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Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VII. Decisions and advisory opinions of international tribunals

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Chapter VII

DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

International Court of Justice

APPLICATION FOR REVIEW OF JUDGEMENT NO. 333[1] OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL (REQUEST FOR AN ADVISORY OPINION)[2]

Request for an advisory opinion by the Committee on Applications for Review of Administrative Tribunal Judgements — Article 11 of the statute of the Tribunal — Competence of the Court — Discretion of the Court and propriety of giving an opinion — Objection to the judgement on the grounds of error on a question of law relating to the provisions of the Charter of the United Nations and of excess of jurisdiction or competence

On 10 September 1984 the Court had recieved a request for an advisory opinion, submitted by the Committee on Applications for Review of Judgements of the Administrative Tribunal of the United Nations, in respect of Judgement No. 333, delivered at Geneva on 8 June 1984 by the Administrative Tribunal in the case of *Yakimetz* v. *the Secretary-General of the United Nations*. Written statements were in due course submitted by the Governments of the Union of Soviet Socialist Republics, Italy, Canada and the United States of America, and on behalf of the Secretary-General of the United Nations. The latter also transmitted a statement on behalf of Mr. Yakimetz, who had made the application for review. Written comments were subsequently received from the Secretary-General of the United Nations, who also transmitted comments made by Mr. Yakimetz, and by the Government of the United States of America.

As in previous similar cases, the Court decided not to hear oral[3] statements, and the United Nations and the States having presented written statements were so informed by a letter of 3 November 1986.

On 27 May 1987 the Court delivered, at a public sitting, its advisory opinion,[4] of which a summary outline and the complete text of the operative paragraph are given below:[5]

Review of the proceedings and summary of facts (paras. 1-22)

The Court outlines the successive stages of the proceedings before it (paras. 1-9) and summarizes the facts of the case as they emerge from the reasons adduced in the judgement of 8 July 1984 in the case concerning *Yakimetz* v. *the Secretary-General of the United Nations*, and as set out in the documents submitted to the Tribunal (paras. 10-18). The facts essential for an understanding of the decision reached by the Court are as follows:

Mr. Vladimir Victorovich Yakimetz (referred to in the Opinion as "the Applicant") was given a five-year appointment (1977-1982) as Reviser in the Russian Translation Service of the United Nations. In 1981 he was transferred as Programme Officer to the Programme Planning and Coordination Office. At the end of 1982 his appointment was extended for one year, expiring on 26 December 1983, and his letter of appointment stated that he was "on secondment from the Government of the Union of Soviet Socialist Republics" (para. 10).

On 8 February 1983 the Assistant Secretary-General for Programme Planning and Coordination informed the Applicant that it was his intention to request an extension of his contract after the current contract expired on 26 December 1983. On 9 February 1983 the Applicant applied for asylum in the United States; on 10 February he informed the Permanent Representative of the USSR to the United Nations of his action, and stated that he was resigning from his positions in the Soviet Government. On the same day, he notified the Secretary-General of his intention to acquire permanent resident status in the United States (para. 11).

On 25 October 1983, the Applicant addresed a memorandum to the Assistant Secretary-General for Programme Planning and Coordination, in which he expressed the hope that it would be found possible on the basis of his performance to recommend a further extension of his contract with the United Nations, "or even better a career appointment". On 23 November 1983, the Deputy Chief of Staff Services informed the Applicant by letter "upon instruction by the Office of the Secretary-General" that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983. On 29 November the Applicant protested against the decision and referred to his acquired rights under section IV, paragraph 5, of General Assembly resolution 37/126 of 17 December 1982, which provides "that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment" (para. 13).

On 13 December, the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond its expiration date and again invoked his rights under General Assembly resolution 37/126. In a letter dated 21 December 1983, the Assistant Secretary-General for Personnel Services replied to the Applicant's letter of 13 December and advised him that, for the reasons stated, the Secretary-General was maintaining the decision communicated in the letter of 23 November 1983 (para. 14).

On 6 January 1984 the Applicant filed the application on the United Nations Administrative Tribunal in respect of which Judgement No. 333 was given (para. 14).

The Applicant then made a further application for United Nations employment (para. 15).

The Court notes that, at a press conference on 4 January 1984, the spokesman for the Secretary-General said that "if Mr. Yakimetz chose to apply for a position . . . he would be given every consideration along with other applicants for any position". It also noted that the *New York Times* of the same day carried an article dealing with the non-renewal of the Applicant's contract, in which the Executive Assistant to the Secretary-General was quoted as having said that "to have the contract extended . . . Soviet consent was essential, But, he said, 'the Soviets refused'." Commenting on that report in a letter to the *New York Times*

dated 24 January 1984, the Under-Secretary-General for Administration and Management pointed out that "a person who is on loan returns to his Government unless that Government agrees otherwise" (para. 16).

