
ADMINISTRATIVE TRIBUNAL

Judgement No. 482

Cases No. 541: QIU
No. 544: ZHOU
No. 545: YAO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman,
First Vice-President; Mr. Ahmed Osman, Second Vice-President;
Whereas, on 28 February 1990, Rong Qiu, Kefu Zhou and Jiping
Yao, former staff members of the United Nations, filed an
application, the pleas of which read as follows:

"III. Pleas

6. The Applicants seek to be reinstated as staff members of the United Nations. They submit that the Respondent should have maintained them in service after 31 January 1990 in accordance with the Charter of the United Nations, the Staff Regulations and Rules, the relevant General Assembly resolutions as well as their own excellent record after more than five years of employment with the Organization and the recommendation of the Department of Conference Services that they be granted probationary contracts. The Applicants respectfully request the Tribunal to rescind the Respondent's decision of 15 January 1990 not to renew their contracts or offer new ones and to direct the Respondent to reinstate them as United Nations staff members.

7. In that connection, the Applicants request the Tribunal to recognize:

(a) That the denial by the Respondent of further employment for the Applicants was illegal because the Applicants were not given every reasonable consideration in contravention of General Assembly

resolution 37/126, section IV, paragraph 5, according to which staff members on fixed-term appointment upon completion of five years of continuing good service should be given every reasonable consideration for a career appointment;

- (b) That the Applicants had a legal expectancy of renewal of their contracts;
- (c) That the Applicants were not given the true reasons for the denial of further employment and, moreover, that the reasons they were given were entirely unfounded or irrelevant and did not support the Respondent's decision;
- (d) That the Respondent's decision was arbitrary, based on considerations contrary to the Charter, and constituted abuse of power;
- (e) That the non-observance by the Respondent of his obligations under the Charter, the Staff Regulations and Rules and relevant General Assembly resolutions also constituted illegal discrimination vis-à-vis the Applicants.

8. The Tribunal is also requested:

- (a) To order payment to the Applicants of salary lost during the period of unemployment between the expiry of their contracts and the reconstitution of their careers; and
- (b) To declare that the Applicants are entitled to reimbursement from the Tax Equalization Fund of the monies which the Applicants were required to surrender to the Chinese Mission from their United Nations salaries."

Whereas the Respondent filed his answer on 6 April 1990;

Whereas the Applicants filed written observations on 1 May 1990, in which they submitted further pleas as follows:

"30. For the reasons mentioned above and in the original brief, the Applicants respectfully request the Tribunal to decide on their pleas in the affirmative and to order their reappointment as career staff retroactively from 1 February

1990.

31. Alternatively, Applicants request that the Tribunal order the cases to be referred to the Appointment and Promotion Committee of the Appointment and Promotion Board [APB/APB] in accordance with the original departmental recommendations and with normal procedure.

32. In the event of compensation being paid in lieu of reappointment or reference to APC/APB, Applicants request the granting of award in the amount of three years net base salary in view of the special circumstances of the case."

Whereas, on 4 May 1990, the Tribunal put questions to the Respondent and requested the production of certain documents;

Whereas, on 8 May 1990, the Respondent submitted some of the documents requested by the Tribunal and answered the Tribunal's questions;

Whereas, on 11 May 1990, the Respondent submitted a further document;

Whereas the facts in the case are as follows:

The Applicants, Rong Qiu, Kefu Zhou and Jiping Yao, nationals of the People's Republic of China (China) and former students of the Beijing Institute of Foreign Languages, passed the 1984 United Nations Competitive Examination for Chinese Verbatim Reporters. The Applicants Qiu and Yao were recruited on 16 September 1984. The Applicant Zhou was recruited on 21 September 1984. The three Applicants were offered five-year fixed-term appointments at the P-2, step IV level, as Verbatim Reporters in the Department of Conference Services (DCS). Their letters of appointment stated, as a special condition, that they were "on secondment from the Government of China".

During the course of their employment with the United Nations, the Applicant Qiu's overall performance was rated as "very good" and "excellent" and the Applicant Yao's and the Applicant

Zhou's overall performance was rated as "very good". The three Applicants were promoted to the P-3 level, effective 1 September 1986.

In a memorandum dated 1 May 1989, the Administrative Officer, DCS, requested the Personnel Officer in the Office of Human Resources Management (OHRM) that six Chinese Verbatim Reporters, including the Applicants Qiu and Yao, who were on secondment from the Government of the People's Republic of China (the Chinese Government) and whose appointments were due to expire on 15 September 1989 "be granted probationary appointments". She confirmed that they encumbered "core posts for the 1990-1991 Biennium", i.e., posts provided for in the budget and against which career appointments could be granted. In a memorandum dated 26 June 1989, the Administrative Officer, DCS, informed the Personnel Officer that the Applicant Zhou's fixed-term appointment was due to expire on 20 September 1989 and that, in view of his satisfactory performance, DCS, recommended that his appointment be converted to probationary. Subsequently, in July 1989, the Office of Programme Planning, Budget and Finance informed OHRM that the Applicant Zhou was encumbering a core post. Nevertheless, the Administration did not submit the three recommendations for a probationary appointment to the appropriate appointment and promotion bodies. In a handwritten note inserted on the 1 May 1989 memorandum from DCS to OHRM, the Personnel Officer wrote: "DCS has informed me on 10.8.89 [10 August 1989] to request from the Government of China an extension of appointment for two years."

