

WRITTEN COMMENTS
OBSERVATIONS ÉCRITES

1. COMMENTS ON BEHALF OF THE
SECRETARY-GENERAL OF THE UNITED NATIONS
SUBMITTED PURSUANT TO ARTICLE 66,
PARAGRAPH 4, OF THE STATUTE OF THE
INTERNATIONAL COURT OF JUSTICE

INTRODUCTION

1. The present proceeding is designed to enable the Court to respond, in the form of an advisory opinion, to the two specific questions addressed to it by the Committee on Applications for Review of Administrative Tribunal Judgements (the Committee) within the context of Article 11 of the Statute of the United Nations Administrative Tribunal (doc. No. 16).

2. The views of the Secretary-General were submitted to the Court in his Written Statement of 26 February 1985 and these views are maintained. However, as this case concerns a dispute between the Applicant and the Secretary-General as his former employer, it was considered that it might be useful for the Court to receive the comments of the Secretary-General on the principal arguments put forward in the Written Statement submitted to the Court by the Applicant.

Question 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?

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

3. The Applicant argues that the Tribunal failed to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to his further employment with the United Nations because "Implicit in [the Tribunal's] judicial character is that it must pronounce independently on the legal issues submitted to it" (Applicant's Written Statement, para. 57). The Applicant, moreover, urges that a reply to the question he posed to the Tribunal "was a necessary preliminary to deciding whether the terms and conditions of his contract had been violated, and whether remedy was due" (*ibid.*, para. 58).

4. The Applicant, relying on press statements made by United Nations officials and a letter dated 21 December 1983 written to him by Mr. Louis-Pascal Nègre, Assistant Secretary-General for Personnel Services, contends that the Tribunal failed to exercise the jurisdiction vested in it by concluding wrongly that the Secretary-General gave the Applicant "every reasonable consideration" for a career appointment to which he was entitled pursuant to General Assembly resolution 37/126 (*ibid.*, paras. 58 to 62 and 72 to 75).

5. The Applicant submits that his service record was so good and so fitted the needs of the service—evidenced by a departmental request that he be offered another contract—that a proper exercise of discretion mandated the grant of a further appointment (*ibid.*, paras. 60 and 77). Relying on *In re Rosescu* (doc.

No. 34), he argues that the Tribunal failed to exercise jurisdiction because it did not conclude that the Secretary-General improperly deferred to the will of a member State in not offering the Applicant a new appointment (Applicant's Written Statement, paras. 68-71).

6. The Applicant also suggests that the Tribunal failed to exercise its jurisdiction because it failed to conclude that resolution 37/126 gave him a legal expectancy of a further appointment because the resolution "had made obsolete the Tribunal's previous jurisprudence on expectancy, except for periods of four years or less under fixed-term contracts" (*ibid.*, para. 72).

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7. With respect to the argument that the Tribunal failed to exercise its jurisdiction by not deciding the question of the existence of a legal impediment against the re-employment of the Applicant, it must be repeated that, as the Tribunal concluded, the Applicant was given "every reasonable consideration" before the Secretary-General decided against giving him a new appointment. Under these circumstances, there was no need for the Tribunal, in logic or in law, to determine whether there would have been a legal impediment to the further employment of the Applicant had the Secretary-General chosen to offer him a career appointment (Written Statement by the Secretary-General, paras. 61-79). The fact that the Applicant and the Tribunal differ on whether the Secretary-General, in arriving at the conclusion not to offer a further appointment, had exercised his discretion in a proper way, does not imply a failure by the Tribunal to exercise its jurisdiction.

8. The fact that the Applicant and the Tribunal drew different conclusions from the press statements and Mr. Nègre's letter does not constitute a failure by the Tribunal to exercise its jurisdiction. Indeed, the Tribunal clearly exercised its jurisdiction in holding that the Applicant had received "every reasonable consideration" for a career appointment (see Written Statement by Secretary-General, paras. 74-79). Moreover, the Tribunal's conclusion that resolution 37/126, rather than giving Applicant a legal expectancy or right to such an appointment, required that he be given "every reasonable consideration" for a career appointment. This accords with the plain meaning of the resolution, which did not intend to give a legal expectancy or right to further employment and consequently make "obsolete" the Tribunal's prior jurisprudence on expectancy and thereby take away the discretion of the Secretary-General whether to grant a staff member with five years service a permanent appointment.

9. The terms of resolution 37/126 clearly indicate that staff members, upon completion of five years of continuing good service on fixed-term appointment, have a right to be considered for a career appointment, which right did not exist prior to the adoption of the resolution. As the Tribunal concluded that resolution 37/126 had been properly applied, it follows that the Applicant's reliance on *In re Rosescu* is misplaced (see further para. 16 below). A right to *every reasonable consideration* for a career appointment is not equivalent to a *legal expectancy or right* to further employment that would be violated by a failure to grant a new contract. The Applicant's service record, which was not in dispute, does not change the right to be considered for a career appointment into a right to receive such an appointment.

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

10. The Applicant argues that the Judgement of the Tribunal offended five areas of the Charter which, in his Written Statement, were characterized as follows: (a) the principle of merit; (b) the principle of neutrality; (c) the principle of equality; (d) administrative principles; and (e) the career concept of the international civil service. For reasons of convenience, in the paragraphs that follow, the Applicant's headings, supplemented by a reference to the relevant Charter articles, will be used.

A. The Principle of Merit (Article 101, Paragraph 3)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

11. The Applicant argues that the Tribunal's Judgement violates the principle of merit in Article 101, paragraph 3, of the Charter because it does not discuss the excellent performance of the Applicant while in United Nations service (Applicant's Written Statement, paras. 86 to 87 and 99).

12. The Applicant also argues that the majority Judgement, and more particularly the concurring statement, appears to raise, as a new "paramount" consideration, the Applicant's refusal to obey orders from his Government regarding his United Nations employment, and his consequent election "to break his ties with his country", which allegedly was considered as disabling him from consideration for a career appointment (*ibid.*, para. 88). The Applicant reaches this conclusion because the majority Judgement cited a passage of a 1953 Fifth Committee report, which stated 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" (Doc. No. 9, p. 52, *supra*, para. XII). The Applicant submits that the Tribunal's adoption of this view—which was not argued by the parties—fails to take account of the principle of merit in the Charter (Applicant's Written Statement, paras. 89-99).

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13. The fallacy in the argument that the Tribunal did not consider Applicant's performance is that it fails to recognize that the quality of the Applicant's performance was never in question, so it is not surprising that his performance was not discussed in the Judgement; it is, however, amply described in the Tribunal's account of the facts (Tribunal's Judgement, pp. 46-49, *supra*; doc. No. 9).

14. In so far as the Applicant's stated intention to change his nationality is concerned, the Tribunal's Judgement did not decide this case on the basis of the 1953 Fifth Committee Report; indeed, the Tribunal specifically stated that the matters considered by the Fifth Committee were not in issue since legislation was being introduced in the United States Congress to avoid the obstacles that would otherwise be caused by Applicant's acquisition of permanent residence status in the United States (Tribunal's Judgement, p. 52, *supra*, para. XII; doc. No. 9). In effect, the Applicant is arguing that the Secretary-General cannot even consider a change of nationality or the way by which this change is effected. The Secretary-General has indicated (doc. No. 21, pp. 11-12, para. 24) that he had taken account of all the circumstances; these obviously included the Applicant's proposed change of nationality. It is submitted that, as chief administrative officer of the United Nations, the Secretary-General has to exer-

cise his discretion and to take each decision individually and separately, in light of all the relevant circumstances, in the interest of the Organization. The Tribunal's finding that he had done so therefore does not constitute an error of law in respect of the Charter.

B. The Principle of Neutrality (Article 100)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

15. The Applicant argues that the Tribunal's Judgement violates Article 100, paragraph 1, of the Charter in that it did not find improper (a) the Applicant's exclusion from the Headquarters building; (b) the Soviet Government's expectation that he would leave for Moscow and that the Government would nominate another official to take his place; and (c) the view expressed by a number of senior United Nations officials that the renewal of the Applicant's contract of employment would require the consent of all parties to the contract of secondment (Applicant's Written Statement, para. 108). The Applicant also relies on *In re Rosescu* (doc. No. 34) to support the argument that Article 100, paragraph 1, of the Charter precludes the Secretary-General from taking into account the views of the Soviet Government (Applicant's Written Statement, paras. 68-71). These arguments are also submitted in the context of the Applicant's section on "Administrative Principles of the Charter" (*ibid.*, para. 130) (see subsection (d) below).

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16. The Respondent submits that the Applicant's reliance on *In re Rosescu* is misplaced. In that case, the Administrative Tribunal of the International Labour Organisation found that the IAEA Director General had changed a decision which he had already taken; it was also found that the change of the decision was not in the interests of the Agency, but was taken so as to comply with the wishes of a member State (ILOAT Judgment No. 431, para. 7; doc. No. 34). This is not the case here. The Tribunal concluded that the decision not to offer a new contract to the Applicant was properly taken in the interests of the Organization after consideration of all the circumstances, including representations to diverse effect from member States (doc. No. 9, pp. 54-55, *supra*, paras. XVIII-XX). Indeed, if the results of the exercise of discretion are considered in isolation, no matter what decision was taken, it would have had to be in accord with the views of one of those member States.

17. The Secretary-General's decision not to permit the Applicant, the centre of a controversy between two member States, to enter the Headquarters buildings, was an administrative decision taken in the light of all the circumstances of the case and in order to avoid potentially disruptive consequences for the functioning of the Secretariat. It cannot seriously be contended that such a decision violated Article 100, paragraph 1, of the Charter. It was, moreover, not the subject of a plea addressed to the Tribunal, and the latter was, therefore, not called upon to deal with it. (Applicant's Statement of Facts and Arguments submitted to the Tribunal, Pleas; doc. No. 19.)

18. The Applicant also argues that the Tribunal erred in respect of the Article by not finding it improper for the Soviet Government to plan to replace the Applicant upon his return to Moscow. This argument disregards the fact that the Statute of the Tribunal does not, of course, permit it to adjudge the actions or intentions of States. The Tribunal's Judgement could therefore only be an

adjudication of a dispute between the Applicant and the Secretary-General as his employer.

19. The Applicant's criticisms of the views of certain senior officials that extension of his contract of employment required, since it was a secondment contract, the consent of all parties to it, overlooks that the Tribunal's Judgement (doc. No. 9, pp. 54-55, *supra*, paras. XVIII-XX) accepted the Respondent's submission to the Tribunal that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case" (Respondent's Answer to Tribunal, para. 24; doc. No. 21). Such a finding of fact does not involve a question of law, let alone a question of law relating to provisions of the Charter. That finding, however, resolved the only issue for adjudication between the parties, that is, whether the Applicant actually received every reasonable consideration for a career appointment (see Written Statement by Secretary-General, para. 105).

C. The Principle of Equality (Article 2, Paragraph 1, and Article 8)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

20. The Applicant argues that Article 2, paragraph 1, of the Charter prevents a member State from seeking special treatment for its nationals and that Article 8 prevents restrictions being placed on persons from participating under conditions of equality in any organ of the United Nations and that the Tribunal erred in law by not finding that the Secretary-General's decision to prohibit the Applicant from entering the Headquarters building violated the Charter (Applicant's Written Statement, paras. 112-120).

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21. The Tribunal's Judgement, of course, had nothing to do with Article 2, paragraph 1, of the Charter, but concerned the application of resolution 37/126 to the Applicant (see Written Statement by Secretary-General, paras. 124-127). Indeed, the Applicant acknowledges that the General Assembly itself has recognized that some member States require their nationals to accept fixed-term appointments by permitting, in its resolution 35/210,

"replacement by candidates of the same nationality . . . in respect of posts held by staff members on fixed-term contracts . . . to ensure that the representation of member States whose nationals serve primarily on fixed-term contracts is not adversely affected" (Applicant's Written Statement, para. 115).

22. Article 8 of the Charter solely prohibits gender-based discrimination and cannot reasonably be extended to cover any of the matters here at issue, which certainly had no relation to the Applicant's sex.

D. Administrative Principles of the Charter (Article 97 and Article 101, Paragraph 1)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

23. The Applicant argues that the Tribunal violated Article 101, paragraph 1, of the Charter by concluding that the Secretary-General gave every reasonable consideration to the Applicant for a career appointment pursuant to resolu-

tion 37/126, since the contemporary evidence made it clear that the Secretary-General gave no such consideration because he was under the mistaken impression that granting Applicant a career appointment would have required the consent of the Soviet authorities (Applicant's Written Statement, paras. 121-131). The Applicant argues that, in reality, the Secretary-General was merely carrying out the instructions of a member State (*ibid.*, para. 130).

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24. As was pointed out in paragraph 16 above, the circumstances under which the Secretary-General had to exercise his discretion were such that, if the result of the exercise of his discretion is considered in isolation, no matter what decision he took, that decision would necessarily have been in accord with the views of one of the member States which had made representations to him. The issue, therefore, is not the substance of the actual discretionary decision, but that the decision had been arrived at after every reasonable consideration, having in mind the interests of the Organization. As indicated, the Secretary-General has submitted to the Tribunal, to the Committee and to this Court that he did consider the Applicant for a career appointment and the Tribunal found that the Applicant received "every reasonable consideration" for such an appointment. This conclusion of fact does not involve a question of law, let alone a question of law relating to provisions of the Charter (Written Statement by Secretary-General, para. 97).

E. The Career Concept (Chapter XV of the Charter)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

25. The Applicant argues that Chapter XV of the Charter envisages a career service and that the desire to give primacy to a career service led to the adoption of resolution 37/126, which was clearly intended to apply also to seconded staff (Applicant's Written Statement, paras. 132-144). The Applicant submits that the Tribunal's Judgement defeats

"the very purpose which the ICSC [International Civil Service Commission] and the General Assembly intended to promote: the reaffirmation of the primacy of the career service, open to all, on the basis of merit",

and that the conclusions of the Judgement are alien to the spirit of Chapter XV of the Charter (*ibid.*, paras. 148-149).

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26. In reply to this argument, it must be repeated that the Secretary-General has submitted to the Tribunal, to the Committee and to this Court that he did consider the Applicant for a career appointment (see para. 24 above). Further, it must be repeated that the situation is different from the *Rosescu* case and that the Tribunal found that the decision in the present case was properly taken in the interests of the Organization after consideration of all circumstances, including representations to diverse effect from member States (see para. 16 above). The Tribunal also found that resolution 37/126 was applied. Under these circumstances—and quite apart from the fact that the Judgement is directed to the question of an alleged violation of Applicant's rights flowing from his earlier employment and not to an examination of the concepts underly-

ing Chapter XV in general—it cannot be maintained that the Tribunal's Judgment constitutes an error of law in respect of Chapter XV of the Charter. It is emphasized that the principle of an independent civil service is applied by the Secretary-General irrespective of the type of appointment held by a staff member.

CONCLUSION

27. The Secretary-General considered the Applicant for a new appointment but decided that it would not be in the interests of the Organization to offer him a career appointment at that time. That decision did not violate the Applicant's contract or terms of employment and the Tribunal exercised its jurisdiction and did not commit an error of law concerning the Charter in so concluding.

(Signed) Carl-August FLEISCHHAUER,

The Legal Counsel
of the United Nations.

26 June 1985.

COMMENTS OF THE APPLICANT MR. VLADIMIR YAKIMETZ ON THE WRITTEN STATEMENTS SUBMITTED TO THE INTER- NATIONAL COURT OF JUSTICE

The Applicant's written statement to the Court, dated 22 February 1985, sets out his views on the issues of law and of principle in which Judgement No. 333 was defective as it applied to him. All Tribunal judgements, however, affect not only the individual staff member who is the Applicant, but also all present and future staff members in the United Nations system and other international organizations influenced by the development of international institutional law. The Applicant submitted, as Annex A to his written statement, a statement of the United Nations Staff Union issued on 20 April 1984, supporting his request for an advisory opinion from the International Court of Justice. Since that date the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations system, and the Federation of International Civil Servants, concerned at the implications of Judgement No. 333 for all the 55,000 staff members of the common system that they represent between them, have requested an independent legal analysis of the issues of law and principle posed by the Judgement. This analysis, by Professor Alain Pellet, of the University of Paris, is attached as Annex B to these Comments, which are submitted in response to the invitation issued by the Court on 5 March 1985.

