

> "*(a)* whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;
>
> *(b)* whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads:
>
> > '*Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every *reasonable consideration* for a career appointment'
>
> has been carried out;
>
> *(c)* the consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship." (Judgement, para. 1.)

It is immediately apparent that issues *(a)* and *(b)* correspond to the Applicant's second and third pleas, and that issue *(c)* is unrelated to the Applicant's pleas. The Tribunal found with respect to the first "issue" that the Applicant had no legal expectancy of further employment with the Respondent arising

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have any expectancy of renewal of his one-year contract *on secondment*". *Answer*, paragraph 21 (emphasis added).

But that is not what the clear words of the letter say. They say that "the Organization agreed so to limit the duration of *your United Nations service*". This wording is entirely consistent with the Applicant's assertion that the Respondent believed itself legally bound not to continue the Applicant's employment *under any circumstances* without Soviet Government approval. It is entirely consistent with the three contemporaneous public statements made by responsible Secretariat officials. It is, by sharp contrast, entirely inconsistent with the *ex post facto* version of events now relied on by the Respondent.

[2] These statements if taken in isolation could also support the Respondent's assertion that the Respondent did not, despite the unambiguous terms of the letter of 21 December 1983, feel itself legally bound not to offer continued employment to the Applicant. In that case, they would constitute evidence that the Respondent yielded to the objections of the Soviet authorities (see discussion, *infra*, at p. 175).

either from his performance while employed under a series of fixed-term contracts, or from General Assembly resolution 37/126, IV (Judgement, para. VI). With respect to the second "issue", it found that the Respondent possessed the sole discretion to determine whether or not it had given the Applicant's application "every reasonable consideration", and that it had so *determined*[1] (Judgement, para. XVIII). The Tribunal found that the third "issue" need not be decided, since "there was apparently no immediate problem and it seems that no request was made to the Respondent for agreeing to the Applicant waiving his privileges and immunities" (Judgement, para. XII).

In addition to ruling on two of the three issues it listed, the Tribunal also ruled on three other issues it had not listed. These were: (1) whether the Respondent improperly took into account the views of the Soviet authorities in denying the Applicant's request; (2) the effect of the Applicant's decision to seek to change his nationality on his eligibility for continued employment with the United Nations; and (3) whether the Applicant had been legally seconded to the United Nations by the Government of the USSR at the time the Respondent took his decision to reject the Applicant's request for continued employment. The Tribunal found that the Respondent had not allowed himself to be improperly influenced by the views of the Soviet Government, that the Respondent was not only permitted, but was required, to take into account the Applicant's intent to change his nationality, and that the Applicant was seconded throughout his last period of continuous service from December 1977 until December 1983.

The views of the United States with respect to all five issues addressed by the Tribunal are set out below.

All of the Tribunal's rulings in this case are of fundamental importance in defining the nature of international civil service and are directly applicable to large numbers of international civil servants. They go far beyond the narrow interests of those immediately concerned. The broader implications of the Judgement were noted by Mr. Tsering, the Representative of Bhutan to the Committee, who stated

> ". . . this case is crucial—to the Applicant, to the Respondent, and in particular for the efficient running of the United Nations Secretariat in the larger interest of the international community" (A/AC.86 XXIV/PV.5, p. 5).

The independence and integrity of the Secretariat is the keystone of the functioning of the United Nations. The need to protect the large number of officials who are seconded under fixed-term contracts from undue pressures is critical. It was in response to that need that the General Assembly adopted resolution 37/126, IV. The facts of the instant case must be viewed in light of this need, the General Assembly's response to it, and Articles 100 and 101 of the Charter. The continued viability of the United Nations in the form envisaged by Articles 100 and 101, an international organization with an independent Secretariat, as opposed to an inter-governmental coalition, is the central issue raised by the instant case.

[1] In so finding, however, the Tribunal noted that the Respondent never expressly advised the Applicant that "every reasonable consideration" had in fact been given to the Applicant's career appointment, and fails to establish of what such "reasonable consideration" in its opinion consisted (Judgement, para. XVIII).

