

XI. For these reasons, the Tribunal rejects the application.

(Signatures)

Suzanne BASTID  
*President*

H. GROS ESPIELL  
*Member*

L. IGNACIO-PINTO  
*Member*

Z. ROSSIDES  
*Alternate Member*

Jean HARDY  
*Executive Secretary*

New York, 25 October 1967.

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## Judgement No. 113

(Original : French)

**Case No. 113 :**  
**Coll**

**Against : The Secretary-General of  
the International Civil  
Aviation Organization**

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*Termination, at the request of the assisted Government, of the fixed-term appointment of a technical assistance expert of ICAO.*

*Special circumstances in which ICAO was operating in the Congo at the time of the Applicant's termination.—Circumstances in which two inquiries were held regarding an air traffic incident in which the Applicant was involved.—Special function of the ICAO mission to the Congolese Government.—Letter from the competent Minister requesting termination of the Applicant's services.—Decision, consequent upon this letter, to terminate the Applicant's appointment "in the interest of the Organization".*

*Consideration of the propriety of this decision.—Principles governing the exercise of the discretionary power conferred on the Secretary-General by the right to terminate an appointment "in the interest of the Organization".—Doubt cast on the Applicant's professional competence in the letter from the Minister requesting the termination of his services.—Fact that the Respondent did not follow the procedure he had undertaken to follow in order that the facts might be clarified and the Applicant enabled to explain his actions.—Disregard by the Respondent of fundamental guarantees to which the Applicant was entitled, and of his right to be heard in a case involving his professional competence.—Award by the Respondent of a termination indemnity based on the strictest application of the Staff Rules, whereas the Respondent had indicated his intention of giving the Applicant the benefit of particularly favourable treatment.—Irregularity of the termination decision, inasmuch as the Applicant was not afforded the guarantees recognized to be necessary by the Respondent himself in the light of the facts of the case.*

*Reinstatement of the Applicant impossible in the circumstances.—Award to the Applicant of an indemnity equivalent to his base salary for the period of the appointment remaining as from the date of termination, less the sums already paid in consequence of the termination.*

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## THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; Mr. Héctor Gros Espiell ; Mr. Louis Ignacio-Pinto ; Mr. Zenon Rossides, alternate member ;

Whereas, on 30 December 1966, Miguel Coll Díez, a former technical assistance expert with the International Civil Aviation Organization (hereinafter called ICAO) and the Applicant in the present case, requested the President of the Tribunal to designate a counsel to assist him in drawing up and submitting an application to the Tribunal ;

Whereas, on 6 January 1967, the President, in pursuance of United Nations Administrative Instruction ST/AI/163, designated as counsel Mr. Felipe A. Pradas, a staff member of the United Nations ;

Whereas, at the request of the Applicant and with the agreement of the Respondent, the President extended the time-limit for the filing of the application to 19 May 1967 ;

Whereas, on 17 May 1967, the Applicant filed an application, the pleas of which he amended by written observations filed on 26 June 1967 ;

Whereas the pleas of the application, as amended, request the Tribunal :

(a) As preliminary measures :

(i) To declare its competence in the present case, in conformity with article 2 of its Statute ;

(ii) To declare the receivability of this application under the terms of article 7.2 of the Statute ;

(b) To rescind the Respondent's decision of 16 February 1966 to terminate the services of the Applicant ;

(c) To rescind the Respondent's decision of 19 December 1966 to reject the appeal of the Applicant ;

(d) To order the Respondent to reinstate the Applicant in the service of ICAO for a period equivalent to the uncompleted part of his last appointment, which was due to expire on 14 November 1966 but was terminated by the contested decision of the Respondent on 23 March 1966 ; concurrently, to order the payment to the Applicant of a sum corresponding to his salary for the period 23 March 1966 to the date of his effective reincorporation in ICAO ;

(e) Should the Respondent, in virtue of the authority vested in him by article 9.1 of the Statute of the Tribunal, decide to pay the Applicant compensation for the prejudice suffered, to order the payment to the Applicant of a sum equivalent to two years' net base salary ;

(f) To hold oral proceedings under article 15 of the Rules of the Tribunal ;

Whereas the Respondent filed his answer on 9 June 1967 ;

Whereas, on 26 June 1967, the Applicant filed the written observations referred to above ;

Whereas the Tribunal heard the parties at a public session on 10 October 1967 ;

Whereas, on 18 October 1967, the Respondent submitted supplementary documents at the Tribunal's request ;

Whereas the facts in the case are as follows :

The Applicant, who was an employee of the Spanish Air Ministry, entered the service of ICAO on 15 May 1964 on a short-term appointment as an Air Traffic Controller with the ICAO Technical Assistance Mission in the Congo. His con-

tract, which was for a period of six months, subject to the right of either party to terminate it upon thirty days' notice, was twice extended, the first time to 14 November 1965 and the second time to 14 November 1966. As a result of the first extension, the conditions of service applicable to intermediate-term status employees thenceforth applied to the Applicant. Moreover, under the terms of the letter addressed to the Applicant at the time of the extension, the conditions of service set out in the ICAO Field Service Staff Rules became applicable to him and, accordingly, the previous letter of appointment issued to the Applicant was cancelled ; furthermore, the duration of the appointment was subject to the right of either party to terminate it in accordance with the provisions of the above-mentioned staff rules, including rule 9.6 relating to notification. The second extension was granted after the Spanish authorities had agreed to continue the Applicant's secondment at the request of the Secretary-General of ICAO.

