DISSENTING OPINION OF JUDGE MOROZOV

I voted against the decision to comply with the request for an advisory opinion and also in the negative on both Question I and Question II in the operative part of the Advisory Opinion of the Court, and I am unable to support the reasoning in the Opinion.

The basic grounds for my position are the following.

1. I believe that *the Court has no competence* to give the advisory opinion which has been requested by the Committee on Applications for Review of Administrative Tribunal Judgements in implementation of Article 11 of the Statute of the Tribunal, this being the first such request almost *18 years* after the Statute was amended by General Assembly resolution 957 (X) of 8 November 1955.

In this connection I can only say that if the procedure established for the so-called review of the judgements of the Tribunal were *really judicial*, in accordance with the Court's Advisory Opinion of 13 July 1954, the review body concerned, but not the International Court of Justice, would be in a position to give a proper judgment on the specific case of Judgement No. 158 of the Tribunal.

2. Article 65, paragraph 1, of the Statute of the Court provides that "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

It is indisputable that the *Statute imposed no duty on the Court automatically to accept any kind of request for advisory opinion*. The Court should only give effect to a request for an advisory opinion, and deliver such an opinion, strictly in accordance with the provisions of the Charter and the Statute of the Court and in particular in accordance with Articles 34 and 65 of its Statute and Article 96 of the Charter.

The present request for advisory opinion contravenes the principles of the Charter and the Statute of the Court.

It is for the General Assembly to adopt whatever resolutions it sees fit, and I do not intend to involve the Court in any revision of resolution 957 (X) adopted by the General Assembly; for *this is in no way a function of the Court*.

But at the same time *the competence of the Court itself and its function must be based, not upon this or that resolution adopted by the General Assembly, but on the Charter of the United Nations and the Statute of the Court, which forms an integral part of the Charter*.

3. Contrary to the conclusion of the majority of the Court, the procedure which has now been imposed on the Court is not a judicial one.

To my mind, the Advisory Opinion makes use of a number of unconvincing arguments in order to justify the procedure referred to as a normal judicial procedure for review of United Nations Administrative Tribunal Judgements; and points of great importance have not been taken into account.

For example, the main argument of the Opinion is that review of United Nations Administrative Judgements in contentious casses between United Nations officials and the Secretary-General could become subject to review by the International Court of Justice, not in the form of a continuation, at least to some extent, of the *contentious* procedure but in the form of *advisory procedure*. This *unusual* procedure was devised 18 years ago and it is quite clear that the above-mentioned procedure could be regarded as intended to conceal the fact that private persons (United Nations officials) had been given the right to request the review of a judgement, and to become *parties* before the International Court of Justice, contrary to the provisions of Article 34 of the Court's Statute, which lays down that "only States may be parties in cases before the Court".

But nothing can cover up the fact that, albeit by means of so-called advisory procedure, private persons become parties to the proceedings before the Court. These persons can *initiate* the procedure of appeal against the judgement of the Administrative Tribunal, have a right to present to the Court statements and evidence of any kind, and have a right to make an oral statement before the Court if the Court decides to hold oral proceedings.

Such limitations of these rights as result from the activity of the Committee on Applications and from the restricted character of the reasons which may be the grounds of an appeal (failure to exercise jurisdiction or fundamental error in the procedure) make no difference in principle, but are merely directed against the interests of the United Nations officials; this last point will be examined further below.

Now it is necessary to recall that the question of the competence of the International Court of Justice was settled by the United Nations Conference on International Organization in very clear terms, which are reflected in Article 34 of the Statute of the Court. It is well known that one of the delegations suggested at that time that Article 34 of the Statute be redrafted to include provision that not only States but also private persons could be permitted to be parties before the Court in cases of review by it of the judgments of administrative tribunals connected with the United Nations when such a right of appeal was provided by the statutes of such tribunals.

That suggestion was rejected by the Conference (*United Nations Conference on International Organization*, Documents, Vol. 13, p. 482).

4. But what situation arose at the 1955 session of the General Assembly, when the procedure for review of the judgements of the United Nations

Administrative Tribunal was adopted contrary to the decision of the United Nations Conference on International Organization?

To answer this question it is necessary to turn our attention to the Advisory Opinion of the Court of 13 July 1954 and the *travaux préparatoires* of the amendment of Article 11 of the Statute of the Administrative Tribunal of the United Nations.

In 1954 the Court, in answer to the question put by the General Assembly, stated that:

> "Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them—all the more so as one party to the disputes is the United Nations Organization itself." (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954*, at p. 56.)

