# UN-Secretariat matters A-S: UN-Secretariat matters A-S - 1

*HS L 179:92*

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U.N. Administrative Tribunal

- Verbatim Record of the 6-th meeting
  held at Headquarters 18 April 1953
- " — " 7-th meeting, 21 April 1953

L 179: 92

UNITED NATIONS

ADMINISTRATIVE TRIBUNAL

LIMITED

AT/PV.28
18 April 1953

ENGLISH

UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Preliminary Proceedings -- Cases 26 to 45

VERBATIM RECORD OF THE SIXTH MEETING

(Transcription from the sound track)

Held at Headquarters, New York,
on Saturday, 18 April 1953, at 10.30 a.m.

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| President: | Mme Paul BASTID |
| Vice-President: | Mr. Sture PETREN |
| Executive Secretary of the Administrative Tribunal: | Mr. Mani SANASEN |

53-10871

The PRESIDENT (interpretation from French): The Tribunal is in session.

Before calling on Counsel for the Respondent, I would like to recall that at the end of the present session I would like to ask both parties to indicate the approximate length of their presentations in the course of the forthcoming oral proceedings. I would like to have that information now before I leave New York so that arrangements can be made and no time wasted when the oral proceedings begin.

Further, I would like to ask the Respondent whether he wishes to bring witnesses at Tuesday's hearing. If so, I would ask him to let me know either today or Monday, under the pertinent rules of the Tribunal, what are the names of these witnesses and the points on which he wishes to question them.

Further, I recall to the parties, and in particular to the Applicants, that I had requested information on the amount of indemnities that had been paid by the Administration. Mr. Weinberger has answered that question in the case of Miss Crawford. I would like to have similar answers for the other Applicants.

There are no comments on these points so I now call on the Counsel for the Respondent to answer the comments made on their Questions by Applicants.

The Counsel for the Respondent has indicated that he would like to break up his statement at various points in order to facilitate translation and that is perfectly agreeable. It will be up to him to indicate when he wants that break.

Mr. SCHACHNER (Counsel for the Respondent): Before addressing myself to the points to which I should address myself this morning, I should like to inform the Tribunal respectfully that we have given thought and study to the question of witnesses and so far as we are able to determine now there will be no necessity for us to produce additional witnesses. If there should, on further study, be any change in that situation we will, of course, notify the Tribunal at the earliest possible time.

The PRESIDENT (interpretation from French): Very well.

Mr. SCHACHNER (Counsel for the Respondent): I shall now address myself to comments on the observations which were made on behalf of the Applicants concerning the Questions put to them by this Tribunal. I shall, in this exposition, not limit myself to considering the question of drcits acquis, but I shall also comment on the first Question which was put by the Tribunal to the Applicants.

In this connexion, I should like first to clarify the situation prior to Judgment No. 4, the implications which we believe Judgment No. 4 to have and the legislative history of the change in Regulation 9.1 (c). As the Secretary-General understood the law prior to the rendition of Judgment No. 4, it was that he was not under the duty to give reasons in the case of dismissal of temporary staff members. Then came Judgment No. 4. There has been a good deal of uncertainty introduced here as to whether the action of the General Assembly subsequent to Judgment No. 4 was a clarification or a modification of the rules. In view of that uncertainty, I think that it will be wise for me to state precisely the position which we have taken and to state precisely why we think that both the terms "modification" and "clarification" are applicable to the legal situation here.

/As we understood

As we understood and some people did understand Judgment No.4, it decided this point: Under the Staff Rules, as distinguished from the Staff Regulations then existing, the Secretary-General was required to give reasons in the case of dismissal of temporary employees. Perhaps this Tribunal did mean to say that under the Regulations he was also so required to do, but it seemed to us that conceivably, at least, the Secretary-General, after Judgment No.4, could have by himself amended the Staff Rules and, in such a way as to make it unnecessary for him to give reasons. We agree with the position taken by the Applicants to this extent: after Judgment No.4, the legal situation was clear; the Secretary-General had to give reasons for dismissal in the case of persons with whom we are here concerned.

It was, however, in our opinion, not clear whether he could not by himself have amended the Rules in such a way as to bring about the result which we claim was brought about by Regulation 9.1(c). In view of this situation, which was unclear, the term "clarification" of the Regulations has been employed by us and was sometimes employed in the debates in the Fifth Committee which dealt with this particular question.

In the next portion of my statement I shall try to show that the Fifth Committee was fully aware of the implications of Judgment No.4 and deliberately set out to change these implications. But, to be even more precise in stating our point of view concerning this first matter, I should say that the provision for giving reasons was found not in the Staff Rules but in a Staff Manual. At any rate, it was found in a provision which the Secretary-General himself, within the applicable Staff Regulations, had established.

Now, to turn to the second point, we have in our brief explained that the words appearing in section 9.1(c) are words of art and that they had a definite meaning, a meaning on which this Tribunal had had occasion to pass in another context -- that this meaning was deliberately meant to incorporate what we contend the effect of Regulation 9.1(c) is. My worthy opponents, in their remarks and in the written answers which they had submitted -- you will find that passage in the paragraph which they numbered "27"; it appears on page 13 a of their written response....

/There they say:

There they say:

"Nothing can be found in the debates which justifies the view that the members of the Fifth Committee disapproved of or disagreed with that judgment" -- referring to Judgment No. 4. /AT/PV.23, p.31/.

I am quoting, not from their brief; I am quoting from their written reply to Question No. I. You will find the passage which I quoted on page 13(a), paragraph 27; it is the third sentence in that paragraph.

Unfortunately, that remark is not based on fact. If you will turn to page 61 of our brief, you will find there remarks quoted in somewhat abbreviated form which indicate quite clearly that the Fifth Committee was keenly aware that Regulation 9.1(c) would change the law as it existed prior to Regulation 9.1(c). As I said, the quotation appearing at page 61 is somewhat abbreviated. In order to give the Tribunal the benefit of the full quotation in so far as it is relevant to this subject, I shall now read the whole paragraph which we have, to some extent, omitted in the printed text.

The two paragraphs read as follows; I am first quoting from the remarks of the representative of Canada -- the full text as it appears in the official records of the 330th meeting, on page 273, is as follows:

"At the same time, it should be pointed out that although the Tribunal's task was to interpret past decisions of the General Assembly, it had not the power to bind the Assembly for the future. It would be no slight to the Tribunal if experience led the Fifth Committee to conclusions at variance with the Tribunal's past rulings."

I next quote from the remarks of the representative of the Union of South Africa appearing in the same publication, at page 277:

"It was clear from the Statute of the Tribunal that it was a body whose authority should not be questioned. However, as in any national system, when a clash occurred between the legislative and the judiciary authorities, it was the duty of the legislative body --in the present case, the Fifth Committee -- to decide whether the interpretation given by the judiciary was consistent with the meaning of the rules as intended by those who had framed them. If not, the legislative body should take steps to bring the rules into line with what had originally been intended."

Now, I think that the remarks which I have just quoted -- without quoting any further remarks that passed in the Fifth Committee -- quite clearly establish that my opponents are mistaken in thinking that the Fifth Committee did not mean to bring about the change in the juridical situation. However, some references has been made here that the action of the Fifth Committee and the General Assembly might be construed to be a reversal of Judgment No. 4. We do not agree that the General Assembly reversed, or undertook to reverse, judgments of this Tribunal. Indeed, Judgment No. 4 of this Tribunal was honoured by the Secretary-General: a very large amount of money was paid out by the United Nations in order to comply with the rulings of this Tribunal. The only thing that happened was that the General Assembly clarified, or modified if you will, the legal situation for the future and, for the future alone. Nothing was done -- I repeat, nothing -- that in any way invalidated Judgment No. 4 as a proper judicial pronouncement and a judgment binding on both parties.

Could the translator please translate this portion?

/To sum up

To sum up our contentions in connexion with the meaning of Regulation 9.1(c):

First, the meaning of the words used is clear and it is clearly to the effect for which we contend. The legislative history is clear; it is clearly to the effect for which we contend. There has been a suggestion that, if so construed, Regulation 9.1(c) would conflict with the appellate procedure laid down by the Regulations and by the Statute of this Tribunal. To that question we have addressed ourselves in answer to Question XIV addressed to us; I believe we have shown that no such conflict exists.

One more point has been made by our opponents in connexion with this question, namely that, as so construed, section 9.1(c) would be an innovation which would find no analogy in the domestic laws of various Member States. I shall not address myself to that question: I refer to the passage in our briefs where the delegate stated that, as so construed, the law pertaining to the United Nations would be analogous to the law obtaining in various Member States, and I believe that this Tribunal is amply capable by itself to know that this analogy, or to ascertain whether or not this analogy does exist.

Having now summed up what I believe to be the effect of the legislation with which we are here dealing, I now turn to the second question: whether, and in what respect, the legislation so construed differs -- or infringes on what we referred to here as droits acquis.

Would you please translate?