In three notes verbales dated 11 August 1989, addressed to the Permanent Mission of the People's Republic of China (the Chinese Mission), the Secretary-General asked the Chinese Government to extend the Applicant Qiu's and the Applicant Yao's secondment until 15 September 1991 and the Applicant Zhou's secondment until 20 September 1991. In three separate replies dated 23 August 1989,

the Chinese Mission informed the Secretariat that the Chinese Government had consented to the extension of the three Applicants' secondment until 31 December 1989 only. Each of the three letters stated: "[A] recommendation from the Chinese Government for his successor will be communicated to the Secretariat in a separate note".

In a letter dated 1 October 1989, the Applicant Qiu requested the Assistant Secretary-General, OHRM, to grant him a career appointment in accordance with paragraph 5 of Section IV of General Assembly resolution 37/126, which provides that "staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment", and with paragraph 5 of section VI of General Assembly resolution 38/232, in which the Assembly "recommends that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts". He stated that he would immediately resign from any post held in his home country, if this was a requirement for the United Nations to offer him a probationary appointment. Finally, he noted that he feared for his safety and that of his family if he were to return to China, because of his participation in protest activities against the manner in which the Chinese Government had dealt with the student demonstrations in Beijing.

In similar letters dated 2 October 1989, the Applicants Yao and Zhou requested the Assistant Secretary-General, OHRM, to grant them career appointments on the ground that they fulfilled the requirements set forth in General Assembly resolutions 37/126 and 38/232. The Applicant Yao stated that he had "never been associated with the Chinese Government". He also admitted his involvement in the protest against recent events in his home country and said that he would face serious consequences if his employment with the United

Nations were terminated and he had to return to his country. The Applicant Zhou argued that as a staff member of the Secretariat, he should not "automatically be denied the right to equal treatment with other staff members because [he came] from a certain country". Furthermore, he asserted that recent events in his country gave him reason to fear for his safety and future if he were to return. He admitted to having been seconded from the Chinese Government but informed the Assistant Secretary-General, OHRM, that he had handed in his resignation to the Foreign Ministry of China in June 1989.

On 13 November 1989, the Applicant Qiu notified the Personnel Department of the Foreign Ministry of China that he would "resign from the Foreign Ministry, effective as of January 1, 1990". On 14 November 1989, the Applicant Yao informed the Chinese Mission that he was unaware "of belonging to any governmental institution or other body" and added that "should the Chinese Government consider otherwise", he would, "as of 1 January 1990, resign from any institution of which it considers me a member ...". On 18 November 1989, the Applicant Zhou wrote to the Personnel Department of the Foreign Ministry of China, offering his "formal resignation to the Foreign Ministry" and stating that he would "cease to be a State employee in the Ministry as of December 31, 1989". He requested a passport as a private citizen.

In his memorandum answering the Tribunal's questions, the Respondent notes that:

"On numerous occasions [from 1 May 1989 onwards and throughout the General Assembly], officials of the Chinese Mission telephoned and sought out Mr. Riesco [Director, Staff Administration and Training Division, Office of Human Resources Management] in conference rooms and other UN areas and asked for information on staffing in the CLS [Chinese Language Services]. No record of these informal conversations, or the dates on which they were made, exist. The conversations were mainly during the General Assembly period. The Mission repeated its views that the rotational system of staffing in CLS should continue."

In a memorandum dated 13 November 1989, the Director, Staff Administration and Training Division (SATD), OHRM, notified Personnel Officers of the procedures to follow in order to implement the directives contained in General Assembly resolutions 37/126, section IV, paragraph 5, and 38/232, section VI, paragraph 5, concerning the conversion to career appointments of fixed-term contracts expiring during the first half of 1990.

In a letter dated 12 December 1989, the Director, SATD, OHRM, informed the three Applicants that their request for a further appointment with the United Nations had "been carefully considered" by DCS and OHRM. He noted in this regard:

"I appreciate your interest in remaining in the service of the United Nations, but I regret to inform you that the Organization is not in a position to offer you a new appointment at this time.

However, in consideration of the closeness of the date of expiration of your current fixed-term appointment, and in order to afford you more time to make new plans, your present appointment will be extended to 31 January 1990."

On 14 December 1989, the three Applicants wrote to the Secretary-General a letter that reads as follows:

"We have received letters from Mr. Federico Riesco, Director of Staff Administration and Training Division, denying our requests for career appointments. We are of course deeply disappointed and depressed by this denial.

