SEPARATE OPINION OF JUDGE ODA

1. Although I would agree with the Court in its conclusions regarding the grounds of objection to the judgement of the United Nations Administrative Tribunal (UNAT), I regret to say that I cannot agree that the Court, in the circumstances, ought to have complied with the request for an advisory opinion.

PART I

2. The Court's Opinion points out various irregularities regarding the composition of the Administrative Tribunal, the procedures in the Committee on Applications for Review of Administrative Tribunal Judgements (hereafter referred to as the Committee on Applications) and the application of the United States to the Committee on Applications, as well as the failure of the Committee on Applications to do all in its power to secure equality between the applicant State and the staff member (paras. 33-44). Yet, despite these difficulties, the Court still holds the view that it should comply with the request in the present case in view of the Court's jurisprudence to the effect that only "compelling reasons" would justify a refusal. In my view, however, the Court should have declined a reply, on the particular ground that the actual question conveyed in the request for advisory opinion is (i) not only extremely sparse and elliptical, or infelicitously expressed and vague, but (ii) also based on a misinterpretation of the judgement of the Administrative Tribunal. The question in the Request seeking an advisory opinion of the Court, identical to that referred to in the application of the United States presented to the Committee on Applications on 15 June 1981, read 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 ?"

* *

3. The UNAT Statute specifies the grounds on which a judgement of the

Tribunal may be challenged through the medium of advisory jurisdiction. Under Article 11, an application may be made to the Committee on Applications for the purpose of obtaining the review of a judgement on any of the following grounds, namely that the Tribunal has :

(i) "exceeded its jurisdiction or competence" ;
(ii) "failed to exercise jurisdiction vested in it" ;
(iii) "erred on a question of law relating to the provisions of the Charter of the United Nations" ; or
(iv) "committed a fundamental error in procedure which has occasioned a failure of justice".

If the Committee on Applications decides that a substantial basis for the application exists, it shall request an advisory opinion of the International Court of Justice (Art. 11, para. 2). However, the Request in this case, though expressly stating that the Committee on Applications has decided that there is a substantial basis within the meaning of Article 11 of the Statute for the application of the United States, fails to specify any of these four grounds. This makes this case quite different from the only previous case to have come before the Court on the basis of the application of the aforesaid Article 11, namely that concerning an *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal.* Now, whereas in that earlier case two grounds were specifically mentioned to justify the application for review, scrutiny of the drafting of the present Request raises doubt in my mind as to whether the Committee on Applications examined the matter sufficiently to convince itself that there was, in this case, a substantial basis within the meaning of Article 11 of the UNAT Statute.

4. The United States application of 15 June 1981, asking the Committee on Applications to request an advisory opinion of the Court, not only failed to comply with some of the procedural requirements, as pointed out in the Opinion of the Court (paras. 39-41), but also overlooked the requirement implicit under its Statute of indicating the ground or grounds on which the United States objected to the judgement in question. Although the United States representative stated in the Committee on Applications that the

> "issue of the Tribunal's having exceeded its jurisdiction and erred on a question of law relating to the Charter has been placed before this Committee in the application" (A/AC.86/PV.1, p. 16),

this is not verily a fact. The importance of this failure on the part of the United States when applying to the Committee on Applications will be savoured if one considers that the applicant State is not necessarily a member of the Committee on Applications, and that it thus might not have had a chance in the Committee on Applications orally to make points not apparent in the original application.

5. In the Committee on Applications it was not the representative of the United States but the Chairman and delegates of other countries who were

more concerned with the specific grounds on which review was called for. After the Chairman pointed out the four grounds specified in the Statute (A/AC.86/PV.1, p. 21), the United Kingdom representative stated his view on two grounds of the four :

> "The first is that the Tribunal erred on a question of law relating to the Charter. Article 101 lays down that the staff regulations shall be established by the General Assembly, and the relevant paragraph of resolution 34/165 was an exercise of that function. The second is that the Tribunal exceeded its jurisdiction or competence in giving more weight to the doctrine of acquired rights than General Assembly resolution 34/165." (Pp. 22-23.)

Only after these statements did the United States representative state :

> "We are here to decide whether or not there is sufficient merit in the concern that the Administrative Tribunal has or may have exceeded its jurisdiction, or committed an error of law in relation to an interpretation of a provision of the Charter, to require the advice of the International Court of Justice." (P. 29.)

The representative of France, on the other hand, clearly pointed out that "in its application the United States [did] not explicitly invoke any of these grounds" (pp. 38-40) and concluded that the only question which the Committee was asked or empowered to consider or on which it was empowered to give an answer, if possible, was : "is there serious reason to believe that the Administrative Tribunal erred on a question of law relating to the Charter of the United Nations ?" After repeating that "none of the grounds mentioned in article 11 of the Statute of the Administrative Tribunal [were] explicitly invoked by the United States", the representative of France further stated that :

> "We find that, even if the United States had implicitly invoked an error on a question of law concerning the provisions of the Charter, this ground should be rejected as lacking a valid basis ; we find that the Tribunal committed no error of interpretation of Article 101 of the Charter since – on the contrary – it recognizes the competence of the General Assembly ; and we find, moreover, that the United States itself recognizes that the Tribunal has some competence to give rulings on decisions of the General Assembly." (A/AC.86/PV.1, p. 42.)

