SEPARATE OPINION OF JUDGE MOSLER

While sharing the view of the Court as expressed in the operative part of the Advisory Opinion, and agreeing to a large extent with the reasons, I nevertheless feel bound to raise some points which seem to me to require either additional explanation or a different kind of argument.

I. Procedural Questions

1. The Court in the present case follows the principle, well established in its previous jurisprudence, that, even though its power to give advisory opinions is discretionary under Article 65 of the Statute, a request should not, in principle, be refused and that only compelling reasons would justify such a refusal (see para. 45 of the present Opinion, with reference to the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973,* p. 183). After having pointed out in detail the deficiencies of the proceedings in the present case it goes so far as to find that "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" (para. 45). It obviously considers the activities of the Committee on Applications for Review which resulted in the request for an advisory opinion as so seriously disregarding some basic principles of judicial procedure that the Court could have refused to entertain the request without thereby extending the scope of its discretion as defined by its earlier case-law.

2. The present case indeed raises, from the aspect of the observation of such principles, considerably more doubts than the preceding advisory opinions concerning judgements of the Administrative Tribunal of the International Labour Organisation and of the Administrative Tribunal of the United Nations (*I.C.J. Reports 1973,* p. 166 and *I.C.J. Reports 1956,* p. 77). The novel procedural problems with which the Court has now been confronted are, first, that the application for review of the judgement of the Administrative Tribunal originates neither from the Secretary-General nor from the staff member concerned, but from a member State of the United Nations which was at the same time a member of the Committee which had to decide on that Application ; and secondly, aspects of the proceedings of the Committee which became, for the first time, known to the Court by means of the transcripts of its meetings (A/AC.86(XX)/PV.1, PV.2 and Add.1, 21 July 1981). The Court had thus the opportunity, which it did not have in 1973 when such transcripts did not exist, to

examine how the Committee, which the Court then characterized as a political body having quasi-judicial functions, operated in the deliberations which resulted in the decision to request an advisory opinion.

The Court pointed out in 1973 that the Committee took part in a procedure which was, taken as a whole, a judicial process, in which the Committee was interposed between the Administrative Tribunal which rendered the judgement and the Court which had to give an opinion on one or more of the legal points listed in Article 11, paragraph 1, of the Tribunal's Statute. It characterized the Committee as a political body, a subsidiary organ of the General Assembly and found that its functions within the whole system of the judicial process were quasi-judicial. This distinction, which is repeated in the present Opinion, is of fundamental importance. It follows from it, on the one hand, that the requirements to be met are not entirely those of a court belonging to the judiciary, but that, on the other hand, the basic principles of a judicial hearing, as they are generally recognized in municipal legal systems and in international legal institutions, have to be observed.

In 1973, the Court confined its remarks on the Committee to the characterization of its composition and functions without analysing its internal activities in the then pending case – on which the Court had no information. The Court was for that reason almost exclusively concerned with the question whether a request for review of a judgement of the United Nations Administrative Tribunal in advisory proceedings complied with the Court's judicial character and allowed the full application of its Statute and Rules. The main preoccupation of the Court related to the inequality between the parties to the original dispute, the Secretary-General and the staff member, because individual persons have, according to the Statute, no *jus standi in judicio* before the Court. In contentious proceedings, the parties always have the opportunity to submit oral statements in public hearings. In advisory proceedings, oral proceedings are not indispensable. The question of inequality between the parties could therefore be bypassed, in 1973, by the Court's decision not to hold hearings and this solution was facilitated by General Assembly resolution 957 (X), which recommended that the Secretary-General and, as the case may be, the applicant member State, should not make oral statements. The Court found that the condition of equality between the interested parties was fulfilled by the submission of written statements (*I.C.J. Reports 1973,* p. 181). This conclusion was reached despite grave doubts among Members of the Court, which are expressed in some of the individual opinions. In the present Opinion the Court does not call in question the view taken at that time. Nevertheless I cannot but regret that there should exist a particular type of case coming under the competence of the Court in which oral statements before the Court are practically excluded once and for all. This is quite a different situation from a decision of the Court that, in the circumstances of a request pending before it, it can comply with its duties on the basis of written statements only. In advisory proceedings dealing

with a request for review of a judgement of the Administrative Tribunal there is no opportunity for the Court to exercise its discretionary power on that point.

