12. Whereas the Tribunal, having received from the Applicant a request for reimbursement of legal costs amounting to $2,685, notes, with regard to its power to pronounce on such requests, that article 12 of its Rules authorizes applicants to be represented by counsel, and that accordingly costs may be incurred in submitting claims. It recalls that in a general statement of 14 December 1950 it pointed out that it could grant compensation for such costs if they are demonstrated to have been unavoidable, if they are reasonable in amount and if they exceed the normal expenses of litigation before the Tribunal. Recalling the case law of the League of Nations Tribunal (Judgements No. 13 of 7 March 1934 and No. 24 of 26 February 1946), " il n'y a aucune raison pour déroger au principe général de droit que les dépens, sauf compensation, sont payés par la partie qui succombe ", the Tribunal considers that it is competent to pronounce upon the costs.

The Tribunal awards an amount of $300

and so orders.

(*Signatures*)

Suzanne BASTID	CROOK	Sture PETRÉN
President	*Vice-President*	*Vice-President*

Omar LOUTFI	Mani SANASEN
Alternate Member	*Executive Secretary*

Geneva, 21 August 1953

Judgement No. 31

Case No. 39: Harris *Against:* **The Secretary-General of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; the Lord Crook, Vice-President; Mr. Sture Petrén, Vice-President; Mr. Omar Loutfi, alternate member;

Whereas Jack S. Harris, former member of the Trusteeship Division, Department of Trusteeship and Information from Non-Self-Governing Territories, filed an application to the Tribunal on 17 February 1953 for rescission of the Secretary-General's decision of 5 December 1952 to terminate his employment, for reinstatement in his post and for compensation;

Whereas a memorandum was submitted to the Tribunal in his name and in the name of other Applicants;

Whereas documents were produced on 23 and 29 July 1953 in justification of the amount of compensation claimed and substituting a request for compensation for the request of reinstatement;

Whereas the Respondent filed his reply to the application on 20 March 1953 and his comments concerning damages on 10 August 1953;

Whereas oral information was obtained at Headquarters from 15 to 21 April 1953 in accordance with article 9(3) of the Tribunal's Rules;

Whereas the Tribunal heard the parties in public session on 17 and 23 July 1953;

Whereas the Tribunal has received from the Staff Council of the United Nations Secretariat a written statement of its views on the questions of principle involved in this case;

Whereas the facts as to the Applicant are as follows:

The Applicant entered the service of the United Nations on 11 February 1947 when he was appointed as a social affairs officer in the Trusteeship Division, Department of Trusteeship and Information from Non-Self-Governing Territories. After serving on a fixed-term contract, the Applicant received a permanent contract effective on 2 May 1947.

On 14 and 27 October 1952 the Applicant appeared as a witness before the Internal Security Sub-Committee of the United States Senate which was investigating the activities of the United States citizens employed by the United Nations. The Applicant had previously appeared as a witness before a Federal Grand Jury. At the hearing of the Sub-Committee the Applicant claimed privilege under the Fifth Amendment to the United States Constitution and refused to answer certain questions in particular as to whether he was or had ever been a member of the Communist Party. On 22 October 1952 the Secretary-General informed the Applicant that he was very much concerned about this matter and placed the Applicant on special leave pending the receipt of the advice of a group of eminent persons. On 31 October 1952 the Director of Personnel requested him not to enter United Nations Headquarters during the period of leave.

On 1 December 1952 the Secretary-General sent to the Applicant the "opinion of the Commission of Jurists" drawing his attention to "the fourth Part of this report which relates to 'Principles with Regard to Officers Accused or Suspected of Disloyalty to the Host Country'".

The Secretary-General indicated his decision to accept the Commission's recommendation and warned the Applicant that if he failed to notify the appropriate United States authorities of his intention to

withdraw the plea of privilege and to answer the pertinent questions put to him, he would be compelled to terminate his employment in the United Nations.

The Applicant replied, on 3 December 1952, that he did not find it possible to abandon his principles and subject himself to invasion of his rights under the Constitution of the United States, that invoking the Fifth Amendment did not, according to the U.S. Supreme Court, justify a presumption of guilt and that the Applicant therefore could not follow the course of action that the Secretary-General had suggested to him. On receiving this reply, the Secretary-General informed the Applicant on 5 December 1952 that his attitude constituted a "fundamental breach of the obligations laid down in Staff Regulation 1.4" and that the Secretary-General had terminated his employment in the Secretariat. On 16 December 1952 the Secretary-General agreed to the direct submission by the Applicant of his application to the Tribunal, in accordance with article 7 of the Tribunal's Statute. On 17 February 1953, the Applicant filed an application with the Tribunal for reinstatement in his former post, arrears of salary and damages. On 29 July 1953 he substituted for his request for reinstatement a claim for further damages amounting to five years' salary.