Following this summary of the facts, the opinion presents the principal contentions of the Applicant and of the Respondent as summarized by the Tribunal, and lists the legal issues which the Tribunal stated were involved in the case (paras. 17-19). It then gives a brief analysis of Judgement No. 333 (paras. 20-21), to which it returns subsequently in more detail.

Competence of the Court to give an advisory opinion, and the propriety of doing so (paras. 23-27)

The Court recalls that its competence to deliver an advisory opinion at the request of the Committee on Applications for Review of Administrative Tribunal Judgements is derived from several provisions: article 11, paragraphs 1 and 2, of the statute of the Tribunal, Article 96 of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has already had occasion to examine the question of its competence under these provisions, whether the request for opinion originated, as in the present case, from an application by a staff member (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Fasla* case, 1973) or from an application by a member State (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Mortished* case, 1982). In both cases, it concluded that it possesed competence. In the present case, its view is that the questions addressed to it are clearly legal questions arising within the context of the Committee's activities (paras. 23-24).

As for the propriety of giving an opinion, it is clearly established, according to the Court, that the power conferred by article 65 of the Statute is of a discretionary character, and also that the reply of the Court to a request for an advisory opinion reflects its participation in the activities of the United Nations and, in principle, should not be refused. In the present case, it considers in any event that there is clear legal justification for replying to the two questions put to it by the Committee. It recalls that, in its 1973 opinion, it subjected the machinery established by article 11 of the statute of the Administrative Tribunal to critical examination. While renewing some of its reservations as to the procedure established by that article, the Court, anxious to secure the judicial protection of officials, concludes that it should give an advisory opinion in the case (paras. 25-26).

In its advisory opinions of 1973 and 1982, the Court established the principle that its role in review proceedings was not "to retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal". That principle must continue to guide it in the present case. In particular, it should not express a view on the correctness or otherwise of any finding of the Tribunal, unless it is necessary to do so in order to reply to the questions put to it (para. 27).

First question (paras. 28-58)

The first question put to the Court is worded as follows:

"1. In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to

the further[6] employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?"

In his application to the Administrative Tribunal, the Applicant contended that "there was no legal bar to his eligibility for a new fixed-term contract" or to a probationary appointment leading to a career appointment. He claimed to have a "legally and morally justifiable expectancy of continued U.N. employment, and a right to reasonable consideration for a career appointment". Before the Tribunal, the Secretary-General stated that there was no legal impediment to the grant of a career appointment, and asserted that the contested decision had been taken after consideration of all the circumstances in the case. This, he contended, constituted "reasonable consideration" within the meaning of General Assembly resolution 37/126, given that the Applicant had no "right" to "favourable consideration for a career appointment" (paras. 29-30).

Before the Tribunal, the Applicant made no reference to the recognition by the Secretary-General that there was no legal impediment, but took issue with the statement that "reasonable consideration" had been given. He argued that if the Secretary-General was under the impression, as the letter of 21 December 1983 and the statements made by certain senior officials indicated, that any extension of the Applicant's appointment without the consent of the Government which had seconded him was beyond the scope of his discretionary power, this would have prevented him from giving every reasonable consideration to a career appointment. The Applicant therefore requested the Tribunal to find that the view which actually was held at that time — that a secondment did give rise to a legal impediment to any further employment—was incorrect, so that no "consideration" on that basis could be "reasonable" within the meaning of resolution 37/126, and requested it to find that there was no legal impediment to his futher employment after the expiry of his contract on 26 December 1983. The Applicant held that the Tribunal had not responded to his plea on that point, and the Court is now requested to state whether in that regard it failed to exercise jurisdiction (paras. 31-32).

The Court considers that the Tribunal's handling of the question of the "legal impediment' is not entirely clear. The reason for this, according to the Court, is that it was obliged to deal first with other contentions set out by the Applicant. As a matter of logic, the Tribunal dealt first with the question whether the Applicant had a "justifiable expectancy of continued United Nations employment" — in other words, whether there was a "legal expectancy" in that connection, since if such an expectancy existed the Secretary-General would have been obliged to provide continuing employment to the Applicant within the United Nations. The Tribunal found that there was no legal expectancy. On the one hand, the consent of the national Government concerned would have been required for the renewal of the previous contract, which was a secondment contract, and on the other hand, according to staff rule 104.12 (*b*), fixed-term appointments carry no expectancy of renewal or of conversion to any other type of appointment. The Tribunal also held that the Secretary-General had given reasonable consideration to the Applicant's case, pursuant to section IV, paragraph 5, of General Assembly resolution 37/126, but without saying so explicitly (paras. 33-37).