3. One might suggest that this deficiency of the system can be, to a certain extent, cured by asking in writing for further information which the Court wishes to obtain additional to the wording of the Request and the documentation annexed to it. Here a further problem arises, one which is certainly not very important but demonstrates another aspect of the inconsistencies of the system. It is the Committee which decides that there is a substantial basis for an application for review on one of the grounds listed in Article 11, paragraph 1, of the Statute of the Tribunal. The Request is therefore made by the Committee but it is transmitted to the Court by the Secretary-General, who was a party to the original dispute and who may, as happens to be the case at present, not object to the judgement which is submitted for review. It may be difficult for him to answer questions of the Court on points which could properly only be answered by the Committee itself, which is the *dominus negotii* but is not a permanent body and has no direct contact with the Court. This difficulty can be overcome, but it certainly does not facilitate the procedure, and adds another function to the complex role of the Secretary-General. It is due to the almost unavoidable inconsistencies between the three degrees of institutions dealing with the case, the Administrative Tribunal deciding on a dispute between a staff member and the Secretary-General, the Committee convoked *ad hoc* and deciding on the substantial basis for review, and the Court dealing, from the legal point of view, not with the contentious case of the parties but only with the question submitted by the Request.

4. The Request refers back, as far as the four grounds mentioned in Article 11, paragraph 1, of the Tribunal's Statute are concerned, to the reasoning of the Judgement. In this respect, the Court's role is close to that of a municipal court of last resort whose competence is confined to certain questions of law and procedure. On the other hand, the effect of an advisory opinion cannot, by its very character, be the final word in the case. Therefore, paragraph 3 of Article 11 establishes a sophisticated system of transforming the Court's Opinion into a final decision either of the Secretary-General or of the Tribunal, on the basis of the Court's Opinion. As the Court pointed out in 1973

> "the fact that under Article 11, paragraph 3, of the Tribunal's Statute the Opinion given by the Court is to have a conclusive effect with respect to the matters in litigation in that case does not constitute any obstacle to the Court's replying to the request for an opinion. Such an effect, it is true, goes beyond the scope attributed by the Charter and by the Statute of the Court to an advisory opinion. It results, however, not from the advisory opinion itself but from a provision of an autonomous instrument having the force of law for the staff members and the Secretary-General." (*I.C.J. Reports 1973,* p. 182, para. 39.)

This statement is certainly correct from the point of view of the legal construction of the system of review, but at the same time it shows the inherent inconsistency in the process as a whole.

5. These imperfections of the system, even when it works regularly, were considered, in the earlier jurisprudence of the Court, as not compromising its own judicial function. Doubts may arise as to whether advisory proceedings are the best way to meet the wish of the General Assembly to have a procedure for review of judgements of the Administrative Tribunal. It is for that reason that I thought it appropriate to draw attention to some weaknesses of this system. Although there are no compelling reasons in this case to refuse the request, these may be seen, in the circumstances of the present case, in a new light. Irregularities in the procedure of the Committee, particularly in dealing with an application coming from a member State, have given rise to problems of a kind which the Court in 1973 could not contemplate. Now, as the Court has knowledge of the proceedings of the Committee, it has to indicate standards for the exercise of the "quasi-judicial" function of the Committee. The main requirement is, as pointed out in paragraph 30 of the Opinion, that the principle of equality of the parties be observed. I share the criticism made in this regard, and I would like to add that the discrimination against the interested staff member seems to be even worse than mentioned in the Opinion, for there is no indication whatsoever in the transcripts of the meeting that the written statement of Mr. Mortished's counsel played any role whatever in the deliberations.