Whereas the Applicant's principal contentions are:

(*a*) The decision contested was illegal and void, as it resulted from an illegal agreement between the United States State Department and the Secretary-General to terminate the employment of U.S. citizens members of the United Nations staff on political grounds. The decision contested was the result of improper pressure exercised upon the Secretary-General by an agency of a Member State, namely the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate. Accordingly, there had been a violation of Article 100 of the Charter and staff regulations 1.1, 1.3 and 1.9.

(*b*) The termination of the Applicant's exployment was improper in that it was based on arbitrary and extraneous political considerations, particularly upon the supposition that the Applicant had or was suspected of having communist political affiliations which were regarded with disfavour and opposed by U.S. governmental agencies.

(*c*) The termination violates the basic tenure rights of the Applicant who held a permanent contract since it was not effected in accordance with the pertinent staff regulations. Holders of permanent contracts can only be discharged for the reasons stated in staff regulations 9.1 and 10.2.

(*d*) The invocation of the privilege under the Fifth Amendment does not constitute a breach of the Staff Regulations, particularly of article 1.4, since under American law the exercise of the privilege does not create an inference of guilt. American staff members of the

United Nations have not agreed as a condition of their employment to surrender their rights under the Constitution.

(*e*) The Secretary-General violated principles of due process in placing the Applicant upon special leave and in failing to make the consultations with the joint bodies prescribed in staff regulations 8.1 and 8.2 dealing with staff relations.

Whereas the Respondent, while contending that various arguments set forth by the Applicant were irrelevant to the case, made the following reply:

(*a*) The Secretary-General merely confined himself to receiving information on staff members under the agreement made with the State Department and at no time did he surrender his power of decision with respect to the retention or appointment of staff.

(*b*) The Applicant had a duty under the Charter and staff regulation 1.4 to conduct himself at all times in a manner befitting his status as an international civil servant and to remain worthy of trust and confidence.

(*c*) The refusal to answer by claiming the privilege under the Fifth Amendment, while legal according to American law, gave rise to the inference that the Applicant was or had been engaged in activities directed towards the violent overthrow of the government of a Member State. His claim of privilege constituted a public pronouncement which reflected adversely upon his status as an international civil servant and rendered him unworthy of trust and confidence.

(*d*) The Applicant therefore was guilty of serious misconduct and his services were shown to be unsatisfactory. His appointment could therefore be terminated under the terms of staff regulations 9.1(a) and 10.2.

(*e*) The Secretary-General observed principles of due process since he gave the Applicant an opportunity of revoking his decision and of answering the questions put to him by the Senate Sub-Committee. Before taking the decision to terminate his appointment, the Secretary-General consulted a group of senior Secretariat officials to whom his letter of refusal was referred.

The Tribunal having deliberated until 21 August 1953, now pronounces the following judgement:

1. Under the terms of its Statute the Tribunal is not competent to pass judgement on the validity, in relation to the Charter, of an agreement made between the Secretary-General and a Member State, whatever influence this agreement might actually have had on the decision taken in respect of the Applicant. It is part of the Tribunal's function, however, to consider whether the termination of the Applicant's employment is in conformity with the provisions of the Staff Regulations and the Staff Rules.

2. The Tribunal notes that the Applicant held a permanent appointment. This type of appointment has been used from the inception of the Secretariat to ensure the stability of the international civil service and to create a genuine body of international civil servants freely selected by the Secretary-General. In accordance with the regulations established by the General Assembly, permanent appointments cannot be terminated except under staff regulations which enumerate precisely the reasons for and the conditions governing the termination of service.

The Secretary-General thus can act only under a provision of the Staff Regulations. He must indicate the provision upon which he proposes to rely, and must conform with the conditions and procedures laid down in the Staff Regulations.

If he fails to comply with these principles, the Tribunal is entitled to inquire whether the termination of employment is in accordance with the rules in force.