On 20 December 1965, a near-miss incident occurred at N'Djili airport (Kinshasa), involving a Sabena Airlines Boeing 707 and an Air Congo DC-4. In a telegram of 24 December 1965, the Chief of the ICAO Technical Assistance Mission to the Congo informed the Director of the ICAO Technical Assistance Bureau at Montreal that an investigation was in progress, that the Applicant had been the Controller on duty, that he had been assigned to other duties pending the result of the investigation and that, in view of the serious nature of the incident and pressure from the Congolese Government and the airlines, he recommended to the Secretary-General the suspension of the Applicant until the completion of the investigation. In reply, the Chief of Mission was instructed, by a telegram of 28 December 1965, to employ the Applicant temporarily in another capacity not involving air safety, and to cable a summary of the investigation as soon as possible followed by a complete report including the Applicant's written explanations ; it was suggested that, if the dismissal of the Applicant was recommended, he should be given the opportunity to resign, effective immediately, by mutual consent. The Chief of Mission asked the Director of the Technical Assistance Bureau whether representatives of Air Congo and Sabena should be invited to the Board of Inquiry, and received the answer, in a telegram of 29 December 1965, that the appointment of a board of inquiry was a matter concerning the Congolese Government exclusively and that the ICAO investigation should remain private, without external participation, but with reports from all interested parties. In a memorandum of 14 January 1966 to the Director of the Technical Assistance Bureau, the Chief of Mission informed him that in its findings, the ICAO Committee of Inquiry had attributed the major responsibility for the near-miss incident to the pilot of the DC-4 ; nevertheless, he added that it was his opinion that the pilot and the Air Traffic Controller were equally responsible and that as far as ICAO was concerned, there seemed to be no other alternative than to terminate the Applicant's contract or to give him the opportunity to resign.

The findings of the ICAO Committee of Inquiry were as follows :

**" Findings**

" In the light of the observations and analyses referred to above, the members of the Committee

" Find that :

(a) A serious error on the part of the pilot commanding the aircraft DC-4-9QCBR resulting from his failure to follow the instructions given by Air Traffic Control and the air regulations (reference : ICAO, Annex 2 : The

commander of the aircraft must inform the control tower if an instruction cannot be followed or if there is any change of route).

" This error was the direct cause of the near collision.

" (b) An error attributable to the Controller, who had given instructions not in conformity with the special regulations in force (AIP Congo). This error was not relevant to the near collision. "

Since the Applicant complained that the Chief of the Technical Assistance Mission had refused to provide him with a copy of the findings of the ICAO Committee of Inquiry, the Director of the Technical Assistance Bureau informed the Chief of Mission, in a telegram of 26 January 1966, that the Applicant must be shown all the documents of the Committee and his comments on them forwarded as soon as possible to Montreal together with a copy of the Committee's report and conclusions ; the Congolese Government's Board of Inquiry should be urged to meet and report as soon as possible ; the Applicant was to remain suspended from his duties as air traffic controller pending a final decision, which could not be taken until all information was available at Montreal. On 27 January 1966, the Director of the Technical Assistance Bureau sent to the Chief of the ICAO Mission, in reply to his memorandum of 14 January 1966, a memorandum in which he enlarged on the substance of his telegram of 26 January 1966. On the same day, he wrote a letter to the Applicant in which, after assuring him that he would have every opportunity to present his defence before a decision was taken in his case, he reprimanded the Applicant for having forwarded to the Under-Secretary for Civil Aviation of the Air Ministry of Spain, to the Spanish Chargé d'Affaires at Kinshasa and to the Spanish representative on the ICAO Council copies of a memorandum which the Applicant had sent on 24 December 1965 to the Chief of Mission.

On 5 February 1966, the Chief of Mission sent to the Director of the Technical Assistance Bureau a memorandum stating, *inter alia*, the following :

" ...

" On 13 January, I was called to the Minister's office [Office of the Minister of Transport and Communications of the Democratic Republic of the Congo] along with the Secretary-General [of the Ministry] and the Director of Civil Aviation to discuss the near-miss incident of 20 December 1965.

" During the discussion, it appeared that the matter had been discussed before and that they were in common agreement that ATS Coll was responsible and I later found out that they based their findings on the Report from Mr. Yurdover [Chief Controller] dated 25 December.

" It seemed at one point that I had convinced them to hold an official board of enquiry but a few days later the Director C.A. appeared reluctant. On 28 January I wrote him a letter explaining that the airlines involved were agreeable to attend this board of enquiry and that it would be to the advantage of all concerned if the matter was dealt with within the least possible delay.

" On 31 January I mentioned to the DCA that Sabena airline would assign the Captain of the B707 CDT Van Dijk to attend the board if a 2-week notice was given.

" The DCA indicated that after consulting with the Secretary-General and the Minister, there was no need to hold this enquiry since they are convinced that ATS Coll is responsible for the incident.

"When asked if he would put it in writing, he replied that the letter with the Minister's signature was forthcoming but to this date, the letter has not arrived..."

On 10 February 1966, the Minister sent the following letter to the Chief of Mission :

"I have the honour to confirm to you the main points of the interview I had with you in my office in the presence of the Secretary-General and the Director of Civil Aviation with regard to the near-miss incident which occurred at N'Djili airport on 20 December 1965 between a Sabena Boeing 707 and an Air Congo DC-4.

"Since the incident resulted from an error on the part of the Controller on duty, who had caused a similar incident some time before, I have decided to dispense with the services of the accused expert, namely, Mr. Coll.

"I would therefore ask you to be good enough to arrange for the person concerned to terminate his service with the ICAO mission in the Congo at the earliest possible date."