/In this exposition

In this exposition of possible conflict with acquired contractual rights, I shall not limit myself only to discussing the effect of Regulation 9.1(c) because other problems are raised in connexion with this question and from time to time I may make reference to other problems but since the discussion, of necessity, will be in general terms I believe that what I have to say will prove applicable to the other problems as well. To begin with -- just so that we can precisely fix the points of reference for this problem -- to begin with, it has been said that the rights and obligations of staff members of the United Nations are exclusively contractual in nature and there has been an attempt made to deduce, from the exclusive contractual nature of these rights, the conclusion that they cannot be of such nature that one party may modify without the consent of the other party. To begin with, let me say that I do not agree with the premise in the broad generality with which it has been stated. I think we are still in the exploratory stages of the law pertaining to international civil servants and it cannot be said dogmatically that their rights and obligations are exclusively contractual. However, I should like to call the Tribunal's attention to the fact that the contractual nature of a relation is not necessarily destroyed because the contract in terms refers to actions which can be taken by the other party seemingly unilaterally.

In this connexion I should like to point out to the Tribunal that contracts of that nature are well known to private law. Take for instance the case of a contract in which a customer contracts with a supplier to buy all his requirements from the supplier at the price generally prevailing at the time the order is given. Such contracts are by no means unusual and they can be modified seemingly unilaterally by both parties. First the buyer can refuse to buy anything, but it is assumed that economic interest will drive them to fill requirements. Second, the seller can fix any price he wishes under this contract and seemingly again it would be in his own discretion whether or not the contract is to be fulfilled because he can destroy the possibility of a sale being made by fixing the price unreasonably high. That is not the case though, because the price has then to be fixed for all possible customers, and if he wishes to discriminate against one he might lose all other customers.

I make this analogy because when I refer to possible modifications it should be clear that I am not referring to modifications of a contract which could be introduced by the Secretary-General of the United Nations merely as a whim. If -- I withdraw the if -- Whatever contractual duties and obligations staff

members have refer in turn to the Staff Regulations which are incorporated in the contract,and the Staff Rules for that matter. So that it is not possible for the Secretary-General to discriminate against one individual staff member if there is to be a change in duties and obligations it has to be introduced by a modification of the Regulations or the Rules as the case may be, and in a manner generally applicable to all staff members.

Could you please translate this portion?

/The first point

The first point which I wish to make in this connexion is that the contractual status of staff members incorporates, by reference, compliance with shifting regulations and shifting staff rules. I do not contend, however, that although these rules and regulations may shift, there are not rights and obligations which staff members have which, whether they can be, at any rate should not be, subject to modification. Certain actions in modifying the rights of staff members would, I think, so offend morals that it could not reasonably be thought that the legal right to such modification does exist. Unfortunately, such modification can come about whatever one may think about it juridically. For instance, I am informed that, in connexion with the League of Nations, the preposterous result was reached that the Assembly refused to honour one of the judgments rendered by a tribunal established there. Fortunately, I think, we do not have to concern ourselves with such extreme cases and the remarks which I address to this Tribunal should not be assumed to be meant as having universal and general application to all rights and all obligations which a staff member may have.

We are here confronted with only two problems: (1) is the doctrine of acquired contractual rights sufficient to freeze the obligation of the Secretary-General as established by Judgment No. 4 to give reasons in the case of the dismissal of temporary staff members and (2) is that doctrine sufficient to freeze the obligation of the Secretary-General to have recourse and to refer personnel actions of a certain kind to the Joint Disciplinary Committee? My remarks are to be understood as applying to these two questions primarily.

Before dealing with the doctrine of acquired contractual rights generally, I should say a few words about the doctrine of acquired contractual rights as the Assembly seems to have construed it, and there was some criticism of the construction which we put on the phrase "minimum guarantee". In our view, and we speak more about this in the brief so I do not have to say very much about it, in our view the Assembly thought that it could not bind a future Assembly but that it nonetheless wanted to give a moral pledge as a guarantee, whatever guarantee they could give, to staff members and I have no doubt, and the General Assembly has quite clearly indicated, that this moral pledge is felt to be of great moral persuasive force and that within the proper limits to which it pertains it will be fully honoured.

/Now, what is

Now, what is the general meaning of the doctrine of acquired contractual rights? There has been a good deal of discussion of this doctrine and it really pertains properly to the frontiers of legal science. It has, or its analogous counterpart has, a peculiar technical meaning in the United States because of the fact that the United States has a written Constitution. I shall deal with that question after I have first discussed the meaning generally.

In countries which do not have written constitutions and in which the doctrine prevails that one legislature cannot bind the next legislature, the doctrine is nonetheless well recognized. First and foremost, it is a doctrine which has a moral sanction. It is exhortatory; it is addressed to the good sense of the legislature itself; it is an exhortation to the legislature not to deprive people of what are essentially property rights by legislation which comes after these property rights have been acquired. There is a second legitimate field of application for this doctrine and that is this: often it is difficult for courts to interpret a legislative enactment -- to interpret a legislative enactment and to deduce from that enactment whether it was meant to apply to situations in which acquired contractual rights would be destroyed. In such cases, courts confronted with this problem have assumed that the legislature would not likely disregard this moral injunction and that, unless the law is clear and compelling, it will be assumed that the legislature meant to exempt from its application cases in which acquired contractual rights would be destroyed by an application. Beyond these limits it cannot have any application in countries which recognize the full power of the legislature to enact laws without any limits on that power, and countries which recognize that one generation and one legislature cannot bind a future generation and a future legislature.

It happens however that in the United States a similar doctrine receives special sanction by the Constitution of the United States and by that of many of our state governments. Now, it is important to note that even in a country like the United States, the doctrine of acquired contractual rights is subject to many limitations which in practice must be administered by the judiciary. First, there is an important qualification which is also recognized in civil law countries in almost the same words, and that is, acquired contractual rights must yield to the so-called police power of the state.

They must yield to the imperative necessities of the general, as distinguished from the individual welfare. Secondly, and more important for the purposes with which we are here concerned, the doctrine of acquired contractual rights is applicable only to substantive rights and not to procedural rights.

First, let me make clear -- perhaps I had better have it translated here so that the remainder will be better understood.

/And the distinction

And the distinction between substantive and procedural laws is not necessarily a distinction between the importance of the laws. It has to be drawn in other terms. To give an example from the criminal law field where ex post facto laws come under the same constitutional inhibition -- or, at least, under a similar constitutional inhibition -- it is well recognized that a criminal may go out and commit a crime, relying on a peculiar rule of evidence, for instance, which will make it impossible for him to be convicted. That, however, has quite consistently been held by the United States courts, not to be a reason why the legislature cannot subsequently modify the law of evidence so that his conviction will be possible.

Similarly, there is no recognized right to any particular procedure; no recognized right to any particular appellate procedure -- all these things have been tampered with and it has been uniformly held that they can be changed and modified after the fact and in spite of the written guarantees of the Constitution Now, here, we deal essentially with procedural problems. I shall not go into the precise juridical situation in connexion with the Wallach Case; I shall discuss it only in so far as the contention is made that he had been, subsequent to his action, been, or -- I'll withdraw that -- I shall discuss it only in so far as the contention is made that, during the time of his tenure, he had been deprived of the intervention of the Joint Disciplinary Committee in connexion with his case. Now, the Joint Disciplinary Committee had only an advisory function; it is only a procedural matter whether the Secretary-General acts with the advice of one body, with the advice of another body, or on his own without any advice.

I want to make it clear in that connexion that certainly the one important right which a staff member possessed; namely, to get a binding adjudication of his rights and duties has not been tampered with -- that right, at all times, existed only before this Tribunal. This is the only organ of the United Nations which serves in a true judicial capacity; it is the only organ of the United Nations which can render binding judgments. Prior to the intervention of this Tribunal, no binding -- as distinguished from advisory opinions -- can be rendered.

Perhaps you will translate this part.

/To turn from a

To turn from a consideration of the peculiar problem arising in connexion with Mr. Wallach, and possibly a problem which has some application to other staff members who conceivably may be held to have been dismissed summarily -- that is, the problem does not really arise if the action is construed as being, as having been taken only under article 9; if it is construed also as possibly having been taken under article 10, a similar problem may arise -- but to turn from these peculiar problems, which in their setting are better described in our brief, to the main current of this argument, we now turn to Regulation 9.1(c).

Now, there again I think the question could be more simply resolved by not dealing with the complicated questions which are raised by the doctrine of acquired rights but by recognizing that it is essentially -- I'll say more than essentially, wholly a procedural modification which the doctrine of acquired rights in all its accepted forms expressly exempts from its operations. We must recognize that the terms of the appointment of temporary staff members contemplate that the relation shall be temporary only. If -- it is up to a staff member, if he is not satisfied with the status of temporary employee, not to accept that status. But once the status of temporary employee is created, we are solely confronted with the question of what the forms are pursuant to which that status shall be terminated: shall there be a reason given, or shall there not be a reason given.