I. PRELIMINARY OBSERVATIONS OF THE APPLICANT

1. Only two Statements were submitted in support of the Tribunal's decision in Judgement No. 333; one by the Union of Soviet Socialist Republics and the other by the Secretary-General of the United Nations (the Respondent). The two Statements differ fundamentally in their understanding of the Tribunal's jurisdiction and in their interpretation of the disputed decision.

2. The USSR Statement, citing Article 2, paragraph 3, of the Tribunal Statute, gives the Tribunal almost limitless latitude in defining the scope of its own jurisdiction, which, it says, the Tribunal "must itself determine in every specific instance". The Respondent, on the other hand, maintains that under Article 2, paragraph 1, jurisdiction is limited to "determining whether contracts or terms of appointment have been observed" (para. 49).

3. The USSR Statement finds that the Judgement did answer the Applicant's question "concerning the existence of legal impediments to his further employment in the United Nations". In contrast the Respondent says that the Tribunal did *not* answer the question, because it "does not have jurisdiction to do so" (para. 57).

4. The USSR Statement says that the Tribunal set forth at least two (and possibly three) specific legal impediments to the Applicant's further United Nations employment. ". . . The absence of (a) trilateral agreement (between the Defendant, the USSR Government, and the Applicant) constitutes a legal impediment to the extension of Applicant's fixed-term contract." The Applicant's decision to "require (*sic*) permanent residence status" in the United States constitutes a legal impediment to "further employment in the United Nations on the basis of concluding with him a separate new contract". The Statement

also says that conversion to a permanent contract is "regulated by Rule 104.12 (b) of the Staff Rules", to which the "Applicant's attention was specifically drawn". The Statement twice refers to this Rule in the context of legal impediments.

The Respondent, on the other hand, says that the question of whether a legal impediment existed was "not at issue between the parties", the Respondent having conceded that it was "within (his) authority and discretion to re-appoint the Applicant after the expiry of his contract" (para. 58).

5. The USSR Statement maintains that the Tribunal supported the Secretary-General's belief that a staff member who had served on secondment "*could not* be appointed on a probation basis for the purpose of subsequently offering him a contract on the basis of a career appointment" (emphasis added). The Respondent, on the other hand, says that "the Tribunal did not find that there were restrictions on the eligibility of the Applicant to be considered for a career appointment" (para. 122).

6. The USSR Statement appears to see the decision of the Applicant to seek permanent residence status as a "juridical" issue in which the Tribunal "followed . . . its previous practice, in particular . . . its Judgement No. 325 (*Fishman*)" (*sic*)—a Judgement in which the Tribunal upheld the Secretary-General's refusal to waive the privileges and immunities of a career staff member who wished to apply for permanent residence. The Respondent, on the other hand, says that the Tribunal "made it clear that these matters (i.e., the difficulties for the United Nations if a staff member on a G-IV visa takes steps to change his nationality) were not in issue since private legislation was to be introduced into the United States Congress to avoid these problems . . . and the Respondent does not dispute this" (para. 114).

7. The USSR Statement says that the Tribunal concluded "that in this specific instance only the Secretary-General is empowered to decide what is the meaning of the phrase 'every reasonable consideration'"; and that he "clearly determined" that reasonable consideration was not in this instance required by resolution 37/126 because of the secondment provision in the Applicant's final contract. The Respondent, on the other hand, says that "the Tribunal held that the Applicant was entitled to the benefit of that resolution and concluded that this consideration had, in fact, been given" (para. 74).

8. Thus, in point after point, the two statements wishing to uphold the Tribunal Judgement negate each other. This mutually self-cancelling quality of their arguments as to what the Tribunal could actually have decided can only serve to corroborate the Applicant's contention that in fact the Tribunal failed to exercise its jurisdiction.

II. THE FIRST QUESTION ADDRESSED TO THE COURT BY THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS: DID THE TRIBUNAL FAIL TO EXERCISE THE JURISDICTION VESTED IN IT?

9. The Respondent argues that the question of 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 "was not in issue between the parties", because the Respondent, in his Answer to the Tribunal, had conceded that no such impediment existed¹ (para. 58).

¹ No jurisdictional inhibition deterred the Tribunal from examining other matters that were not at issue between the parties. Neither the Applicant, nor the Respondent, nor the

10. The *ex post facto* concession by the Respondent that no legal impediment existed did not erase the contemporaneous statements by high officials of the Respondent, and by the Assistant Secretary-General for Personnel Services in the name of the Respondent, that he was “not in a position” to treat the Applicant like any other staff member because of specific legal impediments: a supposed agreement by the United Nations “to limit the duration of your United Nations service”, and the requirement of “involvement of all the parties originally concerned”. Nor did the *ex post facto* concession by the Respondent revise the administrative decision, based on this recital of supposed impediments, not to consider the Applicant for a career appointment. The Tribunal, either consciously or inadvertently, failed to draw any conclusions from the Respondent’s later admission that the reasons given by Mr. Nègre were specious. It searched instead for other impediments, such as the proposed change of residence status, to justify the contested action.

11. The Respondent argues, secondly, that the question of whether or not a legal impediment existed was an “abstract” one, in which the Tribunal “does not have jurisdiction to answer or advise”. The Tribunal does not have to answer abstract questions just because asked; but must solve general legal questions if necessary for the resolution of a concrete question. The supposed impediments arose, in the words of the concurring statement, from “the very nature of the terms of secondment”. The interpretation of contracts, terms of appointment, and special conditions therein, is very much within the competence and jurisdiction of the Tribunal, whose earlier definition of the concept of secondment in *Higgins* and *Levcik* was relied on by both parties and all members of the Tribunal. It has never been a requirement of the Tribunal that every plea contain a specific allegation of non-observance. Indeed the Tribunal’s own reformulation of the “legal issues” contains one that is not only abstract but also quite unrelated to the substance of the case, i.e., 1 (c) “The consequences of the application of United Nations rules and regulations to the United States law on resident status and citizenship”.

12. The Respondent’s third argument—that the question of whether or not a legal impediment existed was not relevant to the Tribunal’s adjudication—was answered comprehensively in the Written Statement of the Government of Italy, which points out that the resolution of this question must logically precede any examination of the other two questions listed. If further employment was legally barred, the Applicant could have no expectancy of renewal, and any consideration, reasonable or otherwise, for a career appointment would be utterly redundant. On the other hand, if the Tribunal found that Respondent’s disclaimer,

Government of the USSR had sought a further secondment. Yet the Judgement and both the Written Statements supporting it deal explicitly with this question. The Respondent characterizes as

“the real issue between the parties—and that upon which the Tribunal adjudicated . . . whether or not the Applicant’s rights were violated by the decision of the Respondent not to grant him a further appointment after 26 December 1983, be it a fixed-term appointment on secondment . . .” (para. 50).

Similarly the Applicant’s decision to seek permanent residence status was not an issue between the parties and was raised by neither. Yet the Tribunal listed it as one of the three legal issues on which it must pronounce judgement (para. 1 (c)), and it formed a conclusive part in the concurring statement’s reasoning.

(however contradicted by the facts of the case) was to be accepted, then it was *ipso facto* led into the concomitant inquiry whether—absent any impediment—the Respondent was not obliged to give the reasonable consideration to a career appointment prescribed by the General Assembly.

13. The Respondent postulated that two pre-conditions must be met before the Tribunal *need make any inquiry* into the existence or otherwise of a legal impediment: a finding of expectancy, *and* a finding that “reasonable consideration” for a career appointment had been denied (para. 61). This assumes that the application of General Assembly resolution 37/126, section IV, paragraph 5, was conditional on an expectancy of renewal. The Statement of the USSR goes even further, interpreting the Judgement as *finding an absence of expectancy* to be itself a legal impediment to conversion of a fixed-term to any other kind of appointment. Expectancy, as the dissenting opinion points out, is in no way a prerequisite to a career appointment. To require proof of expectancy would be to place an impossible burden on a fixed-term staff member. It would also deny all meaning to resolution 37/126, and thwart the purpose of the General Assembly.

14. The Applicant has no dispute with the Tribunal’s conclusion that he had no expectancy of a renewal of his fixed-term appointment on secondment, a status which he did not seek, nor could the Secretary-General bestow. But there is no indication in the Judgement itself that the Tribunal did in fact, as the Respondent claims, “examine all the circumstances of the case” and conclude that “no circumstances existed to create a legal expectancy of future employment” (para. 70). Rather, the Tribunal found such an examination to be unnecessary, on the ground that secondment excluded the Applicant from its previous jurisprudence on expectancy¹:

“In so far as he was on secondment from the USSR Government, none of the actions he took could bring about 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.*” (Para. XII.) (Emphasis added.)

In its previous jurisprudence a finding of expectancy arose not from the actions of the Applicant, but from those of the Respondent or his agents, creating a subjective expectation of further employment, based on such factors as the nature of the duties, the intention of the department in offering the contract, the written assurances of superior officers. In the present case, however, the circumstances examined by the Tribunal in its discussion of expectancy (paras. II to XII) were not the actions of the Respondent or his agents, but rather those of the Applicant in relation to the USSR Government.

15. The Applicant’s expectancy for further employment did not rest, as in the cases cited by the Tribunal, on “correspondence and surrounding facts and circumstances”, but rather on the much less ambiguous—indeed statutory—provisions of General Assembly resolution 37/126, paragraph 5, section IV, which formed part of his terms of appointment. Anyone with five years continuous good service has an objective expectancy of consideration, and unless

¹ Judgement No. 142, *Bhattacharyya*, notes without further comment that Mr. Bhattacharyya was on secondment from the Indian Government. This fact formed no part of the Tribunal’s examinations of Mr. Bhattacharyya’s expectancy of renewal.

legally barred, anyone with a comparable service record, occupying a post which required a long-term commitment, and enjoying the strong recommendations of his department would unquestionably have been favourably considered. The Respondent concedes that the Applicant was entitled to the benefit of this resolution, but seeks to shield from the scrutiny of the Court the central legal issue of the case: whether the Applicant was illegally denied his right to reasonable consideration for a career appointment. The Respondent claims that the Tribunal made a finding of fact that this consideration was given.

16. No such finding of fact is detectable in the Judgement. On the issue of consideration there is no majority view. The concurring statement said that reasonable consideration was not required. The dissenting opinion found that reasonable consideration had been denied. The Judgement found that "the Respondent" had the sole authority to decide what constituted "reasonable consideration" . . . and that "he apparently decided . . . that the Applicant could not be given a probationary appointment". The only evidence supporting this finding, according to the Respondent, was his own statement in his Answer to the Tribunal that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances of the case" (para. 97 of the *Secretary-General's Statement*)—*contradicting the contemporaneous assertion* by Mr. Nègre that the Secretary-General was "not in a position" to agree to his request for reasonable consideration. The Tribunal Judgement thus gives the Secretary-General "unfettered and self-judging discretion", as the Statement of the United States point out, to determine the criteria for reasonable consideration, and accepts his word that it was given, without asking what those criteria were. The Respondent's Statement implies that something is a "fact" simply because he said it was so. The acceptance of such a standard would eliminate the need for any independent legal authority at all. Previous Tribunals have demanded more. Discretionary power "cannot be exercised for reasons not clearly specified" (ILOAT Judgment No. 13, *In re McIntire*); ". . . The exercise of a power which is in principle discretionary requires the Tribunal to test the validity of the explanations . . ." (ILOAT Judgment No. 27, *In re Mauch*); "While it is not for the Tribunal to substitute its judgement for that of the Secretary-General with respect to the adequacy of the grounds for termination stated, it is for the Tribunal to ascertain that an affirmative finding of cause which constitutes reasonable grounds for termination has been made, and that due process has been accorded in arriving at such an affirmative finding" (UNAT Judgement No. 4, *Howrani*). Under the Respondent's interpretation, the Tribunal demanded no clear specification of reasons, did not ascertain the reasonableness of the grounds and made no attempt to test the validity of the explanations given to it, or even to compare them with the explanations previously given to the Applicant.

17. "The mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough; it must in fact have applied them to the determination of the issue" (*I.C.J. Reports 1973*, at p. 190). The Respondent's Statement concedes that no inquiry was made as to the existence or otherwise of a legal impediment to further employment. But even as to the two "preconditions" for such an inquiry, set by the Respondent himself, the Statement fails to show that the Tribunal "applied its mind" or examined the "substance of the matter and not merely the form". In a material issue in the case, therefore, the Tribunal abdicated its powers, and failed to exercise the jurisdiction vested in it.

III. THE SECOND QUESTION ADDRESSED TO THE COURT BY THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS: DID THE TRIBUNAL ERR ON QUESTIONS OF LAW RELATING TO PROVISIONS OF THE CHARTER?

1. Article 101, Paragraph 1, of the United Nations Charter

18. General Assembly resolution 37/126, section IV, paragraph 5, confers a right on all fixed-term staff members who have rendered five years of continuing good service. The same resolution places an obligation upon the Secretary-General which, under Article 101.1, he is bound to fulfil. Staff Rule 104.12 (b) includes "persons temporarily seconded by national governments or institutions" in its provisions on fixed-term appointments. The Applicant did not assert a right to a career appointment, recognizing that the power of appointment remains subject to the discretion of the Secretary-General. He did assert a right to "every reasonable consideration", such consideration having been explicitly denied him in the name of the Secretary-General on 21 December 1983. The Respondent asserts that the Tribunal made a finding of fact that consideration had been given, and that a finding of fact is not reviewable as a question of law. The Applicant submits that no such finding of fact was made (and the USSR Statement implicitly supports this submission). Even if it were, whether or not such consideration was "reasonable" is a legal determination and therefore reviewable.

19. The Tribunal did not make a finding of fact that consideration was given: it made an "inference" (para. XVI). Indeed it expressed its "dissatisfaction with the failure of the Respondent" to make a record on which a finding of fact could be made (para. XX), but draws no consequence from this. Nor did it make a finding of fact that such consideration was "reasonable". It said that the Respondent had "sole authority" to decide what was reasonable, and he "apparently decided" that it was (para. XVIII). The Tribunal made no attempt to apply its own or any other legal standard of reasonableness, nor to set any limits on the Secretary-General's discretion, limits which it had itself articulated in the past (e.g., Judgement No. 54, *Mauch*) and which the Court recognized in *Fasla* as a fundamental part of the Tribunal's role (*I.C.J. Reports 1973*, at p. 205). The Tribunal's Judgement, if allowed to stand, permits the Respondent to act as though General Assembly resolution 37/126, section IV, paragraph 5, had never been passed. Indeed it endows him with even greater discretionary powers than he had before the resolution, when the normal mechanisms and procedures for appointment applied. Under this Judgement, the Respondent has "sole authority" to set standards: he need keep no records, prepare no comparative evaluation, give no reasons or give spurious ones, and may carve out exceptions. Until he has "accepted the recommendation made by the General Assembly" (para. XVIII)—a condition not previously imposed—he need set up no machinery to implement it¹. The Applicant submits that both Written Statements supporting the Judgement interpret it so as to set no limits on the Secretary-General's discretionary powers, raising a question of law relating to Article 101, paragraph 1, of the Charter.

¹ To the date of this writing, no administrative instruction has been issued and no procedure set up to implement General Assembly resolution 37/126, section IV, paragraph 5, pending the Court's determination of this case.

2. Article 100, Paragraph 1, of the United Nations Charter

20. Contrary to the Respondent's assertion, the Applicant at no time "alleged that the Respondent in this case was merely carrying out the instructions of a Government . . ." (para. 99 of the Secretary-General's Statement). The Tribunal acknowledges this (para. XIX). Nor did the Applicant at any time suggest that the "Secretary-General is precluded from taking into consideration formal representations made to him in his official capacity by member States" (para. 100). The Applicant, not being privy to the Secretary-General's appointments, has no means whatever of knowing the content of any representations made to the Secretary-General. The paragraphs in the Application to the Committee listed by the Respondent refer to public statements by high officials of the Secretary-General indicating that *he believed* that further employment of the Applicant was impossible without the consent of the USSR Government, a belief which the Respondent himself has subsequently admitted to be erroneous. It was that belief, and the Tribunal's failure to fault it, that the Applicant alleged to be a dereliction from Article 100.1.

