

ARTICLE 96

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TEXT OF ARTICLE 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

INTRODUCTORY NOTE

1. The structure of the present study follows that of the previous study of Article 96 in volume V of the Repertory. The major headings established in the previous study have been maintained in this study. No new material requiring treatment under headings numbered as follows has been found: I,B,4; II,A,3; II,A,4; II,A,7; II,B,1; II,B,2; II,B,3. Previously established sub-headings dealing with individual cases or with matters on which there was no further development in the period under review have generally been omitted. Only in part II under heading B,5 have the sub-headings been retained. There a new sub-heading (B,5,e) has been added, which deals with the scope of questions on which an advisory opinion of the Court may be requested by an organ (the Committee on Applications for Review of Administrative Tribunal Judgements) established by the General Assembly and authorized by it under Article 96 (2) to make such requests. As explained in the following paragraph, heading B,6 in part II is also new.

2. In the present study, as in the previous study, the two paragraphs of Article 96 are dealt with separately in the Analytical Summary of Practice. In some cases, the material examined in connexion with the treatment of one paragraph of Article 96 may be considered to bear on the Article as a whole. This is the case, for example, with the material on "legal questions" to which reference is made in both paragraphs of the Article. Although the term "legal questions" in Article 96 (2) is qualified by the phrase "arising within the scope of their [other United Nations organs' and specialized agencies'] activities", it cannot be assumed that this qualification affects the legal nature of questions on which advisory opinions may be sought from the Court. Consequently, in so far as the nature and types of legal questions are concerned, the material on legal questions appears to be relevant to both paragraphs of Article 96. For this reason, in part II headings A,2 and B,5 should be read together. Similarly,

in section b ("Practice bearing upon Article 96 (2)") the material under heading B,6 which deals with the question of the binding effect of an advisory opinion of the Court may be said to bear also upon Article 96 (1). This material has been treated under Article 96 (2) because it was discussed by United Nations organs in connexion with requests for advisory opinions made or to be made by bodies authorized by the General Assembly under Article 96 (2) to apply to the International Court of Justice for such opinions. One case involved the United Nations Educational, Scientific and Cultural Organization (UNESCO). The second involved a committee established by the General Assembly and authorized by it under Article 96 (2) to request advisory opinions of the Court in respect of judgments of the United Nations Administrative Tribunal. The material in both cases may be deemed relevant to the general question arising under both paragraphs of Article 96 whether an advisory opinion may be given binding effect.

I. GENERAL SURVEY

A. Decisions bearing upon Article 96

3. During the period under review, the General Assembly has adopted the following resolutions which bear upon Article 96:

Resolution 888 (IX) of 17 December 1954; Awards of compensation made by the United Nations Administrative Tribunal: advisory opinion of the International Court of Justice.

Resolution 904 (IX) of 23 November 1954; Voting procedure on questions relating to reports and petitions concerning the Territory of South West Africa: request for an advisory opinion from the International Court of Justice.

Resolution 934 (X) of 3 December 1955; Voting procedure on questions relating to reports and petitions concerning the Territory of South West Africa: advisory opinion of the International Court of Justice.

Resolution 942 (X) of 3 December 1955; Question of the admissibility of oral hearings by the Committee on South West Africa: request for an advisory opinion from the International Court of Justice.

Resolution 957 (X) of 8 November 1955; Procedure for review of United Nations Administrative Tribunal judgements: amendments to the Statute of the Administrative Tribunal.

4. By its resolutions 904 (IX) and 942 (X), the General Assembly has made two requests for advisory opinions.

5. In its resolution 888 (IX), the General Assembly took note of the advisory opinion of 13 July 1954 of the Court regarding the effect of awards of compensation made by the United Nations Administrative Tribunal. In its resolution 934 (X), the General Assembly, having noted the conclusions of the Court, accepted and endorsed the advisory opinion of 7 June 1955 of the Court on voting procedure on questions relating to reports and petitions concerning the Territory of South West Africa. 1/

6. In its resolution 957 (X), the General Assembly, by amending the Statute of the United Nations Administrative Tribunal, established a Committee and authorized it "under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court."

1/ In the preambles of five resolutions (935 (X) to 939 (X)) adopted by the General Assembly relating to petitions concerning the Territory of South West Africa, reference was made to the acceptance by the Assembly of the advisory opinion of 11 July 1950 of the Court on the international status of South West Africa.

7. The General Assembly has rejected a draft resolution ^{2/} submitted by Belgium which would request an advisory opinion from the Court on the question whether a draft resolution proposed by the Fifth Committee for adoption by the General Assembly regarding the review of Administrative Tribunal judgments was compatible with the pertinent Articles of the Charter and with the contractual obligations assumed by the United Nations Organization towards its officials.

8. Neither the Security Council nor any other organ of the United Nations has made a request for advisory opinions from the Court.

9. As stated ^{3/} in the corresponding study in the Repertory, all the specialized agencies with the exception of the Universal Postal Union, had been authorized by the General Assembly under Article 96 (2) to request advisory opinions from the Court. On 25 November 1955 the United Nations Educational, Scientific and Cultural Organization which had accepted the jurisdiction of the Administrative Tribunal of the International Labour Organisation (ILO), adopted a resolution requesting the Court to give an advisory opinion on questions relating to the competence of the Tribunal. In accordance with article 11, paragraph 2, of the Agreement between the United Nations and UNESCO, the Director-General of UNESCO, by a letter dated 30 November 1955, informed the Economic and Social Council of the request. ^{4/}

10. During the period under review, the International Court of Justice delivered two advisory opinions. The first was given on 7 June 1955 on the voting procedure on questions relating to reports and petitions concerning the Territory of South West Africa; ^{5/} the second, on 1 June 1956, on the admissibility of hearings of petitioners by the Committee on South West Africa. ^{6/}

B. Procedural matters relating to requests for advisory opinions

1. *The question of the appropriate body to draft requests by the General Assembly for advisory opinions*

11. The two requests made by the General Assembly for advisory opinions of the Court (see paragraphs 1 and 2 above) had originated in the Fourth Committee. In the course of debate, a few representatives had referred to General Assembly resolution 684 (VII) ^{7/} and considered it advisable to consult the Sixth Committee on the drafting of the questions to be put to the Court. However, no formal proposal to this effect had been submitted.

12. In the case of the request made by UNESCO, the questions put to the Court were drafted by the Secretariat following a decision in principle by the Executive Board, and then considered and adopted by the Board.

^{2/} G A (X), annexes, a.i. 49, p. 44, A/L.199.

^{3/} See in the Repertory, vol. V., under Article 96, para. 15.

^{4/} E/2817. The advisory opinion of the Court was given on 23 October 1956. Certain passages of this opinion are treated in the present study in order to complete the points under discussion (see paras. 67 and 76 below).

^{5/} I C J Reports 1955, pp. 67 et seqq.

^{6/} Ibid., 1956, pp. 23 et seqq.

^{7/} See in the Repertory, vol. V., under Article 96, para. 22.

2. The forwarding of the request to the Court

13. The procedure of forwarding a request of the General Assembly to the Court, as stated in the corresponding study in the Repertory, was followed in respect of the two requests made by the General Assembly in its resolutions 904 (IX) and 942 (X). The same procedure was applied by UNESCO, the request being transmitted by the Director-General of that Organization to the Registrar of the Court.