The letter was forwarded to the Director of the Technical Assistance Bureau with a memorandum of 11 February 1966 in which the Chief of Mission stated : "For HQ's information, I did not solicit this letter, except as explained in my previous letter, for confirmation only." On receipt of the memorandum, the Director added the following annotation, dated 16 February 1966 : "On the basis of the attached letter... of the Minister Nendaka, please take the necessary action to terminate Mr. Coll's services, in the interest of ICAO administration."

In the meantime, on 13 February 1966, the Applicant addressed a letter containing his comments on the actions of the Chief of Mission and on the report of the enquiry to the Director of the Technical Assistance Bureau. He stated, *inter alia*, that since he had from the beginning been denied access to the documents relating to the incident, he had been deprived of his basic right to examine the charges made against him ; that, knowing himself to be blameless in the eyes of any impartial observer, he had urged the Chief of Mission to arrange for a Government enquiry ; that, instead of such an enquiry, the Chief of Mission had set up an internal investigating committee whose findings had been communicated to the Applicant only belatedly, reluctantly, and at the prompting of Montreal ; that, before responsibility for the incident had been established, an unfavourable report by the Chief Controller had been transmitted to Congolese officials who for that reason had come to believe that the Applicant was guilty and that there was therefore no need to set up a governmental enquiry. On 15 February 1966, the Applicant transmitted to the Chief of Mission his comments on the technical aspects of the findings of the ICAO Committee of Inquiry. ICAO sent two telegrams to the Chief of Mission, dated 16 and 17 February 1966, respectively. The first telegram authorized him, in compliance with the request by the Congolese Minister, to inform the Applicant that his contract was terminated with indemnity. The second asked him to notify the Applicant in writing that his contract was terminated with thirty days' notice and that ICAO waived his services for the duration of the notice period. On 19 February 1966, the Applicant protested that decision in the following telegram addressed to the Secretary-General of ICAO :

"Pursuant my letter of 13 February to Costa I am deeply concerned at ICAO decision communicated to me by Chief of Mission. Termination notice is based on Minister's letter which in turn originated on false premises

and biased information transmitted to him at the time the whole affair was being considered at ICAO Headquarters. I fail to understand termination notice which although with indemnity constitutes obviously a disciplinary measure taken ignoring my letter of thirteen. Staff rules 7.2 (a) and 9 B [sic] have not been respected. I am registering my appeal against this decision which adversely affects not only my interests but my whole career being seconded from Spanish Government..."

In a telegram of 22 February 1966, the Secretary-General replied :

"Decision communicated cable 17 February stands and does not represent disciplinary action. Cannot retain any expert against assisted Government's wishes."

The contested decision was confirmed to the Applicant by two letters from the Director of the Technical Assistance Bureau, dated 2 and 3 March 1966. In the first letter, the Director indicated that consideration had also been given to the possibility of the Applicant's transfer to some other post in the Technical Assistance Programme but that, unfortunately, there were no posts outside the Congo for which he would be qualified. The Director added that the Spanish Government would be informed that the reason for the termination had been the request of the Congolese Government. Since the Staff Association had taken up the Applicant's case with the Resident Representative of the United Nations Technical Assistance Board, the latter had an interview with the Chief of Mission, who reported on it in a memorandum of 5 March 1966 addressed to the Director of the Technical Assistance Bureau. According to that memorandum, the Resident Representative had told the Chief of Mission that he had proof that the termination of the Applicant had been the result of the Chief Controller's manoeuvres and intrigues with the Congolese authorities. On 5 March 1966, in a telegram addressed to the Secretary-General, the Applicant reiterated his protest of 19 February 1966 and his request that a governmental board of enquiry be immediately convened ; he recalled that he had been assured that no decision would be taken before his comments had been studied, and he officially informed the Secretary-General that he intended to appeal under staff rule 8.1 (a) and inquired whether the administrative machinery required under staff rule 8.2 (a) had been established. On 9 March 1966, the Secretary-General replied, repeating the substance of his telegram of 22 February 1966 and adding that ICAO could not force the Government to hold an inquiry. On 7 April 1966, the Director of the Technical Assistance Bureau informed the Applicant that the appropriate administrative machinery to consider his case would be the ICAO Advisory Joint Appeals Board.

Since, as has been stated above, the Director of the Technical Assistance Bureau had informed the Spanish authorities that the Applicant had been terminated at the request of the Congolese Government, the Spanish Under-Secretary of Civil Aviation asked the President of the ICAO Council for information in a letter dated 5 April 1966 in which, after recalling that the Committee of Inquiry had exonerated the Applicant, he protested that "instead of defending Mr. Coll, a member of his Mission, before the Congolese authorities as a proper understanding of his functions would have required him to do", the Chief of Mission had "intervened against Mr. Coll with the Minister of Communications of the Congolese Government with the obvious intention of having him expelled from the Congo". On 18 April 1966, the President of the Council replied that ICAO had asked the Director of the Technical Assistance Bureau to make a personal visit

to Kinshasa at the beginning of May to investigate all the details of the case, adding :

“ From the beginning, our intention had been to bring about an official inquiry into the near-miss that occurred at N'Djili, but unfortunately we have not succeeded, since the Congolese Government has decided not to hold an inquiry, but to request the departure of Mr. Coll. I must, however, make it quite clear that Mr. Coll's services were terminated solely because of this request and not because ICAO held him responsible for the incident. We could not have done otherwise, since ICAO was not satisfied with the preliminary internal inquiry and neither could it simply accept the views of Mr. Guyot, the Chief of the Mission. We have no valid evidence proving or disproving what you say in your letter, namely, that the Congolese Minister's decision to request Mr. Coll's departure was influenced by Mr. Guyot. I cannot express any opinion on this question and on the other questions you mentioned until I receive Mr. Costa's report. ”

The Director of the Technical Assistance Bureau submitted a report on his mission to the Congo, the relevant section of which reads as follows :

“ In investigating the role played by the Chief of Mission in dealing with Mr. Coll's case, I obtained statements from Mr. Guyot, from the Spanish Chargé d'Affaires, Don Carlos de Urgoiti y Bas, and from the Minister of Transport and Communications, Mr. M. Nendaka.