21. The passage from *In re Rosescu* quoted by the Respondent in paragraph 103 directly supports the Applicant's contention in paragraphs 20-22 of his Application to the Committee. It says:

"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, who may wish to keep the official in its service. Similarly if such *government official's* appointment is to be extended, it is reasonable that the organization should again consult the member State, which may have good reason to re-employ him." (Emphasis added.)

Since the Applicant was not a government official at the time of the contested decision, having resigned from any offices in the USSR Government, and since he did not seek an extension of an appointment on secondment, the Applicant argued that Article 100.1 prohibited the search for consent of any government, and relieved the Secretary-General of the need to consult any member State.

22. Given the public statements made by his Spokesman and by other high officials as to the necessity of seeking instructions from a member State, the burden was upon the Secretary-General, as the Written Statement of the United States argues (p. 176) to show that he reached his conclusion on grounds wholly independent of the wishes of a member State or States. "When Respondent does not, of his own initiative, produce such information and evidence . . . the Tribunal is left with no option but to proceed to a conclusion in the absence of such information and evidence" (UNAT Judgement No. 15, *Robinson*). "If an unexplained decision is also apparently inexplicable, silence will provide a foundation for an inference that there must have been at work in the decision-making some element, such as prejudice or a conclusion falsely drawn, which would require the Tribunal to interfere with the discretion" (ILOAT Judgment No. 361, *In re Schofield*; see also UNAT Judgement No. 18, *Crawford*; ILOAT Judgments No. 13, *McIntire*, and No. 415, *Halliwell*). An independent justification, the Applicant submits, is demanded by the much wider injunction of Article 100.1, that international officials "refrain from any action which might reflect on their position as international officials responsible only to the Organization".

23. The Applicant did, however, suggest that the decision to ban him from entering the Headquarters building may have been taken in deference to the wishes of a member State. Once again, not being privy to the Secretary-

General's office, he has no way of knowing what representations, if any, were made. His only knowledge—as set out in paragraph 23 of the Statement on behalf of the Applicant—was that when he reported to work on 23 February 1983 he was told by his supervisor that “a member State” had objected to his presence in the headquarters cafeteria and the second floor coffee shop. Indeed no other plausible explanation for this treatment, usually reserved for felons or undesirables, suggests itself, since the restriction on his movements clearly imposed a hardship and inconvenience on the work of his office (Annex 38 to doc. 19).

24. The Respondent once again seeks to insulate the Tribunal's Judgement from the Court by characterizing as a finding of fact the supposition that the “decision now contested was taken by the Secretary-General after consideration of all the circumstances of the case” (para. 105). No such finding occurs in the paragraphs cited. The Tribunal merely says, in paragraph XIX, that “he (the Respondent) *states* all throughout that the measures he took were in the interests of the United Nations . . .” (emphasis added). That is an explanation of motive, not a finding of fact, and couched in such broad terms as to give the Secretary-General carte blanche to define the interests of the United Nations, if need be, to redefine the Charter.

3. Article 101, Paragraph 3, of the United Nations Charter

25. Although the Applicant referred specially to Article 101.3, along with Staff Regulations 4.2 and 4.4 and Staff Rule 101.14 (a) (ii), in his initial request for administrative review as well as his Tribunal Application, only the dissenting opinion weighs the “paramount consideration” of the Charter against other considerations. Neither the majority Judgement, nor the entire Written Statement of the Secretary-General to the Court, contain any acknowledgement that the Applicant was considered by his Office as having met the “highest standards of efficiency, competence and integrity” demanded by the Charter, or that his performance was rated as excellent, and the concurring statement flatly rejects any consideration of competence and efficiency.

The Respondent suggests that Article 101.3 refers to “personal qualities”, which may legitimately be ignored in favour of “the overall interests of the Organization”. He states that the *Rosescu* Judgment recognizes an inconsistency between the Secretary-General's duties under Article 97, and the requirement that efficiency, competence and integrity shall be the paramount considerations in appointment (para. 111). The passage he cites from *Rosescu*, however, supports the opposite contention: that the interests of the Organization must have primacy over those of member States, and that extraneous considerations have no place in appointment decisions. He also suggests a potential conflict between the mandate of Article 101.3, and the sovereignty of the General Assembly under Article 100.1. The General Assembly may, under Article 100.1, direct and guide the Secretary-General, but both are subject to the constituent treaty of the United Nations.

26. The Respondent's interpretation in his paragraph 116 of the dissenting opinion is puzzling. There is no examination in paragraph 8 (or in para. 10, as the French version has it), or indeed anywhere in the dissent, of the effects of a change of nationality, except that the concluding footnote registers strong reservations about the majority's reference to the Fifth Committee report of 1953, recording a “widely shared view” that “international officials should be true representatives of the culture and personality of which they were nationals”.

27. The Respondent states that the dissenting opinion “differs from the Tribunal’s Judgement on a simple question of fact”. The dissenting opinion differs from the Tribunal’s Judgement, on, *inter alia*, the scope of the Secretary-General’s discretionary powers, the extent to which discretionary decisions are subject to review, on the nature of secondment and the rights and duties of a seconded staff member, on the nature of the Secretary-General’s agreement with the releasing organization, on the intent and scope of resolution 37/126, on what constituted “reasonable” consideration, on the relevance of a decision to seek permanent residence status, and on the weight to be given to Article 101.3. None of these can be characterized as a “simple question of fact”. Their application to the material issues of the case led to a totally different conclusion, one consistent with the principle of merit. The Judgement itself, by omitting any consideration of Article 101.3, makes merit subservient to other considerations.

4. Article 8 of the United Nations Charter

28. The Respondent interprets Article 8 as being “solely concerned with discrimination on the basis of sex”, and argues that any wider interpretation would “drastically curtail the powers of the General Assembly to regulate recruitment”.

Article 8, which the Tribunal described in Judgement No. 162 (*Mullan*) as “a provision of great historic scope”, is one of the many reflections in the Charter of a more general principle of equality. Although the legislative history of the Charter indicates that the prohibition of gender-based discrimination was in the minds of those at the Preparatory Commission, the Article is framed so as to have broader application. The plain words of Article 8 prohibit any restriction on the eligibility of any person to participate in any organ of the United Nations under conditions of equality. It is reflected in the Staff Regulations, in terms of a general principle of non-discrimination, under Article IV, which bears the heading “Appointment and Promotion”, thus:

“Regulation 4.3: In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.”

29. What Article 8 prohibits is any restriction on *eligibility* to serve. This does not prohibit the consideration of other factors in any particular employment decision. And, once serving, it prohibits unequal treatment of staff members for any reason forbidden by the Charter.

30. Article 8, according to the Tribunal in *Mullan*, “contains a rule which is legally binding on United Nations organs”. Responsibility for its implementation falls upon those who are competent to make rules applicable to the staff, primarily the General Assembly and the Secretary-General. Neither the General Assembly nor the Secretary-General possess powers to regulate recruitment in any way contrary to the principle of equal conditions of employment enunciated in the Charter.

31. Resolution 37/126, section IV, paragraph 5, was an exercise by the General Assembly of its powers to regulate recruitment pursuant to Article 101.1 of the Charter. It placed no restrictions on eligibility for consideration after five years continuous good service. The majority Judgement upheld an “apparent” decision that “in the background of secondment” the Applicant was not eligible for a “probationary appointment” (para. XVIII). The concurring statement found the Applicant “ineligible” for consideration for a career

appointment, because of his stated decision to seek permanent residence status in another country.

32. The Written Statement of the USSR interprets the Tribunal Judgement as finding a number of legal restrictions on his eligibility to participate in any capacity, whether fixed-term, probationary, or under "a separate new contract". Of the restrictions enumerated by the USSR, the first, "the absence of (a) trilateral agreement", is forbidden by Article 100.1, since the Applicant was not a government official. The second, Staff Rule 104.12 (b), to which the Applicant's attention was drawn in March 1983, refers to expectancy, but not to eligibility. The third, the "practice" of "recruiting the staff on as wide a geographical basis as possible", was held by the Tribunal in *Estabial* to be an incorrect application of Article 101.3, which may not be used to "refuse to consider the candidatures of United Nations staff members for a vacant post".

The Respondent, on the other hand, says that the Tribunal did not find the Applicant ineligible to serve in the Secretariat, but "simply upheld a discretionary decision by the Secretary-General not to offer him a career appointment at a particular time". The Applicant does not challenge the Secretary-General's discretionary powers of appointment. He submits, however, that that discretion must be exercised in accordance with Article 8 of the Charter.

5. Article 2, Paragraph 1, and Article 100, Paragraph 2, of the United Nations Charter

33. The Respondent states that "the policies of any individual government in respect of the employment of its own nationals by the United Nations can hardly violate the principle of sovereign equality of all member States" (para. 127). The Tribunal was not asked to adjudicate—nor does it have competence to do so—the policies of any individual government. The Tribunal was asked to adjudicate the obligations of the Secretary-General under the Charter and the Staff Rules. If the policies of an individual government conflict with the obligations of the Secretary-General to treat all staff members equally, to give paramount consideration to the principle of merit, to neither seek nor receive instructions from any outside authority, the Secretary-General must, in the words of *Rosescu*, safeguard the interests of the Organization and give them priority over others. In subscribing to the constituent treaty of the United Nations, States have undertaken to respect the political independence of all international civil servants: to neither exert pressures on, nor seek special protections for, their nationals, or those of any other country. To suggest that a staff member of proven merit who has chosen to fulfil, rather than break, his contractual obligations must "face the consequences of his actions"—if those consequences include banishment from Headquarters premises and exclusion from further employment—is to hold the interests of a member State higher than those of the Organization.

34. The Respondent also states that the Applicant's argument denies member States the right to make their views on appointments known to the Secretary-General (para. 128). Under the principle of sovereign equality, all member States may make their views known; but, legally, a Secretary-General may not refuse to appoint or confirm an official on the grounds given in this case by several high officials: opposition by a government (ILOAT Judgments No. 122, *Chadsey*, and No. 431, *Rosescu, inter alia*; also M. Bedjaoui, *Fonction publique internationale et influences nationales*, p. 612). The Charter, in Article 100, and its implementing document, Articles I and IV of the Staff Regulations, establish the principle that officials are recruited as a result of selection by the

Organization, not of the consent or the proposal of member States. Article 2.1 means that this principle must be applied equally to nationals of all countries, and Article 100.2 protects the autonomy of the Secretary-General in the management of his staff, subject only to the regulations of the General Assembly and the provisions of the Charter. The Judgement and concurring statement either evade the material issues posed by this case, or introduce principles alien to the Charter. The Respondent's Statement condones these evasions and fails to assert the autonomy of the international civil service or to accept responsibility for defending its neutrality.

Conclusion

35. In 1949 the Court laid down the principle that the relationship between the Organization and its officials takes precedence over that deriving from nationality, from which flows an obligation to assure administrative and judicial protection to all international officials regardless of their State of origin, whether powerful or weak. In 1954 and 1956 the Court defined the jurisdictional nature of the international administrative tribunals, and set out some of the responsibilities of the organizations towards their staff, responsibilities arising out of the contract of employment. In 1973 and in 1982 the Court recognized the fundamental role of the tribunals in safeguarding officials against wrongful actions of the administration, or against encroachment on their rights by the General Assembly.

36. The Applicant respectfully submits that in Judgement No. 333, the *United Nations Administrative Tribunal failed to exercise the jurisdiction vested in it*, and committed errors of law relating to provisions of the Charter, such as to reverse the concept of official service within the United Nations progressively developed by the Court in its opinions *supra*. Wherefore the Applicant respectfully requests the Court to render an advisory opinion so as to conform Judgement No. 333 to its own previously stated principles, and to the letter and spirit of the Charter.

(Signed), Diana BOERNSTEIN,
Counsel for Vladimir Yakimetz.

26 June 1985.

Annex B

LEGAL OPINION

*on the Validity of Judgement No. 333 of the Administrative Tribunal of the United Nations with Respect to the Charter of the United Nations and the Fundamental Principles of International Civil Service Law*¹

I, the undersigned Alain Pellet, Professor in the University of North Paris and the Paris Institute of Political Studies, having been consulted by the Federation of International Civil Servants' Associations and the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System (New York) on the validity of Judgement No. 333 (*Yakimetz v. the Secretary-General of the United Nations*), rendered on 8 June 1984 by the Administrative Tribunal of the United Nations, have expressed the following opinion:

1. By a decision, communicated to him on 23 November 1983 confirmed on 21 December 1983, Mr. Vladimir Victorovich Yakimetz, a staff member of the United Nations, was informed of the non-renewal of his fixed-term appointment which was due to expire on 26 December 1983.

2. With the agreement of the Secretary-General, Mr. Yakimetz filed directly with the Administrative Tribunal of the United Nations, on 6 January 1984, 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."

On 8 June 1984, the Tribunal rejected the Application of Mr. Yakimetz by its Judgement No. 333. This Judgement was rendered by two votes to one; Mr. Arnold Kean, the Vice-President, attached the text of his dissenting opinion, and Mr. Endre Ustor, the President, made a statement.

2. In application of Article 11 of the Statute of the Tribunal, Mr.

¹ A plan of this legal opinion is attached hereto.

Yakimetz—hereinafter referred to as “the Applicant”—claiming that the Administrative Tribunal had exceeded its jurisdiction or competence, that it had not exercised jurisdiction vested in it, that it had committed an error of law relating to provisions of the Charter of the United Nations and that, in the proceedings, it had committed an essential error which had occasioned a failure of justice, requested the Committee on Applications for Review of Administrative Tribunal Judgements (hereinafter referred to as “the Committee”) to request the International Court of Justice for an advisory opinion on the question.

By 16 votes to 9, the Committee decided, on 23 August 1984, 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?”

3. For their part, the organizations representing the United Nations staff and, in particular, the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System (New York) and the Federation of International Civil Servants' Associations (FICSA) expressed their grave concern at the decision of the Tribunal and question the validity of Judgement No. 333.

By a letter of 19 December 1984, the President of FICSA requested that the following questions should be examined in the context of the current review procedure:

“(a) In this case, has the Secretary-General correctly applied the rules in force relating to the international civil service?

(b) Was the Secretary-General obliged to follow the guidelines given by the General Assembly in the matter and, if so, has he duly fulfilled this obligation?

(c) Has the Secretary-General acted in conformity with the relevant provisions of the Charter and, in particular, with Article 2, paragraph 1, and Articles 8, 100 and 101, and with the fundamental principle of the independence of the international civil service?

(d) And, more generally, assuming that the Secretary-General has acted in conformity with the law in force, has the Tribunal duly exercised jurisdiction vested in it?” (This letter is annexed hereto.)

Concurrently, the President of the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System (New York) stated, in a letter dated 21 December 1984, that he was gravely concerned about the repercussions of the case on the independence, integrity and neutrality of the international civil service and on the very concept of a career civil service, prin-

ciples essential to the effective functioning of the United Nations and to its survival as an international organization (this letter is annexed hereto.)

With the concurrence of the two above-mentioned organizations representing the staff, it was agreed that this legal opinion would be prepared once all the arguments of the parties were known and the observations, if any, had been formulated pursuant to Article 66 of the Statute of the International Court of Justice.

This legal opinion is therefore not intended to replace the arguments submitted to the Court on behalf of Mr. Yakimetz. However, as it is drafted for the purpose of the current review proceedings and as it comes after the exchange by the parties of their first submissions, it will focus mainly on commenting, at the level of principles, on the contentions presented during the review proceedings by the Applicant and the Respondent in the Administrative Tribunal (hereinafter referred to as "the Applicant" and "the Respondent") due regard being paid to the comments set forth in the written statements of the Governments of Canada, the United States, Italy and the Soviet Union.

