DISSENTING OPINION OF JUDGE EL-KHANI

[Translation]

To my great regret I find myself obliged to dissociate myself from the Advisory Opinion which the Court has seen fit to give in the present case, because I consider that, for reasons of principle bound up with the very nature of the Court's jurisdiction, and having regard to the procedural irregularities committed by the body which referred the case to it, the Court, in this instance, ought to have refused to comply with the request for an advisory opinion.

A. Reasons deriving from the Role of the Court

The Court decided by a majority to comply with the request submitted by the Committee on Applications for the Review of Administrative Tribunal Judgements (hereinafter called "the Committee"). In the exercise of the discretionary power conferred upon it by Article 65 of its Statute, the Court agreed to give an advisory opinion on the question laid before the Committee by the United States of America, as to whether the United Nations Administrative Tribunal (hereinafter called "the Tribunal") was "warranted" in Judgement No. 273 in the case *Mortished* v. *the Secretary-General of the United Nations,* a question which the Committee made its own.

Thus the Court was indirectly led to study a case opposing a United Nations staff member to the Secretary-General, within the framework of the review of a judgement rendered by the Tribunal. But I believe, to begin with, that the Court's principal task should be to concern itself with cases between States, which alone may appear before it (Statute, Art. 34) whereas private individuals have no access.

Moved by a concern for equality which was lacking within the Committee, the Court has not held any hearing in the present case ; otherwise counsel for Mr. Mortished would have had to plead before the Court.

It is true that, by virtue of Article 96 of the Charter of the United Nations and Article 65 of the Statute of the Court, duly authorized organs of the United Nations may request an advisory opinion of the Court. The Committee on Applications for Review is one of those organs, by virtue of Article 11, paragraph 4, of the Statute of the Administrative Tribunal ; but is not this an indirect way of giving access to the Court to any staff member concerning whom the Committee, for one reason or another, might consider that there was a "substantial basis" for an application ? Besides, is there not a risk that such a discretionary power may be used without regard to law, given the political nature and the composition of the Committee ? I

do not believe that such unlimited access to the Court entered into the intentions of those who, in 1955, sought to widen the possibilities of challenging Administrative Tribunal judgements.

Furthermore, the Advisory Opinion, in paragraph 26, mentions the following point raised by the Government of the United States of America in its written statement :

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

I find that to venture upon such a statement involves entering into the future intentions of each member State of the United Nations or claiming to speak in the name of the General Assembly. I do not think that the Court, whose jurisdiction, powers and functions are governed by its Statute and the Charter of the United Nations, may base its decisions on considerations of probability or on future intentions as yet unexpressed.

In its Advisory Opinion, the Court, basing itself on longstanding jurisprudence, refutes the argument of the Government of the United States of America ; it concludes however that :

> "even if its giving of an advisory opinion were legally indispensable for a judgement of the Administrative Tribunal to become final . . . this consideration should not prevent it from maintaining unimpaired the discretionary character of its exercise of advisory jurisdiction" *(ibid.)*.

In my view the Court should in the circumstances have made use of the discretionary power conferred upon it by Article 65 of its Statute and refused to give an advisory opinion.

B. The Question of the Irregularities

The Court's Advisory Opinion explicitly and clearly enumerates in great detail the irregularities marring the Committee's request concerning the Tribunal's Judgement No. 273. Despite the fundamental nature of these irregularities, which according to the Advisory Opinion almost constitute "compelling reasons" for not entertaining the request, the Court has decided to comply with it in order "to assist the General Assembly if it should decide to reconsider its present procedure related to review of the Administrative Tribunal's Judgements" (Opinion, para. 79).

Earlier the Opinion had stated :

> "Of course the irregularities which feature throughout the proceedings in the present case could well be regarded as constituting 'compelling reasons' for a refusal by the Court to entertain the request. The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are however of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation." (Opinion, para. 45.)

While agreeing that the stability and efficiency of international organizations must be maintained and strengthened, that there must be closer co-operation to that end among the various organs and agencies of the United Nations family and that it is the duty of the Court, as the Organization's principal judicial organ, to assist in the work of placing the operation of these bodies on solid foundations of law and legality, I do not understand this to mean that the Court should sacrifice the elementary principles of procedure, which are a major factor in the administration of justice.

* * *

I propose to consider in detail some of these irregularities which I find sufficient for the Court to have decided not to entertain the request for advisory opinion submitted by the Committee.

1. The Composition of the Administrative Tribunal

Article 3, paragraph 1, of the Statute of the Administrative Tribunal provides that :

> "The Tribunal shall be composed of seven members, no two of whom may be nationals of the same State. *Only* three shall sit in any particular case." (My emphasis.)