“ Mr. Guyot denied that he had suggested the departure of Mr. Coll to the Minister Nendaka. The Minister confirmed that he had not received such suggestion from Mr. Guyot and stated that he had taken that decision by himself.

“ Don Carlos de Urgoiti y Bas had told me that the Minister Nendaka had informed him, previously, that the Chief of Mission had suggested the departure of Mr. Coll.

“ Only a confrontation between Don Carlos and Minister Nendaka could bring some light to the investigation I was conducting and clarify the contradictory statements regarding Mr. Guyot's behaviour.

“ When I explained the situation to Mr. Osorio-Tafall [TAB Resident Representative], he told me that he never thought that Mr. Guyot had suggested the departure of Mr. Coll to the Minister Nendaka. He was (and is) convinced that Mr. Guyot proclaimed the culpability of Mr. Coll for the near-miss and that the Minister's decision was inspired by Mr. Guyot's statements. Of course I could not reopen my investigation along this new line but I asked Mr. Guyot if Mr. Osorio-Tafall's interpretation was correct. Mr. Guyot stated that the Minister received a letter from SABENA Headquarters (Brussels) accusing Mr. Coll of culpability for the near-miss and, probably, in his views, the Minister's decision to release Mr. Coll from duty in the Congo was inspired by that letter. ”

On 8 July 1966, the President of the Council informed the Spanish Under-Secretary for Civil Aviation of the results of the inquiry made by the Director of the Technical Assistance Bureau in a letter in which he stated, in particular, that the Chief of Mission had not recommended the Applicant's departure to the Minister nor had he “ tried to influence the Congolese Minister to take a decision to request ” his departure ; he also pointed out that the Director had, during his visit to the Congo, learned that the Congolese Government had reconsidered its previous

position and had decided to open an official inquiry. In his reply, dated 25 July 1966, the Under-Secretary stated, among other things, that, according to the report on an interview of 8 March 1966 between the Spanish Chargé d'Affaires and the Congolese Minister of Transport and Communications—a report which the Chargé d'Affaires had forwarded to his Government by letter dated 11 March 1966—the Minister had told the Chargé d'Affaires that the Chief of Mission had informed him that the Applicant's negligence had caused a near-miss at the N'Djili Airport and that that was clear from the results of the ICAO inquiry into the matter; "I do not wish to judge"—the Under-Secretary added—"whether Mr. Guyot's statement contrary to the finding of the ICAO Committee of Inquiry was intended to influence Mr. Nendaka in his decision or not . . . . The Congolese Minister's decision was undoubtedly taken by him alone . . . but it was based on his knowledge of the facts . . . . It is from this point of view that Mr. Guyot's behaviour seems unclear, since he gave the Minister an erroneous account of the facts." On 11 August 1966 the Chief of Mission transmitted to the Director of the Technical Assistance Bureau a copy of the report of the Board of Inquiry set up by the Congolese Government which met on 18 May 1966 and found that the Applicant was wholly at fault. The reports of the two flight commanders were appended to the report on the inquiry, but there was nothing to indicate that the Applicant had had an opportunity to submit his comments.

In the meantime, in two letters dated 9 and 16 March 1966 respectively, the Applicant had lodged an appeal with the Advisory Joint Appeals Board, which handed down its Opinion (Opinion No. 29) on 12 December 1966. The sections of that Opinion entitled "Findings and conclusions" and "Recommendation" read as follows:

*"Findings and conclusions"*

"19. The Board considered first the point made by the Representative of the Secretary-General, namely that the decision of the Secretary-General being based on a request for removal of the Appellant made by the Congo authorities 'neither the request of the Minister, nor the reasons behind it, nor the judgement of the Secretary-General as to the interests of the Organization can be reviewed by the Advisory Joint Appeals Board'.

"The Board has no difficulty in concurring with the view that when a State persists in a request for removal of an international official, the Organization employing the official had no alternative but to comply. However, the Board believes that the nature of the duties, the obligations and the status of experts employed in an international organization at the request of the Government of the country to which he is sent in order to assist that Government, are different from those of diplomatic staff in respect of whom the principle of automatic and unquestioned acceptance of the request for withdrawal is followed, whether or not reasons for the request are given. These differences seem to the Board to call for the application of principles which have to do with, *inter alia*, the mutual obligation of the Organization and the State, prestige of the former and the professional standing and careers of international officials. Therefore, in the opinion of the Board, when a request is made for removal of an expert by reason of error in the performance of his duties, an Organization had the duty and ought to have the right to consider fully the charge of error in the light of all relevant evidence, including any brought forward by the Government concerned. Whether



the Government at a later stage continues to insist upon the removal of the official, in which circumstances to maintain the expert in the country would be profitless, is another matter.