14. In each of the three cases mentioned above, the forwarding of the request to the Court was accompanied by documents "likely to throw light upon the question" in accordance with Article 65 (2) of the Statute of the Court. The question of the transmission of documents, in so far as it is related to the question of the submission of written and oral statements under Article 66 of the Statute, is discussed below.

*3. Written and oral statements under the terms of Article 66
of the Statute of the Court*

15. After the General Assembly had by resolution 785 A (VIII) requested an advisory opinion from the International Court of Justice concerning the effect of awards of compensation made by the United Nations Administrative Tribunal, a firm of lawyers which represented the Applicants before the Tribunal, in a letter 8/ of 5 February 1954 to the Registrar, asked for the "opportunity to submit a written memorandum and to participate in oral argument" in the proceedings then before the Court. In reply to that letter, the Registrar stated 9/ that the advisory proceedings had given rise to the application of Article 66, paragraph 2, of the Statute of the Court, that in accordance with that Article, notification had been sent to the Members of the United Nations and to the ILO for their submission of written or oral statements, and that under Article 65, paragraph 2, of the Statute, the Secretariat of the United Nations had accompanied the request by all documents likely to throw light upon the questions put to the Court. He further explained that

"If the Court should subsequently feel the need for further information, it would most certainly make use again of the faculty given to it by Article 66, paragraph 2, of its Statute. It would, in any event, be bound by the limitations set forth in that clause and would therefore not be authorized to request or receive written or oral statements either from your clients or on their behalf from the Counsel who represented them before the Administrative Tribunal."

16. The General Assembly, in its resolution 957 (X) which amended the Statute of the United Nations Administrative Tribunal, prescribed the following procedure for the utilization of the advisory proceedings of the International Court of Justice: if a Member State, the Secretary-General, or the person in respect of whom a judgment has been rendered by the Tribunal objects to the judgement on certain grounds specified in the resolution and makes application to the Committee (see paragraph 6 above) to request an advisory opinion of the Court, the Committee shall decide whether or not there is substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court and the Secretary-General shall arrange to transmit to the Court the views of the person concerned.

8/ I C J, Pleadings, United Nations Administrative Tribunal, pp. 394 and 395.
9/ Ibid., p. 397.

17. By the same resolution, the General Assembly further recommended "that Member States and the Secretary-General should not make oral statements before the International Court of Justice in any proceedings under the new article 11 of the Statute of the Administrative Tribunal adopted under the present resolution".

18. The proceedings leading up to the adoption of those provisions of the resolution are summarized below.

19. By resolution 888 (IX), the General Assembly set up a Special Committee to study the question of the establishment of a procedure for the review of the judgements of the United Nations Administrative Tribunal. In his working paper submitted to the Special Committee, the Secretary-General, when discussing the possibility of review by the International Court of Justice through its advisory procedure, stated: 10/

"...Some problem might arise with respect to the right of the staff member concerned to present his views to the Court. However, if the review is limited to certain legal questions it would seem possible that the Secretary-General might include a statement or brief by the staff member concerned among the 'documents likely to throw light upon the question' which are submitted to the Court under Article 65, paragraph 2, of its Statute, or in information furnished the Court pursuant to a notification under Article 66, paragraph 2, of its Statute."

20. Pursuant to a suggestion of the Special Committee that an examination of the relevant provisions of the United Nations Charter relating to the International Court of Justice and of the relevant provisions of the Statute of the Court would be useful in its work, the Secretary-General submitted a memorandum 11/ on the "Participation of individuals in proceedings before the International Court of Justice". In part III of the memorandum, entitled "Participation by individuals in advisory proceedings", the Secretary-General cited among other precedents (including the case of the effect of awards of compensation made by the United Nations Administrative Tribunal as summarized in paragraph 15 above), the case of former officials of the Saar Commission who made claims against the League of Nations. In December 1939 the Council of the League adopted a resolution which fixed the period for the submission of statement by the Secretary-General of the League and the submission of memoranda by the claimants. The resolution further provided for the transmission of those documents to the Permanent Court of International Justice with a request for advisory opinion on whether the League had any legal obligations to the claimants; it concluded with the provision that the League of Nations hereby renounces the exercise of the right to present the written and oral statements provided for by Article 66 of the Statute of the Court, if the same possibility cannot be given to the petitioners, since it does not wish to have greater opportunities of furnishing information to the Court than the petitioners themselves.

21. The Special Committee approved a draft amendment 12/ to the Statute of the Administrative Tribunal which had been submitted by China, Iraq, Pakistan, the United Kingdom and the United States. As adopted by the Special Committee this draft amendment which would add a new Article to the Statute of the Tribunal, provided, inter alia, that a Member State, the Secretary-General or the person concerned might initiate the review by making application to a screening committee (paragraph 1 of new article 11) and that if the screening committee decided to request an advisory opinion

10/ G A (X), annexes, a.i. 49, p. 1, A/2909, Annex II, (A/AC.78/L.1 and Corr.1), para. 68.

11/ G A (X), annexes, a.i. 49, p. 1, A/2909, Annex II C, (A/AC.78/L.10).

12/ Ibid., A/2909, paras. 68 (A/AC.78/L.14) and 116.

of the International Court of Justice, the Secretary-General should arrange to transmit to the Court the views of the person concerned (paragraph 2 of new article 11). The representative of the United Kingdom in the Special Committee, speaking on behalf of the co-sponsors, explained that by the latter provision mentioned above, the joint proposal tried to meet the difficulty that the staff member would not have the same rights of representation before the Court as Member States or the Organization. He added: 13/

"The co-sponsors recognized that this provision adequately covered the presentation of a staff member's views in written proceedings, but not their participation in oral proceedings. While it was not believed that any real injustice could result from this apparent disadvantage, the General Assembly might consider the possibility of adopting a resolution expressing the hope that Member States and the Secretary-General would not exercise their rights before the Court in a manner that would take undue advantage of a staff member or other interested party."

The same point was stressed 14/ by another co-sponsor of the joint proposal but no formal proposal was submitted. In opposition to the joint proposal one of the arguments advanced was 15/ that by virtue of Article 66 of the Statute, Member States and the Secretary-General would have the right to deposit written statements and to make oral statements. Such a right, it was contended, was much broader than that given to staff members under paragraph 2 of the joint proposal, which provided only that the Secretary-General should arrange to transmit to the Court the views of the staff member concerned.

22. At its 493rd meeting on 17 October 1955 when the Fifth Committee began to consider the report of the Special Committee, the Secretary-General informed 16/ the Fifth Committee that should the General Assembly decide to adopt the system of review recommended by the Special Committee, i.e., to use the advisory procedure of the International Court of Justice, he would consider it his responsibility to assure as far as possible an equality of rights for the staff member concerned. In transmitting to the Court documents under Article 65 of its Statute, it would be his intention to establish a procedure similar to that devised by the League of Nations for dealing with the claims of former officials of the Saar Commission (see paragraph 20 above). The Secretary-General also informed the Committee that it would be his intention to waive any right which he had to further participation in the proceedings before the Court from which the staff member was excluded, except as the Court might specifically require further information.