Under Article 6, paragraph 1, of the same instrument :

> "Subject to the provisions of the present Statute, the Tribunal shall establish its rules."

Article 6, paragraph 1, of the Rules in question reads :

> "The President shall designate *the three members* of the Tribunal who, *in accordance with article 3 of the Statute,* shall constitute the Tribunal for the purpose of sitting in each particular case or group of cases. The President may, in addition, designate one or more members of the Tribunal to serve as alternates." (My emphasis.)

It clearly emerges from these texts that the Tribunal may only be composed

of *three* members. The word *only* in Article 3, paragraph 1, of the Statute excludes any interpretation enabling four members instead of three to "sit in any particular case".

The alternates designated by the President of the Tribunal (Rules, Art. 6) are, as the word suggests, chosen for the purpose of replacing if need be any member who falls ill, is absent or is prevented from sitting. But it is incomprehensible, and even unlawful, for an alternate to "replace" a full member of the Tribunal who is present, otherwise the Tribunal would have a composition of four and not three members, which would be a violation of Article 3, paragraph 1, of its Statute. Admittedly, in the instant case there was no problem of a majority ; but, supposing that the President and the alternate had taken one view and the two vice-presidents the opposite view, which view would prevail ? Might there not in that case have been an additional element, namely a fundamental error in procedure having occasioned a failure of justice ?

I presume that if some judgements of the Administrative Tribunal, particularly precedent to the Advisory Opinion of 1954 *(Effect of Awards of Compensation Made by the United Nations Administrative Tribunal)*, have in the past been signed by four members, that was perhaps because the alternate had at some stage or other of the proceedings replaced one of the ordinary members who had been sick, absent or prevented from sitting ; or that the alternate possessed some specialization or exceptional qualification that the others did not. However that may be, no explanation was given at the time and no criticism ensued. That does not mean, however, that this ought to constitute a precedent.

But in the *Mortished* case the alternate, who by a strange coincidence possessed the nationality of the State which later was to call for the review of Judgement No. 273, not only sat throughout the proceedings but also appended a dissenting opinion breaking the unanimity of the members composing the Tribunal. By failing to consider this aspect of the matter in any way whatever, the Committee betrayed a degree of casualness in regard to the rules of procedure and the need to subject the "substantial basis" of the application to a sufficiently searching examination.

I believe that the Court should have taken account of this legal aspect of the procedure and refused to entertain the request for an advisory opinion.

2. The Composition of the Committee

The Advisory Opinion very clearly enumerates the irregularities tarnishing the composition and operation of this Committee.

Article 11, paragraph 4, of the Statute of the Administrative Tribunal provides :

> "For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. The Committee shall be composed of

the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. The Committee shall meet at United Nations Headquarters and shall establish its own rules."

This Committee is composed of 29 members, selected in accordance with a regional and geographic distribution which is well established at the United Nations. It is an essentially political organ but one having quasi-judicial competence in this instance. It has discretionary power to decide whether or not there is a "substantial basis" for any application for review. It may therefore either accept that application or reject it.

Given its quasi-judicial character and the importance and novelty of the case (it was the first time that an application for review had been submitted by a State), every member of the Committee should have been present or represented at the twentieth session which took the decision. But there were only 17. No official list of the members attending that session has been communicated to the Court and, so far as one can judge, the quorum and number of votes required by the Committee's rules of procedure were obtained by the barest of margins.

Here attention should be drawn to the presence of the representative of Canada, who, in the absence of the representative of Sierra Leone, the Chairman of the Sixth Committee, and being designated by the latter to represent him as Vice-Chairman of the Sixth Committee, not only attended the meetings of the Committee but was elected to be its Chairman, directed its deliberations and took part in the vote. But the presence of the representative of Canada was illicit – which did not prevent him from casting a vote which was important in the circumstances. The member from Sierra Leone ought to have had someone of his own delegation deputize for him, not somebody foreign to the Committee.

The Committee, which is essentially a political organ, exercises judicial functions when it decides that there is a "substantial basis" for an application for review. To take such a decision, it has to study thoroughly not only the legal validity of the application itself and its concordance with the grounds of review enumerated in Article 11, paragraph 1, of the Statute of the Administrative Tribunal, but also the judgement itself. (Article 65 of the Statute of the Court emphasizes the legal nature of the question which the organ of the United Nations is authorized to put to it.)

An investigation of this kind calls for judicial qualifications. This Committee, which constitutes a link between the Tribunal, the applicant State and the Court, has to verify the legal validity and the specificity of the application before deciding whether it has a substantial basis or not.