" 20. Since allegations were made in this case that the Government's request had been based upon false information, it appeared to the Board necessary to ascertain whether the unquestioning acceptance of the Government's request had been justifiable. Other allegations also made it necessary for the Board to consider, in line with the principle recognized in Rule 16<sup>1</sup> of the Rules Governing the Constitution and Procedure of the Board, whether prejudice or some other extraneous factor had led to the request.

" 21. The Appellant indeed based his case on the argument that the persons who were his immediate superiors had acted improperly in the affair, and that this had led to the submission of advice to the Government that resulted in the request for the Appellant's removal, which was accepted without further question.

" 22. The Board finds that :

" (a) The Chief Controller made a report upon the near-miss incident to the Commandant of the Airport and to the Chief, ICAOTAM, sending a copy to the Director of Civil Aviation, before a formal inquiry had been held. This report was unfavourable to the Appellant ;

" (b) ICAO ordered an inquiry to be held ; and the members of the Committee of Inquiry, composed of the Director and two instructors of the Institut de l'Aviation Civile at Leopoldville, exonerated the Appellant. This investigation was conducted without the participation or hearing of Mr. Coll, who was, however, permitted much later on to make comments on it ;

" (c) The Appellant, who was suspended from duties after a meeting in the Chief ICAOTAM's Office three days after the near-miss incident, was directed to resume duties as VFR traffic controller immediately upon completion of the enquiry ;

" (d) In addition to the report mentioned under (a) above which was communicated to the Director of Civil Aviation, the Minister was verbally informed by the Chief ICAOTAM, in spite of the result of the enquiry, that the blame for the incident lay upon the Appellant (this is confirmed by the Spanish Chargé d'Affaires, Leopoldville,<sup>2</sup> who had sought an interview with the Minister of Transport and Communications, Congo, on this point and had been given the same version by the latter) ; and

" (e) After the enquiry the Chief ICAOTAM continued to represent to Headquarters, Montreal, that the Appellant was culpable and to claim that his services should be terminated, and acted throughout in a manner prejudicial to the Appellant. For example, it was only upon repeated instructions from

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<sup>1</sup> " 16. In the case of a termination or other action on the grounds of inefficiency or relative efficiency, the Board shall not consider the substantive question of efficiency, but only evidence that the decision has been motivated by prejudice or by some other extraneous factor. " (GSI - 1.4.7.)

<sup>2</sup> See the letter of the Spanish Chargé d'Affaires, dated 11 March 1966, addressed to his Government.

ICAO that he showed the report of the enquiry and other documents to the Appellant.

"23. The Board concludes that whereas the Chief ICAOTAM was entitled to his own view on the causes of the incident, and to convey them to Headquarters, Montreal, he was in error in advising the Minister that the Appellant was to blame at a time when ICAO had not reached a decision on the results of the enquiry which it had ordered to be held. As a consequence of his advice, ICAO was presented with a request the justification for which was open to question in the light of evidence available to the Organization itself. In these circumstances, acceptance without due consideration of all evidence available was not justified. The Board concludes also that the actions of the Chief ICAOTAM were based upon motives other than an intention to pursue the course of investigation and consideration initiated by ICAO, and had the effect that the issue was prejudged.

"24. The Board notes that the Appellant was informed . . . that by having recourse to the intervention of the Spanish Ambassador and by disclosing the situation to other authorities, he had breached the declaration signed by him at the time he accepted his contract. It seems clear that he did so because he felt that he could not look for an unprejudiced examination of the matter. To the extent that the censure was justified, his motive should be considered as mitigating, particularly since, as it now appears, had he not taken this course of action, conclusive evidence on the intervention of the Chief ICAOTAM in the sequence of events that led to his removal would have been lacking.

"25. The Board considers that the Appellant is entitled to rehabilitation of his professional reputation, taking into account that he is a civil servant of the Spanish Government, and that he may, otherwise, be subject to loss of prestige in his own service. Furthermore, that Government has shown its interest in having the matter settled by permitting the Appellant to leave his post in order to attend the hearing at Montreal at Government expense.

*" Recommendation*

"26. In view of the above findings and conclusions, the Board recommends to the Secretary-General that a letter be sent to the proper Spanish authorities stating specifically that the reason for terminating Mr. Coll's service had nothing to do with his professional capacity or personal conduct.

"The Board also recommends that the Appellant be granted a sum, by way of compensation—over and above the normal termination indemnity already received by him—equivalent to two months' salary, for the moral and material damages suffered by him in connexion with his separation from his post."

As the Secretary-General rejected the Board's recommendation on 19 December 1966, the Applicant submitted the aforementioned application on 17 May 1967.

Whereas the Applicant's principal contentions are :

1. The Respondent's decision, the result of the alleged responsibility of the Applicant for the incident of 20 December 1965, was taken in spite of the fact that an ICAO Committee of Inquiry, conducted without the Applicant's

participation and in the absence of an important document, had exonerated the Applicant.

2. It is clear from the file that the termination of the Applicant constituted a disciplinary measure under Rule 7.1 of the Field Service Staff Rules; but provisions of Rule 7.2 of those rules had not been complied with. The fact that, at the moment of taking the decision, the Respondent has said that it was in the interest of the ICAO Administration does not change either the facts or the unjustified prejudice caused to the Applicant in his professional reputation. Consequently, the disciplinary nature of the decision remains.

3. If the termination decision is to be considered as taken under Rule 9.4 of the Field Service Staff Rules, the same facts lead to the same result. On that assumption, the Tribunal would be in the presence of a decision, in which the motivation for the termination of the Applicant was stated. The decision was based on the request of the Minister, which in turn was based on the alleged responsibility of the Applicant, the Minister's opinion itself being based on the erroneous information provided by ICAO officials. The decision was therefore based on improper motivation.

