INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICATION FOR REVIEW OF JUDGEMENT No. 273 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

ADVISORY OPINION OF 20 JULY 1982

1982

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

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APPLICATION FOR REVIEW OF JUDGEMENT No. 273 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Request for advisory opinion by the Committee on Applications for Review of Administrative Tribunal Judgements — Article 11 of the Statute of the United Nations Administrative Tribunal.

Proceedings commenced by application of a United Nations member State to the Committee — Whether application tantamount to intervention of an entity not party to the original proceedings — Its effect on authority of Secretary-General — Principle of equality of the parties.

Composition of United Nations Administrative Tribunal — Composition and functioning of Committee on Applications for Review of Administrative Tribunal Judgements — Requirements as to form of application to Committee — Whether procedural irregularities and failure by Committee to ensure equality constitute "compelling reasons" for refusal of advisory opinion.

Competence of the Court — Propriety of the Court's giving the opinion — Nature and scope of the advisory opinion requested — Determination by the Court of the meaning and implications of question submitted for advisory opinion — Need for Court to ascertain and state legal questions really in issue.

Objection to Judgement on ground of error on a question of law relating to the provisions of the Charter — Nature of task of Court — Meaning of error "on a question of law relating to the provisions of the Charter" — Relation between General Assembly resolutions, Staff Regulations and Staff Rules as governing relations of United Nations with its staff — Role and competence of International Civil Service Commission — Acquired rights and Staff Regulation 12.1 — Application by Tribunal of two sets of rules equally applicable to situation of staff member.

Objection to Judgement on ground of excess of jurisdiction or competence.

ADVISORY OPINION

Present: *President* ELIAS; *Vice-President* SETTE-CAMARA; *Judges* LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-KHANI, SCHWEBEL, Sir Robert JENNINGS, DE LACHARRIÈRE, MBAYE, BEDJAOUI; *Registrar* TORRES BERNÁRDEZ.

In the matter of the Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal,

THE COURT,

composed as above,

gives the following Advisory Opinion :

1. The question upon which the advisory opinion of the Court has been asked was laid before the Court by a letter dated 23 July 1981, filed in the Registry on 28 July 1981, from the Secretary-General of the United Nations. By that letter the Secretary-General informed the Court that the Committee on Applications for Review of Administrative Tribunal Judgements had, pursuant to Article 11 of the Statute of the United Nations Administrative Tribunal, decided on 13 July 1981 that there was a substantial basis for the application made to that Committee for review of Administrative Tribunal Judgement No. 273, and had accordingly decided to request an advisory opinion of the Court. The decision of the Committee, which was set out *in extenso* in the Secretary-General's letter, and certified copies of which in English and French were enclosed with that letter, read as follows :

> "The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application presented by the United States of America for review of Administrative Tribunal Judgement No. 273, delivered at Geneva on 15 May 1981. Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following question :
>
> > 'Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General,* warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station ?' "

2. In accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an advisory opinion was given on 4 August 1981 to all States entitled to appear before the Court ; a copy of the Secretary-General's letter with the decision of the Committee appended thereto was transmitted to those States.

3. Pursuant to Article 65, paragraph 2, of the Statute and to Article 104 of the Rules of Court, the Secretary-General of the United Nations transmitted to the Court a dossier of documents likely to throw light upon the question ; these documents reached the Registry in English on 30 September 1981 and in French on 10 November 1981.

4. The President of the Court decided on 6 August 1981 that the United Nations and its member States were to be considered as likely to be able to furnish information on the question. Accordingly, on 10 August 1981 the Registrar notified the Organization and its member States, pursuant to Article 66,

paragraph 2, of the Statute of the Court, that the Court would be prepared to receive written statements from them within a time-limit fixed at 30 October 1981 by an Order of the President dated 6 August 1981.

5. At the request of the Secretary-General of the United Nations, the Acting President of the Court, by Order of 8 October 1981, extended that time-limit to 30 November 1981.

6. Within the time-limit as so extended, written statements were received from the Governments of France and of the United States of America, and the Secretary-General of the United Nations transmitted to the Court, pursuant to Article 11, paragraph 2, of the Statute of the Administrative Tribunal, a statement setting forth the views of Mr. Ivor Peter Mortished, the former staff member to whom the Judgement of the Administrative Tribunal relates. By a telex message received in the Registry on 2 December 1981 the Secretary-General informed the Court that he would not be submitting a written statement to the Court other than formally transmitting the observations of Mr. Mortished.

7. Copies of these statements were on 21 and 23 December 1981 communicated to the United Nations and to the States to which the communication provided for in Article 66, paragraph 2, of the Statute had been addressed.

8. By letter of 1 March 1982, France and the United States of America, as well as the United Nations, were informed that the Court, pursuant to Article 66, paragraph 4, of its Statute, had decided to permit any State or organization having presented or transmitted a written statement to submit comments in writing on the statement made or transmitted by any other, and had fixed 15 April 1982 as the time-limit for the submission of such comments. Within the said time-limit, written comments were received in the Registry from France and from the United States of America. The Secretary-General also transmitted to the Court a letter from counsel for Mr. Mortished indicating that he did not wish to comment on the statements presented.

9. On 19 and 21 April 1982 the Registrar transmitted to the United Nations and to the States to which the communication provided for in Article 66, paragraph 2, of the Statute had been addressed, copies of the written comments of France and the United States of America, and informed them that the Court did not intend to hold any sitting for the purpose of hearing oral statements or comments in the case.

* *

10. The Judgement of the United Nations Administrative Tribunal (Judgement No. 273) which was the subject of the application to the Committee on Applications for Review of Administrative Tribunal Judgements resulting in the present request for advisory opinion was given on 15 May 1981 in case No. 257, *Mortished* v. *the Secretary-General of the United Nations*. The facts of that case, as found by the Administrative Tribunal, were briefly as follows. Mr. Mortished, an Irish national, entered the service of the International Civil Aviation Organization (ICAO) on 14 February 1949. In 1958 he was transferred to the United Nations, and received a permanent appointment as a Translator/Précis-Writer. On 1 April 1967 he was transferred from United Nations Headquarters in New York to the United Nations Office at Geneva. On attaining the age of 60, he retired from United Nations service on 30 April 1980. A benefit known as the

"repatriation grant" is payable in certain circumstances to staff members at the time of their separation from service, under United Nations Staff Regulation 9.4, and Annex IV to the Staff Regulations, which provide as follows :

> *"Regulation 9.4 :* The Secretary-General shall establish a scheme for the payment of repatriation grants within the maximum rates and under the conditions specified in annex IV to the present Regulations."
>
> *"Annex IV*
>
> REPATRIATION GRANT
>
> In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate. The repatriation grant shall not, however, be paid to a staff member who is summarily dismissed. Detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General. The amount of the grant shall be proportional to the length of service with the United Nations, as follows :"
>
> (Annex IV continues with a table of the amount of the grant according to length of "continuous service away from home country".)

The grant was established by General Assembly resolution 470 (V) of 15 December 1950, following the abolition of an expatriation allowance which was paid annually. The "detailed conditions and definitions" referred to in Annex IV were laid down by the Secretary-General in Staff Rule 109.5. When Mr. Mortished joined United Nations service in 1958 by transfer from ICAO, he had received from the United Nations Office of Personnel a personnel action form stating : "Service recognized as continuous from 14 February 1949" and "Credit towards repatriation grant commences on 14 February 1949".

11. At the time of Mr. Mortished's retirement, the United Nations General Assembly had recently adopted two successive resolutions relating to *(inter alia)* the repatriation grant. By resolution 33/119 of 19 December 1978, the General Assembly decided

> "that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of evidence of actual relocation, subject to the terms to be established by the [International Civil Service] Commission ;"

that is to say, evidence that upon separation, the staff member was not continuing to reside in the country of his last duty station. Pursuant to this resolution, the International Civil Service Commission established a text with a view to the modification of the Staff Rule governing the repatriation grant, which had not previously contained any requirement for evidence of this kind to be produced. This text was given effect from 1 July 1979 by the Secretary-General, first by Administrative Instruction ST/AI/262 of 23 April 1979, and subsequently by an amendment to Staff Rule 109.5 circulated on 22 August 1979. Paragraphs *(d)* and *(f)* of the new text of that Rule provided that :

> "*(d)* Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station. Evidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station."
>
> "*(f)* Notwithstanding paragraph *(d)* above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation with respect to such qualifying service."

In the case of Mr. Mortished, who had accrued the maximum qualifying service (12 years) well before 1 July 1979, paragraph *(f)* would have totally exempted him from the requirement as to evidence of relocation.

12. On 17 December 1979, however, the General Assembly adopted resolution 34/165 by which it decided, *inter alia,* that :

> "effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided".

On 21 December 1979 the Secretary-General accordingly issued Administrative Instruction ST/AI/269, amending Administrative Instruction ST/AI/262 with effect from 1 January 1980 ; its effect was to abolish the transitional provision of Staff Rule 109.5 *(f),* quoted above. Even before Mr. Mortished retired on 30 April 1980, he had appealed to the Joint Appeals Board established by Staff Rule 111, with a view to claiming a right to repatriation grant without producing evidence of relocation, and requested the agreement of the Secretary-General for direct submission of an application to the Administrative Tribunal under Article 7, paragraph 1, of the Statute of the Tribunal. That was agreed to, but in the meantime, on Mr. Mortished's retirement, the Secretariat had refused to make payment to him of the repatriation grant without evidence of relocation. Mr. Mortished seised the Administrative Tribunal of an appeal on 10 October 1980. In the meantime Administrative Instruction ST/AI/269 had been followed up by a revised edition of the Staff Rules, with the deletion of paragraph *(f)* of Rule 109.5. By Judgement No. 273 the Tribunal decided, for reasons to be examined below, that :

> "By making payment of the Applicant's repatriation grant conditional on the production of evidence of relocation, the Respondent failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 *(f).*"

The Tribunal recognized that Mr. Mortished "was entitled to receive that grant on the terms defined in Staff Rule 109.5 *(f),* despite the fact that that rule was no longer in force on the date of [his] separation from the United Nations", and was therefore entitled to compensation for the injury sustained "as the result of a

disregard of Staff Regulation 12.1 and Staff Rule 112.2 *(a)*". That Regulation and that Rule provide as follows :

> "*Regulation 12.1 :* These Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."
>
> "Rule 112.2
>
> AMENDMENT OF . . . STAFF RULES
>
> *(a)* These rules may be amended by the Secretary-General in a manner consistent with the Staff Regulations."

The injury was assessed at the amount of the repatriation grant of which payment was refused.

*

13. On 15 June 1981, the United States of America addressed a letter to the Acting Legal Counsel of the United Nations by way of application to the Committee on Applications for Review of Administrative Tribunal Judgements, under Article 11, paragraph 1, of the Statute of the Tribunal, asking the Committee to request an advisory opinion of the Court. The text of that application is set out in paragraph 39 below. In accordance with the Provisional Rules of Procedure of the Committee, a copy of the application was transmitted to counsel for Mr. Mortished, and written comments on it were submitted on his behalf to the Committee on 23 June 1981. A copy was also transmitted to the Secretary-General of the United Nations, who advised the Committee on 23 June 1981 that he was not availing himself of his right under the Provisional Rules of Procedure to submit comments on the application.

