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

Abbreviated reference :

I.C.J. Pleadings, Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal

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Référence abrégée :

C.I.J. Mémoires, Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies

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APPLICATION FOR REVIEW OF JUDGEMENT No. 333
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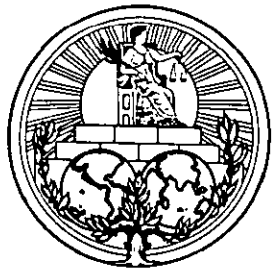
DEMANDE DE RÉFORMATION DU JUGEMENT N° 333 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES



The present volume reproduces the Request for opinion, the dossier transmitted by the Secretary-General of the United Nations, the written statements and comments, and the correspondence in the case concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*. This case, entered on the Court's General List on 10 September 1984 under number 72, was the subject of an Advisory Opinion delivered on 27 May 1987 (*Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987*, p. 18).

The Hague, 1990.

Le présent volume reproduit la requête pour avis consultatif, le dossier transmis par le Secrétaire général des Nations Unies, les exposés écrits et observations écrites et la correspondance concernant l'affaire de la *Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies*. Cette affaire, inscrite au rôle général de la Cour sous le numéro 72 le 10 septembre 1984, a fait l'objet d'un avis consultatif rendu le 27 mai 1987 (*Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies, avis consultatif, C.I.J. Recueil 1987*, p. 18).

La Haye, 1990.

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REQUEST FOR ADVISORY OPINION

REQUÊTE POUR AVIS CONSULTATIF

THE SECRETARY-GENERAL OF THE UNITED NATIONS TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

28 August 1984.

Sir,

I have the honour to refer to Article 11 of the Statute of the United Nations Administrative Tribunal (resolution 957 of 8 November 1955) whereby the General Assembly of the United Nations established a Committee on Applications for Review of Administrative Tribunal Judgements and authorized it, under paragraph 2 of Article 96 of the Charter, to request advisory opinions of the International Court of Justice.

The twenty-fourth session of the Committee on Applications for Review of Administrative Tribunal Judgements opened at United Nations Headquarters on 20 August 1984. The purpose of the session was to consider, *inter alia*, an application from Mr. Vladimir Victorovich Yakimetz (doc. A/AC.86/R.117) for a review of Judgement No. 333 delivered by the United Nations Administrative Tribunal on 8 June 1984 (doc. AT/DEC/333). At a closed meeting on 23 August 1984 the Committee, having taken a separate decision in respect of each of the four grounds invoked by the Applicant under Article 11 of the Statute of the Administrative Tribunal, decided to request an advisory opinion of the International Court of Justice regarding Tribunal Judgement No. 333.

The decision of the Committee, as formally announced by its Chairman at an open meeting of the Committee on 28 August 1984, reads as follows :

> "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 ?' "

I am enclosing herewith one copy each, duly certified, of the English and French texts of the document of the Committee (A/AC.86/R.121) containing its decision.

Pursuant to the Committee's rules of procedure (A/AC.86/2/Rev.3 and Corr.1 (English only)), a verbatim record of the open meeting of the Committee

on 28 August 1984 is being prepared and will be transmitted to the Court as soon as possible.

In accordance with Article 65 of the Statute of the Court, I shall transmit to the Court all documents likely to throw light upon the questions addressed to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements. Furthermore, as required by paragraph 2 of Article 11 of the Statute of the Administrative Tribunal, I shall arrange to transmit any views that Mr. Yakimetz, the person in respect of whom the Tribunal rendered its Judgement No. 333, may wish to submit.

Accept, etc.

(Signed) Javier PÉREZ DE CUÉLLAR.

DOSSIER TRANSMITTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

DOSSIER TRANSMIS PAR LE SECRÉTAIRE GÉNÉRAL DES NATIONS UNIES

INTRODUCTORY NOTE

1. On 28 August 1984 the Secretary-General informed the President of the International Court of Justice that, by a decision adopted on 23 August 1984 at its 24th session and announced at a public meeting on 28 August 1984, the Committee on Applications for Review of Administrative Tribunal Judgements (the Committee), after having considered an Application from Mr. Vladimir Victorovitch Yakimetz relating to Judgement No. 333 of the Tribunal, requested the Court to give an advisory opinion 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 ?"

2. The present dossier contains documents likely to throw light upon these questions. The dossier consists of two parts. Part I contains documents relating to the proceedings leading to the request by the Committee for an advisory opinion of the International Court of Justice, including Judgements of the Administrative Tribunals of the United Nations and the International Labour Organisation that were referred to in such documents. Part II contains documents directly relating to the formulation of paragraph 5 of section IV of General Assembly resolution 37/126, and paragraph 5 of section VI of General Assembly resolution 38/232.

3. The documents, which constitute part of the Official Records of the General Assembly, of the Committee, of the Administrative Tribunal of the United Nations, as well as of the Secretariat of the United Nations and of the Administrative Tribunal of the International Labour Organisation, have been certified to be so or to be true copies or translations thereof. Each document is identified by title and official United Nations symbol, if any. Whenever possible, a citation is also given to the volume where the document may be found in the *Official Records* of the United Nations. In addition all documents have, for convenience of use, been numbered consecutively in the order in which they appear in the dossier and references to documents in this Introductory Note are based as closely as possible on this system of numbering.

Part I of the Dossier. Documents relating to the Proceedings Leading to the Request by the Committee on Applications for Review of Administrative Tribunal Judgements for an Advisory Opinion of the International Court of Justice in Relation to Judgement No. 333 of the United Nations Administrative Tribunal

A. Documents of the Twenty-fourth Session of the Committee

4. On 21 June 1984 Mr. Vladimir Victorovitch Yakimetz presented an Application (doc. No. 1) for a review of Judgement No. 333 rendered on 8 June 1984 by the Administrative Tribunal in the case of *Yakimetz against the*

Secretary-General of the United Nations (see Section B below). The twenty-fourth session of the Committee was thereupon convened to consider, *inter alia*, that Application (docs. Nos. 2 and 3). On 10 August 1984 the Secretary-General presented his comments on the Application submitted by Mr. Yakimetz (doc. No. 4).

5. The Committee met on 21, 22 and 23 August 1984 and considered the application presented by Mr. Yakimetz in closed meetings and, having considered an informal draft proposal of the United Kingdom of Great Britain and Northern Ireland (doc. No. 5), decided to submit two questions to the Court (docs. Nos. 6 and 7). According to the Rules of the Committee (doc. No. 10), no records were kept of the closed meetings but verbatim records (doc. No. 8) are available of the public meeting held on 28 August 1984 at which the Committee adopted its decision on the application of Mr. Yakimetz and announced the text of the questions to be addressed to the Court ; the results of and the participants in the votes taken during the private deliberations were also formally announced by the Chairman at that meeting, and six members of the Committee made statements for the record.

B. Other Documents Cited in or Relevant to Documents Considered by the Committee at Its Twenty-fourth Session

6. The Tribunal's Judgement, delivered on 8 June 1984, in the case of *Yakimetz against the Secretary-General of the United Nations* is contained in document No. 9.

7. The rules of procedure that governed the twenty-fourth session of the Committee were the rules adopted at its twenty-second session (doc. No. 10). Earlier, the Rules of Procedure of the Committee were the provisional rules it had adopted at its first meeting, on 16 October 1956, and amended at its meetings on 25 October 1956, 21 January 1957 and 11 December 1974. At its twenty-second session the Committee considered (doc. No. 11) the Advisory Opinion in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 325) in which the Court expressed concern about certain procedures followed by the Committee in considering that application ; as a result, the Committee amended its Rules of Procedure and adopted them in definitive form (doc. No. 10).

8. Portions of two General Assembly resolutions were referred to in the documents considered by the Committee, i.e., paragraph 5 of section IV of resolution 37/126 (doc. No. 12) and paragraph 5 of section VI of resolution 38/232 (doc. No. 13). Two documents relating to change of visa status were referred to in the documents considered by the Committee, i.e., a 1953 report of the Fifth Committee on Personnel Policy (doc. No. 14) and a 1954 Information Circular addressed to Members of the Staff (doc. No. 15).

9. The Statute and Rules of the United Nations Administrative Tribunal were those in effect from 3 October 1972 (doc. No. 16). The Statute and Rules have not been changed from the version considered by the Court in the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 325), and with the exception of the addition of Article 26 of the Rules, are also identical to the version considered in the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166).

10. The Staff Regulations are set out in the dossier (doc. No. 17) in the version in force as of 1 January 1983 and the "100 Series" of Staff Rules (doc. No. 18) in the version in force as of 1 January 1984 (doc. No. 18), but all provisions

relevant to the Application are unchanged from those in force at the time of Mr. Yakimetz's separation.

C. Documents[1] Submitted to the United Nations Administrative Tribunal : Case No. 322 : Yakimetz against the Secretary-General of the United Nations

11. Mr. Yakimetz filed an Application with the Administrative Tribunal on 3 January 1984 (doc. No. 19), together with 42 annexes (doc. No. 20). The Secretary-General filed the Respondent's Answer on 14 March 1984 (doc. No. 21). Mr. Yakimetz filed observations (together with three Annexes) on the Respondent's Answer on 13 April 1984 (doc. No. 22).

D. Administrative Tribunals Judgements Cited in the Documents Submitted to the Committee or to the United Nations Administrative Tribunal or in Its Judgement No. 333

1. Judgements of the United Nations Administrative Tribunal (UNAT)

12. UNAT Judgement No. 142 *(Bhattacharyya)* (doc. No. 23) was referred to in document No. 9, paragraph VI (Judgement No. 333) and document No. 19, paragraph 69 (Applicant's Statement of Facts and Arguments).

13. UNAT Judgement No. 205 *(El-Naggar)* (doc. No. 24) was referred to in document No. 9, paragraph VI (Judgement No. 333), document No. 21, paragraph 15 (Answer of Respondent) and document No. 22, paragraph 4 (Observations on the Answer of the Respondent).

14. UNAT Judgement No. 310 *(Estabial)* (doc. No. 25) was referred to in document No. 1, paragraph 23 (Application to Committee), document No. 9, page 8 (Judgement No. 333) and document No. 19, paragraphs 32, 60 and 75 (Applicant's Statement of Facts and Arguments).

15. UNAT Judgement No. 326 *(Fischman)* (doc. No. 26) was referred to in document No. 1, paragraph 41 (Application to Committee), document No. 4, paragraph 18 (Comments of Secretary-General on Application), document No. 8, page 12, statement of representative of United States of America (*Verbatim Record* of the Fifth Meeting of Committee) and document No. 9, paragraph XII and paragraph 12, footnote *(a)*, of the dissenting opinion (Judgement No. 333).

16. UNAT Judgement No. 92 *(Higgins)* (doc. No. 27) was referred to in document No. 1, paragraphs 35, 36 and 38 (Application to Committee), document No. 4, paragraph 25 (*Comments of Secretary-General on Application*), document No. 9, paragraph IV, and in the Statement by President Endre Ustor and in paragraph 9 of the dissenting opinion (Judgement No. 333), document No. 19, paragraphs 34, 44 and 54 (Applicant's Statement of Facts and Arguments), document No. 21, paragraphs 9 and 21 (Answer of Respondent) and in document No. 22, paragraph 14 (Observations on the Answer of the Respondent).

17. UNAT Judgement No.192 *(Levcik)* (doc. No. 28) was referred to in document No. 1, paragraphs 20, 31, 35, 36, 38 and 39 (Application to Committee),

[1] In these documents, which were submitted to the United Nations Administrative Tribunal, Mr. Yakimetz is usually referred to as the "Applicant" and the Secretary-General is usually referred to as the "Respondent". These documents are noted in the opening paragraphs of Judgement No. 333 of the Tribunal (doc. No. 9) and constitute the written submissions made to the Administrative Tribunal in the case.

document No. 4, paragraph 25 (Comments of Secretary-General on Application), document No. 9, paragraph IV, and in the statement by President Endre Ustor and in paragraph 9 of the dissenting opinion (Judgement No. 333), document No. 19, paragraphs 36, 41, 44, 54, 56, 58 and 67 (Applicant's Statement of Facts and Arguments) and in document No. 21, paragraph 9 (Answer of Respondent).

18. UNAT Judgement No. 54 *(Mauch)* (doc. No. 29) was referred to in document No. 9, paragraph XIX and in paragraph 4 of the dissenting opinion (Judgement No. 333) and in document No. 22, paragraph 15 (Observations on the Answer of the Respondent).

19. UNAT Judgement No. 181 *(Nath)* (doc. No. 30) was referred to in document No. 21, paragraph 14 (Answer of Respondent) and in document No. 22, paragraph 4 (Observations on the Answer of the Respondent).

20. UNAT Judgement No. 140 *(Seraphides)* (doc. No. 31) was referred to in document No. 21, paragraph 14 (Answer of Respondent) and in document No. 22, paragraph 4 (Observations on the Answer of Respondent).

21. UNAT Judgement No. 95 *(Sikand)* (doc. No. 32) was referred to in document No. 19, paragraph 69 (Applicant's Statement of Facts and Arguments).

22. UNAT Judgement No. 249 *(Smith)* (doc. 33) was referred to in document No. 9, paragraph 2 of the dissenting opinion (Judgement No. 333).

2. A Judgment of the International Labour Organisation Administrative Tribunal (ILOAT)

23. ILOAT Judgment No. 431 *(In re Rosescu)* (doc. No. 34) was referred to in document No. 1, paragraphs 35, 37 and 39 (Application to Committee), document No. 4, paragraphs 25 and 26 (Comments of the Secretary-General on Application), document No. 9, paragraph XIX and in paragraphs 4 and 9 of the dissenting opinion (Judgement No. 333), document No. 19, paragraphs 54, 57 and 58 (Applicant's Statement of Facts and Arguments) and in document No. 21, paragraphs 25 and 26 (Answer of Respondent).

Part II of the Dossier. Documents directly relating to the Formulation of Paragraph 5 of Section IV of General Assembly resolution 37/126 of 17 December 1982 and of Paragraph 5 of Section VI of General Assembly resolution 38/232 of 20 December 1983

A. Paragraph 5 of Section IV of General Assembly Resolution 37/126

1. Documents of the Thirty-fifth Session of the General Assembly

24. At its 35th session, the General Assembly, by paragraphs 1 and 2 of Section IV of resolution 35/210 (doc. No. 35), requested the International Civil Service Commission (ICSC) and the Joint Inspection Unit (JIU) to study further and submit reports on the subjects of the concepts of career, types of appointment, career development and related questions and invited them to co-operate in the drafting of those two reports[1].

[1] These two reports were to be the basis for discussion of these subjects at the thirty-seventh session and therefore earlier references to these questions throughout the years are not included in the dossier because they throw no light on the interpretation of paragraph 5 of section IV of resolution 37/126, which was adopted as a result of these and later reports, all of which are included in the dossier.

2. Documents of the Thirty-sixth Session of the General Assembly

25. In response to paragraphs 1 and 2 of section IV of General Assembly resolution 35/210, the JIU submitted a report on the personnel policy options : career concept, career development and types of appointment (docs. Nos. 36 and 37). The Secretary-General submitted comments on this report (doc. No. 38). The ICSC submitted a report, which, *inter alia*, dealt in a preliminary way with this matter (doc. No. 39, para. 17 and Annex I). The Staff Unions and Associations of the United Nations Secretariat submitted a report which dealt, *inter alia*, with this matter (doc. No. 40, paras. 96 to 98 and 101 to 106).

26. The Fifth Committee considered these reports under agenda items 107 : Personnel Questions, and 108 : Report of the International Civil Service Commission. Summary of the discussion may be found in the reports of the Fifth Committee on agenda items 107 (doc. No. 41) and 108 (doc. No. 42). On the basis of the recommendations of the Fifth Committee on agenda items 107 and 108 the General Assembly on 18 December 1981 respectively adopted resolution 36/233 (doc. No. 43) and decision 36/457 (doc. No. 44), by which it decided to discuss at its thirty-seventh session the subjects of concept of career, types of appointment, career development and related questions[1].