4. The discretionary powers of the Secretary-General of ICAO under Rule 9.4 are wide in scope but they cannot be unlimited. The same discretionary powers to terminate certain types of contracts were vested in the Secretary-General of the United Nations under regulation 9.1 (c) of the Staff Regulations of the United Nations. In its judgements Nos. 43, 44, 48, 49 and 50, the Administrative Tribunal has recognized that "such discretionary powers must be exercised without improper motive so that there should be no misuse of power, since any such misuse of power would call for the rescinding of the decision". Since in the Applicant's case the motivation for the contested decision was improper, there has been a misuse of power.

5. The termination of the Applicant's services was not the only choice open to ICAO. Under the Applicant's contract, the Organization reserved its right to transfer him to any other duty station in the Congo or to any other territory, or to ICAO headquarters. The Applicant was regarded by ICAO as being conscientious and dependable, giving complete satisfaction of service and possessing technical capacities to a high degree. In addition, the Congolese authorities were fully satisfied with the Applicant's performance. When the attitude of the Congolese authorities with regard to the Applicant changed as a result of actions of certain ICAO officials, the Organization could and indeed should have made use of that contractual provision, as the Applicant himself had suggested.

Whereas the Respondent's principal contentions are:

1. The Applicant's contract was terminated in accordance with the conditions of his employment. The letter of appointment of the Applicant in which he was offered an extension of his appointment to 14 November 1966 stated that the offer of extension, which the Applicant accepted, was subject to the conditions of service set out in the ICAO Field Service Staff Rules. Rule 9.4 of the Field Service Staff Rules provides for the termination of the appointment of a staff member by the Secretary-General prior to its expiration "if, in the opinion of the Secretary-General... the termination of the staff member's appointment would be in the interest of the Organization". The Minister having requested that the Applicant cease to render services to the ICAO Mission, it was not possible to maintain him there, and it was decided to terminate his service in the interest of ICAO

Administration. It may be added that there was no other suitable post for him.

2. The termination of the Applicant was the result of the request from the Minister ; it was not a disciplinary measure. The Applicant was so informed and termination indemnity was paid. If the termination of the contract had been applied as a disciplinary measure, payment of termination indemnity would have required a decision by the Secretary-General, exercising his discretion in accordance with Rule 9.7 (c) of the Staff Rules. This procedure was not applicable in the Applicant's case and therefore termination indemnity was paid him in accordance with Rule 9.7 (b).

3. Neither the request of the Minister, nor the reasons behind it, nor the judgement of the Secretary-General as to the interests of the Organization can be reviewed by the Tribunal.

4. Judgements Nos. 43, 44, 48, 49 and 50 of the Administrative Tribunal are not relevant. The Minister's letter is an important element which did not exist in the appeals considered in those judgements. In addition, no improper motivation was proved before the Advisory Joint Appeals Board, although the latter seems to have assumed that the actions of the Chief of Mission were based upon such motivation.

5. Even if it were assumed for the sake of argument that the Chief of Mission advised the Minister that the blame for the incident lay upon the Applicant and that the Chief Controller sent to the Minister a copy of his report on the near-miss incident, it must be borne in mind that each of them was under duty to give his opinion to the Minister as they had a duty to promote the safety of civil aviation in the Congo.

6. It is not for the Tribunal to go into the findings of the ICAO Committee of Inquiry or of any other inquiry, since such findings are not relevant to the reason for the termination of the Applicant's contract.

The Tribunal, having deliberated until 25 October 1967, now pronounces the following judgement :

I. The Tribunal notes that this case raises complex issues, some of which have to do with the special circumstances in which ICAO was operating in the Congo at the time of the Applicant's termination.

First of all, the near-miss incident of 20 December 1965, from which this case arose, was the subject of two inquiries, one held by ICAO in January 1966 and the other by the Congolese Government in May 1966. The two inquiries resulted in contradictory findings. The Tribunal is not called upon to try to explain this contradiction ; it finds, however, that the Applicant was not invited to testify before the bodies of inquiry and that the unfavourable findings of the board appointed by the Congolese Government were posterior to the letter from that Government which had led to the Applicant's termination. This second inquiry was held after the Applicant had left the Congo.

II. Moreover, the Tribunal finds that the ICAO Mission, of which the Applicant was a member, was performing a special function for the Congolese Government. Some of the functions of the ground services of the Congolese Department of Civil Aviation were being performed directly by ICAO experts. It was while the Applicant was performing functions of this nature as air traffic controller at N'Djili Airport that the events which gave rise to this case occurred.

According to the Respondent, the nature of the services being performed at

that time by ICAO on the basis of agreements with the Congolese Government gave the Congolese authorities special jurisdiction over the experts then employed by ICAO. The Tribunal is not required, in the present case, to pass judgement on the manner in which that jurisdiction was exercised or to rule on the scope of the agreements in question. There is accordingly no need to examine whether or not the decision of the Congolese Government is analogous, from the legal standpoint, to a decision whereby a Government declares a diplomatic agent *persona non grata*. The Tribunal simply notes that the letter of the Congolese Minister dated 10 February 1966 stated: "Since the incident resulted from an error on the part of the Controller on duty, who had caused a similar incident some time before, I have decided to dispense with the services of the expert concerned, namely, Mr. Coll." It was following this letter that the Respondent decided to terminate the appointment of the Applicant, on the basis of Rule 9.4 (d) of the ICAO Field Service Staff Rules, under which the appointment of a staff member may be terminated if, in the opinion of the Secretary-General, the termination of the appointment would be in the interest of the Organization. It is, on the other hand, incumbent on the Tribunal to examine whether in the particular circumstances the decision of the Respondent to terminate the Applicant's appointment "in the interest of the Organization" was properly taken.