23. At the opening of the general discussion in the Fifth Committee, a draft resolution with subsequent editorial revision 17/ was submitted jointly by Argentina, Canada, China, Cuba, Iraq, Pakistan, the United Kingdom and the United States which incorporated the amendments to the Statute of the United Nations Administrative Tribunal as recommended by the Special Committee. Following the text of the proposed amendments, the revised joint draft resolution concluded with the recommendation that Member States and the Secretary-General should not make oral statements before the International Court of Justice in any proceedings under the new article 11 of the statute of the Administrative Tribunal.

13/ G A (X), annexes, a.i. 49, p. 1, A/2909, para. 74.

14/ Ibid., para. 86.

15/ Ibid., para. 99.

16/ G A (X), annexes, a.i. 49, p. 37, A/C.5/635.

17/ Ibid., p. 38, A/3016, para. 11 (A/AC.5/L.335/Rev.1).

24. It was again explained 18/ that by providing, in paragraph 2 of the proposed Article 11, for transmitting to the Court the views of the individual concerned, the co-sponsors of the joint draft resolution intended that written requests and replies of the individual concerned would be laid before the Court on a completely equal footing with those of the Secretary-General and Member States. Furthermore, it was pointed out by some representatives that the Court itself would be a guardian of due process and would not give an opinion if it considered that one of the parties was at a disadvantage. The Court could itself require the evidence necessary for its opinion.

25. One of the arguments against the revised joint draft resolution was 19/ that there would be an inherent inequality between the staff member on the one hand and the Secretary-General and Member States on the other. Those representatives who held this view considered that personal appearance was an essential feature of due process of law. Since only States and international organizations were entitled, under Article 66 of the Statute of the Court, to submit statements to the Court, an expression of hope by the General Assembly that Member States and the Secretary-General would forego their right to an oral hearing was not in their view a sufficient guarantee. Nor did they consider it appropriate that an individual should be dependent on another party to the dispute for the presentation of his views to the Court.

26. As a result of discussion, the revised joint draft resolution, with some changes, was recommended by the Fifth Committee and adopted by the General Assembly as resolution 957 (X). (See paragraphs 16 and 17 above and 71 below.)

*** 4. Forwarding of the advisory opinion of the Court*

5. Consideration of the advisory opinion by the General Assembly

27. Of the two advisory opinions rendered by the Court in the period under review, one was included 20/ in the agenda of the General Assembly as a sub-item and the other was presented in the agenda of the Assembly as a separate item.

28. In both cases, the advisory opinions were referred by the General Assembly, upon the recommendation of the General Committee, to the Committee in which the request for the opinion of the Court originated.

II. ANALYTICAL SUMMARY OF PRACTICE

A. Practice bearing upon Article 96 (1)

1. Consideration of the question of the obligation to submit legal questions to the International Court of Justice

29. During the proceedings leading to the adoption of General Assembly resolution 904 (IX) in which a request was made for an advisory opinion of the Court, extensive discussion took place on whether or not to consult the Court. The discussion turned around the necessity to have a firm legal foundation for the action to be taken by the General Assembly rather than around the duty to consult the International Court of Justice.

18/ *Ibid.*, A/3016, para. 19.

19/ *Ibid.*, para. 27.

20/ "Question of South West Africa: (a) Voting procedure on questions relating to reports and petitions concerning the Territory of South West Africa: advisory opinion of the International Court of Justice;".

30. The Committee on South West Africa, established in accordance with General Assembly resolution 749 A (VIII), submitted to the Assembly its report which included in annex IV two parts: 21/ In part A, the Committee recommended the adoption by the Assembly (1) of certain special rules governing the procedure for the examination of reports and petitions relating to the Territory of South West Africa and (2) of a special rule F providing for the application of Article 18, paragraph 2, of the Charter to decisions of the General Assembly on questions relating to such reports and petitions. The Committee proposed that the adoption of special rule F be made "subject to the concurring vote of the Union of South Africa as the State most directly concerned". In part B of annex IV to the report, the Committee recommended that "if special rule F should be approved by the required majority of the General Assembly, but without the concurring vote of the Union of South Africa", the Assembly should submit to the Court for an advisory opinion the questions whether special rule F was a correct interpretation of the (1950) advisory opinion of the Court on the question of South West Africa and, if not, whether the Court would indicate what voting procedure should be applied by the Assembly.

31. The Rapporteur of the Committee on South West Africa, speaking before the Fourth Committee to which the report was referred, drew particular attention to the voting procedure suggested in special rule F and gave the following explanation: 22/

"...the Union of South Africa had stated on several occasions that in applying the Court's advisory opinion, the General Assembly would have to make decisions relating to South West Africa subject to the principle of unanimity which had applied in the Council and Assembly of the League of Nations. On the other hand, most of the members of the Committee on South West Africa, including himself, had considered that the voting procedure recommended in special rule F was in complete conformity with the Court's advisory opinion. In giving its advisory opinion and in stating that the supervisory functions formerly exercised by the Council of the League now be exercised by the United Nations, the Court must have been fully aware of the voting procedure laid down in the Charter of the United Nations. However, in order to dispel any doubts which might arise, the Committee on South West Africa had decided to recommend that if special rule F was adopted without the concurring vote of the Union of South Africa, as the State most directly concerned, the matter should be referred to the International Court of Justice for an advisory opinion."

32. The Fourth Committee adopted the recommendations contained in annex IV to the report of the Committee on South West Africa with the following modifications. In the first recommendation, which was adopted by the Fourth Committee as draft resolution A, the phrase "subject to the concurring vote of the Union of South Africa as the State directly concerned" (see paragraph 30 above) was replaced by the phrase "subject to the acceptance by the Union of South Africa, as the Mandatory for the Territory of South West Africa". 23/ The second recommendation was adopted by the Fourth Committee as draft resolution B which provided that the General Assembly, considering the adoption of special rule F and "considering also that the Union of South Africa, as the Mandatory Power of the Territory of South West Africa did not accept special rule F referred to in the preceding paragraph", 24/ would submit to the Court for an advisory

21/ G A (IX), Suppl. No. 14 (A/2666), p. 13.

22/ G A (IX), 4th Com., 399th mtg., para. 13.

23/ See Report of the Fourth Committee (Part I), G A (IX), annexes, a.i. 34, p. 6, A/2747, para. 14.

24/ Ibid., para. 20.

opinion the questions proposed by the Committee on South West Africa (see paragraph 30 above). The same draft resolution further provided that, if the Court replied in the affirmative to the first question submitted to it, the provision under which the adoption of special rule F was made conditional on the acceptance of that rule by the Union of South Africa would cease to be in force.

33. At its 494th plenary meeting, when voting on draft resolution A, the General Assembly took a separate vote on the phrase "subject to the acceptance by the Union of South Africa, as the Mandatory for the Territory of South West Africa". The result of the vote was 13 in favour, 8 against, with 29 abstentions. Having failed to obtain the necessary two-thirds majority, the phrase was not adopted. The resolution as a whole, with the deletion of the phrase in question, was then adopted by 33 votes to 3, with 15 abstentions. The President then ruled ^{25/} that in view of the text of draft resolution A as adopted, there was no need to put draft resolution B to the vote. The President's ruling was challenged on the ground that the advisory opinion of the Court was required - or at least was desirable - because the Union of South Africa had refused to accept special rule F. ^{26/} When put to the vote, the ruling was sustained by 30 votes to 8, with 13 abstentions. Draft resolution B was therefore not voted upon.

