DISSENTING OPINION OF JUDGE MOROZOV

I voted against the reasoning and the operative part (Nos. 1, 2 A and 2 B) of the Advisory Opinion given by the Court at the request of the Committee on Applications for Review of Administrative Tribunal Judgements, relating to Tribunal Judgement No. 273 of 15 May 1981, for the following reasons.

1. The General Assembly in 1955 (resolution 957 (X)), changed the text of Article 11 of the Statute of the Tribunal and authorized the Committee on Applications for Review of the Judgements of the Tribunal to request the International Court of Justice to give an advisory opinion when the Committee has found a "substantial basis" for an objection that the Tribunal "has exceeded its jurisdiction or competence . . . or has erred on a question of law relating to the provisions of the Charter of the United Nations . . .".

During the discussions on this resolution many of the Members of the United Nations strongly objected to the procedure suggested for review of the judgements on the grounds that it was incompatible with the competence provided for in Article 65 of the Statute of the Court which is an inseparable part of the United Nations Charter. Some of them stressed that such a procedure undermined the *cornerstone of the Court's Statute,* which provided *that only States could be parties* before the Court, but not private individuals.

It was also observed that acceptance of this resolution would *unavoidably lead the Court to consider the merits of the case* in which one party is the Secretary-General of the United Nations and the other party a *private person.* It was also said that it is impossible to answer the question whether the Tribunal has exceeded its jurisdiction, or has erred on a question of law, without judicial deliberation on *the merits* of the case.

In the General Assembly on 8 November 1955 the resolution was not supported by 30 delegations out of 57 (27 to 18 with 12 abstensions) :

In favour : Argentina, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Honduras, Iraq, Israel, Lebanon, Liberia, Pakistan, Panama, Paraguay, Philippines, Thailand, Turkey, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela.

Against : Belgium, Byelorussian Soviet Socialist Republic, Czechoslovakia, Denmark, Egypt, India, Indonesia, Netherlands, Norway, Poland,

Saudi Arabia, Sweden, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay, Yemen, Yugoslavia.

Abstaining : Afghanistan, Australia, Burma, Ethiopia, Greece, Guatemala, Haiti, Iran, Luxembourg, Mexico, New Zealand, Peru.

It followed as a consequence that the *procedure involving the Court was not used for 18 years,* and it was only in 1973 that the first request to the Court to give an advisory opinion was presented by the Committee for Review (in the case *Fasla* v. *the Secretary-General*), and for the second time only *after eight more years* (in the current case).

I would like to recall that in 1973 I voted against the Advisory Opinion of the Court in the so-called *Fasla* case, and presented a dissenting opinion, in which it was pointed out that despite resolution 957 (X) I had voted against the Opinion, without making any attempt to revise the above-mentioned resolution *(because in any case this is not a function of the Court).*

2. But the competence of the Court and its judicial function should be based exclusively on the Charter of the United Nations and the Statute of the Court, which is an integral part of it.

To give or not to give an advisory opinion on a request of any kind is the *discretionary right* of the Court, as laid down in paragraph 1 of Article 65 of the Statute "The Court *may* give an advisory opinion . . ." (emphasis added).

In accordance with Article 34 of the Statute *"Only States may be parties in cases before the Court"* [1]. The situation which the Court faces in the current case had as a matter of principle the same character as that in the 1973 case, and the Court has made more than a dozen references to that case.

The Court is again in substance requested to undertake a judicial review of a Judgement of the Tribunal in which *one party* is a private person and the *other party is the Secretary-General* "the chief administrative officer of the [United Nations] Organization".

The Court has stated (para. 58) that it :

> "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".

It has also been said that the intention of the Court is only to render some assistance to the General Assembly ; but in reality the deliberation on the current case is a kind of surrogate of judicial deliberation, contrary to the Charter of the United Nations and the Statute of the Court relating to its advisory function.