We have been very careful, I believe, in making it quite clear that the absence of a stated reason for a personnel action does not permit the Secretary-General to act for reasons which the Charter or the Regulations make illegal reasons. As the substance of the rights is not really modified by Regulation 9.1(c), the only question is one of what form the termination should take. When I say we have been careful, it wasn't care which was meant to be a concession; in our opinion, such is the applicable law and we could not very well claim for the Secretary-General to possess powers which we believe the law does not grant him. But within the limits of those powers, the precise form which his action should take -- it seems to me -- is not in any way controlled by the doctrine of acquired rights. If it were controlled -- if this precise problem were controlled -- then all the reasons and all the other limitations which I have urged in connexion with the doctrine of acquired rights would come into play here, and in my opinion would still necessitate the upholding of the action taken by the Secretary-General. But I believe that fortunately it is not

necessary to grapple with these admittedly difficult problems of construction, and difficult problems of the national and international standards of acquired rights it raises in connexion with these problems. I repeat, I think the decision can be made on much simpler grounds, namely that this is a procedural problem, and it does not matter that the opponents think that it is a very serious problem. I do not agree with them. But whether it is serious or not, once it is recognized -- as I believe it must be -- that it is only a procedural problem, it falls outside of the realm to which the doctrine can have a legitimate application.

Now, perhaps it will be helpful to the Tribunal if I summed up in a few words what I meant to say in connexion with this problem. First, I meant to establish the point that not all the rights of staff members are contractual; second, that whether they are contractual or not they incorporate as a standard of reference the Regulations and Rules; third, that certainly the Joint Disciplinary Committee was not a substantive right, it was a purely procedural right; fourth, the obligation of the Secretary-General prior to section 9.1(c) to give reasons for termination was not a substantive requirement, it was only a procedural requirement; and that none of the changes about which our opponents complain are of a nature that the doctrine of acquired rights has proper application to them; finally, and seventh, even if it had, it would not be sufficient to modify -- or to warrant reversal of the action taken by the Secretary-General.

In conclusion, I would also like to apologize for having taken so much time. I wish to thank the Tribunal for its patience; it was only because I believe that the Tribunal looks upon these problems as central problems arising in these cases, and as important problems, that I have taken the time to give what I believe to be a fuller explanation of our position -- and I certainly hope that I have not abused the patience of the Tribunal. Thank you.

/The PRESIDENT

The PRESIDENT (interpretation from French): Now, gentlemen, we have the views of both parties on all the questions propounded by the Tribunal. I thank the parties for their explanations which will no doubt facilitate the study of these matters by members of the Tribunal. I think that this is all the information that is to be submitted and that we therefore can close this phase of our proceedings.

I would now like to discuss the forthcoming oral proceedings, properly so-called, and I would like to know from the Applicants how long they will need -- how much time they would need in the course of those oral proceedings.

Mr. DONNER (Counsel for Applicants): Our present estimate, Madam Chairman, is about ten days for all of the cases.

The PRESIDENT (interpretation from French): You intend speaking during ten days?

Mr. DONNER (Counsel for Applicants): I do not intend myself to speak for ten days, but myself, my colleagues and those witnesses whose testimony we intend to adduce, will take about ten days.

The PRESIDENT (interpretation from French): That would be ten working days, or ten days in all?

Mr. DONNER (Counsel for Applicants): Ten working days.

/The PRESIDENT

The PRESIDENT (interpretation from French): That would be two weeks practically during which you would speak. How much time will the Counsel for the Respondent require?

Mr. SCHACHNER (Counsel for the Respondent): I take it that Madam President understands that the position of the defendant or the Respondent is somewhat dependent upon that of the Applicants. Before I give my reply, I should like to ask for a point of information. I believe the Applicants speak about the production of further witnesses. It was my impression that witnesses are to be produced in these proceedings and that the oral proceedings properly speaking will not deal with the introduction of further proof but only with the making of arguments, but maybe I am mistaken about that. Perhaps I can be enlightened.

The PRESIDENT (interpretation from French): I must remind the parties of the existence of a resolution adopted in the plenary session on 10 December 1952 by the Tribunal at a time when the Tribunal already had a fair amount of information concerning these cases.

Here are some of the conclusions that I wish to recall:

"The Tribunal holds the view that its experience has shown no particular value in representation by counsel at oral hearings. Indeed, the Tribunal on its experience to date is not convinced that the average case receives any benefit by oral hearings of any kind.

"There has been no use of witnesses during these three years and it is difficult for the Tribunal to visualize many cases in which the calling of witnesses would be likely to be of value.

"The Tribunal would like to indicate that it would be quite satisfied at any time to consider cases on documents presented only."

We also have laid down some rules as to the material arrangements for oral proceedings for the future and these appear on page 3:

"When there is to be an oral hearing, the Tribunal will normally expect to complete such a hearing during one day in accordance with the following programme:

"(i) 10:30 a.m. The Applicant's case to be stated and to be completed within 2 1/2 hours.

"(ii) The Respondent's case to be opened at 2:30 p.m. and to last for not more than 2 1/2 hours.

"(iii) The Applicant to be allowed a further half-hour for observations on any new matter raised in the Respondent's reply. (But the Applicant not to be allowed to make submissions merely restating the original statement.)"

/These are rules

These are rules which, as you know, have been adopted by the Tribunal in plenary session. Now, up to the present, the parties have put in a considerable amount of work. They have prepared excellent briefs and very detailed individual files which are in the hands of the members of the Tribunal. Furthermore, we have the records of these last few meetings where all the major points of law at issue were discussed at some length and these records will also, of course, be in the hands of the members of the Tribunal.

Therefore, I would like to ask the parties to think, to ponder over the state of these cases before the Tribunal and I would urge them not to make a mistake to repeat, in any oral presentations which they wish to make, what has already been stated here or in the written documents at the disposal of the Tribunal.

I know the reactions of the members of the Tribunal: some are patient, some are not quite so patient, and when they feel that what is being stated is somewhat repetitious, I very promptly get a little note asking me to make use of my gavel. I wish to inform you of this attitude of the members of the Tribunal which they have adopted on several occasions in the past. And, it would not be, I submit, in the interest of the parties to place the President in the situation where he would have to fight against his colleagues on the question of reducing oratory, in view especially of the very full and complete written documentation already available.

This does not mean that I wish to go back in any way on the decision which has been made that oral proceedings should take place. This decision has been made in consultation with my colleagues on the Tribunal in view of the fact that we felt it was useful to have a sort of general, well-rounded, exposition of these cases in an oral debate. But, it would be entirely pointless to repeat what has already been said in hours on which I have not kept statistics but which must be rather numerous on, for instance, such points as the doctrine of acquired rights or on the interpretation of Rule 9.1(c). I think that would be somewhat more than the benefit that members of the Tribunal expect from those oral proceedings. Therefore, I would request the parties to think this matter over now, during some ten minutes after this translation, so that we might have discussed all this by 1 o'clock. If they need more time, of course we could come back to these points on Tuesday and the final decision would be rendered later on. We shall recess until 12.45 to allow for discussion.

The meeting recessed at 12.35 p.m. and was resumed at 1 p.m.

The PRESIDENT (interpretation from French): Gentlemen, we had a discussion with counsel for the Applicants and I think we can agree on the following arrangements. First of all, those of the parties who will not be able to appear personally for the Tribunal may submit written statements concerning their own individual position, on the condition however that these should not merely repeat what is already included in their individual statements of claims which are already on file. Those statements, of course, will be communicated to the Respondent under the rules of the Tribunal.

A second point concerns the oral proceedings. I think that the Applicants have appreciated the weight of the considerations I put before them a little while ago and it is felt that probably five working days would be sufficient for their statements and the reply by the Respondent. I think that those arrangements would enable the Tribunal to work under satisfactory conditions. Naturally, if it should appear in the course of these proceedings that more questions should be asked or raised the Tribunal reserves the right to do so and the indications as to time, which I gave, are not in any sense binding time limits. Therefore I would think that if these oral proceedings can start on a Monday--I have in mind the date of Monday, 13 July -- we could go on through Friday and review, under those conditions, all the present cases. Such are my suggestions. I do not require an immediate answer. I would rather that you thought it over and consult, possibly, your clients and you will tell me on Tuesday if those arrangements appear satisfactory to you -- and that goes also, naturally,for the counsel for the Respondent. And subject to that the meeting is now adjourned.

We will meet on Tuesday at 10 o'clock.

The meeting rose at 1.05 p.m.

UNITED NATIONS

ADMINISTRATIVE TRIBUNAL

LIMITED

AT/PV.29
21 April 1953

ENGLISH

UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Preliminary Proceedings -- Cases 26 to 45

VERBATIM RECORD OF THE SEVENTH MEETING

(Transcription from the sound track)

Held at Headquarters, New York,
on Tuesday, 21 April 1953, at 10 a.m.

| | |
|---|---|
| President: | Mme Paul BASTID |
| Vice-President: | Mr. Sture PETREN |
| Executive Secretary of the Administrative Tribunal: | Mr. Mani SANASEN |

53-11089

The PRESIDENT (interpretation from French): The Tribunal is now in session.

Now, gentlemen, since the parties are here, I would like to take this opportunity to say a few words about the exact date of the full-dress meeting of the Tribunal. Earlier in these proceedings I had mentioned the date of 13 July. Now, judging from some information I have received, it might perhaps prove advisable to meet one week earlier, in view of certain documents which have to be prepared for the General Assembly.