III. In previous judgements the Tribunal has acknowledged that the right to end a contract "in the interest of the Organization" confers on the Secretary-General a discretionary power in the matter of termination.

Nevertheless, the Tribunal has recognized that the exercise of this discretionary power should conform to certain general principles (Judgements Nos. 18, 27, 43-45, 48-50, 54).

In Judgement No. 54 (Mauch, para. 5) the Tribunal stated: "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."

IV. In the present case, the Respondent informed the Applicant that an expert could not be retained against the wishes of an assisted Government. The Tribunal cannot challenge this position. It notes, however, that the Minister's letter of 10 February 1966 made specific complaints against the Applicant in regard to his professional ability; the letter mentioned the near-miss incident of 20 December 1965, expressly attributing it to "an error on the part of the Controller on duty", and also "a similar incident" which the Applicant had allegedly caused some time before.

Thus the request of the Congolese authorities that the Applicant's services in the Congo should be terminated cast doubt on his professional competence.

In terminating the appointment of the Applicant in these circumstances, the Respondent simply informed him that the decision did not represent disciplinary action, without indicating any view concerning the Minister's opinion—no doubt without endorsing it, but also without contesting it.

The termination thus came about following the expression of an unfavourable opinion concerning the Applicant's services. However, the Respondent, to whom the Applicant was bound by contract, did not see fit to take a final position in

the matter and, above all, did not proceed as he had himself stated he should in order to reach a considered opinion on the Applicant's case.

V. When informed of the near-miss incident, the Respondent took two kinds of actions : the Applicant was suspended from his duties as Controller and assigned to other duties, and the Respondent called for steps to elucidate the matter before a final decision was taken.

In a telegram of 28 December 1965 and in another of 26 January 1966, and also in a memorandum of 27 January 1966, the Director of the Technical Assistance Bureau told the Chief of the ICAO Mission that, before deciding on the difficult question of appropriate disciplinary action with regard to the Applicant :

(1) The full report and findings of the ICAO Committee of Inquiry should be sent to Montreal ;

(2) All that documentation should be shown to the Applicant and his comments should be forwarded to Montreal ;

(3) The Congolese Government's official Board of Inquiry should have completed its report, which should also be sent to Montreal.

The memorandum of 27 January 1966 shows that the Respondent realized the seriousness of the action which might be taken against the Applicant and that he intended, before a decision was taken, to follow an appropriate procedure in order that the facts might be clarified and the Applicant enabled to explain his actions in the knowledge of the findings of the inquiry.

VI. The Tribunal finds that this procedure was not followed. It observes that on 14 January 1966 the Chief of Mission sent to Montreal a commentary on the findings of the ICAO Committee of Inquiry together with his own assessment that the pilot of the DC-4 and the Controller were equally responsible. He also stated that there was no alternative but to terminate the Applicant's contract. Without attaching the Committee's report, which had been drawn up by that time, he forwarded other documents, the inadequacy of which was stressed by the Director of the Technical Assistance Bureau in his memorandum of 27 January 1966.

The Tribunal has examined closely the communication of 14 January and the circumstances in which it was sent. Firstly, it appears from the file that the report of the ICAO Committee of Inquiry was sent officially to the Congolese Minister of Transport and Communications by the Chief of Mission before it was sent to the Director of the Technical Assistance Bureau at Montreal. Secondly, in that communication the Chief of Mission gave his own opinion about the various responsibilities in the near-miss incident, an opinion unfavourable to the Applicant ; but he did not forward a copy of the report of the Committee of Inquiry, whose members he himself had appointed and which had found the pilot of the DC-4 to be responsible. Lastly, the communication is dated 14 January 1966 ; as stated by the Chief of Mission in a memorandum sent subsequently, on 5 February 1966, to the Director of the Technical Assistance Bureau, he had been called to the Minister's office on 13 January to discuss the matter with the Secretary-General of the Ministry and the Director of Civil Aviation. In the memorandum of 5 February the Chief of Mission states that it seemed to him during the discussion of 13 January that the matter had been discussed before by the Congolese authorities and that they were convinced of the Applicant's responsibility. He adds, however, that he found out later that their opinion had been based on the report of the Chief Controller dated 25 December 1965.

VII. The Tribunal notes with surprise that the Chief of Mission, in writing to the Director of the Technical Assistance Bureau on 14 January, did not inform him of this conversation with the Congolese authorities, which presumably had taken place on the previous day. It likewise notes the identical views of the Chief of Mission and the Congolese authorities concerning the responsibility of the Applicant in the near-miss incident. The Tribunal notes further that the Chief of Mission, in forwarding the Minister's letter to the Director of the Technical Assistance Bureau on 11 February 1966, saw fit to say: "For HQ's information, I did not solicit this letter, except as explained in my previous letter, for confirmation only."

The Tribunal furthermore observes that nothing in the file gives reason to think that the Chief of Mission, having been informed by the Director of the way in which the latter intended to proceed before considering action against the Applicant, conveyed this information to the Congolese authorities or pointed out that the Respondent felt that an official inquiry should be held by the Congolese Government before a decision was taken concerning the Applicant.