4. The first step should be to attempt to determine the exact scope of the two questions addressed to the Court.

To a certain extent they may actually be thought of as irreconcilable or, at least, alternatives.

Thus, as the Secretary-General rightly points out:

"The real issue between the parties (. . .) was whether the Applicant's rights were violated by the decision of the Respondent not to grant him a further appointment." (Written Statement, para. 50.)

The Administrative Tribunal has responded to this question in the negative; the Applicant, supported by the United States and, less strongly, by Canada and Italy, criticizes this reply; the Respondent and the USSR Government support it. But it is quite remarkable to note that the respective positions held by the supporters of each of the two arguments advanced differ radically on one fundamental point:

- according to the Applicant (at least in his Application to the Committee on Applications—for his position in the Written Statement submitted to the Court is less precise), the Administrative Tribunal has failed to exercise jurisdiction vested in it *by not replying* to the question which was, in his view, the preliminary question, as to whether any legal impediment existed to his further employment (Application to the Committee, paras. 6 to 16);
- the United States Government apparently supports this analysis (Written Statement, pp. 181, et seq., *supra*) but nevertheless considers that the Tribunal has implicitly *admitted* that the Secretary-General was bound in this connection by the opposition of the Soviet authorities (*ibid.*, pp. 172 and 176, *supra*); the Italian Government's analysis of the Judgement is based on the same ambiguity (Written Statement, pp. 160, et seq., *supra*);
- the Secretary-General, for his part, considers that the Tribunal rightly *refrained from taking a decision* on the matter as the question was not at issue between the parties and not relevant to its adjudication (Written Statement, paras. 58 et seq.);
- whereas the Soviet Government takes the view that the Tribunal rightly *based itself* on the status of Mr. Yakimetz as a seconded official in order to deny him any right to further employment of any type (Written Statement, pp. 155-156, *supra*).

Actually even a superficial reading of the Judgement confirms this last

analysis (see para. 7 below); and it is precisely *because* the Tribunal has held the secondment of Mr. Yakimetz to constitute a legal impediment to his further employment that it erred on questions of law relating to provisions of the Charter of the United Nations.

5. The fact that the Administrative Tribunal held the secondment of Mr. Yakimetz to constitute a legal impediment to his further employment does not, however, mean that the reply to be given to the first question addressed to the Court must necessarily be negative.

For one thing, the Court has stated that

“the test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned *eo nomine* in the substantive part of a judgement: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based . . .” (*Application for a Review of Judgement No. 158, I.C.J. Reports 1973, p. 193*).

In other words, it is for the Court to determine whether the Tribunal, in order to conclude that a legal impediment to further employment existed, examined with sufficient care all the circumstances of the case and, in particular, the situation of the Applicant *vis-à-vis* the Soviet Union (see para. 8 below).

On the other hand it must be noted that the Committee worded this first question in an untypical way by itself indicating what, in its view, constituted non-exercise by the Tribunal of jurisdiction vested in it. The question arises as to whether, in so doing, it does not exceed its terms of reference by unduly limiting the powers which the Court derives from Article 11, paragraph 1, of the Statute of the Tribunal, a provision which has “primacy over the actual terms of the request” (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982, p. 349*) and appears to allow the Committee, which, even less than the Court, cannot be considered a court of appeal, only a choice out of four questions—which it can raise alternatively or jointly. If, as is reasonable, this interpretation—which seems to conform to the “customary” practice of the Committee (cf., *ibid.*, p. 345, and the Report of the Committee in the present case, A/AC.86/30, pp. 29, et seq., *supra*, paras. 8 et seq.)—is upheld by the Court, the Court will be led to address itself to the much more general question as to whether the Tribunal has not also omitted to exercise jurisdiction vested in it for reasons other than that adduced by the Committee.

This question, thus formulated, is particularly interesting because, on several occasions, the Administrative Tribunal, breaking with its tradition of in-depth verification of the facts adduced by the parties, has limited itself, in its Judgement No. 333, to taking for granted the facts as presented by the Respondent. In particular, the Tribunal seems to have replied very partially, or not at all, to the following questions:

- (i) Was Mr. Yakimetz, at the time of his appointment, really a Soviet civil servant?
- (ii) If it is admitted that he was then on secondment, could he have been considered still on secondment at the time when the problem of further employment arose?
- (iii) Independently of a possible right to career employment, was he entitled to claim a fixed-term appointment?
- (iv) Does not the position taken by the Respondent amount to placing undue impediments in the way of certain of the Applicant’s human rights?

(v) According to what procedures was the Secretary-General to give "every reasonable consideration" to the possibility of granting Mr. Yakimetz a permanent appointment?, etc.

All these questions, which were raised in the proceedings by the Applicant and whose solution was necessary for an exhaustive examination of the case, were not addressed by the Tribunal which did not therefore fully exercise jurisdiction vested in it.

6. Accordingly, it does not seem expedient to deal successively with the two questions presented to the Court. As the Italian Government observes, they are largely interdependent (Written Statement, pp. 158, et seq., *supra*): on the one hand, they are in part mutually exclusive—at least if the first is considered in the same way as it is in the Written Statements submitted to the Court during the first stage of the proceedings (see para. 4 above); on the other hand, it is largely because the Tribunal has not fully exercised jurisdiction vested in it that the Tribunal has committed, or endorsed, errors of law relating to the provisions of the Charter and, in particular, that it has failed to uphold those of its provisions which guarantee the independence of the international civil service (I) and those which assign a higher policy-making authority to the General Assembly in the matter (II).

I. THE TRIBUNAL HAS FAILED TO UPHOLD THE PROVISIONS OF THE CHARTER GUARANTEEING THE INDEPENDENCE OF THE INTERNATIONAL CIVIL SERVICE

7. An essential part of the discussions between the parties and the Governments which have submitted written statements to the International Court of Justice relates to the implications to be drawn from the situation of secondment from the Soviet civil service in which Mr. Yakimetz apparently found himself at the time of the events.

This emphasis on secondment is justified by the key role that this element plays in the reasoning followed by the Administrative Tribunal:

(i) In the first place, the Tribunal states that

"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" (Judgement, para. IV);

and the Tribunal holds that this position accords with its previous jurisprudence (*ibid.*);

(ii) passing on to the matter of legitimate expectancy of renewal, invoked by the Applicant, the Tribunal concludes:

"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" (para. XII);

(iii) and finally,

"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 . . . could not be modified except with the consent of all three parties." (Para. XIII.)

It is thus quite clear that the Administrative Tribunal has held the secondment of Mr. Yakimetz to be an impediment to the renewal of his appointment and even to his cherishing any legitimate expectancy whatsoever thereto (he did not relinquish this conviction until, at the end of the Judgement, it envisaged the implications of General Assembly resolution 37/126, a problem which will be examined later—see paras. 24 et seq.).

8. Quite obviously, the entire case built up by the Tribunal derives from the conviction of its members that the Applicant was in effect seconded from the Soviet civil service. This conviction is based on two elements: the reference to secondment in the last letter of appointment of Mr. Yakimetz, dated 8 December 1982, and the fact that, on 10 February 1983, he addressed to the Permanent Representative of the USSR to the United Nations and to the Secretary-General letters announcing his resignation from the Soviet civil service.

Conversely, there are several arguments to the contrary which are developed at length by the Applicant (cf. his Written Statement, pp. 126, et seq., *supra*) and may be summarized thus: in the Personal History forms, addressed to the United Nations in respect of his successive appointments, Mr. Yakimetz has always stated that he was not a "permanent civil servant" in his country; his previous letters of appointment made no mention of his secondment and, if secondment did not exist in 1977, it could not have existed in 1982 because, in the interval, he had continuously been an international civil servant, which excluded the possibility of his acquiring the status of a Soviet civil servant; finally, the mention of "secondment" in his last contract apparently results from a routine assumption of personnel services which are accustomed to considering all staff members of Soviet nationality to be seconded from the USSR civil service. Certainly the Court is in no way bound by the findings of the Administrative Tribunal, and it can examine "in full liberty the facts of the case or check the Tribunal's appreciation of the facts" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973*, p. 207). It may then find that the Applicant was not seconded from the Soviet civil service and may hold that, in taking the opposite view and hardly even examining the arguments put forward by Mr. Yakimetz in this connection, the Tribunal omitted to exercise jurisdiction vested in it.

This legal opinion will, however, continue with the issue of secondment—not as being the most likely hypothesis but because the implications which the Tribunal has drawn from the issue of secondment, whose existence it has postulated, raise the most serious problems of principle.

It would seem that, by sanctioning the existence of a separate and new category of appointment—fixed-term appointment "on secondment"—the Administrative Tribunal has seriously jeopardized the principle whereby the Secretary-General, on the one hand, and the staff, on the other hand, perform functions of an exclusively international nature.

It goes without saying that these considerations are particularly relevant as the Applicant was not in fact seconded from the Soviet civil service.

1. The Tribunal Has Sanctioned the Existence of a New Category of Appointment

9. In the appendix to his Written Statement, the Secretary-General specifies three categories of appointment: career appointment, fixed-term appointment, and fixed-term appointment on secondment. This triple breakdown is reiterated by the Soviet Government, whereas the United States refers to the notion of a

“contract of secondment”, and the Italian Government speaks of “the contract of a seconded employee”.

This presentation concords with Judgement No. 333 which, on two occasions, asserts that the Applicant’s appointment was “on secondment” (paras. II and XII); it is, nevertheless, not justified on that account.

10. There is in fact nothing in the Staff Regulations or Rules of the United Nations to support the idea of “appointments on secondment” which would constitute additions to the two categories of appointment, namely, temporary and permanent, provided for in Staff Regulation 4.5 and Staff Rules 104.12 and 104.13.

Quite on the contrary, as stipulated in Staff Rule 104.12:

“The fixed-term appointment . . . may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including persons temporarily seconded by national governments or institutions for service with the United Nations.”

Far from constituting a particular type of appointment, secondment is therefore simply a circumstance, among others, justifying a fixed-term appointment.

Not only is the opposite position held by the Tribunal unsupported by any of the texts which, by virtue of Article 2 of its Statute, the Tribunal is bound to uphold; it is also tantamount to admitting that a United Nations staff member may find himself, *vis-à-vis* the Organization, in a special legal situation that does not correspond to any statutory category and without any action on the part of United Nations bodies. Such a judicial interpretation is compatible neither with Article 97 nor with Article 101 of the Charter. It is, moreover, significant that the Secretary-General has so far been firmly opposed to the establishment of a new type of appointment for seconded staff members (see, for example, his comments on two recent reports of the Joint Inspection Unit in documents A/36/378, paras. 12 and 13 and A/36/432/Add.2, para. 13).

11. As emphasized by the Respondent, “the term ‘secondment’ is not defined in the Staff Rules” (Written Statement, appendix, para. 6), any more than it is in any statutory or regulatory instrument of the United Nations.

The sole exception in this connection seems to be the one in Article 1 (*d*) of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances, concluded in 1972. This provision reads as follows:

“*Secondment* is the movement of a staff member from one organization to another for a fixed period, normally not exceeding two years, during which he will normally be paid and, except as otherwise provided hereafter, be subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization.”

This definition can be transposed, though not without precautions to the hypothesis of the secondment of a staff member who is a national of a State member of an international organization.

Furthermore, in its Judgement No. 92 (*Higgins v. the SG of IMCO*), the Administrative Tribunal gave a general definition of secondment that is valid in all hypotheses:

“the term ‘secondment’ is well-known in administrative law. It implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of employment and retains his right to promotion and to retirement benefits”.

This approach—quite different from that taken by the Secretary-General (Written Statement, appendix, sec. III)—is based on the idea that secondment establishes a special legal relationship between the staff member and the releasing establishment. On the other hand, *vis-à-vis* the receiving establishment, secondment is a simple fact which certainly does not preclude the latter establishment from weighing it (just as it does in respect of certain factors which it cannot change, such as the age, nationality, qualifications, etc., of the person concerned) but, of course, on the obvious condition that this does not run counter to its rules, especially if they derive from the Organization's public policy. It is *a fortiori* inadmissible that the existence of a special category of appointment, in the determination of which the Organization has played no part, should be sanctioned.

2. The Tribunal Has Failed to Uphold the Discretionary Power of the Secretary-General in the Matter

12. In his Written Statement to the Court, Mr. Yakimetz states that the impugned Judgement "widens the discretionary powers of the Secretary-General at the expense of both the staff and the General Assembly" (p. 109, *supra*). While this comment is accurate as regards the implications drawn by the Tribunal from the adoption by the General Assembly of resolution 37/126 (see para. 24 below), it is not, on the other hand, applicable to the first part of Judgement No. 333 (paras. II to XIII).

On the contrary, since the Tribunal has held that the chief administrative officer of the Secretariat had no alternative but to bow to the refusal of the Soviet Union to renew the Applicant's secondment, it has erroneously admitted that the Secretary-General could surrender the discretionary power conferred by the Charter on the Secretary-General in this connection.

The Charter quite clearly confers discretionary power on the Secretary-General with regard to the recruitment of staff: as chief administrative officer of the Organization, to use the words of Article 97, it is incumbent on him to appoint the staff by virtue of Article 101, paragraph 1, without receiving "instructions from any government or from any other authority external to the Organization", as laid down in Article 100, paragraph 1.

This principle, recognized by a unanimous doctrine (see, for example, Mohammed Bedjaoui, *Fonction publique internationale et influences nationales*, Pedone, Paris 1958, pp. 60 et seq., or Alain Plantey, *Droit et pratique de la fonction publique internationale*, CNRS, Paris, 1977, particularly pp. 301 et seq.), is upheld by an absolutely consistent jurisprudence, particularly as regards the renewal (or non-renewal) of fixed-term appointments (cf. among very many decisions, UNAT, 287, *Harkins v. UNRWA*, or ILOAT, 131, *Segers v. WHO*; 251, *De Sanctis v. FAO*; 415, *Halliwell v. WHO*, etc.).

There seems, moreover, to be no disagreement between the parties on this issue, as both the Applicant and the Respondent base themselves (see Judgement, para. XIX) on ILO Administrative Tribunal Judgment No. 431 (*Rosescu v. IAEA*) which affirmed both the principle of the chief administrative officer's discretionary power and the limits to this power; Judgement No. 191 of the same Tribunal has given a particularly clear definition of these limits:

"Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has

been followed and, as regards its legality under the Organization's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority." (ILOAT, 191, *Ballo v. UNESCO*.)

Hence the only question that arises is whether, in the case at issue, the Secretary-General exercised the discretionary power vested in him and, if so, whether such exercise was consistent with the limitations inherent in the very concept of discretionary power.

13. Actually, in accordance with an absolutely general principle of law, any authority invested with such a discretionary power cannot leave it to be exercised by a third party (see M. B. Akehurst, *The Law Governing Employment in International Organizations*, Cambridge U.P., 1967, p. 153). And, while international administrative jurisprudence on this point is relatively scarce—heads of Secretariats tend to exceed their powers rather than to refrain from using them—some judicial authorities have nevertheless been led to rescind the acts of authorities which had erroneously held that the power vested in them was tied (see ILOAT, 122, *Chadsey v. UPU*; 294, *Connolly-Battisti (No. 4) v. FAO*; see also UNAT, 209, *Corrado v. UN SG*).

In the same spirit, the international administrative tribunals censure decisions submitted to them when, voluntarily or inadvertently, the Respondent has based his case on an incomplete dossier or has omitted to take essential facts into account (see UNAT, 18, *Crawford v. UN SG*; 158, *Fasla v. UN SG* and, especially, the abundant jurisprudence of the ILOAT, e.g.: 191, *Ballo v. UNESCO*; 230, *Stracey v. FAO*, or 388, *Babbar v. FAO*).

14. It may, however, happen that the discretionary power is restricted or slanted: this is so when statutory provisions require the head of the Secretariat to take certain expressly stated factors into account; on such occasions the tribunals, without taking the place of the authority in which the power of decision is vested, make sure that the said authority has actually taken these elements into account (cf. UNAT, 62, *Julhiard v. UN SG* or ILOAT, 415, *Halliwell v. WHO*).