C. Discussion of the Tribunal's Judgement

1. The Legal Reasoning Underlying the Tribunal's Holding that the Applicant Had no Legal Expectancy of Further Employment with the United Nations Is Flawed

The Tribunal's reasoning in reaching the conclusion that Applicant had no expectancy of further employment is unsound [1]. The Tribunal states that "[i]n so far as he was on secondment for the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment" (Judgement, para. XII). This sentence is a *non sequitur*, since no action taken by an employee can generate a legal expectancy in any case. The Tribunal goes on to assert:

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

The Tribunal would thus appear to be holding that secondment in and of itself precludes the creation of a legal expectancy for continued employment even if the Respondent were to take actions that would otherwise create one [2]. The Tribunal gives no argument to support this view, which colours its entire judgement, and cites no authority for it. It is this view that leads the Tribunal to fail to grasp the thrust and meaning of resolution 37/126, IV, including its critical relationship to Chapter XV of the Charter, and causes the Tribunal to fail to perceive the conflicts between the Respondent's actions and Articles 100 and 101 of the Charter. There is no basis for this holding in logic, in the Charter, in the Staff Rules, or the jurisprudence of the Tribunal, and it is moreover inconsistent with the nature of secondment, as the United States shall show. The United States therefore believes that the Tribunal's legal analysis on this point is fundamentally in error.

2. The Respondent Was Obligated under General Assembly Resolution 37/126, IV, to Give the Applicant's Request "Every Reasonable Consideration". It Did not Comply with this Obligation

(a) *Resolution 37/126, IV, Was Binding upon the Respondent*

Resolution 37/126, IV, was adopted while the Applicant was employed by the United Nations. The obligations placed upon the Respondent with respect to the Applicant by that resolution thus became part of the terms and conditions of his contract upon which he could rely in his dealings with the Respondent

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[1] Whether or not a case could be made out on the facts to support a finding of expectancy does not go to the issue of the Tribunal's legal reasoning.

[2] The Tribunal makes clear in this passage its belief that the critical element precluding the creation of expectancy is secondment, not the fixed-term nature of the contract. Yet the Staff Rule in question states: "The *fixed-term appointment* does not carry any expectancy of renewal . . ." (Rule 104.12 *(b)* (emphasis added).) This apparent contradiction is resolved when it is realized that although the fixed-term contract itself cannot give rise to an expectancy, actions taken or assurances given by the Respondent may give rise to expectancy without regard to the type of contract in question (*Bhattacharrya*, UNAT Judgement No. 142, para. 5).

(*I.C.J. Reports 1982*, p. 386). The General Assembly "decided" in paragraph 5 of the resolution that employees of the Secretariat having more than five years' of acceptable service under fixed-term contracts "shall" be given "every reasonable consideration" for conversion to career status. Whether or not the Applicant had a "legal expectancy", that is a legal right, that the Respondent would continue to employ him, under the terms of resolution 37/126, IV, he certainly did have a "legal expectancy" that the Respondent "shall" give his application for such employment "every reasonable consideration". The member States of the United Nations, who adopted the resolution have, moreover, a right to expect the Respondent to comply with its terms, especially when their purpose is to assure the effectiveness of a fundamental Charter provision.

(b) *The Respondent Does not Have Unfettered and Self-Judging Discretion to Determine Whether "Every Reasonable Consideration" Was Given the Applicant's Request*

The Tribunal holds that

> "it is left to the Respondent to decide how 'every reasonable consideration' for a career appointment should be given to a staff member under General Assembly resolution 37/126, IV, paragraph 5. In the present case, the Respondent had *sole authority to decide what constituted 'reasonable consideration'* and whether the Applicant could be given a probationary appointment." (Judgement, para. XVIII (emphasis added).)

In the view of the United States, the Respondent's discretion to determine whether it had given the Applicant's request "every reasonable consideration" cannot be both unfettered and self-judging, as the Tribunal holds. The Respondent's discretion must in every case be exercised in a manner consistent with the Charter, and the United Nations Staff Regulations and Rules. It was the task of the Tribunal to determine on the basis of the law whether that discretion had been abused.

One particularly well-expressed formulation of the standard that should be applied to determine whether the Respondent had abused its discretion is that used by the ILO Administrative Tribunal in the *Rosescu* case (ILOAT Judgment No. 431), which is referred to by Mr. Kean at paragraph 4 of his dissent; namely, whether the Respondent's claim that it gave "every reasonable consideration" to the Applicant's request

> "is tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or law, disregard of essential facts, misuse of authority, or the drawing of clearly mistaken conclusions from the facts [1]".

The Tribunal in this case, by contrast, fails to apply any objective legal standard to the Respondent's conduct. It merely points to the Respondent's statement in the letter of 21 December 1983 claiming that it had "given careful consideration to the issues raised in your request for administrative review".