3. Documents of the Thirty-seventh Session of the General Assembly

27. At the 37th session of the General Assembly, the Fifth Committee had before it the eighth annual report of the ICSC (doc. No. 45), a note by the Secretary-General transmitting the comments by the Federation of International Civil Servants' Associations (FICSA) (doc. No. 46), a note by the Secretary-General transmitting the JIU's second report on the career concept (doc. No. 47) and the comments of the Administrative Committee on Co-ordination (doc. No. 48). The report of the ICSC as a whole was considered by the Fifth Committee under agenda item 112 ("Report of the International Civil Service Commission") and the portions dealing with its study on the concepts of career, type of appointment, career development and related questions were also considered by that Committee under agenda item 111 ("Personnel Questions"). The Fifth Committee considered item 112 at its 28th, 29th, 31st, 35th, 36th, 40th, 42nd, 43rd, 44th, 63rd, 64th and 67th meetings and item 111 at its 23rd, 25th, 26th, 27th, 28th, 30th, 31st, 32nd, 33rd, 34th, 36th, 37th, 38th, 40th, 41st, 43rd, 47th, 49th, 53rd, 56th, 58th, 63rd, 65th and 70th meetings. However, only the following meetings are relevant to paragraph 5 to section IV of resolution 37/126 : 23rd meeting (doc. No. 49, paras. 10 and 11), 26th meeting (doc. No. 50, paras. 25 and 30), 27th meeting (doc. No. 51, paras. 15 and 16), 28th meeting (doc. No. 52, paras. 37, 38, 43, 44 and 45), 29th meeting (doc. No. 53, para. 42), 30th meeting (doc. No. 54, para. 47), 31st meeting (doc. No. 55, paras. 2, 14, 24, 30, 42 and 52), 33rd meeting (doc. No. 56, paras. 13 and 14),

[1] The Fifth Committee had considered item 107 at its 35th, 36th, 40th, 41st, 43rd, 45th, 49th to 55th, 59th to 61st, 65th, 67th, 68th, 71st to 73rd and 75th meetings and item 108 at its 31st, 34th to 36th, 38th, 40th, 43rd, 45th, 49th, 51st, 53rd, 61st, 68th and 81st meetings. These discussions did not deal with the substance of the reports on concept of career, types of appointment, career development and related questions submitted to it but referred primarily to the question of co-ordination between the JIU and the ICSC in the preparation by the ICSC of its substantive report to be submitted to the thirty-seventh session of the General Assembly. These records are not included in the dossier as they throw no light on the questions submitted to the Court.

34th meeting (doc. No. 57, paras. 44, 50 and 61), 36th meeting (doc. No. 58, paras. 12, 29 and 30), 37th meeting (doc. No. 59, paras. 3 and 14), 40th meeting (doc. No. 60, paras. 4, 60 to 62, 77 and 96), 43rd meeting (doc. No. 61, paras. 13, 17 and 48), 44th meeting (doc. No. 62, paras. 15 to 16), 63rd meeting (doc. No. 63, para. 15) and 67th meeting (doc. No. 64, paras. 7 to 10).

28. A draft resolution sponsored by Canada, Finland, Ghana, Norway, Pakistan, Panama and Sweden (doc. No. 65) was considered by the Fifth Committee, together with several amendments having no bearing on paragraph 5 of section IV of resolution 37/126 (doc. No. 66, para. 4). At its 67th meeting, on 13 December 1982, the Fifth Committee adopted the draft resolution as amended (doc. No. 66, para. 5). The General Assembly considered the report of the Fifth Committee (doc. No. 66) at its 109th meeting, on 17 December 1982, and adopted the draft resolution without any debate (doc. No. 67, pp. 26 to 27).

B. Paragraph 5 of Section VI of General Assembly Resolution 38/232

Documents of the Thirty-eighth Session of the General Assembly

29. At the 38th session of the General Assembly, the Fifth Committee had before it the ninth annual report of the ICSC (doc. No. 68). The Fifth Committee considered this report under agenda item 117 ("United Nations Common System") at its 28th, 31st, 33rd, 38th, 41st, 42nd, 49th, 50th, 61st, 62nd, 65th and 67th meetings. Comments made in the course of the discussion on the subject relevant to paragraph 5 of section VI of General Assembly resolution 38/232 are reflected in the summary records of the 31st meeting (doc. No. 69, para. 56), 33rd meeting (doc. No. 70, para. 35), 38th meeting (doc. No. 71, para. 73), 42nd meeting (doc. No. 72, para. 12), 61st meeting (doc. No. 73, para. 8) and 66th meeting (doc. No. 74, paras. 38 and 41).

30. At the 61st meeting of the Fifth Committee, on 12 December 1983, the representative of Canada introduced a draft resolution sponsored by Australia, Austria, Canada, Denmark, Egypt, Norway, Pakistan, Sweden and Venezuela (doc. No. 75). Several amendments to the draft resolution were submitted, none having any bearing on paragraph 5 of section VI of resolution 38/232. At its 66th meeting, on 15 December 1983, the Committee adopted the draft resolution as amended (doc. No. 76, para. 12). The General Assembly considered the report of the Fifth Committee (doc. No. 76) at its 104th meeting, on 20 December 1983, and adopted the draft resolution without any debate (doc. No. 77, pp. 32 to 33).

CONTENTS OF THE DOSSIER

Part I of the Dossier. Documentation relating to the Proceedings Leading to the Request by the Committee on Applications for Review of Administrative Tribunal Judgements for an Advisory Opinion of the International Court of Justice in Relation to Judgement No. 333 of the United Nations Administrative Tribunal

A. Documents of the Twenty-fourth Session of the Committee on Applications for Review of Administrative Tribunal Judgements

A/AC.86/R.117
23 July 1984.

1. Application of Mr. Vladimir Victorovitch Yakimetz dated 21 June 1984

APPLICATION

The Applicant, Vladimir Victorovitch Yakimetz, in respect of whom Judgement No. 333 was rendered by the United Nations Administrative Tribunal, hereby makes application to the Committee to request an advisory opinion of the International Court of Justice on the following grounds :

I. *The Tribunal has exceeded its jurisdiction and competence.* Paragraphs 1-5.

(a) The Tribunal has no competence to widen the discretionary powers of the Secretary-General, to diminish the contractual rights of staff members, or to substitute its own judgement for that of the General Assembly.

(b) The majority Judgement sanctions the Secretary-General's denial to the Applicant of reasonable consideration for a career appointment, as mandated in General Assembly resolution 37/126, paragraph IV.5. This has the effect of increasing the discretionary authority of the Secretary-General, a discretion specifically abridged by the General Assembly, and denying the Applicant his contractual right.

II. *The Tribunal has failed to exercise jurisdiction vested in it.* Paragraphs 6-16.

(a) The Applicant sought the right to be considered for a career appointment, a right granted him by General Assembly resolution 37/126, by virtue of his six years of continuing good service. The Respondent denied him this right, under the impression that a legal impediment existed in his case and that he could not be treated like "most staff members with comparable service records" ; because his last contract was concluded on the basis of secondment.

Since there was no question of an extension of secondment, the Applicant requested the Tribunal to determine whether a legal impediment existed to his further employment.

(b) Only the dissenting opinion addressed this threshold question. The majority Judgement failed to examine it. The Tribunal has therefore failed to exercise the jurisdiction vested in it.

III. *The majority Judgement of the Tribunal errs on questions of law relating to provisions of the Charter* Paragraphs 17-33.

(a) The Judgement conflicts with Article 101.1.
(b) The Judgement conflicts with Article 100.1.
(c) The Judgement conflicts with Article 101.3.
(d) The Judgement conflicts with Article 8.
(e) The Judgement conflicts with Article 2.1.

IV. *The Tribunal has committed fundamental errors of procedure which have resulted in a miscarriage of justice.* Paragraphs 34-43.

(a) The Tribunal has departed from its own previously enunciated principles and doctrine, and those of the ILO Tribunal.
(b) The Tribunal has interposed, *sua sponte* and with prejudice, issues outside the scope of the case before it.

I. The Tribunal Has Exceeded its Jurisdiction and Competence

1. The Tribunal is competent to pass judgement upon applications alleging non-observance of contracts of employment of Secretariat staff members, or of their terms of appointment, which include all pertinent regulations and rules in force at the time as well as the provisions of the Charter. It has no competence to widen the discretionary powers of the Secretary-General, to diminish the contractual rights of staff members, or to substitute its own judgement for that of the General Assembly.

2. General Assembly resolution 37/126, paragraph IV.5, followed by resolution 38/232, VI, 5, conferred certain rights on fixed-term staff members who, "upon completion of five years of continuing good service *shall be given* every reasonable consideration for a career appointment" (emphasis added). The choice of "shall be" rather than "may be", means that this provision is mandatory. The General Assembly did not give the Secretary-General discretion to give reasonable consideration to some and not to others. As the dissenting opinion points out, the International Civil Service Commission specifically considered the case of staff on secondment, and did not exclude them from this right. In the absence of any provision to the contrary, it may be assumed that the General Assembly intended the normal machinery for considerning candidates to be employed, viz. the Appointment and Promotion Bodies.

3. All three opinions agree that the Applicant was not afforded every reasonable consideration. The majority judgement expresses its "dissatisfaction" at the failure of the Respondent to record that he had given every reasonable consideration; the concurring statement says he was not eligible for such consideration; and the dissenting opinion says he was illegally denied his right.

4. Paragraph XVIII of the Judgement states that "the Respondent had the sole authority to decide . . . whether the Applicant could be given a career appointment". The majority, therefore, widens the Secretary-General's discretionary powers to decide which fixed-term staff shall and which shall not be considered for a career appointment—a discretion that was abridged by the mandatory term used in resolution 37/126. The majority denies the right of the Applicant, after six years of continuing good service, to reasonable consideration, thus altering and diminishing his contractual rights.

5. The majority Judgement, therefore, encroaches upon the powers of the General Assembly, and retroactively curtails the Applicant's terms of appointment. The Tribunal has neither the jurisdiction nor the competence to do so.

II. The Tribunal Has Failed to Exercise Jurisdiction Vested in It

6. The Applicant served a total of 11 years under three fixed-term contracts at the United Nations. His first fixed-term contract was from 1966 to 1974, his second was from 1977 to 1982, and his third was from December 1982 to December 1983. All the P-11 application forms filled in by him for these contracts were submitted to the United Nations by the USSR Ministry of Foreign Affairs. 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 answered "No". His first two Letters of Appointment, under item 5, "*Special Conditions*", carried the notation "None". His third one-year contract, continuous with the second, stated under "*Special Conditions*": "On secondment from the Government of the Union of Soviet Socialist Republics."

7. In February 1983, while this latter contract was in force, he resigned from any positions he might have held in his Government. Although initially barred from entering United Nations premises, he continued to perform his duties without interruption and served out the remainder of his contract in the DC-2 building. Having rendered six years of continuing good service, the Applicant sought the right, in terms of General Assembly resolution 37/126, paragraph IV.5, to reasonable consideration for a career appointment, like any other staff member with an excellent service record. The Respondent denied him the request, under the impression that a legal impediment existed in his case and that he could not be treated like "most staff members with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service" (Judgement, p. 49, *infra*).

8. Legally the only effect of his resignation was to relieve his Government of any obligation to preserve a post for him with such promotion and retirement benefits as may have accrued. Neither the Respondent nor the Tribunal maintained that his resignation constituted any violation of his contract with the United Nations. Since he no longer had an employment relationship with any releasing organization there could have been no question whatsoever in the mind of the Applicant, the Respondent, or the Tribunal of an extension of secondment.

9. The Applicant therefore requested the Tribunal to determine whether any legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983. In other words, did the Respondent err in his belief that having once served under a contract labelled "secondment", the Applicant was thereby permanently disabled from further United Nations service under any other form of contract or appointment. It was well within the Tribunal's jurisdiction to make such a determination.

10. The majority Judgement of the Tribunal completely omits this threshold question from the legal issues to which it addresses itself. Paragraph I of the Judgement lists the issues with which it deals : expectancy, General Assembly resolution 37/126, IV, and "the consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship" (an issue not raised by either Applicant or Respondent, and further discussed in section IV *(b), infra*).

11. The majority Judgement finds (para. V) that a fixed-term appointment normally carries no expectancy of renewal or conversion to any other type of appointment. This was never in dispute. In paragraph XII the Judgement concedes that "he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension" if his fixed-

term contract were not based on secondment. The Judgement concludes (para. XIII), that a secondment cannot be modified except with the consent of the three parties involved. The concurring statement goes further and says that a secondment cannot be extended or converted without the consent of the *Government* concerned.

12. The Applicant has no dispute with the statement that a secondment cannot be extended or modified without the consent of the three parties involved. At no time, after 10 February 1983, did he or the Government of the USSR seek an extension or modification of secondment.

13. The majority Judgement examines, and rejects, the Applicant's contention that the contract of employment signed on 9 December 1982 was modified on or after 10 February 1983 by agreement between the parties. On that date he notified the Respondent of a change in his status inconsistent with the "*Special Conditions*". The Respondent, by permitting him to serve out his contract, accepted the modification.

14. But nowhere does the majority Judgement examine the Applicant's status after the expiry of his contract on 26 December 1983. He was clearly not eligible for an extension of secondment, nor would he have consented to one. Any *Special Conditions* in one contract are coterminous with that contract, and have no binding force on either party after the contract has expired. The Applicant contended that no legal impediment existed after that date to his further employment.

15. Only the dissenting opinion examined the central legal issue posed by this appeal, and concluded that since the secondment contract ended on 26 December 1983, and since there was no possibility of further government service, "the only effect of a supposed preclusive agreement (expressed or implied) would have been to prevent the Applicant from being employed, then or at any future time, by the United Nations, however valuable or necessary his services might be. It cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement, bearing in mind the provisions of Article 101.3 of the Charter . . ."

16. The Tribunal majority has therefore failed to exercise the jurisdiction vested in it.

III. The Majority Decision Errs on Questions of Law relating to Provisions of the Charter

(a) *The Judgement conflicts with Article 101.1*

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

17. As the sovereign law-making body of the United Nations, the General Assembly's powers are limited only by the provisions of the Charter and the inviolability of existing contracts of service. It is the Secretary-General's responsibility to embody the resolutions of the General Assembly in rules and administrative instructions of equal application to all. General Assembly resolution 37/126, paragraph IV.5, was a mandate, not a "desideratum". The word used was "*decides*", not "requests" or "recommends". It was the duty of the Respondent to devise and promulgate appropriate machinery to give effect to this mandate, and it was not the responsibility of the Applicant, as paragraphs XV and XVI of the Judgement imply, to draw the Respondent's attention to the resolution in question.

18. Only the dissenting opinion considers whether the Respondent gave due

effect to his Charter obligations in respect of this resolution, and concludes that, due to errors of fact and law, he did not. The majority Judgement concludes, without supporting evidence, that the Respondent himself gave "every reasonable consideration" to the Applicant's candidacy (para. XVI), holds that he had discretionary powers to do so (para. XVIII), and then rebukes him for not stating that he had done so (para. XVIII). The concurring statement exempts him from any responsibility for giving effect to the General Assembly's mandate.

19. The majority Judgement, therefore, is inconsistent with Article 101.1, and an advisory opinion should be sought.

(b) *The Judgement conflicts with Article 100.1*

> "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization . . ."

20. Only in a secondment may the Secretary-General seek or receive instructions from any government or from any other authority external to the Organization, and then only in requesting the release of the employee. In all other matters relating to promotion, appointment, deployment or separation of staff, the Secretary-General may consider the views of governments, along with other relevant considerations, but may not be bound by them. "In the absence of a secondment agreed to by all the parties concerned . . . the Respondent cannot legally invoke a decision of a government to justify his own action with regard to the employment of a staff member." (*Levcik*, para. 5.) Where the conditions precedent for a secondment are not present, the Secretary-General may not, consistently, with Article 100 of the Charter, seek the consent of an external authority. Among the conditions precedent for a secondment are a continuing relationship of employment between the staff member and the releasing organization, and the consent of the staff member to the arrangement. After his resignation on 10 February 1983 neither of these conditions precedent existed with respect to the Applicant. Therefore a further secondment, or an extension of secondment was out of the question.

21. In his letter of 21 December 1983, the Assistant Secretary-General for Personnel Services wrote that the Applicant could have no expectancy of renewal "without the involvement of all the parties originally concerned". Both the spokesman for the Secretary-General and his Executive Assistant, in statements made to the press and given to the Tribunal, but not referred to in the Judgement, stated that his further employment was impossible without the consent of the USSR Government. Far from finding these statements to be legally erroneous, the majority Judgement endorses them. Paragraph XIII says that the Applicant was under secondment which "could not be modified except with the consent of all three parties". The concurring statement says there could be no extension or conversion to another type of appointment without the consent of the Government concerned.

22. The Tribunal majority makes no attempt to reconcile these views with the express prohibition of Article 100, and therefore an advisory opinion should be sought.

(c) *The Judgement conflicts with Article 101.3*

> "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."

23. It follows from the clear mandate of Article 101.3 that a staff member whose service record has amply demonstrated the qualities of efficiency, competence and integrity, and who has received the unqualified endorsement of his superiors, should not be excluded from consideration by extraneous, secondary or illegitimate factors; a principle frequently upheld by the Tribunal (see, e.g., Judgement No. 310, *Estabial*).

24. Neither the majority Judgement nor the concurring statement give any indication that they have weighed the mandate of Article 101.3 against other factors of lesser paramountcy. The concurring statement, indeed, appears to preclude *a priori* any consideration of competence and efficiency. 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. Such a ruling sets an extremely dangerous precedent, one which has no support in the Charter, the Staff Rules and Regulations, or the prior jurisprudence of the Tribunal. Many currently serving staff members have resigned from their government service; many carry passports other than those of the country of their birth: a number have made the transition from secondment to another type of appointment. In the United Nations context the appropriate yardstick for measuring standards of integrity must surely be fidelity to the oath of office and the Charter. Efficiency and competence are unaffected by nationality or visa status.

25. Therefore, the Tribunal's Judgement is inconsistent with Article 101.3, and an advisory opinion should be sought.

(d) *The Judgement conflicts with Article 8*

> "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."