Now, I cannot as yet give a firm commitment on that matter but if the date of 6 July were to be appointed instead of the 13th, you will be advised in the next few days. I must, first of all, get in touch with my colleagues on the Tribunal to find out whether that new date would be convenient to them; that might take a few days. Therefore, you can plan right now for a meeting to be held either on 6 or 13 July and, which of these dates will finally be selected, you will be informed very soon.

May I point out also that I intend to hear the oral presentations which are to be made on the very first day of the scheduled meetings; that is, either on the 6th or on the 13th of July. Applicants will therefore speak first on either of these two dates and on a time schedule similar to the one you know about.

Now, in the case of the applicants who will not make any oral presentations, I have already indicated that it will be open to them to submit supplementary written statements concerning the reply of the Administration and, of course, only on the new points that may have been raised in that reply.

Now, planning on the basis of a meeting to be held on 6 July, it would be convenient if those written statements were to be handed in by 20 May -- that would leave one full month for the preparation of such statements and that would also allow for some time for the members of the Tribunal to acquaint themselves with them.

We shall now hear the applicants who have requested to be heard and to submit oral information: they are Miss Crawford and Mr. Kaplan. They are the only ones who have asked to be so heard in these preliminary proceedings under rule 9, paragraph 3, of the rules of procedure of the Tribunal.

I first call upon Miss Crawford.

Mr. WEINBERGER (Counsel for Applicants): Madam President, unless it is material to you, we would prefer -- Mr. Donner and I -- that Mr. Kaplan make his statement first.

The PRESIDENT (interpretation from French): Very well.

Mr. DONNER (Counsel for Applicants): Where would you like Mr. Kaplan to sit?

The PRESIDENT (interpretation from French): It is immaterial. You may sit wherever you prefer.

Mr. KAPLAN (Applicant): In the list of questions put to the Respondent by this Tribunal there is included Question XV: Does the Respondent accept the statement attributed to him that the dismissal of Mr. Kaplan was based on "possible embarrassment arising from future publicity"?

Respondent's written reply, after stating that the question arose already on my appeal before the Joint Appeals Board, merely quotes the memorandum prepared by the Appeals Board purporting to summarize the substance of statements by Mr. Owen at a hearing before the Board at which hearing, by express decision of the Board, neither the Respondent nor I were present. The oral statement added by Counsel on behalf of Respondent, as I understand it, is limited to calling attention to the fact that the Board's memorandum states that Mr. Owen did not know the reason for my dismissal. When this Tribunal prepared its question to the Respondent, it already had before it my general statement in my application and the Board's memorandum. The response therefore adds nothing to the information before the Tribunal. It neither accepts nor directly rejects my statement of the actual reason. Since it is clear to me that the Secretary-General's fears of the pressures and threats of the Grand Jury and the McCarran Committee were first definitely revealed in his handling of my case, I think it is incumbent upon me to relate the following facts.

I believe it will help the Tribunal to arrive at their own judgment as to whether I am justified in making my assertion of the actual reason and as to whether it is the actual reason.

On 28 March 1952 I reported to United Nations authorities -- Mr. Owen and Mr. Feller -- on my appearance the previous afternoon before a U.S. Federal Grand Jury. I indicated that it was a special Grand Jury investigating subversive activities and that the subpoena/in response to which I appeared referred to a conspiracy section of a criminal statute relating to espionage; that I had at the start of the proceedings been asked questions about the United Nations which I did not believe I was authorized to answer under the staff rules approved by the General Assembly; that I had objected to these questions, explaining the basis of my objection and requesting/an opportunity to consult the United Nations authority, but had in each case been instructed to answer; that I did so as long as I felt I could respond to the questions in terms that did not violate the staff rules, but when it appeared to me that I was clearly being

driven to a violation of the staff rules I refused to answer, invoking my privilege under the United States Constitution. I reported in some detail on the character of questions addressed to me and on my answers. I told them that, following upon the question: "Do you know Mr. Owen Lattimore?" to which I answered in the negative, I was asked whether I had recommended him for his appointment to the technical assistance mission of the United Nations, to which I objected, and when instructed to answer, invoked the Fifth Amendment for my refusal. I reported in equal detail on the personal and political questions which had ensued before the Grand Jury, including questions relating to espionage and to a Miss Bentley and Mr. Chambers who, in public testimony about espionage activities about four years ago, had made certain allegations against me. I also refused to answer these questions, relying on my privilege under the United States Constitution, although about five years ago, before a similar Grand Jury, I had answered all questions relating to espionage by categorical denial of any knowledge of or participation in espionage activities. And four years ago I offered in writing to appear before the U.S. House Committee on Un-American Activities when Bentley and Chambers testified before that Committee and made their allegations concerning me.

I also stated to United Nations authorities that with respect to a number of the questions I refused to answer on 27 March I had so refused after I had requested and been denied an opportunity to consult Counsel before responding, and that at the conclusion of the proceeding it was clearly indicated to me that I was being threatened by the Grand Jury authorities with the loss of my employment at the United Nations for my refusal to answer the questions. The latter possibility was curtly and vigorously dismissed by the United Nations authorities, and I was told that the United Nations was concerned solely with the limits of my testimony about United Nations affairs and that my answers to other questions were my own business.

In the course of the discussion on 28 March, it was recalled that I had brought to the attention of the United Nations authorities in 1948--at the time when it was published and came to my knowledge--the testimony concerning me and that I had also then advised the United Nations authorities of my letter to the House Committee offering to appear. In this connexion, I stated on 28 March 1952 that I had insisted on bringing the matter to the attention of

the United Nations authorities in writing because I felt a responsibility to the United Nations but I also wished to reserve complete freedom of action on my own behalf; that my action was likely to give rise to publicity concerning my employment at the United Nations and I felt the appropriate United Nations authorities should know about it in order to consider any interest the United Nations may have in the matter. I also stated that the House Committee never responded to my letter and that I knew of no other allegations against me.

I wish to add at this point that no concern on the part of the United Nations about the matter was ever indicated to me by any United Nations authority after I brought it to their attention four years ago. Nor has any United Nations authority ever raised any question reflecting adversely on my work, my services to the United Nations or my conduct in or outside the United Nations. On the contrary, my superiors, my colleagues and my associates have at all times indicated their highest regard for my work and for my services to the United Nations.

On 2 April I was informed on behalf of the United Nations authority that one of my superiors had appeared before the Federal Grand Jury the previous day in response to a subpoena, and in the course of the proceedings certain of the questions that I had been asked on 27 March about which I had already reported to United Nations authorities on 28 March, and my refusal to answer, were disclosed to him; that he had been asked whether he would fire me and whether he would report the matter to me and to the United Nations authorities and that, in response to his question as to the secrecy of grand Jury proceedings, he had been authorized to report it. In other words, notwithstanding the obligation specifically imposed on the United States Attorney and the Grand Jurors by statute and by their oaths of office to safeguard the secrecy of the proceedings, they not only disclosed my testimony to another witness but in effect directed him to disclose it to others. My own prior disclosure of the same testimony to the same United Nations authorities is of course not barred by any law.

On 17 April I was told by the Assistant Secretary-General for Economic Affairs, Mr. Owen, that he was instructed by the Secretary-General to notify me that the Secretary-General had decided the continuation of my services was not in the interests of the United Nations, and accordingly the Secretary-General proposed to terminate my appointment, pursuant to his authority under rule 9.1(c) of the Staff Regulations, and pay me the indemnities to which I was thereby entitled. As an alternative, I could resign and receive the same indemnities.

Further, he, Mr. Owen, was authorized to give me a letter attesting to my professional competence and the satisfactory performance of my services. Mr. Owen stated that he would be glad to give me such a letter, having had occasion to observe personally some of my work, and he assured me he held my work in high esteem.

After Mr. Owen confirmed the fact that the decision arose out of circumstances relating to my recent appearance before the Grand Jury, I indicated I considered the action unfair and seriously prejudicial to me, and I asked whether I could talk with the Secretary-General about it. I was told that I could of course make the request, but he did not think the Secretary-General would agree to it. I then said that I wanted time to think about the alternatives presented to me. Mr. Owen indicated that he attached very much importance to his authorization to give me a letter of recommendation, since he hoped it would help to salvage my professional career and it would be unfair to ruin it by the termination. I then told Mr. Owen that I was not at this time concerned with salvaging my professional career but solely with the implications that may be drawn by United States authorities and much of the Press and accepted by many people, from the Secretary-General's decision in its bearing on allegations made against me and on my conduct.

From then on, the discussions of the possibility of my resigning as well as my own consideration of it, were conducted in the latter context. I asked whether I could have until the following Monday to think it over. Mr. Owen replied by indicating there was extreme urgency to take immediate action. I stated I was not seeking delay, but the next day was Friday and I would give my decision then if I must, but that the considerations relating to resigning involved complications and I would feel better satisfied that I had given them adequate thought if I had the week-end to think it over. We agreed that I would notify Mr. Owen of my decision on Monday morning.