3. Inasmuch as the majority of the Court has decided in paragraph 1 of

[1] See also my dissenting opinion, *I.C.J. Reports 1973,* pp. 134-138.

the operative part of the Opinion, taking into account all the circumstances mentioned in the reasoning part of the Opinion, to comply with the request for advisory opinion, I am compelled to turn to the substance of the reasoning part of the Opinion, as well as paragraphs 2 A and 2 B of its operative part, without prejudice to my position, which I have expounded in *Fasla*'s case in 1973 as well as later in the case on the request of the WHO to give an advisory opinion in 1980, for the reasons expressed in my dissenting opinions [1], which I continue to support.

4. I would like to be excused from analysing the whole collection of arguments used by the Tribunal, and later by the Court, because *all of them are based on the same wrong presumptions.*

Therefore, I limit myself only to certain remarks, which, it seems to me, are of really decisive significance.

The Court has accepted once more a request for advisory opinion from the Committee on Applications for Review of Administrative Tribunal Judgements, and has thus not only repeated the mistake made in 1973 (in the so-called *Fasla* case), but has made new serious legal mistakes.

In the current case the Court, like the Tribunal, in fact did not take due account of the legal meaning of General Assembly resolution 34/165 of 17 December 1979, and in this way has acted contrary to the sovereign right of the Assembly, established in Article 101, paragraph 1, of the Charter, to be the exclusive organ of the United Nations for the establishment of regulations for the appointment of the staff of the United Nations.

Reservations were made in the Advisory Opinion and earlier by the Tribunal in its Judgement that they allegedly did not deny this right of the General Assembly, and resolution 34/165 as it is. But such reservations could not disguise what the Tribunal and the Court have done in reality (paras. 49, 50, 73-75).

5. The text of the question presented by the Committee on Applications for Review to the Court is quite clear :

> "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 answer to the question could easily be found in the text of the above-mentioned resolution of the Assembly :

[1] *I.C.J. Reports 1973,* pp. 134-138, and *I.C.J. Reports 1980,* pp. 121-198.

"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 last duty station is provided" (emphasis added).

Is there any need to point out that the word *"no"* in this context has only one meaning – *"nobody"* or that the words "effective 1 January 1980" can have no meaning other than that, as from that date, the resolution has "immediate effect" for all members of the staff without exception ?

6. But in paragraph 47 of the Opinion we read :

"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 (para. 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."* (Emphasis added.)

It is necessary first to say that Article 11 of the Tribunal's Statute *could not confer any kind of power on the Court. The sole sources of the powers of the Court are the Charter of the United Nations and the Statute* of the Court. Thus this argument is not a legal one, and is used among the other unconvincing arguments for justification of the view that the Court allegedly has a right, under pretext of an Advisory Opinion, to avoid giving an answer to the request presented, but to reformulate it completely ; and after that to reply to its own question.

In paragraph 55 of the Opinion also all arguments related to the so-called reformulation of the request confirm that there is no legal basis for the situation in the current case, in which the request for advisory opinion has *completely disappeared.*

Secondly, in paragraph 55 of the Opinion we read :

"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)." (Emphasis added.)

And after this discovery, the Court in the same paragraph, contrary to the substance of the matter, continues :

> "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.*" (Emphasis added.)

But that statement could only be considered as an additional attempt to give to the judgement of the Tribunal, and also to the real meaning and effect of the Advisory Opinion of the Court, some appearance of legal reasoning.

In pursuit of this wrong approach, the Court undertook a long excursion into the field of what it imagines was the way of thinking of the members of the Committee for Review, before and in the process of their voting on the request presented officially to the Court, as well as what it imagines was the way of thinking of the delegations of the Members of the General Assembly in the process of elaboration and acceptance of resolution 34/165, and the way it was implemented. This excursion has led the majority of the Court to consideration of a large number of questions related to the activity of the General Assembly, and various organs of the United Nations, and particularly of the activity of the Secretary-General, which does not relate to the real legal issue of the request presented to the Court.

7. On the basis of this, to put it mildly, very unstable foundation, the Court continues to advance its allegations that it has acted in accordance with "established jurisprudence".

In justification of its position the Court has particularly used references to the Advisory Opinion of the Court in 1980 given at the request of the WHO in connection with the relocation of its regional office from Cairo.