34. When the Fourth Committee resumed the examination of the report of the Committee on South West Africa, at its 409th meeting, several representatives expressed regret that draft resolution B recommended by the Fourth Committee had not been voted upon in the General Assembly, and emphasized the need for requesting the Court's opinion by stating: ^{27/}

(1) That by its vote on draft resolution B the Fourth Committee had shown that it clearly recognized the wisdom of seeking an advisory opinion from the Court in order to resolve any doubts over the legality of the voting procedure incorporated in special rule F;

(2) That all members of the Fourth Committee must be aware of the implications of the General Assembly's adoption of special rule F without the concurrence of the Union of South Africa and without the firm legal basis for its action which an advisory opinion of the International Court of Justice would have provided;

(3) That even if the General Assembly, in deleting the phrase referring to the concurrence of South West Africa, had logically set aside the draft resolution seeking the Court's opinion, the legal doubt concerning the voting procedure remained and would remain to plague future debates on South West Africa unless the Court was asked to resolve it at once; or

(4) That the only right and reasonable course was to seek an advisory opinion from the International Court along the lines originally suggested in draft resolution B, particularly as the South African Government had challenged special rule F and a number of delegations entertained legal doubts concerning it.

35. Several representatives indicated that without an advisory opinion from the Court, they could not participate in any discussions or decisions concerning reports and petitions relating to the Territory of South West Africa. As a result of discussion, the Fourth Committee established a Sub-Committee to review the situation arising in the Committee's 409th meeting.

^{25/} G A (IX), Plen., 494th mtg., para. 82.

^{26/} *Ibid.*, para. 86.

^{27/} G A (IX), 4th Com., 409th mtg., paras. 3, 5, 11 and 21.

36. A large part of the report of the Sub-Committee to the Fourth Committee was devoted to the question of "need for reference of the voting procedure for reports and petitions relating to the Territory of South West Africa to the International Court of Justice for an advisory opinion." ^{28/} The following were among the reasons given by the Sub-Committee in support of its recommendation that the question of submitting special rule F to the Court for an advisory opinion be reopened:

"11. The Sub-Committee recalls that draft resolution A, without the clause in question, ^{29/} was adopted by the General Assembly (494th plenary meeting) by 33 votes to 3, with 15 abstentions. It should be noted, however, that a number of delegations have stated informally that they voted for this resolution because they believed that draft resolution B, to refer the voting procedure to the International Court of Justice for an advisory opinion, would also be put to a vote. These delegations have stated that if they had known that the latter resolution would not be put to a vote they would in fact have opposed special rule F by voting against draft resolution A. Therefore there exists some doubt whether draft resolution A may not in that event have failed to secure the necessary two-thirds vote.

"12. The Sub-Committee concludes therefore that in the circumstances Members of the General Assembly did not have a complete opportunity to vote on the two resolutions which many regarded as substantively forming a whole.

"13. The Sub-Committee considers that, under the then existing circumstances, it was correct to consider that, on procedural grounds, there was no need to put draft resolution B to a vote. The Sub-Committee is now forcefully of the opinion that in view of the new situation which was created when several Members expressed their inability to participate in the consideration of substantive resolutions relating to the Territory of South West Africa it will be necessary to discuss anew the advisability of submitting the voting procedure, and in particular special rule F, for an advisory opinion to the International Court of Justice."

The Sub-Committee also submitted a draft resolution recommending the referral of the question of voting procedure to the Court.

37. The recommendation of the Sub-Committee to reopen the question was rejected ^{30/} by the Fourth Committee by 18 votes to 18, with 16 abstentions. The Chairman of the Fourth Committee stated ^{31/} that the draft resolution of the Sub-Committee on referral of the voting procedure to the Court fell away as a result of this decision. The representatives of Iraq, Sweden, and the United States stated that as a consequence of the decision taken by the Fourth Committee, their delegations would be unable to accept an invitation to serve on the Committee on South West Africa; and the representatives of Brazil, Mexico, Pakistan, Syria and Thailand reserved the position of their Governments with respect to their future participation in the Committee on South West Africa.

38. When the second part of the report of the Fourth Committee was considered by the General Assembly, the delegations of Guatemala and Lebanon jointly submitted a draft

^{28/} G A (IX), annexes, a.i. 34, p. 9, A/C.4/274.

^{29/} See para. 33 above.

^{30/} G A (IX), 4th Com., 425th mtg., para. 66. See also in this Supplement under Article 21.

^{31/} G A (IX), annexes, a.i. 34, p. 12, A/2747/Add.1, para. 18.

resolution 32/ proposing again the referral of special rule F (which had been adopted by the General Assembly) to the Court for an advisory opinion. The authors of the draft resolution explained 33/ that such a referral was necessary in order to remove any legal doubts regarding the appropriateness of special rule F and thereby to strengthen the position of the United Nations in its negotiation with the Union of South Africa and to make possible direct and proper participation of certain governments in such negotiations. When put to the vote, the draft resolution was adopted by 25 votes to 11, with 21 abstentions. It became General Assembly resolution 904 (IX).

2. *Consideration of the nature and types of questions referred to in Article 96 (1)*

39. In its resolutions 904 (IX) and 942 (X) the General Assembly made requests for advisory opinions of the Court on questions relating to the interpretation of a previous advisory opinion of the Court.

40. By resolution 904 (IX), the General Assembly

"Requests the International Court of Justice to give an advisory opinion on the following questions:

"(a) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:

"'Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations.'

"(b) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South West Africa?"

The legal nature of the questions thus submitted to the Court was referred to during the proceedings leading to the adoption of the resolution when it was urged that any doubts concerning the legality of the voting procedure should be resolved by the Court and that an advisory opinion of the Court was required in order to provide a firm legal basis for the actions to be taken by the General Assembly (see paragraphs 34-38 above).

41. At the tenth session of the General Assembly, during the discussion in the Fourth Committee of the question of admissibility of oral hearings by the Committee on South West Africa, a draft resolution was submitted 34/ by Lebanon, Liberia, Mexico and Thailand the operative part of which provided for requesting the Court to give an advisory opinion on the following question:

32/ A/L.178.

33/ G A (IX), Plen., 500th mtg., paras. 25-32, 39-40 and 51-55.

34/ G A (X), annexes, a.i. 30, p. 9, A/C.4/L.415 and Add.1.

"Is it consistent with the advisory opinion of the International Court of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?"

42. Some representatives 35/ in support of the draft resolution stated (1) that the question put to the Court was linked to the interpretation of a point of law which was related to the 1950 opinion of the Court and on which delegations had been unable to agree and (2) that it was necessary for the Court to explain the meaning of its advisory opinion. Those representatives 36/ who were opposed to the draft resolution considered that the question was procedural and ought to be settled by the General Assembly because the point of law had already been settled by the Court in its 1950 opinion.

43. The draft resolution, with an amendment submitted by Peru to delete a paragraph from its preamble, was adopted by the Fourth Committee by 23 votes to 5, with 21 abstentions. 37/ It became General Assembly resolution 942 (X) by 32 votes to 5, with 19 abstentions. 38/

**** 3. The formulation of legal questions**

**** 4. Questions relating to the scope of the power of the General Assembly to request an advisory opinion**

5. The effect of a request for an advisory opinion upon continued consideration by the requesting organ and upon implementation of prior decisions in the case

44. The proceedings summarized below relate to the question whether an organ should proceed to vote on the draft resolutions the subject matter of which was linked to the question on which an advisory opinion was being requested from the Court.

