## SEPARATE OPINION OF JUDGE AGO

*[Translation]*

1. I cannot begin these few brief comments which I am appending to the Advisory Opinion rendered by the Court in the present case without first stating that I did not, in perusing Judgement No. 333 of the United Nations Administrative Tribunal, receive the same impression of clarity and exhaustiveness as I have previously had in studying other judgements of that Tribunal. Nor did this perusal satisfy me that, in this particular case, the proper degree of elucidation which must accompany the quest for full justice took place. Against this it might reasonably be argued that such impressions are not actually relevant to the Court's strictly defined task in this case. Accordingly I hasten to stress that, despite these preliminary remarks, I find no sufficient cause to dissociate myself from the negative answers which the Court has considered it necessary to give to both questions put to it by the Committee on Applications for Review of Administrative Tribunal Judgements.

2. I also consider that the Tribunal did not, in fact, omit to indicate its line of thought regarding the question contained in paragraph 1 of the request for advisory opinion, even if it did so implicitly rather than directly and specifically, and that there are therefore no grounds for upholding the complaint of "failure to exercise jurisdiction" on the Tribunal's part. Moreover, I find this conclusion borne out by the fact that the question really involved in the Applicant's claim was not so much whether the Tribunal had ruled upon the existence of any legal impediment to his employment with the United Nations as whether, in the Tribunal's view, the United Nations administration had extended to the Applicant the benefit of resolution 37/126 (sec. IV, para. 5) by giving reasonable consideration to his application for a career appointment. The answer to the first question followed, as it were, automatically from the answer to the second. Now, the Tribunal undoubtedly did rule upon the latter question, in that it first explained that, in its view, the Respondent had sole authority to decide what constituted "reasonable consideration" and then concluded that the Respondent, in the proper exercise of his discretion, had given reasonable consideration to the Applicant's case for the grant of a career appointment, reaching however a negative conclusion which the Tribunal found unimpeachable. Whatever one may think of the soundness of this conclusion, and however much one may regret the relative flimsiness of the arguments produced in its support and the perplexity likely to be occasioned by the conflicting views expressed on certain points by the three members of the Tribunal, I realize that it is not for the Court to

make any finding upon it. Within the narrow bounds of its competence, all the Court has to state is whether, in its opinion, the Tribunal did or did not exercise its jurisdiction, and I do not think it possible to reach any conclusion other than that it did.

3. Nor can I dissociate myself from the Court's conclusion on the question whether errors were made by the Administrative Tribunal, in its Judgement No. 333, on "questions of law relating to provisions of the Charter of the United Nations". Here again, on reflection, I have come to endorse the view that the answer must be in the negative. In this particular connection, there is one point which caught my attention from the start, and still preoccupies me: the passage in Judgement No. 333 where the Tribunal saw fit to quote once more — as it had done in its Judgement No. 326 — an opinion expressed in 1953 by a delegate to the Fifth Committee of the General Assembly, one which the Tribunal, I believe without any clear justification, considered to be widely held. The Court's present Opinion includes some observations on this point which, I feel, constitute a proper corrective. I believe that a more thorough examination would and should have led the Tribunal to realize that, as articulated, such an opinion could not be deemed compatible with the requirement laid down in Article 100, paragraph 2, of the Charter, nor indeed with the very concept of an international civil service. I find it understandable that the Judgement of the Administrative Tribunal should have excited concern among the staff on this point. But however that may be, it is I think crucial that the Tribunal, in its Judgement No. 333, does not appear to have drawn from the opinion in question any inferences of concrete relevance to the case in point and actually prejudicial to the Applicant; for it seems clear to me that, where the Statute of the Administrative Tribunal provides as a possible ground for review of a Tribunal judgement an error of law relating to the provisions of the Charter, it can only have contemplated situations in which the alleged error would have had a decisive impact on the actual substance of a finding counter to a plea of the applicant's. No such situation seems to have arisen in the present case.