26. The only restrictions on eligibility for appointment permitted by the Charter and the Staff Rules are the standards set out in Article 101.3. The General Assembly placed no restrictions on eligibility for reasonable consideration except five years of continuous good service. The principle of universality, of non-discrimination, is fundamental to the United Nations.

27. The majority Judgement and the concurring statement, however, place a number of restrictions on eligibility, none of them related to efficiency, competence or integrity. Previous contractual status, "expectancy", consent of a government, election to "break ties" are amongst the restrictions raised. The concurring statement flatly denies the Applicant's eligibility for consideration.

28. The inconsistency of these views with the prohibition of Article 8 raises questions of law in which an advisory opinion should be sought.

(e) *The Judgement conflicts with Article 2.1*

> "The Organization is based on the principle of sovereign equality of all its members."

29. No nation, large or small, may claim special treatment for itself or its nationals within the Organization or outside. The General Assembly endorses the principle of equality of States every time it calls for equitable geographical distribution. The principle of equality of States extends, within the Organization, to all conditions of service and all posts, consistent with the principle of merit. No post should be considered the exclusive preserve of any member State or group of States (General Assembly resolution 35/210, para. 1 (3), 1980).

Member States are under an obligation to recognize the exclusively international character of the Secretary-General's responsibility in all staff matters, as set out in Article 100, and to impose no conditions in conflict with this responsibility.

30. Since other staff members have accepted career appointments after resigning from their governments, have changed nationality, have been offered regular appointments after a period of secondment, and since General Assembly resolution 37/126, paragraph IV.5, confers the right to reasonable consideration on *all* staff who have rendered five years of continuous good service under fixed-term contracts, the principle of sovereign equality would demand that no nationality may be either burdened by additional restrictions, or favoured by special treatment.

31. The Tribunal was aware that some Governments "have informed the Secretary-General that they expect to be routinely consulted about the employment of any staff members or certain categories of staff members . . ." and that "with respect to the nationals of some States, the applications are almost always received from the national missions of their Governments. This is the case with respect to most Eastern European countries." (Tribunal Judgement No. 192, *Levcik*, para. IX.) The Tribunal also notes, that in the instant case "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, but his application for leave was refused by the United Nations" (para. XI, Judgement No. 333).

32. The Tribunal failed to consider the conflict between this evidence and the principle of sovereign equality (or indeed of the principle of non-interference of Art. 100.2). No post should be the exclusive preserve of any member State or group of States. No nation may claim special treatment within the Secretariat, or intervene in the contractual arrangements between a staff member and the United Nations.

33. Therefore, the Judgement raises substantial questions of law as to the applicability of Article 2.1 within the Secretariat, and an advisory opinion should be sought.

IV. The Tribunal Has Committed a Fundamental Error of Procedure Which Has Occasioned a Failure of Justice

(a) *The Tribunal has failed to follow its own precedent*

34. The United Nations Tribunal, the ILO Tribunal, and the other courts of international administrative law have, over the years, built up a body of jurisprudence on which the Administration relies in interpreting its obligations and to which Applicants turn for doctrine and principle when seeking a remedy. In the past, Tribunal judgements have followed their own precedents. New cases have been either reconciled with, or distinguished from, cases that have gone before. To depart from this method constitutes a procedural error amounting to a failure of due process.

35. Two major decisions of the United Nations Tribunal, and one of the ILO Tribunal, have dealt squarely with the legal relationships created by a secondment contract. Judgement No. 92 *(Higgins)* distinguishes three kinds of staff movements: "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" the 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". *Higgins* concerned an inter-agency secondment. United Nations Tribunal Judgement No. 192 *(Levcik)* and Judgment No. 431 of the ILO Tribunal, *In re Rosescu*, both concerned staff members whose governments refused to consent to contract extensions. In all three cases the Tribunals concerned upheld the rights of the "seconded" staff members, whose consent to the arrangement, they held, was essential. In all three cases they awarded compensation to the injured staff member; in the case of *Higgins*, for prolonged doubts and uncertainties; in the other two cases, for losses suffered due to the non-renewal of their fixed-term contracts.

36. *Higgins* made it clear that the receiving and the releasing organizations cannot vary the terms of a secondment without the consent of the staff member concerned. *Levcik* closely scrutinized the communications and memoranda surrounding the Applicant's appointment and concluded that no valid secondment took place: "The Tribunal does not have to consider the arguments presented by the Applicant regarding either the nature of the legal relationship between a seconded official and his national authorities or the situation arising when that legal relationship ceases to exist during the period of secondment" (para. XVI, Judgement No. 192).

37. The ILO Tribunal in the *Rosescu* case did consider a situation where the legal relationship between the complainant and his national authorities had ceased to exist. Not only did the Tribunal find no duty on the part of the organization to limit the duration of the complainant's services to the period of his initial contract, but also it found no obligation to "defer to the will of the Romanian authorities". Such deference they found to be a misuse of authority.

The relevant paragraph states:

> "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." (Para. 6, Judgment No. 431.)

38. Judgement No. 333 is a complete departure from this line of precedent, and makes no attempt to reconcile its conclusions with those of previous judgements. The majority Judgement cites *Higgins* and *Levcik* only to define the nature of secondment, not in reference to the rights of the staff member.

The concurring statement requires only the consent of "the Government concerned", with no mention whatsoever of the consent of the staff member. The concurring statement also makes reference to "the circumstances in which he elected to break his ties with his country" (i.e., his resignation), as disqualifying him for career employment. Thus in two sentences, the concurring statement effectively redefines "secondment", *making it identical with "loan"*.

39. *Rosescu* is noted in passing, in paragraph XIX, apparently in the context of the discretionary powers of the Secretary-General, although the criteria used are markedly divergent. The concurring statement refers to "doctrine" developed by the Tribunal which precludes "conversion to any other type of appointment without the consent of the government concerned". As the dissenting opinion points out, no such preclusive agreement can be inferred from *Higgins* or *Levcik* and most certainly not from *Rosescu*.

(b) *The Tribunal has interposed,* sua sponte *and with prejudice, issues outside the scope of the case before it*

40. At no time material to this case was the issue of a change of residence status or citizenship presented. The Applicant did not request permission to waive certain privileges and immunities because the occasion to do so had not arisen during his service, and there is no precedent for permission to sign such a waiver before the expiry of a fixed-term contract. The Respondent did not base his denial of reasonable consideration for a career appointment on a possible future change of citizenship (a change which has not, to the date of this writing, occurred). There is ample precedent for the Appointment and Promotion Board considering a candidate for appointment pending a change of citizenship. The Personnel Data Unit routinely compiles an "Annex to Nationality Statistics : Changes which have occurred in Staff in Posts Subject to Geographical Distribution". Changes of nationality/visa status appear as "Gain" or "Loss" in the appropriate country quota. The Annex for the nine months from 1 July 1983 to 31 March 1984 shows six such changes. The previous year records seven changes; the year before ten; and so on.

The only action of the Applicant of legal consequence to the Tribunal's deliberations was his resignation from any positions he might have held in his national government. Many staff members have at one time or another resigned from government service, an action which is quite consistent with and a normal preliminary to seeking a career appointment.

41. The Tribunal raised the issue of citizenship change *sua sponte*. Paragraph I of the majority Judgement lists it as one of the three legal issues before it. Paragraph XII cites the recently decided *Fischman* case and quotes a "widely held belief" 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."

The same paragraph goes on to say that in the case of the Applicant "there was apparently no immediate problem" of a waiver. Since there was no immediate problem, the paragraph quoted was irrelevant and prejudicial. The dissenting opinion emphasizes the caution with which the view should be treated. The discussion was in a context of geographical distribution, and the same 1953 Fifth Committee report records that proposals inconsistent with that view were also put forward, one accepted by majority vote.

42. The concurring statement cites this "widely held belief" as though it were legal prohibition on eligibility for consideration, to even more prejudicial effect. The second paragraph of the concurring statement implies that anyone who resigns from a government office is not fit to be an international civil servant. No support for this view can be found in the Charter, the Staff Rules and Regulations, or the practices and procedures of the United Nations, and no previous judgement of the Tribunal has produced a doctrine so restrictive.

43. A deviation from established jurisprudence on which the Applicant has placed reliance, and the introduction of prejudicial elements not properly before them, constitute a failure of justice.

For these reasons the Applicant respectfully asks the Committee to request an advisory opinion of the International Court of Justice.

(Signed) Vladimir YAKIMETZ,
Applicant.

(Signed) Diana BOERNSTEIN,
Counsel for Applicant.

20 July 1984.

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2. Information Circular[1] A/AC.86/INF/23
3. Agenda for the Twenty-fourth session[1] A/AC.86/R.116

A/AC.86/R.118
10 August 1984.

4. Comments of the Secretary-General on Applicant's Written Statement (A/AC.86/R.117)

INTRODUCTION

1. The case before the Committee involves a decision by the Administrative Tribunal upholding the non-renewal by the Secretary-General of the appointment of a staff member whose fixed-term appointment had expired. The Secretary-General, after himself fully considering all the facts of the case, had concluded that offering a new appointment to the staff member would not be in the interests of the United Nations. The Tribunal confirmed that the Secretary-General's decision did not violate the staff member's rights. The Tribunal was unanimous in finding that the Applicant had no expectancy to further employment (Judgement, para. VI; statement by Mr. Endre Ustor, para. 1, and dissenting opinion of Mr. Arnold Kean, para. 1) and, by a majority, held that the Applicant received the consideration for a career appointment that he

[1] Document not reproduced. *[Note by the Registry.]*

was entitled to pursuant to General Assembly resolution 37/126, section IV, paragraph 5, in which the General Assembly had 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" (*Judgement, paras. XIV-XVIII, and statement by Mr. Endre Ustor, paras. 1 and 3*).

2. The staff member has now objected to the Tribunal's Judgement, basing his objection on all four of the grounds set forth in Article 11 of the Tribunal's Statute and asking the Committee to request an advisory opinion of the International Court of Justice on the matter. However, the dispute between the parties is essentially whether the Applicant was given "every reasonable consideration" for a career appointment pursuant to General Assembly resolution 37/126, section IV, paragraph 5. The question of what the General Assembly meant by "every reasonable consideration" in one of its resolutions is not one of the four grounds upon which this Committee can request the International Court of Justice for an advisory opinion.

3. The Respondent submits that there is no basis—much less a substantial basis—for the application on any of the grounds which are now being alleged and further submits that the Administrative Tribunal has properly exercised its jurisdiction and competence, that it has correctly interpreted the applicable provisions of the Charter of the United Nations and that it did not commit an error of procedure which could have occasioned a failure of justice in this case.

I. The Tribunal Properly Exercised Its Jurisdiction and Competence by Hearing the Application and Adjudicating upon the Claim

4. The Applicant alleges that the Tribunal has both exceeded its jurisdiction and competence and, at the same time, has failed to exercise jurisdiction vested in it (see Application, secs. I and II, paras. 1-16).

5. The Respondent has some difficulty in following these inconsistent assertions since the Tribunal is "competent to hear and pass judgement upon applications alleging non-observance of contracts of employment" (see Art. 2 of Tribunal's Statute) and this is precisely what the Tribunal did. The fact that a party disagrees with the judgement of the Tribunal and with its failure to act favourably on his application does not lead to the result that the Tribunal's judgement constituted either a failure to exercise jurisdiction or exceeded that jurisdiction.

6. The Applicant argues that the Tribunal exceeded its jurisdiction because it widened the discretion of the Secretary-General in that it permitted him to ignore General Assembly resolution 37/126, section IV, paragraph 5, of 17 December 1982 regarding "every reasonable consideration" for a career appointment to be given to staff members on fixed-term appointments after five years of continuing good service (Application, sec. I, paras. 2-5).

7. The Respondent submits that the Tribunal might exceed its jurisdiction if it were to consider a case brought by a person other than a staff member or consider a claim based on a ground other than an alleged non-observance of a contract of employment. However, merely deciding a case properly brought before it by a former staff member, whether the decision is favourable or unfavourable, is not an excess of jurisdiction. In any event, 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 (Judgement, paras. XIV-XVIII).

8. The Applicant also argues that the Tribunal failed to exercise its jurisdic-

tion because it did not determine whether there was any legal impediment to his further appointment (Application, sec. II, para. 9).

9. The Respondent submits that while the Tribunal might fail to exercise its jurisdiction by erroneously failing to take a case properly submitted to it, a mere failure to find in favour of the Applicant is not a failure to exercise jurisdiction. In any event, it is clear that the Tribunal did consider the Applicant's argument favourably as it held that the Applicant was entitled to reasonable consideration for a career appointment and that he was in fact given such consideration (Judgement, para. XVIII).

10. The Respondent observes that the International Court of Justice has recently emphasized that the findings of the Tribunal in a decision on the import of Staff Regulations, Staff Rules and General Assembly resolutions do not raise a question of jurisdiction:

> "It can hardly be denied that Mr. Mortished's appeal to the Tribunal, based as it was upon the various provisions of the Staff Regulations and on Rules established by the Secretary-General in pursuance of those Staff Regulations, corresponds directly with both the words and spirit of Article 2 (of the Tribunal's Statute). It is difficult to see any possible ground on which the Tribunal could be said to have exceeded the terms of its jurisdiction or competence thus defined. It sought to interpret and apply the terms of Mr. Mortished's appointment and the relevant Staff Regulations and Rules and General Assembly resolutions . . . Whether or not it was right in its decision is not pertinent to the question of jurisdiction." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion of 20 July 1982, *I.C.J. Reports 1982*, para. 78.)

11. The Respondent submits that it is therefore clear that the Tribunal properly exercised its jurisdiction and competence under Article 2 of its Statute when it heard and passed judgement on the Application in the manner which is reflected in its judgement in this case. It did not refuse to exercise its jurisdiction and, by concluding that the Applicant had no entitlement to further employment, could hardly have exceeded its jurisdiction since this was the matter at issue.

II. The Tribunal Has Correctly Interpreted Applicable Provisions of the Charter

12. In its judgement in the case, the Tribunal found that there was no expectancy for renewal and held that the Secretary-General had the sole authority to decide whether the Applicant should be granted a career appointment 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.

13. The Applicant has alleged that the Secretary-General sought and received instructions from a Government in violation of Article 100, paragraph 1, of the Charter (Application, paras. 20-22), which Article 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."

14. The Respondent, however, observes that the Tribunal, in paragraph XIX of its Judgement found, as a fact, that

> "there has been no allegation, and far less any evidence, that the Respondent sought any 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".

Such a finding of fact by the Tribunal with respect to the Secretary-General's personal decision, taken in conformity with Article 100 of the Charter, is, of course, not a matter which relates to any of the four grounds upon which an opinion of the Court may be sought. Furthermore, the Tribunal emphasized that

> "indeed, he (the Secretary-General) 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, para. XIX).

15. However, in this context, one member of the Tribunal seems to have formed the impression that the Secretary-General had followed what the member called "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" (para. 11 of the dissenting opinion). 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 104.14 *(f)* (i) with respect to proposed appointments" (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.

17. In addition to his allegation in connection with Article 100 of the Charter, the Applicant cited Article 101 of the Charter in his application to the Tribunal, contending that the Secretary-General was required to re-appoint the Applicant under paragraph 3 of that Article, which provides as follows:

> "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."

18. In view of his responsibilities as "Chief Administrative Officer" (Art. 97 of the Charter), the Respondent argued that the Secretary-General was obligated to take into account all the circumstances in the case and that the Secretary-General could not be compelled to exercise his power of appointment under Article 101 of the Charter in a case where the Applicant had no right to re-appointment and the Secretary-General determined that re-appointment would not be in the interest of the Organization. In that connection, the Tribunal noted that the "Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions" (para. XII of the Judgement). Furthermore, the Tribunal noted that one consequence of the Applicant's actions was to raise "the question of his suitability as an international civil servant" citing its Judgement No. 326 in the *Fischman* case and referring to the following statement from a report of the Fifth Committee of the General Assembly:

> "International officials must be true representatives of the cultures and personality of the country of which they were nationals, and those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations (doc. A/2615, para. 70)."

The Tribunal held that the report of the Fifth Committee "must continue to provide an essential guidance in this matter" *(ibid.)*.

19. Finally, in addition to his arguments under Chapter XV of the Charter, the Applicant cites Article 2, paragraph 1, from Chapter I and Article 8 from Chapter III of the Charter, which respectively provide as follows:

> "The Organization is based on the principle of the sovereign equality of all its Members." and
>
> "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."

20. The Applicant's reference to Article 2, paragraph 1, is entirely misplaced inasmuch as the Judgement of the Tribunal, which is in issue in this case, and the decision of the Secretary-General, which is the subject of that Judgement, have nothing at all to do with the sovereign equality of member States. The Applicant's reference to Article 8 is equally misplaced, since that article refers to sex discrimination, an issue which has never been raised in this case. The essence of the Secretary-General's decision was his determination of the interest of the Organization, and the Tribunal upheld him in that determination with no mention whatsoever of either Article 2, paragraph 1, or Article 8 of the Charter.