So far as the minutes of the Committee indicate, these were practically all the discussions held in the Committee concerning the grounds which are referred to in Article 11 of the Statute of the Tribunal and which, according to Article II, paragraph 3 *(c)*, of the Committee's Provisional Rules of

Procedure, ought to have been indicated in the application for review. It was not even argued in the Committee how the grounds should be invoked in applying for review in this case. If there was any explanation on this subject, it was only that made by the representative of the United Kingdom, as quoted above, who stated :

(i) concerning excess of jurisdiction or competence :

> "The Tribunal exceeded its jurisdiction or competence in giving more weight to the doctrine of acquired rights than General Assembly resolution 34/165" ; and

(ii) concerning error on a question of law relating to the provisions of the Charter :

> "Article 101 lays down that the staff regulations shall be established by the General Assembly, and the relevant paragraph of resolution 34/165 was an exercise of that function."

6. Without ascertaining how any of the four grounds could justifiably have constituted a basis for a request for an advisory opinion of the Court, the Chairman of the Committee on Applications, simply requesting the Committee to indicate whether there was substantial basis for the application within the meaning of Article 11 on the two grounds of the four, proceeded to put these two points to the vote. The two issues and the results of the voting were as follows :

(a) the ground that "the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations" : a vote of 14 to 2, with 1 abstention ;
(b) the ground that "the Tribunal has exceeded its jurisdiction or competence" : a vote of 10 to 2, with 6 abstentions.

In spite of these decisions of the Committee on Applications, I would suggest that these grounds had scarcely been discussed in the Committee.

*

7. While the question in the Request was not formulated so as to satisfy the necessary conditions, the Court, relying upon the settled jurisprudence whereby it may "seek to bring out what it conceives to be the real meaning of the Committee's request" (para. 47), holds the view that, in spite of the incompleteness of the Request in this case,

> "If [the legal questions really at issue in questions formulated in a request], 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." (Para. 48.)

The Court takes up the question as to whether the Tribunal had erred on a question of law relating to the provisions of the United Nations Charter. If, despite the tortuous phraseology of the Request, one can suppose that the judgement was opposed on the ground that the Tribunal had erred on a question of law relating to the provisions of the Charter, as can be speculated from the deliberations in the Committee on Applications (the Court reformulates the question put in the Request in that sense), I still would have some doubts whether the ground that the Tribunal had erred on such a question would have applied in this case – in other words, if the judgement of the Administrative Tribunal which was dealing with amendments to Staff Rules – not Charter provisions – *could* prima facie have been challenged on that ground.

8. It is pertinent here to investigate how this ground, as provided for in Article 11 of the UNAT Statute, was brought in as a ground for the review procedure therein contemplated. While the Statute of the ILO Administrative Tribunal, adopted on 9 October 1946, specified two grounds – wrongful confirmation of jurisdiction, and fundamental fault in the procedure followed – as capable of founding a request for an advisory opinion of the Court, the process of introducing the review system for UNAT judgements, in 1955, resulted in the addition of two further grounds where that Tribunal was concerned. Under one of these new grounds, cases would be covered where the Tribunal had "erred on a question of law relating to the provisions of the Charter of the United Nations". As clearly explained in the Opinion :

> "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" (para. 63).

9. In the Special Committee on Review of Administrative Tribunal Judgements, convened on 4 April 1955, the discussions which took place between 11 and 14 April to consider various draft proposals brought to light a wide divergence of views. In an effort to achieve a broader basis of agreement, a new joint draft amendment was introduced on 20 April by the representative of the United Kingdom on behalf of China, Iraq, Pakistan, the United Kingdom and the United States (A/AC.78/L.14 and Corr.1) ; this suggested that the judgement might be objected to

> "on the ground that the Tribunal has exceeded its jurisdiction or competence, or has erred on a question of law relating to the provisions of the Charter, or has committed a fundamental error in procedure . . ."

The representative of the United Kingdom, after having stated that the element of an error on a question of law "represented the highest common factor of agreement", remarked, on behalf of the co-sponsoring States, that

> "[This] ground, while attempting to meet half-way those representatives who favoured inclusion of any substantial question of law as a ground for review, provided a safeguard against the danger that review might become a matter of course in all cases. It attempted to define with maximum precision what questions of law could be grounds for review. The words 'relating to the provisions of the Charter' covered not only interpretations of the provisions of the Charter but also the interpretation or application of staff regulations deriving from Chapter XV of the Charter." (A/AC.78/SR.10, p. 3.)

On the other hand, the representative of the United States specified certain concrete cases to be covered under the ground mentioned above. He said that his Government

> "understood the ... ground ... to include *(a)* a question under Article 101 of the Charter whether the Secretary-General's judgement should be upheld with regard to the conduct of a staff member under United Nations standards of efficiency, competence and integrity ; *(b)* a question under Article 97 whether the Secretary-General's action in giving directions to or taking disciplinary action against a staff member should be sustained ; *(c)* a question under Article 100 involving a staff member's duty to refrain from any action which might reflect on his position as an international civil servant responsible only to the Organization" (*ibid.*, p. 6).