When the three of us individually spoke out against the Chinese Government's illegal interference and exploitation of Chinese staff members of the United Nations, the least we expected was that the Organization we serve and love would protect the personal safety of staff members who take risks to defend United Nations rules and principles. Instead, it appears we are going to end up jobless and homeless. We cannot believe this is how the United Nations is supposed to be, or how justice is supposed to work.

There are six Chinese verbatim reporters in our unit who were recruited at the same time. When the Chinese Government decided that the three of us must go while the others would have their contracts extended, that was because we had refused to accede to its repeated demands for our salaries. When we turned to the Organization for help and justice, we never suspected that an Organization having such noble purposes and principles would be indifferent in the face of such outrages. We hope we are not too naïve.

We have given Mr. Federico Riesco some material we think will interest you. We have evidence proving that the Chinese Government has been forcing its nationals to hand in their salaries and interfering in the functioning of international civil servants in defiance of the rules that govern the United Nations.

We urgently appeal to you, Sir, to review that material and to intervene personally so that our requests will be reconsidered and decided upon in our favour, in a spirit of humanity and justice."

On 20 December 1989, each Applicant addressed a further identical letter to the Secretary-General as follows:

"I hereby respectfully request a review, under the terms of staff rule 111.2(a) and staff regulation 11.1, of the decision conveyed to me by the Director, Staff Administration and Training Division, in a letter dated 12 December 1989, a copy of which I attach.

The letter was in response to my letter of 2 October 1989 to the Assistant Secretary-General, Office of Human Resources Management, requesting that I be considered for a career appointment under General Assembly resolutions 37/126, section IV, paragraph 5, and 38/232, Section VI, paragraph 5. Resolution 37/126 provides that staff members on fixed-term appointment upon completion of five years of continuing good service should be given 'every reasonable consideration' for a career appointment, and resolution 38/232 recommends that the Organization normally dispense with the requirement for a probationary appointment following a period of five years of satisfactory service on fixed-term appointments. I understand that you have approved a recommendation of SMCC [Staff Management Co-ordination Committee] XIII to give effect to these resolutions, and that the Office of Human Resources Management has directed all Departments to

implement the resolutions with respect to staff who have completed five years of continuing good service and whose fixed-term appointments are due to expire. I understand further that consideration for the granting of career appointments should relate to the retrenchment exercise, and that staff encumbering core posts are eligible for consideration.

I have served for over five years with the United Nations Secretariat and have received excellent evaluations throughout. I was informed by my Section Chief, Mr. Baha Fahmy, that he was recommending me for a career appointment. Moreover, the post I am occupying has been designated a core post and is not affected by the retrenchment exercise. I believe, therefore, that I meet all the criteria laid down by the General Assembly for 'every reasonable consideration' for a career appointment.

The letter of 12 December 1989 from the Director, SATD, does not indicate that any consideration was given to my request, much less the serious consideration to which my terms of appointment entitle me. It simply states that the Organization 'is not in a position to offer (me) a new appointment at this time'. No reason is given for this conclusion.

I therefore respectfully request that the decision of 12 December be reviewed, and that while consideration is being given to this request my status with the Organization is preserved, so that I would be in a position to exercise my rights of appeal if necessary. In view of the urgency of the situation, and having regard to relevant United Nations human rights instruments and to the fact that my present contract expires on 31 January 1990, I would appreciate a response as soon as practicable."

On 21 December 1989, the Applicants signed new letters of appointment for fixed-term appointments of one month, effective 1 January 1990 and expiring on 31 January 1990.

On 15 January 1990, the Acting Under-Secretary-General for Administration and Management informed each Applicant that:

"I have been instructed by the Secretary-General to reply on his behalf to the letters that you addressed to him on 14 and 20 December 1989.

I regret that you consider that Mr. Riesco's letter of 12 December 1989 did not show that you had received every reasonable consideration for a further appointment. Let me assure you that your case at that stage received such consideration. Following your request for review of the decision communicated to you in Mr. Riesco's letter of 12 December 1989, a further review was fully and completely conducted in the light of paragraph 5 of section IV of General Assembly resolution 37/126, which gives you the right to every reasonable consideration for a career appointment.

In considering your case, at all stages, your continuing good service as a verbatim reporter was taken into account, as well as the fact that your Department recommended you for a further appointment.

On the other hand, it was also necessary to take into account the interests of the Organization and in particular its functional needs. In this connection, it was important to ensure that the Chinese language services continued to function effectively and efficiently. Since the primary users of those services are representatives of the Government of the People's Republic of China, it is of critical importance for the effectiveness of the services that those representatives have confidence that their statements, both oral and written, will be objectively and fairly rendered, interpreted or reported. Furthermore, the efficient functioning of the Chinese language services would not be possible in a situation where staff members were antagonistic to each other because of expressly stated political animosities.