14. The Committee considered the application at two meetings held on 9 and 13 July 1981. Counsel for Mr. Mortished had requested that he be given the opportunity to participate in all the proceedings of the Committee ; that he be permitted to make statements to the Committee ; that the sessions of the Committee be open ; that the proceedings of the Committee be duly recorded ; and that an official transcript of the record be made available to him (A/AC.86/R.100, p. 3). The Committee decided, without a vote, that its discussions should be recorded on tape, and that "if the United States application is accepted", they would be "transcribed and distributed to the members of the Committee, to the parties concerned in Mr. Mortished's case" and to the Court (A/AC.86(XX)/PV.1, pp. 12, 13-15 ; A/AC.86(XX)/PV.2, p. 63). A proposal by the representative of the United Kingdom that the Committee invite Mr. Mortished's counsel to be present during the Committee's consideration of the application before it and that, if necessary, he be permitted to make a statement, was rejected by the Committee by 5 votes to 2, with 9 abstentions ; the representative of the United States did not participate in the vote.

15. After members of the Committee had presented their views on the application presented by the United States, the Chairman requested the Committee to indicate whether there was a substantial basis for the application within the meaning of Article 11 of the Statute of the Administrative Tribunal on the ground that the Administrative Tribunal had erred on a question of law relating

to the provisions of the Charter of the United Nations. The Committee agreed, by a vote of 14 to 2, with 1 abstention, that there was a substantial basis for the application on that ground. The Chairman then requested the Committee to indicate whether there was a substantial basis for the application within the meaning of Article 11 of the Statute of the Administrative Tribunal on the ground that the Administrative Tribunal had exceeded its jurisdiction or competence. The Committee agreed by a vote of 10 to 2, with 6 abstentions, that there was a substantial basis for the application on that ground. Neither of those two grounds, nor any of the grounds stated in Article 11 of the Tribunal's Statute, had been mentioned, at least in the form in which they are enumerated in that Article, in the United States application communicated to Mr. Mortished. The formulation of the question to be put to the Court was then adopted, without a vote being taken, as set out in the application of the United States of America.

* * *

16. The Court will begin by considering whether it is competent to comply with this request for an advisory opinion submitted by the Committee on Applications for Review of Administrative Tribunal Judgements (hereinafter called "the Committee"), and whether it should exercise its discretion to do so. It is the second request which has been submitted under the terms of Article 11, paragraphs 1 and 2, of the Statute of the United Nations Administrative Tribunal which provide as follows :

> "1. If a member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction of competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.
>
> 2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1."

It is however the first such request to arise from the Committee's consideration of an application by a member State. It therefore raises problems relating to the general aspects of the review procedure and also some specific problems concerning the fact that the request now before the

Court is the outcome of an application by the Government of the United States.

17. In 1973, when giving its Advisory Opinion on the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal,* the Court envisaged a situation of this kind, though it was then no more than a hypothesis. On that occasion, the advisory proceedings had been set in train by a staff member's application to the Committee, and the Court was careful to stress that its conclusions regarding the compatibility of the review procedure with the requirements of the judicial process were to be understood as applying to a case of that nature. It did not, of course, overlook the fact that a similar request for an advisory opinion might, by the terms of Article 11 of the Statute of the Administrative Tribunal, originate in a decision taken by the Committee on the application of a member State. However, during the debates in the General Assembly in 1955, at the time of adoption of the procedure in question, various arguments had been put forward against the propriety of the provision making this possible. This introduced "additional considerations which would call for close examination by the Court if it should receive a request for an opinion resulting from an application to the Committee by a member State" (*I.C.J. Reports 1973,* p. 178, para. 31). Those considerations were "without relevance" in the 1973 proceedings, so that it was not then necessary for the Court to evaluate them before reaching its decision on the advisory opinion requested of it. It therefore stated that it was not to be understood as "expressing any opinion in regard to any future proceedings instituted under Article 11 by a member State" *(ibid.).* Hence the Advisory Opinion given by the Court on the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* is relevant to its approach to the present request on two main counts : because that Opinion recognized that it would be incumbent upon the Court to examine the features characteristic of any request for advisory opinion the Committee decides to submit at the prompting of a member State, and because it indicated that the Court should bear in mind during that examination not only the considerations applying to the review procedure in general but also the "additional considerations" proper to the specific situation created by the interposition of a member State in the review process.

18. The Court of course will not fail to discharge that duty. It will consider the problems raised by the present request in the light of the considerations previously discussed in its 1973 Advisory Opinion and of those which it finds relevant to the present case. To that end, it must recall those considerations which it found important for the above-mentioned Opinion and then add those arising from the special characteristics of the present advisory proceedings. This will enable it to proceed to an examination of the course in fact taken by the proceedings leading to the present request, in the light of the considerations in question.

19. In the Advisory Opinion of 1973, the Court pointed out that the terms in Article 11 of the Statute of the Administrative Tribunal could not

have had the effect of changing the nature of the Court's task under its own Statute, the character of its functions or its manner of discharging them. The Court therefore had a duty to ascertain whether the procedure in which it was called upon to play an essential part was truly compatible with its task, its functions and the ways they are to be discharged. That meant that it had to satisfy itself that this system enabling Administrative Tribunal judgements to be reviewed by the indirect means of an advisory opinion was compatible with the provisions of the United Nations Charter and the Statute of the Court, and with the requirements of the judicial process. As the necessity for the Court to make this assessment does not depend on whether it was on the application of a staff member, the Secretary-General or a member State that the Committee decided to request an advisory opinion, the Court may for present purposes confine itself to reiterating its previously adopted position.

20. In considering whether the review procedure was compatible with the Charter, more especially Article 96, the Court first examined certain doubts that had been expressed as to the legality of employing its advisory function in connection with the review of Administrative Tribunal judgements. It found that there was no reason for it to depart from the position it had adopted in agreeing to give advisory opinions on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954,* p. 47), and on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* (*I.C.J. Reports 1956,* p. 77), even though the questions laid before it in those cases had concerned the rights of private individuals. In this respect the Court confirms its earlier position that "The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute" (*I.C.J. Reports 1973,* p. 172, para. 14). The fact that a request for an advisory opinion derives, as it does in the present case, from the initiative of a member State and not from an application by a staff member, as in the Advisory Opinion of 1973, does not raise any additional considerations such as to modify the Court's reasoning as to the compatibility with the Charter of its exercising advisory jurisdiction in such cases. The considerations contemplated by the Court in 1973 as calling for close examination in the event of a request from the Committee made on the application of a member State, were not broached in the context of the question of the Court's competence to give the opinion requested. They relate to the question whether this feature of the procedure established by Article 11 is of such a character as should lead the Court, although competent, to decline to answer the request (*I.C.J. Reports 1973,* p. 175, para. 24, and p. 178, para. 31), and will be considered below.

21. It is however a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should

be one arising within the scope of the activities of the requesting organ. Certain doubts had been expressed in that regard also, but the Court, in its 1973 Advisory Opinion, found that the questions submitted to the Court were legal questions arising within the scope of the Committee's own activities, and concluded that the Committee on Applications for Review of Administrative Tribunal Judgements was indeed

> "an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal".

Accordingly the Court declared itself competent under Article 65 of its Statute (*I.C.J. Reports 1973,* p. 175, para. 23). The special features of the proceedings leading up to the present request for advisory opinion afford the Court no grounds for departing from its previous position on the point under consideration.

*

22. After finding that it was competent to give the advisory opinion requested, the Court in its 1973 Opinion recalled the discretionary nature of the power it might thus exercise. It then considered whether, having regard to the requirements of its judicial character, to which it must remain faithful even in the exercise of its advisory function, certain aspects of the procedure laid down in Article 11 of the Statute of the Administrative Tribunal should not lead it to decline to give an advisory opinion (*I.C.J. Reports 1973,* p. 75, para. 24). In the case at present before it, the Court must undertake the same examination.

23. Having considered certain aspects of the review procedure which were relevant to its response to the Committee's request, the Court, in the 1973 Advisory Opinion, reached certain conclusions. It noted that the Committee was a "political organ", vested with functions that were "normally discharged by a legal body" and were to be regarded as "quasi-judicial" in character. But as the Court explained

> "there is no necessary incompatibility between the exercise of these functions by a political body and the requirements of the judicial process . . . the compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system" (*I.C.J. Reports 1973,* p. 176, para. 25).

The Court considers that the findings which it thus expressed in its earlier Advisory Opinion remain wholly relevant to the determination of its proper response to the request now before it. It regards it as a highly important principle that the requirements of the judicial process should be observed not only during the two sets of judicial proceedings (one before

the Administrative Tribunal, the other before the Court) but also during the operation of the political organ with quasi-judicial functions which furnishes what the Court in its earlier Advisory Opinion called "a potential link" between them. It is essential for the Court's decision as to what response it will make to the request for advisory opinion that the Committee's part in the process should be tested against the requirements of the judicial process. As the satisfaction of those requirements depends on the circumstances and conditions of the review system, and of the particular case in question, the Court must appraise, *inter alia,* the circumstances and conditions surrounding the fact that the Committee's part in the process in the present case was originally set in motion by an application from a member State.

24. In that connection, the Court, in the present proceedings, is called upon to ask itself whether the part played by a member State in submitting an application for review is not tantamount to intervention in the review process by an entity which was not a party to the original proceedings. It is contended in the Written Statement of Mr. Mortished that the procedure

> "allowing a third party to raise objections to a judgement in which it has no legal right or interest and to seek a review of that judgement is contrary to fundamental principles of the judicial process".

In the first place, the Court observes that although a member State of the United Nations be not a party to a judgment rendered by the Administrative Tribunal in a dispute between a staff member and the Organization, it may well have a legal interest in giving rise to a review of the Judgement. This is certainly so, where, as in the present case, the Judgement in question is challenged on the ground that an error has been committed on a question of law relating to the provisions of the Charter, that is to say of a treaty to which this State is a party. Secondly, the Court notes that the respective roles of a member State which submits an application to the Committee and of the Committee itself are precisely defined by the Statute of the Administrative Tribunal. Admittedly, it is the member State which, by submitting its application to the Committee, gives rise to the Committee's discussion of that application. Nevertheless, once the Committee has decided that there is a substantial basis for the application, the request for advisory opinion comes from the Committee and not from the member State. The origin of the application which the Committee has to consider, be it the initiative of a member State, of the Secretary-General or of a staff member party to the judgement in question, does not affect the formal origin of the request submitted to the Court : it is always from the Committee that this request emanates. Besides, if that were not so, as neither a member State nor the Secretary-General nor a staff member is authorized by the Charter to request an advisory opinion of the Court, their request would not be admissible. The Court was in no doubt in 1973 that the request for an advisory opinion then before it emanated from the Com-

mittee even though the Committee's decision had been taken on the application of a staff member. It does not consider, in the present case either, that the request before it emanates from a member State. Thus it does not consider that this request constitutes an intervention, at review level, of a member State and hence of a third person in relation to the original proceedings.