It is well known that in that case the Court did not give a precise answer to the request, but substituted its own text for the request made. This was done also under the pretext that it should help the Court to understand correctly the real legal meaning of the request of the WHO [1]. The result of the implementation of such a method is well known : in substance no answer to the legal question presented to the Court was ever given in its advisory opinion, which was adopted on the basis of a method which the Court *now* continues to consider as "established jurisprudence".

8. The repeated attempts of the majority of the Court to canonize the right to *reformulate* the request presented for advisory opinion, have created in general the dangerous situation in which the Court allegedly could voluntarily intervene in any question related to the constitutional rights and the activity of any of the main bodies of the United Nations and specialized agencies, or any problem of the interrelations between States, under the pretext of receiving a request for advisory opinion. And this is what has happened, in the case of the WHO in 1980 particularly.

---

[1] See also more detailed reasoning related to the 1980 case submitted to the Court in my *dissenting* opinion *I.C.J. Reports 1980,* pp. 190-197.

The competence of the Court in respect of advisory opinions, in accordance with Article 65 of its Statute, is *strictly limited.* If the Court considers that some request has no real legal meaning, then it is the Court's right to reject the request, and that is all. But to substitute for the request its own text is completely unacceptable from the point of view of its Statute.

It is necessary to stress the fact that throughout the long chain of its argument the Court avoided, as the Tribunal also had done earlier, giving its conclusion on the real decisive legal questions, or distorted their meaning.

9. In particular, the Court did not consider the nature of the right to a grant on repatriation or relocation. It is quite clear that the right to a repatriation grant was never considered as *a duty of the United Nations* to pay for *nothing,* but payment was only made in the case of real repatriation, or relocation. Any attempt to separate the legal concept of payment from the legal nature of repatriation or relocation has no basis in law or logic.

In short, how could one possibly consider that the words "unless evidence of relocation . . . is provided" are in any way equivalent to some such words as : "Every staff member of the United Nations has the right to be paid for repatriation or relocation independently of whether or not he is repatriated or relocated away from the country of his last duty station" ?

And yet *it is on this tacit and incorrect understanding that the words quoted above are equivalent to such a meaning that one of the general approaches of both the Tribunal and the Court is based.* It is however simply not possible, even if one tries to read between the lines of General Assembly resolution 34/165, to find that the Assembly would have regarded the two expressions as synonymous. And finally if, contrary to all legal and logical arguments, it could be contended that the two expressions are equivalent or synonymous, how can it be explained that this same approach is not implemented also for staff members who were citizens of the country of their last duty station ?

10. No decision to abandon the legal and literal meaning of the term "repatriation" was ever taken by the General Assembly which, under Article 101, paragraph 1, of the Charter is the only body authorized to establish regulations relating to the appointment (*ergo,* to the conditions of work) of United Nations staff members – regulations which are obligatory for the Secretary-General.

All references in the Tribunal's Judgement, as well as in the Advisory Opinion of the Court, to the long-followed practice whereby repatriation grant was paid to members of staff without presentation of evidence of repatriation or relocation could add nothing in favour of the Judgement of the Tribunal and Advisory Opinion of the Court. As has been said, the duty to present evidence does not in any way nullify or limit the grant for repatriation or relocation : it should be considered only as one of the

elements of a purely technical character for the implementation of the grant.

Contrary to that, and to General Assembly resolution 34/165, the Tribunal adopted an approach, the consequences of which were equal to an attempt to redraft the resolution in such a way that the word "no" in this context for the Tribunal, meant nothing, and the text allegedly should be taken as reading "no member of the staff appointed after 1 January 1980".

Is it necessary to demonstrate that no kind of wrong or illegal practice of the executive mechanism could be considered as a source for creation of legally recognized rights, and therefore *could not generate any so-called acquired right within the meaning of Staff Regulation 12.1* (Chap. XII – General Provisions) ?

The Tribunal avoided giving a direct answer to this problem and said that "in view of the particular situation of the Applicant, the Tribunal finds that it is not required to adjudicate that question *in abstracto*" (para. VIII).

But in the following paragraphs of its Judgement, under the pretext that it was analysing the particular situation relating only to the Applicant, the Tribunal in reality came to far-reaching conclusions, going beyond the specific case, which distorted the definition of the grant for repatriation or relocation as established for members of the United Nations Secretariat by the General Assembly *in abstracto* as well as in the specific case.

