

APPLICATION FOR REVIEW OF JUDGEMENT NO. 273 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Advisory Opinion of 20 July 1982

In its Advisory Opinion concerning an Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, the Court decided that in Judgement No. 273 the United Nations Administrative Tribunal did not err on a question of law relating to the provisions of the Charter of the United Nations, and did not commit any excess of jurisdiction or competence.

The question submitted to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements was 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?”

Having interpreted the question as requiring it to determine whether, with respect to the matters mentioned in it, the Administrative Tribunal had “erred on a question of law relating to the provisions of the Charter” or “exceeded its jurisdiction or competence”, the Court decided as follows:

1. By nine votes to six, the Court decided to comply with the request for an advisory opinion.

2(A) By ten votes to five, the Court was of the opinion that the Administrative Tribunal of the United Nations in Judgement No. 273 did not err on a question of law relating to the provisions of the Charter of the United Nations.

2(B) By twelve votes to three, the Court was of the opinion that the Administrative Tribunal of the United Nations in Judgement No. 273 did not commit any excess of the jurisdiction or competence vested in it.

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The Court was composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov,

Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye and Bedjaoui.

Judges Nagendra Singh, Ruda, Mosler and Oda appended separate opinions to the Advisory Opinion.

Judges Lachs, Morozov, El-Khani and Schwebel appended dissenting opinions to the Advisory Opinion.

In their opinions the judges concerned state and explain the positions they adopted in regard to certain points dealt with in the Advisory Opinion

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Summary of facts
(paras. 1–15 of the Opinion)

After outlining the successive stages of the proceedings before it (paras. 1–9), the Court gave a summary of the facts of the case (paras. 10–15); the principal facts were as follows:

Mr. Mortished, an Irish national, entered the service of the International Civil Aviation Organization (ICAO) in 1949. In 1958 he was transferred to the United Nations in New York, and in 1967 to the United Nations Office at Geneva. On attaining the age of 60 he retired on 30 April 1980.

A benefit known as the “repatriation grant” was payable in certain circumstances to staff members at the time of their separation from service, under United Nations Staff Regulation 9.4 and Annex IV; the conditions for payment of this grant were determined by the Secretary-General in Staff Rule 109.5.

At the time of Mr. Mortished’s retirement, the General Assembly had recently adopted two successive resolutions relating to (*inter alia*) the repatriation grant. By resolution 33/119 of 19 December 1978, the General Assembly had decided

“that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation

Continued on next page

by the staff member of evidence of actual relocation, subject to the terms to be established by the [International Civil Service] Commission;”.

To give effect, from 1 July 1979, to the terms established by the Commission for the payment of the repatriation grant, for which there had previously been no requirement of presentation of evidence, the Secretary-General had amended Staff Rule 109.5 to make payment of the repatriation grant subject to provision of evidence that “the former staff member has established residence in a country other than that of the last duty station” (para. (d)). However, paragraph (f) of the Rule was worded to read:

“(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.”

Since Mr. Mortished had accumulated the maximum qualifying service (12 years) well before 1 July 1979, paragraph (f) would have totally exempted him from the requirement to present evidence of relocation.

On 17 December 1979 the General Assembly adopted resolution 34/165 by which it decided, *inter alia*, that

“effective 1 January 1980 no staff member shall be entitled to any part of the relocation grant unless evidence of relocation away from the country of the last duty station is provided”.

The Secretary-General accordingly issued an administrative instruction abolishing Rule 109.5 (f) with effect from 1 January 1980, followed by a revision of the Staff Rules deleting paragraph (f).

On Mr. Mortished's retirement, the Secretariat refused to pay him the repatriation grant without evidence of relocation, and on 10 October 1980 Mr. Mortished seized the Administrative Tribunal of an appeal.

The Administrative Tribunal, in its Judgement No. 273 of 15 May 1981, found *inter alia* that the Secretary-General had “failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 (f)”.

It concluded that Mr. Mortished

“was entitled to receive that grant on the terms defined in Staff Rule 109.5 (f), despite the fact that that rule was no longer in force on the date of that Applicant's separation from the United Nations”,

and was therefore entitled to compensation for the injury sustained “as the result of a disregard of Staff Regulation 12.1 and Staff Rule 112.2 (a)”, which read:

“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 compensation was assessed by the Tribunal at the amount of the repatriation grant of which payment was refused.