25. The Court has also to take a position on two points relating to the scope of the advisory opinion it is requested to give. On the one hand, the view has been held that the fact that the Court's advisory opinion is, by virtue of Article 11, paragraph 3, of the Statute of the Administrative Tribunal, to have a conclusive effect with respect to the matters in litigation affords a ground for objecting to the exercise of the Court's advisory jurisdiction. The Court, however, in its 1973 Advisory Opinion, after recalling the position it took on a similar contention based on Article XII of the Statute of the ILO Administrative Tribunal, in its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco,* found that

> "the special effect to be attributed to the Court's opinion by Article 11 of the Statute of the United Nations Administrative Tribunal furnishes no reason for refusing to comply with the request for an opinion in the present instance" (*I.C.J. Reports 1973,* p. 183, para. 39).

As the origin of the present advisory proceedings is irrelevant to appreciation of the point under consideration, the Court confirms the position it adopted in the matter in the Advisory Opinions of 1956 and 1973.

26. On the other hand, in the present proceedings the Government of the United States, in its written statement, has put forward another point concerning the scope of the advisory opinion sought of the Court. This point is not connected with the origin of the present request for advisory opinion. However, as it was not raised during the advisory proceedings in 1973, it will be as well for the Court to consider it here. Warning the Court of the consequences of not complying with the request for an opinion, the Government of the United States made the following observation :

> "The Assembly appears to have decided that the United Nations and the General Assembly will not be bound by an adverse Administrative Tribunal judgement with respect to which substantial legal doubt exists [that is to say, if objection has been taken to the judgement, and the Committee has found that there is a substantial basis for the objection] unless the Court sustains the Administrative Tribunal on the law of the matter."

The United States concluded that if the Court declined to give an opinion, that would "put in question the status of Judgement No. 273 of the Administrative Tribunal", with manifest implications for the Court's discretion to give or to refuse the opinion requested. The Court does not intend to pronounce on the intentions imputable to the General Assembly

in regard to this aspect of the review procedure. Nevertheless, the adoption of that procedure cannot have had the effect of amending the provisions of the Charter or of the Statute of the Court whereby the Court's exercise of its advisory jurisdiction remains discretionary. The Court would repeat what it stated in 1956 as to the binding force attributed by Article XII of the Statute of the ILO Administrative Tribunal to the advisory opinion requested, that the provision in question "in no wise affects the way in which the Court functions . . . Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself" (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956,* p. 84). The Court therefore considers that even if its giving of an advisory opinion were legally indispensable for a judgement of the Administrative Tribunal to become final – a point which it does not have to settle in relation to the present request – this consideration should not prevent it from maintaining unimpaired the discretionary character of its exercise of advisory jurisdiction.

27. An objection to the giving of an advisory opinion by the Court has been based by Mr. Mortished on the contradiction which he finds between the application of the Government of the United States and certain articles of the Charter concerning the Secretary-General and the Secretariat. He contends that the initiative taken by a member State to seise the Committee

> "impinges upon the authority of the Secretary-General under Article 97 of the United Nations Charter as Chief Administrative Officer of the Organization, and conflicts with Article 100 of the Charter regarding the 'exclusively international character' of the Secretariat".

He has in particular maintained that the procedure contemplated by Article 11 of the Statute of the Administrative Tribunal "allows any member State to force the Secretary-General to refrain from accepting and implementing an otherwise final and binding judgement". The Court recognizes that an application addressed by a member State to the Committee, when the Secretary-General has not taken any step of this kind, will, in a case in which the Committee finds that it should ask for an advisory opinion of the Court, lead to delay in the judgement of the Tribunal becoming final. But this effect is not produced by the application addressed by the member State to the Committee, which the Committee can perfectly well reject. The effect in question must be attributed to the decision of the Committee to seek an advisory opinion from the Court. This is however just as much the effect of the action of the Committee when it is seised by a staff member as when it is seised by a member State. When a member of the Secretariat, dissatisfied with the judgement given by the Administrative Tribunal, endeavours to set in train a request by the Committee for an advisory opinion, he also obliges the Secretary-General, who was satisfied with the judgement of the Tribunal and was preparing to implement it, to refrain from doing so until the judgement has been

confirmed or modified. This is no more than the normal effect of the operation of a review procedure. To say that it constitutes an encroachment on the authority of the Secretary-General, and a violation of Article 100 of the Charter, amounts to denying that judgements of the Administrative Tribunal which satisfy the Secretary-General may be subjected to a review procedure. The Court cannot therefore accept Mr. Mortished's views in this respect.

28. For the purposes of the present proceedings the Court does not have to analyse in detail the question of the powers of representing the United Nations, which presents aspects which are complex or obscure. It is sufficient for it to find that the competence exercised by the Committee in the context of Article 11 of the Statute of the Administrative Tribunal does not contradict the status of the Secretary-General as "the chief administrative officer of the Organization" (Art. 97 of the Charter), nor to infringe the "exclusively international character of [his] responsibilities" (Art. 100 of the Charter). Finally, the Court can find no justification for Mr. Mortished's further claim that the staff member in whose favour the judgement was given may, in challenging the views of the member State which disputes the judgement, be jeopardized in the performance of his duties as an international official, contrary to paragraph 1 of Article 100. The fact that a staff member disputes the legal views of a member State on proceedings to which the staff member is a party no more prevents him from respecting the duties resulting from his international status under Article 100, than his opposition to the contentions of the Secretary-General on the subject-matter of the proceedings involves him in a breach of the discipline to be observed by a member of the Secretariat with regard to its chief administrative officer.

29. The Court now comes to the principle which, in its 1973 Advisory Opinion, it regarded as a requirement of the judicial process : the principle of equality of the parties. In that Opinion the Court emphasized various applications of the principle ; it referred to it first with regard to the decision by the Committee "after an examination of the opposing views of the interested parties" (*I.C.J. Reports 1973,* p. 176, para. 26). It also referred to it in connection with the interpretation by the Committee of the requirement laid down in Article 11 of the Statute of the Administrative Tribunal that there should be "a substantial basis for the application" brought before the Committee. On this point, it noted that it would be incompatible with the principles governing the judicial process if the Committee were not to adopt a uniform interpretation of this requirement whether or not the applicant was a staff member (*ibid.*, p. 177, para. 29). It was also concerned as to the inherent inequality resulting from the Court's Statute between the staff member, on the one hand, and the Secretary-General, on the other. Observing that the difficulty arose from the terms of Article 66 of the Court's Statute, which makes provision for the submission of written or oral statements only by States and international organizations, the Court noted that Article 11 of the Statute of the Administrative Tribunal provides that the staff member is entitled to have his views

transmitted to the Court, with the implication that this is to be without any control being exercised over the contents by the Secretary-General. In this way, the equality of a staff member before the Court is "a matter of right guaranteed by the Statute of the Administrative Tribunal" (*ibid.,* p. 180, para. 35). Thus the Court, which, in its 1956 Advisory Opinion, had considered that "any seeming or nominal absence of equality", inherent in Article 66 of its Statute, should not prevent it from giving effect to a request for advisory opinion, clearly took the view that what was essential was that actual equality should be ensured by practical measures. In giving effect to the present request for advisory opinion, the Court must attribute great importance, as it did in its response to the request mentioned above, to the question whether actual equality is ensured despite a seeming or nominal absence of equality.

30. In the present case, that is to say in advisory proceedings resulting from the application to the Committee of a member State, the problem of the implementation of the principle of equality does not give rise to any particular difficulty as regards the proceedings before the Court itself. The views of the staff member concerned have been transmitted to the Court in accordance with Article 11, paragraph 2, of the Statute of the Administrative Tribunal. As the Court observed in its 1973 Advisory Opinion :

> "The Court is, therefore, only concerned to ensure that the interested parties shall have a fair and equal opportunity to present their views to the Court respecting the questions on which its opinion is requested and that the Court shall have adequate information to enable it to administer justice in giving its opinion." (*I.C.J. Reports 1973,* p. 182, para. 38.)

As in that case, the Court "is satisfied that these requirements have been met in the present proceedings" *(ibid.).* Similarly, the decision, taken in the present case as in 1973, to do without oral proceedings, while for the Court it amounts to depriving itself of a very useful procedure, appears to be a sacrifice which is justified by concern thereby to ensure actual equality. This is however on the basis that the task of the Court in relation to the judgement of the Tribunal is not fundamentally different from the task it performed in the 1973 Opinion ; this is a point to which the Court will have to return (paragraph 61 below).

31. But the problem is not merely that of equality before the Court. As has been observed above, comparison of the review procedure with the requirements governing the judicial process, and thus in particular with the principle of equality of the parties, must also be made with regard to that stage of the review procedure which involves the intervention of the Committee. From this point of view, the Court should note a fundamental aspect of the review procedure which is not linked to the special circumstances of the present case, but which has been particularly highlighted by it : the fact that the Committee is no more than an organ of the party which was unsuccessful before the Tribunal, that is to say the United Nations. Consequently, in the review procedure, one of the parties – the United

Nations – has the right to decide the fate of the application for review made by the other party, the staff member, through the will of a political organ, even if such organ has to some extent an "independent character" (*I.C.J. Reports 1973*, p. 173, para. 18). This fundamental inequality entails a particularly careful examination of the rules governing the composition and functioning of the Committee.

32. That Committee is composed of the member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. One of those States may be the State which applies to the Committee to request an advisory opinion of the Court. In such a case, the government in question can itself present its application, take an active part in the discussion thereof, and even take part in the vote at the close of the discussion. Since neither such participation in the discussion nor voting are forbidden by the Statute of the Administrative Tribunal, or by the rules of procedure of the Committee, it is certain that there is here a cause of inequality between the parties concerned in the review procedure, which results from the nature of the specialized organ created by the General Assembly, and from the rules governing its functioning. Since the Court, maintaining the approach it adopted on this point when it gave its 1973 Opinion, proposes to assess whether inequality exists at both the theoretical and the practical level, it can conclude at once that on the theoretical level inequality exists. To ascertain whether it also exists on the practical level, the Court must examine what the Committee actually did when it was seised of the application from the United States Government concerning Judgement No. 273 of the Administrative Tribunal. At the same time, the Court will endeavour to establish whether the Committee duly respected the elementary principle governing the judicial process, that an organ which intervenes in a procedure which, taken as a whole, is judicial in nature, must observe the rules governing its composition and its functioning.

* *

33. Before turning to an examination of the proceedings of the Committee, the Court should however first deal with a point relating to the composition of the United Nations Administrative Tribunal for its Judgement No. 273, since it might be suggested that this was irregular, and that if the irregularity were found to be such as to vitiate the decision of the Tribunal, further examination of the question put to the Court would be unnecessary. The Judgement begins as follows :

> "THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
>
> Composed of Madame Paul Bastid, President ; Mr. Endre Ustor, Vice-President ; Mr. Francisco A. Forteza, Vice-President ; Mr. Herbert Reis, alternate member".