4. Having said that, I now wish to take advantage of the opportunity afforded me to stress a point of principle by which I have long been exercised. I must say that I have always felt some dissatisfaction — although no more in the case now in question than in previous ones — whenever the Court has been called upon to give an opinion in the context of proceedings for review of a decision of the United Nations Administrative Tribunal or of other similar tribunals. This is because such requests, or so I cannot help feeling, place the Court in an uncomfortable position. It is, so to speak, caught between two conflicting requirements. On the one hand, it must scrupulously avoid the temptation to carry out any of the functions which might be proper to an administrative appeal court, but which would be wholly incompatible

with its nature as the supreme judicial organ of the United Nations, whose role is to settle international legal disputes between States. On the other hand, given the narrow limits to which its powers of appraisal in such cases are confined — and quite rightly, let me hasten to say — by the governing texts, including the Statute of the United Nations Administrative Tribunal, it can scarcely be denied that the Court has very little scope for exercising any decisive concrete influence in the interest of ensuring that administrative justice is genuinely done.

5. That something had to be done to counteract the drawbacks which might result from the decisions of the Administrative Tribunal, established in order to ensure observance of the law in the mutual relations between the United Nations administration and its staff, was clear from the outset to those responsible for setting up this essential judicial body. This was the reason why a review procedure was devised and put into operation. But it may be wondered whether this procedure, which is undeniably complex, requiring as it does the successive and combined intervention of two high-level bodies, is the most appropriate one for the particular ends in view. Under this system, the forum which is immediately available to an individual considering himself injured by a judgement of the Administrative Tribunal is the Committee on Applications for Review of Administrative Tribunal Judgements. The members of this Committee are the representatives of all the member States on the General Committee of the most recent regular session of the General Assembly. This extremely broad composition, and the type of procedure followed by the Committee in reaching its decisions, do not correspond very closely to the sort of composition and procedure one expects of a body entrusted with judicial functions. And yet the functions entrusted to it are certainly judicial, or at least quasi-judicial. It has to *(a)* sift and examine the applications received for review of judgements of the Administrative Tribunal; *(b)* decide whether or not there is a "substantial basis" for each application; *(c)* select, among the various grounds for review laid down in the Statute of the Administrative Tribunal, those which it considers applicable to the case in hand, thereby taking the responsibility of excluding the others outright; *(d)* request, in such cases, an advisory opinion of the International Court of Justice on the grounds not rejected. Moreover, the competence bestowed upon the Court for the rendering of an advisory opinion to that Committee following such a request is necessarily confined to certain clearly-defined legal aspects, and nobody anxious to avoid distorting the Court's proper functions would seriously contemplate widening these limits. Then again, I leave unuttered all that might be said about the, to say the least, curious aspects, in legal logic, of a procedure which consists of requesting a tribunal to rule by means of an advisory opinion upon a decision handed down by another tribunal.

6. What is chiefly important, in my view, is to bring out some of the consequences of this general situation. One almost inevitable result is that the judgements of the Administrative Tribunal are ultimately beyond the reach of any genuine judicial review, and not only as regards whichever legal aspects exceed the limits of the Court's advisory jurisdiction, but also as regards their factual aspects, which are often of great importance. It cannot therefore be claimed, in my view, that the system as originally devised fully met the need for a system of administrative justice which must be satisfactory in itself, and must also provide proper safeguards both for the overriding interests of the United Nations as an organization and for the legitimate claims at law of individuals in its service. For these reasons I have always held the view that the only true remedy for the drawbacks I have mentioned would be the introduction of a second-tier administrative court, in other words, a court with competence to review the decisions of the first-tier court in all respects, both legal and factual, and to correct and compensate any defects they may contain. I would also point out that such a second-tier court could exercise jurisdiction over the decisions of all the administrative tribunals which exist in the various international organizations, thus achieving at this higher level the kind of unified jurisdiction which has so far proved difficult to create at the lower level.

7. To conclude these few remarks, I may say that I hope the competent organs of the United Nations will focus their attention on these problems, and above all that they will one day possess the necessary will and find the requisite resources to carry out a proper reform of the existing system.

*(Signed)* Roberto AGO.