An analysis of the Judgement therefore shows that, for the Tribunal, there could be no legal expectancy, but neither was there any legal impediment to "reasonable consideration" being given to an applicant for a career appointment.

According to the Tribunal there would have been no legal impediment to such an appointment if the Secretary-General, in the exercise of his discretion, had seen fit to offer one (paras. 38-41).

The Court notes that the real complaint of the Applicant against the Tribunal was, rather than failing to respond to the question whether there was a legal impediment to his further employment, that it had paid insufficient attention to the indications that the Secretary-General had thought that there was a legal impediment, so that the "reasonable consideration" either never took place or was vitiated by a basic assumption — that there was an impediment — which was later conceded to be incorrect. Here the Court recalls that in appropriate cases it is entitled to look behind the strict terms of the question as presented to it (*Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, 1980), provided its reformulation remains within the limits of the powers of the requesting body. In the present case, without going beyond the limits of the ground of objection contemplated by article 11 of the Tribunal's statute and upheld by the Committee (failure to exercise jurisdiction), it is open to the Court to redefine the point on which it is asserted that the Tribunal failed to exercise its jurisdiction, if this will enable it to give guidance on the legal question really in issue. It thus seems to the Court essential to examine not only whether the Tribunal failed to examine the question of the legal impediment to the Applicant's further employment — as it is requested to do — but also whether the Tribunal omitted to examine the Secretary-General's belief in that regard, and the possible impact of that belief on his ability to give "every reasonable consideration" to a career appointment. If it can be established in this case with sufficient certainty that the Tribunal addressed its mind to the matters on which the Applicant's contentions were based, there was no failure to exercise jurisdiction in that respect, whatever may be thought of the conclusion it reached in the light of the information available to it (paras. 42-47).

The Court refers first to the actual text of the Tribunal's judgement, which did not deal specifically with the question of the existence of a "legal impediment". It does not, however, conclude from this that it failed to address its mind to this question. What the judgement states is that, in the Tribunal's view, the Secretary-General could take the decision to offer the Applicant a career appointment, but was not bound to do so. It follows from this that the Tribunal was clearly deciding, though by implication, that there was no absolute legal impediment which had supposedly inspired the decision not to give the Applicant a career appointment. In so doing the Tribunal therefore responded to the Applicant's plea that it should be adjudged that there was no legal impediment to the continuation of his service (para. 48).

The Court then refers to a statement by the President of the Administrative Tribunal, Mr. Ustor, appended to the judgement, and to the dissenting opinion of another member of the Tribunal, the Vice-President, Mr. Kean. It seems to the Court impossible to conclude that the Tribunal did not address its mind to the issues which were specifically mentioned by Mr. Ustor and Mr. Kean as the grounds for their disagreement with part of the judgement relating to the "legal impediment" and to the "reasonable consideration". The Tribunal, as a body represented by the majority which voted in favour of the judgement, must have drawn its own conclusions on these issues, even if these conclusions were not spelt out as clearly in the judgement as they ought to have been (paras. 49-57).

As to the question whether "every reasonable consideration" was in fact given, the Tribunal decided this in the affirmative. The Court, considering that it is not entitled to substitute its own opinion for that of the Tribunal on the merits of the case, does not find it possible to uphold the contention that the Secretary-General did not give "every reasonable consideration" to the Applicant's case, in implementation of resolution 37/126, because he believed that there was a legal impediment.

The Court, after due analysis of the text of Judgement No. 333 of the Tribunal, considers that the Tribunal did not fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983. Accordingly, the answer to the first question put to it by the Committee must be in the negative (para. 58).

Second question (paras. 59-96)

The question is worded as follows:

> "2. Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

Concerning the nature of its task, the Court recalls that the interpretation, in general, of Staff Regulations and Rules is not its business, but that it is the business of the Court to judge whether there is a contradiction between a particular interpretation or application of them by the Tribunal and any of the provisions of the Charter of the United Nations. It is also open to the Court to judge whether there is any contradiction between the Tribunal's interpretation of any other relevant texts such as, in this case, General Assembly resolution 37/126, and any of the provisions of the Charter (paras. 59-61).