The United States of America did not accept the Tribunal's Judgement and therefore applied to the Committee on Applications for Review of Administrative Tribunal Judgements

(hereinafter called “the Committee”), asking the Committee to request an advisory opinion of the Court. This application was made pursuant to Article 11, paragraph 1, of the Tribunal's Statute, which empowered member States, the Secretary-General or the person in respect of whom the judgement had been rendered to object to the judgement. If the Committee decides that there is a substantial basis for the application, it requests an advisory opinion of the Court. In the case in question, after examining the application at two meetings, the Committee decided that there was a substantial basis for it, on the grounds both that the Administrative Tribunal had erred on a question of law relating to the provisions of the Charter, and that the Tribunal had exceeded its jurisdiction or competence.

Competence to give an advisory opinion (paras. 16–21)

The Court began by considering whether it had competence to comply with the request for advisory opinion submitted by the Committee. It recalled that the request was the second made to it under Article 11, paragraphs 1 and 2, of the Statute of the Administrative Tribunal (the first concerning an *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*); it was however the first to arise from the Committee's consideration of an application by a member State, the previous case having resulted from the application of a staff member. When in 1973 the Court had agreed to give an advisory opinion in the case mentioned, it had recognized that it would be incumbent upon it to examine the features characteristic of any request for advisory opinion submitted on the application of a member State, and had indicated that the Court should then bear in mind not only the considerations applying to the review procedure in general, but also the additional considerations proper to the specific situation created by the interposition of a member State in the review process. The Court found that the special features of the proceedings leading up to the present request did not afford any grounds for the Court to depart from its previous position.

Discretion of the Court and propriety of giving an Opinion (paras. 22–45)

The Court then considered whether, although it had found that it had competence, certain aspects of the procedure should not lead it to decline to give an advisory opinion, having regard to the requirements of its judicial character, and the principles of the due administration of justice, to which it must remain faithful in the exercise of its functions, as much in advisory as in contentious proceedings.

The Court first disposed of a number of objections, concerning the following points:

— whether an application for review made by a member State constituted an intervention by an entity not a party to the original proceedings;

— whether the conclusive effect of the Advisory Opinion to be given by the Court would found an objection to the exercise by the Court of its advisory jurisdiction;

— whether a refusal by the Court to give the Opinion would put in question the status of Judgement No. 273 of the Administrative Tribunal;

— whether an application for review by a member State was in contradiction with certain articles of the Charter or impinged upon the authority of the Secretary-General under other articles.

With reference to the proceedings before the Court, great

importance was attached by the Court to the question whether real equality was ensured between the parties, notwithstanding any seeming or nominal absence of equality resulting from Article 66 of the Court's Statute, which confined to States and international organizations the power to submit written or oral statements. In that respect, it noted that the views of the staff member concerned had been transmitted to it through the Secretary-General, without any control over the contents being exercised by the latter, and that the Court had decided to dispense with oral proceedings in order to ensure actual equality. With regard to the stage of the proceedings involving the Committee, the Court noted that it was no more than an organ of the party which had been unsuccessful before the Tribunal, that is to say the United Nations. Thus that party was able to decide the fate of the application for review made by the other party, the staff member, through the will of a political organ. That fundamental inequality entailed for the Court a careful examination of what the Committee had actually done when seized of the application of the United States.

The Court referred to the question of the composition of the Administrative Tribunal in the case before it, and posed the question why, when the three regular members of the Tribunal had been available to sit and had sat, it had been thought appropriate to allow an alternate member to sit, who in fact appended a dissenting opinion to the Judgement. His participation seemed to require an explanation, but the Court noted that it had not been asked to consider whether the Tribunal might have committed a fundamental error in procedure having occasioned a failure of justice. Accordingly, further consideration of the point did not seem to be called for.

With regard to the discussions in the Committee, the Court pointed out that they involved a number of notable irregularities showing the lack of rigour with which the Committee had conducted its proceedings. Those irregularities related to:

- its composition at its twentieth session;
- the application submitted to it by the United States;
- the conduct of its meetings.

Despite those irregularities, and the failure of the Committee to show the concern for equality appropriate to a body discharging quasi-judicial functions, the Court considered that it should comply with the request for advisory opinion. The irregularities which featured throughout the proceedings could of course be regarded as "compelling reasons" for refusal by the Court to entertain the request; but the stability and efficiency of the international organizations were 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. Furthermore, such a refusal would leave in suspense a very serious allegation against the Administrative Tribunal: that it had in effect challenged the authority of the General Assembly.