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[1] The concept of abuse of discretion, embodied in the standard employed by the ILOAT in *Rosescu*, is well established in the administrative law of all major legal systems. See, e.g., Wiersbowski and McCaffrey, "Judicial Control of Administrative Authorities: A New Development in Eastern Europe", *International Lawyer*, Vol. 18, No. 3, pp. 645-659.

The Tribunal infers from this unsupported assertion that the Respondent had consciously and freely exercised its discretion to decide whether the applicant had been given "every reasonable consideration for a career appointment", and finds that it had decided in the affirmative (*Judgement*, para. XVI). The Tribunal does not go on to test the Respondent's exercise of discretion against the *Rosescu* standard (or any standard, for that matter), but without further analysis concludes that the Respondent's decision in this regard was proper. This failure could be construed to be, in the words of Article XI of the Tribunal's Statute, ". . . a fundamental error in procedure which has occasioned a failure of justice . . .".

(c) *Under Either the Applicant's or the Respondent's Version of the Facts, the Respondent Abused Its Discretion in Deciding that It Had Given the Applicant's Request "Every Reasonable Consideration"*

No matter which party's version of the facts is used as the basis for analysis, the Respondent in this case clearly failed to meet the standard set out in *Rosescu*. If the unambiguous terms of the Respondent's letter of 21 December 1983, corroborated by the officials' statements, are accepted, one must conclude that the Respondent rejected the Applicant's request because it felt legally bound not to employ the Applicant further without the consent of the Soviet Government. Under this factual assumption, the Respondent in fact gave *no* substantive consideration to the Applicant's request. The conclusion that in this case no consideration at all constituted "every reasonable consideration" was based upon a "mistake of fact or law", since no such legal bar in fact exists, as demonstrated *infra*. The decision thus constituted an abuse of discretion under the *Rosescu* standard.

Even if one were to ignore all the Respondent's actions between 10 February 1983 and 4 January 1984, and accept, *arguendo*, the Respondent's unsupported *ex post facto* rationalization of its actions, it is equally clear that by considering the Applicant's intent to change his nationality as a factor militating against continued employment, the Respondent would have also failed to give the Applicant's request "every reasonable consideration". As the United States shall subsequently demonstrate, the definition of "every reasonable consideration" cannot include consideration of criteria barred by the Charter. Since the Respondent, under its version of the facts, admits that "the events of 10 February and thereafter" played a role in its decision (Answer, para. 24), the admitted use of a criterion barred by the Charter would have meant that its "consideration" of the Applicant's request was *ipso jure* "unreasonable", and amounted to an abuse of discretion. This is particularly so where, as here, that improper criterion, together with Soviet Government opposition, was the only apparent basis for the Respondent's refusal to consider the Applicant's request. The Respondent's decision under these circumstances would have constituted a "misuse of authority" a "breach of a formal . . . rule(s)" and a "mistake of . . . law" [1,2].

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[1] Moreover, the Respondent's refusal to forward the Applicant's request to the Appointment and Promotion Board for its consideration could be considered a "breach of a procedural . . . rule", since under Staff Rule 104.14 it is the Board, not the personnel services, that are to "give advice on the appointment . . . of staff".

[2] Even if the Respondent had "given careful consideration to the issues raised in [the Applicant's] request for administrative review", this could not have constituted, as the Tribunal found, "every reasonable consideration" of the Applicant's application for a

3. THE TRIBUNAL'S HOLDING THAT THE RESPONDENT DID NOT "ALLOW THE WISHES OF A MEMBER STATE PREVAIL OVER THE INTERESTS OF THE UNITED NATIONS" IS IN ERROR.

The United States believes that the Tribunal has misconstrued the *Rosescu* case, and that in fact that case stands squarely for the proposition that it is impermissible for the Respondent to "allow the wishes of a member State [to] prevail over the interests of the United Nations" in reaching personnel decisions. The United States further believes that the establishment of such improper influence does not require the proof of a causal link between the opposition of a member State and the action of the Respondent.