These requirements do not appear to have been satisfied in the present case. The Committee itself does not appear to have been legally constituted, and its Chairman, the delegate from Canada, had no standing to be part of it. Thus, if the representative of the United States, out of concern for equality and justice, ought not to have participated in the vote, and if

the representative of Canada ought not to have been present, that leaves only 15 members out of the 17 present. That being so, it was only by the finest of margins that the quorum and number of votes required by the Committee's rules of procedure were obtained, and the formation of the Committee appears irregular for want of a legally elected chairman. It follows that the request for review presented by this Committee was itself irregular, and the Court should have rejected it out of hand.

3. The Inequality of the Parties before the Committee

The Advisory Opinion does well to stress this inequality between the parties, which was merely accentuated in the proceedings before the Committee, which did not permit counsel for Mr. Mortished to attend and take part in its deliberations, a fact which deprived one of the parties of the possibility of learning the grounds of the application for review and of replying to them. Admittedly, this inequality was effaced before the Court by the omission of oral proceedings, but was not that a lacuna which ought to have been filled in the proceedings within the Committee before the matter reached the Court ?

I find herein another important reason which should have impelled the Court to decline to give an opinion.

4. The Singular Formulation of the Question

The Court begins by quoting in its Advisory Opinion the question as put to it :

> "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 ?"

Subsequently the Opinion adds :

> "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'." (Para. 47.)

After examining "the objections, for which the Committee found there was a 'substantial basis' " (*ibid.,* para. 48) and discussing various considerations, the Court accepts the Committee's interpretation of this vague

and ambiguous question and itself concludes likewise that the two out of four possible grounds discerned by the representative of the United Kingdom, accepted and enlarged upon by the representative of the United States, are points of law upon which the Court should give its opinion. And so it is thanks to the representative of the United Kingdom that the two grounds of review were finally defined. Nevertheless the question remained the same, without any fresh formulation such as might have rendered it clearer, more juridical or more in conformity with the requirements of Article 11, paragraph 1, of the Statute of the United Nations Administrative Tribunal. It remained vague, imprecise and badly drafted. It lends itself to ambiguities and is contrary to the terms of Article 65, paragraph 2, of the Statute of the Court, which stipulates :

> "Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an *exact statement* of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question." (My emphasis.)

But the sort of terms to be found in the question, e.g., "warranted", *"légitimement"* provide no kind of "exact statement" of the two grounds envisaged by the United States, adopted by the Committee and taken over by the Court.

In 1973, in the *Fasla* case, the question put to the Court did indicate, very clearly, the two grounds of application for review.

In the present case, the Court did not give its own interpretation of the question as it did in 1980 (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*). If it had done so, it would have added to the existing confusion and, although its jurisprudence authorizes it so to act, it should only do so in cases of absolute necessity. The Court admitted the Committee's interpretation, which, by giving two grounds of review for a single question, created a confusion that resulted in the diversity of the voting both in the Committee itself and within the Court. It may be wondered whether the second ground adduced, namely excess of jurisdiction, is not included in the first : error on a question of law ; or if error on a question of law does not engender excess of jurisdiction. It is in order to avoid all ambiguity that the Statute of the Court requires that the request should contain an exact statement of the question and be "accompanied by all documents likely to throw light upon" it (Art. 65, para. 2). If such is not the case and the Court finds the question vague, ill-drafted, imprecise and conducive to ambiguity, the Court is entitled and has an obligation to reject it. That, in my view, is what it ought to have done.

The Court may not evade its judicial obligations. If it recognizes that errors committed in proceedings which are "quasi-judicial" in character are fundamental, that they constitute "compelling reasons" for rejecting the request for an opinion, it is to offer up procedure as a sacrifice to disregard the fact and say that, these blatant errors notwithstanding, the Court, in order to assist the United Nations to put its authority and

operation on a firm foundation, agrees to comply with the request and render its opinion.

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I have therefore voted against point 1 in the operative paragraph of the Advisory Opinion because I consider :

(a) that the Court, whose primary role is to deal with cases between States, should not be led into giving opinions which finally result in diverting it from its principal sphere of jurisdiction and reducing it to being a court of appeal from judgements of the United Nations Administrative Tribunal in cases between officials and the Secretary-General ;

(b) that the grave errors vitiating the request constitute "compelling reasons" that should induce the Court to consider the request for advisory opinion as inadmissible.

I voted against point 2, paragraphs A and B, in order to be rational and consistent, because I consider that the Court should have gone no farther after point 1.

(Signed) A. EL-KHANI.