Scope of the question submitted to the Court
(paras. 46–56)

The Court then turned to the actual question on which its opinion had been requested (see p. 1 above), and considered first whether, in the form in which it had been submitted, it was one which the Court could properly answer. Finding that it had been badly drafted and did not appear to correspond to the intentions of the Committee, the Court, in the light of the discussions in the Committee, interpreted the question as requiring it to determine whether, with respect to the matters mentioned in the question, the Administrative Tribunal had

"erred on a question of law relating to the provisions of the Charter" or "exceeded its jurisdiction or competence".

The Court recalled the nature of the claim submitted to the Administrative Tribunal, what in fact it had decided, and the reasons it had given for its decision. The Court found that, so far from saying that resolution 34/165 (see p. 4 above) could not be given immediate effect, the Tribunal had held that the Applicant had sustained injury precisely by reason of the resolution's having been given immediate effect by the Secretary-General in the new version of the Staff Rules which omitted Rule 109.5 (f), the injury, for which compensation was due, being assessed at the amount of the grant of which payment had been refused. The Tribunal had in no way sought to call in question the validity of resolution 34/165 or the Staff Rules referred to, but had drawn what in the Tribunal's view had been the necessary consequences of the fact that the adoption and application of those measures had infringed what it considered to have been an acquired right, which was protected by Staff Regulation 12.1 (see p. 4 above). While the question submitted by the Committee produced that answer, it appeared that it left another question as it were secreted between the lines of the question as laid before the Court, namely: whether the Tribunal denied the full effect of decisions of the General Assembly, and so erred on a question of law relating to the provisions of the Charter or exceeded its jurisdiction or competence? This seemed in the Court's view to be the question which was the gravamen of the objection to the Tribunal's Judgement, and the one which the Committee had intended to raise.

Did the United Nations Administrative Tribunal err on a question of law relating to the provisions of the Charter?
(paras. 57–76)

In order to reply, the Court first examined what was its proper role when asked for an advisory opinion in respect of the ground of objection based on an alleged error "on a question of law relating to the provisions of the Charter". That its proper role was not to retry the case already dealt with by the Tribunal, and attempt to substitute its own opinion on the merits for that of the Tribunal, was apparent from the fact that the question on which the Court had been asked its opinion was different from that which the Tribunal had had to decide. There were however other reasons. One was the difficulty of using the advisory jurisdiction of the Court for the task of trying a contentious case, since it was not certain that the requirements of the equality of the parties would be met if the Court were called upon to function as an appeal court and not by way of advisory proceedings. Likewise, the interposition of the Committee, an essentially political body, between the proceedings before the Tribunal and those before the Court would be unacceptable if the advisory opinion were to be assimilated to a decision on appeal. That difficulty was especially cogent if, as in the present case, the Committee had excluded from its proceedings a party to the case before the Tribunal, while the applicant State had been able to advance its own arguments. Furthermore, the fact that by Article 11 of the Tribunal's Statute the review procedure could be set in train by member States—that is to say, third parties—was only explicable on the assumption that the advisory opinion was to deal with a different question from that dealt with by the Tribunal.

Since the Court could not be asked to review the merits in the case of *Mortished v. the Secretary-General of the United Nations*, the first question for the Court was the scope of the enquiry to be conducted in order that it might decide whether the Tribunal had erred on a question of law relating to the pro-

visions of the Charter. Clearly the Court could not decide whether a judgement about the interpretation of Staff Regulations or Rules had so erred without looking at that Judgement. To that extent, the Court had to examine the decision of the Tribunal on the merits. But it did not have to get involved in the question of the proper interpretation of the Staff Regulations and Rules further than was strictly necessary in order to judge whether the interpretation adopted by the Tribunal was in contradiction with the requirements of the provisions of the Charter. It would be mistaken to suppose that an objection to any interpretation by the Tribunal of Staff Rules or Regulations was a matter for an advisory opinion of the Court.

The Court then examined the applicable texts concerning the repatriation grant. The relations of the United Nations with its staff were governed primarily by the Staff Regulations established by the General Assembly according to Article 101, paragraph 1, of the Charter. Those Regulations were themselves elaborated and applied in the Staff Rules, drawn up by the Secretary-General, who necessarily had a measure of discretion in the matter. There was no doubt that the General Assembly itself had the power to make detailed regulations, as for example in Annex IV to the Staff Regulations which set out the rates of repatriation grant; but in resolutions 33/119 and 34/165 (see pp. 3 and 4 above) it had not done so; instead, it had laid down a principle to which it had left the Secretary-General to give effect. There could be no doubt that in doing so the Secretary-General spoke for and committed the United Nations in its relations with staff members.