/In the following days

In the following days there were a number of conversations with Mr. Owen. They were concerned with negotiations by Mr. Owen on behalf of the Secretary-General and myself on my own behalf. Since the conversations were rather extensive I believe the Tribunal's interest in brevity at this time would be best served by relating relevant facts to my summary statement in the application rather than sticking to a purely narrative statement. Also in the interest of brevity I will not read the statements I made in the application since they are a matter of record before the Tribunal and also appear on pages 7 and 8 of the Applicants' brief.

The first of these statements deals with my competence, efficiency and integrity. On this point the Tribunal has a copy of the letter the Secretary-General authorized Mr. Owen to give me and it has copies of the periodic reports. I will only add what I proposed to the Joint Appeals Board, that if any member, then of the Board but I now extend it to the Tribunal, wishes to do so I would welcome it if the Tribunal called any of my superiors, colleagues or associates to testify or wished to examine any of the reports or memoranda for which I was responsible or any of the comments on any of them. My second statement asserts that the decision to dismiss me was not based upon any facts or adverse judgment bearing upon allegations against me. My statement is substantially the same as in my letter of 7 May to the Secretary-General, which letter Mr. Owen undertook to deliver. The Secretary-General's letter of 14 May was in reply to my letter of 7 May. On Monday, 21 May -- April rather -- in the course of discussion of my draft letter of resignation I pointed out to Mr. Owen that when on the previous Thursday I was informed of the Secretary-General's decision I had immediately asked whether I could talk with him having in mind that I wanted to know the basis of his decision and particularly whether it was based upon any facts bearing upon the allegations made against me or upon my conduct in meeting them or in any other way of concern to United Nations authorities; that if there were any such facts I wanted to know about them and if there were any judgment adverse to me I wanted to know about it and the basis for it. But if there were neither facts nor judgment adverse to me I would be prepared to resign if by so doing I obtained confirmation of that situation.

I was then explicitly assured that the Secretary-General's decision was not based upon any facts or judgment adverse to me, no such facts being available and no such judgment having been made. The statement was added however that the Secretary-General has confidential sources of information and may have information of which Mr. Owen is not aware. But Mr. Owen did not believe that there was any such information.

On 23 April, discussing changes that the Secretary-General proposed I make in my letter and replying to my objections to the proposed deletion of the reference to the Secretary-General's prior decision to dismiss me and the consequent deletion of the reason for the decision, Mr. Owen called attention to a proposal for an addition to the letter of acceptance. He then added that he could now say categorically what he could only say he believed the other day that there is no information available and the Secretary-General has no information on the base of which to form a judgment as to the merits of either the allegations made against me or as to my conduct in meeting them. This much at least he said he had definitely ascertained as a result of the discussions of the letters the other day.

My third statement asserts that my refusal to answer questions before United States authorities was disclaimed as a reason for my dismissal. During the discussion on 23 April I also indicated I was concerned as to whether my refusal to answer certain questions may not be attributed as the reason for the Secretary-General's decision, pointing out that when I reported the apparent threat of the Grand Jury proceeding, that I would lose my job for refusing to answer questions, that possibility was dismissed with a wave of the arm and an explanation indicating it was impossible. Yet this is exactly what has happened after Grand Jury authorities disclosed my refusal to answer questions in violation of the statute safeguarding the secrecy of their proceedings and specifically enjoining them from disclosing testimony.

I observed there has been a studied attempt which anyone can recognize on the part of large sections of the press as well as certain United States Governmental authorities to stamp reliance on constitutional grounds in refusing to answer questions as itself incriminating and that this presumably was the premise of the Federal Grand Jury authorities who illegally disclosed my testimony.

Mr. Owen replied that there has never been any disposition that way in the United Nations and it was not so regarded; that there has been no suggestion of it anywhere in the United Nations in any of the discussions.

My last statement asserts that the actual reason for my dismissal was the threat of possible embarrassment to the Secretary-General through publicity that might arise out of the proceedings by United States authorities against me. On Friday, 18 April -- that is, the morning after I had been notified of the Secretary-General's decision -- Mr. Owen asked to see me and then told me he had been thinking about the matter and had a suggestion to make which I may want to consider or dismiss. He said that the Secretary-General bore me no ill will and that the best way to describe the situation in which he finds himself is one of embarrassment; that it occurred to Mr. Owen that if I would offer a resignation on that ground he expected he could work out a satisfactory acceptance. I thanked Mr. Owen for his concern and told him I had assumed a resignation would involve an exchange of letters. I observed that in the absence of any indication as to the basis of the Secretary-General's decision, I found it difficult to set forth a basis in my resignation without either being presumptuous with respect to the Secretary-General's considerations or leaving open to inference implications for the Secretary-General's decision adverse to me. The alternative of resigning was therefore likely to fall for lack of the means for carrying it out.

I said I recognized that I could resign by writing a simple letter offering to resign without giving reasons and receiving a letter of acceptance, but I would not do that. I felt I must include in my letter appropriate reference to the circumstances of my resignation and a statement of the facts which I believe indicate I have at all times adequately discharged my responsibilities to the United States authorities and to the United Nations in connexion with the situation. I added that the letter of acceptance would have to provide a satisfactory confirmation. I expressed the belief that the suggestion was likely to be helpful in formulating a letter of resignation since I had in fact insisted four years ago on bringing the testimony concerning me to the attention of the United Nations authorities because I felt they may be concerned about the publicity that was likely to arise from the action I contemplated taking of offering to appear before the Congressional Committee.

All of the discussions which followed were within the context of my assumption, explicitly repeated at times, that the actual reason was the threat of embarrassment arising out of publicity that might arise.

On Monday morning, 21 April, I presented a draft letter of resignation to Mr. Owen. As a result of the discussion of this draft only two consequential changes were made. One, my statement relating to allegations made against me and my conduct in connexion with them was made into an attached memorandum and the letter of resignation was revised by me taking this separation into account; and two, a reference in the letter to embarrassment to the United Nations and to the Secretary-General which may be entailed in the possible continuation of the inquiry by United States authorities was changed to possible embarrassment, in order to take into account Mr. Owen's comment that all the talk had been about possible embarrassment. Nobody now feels embarrassed and he had heard no suggestion that the Secretary-General now feels embarrassed by the situation. The resignation was therefore offered on the ground that the possibile continuation of the inquiry by United States authorities may entail embarrassment to the United Nations and the Secretary-General, with the understanding that for the latter reason the Secretary-General is of the opinion that my continued employment in the United Nations is now not in the best interests of the United Nations.

On 22 April copies of the revised draft of my letter and attached memorandum were ready, together with the draft letter of acceptance prepared for the signature of the Secretary-General and satisfactory to me. In connexion with the letter I indicated the parts which I considered essential and the parts which might be retained or deleted at the option of the Secretary-General. On 23 April Mr. Owen notified me that the Secretary-General was well enough disposed that he would not move in my case without legal opinion, that he had such legal opinion and it was reflected in the changes proposed.

/The considerations

The considerations determining the proposed changes were indicated to be solely of a legal character and the legal consideration emphasized was that the Secretary-General sets great store by his authority to give no reason for a termination and does not want to do anything abandoning it. The changes proposed in my letter of resignation were the deletion of all reference to the Secretary-General having formed an opinion or made a decision concerning the continuation of my services and of any reference to the reason of possible embarrassment attributable to him.

In commenting, I recalled that Mr. Owen had, on the preceding Thursday, read to me a statement that he was instructed by the Secretary-General to notify me that the Secretary-General had formed an opinion and had made a decision to terminate my services. I maintained this was an irrevocable part of the situation and that the proposed deletion in effect called upon me to assume responsibility for evading the situation but I did not want to do so. It was in the ensuing discussion that the aforementioned categorical assurances were given. Also, possible embarrassment arising out of future publicity was definitely and explicitly the only basis of the Secretary-General's decision under consideration in this discussion. I was told the Secretary-General would not directly or by implication give the reason and that his legal adviser foresees the possibility of some action taking place which might bring it to public light. I pointed out that the whole purpose of the exchange of letters and of my consideration of the alternative of resigning was to cover exactly that contingency.

I think it is unnecessary for me at this time to detain this Tribunal with any further recital of the facts supporting the general assertions in my application.

With respect to textual accommodations which Mr. Owen proposed I consider on my behalf, I indicated I had no confidence I could be satisfied in the light of the fact that the Secretary-General objected to any reference to his prior decision and even to an implication of the actual reason. I acknowledged that the proof of the matter would be in the drafting and I therefore wanted time to consider the proposal. On Thursday morning, 24 April, I told Mr. Owen I had come to the conclusion that under the conditions given there could be no

suitable textual accommodation and I could not resign. The conditions required m to assume responsibility for the Secretary-General's reason and take the responsibility away from him which I could not agree to do.

On 29 April I received a notice of termination dated 28 April. On 7 May I gave Mr. Owen my letter of that date to the Secretary-General which Mr. Owen had undertaken to deliver, and on 14 May I received the Secretary-General's reply. All three of these documents are among the documents submitted in support of my appeal.

Mr. DONNER (Counsel for Applicants): That is the conclusion of Mr. Kaplan's statement.

/The PRESIDENT

The PRESIDENT (interpretation from French): I would like to ask the Counsel for the Respondent whether he has any supplementary information to submit with reference to this latter statement.