It would also not be in the interests of the Organization to disrupt the rotational system for the staffing of the Chinese language services, which has proven to be most effective. This system has enabled the establishment of a specialized language training programme at the Beijing Institute for Foreign Languages, the termination of which would make it immensely difficult to recruit language staff with the specific qualifications required to fill vacancies appropriately and expeditiously.

After weighing these factors again, the Secretary-General has confirmed his earlier conclusion as conveyed to you in Mr. Riesco's letter of 12 December 1989.

As regards the complaints concerning compulsory deductions from your salary, to which you refer in the fourth

paragraph of your letter of 14 December, I wish to inform you that the Secretary-General is at present conducting a comprehensive examination of the question of deductions from and supplements to the emoluments of United Nations staff members. This is a matter on which he is already in touch with the International Civil Service Commission and the Member States of the Organization.

Finally, I urge again that you remain in contact with the Staff Counsellor, ..., who has been instructed to offer you appropriate advice and assistance in regard to your future."

On 24 January 1990, the Applicants requested the Secretary-General to authorize them to submit their appeals directly to the Administrative Tribunal under article 7 of its Statute.

On 25 January 1990, the Applicants requested the President of the Tribunal to request the Secretary-General, "as a preliminary measure under article 7.(3)(a) of the Rules of the Tribunal", to grant them special leave without pay until their cases were adjudicated by the Tribunal, which would enable them to remain in the United States lawfully without compromising the Secretary-General's relationship with the host country. On 5 March 1990, the President of the Tribunal decided to reject their preliminary request.

On 8 February 1990, the Secretary-General consented to direct submission of the three appeals to the Administrative Tribunal.

On 28 February 1990, the three Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal arguments are that:

1. The Respondent failed to discharge his obligation under Article 100 and Article 101, paragraph 3, of the Charter and General Assembly resolutions 37/126 and 38/232, to give the Applicants every reasonable consideration for a career appointment.

2. Staff members do not serve Governments but, according to

Article 100 of the Charter and staff regulation 1.1, serve the Organization. They do not have to agree with the policies of Governments in order to carry out their duties with impartiality.

3. The Respondent's decision not to extend the Applicants' appointments was based on illegal considerations, such as the wishes of the Chinese Government.

4. The establishment of a training institute in a Member State may not derogate from or replace Articles 100 and 101 of the Charter or the Staff Regulations and Rules.

Whereas the Respondent's principal arguments are that:

1. The Applicants did not have a legal expectancy of further employment upon expiry of their fixed-term appointments.

2. Appointments on secondment require the consent of all parties to the secondment arrangement. The Respondent properly sought the consent of the Chinese Government to an extension of the Applicants' appointments on secondment.

3. The Secretary-General is bound to give reasonable consideration to granting career appointments to staff on fixed-term appointments (including fixed-term appointments on secondment) with five years of continuing good service, but this requirement does not deprive the Secretary-General of his discretion in deciding whether the grant of career appointments is in the interests of the Organization.

4. The Secretary-General's assessment of the interests of the Organization in considering whether to offer career appointments to the Applicants cannot be challenged except on the basis of prejudice or improper motive.

5. The Respondent did not violate any applicable procedures through the manner in which he gave the Applicants every reasonable consideration for a career appointment.

6. Instructing the Staff Counsellor to extend assistance to

the Applicants is an appropriate manner in which to protect their interests.

7. The Applicants' request for a declaration by the Tribunal that they are entitled to payments from the Tax Equalization Fund is not receivable.

The Tribunal, having deliberated from 23 April to 25 May 1990, now pronounces the following judgement:

I. Since the applications by Mr. Qiu, Mr. Zhou and Mr. Yao are related, the Tribunal decides that they should be joined and disposed of in a single judgement.

II. The three Applicants are nationals of the People's Republic of China (China). In 1984, they passed the Competitive Examination for Verbatim Reporters organized by the United Nations Secretariat.

III. The Applicant Qiu had worked as a teacher of English at a school in the province of Canton from 1974 to 1976, and as an employee in the Export Department of the China Machinery Import and Export Corporation (Canton branch) from 1976 to 1978. He left this job when he was admitted to the Beijing Institute of Foreign Languages (hereinafter referred to as "the Institute") in 1978.

IV. The Applicant Yao had mainly taught English, among other subjects, since 1976. His last employer had been the Shanghai Agricultural College. He was admitted to the Institute in October 1982.

V. The Applicant Zhou had not engaged in any profession before entering the Institute. He had been a student at Fudan University in Shanghai. He was recruited under the same conditions as the two

other Applicants, but on 21 September 1984.