The Tribunal, faced with Mr. Mortished's claim, had had to take account of the whole body of regulations and rules applicable to Mr. Mortished's claim (see pp. 3 and 4 above). The Tribunal had also relied on Staff Regulation 12.1, in which the General Assembly had affirmed the "fundamental principle of respect for acquired rights", and Staff Rule 112.2 (a), which provided for amendment of the Staff Rules only in a manner consistent with the Staff Regulations (see p. 4 above). It had therefore decided that Mr. Mortished had indeed an acquired right, in the sense of Regulation 12.1, and that he had accordingly suffered injury by being deprived of his entitlement as a result of resolution 34/165 and of the texts which put it into effect. The Tribunal's Judgement had not anywhere suggested that there could be a contradiction between Staff Regulation 12.1 and the relevant provision of resolution 34/165.

There might be room for more than one view on the question as to what amounted to an acquired right, and the United States had contested in its written statement that Mr. Mortished had any right under paragraph (f) of Rule 109.5. But to enter upon that question would, in the Court's view, be precisely to retry the case, which was not the business of the Court. The Tribunal had found that Mr. Mortished had an acquired right. It had had to interpret and apply two sets of rules, both of which had been applicable to Mr. Mortished's situation. As the Tribunal had attempted only to apply to his case what it had found to be the relevant Staff Regulations and Staff Rules made under the authority of the General Assembly, it clearly had not erred on a question of law relating to the provisions of the Charter.

Did the United Nations Administrative Tribunal exceed its jurisdiction or competence?
(paras. 77 and 78)

With regard to the second ground of objection, that the Tribunal had allegedly exceeded its jurisdiction or competence, it appeared that that had not been put forward as a ground

entirely independent of that concerning error on a question of law relating to the provisions of the Charter, but rather as another way of expressing the allegation that the Tribunal had attempted to exercise a competence of judicial review over a General Assembly resolution, a matter already dealt with. However, it was clear that the Tribunal's jurisdiction, under Article 2 of its Statute, included not only the terms of Mr. Mortished's contract of employment and terms of appointment, but also the meaning and effect of Staff Regulations and Rules in force at the material time. It was impossible to say that the Tribunal—which had sought to apply the terms of Mr. Mortished's instruments of appointment and the relevant Staff Regulations and Rules made in pursuance of General Assembly resolutions—had anywhere strayed into an area lying beyond the limits of its jurisdiction as defined in Article 2 of its Statute. Whether or not it was right in its decision was not pertinent to the issue of jurisdiction.

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The complete text of the operative paragraph of the Advisory Opinion is reproduced below.

OPERATIVE PART OF THE ADVISORY OPINION

THE COURT,*

1. By nine votes to six,

Decides to comply with the request for an advisory opinion:

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Nagendra Singh, Mosler, Ago, Schwebel, Sir Robert Jennings, de Lacharrière and Mbaye;

AGAINST: *Judges* Lachs, Morozov, Ruda, Oda, El-Khani and Bedjaoui.

2. With respect to the question as formulated in paragraph 48 above, *is of the opinion*:

A. By ten votes to five,

That the Administrative Tribunal of the United Nations in Judgement No. 273 did not err on a question of law relating to the provisions of the Charter of the United Nations;

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Nagendra Singh, Ruda, Mosler, Oda, Ago, Sir Robert Jennings, de Lacharrière and Mbaye;

AGAINST: *Judges* Lachs, Morozov, El-Khani, Schwebel and Bedjaoui.

B. By twelve votes to three,

That the Administrative Tribunal of the United Nations in Judgement No. 273 did not commit any excess of the jurisdiction or competence vested in it.

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, Sir Robert Jennings, de Lacharrière, Mbaye and Bedjaoui;

AGAINST: *Judges* Morozov, El-Khani and Schwebel.

SUMMARY OF OPINIONS APPENDED TO THE ADVISORY OPINION

Separate opinions

While agreeing mostly with the dispositive of the Court in

*Composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

this case, *Judge Nagendra Singh* has observed that the Court should have applied principles of interpretation and application of Statutes and rules in relation to General Assembly resolution 34/165 to come to the conclusion that the latter could not be retroactively applied to Mr. Mortished's case since the entire repatriation grant had been earned by him and completed well before 1 January 1980, from which date alone was the resolution of the General Assembly to become operative. The Court could therefore have come to this conclusion without going into the question of acquired rights of Mr. Mortished because the said resolution has a clear and unambiguous prospective thrust only and cannot be stretched to apply to past completed and finished cases like that of Mr. Mortished. However, the resolution 34/165 would certainly apply to govern all cases where the repatriation grant continues to accrue after 1 January 1980 with the result that evidence of relocation would be necessary to obtain the grant in such cases for any period of entitlement, whether before or after 1 January 1980.