21. In view of the foregoing, the Respondent submits that the Tribunal interpreted Articles 97, 100 and 101 of the Charter in the course of its judgement in favour of the Secretary-General who properly discharged his responsibilities as Chief Administrative Officer, under Article 97 or the Charter, without derogating from his responsibilities under Article 100 of the Charter, when he decided not to exercise his power of appointment under Article 101 of the Charter to grant the Applicant a new appointment after his fixed-term appointment on secondment expired.

III. The Tribunal Did not Commit a Fundamental Error of Procedure Which Has Occasioned a Failure of Justice

22. The Applicant alleges that the Tribunal has committed a fundamental error of procedure which has occasioned a failure of justice because it failed to follow an earlier precedent and because it considered an issue not raised by the parties (Application, sec. IV, paras. 34-43).

23. The Respondent observes that these two arguments do not relate to the Tribunal's procedure but relate to questions of substance.

24. Articles 7 to 11 of the rules of the Administrative Tribunal of the United Nations describe the procedure to be followed by the Tribunal in considering appeals. In considering the case, the Tribunal had before it the Applicant's Application, the Respondent's answer and the Applicant's written observations on the Respondent's answer (see pp. 43 and 44, *infra*, of the Judgement). Before pronouncing its judgement, the Tribunal reviewed the requests made by the Applicant in his Application (p. 43, *infra*, of the Judgement), summarized the facts in the case (pp. 43-50, *infra*, of the Judgement), enumerated the principal contentions of the parties (pp. 50 and 51, *infra*), and identified the legal issues involved in the case (para. I of the Judgement). This procedure followed strictly that set out in Articles 7 to 11 of the rules.

25. The Applicant, however, suggests that a fundamental error of procedure was committed because the Tribunal allegedly departs from two earlier Judgements (No. 92: *Higgins* and No. 192: *Levcik*) and departs from a judgment of the Administrative Tribunal of the International Labour Organisation (No. 431: *Rosescu*) (Application, sec. IV, paras. 34-39).

26. The Respondent submits that the Tribunal (Judgement, paras. IV and XIX), in fact, did not consider that it departed from its earlier Judgements and that the Secretary-General's actions did not impinge the principles stated in *Rosescu*. The Respondent considers it appropriate, at this juncture, to note that *Rosescu* was decided by a different Tribunal on different facts in a case where the contested decision of non-renewal occurred after the Executive Head initially decided to grant a new appointment. In any event, the Tribunal is required, under Article 2 of its Statute, to hear and pass judgement on the individual merits of each case before it, in the light of the particular circumstances in which the case is presented.

27. The Applicant also argues that the Tribunal committed a fundamental error of procedure because it dealt with the question of a change in residence status and citizenship, which question was not raised by the parties (Application, sec. IV, paras. 40-43).

28. The Respondent submits that the Tribunal's Statute clearly shows that the Tribunal is not limited to considering the legal arguments adduced by the parties but must consider whether a staff member's contract of employment has not been observed, including "all pertinent regulations and rules" (see Art. 2.1 of the Tribunal's Statute). In other words, the Tribunal must consider a case on the basis of all applicable laws and rules even if the parties failed to refer to some of them. In any event, the Tribunal's reliance on such matters cannot be deemed to be an error, much less "a fundamental error of procedure which occasioned a failure of justice" since the purpose of requiring the Tribunal to consider all matters is to ensure that justice is done and not to do justice merely on the basis of those rules cited by the parties. The parties to a proceeding cannot avoid a proper consideration of all directly pertinent issues by failing to raise them, the Tribunal having the authority and, indeed, the duty to do so on its own initiative.

CONCLUSION

29. In Respondent's submission, no basis exists for concluding that the Tribunal, in upholding the decision of the Secretary-General not to grant a new appointment to the Applicant, exceeded its jurisdiction or competence, failed to exercise its jurisdiction, or erred on a question of relating to provisions of the Charter or committed an error, let alone a fundamental error of procedure which has occasioned a failure of justice.

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5. United Kingdom of Great Britain and Northern Ireland: Informal draft proposal[1] A/AC.86/R.120

A/AC.86/R.121
31 August 1984.

6. Decision of the Committee on the Application of Mr. Yakimetz requesting an Advisory Opinion of the International Court of Justice in Respect of the United Nations Administrative Tribunal Judgement No. 333 *(Yakimetz against the Secretary-General of the United Nations)*

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?

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[1] Document not reproduced. *[Note by the Registry.]*

A/AC.86/30
21 September 1984.

7. Report of the Committee

Rapporteur: Mr. David M. EDWARDS (United Kingdom of Great Britain and Northern Ireland)

INTRODUCTION

1. At its twenty-fourth session, the Committee on Applications for Review of Administrative Tribunal Judgements, established under Article II of the Statute of the United Nations Administrative Tribunal, considered applications for review of the following Administrative Tribunal Judgements:

(a) No. 333—*Yakimetz* v. *Secretary-General of the United Nations*;
(b) No. 331—*Large* v. *United Nations Relief and Works Agency for Palestine Refugees in the Near East*;
(c) No. 326—*Fischman* v. *Secretary-General of the United Nations.*

The Committee also considered but did not accede to a request received from Mr. Zuleidu Jekhine that the time-limit for the submission of an application to the Committee be extended in respect of Administrative Tribunal Judgement No. 319 *(Jekhine* v. *Secretary-General of the United Nations)* rendered on 28 October 1983.

2. Meetings of the Committee were held on 20, 21, 22, 23 and 28 August 1984.

I. Composition of the Committee and Organization of the Session

3. The Committee, under paragraph 4 of Article II of the Statute of the Administrative Tribunal, is composed of the member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly, namely at this time: Algeria, Belgium, Bhutan, Burundi, Canada, China, Colombia, Czechoslovakia, France, German Democratic Republic, Guyana, Japan, Lebanon, Liberia, Libyan Arab Jamahiriya, Nepal, Norway, Pakistan, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Union of Soviet Socialist Republics and Venezuela.

4. At its meeting on 20 August 1984, the Committee elected the following officers:

Chairman: Mr. Liés Gastli (Tunisia)
Rapporteur: Mr. David M. Edwards (United Kingdom).

II. The Applications Before the Committee and Their Consideration

5. On 23 July 1984, the Committee received, through its Secretary, an Application from Mr. Vladimir Yakimetz requesting a review of Judgement No. 333 rendered by the United Nations Administrative Tribunal on 8 June 1984 in the case of *Yakimetz against the Secretary-General of the United Nations*. In accordance with paragraph 1 of Article III of the Rules of Procedure of the

Committee (A/AC.86/2/Rev.3), the Application, which had been submitted in English, was translated into the other languages of the General Assembly. Thereafter, on 6 August 1984, in accordance with the same Rules of Procedure, the Application was communicated in the form of a document (A/AC.86/R.117) to all members of the Committee and to the Secretary-General together with a copy of the Judgement of the Administrative Tribunal (AT/DEC/333).

6. The Secretary-General's written comments, submitted with respect to the Application of Mr. Yakimetz in accordance with paragraph 1 of Article IV of the Rules of Procedure of the Committee, were received by the Secretary of the Committee on 10 August 1984 and thereafter duly circulated to all members of the Committee in the form of a document (A/AC.86/R.118).

7. The Committee considered the application of Mr. Yakimetz at three closed meetings held on 21, 22 and 23 August 1984.

8. After members of the Committee had presented their views on the Application of Mr. Yakimetz, the Chairman invited the Committee to decide whether or not there was a substantial basis for the application in respect of each ground set forth in Article II of the Statute of the United Nations Administrative Tribunal. At the request of a member of the Committee, the decisions were taken by a roll-call.

9. On the question of whether the Application had a substantial basis on the ground that the Administrative Tribunal had exceeded its jurisdiction or competence the Committee decided, by a vote of 25 to none with 3 abstentions, that there was not a substantial basis for the Application on that ground. The voting was as follows:

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, USSR, United Kingdom, United States, Venezuela.
Abstaining:	Pakistan, Swaziland, Thailand.
Absent:	China.

10. On the question of whether the Application had a substantial basis on the ground that the Administrative Tribunal had failed to exercise jurisdiction vested in it, the Committee decided, by a vote of 16 to 9, with 3 abstentions, that there was a substantial basis for the application on that ground. The voting was as follows:

In favour:	Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, United Kingdom, United States, Venezuela.
Against:	Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR.
Abstaining:	Lebanon, Pakistan, Thailand.
Absent:	China.

11. On the question of whether the Application had a substantial basis on the ground that the Tribunal had erred on a question of law relating to the provisions of the Charter of the United Nations, the Committee decided, by a vote of 16 to 9, with 3 abstentions, that there was a substantial basis for the Application on that ground. The voting was as follows:

In favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, United Kingdom, United States, Venezuela.
Against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR.
Abstaining: Lebanon, Pakistan, Thailand.
Absent: China.

12. On the question of whether the Application had a substantial basis on the ground that the Administrative Tribunal had committed a fundamental error in procedure which had occasioned a failure of justice, the Committee decided, by a vote of 11 to 13, with 4 abstentions, that there was not a substantial basis for the Application on that ground. The voting was as follows:

In favour: Belgium, Canada, Colombia, France, Japan, Liberia, Norway, Panama, United Kingdom, United States, Venezuela.
Against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Guyana, Libyan Arab Jamahiriya, Nepal, Sierra Leone, Singapore, Sudan, Tunisia, USSR.
Abstaining: Lebanon, Pakistan, Swaziland, Thailand.
Absent: China.

13. In the light of the foregoing decisions, the Committee considered, in accordance with paragraph 2 of Article IX of its Rules of Procedure, the formulation of the questions on which it would request an advisory opinion of the International Court of Justice. In this respect, an "informal draft proposal", submitted by the delegation of the United Kingdom and contained in document A/AC.86/R.120, was brought by the Chairman to the attention of the members of the Committee. The Committee adopted, by a roll-call vote of 16 to 9, with 1 abstention, the following decision (A/AC.86/R.121) based on the proposal of the United Kingdom:

"Decision of the Committee on the application of Mr. Yakimetz requesting an advisory opinion of the International Court of Justice in respect of the United Nations Administrative Tribunal Judgement No. 333 (Yakimetz against the Secretary-General of the United Nations)

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?"

14. The results of the vote were as follows:

In favour:	Belgium, Canada, Colombia, France, Guyana, Japan, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, United Kingdom, United States, Venezuela.
Against:	Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR.
Abstaining:	Pakistan.
Absent:	China, Lebanon, Liberia.

15. The aforementioned decisions of the Committee on the Application of Mr. Yakimetz and text of the questions addressed to the International Court of Justice, as well as the results of and the participants in the votes taken during the private deliberations, were in accordance with paragraph 4 of Article VII of the Rules of Procedure of the Committee, formally announced by the Chairman in a public meeting (5th meeting) held on 28 August 1984. At that meeting, the following members of the Committee made statements for the record: Bhutan, Czechoslovakia, France, Panama, United States and USSR. The verbatim record of the 5th meeting of the Committee is contained in document A/AC.86/XXIV/PV.5.

16. On 5 July 1984, the Committee received, through its Secretary, an application from Mr. Robert Large requesting a review of Judgement No. 331 rendered by the United Nations Administrative Tribunal on 28 May 1984 in the case of *Large against the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. In accordance with paragraph 1 of Article III of the Rules of Procedure of the Committee, the application, which had been submitted in hand-written form in English, was translated into the other languages of the General Assembly. Thereafter, on 9 August 1984, in accordance with the same Rules of Procedure, the application was communicated in the form of documents (A/AC.86/R.111 and Corr.1 and Add.1) to all members of the Committee and to the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East together with a copy of the Judgement of the Administrative Tribunal (AT/DEC/331).

17. The written comments of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, submitted with respect to the application of Mr. Large in accordance with paragraph 1 of Article IV of the Rules of Procedure of the Committee, were received by the Secretary of the Committee on 14 August 1984 and thereafter duly circulated to all members of the Committee in the form of a document (A/AC.86/R.113).

18. The Committee considered the application of Mr. Large at a closed meeting (6th meeting) on 28 August 1984.

19. The Committee decided unanimously that there was not a substantial basis for the application of Mr. Large under Article II of the Statute of the Administrative Tribunal and concluded that the International Court of Justice should not be requested to give an advisory opinion in respect of Judgement No. 331 delivered by the United Nations Administrative Tribunal in the case of *Large against the United Nations Relief and Works Agency for Palestine Refugees in the Near East*.

20. On 23 July 1984, the Committee received, through its Secretary, an application from Mr. Emilio Fischman requesting a review of Judgement No. 326 rendered by the United Nations Administrative Tribunal on 17 May 1984 in the case *Fischman against the Secretary-General of the United Nations*. In

accordance with paragraph 1 of Article III of the Rules of Procedure of the Committee, the application, which had been submitted in English, was translated into the other languages of the General Assembly. Thereafter, on 6 August 1984, in accordance with the same Rules of Procedure, the application was communicated in the form of a document (A/AC.86/R.114) to all members of the Committee and to the Secretary-General together with a copy of the Judgement of the Administrative Tribunal (AT/DEC/326).

21. The Secretary-General's written comments, submitted with respect to the application of Mr. Fischman in accordance with paragraph 1 of Article IV of the Rules of Procedure of the Committee, were received by the Secretary of the Committee on 10 August 1984 and thereafter duly circulated to all members of the Committee in the form of a document (A/AC.86/R.115).

22. In response to the Committee's request made at its 1st meeting on 20 August 1984, the Secretary of the Committee, on 21 August 1984, presented additional information on the circumstances surrounding the submission of Mr. Fischman's application and, in particular, the date of the receipt of the Tribunal's judgement by Mr. Fischman. This information is contained in document A/AC.86/R.119.

23. The Committee considered the application of Mr. Fischman at a closed meeting (6th meeting) on 28 August 1984.

24. The Committee decided unanimously that there was not a substantial basis for the application of Mr. Fischman under Article 11 of the Statute of the Administrative Tribunal and concluded that the International Court of Justice should not be requested to give an advisory opinion in respect of Judgement No. 326 delivered by the United Nations Administrative Tribunal in the case of *Fischman against the Secretary-General of the United Nations*.

25. In accordance with paragraph 4 of Article VII of the Rules of Procedure of the Committee, the decisions of the Committee on the applications of Mr. Large and Mr. Fischman were formally announced by the Chairman in a public meeting (7th meeting) held on 28 August 1984. At that meeting, the representative of the Sudan made a statement stressing the importance of advance announcement in the *Journal of the United Nations* of open meetings of the Committee held pursuant to the spirit and letter of the Committee's rules of procedure.

A/AC.86/XXIV/PV.5
17 September 1984.

8. Verbatim Record of the 5th Meeting

Held at Headquarters, New York,
on Tuesday, 28 August 1984, at 10.30 a.m.

Chairman: Mr. Gastli (Tunisia)

The meeting was called to order at 11.05 a.m.

The Chairman (interpretation from French): The present public meeting of the Committee on Applications for Review of Administrative Tribunal

Judgements has been convened pursuant to Article VII (4) of the Committee's Rules of Procedure. That paragraph provides that

> "The decisions of the Committee and the text of any questions to be addressed to the International Court of Justice, as well as the results of and the participants in any votes taken during the private deliberations, shall be formally announced in a public meeting, at which any member of the Committee may make a statement for the record."

The Committee has held four meetings in the course of its present session, and has completed the consideration of one of the applications before it, namely, the Application of Mr. Vladimir Victorovitch Yakimetz, dated 21 June 1984, in which Mr. Yakimetz asks the Committee to request an advisory opinion of the International Court of Justice in respect of United Nations Administrative Tribunal Judgement No. 333. Pursuant to that Application, and in compliance with the provisions of paragraph 1 of Article IX of its Rules of Procedure, the Committee has taken a decision in respect of each of the four grounds invoked by the Applicant under Article 11 of the Statute of the Administrative Tribunal. Each decision was taken by a roll-call vote. The grounds voted upon 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.

Having decided as just described, on the four grounds advanced by the Applicant, the Committee adopted the following decision containing the texts of the questions addressed by it to the International Court of Justice:

> "The Committee on Applications for Review of Administrative Tribunal Judgements at the fourth meeting of its twenty-fourth session on 23 August 1984 in New York decided that there is 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?' "

The above decision was adopted by a roll-call vote of 16 votes to 9, with 1 abstention. The pattern of voting was as follows: in favour, Belgium, Canada, Colombia, France, Guyana, Japan, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, United Kingdom, United States, Venezuela; against, Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR; abstaining, Pakistan.

That is the formal announcement I intended to make this morning in keeping with our Rules of Procedure. Pursuant to Article VII (4) of the Committee's Rules of Procedure, at this public meeting any member of the Committee may make a statement for the record.

I shall now call on those members who wish to exercise that prerogative.

Mr. Tsering (Bhutan): The four questions as contained in Article 11 of the Statute of the United Nations Administrative Tribunal have formed the basis of our deliberations.

On the part of my delegation, in reviewing the case before us, *Yakimetz against the Secretary-General of the United Nations,* I have taken into account all the documents presented to us, namely: document AT/DEC/333, containing the Judgement of the United Nations Administrative Tribunal; document A/AC.86/R.117, which is the Application of Yakimetz; and document A/AC.86/R/118, consisting of the comments of the Secretary-General on the

Applicant's written statement. I have also paid close attention to all of the speakers during our deliberations.