The first provision of the Charter in respect of which the Applicant contends that the Tribunal made an error of law is *Article 101, paragraph 1*, which provides that: "The staff [of the Secretariat] shall be appointed by the Secretary-General under regulations established by the General Assembly." More specifically, the Applicant's complaint bears upon the role which ought to have been played by the Appointment and Promotion Board, but which it was unable to play because no proposal ever reached it, with the result that it never had a chance to consider his case. The Applicant presented this as one element of the denial of "reasonable consideration" of his case. The Tribunal found that it was "left to the Respondent to decide how every reasonable consideration for a career appointment should be given to a staff member" and that the Respondent had "the sole authority to decide what constituted "reasonable consideration". On the basis of this passage the Applicant contends that this is a question of law relating to Article 101, paragraph 1, of the Charter (paras. 62-69).

The Court interprets the above-quoted passage as meaning that it was for the Secretary-General to decide what process constituted "reasonable consideration", and not that the only test of reasonableness was what the Secretary-General thought to be reasonable. Indeed the Tribunal has nowhere stated that the Secretary-General possesses unfettered discretion. Nevertheless, the Tribunal did accept as sufficient a statement by the Secretary-General that the "reasonable consideration" required by resolution 37/126 had been given. It did not require the

Secretary-General to furnish any details of when and how it had been given, let alone calling for evidence to that effect. Because the texts do not specify which procedures are to be followed in such a case, the Court is unable to regard this interpretation as in contradiction with Article 101, paragraph 1, of the Charter (paras. 70-73).

The Secretary-General has also asserted that the decision taken in this case was "legitimately motivated by the Secretary-General's perception of the interests of the Organization to which he properly gave precedence over competing interests". The Tribunal need not have accepted this; it might have regarded the statements quoted by the Applicant as evidence that the problem of secondment and the lack of Government consent had been allowed to dominate more than the Secretary-General was ready to admit. That was not, however, the view it took. It found that the Secretary-General had "exercised his discretion properly". Whether or not this was an error of judgement on the Tribunal's part, what is certain is that it was not an error on a question of law relating to Article 101, paragraph 1, of the Charter. The essential point is that the Tribunal did not abandon all claim to test the exercise by the Secretary-General of his discretionary power against the requirements of the Charter. On the contrary, it reaffirmed the need to check any "arbitrary or capricious exercise" of that power (paras. 74-75).

The Applicant claims that the Tribunal committed an error of law relating to *Article 100, paragraph 1*, of the Charter, which provides:

> "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."

The Applicant does not allege that in refusing him further employment the Secretary-General was merely carrying out the instructions of a Government, but considers that the statements made by senior officials as mentioned above indicated that the Secretary-General believed that further employment was impossible without the consent of the Applicant's Government — which has been shown to be untrue — and that the Tribunal concluded that this was indeed the belief of the Secreatry-General. The Court does not find it possible to uphold this contention, since it does not consider the Tribunal to have reached that conclusion (paras. 76-78).

The Applicant alleges a failure to observe *Article 101, paragraph 3*, of the Charter, which provides:

> The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and intregrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

He asserts that the Tribunal's judgement failed to weigh the mandate of that Article against other factors, and that it made merit subservient to other considerations. It is clear that the expression "the paramount consideration" is not synonymous with "the sole consideration", and it is for the Secretary-General to balance the various considerations. It was not for the Tribunal, nor is it for the Court, to substitute its own appreciation of the problem for his. The Secretary-General's

decision cannot be said to have failed to respect the "paramount" character of the considerations mentioned in Article 101, paragraph 3, simply because he took into account all the circumstances of the case in order to give effect to the interests of the Organization (paras. 79-82).

In taking his decision, the Secretary-General had taken account of "the events of 10 February 1983" (the date of the Applicant's communication informing the Soviet Government that he was resigning from its service) "and thereafter". The Tribunal examined this matter in the context of the new contractual relationship "which, according to the Applicant, had been created between himself and the United Nations on that date". For his part, the Secretary-General denied that "a continuing relationship with a national Government is a contractual obligation of any fixed-term staff member — seconded or not" and that the Applicant's continued employment did not imply that a new contractual relationship had been created. The Tribunal comments on the significance of national ties and expresses disapproval of the Secretary-General's above-quoted remarks. It does not apparently consider them consistent with the ideas found shortly beforehand in Judgement No 326 *(Fischman)* which referred to a "widely held belief" expressed in a report to the Fifth Committee of the General Assembly to the effect that staff members who break their ties with their home countries can no longer claim to fulfil the conditions governing employment in the United Nations. The Tribunal adds that this position must continue to provide an essential guidance in this matter. The Court here observes that this "widely held belief" amounts to the views expressed by some delegates to the Fifth Committee in 1953 at the eighth Session of the General Assembly, and never materialized in an Assembly resolution (paras. 83-85).