Paragraph 1 of this joint proposal, which contained the relevant ground, was adopted by 9 votes to 5, with 3 abstentions, and the joint proposal, as a whole, was finally adopted by a roll-call vote of 9 to 4, with 4 abstentions. Thus the Special Committee recommended to the consideration of the General Assembly the draft amendments to the Statute of the Administrative Tribunal which contained the paragraph as quoted above from the five nations' joint draft proposal.

10. The report of the Special Committee was on the agenda as item 49 of the tenth session of the General Assembly in 1955 and was referred to the deliberations of the Fifth Committee. The Fifth Committee started deliberation on this agenda on 17 October 1955. By that time the draft recommended by the Special Committee, as well as a joint draft resolution submitted by Argentina, Canada, China, Cuba, Iraq, Pakistan, the United Kingdom and the United States (A/C.5/L.335 and Add.1), had been made available. The eight powers' joint proposal contained a provision exactly identical to that recommended by the Special Committee, and thus also identical to the original five-nation proposal presented in the Special Committee, as quoted in paragraph 9 of this opinion.

11. It was apparent at the outset that the staff of the Secretariat, as well

as the United Nations Secretary-General, held a somewhat negative attitude towards the suggested review system. A letter of 10 October 1955 from the Chairman of the Staff Committee to the Secretary-General, which was made available to the Fifth Committee, read as follows :

> "VI, 15. The proposed procedure is certainly a complex one ; it would undoubtedly be lengthy ; it might well be uneconomical for all concerned. But more important than these practical weaknesses is the fact that it would not accord with the principles inherent in the concept of judicial review. The Staff Council fears that the proposed procedure might be so used in practice as to frustrate the declared purpose for which it was created." (A/C.5/634.)

Opening the Fifth Committee discussion on this subject, the Secretary-General made some observations along the following lines :

> "at no time have I felt the need for a review procedure with respect to the normal cases coming before the Administrative Tribunal. For its part the Staff Council has stated that it does not consider it necessary a procedure for reviewing judgements of the Administrative Tribunal. Even though there has, quite naturally, not been full agreement with every judgment, there has been no feeling that a new step in the judicial procedure is necessary." "I consider basic for any review procedure which may be adopted [the principle (one of four) that] the review should serve only as an outlet in exceptional cases and should not be for regular use." (A/C.5/635.)

The discussions on these points were summarized in the report of the Fifth Committee (A/3016) as follows :

> "12. Discussion in the Fifth Committee centred primarily on the proposed new article 11. In favour of this article, it was argued that experience had shown a need for some method of review of the Administrative Tribunal judgements in certain cases. By having a procedure of judicial review available in the event of crisis, the discussion of cases in the General Assembly could be avoided ...
>
> 13. It was pointed out that the recommendations of the Special Committee represented a compromise which its supporters believed contained the essential conditions of a satisfactory review procedure. Alternative proposals had been thoroughly considered in the Special Committee and the texts recommended were those on which there was the broadest basis of agreement. Those members of the Fifth Committee supporting the revised joint draft resolution, therefore, did not

consider it desirable to reopen matters which had been settled in the Special Committee.

14. It was pointed out that the text of the proposed article 11 followed the precedent of article XII of the Statute of the Administrative Tribunal of the International Labour Organisation ...

15. The co-sponsors of the revised joint draft resolution explained that the new draft article 11 was intended to limit review to exceptional cases. Two of the grounds for review were those provided in the Statute of the ILO Administrative Tribunal, i.e., questions of competence and of fundamental error in procedure. One additional ground was provided, i.e., errors on 'a question of law relating to the provisions of the Charter'. The co-sponsors of the revised draft resolution referred to the statements which they had made concerning the interpretation of this phrase which was contained in the report of the Special Committee (A/2909). The opinion was expressed in the debate that the grounds provided for review were of a fundamental nature and that as such they could not be ignored, if and when they arose, in the interest of justice."

12. The addition of a third ground, reading that the Tribunal "has erred on a question of law relating to the provisions of the Charter of the United Nations", was explained by the representatives of both the United Kingdom and the United States in the same way as in the Special Committee, as quoted in paragraph 9 of this opinion. The statements of these two delegates are worth quoting in order properly to understand the real sense of the third ground. The representative of the United Kingdom stated :

"It has been felt that the third ground was adequate to cover cases where the Tribunal, in interpreting and applying some of the Staff Regulations, did so in a manner which might be considered inconsistent with the provisions of the Charter, especially of Chapter XV." (A/C.5/SR.493, para. 9.)

According to the representative of the United States :

"[this category] would include such questions as [i] whether the Secretary-General's judgment should be upheld in regard to the conduct of a staff member and the United Nations standards of efficiency, competence, and integrity as prescribed in accordance with Article 101 of the Charter, or, [ii] whether the Secretary-General's action should be sustained in giving directions to a staff member, or taking disciplinary action against him, in view of the Secretary-General's position as Chief Administrative Officer of the Organization under Article 97 of the Charter ; or [iii] a question involving the staff member's duty to refrain from any action which might reflect on his position as an international official responsible only to the Organization, as laid down in Article 100 (1)" (A/C.5/SR.494, para. 20).