Such was precisely the situation in this case, because Article 101, paragraph 3, of the Charter makes the "necessity of securing the highest standards of efficiency, competence, and integrity" the "paramount consideration" which must motivate the competent bodies "in the employment of the staff and in the determination of the conditions of service".

Certainly a "paramount consideration" is not an "exclusive consideration", and the Respondent is right to infer that he can take into account all the factors that will enable him to decide in the interest of the Organization (see *Written Statement*, p. 100, *supra*). And it is doubtful that, in the context of review proceedings, the International Court of Justice would agree to substitute its own opinion for the appraisal made by the Secretary-General in the light of the various factors to be taken into consideration.

But such is not the background to the problem that arises in the present case: the Court is not being asked to say what the real interest of the Organization is, but simply to find that the Administrative Tribunal has committed an error of law relating to the provisions of the Charter by sanctioning the fact that the Secretary-General did not seek to determine what that interest was in the light of all the factors which it was incumbent on him to take into account and, first and foremost, the "paramount consideration" specified by the Charter itself.

In this sense, the case at issue does not differ, at least in terms of principles, from the case which recently resulted in Administrative Tribunal Judgement No. 310 (*Estabial v. UN SG*). In this case, the Tribunal held that it was not for the Secretary-General to alter the conditions for staff recruitment set forth in Article 101 of the Charter and Staff Regulation 4.2,

“by establishing as a ‘paramount’ condition the search, however, legitimate, for ‘as wide a geographical basis as possible’, thereby eliminating the paramount condition set by the Charter in the interests of the service”,

although the second sentence of Article 101, paragraph 3, of the Charter expressly makes equitable geographical distribution a factor to be taken into account (in the same sense, see NATO Appeals Committee Decision No. 65 (a), 13 November 1965).

The same considerations should have been applied in the present case. It is a fact that at no time were the strictly professional merits of the Applicant considered, and Mr. Yakimetz was right in stating that they are not mentioned at all in the grounds for the Judgement (Written Statement, p. 133, *supra*), which is further evidence that the exercise by the Tribunal of the jurisdiction vested in it was incomplete.

15. In fact the Secretary-General has not only failed to take account of the “paramount consideration” specified in the Charter but has also considered, improperly, that he could not take it into account because of the opposition of the Soviet Government to extending the renewal of Mr. Yakimetz’s appointment. He has thus erroneously surrendered the discretionary power available to him.

In the present proceedings before the Court, the Respondent affirms that:

“Even in the case of appointments on secondment, the Respondent is free to decide whether such particular appointment is in the interests of the Organization.” (Written Statement, para. 102.)

Thus he seems to be asserting the existence of the discretionary power which, in this matter, is indeed vested in him (see also the Respondent’s comments to the Tribunal, quoted in the Written Statement, para. 58).

But, immediately after this correct statement, he adds:

“If he considers it to be so, the Respondent needs to obtain the consent of the Government (or other permanent employer) because secondment is, of necessity, a tripartite affair.” (*Ibid.*)

These two propositions are clearly incompatible, as the second amounts to admitting that the Secretary-General cannot exercise the discretionary power theoretically vested in him, because of the veto power that would be exercised by the seconding authority.

It should also be borne in mind that while, before the Court (and already to some extent before the Administrative Tribunal), the Respondent modifies his initial position slightly, it is in respect of the reason invoked in support of the impugned decision that the legality of the decision must be appraised (see UNAT, 89, *Young v. UN SG*, or ILOAT, 388, *Babbar v. FAO*); now, as the Applicant has shown, it is because the Secretary-General considered himself bound by the views of the Soviet Government that he adopted the decision at issue (Written Statement, p. 147, *supra*). Moreover, it is this very position which was endorsed by the Tribunal (see para. 7 above) and, in the context of the review proceedings, the Court is not called upon to rule on the positions taken

in the proceedings by the Applicant but on the merits of the Judgement with respect to the questions addressed to it.

16. It is true that, in support of his main argument, reiterated in the impugned Judgement, the Respondent invoked the authority of an earlier jurisprudence of the Administrative Tribunal (A/AC.86/R.118, p. 5) which, in its Judgements No. 92 (*Higgins v. SG of IMCO*) and No. 192 (*Levcik v. UN SG*), held that in every secondment, "there are really three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned", and 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. When a Government which has seconded to the Secretariat of the United Nations refuses to extend the secondment, the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the Government."

Independently of the limited evidentiary value of these precedents—the *Higgins* case concerned an inter-agency secondment and, in the *Levcik* case, the Tribunal held that there was no secondment—it is far from evident that the inferences which the Judgement (para. IV) and the Respondent (Written Statement, appendix, para. 7) draw from his jurisprudence are correct. The sentences quoted are actually ambiguous.

On the one hand, it is quite clear that extension of the secondment itself requires the consent of the initial employer, but this is a simple fact so far as the Organization is concerned (see para. 11 above); there is no "trilateral agreement on secondment" between the releasing State, the Organization and the person concerned (or, in any case, no evidence of this has been furnished and the regularity of such an agreement could be disputed); actually an internal practice of the Soviet Union has been followed (the facts of which, moreover, Mr. Yakimetz contests on the basis of not insubstantial arguments—see para. 8 above), and this point was mentioned in the Applicant's letter of appointment.

This fact, admitted by the staff member by his signature and known to the Organization, may be taken into account by the Organization at the time of appointment, and it is legitimate for it "to take account" of any change that may occur in this connection.

The Canadian Government rightly points out that "secondments may be a useful tool to encourage a wider selection of staff both geographically and in terms of experience" (Written Statement, p. 166, *supra*); and this tool would have scarcely any meaning unless the employer consenting to the secondment had some reasonable assurance that the arguments that he might present for the return of the person concerned to his releasing establishment would be considered with objectivity.

17. But taking into account the views expressed by the Government of a member State in order to determine what constitutes the interest of the Organization is one thing; to make this the exclusive basis, in this case, for the position adopted is another and very different matter.

"If a [head of a Secretariat] 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 organization 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 organization's interests for the sole purpose of satisfying a member State. The organization has an interest in being on good terms with all member States, but that is no valid ground for a director-general to fall in with the wishes of every one of them." (ILOAT, 431, *Rosescu v. IAEA.*)

Judgement No. 333 (para. XIX) emphasizes that the circumstances of the *Rosescu* case were very different from those of the present case; the essential difference resides in the fact that, in the *Rosescu* case, the Respondent denied that he had yielded to the pressures of Romania which was opposed to the renewal of the Applicant's appointment, whereas, in the present case, the Secretary-General expressly holds that the opposition of the Soviet Union to any extension of the secondment constitutes a legal impediment to renewal of the appointment; furthermore, in the two cases:

- The Applicant was seconded from his national civil service (Mr. Yakimetz contests this but Mr. Rosescu apparently never denied it);
- the person concerned was a staff member whom the service to which he was assigned wished to continue employing;
- the releasing State was opposed to the granting of a further appointment;
- and the reinstatement of the Applicant in his original post could not be contemplated.

Drawing the inference, the ILO Administrative Tribunal rescinded the impugned decision which could only have been taken "at least to a large extent, [in] a desire to defer to the will of the Romanian authorities" (*ibid.*), thus confirming that, while an organization may take account of the views of member States, it cannot reach its decision solely in the light of the opposition of such a State to a measure affecting a staff member.

"Such an objection . . . cannot be reconciled with the fundamental principle of the independence of an international organization in relation to its member States; it ought not to form any part of the legal basis of the decision impugned.

In restricting itself to this single reason, which is tainted by illegality, and in omitting to exercise its discretionary power . . . the (Respondent) misinterpreted its own competence, and the decision impugned must accordingly be quashed" (ILOAT, 122, *Chadsey v. UPU*);

"The Organization cannot bow to a government's wishes before making sure that they are compatible with its own interests" (ILOAT, 448, *Troncoso v. PAHO/WHO*);

"[It] must enjoy the full sovereignty of its own authority and must not be to any extent subject to external influence emanating from any one of its member States; in this respect the most strict and clear provisions guarantee its complete independence and that of its officials" (ILOAT, 15, *Leff v. UNESCO*; see also 17, *In Re Duberg*).

This was expressed very forcefully and concisely by the Appeals Board of the International Centre for Advanced Mediterranean Agronomic Studies (ICAMAS) in the first decision which it rendered, on 10 March 1972, under the chairmanship of Professor Maresca, in a case very similar to the present one:

the services of the Applicant, an administrative officer in the French Ministry of the Interior and seconded to the Organization, had been terminated because the French Government had indicated that it would not extend his secondment beyond the specified date. The Appeals Board declared:

“According to a general principle of the law of international organizations, each organization enjoys full autonomy *vis-à-vis* member States and particularly in its relations with its staff, so that the recall of an official seconded to such an organization by his releasing State cannot *ipso facto* determine the termination of his functions within the said organization.” (ICAMAS Appeals Board, *Brault v. ICAMAS.*)

For having taken the opposite view, the United Nations Administrative Tribunal has permitted the fundamental principle of the independence of the Secretary-General *vis-à-vis* member States to be seriously distorted. And this is all the more certainly an error of law relating to the provisions of the Charter because this principle is reiterated in Article 100 of the United Nations Charter. At the same time, the Administrative Tribunal has failed to uphold Article 101, paragraph 3—as it has sanctioned the Secretary-General’s failure to respect the “paramount consideration” established by that provision—and it has erroneously permitted substitution by the Secretary-General of a competence deriving from the discretionary power conferred on him by Articles 97 and 101, paragraph 1, in the interest of the Organization.

3. The Tribunal Has Failed to Uphold Respect for the Fundamental Guarantees Accorded to United Nations Staff

18. By its grounds, Judgement No. 333 is incompatible with the Charter provisions that make the Secretary-General the sole judge of the interest of the Organization in the matter of staff recruitment and, more generally, of staff policy—subject only to complying with the instructions of the Charter itself or the General Assembly. By its implications, this decision also poses serious threats for the fundamental guarantees accorded by the Charter to United Nations staff (and, for not having concerned itself therewith in spite of the arguments developed at length on this aspect by the Applicant, the Administrative Tribunal has failed to exercise fully the jurisdiction vested in it).

By making seconded staff members “second-class” officials, the impugned Judgement actually jeopardizes both the rights to which Mr. Yakimetz is entitled under the Charter as an international civil servant and what might be called his “professional” or “statutory” rights, and it threatens the exercise by the Applicant of certain human rights which are guaranteed to every human being and for which the United Nations must ensure respect.

In fact, the adjudication

- does not guarantee the independence of certain staff members *vis-à-vis* member States;
- introduces discrimination as between staff members;
- may ultimately endanger exercise of the right of every individual to change his or her nationality;
- and excludes the right to change one’s employer.

19. Independence *vis-à-vis* governments and any other authority external to the Organization is both a right and a duty not only for the Secretary-General (see above) but also for all staff members. It is laid down and guaranteed by Article 100 of the Charter:

"1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

The principle was accepted even before the founding of the United Nations, Mme. Bastid, for example, wrote as follows:

"An international institution must be under the control and direction of the representatives of States, but it is not admissible that international civil servants should be in any sense under the control of their State of origin, that being contrary to the concept of international service and even of civil service. In legal terms, an attempt by a State to influence its nationals who are international civil servants runs counter to the obligations which it has contracted, in particular on the establishment of the international body; in practical and administrative terms, any provision that might encroach on the authority of the chief administrative officer and might even take its place is liable to introduce, within the international body, an element of disintegration all of whose implications cannot be evaluated in advance." (Suzanne Basdevant, *Les fonctionnaires internationaux*, Sirey, Paris, 1931, p. 155.)

And today authors are agreed on viewing the independence accorded to staff members *vis-à-vis* States and, in particular, *vis-à-vis* their countries of origin, as the keystone of the international civil service system conceived 40 years ago in San Francisco (cf. M. B. Akehurst, *op. cit.*, pp. 5 ff.; M. Bedjaoui, *op. cit.*, *passim*, not. pp. 57 ff.; Georges Langrod, *La fonction publique internationale*, Sijthoff, Leyde, pp. 75 ff.; Theodor Meron, "Status and Independence of the International Civil Service", *RCADI* 1980-II, No. 167, pp. 285-384, *passim*; A. Plantey, *op. cit.*, pp. 112 ff.; S. M. Schwebel, "The International Character of the Secretariat of the United Nations", *BYBIL* 1953, pp. 71-115; Jean Siotis, *Essai sur le secrétariat international*, Droz, Geneva, p. 209; etc.).

Although they have rarely had occasion to apply the principle directly, international administrative authorities have sometimes reaffirmed its importance (see, in this connection, the jurisprudence quoted in the Applicant's Written Statement and the judgements rendered by the Administrative Tribunals of the ILO and the United Nations in cases arising from the consequences of the "witch hunt" in the United States, especially ILOAT, 15, *Leff v. UNESCO*; 17, *Duberg v. UNESCO*; UNAT, 18, *Crawford v. the Secretary-General*) and, in its above-mentioned decision (see para. 17 above), the ICAMAS Appeals Board emphasized, precisely on the occasion of the non-renewal of the appointment of a seconded staff member because of the opposition of the State of origin, that:

"It is a general principle that the independence of the international civil servant would be seriously jeopardized if a member State were able to interfere at its own discretion in the relationship between the international organization and its staff member."

20. The fact of making the renewal of any seconded staff member's service

relationship subject to the agreement of his government is incompatible with the very principle of his independence *vis-à-vis* that government.

The grounds on which the Court based its advisory opinion of 11 April 1949 in order to affirm the right of international civil servants to the protection of their Organization provide very sound guidelines in this connection:

“To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter.” (*I.C.J. Reports 1949*, p. 183.)

The same reasoning applies in this case: the independence of international civil servants seconded from their national civil service would be gravely jeopardized if the professional future of the persons concerned within the Organization depended entirely on the goodwill of the releasing establishment; not only would the insecurity inherent in fixed-term appointments be considerably increased, but such a staff member would also have to be blessed with extraordinary strength of character, assuming the occasion arose, to make the interest of the Organization—which could not guarantee him continuous employment—take primacy over the possibly conflicting interest, in a given case, of his government, his former and future employer on whom his future professional career would entirely depend (see, on this point, the comments of the Italian Government, p. 158, *supra*).

The facts given in the impugned Judgement also show that the possibility of pressure being exerted by the government of a member State both on the Organization itself and on staff members of its nationality is not just a schoolroom hypothesis; did not the Soviet authorities, for example, intervene in order to limit to one year the previous renewal of Mr. Yakimetz's appointment (Judgement, para. X); and did they not contemplate “replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant”, and suggest to him that he leave for Moscow for that purpose (*ibid.*, para. XI)? These practices ought to be condemned *per se*; the Administrative Tribunal's Judgement, by dangling a sword of Damocles over the heads of seconded staff members, legitimizes such practices or, in any event, opens up very encouraging prospects for their use.

21. At the same time, the Tribunal introduces inequalities between staff members to the extent that it severely limits the career prospects of international civil servants seconded from their national civil services.

Unquestionably, there exists no actual “right to a career” in the international civil service, and the problem is made all the more complex by the fact that fixed-term appointments do not in principle enable their holders to count on their renewal. The fact nevertheless remains that

“when he takes up service with an organization, an official may reasonably hope some day to advance in grade” (ILOAT, 365, *Lamadie (No. 2) and Kraanen v. IPI*; see also No. 526, *Puel v. WMO*),

and that staff regulations or rules make no distinction in this connection in terms of types of appointment. Owing to the particular precariousness of their situation and to the influence which, according to the Tribunal, States are en-

titled to exert on decisions affecting their seconded staff members, these staff members find themselves in a decidedly inferior situation in this respect; indeed, as pointed out by Mr. Yakimetz (Written Statement, pp. 141, et seq., *supra*), this inequality between staff members is accompanied by an inequality between member States because, while the Socialist countries are certainly not the only ones to practise secondment, they are the only ones to do so in a completely systematic manner—see, on a related problem, M. Bedjaoui, *op. cit.*, page 70, who shows that the difficulty already existed, on a much smaller scale, in the 1950s.