The verbatim record of the sitting of the Tribunal in the case records the

presence of these four members. The Judgement is signed by the President and the two Vice-Presidents of the Tribunal ; there follows the statement "Not being in agreement with the judgement, I set forth my dissenting opinion below", which is signed by the alternate member, and his dissenting opinion follows.

34. While under Article 3, paragraph 1, of its Statute, the Tribunal is "composed of seven members, no two of whom may be nationals of the same State", that Article then stipulates as follows : "Only three shall sit in any particular case." The Tribunal is empowered by Article 6 of its Statute to establish its own Rules, and by Article 6, paragraph 1, of those Rules, the President is authorized to designate the three members of the Tribunal who "shall constitute the Tribunal for the purpose of sitting in each particular case or group of cases". This paragraph further provides, however, that the President "may, in addition, designate one or more members of the Tribunal to serve as alternates". It is obvious that, in the case before it, the President of the Tribunal exercised her power under this article but nowhere in the Judgement is there a statement as to the circumstances or purposes dictating that an alternate member should be appointed. The silence of the Tribunal's Judgement on the issue leads to speculation as to whether an alternate member is expected to be designated by the President normally in the absence of one of the regular three members or when such alternate member possesses exceptional expertise or qualifications not to be found in the three ordinary members of the Tribunal. It is thus a question why it was considered proper for the alternate member to be allowed to sit with the Tribunal when all the three regular members were available, and did sit ; the participation of the alternate member in the Judgement would seem to require an explanation. It should also be recalled that a dissenting opinion was appended by him to the Judgement of the Tribunal.

35. Article 6 of the Rules of the Tribunal gives the President a discretion, which must however be exercised in harmony with Article 3 of the Statute of the Tribunal quoted above. The published Judgements of the Tribunal show that it has in the past sat on many occasions with more than three members present, without any explanation. So far as the Court is aware no objection has been taken in the past to this practice. The case concerning *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* in 1954 sprang from 11 judgements of the Tribunal, the texts of which were before the Court, in each of which the Tribunal was recorded to be composed of four persons. In that case the Court however observed that in none of the "reports or relevant records" before it was there to be found "any suggestion indicating that the Tribunal, when rendering its awards in those 11 cases, was not legally constituted according to the provisions of Article 3 of its Statute" (*I.C.J. Reports 1954*, p. 50). At all events the Court has not been asked to consider whether the Tribunal might have "committed a fundamental error in procedure which has occasioned a failure of justice" as contemplated by Article 11, paragraph 1, of the Tribunal's Statute, nor does the matter appear on the face of

it to disclose any failure of justice. Accordingly, further consideration of the point does not seem to be called for.

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36. The Court now turns to the proceedings of the Committee. The material available to the Court concerning those proceedings includes not only the Report of the Committee (A/AC.86(XX)/25) but also transcripts of a tape-recording of its meetings (A/AC.86(XX)/PV.1 and 2), supplied pursuant to a decision of the Committee adopted in response to a request to that effect by counsel for Mr. Mortished (paragraph 14 above). It is however to be regretted that the Committee does not appear to have kept an official list of those present and names of voters and absentees at the time of each decision.

37. In the present case the records disclose a number of notable irregularities attending the proceedings of the Committee at its 20th session, and these must be considered in the light of the texts governing the composition and activity of the Committee. Under Article 11, paragraph 4, of the Statute of the Administrative Tribunal, the Committee on Applications for Review of Administrative Tribunal Judgements is empowered to establish its own Rules. On 16 October 1956 the Committee adopted Provisional Rules of Procedure (amended on 25 October 1956, 21 January 1957 and 11 December 1974), which provide in Article I that "The proceedings of the Committee shall be governed by the rules of procedure of the General Assembly applicable to committees" (A/AC.86/2/Rev.2).

38. One of the most important irregularities in the procedure adopted by the Committee concerns its composition at its 20th session, when it took the decision to request the present advisory opinion. Article 11, paragraph 4, of the Statute of the United Nations Administrative Tribunal requires that the Committee be "composed of the member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly". One of the States in question was Sierra Leone, since it participated in the General Committee through its representative, who was Chairman of the Sixth Committee at the relevant time. As he was, however, away from United Nations Headquarters on official business during the 20th session of the Committee, he designated the representative of Canada, who was a Vice-Chairman of the Sixth Committee, to act in his place, allegedly "under Rule 39 of the Rules of Procedure of the General Assembly". This replacement was irregular in the case of the Committee on Applications for Review of Administrative Tribunal Judgements, since it is clear that Canada was not one of the States Members composing the General Committee. It is true that the Committee on Applications for Review, at the outset of the meeting, accepted the Canadian representative by taking the decision that "Canada, rather than Sierra Leone, should serve as a member of the Committee at this session"

(A/AC.86(XX)/PV.1, p. 6) ; but this decision itself could not be regarded as regular since the Committee has no power to derogate from Article 11 of the Statute of the United Nations Administrative Tribunal. The Sierra Leone chairman of the Sixth Committee could, and indeed should, have nominated another member of the Sierra Leone delegation to sit on the Committee on Applications for Review, but it was unquestionably irregular for him to have nominated the Canadian, as Vice-Chairman of the Sixth Committee, to sit on the Committee on Applications for Review, and for this substitution to have been adopted by the Committee itself. The irregularity was compounded by the election of the Canadian representative as Chairman of the Committee, even though the election as such complied with Rule 103 of the Rules of Procedure of the General Assembly. Curiously enough the issue of the improper composition of the Committee was not raised either by the United States Government or by the French Government, or even by counsel for Mr. Mortished, throughout their respective Written Statements. And yet the matter is fundamental to the whole question of the present reference to this Court.

39. Further irregularities relate to the Application submitted to the Committee by the United States Government. As Mr. Mortished's counsel's letter to the Secretary of the Committee (A/AC.86/R.100, p. 2) indicates, the United States' application was addressed to the Acting Legal Counsel whereas it should have been addressed "to the official designated by the Secretary-General to serve as Secretary of the Committee" under Article II, paragraph 1, of the Committee's Provisional Rules of Procedure. This irregularity is admittedly not of great importance, but the fact that the Committee nevertheless accepted the Application without comment is an illustration of the lack of rigour with which the Committee conducted the proceedings in the present case. The application in question reads as follows :

> "The United States respectfully requests the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion of the International Court of Justice on the matter of Judgement No. 273 of the Administrative Tribunal.
>
> Judgement No. 273 raises a question of law relating to the provisions of the Charter of a constitutional dimension within the ambit of article 11 of the statute of the Administrative Tribunal which is of sufficient seriousness and magnitude to merit seeking the advice of the International Court of Justice.
>
> The General Assembly is expressly charged, pursuant to Article 101 of the United Nations Charter, with establishing regulations concerning the staff. Resolution 34/165 constitutes the making of such regulations. It states in relevant part :
>
> "*Decides* that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence

of relocation away from the country of the last duty station is provided".

It is thus abundantly clear from the face of the resolution as well as the legislative history that the General Assembly intended the resolution to terminate the administrative practice of payments of repatriation allowances to persons who do not relocate upon retirement. The Secretary-General acted in strict compliance with this resolution, as he was bound to do, when he issued administrative instruction ST/AI/269. In invalidating these actions of the Secretary-General as applied to Mr. Mortished, the Administrative Tribunal acted to deny the full effect of decisions of the General Assembly which were neither arbitrary nor capricious.

It is not the contention of the United States that there are no circumstances in which the Administrative Tribunal could reject the application of rules made by the General Assembly and no rights of employees that the Administrative Tribunal may seek to preserve. These issues are not raised by the instant case. The issue that is raised is whether, in light of all the circumstances of the case, the Administrative Tribunal gave due weight to the actions of the General Assembly concerning repatriation grants when it found that Mr. Mortished should be given a repatriation allowance even though he did not depart or express an intention to relocate away from the country of his last duty station.

In light of the constitutional dimensions of these issues, including the relevance of Article 101 of the Charter and the authority of the General Assembly thereunder, it is believed that the matter calls for an advisory opinion from the International Court of Justice. It is consequently our view that the Committee on Applications for Review of Administrative Tribunal Judgements should ask the Court the following question :

'Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General,* warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station ?' "

40. Article II, paragraph 3, of the Committee's Provisional Rules of Procedure provides that :

"The application shall contain the following information in the order specified :

. . . . . .

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

It is evident that the application of the United States did not comply with this requirement. Article II, paragraph 3, of the Committee's Provisional Rules of Procedure does not impose a sanction for its non-observance, and it is to be noted that in the course of the discussion two of the four grounds specified in Article 11 of the Tribunal's Statute were identified as intended by the application, and voted on (paragraph 15 above). In this respect it would seem that the Committee did not, on this particular occasion, follow its "traditional" procedure, which the Chairman of the Committee at this session stated to be that the Committee normally takes a decision on four questions corresponding to the four grounds listed in Article 11, paragraph 1, of the Statute of the Tribunal. If this assertion of the Chairman of the Committee is to be taken as correct, the procedure adopted at the 20th session was not that traditionally followed. So far as the procedural irregularity in failing to state in the application the grounds of objection was a breach of the Rules made by the Committee, the Committee may thus be taken to have waived it. It must however be borne in mind that Article 11, paragraph 1, of the Tribunal's Statute itself provides for application to the Committee "If a member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal . . . objects to the judgement *on the ground that*" the Tribunal had committed one of the four specified errors.

41. Thus, the United States application to the Committee was formally defective in not complying fully with the requirements of Article 11, paragraph 1, of the Statute of the Administrative Tribunal, and Article II, paragraphs 1-3, of the Provisional Rules of Procedure of the Committee, since the necessary details and supporting argument were not fully set out therein. Furthermore, it is certain that Mr. Mortished, whose counsel argued in his communication to the Committee that the application should be rejected "on the grounds that it does not fall within the terms of Article 11 of the Statute of the Administrative Tribunal" (A/AC.86/R.100, p. 9), was unable to identify in advance and comment on the two specific grounds eventually selected by the Committee. Mr. Mortished, in his written statement laid before the Court, has challenged the Committee's acting on a legally defective application, and has complained in this respect of a breach of the principle *audi alteram partem* ; the Court considers that such action exacerbated on the practical level the inequality already established on the theoretical level (paragraph 32 above) between the staff member and the applicant State. The same must be said of a further action by the Committee which, while not a procedural defect in the sense of being contrary to a text governing the activity of the Committee, was nevertheless, from the point of view of the Committee's quasi-judicial functions, a startling irregularity. This was the refusal of the Committee to grant the request of counsel for Mr. Mortished to be given

the opportunity to participate in the proceedings of the Committee at which the United States application was considered (A/AC.86/R.100, p. 3).