13. After the Indian proposal (to an effect not relevant to the particular problem we are now concerned with) had been accepted by the co-sponsors of the joint draft resolution, the relevant parts of the revised joint draft resolution, with the Indian amendments, were adopted by a vote of 28 to 19, with 11 abstentions. The whole revised joint resolution, including the amendments, was approved by a vote of 27 to 18, with 12 abstentions, in the Fifth Committee, giving us the present Article 11 of the Statute as adopted under General Assembly resolution 957 (X) of 8 November 1955.

14. The three examples which the representative of the United States, as a sponsor of the third ground, suggested in 1955 – both in the Special Committee and in the Fifth Committee – could admittedly not be considered as exhaustive ; as illustrations, however, they may be regarded as particularly telling for the present case, as the question before the Tribunal in case No. 257 involved none of them. Thus, quite apart from the fact that no persuasive discussion took place in the Committee on Applications in 1981 on how the Administrative Tribunal could have erred on a question of law relating to the provisions of the Charter in this case, it is far from clear why this specific ground for objection to the Administrative Tribunal judgement *could* have been applicable in this particular instance, in the light of the drafting process of Article 11 of the UNAT Statute in the Special Committee and the Fifth Committee of the General Assembly in 1955.

* *

15. As properly pointed out in the Court's Opinion (para. 55), the question in the Request seems to be based on misinterpretation of the judgement of the Administrative Tribunal. Though it was drafted in such a way as to imply that the Administrative Tribunal was deemed to have determined 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 Tribunal did not so determine", as pointed out in the Court's Opinion (para. 55). The judgement of the Administrative Tribunal, in fact, nowhere challenges the effect of General Assembly resolution 34/165 and, as again the Court's Opinion rightly says *(ibid.)*, "in no way seeks to call in question the legal validity of . . . resolution 34/165". Combined with the failure to specify grounds, such a misconception inherent in the question posed could, in my view, have by itself justified a refusal to comply with the request – *a fortiori,* after the committing of procedural irregularities. Yet, having decided nevertheless to give an opinion, the Court should in my view have exposed this misconception with greater clarity. This implies a somewhat closer analysis of the Tribunal's task.

16. The Administrative Tribunal was requested to adjudge and declare, among other things, for Mr. Mortished, who was separated from United Nations service on 30 April 1980 –

> "that the scheme and detailed conditions and definitions established by the Secretary-General pursuant to Staff Regulation 9.4 and Annex IV to the Staff Regulations for the payment of repatriation grants entitled the Applicant to the payment of such a grant without the necessity for the production of evidence of relocation".

It was bound, in reaching its findings, to apply any applicable laws in existence, that is, in this case, those which were valid as of 30 April 1980. The specific laws that the Tribunal would have had to apply to the question of repatriation grants were Staff Regulation 9.4 and Staff Rule 109.5. Staff Regulation 9.4 has undergone barely any substantial change since the Staff Regulations were adopted by General Assembly resolution 590 (VI) of 2 February 1952. The relevant provisions in force in 1980 read 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 . . . Detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General . . ."

Staff Rule 109.5, on the other hand, has been extensively amended over the past several years. It will be pertinent here to take a brief look at the history of these amendments.

17. Staff Rule 109.5, as amended on 1 June 1976 (ST/SGB/Staff Rules/1/Rev.3) and then on 1 January 1977 (ST/SGB/Staff Rules/1/Rev.4), read in part :

> "Rule 109.5
>
> REPATRIATION GRANT
>
> Payment of repatriation grants under regulation 9.4 and annex IV to the Staff Regulations shall be subject to the following conditions and definitions :
>
> *(a)* 'Obligation to repatriate', as used in annex IV to the Staff Regulations, shall mean the obligation to return a staff member and his or her spouse and dependent children, upon separation, at the

expense of the United Nations, to a place outside the country of his or her duty station . . ."

The part quoted above remained unchanged until the critical date in 1980, but new paragraphs *(d)-(g)* were introduced by the amendment of the Staff Rules on 22 August 1979 (ST/SGB/Staff Rules/1/Rev.5), relettering the then-existing paragraphs *(e)-(j)* as new paragraphs *(h)-(m)*.

"*(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.

(e) Entitlement to repatriation grant shall cease if no claim for payment of the grant has been submitted within two years after the effective date of separation.

(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.

(g) Payment of the repatriation grant shall be calculated on the basis of the staff member's pensionable remuneration, the amount of which, exclusive of non-resident's allowance or language allowance, if any, shall be subject to staff assessment according to the applicable schedule of rates set forth in staff regulation 3.3 *(b)*."

Staff Rule 109.5 was further amended on 15 July 1980 (ST/SGB/Staff Rules/1/Rev.5/Amend.1), with effect from 1 January 1980, to implement the decision adopted by the General Assembly in its resolution 34/165, so that paragraph *(f)* was simply cancelled. (In this amendment of 15 July 1980 paragraph *(e)* was expanded, but this is not relevant to the present case.) Staff Rule 109.5 *(d)*, which had already been in force since 22 August 1979, categorically required the presentation of evidence of relocation by a former staff member. The Administrative Tribunal, in 1981, could not have ignored this rule, and in fact did not ignore it.

18. The Administrative Tribunal, in applying Staff Rule 109.5 *(d)*, which was in force at the critical date, would also have had to take into account Staff Rule 112.2 *(a)*, closely linked with Staff Regulation 12.1, which is intended to ensure due regard for the acquired rights of staff members. The provisions read 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

(a) These rules may be amended by the Secretary-General in a manner consistent with the Staff Regulations."