The Applicant argues that Article 8 of the Charter demands equal treatment of all staff members (Written Statement, pp. 141, et seq., *supra*). However, while a literal reading of this provision justifies this conclusion, it is not the dominant interpretation which holds that Article 8 prohibits discrimination within the Organization on the basis of gender.

Obviously it does not follow from this that the United Nations must not respect, in its staff relations, the fundamental principle of non-discrimination which, reiterated several times in the Charter (cf. the Preamble or Art. 1, para. 3, Art. 13, para. 1.b, Art. 55.c, etc.), is absolutely general in scope.

According to President Manfred Lachs,

“If the United Nations is to promote, ‘With a view to the creation of conditions of stability and well-being . . . based on respect for the principle of equal rights . . . of peoples’, ‘conditions of economic and social progress and development’ (Charter, Art. 55), it is obviously bound to proclaim and practise the same principles within its internal legal system: not only to avoid but to bar all types of discrimination among those serving this Organization.” (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982, p. 419.*)

22. The same reasoning applies to other human rights whose exercise is compromised by the impugned Judgement.

The question arises, in the first place in the context of the rights of every human being to leave his or her country, to seek and avail himself or herself of asylum in any other country and to change his or her nationality (rights proclaimed respectively in Arts. 13, 14 and 15 of the Universal Declaration of Human Rights of 10 December 1948).

It is in the Written Statement of the United States Government that this problem is addressed in most detail; but it is addressed rather ambiguously because, after criticizing the Administrative Tribunal for holding that the Secretary-General, in his decision, had to take into account the change of nationality requested by Mr. Yakimetz (pp. 177, et seq., *supra*), that Government concedes that the Judgement admits, implicitly, that that was not a bar to renewal of the appointment (pp. 183, et seq., *supra*).

If that is so, it is unlikely that the Court will accede to the wish expressed by the United States Government that the Court should confirm explicitly this implicit finding of the Tribunal so as to clarify the law (*ibid.*, p. 183, *supra*), for that is not the purpose of review proceedings.

But it is not certain that the United States interpretation of paragraph XII of Judgement No. 333 is the correct one: even though the Tribunal presents the problem with some hesitation (it refers to the “question of his suitability as an international civil servant”), it nevertheless also refers to its Judgement No. 326 (*Fischman v. UN SG*) and to documents on which it had based itself in order to hold that, *a priori*, an application for permanent residence status in the United States “in no way represents an interest of the United Nations”.

Regardless of the fact that the circular quoted was not in force in 1983, as Mr. Yakimetz (*Written Statement*, p. 136, *supra*) shows, the question arises as to whether this remark does not reflect some regrettable confusion on the part of the Tribunal; either, as seems to be admitted in the Judgement itself (para. XII, *in fine*), it is a needless digression whose only point would be to create suspicion about the Applicant's personality; or this reasoning constitutes support of the finding and must be analysed to be an error of law because it would mean that international civil servants find themselves denied the rights referred to above which belong to every man and woman. This is the position unless one admits, as the Administrative Tribunal has done in its Judgement No. 326 (*Fischman*, above), that the person concerned could "resign from his post and release himself thereby from all constraints of the service", but to enjoy one's internationally proclaimed human rights at the expense of losing one's job is very uncompromising logic and would create an unacceptable dilemma.

While there is, without doubt, a great deal of truth and wisdom in the idea that, so far as possible, international civil servants must not be "intellectual or spiritual stateless persons", this can be nothing more than a general political principle which may not be invoked as a rule of law in any given case against a particular civil servant. And it would be particularly unacceptable in the present case since Mr. Yakimetz made it known very quickly that he intended to acquire the nationality of another State Member of the Organization.

As Judge Bedjaoui wrote, strictly in line with the ILO Administrative Tribunal's jurisprudence of the 1950s (see ILOAT, 17, *Duberg v. UNESCO*);

"Respect for alleged national loyalty is legally irreconcilable, whatever may have been said about it, with international loyalty and must remain alien to the international civil service" (*op. cit.*, p. 162).

23. Whatever uncertainties may exist concerning the scope of the Judgement in question as regards the right to change one's nationality, there is another human right which this decision certainly violates: that of the free choice of one's work and of one's employer, to which every human being is entitled (by virtue, *inter alia*, of Article 23 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Economic, Social and Cultural Rights of 6 December 1966).

While, strictly speaking, the Judgement did not require the Applicant to return to the service of his former employer, which, moreover, would have exceeded the Tribunal's competence and would hardly have been realistic—excluded from the international civil service, Mr. Yakimetz is free to seek work elsewhere. But, here again, the reasoning is based on very uncompromising logic as it implies the existence of an automatic link between the end of secondment and the end of employment in the United Nations (see, in particular, para. 7 above), the Administrative Tribunal actually requires seconded staff members to resume their former function or to take a very serious risk. It is, moreover, the existence of this risk which exposes staff members "on secondment" most to pressures from their releasing State (see para. 20 above).

One might well ask whether the very notion of secondment does not imply, for the seconded person, an obligation to return to the service of his original employer on the expiry of the period specified. Apart from the fact that, in Judgement No. 333, the Tribunal says nothing of the kind and limits itself to holding that the person concerned "must face the consequences for his actions" (para. XII), it would seem that such an excessive obligation imposed by law and one that contravenes recognized human rights should be justified only by

express and clear rules; no such rules were invoked either by the Respondent or the Administrative Tribunal.

Furthermore, the very definition of secondment (see para. 11 above) indicates that secondment is conceived first of all in the interest of the staff member: he derives therefrom the assurance that he can be reinstated in his releasing establishment. The earlier jurisprudence of international administrative tribunals is also clearly established in this sense, as pointed out in the dissenting opinion of Mr. Kean, attached to the Judgement, which quotes the cases of *Higgins*, *Levcik* and *Rosescu* (No. 9), but there are very many more examples; thus, in its Judgement No. 56 (*Aglion v. UN SG*), the United Nations Administrative Tribunal made it clear that a United Nations staff member temporarily assigned to the Technical Assistance Board could, at the end of such assignment, be reinstated in a Secretariat post. Conversely, the same Tribunal held that another United Nations staff member, seconded to the Technical Assistance Board, had duly resigned from his original post and the Tribunal had drawn the relevant inferences (UNAT, 95, *Sikand v. UN SG*).

This last decision stands in sharp contrast to Judgement No. 333 in which the Tribunal refused to ascribe any legal effect whatsoever to the resignation from the Soviet civil service submitted by the Applicant on 10 February 1983.

Hence the Administrative Tribunal has found that the Applicant could not release himself from the professional bond linking him—according to the Tribunal—to the Government of his country and has not recognized the right of Mr. Yakimetz—a right to which every person is entitled—to change his employer.

Furthermore, following this line of logic, by limiting itself to examining the question as to whether the Applicant was entitled to renewal of his *secondment* (as this is particularly apparent from the partial finding set forth in paragraph XIII of the Judgement) whereas the real problem was that of the renewal of the *appointment*, the Tribunal has failed to exercise jurisdiction vested in it on an essential point.

II. THE TRIBUNAL HAS FAILED TO UPHOLD THE SOVEREIGN POLICY-MAKING POWER VESTED IN THE GENERAL ASSEMBLY

24. Curiously, the Administrative Tribunal, which has based itself on the particular nature which, according to it, should be attributed to fixed-term appointments “on secondment” in order to deny any entitlement to, and any legitimate expectancy of, renewal of the service relationship of Mr. Yakimetz on a temporary basis, makes almost no reference to secondment in the part of the Judgement where closer examination is given to the question of granting the Applicant a career appointment (paras. XIV-XX).

It is true that this passage of the decision is difficult to interpret because one of the two members of the “majority”, Mr. E. Ustor, the President, dissociates himself from the reasoning followed on this point and states, with regard to the fact of secondment that “the Applicant was in my view not eligible for consideration for a career employment”, whereas almost the entire dissenting opinion of the Vice-President, A. Kean, is devoted to establishing not only that the Applicant was entitled to every reasonable consideration for a career employment but also that this was not done.

In any event the result is that this part of the Judgement is approved only by one member of the Tribunal.

It does not, however, seem necessary to dwell on the statement of the President of the Tribunal: being based on the same reasoning as that followed in the

first part of the Judgement, it comes up against the same objections and calls for the same comments.

So far as the Judgement itself is concerned, it raises mainly two problems: that of the legal merits of resolution 37/126 and, above all, that of the content of the resultant obligations for the Secretary-General.

25. As regards the first point, attention must be drawn to the unusual nature of the Tribunal's course of action which begins by establishing at length the fact that "the Applicant did not draw sufficiently early the Respondent's attention to the resolution under discussion" (para. XVI) and then continues with the words "the Respondent was bound nonetheless by its terms" (*ibid.*).

While this is so, the Judgement, the dissenting judge and the parties (Written Statement of the Applicant, p. 145, *supra*, and of the Respondent, p. 91, *supra*) seem to agree in finding that the Secretary-General was obliged to implement resolution 37/126 in spite of the fact that it had not been formally incorporated into the Staff Regulations (besides Judgement No. 249, *Smith v. UN SG*, quoted in the dissenting opinion, see, for example, UNAT, 57, *Harris and others v. UN SG*).

This opinion can be taken to be unanimous, because the President, Mr. Ustor, in his statement and perhaps the USSR Government in its Written Statement, dispute not the mandatory nature of the resolution but its applicability to the present case. All the same, it is consistent with the provisions of Article 101, paragraph 1, of the Charter and with the sovereign authority exercised by the General Assembly over the Secretary-General under Article 97.

26. With regard to the merits, there is no doubt that the laconic wording of the relevant provision makes for great uncertainty concerning its exact scope:

"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."

The least of these uncertainties is probably the one which caused President Ustor to differ from his colleagues and which concerns the question of the applicability of the resolution to seconded staff. To this question the dissenting opinion replies in the affirmative on the basis of altogether convincing arguments and, in particular, of the preparatory work done on the resolution which leaves no room for doubt (No. 11). In any case, for the reason given in paragraph 24 above, there is no need to go into this controversy in detail.

Given the reticence of the text and, to a very large extent, of the preparatory work—dealing with the principle raised by the resolution but scarcely touching on the problem of its implementation—it is certainly more difficult to determine the meaning of the expression "shall be given every reasonable consideration". As pointed out in the Judgement, "The General Assembly resolution is silent on who should give 'every reasonable consideration' and by what procedure" (para. XVIII); and there is reason to feel somewhat diffident about admitting that this last point has been cleared up by resolution 38/232 whereby the General Assembly recommends that the organizations should normally dispense with the requirement for a probationary appointment following a period of five years' satisfactory service: this text actually moves a step further on from the expectancy created by resolution 37/126, but it by no means specifies the procedure to be followed for its implementation.

27. In his Written Statement, the Respondent considers that, as the text adopted by the General Assembly is silent on the point, he has full discretionary power with regard to its implementation and

“is entitled to adopt informal procedures rather than use the formal advisory machinery established by the staff rules such as the Appointment and Promotion Board” (para. 95).

So far as its principle is concerned, this position appears to be correct and in conformity with the provisions of Article 101, paragraph 1, of the Charter which allows the Secretary-General great freedom of action in what might be called the “gaps in the rules” left by the General Assembly. But, as already stressed, discretionary power “must not be confused with arbitrary power” (see para. 12 above). In particular, it is important that the Secretary-General should decide only after a reasonable procedure enables him to be fully informed.

28. In the present case it seems difficult to take this condition for granted.

First of all, the question arises as to whether the Secretary-General was entitled to dispense with the intervention of the Appointment and Promotion Board which, under Staff Rule 104.14.f. (i)—adopted by the General Assembly—has the function of recommending in respect of “proposed probationary appointments and other proposed appointments of a probable duration of one year or more”, for it is hard to see in what respect resolution 37/126 should imply any exception whatsoever to the pre-existing procedures. In any case, in accordance with a general principle of law, consistently applied by international judicial authorities, the chief administrative officer of the Secretariat must, when taking a decision affecting the status of a staff member, seek to apprise himself of all aspects of the problem (see, for example, UNAT, 203, *Sengal v. UN SG*, or ILOAT, 32, *Garcin v. UNESCO*; 136, *Goyal v. UNESCO* or 268, *Bâ v. WHO*). Now, in the present case, the Secretary-General did not establish any body and did not seek any impartial opinion before taking the decision not to grant Mr. Yakimetz a career appointment.

He maintained this attitude during the adversary proceedings in the Administrative Tribunal, limiting himself to affirming that he had “given reasonable consideration” to the Applicant’s case for the purposes of a career appointment but without giving any further explanation either about the procedure followed or about the grounds for his decision. Thus, the Respondent has not fulfilled the obligation incumbent on him

“to enable the Court to render a complete decision on the dispute” (ILOAT, 574, *Hubeau v. EPO*, see also, for example, UNAT, 4, *Howrani and others v. UN SG* or 131, *Restrepo v. UN SG*).

In comparable cases, the Tribunal has censured such an attitude on the part of the Respondent; thus, in its Judgement No. 310 (*Estabial*, above):

“The Applicant and the Respondent disagree as to whether the Applicant’s candidature (for a vacancy) was ruled out without being taken into consideration or examined (. . .). The Tribunal’s first task was to settle this point”,

although the Respondent had declared that he had “carefully examined” this candidature. The Tribunal has done no such thing in the present case, any more than it has used the powers of inquiry, vested in it under Articles 10 and 17 of its Rules, to obtain information, thereby omitting to exercise jurisdiction vested in it.

In the circumstances of the present case, the Tribunal’s passivity is all the more open to criticism because it led the Tribunal to put forward a hypothesis concerning the grounds on which the Respondent based its decision, grounds which cannot justify the decision:

“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” (para. XVIII).

Contrary to what the Respondent writes, the Tribunal has not “found” that “all the circumstances were considered” (Written Statement, para. 96): it has in fact committed the same error on questions of law relating to the provisions of the Charter as that which is analysed in paragraphs 12 et seq. above relating to the non-renewal of the Applicant’s appointment.

In addition, it seems unacceptable that the Secretary-General, whose powers in respect of staff recruitment are, by Article 101, paragraph 1, of the Charter, made subject to compliance with the rules laid down by the General Assembly, should void them of their substance and exempt himself from all control in their application. By tolerating this attitude, the Administrative Tribunal has failed to comply with the rules laid down by the Charter relating to the hierarchy of the respective competencies of the General Assembly and of the Secretary-General in this field.

29. In conclusion, there are, in Judgement No. 333 of the Administrative Tribunal of the United Nations several errors in questions of law relating to provisions of the Charter and to the fundamental principles of international civil service law, and it appears that the Tribunal has omitted to exercise jurisdiction vested in it on several important points, even though the two categories of flaws tainting the decision cannot always be clearly distinguished.

Done at Paris, on 17 June 1985
in three copies,

Alain PELLET.

PLAN OF THE LEGAL OPINION

1. The issue before the Administrative Tribunal of the United Nations.
 2. The request for an advisory opinion addressed to the International Court of Justice.
 3. Purpose of the legal opinion requested.
 4. Question of the compatibility of the questions addressed to the Court.
 5. Scope of the first question addressed to the Court.
 6. Plan of the legal opinion.
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1. THE TRIBUNAL HAS FAILED TO UPHOLD THE PROVISIONS OF THE CHARTER GUARANTEEING THE INDEPENDENCE OF THE INTERNATIONAL CIVIL SERVICE
 7. Role of the notion of secondment in the reasoning of the Tribunal.
 8. Question of the reality of secondment.
 1. The Tribunal Has Sanctioned the Existence of a New Category of Appointment
 9. Sanctioning by the Tribunal of the notion of "appointment on secondment".
 10. Non-existence in law of "appointments on secondment".
 11. Definition of "secondment"—Secondment is a simple fact with respect to the Organization.
 2. The Tribunal Has Failed to Uphold the Discretionary Power Vested in the Secretary-General
 12. A discretionary power is vested in the Secretary-General.
 13. Obligation to exercise the discretionary power.
 14. Obligation to take into account the "paramount consideration" referred to in the Charter.
 15. Substitution by the Respondent of a power deriving from the discretionary authority vested in him.
 16. The Secretary-General may take into account the fact of the secondment . . .
 17. . . . but he cannot rely on an external authority in taking decisions within his discretionary power.
 3. The Tribunal Has Failed to Uphold the Fundamental Guarantees Accorded to United Nations Staff
 18. Statutory rights and human rights.
 19. Importance of the principle of the independence of international civil servants.
 20. Violation of the principle by Judgement No. 333.
 21. Violation of the principle of the equality of staff members.
 22. Question of violation of the right to change one's nationality.
 23. Violation of the principle of the freedom to choose one's employer and the right to renounce secondment.