42. The United States was a member of the General Committee of the Assembly and therefore of the Committee on Applications, and its representative not only sat on the Committee during the proceedings, but also submitted comments not elaborated in the original application, upon which alone, as noted above, Mr. Mortished had had the opportunity to comment in writing. When the representative of the United Kingdom on the Committee identified specific grounds of objection to the Tribunal's judgement, namely that it erred "on a question of law relating to the Charter" and that it had committed "an excess of jurisdiction or competence" (A/AC.86(XX)/PV.1, pp. 22-23), the United States representative was able to endorse that approach and elaborate upon it. It is needless to say that Mr. Mortished was deprived by the Committee's decision not to admit the participation of his counsel of the opportunity of knowing about these grounds, and of commenting upon them. It must of course in fairness be recalled that the United States representative did not participate in the vote on the admission of counsel for Mr. Mortished. Nevertheless, Mr. Mortished was precluded from participating in the discussion of the grounds of objection to the Tribunal's Judgement, while the representative of the applicant State was able to participate fully.

43. The United States Government has asserted that the Committee "is not a judicial body taking action on the merits of the staff member's case", and that its procedures "need not be judicial". This Court has however held in its 1973 Advisory Opinion that the Committee is a body discharging "quasi-judicial" functions, which operates between the Administrative Tribunal and this Court by determining the legal question to be submitted by it to the Court under Article 96, paragraph 2, of the Charter (*I.C.J. Reports 1973*, pp. 174, 176). The United States has also argued that, in any case, Mr. Mortished had been allowed to submit his written comment on the United States' application, and that his appearance before the Committee was not necessary, since "There should be no requirement that the staff member and the member State be in a position of equality in such a process". It is, however, not true, as the United States contends, that "the staff member's interest in an equal hearing is more compelling when it is his own application which may be denied" ; the procedure before the Committee is no doubt at least quasi-judicial, since it constitutes a necessary link between the findings of the Tribunal, which are judicial, and the review findings of the Court, which are also judicial. Mr. Mortished's written comments on the United States' application, although of interest to the proceedings before the Committee, are not a valid substitute for his observations on the grounds which emerged from the Committee's proceedings. It is not necessary to argue that the issues raised by the application were not considered to be "uniquely within the competence of Mr. Mortished's counsel on which he must be heard in order for justice in fact to be done" (A/AC.86(XX)/PV.1, p. 16).

44. Thus the admission by the Committee of the incomplete application by the United States, and the subsequent refusal to allow Mr. Mortished's counsel to participate in its work, when the United States representative on the Committee sat throughout the proceedings and explained and argued the grounds therefor, accentuated the irregularity of the proceedings. The Committee was, in the view of the Court, under a duty in the circumstances of this case to take such steps as were open to it to mitigate the basic inequality on the theoretical level between the applicant State and the staff member (paragraph 32 above). It might, for example, have been wise for the United States representative to have refrained from participating in the substantive votes, as he did on the procedural vote on the admission of Mr. Mortished's counsel. Since the Committee decided not to hear the counsel, the United States representative could, with propriety, have refrained from participating in the discussion.

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45. Despite the irregularities described in the preceding paragraphs, and despite also the failure of the Committee to show the concern for equality appropriate to a body discharging quasi-judicial functions, the Court nevertheless feels called upon, for reasons now to be explained, to accept the task of assisting the United Nations Organization. It is in accordance with the Court's jurisprudence that, even though its power to give advisory opinions is discretionary under Article 65 of its Statute, only "compelling reasons" would justify refusal of such a request (cf. *I.C.J. Reports 1973,* p. 183 ; *I.C.J. Reports 1956,* p. 86). Of course the irregularities which feature throughout the proceedings in the present case could well be regarded as constituting "compelling reasons" for a refusal by the Court to entertain the request. The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are however of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation. While it would have been a compelling reason, making it inappropriate for the Court to entertain a request, that its judicial role would be endangered or discredited, that is not so in the present case, and the Court thus does not find that considerations of judicial restraint should prevent it from rendering the advisory opinion requested. In the present case such a refusal would leave in suspense a very serious allegation against the Administrative Tribunal, that it had in effect challenged the authority of the General Assembly. While there can be no question, as pointed out in paragraph 26 above, of any restriction on the Court's discretion, the Court will not refuse "its participation in the activities of the Organization" (*I.C.J. Reports 1950,* p. 71), so that the important legal principles involved may be disposed of, whilst at the same time the Court must point out the

various irregularities. It is not by appearing to shy away from the latter that the Court can discharge its true judicial functions.

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46. The Court will therefore now turn to the actual question on which its opinion is requested, and will consider first whether, in the form in which it has been submitted, it is one which the Court can properly answer. The question laid before the Court for advisory opinion by the request submitted by the decision of the Committee dated 13 July 1981 is as follows :

> "Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General,* warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station ?"

The Committee in fact adopted exactly the question formulated by the United States in its application to the Committee ; but as already noted, before doing so it decided that there was a substantial basis for the application on two of the specific grounds provided for in Article 11 of the Statute of the Administrative Tribunal. Thus, in the first place, the question put to the Court is, on the face of it, at once infelicitously expressed and vague ; and, in the second place, the records and report of the Committee cast doubt on whether the question as framed really corresponds to the intentions of the Committee in seising the Court. Its wording is infelicitous because of the expression used in asking whether Judgement No. 273 is "warranted", and whether it gives "immediate effect" to General Assembly resolution 34/165 ; it might have been differently and more happily phrased in language which made it clear that the question was a legal question arising within the scope of the activities of the Committee, in accordance with Article 96, paragraph 2, of the United Nations Charter, and one within the powers of the Committee to put under Article 11, paragraph 1, of the Statute of the Tribunal. It appears not to correspond to the intentions of the Committee in that it is worded in such a way that it does not disclose the two grounds of objection, error in law and excess of jurisdiction, made to the Tribunal's Judgement during the discussions of the Committee, and which clearly lie at the basis of the question intended to be referred to the Court by the Committee. This defect derives from the original omission of the United States Government to set forth those two issues and supporting argument in its application to the Committee, a defect which was later imperfectly covered up by the votes of the Committee finding that there was a substantial basis for the two grounds discussed.

47. The Court has therefore to consider whether it should confine itself to answering the question put ; or, having examined the question, decline to give an opinion in response to the request ; or, in accordance with its established jurisprudence, seek to bring out what it conceives to be the real meaning of the Committee's request, and thereafter proceed to attempt to answer rationally and effectively "the legal questions really in issue" (*I.C.J. Reports 1980,* p. 89, para. 35). As will be explained below (paragraph 55), it might be possible to give a reply to the question on its own terms, but the reply would not appear to resolve the questions really in issue, and it is also doubtful whether such a reply would be a proper exercise of the Court's powers under Article 11 of the Tribunal's Statute. The dilemma has been emphasized in the written statement of France : while not going so far as to contend that the Court should not give effect to the request, the French Government observed that the question put to the Court "does not indicate on what grounds the Committee on Applications for Review has decided that 'there is a substantial basis' for the application presented by the United States of America" and that the Court may therefore "encounter particular difficulties in exercising its jurisdiction". It recalls that according to the established case-law of the Court in this field, on the one hand "in giving its opinion the Court is, in principle, bound by the terms of the questions formulated in the request" (*I.C.J. Reports 1973,* p. 184, para. 41), while on the other hand, the Court's jurisdiction under Article 11 of the Statute is limited to the four specific grounds of objection there specified, and

> "consequently, the Committee is authorized to request, and the Court to give, an advisory opinion only on legal questions which may properly be considered as falling within the terms of one or more of those four 'grounds'" *(ibid.).*

48. The Court does not however conclude that in the present case it is obliged to decline on these grounds to give an opinion. The Court pointed out in its advisory opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* that

> "if [the Court] is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request" (*I.C.J. Reports 1980,* p. 88, para. 35).

If those questions, once ascertained, prove to be questions "which may properly be considered as falling within the terms of one or more of" the grounds contemplated in Article 11 of the Statute of the Tribunal, it is upon those questions that the Court can give its opinion. In its 1973 Opinion the Court indicated the primacy of Article 11 over the actual terms of the request, when it pointed out that the scope of the question put to it is

> "determined first, by Article 11 of the Statute of the Administrative Tribunal, which specifies the grounds on which a judgement of the Tribunal may be challenged through the medium of the advisory jurisdiction, and, secondly, by the terms of the request to the Court" (*I.C.J. Reports 1973,* p. 183, para. 41).

In the present case, the Court therefore concludes that, in order to respond to the request made by the Committee, it must determine whether each of the objections, for which the Committee found there was a "substantial basis", is well-founded, despite the fact that neither of those objections is, in terms, stated in the request for the Court's opinion. As the Court observed in its 1980 Advisory Opinion,

> "the Court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980,* p. 89, para. 35).

The Court therefore interprets the question put to it as requiring it to determine whether, with respect to the matters mentioned in that question, the Administrative Tribunal "erred on a question of law relating to the provisions of the Charter of the United Nations", or "exceeded its jurisdiction or competence". This is not the order in which these grounds of objection appear in Article 11, paragraph 1, of the Tribunal's Statute, but it is the order in which they were dealt with and voted upon in the Committee. The Court will also deal with them in that order.

* *

49. In order to examine the objections taken to the Judgement of the Tribunal, it is clearly necessary for the Court first to set out the nature of the claim submitted to the Tribunal, what in fact it decided, and the reasons it gave for its decision. The facts of the case have already been summarized in paragraphs 10 to 12 above. In his application to the Tribunal Mr. Mortished requested it to adjudge and declare that the scheme and detailed conditions and definitions established by the Secretary-General for the payment of repatriation grants entitled him to the payment of such a grant without the necessity for the production of evidence of relocation ; that his entitlement to the payment of a repatriation grant amounted to an acquired right ; that this entitlement could not be retroactively effaced by subsequent amendments to the Staff Regulations and Rules ; and

> "D. In consequence of the foregoing to *order* the Secretary-General to pay to him his entitlement to a repatriation grant in accordance with Annex IV to the Staff Regulations."

50. After setting out the principal contentions of the two parties the Tribunal noted that "The refusal to pay the repatriation grant to the Applicant was . . . grounded in Administrative Instruction ST/AI/269, established in pursuance of resolution 34/165" (para. I). The Tribunal then recalled the basis of the legal obligations of the United Nations towards the Applicant. The Tribunal observed that the legal status of staff members is defined by a contract, entitled "letter of appointment", the provisions of which are binding on the parties and can be amended only by mutual agreement. The letter of appointment stipulates that the appointment is offered "subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules". These documents of general application "are made an integral part of the contract and the staff member accepts in advance any amendments which may be made to them", new provisions resulting from amendment becoming an integral part of the contract on the date of their entry into force (para. II).