The rights of the Secretariat staff are certainly protected under these provisions.

19. The provisions on the acquired rights of staff members could have been applied in different ways. On the one hand, the Administrative Tribunal could have decided that, already at the date of its entry into force, namely 22 August 1979, Staff Rule 109.5 *(d)* had deprived the staff of the United Nations Secretariat of the alleged acquired right to receive repatriation grant without any evidence of relocation, a right implied to exist in view of the shifting of the concept of repatriation grant or the practices followed over the previous few decades (cf. Judgement No. 273, para. VII). On the other hand, the Tribunal could simultaneously have stressed the importance of Staff Rule 109.5 *(f)* – in force from 22 August 1979 to 31 December 1979 – so that the applicant suffered injury by being deprived of the entitlement he enjoyed under this specific clause. This also seems to be an interpretation given by the Judgement (para. XIII). I have some doubts, as I will later explain in Part II of this opinion, about the process whereby this particular provision, Staff Rule 109.5 *(f)*, was set up in 1979. Yet it cannot be denied that it remained in force for several months in late 1979. It was simply cancelled in the new Staff Rules of 1980, which implemented General Assembly resolution 34/165. Whether the simple cancellation of Staff Rule 109.5 *(f)* in the 1980 Staff Rules had prejudiced the right which the applicant might have acquired under this specific provision of the 1979 Staff Rules in the light of Staff Regulation 12.1 and Staff Rule 112.2 *(a)* was also a matter for the Administrative Tribunal to judge.

20. If a violation of acquired rights under Staff Regulation 12.1 and Staff Rule 112.2 *(a)* has been ascertained, the Administrative Tribunal cannot amend the Staff Regulations or Staff Rules, but can only adjudge that the applicant has sustained an injury as a result of disregard of a Staff Regulation or a Staff Rule and is thus entitled to compensation. And, indeed, that is what the Tribunal did ; it delivered a judgement saying that compensation for injury should be paid to Mr. Mortished without raising any questions as to the validity of General Assembly resolution 34/165. It is difficult to see in what way, by such a pronouncement, the Tribunal could have exceeded its competence.

* *

21. To sum up : first, quite apart from the lack of any explicit reference in the Request to any of the four possible grounds (as required under

Art. II, para. 3 *(c)*, of its Provisional Rules of Procedure), the deliberations of the Committee on Applications do not convincingly indicate any reasonable grounds on which the Judgement of the Administrative Tribunal could have been objected to and, in addition, it would seem that the ground for objection on the basis of error on a question of law relating to the provisions of the United Nations Charter was not applicable from the outset ; secondly, the Request is drafted on the basis of an entirely erroneous premise. I myself wonder whether these fundamental errors of procedure and understanding ought not to have been regarded as "compelling reasons" for the Court not to have responded to the Request for an advisory opinion in the present case.

PART II

22. While voting against on the first point in the operative paragraph for the reasons I have stated above, I voted in favour on the second and third points, since I can share the views expressed in the Court's Opinion, being fully convinced that the Administrative Tribunal did not err on a question of law relating to the provisions of the Charter of the United Nations and that it did not commit any excess of jurisdiction or competence vested in it. Yet I cannot but suggest that some errors seem to have been committed in the preparation of the provisions on repatriation grant in the 1979 Staff Rules (ST/SGB/Staff Rules/1/Rev.5).

23. As this may have affected the nature of the case before the Tribunal, it seems pertinent to look in a more detailed manner than does the Court's Opinion at the way in which the 1979 amendments affecting Rule 109.5 on repatriation grant came to be drafted. The second annual report of the International Civil Service Commission (A/31/30) was put on the agenda (item 103) of the thirty-first session of the General Assembly. The International Civil Service Commission had been established "in principle, as of 1 January 1974" "as a new organ for the regulation and co-ordination of the conditions of service of the United Nations common system" under General Assembly resolution 3042 (XXVII) of 19 December 1972 and, according to its Statute drafted by General Assembly resolution 3357 (XXIX) of 18 December 1974, the Commission is, under Article 10, to "make recommendations to the General Assembly" on, among other things, "*(a)* the broad principles for the determination of the conditions of service of the staff" and "*(c)* allowances and benefits of staff which are determined by the General Assembly", including the repatriation grant. On the other hand, the Commission could, under Article 11, "establish", among other things, "rates of allowances and benefits, other than pensions and those referred to in Article 10 *(c)*, the conditions of entitlement thereto . . ."

24. In 1976 the newly-created International Civil Service Commission

examined, among many other things, the repatriation grant scheme and, pending a further study, recommended in its second annual report, as mentioned above, some changes to the scale of benefits. During the discussions on item 103 in the Fifth Committee of the General Assembly at its thirty-first session some doubts were expressed as to the handling of the repatriation grant, and

> "The view was . . . expressed that the Commission should consider whether staff members who did not return to their country of origin on retirement should be entitled to the grant." (Report of the Fifth Committee (A/31/449), para. 28.)