45. During the consideration of the question of South West Africa at the ninth session of the General Assembly, after the recommendation of a Sub-Committee of the Fourth Committee to reopen the question of submitting special rule F to the Court for an advisory opinion was rejected (see paragraphs 36 and 37 above), the Fourth Committee recommended for adoption by the General Assembly four draft resolutions. 39/ Draft resolutions A and B dealt with two petitions concerning South West Africa, and draft resolutions C and D dealt with the report of the Committee on South West Africa and the status of the Territory of South West Africa respectively.

46. When the General Assembly subsequently adopted resolution 904 (IX) to request an advisory opinion from the Court on the voting procedure on questions relating to reports and petitions concerning the Territory of South West Africa (see paragraph 38

35/ G A (X), 4th Com., 506th mtg.: Burma, para. 42; Denmark, para. 31; Mexico, paras. 2 and 32; New Zealand, para. 43.

36/ *Ibid.*: Ecuador, para. 13; Egypt, para. 40; Uruguay, paras. 21 and 29; Venezuela, para. 8.

37/ *Ibid.*, paras. 37 and 38.

38/ G A (X), Plen., 550th mtg., para. 138.

39/ G A (IX), annexes, a.i. 34, p. 12, A/2747/Add.1.

above), one representative requested 40/ that until the Court's opinion was received, the Assembly should not proceed to vote on draft resolutions A and B recommended by the Fourth Committee, especially in view of the last paragraph of resolution 904 (IX) which asked the Court to indicate what voting procedure should be applied if special rule F was not in conformity with the Court's 1950 opinion. Another representative was also of the opinion 41/ that the inevitable consequence in law of the Assembly's decision to adopt resolution 904 (IX) was not to vote on draft resolutions A and B, because those drafts presupposed a procedure on which the Assembly had decided to apply to the Court for an advisory opinion. On the other hand, the view was expressed 42/ that the work on questions to which the Fourth Committee had addressed itself in consequence of petitions received should not be delayed because of the referral of the question of voting procedure to the Court.

47. The President then put the following motion to the vote: 43/

"The General Assembly,

"Decides not to put to the vote draft resolutions A and B contained in document A/2747/Add.1 until such time as it is seized of the advisory opinion of the International Court of Justice requested by the resolution [904 (IX)] adopted at the present meeting."

The motion was adopted by 27 votes to 18, with 8 abstentions. The voting on draft resolutions A and B was therefore postponed. 44/

48. On 7 June 1955, the Court delivered its advisory opinion with the conclusion that special rule F was a correct interpretation of the Court's 1950 opinion concerning South West Africa. 45/ At the tenth session of the General Assembly, the two draft

40/ G A (IX), Plen., 501st mtg., paras. 70 and 88.

41/ Ibid., para. 84.

42/ Ibid., paras. 92-98.

43/ Ibid., para. 101.

44/ When the President proposed to put draft resolution C to the vote, the representative of the Union of South Africa raised the point that special rule F which was being submitted to the Court for an opinion referred to both reports and petitions concerning the Territory of South West Africa and that draft resolution C involved a decision of the Assembly on a question relating to a report on South West Africa (see G A (IX), Plen., 501st mtg., paras. 103 and 104). After a different view was expressed that draft resolution C referred not to a report on the Territory of South West Africa but to a report of a Committee of the General Assembly which could not come under special rule F (see ibid., paras. 110 and 116). The representative of the Union of South Africa asked the President to put to the vote the following motion:

"The General Assembly,

"Decides that special rule F is applicable to draft resolution C submitted by the Fourth Committee [A/2747/Add.1]."

The motion was rejected by 18 votes to 4, with 30 abstentions (see ibid., paras. 123-125). Draft resolution C was then adopted by 34 votes to 8, with 9 abstentions as resolution 851 (IX).

45/ I C J Reports, 1955, pp. 67, et seq.

resolutions postponed from the ninth session were included by the Fourth Committee in its report 46/ to the Assembly and were adopted by the Assembly as resolutions 938 (X) and 939 (X), after the Assembly had by resolution 934 (X) accepted and endorsed the Court's 1955 advisory opinion.

49. The question of the effect of a request for advisory opinion upon a decision to be taken by a United Nations organ was also raised on the following occasions.

50. At its 506th meeting on 11 November 1955, the Fourth Committee of the General Assembly adopted a draft resolution which would request the Court's opinion on whether or not the Committee on South West Africa could grant oral hearings to petitioners on matters relating to the Territory of South West Africa (see paragraphs 41-43 above). At its 507th meeting when the Fourth Committee proceeded to consider the request 47/ for a hearing submitted by the Reverend Michael Scott on behalf of the native inhabitants of the Territory, one argument put forward against the granting of the request was 48/ that the Fourth Committee had decided at the previous meeting that it was unable to agree on the interpretation of the Court's advisory opinion in regard to oral hearings and would therefore refer the matter again to the International Court of Justice. If it was impossible to determine the powers of the Committee on South West Africa in regard to oral hearings, it was similarly impossible to determine the powers of the Fourth Committee, which was also an organ of the General Assembly. The question of granting an oral hearing should therefore be postponed until the Court had produced the advisory opinion which had been requested. In favour of hearing the Reverend Michael Scott, it was argued 49/ that the advisory opinion to be given by the Court in response to the draft resolution adopted at the previous meeting would not in any way affect the Fourth Committee's right to grant hearings.

51. When put to the vote, the request for hearing was granted 50/ by 29 votes to 11, with 10 abstentions. Thereafter, the Fourth Committee heard the Reverend Michael Scott.

52. At the 510th meeting of the Fourth Committee, Liberia submitted a draft resolution 51/ which would transmit the statements of the Reverend Michael Scott to the Committee on South West Africa for its study and recommend to that Committee to give appropriate attention to the matter raised in those statements and to report to the General Assembly at its eleventh session. In opposition to this draft resolution, it was again contended 52/ that by transmitting the records of the hearing of the petitioner to the Committee on South Africa, the Fourth Committee had in effect made that Committee a party to the oral hearings it had granted. It had been agreed, the argument continued, that the Committee on South West Africa should not hold oral hearings until the Court had delivered an advisory opinion on the subject; now an attempt was being made to circumvent that decision and as a result the Court would be faced with a fait accompli. Moreover, if the Court subsequently ruled that oral hearings were inadmissible not only in the Committee on South West Africa but in the United Nations as a whole, the General Assembly might find that it had instructed a subordinate body to report on a hearing which had been found illegal. Against those

46/ G A (X), a.i. 30, p. 9, A/3043, paras. 10 and 11.

47/ A/C.4/313.

48/ G A (X), 4th Com., 507th mtg., paras. 3 and 15.

49/ Ibid., paras. 4 and 5.

50/ Ibid., para. 29.

51/ G A (X), annexes, a.i. 30, p. 9, A/3043, para. 30, (A/C.4/L.417).

52/ G A (X), 4th Com., 510th mtg., paras. 39 and 48.

arguments it was maintained ^{53/} that when the record of Mr. Scott's statement was transmitted to the Committee on South West Africa, it would have ceased to be an oral hearing and would become a written petition and there could therefore be no objection to the Committee's receiving it.