3. The Applicant held a permanent contract and his professional ability and devotion to duty have not been disputed. The termination of his employment was decided upon by the Secretary-General following the report of the Commission of three jurists which he consulted. In his letter of 1 December 1952 to the Applicant, the Secretary-General wrote:

> "I have decided to accept the recommendation of the Commission regarding the attitude the Secretary-General should take towards an officer who pleads some constitutional privilege against answering questions on the grounds that answers might incriminate him with regard to activities involving disloyalty to the United States. This recommendation was to the effect that a person who has refused to answer questions whether he is or has been engaged in espionage or other subversive activities in the United States, or whether he is or has at any time been a member of the Communist Party in the United States, or of some other organization declared to be a subversive organization, is unsuitable for continued employment by the United Nations in the United States and that his employment in the United Nations should not be continued."

The decision to terminate the Applicant's employment rests on the recommendation of the three jurists and states that the refusal to answer the questions "constitutes a fundamental breach of the obligations laid down in Staff Regulation 1.4, and that you [the Applicant] are unsuitable for continued employment in the Secretariat."

4. The three jurists sought a legal basis for the termination of the appointment of staff members pleading privilege under the Fifth Amendment. They started from the concept that "the rights of the staff in matters of their employment are contractual and that the terms

of the contract are to be found in the Staff Regulations and the rules promulgated as Staff Rules in pursuance of the Regulations."

They then propounded a general theory for dealing with breaches of the obligations laid down in the Staff Regulations and for termination indemnities:

> "a fundamental breach by a staff member of his obligations laid down in articles 1.4 and 1.8 is intended to be dealt with by the Secretary-General on his own responsibility, although in many cases such a fundamental breach would also be serious misconduct under article 10. We think also that the provisions with regard to termination indemnity contained in Annex III to the Regulations apply only in cases arising under article 9.1 and not in cases of fundamental breaches of articles 1.4 or 1.8 or in the case of dismissal under article 10."

The jurists added:

> "It will be observed that, in our opinion, it would be necessary to rely upon the Secretary-General's inherent right to terminate a contract for fundamental breach under article 1.4 or article 1.8 only in cases of officers holding permanent or fixed-term appointments whose actions could not be said to constitute serious misconduct under article 10."

Thus, the three jurists reached the conclusion that the Secretary-General had the right to terminate appointments without indemnity, in addition to the cases provided for in the Staff Regulations.

In actual fact, no provision concerning the termination of employment was cited in this case, and the Applicant received an indemnity in accordance with Annex III of the Staff Regulations.

Thus the decision reached in respect of the termination of the Applicant's appointment did not correspond exactly with the recommendations of the jurists.

5. The Tribunal notes that the opinion of the three jurists — according to which the Secretary-General can go beyond the provisions of a definite article of the Staff Regulations and terminate an appointment because of the contractual relationship between a staff member and the Secretary-General — disregards the nature of permanent contracts and the character of the regulations governing termination of employment laid down by the General Assembly under Article 101 of the Charter.

6. When before the Tribunal, however, the Respondent did not advance these arguments of the jurists. He held that the breach of article 1.4 could be dealt with both under article 9.1 and under article 10 and treated as both unsatisfactory service and serious misconduct enabling the Secretary-General to dismiss the Applicant without imposing disciplinary measures. In the latter case, according to the

Respondent, it was not for the Applicant to protest against the *ex gratia* payment of an indemnity.

The Tribunal has therefore to inquire whether any one provision of the Staff Regulations was applicable to the case of the Applicant.

7. Article 9.1 provides for termination of employment for unsatisfactory services. Article 10 deals with misconduct and authorizes summary dismissal for serious misconduct.

The scope of the term "unsatisfactory services" is to be determined by examination of the meaning given to the word "services" in the Staff Regulations and Rules. It appears clearly that the word "services" is used in the Staff Regulations and Rules solely to designate professional behaviour within the Organization and not to cover all the obligations incumbent upon a staff member. If it is admitted that the invoking of a constitutional privilege in respect of acts outside a staff member's professional duties constitutes a breach of article 1.4 of the Staff Regulations, this fact cannot be considered as unsatisfactory services and cannot fall within the purview of article 9.1.

On the other hand, misconduct punishable under article 10 could also be either misconduct committed in the exercise of a staff member's professional duties or acts committed outside his professional activities but prohibited by provisions creating general obligations for staff members. This view is confirmed by the fact that, during the discussions in the Fifth Committee on the revision of the Staff Regulations, the question of dealing with obligations deriving from article 1.4 was raised and no objection was made to the statement by the Chairman of the Fifth Committee that they were dealt with under disciplinary provisions.