The General Assembly, in its resolution 31/141 of 17 December 1976, entitled "Report of the International Civil Service Commission", requested the Commission

> "to re-examine, in the light of the views expressed in the Fifth Committee at the current session, . . . *(a)* The conditions for the provision of terminal payments (for example, repatriation grant, . . .)" (B, II, para. 3).

In 1978, the International Civil Service Commission studied the conditions for payment of the repatriation grant, and its examination centred on, as one of two questions, "the appropriateness of paying the grant to a staff member who, upon separation, does not return to his home country" (A/33/30, para. 181). However, the Commission in its report (A/33/30), being of the view that

> "Strictly speaking, it was clear that [paying repatriation grant to a staff member who did not in fact return to his home country upon separation from the organization] would be inconsistent with the stated purpose of the grant" (para. 183),

acknowledged the practical difficulties of keeping track of the movements of a former staff member after he had left the service, and had no desire to see an international information network set up to do so. Believing that to pay repatriation grant to a person who remained permanently in the country of his last duty station was incompatible with the purpose of the grant, it considered the possibility that the grant be paid only to a staff member who supplied evidence that he had settled elsewhere. It recommended that

> "payment of the repatriation grant should be made conditional upon signature by the staff member of a declaration that he does not intend to remain permanently in the country of his last duty station" (para. 186).

25. At the thirty-third session of the General Assembly in 1978, the Fifth Committee considered the report of the International Civil Service

Commission (agenda item 111). The Chairman of the Commission stated, along the lines mentioned above, that

> "it believed that the repatriation grant should not be paid when the staff member, at the end of his service, remained in the place of his last duty station . . . The Commission considered that the most practical solution would be to require, as a condition for payment of the grant, that the staff member should sign a declaration to the effect that he did not intend to continue to reside permanently in the country of his last duty station." (A/C.5/33/SR.32, para. 41.)

Thus the intent of the Commission was at that time crystal-clear. The discussions in the Fifth Committee on eligibility for the repatriation grant or the means of proof were very limited, and several delegates considered that the proposed condition for payment of the grant did not constitute a sufficient guarantee against abuse. The Chairman of the Commission made a statement that

> "greater measures of control should be applied only if there were proven cases of abuse. In its study, the Commission has found that in a few cases repatriation grants had been paid to expatriate staff members who had not moved from the country of their last duty station, and the proposal was intended to eliminate what was considered to be an unjustifiable and anomalous payment in such cases." (A/C.5/33/SR.42, para. 69.)

26. In the Fifth Committee a draft resolution on the report of the International Civil Service Commission read to the effect that

> "The General Assembly . . . decides 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 Commission." (A/C.5/33/L.33/Rev.1, IV, para. 4.)

It seems certain, in the light of the competence of the Commission as provided for in its Statute, that the phrase "to be established by the Commission" could not have been meant as corresponding to the word "establish" in Article 11 of the Statute. The representative who introduced a draft resolution on behalf of 17 countries had explained that this paragraph had made it clear that evidence of actual relocation would be required in addition to a signed declaration by the staff member (A/C.5/SR.56, para. 29), and that the phrase "subject to the terms to be established by the Commission" in no way "diluted the thrust" of the decision for the whole paragraph but merely provided for its administra-

tive implementation (para. 51). It seems that the intention of the sponsoring countries, as pointed out by many delegates at the Fifth Committee one year later, was not to leave any doubt at all regarding the problem of repatriation grants. General Assembly resolution 33/119, entitled "Report of the International Civil Service Commission", as adopted on 19 December 1978, read the same as a text proposed at the Fifth Committee. No amendment in respect of repatriation grant was made in the Staff Regulations and annexed, as usual, to the General Assembly resolution. It is quite clear that, while amendments to the Staff Regulations and "such consequential changes as are necessary in the Staff Rules" to be made by the Secretary-General were referred to in this General Assembly resolution (IV, para. 11), they did not have any relevance to the repatriation grant. It has, however, to be noted that the Under-Secretary-General for Administration and Management expressed some concern regarding the requirement of evidence of relocation and stated that, since acquired rights were involved, the matter could create problems unless the Commission could find some means of resolving the difficulty (A/C.5/33/SR.56, para. 32). This statement seems to be the first sign of acquired rights rearing their head.

27. The following facts are known from the Report of the International Civil Service Commission (A/34/30) : early in 1979 the International Civil Service Commission considered, on the one hand, what should be admitted as constituting evidence of relocation and the provision of documentary evidence that the former member had taken up residence in another country. On the other hand, it was informed that the legal advisers of several organizations had studied the question and come to the conclusion that any entitlement already earned by a staff member could not be affected retroactively by changing the rules, though the exercise of further entitlements accruing after the date of the change would be subject to compliance with the new condition. It then sought an opinion of the Office of Legal Affairs of the United Nations Secretariat, which indicated that, in so far as the United Nations Organization itself was concerned, there was no express or implied provision that only those who actually made use of the travel entitlement should receive the repatriation grant. Seemingly affected by the opinion of the Secretariat of the United Nations and other specialized agencies, the Commission appears to have completely changed its position of one year before and surrendered to the idea that all existing staff members had acquired the right to repatriation grant irrespective of their future location upon separation. The International Civil Service Commission adopted and "promulgated" on 6 April 1979 the following text (CIRC/GEN/39) :

> "The following modifications to the terms of entitlement to the repatriation grant are *established* by the International Civil Service

Commission in pursuance of paragraph 4 of section IV of General Assembly resolution 33/119 :

(a) With effect from 1 July 1979 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 ;

(b) 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, such as a declaration by the immigration, police, tax or other authorities of the country, by the senior United Nations official in the country or by the former staff member's new employer ;

(c) Payment of the grant may be claimed by the former staff member within two years of the effective date of separation ;

(d) Notwithstanding paragraph (a) *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 ;* the exercise of any additional entitlement accrued after that date shall, however, be subject to the conditions set out in paragraphs *(a)* to *(c)* above." (Emphasis added.)