The complexity of the case is reflected in the seeming absence of consensus on it. Some of the speakers concentrated on certain elements of the legal issues of the case and on certain parts of the Judgement of the Administrative Tribunal. This led us to believe that there was agreement on the fundamental issues involved. Elements of the legal issues and parts of the elements do not necessarily represent the case entirely.

In reviewing the case itself and the Judgement of the Tribunal, we must take into account all the relevant issues, large and small, old and new, for 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.

I want to make it clear that my delegation fully supports the principles and objectives enshrined in the Charter of the United Nations. It is important to us, as it is to many, for the United Nations Secretariat to function free from pressures and to fulfil its responsibilities. As the Secretary-General, in his report on the work of the Organization to the thirty-eighth session of the General Assembly, pointed out:

> ". . . while all profess their dedication to the principles of independent and objective international administration, few refrain from trying to bring pressure to bear in favour of their own particular interests. This is especially so on the personnel side." (A/38/1, p. 5.)

We believe it is in the general interest of the international community to act together, fully aware of the practical difficulties of the enterprise but with the united objective of strengthening the Secretariat and the United Nations system. To this end, within the rules and provisions of the Charter of the United Nations, the Secretary-General should be allowed to exercise his discretion and we should refrain from creating any undesirable precedents in the functioning of the Secretariat.

In the case of Mr. Yakimetz, his contract expired on 26 December 1983. The questions posed by the Applicant and now by certain members of the Review Committee are, "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" and "Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

The responses to these questions are fully reflected in the Administrative Tribunal's Judgement. It even referred to the "widely held belief" in a report of the Fifth Committee, which states:

> "International officials should be true representatives of the culture and 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." (A/AC.86/R.117, para. 41.)

With regard to the second question, Article 101 (3) of the United Nations Charter 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."

Here I wish to underline the words "and integrity" of the individuals.

All these factors are well covered in the Judgement of the Tribunal. I fail to see the need for an opinion on what is already crystal clear.

It is also clear from all the relevant documents before us that the Tribunal did consider the Applicant's arguments and the other relevant issues. The legal issues have been well analysed and presented to us by the Judgement of the Tribunal as a result of the hard work of the members of the Tribunal, who sifted through substantial documentation, facts and available information supplied both by the Applicant and the Respondent. Therefore we find no substantial basis for recommending the case for an advisory opinion of the International Court of Justice. My delegation had no choice but to vote against referring portions of the Tribunal's Judgement to the International Court of Justice for an opinion.

Mr. Rapin (France) (interpretation from French): Mr. Chairman, my delegation also wishes to begin by congratulating you on and thanking you for your most efficient conduct of the Tribunal's work.

With regard to the first question put to the Tribunal, my delegation agrees with the majority of the Committee that Mr. Yakimetz's application is based on grounds that are valid under Article 11 (2) of the Statute of the Administrative Tribunal in claiming that the Tribunal did not answer the question of whether that was a legal impediment to the renewal of the Applicant's employment at the United Nations after the expiry of his contract on 26 December 1983. However, my delegation is inclined to believe that this complaint is grounded not on any failure of the Tribunal to exercise its jurisdiction, but rather on its having committed a fundamental procedural error that gave rise to a failure of justice, under Article 11 (1) of the Statute. We regret that, as had been suggested, the Committee did not agree to accept either of these grounds in support of the application before the Tribunal.

Mr. Agayantz (Union of Soviet Socialist Republics) (interpretation from Russian): At the outset, Mr. Chairman, I should like to congratulate you on and to thank you for your successful and wise guidance of the work of our Committee during this discussion of the extremely complex matter before us.

The Soviet delegation deems it necessary to state its position on the decision taken by the Committee on Applications for Review of Administrative Tribunal Judgements on 23 August 1984. In our view, this decision to request an advisory opinion of the International Court of Justice in respect of Judgement No. 333 of the Administrative Tribunal is absolutely unfounded and artificial. As is known, the Committee took the decision to go to the International Court of Justice on the following two matters.

One is: Has the Administrative Tribunal failed to exercise a 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? The Administrative Tribunal considered the case of the Applicant for consideration, heard it and issued its Judgement—that is, it did not fail to exercise the jurisdiction vested in it. The Judgement of the Administrative Tribunal may give rise to satisfaction or not; but this is not relevant in regard to whether the Tribunal exercised a jurisdiction.

It is worthwhile pointing out that the International Court of Justice in its decision on the *Mortished* case stated: "Whether or not it [the Tribunal] was right in its decision is not pertinent to the question of jurisdiction." That is from paragraph 78 of the advisory opinion of the International Court of Justice of 20 July 1982.

The judgement of the Administrative Tribunal contains a number of very

detailed points which show that the Tribunal did consider this question of legal impediments and did give an answer to it.

In paragraph VI of the Judgement, the Administrative Tribunal says, for example:

> ". . . 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" (AT/DEC/333, para. VI).

Thus the Administrative Tribunal quite definitely covered the juridical situation of the Applicant after the end of his secondment contract, and that situation was that the Applicant had no legal grounds to expect any further appointment.

Further on, the Administrative Tribunal states:

> "The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions." (Para. XII.)

In that paragraph of its Judgement the Administrative Tribunal considered the question of the Applicant's prospects of being given another contract after the expiry of his secondment contract. The Tribunal stated, in particular, that

> "In so far as he was on secondment from the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment." (Para. XII.)

Hence, in the opinion of the Administrative Tribunal, the actions of the Applicant were an impediment making further service in the United Nations Secretariat difficult.

Still in paragraph XII of the Administrative Tribunal's Judgement, it says: "Another consequence of his actions raised the question of his suitability as an international civil servant." (Para. XII.) The Tribunal explains its evaluation of the suitability of the Applicant as an international civil servant by giving a very unambiguous quotation from a document of the Fifth Committee of the General Assembly—document A/2615, paragraph 70—as follows:

> "International officials should be true representatives of the cultures 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." (Para. XII.)

Thus the Tribunal again talks about a circumstance which does not permit the Applicant to expect further service in the United Nations.

Further on in paragraph XII the Administrative Tribunal quotes from Information Circular ST/AFS/SER.A/238, published on instructions from the Secretary-General, relating directly to this question of "suitability" of a candidate for working in the United Nations, as follows:

> "The decision of a staff member to remain on or acquire 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 . . ." (Para. XII.)

This is further evidence to the effect that the Administrative Tribunal did specifically consider the various aspects of the existence of legal impediments to the further employment of the Applicant in the United Nations after the expiration of his contract on 26 December 1983.

All these circumstances point to a lack of any grounds for submitting to the International Court of Justice the first question contained in the decision of the Committee: that question does not exist.

The second question involved was whether the United Nations Administrative Tribunal had erred on questions of law relating to the provisions of the Charter of the United Nations. We believe that this question too, is unfounded and artificial.

By the terms of Article 97 of the Charter, the Secretary-General is the chief administrative officer of the Organization. It is he who, according to Article 101 (1) of the Charter, appoints Secretariat staff under regulations established by the General Assembly. One of those regulations is to be found in paragraph 5 of Part IV of General Assembly resolution 37/126; the Secretary-General fully complied with the provisions of that paragraph, giving every reasonable consideration to the candidacy of the Applicant, and his decision took account of all the circumstances of the case.

Paragraphs XIV to XVIII of the Judgement of the Administrative Tribunal refer to and evaluate the actions of the Secretary-General. In paragraph XVIII the Tribunal reaffirmed the Secretary-General's sole authority to decide on the appointment of the Applicant, and it deemed that the Secretary-General exercised his discretion properly.

By the terms of Article 100 (1) of the Charter, the Secretary-General and the staff should not seek or receive instructions from any Government or from any other authority external to the Organization. In its Judgement, the Tribunal states that

> "In the present case . . . 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."

Throughout the consideration of the case, the Secretary-General maintained—and there is no reason to question this—that the measures he took were in the interests of the United Nations taking into account all the facts.

There is no ground for the contention that the Administrative Tribunal did not take account of the provisions of Article 101 (3) of the Charter; the qualities of an international civil servant enumerated in that paragraph were fully taken into account by the Administrative Tribunal, since they were amply enough considered in the material submitted to the Tribunal. In paragraph XII of its decision, the Administrative Tribunal, as we have shown, refers to other qualities required of an international civil servant. The need to take into account qualities other than efficiency, competence and integrity is qualified by the word "paramount" in Article 101 (3) of the Charter.

With respect to Article 2 (1) and to Article 8 of the Charter, which have been referred to in this Committee's discussions, it is perfectly clear that they are not relevant to this case, which has no bearing on the sovereign equality of member States or on questions of discrimination on the basis of sex. References to these provisions, completely inappropriate in the context of this case, once again underscore the insidious nature of the attempts to prove the Administrative

Tribunal's ostensible error on a question of law relating to the provisions of the Charter.

Thus, in the view of my delegation, neither of the two questions raised by the Committee in its decision constitutes grounds for requesting an advisory opinion of the International Court of Justice. Therefore, my delegation, along with many other delegations, voted against that decision.

Since there is a lack of any substantial legal grounds for referring this matter to the International Court of Justice, those who supported such a referral were, we believe, guided by nothing but one-sided political considerations. The political tinge that coloured this issue runs counter to the United Nations Charter, and can only prejudice the effectiveness of the Secretariat and Administration of the United Nations.

Mr. Rosenstock (United States of America): We had not intended to speak at this meeting, since we believe that the decisions taken speak for themselves and were obviously taken on the basis of the very helpful Applicant's brief which was before the Committee and which the Court will have before it, as well as other briefs, which will leave no doubt as to why the broad majority in this Committee took the decision it did.

We believe that the question whether there was a legal bar to further employment is a critical one, one on which the Tribunal erred. It is separate from the question of whether there was any expectation. The separate nature of those questions is obvious, and if it were not in and of itself it would be obvious by the existence of resolution 37/126, which underlines the distinction. There would be no purpose in that resolution if that distinction did not exist.

We concur in the reasoning in the *Mortished* case that questions of this character may be correctly analysed, either in failure of terms to exercise jurisdiction or in terms of a fundamental error of procedure. To those of us from the common-law tradition it appears more clearly to be a failure to exercise jurisdiction. To those from the civil-law tradition the failure apparently amounts more obviously to a procedural error occasioning a denial of justice. We believe both perceptions lead to the same conclusion.

We are also convinced that we are faced here with a course of dealing that leaves little doubt that the Tribunal committed errors of law with regard to interpretation and application of the Charter. Merely to touch on some of the reasoning which led us to participate in the decision that was taken to refer this matter, we believe Articles 100 and 101 of the Charter are directly involved. Article 2 (1) is either directly involved—since we are faced with a course of dealing which must be generalized if Article 2 (1) is to be honoured but which if generalized would be not merely subversive but destructive of the very notion of an international civil service as opposed to some form of inter-governmental collation—or alternatively, as a fundamental principle of the Charter, one which must infuse its meaning to all other relevant articles and certainly is instinct in the wording, object and purpose of Articles 100 and 101.

Now, as we have indicated, is not the time to go into the precise reasons why we believe questions have been raised with regard to Articles 100 and 101 and why the advice of the Court should be sought on those questions. The articles and resolution 37/126 are crucial to the matter. Resolution 37/126, moreover, in our view, is not just some resolution adopted under the Charter-based powers of the Assembly. It is an exceptionally strongly worded text with its use of the word "decides", which goes directly to basic questions relating to the key Charter articles involved and thus ought to have played a central role in the *ratio decidendi* of the Tribunal were errors of law in connection with the Charter to be avoided. To the extent that it was considered at all, we believe it was con-

sidered in the context of serious errors of law relating to the resolution, Article 100 and Article 101.

The discretion on the part of the Secretary-General does not mean freedom to act in a manner inconsistent with the plain meaning, object and purpose of the key articles of the Charter.

Dubious quotations from curious aspects of the curiously broadly drafted *Fischman* opinion of the Administrative Tribunal do not obviate the legal obligation to stick within the meaning, letter and spirit of Articles 100 and 101 —even in cases in which discretion is being exercised.

Those are a few of the reasons, in the context of all the matters before us, which led us strongly to support the referral of those questions to the Court. We are confident that the Court will address them in the manner in which they deserve.

Mr. Pavlovsky (Czechoslovakia): I also should like to congratulate you, Mr. Chairman, on the efficient manner in which you have guided this Committee's deliberations.

Our delegation supports the decision of the Committee on Applications for Review of Administrative Tribunal Judgements to dismiss the Applicant's pleas with regard to the Tribunal's Judgement No. 333 as far as they were based on the Applicant's claims that the Tribunal has exceeded its jurisdiction and competence and committed fundamental errors of procedure which have resulted in a miscarriage of justice.

However, we cannot concur in the majority view that an advisory opinion of the International Court of Justice must be sought on questions of the alleged failure of the Tribunal to exercise jurisdiction vested in it and having erred on questions of law relating to provisions of the Charter.

In our delegation's view, the Tribunal properly exercised its jurisdiction and competence by hearing the application and adjudicating upon it. At this juncture, the Czechoslovak delegation fully supports the view of the Respondent in the case that:

> ". . . while the Tribunal might fail to exercise its jurisdiction by erroneously failing to take a case properly submitted to it, a mere failure to find in favour of the Applicant is not a failure to exercise jurisdiction" (A/AC.86/R.118, para. 9).

And the Respondent's view that:

> ". . . the findings of the Tribunal in a decision on the import of Staff Regulations, Staff Rules and General Assembly resolutions do not raise a question of jurisdiction:" (para. 10)—

a view that was developed by the International Court of Justice itself.

Furthermore, the Tribunal could not fail to exercise its jurisdiction by not responding to the question whether a legal impediment existed to further employment of the Applicant by the United Nations after expiry of his contract in the manner in which the Applicant obviously anticipated it, but rather in the manner in which the Tribunal itself considered as being appropriate, taking into account all facts and circumstances of the case.

In paragraph XII of its Judgement No. 333 the Tribunal correctly held that the Applicant "was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions" (AT/DEC/333, para. XII) and pointed out that one of these consequences "raised the question

of his suitability as an international civil servant" (para. XII). At this juncture the Tribunal upheld the validity of the report of the Fifth Committee adopted by the General Assembly at its eighth session (A/2615) stating that

> "International officials should be true representatives of the cultures 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." (Para. XII.)

Moreover, in a broader sense, while the presence of a legal impediment would invalidate an appointment of a staff member by the Secretary-General, the absence of such an impediment does not legally oblige the Secretary-General to proceed with an appointment if he, within his discretionary powers, rightfully considered the Applicant otherwise unsuitable for the international civil service.

The question of a legal impediment in the given case was brought up by the Applicant himself, while the Respondent repeatedly stressed that his decision against reappointment to which the Applicant had no right, was made after taking into account all the circumstances in the case and after determining that reappointment would not be in the interest of the Organization.

Thus the question of a legal impediment could hardly play a central role in the adjudication on the case by the Tribunal since this was not the main matter at issue and in the view of the Czechoslovak delegation does not constitute a substantive basis as regards the Applicant's claim that the Tribunal has failed to exercise its jurisdiction.

The Czechoslovak delegation furthermore strongly believes that the Tribunal has in this case correctly interpreted applicable provisions of the Charter and supports the position of the Respondent contained in his comments on the case.

In addition, with respect to Article 100 (1) of the Charter of the United Nations, it is also the view of the Czechoslovak delegation that the distinction between the obligation of the Secretary-General not to seek or receive instructions from any government or from any other authority external to the Organization, on the one hand, and the legitimate right of any government to convey to the Secretary-General its views on matters relating to its interests, on the other hand, must be preserved. 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.

The Czechoslovak delegation does not see any substantive grounds for seeking an advisory opinion of the International Court of Justice as regards the Applicant's claims and believes that the Tribunal's Judgement No. 333 should therefore be sustained.

The Chairman (interpretation from French): As there are no further speakers, I therefore declare closed this public meeting of the Committee under Article VII (4) of the Rules of Procedure.

The meeting rose at 12.15 p.m.

B. Other Documents Cited in or Relevant to Documents Considered by the Committee on Applications for Review of Administrative Tribunal Judgements at its Twenty-fourth Session[1]

AT/DEC/333
8 June 1984.