Mr. SCHACHNER (Counsel for the Respondent): The Respondent has no information to add at this time. I should like the Tribunal to consider putting to the Applicant the following question, if I may: Do you think it possible that the Secretary-General, in terminating your contract, acted on confidential information that you were so situated that you would later consider it necessary to refuse answering one hundred and nineteen questions -- including the question: are you a Soviet espionage agent now? -- which were asked by the Senate Sub-Committee, on the ground that the answers might tend to incriminate you?

/Mr. DONNER

Mr. DONNER (Counsel for Applicants): This is a very devious and tendentious way of making an argument to the Tribunal, rather than seeking light on the issue which is before the Tribunal; point 1. Point 2: apart from this attempt to arouse prejudice, it is a completely meaningless question. Does the Secretary-General now contend that he did not terminate Mr. Kaplan because of anything other than the fact that sometime in the future he might plead the privilege against self-incrimination? Was this an act of prophecy on the part of the Secretary-General and is that why he terminated Mr. Kaplan -- because he, at that time, made a prediction that Mr. Kaplan would, at some time in the future, plead the privilege against self-incrimination?

And, finally, if the Secretary-General wanted, in good faith, to meet the issue which was posed by Mr. Kaplan, he would produce here the confidential information that he claims he has with respect to Mr. Kaplan, which induced him at that time to terminate Mr. Kaplan. And I say that, as the question stands, not only is it improper to ask it, but it should be stricken from the record.

The PRESIDENT (interpretation from French): I would like personally to ask a question of Mr. Kaplan. You said in your statement a while ago that you drew the attention of the United Nations authorities, four years ago, on the possible difficulties arising out of certain accusations that had been made against you. Did you draw the attention of the United Nations authorities in writing or orally, and to what authority precisely did you give those indications?

Furthermore, Counsel for the Respondent has requested me to ask a certain question of Mr. Kaplan. I would like to say this to him -- to Mr. Kaplan -- if he has any information to supply with reference to the question asked, I am ready to hear him. If, however, he feels that he has no information to supply, his silence will be quite normal.

I will now recess the Tribunal for a few minutes in order to allow Mr. Kaplan some time for thinking this over. We shall resume the session at 11.35.

Mr. KAPLAN (Applicant): I would prefer to answer the question immediately.

I should like first, if I may, to comment on the question propounded by Counsel for Respondent which I understand is appropriate for me to comment on since it is part of the record and it has been mentioned in the second part of the statement by the President.

The question asks me to speculate about possibilities. Now, I have two points to make about the question, endorsing, first of all, what my Counsel has already said. The Secretary-General knew that I was standing on my Constitutional privilege in refusing to answer questions at the time that I was dismissed. It was specifically disclaimed as a reason for my dismissal and the interpretation that there is any suspicion about me, because of reliance on the Constitution, was specifically disclaimed by Mr. Owen. This question asks me in the form of speculation, in one sense, whether the Secretary-General did know that I was relying on my Constitutional privilege. And, of course, he knew; I am satisfied that my report to Mr. Owen and to Mr. Feller was transmitted to the Secretary-General.

The second part of that question to my mind is nothing more than an example of the kind of questions that can be formulated, apparently by Counsel for Respondent as well as by the McCarran Committee, with full knowledge that I was then at that hearing -- in which 119 questions are cited -- relying on my Constitutional privilege and the question was asked, with full knowledge by the Committee, that I would not answer it for that reason.

I gather from the President's question that I, as well as Respondent's Counsel, am called upon now to present any information I may have with respect to that question. I cannot possibly have any information with respect to that question, other than the information which is a matter of public record of the setting and circumstances under which it was posed to me, with full knowledge that I would not answer.

The President has asked another question and I take that the reference to my report at the time that the allegations were made public to the United Nations on these allegations and my initiative in bringing it to the attention of the United Nations. The question, as I recall it, is: To whom did I report, did I do it orally or in writing? The facts are as follows. At the time that this happened, I did not know my name was mentioned until it appeared in the Press, together with an excerpt of what was said about me.

/I brought that to the

I brought that to the attention of the then Acting Assistant Secretary-General, a Mr. Goldet, Mr. Owen being in Geneva or Paris for a session of one of the United Nations bodies. I told him about this and he persisted in treating it rather lightly. I insisted, however, that I felt the responsibility, as I described it briefly in my statement, and was of the opinion that I should put it down in writing. I emphasized the fact that I feel I have certain personal responsibilities in the U.S. and that I wanted to be free to take such action as I saw fit; that I thought that at the very least the United Nations ought to be informed about that in advance. After some considerable discussion of this, he finally agreed that it would be satisfactory for me to put it in writing and he would transmit it. I did put it in writing and it was transmitted, and a memorandum is available in the files of the United Nations.

The PRESIDENT (interpretation from French): I would request Counsel for the Respondent to discover and supply to the Tribunal this memorandum dealing with the 1948 accusations.

Mr. SCHACHNER (Counsel for the Respondent): It will be transmitted as soon as it can be found in sufficient number of copies for all the members of the Tribunal and we will furnish it to the Applicant.

The PRESIDENT (interpretation from French): Thank you.

I now call on Miss Crawford to submit the information as announced by her Counsel.

Mr. WEINBERGER (Counsel for Applicant ): Miss Crawford, did you testify before the McCarran Committee on 15 October 1952?

Miss CRAWFORD (Applicant): Yes, I did.

Mr. WEINBERGER (Counsel for Applicant ): Did you, approximately a half hour earlier that same day, testify in executive session of the McCarran Committee?

Miss CRAWFORD (Applicant): I did.

Mr. WEINBERGER (Counsel for Applicant): Did you in the intervening time consult with Counsel or with anyone?

Miss CRAWFORD (Applicant): No, I had no opportunity.

Mr. WEINBERGER (Counsel for Applicant): Was Senator O'Conor . the Sub-Committee sitting at both the executive session and the public session of 15 October 1952?

Miss CRAWFORD (Applicant): Yes.

Mr. WEINBERGER (Counsel for Applicant): Was Robert Morris the Counsel for the Committee at both the executive session and the public session?

Miss CRAWFORD (Applicant): Yes.

Mr. WEINBERGER (Counsel for Applicant): The transcript of the public session shows that you were asked by Mr. Morris who invited you to join the Communist Party and that you answered "That I would refuse to answer under the immunity offered under the Fifth Amendment". Miss Crawford, in substance were you asked that same question at the executive session?

Miss CRAWFORD (Applicant): No, I was not.

Mr. WEINBERGER (Counsel for Applicant): The transcript shows that at the public session you were asked -- by Mr. Morris: Did you belong to a particular unit of the Communist Party after you joined the Communist Party, and that you answered: "I must refuse to answer again under the protection offered me by the Fifth Amendment of the Constitution". Were you in substance asked that question at the executive session?

Miss CRAWFORD (Applicant): Yes, I was asked that.

/Mr. WEINBERGER

Mr. WEINBERGER (Counsel for Applicant): Did you answer that question at the executive session?

Miss CRAWFORD (Applicant): Yes.

Mr. WEINBERGER (Counsel for Applicant): The transcript shows that you were asked at the public session of the McCarran Committee "Did you ever have meetings in your home, Communist Party meetings in your home" and that your answer was "I am sorry, I must refuse to answer under the protection offered me by the Fifth Amendment of the Constitution." Were you in substance asked this question at the executive session of the McCarran Committee.

Miss CRAWFORD (Applicant): Yes.

Mr. WEINBERGER (Counsel for Applicant): Did you answer it?

Miss CRAWFORD (Applicant): Yes, I answered it.

Mr. WEINBERGER (Counsel for Applicant ): Did you refuse to answer any questions in the executive session?

Miss CRAWFORD (Applicant): My recollection is that there was not any need for me to refuse to answer any of the questions and that I answered them all. This is the executive session? Yes, the executive session.

Mr. WEINBERGER (Counsel for Applicant ): Then the one question that you did not answer, either before the executive session or in the public session, was who invited you to join the Communist Party, is that correct?

Miss CRAWFORD (Applicant): That is correct.

Mr. WEINBERGER (Counsel for Applicant ): Were you directed by Senator O'Conor, the Chairman of the meeting, to answer these three questions that you refused to answer at the public meeting?

Miss CRAWFORD (Applicant): No, I was not.

Mr. WEINBERGER (Counsel for the Applicants): I draw to your attention Madam President, the statement by Senator O'Conor on page 4 of the typewritten transcript which is annexed to Miss Crawford's application in which he says -- and this is directly following the refusal to answer the first question:

"Senator O'Conor: I would rather not express an opinion and to have it reflect on the testimony at this juncture. You will undoubtedly" -- referring to Mr. Morris --

"pursue the matter further and I think it will be timely to pass on it then."

Madam President, I draw to your attention in document 12 annexed to the application, on page 77, column 1, the following two sentences. This is in the article "I Have a Thing to Tell You" written by this applicant and published in that document in its issue of 24 January 1953.

"The McCarran Committee asked who had invited me to join the Communist Party. The truth is that I invited myself, moved as I was by anger and frustration at the things that were happening."