8. The Tribunal is thus called upon to consider whether the allegations made against the Applicant constituted serious misconduct justifying his summary dismissal by the Secretary-General without reference to the Joint Disciplinary Committee.

The conception of serious misconduct enabling the Secretary-General to impose summary dismissal without disciplinary procedure was introduced at the revision of the Staff Regulations to deal with acts obviously incompatible with continued membership of the staff.

Except in cases of agreement between the person concerned and the administration, the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent and where the interest of the service requires immediate and final separation.

9. In the present case, the Applicant invoked the privilege provided in the constitution of his country. This step did not give rise to subsequent legal proceedings against the Applicant. This provision of the constitution may be properly invoked in various situations which,

because of the complexity of the case law, cannot be summarized in a simple formula.

The legal situation arising from recourse to the Fifth Amendment was so obscure to the Secretary-General himself that he considered it desirable to seek clarification from a Commission of Jurists. Their conclusions were later discussed by the General Assembly who reached no decision. Subsequently, these conclusions were partially set aside by the Secretary-General himself.

The nature of serious misconduct appeared so disputable to the Secretary-General that he granted termination indemnities, which are expressly forbidden by the Staff Regulations (annex III) in cases of summary dismissal.

Whatever view may be held as to the conduct of the Applicant, that conduct could not be described as serious misconduct which alone under article 10.2 of the Staff Regulations and the pertinent Rules justifies the Secretary-General in dismissing a staff member summarily without the safeguard afforded by the disciplinary procedure.

10. In these circumstances, the decision to terminate the Applicant's employment, since it cannot be based upon the provisions of the Staff Regulations and Rules, must be declared illegal.

11. Whereas the Tribunal has received claims in respect of the period up to date of reinstatement as follows:

(*a*) for full salary up to date of reinstatement, less amount paid at termination in lieu of notice;

(*b*) additional remedial relief to the extent of $ 8,925;

and has considered the Respondent's reply;

the Tribunal awards:

(*a*) full salary up to the date of this judgement less the amount paid at termination in lieu of notice and less also the amount of termination indemnity;

(*b*) no remedial relief

and so orders.

12. Whereas the Tribunal has received a further claim for compensation in lieu of reinstatement,

the Tribunal awards $ 40,000 in lieu of reinstatement and notes that in the computation of the amount regard has been paid to the following factors:

(*a*) Applicant's "outstanding professional competence" as consistently referred to in his annual reports;

(*b*) The very limited and specialized nature of his profession as anthropologist and African specialist whereby the opportunities of further employment are rare;

(*c*) The fact that he joined United Nations at the special request of

Mr. Ralph Bunche, Director of the Trusteeship Division, thereby terminating his previous career;

(*d*) His age is now 41 years;

(*e*) The fact that his review at the end of five years' service was due on 2 May 1952 and, had the work of review been up to date, might have expected a clear indication that his position was safeguarded until 2 May 1957;

(*f*) The adverse comment was made by the State Department in May 1950 but was not such as to cause any action by the United Nations;

(*g*) His base salary was $11,690 per annum;

and so orders.

13. Whereas the Tribunal having received from the Applicant a request for reimbursement of legal costs amounting to $2,975 notes, with regard to its power to pronounce on such requests, that article 12 of its Rules authorizes applicants to be represented by counsel, and that accordingly costs may be incurred in submitting claims. It recalls that in a general statement of 14 December 1950 it pointed out that it could grant compensation for such costs if they are demonstrated to have been unavoidable, if they are reasonable in amount and if they exceed the normal expenses of litigation before the Tribunal. Recalling the case law of the League of Nations Tribunal (Judgements No. 13 of 7 March 1934 and No. 24 of 26 February 1946), "il n'y a aucune raison pour déroger au principe général de droit que les dépens, sauf compensation, sont payés par la partie qui succombe", the Tribunal considers that it is competent to pronounce upon the costs.

The Tribunal awards an amount of $300

and so orders.

(*Signatures*)

Suzanne BASTID	CROOK	Sture PETRÉN
President	*Vice-President*	*Vice-President*

Omar LOUTFI	Mani SANASEN
Alternate Member	*Executive Secretary*

Geneva, 21 August 1953