In *Rosescu*, the interests of the IAEA were expressed in a letter to the Romanian authorities stating that the Organization intended to conclude a new five-year fixed-term contract with the Applicant. The Romanian authorities expressed disapproval of the Organization's intention to continue to employ Mr. Rosescu. In the event, the new contract was limited to a duration of eight months. The fact that the contract actually concluded was of a shorter duration that the one originally intended was viewed by the ILOAT as *ipso facto* evidence that the Organization had conformed its conduct to some extent to the wishes of a member State, notwithstanding the absence of evidence proving the existence of a causal link between the opposition of the Romanian authorities and the modification of the contract. All that was needed to be shown was that one course of action defining the Organization's interest was originally proposed, that a member State objected, and that another course of action was taken.

In the instant case, the letter written on 2 December 1983 by the Applicant's superior, indicating his desire to have the Applicant continue in the service of the United Nations, constitutes clear evidence of the interests of the organization. The statements by responsible United Nations officials (at p. 170, *supra*), confirm that the Soviet authorities had opposed the continued employment of the Applicant by the United Nations. The fact that the Respondent in the end refused to employ the Applicant further constitutes, under *Rosescu*, *ipso facto* evidence that (to the extent discretion was exercised) the Respondent had conformed its conduct, at least to some extent, to the wishes of a member State.

The burden was thus on the Respondent to show that in rejecting the Applicant's request, it was not responding to the wishes of the Soviet authorities, and that its decision was based on unrelated, and legitimate, concerns. The burden was not sustained. The Respondent merely states in a circular fashion that its decision "was legitimately motivated by the Secretary-General's perception of the interests of the organization" (Answer, para. 25). This conclusory statement is insufficient to sustain the burden imposed by *Rosescu*. Not only does the Respondent fail to sustain the burden of establishing freedom from undue influence, but the facts strongly suggest both that such pressures were applied, and that the Secretariat believed it was legally bound to heed them. The conclusion that the Respondent was reacting to the opposition of the Soviet authorities stands unrebutted.

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career appointment. The administrative review referred to pertained only to the Respondent's decision of 23 November not to consider an extension of the Applicant's *fixed-term* appointment. An assertion that "careful consideration" has been accorded a protest against denial of an application for a fixed-term appointment cannot properly be considered as evidence for the proposition that "every reasonable consideration" has been given a later application for a career appointment.

The decision of the ILOAT to require proof of the absence of impropriety is compelling as a logical and legal matter and the Tribunal is bound by the Charter and fundamental principles of justice to follow that approach. If those who believe they have been damaged by improper governmental intervention with the Secretariat were to have to prove impropriety, they would be saddled with an impossible burden. Employees cannot have access to the facts that could prove such an assertion. The Secretary-General on the contrary must have access to facts that would credibly support the conclusion that he reached his decision for reasons other than the request of a State. Indeed, if the Secretary-General did not have sufficient facts fully to justify his decision on grounds totally independent of the request of a State not to employ someone, he could have no legitimate basis for deciding not to employ him. It is this practical and logical matrix that makes the reasoning of *Rosescu* compelling as a matter of logic, law and justice [1].

4. The Tribunal Erred in Ruling that the Respondent Was Required to Take into Account the Applicant's Desire to Change His Nationality when Deciding Whether to Continue His Employment

The Tribunal interprets a statement contained in a report by the Fifth Committee to find a necessary inconsistency between a change in an employee's nationality and his eligibility for continued employment with the United Nations. The Tribunal holds that this view, which it characterizes as a "widely held belief", "must continue to provide an essential guidance in this matter" [2] (Judgement, para. XII). In the view of the United States, the Fifth Committee's statement, coming as it did in the context of a discussion of the effect nationality changes would have upon the national quota system, cannot have been intended to have the meaning the Tribunal ascribes to it. If change of nationality were to render an employee "unsuitable" for employment, the question of how to arrange the quotas to take account of his continued employment under a new nationality would never arise [3].

Even if the interpretation given by the Tribunal to the Fifth Committee's view were correct, it is beyond question that the Secretary-General may not follow any "belief", no matter how "widely held", if to do so would cause him to violate the terms of the Charter which he is sworn to uphold.

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[1] In the view of the United States, the long range interests of the organization, i.e., the interests of the membership as a whole, cannot be permitted to be subordinated to the interests and potential actions of a single member. This is not merely the logic and conclusion of *Rosescu, but an inescapable conclusion in light of Article 2, paragraph 1,* of the Charter. Under Article 2, paragraph 1, if the objections of any one State are to be accorded determinative weight, then each State must be accorded a similar capability in analogous circumstances. The disintegrative effects of such a régime on the organization and its Charter are obvious.