VI. The Tribunal notes that the Applicant Yao's personnel file contains the contract accepted by students on entering the Institute. It is entitled "Agreement for Students" and includes the following provisions, which, in the opinion of the Tribunal, also apply to the two other Applicants:

"1. ... You are hereby invited by the United Nations to attend the United Nations Training Course for translators and interpreters at the Beijing Institute ... This offer is made to you subject to your acceptance of the following conditions:

1. For the duration of the Course, or until such time as the Institute decided that your continued participation would not serve the purpose of this Course:

- (a) You will receive a stipend from the Institute on behalf of the United Nations;
- (b) You will attend all classes and devote full time to studies connected with the Course; you will not undertake any other work, studies or employment, except with the prior permission of the Head of the Institute in consultation with the United Nations;
- (c) You will do as much translation work for the United Nations as you may be assigned by the Head of the Course in accordance with the curriculum.

2. Upon completion of the Course you will take the recruitment examination given at a date to be determined by the United Nations in consultation with the Institute.

3. If you successfully pass the recruitment examination and are selected for employment with the United Nations, the United Nations will offer you an appointment subject to a satisfactory medical examination. You will agree to accept such appointment, subject to the United Nations Staff Regulations and Rules, for a minimum period of five years, and to perform duties of an interpreter or a translator, at the Headquarters of United Nations or at any of its offices to which you may be assigned.

You will normally be appointed initially at a P-2 level and will normally be promoted to the P-3 level after completing two years of satisfactory service.

4. Prior to appointment by the United Nations, you will not have the status of a staff member of the United Nations, and your rights, benefits, and entitlements will be strictly limited to those specified herein.

(Signature)
Head, Beijing Institute

To the Head, Beijing Institute of Foreign Languages

I hereby accept the above offer and solemnly undertake to fulfil the conditions set out in paragraphs 1, 2 and 3 above.

(Signed)
Yao/Trainee"

VII. In 1984, after passing the examination, the three Applicants applied for jobs as verbatim reporters. The Department of Conference Services (DCS) requested the Office of Human Resources Management (OHRM) to offer them posts as verbatim reporters for a fixed-term of five years. The letters of appointment accepted by the Applicants Qiu and Yao specified that the appointments would be from 16 September 1984 and would expire on 15 September 1989; the Applicant Zhou's appointment would be from 21 September 1984 and would expire on 20 September 1989. In the "Special Conditions" section of each contract it is noted: "On secondment from the Government of China". The Tribunal notes that no details concerning the nature and conditions of the employment with the Chinese Government from which the Applicants were seconded are given in the letters of appointment or in other documents submitted by the Administration.

VIII. Neither has the Administration produced any agreement concluded with the Chinese Government, such as envisaged in the Tribunal's case-law referred to below, concerning the secondment of

the Applicants nor any document in which the competent authorities define the Applicants' situation in writing and specify the conditions of secondment. The Tribunal notes that no details are given concerning the Applicants' posts in their own country nor of the conditions governing their reintegration into those posts. It also notes that if such an agreement did exist, it was not brought to the Applicants, for their consent.

IX. The Applicants have duly taken and signed the oath required of every United Nations staff member:

"... to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other authority external to the Organization."

X. On 1 May 1989, the Administrative Officer, DCS, wrote to the competent Personnel Officer, OHRM, concerning the Applicants Qiu and Yao, and on 26 June 1989, concerning the Applicant Zhou, whose appointments would expire in September 1989, requesting that they be granted probationary appointments. She noted that the Applicants held core posts for the 1990-1991 Biennium against which career appointments could be granted.

A handwritten annotation entered by the Personnel Officer on 10 August 1989, on the memorandum of 1 May 1989, stated, however, that: "DCS has informed me on 10.8.89 (10 August 1989) to request from the Government of China an extension of appointment for 2 years."

XI. The annotation does not explain the underlying motivation for it. The explanations offered by the Respondent in his communication dated 8 May 1990, addressed to the Tribunal, are neither

satisfactory nor supported by documents. In the opinion of the Tribunal, these explanations are not borne out by the various documents produced by the Respondent at the request of the Tribunal.

XII. In three notes verbales dated 11 August 1989, the Secretary-General asked the Permanent Mission of the People's Republic of China to the United Nations (the Chinese Mission) to extend the Applicants' secondment for two years. But on 23 August 1989, the Chinese Mission informed the Secretariat that "the Chinese Government has consented to the extension of Mr. Qiu's secondment through 31 December 1989". It added that a "recommendation from the Chinese Government for his successor will be communicated to the Secretariat in a separate note". The same reply was made with regard to the Applicants Yao and Zhou.

XIII. The appointments of the three Applicants were eventually extended from 1 to 31 January 1990.

XIV. The three Applicants gave complete satisfaction in the performance of their functions in the United Nations, particularly during 1989 and until the date of their separation from service on 31 January 1990. There was no allegation of any sign of antagonism towards other colleagues, certainly not Chinese colleagues. There was no sign of political animosity.

XV. The Tribunal notes that, on the occasion of their separation from service, the three Applicants received a letter dated 20 February 1990, which, in particular, drew their attention to the following point:

"1. Under the United States Government regulations, a staff member's authorized stay in the United States expires automatically upon separation from service or transfer to a duty station outside of the United States, even if the G-4

visa stamped in the passport indicates it is valid beyond the separation or transfer date. However, if additional time is required, the application must be made in writing directly to the Travel Control Section, United States Immigration and Naturalization Service, 26 Federal Plaza, New York, N.Y. 10267. Proof of date of separation from service or of date of transfer must accompany the application".