51. After outlining the competent authorities and procedures for the making of Staff Regulations and Staff Rules (see paragraphs 67 ff. below), the Tribunal noted that "the legal status of a staff member is governed by the provisions of the Staff Rules immediately on their entry into force" (para. III). Citing Staff Regulation 12.1 and Staff Rule 112.2 *(a)* (the texts of which are set out in paragraph 12 above), the Tribunal stated that "the Secretary-General is bound to respect the acquired rights of staff members in the same way as the General Assembly" (para. IV). After noting the provisions concerning the International Civil Service Commission, which "form part of the régime governing the staff of the United Nations" (para. V), the Tribunal turned to consideration of whether the Applicant had rights on which he might rely as regards the repatriation grant. It noted the personnel action form of 1958 (see paragraph 10 above) and found that the statements therein "unquestionably constitute the explicit recognition by the United Nations of [Mr. Mortished's] entitlement to the repatriation grant, and validation for that purpose of more than nine years' service already completed with ICAO" (para. VI), and that as a result of the formal reference thus made at the time of appointment to the principle of the relationship between the amount of the grant and length of service the Applicant was in the position "that special obligations towards him were assumed by the United Nations" (para. VI).

52. The Tribunal examined the genesis and application of the repatriation grant system, and found it proved that the system of not making payment of the grant dependent on evidence of repatriation, proposed in 1952 by the Consultative Committee on Administrative Questions, "was in effect followed to the benefit of staff members, even though it was not explicitly embodied in any United Nations regulation" (para. VIII). The Tribunal found that, in view of the particular situation of the Applicant, it was not required to adjudicate *in abstracto* the question "whether a practice

followed consistently for nearly 30 years could generate an acquired right within the meaning of Staff Regulation 12.1" *(ibid.)*. The Tribunal continued :

> "The existence of the repatriation grant and the respective roles of the General Assembly and the Secretary-General in defining its juridical rules of application have their foundation in the Staff Regulations." (Para. IX.)

It quoted Staff Regulation 9.4 and Annex IV to the Regulations (set out in paragraph 10 above), and noted the margin of discretion conferred on the Secretary-General by these texts, and that Annex IV, in defining those entitled to the grant, "does not refer to staff members *actually* repatriated but to those for whom that obligation on the part of the Organization exists" *(ibid.)*. The Tribunal concluded :

> "These two provisions of the Staff Regulations, which expressly acknowledge that the repatriation grant scheme falls within the scope of the rule-making authority of the Secretary-General, are still in force. No new provision relating to that grant was added to the Staff Regulations by the General Assembly at either its thirty-third or thirty-fourth sessions.
>
> Thus the question whether the Applicant is entitled to rely on acquired rights does not arise in respect of provisions of the Staff Regulations which fall within the competence of the General Assembly, even though the subject of the application is closely related to the decisions on the repatriation grant taken by the General Assembly." *(Ibid.)*

53. Next the Tribunal examined the background to the adoption by the General Assembly of resolution 33/119, and the action subsequently taken by the International Civil Service Commission (ICSC) and by the Secretary-General. It noted that at no point in the discussion in the General Assembly was the nature of the terms to be established by ICSC specified (para. XI), and that the General Assembly set a fundamental objective and requested ICSC to establish the terms of implementation, ICSC being required to take action in accordance with the powers vested in it to ensure co-ordination within the common system (para. XII). Referring to the texts of paragraphs *(d)* and *(f)* of Staff Rule 109.5 as amended on 22 August 1979 (quoted in paragraph 11 above), the Tribunal observed that "In taking this measure, the Secretary-General adopted the same position as the Executive Heads of the specialized agencies" (para. XII), and that "this was the first time that a provision of the Staff Rules acknowledged that entitlement to the repatriation grant might exist without evidence of relocation being provided" (para. XIII). The Tribunal drew the conclusion that "under the terms of Staff Rule 109.5 *(f)* . . ., the Applicant retains his entitlement to the amount of the grant without the need, as regards that period of service, to produce evidence of relocation" (para. XIII), and

proceeded to examine the question whether that entitlement "can have been effaced retroactively by the Secretary-General's deletion of subparagraph *(f)* in pursuance of resolution 34/165" (para. XIV). The Tribunal surveyed the circumstances preceding the adoption of that resolution and noted that

> "at no time did the General Assembly contemplate supplementing or amending the provisions relating to the repatriation grant contained in the Staff Regulations. Nor did the Assembly examine the text of the Staff Rules in force since 1 July 1979, and it never claimed that there was any defect in the provisions introduced on that date which diminished their validity. The Assembly simply stated a principle of action which the Secretary-General acted upon in establishing a new version of Staff Rule 109.5 which, from 1 January 1980, replaced the version previously in force on the basis of which the Applicant could have obtained the repatriation grant." (Para. XIV.)

54. The Tribunal considered finally the question whether the Applicant could rely on an acquired right, failure to recognize which would give rise to the obligation to compensate for the injury sustained (para. XV). It referred to its own previous jurisprudence on acquired rights of staff members, and concluded that, in the case before it,

> "the link established by the General Assembly and the Secretary-General between the amount of the grant and length of service entitles the Applicant to invoke an acquired right, notwithstanding the terms of Staff Rule 109.5 which came into force on 1 January 1980 with the deletion of subparagraph *(f)* concerning the transitional system" (para. XV).

The decision of the Tribunal on Mr. Mortished's claim was accordingly as follows :

> "By making payment of the Applicant's repatriation grant conditional on the production of evidence of relocation, the Respondent failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 *(f)*.
>
> The stand taken by the Respondent has had the effect of depriving the Applicant of payment of the repatriation grant. Recognizing that the Applicant was entitled to receive that grant on the terms defined in Staff Rule 109.5 *(f)*, despite the fact that that rule was no longer in force on the date of the Applicant's separation from the United Nations, the Tribunal finds that the Applicant sustained injury as the result of a disregard of Staff Regulation 12.1 and Staff Rule 112.2 *(a)*. The Applicant is thus entitled to compensation for that injury. The

injury should be assessed at the amount of the repatriation grant of which payment was refused." (Para. XVI.)

*

55. Having thus summarized the judgement of the Tribunal, the Court can now turn to the question put to it. This, as already noted, is sparse and elliptical, and seems to embody an assumption about the Tribunal's judgement that is hardly sustainable. Even if it be related to the grounds of objection stated in Article 11 of the Tribunal's Statute, so as to ask the Court whether the Tribunal "erred on a question of law relating to the provisions of the Charter of the United Nations" or "exceeded its jurisdiction or competence" in

> "determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station",

it seems that it might be a correct answer to reply simply that the Tribunal did not so determine. For it is important not to confuse what Mr. Mortished asked the Tribunal to decide and what it in fact did decide, which is somewhat different. If the decision of the Tribunal, quoted above, is compared with Mr. Mortished's claim, summarized in paragraph 49 above, it will be apparent that the Tribunal did not find in the terms of what was asked for in paragraph D of that statement of claim. It did not order the Secretary-General to pay to Mr. Mortished "his entitlement to a repatriation grant in accordance with Annex IV to the Staff Regulations". What it did decide was that the Applicant had an acquired right to receive the grant "on the terms defined in Staff Rule 109.5 *(f)* despite the fact that that rule was no longer in force on the date of the Applicant's separation from the United Nations" ; and that he had accordingly sustained injury for which compensation was due, the injury being assessed at the amount of the grant of which payment had been refused. Thus the decision was not that resolution 34/165 could not be given immediate effect but, on the contrary, that the Applicant had sustained injury precisely by reason of its having been given immediate effect by the Secretary-General in the new version of the Staff Rules which omitted Rule 109.5 *(f)*. The difference between a decision that resolution 34/165 could not be given immediate effect and a decision that, precisely because it had been given immediate effect, the Applicant had sustained injury, is not unimportant. The judgement of the Tribunal in no way seeks to call in question the legal validity and effectiveness of either resolution 34/165 or the Staff Rules made by the Secretary-General for its immediate implementation. It drew what, in the Tribunal's view, were the necessary consequences of the fact that the adoption and application of those measures had infringed what the Tri-

bunal considered to have been an acquired right of the staff member, which was therefore protected by Staff Regulation 12.1.

56. Thus this understanding of the actual question produces the above answer which, important as it is, still leaves another question as it were secreted between the lines of the question as originally formulated : namely, was the decision of the Tribunal, in awarding Mr. Mortished a sum equivalent to the grant, even if it did not seek to deny the immediate application of resolution 34/165, nevertheless one that denied "the full effect of decisions of the General Assembly" (paragraph 39 above), and so erred on a question of law relating to the provisions of the United Nations Charter, or amounted to an excess of jurisdiction or competence ? This seems to be the question which is the gravamen of the objection to the Tribunal's Judgement, and the one which the Committee intended to raise. In order to answer it, the Court must first consider the scope of the concept of error "on a question of law relating to the provisions of the Charter of the United Nations".

57. The ground of objection, that the United Nations Administrative Tribunal "erred on a question of law relating to the provisions of the Charter of the United Nations", does not appear in the corresponding article (Art. XII) of the Statute of the ILO Administrative Tribunal, which was before the Court in 1956 ; and it was not one of the grounds relied on in the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* in 1973. Its meaning has, accordingly, not previously fallen to be examined by the Court ; however, in the second of the two cases just mentioned, the Court indicated that this ground differed from those then under examination in that the fact that the role of the Court in review proceedings is not to retry the case

> "does not mean that in an appropriate case, where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may not be called upon to review the actual substance of the decision" (*I.C.J. Reports 1973,* p. 188, para. 48).

What then is the proper role of the Court when asked for an advisory opinion in respect of this ground of objection ? The answer to this question must depend not only upon the terms of Article 11, but also upon several other factors including, first of all, the Court's Statute, the case-law of the Court, the general requirements for the exercise of the judicial function ; and, since Article 65, paragraph 2, of the Court's Statute provides that "Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required", upon the terms of the particular question asked of the Court by the Committee.

58. In another well-known passage in its 1973 Advisory Opinion, preceding that quoted above, the Court declared that :

> "the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement. The Court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgement on one of the grounds mentioned in Article 11 is well founded." (*I.C.J. Reports 1973,* pp. 187-188, para. 47.)

That the Court's proper role is not to retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal, is apparent from the very fact that the question or questions on which the Court is asked its opinion are, since they must conform to Article 11, paragraph 1, of the Tribunal's Statute, different from the questions which the Tribunal had to decide. As the Court then observed, they "arise not out of the judgements of the Administrative Tribunal, but out of the objections to those judgements raised before the Committee itself" (*ibid.,* p. 174, para. 21). There are, however, other reasons, some of them especially compelling in the present case, why the Court should not attempt by an advisory opinion to fill the role of a court of appeal and to retry the issues on the merits of this case as they were presented to the Tribunal.

59. Foremost amongst those reasons must be the difficulties of using the advisory jurisdiction of the Court for the task of trying a contentious case, and especially one to which one of the parties is an individual. Some of the difficulties may be mitigated by such devices as dispensing with oral proceedings and enabling an individual to present written observations through the intermediary of the Secretary-General ; but although such safeguards of elementary principles of judicial procedure such as the equality of the parties and the need to hear both sides may be adequate where the issue for the Court is limited in the way indicated in its 1973 Opinion, they would need most careful re-appraisal were the Court called upon to function as an appeal court in respect of the contentious case itself. Where, however, "the task of the Court is not to retry the case but to reply to the questions put to it regarding the objections which have been raised to the Judgement of the Administrative Tribunal" (*I.C.J. Reports 1973,* p. 182, para. 38), the position is different, and, as noted above, the requirements of equality have been met, on that assumption, in the present proceedings (paragraph 30 above).