[2] The Tribunal here relies upon its Judgement in the *Fischman* case (UNAT Judgement No. 326), which was decided contemporaneously with the instant case and in which the two Justices who constituted the majority also participated. The extent to which *Fischman* may be relied upon as independent previous authority for the view expressed in the instant case is therefore open to serious question.

[3] In his dissent, Mr. Kean points out that this apparently categorical statement in the Fifth Committee's report was taken out of context by the Tribunal, and must be viewed with caution in the light of the subsequent discussions in that Committee (Dissent, para. 12, note *(a)*).

In the latter connection, the United States would invite the Court's attention to the Tribunal's holding in *Estabial* (UNAT Judgement No. 310). In that case, the Secretary-General sought to deny the Applicant consideration for a transfer based on his determination that the position in question was reserved for an employee from a geographical area other than that represented by the Applicant. The Tribunal, in rejecting the Secretary-General's decision, said:

> "It was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a 'paramount' condition the search, however legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount condition set by the Charter in the interests of the service." (Judgement No. 310, para. XIV.)

If it is unlawful for the Secretary-General to alter Article 101, paragraph 3, of the Charter by making geographic diversity an additional "paramount" criterion upon which personnel decisions are to be taken, *a fortiori* it cannot be lawful for him to alter the Charter in order to take into account a so-called "widely held belief" concerning the suitability of certain employees for future employment—a "belief" that is moreover unsupported by the language of the Charter or by any reasonable interpretation of the Fifth Committee's intent.

Since the Tribunal in *Estabial* makes clear that the fulfilment of the paramount criterion laid down in Article 101 (3) is *ipso facto* "in the interests of the service", it follows that basing personnel decisions on some other criterion cannot be "in the interests of the service". The employment of a criterion such as "the events of 10 February 1983 and thereafter" by the Secretary-General in reaching a decision respecting the "appointment transfer or promotion of the staff", Regulation 4.2, thus cannot be, contrary to the Respondent's assertion, "in the interests of the Organization". The use of this criterion constitutes, rather, a violation of the standards established by Article 101, paragraph 3, and in Staff Regulation 4.2 and is thus an abuse of discretion.

5. The Tribunal Erred in Finding that a Secondment Contract Was in Effect at the Time the Respondent Considered the Applicant's Request for Continued Employment. Mr. Ustor's View that a Contract of Secondment Bars Continued Employment without the Consent of the Sending Organization Is in Error

Respondent no longer asserts that the status of Mr. Yakimetz as a seconded official rather than as a party to a simple fixed-term contract is relevant. The United States agrees that such a distinction ought not to have been relevant. Its relevance in the instant case is that at an earlier and critical stage Respondent relied on such a distinction, and that the errors in the Judgement flow in part from the failure of the Tribunal to understand why secondment is irrelevant, and in part from its erroneous view of the nature of secondment [1].

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[1] The United States believes it is nevertheless important for the Court to clarify the meaning and nature of secondment in the light of its increasing use in staffing international organizations generally and the United Nations in particular, even though this case does *not* turn on the question of whether the Applicant was in fact seconded to the United Nations during his second continuous period of service there from 27 December 1977 to 26 December 1983.

(a) *The Secondment Contract Is a Symmetrical Trilateral Agreement, Defined by Three Sets of Reciprocal Obligations*

According to the jurisprudence of the Tribunal, secondment is a contract concluded among a sending organization, a receiving organization, and an employee (*Higgins*, Judgement No. 92, para. VII). The contract of secondment may thus be likened to a triangle, with one party at each corner, and with reciprocal obligations flowing between each pair of parties along each of the three sides. Defining these obligations defines the contract of secondment.

The obligation of the *sending organization* to the receiving organization is to make the employee available to the receiving organization for the period agreed among the three parties. The obligation of the sending organization to the employee is to offer to re-employ him at the conclusion of his service with the receiving organization.

The obligation of the *employee* to the sending organization is to leave the employ of the sending organization, to enter the employ of the receiving organization and to remain there until the conclusion of the arrangement. The obligation of the employee to the receiving organization is to accept the discipline of the receiving organization and to perform whatever tasks are properly required of him pursuant to the organic law of the organization.

The obligation of the *receiving organization* to the sending organization is to employ the employee for the period agreed among the three parties. The obligation of the receiving organization to the employee is to compensate him for the work he performs and to employ him according to the organic law of the organization for the term of the contract.