In the following paragraphs, contrary to its own general statement, and under the pretext that the approach of the Tribunal only concerns the Applicant, the Tribunal used for that purpose a great number of unconvincing arguments.

11. The general approach of the Tribunal is based on an artificial separation of its arguments from the nature of the repatriation or relocation grant as it is and was established by the General Assembly.

The result of this wrong approach leads the Tribunal to the conclusion that the above-mentioned payment is allegedly part of the general "benefit" or acquired right of members of the staff taken independently from and allegedly not bound up with the real legal nature of the right. In support of this reference was made to Annex IV to the Staff Regulations.

In paragraph XV of the Judgement we read :

> "Consequently, 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 . . . it is incumbent upon the Tribunal to assess the consequences of any failure to recognize an acquired right."

But the Tribunal passed over an important fact, namely that the refer-

ence to length of service as stated in Annex IV to the Staff Regulations is *related only to calculation* of the grant and could not be used as a legal argument for the legal definition of the right as it is, or for recognition of it as an acquired right within the meaning of Staff Regulation 12.1.

12. One of the main mistakes in the Judgement is an assertion by the Tribunal that the provision relating to presentation of evidence of repatriation or relocation provided in General Assembly resolution 34/165 allegedly changed the legal character and real nature of the right.

Let us therefore turn for a moment to resolution 33/119 of 19 December 1978, when the General Assembly decided

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

Thus in 1978 already the Assembly dotted the i's and crossed the t's, and correct implementation of its resolution should have led to the establishment of due order relating to the payment of the grant on repatriation or relocation.

What happened thereafter ? The text of resolution 33/119 was wrongly implemented, with the purpose of maintaining the illegal practice of payment of repatriation grant without factual repatriation or relocation, for members of staff who were in the service of the United Nations before 1 July 1979.

How did this happen ? Contrary to the letter and the spirit of resolution 33/119 of 19 December 1978, the words in paragraph 4 of the resolution of 1978 – "subject to the terms to be established by the Commission" together with the words in paragraph 12 : "Decides that the above decisions shall enter into effect on 1 January 1979, except where otherwise specified" – were wrongly presented as a legal basis for such approach.

In reality, paragraph 4 meant that the Commission (ICSC) should settle only the details of what kind of evidence of repatriation should be necessary to be presented by members of staff entitled to the grant in accordance with the resolution of the General Assembly of 19 December 1978 ; but the Commission never was authorized to overrule its substance and to establish a so-called transitional period, because this was senseless as a matter of substance in the light of the letter and spirit of resolution 33/119.

However, contrary to that, there was included in the Staff Rules (Rule 109.5) a paragraph *(f)* which distorted the real meaning of paragraph 4 of General Assembly resolution 33/119 by excluding from the implementation of that resolution all members of the Staff who in reality did not repatriate or relocate, from the country of their last duty station.

The observation in paragraph 71 of the Opinion that "Paragraph *(f)* was in conformity with the text prepared by the International Civil Service Commission" has no legal basis, because, as has been said, the Commission also had no right to intervene in the interpretation of the substance of a resolution of the General Assembly.

This happened for a short period before the opening of the thirty-fourth session of the General Assembly meeting in September 1979. The Secretary-General in 1978 was only invited "to make such *consequential* changes as are necessary in the Staff Rules and to report thereon to the General Assembly at its thirty-fourth session in accordance with the provisions of regulation 12.2 of the Staff Regulations".

As is well known, the above-mentioned paragraph *(f)* existed only a short time and was *never confirmed by the General Assembly,* and was excluded from the Rules by the Secretary-General in December 1979 in accordance with the confirmation by resolution 34/165 of the duty to present evidence of repatriation or relocation, thus repeating the same position which the General Assembly had taken up in 1978.

13. Now let us consider once more the real meaning of this former short-lived paragraph *(f),* because the wrong interpretation of it constitutes one of the key questions in the whole construction of the Judgement of the Tribunal as well as the Advisory Opinion of the Court.