The three Applicants made known their intention to remain in the United States of America in order to continue their studies.

XVI. In the light of these facts noted by the Tribunal, the Applicants request the Tribunal:

1. To rescind the Respondent's decision of 15 January 1990, not to renew their contracts or offer them new ones, particularly probationary contracts, with a view to career appointments, and to order payment to the Applicants of the salaries which were not paid to them between the expiry of their contracts and their reinstatement in their careers;

2. To declare that the Applicants are entitled to reimbursement from the Tax Equalization Fund of the monies which they were required to remit to the Chinese Mission out of their United Nations salaries.

XVII. The Respondent contests the receivability of the Applicants' request that the Tribunal should declare that they are entitled to payments from the Tax Equalization Fund. The Tribunal will first consider this claim of non-receivability.

XVIII. On 24 January 1990, the Applicants requested the Secretary-General to authorize them to submit directly to the Tribunal their applications challenging the decision of 15 January 1990, not to renew their contracts beyond 31 January 1990. This authorization was given on 8 February 1990. Neither the request for authorization addressed to the Secretary-General nor the letter

addressed by the Applicants on 25 January 1990, to the President of the Tribunal made mention of a claim for reimbursement of the monies levied by the Chinese Mission on their United Nations salaries. The Tribunal considers that the Secretary-General could not have agreed to submit directly to the Tribunal a claim of which he was not seized.

There can be no doubt that the Applicants' pleas concerning this claim exceed the terms of the agreement reached. Accordingly, they are not receivable.

XIX. Moreover, the Respondent observes that the Applicants' claim was submitted to him on 20 March 1990, after the submission of the applications to the Tribunal (28 February 1990). The claim is under consideration. Hence, there is no decision to be challenged.

XX. On the merits, the Applicants maintained, in their applications instituting these proceedings, that they had a legal expectancy of renewal of their fixed-term contracts or alternatively, a career appointment.

XXI. With regard to the renewal of the Applicants' fixed-term contracts, the Respondent maintains that, since they were on secondment, such renewal was subject to the agreement of the Chinese Government. As this agreement was not obtained, the Respondent concluded that the decision not to renew the contracts in question was in conformity with the applicable rules and with the case-law of the Tribunal (Judgement No. 192, Levcik (1974)).

XXII. The Tribunal will apply its case-law on secondment, in the light of the principles reiterated in paragraph V of Judgement No. 192, cited by the Respondent.

XXIII. The Tribunal finds that the conditions laid down for an official to be on secondment are not fulfilled in this case. The Applicants' status was not, in fact, "defined in writing by the competent authorities in documents specifying the conditions and particularly the duration of the secondment". Such documents, if they exist, have not been brought to the attention of the Applicants. The Applicants were not on genuine secondment within the meaning given to that term in Judgement No. 192, which reaffirms the definition established in Judgement No. 92, Higgins (1964): "... the term 'secondment' ... implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits ..." (Judgement No. 192, para. IV).

XXIV. As stated in Judgement No. 192, cited by the Respondent, it is only when these conditions are fulfilled that "the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the Government".

The Judgement adds, and the Tribunal can only reiterate and endorse this reasoning:

"Bearing in mind the provision in Article 100 of the Charter that 'in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization', the Tribunal considers that in the absence of a secondment agreed to by all parties concerned in conformity with the above-mentioned principles, the Respondent cannot legally invoke a decision of a Government to justify his own action with regard to the employment of a staff member" (Judgement No. 192, para. V).

XXV. The Tribunal finds that the secondment of the Applicants was not effected in conformity with the principles applicable.

Secondment is an objective situation. It is not for the United Nations Administration or the Government in question or staff members to invoke a secondment which does not exist. Accordingly, the Tribunal considers that it was not for the Respondent either to request authorization of, or to comply with the decision of a Government in order to renew the Applicants' contracts. This being so, the Tribunal finds that the decision not to renew the Applicants' fixed-term contracts was vitiated by extraneous reasons contrary to the interests of the United Nations, incompatible with Article 100 of the Charter.

The Applicants have also requested the Tribunal to recognize their right to a career appointment. Their pleas in this regard will now be examined by the Tribunal.

XXVI. Concerning their claim to career appointments, the Respondent acknowledges that the Applicants "upon completion of five years of continuing good service ... had a right to every reasonable consideration to a career appointment".

XXVII. The Respondent recalls that the Secretary-General has discretionary powers when deciding whether granting a career appointment is in the interest of the Organization. At the same time, he acknowledges his discretion is not unlimited.