60. Likewise, while the interposition, between the proceedings before the Administrative Tribunal and the proceedings before the Court, of the Committee, an essentially political body with discretion to determine whether or not this Court shall be seised of the matter at all, is not necessarily inappropriate for the purposes of seeking an advisory opinion,

it would on the other hand be unacceptable if the advisory opinion were to be assimilated to a decision on appeal. The finding of the Court in its 1973 Advisory Opinion (quoted in paragraph 23 above) that there was "no necessary incompatibility between the exercise of these functions by a political body and the requirements of the judicial process" (*I.C.J. Reports 1973,* p. 176, para. 25) was on the assumption that the proceedings before the Court were not to retry, on appeal, the same issue as that tried by the Administrative Tribunal. This difficulty is especially cogent if, as in the present case, the Committee, in its own exercise of what is clearly a quasi-judicial function, has excluded from its proceedings one who was a party in the case before the Tribunal, whilst the applicant State was able not only to speak and argue but also to vote on the question whether its own objection to the Judgement of the Tribunal had a "substantial basis" or not. The gravity of these aspects has already been made clear above (paragraphs 42-44).

61. The very according of a right, in Article 11 of the Statute of the United Nations Administrative Tribunal, not only to the Secretary-General, or the person in respect of whom a judgement has been rendered by the Tribunal, but also to any member State of the United Nations, to bring before the Committee an objection to a judgement of the Tribunal, suggests of itself that the procedure before the Court was not intended to be part of a procedure of appeal on the merits of the case. Such a right of intervention by a third party is only explicable on the assumption that the advisory opinion is to deal with a different question from that submitted to the Tribunal, and a question in which the intervening member State may well have a legitimate interest (see paragraph 24 above).

62. In short the Court in the present case has not been, and in fact could not be, asked to make a comprehensive review of the merits in the case of *Mortished* v. *the Secretary-General of the United Nations,* but only to give its opinion on two particular grounds of objection to the Judgement in that case. The articles of the Charter that are possibly relevant to the first ground of objection, that of error "on a question of law relating to the provisions of the Charter of the United Nations", are those of Chapter XV, and in particular Article 101, paragraph 1, where it is provided : "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly." It is clear, however, that the Court must first consider whether it is only the possibility of an error in the application or interpretation of those texts of the Charter itself which has to be investigated. What is the scope of the enquiry to be conducted by the Court in order that it may decide whether the Tribunal "has erred on a question of law relating to the provisions of the Charter of the United Nations" ?

63. This ground of objection was the subject of much discussion in the Special Committee on Review of Administrative Tribunal Judgements set up in 1954 (resolution 888 (IX)), and also in the Fifth Committee of the General Assembly. It is well known that the formulation of this clause was the result of a compromise between those who wanted a review system dealing with questions of law more generally, and those who favoured the

narrower range of permissible objections that appears in the Statute of the International Labour Organisation Administrative Tribunal (that is to say, a challenge to a decision of the Tribunal confirming its jurisdiction, or an alleged fundamental fault in the procedure followed which vitiated the decision of the Tribunal). In the opinion of the Court only limited assistance with regard to this question is to be found by consulting the various stages of the legislative history of Article 11 and the gradual evolution within the Special Committee of this compromise. For one thing, the words error "on a question of law relating to the (French : *concernant les*) provisions of the Charter of the United Nations" could hardly be plainer ; and for another, the limits of the Court's role are, as has already been mentioned, determined not only by Article 11 but also by other considerations such as the inherent limitations of the advisory procedure and the imperative requirements of a judicial procedure in contentious cases. It is rather in the light of these other considerations that any doubts over the scope of Article 11 should be resolved.

64. In any event, the Court clearly could not decide whether a judgement about the interpretation of Staff Regulations or Staff Rules has erred on a question of law relating to the provisions of the Charter, without looking at that judgement to see what the Tribunal did decide. While to that extent the Court has therefore to examine the Tribunal's decision on the merits, it is not the business of the Court, after making that examination, itself to get involved in the question of the proper interpretation of the Staff Regulations and Staff Rules, as such, further than is strictly necessary in order to judge whether the interpretation adopted by the Tribunal is in contradiction with the requirements of the provisions of the Charter of the United Nations.

65. This conclusion, dictated by the considerations of principle noted above, is also in accord with the actual words of the ground of objection mentioned in Article 11 of the Tribunal's Statute which speaks, not of "error of law" but of error "on a question of law relating to the provisions of the Charter of the United Nations", and these latter words cannot be other than words of qualification. It is true that the regulations and rules applied by the Administrative Tribunal must derive their validity from the provisions of the Charter. Indeed, all valid regulations and rules adopted by a United Nations organ cannot be other than based on the provisions of the Charter. It does not follow, however, that every question of the interpretation or application of those regulations and rules is a question of law relating to the provisions of the Charter. Nor indeed would the words of Article 101 of the Charter ordinarily be of any assistance or pertinence in the task of interpreting a rule or regulation. Accordingly, it would be quite mistaken to suppose that, because the law applied by the Tribunal, or indeed the law applied by any organ of the United Nations, derives its ultimate validity from the Charter, the ground of Article 11 now under examination means that an objection to any interpretation by the Tribunal of staff rules and regulations is a matter for an advisory opinion of the Court. Furthermore, if the words "error on a question of law relating to the

provisions of the Charter" were to be interpreted to mean the same as "error of law", the efforts in 1955 to reach a compromise solution would have been ineffective.

66. But if the interpretation, in general, of Staff Regulations and Rules is not the business of the Court, it is, as already noted, very much the business of this Court to judge whether there is a contradiction between a particular interpretation or application of Staff Regulations and Rules by the Tribunal and any of the provisions of the Charter ; and such an examination appears to be the purpose of the particular question asked of the Court in this present case. This question cannot be understood without some reference to the history of the repatriation grant over the last 30 years, though it is not necessary to go into the whole of that history. It was established by the General Assembly by resolution 470 (V) of 15 December 1950, which added, for the purpose, a new Regulation 35 and Annex II to the Provisional Staff Regulations. In the Staff Regulations of 1952 these became Regulation 9.4 and Annex IV, quoted in paragraph 10 above. The repatriation grant was substituted for an earlier "expatriation allowance", and seems never in fact to have been a grant limited to those who were repatriated to their country of origin, so that the title of the grant has always been a misnomer. It was from its inception based not upon repatriation but upon the United Nations' "obligation to repatriate", which has since 1 January 1953 been defined in Rule 109.5 *(a)*, as meaning an obligation to return the staff member on separation at United Nations expense to a place outside the country of his duty station. The amount of the grant was from the outset made dependent on the number of years of continuous service by the staff member away from his home country.

67. It is important, however, to appreciate how Staff Regulations and Rules are made. The relations of the United Nations with its staff are governed primarily by the Staff Regulations established by the General Assembly according to Article 101, paragraph 1, of the Charter of the United Nations. The successive editions of the Staff Regulations recite Article 101 at their commencement, and go on to state as their function that :

> "The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary-General, as the Chief Administrative Officer, shall provide and enforce such staff rules consistent with these principles as he considers necessary."

68. Accordingly, the Staff Regulations are themselves elaborated and applied in the Staff Rules ; and it is the Secretary-General who drafts the Staff Rules, and in this he has necessarily a measure of discretion. This is tempered by his duty to "report annually to the General Assembly such

Staff Rules and amendments thereto as he may make to implement the Regulations" (Staff Regulation 12.2). The bringing into force of the Rules, on a date fixed by the Secretary-General, is not subject to approval by the General Assembly ; and on entry into force they immediately govern the legal status of staff members. The Rules, according to Staff Rule 112.2 *(a)* (quoted in paragraph 12 above), may be amended by the Secretary-General in a manner consistent with Staff Regulations. There is no doubt that the General Assembly has the power itself to make detailed regulations, as for example, in Annex IV of the Staff Regulations which sets out the rates of repatriation grant. As the Court said in 1954 :

> "The General Assembly could at all times limit or control the powers of the Secretary-General in staff matters, by virtue of the provisions of Article 101 [of the Charter]." (*I.C.J. Reports 1954,* p. 60.)

But in the pertinent General Assembly resolutions, 33/119 and 34/165, to be examined below, it did not do so ; it laid down a principle which was in the usual way left to the Secretary-General to give effect to, first by an administrative instruction, and eventually in a new version of the Staff Rules. And where it is left to the Secretary-General to make rules there can be no doubt that by making rules he speaks for and commits the United Nations in its relations with staff members.

69. In the matter of the repatriation grant, as in some other staff matters also, there is the further complication that entities other than the Secretary-General have from time to time been concerned with the conditions of service of staff members. The Consultative Committee on Administrative Questions (CCAQ), a subsidiary of the Administrative Committee on Co-ordination (ACC), and particularly concerned with relations between the United Nations and specialized agencies, in a report of 14 May 1952 (CO-ORDINATION/R.124) recommended, *inter alia,* that the repatriation grant be paid on the basis of an obligation to repatriate, regardless of whether the staff member was actually repatriated, but excluding those summarily dismissed and those who had, or had voluntarily assumed, the nationality of the country of the last duty station. This was to take account of the fact that in the International Labour Organisation and the World Health Organization, the Staff Regulations provided that the grant was to be payable on separation to persons "serving at a duty station outside of the home country". The same Committee, after a further study, reported on 6 May 1974 (CCAQ/SEC/325(PER)) that "CCAQ Secretariat doubts the feasibility of attempting to make payment of the grant dependent on evidence of repatriation".

70. The other body involved has been the International Civil Service Commission set up in 1974 (by General Assembly resolutions 3042 (XXVII) of 19 December 1972, and 3357 (XXIX) of 18 December 1974) "for the regulation and co-ordination of the conditions of service of the United Nations common system" ; it was thus particularly concerned with an endeavour that staff rules should, as far as maybe, form a system common to the United Nations system and to some specialized agencies, and in respect of the repatriation grant it had, therefore, to take account both of the United Nations Secretariat's three decades of practice and of the position in the specialized agencies and other international organizations which participate in the United Nations common system.