Miss Crawford, I draw your attention, in document 11, being a copy of the letter you addressed on 17 December 1952 to Mr. E. J. R. Heyward, Deputy Director of UNICEF, to paragraph 3 on page 2.

"As for the three questions I did not answer, questions relating to my membership in the Communist Party seventeen years ago, I will explain to the Secretary-General or his legal representative why I was completely within my rights in refusing to answer. It will then be understood that I am not withholding information of any importance except to myself. The questions are: Who invited me to join the Communist Party, did I belong to a unit of the Party, and were any meetings held in my home."

Miss Crawford, did you receive any response from the Secretary-General or anyone else in the Administration to this document 11 -- to this part of document 11?

Miss CRAWFORD (Applicant): No, I was never given an opportunity.

Mr. WEINBERGER (Counsel for Applicants): Madam President, I wish to read into the record a short part of the statement of the delegate from Canada at the 418th meeting. He said:

> "Our present view is that it is not just or reasonable that an employee should be dismissed on the sole ground of having refused to answer questions the answers to which might serve to incriminate him. We agree with several opinions which have been expressed that such refusal should cause the Secretary-General to institute inquiries. It would, for example, seem reasonable that such a staff member should be asked to appear before the Secretary-General."

And at the 417th meeting the delegate from Australia said -- and I will read a short part of what he said: "It is, for example, not unknown for a witness to seek to claim the privilege not because he fears the answers to the specific questions directed to establish the major allegations of, say 'subversive activity', but because he fears, whether there be ground for the apprehension or not, that the real purpose of his examination is to lay the grounds for a possible charge of purjury."

And finally, I would like to read a part of the statement of the delegate for Norway at the 416th meeting, and while I do not want to read into the words of the delegate, it seems to me that the facts that he states here, without name, are particularly applicable to the circumstances of this Applicant.

/The statement is:

The statement is:

"The effect must be determined by a full evaluation of each individual case. This determination will, of course, depend upon a great many factors and I shall mention only a few of them. Did the staff member stand on his constitutional rights in a court of law where he was protected by all the rules ensuring him due process of law or was he questioned by an investigating committee functioning in an inquisitorial manner without benefit of advance preparation for the questions put to him and without legal counsel? Was the committee bound by acceptable laws of evidence? Were the questions put to the witness of a concrete and limited nature and so phrased that the answers might result in criminal prosecution or were the questions vague and general in nature and did they deal with facts which were not in themselves of a criminal nature, for instance the political opinions and beliefs of the witness?"

Miss Crawford would like to make a brief statement, Madam President, on her own behalf.

Miss CRAWFORD (Applicant): Madam President, I asked for this opportunity to testify on my own behalf about those three questions that I refused to answer before the McCarran Committee. I am grateful for this opportunity and I shall be very brief. It will take only a few minutes and I will try to keep myself within the limitations that you have set.

I am greatly disturbed, in connexion with this, about a paragraph that is in the Secretary-General's brief on page 73, and I will read the sentence or two from it that bothers me greatly:

"The only theory on which it is possible to uphold the legitimacy of the Applicant's claim of privilege is that if she had answered the questions she would in some way have furnished clues tending to show that she was guilty of criminal activities within the three years next preceding her claim." That is, as I take it, within these last three years. "Unfortunately, the claim of privilege gives rise to that inference."

Now, I do not fully understand or pretend to understand the legal legal implications of that whole paragraph but I do know that as far as I am concerned what it is saying is that perhaps the inference is there that the reason I did not answer is that I was trying to cover up some criminal activities in recent years. Such is the farthest thing possible from the truth and if the Secretary-General had given me the opportunity I sought to tell him why I had not answered the questions, then I am quite sure that paragraph would never have been in this brief. With your permission, I shall now try to explain to you what I would have told the Secretary-General.

The first thing I would have told him,or told anyone about what we do when we are asked these questions and we invoke the Fifth Amendment, is that we cannot separate our motives. That is something we cannot do in this situation. As the testimony has brought out, I had no legal advice. I think it is very fortunate now that I did not have legal advice -- I am sorry. If I had had, I probably would not have done what I did, but I did not know the limitations on the Fifth Amendment when I invoked it. All I knew about the Fifth Amendment was what it really says and it says that you cannot be made to be a witness against yourself and it seems to me that if I had answered a question naming a person that I knew to be innocent that I would indeed have been bearing witness against myself.

Now, the people I knew in the Communist Party for the most part were honest, upright people. They were my friends and they were my associates. The Communist Party was a legal entity -- it still is -- and we were operating in a completely legal framework so I had no subversive activities to report even if I had wanted to report any and,that being the case, it was inconceivable to me that I could have given that Committee any names.

And now justification. As I sat there figuring out what I was going to do/was that I would be bearing witness against myself and I also knew that the Fifth Amendment said that you were entitled to due process of law and it did not seem to me that I, in any way, was being given due process of law because I did not know of what I was accused, if I was accused of anything, or of what anybody that I might have named might have been accused. There was at least one interpretation

of the Fifth Amendment with which I was familiar,because we are all familiar with that now in this country, and that is that you can invoke it to save yourself from possible incrimination and it seemed to me that it was first within my right, even in regard to testimony about someone else, to invoke the Amendment on that ground if not on these other two, because the way things are now you do not know what the connexion is that the Committee is trying to establish -- you have no idea what it is they are trying to establish -- and so I felt that I was completely within my rights on that. So, as I sat there waiting trying to figure out what I was to do, I figured out that the best thing to do was to answer all the questions that had to do about myself but, if they asked me about anybody else, to invoke the Fifth Amendment.

/Now, that is

Now, that was how I had it figured out what I would do. I had no time -- I had been in Philadelphia because of a sister-in-law who was very ill and I was cut off from all that was happening here in New York at the time. The Tuesday night when my brother and I came home from the hospital there was a telephone call from New York, telling me that I had to be here the next morning. When I got in here at 8 o'clock I called Mr. Pate and told him what had happened, and he asked if I had an attorney and I told him I did not and he said that perhaps Abe Feller, that is, Abraham Feller, who was UN Counsel, might be there and if he was I should try to talk to him first. I don't know whether or not Abe Feller was there -- I do know that I didn't talk to anyone. And then, first I was called into the Executive Session and that was as I have described here this morning. It was not at all bad; it was a friendly sort -- I wouldn't say it was friendly -- at any rate, there wasn't any reason to be afraid in the Executive Session and I think that fact that there was no reason to be afraid there has a bearing on what subsequently happened, because I got my confidence and I was not really very much afraid when I was called to the open session then.

But when the question was asked: Who had invited me to join the Communist Party? I answered it without thinking. I simply invoked the Fifth Amendment as I had planned. If I had thought about it I would have answered differently. Then the next two questions came along and the circumstance there, in order to get back to how you don't know what your motive is... There the situation was really very different because, by this time, I had become frightened. Why did they want to know that? I had answered it, it was a perfectly simple question, so why did they want to know that? And there was a reason, a very special reason, why I should have been afraid of those two questions, since they had been preceded by that other one. I knew and the Committee knew that I knew that they knew that the FBI had my sworn statement about my membership in the Communist Party in those years.

At the end of an investigation of my activities by the FBI in 1938 or 1939, I was called over to the FBI headquarters and a statement was prepared -- I don't know whether I dictated it, I don't really know now, but I do know that there was a statement there that I signed and whatever was in that statement is true because I signed it. But I don't know now what is in that statement.

All I do know is that I did not deny that I had been a member of the Communist Party and that at that time I had said I would not give any names. They did not ask me for any names and I was never asked for any names until I was asked at this open session who had invited me to join the Communist Party. So, it was a shock that came then.

But, to get back to why I did not answer those other two questions -- here I was being asked to testify against a **record** that I knew they had and **something** I hadn't seen during all that time and I was afraid that I might be guilty of perjury, quite unintentionally, because we have reason to be afraid of that...because, if you make a mistake, for instance, about a date, or if you make a mistake about a meeting, or if you make a mistake about.. if you say that you do not know someone and it turns out that you did, you are liable, in the present temper of the times here, to be put in ... the charge is actually made that you are guilty of perjury and you are apt to be brought to trial for it. So I had a very real fear at that time that I could not now make my testimony fit that testimony that they had, although there was no guilt that I had to cover up whatsoever. It was just the circumstance that in my panic at that time I felt that I could not do that. I had a feeling that I really was in danger. But then the questioning proceeded and, as you know, I got my confidence back and I don't really think now that there was any danger that I was going to be brought **up on a perjury charge.** But, at the time, it was a very real fear.

Had the Secretary-General given me the opportunity that I sought, this is the story that I would have told him and I do not believe that he would then have thought that I was covering up any criminal activities and I think he would have agreed, too, that in refusing to answer each of the three questions-- in my interpretation at any rate -- I was acting in good faith. That is all that I have to say.

/The PRESIDENT

The PRESIDENT (interpretation from French): Does Counsel for Respondent wish to speak on this matter?

Mr. SCHACHNER (Counsel for the Respondent): I have no information or questions about Miss Crawford. I would like to say something for a minute or two before the Tribunal adjourns.