9. Administrative Tribunal

Judgement No. 333

Case No. 322: YAKIMETZ Against: THE SECRETARY-GENERAL OF THE UNITED NATIONS

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President; Mr. Arnold Kean, Vice-President;

Whereas, on 6 January 1984, Vladimir Victorovitch Yakimetz, a former staff member of the United Nations, filed an application in which 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.";

Whereas the Respondent filed his answer on 14 March 1984;

Whereas the Applicant filed written observations on 17 April 1984;

Whereas the facts in the case are as follows:

On 20 July 1977, in a letter addressed to the Assistant Secretary-General for Personnel Services, the Deputy Permanent Representative of the USSR to the United Nations recommended the Applicant, a national of the USSR who had been employed by the United Nations in 1969-1974, for a post of reviser (P-4)

[1] See also, in Part II of the dossier, document No. 35, General Assembly resolution 35/210, and document No. 45, Report of the International Civil Service Commission to the General Assembly, Thirty-seventh Session (A/37/30).

in the Russian Translation Service of the United Nations; a Personnel History form signed by the Applicant was attached to the letter. On 31 October 1977 the Appointment and Promotion Board recommended, and the Officer-in-Charge of the Office of Personnel Services subsequently approved on behalf of the Secretary-General, the appointment of the Applicant "as a Russian Reviser at the First Officer (P-4) level on a fixed-term secondment basis for a period of five years". On 23 November 1977 the Deputy Chief of the Secretariat Recruitment Service offered to the Applicant, on behalf of the Secretary-General, "a five-year fixed-term appointment, on secondment from the USSR Government, at step IV of the First Officer (P-4) level, as Reviser in the Russian Service". On the same day the Secretariat of the United Nations sent a Note Verbale to the Permanent Mission of the USSR to the United Nations informing the Mission that this offer had been made. The letter of appointment, which took effect on 27 December 1977, was issued on behalf of the Secretary-General on 28 December 1977 and accepted by the Applicant on 24 January 1978; it did not mention secondment and, under item 5 ("Special Conditions"), specified "None". On 5 October 1981 the Applicant was transferred as Programme Officer to the Programme Planning Section, Programme Planning and Co-ordination Office, Department of International Economic and Social Affairs. On 22 October 1982 the Secretariat of the United Nations requested the assistance of the Permanent Mission of the USSR to the United Nations "in securing the consent of its Government to the extension of Mr. Yakimetz's secondment to the United Nations" for one year, that is up to 26 December 1983. On 15 November 1982 the Permanent Mission communicated to the Secretariat of the United Nations "its agreement to the extension of the contract of V. V. Yakimetz . . . up to 26 December 1983". On 6 December 1982 the Applicant was recommended for promotion to P-5. Effective on 27 December 1982 the Applicant's appointment was extended for one year. The letter of appointment, signed on behalf of the Secretary-General on 8 December 1982 and by the Applicant on 9 December 1982, specified under item 5: "On secondment from the Government of the Union of Soviet Socialist Republics." On 8 February 1983 the Assistant Secretary-General for Programme Planning and Co-ordination sent the following memorandum to the Applicant:

> "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 continue.
>
> 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."

On 9 February 1983 the Applicant applied for asylum in the United States of America. On 10 February 1983 he informed the Permanent Representative of the USSR to the United Nations that he was resigning from his position with the Ministry of Foreign Affairs of the USSR and from all other official positions he held in the Soviet Government and that he had made an application to the Government of the United States of America requesting asylum. On the same day the Applicant notified the Secretary-General, under Staff Rule 104.4 *(c)*, of his intention to acquire permanent resident 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 [assure] 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 . . ."

On 28 February 1983 the Director of the Division of Personnel Administration informed the Applicant that the Secretary-General had decided 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 that any other decision pertaining to his case would be taken by the Secretary-General at a later stage. On 1 March 1983, in a letter to the Director of the Division of Personnel Administration, the Applicant asked to be advised on 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."

On 11 March 1983 the Executive Assistant to the Secretary-General informed the Director of the Division of Personnel Administration that the Secretary-General had also decided that the Applicant should not enter the premises of the United Nations until further notice. On the same day the Director of the Division of Personnel Administration answered the questions put by the Applicant on 1 March 1983, as follows:

"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."

On 17 March 1983 the Applicant wrote to the Secretary-General asking for a review under Staff Rule 111.3 *(a)* of the decision to place him on special leave and reiterating his request for a written explanation as to why it was considered in the best interest of the Organization that he did not enter the premises of the United Nations; he added, however, that on the advice of his counsel and under protest, he would of course comply with the Secretary-General's decision. On 29 June 1983 the Applicant was promoted to P-5 with effect from 1 April 1983. On 25 October 1983 he addressed the following memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination:

"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."

On 8 November 1983 the Assistant Secretary-General replied:

"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 connexion 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 Coordination 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."

On 23 November 1983 the Deputy Chief of Staff Services informed the Applicant, "upon instruction by the Office of the Secretary-General", that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983. On 29 November 1983 the Applicant protested against that decision in a letter to the Assistant Secretary-General for Personnel Services which read:

". . . I am shocked at this decision since, in response to my queries, I was recently informed by the head of the Office in which I am working that he intended to recommend an extension of my appointment. I would be grateful if you could give me the reasons for this decision. In any case, the procedure followed in arriving at the decision not to renew my appointment is irregular and arbitrary and contravenes the legal expectancy of renewal which I have as well as my acquired rights under the General Assembly resolution 37/126, IV, paragraph 5, which states that the General Assembly:

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

I would be grateful for your urgent attention to this matter. The abrupt manner in which the decision was taken and communicated to me has not allowed me the opportunity to use the internal recourse procedures that our Organization has established for challenging decisions of this kind.

In order to permit me to resort meaningfully to these internal procedures I would be grateful if you could extend my contract for a period of three months while the matter is under investigation. This request is without prejudice to my claim to a longer-term appointment in the Organization. I am by a copy of this letter requesting the Grievance Panel to look into this case."

On 2 December 1983 the Assistant Secretary-General for Programme Planning and Co-ordination also protested against the decision in question in a letter addressed to the Assistant Secretary-General for Personnel Services; the letter read in part:

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

On 13 December 1983 the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond its expiration date; he 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 effi-

ciency, 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 . . ."

In a reply dated 21 December 1983, the Assistant Secretary-General for Personnel Services stated:

". . . In your letters, after referring to your service record and the evaluations of your supervisors, you state that under such conditions 'most staff members would have an expectancy that their candidacy for a career appointment would be "given every reasonable consideration", as General Assembly resolution 37/126 IV requires'.

Your situation, however, is not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.

Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in staff rule 104.12 *(b)* and reiterated in your letter of appointment, 'does not carry any expectancy of renewal or of conversion to any other type of appointment'.

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

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."

On 6 January 1984 the Applicant filed the application referred to earlier.

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 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.

The Tribunal, having deliberated from 11 May to 8 June 1984, now pronounces the following judgement:

I. In this case the legal issues involved are interspersed with political considerations. The Tribunal can however deal only with the legal issues, which 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.

The issues mentioned above are not independent of each other; sometimes they overlap and at other times conclusions reached on any of them influence those on others.

II. As regards the controversy about the legal expectancy for further service with the United Nations, the Tribunal notes that although there was no reference to secondment in the Applicant's letters of appointment of 21

November 1969 and 28 December 1977, his third and last letter of appointment dated 8 December 1982 included a "special condition" that he was "on secondment from the Government of the Union of Soviet Socialist Republics". He accepted this letter of appointment without objection, and in fact he had accepted without comment the Respondent's letter of 23 November 1977 which had preceded the letter of appointment of 28 December 1977 and which had stated that he was offered a five-year fixed-term appointment "on secondment from the USSR Government".

III. A Note Verbale from the Respondent to the Permanent Mission of the USSR dated 23 November 1977 stated that the Applicant's five-year fixed-term appointment was to be on secondment from the USSR Government, as did a similar Note sent by the Respondent to the Permanent Mission on 22 October 1982 seeking the consent of the Government of the USSR to the extension of the Applicant's appointment on secondment for a further year. The Permanent Mission of the USSR replied on 15 November 1982 communicating its agreement to the extension of the Applicant's appointment.

From the foregoing, 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.

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".

V. The Respondent's letter of 21 December 1983 also relied, as does his answer to the application, on Staff Rule 104.12 *(b)*, reiterated in the Applicant's letter of appointment, which provides that a fixed-term appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment".

VI. 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.

VII. This conclusion needs no modification in the light of two other related arguments put forward by the Applicant. First, it is asserted that the Applicant's connection with the USSR Government was at best tenuous and informal and that his relationship with "the Ministry of Foreign Affairs was nominal rather than real". In support, the Applicant points out that in his first and second applications for employment with the United Nations, he answered in the negative the question "Are you now, or have you ever been, a permanent civil servant in your government's employ?". However, in his application in 1969 he had stated that he was a senior teacher at the Moscow Physical Engineering Institute. Moreover, in his letter of 10 February 1983 to the Permanent Representative of the USSR to the United Nations, he stated that he was "hereby resigning from my position with the Ministry of Foreign Affairs of the

USSR and from all other official positions I had in the Soviet Government". He wrote to the Secretary-General in similar vein on the same day.

VIII. The Applicant's second argument is that even if secondment existed or was implied for his service in the United Nations, a change in his status took place from 10 February 1983 onwards when he resigned from the service of the USSR Government, and that in fact a new contractual relationship could be assumed to have been created between him and the Respondent. He argues that the Respondent, by not taking disciplinary action against him, by promoting him, by allowing him to serve out his contract until the date of its expiry (26 December 1983), and by letting him continue as Vice-Chairman of the Appointment and Promotion Committee, created a new, although tacit, agreement in which the Soviet Government was not in any way involved.

IX. The Tribunal notes that apart from the measures described above, the Respondent also put the Applicant on special leave, which he had not asked for, and ordered that the Applicant's entry to the United Nations Headquarters building be barred. He states that the Applicant's promotion was no more than a consequence of his earlier good service. On 11 March 1983 the Respondent wrote to the Applicant that these steps were taken in the best interests of the Organization and advised him that "as regards . . . 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". This rule stipulates that the fixed-term appointment "does not carry any expectancy of renewal of or conversion to any other type of appointment". The Respondent further argues in his answer to the application that a break between a staff member and his government does not "constitute in itself grounds for terminating the fixed-term contract of a fixed-term staff member seconded or not". In its consideration of the conflicting arguments, the Tribunal finds that the events leading to and following from the Applicant's resignation from the service of the USSR Government throw much light for the resolution of this controversy.

X. In September-October 1982, the Assistant Secretary-General for Programme Planning and Co-ordination discussed with the Permanent Mission of the USSR a two-year extension for the Applicant's service with the United Nations, but apparently accepted that Mission's argument that "for technical reasons it was easier to propose extensions one year at a time".

XI. About the same time 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, but his application for leave was refused by the United Nations.

XII. The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions. In so far as he was on secondment from the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment. 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. Another consequence of his actions raised the question of his suitability as an international civil servant. In Judgement No. 326 *(Fischman)*, the Tribunal referred to the widely held belief mentioned in a report of the Fifth Committee of the General Assembly that

> "International officials should be true representatives of the cultures 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",

and held that this "must continue to provide an essential guidance in this matter".

In the same judgement, the Tribunal also recalled a part of Information Circular ST/AFS/SER.A/238 of 19 January 1954 which stated, *inter alia*, that

> "The decision of a staff member to remain on or acquire 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 . . ."

The Applicant had been granted asylum in the United States of America and there arose the problem of his having to waive privileges and immunities with the permission of the Respondent. Such a waiver was necessary for changing his visa category under the United States laws. However 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. Besides, a private bill was later introduced on the Applicant's behalf in the United States House and Senate.

XIII. In view of the foregoing, 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.

XIV. With these conclusions in mind the Tribunal considered the Applicant's plea that he was entitled to, but was denied, the right to receive "every reasonable consideration" in terms of paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982.

XV. The Tribunal notes that until the end of November 1983, there was no reference to this resolution either by the Applicant or the Respondent. Before this time, the only mention of a career appointment occurs casually in the Applicant's memorandum of 25 October 1983 in which he expresses the hope to the Assistant Secretary-General for Programme Planning and Co-ordination that he would 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" without however citing the General Assembly resolution. A series of letters, memorandums and other communications exists relating to the Applicant's continuation with the United Nations; all of them consider extension of his current contract and none of them refers to the General Assembly resolution. In his letter of 29 November 1983 to the Assistant Secretary-General for Personnel Services the Applicant drew for the first time the attention of the Respondent to General Assembly resolution 37/126, IV, paragraph 5. A fuller argumentation on the basis of this plea occurs in the Applicant's letter of 13 December 1983. The Tribunal notes in this connection that as early as 3 March 1983, the Director of the Programme Planning and Evaluation Branch concluded his memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination by stating: "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." There is no reply

to this memorandum in the files and the Tribunal is left with the impression that the Applicant's plea based on the General Assembly resolution came much later in the proceedings.

XVI. However, even if the Applicant did not draw sufficiently early the Respondent's attention to the resolution under discussion, the Respondent was bound nonetheless by its terms and the Tribunal has to decide how and to what extent he carried out his obligations under it.

The Respondent's letter dated 21 December 1983, addressed to the Applicant in reply to his counsel's letter of 13 December 1983, states that he has "given careful consideration to the issues raised in your request for administrative review", and since these issues are particularly related to the provision of the General Assembly resolution in question, the plain and simple inference is that the Respondent had given the required (i.e., "every reasonable") consideration for a career appointment for the Applicant. This is further elaborated in the Respondent's answer to the application when he states:

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

XVII. To this the Applicant replies that the Respondent cannot argue that the pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled, since he himself prevented their fulfillment.

XVIII. The General Assembly resolution is silent on who should give "every reasonable consideration" and by what procedure. That this latter question needed elucidation is evident from a subsequent resolution of the General Assembly adopted on 20 December 1983, i.e., six days before the Applicant's fixed-term appointment came to an end. The relevant part of this resolution (38/232, VI, para. 5) reads:

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

The Tribunal holds that until the Respondent has accepted the recommendation made by the General Assembly on 20 December 1983, the existing procedure of offering a probationary appointment to a candidate remains applicable, and that in the absence of such an appointment 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 the sole authority to decide what constituted "reasonable consideration" and whether the Applicant could be given a probationary appointment. He apparently decided, in the background of secondment of the Applicant during the period of one year from 27

December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment. He thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 that he had given "every reasonable consideration" to the Applicant's career appointment.

XIX. In this context, the *Rosescu* case (ILO Administrative Tribunal Judgment No. 431 of 11 December 1980) has been cited by both the Applicant and the Respondent, but their interpretations of its considerations are widely divergent. In the present case, different in many material respects from the *Rosescu* case, 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".

In Judgement No. 54 *(Mauch)*, the Tribunal stated that:

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

In the present case, the Tribunal holds that the Respondent's action in the exercise of his discretion cannot be impugned on any of the grounds stated above.

XX. In view of the above, the Tribunal holds that the Applicant's pleas cannot be sustained. The Tribunal would however express its dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment "every reasonable consideration" as enjoined by the General Assembly resolution. However, this omission on the part of the Respondent has not caused any discernible injury to the Applicant and he is therefore not entitled to any monetary relief.

XXI. Accordingly, and subject to the comments made in the preceding paragraph, the Tribunal rejects the application.

(Signatures)

Endre USTOR,

President.

Samar SEN,

Vice-President.

Jean HARDY,

Executive Secretary.

Geneva, 8 June 1984.

STATEMENT BY MR. ENDRE USTOR

I concur in the Judgement as in my view the rejection of the Application is fully justified. I cannot, however, accept some parts of the reasoning.

I agree with the finding that the Applicant's appointment had satisfied the requirements of secondment as set out by this Tribunal in earlier Judgements (Nos. 92: *Higgins* and 192: *Levcik*). I believe, however, 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.

In view of the above, the Applicant was in my view not eligible for consideration for a career appointment. In any event, the Applicant, in view of the circumstances in which he elected to break his ties with his country, "could no longer claim to fulfil the conditions governing employment in the United Nations" and could not expect that any consideration would lead to his career employment. As the Respondent exercised his discretionary power correctly by refusing the requests of the Applicant, he does not deserve the disapproval expressed in the Judgement.

(Signed) Endre USTOR,

Geneva, 8 June 1984.

DISSENTING OPINION OF MR. ARNOLD KEAN

1. Although I can concur in the view of my colleagues that the Applicant was employed by the United Nations on secondment from the Government of the USSR for the whole of his final fixed-term appointment, and with the rejection of the Applicant's claim in so far as it is based on an expectancy of further employment, I regret that I cannot concur in the conclusion reached by the majority Judgement.

2. The majority Judgement does not, in my view, adequately consider whether the Respondent gave due effect to General Assembly resolution 37/126, paragraph IV.5, the relevant part of which reads as follows:

> [The General Assembly] "*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."

It will be observed that consideration for a career appointment was not expressed in the resolution to be conditional on the staff member having a legal expectancy of a further appointment. The resolution, although not yet incorporated in the Staff Rules, was nevertheless a condition of the Applicant's employment, binding on the Respondent, who must have been fully aware of it (Judgement No. 249: *Smith*).

3. The Respondent does not dispute that the Applicant had, by 1983, completed more than five years of satisfactory service on fixed-term appointments, so that he fell within the terms of the resolution. The Respondent does, however, contend in paragraph 17 of his answer that the relevant paragraph of the resolution (para. IV.5) only stated a "desideratum". This contention is without

foundation, because the General Assembly expressly used the word "decides" in paragraph IV.5, while in cases where it was only expressing a desideratum (paras. IV.7 and V) it used the word "requests", or, in paragraph IV.3 and 4, the word "recommends". The contrast in the choice of verb is striking and was no doubt deliberate: Paragraph IV.5 must be regarded as a decision of the General Assembly which the Respondent was obliged to obey.