71. The Tribunal, faced with Mr. Mortished's claim, had to take account not only of resolution 34/165, and of Administrative Instruction ST/AI/269 (replaced by the amended Staff Rules of 15 July 1980), by which resolution 34/165 was put into effect, but also of the whole body of regulations and rules relevant to the Applicant's claim. These regulations and rules comprised in particular Staff Regulation 9.4 and Annex IV, quoted in paragraph 10 above, and the following. In General Assembly resolution 33/119 of 19 December 1978, which dealt with a Report of the International Civil Service Commission, the General Assembly decided that payment of the repatriation grant was to be made conditional on the furnishing of evidence of relocation, "subject to the terms to be established by the Commission". On the basis of these terms the Secretary-General was to make the required changes in the Staff Rules and report back at the 34th session "in accordance with the provisions of regulation 12.2 of the Staff Regulations". As noted above (paragraph 11), the Commission adopted a text to implement resolution 33/119, and this was put into effect by the Secretary-General, first by Administrative Instruction ST/AI/262 of 23 April 1979, and then by the Staff Rules (ST/SGB/Staff Rules/1/Rev.5) of 22 August 1979, Rule 109.5 of which dealt with the repatriation grant. Paragraph *(d)* of that Rule accordingly provided that the payment of the grant was conditional on the presentation of evidence of relocation. Paragraph *(f)* of that Rule, however, saved the entitlement "Notwithstanding paragraph *(d)* above", of "Staff Members already in service before 1 July 1979", who were thereby to "retain the entitlement to repatriation grant" in respect of service already accrued before that date, without the necessity of production of evidence of relocation "with respect to such qualifying service". Paragraph *(f)* was in conformity with the text prepared by the International Civil Service Commission.

72. Next came General Assembly resolution 34/165 of 17 Decem-

ber 1979, on the "Report of the International Civil Service Commission", which was again for the most part concerned with receiving and approving the annual report of the Commission. It also recalled resolution 33/119 in which "it set down important objectives for maintaining and reinforcing the common system and established guidelines for the future work of the Commission". The rest of the resolution, in three parts, is to do with the work of the Commission, and the only paragraph of direct interest to the present case is the following :

> "3. *Decides* that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided."

The Secretary-General, accordingly, in order to put this decision into effect, issued Administrative Instruction ST/AI/269 on 21 December 1979, and thereafter revised the Staff Rules (15 July 1980), in Rule 109.5 of which revised Rules, instead of the paragraph *(f)* of the 1979 Rule, there appeared "*(f)* (Cancelled)".

73. The Tribunal in the case of Mr. Mortished had to apply, therefore, the relevant General Assembly resolutions, the Staff Regulations established by the General Assembly under Article 101, paragraph 1, of the Charter, and also the Staff Rules by which they were implemented. It noted that the General Assembly, in Staff Regulation 12.1, had affirmed the "fundamental principle of respect for acquired rights" and that Staff Rule 112.2 *(a)* provided for amendment of Staff Rules only in a manner consistent with the Regulations (para. IV). It decided that Mr. Mortished had indeed an acquired right, in the sense of Regulation 12.1 ; and that he had therefore suffered injury by being, as a result of resolution 34/165 and the resulting 1979 Administrative Instruction (ST/AI/269) and the 1980 amendment of the Staff Rules, deprived of his entitlement (para. XVI). Accordingly the effect of resolution 34/165 and the amended Rules with its deletion of paragraph *(f)* was not retroactive to destroy Mr. Mortished's "acquired right", having regard to Regulation 12.1 which provided precisely against such retroactive effect. The Tribunal's Judgement does not anywhere in fact suggest that there could be an opposition between Article 12.1 of the Staff Regulations and paragraph 3 of section II of resolution 34/165.

74. The Government of the United States in its written statement argues that this decision takes an erroneous view of the law, and that even assuming that Mr. Mortished had a right under paragraph *(f)* of the 1979 Rules, which the United States contests, that right did not survive resolution 34/165 and the amended Rules, and that the only right Mr. Mortished enjoyed at the date of separation was the right to a grant on his furnishing evidence of relocation. There may be room for more than one

view on the question what amounts to an acquired right ; and in particular whether or not Mr. Mortished had an acquired right, which was saved by the effect of Staff Regulation 12.1, and Staff Rule 112.2 *(a)*, either as a result of paragraph *(f)* of Rule 109.5 of the 1979 Rules, or – a point noted but not decided by the Tribunal – on the basis of "a practice followed consistently for nearly 30 years". But to enter upon that question would be precisely to retry the case with a view to deciding whether to substitute the Court's view of the merits of the case for that of the Tribunal. This, for the reasons explained above, is not the business of this Court. It is not the business of this Court to decide whether the Tribunal's Judgement involves an error in its interpretation of the relevant instruments, unless it involves an error on a question of law relating to the provisions of the United Nations Charter.

75. In the Court's view it is not possible to say that the Tribunal in its Judgement "erred on a question of law relating to the provisions of the Charter". The concept of an acquired right is, of course, neither defined nor even mentioned in the Charter. Article 101 of the Charter does provide that "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly". But it was precisely in the Staff Regulations thus established by the General Assembly itself that the Tribunal found, and so must apply, the general provision about acquired rights and the non-retroactivity of supplementing or amending regulations in regard to acquired rights. In fact Regulation 12.1 was presumably made precisely in anticipation of, and to provide for, the kind of change in conditions of service resulting from the Administrative Instruction and amended Staff Rules which gave effect to resolution 34/165. The interpretation of resolution 33/119 which the International Civil Service Commission and the Secretary-General had made in introducing the transitional paragraph *(f)* into the Staff Rules of 1979 acknowledged or created a right for Mr. Mortished, and this, said the Tribunal, was preserved by Staff Regulation 12.1. Thus the Tribunal saw itself not as in any way challenging resolution 34/165 by means of a general notion of acquired rights but simply as applying the existing Staff Regulations and Rules.

76. Certainly the Tribunal must accept and apply the decisions of the General Assembly made in accordance with Article 101 of the United Nations Charter. Certainly there can be no question of the Tribunal possessing any "powers of judicial review or appeal in respect of the decisions" taken by the General Assembly, powers which the Court itself does not possess (*I.C.J. Reports 1971*, p. 45, para. 89). Nor did the Tribunal suppose that it had any such competence. It was faced, however, not only with resolution 34/165 and the 1980 Staff Rules made thereunder, but also with Staff Regulation 12.1 also made no less by and with the authority of the General Assembly. On the basis of its finding that Mr. Mortished had

an acquired right, it had therefore to interpret and apply these two sets of rules, both of which were applicable to Mr. Mortished's situation. The question is not whether the Tribunal was right or wrong in the way it performed this task in the case before it ; the question – indeed, the only matter on which the Court can pass – is whether the Tribunal erred on a question of law relating to the provisions of the Charter of the United Nations. This it clearly did not do when it attempted only to apply to Mr. Mortished's case what it found to be the relevant Staff Regulations and Rules made under the authority of the General Assembly.

* *

77. In the proceedings of the Committee there was some discussion of a second ground of objection to the Tribunal's Judgement, namely the allegation that it had "exceeded its jurisdiction or competence", and on this ground also there was found to be a "substantial basis" for the application. It seems, however, from what was said in the Committee that this ground was not put forward as a ground entirely independent of the allegation of error of law relating to the provisions of the Charter. The representative of the United States, which had made the application to the Committee, explained at one point in the discussion that the ground of error of law relating to the provisions of the Charter "had been put to the Committee on the basis that it did not by any means exclude, but rather subsumed, the other ground of exceeding jurisdiction or competence" (A/AC.86(XX)/PV.2 at p. 46). It would seem to follow from this that this second objection must by definition fall with the first. In fact this suggested excess of jurisdiction seems to have been conceived of as little more than another way of expressing the allegation that the Tribunal had decided that General Assembly resolution 34/165 "could not be given immediate effect", and that it was therefore attempting to exercise a competence of judicial review over a General Assembly resolution : the matter which has already been dealt with above.

78. However that may be, the Tribunal's competence is defined in Article 2 of its Statute, and the pertinent paragraph reads as follows :

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

Thus, it is clear that the Tribunal's jurisdiction included not only the terms of Mr. Mortished's contract of employment and terms of appointment, but also the meaning and effect of Staff Regulations and Staff Rules, in force at the material time. It can hardly be denied that Mr. Mortished's appeal to the Tribunal, based as it was upon the various provisions of the Staff Regulations and on Rules established by the Secretary-General in pursuance of those Staff Regulations, corresponds directly with both the words and spirit of Article 2. It is difficult to see any possible ground on which the Tribunal could be said to have exceeded the terms of its jurisdiction or competence thus defined. It sought to interpret and apply the terms of Mr. Mortished's appointment, and the relevant Staff Regulations and Rules and General Assembly resolutions. Even its application of the notion of acquired rights it derived from the Staff Regulations which had been established by the General Assembly. It is impossible to say that the Tribunal anywhere strayed into an area lying beyond the limits of its jurisdiction as defined in Article 2 of its Statute. Whether or not it was right in its decision is not pertinent to the question of jurisdiction. As the French Government has rightly pointed out, it appears from the transcripts of the proceedings that the Committee members "made a questionable assimilation between a possible error of law that might have been committed by the Tribunal and the excess of jurisdiction imputed to it". An error of law is not necessarily, and in fact is not usually, made by a Tribunal's exceeding its competence or jurisdiction. As the Court observed in its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco,*

> "The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction." (*I.C.J. Reports 1956,* p. 87.)

* *

79. The Court has concluded that the Administrative Tribunal in Judgement No. 273 has neither erred on a question of law relating to the provisions of the Charter of the United Nations, nor committed any excess of its jurisdiction or competence. It wishes it to be clearly understood, however, that the fact that it has, in the present case, decided to comply with the request for an advisory opinion does not in any way imply condonation of the various irregularities pointed out above, or of the failure of the Committee on Applications for Review of Administrative

Tribunal Judgements to do all in its power to secure equality between the applicant State and the staff member. The main reason for the Court's deciding to comply with the request in the present case is, as it has stressed, its desire to assist the General Assembly if it should decide to reconsider its present procedure related to review of the Administrative Tribunal's Judgements.

* *

80. For these reasons,

THE COURT,

1. By nine votes to six,

Decides to comply with the request for an advisory opinion ;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Nagendra Singh, Mosler, Ago, Schwebel, Sir Robert Jennings, de Lacharrière and Mbaye ;

AGAINST : *Judges* Lachs, Morozov, Ruda, Oda, El-Khani and Bedjaoui.

2. With respect to the question as formulated in paragraph 48 above, *is of the opinion* :

A. By ten votes to five,

That the Administrative Tribunal of the United Nations in Judgement No. 273 did not err on a question of law relating to the provisions of the Charter of the United Nations ;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Nagendra Singh, Ruda, Mosler, Oda, Ago, Sir Robert Jennings, de Lacharrière and Mbaye ;

AGAINST : *Judges* Lachs, Morozov, El-Khani, Schwebel and Bedjaoui.

B. By twelve votes to three,

That the Administrative Tribunal of the United Nations in Judgement No. 273 did not commit any excess of the jurisdiction or competence vested in it.

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, Sir Robert Jennings, de Lacharrière, Mbaye and Bedjaoui ;

AGAINST : *Judges* Morozov, El-Khani and Schwebel.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, one thousand nine

hundred and eighty-two, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) T. O. ELIAS,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

Judges NAGENDRA SINGH, RUDA, MOSLER and ODA append separate opinions to the Opinion of the Court.

Judges LACHS, MOROZOV, EL-KHANI and SCHWEBEL append dissenting opinions to the Opinion of the Court.

(Initialled) T.O.E.
(Initialled) S.T.B.