But what did happen in 1955? The General Assembly created, allegedly on the basis of Article 22 of the Charter, a subsidiary organ—the Committee on Applications for Review of Administrative Tribunal Judgements, and authorized it to request advisory opinions of the Court in cases in which the Committee found a substantial basis for the application made to it, including applications from private persons, from the United Nations Secretary-General and from member States. It is quite clear that, to take such a decision, the Committee should consider the merits of the relevant judgement of the Administrative Tribunal.

In the light of the above-cited Opinion of the Court, the General Assembly created a "subsidiary" organ authorized to implement a function which the General Assembly should not, according to the Opinion of the Court, itself exercise.

But Article 22 of the Charter permits the General Assembly to "establish such subsidiary organs as it deems necessary for the performance of *its functions*" (emphasis added).

Therefore according to the above-mentioned view expressed by the Court in 1954, which I share completely, the Committee created in 1955 cannot be considered as an organ of the United Nations within the meaning of Articles 7 and 22 of the Charter and therefore this Committee has no right to ask for advisory opinions of the Court in accordance with Article 96, paragraph 2, of the Charter.

There is additional evidence that this Committee could not request opinions of the Court, because any organ of the United Nations other than the General Assembly and the Security Council may be authorized

to do so only "on legal questions arising within the scope of their activities" (Art. 96, para. 2, of the Charter). But the Committee (which is not a permanent organ of the United Nations) has requested an advisory opinion not in the *scope of its own activities* but in the *scope of the activities of another body*—the United Nations Administrative Tribunal.

5. It is suggested in the present Advisory Opinion that the activity mentioned above could be explained on the basis of Article 101 of the Charter.

I should like to recall that Article 101 provides: "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly." But as the Court said in 1954, the Charter "does not confer judicial functions on the General Assembly" and that when it established the Administrative Tribunal it "was not delegating performance of its own functions" (*I.C.J. Reports 1954*, p. 61).

These observations of the Court stressed the judicial nature of the activity of the United Nations Administrative Tribunal, and can be correctly interpreted in the sense that any procedure for reviewing the *judicial* decisions of that Tribunal should be a *judicial* one.

6. From the very outset the adoption of the procedure which has now been approved by the majority of the Court was inspired by considerations other than the interests of United Nations officials.

The Secretary-General, as well as the representative of the United Nations Staff Committee, objected to the proposed review procedure.

The discussions in the Fifth Committee and the plenary meetings of the General Assembly in 1955 showed very important divergences of views, which touched upon the Charter and the Statute of the Court.

In the Fifth Committee 30 out of the 57 delegations did not support the amendments to Article 11 of the Statute of the Tribunal. In the plenary meetings of the General Assembly 26 out of 59 delegations did not support these amendments.

It may also be useful at this point to indicate some important consequences of the procedure which the Court has approved.

As has already been observed, that procedure is not a judicial one. In addition to the evidence of this mentioned above, I should like to stress the following.

Paragraph 3 of Article 11 of the Statute of the Administrative Tribunal authorizes the Secretary-General to give effect to the opinion of the Court. This means that if the opinion of the Court is contrary to the judgement of the Tribunal, and the Secretary-General is in agreement with the opinion, he can *de jure* and *de facto* nullify the judgement of the Tribunal, despite the fact that the Secretary-General *is only one of the parties in the case.*

7. Reference was made in the Advisory Opinion to the Opinion of the

Court in the Unesco case; and the fact that the Governing Body of the ILO has been authorized by the International Labour Conference to seek the advisory opinion of the Court with regard to judgments delivered by the ILO Administrative Tribunal has been used as an analogy for the procedure accepted by the Court in the present case. But it is necessary to stress that the Governing Body of the ILO (like the governing bodies of some other specialized agencies) is the executive committee of the ILO, whereas the Committee on Applications it not an executive committee of the United Nations, nor is its composition comparable with that of the ILO Governing Body.

A further important point is that the right to initiate the procedure for review of the judgments of the ILO Tribunal does not belong to private persons or to any State, but to the Governing Body itself alone.

I do not intend to analyse all the other ways in which the provisions of the Statute of the ILO Tribunal concerning the question of review of judgments of the Tribunal differ from those concerning the United Nations Administrative Tribunal. There is a well-known divergence of views upon that matter; and I have mentioned the main differences only in order to show that there is no room for any analogy of the kind mentioned above.

(Signed) Platon MOROZOV.