VIII. Moreover, the Applicant did not receive the report of the ICAO Committee of Inquiry until 28 January 1966, after he had protested to the Director at Montreal by telegram of 24 January. The full set of documents was not transmitted to him until 7 February, and in a letter of 13 February 1966 the Applicant protested to the Director of the Technical Assistance Bureau against the irregular manner in which it was handed over to him.

It was accordingly not until 15 February 1966 that the Applicant was able to submit to the Chief of Mission the comments which the Director of the Technical Assistance Bureau had said were necessary in his communications of 28 December 1965 and 27 January 1966. By that time, however, his fate had been decided, as a result of the Congolese Minister's letter. The telegram announcing the decision of the Respondent to terminate the Applicant's appointment is dated 16 February 1966. Hence the Applicant's comments could not have been considered before his termination, contrary to the Respondent's intention. Nothing in the file would indicate that the Applicant had been informed of the views of the Chief of Mission about his responsibility in the near-miss incident or that he had had an opportunity to explain his actions in the matter or in the other incident mentioned by the Congolese Minister.

IX. Accordingly, before the termination decision was taken, the Applicant did not know the complaints made against him and had no opportunity to present his side of the matter. Moreover, the commitment made in his regard by the Director of the Technical Assistance Bureau, that an adequate procedure would be followed before a decision on his case was taken, was not fulfilled. The Applicant was therefore deprived of fundamental guarantees, and his right to be heard in a case involving his professional competence was disregarded. While he was not subjected to disciplinary action, it is incontestable that his conduct in the performance of his duties was directly impugned not only by the Congolese Government but also by his superior. Observance of those fundamental guarantees was therefore a precondition for the legality of the termination.

X. The Tribunal notes, finally, that a personal letter addressed to the Applicant on 3 March 1966 by the Director of the Technical Assistance Bureau stated that the notice period would begin as from the date of the communication which would be sent to him by the Chief of Mission. However, by 3 March 1966

the Applicant had had that communication for ten days—since 22 February—and the notice period was counted from the latter date.

The letter also stated: "Since the contract provided for your appointment until November 1966, you are entitled to a maximum indemnity of three months' base salary."

The same statement was made in a letter of the same date sent by the Director of the Technical Assistance Bureau to the Secretary-General of Aviation and Air Transport of the Spanish Air Ministry, which cited the text of Rule 9.7 (b) of the ICAO Field Service Staff Rules:

"A staff member who has completed the period of his probation and whose fixed term appointment is terminated by the Secretary-General as in (a) above shall, if his appointment is for six months or more, be entitled to a termination indemnity of one week's salary for each month of uncompleted service subject to a minimum indemnity of six weeks' salary and a maximum indemnity of three months' salary."

The Respondent thus indicated his intention of giving the Applicant the benefit of particularly favourable treatment. The Tribunal finds, however, that the final financial settlement was based on the strictest application of Rule 9.7 (b), since the Applicant received a termination indemnity corresponding to only seven weeks' salary.

In this latter respect, the line of action which the Respondent said he proposed to observe was not followed. The Applicant was deprived of an indemnity which would have been a symbolic expression of the fact, stated by the Director of the Technical Assistance Bureau in his letter to the Secretary-General of Aviation and Air Transport of the Spanish Air Ministry, that the Respondent "deeply regrets that it was not possible for [the Applicant] to continue his service with this Organization in the Congo".

XI. Accordingly, the Tribunal decides that, inasmuch as the Applicant was not afforded the guarantees recognized to be necessary by the Respondent himself in the light of the facts of the case, the termination decision must be deemed to be irregular, and that therefore the application is well founded.

XII. As regards the pleas in the application to rescind the decision contested and to reinstate the Applicant, the Tribunal notes that article 9 of its Statute provides that if the Tribunal finds that an application is well founded it shall order the rescinding of the decision contested or the specific performance of the obligation invoked.

In the present case, the Tribunal notes that the Respondent has set forth various reasons why reinstatement would be impossible in practice.

Thus, in the present circumstances, the Applicant could not, by virtue of the rescinding of the decision contested, be reinstated until the end of his contract, which was to expire on 14 November 1966.

The Tribunal has found previously (Judgements No. 68, Bulsara, and No. 92, Higgins) that, where the parties cannot be restored to *status quo ante*, compensation in lieu of specific performance may prove to be adequate and proper relief.

XIII. The Applicant has requested, in the event of non-reinstatement, payment of a sum equivalent to two years' net base salary. He has laid emphasis on the professional prejudice he has suffered as a result of termination in the particular circumstances of the case.

The Tribunal notes that the Applicant's contract was renewed for one year



from 15 November 1965 following pressing appeals by the Respondent to the Spanish authorities. The Applicant could therefore normally have expected to remain in the service of ICAO until 14 November 1966.

Bearing in mind all the circumstances of the case, the Tribunal finds that the monetary compensation to which the Applicant is entitled would be fairly appraised if the Applicant was awarded as indemnity the equivalent of his base salary for the period of the contract remaining as from the date of termination, less the sums already paid following the termination.

XIV. For these reasons, the Tribunal decides that :

- (1) The termination decision is invalid ;
- (2) Inasmuch as the reinstatement of the Applicant is impossible in the circumstances, he is hereby awarded, for the prejudice suffered, an indemnity equivalent to his base salary for the period of the contract remaining as from the date of termination, less the sums already paid following the termination ;
- (3) The rest of the application is rejected.

*(Signatures)*

Suzanne BASTID

*President*

H. GROS ESPIELL

*Member*

L. IGNACIO-PINTO

*Member*

Z. ROSSIDES

*Alternate Member*

Jean HARDY

*Executive Secretary*

*New York, 25 October 1967.*