XXVIII. The Respondent cites, in this connection, an excerpt from Judgement No. 333, Yakimetz, paragraph XIX (1984), in which the Tribunal expresses itself in the following terms:

"In Judgement No. 54 (Mauch) [1954], the Tribunal stated that:

'While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would

connote a lack of good faith or due consideration for the rights of the staff member involved'".

The Applicants also invoke this precedent in support of their application.

XXIX. More generally, the Tribunal considers that the limits of the Secretary-General's discretionary powers are governed by the following principle established by the Tribunal's consistent case-law: the Secretary-General may not legally take a decision which is contrary to the Charter, in particular to Articles 100 and 101, or to the provisions of the Staff Rules and Regulations.

XXX. In this connection, the Tribunal agrees with the Respondent that the Secretary-General has the right to consult the Governments of Member States when he exercises his power of appointment, provided however that such consultation should not contravene the principles referred to in the preceding paragraph.

As the Tribunal states below, it holds that, in the present case, by accepting the position advocated by the Government consulted, the Secretary-General has not acted in conformity with the foregoing principles.

XXXI. Nevertheless, the Tribunal does not hold that the Secretary-General could not, in proper circumstances, take into consideration the requirements of the efficient functioning of the Beijing Institute of Foreign Languages. The Secretary-General stressed, in his letter of 15 January 1990, that the termination of the specialized language training programme "would make it immensely difficult to recruit language staff with the specific qualifications required to fill vacancies appropriately and expeditiously". As the Tribunal shows below, in this case, the alleged adverse effect on the efficient functioning of the Institute and on recruitment is

pure speculation. It appears to the Tribunal also, that there might be other sources for the recruitment of qualified language staff.

XXXII. The Tribunal notes that there is no evidence in the files to support the existence of a threat to suppress the programme in question if the Applicants received career appointments. The Tribunal finds it difficult to understand why, if there had been such a threat, DCS should, on 1 May 1989, have asked OHRM to grant probationary contracts to six Chinese-language verbatim reporters prior to career appointments.

XXXIII. In keeping with the wishes expressed by the Chinese Mission, there is nothing to prevent the maintenance of a rotation system. The Tribunal considers that a rotation system is not unlawful per se. Such a system can and must serve the interests of the United Nations and the Member State concerned by providing a pool of Chinese-language translators, verbatim reporters and interpreters, while at the same time developing their knowledge and command of foreign languages. Such training will be very useful in the development of relations between the United Nations and China when those experts return home permanently.

But in the opinion of the Tribunal, the rotation system must be established on a precise legal basis - through secondment in accordance with the terms governing secondment and without ruling out career appointments, pursuant to General Assembly resolution 37/126.

XXXIV. Accordingly, the Tribunal can only reject the Respondent's contention that the mere existence of the rotation system would prohibit career appointments.

XXXV. The Tribunal appreciates the Administration's concern that

"it is of critical importance ... that [the] representatives [of China] have confidence that their statements, both oral and written, will be objectively and fairly rendered, interpreted or reported".

XXXVI. But the Tribunal notes that during the period when the career appointments of the Applicants were considered, i.e. from 1 May 1989, to the termination of their services on 31 January 1990, no observation was made, and no complaint levelled against them concerning their performance. The reason invoked by the Administration for denying appointments to the Applicants is based on an inaccuracy, if not an error.

XXXVII. The Tribunal has also taken into account the terms of the letter addressed to the Applicants on 15 January 1990, on behalf of the Secretary-General, by the Acting Under-Secretary-General for Administration and Management:

"The efficient functioning of the Chinese language services would not be possible in a situation where staff members were antagonistic to each other because of expressly stated political animosities."

But the Tribunal notes that no act of this nature has been alleged against the Applicants. It notes moreover that the Applicants have never failed to maintain the discretion incumbent upon them as international civil servants. Even during 1989, no such complaint against them was made by their Government. Lastly, the Tribunal notes that nothing has been shown to indicate the possibility of such a problem arising in the future.

XXXVIII. In the opinion of the Tribunal, the Respondent's assumptions in this respect lack any factual basis. The Applicants' record as international civil servants, as recognized by the Administration itself, shows that they are devoid of any substance.

They constitute arbitrary suspicions on the future conduct of the Applicants. The Applicants are being disciplined by the denial of appointments, for potential misconduct. The Tribunal considers that the Applicants are being tried for their imputed intentions. An attitude of irresponsibility is ascribed to international civil servants who, during many years of service, have not given the slightest justification for such a charge.

XXXIX. The Tribunal moreover recalls that the Secretary-General has the necessary powers to prevent any irresponsible conduct on the part of the staff under his authority.

XL. The Respondent acknowledges that discussions took place with representatives of the Chinese Mission throughout the period beginning on 1 May 1989. The Tribunal takes note that following those discussions, the Secretary-General denied the Applicants career appointments on 12 December 1989.

XLI. The Tribunal finds that the Secretary-General accepted the Chinese Mission's position that the Applicants should be denied an extension of their fixed-term contracts or be offered career appointments.