As has been said, paragraph *(f)* provided for the exclusion of a particular group of staff members from the requirement of presentation of evidence of relocation ; but this paragraph did not provide that the nature and character of the right to repatriation, as it is, was changed. *Nor did it provide that a staff member should be paid without relocation from the country of his last duty station,* if no actual relocation took place. In this context the former paragraph *(f)* cannot be interpreted as meaning that the repatriation or relocation grant itself, and the requirement of presentation of evidence of relocation, are somehow equivalent or synonymous, as has already been observed. *Paragraph* (f) *at the last count was only used as a pretext for illegal payment for nothing.*

I repeat that the obligation to present evidence of repatriation or relocation is only a technicality, with the purpose of ensuring that no one should be able to abuse the confidence of the United Nations and receive payment contrary to the legal nature of the grant. For the same reason, any consideration of the question of the so-called *retroactivity or non-retroactivity of the 1979 resolution* of the General Assembly *has no legal meaning,* because the right to the grant on repatriation or relocation, as it is, has been neither denied nor changed.

The other approach, to my regret, is an attempt to ignore real facts.

14. Reference has been made by the Tribunal to contractual and other obligations to the Applicant created at the time of the appointment of the Applicant but this is also unconvincing, and does not relate to the question of legal nature of the right of repatriation or relocation. And the United

Nations never undertook the obligation, at the moment of appointment of the Applicant, to pay the grant *without factual repatriation or relocation.*

If the applicant had decided not to stay in Switzerland, his last duty station, but to repatriate or relocate to some other country, he would of course have the full right that in the process of calculation of the size of the grant there should be taken into account the "years of past service in another international organization". So these references of the Tribunal could add nothing to the matter.

It is necessary to add that "the words 'contract' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations" (UNAT Statute, Art. 2).

It is important to stress that the pertinent provision of the regulations in force in April 1980, the time when the Applicant separated from United Nations service, was paragraph *(d)* of Rule 109.5 :

> "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 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."

These regulations were correctly based on the text of resolution 34/165 *unanimously* adopted by the General Assembly in accordance with Article 101, paragraph 1, of the United Nations Charter : "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

CONCLUSION

A. For all these reasons it is impossible to accept the assertion of the Tribunal that ". . . the stand taken by the Respondent has had the effect of depriving the Applicant of payment of the repatriation grant . . ." and therefore it ". . . finds that the Applicant sustained injury as the result of a disregard of Staff Regulation 12.1 and Staff Rule 112.2 *(a)*".

B. Instead of being guided by the resolutions of the General Assembly, and by its own Statute as adopted by the General Assembly, and by the provisions of the Charter, *which ultimately is the only source of law for the Tribunal,* Judgement No. 273 of the Tribunal demonstrates an attempt to give legal validity to its unconvincing arguments and conclusions, and

clearly was not warranted in determining that resolution 34/165 of 17 December 1979 could not be given immediate effect.

C. In reality the Judgement was directed not against the Respondent – the Secretary-General – *but against General Assembly resolution 34/165, against its letter and spirit.*

Therefore *the significance of the Judgement goes far beyond the specific case, and has a meaning of principle also for all the future activity of the Tribunal, and moreover for its correct interrelations with the General Assembly.*

D. In accordance with its Statute "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". But acting contrary to that provision, the Tribunal exceeded its competence, and in fact rejected resolution 34/165 of the General Assembly, 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 last duty station is provided".

The Tribunal under the pretext of interpretation of the 1978 and 1979 resolutions of the General Assembly erred on a question of law relating to the provisions of the Charter of the United Nations, as well as exceeding its jurisdiction or competence, when it found that the Applicant, who separated from the United Nations in April 1980, allegedly has the right to payment of the repatriation grant although the Applicant has continued to stay up to the present time in the country of his last duty station.

E. The Advisory Opinion of the Court misses the really decisive point of the case, and denies that the Tribunal did commit the violations mentioned in paragraphs A, B, C and D of this dissenting opinion.

Therefore I could not, to my regret, consider the Advisory Opinion as a document which coincides with my understanding of an implementation of international justice.

(Signed) Platon MOROZOV.