4. The decision taken by the Respondent in pursuance of General Assembly resolution 37/126, paragraph IV.5, was, however, discretionary. The ILO Administrative Tribunal, in its Judgment No. 431 *(Rosescu)*, has considered the extent to which such a discretionary decision is subject to review:

> "Although a decision on the extension of an appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. The Tribunal will set it aside if it is tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the facts." (Para. 5.)

This principle is similar to that adopted by the United Nations Administrative Tribunal in Judgement No. 54 *(Mauch)*. The Respondent has submitted in his answer to the application (para. 21) that "the decision not to re-appoint the Applicant was properly based . . . on the interests of the Organization". This would not, however, shelter the Respondent from review of the question whether the decision was tainted by some such flaw as is referred to in the Judgements cited above.

5. The Applicant received from the Administration two letters in which his claim was rejected. The first, dated 11 March 1983, was from the Director of the Division of Personnel Administration. It stated that consideration of the possible extension of the Applicant's appointment would be premature at that time. It also referred the Applicant to Staff Rule 104.12 *(b)* which provides that a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.

6. The other letter giving reasons for the rejection of the Applicant's claim was from the Assistant Secretary-General for Personnel Services and was dated 21 December 1983. It stated the Respondent's view as follows:

> ". . . 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.*" (Emphasis added.)

7. This argument was, by its terms, addressed to "expectancy of renewal", as was the tenor of the whole letter, particularly in its reference to Staff Rule 104.12 *(b)*. It was evidently the belief of the writer of the letter that, if the Applicant had no expectancy of renewal, there was no possibility of his receiving a career appointment in pursuance of the General Assembly resolution. That resolution is, however, not conditional upon the staff member having an expectancy of further employment, which is therefore in no way a prerequisite of a career appointment.

8. A second factor which, according to the Administration's letter, was regarded by the Respondent as decisively obviating further consideration of the Applicant for a career appointment under the General Assembly resolution, was

that his existing fixed-term appointment was on the basis of secondment under a one-year contract, by which "the Organization agreed so to limit the duration of your United Nations service". This supposedly agreed limit was expressed in the letter to apply to service generally, and not only to service on secondment.

9. The supposed agreement by the Organization might have been either expressed or implied. No evidence has been produced of any expressed agreement and it must be considered whether any such agreement is implied in the nature of secondment. The Applicant's secondment ended on 26 December 1983, and the question therefore arises whether, on that date and bearing in mind that he had previously resigned any posts he had held with his Government, he was then obliged to return to its service. In its Judgement No. 92 *(Higgins)*, paragraph IV, where the Tribunal considered the nature of secondment, there is reference only to rights of the seconded staff member, and no reference to or implication of a duty on his part to return to the service of the releasing organization. Clearly, as indicated by the Tribunal in Judgement No. 192 *(Levcik)*, the staff member's secondment cannot be confirmed or extended without the consent of the releasing government, but, in the words of the ILO Administrative Tribunal in Judgment No. 431 *(Rosescu)*, paragraph 7: "if the Romanian authorities had . . . wanted to have the complainant back again, . . . they would have needed his consent".

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

11. Guidance may be derived from the *travaux préparatoires* used by the General Assembly in preparing the resolution in question, which indicate that, when it came to considering a seconded staff member for a career appointment, it was generally agreed that the views of the Government concerned should be "fully taken into account". The relevant passage (para. 33) of Annex I to the Report of the International Civil Service Commission (ICSC), 1982 (*General Assembly Official Records*, 37th Session, Supplement No. 30 (A/37/30)) reads as follows:

> "The Commission *recommends* that, upon completion of five years of service, each employee be given every reasonable consideration by the employing organization for a career appointment. With regard to staff on secondment, the majority of the members of the Commission stressed the need for each organization, in situations when 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."

Far 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 but was to be fully taken into account together with all other relevant factors. The report of the ICSC does not indicate how much weight, if any, should be given to the views of the releasing government if the effect of refusing its consent could not have been to recover the staff member for its own service (which in the circumstances of the Applicant's case was clearly impossible) but only to prevent his future employment by the United Nations.

12. For the foregoing reasons, my opinion is that the Respondent's decision was flawed by fundamental mistakes of fact or law and requires to be set aside, and that the Tribunal should accept the Applicant's plea that he was illegally denied his right to reasonable consideration for a career appointment[1].

(Signed) Arnold KEAN,

Geneva, 8 June 1984.

A/AC.86/2/Rev.3
25 March 1983.

10. Rules of Procedure[2]

Article I

1. The proceedings of the Committee shall be governed by the rules of procedure of the General Assembly applicable to committees.

2. In addition to the aforementioned rules of procedure of the General Assembly, the following special rules, set out in Articles II to XII below, relating to applications under Article 11 of the Statute of the United Nations Administrative Tribunal shall apply.

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[1] Reference has been made in the majority Judgement to Judgement No. 326 *(Fischman)*, a decision made previously during the present session of the Tribunal. This referred to a report of the Fifth Committee, dated 1953 (doc. A/2615, para. 70), recording a "widely shared view" 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". Consideration of this view requires caution because the next two paragraphs of the report (paras. 71 and 72) record that two proposals inconsistent with that view were put forward, one by the representative of Czechoslovakia (which was rejected) and the other by the representative of Lebanon (which was accepted by a majority vote). Both proposals were concerned with the quotas to which officials who had broken their ties with their country should be assigned for the purposes of geographical distribution, a question which would have been meaningless if it had been accepted that such officials "no longer fulfilled the conditions governing employment in the United Nations".

[2] The Committee adopted provisional rules of procedure at its first meeting on 16 October 1956 which were amended at its meetings on 25 October 1956 (A/AC.86/2), 21 January 1957 (A/AC.86/2/Rev.1) and 11 December 1974 (A/AC.86/2/Rev.2 and A/AC.86/19). At its twenty-second session the Committee carried out a comprehensive review of its procedures and at its meeting on 16 February 1983 adopted the rules set out in this document as its definitive rules of procedure (A/AC.86/28).

Article II

1. Applications asking the Committee to request advisory opinion of the International Court of Justice shall be submitted in writing to the official designated by the Secretary-General to serve as Secretary of the Committee. For the purposes of paragraph 1 of Article 11 of the Statute of the Administrative Tribunal, the date of the judgement shall be considered to be the date on which it has been received by the parties to the proceedings before the Tribunal, which date shall be presumed to be two weeks after the dispatch of copies thereof by the Executive Secretary of the Tribunal. For the purposes of paragraph 2 of Article 11 of the Statute, the date of the receipt of an application is the date when copies of that application are dispatched to the members of the Committee by the Secretary of the Committee[1].

2. The application, except for any annexed documents, shall be submitted in any of the six languages of the General Assembly and shall be as brief as possible, in no event exceeding 12 pages. It shall contain the following information, which should be set out in the order indicated below:

(a) The number and date of the judgement concerning which a review is desired, and the names of the parties with respect to which the judgement was rendered.

(b) The full name of the applicant for review, and his address or that of his representative for the purpose of the proceedings. If the applicant for review is one who has succeeded to the rights of the person in respect of whom the judgement was rendered on the latter's death, this fact, together with supporting evidence including relevant data pertaining to the succession, shall be set forth.

(c) A statement setting forth in detail the grounds of the application under paragraph 1 of Article 11 of the Statute of the Administrative Tribunal and the supporting arguments.

(d) A list of any supporting documents which are annexed to the application.

Article III

1. Upon receipt of an application the Secretary shall as soon as possible have it (excluding any annexed documents) translated into the other languages of the General Assembly and thereafter immediately communicate it to all members of the Committee, as well as to the applicant for review and to the other party or parties to the proceedings before the Administrative Tribunal, together with a copy of the judgement to which it relates and an indication of where any annexed documents may be examined. Any document annexed to the application that is not available in English or French shall be translated into one of those languages at the request of any member of the Committee, except that no translation shall be made without the approval of the Committee if the document to be translated exceeds five pages.

2. Notwithstanding paragraph 1, if an application manifestly does not comply with the requirements of Article II, paragraph 2, above, the Secretary, with the approval of the Chairman or in his absence the Rapporteur, shall, if the non-

[1] The Committee agreed that the period of two weeks referred to in the second sentence of this paragraph should have the status of a presumption only, so that it would be open to either party to the proceedings to show that the actual date of receipt of a judgement delivered by the Administrative Tribunal was later than two weeks after its dispatch by the Executive Secretary (A/AC.86/28, para. 4).

compliance appears susceptible of correction, return the application to the applicant with a request that it be corrected and resubmitted within one week of the date of return if the applicant is located in New York or otherwise within three weeks. If the application is not resubmitted in correct form within the indicated time-limit or if it does not appear to be susceptible of correction, it shall be considered to be irreceivable and the Secretary shall so inform the applicant[1].

Article IV

1. The other party to the proceedings before the Administrative Tribunal or each of the parties in those cases where the application is made by a member State may, within one week from the date on which a copy of the application was communicated in accordance with paragraph 1 of Article III above if the party is located in New York or otherwise within three weeks, submit in writing to the Secretary its comments with respect to the application.

2. Comments of a party, or parties, shall be submitted in any of the six languages of the General Assembly and shall in no event exceed 12 pages (excluding any annexed documents).

Article V

Copies of comments submitted in accordance with Article IV above shall be forthwith circulated by the Secretary to the members of the Committee, to the applicant for review and to the parties to the Administrative Tribunal proceedings.

Article VI

The Committee shall be convened as soon as possible after the expiry of the time-limit for receipt of comments in accordance with Article IV above, and in any event no later than 25 days from the date of the receipt of the application.

Article VII

1. Except as provided in paragraph 4, all meetings of the Committee shall be closed.

2. Observations that the parties to the proceedings before the Administrative Tribunal wish to present to the Committee shall be submitted exclusively in writing. However, if the application is submitted by a member of the Committee, both parties to the proceedings before the Administrative Tribunal may request to be heard by the Committee for the purpose of allowing the parties or their representatives, with the permission of the Chairman, to make statements to the Committee concerning the application and to reply to questions that may be posed by members of the Committee.

3. All deliberations of the Committee shall take place in private, with the assistance solely of its Secretary and members of the Secretariat servicing the meeting. The Committee shall take all its decisions concerning an application in private session.

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[1] The Committee requested its Secretary to inform it at the beginning of each session of any applications submitted since its last session that had been treated as irreceivable pursuant to this paragraph (A/AC.86/28, para. 5).

4. The decisions of the Committee and the text of any questions to be addressed to the International Court of Justice, as well as the results of and the participants in any votes taken during the private deliberations, shall be formally announced in a public meeting, at which any member of the Committee may make a statement for the record.

Article VIII

The Committee may at any time invite additional information or views on any point with respect to which it considers such information or views necessary, provided that in such cases the same opportunity to present additional information or views is afforded to all parties to the Administrative Tribunal proceedings.

Article IX

1. The Committee shall take a decision in respect of each ground of the application set forth in accordance with subparagraph 2 *(c)* of Article II above.

2. If the Committee decides that there is a substantial basis for the application under Article 11 of the Statute of the Administrative Tribunal, it shall request an advisory opinion from the International Court of Justice, which request shall specify the ground or grounds as to which it has so decided pursuant to paragraph 1.

Article X

The decision taken by the Committee with respect to an application, together with the text of its request, if any, for an advisory opinion, shall be communicated by the Secretary to the parties to the proceedings before the Administrative Tribunal and to the Tribunal, and shall be circulated as a Committee document to all member States.

Article XI

1. Sound recordings shall be prepared and kept of all proceedings of the Committee, in accordance with the practice of the United Nations.

2. If the Committee requests an advisory opinion of the International Court of Justice in respect of an application, the Secretary shall prepare and transmit to the Court, to all members of the Committee and to the parties to the proceedings before the Administrative Tribunal, a verbatim record, in English and French, of the proceedings of the Committee in respect of that application, except for those in the private deliberations provided for in paragraph 3 of Article VII.

Article XII

1. The Committee shall, at its first session after the opening of each regular session of the General Assembly, elect the following officers:

(a) A Chairman, provided that until such election the Chairman of the Sixth Committee at the current or most recent session of the General Assembly shall serve as Chairman;

(b) A Rapporteur, provided that until such election the Rapporteur previously elected by the Committee shall continue to serve in that capacity.

2. The Rapporteur shall perform the functions of the Chairman in the absence of the latter.

A/AC.86/28
25 March 1983.

11. Procedures of the Committee

Second report of the Committee

Chairman: Mr. Philippe KIRSCH (Canada)
Rapporteur: Mr. F. D. BERMAN (United Kingdom of Great Britain and Northern Ireland)

1. At the 1st meeting of its twenty-second session, on 14 December 1982, the Committee's attention was drawn to the Advisory Opinion delivered by the International Court of Justice on 20 July 1982 in connection with the Application for Review of Administrative Tribunal Judgement No. 273 *(Mortished* v. *the Secretary-General of the United Nations)*[1]. In that opinion, the Court expressed concern about certain procedures followed by the Committee in considering that application. On the proposal of the Chairman, the Committee decided to add to its agenda an item entitled "Procedures of the Committee". Subsequently, the Committee decided to defer consideration of that item to a later meeting and requested the Secretariat to prepare appropriate documentation for the Committee.

2. The Committee considered that item at meetings held on 4, 15 and 16 February 1983 (2nd to 6th meetings of the twenty-second session). Mr. Paul C. Szasz, of the Office of Legal Affairs, assisted the Committee in this exercise.

3. The Committee had before it a document prepared by the Secretariat containing possible amendments to the Rules of Procedure (A/AC.86/107), which was circulated to members of the Committee in advance of its meeting on 4 February, and two informal working papers, also prepared by the Secretariat, circulated to members of the Committee at its meetings on 15 and 16 February (informal Working Papers Nos. 1 and 2).

4. In connection with paragraph 1 of Article II of the Rules of Procedure, the Committee agreed that the period of two weeks referred to in the revised form of the second sentence should have the status of a presumption only: it would be open to either party to the proceedings to show that the actual date of receipt of a judgement delivered by the Administrative Tribunal was later than two weeks after its dispatch by the Executive Secretary. As the normal proof would be a dated acknowledgement of receipt signed by or for the party, the Committee agreed that the Executive Secretary of the Administrative Tribunal should be encouraged to make arrangements to obtain such an acknowledgement from each addressee.

5. In connection with the new paragraph 2 of Article III of the Rules of Procedure, the Committee requested the Secretary to inform it at the beginning of

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[1] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (Mortished* v. *the Secretary-General of the United Nations), I.C.J. Reports 1982.*

each session of any application submitted since its last session that had been treated as irreceivable pursuant to that article.

6. At its sixth meeting, on 16 February, the Committee adopted, without a vote, a number of amendments to its provisional rules of procedure and, subsequently, the Committee adopted, again without a vote, its amended provisional rules as a whole as its definitive rules of procedure. These are reproduced in the Annex to the present report.

7. In the course of reviewing its procedures the Committee took note of the observations of the International Court of Justice in its advisory opinion of 20 July 1982[1] concerning the position of a State member of the Committee in connection with votes taken on an application for review submitted to the Committee by that State. The Committee did not consider it necessary to make any amendment to its rules of procedure in that respect, but was confident that, in any such future case, members of the Committee would bear the observations of the Court in mind in exercising their rights.

8. At the conclusion of the Committee's consideration of its procedures, a member of the Committee expressed the view that the task of the International Court of Justice might be facilitated if arrangements could be made for oral hearings in connection with the Court's consideration of requests for advisory opinions emanating from the Committee.

Annex

RULES OF PROCEDURE OF THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

(as adopted by the Committee at the 6th meeting of its twenty-second session, on 16 February 1983)[2]

Article I[3]

1. The proceedings of the Committee shall be governed by the Rules of Procedure of the General Assembly applicable to committees.

2. In addition to the aforementioned Rules of Procedure of the General Assembly, the following special rules, set out in Articles II to *XI* below, relating to applications under Article 11 of the Statute of the United Nations Administrative Tribunal shall apply.

Article II

1. Applications asking the Committee to request an advisory opinion of the International Court of Justice shall be submitted in writing to the official designated by the Secretary-General to serve as Secretary of the Committee. *For*

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[1] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (Mortished* v. *the Secretary-General of the United Nations), I.C.J. Reports 1982,* at para. 44.

[2] New provisions and other substantive changes in the rules adopted by the Committee at its twenty-second session are italicized. The numbering of the rules as reflected in document A/AC.86/2/Rev.2* has been maintained at this stage to avoid confusion and to facilitate identification of changes, additions and deletions. The revised rules with new numbering are reproduced in a separate Committee document (A/AC.86/2/Rev.3).

[3] The provisions contained in this article were not amended by the Committee.

the purpose of paragraph 1 of Article 11 of the Statute of the Administrative Tribunal, the date of the judgement shall be considered to be the date on which it has been been received by the parties to the proceedings before the Tribunal, which date shall be presumed to be two weeks after the dispatch of copies thereof by the Executive Secretary of the Tribunal. For the purposes of paragraph 2 of Article 11 of the Statute, the date of the receipt of an application is the date when copies of that application are dispatched to the members of the Committee by the Secretary of the Committee.