53. The Liberian draft resolution, amended by India ^{54/} to provide for the transmission of the Reverend Michael Scott's statements to the Committee on South West Africa for its study and consideration as appropriate, was adopted ^{55/} by the Fourth Committee by 27 votes to 6, with 16 abstentions.

6. *Prior decisions concerning the binding effect of advisory opinions*

54. During the period under review the General Assembly has again had occasion to take a decision in advance concerning the binding effect of an advisory opinion of the Court. For reasons explained in the Introductory Note (see paragraph 2 above), the supplementary material on this question is treated in the present study under Article 96 (2). (See paragraphs 75-85 below.)

**** 7. Consideration of the effect to be given to the advisory opinions of the Court**

B. Practice bearing upon Article 96 (2)

**** 1. The question whether the authorization under Article 96 (2) should be a general authorization or an ad hoc authorization**

**** 2. The question of the revocability of the authorization by the General Assembly**

**** 3. The question whether a prior request of the organ concerned is necessary**

4. The question of the organs which may be authorized to request advisory opinions

55. Paragraph 4 of the new article 11 of the Statute of the United Nations Administrative Tribunal, as adopted by the General Assembly in its resolution 957 (X), read as follows:

"4. 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."

During the proceedings leading to the adoption of the above quoted provision, various suggestions were made concerning the organ which might be authorized to request advisory opinions of the Court on questions relating to the judgements of the Administrative Tribunal. These suggestions together with the relevant discussions are summarized below.

56. In its resolution 888 (IX), the General Assembly accepted in principle judicial review of judgements of the United Nations Administrative Tribunal and appointed a

^{53/} Ibid., para. 42.

^{54/} G A (X), 4th Com., 511th mtg., paras. 4 and 8.

^{55/} Ibid., para. 9. The draft resolution recommended by the Fourth Committee was adopted by the General Assembly as resolution 943 (X).

Special Committee to study the question of the establishment of a procedure for such review in all its aspects. In a working paper submitted to the Special Committee, the Secretary-General, when analysing the possibility of review by the International Court of Justice, stated that only the advisory proceedings of the Court would be available since the parties to the proceedings were not States but a staff member on the one hand and the United Nations represented by the Secretary-General on the other. He went on to say: 56/

"Under Article 65 of its Statute, the International Court of Justice may give an advisory opinion on any legal question at the request of any organ of the United Nations or specialized agency authorized to make such a request. It would appear to be too cumbersome a procedure for the General Assembly, itself, to request advisory opinions in each case. Article 96, paragraph 2, of the Charter, however, provides that organs of the United Nations which may at any time be so authorized by the General Assembly may request advisory opinions of the Court on legal questions arising within the scope of their activities. The General Assembly could therefore authorize the Secretary-General, who is the head of a principal organ of the United Nations, to request advisory opinions on legal questions concerning Administrative Tribunal judgements, and conceivably it might be able to authorize him to do so, not only on his own initiative, but also at the request of some other body, such as, for example, a Member State or Member States, or possibly the applicant."

57. During the initial debate in the Special Committee, a number of representatives drew attention 57/ to the provisions of article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, which had been discussed in the working paper of the Secretary-General. 58/ Paragraph 1 of article XII reads as follows:

"1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Funds challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice."

Some representatives thought that, in connexion with the review of the judgements of the United Nations Administrative Tribunal, a procedure analogous to that of article XII of the Statute of the ILO Administrative Tribunal might be followed with some organ of the General Assembly acting in place of the Governing Body of ILO, and one representative suggested that the function of the Governing Body of ILO could be exercised by a committee which would have the task of screening requests for an advisory opinion and preserving the exceptional character of the procedure. Another representative suggested that the Secretary-General should be authorized to request the Court for an advisory opinion if a number of States, perhaps five, requested him to do so.

58. The foregoing suggestions were embodied in two proposals before the Special Committee as draft amendments to the Statute of the United Nations Administrative

56/ G A (X), annexes, a.i. 49, p. 1, A/2909, annex II, para. 67.

57/ G A (X), annexes, a.i. 49, p. 1, A/2909, paras. 36 and 37.

58/ Ibid., annex II A (A/AC.78/L.1 and Corr.1), paras. 6-16 and 52.

Tribunal: (1) A French proposal 59/ provided that the Secretary-General should make the request for an advisory opinion of the Court either on his own initiative or at the request of the other party to the dispute, and that he could not refuse to refer the case to the Court "except in accordance with the concurrent and motivated opinion of the Chairman of the Special Advisory Board provided for in staff regulation 9.1(a)". This proposal was subsequently revised 60/ by the representative of France to accept the idea of a committee of experts in place of the Chairman of the Special Advisory Board, with the stipulation that if the committee did not take a decision within one month, the case was to be referred to the Court by the Secretary-General; (2) A joint proposal 61/ submitted by China, Iraq and the United States provided that the request for an advisory opinion should be made by a committee to be composed of Member States, the representatives of which had served on the General Committee of the most recent session of the General Assembly. This joint proposal was later revised 62/ to include in the membership of the committee the Secretary-General and a representative of the Staff Council of the Secretariat.

59. The discussion of the proposals mentioned in the preceding paragraph and other proposals indicated a wide divergence of views among members of the Special Committee. In an effort to achieve a wider basis of agreement, a new joint proposal 63/ was introduced by China, Iraq, Pakistan, the United Kingdom and the United States recommending the addition of a new article 11 to the Statute of the Administrative Tribunal. The proposed article 11 contained the following provisions: A special committee is established which 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. A Member State, the Secretary-General or the person concerned who objects to a judgement of the United Nations Administrative Tribunal may make a written application asking the committee to request an advisory opinion of the Court. If the committee decides that a substantial basis for the application exists, it shall request an advisory opinion of the Court. For this purpose, the committee is "authorized under paragraph 2 of Article 96 of the Charter" to make the request.

60. The representative of France, who had withdrawn his previous revised proposal, introduced amendments 64/ to the new joint proposal which would delete the stipulation that the proposed committee be authorized under Article 96 (2) of the Charter to request advisory opinions of the Court, change the membership of the committee to experts rather than States and provide that if the committee decided that a substantial basis for the application existed, it should "authorize the Secretary-General to request an advisory opinion of the Court".

61. During the discussion one of the sponsors of the joint proposal explained 65/ that the screening committee should decide only whether or not there was a genuine application within the grounds specified in the joint proposal (see paragraphs 71 and 72 below) and that the committee would have no further discretion and could not decide for itself whether it was desirable to request an advisory opinion. Against the

59/ Ibid., A/2909, para. 54.

60/ Ibid., para. 60 and annex IA (A/AC.78/L.7/Rev.1).

61/ Ibid., para. 55 (A/AC.78/L.6).

62/ Ibid., para. 57 and annex IB (A/AC.78/L.6/Rev.1).

63/ Ibid., paras. 67 and 68 (A/AC.78/L.14 and Corr.1)

64/ Ibid., para. 91.

65/ Ibid., para. 76

provision to authorize the committee to request advisory opinions, it was contended 66/ that the proposed committee did not have a judicial character but was entrusted with an essentially judicial function.