28. Now, admittedly, Article 25, paragraph 1, of the Commission's Statute provides that "decisions of the Commission shall be promulgated" but the "decisions" which are to be "promulgated" are clearly those falling within the terms of Article 11. However, matters dealt with under Article 10 of that Statute (which include repatriation grant) are to be the subject of *recommendations* to the General Assembly, and there is no question of promulgating these : they may simply be communicated by the Secretary-General of the United Nations to the executive heads of the other organizations under Article 24, paragraph 1, and are not the object of promulgation by the Commission itself. I wonder therefore if the Commission, in *promulgating* the text concerning the repatriation grant, did not exceed the mandate entrusted to it under Article 10 of its Statute ? At any rate, it was clear to several delegates who took part in the discussions in the Fifth Committee at the thirty-fourth session of the General Assembly several months later that such a decision by the Commission was not quite in conformity with the terms of its mandate under General Assembly resolution 33/119. In particular, the representative of the United States pointed out :

"As a sponsor of that resolution [33/119], the United States believed that all Member States had understood that the phrase 'subject to the

> terms to be established by the Commission' meant solely establishing the documentation which a former staff member must submit in order to qualify for a repatriation grant." (A/C.5/34/SR.46, para. 66.)

It is possible, I suggest, that some misunderstanding had arisen owing to the resolution's use of the word "establish", which is featured in Article 11 of the Commission's Statute and may be associated with "decisions" that are to be "promulgated" under Article 25. Though I do not think that the Commission would have been justified in taking the use of this word as automatically strengthening its powers in relation to an aspect of repatriation grant, I can see how some confusion might have arisen in this respect.

29. At all events, the very rapid response of the Secretary-General to the action taken by the International Civil Service Commission seemed to assume that the Commission had indeed been given a major delegation of powers. An Administrative Instruction was issued on 23 April 1979 under the name of the Assistant Secretary-General for Personnel Services (ST/AI/262):

> "2. Pursuant to that decision [Section IV, paragraph 4, of the General Assembly resolution 33/119], the [International Civil Service] Commission has established the following modifications to the terms of entitlement to the repatriation grant:
>
> [quotation from CIRC/GEN/39, as given above]
>
> 3. Effective 1 July 1979, the above-cited provisions shall govern the conditions for payment of repatriation grant to United Nations staff members under Annex IV to the Staff Regulations. Suitable amendments to the Staff Rules will be made in due course."

Some revisions to the then-existing Staff Rules were introduced by the Secretary-General's Bulletin of 22 August 1979 (ST/SGB/Staff Rules/1/Rev.5). The Bulletin stated that Rule 109.5 was amended with effect from 1 January 1979

> "as a consequence of the changes to ... the repatriation grant ... adopted by the General Assembly in its resolution 33/119," "to make the payment of the grant conditional upon presentation of actual evidence of relocation with respect to periods of eligibility arising after 1 July 1979".

The new text of Rule 109.5 has already been quoted in paragraph 17 of this opinion.

30. Pursuant to Staff Regulation 12.2, requiring the Secretary-General to report annually to the General Assembly any amendments to the Staff Rules, the Secretary-General made a report to the General Assembly dated

13 September 1979 on "Personnel questions : Other personnel questions : Amendments to the Staff Rules" (A/C.5/34/7) :

> "Those changes [such consequential changes as were necessary in the Staff Rules] as well as other amendments to the Staff Rules, which were mostly based *on the decisions taken by the International Civil Service Commission under Article 11 of its Statute,* are incorporated in the revised editions of the two series of Staff Rules that have been approved by the Secretary-General for publication . . .
>
> 2. . . . (e) *Pursuant to General Assembly resolution 33/119,* rule 109.5, Repatriation grant, was amended to make the payment of the grant conditional upon presentation of actual evidence of relocation *with respect to periods of eligibility arising after 1 July 1979* . . ." (Emphasis added.)

It has already been pointed out that reference to Article 11 of the Statute of the International Civil Service Commission would be improper in connection with the implementation of resolution 33/119 by the Commission. One must therefore assume that the Secretary-General did not intend the "mostly" to apply to the modifications of Rule 109.5, but the impression conveyed is otherwise.