II. THE TRIBUNAL HAS FAILED TO UPHOLD THE SOVEREIGN POLICY-MAKING POWER
VESTED IN THE GENERAL ASSEMBLY

24. A Judgement rendered "by the minority".
25. Mandatory nature of General Assembly resolution 37/126.
26. Uncertainties relating to the meaning of resolution 37/126.
27. Discretionary power of the Secretary-General.
28. The errors committed by the Tribunal.
29. Conclusion.

Annex 1. Letter Dated 19 December 1984 from the President of the Federation of International Civil Servants' Associations.

Annex 2. Letter Dated 21 December 1984 from the President of the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System.

ANNEX 1. FEDERATION OF INTERNATIONAL CIVIL SERVANTS' ASSOCIATIONS
FICSA/AMCL.PAR/84.50 Paris, 19 December 1984.

MR. ALASTAIR MCLURG, PRESIDENT, TO MR. ALAIN PELLET

On 23 August 1984, the Committee on Applications for Review of Administrative Tribunal Judgements decided to submit Judgement No. 333, rendered on 8 June 1984 by the United Nations Administrative Tribunal in the case of *Yakimetz against the Secretary-General*, to the International Court of Justice.

Gravely concerned by the position taken by the Tribunal in this Judgement, the Federation of International Civil Servants' Associations (FICSA) wishes to make its contribution to the presentation of Mr. Yakimetz's contentions during the proceedings in the Court of The Hague.

To that end, we have decided, by agreement with Mr. Yakimetz and the Coordinating Committee of Independent Staff Associations and Unions (which includes among its members the United Nations Staff Union (New York)), to request a legal opinion from a specialist in international civil service law on the validity of this Judgement with respect to the fundamental principles in force. *Would it be possible for you to undertake this work?*

If, as we hope, your reply is affirmative, we should be grateful if you would examine, in particular, the following questions with regard to the current review proceedings:

(a) In this case, has the Secretary-General correctly applied the rules in force relating to the international civil service?

(b) Was the Secretary-General obliged to follow the guidelines given by the General Assembly in the matter and, if so, has he duly discharged this obligation?

(c) Has the Secretary-General acted in conformity with the relevant provisions of the Charter and, in particular, with Article 2, paragraph 1, and Articles 8, 100 and 101 and with the fundamental principle of the independence of the international civil service;

(d) And, more generally, assuming that the Secretary-General has acted in conformity with the law in force, has the Tribunal duly exercised the jurisdiction vested in it?

I would draw your attention to the fact that the deadline for the written submissions of the parties has been set at 14 February 1985; as Mr. Yakimetz wishes to be able to attach this legal opinion and, as the case may be, the comments of FICSA to his own comments, I should be most grateful if you would notify me of your agreement in principle as soon as possible.

(Signed) Alastair McLURG,
President.

ANNEX 2. THE CO-ORDINATING COMMITTEE FOR INDEPENDENT STAFF UNIONS
AND ASSOCIATIONS OF THE UNITED NATIONS SYSTEM

21 December 1984.

THE PRESIDENT, STAFF COMMITTEE, TO PROFESSOR ALAIN PELLET

The United Nations Staff Union is gravely concerned at the implications for the Staff and for the Organization itself of Judgement No. 333 of the United Nations Administrative Tribunal.

The *Co-ordinating Committee, representing the 25,000 staff members of the common system including the UN Staff Union, and the Federation of International Civil Servants, representing the 30,000 staff members of the common system* have decided that the issues posed by this case transcend the well-known differences between our two federations, and have joined to request from you an independent written statement analyzing the applicable law and judicial principles, to be annexed to the Statement of the Applicant, Mr. Yakimetz, before the International Court. FICSA will convey to you their concerns by separate letter.

For your part we feel the case has substantial implications for the independence, integrity and neutrality of the international civil service. We feel the concept of a career international civil service with proper contractual guarantees is a fundamental part of the UN system and essential to the original intention of the Charter. Furthermore, it is important that merit be considered the primary factor for appointment and promotion and that all staff regardless of nationality be afforded equal treatment.

If the international system as we know it is to survive and flourish it must be based upon the recognition that national or political considerations must be subordinate to the values exemplified in the UN Charter. We have fully supported Mr. Yakimetz in his attempt to ensure that as an international civil servant he be given due consideration for continued employment with an Organization he has undertaken to serve with distinction for many years.

I trust you will reflect all these concerns in your brief. I wish to thank you in advance for your valuable assistance.

(Signed) George IRVING,
President
Staff Committee.

2. COMMENTS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

1. The United States herewith submits its comments on the Statements concerning United Nations Administrative Tribunal Judgement No. 333 (*Yakimetz*) of the Secretary-General of the United Nations (the Respondent) and the Union of Soviet Socialist Republics (USSR). These comments are submitted pursuant to the decision of the President of the Court of 5 March 1985, made under Article 66, paragraph 4, of the Statute and Article 105, paragraph 2(a), of the Rules.

II. COMMENTS OF THE UNITED STATES OF AMERICA ON THE STATEMENT SUBMITTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

A. The Tribunal's Judgement Fails to Meet Even the Minimal Standard Suggested by the Respondent for Determining Whether the Tribunal Exercised the Jurisdiction Conferred upon It

2. The Court has been asked by the Committee to determine whether the Tribunal failed to exercise jurisdiction conferred upon it. At paragraphs 47-49 of its Statement, the Respondent sets out the criteria it contends the Court should use in making this determination. The Respondent states in conclusion that:

"The Tribunal exercises its jurisdiction if it examines the substance of the Applicant's allegations or pleas and determines whether those allegations constitute 'non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members' . . ." (Respondent's Statement, para. 49.)

This is a minimal standard. The United States believes that a higher standard should apply, and that in certain cases a tribunal has not only the right, but the obligation to raise certain issues on its own¹. It is not necessary, however, to argue here for a stricter standard, since the Tribunal's Judgement clearly fails to meet even the minimal test suggested by the Respondent.

3. According to the Respondent, the Tribunal must first "examine the substance of the Applicant's allegations". In this case, the Applicant alleged that the Respondent improperly failed to consider the Applicant's request for career employment because the Respondent mistakenly believed that it was legally barred from doing so (Judgement, p. 49, *supra*). The Applicant's allegation is supported by the unambiguous language of the Respondent's letter of 21 December 1983, wherein it was stated that ". . . the Organization agreed

¹ If, for example, the parties to a particular case were to fail to make reference to a fundamental issue of Charter interpretation the Tribunal would certainly not be barred from examining it. Indeed there can be no doubt that, were such an issue to be relevant to such a case, the Tribunal would commit error if it failed to raise the issue *sua sponte*.

to so limit the duration of your United Nations service . . .” and by the virtually contemporaneous statements of three responsible officials of the Respondent, all of which confirmed that the Respondent believed at that time that it had no choice but to deny further employment to the Applicant absent approval by the Soviet authorities, which under the circumstances, was clearly not to be forthcoming.

4. In its pleadings the Respondent put forward a different version of the facts. It argued that the refusal to consider the Applicant’s request had resulted from an unfettered exercise of discretion (Respondent’s Answer, paras. 21-24). Although the Respondent brought forward no evidence that its version of the facts was accurate, the Tribunal nonetheless apparently accepted it without even noting that a fundamental issue of fact divided the parties, much less ruling upon that issue. As a result, the Tribunal adopted a factual context for its Judgment wherein the Applicant’s allegation concerning a possible legal bar could not logically be addressed. The Tribunal thus failed completely either to “examine the substance” of that allegation or to “determine” whether it constituted a violation of the Respondent’s obligations. These failures were fundamental errors of procedure occasioning injustice as well as failures to exercise jurisdiction.

B. The Respondent’s Statement with Respect to the Issue of Failure to Exercise Jurisdiction Is Ill-Founded and Unpersuasive

1. CONTRARY TO THE RESPONDENT’S STATEMENT, THE QUESTION OF WHETHER A LEGAL BAR EXISTED TO THE FURTHER EMPLOYMENT OF THE APPLICANT WAS IN ISSUE BETWEEN THE PARTIES

5. The Respondent makes three arguments in support of the assertion that the Tribunal did not fail to exercise its jurisdiction to determine whether a legal bar existed to the further employment of the Applicant on a non-secured basis. The first of these arguments is that “the question to which the Committee referred was not in issue between the parties” (Respondent’s Statement, para. 57). As has been noted above, it was the Respondent’s re-writing of history and the Tribunal’s unquestioning acceptance of this unsupported version of the facts that allow the Respondent now to indulge in this sophistry. The legal issues in this case relating to the exercise of jurisdiction and the question of procedural error arise not from a formalistic comparison of the parties’ pleadings but from the evidence, which is uncontroverted. That the facts to the contrary were before the Tribunal only serves to underline the extent of its failure to exercise jurisdiction. The evidence shows the Respondent refused to consider the Applicant’s request because it believed itself to be legally bound not to do so. The Applicant alleged that no such legal prohibition existed. At this point the issue was joined. The Tribunal, according even to the minimal standard suggested by the Respondent, was obligated to “examine” that issue despite the fact that the Respondent asserted in subsequent arguments that it did not exist. The Tribunal failed to discharge its obligation.

2. THE QUESTION OF WHETHER A LEGAL BAR EXISTED TO THE FURTHER EMPLOYMENT OF THE APPLICANT IS A CONCRETE ISSUE THAT THE TRIBUNAL WAS OBLIGATED TO ADDRESS AND ADJUDICATE

6. Secondly, the Respondent seeks to characterize the Applicant’s allegations with respect to the existence of a legal bar as “an abstract question” upon which

the Tribunal was not only free not to comment, but was, in fact, obliged to leave unaddressed. The Respondent asserts that the Tribunal

“must limit itself to pass judgement upon allegations (or pleas) of non-observance of contracts and terms of appointment. The Tribunal must, therefore analyze any pleas submitted to it to determine whether those pleas involve an allegation of non-observance and, if so, then pass judgement on those allegations.” (Respondent’s Statement, para. 59.)

7. One searches the Judgement in vain, however, for the analysis the Respondent asserts the Tribunal must conduct. The Respondent claims that evidence of the requisite analysis is implicit in the fact that the Tribunal made no reference to the question of a legal bar when it “associated” the Applicant’s pleas with the legal issues in the case (Respondent’s Statement, para. 60). But the sudden disappearance of further reference to this question is far more plausibly explained by another hypothesis. It is that the Tribunal simply neglected to deal with the issue because it could not arise logically in the false analytical context the Tribunal had constructed upon the unsupported assumption that the Respondent’s factual assertions were correct.

8. In the view of the United States, proper exercise of its functions by any judicial body requires at least a minimal amount of explication in its decisions. Those who turn to the Tribunal’s Judgements for guidance concerning their rights and obligations should not be forced to grope for meaning without a clue as to what the Tribunal concluded or why. Failure to address issues squarely before the Tribunal, which must be decided in order to produce a logically comprehensible judgement, constitutes, in our view, failure to exercise jurisdiction as that term is used in the first question posed to the Court by the Committee.¹

9. Even had the Tribunal ruled, either implicitly or explicitly, that the Applicant’s plea with respect to a legal bar did not pose a question upon which the Tribunal was competent to rule under Article 2 of its Statute, the United States believes such a ruling would have been incorrect. Such a ruling would merely have changed an implicit failure to exercise jurisdiction into an explicit one. The Applicant argues in the context of publicly available facts and statements that the Respondent made his decision not to consider the Applicant’s request under a misapprehension concerning his legal obligations. In so doing, the Applicant argues, the Respondent failed to give effect to General Assembly resolution 37/126 (IV), which was binding upon the Respondent and therefore constituted a part of the terms and conditions of the Applicant’s contract. This issue falls squarely within the terms of Article 2 of the Tribunal’s Statute, and the Tribunal was thus fully competent to rule on it. It is not “abstract”; it is, rather, a concrete issue upon which the entire case turns.

3. ADJUDICATION OF THE QUESTION OF WHETHER A LEGAL BAR EXISTED TO THE FURTHER EMPLOYMENT OF THE APPLICANT IS LOGICALLY REQUIRED AT THE THRESHOLD OF THE ANALYSIS OF THIS CASE

10. The Respondent claims in its third argument with respect to the Committee’s question concerning jurisdiction that the issue of whether the Respondent was legally barred from offering continued employment would have become

¹ Those trained in the civil law tradition might instead characterize the Tribunal’s failure to so much as consider the factual issues, much less its failure to explain why it ignored the Applicant’s plea with respect to a legal bar, as a “procedural error leading to injustice”.

ripe for decision only if the Tribunal had first found either that the Applicant had a legal expectancy of further employment or that the Respondent had failed to accord the Applicant's request "every reasonable consideration" as required by resolution 37/126 (IV). The Respondent concludes by asserting that "[s]ince neither of these preconditions existed, it follows logically that no answer is required" (Respondent's Statement, para. 61).

11. In fact, logic is a stranger to this argument. Logic requires that the issue of whether a legal bar existed be resolved before, not after, the questions of expectancy and whether "every reasonable consideration" was accorded the Applicant's request are addressed (see, Exposé du Gouvernement italien, para. 4). If a legal bar existed, then *ipso facto*, a legal expectancy could not. If a legal bar did not exist, then an expectancy might or might not exist, depending upon the facts. If a legal bar had existed, the Respondent would not have been obliged to consider the Applicant's request (as the Respondent indeed alleged in his letter of 21 December 1983). In the absence of a legal bar, the Respondent would have been obligated under resolution 37/126 (IV) to give the Applicant's request "every reasonable consideration", as the Applicant contended in his pleadings to the Tribunal¹.

12. As the Tribunal's Judgement amply demonstrates, it is impossible to make sense of this case unless the question of whether the Respondent was legally required to seek the approval of the Soviet authorities before employing the Applicant after 26 December 1983 is answered at the threshold of the analysis. The Tribunal's failure, for whatever reason, to deal with this critical preliminary issue constitutes a failure to exercise jurisdiction.

C. The Respondent Misconstrues the Tribunal's Decision with Respect to Whether "Every Reasonable Consideration" Was Given to the Applicant's Request

13. The Tribunal's ruling on the issue of whether "every reasonable consideration" was given the Applicant's request is of great importance to the law pertaining to the Respondent's obligations under General Assembly resolutions as a general matter, and it is therefore regrettable that the Respondent grossly misconstrues that ruling. The Respondent asserts that "[t]he Tribunal . . . concluded that this consideration had, *in fact*, been given" (Respondent's Statement, para. 74). The Tribunal did not so "conclude". It ruled, rather, that the Respondent was to be the sole judge of whether "every reasonable consideration" had been accorded the Applicant's request, and that the Respondent had so concluded (Judgement, para. XVII). The Tribunal thus purported to transfer the jurisdiction conferred upon it by its Statute to another organ of the United Nations, i.e., the Secretariat. The United States believes this purported transfer of jurisdiction to be invalid, and that the failure of the Tribunal itself to rule on whether "every reasonable consideration" was accorded the Applicant's request was a failure of jurisdiction within the context of the Committee's ques-

¹ The conclusion that the Applicant did not benefit from a legal expectancy does not, as the Respondent argues at paragraph 73 of its Statement, dispose of the question whether the Respondent abused discretion it purportedly exercised when it refused to consider the Applicant's request. The negative finding with respect to expectancy only allows this latter question to be asked; it does not provide the answer. See also paragraph 31, *infra*, where the United States comments on the use of this same argument by the Soviet Union.

tion to the Court, as well as an error of law relating to the Charter of the United Nations.