The Court also notes that the relevant passage in Judgement No. 333 is not essential to the reasoning of the decision, but that the Court has a duty to point out any error "on a question of law relating to the provisions of the Charter of the United Nations" whether or not such error affected the disposal of the case. However, having considered the relevant passage of the judgement (para. XII), the Court is unable to find that the Tribunal there committed an error of law "relating to the provisions of the Charter". For the Secretary-General, the change of nationality was an act having no specific legal or administrative consequences. The Tribunal upheld the Secretary-General's main contention, but at the same time pointed out that according to one view, the change of nationality was not necessarily such an act, but one which in some circumstances may adversely affect the interests of the United Nations. This is very far from saying that a change or attempted change of nationality may be treated as a factor outweighing the "paramount consideration" defined by Article 101, paragraph 3, of the Charter; this is what the Applicant accuses the Secretary-General of having done, but the Tribunal did not agree with him, since it established that "reasonable consideration" had taken place. (paras. 86-92).

The Applicant asserts that the Tribunal erred on a question of law relating to *Article 8* of the Charter, which is worded as follows:

> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

The Applicant propounds a novel view of that Article, that it prohibits "any restriction on the eligibility of any person". The Court explains why it is not

called upon to deal with this contention, so that Article 8, even in the wide interpretation contended for by the Applicant, has no relevance whatever (para. 93).

The Applicant asserts that the Tribunal erred on a question of law relating to *Article 2, paragraph 1*, of the Charter, namely: "The Organization is based on the principle of the sovereign equality of all its Members", coupled with *Article 100, paragraph 2:*

> "Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

The complaint here examined appears to be that a certain Government brought pressure to bear on the Secretary-General contrary to Article 100, paragraph 2, of the Charter. In that event, even if there had been evidence (which there was not) that a member State had behaved in violation of that Article of the Charter, the Tribunal would not have been justified in making any finding in that respect, and could not therefore be critized for not doing so. The Court can therefore see no possibility of an error of law by the Tribunal relating to Article 2 and Article 100, paragraph 2, of the Charter (paras. 94-96).

In respect of the second question put to it in this case, the Court concludes that the Tribunal, in its Judgement No. 333, did not err on any question of law relating to the provisions of the Charter. The reply to that question also must therefore be in the negative (para. 96).

Operative paragraph (para. 97)

> "THE COURT,
>
> A. Unanimously,
>
> *Decides* to comply with the request for an advisory opinion;
>
> B. *Is of the opinion:*
>
> (1) with regard to question 1,
>
> Unanimously,
>
> *That* the United Nations Administrative Tribunal, in its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did not fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his fixed-term contract on 26 December 1983;
>
> (2) with regard to question 2,
>
> by 11 votes to 3,
>
> *That* the United Nations Administrative Tribunal, in the same Judgement No. 333, did not err on any question of law relating to the provisions of the Charter of the United Nations.
>
> IN FAVOUR: *President* Nagendra Singh; *Vice-President* Mbaye; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Bedjaoui, Ni and Tarassov;
>
> AGAINST: *Judges* Schwebel, Sir Robert Jennings and Evensen."

Judge Lachs appended a declaration to the Advisory Opinion.[7] Judges Elias, Oda and Ago appended separate opinions[8] and Judges Schwebel, Sir Robert Jennings and Evensen appended dissenting opinions.[9]

NOTES

[1]For a summary of the judgement, see *Juridical Yearbook, 1984*, p. 146.

[2]Ibid., p. 87.

[3]See *I.C.J. Yearbook 1972-1973*, p. 127; *I.C.J. Yearbook 1981-1982*, pp. 131-132.

[4]*I.C.J. Reports 1987*, p. 18.

[5]The summary is taken from the *I.C.J. Yearbook 1986-1987*, No. 41, p. 148.

[6]The Opinion notes a discrepancy between the English and French texts, pointing out that the words "obstacle juridique au renouvellement de l'engagement" appearing in the French version include both a case of prolongation of an existing contract and that of an appointment distinct from the pre-existing contractual relationship (para. 28).

[7]*I.C.J. Reports 1987*, pp. 74-75.

[8]Ibid., pp. 76-108.

[9]Ibid., pp. 110-174.