(b) *A Valid Contract of Secondment Could not Have Been Concluded among the Applicant, the Respondent, and the Government of the USSR at the Beginning of the Applicant's Final Continuous Term of Service in 1977*

The Tribunal found, contrary to the Applicant's view, that a valid contract of secondment had been concluded among the Applicant, the Respondent, and the Government of the USSR in December 1977, at the beginning of the Applicant's second continuous term of service with the United Nations. This conclusion is supported only by the observation that the existence of this contract of secondment, co-terminous with the Applicant's appointment of 20 December 1977 on 26 December 1982, was proven by the fact that all three parties believed that such a contract of secondment existed (*Judgement*, para. III).

The United States does not find the Tribunal's reasoning in this regard to be sound. A shared belief among the purported parties that a certain legal relationship exists is not alone sufficient to create that relationship. The legal capacity to enter into the relationship in question must also be present. In this case the Government of the USSR was incapable of entering into a secondment relationship with respect to the Applicant because at the time the purported contract was concluded, the autumn of 1977, the Applicant was not employed by that Government. Immediately prior to his appointment in 1977, the Applicant had been a student of economics, not a government official. The fact that the Applicant had been employed by that Government as a teacher of physics until 1969 (Judgement, para. VII), is not relevant to the issue posed in 1977. Since the Applicant was not serving under a contract of secondment during the period 1977-1982, the purported modification of that non-existent contract to make it expire in December 1983 *vice* December 1982 was ineffective. This is true despite the fact that reference was made to it in the letter of appointment of 9 December

1982. Accordingly, the United States believes that the Applicant was not validly seconded to the United Nations by the Government of the USSR at the time the Respondent considered his application for career employment.

(c) *Even if the Applicant Had Been Employed under Secondment During His Final Fixed-Term Contract, the Waiver of His Right to Re-employment with the Sending Organization on 10 February 1983 Would Have Vitiated the Secondment*

The Tribunal, having erroneously found that a valid contract of secondment was concluded in relation to the Applicant's letter of appointment of 27 December 1977 and that this secondment was modified by agreement of the three parties to extend it until 26 December 1983, ruled that the severing of all official connections between the Applicant and the Government of the USSR during the pendency of that contract had no effect upon the secondment relationship (Judgement, para. XIII).

This holding is in error even if a valid secondment could be said to have existed as of December 1977 or December 1982. The contract of secondment necessarily obliges the sending organization to offer re-employment to the employee at the conclusion of the contract. This obligation gives rise to a right on the part of the employee to re-employment which, as with all rights, may be waived by the employee.

That waiver has the effect of relieving the sending organization of its obligation to offer re-employment. This being the only remaining obligation tying the sending organization to the employer and the receiving organization (the other three having been discharged at the commencement of the term of the contract), once it is discharged all that remains is the bilateral contract between the employee and the receiving organization, defined in this case by the letter of appointment. That contract is unaffected by cessation of the secondment relationship.

(d) *A Contract of Secondment Contains no Implicit Agreement on the Part of the Receiving Organization not to Employ the Employee Subsequent to Its Expiry without the Consent of the Sending Organization*

The question of an implicit preclusive agreement not to employ is not dealt with in the Tribunal's Judgement; it is addressed only in the statement appended to the Judgement by Mr. Ustor and in Mr. Kean's dissent. Mr. Ustor states

> "that the doctrine developed in this respect by the Tribunal—based on the very nature of the concept of secondment—precludes not only the extension of a seconded fixed-term appointment but also its conversion to any other type of appointment without the consent of the government concerned".

Mr. Kean, on the other hand, referring to a paragraph in Annex I of the 1982 Report of the ICSC, says that

> "[f]ar from there being a generally accepted rule that in the absence of the government's consent a seconded staff member must always be refused, *in limine*, a career appointment at the end of his period of secondment, this paragraph makes it quite clear that the government's view was not to be decisive" (Dissent, para. 11).

The United States agrees with Mr. Kean, and considers that Mr. Ustor's discovery of a "doctrine developed in this respect by the Tribunal" to be without foundation. Nothing in either the *Higgins* or the *Levcik* cases, relied on by Mr. Ustor, supports this claim.

The issue in *Higgins* was whether the sending and receiving organizations could legally vary the terms of the secondment contract while it was in effect, in this case by terminating it before the previously agreed date. The Tribunal found that they could not do so without the agreement of the employee. In *Levcik* the Tribunal found that there was no valid secondment. There was in neither case any discussion of the existence or nature of any preclusive agreement inherent in the secondment contract that would require the sending organization to approve the future employment of the employee on a non-seconded basis by the receiving organization after the secondment had expired; the issue did not arise in either case, so there was no need for the Tribunal to discuss it.