6. Apart from the irregularities in the present case, which can be avoided in the future, one has to answer the question how the proper role of the Committee, as an organ interposed between a judgement of a judicial body in a contentious case and an advisory opinion on certain legal points of that judgement given by the Court, could be defined. Any decision of the Committee, whether or not it decides that there is a substantial basis for an application for review, must be based on legitimate considerations deduced from the task of the Committee, as a subsidiary organ of the General Assembly which is embedded in a system of a judicial process. The question is therefore : what are the reasons justifying the Committee's decision either to reject an application for review or to endorse it ? Since it is not its task itself to review the Judgement its functions are, as the Court put it in 1973,

> "merely to make a summary examination of any objections to a judgement of the Tribunal and to decide whether there is a substantial basis for the application to have the matter reviewed by the Court in an advisory opinion" (*I.C.J. Reports 1973,* p. 176, para. 25).

The criterion which the Committee has to apply in order to come to the conclusion that the case is appropriate for review, is, in my view, an

evaluation of the objections made to the Judgement from the aspect of the four grounds of effectiveness open to the Court's review by means of an advisory opinion. The Committee need not go into the details of this question. The provisional conviction of the Committee that the Judgement is likely to be criticized by the Court on one or more of the four grounds is sufficient to justify the endorsement of the Application. This extent of the examination of the Application is both necessary and sufficient to fulfil the function of screening the applications presented to the Committee.

7. Although the Committee is a body composed of members who are not chosen because of their qualification as experts in the matter but as delegates of States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly, its decisions must not be motivated by reasons of a political or financial nature. As part of a judicial system of review, the Committee can legitimately decide only on the basis of the law governing the whole system of review. There is no room for any other basis of its decisions than that resulting from the determination of the Committee's competence in Article 11, paragraphs 1 and 2. In exercising its powers the Committee acts, in my view, in the common interest of the organization of the United Nations to ensure control of judgements of the Administrative Tribunal by the Court in cases which, according to resolution 957 (X) require review. It may be preferable that it should meet in permanent composition, and that its members be free from any instruction. I take the liberty of making these remarks not because there is any indication, in the present case, that arguments have been advanced which were not of a legal nature, but in order to attempt to define the role of the Committee between the Tribunal and the Court as it seems to me to follow from the logic of the whole system.

8. The conclusion of the Court, that it should entertain the request despite the irregularities which took place in the Committee's procedure, is based on two grounds, each of a different character. The positive motivation is the duty the Court feels to assist the United Nations, the negative one is the absence of a compelling reason not to give this decision (cf. para. 45). Although with reluctance, I have voted in that sense, because I share the view expressed in paragraph 45 that, in entertaining the request, the Court's judicial role will not be endangered or discredited. I would like however to point out the following additional considerations : despite the imperfections inherent in the whole system as I have described them above, and despite the deficiencies of the proceedings in the intermediary stage before the Committee in the present case, the Advisory Opinion can be given in full independence and impartiality, and by means of judicial proceedings before the Court governed by its Statutes and Rules. The Court has been able to clarify, by interpretation of the Application, and with reference to the debates of the Committee, the precise meaning of a badly formulated Request, and to deal with this question on the basis of the documentation transmitted to it. This information was not one-sided but allowed the Court to consider the case from all legally relevant aspects. The

deficiencies of the procedure in the present case did not therefore result in any disadvantage to Mr. Mortished with regard to the objective finding of the law by means of all relevant legal methods. It is only on the basis of this test that I am able to consider the request admissible.

II. The So-Called "Constitutional Dimension" of the Case

1. The key issue of the request as explained by the United States 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 ..." (A/AC.86/R.97, 17 June 1981). The United States stressed the "constitutional dimension" of this point because it included the relevance of Article 101 of the Charter and the authority of the General Assembly thereunder. The request, as submitted by the Committee in terms identical to those in the application of the United States, suggests that the Tribunal has not given immediate effect to General Assembly resolution 34/165 of 17 December 1979 (see para. 1 of the Opinion). This resolution, in so far as it concerns the repatriation grant, reads as follows :

> *"The General Assembly ...*
>
> *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."