31. When the report of the International Civil Service Commission to the General Assembly (A/34/30) was discussed in the Fifth Committee of the General Assembly at its thirty-fourth session, the significance and implication of that decision of the Commission, as well as the revision of the Staff Rules on 22 August 1979, gradually drew attention. Strong criticisms of the decision were heard from various delegates and few favourable views were expressed. Yet the Acting Chairman of the Commission stated that the General Assembly had clearly mandated the Commission to establish the terms under which the grant would be paid and, noting that the question of repatriation grant had called for no action by the General Assembly, he further stated :

> "The Commission, which did not claim to be a legal committee, had taken a pragmatic decision in the interests of economy, judging that it would be unreasonable to impose upon organizations a measure which would certainly be appealed by staff members . . . The General Assembly was, of course, free to overrule the Commission, but it should be noted that the governing bodies of the majority of the other organizations in the common system had, since July 1979, approved the incorporation of the measures announced by the Commission into their organizations' staff regulations." (A/C.5/34/SR.55, para. 41.)

In so saying, he noted that "the practice of paying the grant to staff members who did not leave their duty station had been established", and

he admitted that the majority of the members of the Commission had felt that the practice was in conformity with the provisions of the Staff Rules and Regulations (*ibid.*, para. 40).

32. In such a situation, the idea that effective 1 January 1980 no staff member should be entitled to any part of the repatriation grant unless he provided evidence of relocation away from the country of the last duty station was introduced by several delegates as a part of a draft resolution, but on the other hand some of them were aware that it might create a number of problems, particularly from the point of view of other organizations in the common system. The Under-Secretary-General for Administration, Finance and Management was concerned about such an idea because it would have the effect of revoking a decision which was in process of implementation by the agencies in the common system (A/C.5/34/SR.60, para. 59). It is quite clear, in the light of his suggestion that transitional arrangements regarding the requirement of evidence of relocation as a condition for payment of the repatriation grant be accepted, that he held the view that Rule 109.5 *(f)*, with the effect of not applying the new obligation concerning the evidence of relocation to any period of service prior to 1 July 1979, would simply be revoked. That this point reflected the interpretation of the United Nations Secretariat was also clear from the statement made later by the Assistant Secretary-General for Personnel Services to the effect that –

> "The net result of the new decision would be to nullify the notion of such service credit and make all payments of the repatriation grant subject to the uniform requirement of evidence of relocation." (A/C.5/34/SR.79, para. 111.)

His appeal for a period of transition in the form of a grace period of one month during which all staff members (*ibid.*, para. 112) would have been in a position to assess its impact on their terminal benefits also affords further proof that the proposed imposing of a deadline would, in his view, simply revoke the right of the personnel to receive repatriation grant without provision of evidence of relocation. Further evidence in the same sense was furnished by his Information Circular of 14 December 1979 (ST/IC/79/84).

33. On 17 December 1979 the General Assembly adopted resolution 34/165 entitled "Report of the International Civil Service Commission", which contained the following provision :

> "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." (II, para. 3.)

On 21 December 1979 an Administrative Instruction was issued from

the Assistant Secretary-General for Personnel Services (ST/AI/269) :

> "2. . . . the terms of entitlement to the repatriation grant set out in administrative instruction ST/AI/262 of 23 April 1979 are amended by the substitution of a new subparagraph *(d)* and, as so amended with effect from 1 January 1980, are as follows :
>
> . . . . . .
>
> *(d)* No staff member shall be entitled to any part of the repatriation grant unless evidence of relocation of residence away from the country of the last duty station is provided."

Some new amendments to the Staff Rules (ST/SGB/Staff Rules/1/Rev.5/Amend.1) were introduced by the Secretary-General in his Bulletin of 25 July 1980. The Bulletin stated that –

> "Rule 109.5. Repatriation grant, is amended with effect from 1 January 1980 to implement the decision concerning repatriation grant adopted by the General Assembly in its resolution 34/165 by cancelling the transitional arrangement which had been established with regard to staff members already in service before 1 July 1979"

and the new Rule 109.5 read in part as follows :

> "Rule 109.5
>
> REPATRIATION GRANT
>
> . . . . . .
>
> *(f)* (Cancelled)."

34. The International Civil Service Commission presented to the thirty-fifth session of the General Assembly, in 1980, a report (A/35/30) in which it commented upon the effect of General Assembly resolution 34/165 on the harmonization of personnel practices of the organizations within the United Nations common system. It stated :

> "The Commission was concerned that the General Assembly, having at its thirty-third session given an express mandate to the Commission to establish terms under which repatriation grant would be payable to the staff, should, at its thirty-fourth session, have reversed the decision taken by the Commission. It wished to draw to the attention of the General Assembly the implication of such action for the harmonization of personnel practices in the common system, as well as for the credibility and the effectiveness of the Commission which the General Assembly had itself set up and to which it had

> assigned certain responsibilities. The Commission, therefore, would have preferred that the General Assembly refer this question back to the Commission for reconsideration of its decision as allowed for under the Statute approved by the Assembly." (Para. 14.)

As I see it, this criticism of the General Assembly by the International Civil Service Commission was perhaps somewhat over-hasty in view of the doubts about the Commission's own interpretation of resolution 33/119.

35. To sum up, I would suggest that if in 1979 the Staff Rules had been revised in a more cautious and proper manner, so as to meet the wishes of the member States of the United Nations, such confusion as has confronted the Court could well have been avoided. More particularly, if the amendment of Staff Rule 109.5 in 1979 had been carried out in conformity with the spirit of the General Assembly resolution of the previous year, the situation of the repatriation grant system might have been totally different and the Administrative Tribunal might have delivered a different judgement on any case therefrom arising.

(Signed) Shigeru ODA