62. When put to the vote, the French amendments were rejected 67/ by the Special Committee. The joint proposal was adopted and included by the Special Committee in its report as its recommendations to the General Assembly.

63. At the tenth session of the General Assembly, both in the Fifth Committee and in plenary meetings, those representatives who were in favour of the establishment of the screening committee pointed out 68/ that the idea of such a committee was borrowed from the Statute of the Administrative Tribunal of the ILO, under which the Governing Body of that Organization was authorized to request advisory opinions. They further maintained that there could be no legal objection to an organ of the United Nations, which had been so authorized by the General Assembly in accordance with Article 96 (2) of the Charter, seeking an advisory opinion of the Court where it challenged a judgement of the Administrative Tribunal on a question of law. On the other hand, several representatives 69/ considered it doubtful whether the screening committee could be considered an organ entitled to request an advisory opinion under Article 96 of the Charter. That Article provided that an organ of the United Nations might be authorized by the General Assembly to request advisory opinions of the Court on legal questions arising within the scope of its activities. They contended that the proposed committee would have no other activity than to request advisory opinions and therefore could not be considered to come within the meaning of Article 96.

64. The recommendations of the Special Committee were incorporated in a draft resolution recommended by the Fifth Committee and adopted by the General Assembly as resolution 957 (X).

*5. The scope of questions on which advisory opinions
may be sought under the terms of Article 96 (2)*

** a. THE ECONOMIC AND SOCIAL COUNCIL

** b. THE TRUSTEESHIP COUNCIL

c. SPECIALIZED AGENCIES

65. As stated in paragraph 9 above, the UNESCO has recognized the jurisdiction of the Administrative Tribunal of the ILO. By its judgements given on 26 April and 29 October 1955, the ILO Administrative Tribunal upheld its jurisdiction in the complaints filed by Mr. Duberg, Mr. Leff, Mrs. Wilcox and Mrs. Bernstein against UNESCO.

66. In a resolution adopted on 25 November 1955 70/ the Executive Board of UNESCO decided to avail itself of the provisions of article XII of the Statute of the ILO

66/ Ibid., paras. 98 and 101.

67/ Ibid., para. 115.

68/ G A (X), annexes, a.i. 49, p. 38, A/3016, para. 17; G A (X), 5th Com., 495th mtg., para. 29; 497th mtg., para. 6.

69/ Ibid., para. 25; G A (X), Plen., 541st mtg., paras. 23, 24 and 92.

70/ E/2817.

Administrative Tribunal (see paragraph 64 above) and requested an advisory opinion of the International Court of Justice on the following questions of law:

"Having regard to the Statute of the Administrative Tribunal of the International Labour Organisation;

"Having regard to the Staff Regulations and Staff Rules of the United Nations Educational, Scientific and Cultural Organization, and all other pertinent instruments and texts;

"Having regard to the provisions of the contracts of employment of Mr. Duberg, Mr. Leff, Mrs. Wilcox and Mrs. Bernstein,

"I. Was the Administrative Tribunal competent, under article II of its Statute, to hear the complaints filed against the United Nations Educational, Scientific and Cultural Organization on 5 February 1955 by Mr. Duberg, Mr. Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?

"II. In the event of an affirmative reply to question I:

"(a) Was the Administrative Tribunal competent to determine whether the power vested in the Director-General to refrain from renewing fixed-term appointments was exercised for the good of the service and in the interest of the Organization?

"(b) Was the Administrative Tribunal competent to say what attitude the Constitution of the United Nations Educational, Scientific and Cultural Organization requires the Director-General to adopt in his relations with a Member State, especially with regard to the application of the Governmental policy of such Member State?"

67. In its advisory opinion given on 23 October 1956, the Court stated: 71/

"The question put to the Court is a legal question. It arose within the scope of the activities of UNESCO when the Executive Board had to examine the measures to be taken as a result of the four Judgments. The answer given to it will affect the result of the challenge raised by the Executive Board with regard to these Judgments. In submitting the Request for an Opinion the Executive Board was seeking a clarification of the legal aspect of a matter with which it was dealing."

** d. THE INTERIM COMMITTEE OF THE GENERAL ASSEMBLY

e. THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

68. By resolution 957 (X), the General Assembly amended the Statute of the United Nations Administrative Tribunal to provide a procedure for the review of the Tribunal's judgements. A Committee was established and authorized, under Article 96 (2) of the Charter, to request advisory opinions of the Court (see paragraphs 55-64 above). The questions on which the Committee might decide to request the Court's opinion were

71/ Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, I C J Reports 1956, p. 84.

indicated in paragraph 1 of Article 11 adopted by the General Assembly as one of the amendments to the Statute of the Administrative Tribunal. The proceedings leading to the adoption of that paragraph are summarized below.

69. In the working paper on judicial review of Administrative Tribunal judgements submitted by the Secretary-General to the Special Committee mentioned in paragraph 56 above, it was stated 72/, in discussing various possibilities with respect to the "Reviewing Body", under the heading "review by the International Court of Justice," that

"Advisory proceedings might be suitable for the review of certain legal questions in determining the validity of a judgement as is provided by the Statute of the ILO Administrative Tribunal ... 73/

"If, however, a broader scope of review were desired it might be difficult to fit such review into the advisory proceedings. A re-examination of the merits of the case might involve matters which are not strictly legal questions within the meaning of Article 65 of the Statute of the Court ..."

70. The views of the members of the Special Committee concerning the review procedure were summarized in the report 74/ of the Special Committee to the General Assembly. The following passages 75/ in the report indicated the correlation between the use of the advisory procedure of the Court and the legal questions arising out of the Administrative Tribunal judgments:

"... The representatives of China, Israel and the United States considered it undesirable to create a new organ which would compete with the International Court of Justice as the final arbiter on questions of United Nations Law..."

"... The representative of Syria was of opinion that the International Court of Justice, which had been established to decide questions of international law in disputes between States, should not be asked to adjudicate between the Secretary-General and a staff member..."

"... These members favouring the use of the International Court of Justice pointed out that, under the Charter, the General Assembly and other organs so authorized could request opinions of the Court on legal questions. The representative of France believed that the Court's Statute was fully compatible with a request for an advisory opinion on legal questions which might be raised by a judgment of the Administrative Tribunal..."

"... The representative of Australia stated that his Government did not consider it in keeping with the dignity of the Court that the advisory procedure designed to deal with questions of an entirely different kind should be used to determine rights between the Organization and an individual."

72/ G A (X), annexes, a.i. 49, p. 1, A/2909, Annex IIA (A/AC.78/L.1 and Corr.1), paras. 68 and 69.

73/ See para. 57 above.

74/ G A (X), annexes, a.i. 49, p. 1, A/2909.

75/ Ibid., paras. 25, 26, 29 and 96.

71. The Special Committee concluded its discussion by recommending to the General Assembly for its consideration two new articles (11 and 12) to be added to the Statute of the United Nations Administrative Tribunal. Paragraph 1 of the new article 11 reads as follows: 76/

"1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Administrative Tribunal (including any person who has succeeded to his rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence, or has erred on a question of law relating to the provisions of the Charter, or has committed a fundamental error in procedure, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the committee established by paragraph 4 of this article asking the committee to request an advisory opinion of the International Court of Justice on the matter."