2. As is pointed out in the Opinion, the Tribunal did not call in question the fact that the resolution took effect from the date indicated therein. It interpreted the resolution in the light of the intentions of the General Assembly, and emphasized that the Assembly did not contemplate supplementing or amending the provisions relating to the repatriation grant contained in the Staff Regulations. In the view of the Tribunal the Assembly never claimed that there was any defect in the provisions introduced on 1 July 1979 which diminished their validity (see the reference made in para. 53 of the Advisory Opinion, and para. XIV of the Judgement). From that argument the Court concludes that the decision was not that resolution 34/165 could not be given immediate effect but, on the contrary, that Mr. Mortished had sustained injury precisely by reason of its having been given immediate effect by the Secretary-General, because the Secretary-General did apply the Staff Rules, in a version which omitted the transitional Rule 109.5 *(f),* according to which Mr. Mortished had a right to receive the repatriation grant without evidence of relocation (para. 55 of the Opinion). On the basis of this reasoning the "constitutional dimension" does not arise, because according to this interpretation – which is followed by the Court's Opinion – the Tribunal did not disregard a

resolution of the General Assembly ; it only allocated compensation for the measures taken by the Secretary-General who acted to give effect, in the case of Mr. Mortished, to General Assembly resolution 34/165, as he considered it his duty to do.

3. Although it is true that the Tribunal did not directly disregard General Assembly resolution 34/165, the question however remains whether it did so indirectly, since it ordered the Secretary-General to pay compensation for the injury inflicted on Mr. Mortished by the refusal to pay him the repatriation grant, after 1 January 1980, without evidence of relocation, thus executing, as the Secretary-General saw it, the decision of the General Assembly. Implicitly the Tribunal made a decision on the effect of resolution 34/165. It interpreted it as not having changed the relevant provisions of the Staff Regulations, and it followed therefrom that the law applicable to Mr. Mortished was Regulation 12.1 and Staff Rule 109.5 *(f)*. The inevitable implication is that the Tribunal criticized the Secretary-General's understanding of the resolution. The Opinion does not go so far as to discuss the question whether this interpretation of resolution 34/165 is correct, and whether, should the answer be in the negative, the decision to pay compensation interferes with the power of the General Assembly under Article 101, paragraph 1, of the Charter. On that supposition, the question arises whether the Tribunal has committed an error on a question of law relating to a provision of the Charter which, at the same time, resulted in an excess of its jurisdiction or competence.

4. After examining this additional question, I come to the conclusion that the Tribunal did not commit any error of law relating to this provision of the Charter and that, consequently, it did not interfere with the competence of the General Assembly. It was therefore possible for me to vote in favour of the whole of the operative part of the Opinion. In explaining my reasons, I follow the Opinion of the Court in 1973 when it stated that it

> "is not limited to the contents of the challenged award itself, but takes under its consideration all relevant aspects of the proceedings before the Tribunal as well as all relevant matters submitted to the Court itself . . . with regard to the objections raised against that judgement" (*I.C.J. Reports 1973,* p. 188, para. 49).

The General Assembly decided in the resolution in question that from 1 January 1980 onwards no staff member should be entitled to the repatriation grant unless evidence of relocation were provided. In my interpretation, this means that, corresponding to the non-existence of the right, no payment shall be made, as from that date on, to any staff member who does not provide the required evidence. This is, in my view, the objective content of the wording. The preparatory work preceding the resolution therefore need not be explored. This interpretation of the resolution does however not necessarily mean that the legal position of Mr. Mortished,

either acknowledged or created by the transitory rule, had been altered. That rule had been incorporated in the Staff Rules in order to implement General Assembly resolution 33/119 where the Assembly decided, *inter alia,*

> "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".

The amendments to the Staff Rules which the International Civil Service Commission considered to be a correct implementation of resolution 33/119 became, by an executing act of the Secretary-General, part of the Staff Rules. They were duly promulgated and governed, from 1 July 1980, the legal relations between the United Nations and the staff members concerned (see the introductory remarks to the Staff Regulations, entitled "Scope and purpose", and Staff Rule 101.1 relating to the applicability to all staff members of the Staff Rules issued by the Secretary-General).