14. The Respondent moreover incorrectly characterizes this supposed finding by the Tribunal as a "factual conclusion", seeking thereby to insulate it from the scrutiny of the Court. The United States can conceive of no question more clearly legal in nature than whether a certain course of action pursued by a party to a dispute was or was not consistent with that party's legal obligations. Whether the Respondent complied with the mandatory standard imposed by resolution 37/126 (IV) and with its obligations under the Charter are the central *legal* questions that were before the Tribunal and are now before the Court.

D. The Respondent's Statement with Respect to the Committee's Question concerning Charter Interpretation Misconstrues the Respondent's Obligations under the Charter

15. In its second question the Committee asks the Court to determine whether the Tribunal erred on questions of law relating to provisions of the Charter of the United Nations. Although the Respondent addresses six Charter provisions in its statement, the United States will confine its comments to the Respondent's arguments with respect to Articles 101 and 100.

1. ARTICLE 101

16. This case raises three issues with respect to Article 101. Was resolution 37/126 (IV) *binding on the Respondent*, and was it therefore obligated under Article 101 to apply it with respect to the Applicant's request? What, under the circumstances, did that obligation require the Respondent to do? Did the Respondent do what was required?

17. The first issue is not disputed; the resolution binds the Respondent, and is therefore a "regulation established by the General Assembly" falling under Article 101.

18. With respect to the content of the Respondent's obligation, the Tribunal holds that, in the absence of specific implementing instructions from the General Assembly or of Staff Rules providing administrative procedures, it is up to the Secretary-General to decide how the obligation is to be discharged (Judgement, para. XVIII). But the Respondent's discretion is not unbounded. Even the Respondent admits that it was "of course, obliged to apply the resolution in substance" and argues that it did so by "having regard to the interests of the Organization", "to the qualities of the staff member", the "need to recruit staff on as wide a geographical basis as possible", and "to the qualities of existing staff and the need to secure fresh talent" (Respondent's Statement, paras. 95 and 96).

19. There is, however, no basis in the uncontroverted facts of the case for the assertion that the Respondent in fact fulfilled its obligation to give the Applicant's request "every reasonable consideration" "in substance". To the contrary, the record clearly indicates that at the time it considered the Applicant's request in December 1983, the Respondent believed that it was legally barred from employing the Applicant after 26 December 1983 absent Soviet approval. Being under this basic misapprehension, the Respondent gave *no* consideration to the request. Only if the legal bar the Respondent thought existed had, in fact, existed, could it be possible to find that no consideration was "reasonable" under the circumstances.

20. Even under the factual hypothesis advanced by the Respondent, its

actions would fail to meet the standard of "every reasonable consideration". An exercise of discretion based upon "mistake of fact or law" is invalid (Mr. Kean's dissent, para. 4 (quoting *Rosescu*, para. 5)). By taking into account "the events of 10 February and thereafter" (i.e., the Applicant's decision to change his nationality and the severing of his relations with the Soviet Government), the Respondent would have committed a mistake of law, as the taking into account of these factors would have been contrary to Article 100. Under either factual hypothesis, therefore, the answer is the same: the Respondent failed to accord to the Applicant's request "every reasonable consideration", as it was required to do under resolution 37/126 (IV) and thus under Article 101 of the Charter.

2. ARTICLE 100, PARAGRAPH 1

21. In its Statement the Respondent implies that the Court is precluded from examining the question of whether its actions constituted the receipt "of instructions from any government or from any other authority external to the Organization" or "reflect[ed] on [its] position as international officials responsible only to the Organization" (Art. 101, para. 1) because the Tribunal

"found as a fact that: ' . . . there has been no allegation, and far less any evidence, that the Respondent sought instructions from any member State, or that he had in any manner let the wishes of a member State prevail over the interests of the United Nations . . .'" (Respondent's Statement, para. 75).

The Respondent argues that the Tribunal's acceptance of the assertion that its actions were not contrary to Article 100, paragraph 1, constituted a finding of fact, and that "[s]uch a finding of fact does not involve a question of law, let alone a question of law relating to the provisions of the Charter" (Respondent's Statement, para. 105).

22. This effort by the Respondent to portray as an issue of fact a clear question of Charter interpretation is a transparent attempt to exclude from the Court's review a fundamental legal issue in this case. The Court's mandate is "to judge whether the interpretation adopted by the Tribunal is in contradiction with requirements of the provisions of the Charter of the United Nations" (*Morishid*, para. 64). No matter which version of the facts is adopted, whether what the Respondent did with respect to the Applicant's request was or was not consistent with the Charter is not an issue of fact, but an issue of law, upon which the Tribunal ruled and which the Court is thus bound to examine.

23. The United States has set out in detail in its Statement the reasons why it believes the Tribunal's finding that the Respondent's actions were in accord with Article 100, paragraph 1, is erroneous (US Statement, p. 176, *supra*). Nothing in the Respondent's Statement addresses these arguments, and the United States therefore stands by them. We believe a rebuttable presumption that Article 100, paragraph 1, has been violated is created when it is shown that the Respondent has altered a proposed personnel decision in a manner less favourable to the interests of the Organization after protests against the originally-planned action have been received from a member State. Unless this presumption is incorporated in the law pertaining to United Nations personnel actions (as it has been in the IAEA's law as a result of the *Rosescu* decision), employees victimized by improper pressures will be effectively deprived, *inter alia*, for want of access to the evidence, of the ability to enforce their rights, and the guarantees of Article 100, paragraph 1, will be emptied of substantive content.

3. ARTICLE 100, PARAGRAPH 3

24. The Respondent argues in his Statement that the question of whether it is legitimate for the Respondent to take into account the Applicant's intent to change his nationality was not in issue and that the Tribunal determined this to be so (Respondent's Statement, para. 114). The Respondent is mistaken. The Tribunal did not hold that these matters "were not in issue since private legislation was to be introduced into the United States Congress to avoid these problems". The "problems" referred to in this passage concerned waiver of privileges and immunities by employees of the United Nations who become permanent resident aliens in the United States, *not* whether the Respondent could legitimately consider the Applicant's intent to change his nationality, which is an entirely separate question. The Tribunal's ruling with respect to the latter issue was that "the Applicant must necessarily face the consequences for his actions", of which one was that

"those who elected to break their ties with [the country of which they were nationals when they entered United Nations service] could no longer claim to fulfil the conditions governing employment in the United Nations" (Judgement, para. XII).

25. This doctrine first appeared in the *Fischman* case (UNAT Judgement No. 326), which was decided while *Yakimetz* was before the Tribunal by a panel including two of the members of the *Yakimetz* panel. The United States believes that there is no legally acceptable basis for the attempt to relate it to the instant case. It is, after all, one thing to recognize that the Secretary-General may decline to grant permission to waive certain privileges and immunities and quite another to find an intent to change nationality, or more accurately to seek to change nationality, is relevant to an individual's suitability as a United Nations employee. Article 100, paragraph 3, establishes three paramount criteria (efficiency, competence and integrity) to be employed by the Respondent in making personnel decisions. A change in an employee's nationality, much less an intent to seek a change, relates to none of the three paramount criteria. The Tribunal has ruled in the *Estabial* case that not even considerations of geographical distribution may be used to overturn an employment decision reached on the basis of an assessment of an employee's efficiency, competence and integrity. The same must hold true of considerations of nationality, which are nowhere mentioned in the Charter. Such considerations, if permitted to be regarded as relevant, would be subversive of the very notion of an international civil service. The conflict between *Estabial* on the one hand and *Fischman/Yakimetz* on the other cries out for resolution by the Court.

III. COMMENTS OF THE UNITED STATES ON THE STATEMENT SUBMITTED BY THE USSR

A. The Statement of the USSR Misconstrues the Issues Raised by the Committee with Respect to Exercise of the Tribunal's Jurisdiction

26. At paragraph 3 of its Statement, the USSR asserts that the Tribunal "must itself determine in every specific instance the scope of its jurisdiction, as is clearly stated in Article 2, paragraph 3, of its Statute". The cited paragraph states that "[i]n the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal".

27. In the instant case, however, there is no dispute between the parties over the competence of the Tribunal, including its competence to rule on the question of whether a legal bar existed to the further employment of the Applicant by the Respondent after the expiry of his fixed-term contract on 26 December 1983. Nor is there any indication in the Judgement that the Tribunal ever considered that it might not have competence to rule. The question is, rather, whether, being competent to rule, did the Tribunal fulfil its obligation to exercise its jurisdiction as spelled out in Article 2, paragraph 1, of its Statute. The reference in the Soviet Statement to Article 2, paragraph 3, is therefore inappropriate and superfluous.

B. The Statement of the USSR with Respect to the Question Posed by the Committee to the Court concerning Exercise of Jurisdiction Is Inconsistent with the Nature of Employment Contracts in the United Nations, Misconstrues the Effect of Staff Rule 104.12 (b), and Misinterprets the Tribunal's Judgement with Respect to the Effect of Change of Nationality on an Employee's Eligibility for Further Employment

28. The Statement of the USSR asserts that

"in its Judgement the Tribunal provided answers to all legal aspects of the case, including the question, raised in the Applicant's claim, concerning the existence of legal impediments to his further employment with the United Nations" (USSR Statement, para. 5).

The Statement goes on in the same paragraph to identify three subissues upon which, it is asserted, the Tribunal adjudicated, and by so doing disposed of the Applicant's plea regarding the existence of a legal bar to further employment.

29. The first of the three subissues is whether a legal bar existed to the "extension of a one-year contract after its expiry on 26 December 1983"¹ (USSR Statement, para. 5). The Soviet Statement argues that

". . . the Tribunal in paragraph IV concluded that 'any subsequent change in the terms of the secondment initially agreed on, for example, its extension, obviously requires the agreement of all three parties involved'. It is therefore clear that the absence of such trilateral agreement constitutes a legal impediment to the extension of the Applicant's fixed term contract²." (USSR Statement, para. 6.)

30. The United States submits that this argument is a non-sequitur. The trilateral secondment arrangement and the bilateral contract of employment are separate legal entities. Analysis of one casts no light on issues pertaining to the other. Even accepting *arguendo* the proposition that the Applicant, Respon-

¹ The issues before the Tribunal in fact related only to the Applicant's request for consideration for a career position. "Extension" (i.e., renewal) of his employment on a fixed-term basis was addressed *sua sponte* by the Tribunal, and is addressed here only because it has been raised once more by the USSR.

² This argument suffers from the same confusion over use of the term "extension" that characterized the Tribunal's Judgement. See, US Statement, p. 168, n. 2, *supra*. It is not the practice of the United Nations to "extend" fixed-term contracts. They are, rather, "renewed", i.e., a new letter of appointment is issued with respect to each such contract, and each such contract is thus a separate legal instrument, unencumbered by any "special conditions" that might have affected its predecessors (see, UN Staff Rules, Annex II).

dent, and Soviet Government were bound by a secondment arrangement until 26 December 1983 (but see, US Statement, pp. 178-181, *supra*), this forms no basis to conclude that that arrangement continued in force after that date or that the Applicant and the Respondent were obligated to seek the approval of the Soviet authorities should they have wished to enter into a bilateral employment contract on a career basis taking effect after 26 December 1983. The Tribunal, in fact, does not address in its Judgement the issue of whether such approval would be necessary, which is precisely the reason the United States believes that the Tribunal failed to exercise its jurisdiction in this regard.

31. The second subissue addressed in the Soviet Statement is whether the Respondent was legally barred from converting the Applicant from fixed-term to career status. The Soviet Statement asserts that Staff Rule 104.12 (*b*) bars such a conversion (USSR Statement, para. 7). The United States disagrees. The rule states only that the Applicant has no *expectancy* of conversion arising from his service, no matter how well performed, on a fixed-term basis. It does not state that the Respondent could not have converted the Applicant's status should it have wished to do so.

32. The third subissue raised in the Soviet Statement is whether the Respondent was barred from further employment with the United Nations because he had sought to change his nationality. The Soviet Statement implies that the Tribunal held that an attempt to change nationality constitutes such a legal bar. The opposite is in fact the case. The Tribunal found that the Respondent had properly exercised its discretion to reject the Applicant's request for conversion to career status¹ (Judgement, para. XVIII). Had the Tribunal perceived the Applicant's actions as a legal bar, logic dictates that it could not have so ruled, as in that case no discretion would have been allowed. This interpretation of the Judgement is buttressed by the fact that Mr. Ustor in his dissent disagreed explicitly with the Tribunal's Judgement on this very point, taking the position that ". . . the Applicant was in my view not eligible for consideration for a career appointment", i.e., the same view now advanced by the Soviet Union.

C. The "Answer" of the Soviet Union to the Question Posed by the Committee to the Court concerning Charter Interpretation

33. The second question posed to the Court by the Committee was whether the Tribunal had erred on questions of law relating to provisions of the Charter of the United Nations. In supporting the Tribunal's Judgement, the Soviet Statement simply quotes the relevant provisions of the Charter and United Nations General Assembly resolution 37/126 (IV), states that the Tribunal found that no violations of these instruments had occurred, and asserts in a completely conclusory and unsupported manner that the Tribunal was correct in all respects (USSR Statement, pp. 156 and 157, *supra*). The Statement of the USSR offers no independent analysis to support the Tribunal's findings, ignores the arguments raised by the Applicant in this regard, and implies, contrary to Article 11 of the Tribunal's Statute and Article 65 (1) of the Statute of the Court, that the Tribunal's findings are final and unreviewable by the Court.

¹ This finding was made without supporting analysis of the facts—which are entirely to the contrary—and is, in addition, inconsistent with the Tribunal's treatment of the same issue in paragraph XII of the Judgement. Whatever its faults, however, it is clear that this finding contradicts the argument that the Tribunal found that an attempt to change nationality constitutes a legal bar to further employment.

34. In the view of the United States, the USSR has said nothing of legal substance in its Statement with respect to the Tribunal's interpretation of the Charter. *The Soviet Statements in this regard are therefore not susceptible to substantive legal comment, and we offer none.*

IV. CONCLUSION

35. Nothing in the Respondent's Statement or that of the USSR has caused the United States to alter its views with respect to this case. The same unwillingness to confront the issues that characterizes the Tribunal's Judgment infects these documents as well. In the view of the United States these issues are:

(a) What is the basis of the case? If it is that the Respondent believed it was legally barred from employing the Applicant after 26 December 1983 and therefore refused to consider the Applicant's request to be considered for such employment, was that belief correct? If it is that the Respondent weighed the substantive factors relating to continued employment of the Applicant and decided not to employ him further, was that exercise of discretion consistent with the requirements of the Charter?

(b) Who determines whether the Respondent complied with the requirements of resolution 37/126, the Tribunal or the Respondent itself?

(c) May "every reasonable consideration" include consideration of the objections of the Soviet Government to the further employment on a career basis of a person who has severed all his relations with that Government? *If the answer is affirmative, how can that answer be squared with Article 100, paragraph 1, of the Charter?*

(d) Does a change in nationality, more accurately in the instant case an intention to seek a change, disable a member of the United Nations Secretariat from further employment with the Organization or otherwise provide legitimate grounds to deny him further employment? If so, how is this to be reconciled with Article 100, paragraph 3, of the Charter?

(e) How is the Tribunal's Judgment to be reconciled with the notion of the Secretariat of the United Nations as an international civil service dedicated uniquely to the best interests of the Organization, and protected from undue influence from powerful member States by a vigilant and energetic Secretary-General?

(f) If the risk of a negative reaction by a powerful member State gives rise to a legitimate denial of employment in the interests of the Organization, is this equally true if the member in question is small and weak?

36. The United States urges the Court to consider these issues and to rule on them forthrightly. Only then can the rights of the Applicant as an international civil servant be upheld, the interests of his fellow staff members be protected, and the integrity of the United Nations be preserved.