Leaving aside the question of whether there exists authority in the Tribunal's jurisprudence for the "doctrine" alluded to, in the view of the United States no such "doctrine" exists. There is nothing in the secondment contract that remotely suggests the existence of an implicit obligation not to re-employ a previously seconded employee on a non-seconded basis over the objections of his government. If such an obligation were to be implied, it could deny the United Nations the future services of competent personnel at the uninhibited whim of member States. Working under the shadow of such an obligation would place United Nations personnel in a situation of divided loyalties, to the disadvantage of the Organization and contrary to the most basic assumptions underlying the concept of an international civil service. The assumptions that staff members of the United Nations are to exercise their judgment with complete independence and impartiality, and that member States are to respect and support the independence of the Secretariat, are enshrined in Articles 100 and 101 of the Charter. These assumptions form the foundation of the Secretariat *as an international, rather than inter-governmental, institution.* Accordingly, the existence of a doctrine so clearly at variance with these assumptions, and at variance with the symmetrical structure of secondment described *supra*, should not be implied in the absence of clear evidence.

IV. THE TRIBUNAL'S DECISION IN THE LIGHT OF THE QUESTIONS POSED TO THE COURT BY THE COMMITTEE

A. The Tribunal Failed to Exercise Jurisdiction Vested in It by not Responding to the Question Whether a Legal Impediment Existed to the Further Employment of the Applicant

1. The Court Defined in the *Fasla* Case the Standard of Review to Be Applied to Determine Whether Jurisdiction Has Been Exercised

The Court interpreted the Committee's first question in the *Fasla* case (*I.C.J. Reports 1973*, p. 166). The Court there held that

> "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" (*ibid.*, p. 189).

It went on to warn that

> "[t]he test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned *eo nomine* in the substantive part of a judgment: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based . . ." (*ibid.*, p. 193).

Mr. Ustor's statement sheds important light on whether the Tribunal met the standard established in *Fasla*. Mr. Ustor posits two possible legal bars to the Applicant's continued employment with the United Nations: First, that under secondment, "conversion to any other type of appointment without the consent of the Government concerned" is precluded; second, that "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' ".

In both cases, Mr. Ustor disagrees with the reasoning of the Judgement, arguing that the result, in which he concurred, should have been reached on the ground that the Applicant was legally barred, and not on the ground upon which it was reached, i.e., that the Respondent's refusal to consider the Applicant's request for a career appointment was a legitimate exercise of discretion. In the light of Mr. Ustor's statement, only two conclusions are possible with respect to each issue. Either the Tribunal in the Judgement (1) failed to address the issue entirely, or (2) considered the issue and decided that there was no legal bar, but neglected to reflect that decision explicitly in the text. The conclusion that the Tribunal found, even implicitly, that a legal bar of any kind existed is ruled out.

The United States believes that the Tribunal failed entirely to consider the issue of governmental consent for continued employment, and that it implicitly found that a change of nationality does not bar an employee from continued United Nations service.

2. The Tribunal Failed to "Address Its Mind" to the Question of Whether the Contract of Secondment Contains a Preclusive Agreement

The Tribunal's discussion of secondment, wherein the first issue of the existence of a legal bar would have arisen if it had been considered, is entirely concerned with the question of whether the Applicant had an expectancy of further employment. The question of whether the contract of secondment among the Applicant, the Respondent, and the Soviet Government contained some preclusive agreement, as suggested in the Respondent's letter of 21 December 1983 and in Mr. Ustor's statement, but rejected in Mr. Kean's dissent, is not mentioned. It is not mentioned because the Tribunal failed to "address its mind to [a] matter [. . .] on which a plea was based", i.e., the critical threshold issue of whether the Applicant's version of events (that the Respondent believed itself legally bound not to continue the Applicant's employment absent the agreement of the Soviet Government) or the Respondent's *ex post facto* reconstruction was to be accepted as the factual basis for the Judgement. The Judgement appears superficially to be consistent with the Respondent's reconstruction, but the Tribunal at no point actually *finds* that the Respondent was correct, or even implies that it perceived that a difference of view existed between the Applicant and the Respondent. The United States believes this omission to consider an issue critical to the case was a failure of the Tribunal to "address its mind to the matter [. . .] on which a plea was based", a failure the Court has stated defines "failure to exercise jurisdiction" (*I.C.J. Reports 1973*, p. 193).