The Tribunal has shown that, in the absence of the necessary criteria for secondment consistent with case-law, it was not permissible for the Secretary-General to take into account the Chinese Mission's opposition to the renewal of the fixed-term contracts.

As regards career appointments, the Tribunal considers that these were withheld because of the Chinese Mission's position concerning the rotation system. The Tribunal notes that, in the opinion of the Chinese Mission, the rotation system categorically ruled out career appointments. The Tribunal considers that the

Secretary-General could not defer to this opposition by the Chinese Mission without being in breach of his obligations under the Charter and the Staff Rules and Regulations, as well as under General Assembly resolutions 37/126 and 38/232 (see para. XXXIII).

XLII. Consequently, the Tribunal finds that the Secretary-General's decision to refuse the Applicants' request for career appointments exceeds the limits of his discretion. His decision is based on reasons which are contrary to the interests of the United Nations, erroneous or inaccurate as to fact, and specious. It ignores the basic principles of the international civil service, as enunciated in Articles 100 and 101 of the Charter.

XLIII. The Tribunal considers that the Secretary-General wrongly refused the Applicants career appointments, contrary to General Assembly resolutions 37/126 and 38/232. The decision of 12 December 1989, as confirmed on 15 January 1990, in respect of the three Applicants must therefore be rescinded, and career appointments granted to them with effect from 1 February 1990.

XLIV. The Tribunal notes that the Applicants have contended that they were not considered in accordance with the procedure established in the memorandum dated 13 November 1989, from the Director of the Staff Administration and Training Division, OHRM, addressed to all Personnel Officers, with a view to giving effect to General Assembly resolutions 37/126 and 38/232, and that accordingly the denial of career appointments was also vitiated by the lack of due process. However, the Tribunal takes the view that there is no need to examine that point. It has found the Secretary-General's denial of career appointments invalid on other grounds.

XLV. In accordance with article 9, paragraph 1, of its Statute, it

is for the Tribunal to fix the amount of compensation to be paid to each Applicant for the injury sustained should the Secretary-General, within 30 days of the notification of the judgement, "decide, in the interest of the United Nations, that the applicant shall be compensated".

XLVI. With regard to the injury sustained, the Applicants estimate it, for each of them, as the net amount of their base salary for a period of three years. The compensation thus requested exceeds by one year's salary the maximum amount which the Tribunal would normally award.

The Tribunal considers that this is an "exceptional case" justifying the payment of higher compensation. The Tribunal notes that the Applicants have displayed outstanding professional ability and competence in the performance of their duties, that they had a reasonable expectancy of permanent employment and a career in the United Nations, that after offering them a career appointment the Administration proposed a two-year renewal of contract and then withdrew the offer, and that this vacillation constituted a particularly painful mental ordeal for the Applicants in the then prevailing circumstances, that the Administration has not acted in the Applicants' case with the prudence, care and attention to be expected of an international organization with regard to personnel questions, and lastly, that the rule that compensation may not exceed two years' net base salary would not, in this case, adequately compensate the Applicants for the injury they have sustained and will sustain if they are not granted career appointments.

XLVII. The Tribunal considers that there is no need in this case to rule on the question of the privilege claimed by the Respondent regarding certain communications between the Secretary-General and

the Chinese Mission which the Tribunal had asked him to produce.

XLVIII. For these reasons, the Tribunal:

1. Declares that the Applicants' pleas for the reimbursement by the Tax Equalization Fund, of the monies which they remitted to the Chinese Mission from their United Nations salaries are not receivable at this stage.

2. Rescinds the decision taken by the Secretary-General on 12 December 1989, and confirmed on 15 January 1990, not to grant the Applicants career appointments in the circumstances provided for in General Assembly resolutions 37/126 and 38/232, and decides that they should be granted such appointments as from 1 February 1990.

3. Fixes the compensation to be paid to each of the Applicants at three years' net base salary of the Applicants as at the date of their separation from service, if the Secretary-General decides, within 30 days of the notification of the Judgement, in the interest of the United Nations, not to grant the Applicants career appointments.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

Geneva, 25 May 1990

R. Maria VICIEN-MILBURN

Executive Secretary

DECLARATION BY JEROME ACKERMAN

Having signed the Judgement in this case, of course, I agree with it entirely. I should like to note, in addition, that had the Tribunal thought it necessary to address the Applicants' contentions concerning the procedure established by the Administration on 13 November 1989, with respect to General Assembly resolutions 37/126 and 38/232, I would have deemed it axiomatic that such a procedure must observe the requirements of due process including the absence of discrimination. Staff members are surely entitled to this in the implementation of such General Assembly resolutions as well as in other aspects of their employment. Regrettably, I believe that the Applicants were not accorded the due process to which they were entitled.

In my view, it is also regrettable, to put it mildly, that there should be even so much as an appearance that this entire affair might be related to humanitarian pleas made by them.

(Signature)

Jerome ACKERMAN
First Vice-President

Geneva, 25 May 1990