2. [Deleted]

3. *The application, except for any annexed documents, shall be submitted in any of the six languages of the General Assembly and shall be as brief as possible, in no event exceeding 12 pages. It shall contain the following information, which should be set out in the order indicated below:*

(a) The number and date of the judgement concerning which a review is desired, and the names of the parties with respect to which the judgement was rendered.

(b) The full name of the applicant for review, and his address *or that of his representative* for the purpose of the proceedings. If the applicant for review is one who has succeeded to the rights of the person in respect of whom the judgement was rendered on the latter's death, this fact, together with supporting evidence including relevant data pertaining to the succession, shall be set forth.

(c) A statement setting forth in detail the grounds of the application under paragraph 1 of Article 11 of the Statute of the Administrative Tribunal and the supporting arguments.

(d) [Deleted]

(e) A list of any *supporting* documents which are *annexed to* the application.

Article III

1. *Upon receipt of an application the Secretary shall as soon as possible have it (excluding any annexed documents) translated into the other languages of the General Assembly and thereafter immediately communicate it to all members of the Committee, as well as to the applicant for review and to the other party or parties to the proceedings before the Administrative Tribunal, together with a copy of the Judgement to which it relates and an indication of where any annexed documents may be examined. Any document annexed to the application that is not available in English or French shall be translated into one of those languages at the request of any member of the Committee, except that no translation shall be made without the approval of the Committee if the document to be translated exceeds five pages.*

2. *Notwithstanding paragraph 1, if an application manifestly does not comply with the requirements of Article II, paragraph 3, above, the Secretary, with the approval of the Chairman or in his absence the Rapporteur, shall, if the non-compliance appears susceptible of correction, return the application to the applicant with a request that it be corrected and resubmitted within one week of the date of return if the applicant is located in New York or otherwise within three weeks. If the application is not resubmitted in correct form within the indicated time-limit or if it does not appear to be susceptible of correction, it shall be considered to be irreceivable and the Secretary shall so inform the applicant.*

Article IV

1. The other party to the proceedings before the Administrative Tribunal or each of the parties in those cases where the application is made by a member State may, *within one week from the date on which a copy of the application was communicated in accordance with paragraph 1 of Article III above if the party is located in New York or otherwise within three weeks*, submit in writing to the Secretary its comments with respect to the application.

2. Comments of a party, or parties, shall be submitted *in any of the six languages of the General Assembly and shall in no event exceed 12 pages (excluding any annexed documents).*

Article V[1]

Copies of comments submitted in accordance with Article IV above shall be forthwith circulated by the Secretary to the members of the Committee, to the applicant for review and to the parties to the Administrative Tribunal proceedings.

Article VI

The Committee shall be convened as soon as possible after the expiry of the time-limit for receipt of comments in accordance with Article IV above, and in any event no later than *25* days from the date of the receipt of the application.

Article VIbis

1. *Except as provided in paragraph 4, all meetings of the Committee shall be closed.*

2. *Observations that the parties to the proceedings before the Administrative Tribunal wish to present to the Committee shall be submitted exclusively in writing. However, if the application is submitted by a member of the Committee, both parties to the proceedings before the Administrative Tribunal may request to be heard by the Committee, in which case the Chairman shall convene a meeting of the Committee for the purpose of allowing the parties or their representatives, with the permission of the Chairman, to make statements to the Committee concerning the application and to reply to questions that may be posed by members of the Committee.*

3. *All deliberations of the Committee shall take place in private, with the assistance solely of its Secretary and members of the Secretariat servicing the meeting. The Committee shall take all its decisions concerning an application in private session.*

4. *The decisions of the Committee and the text of any questions to be addressed to the International Court of Justice, as well as the results of and the participants in any votes taken during the private deliberations, shall be formally announced in a public meeting, at which any member of the Committee may make a statement for the record.*

Article VII[1]

The Committee may at any time invite additional information or views on any point with respect to which it considers such information or views necessary,

[1] The provisions contained in this article were not amended by the Committee.

provided that in such cases the same opportunity to present additional information or views is afforded to all parties to the Administrative Tribunal proceedings.

Article VIII

1. *The Committee shall take a decision in respect of each ground of the application set forth in accordance with subparagraph 3* (c) *of Article II above.*

2. If the Committee decides that there is a substantial basis for the application under Article 11 of the Statute of the Administrative Tribunal, it shall request an advisory opinion from the International Court of Justice, *which request shall specify the ground or grounds as to which it has so decided pursuant to paragraph 1.*

Article IX

The decision taken by the Committee with respect to an application, together with the text of its request, if any, for an advisory opinion, shall be communicated by the Secretary to the parties to the proceedings before the Administrative Tribunal and to the Tribunal, *and shall be circulated as a Committee document to all member States.*

Article X

1. *Sound recordings shall be prepared and kept of all proceedings of the Committee, in accordance with the practice of the United Nations.*

2. *If the Committee requests an advisory opinion of the International Court of Justice in respect of an application, the Secretary shall prepare and transmit to the Court, to all members of the Committee and to the parties to the proceedings before the Administrative Tribunal, a verbatim record, in English and French, of the proceedings of the Committee in respect of that application, except for those in the private deliberations provided for in paragraph 3 of Article VIbis.*

Article XI

1. *The Committee shall, at its first session after the opening of each regular session of the General Assembly, elect the following officers:*

(a) *a Chairman, provided that until such election the Chairman of the Sixth Committee at the current or most recent session of the General Assembly shall serve as Chairman;*

(b) *a Rapporteur, provided that until such election the Rapporteur previously elected by the Committee shall continue to serve in that capacity.*

2. *The Rapporteur shall perform the functions of the Chairman in the absence of the latter.*

12.	General Assembly resolution 37/126, Report of the International Civil Service Commission (17 December 1982) [1]	*General Assembly, Official Records*, Thirty-seventh Session, Supplement No. 51
13.	General Assembly resolution 38/232, United Nations common system: report of the International Civil service Commission (20 December 1983) [1]	*General Assembly, Official Records*, Thirty-eighth Session, Supplement No. 47
14.	General Assembly, Eighth Session, Report of the Fifth Committee, agenda item 51, "Personnel policy: reports of the Secretary-General and of the Advisory Committee on Administrative and Budgetary Questions" (7 December 1953) [1]	*General Assembly, Official Records*, eighth Session, Annexes, agenda item 51, A/2615
15.	Information Circular, Visa status of non-United States staff members serving in the United States, 19 January 1954 [1]	ST/AFS/SER.A/238
16.	United Nations Administrative Tribunal: Statute and Rules, Provisions in force with effect from 3 October 1972 [1]	AT/11/Rev.4
17.	Staff Regulations (1983) [1]	ST/SGB/Staff Regulations/Rev.15
18.	Staff Rules: Staff Regulations of the United Nations and Staff Rules 101.1 to 112.8 (1984) [2]	ST/SGB/Staff Rules/1/Rev.6

C. Documents[1,3] Submitted to the United Nations Administrative Tribunal: Case No. 322: Yakimetz against the Secretary-General of the United Nations

19.	Applicant's Statement of Facts and Arguments (3 January 1984)
20.	Annexes to Applicant's Statement of Facts and Arguments (Annexes 1 to 42)
21.	Respondent's Answer (14 March 1984)
22.	Observations [by Applicant] on the Answer of the Respondent (including Annexes 43 to 45) (13 April 1984)

[1] Documents not reproduced. *[Note by the Registry.]*

[2] This version of the Staff Rules is the version in force as of 1 January 1984 but the provisions relevant to the application are unchanged from those in force at the time of Mr. Yakimetz's separation (26 December 1983).

[3] In these documents, which were submitted to the United Nations Administrative Tribunal, Mr. Yakimetz is usually referred to as the "Applicant" and the Secretary-General is usually referred to as the "Respondent". These documents are noted in the opening paragraphs of Judgement No. 333 of the Tribunal (doc. No. 9) and constitute the written submissions made to the Administrative Tribunal in the case.

D. Administrative Tribunals Judgements Cited in the Documents Submitted to the Committee and to the United Nations Administrative Tribunal or in Its Judgement No. 333 (listed in alphabetical order)

1. Judgements[1] of the United Nations Administrative Tribunal

23. *Bhattacharyya against the Secretary-General of the United Nations*, Judgement No. 142.
24. *El-Naggar against the Secretary-General of the United Nations*, Judgement No. 205.
25. *Estabial against the Secretary-General of the United Nations*, Judgement No. 310.
26. *Fischman against the Secretary-General of the United Nations*, Judgement No. 326.
27. *Higgins against the Secretary-General of the Inter-Governmental Maritime Consultative Organization*, Judgement No. 92.
28. *Levcik against the Secretary-General of the United Nations*, Judgement No. 192.
29. *Mauch against the Secretary-General of the United Nations*, Judgement No. 54.
30. *Nath against the Secretary-General of the United Nations*, Judgement No. 181.
31. *Seraphides against the Secretary-General of the United Nations*, Judgement No. 140.
32. *Sikand against the Secretary-General of the United Nations*, Judgement No. 95.
33. *Smith against the Secretary-General of the United Nations*, Judgement No. 249.

2. A Judgment of the International Labour Organisation Administrative Tribunal

34. *In re Rosescu [against the International Atomic Energy Agency]*, Judgment No. 431[1].

Part II of the Dossier. Documents directly relating to the Formulation of Paragraph 5 of Section IV of General Assembly resolution 37/126 of 17 December 1982 and of Paragraph 5 of Section VI of General Assembly resolution 38/232 of 20 December 1983

A. Paragraph 5 of Section IV of General Assembly resolution 37/126

1. Documents[1] of the Thirty-fifth Session of the General Assembly

35.	General Assembly resolution 35/210, Personnel questions (17 December 1980)	*General Assembly, Official Records*, thirty-fifth Session, Supplement No. 48

[1] Documents not reproduced. *[Note by the Registry.]*

2. Documents[1] of the Thirty-sixth Session of the General Assembly

36.	Joint Inspection Unit: Personnel Questions: Personnel policy options (14 September 1981)	A/36/432 (JIU/REP/81/11)
37.	Joint Inspection Unit: Personnel Questions: Personnel policy options: Note by the Secretary-General (29 October 1981)	A/36/432/Add.1 (JIU/REP/81/11, Annex VIII)
38.	Joint Inspection Unit: Personnel Questions: Personnel policy options: Comments of the Secretary-General (27 November 1981)	A/36/432/Add.2
39.	Report of the International Civil Service Commission (1981) (see para. 17 and Annex I)	*General Assembly, Official Records*, Thirty-sixth Session, Supplement No. 30, A/36/30
40.	Personnel questions: Report submitted by the Staff Unions and Associations of the United Nations Secretariat: Note by the Secretary-General (see paras. 96 to 98 and 101 to 106) (15 October 1981)	A/C.5/36/19
41.	Report of the Fifth Committee, agenda item 107, Personnel questions (15 December 1981) (see paras. 1 to 3, 55, 62 and 64)	*General Assembly, Official Records*, Thirty-sixth Session, Annexes, agenda item 107, A/36/831
42.	Report of the Fifth Committee, agenda item 108, Report of the International Civil Service Commission (17 December 1981)	*General Assembly, Official Records*, Thirty-sixth Session, Annexes, agenda item 108, A/36/840
43.	General Assembly resolution 36/233, Report of the International Civil Service Commission (18 December 1981), section III, paragraph 1	*General Assembly, Official Records*, Thirty-sixth Session, Supplement No. 51
44.	General Assembly decision 36/457, Concept of career, types of appointment, career development and related questions (18 December 1981)	*General Assembly, Official Records*, Thirty-sixth Session, Supplement No. 51

3. Documents[1] of the Thirty-seventh Session of the General Assembly

45.	Report of the International Civil Service Commission (1982) (see paras. 10 and 283-311, Annex I, paras. 24 to 34 and Appendix II, paras. 41 to 67)	*General Assembly, Official Records*, Thirty-seventh Session, Supplement No. 30, A/37/30
46.	Report of the International Civil Service Commission: Comments by the Federation of International Civil Ser-	A/C.5/37/29

[1] Documents not reproduced. *[Note by the Registry.]*

vants' Associations (FICSA): Note by the Secretary-General (1 November 1982) (see paras. 7 to 9)

47. Joint Inspection Unit: Personnel Questions, Second report of the career concept, Note by the Secretary-General (12 October 1982) — A/37/528 (JIU/REP/82/3)

48. Joint Inspection Unit: Personnel Questions: Personnel policy options and second report on the career concept: Comments of the Administrative Committee on Co-ordination (28 October 1982) — A/37/528/Add.1

Summary records of meetings and a document[1] *of the Fifth Committee*

49. 23rd meeting, 1 November 1982 (see paras. 10 and 11) — *General Assembly, Official Records*, Thirty-seventh Session, A/C.5/37/SR.23

50. 26th meeting, 4 November 1982 (see paras. 25 and 30) — *Ibid.*, A/C.5/37/SR.26

51. 27th meeting, 5 November 1982 (see paras. 15 and 16) — *Ibid.*, A/C.5/37/SR.27

52. 28th meeting, 8 November 1982 (see paras. 37, 38, 43, 44 and 45) — *Ibid.*, A/C.5/37/SR.28

53. 29th meeting, 9 November 1982 (see para. 42) — *Ibid.*, A/C.5/37/SR.29

54. 30th meeting, 10 November 1982 (see para. 47) — *Ibid.*, A/C.5/37/SR.30

55. 31st meeting, 10 November 1982 (see paras. 2, 14, 24, 30, 42 and 52) — *Ibid.*, A/C.5/37/SR.31

56. 33rd meeting, 12 November 1982 (see paras. 13 and 14) — *Ibid.*, A/C.5/37/SR.33

57. 34th meeting, 15 November 1982 (see paras. 44, 50 and 61) — *Ibid.*, A/C.5/37/SR.34

58. 36th meeting, 16 November 1982 (see paras. 12, 29 and 30) — *Ibid.*, A/C.5/37/SR.36

59. 37th meeting, 17 November 1982 (see paras. 3 and 14) — *Ibid.*, A/C.5/37/SR.37

60. 40th meeting, 19 November 1982 (see paras. 4, 60 to 62, 77 and 96) — *Ibid.*, A/C.5/37/SR.40

61. 43rd meeting, 23 November 1982 (see paras. 13, 17 and 48) — *Ibid.*, A/C.5/37/SR.43

62. 44th meeting, 24 November 1982 (see paras. 15 and 16) — *Ibid.*, A/C.5/37/SR.44

[1] Documents not reproduced. *[Note by the Registry.]*

63.	63rd meeting, 10 December 1982 (see para. 15)	*Ibid.*, A/C.5/37/SR.63
64.	67th meeting, 13 December 1982 (see paras. 7 to 10)	*Ibid.*, A/C.5/37/SR.67
65.	Report of the International Civil Service Commission: draft resolution sponsored by Canada, Finland, Ghana, Norway, Pakistan, Panama, and Sweden (9 December 1982) (see section IV, para. 5)	A/C.5/37/L.38

Verbatim record and a document[1] *of the plenary meeting of the General Assembly*

66.	Report of the International Civil Service Commission: Report of the Fifth Committee (16 December 1982)	A/37/768
67.	109th meeting, 17 December 1982 (see agenda item 112, pp. 26 to 27)	A/37/PV.109

B. Paragraph 5 of Section VI of General Assembly resolution 38/232

Documents[1] *of the Thirty-eighth Session of the General Assembly*

68.	Report of the International Civil Service Commission (1983) (see paras. 141 to 147)	*General Assembly, Official Records*, Thirty-eighth Session, Supplement No. 30, A/38/30

Summary records of meetings and a document[1] *of the Fifth Committee*

69.	31st meeting, 8 November 1983 (see para. 56)	*General Assembly, Official Records*, Thirty-eighth Session, Fifth Committee, A/C.5/38/SR.31
70.	33rd meeting, 10 November 1983 (see para. 35)	*Ibid.*, A/C.5/38/SR.33
71.	38th meeting, 15 November 1983 (see para. 73)	*Ibid.*, A/C.5/38/SR.38
72.	42nd meeting, 18 November 1983 (see para. 12)	*Ibid.*, A/C.5/38/SR.42
73.	61st meeting, 12 December 1983 (see para. 8)	*Ibid.*, A/C.5/38/SR.61
74.	66th meeting, 15 December 1983 (see paras. 38 and 41)	*Ibid.*, A/C.5/38/SR.66
75.	United Nations Common System: draft resolution sponsored by Australia,	A/C.5/38/L.17

[1] Documents not reproduced. *[Note by the Registry.]*

Austria, Canada, Denmark, Egypt, Norway, Pakistan, Sweden and Venezuela (7 December 1983)

Verbatim record and a document[1] *of the plenary meeting of the General Assembly*

76. United Nations Common System: Report of the Fifth Committee (18 December 1983) — A/38/745

77. 104th meeting, 20 December 1983 (see agenda item 117, pp. 32 to 33) — A/38/PV.104

[1] Document not reproduced. *[Note by the Registry.]*