72. During the consideration of the report of the Special Committee by the Fifth Committee at the tenth session of the General Assembly, a draft resolution was submitted 77/ jointly by Argentina, Canada, China, Cuba, Iraq, Pakistan, the United Kingdom and the United States which incorporated the new articles recommended by the Special Committee. In regard to the proposed article 11, arguments similar to those put forward in the Special Committee were again advanced by various representatives. 78/ The following paragraphs contained in an amendment submitted 79/ by India to paragraph 1 of the proposed article 11 were accepted by the co-sponsors of the draft resolution:

"(2) After the words 'has exceeded its jurisdiction or competence' insert the words 'or that the Tribunal has failed to exercise jurisdiction vested in it.'

"(3) After the words 'fundamental error in procedure', insert the words 'which has occasioned a failure of justice'."

73. As amended, paragraph 1 was included in the draft resolution recommended by the Fifth Committee and adopted by the General Assembly as resolution 957 (X).

74. Article 11 (1) of the Statute of the United Nations Administrative Tribunal, as amended, authorizes applications to be made to the Committee referred to in paragraph 68 above to request advisory opinions of the Court on the following legal questions:

(1) Whether the Tribunal has exceeded its jurisdiction or competence or whether the Tribunal has failed to exercise jurisdiction vested in it;

(2) Whether the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations, or

76/ Ibid., para. 116.

77/ G A (X), annexes, a.i. 49, p. 38, A/3016, para. 11 (A/C.5/L.335/Rev.1).

78/ See report of the Fifth Committee, G A (X), annexes, a.i. 49, p. 38, A/3016, para. 18; see also G A (X), 5th Com., 494th mtg., para. 16, 496th mtg., paras. 5 and 7, 499th mtg., para. 17.

79/ G A (X), annexes, a.i. 49, p. 38, A/3016, para. 32 (A/C.5/L.339).

(3) Whether the Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice.

6. *The question of prior decision concerning the binding effect of an advisory opinion of the Court*

75. Paragraph 1 of article XII of the Statute of the ILO Administrative Tribunal, as quoted in paragraph 57 above, provides for the utilization of the advisory proceedings of the International Court of Justice when the validity of a decision given by the Tribunal is challenged. Paragraph 2 of the same article reads: 80/

"2. The opinion given by the Court shall be binding."

76. In its advisory opinion of 23 October 1956 on the "Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO", the International Court of Justice made the following observation: 81/

"Under Article XII of the Statute of the Administrative Tribunal, the Opinion thus requested will be 'binding'. Such effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion. However, the provision in question is nothing but a rule of conduct for the Executive Board, a rule determining the action to be taken by it on the Opinion of the Court. It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself. Accordingly, the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with."

77. The question of the binding effect of an advisory opinion of the Court was also discussed by the General Assembly and its subsidiary organ in connexion with the question of review of the judgements of the United Nations Administrative Tribunal.

78. By resolution 957 (X), the General Assembly amended the Statute of the United Nations Administrative Tribunal by adding new articles 11 and 12 to it. The new article 11, which provided for the use of the advisory procedure of the International Court of Justice for the review of the Tribunal's judgements, contained in paragraph 3 the following provision:

"3. ... In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court, or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene, specially, the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court."

79. The above-quoted provision was recommended in the first instance by a Special Committee on Review of Administrative Tribunal Judgements as a result of the following discussion.

80/ G A (X), annexes, a.i. 49, p. 1, A/2909, annex IIA, para. 12.

81/ I C J, Reports, 1956, p. 84.

80. During the general discussion in the Special Committee, several representatives who favoured the review by the Court considered 82/ that provision could be made for acceptance in advance of advisory opinions. Some of these representatives also referred to the authoritative character and moral force of advisory opinions of the Court.

81. In a revised draft amendment to the Statute of the Administrative Tribunal of the United Nations, France proposed, 83/ in connexion with submission to the International Court of Justice of the question of validity of the Tribunal's judgements, that

"The opinion given by the Court shall be binding. In any case where its application requires the amendment of the judgement given, the Administrative Tribunal must, at the request of the Secretary-General and not later than three months after the opinion was given, amend its judgement accordingly."

82. A joint revised draft amendment to the Statute of the United Nations Administrative Tribunal was submitted by China, Iraq, and the United States which, having provided for the use of advisory procedure of the Court, stated 84/ that "such advisory opinions shall be binding upon and given effect to by the Administrative Tribunal".

83. In view of the wide divergence of views among members of the Special Committee on the various aspects of the review procedure, a new joint draft amendment to the Statute of the Administrative Tribunal was introduced 85/ by China, Iraq, Pakistan, the United Kingdom and the United States which contained, in paragraph 3 of the proposed new article 11, a provision identical with that quoted in paragraph 78 above. In an amendment to this joint proposal the representative of France (who had withdrawn his previous draft amendment to the Statute of the Administrative Tribunal) proposed to delete that provision and substitute the following: 86/

"If the Court has given an advisory opinion, the Secretary-General shall give effect to that opinion, which shall be binding. The Secretary-General may, if necessary, request the Tribunal to convene specially in order that it shall either confirm its original judgement or give a new judgement in conformity with the opinion of the Court."

In regard to this amendment, the representative of the United Kingdom, on behalf of the co-sponsors of the joint proposal, stated 87/ that the joint proposal had not included a provision to the effect that the Court's advisory opinion would be binding because some members of the Special Committee objected to saying expressly that an "advisory opinion" was "binding".

84. The French amendment was rejected 88/ by the Special Committee by 8 votes to 2, with 7 abstentions. Paragraph 3 of the proposed article 11 was adopted by 9 votes to 4, with 4 abstentions and the joint proposal as a whole, by the same vote. The

82/ G A (X), annexes, a.i. 49, p. 1, A/2909, para. 30.

83/ Ibid., annex IA (A/AC.78/L.7/Rev.1), para. III.

84/ Ibid., annex IB (A/AC.78/L.6/Rev.1), para. 3.

85/ Ibid., para. 67 (A/AC.78/L.14 and Corr.1).

86/ Ibid., para. 91 (A/AC.78/L.15).

87/ Ibid., para. 92.

88/ Ibid., para. 115.

joint proposal was recommended by the Special Committee in its report for consideration by the General Assembly.

85. During the consideration of the report of the Special Committee by the Fifth Committee at the tenth session of the General Assembly, a revised joint draft resolution 89/ was submitted by Argentina, Canada, China, Cuba, Iraq, Pakistan, the United Kingdom and the United States which, among other provisions, incorporated the new articles 11 and 12 proposed by the Special Committee to be added to the Statute of the United Nations Administrative Tribunal. Objection to the provision concerning the execution of the advisory opinion of the Court was raised 90/ on the ground that advisory opinions were intended by the Charter to be advisory only and that under the proposed provision the Court's advisory opinion would take the place of a judgement and would cease to be an advisory opinion under Article 96 of the Charter and Chapter IV of the Court's Statute.

86. The revised joint draft resolution containing the provision on the effect to be given to the advisory opinion of the Court was recommended by the Fifth Committee and adopted by the General Assembly as resolution 957 (X).

89/ G A (X), annexes, a.i. 49, p. 38, A/3016, para. 11 (A/C.5/L.335/Rev.1).
90/ Ibid., para. 26; see also G A (X), 5th Com., 496th mtg., para. 17.

Chapter XV

THE SECRETARIAT