5. In municipal legal systems it is a generally accepted principle that everyone can rely on the validity of a legal norm duly enacted by the competent authority and promulgated in due form to whom it may concern. The internal law of the United Nations Organization is, as far as the relationship between the Organization and its staff members is concerned, in the same legal position as domestic law. The Tribunal was therefore right in stating that Mr. Mortished had a right by virtue of the amendment adding subparagraph *(f)* to Rule 109.5. If the International Civil Service Commission erroneously interpreted General Assembly resolution 33/119, and the Secretary-General consequently amended Rule 109.5 in a manner not in conformity with the will expressed by that resolution, that error of interpretation is to be imputed to the United Nations Organization, but not to the staff members, who are bound by the Rules, and correspondingly, can rely on their validity.

6. The Tribunal qualified the transitional provision of Rule 109.5 *(f)* as embodying acquired rights of the staff members concerned. It did so on the basis of Regulation 12.1, according to which the Staff Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members. As the Opinion points out, it is within the competence of the Tribunal to interpret whether a right existing in favour of a staff member is to be considered as "acquired". In so doing, it does not deal with a question "relating to the provisions of the Charter" within the meaning of its Statute, and, consequently, did not exceed its jurisdiction or competence.

7. In resolution 34/165, the General Assembly took a decision which, on my interpretation mentioned above, ran contrary to the wording of Rule 109.5 *(f)*, in so far as payments after 31 December 1980 were concerned. This resolution did not amend the Regulations in force nor did it state that, in the view of the General Assembly, the rights covered by the transitional Rule could not be qualified as acquired in the meaning of Regulation 12.1. The Staff Regulations of the United Nations were adopted, on the basis of Article 101, paragraph 1, by General Assembly resolution 590 (VI) of 2 February 1952 (*General Assembly Official Records, Sixth Session, Supplement No. 2* (A/2119). The introduction to the Regulations which forms part of the text annexed to resolution 590 (VI) characterizes the Regulations as embodying

> "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."

In the following years, as up to the present, these Regulations have from time to time been amended by General Assembly resolutions which have provided, in precise terms annexed to the resolutions, for the incorporation of new texts in the existing articles of the Regulations (see the list preceding the 1981 edition of the Staff Regulations, ST/SGB/Rev.13). It is true that the General Assembly, when dealing with matters of staff employment, does not confine itself to formal amendments to the Regulations. There are other forms of decisions relating to conditions of employment which have to be taken into account by the organs concerned with their application. In the present case, however, Regulation 12.1 protects explicitly "the acquired rights of staff members" against supplements or amendments to the Regulations which may result in a prejudice to such rights. Resolution 33/119 confirms, in a part which is not directly relevant to the present case, a precisely formulated amendment to the Regulations. The resolution was satisfied, as far as the question of relocation was concerned, with asking the International Civil Service Commission to implement a principle of policy. The Regulations were not touched upon on that point. Resolution 34/165 also did not affect the Regulations. The question whether acquired rights of staff members existed had been discussed before the Resolution was adopted ; the Assembly was aware of the problem. The Tribunal was therefore bound to apply Regulation 12.1, and not to apply a staff rule which, in its interpretation of the character of Mr. Mortished's right as "acquired", had an effect contrary to Regulation 12.1.

8. This regulation is the higher norm in the hierarchy of the legal provisions applicable to the present case. Resolution 34/165 could not have the effect of changing the law, since it did not either amend Regulation 12.1 or clearly state that the General Assembly decided either to disregard this regulation or to state that the right to the repatriation grant in the conditions laid down in Rule 109.5 *(f)* could not be considered as acquired in the meaning of Regulation 12.1. The question may be left open whether a decision of this kind would have bound the Tribunal under the principles governing the distribution of powers between the various organs of the United Nations. The problem does not arise in the present case because resolution 34/165 provides no indication in this respect.

9. The preceding additional considerations lead me to the conclusion that resolution 34/165 did not change the law applicable to Mr. Mortished. Consequently, the Tribunal did not commit an error on a question of law relating to provision of the Charter. In my view, the *Mortished* case has therefore no "constitutional dimension".

(Signed) H. MOSLER.