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Judge Ruda voted in favour of paragraphs 2 (A) and 2 (B) of the operative clause of the Advisory Opinion, which contained the decisions of the Court on the merits; but, since he voted against paragraph 1, on the preliminary point as to whether or not the Court should comply with the request, he felt obliged to explain, in an individual opinion, the reasons for his vote.

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Judge Mosler, while sharing the view of the Court as expressed in the operative part of the Advisory Opinion, and agreeing to a large extent with the reasons, nevertheless felt bound to raise some points which seemed to him to require either additional explanation or a different kind of argument.

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In the view of *Judge Oda*, who voted against the first point of the operative clause, the Court ought not to have responded to the Request for an advisory opinion because of fundamental irregularities, including the fact that the deliberations of the Committee on Applications for Review of Administrative Tribunal Judgements did not convincingly indicate any reasonable grounds on which the judgement of the Administrative Tribunal could have been objected to: in addition, it would seem that the Request had been drafted on the basis of an entirely erroneous premise. Judge Oda further suggests 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, confusion could well have been avoided: the situation of the repatriation grant scheme might now have been totally different and the Administrative Tribunal might have delivered a different judgement on the subject.

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Dissenting opinions

Judge Lachs, in his dissenting opinion, writes that, while he had found no compelling reason for refusing an advisory opinion, the procedural irregularities at the stage of the Committee on Applications had caused him (not without hesitation) to vote against point 1 of the operative paragraph. The Court's having decided to give an opinion had, however, given him a welcome opportunity to consider the merits. In his view, the Court should have gone more deeply into the nature of the repatriation grant and the wishes of the General Assembly. Instead, it had considered that its powers of review did not enable it to question the Tribunal's finding that Mr. Mortished had possessed an acquired right which had been disregarded in the imposition of the rule resulting from General Assembly resolution 34/165. However, an injury allegedly traceable to a decision of the General Assembly and failure to give due attention to the effect of Assembly resolutions in the sphere of staff regulations had raised the essential question of acquired rights and entitled the Court to examine it. Judge Lachs questioned the Tribunal's view that the cancelled Rule 109.5 (f), which had stemmed from the International Civil Service Commission's interpretation of its mandate and been incompatible with the very nature of repatriation grant, could have founded any acquired right. On point 2 (B) of the Opinion he held, however, that the Tribunal had acted within the bounds of its jurisdiction.

Judge Lachs concludes by enlarging upon the observations he made in 1973 regarding the improvement of the review procedure and the establishment of a single international administrative tribunal.

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

He believed that, acting contrary to the provision of its Statute, the Tribunal exceeded its competence, and in fact rejected resolution 34/165 of the General Assembly. 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.

The Advisory Opinion of the Court which recognized that the Tribunal did not err on a question of law relating to the provisions of the Charter of the United Nations could not be supported by him and Judge Morozov could not therefore consider the Advisory Opinion as a document which coincided with his understanding of an implementation of international justice.

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Judge El-Khani voted against point 1 in the operative paragraph of the Advisory Opinion because he considered:

(a) that the Court, whose primary role is to deal with cases between States, should not be led into giving up opinions which finally result in diverting it from its principal 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; and

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

He voted against point 2, paragraphs (A) and (B), in order to be consistent and because he considered that the Court should have gone no farther after point 1.

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Judge Schwebel dissented from the Court's Opinion, essentially on two grounds. Taking a broader view than did the Court of its competence to review the merits of a judgment of the United Nations Administrative Tribunal, he particularly maintained that, when an objection to a judgment is lodged on the ground of error of law relating to provisions of the United Nations Charter, the Court is to act in an appellate capacity, passing upon the judgment's merits insofar as answering the question put to the Court requires it to do so. On the merits of the Tribunal's judgment in this case, Judge Schwebel concluded that the Tribunal had erred on questions of law relating to provisions of the Charter and had exceeded its jurisdiction, primarily because its judgment derogated from an unequivocal exercise of the General Assembly's authority under Article 101(1) of the Charter to regulate the conditions of service of the United Nations Secretariat.