The PRESIDENT (interpretation from French): The Vice-President has two questions to put to the Applicant or her Counsel.

The VICE-PRESIDENT: It is rather a question to Counsel on both sides: could you explain to us what is exactly the difference between a public meeting and an executive session of the Subcommittee of the Senate?

Mr. BOUDIN (Counsel for Applicants): The executive session is a session to which the public is not admitted and in which the witness, together with counsel, usually faces the Committee members and its counsel with a stenographic reporter present. This is customarily followed, either the same day or a day later, by a public meeting. There really is no legitimate purpose in an executive session of a Congressional Committee, with one possible exception, where in time of war national security may require that material not be given to public consumption. In that case, an executive session has a legitimate function. However, as the executive sessions are used these days, they are used for the purpose of determining the soft spots in a witness -- the extent to which a witness can be manoeuvred -- and so once the Committee knows exactly what the witness' testimony will be like, where the witness will plead the privilege, where the witness will not, the extent to which the witness is what they call a "friendly" -- an unpleasant term in the current situation -- a friendly or co-operative witness; to that extent the Committee is guided in its tactical and public operations.

Actually, once the executive session of the Committee is over, there is no need to have a public session; but the Committee has the public session -- not because it needs information, you recall our discussion the other day along the lines of the Committee not having any desire for information for legislative purposes. The purpose of the public session is as indicated here -- to defame, to injure, etc. -- so that the answer to your question is:there is no reason for both sessions at all.

The PRESIDENT (interpretation from French): I have to recall to the Counsel for Applicants that the question aimed at gathering some factual information. The Tribunal will not accept an expression of opinion on the institutions of a Member State. I would be grateful if the Counsel of parties act in such a way that I will not be obliged to repeat this observation.

Mr. SCHACHNER (Counsel for the Respondent): I should like to inform the Tribunal of this: there is no legal difference between an executive session and a public session of a Congressional Committee. Both can be carried on under the same formalities. I want to make it clear that, in view of the President's direction, I do not comment on the purposes for which executive sessions are sometimes used, although, as a former counsel for a Congressional Committee, I would feel competent to do so.

/The PRESIDENT

The PRESIDENT (interpretation from French): The Vice-President has another question to ask.

The VICE-PRESIDENT: The second question would be the following one: When the Secretary-General took the decisive step to dismiss Miss Crawford, did he know that Miss Crawford, while refusing to answer certain questions in the public meeting of the Sub-Committee of the Senate, had answered some of those questions in the executive meeting?

Mr. WEINBERGER (Counsel for Applicant ): He did not. Would you prefer the witness to answer?

The VICE-PRESIDENT: Who knows the answer?

Mr. WEINBERGER (Counsel for Applicants): I believe I know the answer, and I will ask Miss Crawford to answer it, but I want to point out that document 11, particularly the paragraph that was read into the record -- the offer to meet with or explain to the Secretary-General -- was not answered or responded to by the Secretary-General or any member of the Administration -- which is what Miss Crawford testified to.

The VICE-PRESIDENT: Excuse me, but do we know of any other source? Perhaps it would be better to ask Mr. Schachner first.

Mr. SCHACHNER (Counsel for Respondent): We do not have that information and we can search the records to see whether or not he was aware of it, but we do not know whether he was or was not.

The PRESIDENT: I would then request the Counsel for the Respondent to check on that point and give us the necessary information in the oral proceedings.

Does Mr. Kaplan wish to speak?

Mr. KAPLAN (Counsel for Applicants): Madam President, I should like simply to call to the Tribunal's attention some related matter for your consideration before we resume the plenary hearings in July.

If you examine the applications, by way of illustration, of two of my clients, Mrs. Older and Mr. Bancroft, you will note that there is included in each of these applications the full United Nations application for employment, as one of the documents. Included in that document is a recitation of various associations of each of these persons with various organizations and job activities. If you examine the transcript of the Senate hearings you will find that these questions were asked -- questions addressed to these associations were asked -- by the Senate Sub-Committee Counsel. You will find further that to a number of these questions each of these clients pleaded the privilege. The point I make is that the Secretary-General himself long since knew the answers to a number of the questions that were asked by the Senate Sub-Committee and to which questions each of these applicants whom I have mentioned by way of illustration pleaded the privilege. I sincerely hope you will examine these facts in the record and draw what I hope are the appropriate inferences.

The PRESIDENT: Thank you. I call on Counsel for the Respondent.

Mr. SCHACHNER (Counsel for Respondent): I just wanted to say that it will be of interest to the Tribunal that Counsel for both parties have agreed that if anything was said here in the heat of the argument that in any way might reflect on Counsel for the other party, we are agreed that the Tribunal may treat it as if it had never been said. Of course I was much impressed by the skilful way in which Counsel for the Applicants presented the information to this Tribunal. I might say it is clear that the Tribunal has a very difficult and comprehensive task and we all wish you a good voyage.

Mr. DONNER (Counsel for Applicants): May I join Mr. Schachner in his sentiments with respect to what may have occurred in the course of the hearing and then on behalf of my colleagues thank you, Mr. Petren, for coming here. I am sure it was a great deal of trouble; you have other things to do, and we want to thank you for listening and deliberating with such care. We still live in the hope that some day the Tribunal will revoke that portion of its resolution which

it passed in December in which it states that lawyers have not been of any aid to it. This is not something that I say in a perfunctory way.

More than that, I want to thank you on behalf of my clients, and the clients of all of us, because you must recognize that this is the first time that they have had a chance to present their story, to give their case. And hearing them with the care that you have, and the patience that you have, you have contributed to their sense of dignity, you have contributed to their feeling that justice will be done and can be done, because you have substituted for prejudgment impartiality and for slander deliberate inquiry, and you have indicated a real determination to apply to the United Nations the rule of law which in our day is as important as bread itself.

/Mr. KAPLAN

Mr. KAPLAN (Counsel for Applicants): I do not want to repeat Mr. Donner's concluding remarks. I think he has very adequately represented the sentiment of all counsel here. I simply want to observe that Mr. Donner has a certain seniority in the work of the Tribunal and his colleagues here are novitiates, and I think we have some special separate observation to make and that is -- and I think I represent the views of my colleagues and I do not mean to foreclose them if they want to state their own views separately -- I am talking about the novitiates here: We have very particularly enjoyed the honour and the privilege of appearing before members of the Tribunal and being treated with the courtesy and the dignity which has prevailed throughout these days of inquiry. I might observe parenthetically that this standard of dignity could well serve as a guide to all judicial tribunals.

I want also, at this time, on behalf of my colleagues, to particularly thank the translators who were burdened with this daily stream of words, perhaps some might have been spared both them and the Tribunal, and I for one apologize if I have been unnecessarily effusive or excessive in my observations. I thank them and I certainly thank the staff members here who are responsible for the physical comforts of this assembly hall. I want to thank Mr. Sanasen and his staff, who have been most co-operative in the matter of expediting the development of information and communicating with us under some difficult circumstances, particularly the separation of the Tribunal from the clients by that great ocean which can be negotiated readily but on occasion serves as a serious obstacle to expediting information from border to border.

Madam President and Mr. Petren, we look forward to seeing you in Geneva and concluding the proceedings there and evolving a record that will be so thorough, so complete, that there will be no hestitation on the part of the Tribunal to feel free to make a final, a fair and impartial judgment.

Mr. WEINBERGER (Counsel for Applicants): I join with Mr. Schachner in saying that it is regrettable and it should be deemed a nullity such personal remarks as may have been made by counsel about another, and I want you and the Vice-President to know that I wholeheartedly join in all that Mr. Donner and my other colleague has said. And I wish you bon voyage.

Mr. BOUDIN (Counsel for Applicants): Madam President, I want to compliment the Tribunal on its ability to separate facts from argument throughout these discussions. And of course I associate myself with my friends here in the remarks that have been made, and we will see you in Geneva.

/The PRESIDENT

The PRESIDENT (interpretation from French): I want to thank all concerned for the kind words which have been said and I thank quite particularly the parties for having so clearly understood the particular spirit which guided these preliminary proceedings. The co-operative work in which we have been engaged will, I am sure, greatly facilitate the necessary thorough-going study of these difficult matters by the members of the Tribunal.

As you know, I come from a country where there exists an ancient tradition of administrative jurisdiction and the present position of civil servants in my country has been the handiwork of one great administrative tribunal. Of course I realize that the position of United Nations civil servants is quite different from that of national civil servants. However, I hope that we will be in a position to facilitate the evolving of administrative rules and practices that will serve the highest interests of the United Nations.

I want to thank all our assistants, the interpreters, all those who facilitated the physical holding of these meetings. I want to thank our Secretary who has been patience itself for on him has converged all the impatience involved here -- that of the parties, that of the members of the Tribunal, on whatever continent they live. I wish also to thank quite particularly our Vice-President, who has contributed his share in giving to these proceedings the rather stern but very useful character of a preliminary inquiry. We shall see each other soon again. I hope that everything will work very smoothly and I hope that we shall be able to render decisions that will be useful to all but essentially to the United Nations. And I say now "Goodbye".

The meeting rose at 12.45 p.m.