In the light of the foregoing, the United States asks the Court to advise the United Nations that the Tribunal failed to exercise jurisdiction vested in it by not answering the question whether the consent of the Soviet Government was required for the further employment of the Applicant on a non-seconded basis, and that, as a matter of law, no such consent was required.

3. The Tribunal Found, Albeit Implicitly, that an Employee's Change of Nationality Does not Constitute a Legal Bar to His Continued Employment by the United Nations

The Tribunal did, by contrast, discuss extensively the facts (which in any case were uncontested) pertaining to the Applicant's decision to seek to change his nationality. Yet at no point does the Tribunal conclude that the Applicant's decision constituted a legal bar to continued employment, as Mr. Ustor wishes it had. The Tribunal instead found that the Respondent had the discretion to continue to employ the Applicant despite his intent to change nationality [1], and that the Respondent's decision not to do so in the light of the Applicant's intent was a proper exercise of that discretion. This finding necessarily presupposes a determination that the decision by the Applicant to seek to change his nationality did not constitute an impenetrable legal bar to continued employment. Accordingly, the United States believes that, with respect to this issue, the Tribunal found implicitly that no legal bar to continued employment is raised by a decision to seek a change in nationality. (In any event, as shown *supra*, at p. 177, to raise a change of nationality to the status of a paramount criterion in making personnel decisions is contrary to the Charter.)

In the interests of clarifying the law, the United States asks the Court to confirm explicitly the implicit finding of the Tribunal that a decision by an employee to seek to change his nationality does not constitute a legal bar to continued employment with the United Nations.

B. The Tribunal Erred on Questions of Law relating to the Charter of the United Nations

1. The Tribunal's Finding that the Respondent Had not Allowed the Wishes of a Member State to Influence Its Decision with Respect to the Applicant Was Based upon a Misinterpretation of Article 100, Paragraphs 1 and 3, of the Charter

The United States believes that the Tribunal's finding that the Respondent had not "in any manner let the wishes of a member State prevail over the interests of the United Nations" (Judgement, para. XIX), to be erroneous. Under the analysis employed in the *Rosescu* case, applied *mutatis mutandis* to the facts of this case, it is clear that the established United Nations interest in the continued employment of the Applicant was improperly overriden by consideration of a member State's opposition. For the Respondent to have taken that opposition into consideration in rejecting Applicant's request for continued employment (assuming, as apparently did the Tribunal, that he freely exercised

[1] The United States would observe that this finding appears flatly inconsistent with the Tribunal's previous reading of the Fifth Committee statement, discussed *supra* at page 177.

discretion in the matter) the Respondent would have acted in a manner incompatible with Article 100, paragraphs 1 and 3. The United States asks the Court so to advise the United Nations.

2. THE TRIBUNAL'S FINDING THAT THE RESPONDENT WAS JUSTIFIED IN TAKING INTO ACCOUNT THE APPLICANT'S DESIRE TO CHANGE HIS NATIONALITY IN DECIDING WHETHER TO OFFER HIM CONTINUED EMPLOYMENT WAS BASED UPON A MISINTERPRETATION OF ARTICLE 101, PARAGRAPH 3, OF THE CHARTER

The Tribunal holds that the Secretary-General is required to consider a decision on the part of an employee to seek to change his nationality as a negative factor in deciding whether to extend that employee's employment with the United Nations (Judgement, para. XII). The United States believe that the Secretary-General is not only not required to consider this factor, but is in fact legally precluded from doing so. As noted *supra*, the reasoning employed by the Tribunal in the *Estabial* case applies with equal force to the present case. The considerations of "efficiency, competence and integrity" are, according to *Estabial* and in the view of the United States, "paramount", as indeed Article 101, paragraph 3, of the Charter expressly provides. In the context of this case, where there is no question of competition for a position among candidates from various geographic regions who all meet the "paramount" criteria, the criteria are, in addition, exclusive. Moreover, the so-called "widely held belief" that change of nationality disables an international civil servant from continued service is in our view based upon a misreading of the record of the Fifth Committee's discussion of the issue. That "belief" is in fact simply an expression of the politically motivated preferences of a small number of States, totally devoid of legal foundation, which is entitled to no weight when matched against the clearly contrary words of the Charter. The United States asks the Court so to advise the United Nations.