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June 22, 2004

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MEMORANDUM FOR MR. PETER FLANIGAN, THE WHITE HOUSE

FROM: John B. Rhinelander
Deputy Legal Adviser
and
Bert W. Rein
Deputy Assistant Secretary for
Transportation and Telecommunications

SUBJECT: Air Piracy - Follow-on International Action
Following Adoption by ICAO Council of
US Resolution

Adoption by the Council of the International Civil Aviation Organization (ICAO) of a somewhat modified version of the US proposal calling for joint sanctions against states participating in hijackings for international blackmail purposes or failing to extradite or prosecute their perpetrators constitutes a significant advance in our diplomatic effort to deter future acts of this kind. This memorandum describes measures the Department proposes to take in order to maintain the international momentum achieved through the ICAO resolution.

By its recognition that all states were obligated to act against hijackings for international blackmail purposes by observing the principles of Article 11 of the Tokyo Convention (return of the passengers, crew and aircraft) and Articles 7 and 8 of the draft convention on unlawful seizure of aircraft (extradition or prosecution of offenders), the Council clearly served notice that states could not avoid their responsibilities by failing to adhere to these conventions. Equally important, in recognizing the possibility of action against offending states, the Council provided a recognized international framework for future US action to cut off services and to persuade others to join us. It is worth noting that most of the major civil aviation countries supported the Council's action.

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To drive home the importance of the Council action, and to emphasize the need to follow through with an effective international convention, we recommend that the President sign the attached (draft) letter (Tab A) to the President of the ICAO Council, making it and the text of the ICAO Resolution (Tab B) a White House press release. The wide publicity such a release would generate would help inform the American public of the Administration's continuing efforts against hijacking while indicating to foreign nations the President's continuing concern and his interest in effective action. The President's August 13, 1970 letter to the President of the ICAO Council commending ICAO on its declaration against unlawful interference with civil aviation provides an appropriate precedent for this channel of correspondence.

As noted in the proposed Presidential letter, the Department has prepared a draft convention (Tab C) to implement the principles of the ICAO Resolution which we are tabling in the ICAO Legal Committee now meeting in London. This convention would have the following features:

(a) An agreed premise that hijackings for international blackmail purposes and acts of sabotage which damages aircraft or kills or injures passengers is a threat to aviation that requires concerted action by all states directly affected.*

(b) Consultative procedures and a framework for determining failures by a State to meet their international obligations in two cases, detention of passengers, crew or aircraft for international blackmail purposes and failure to take into custody, and thereafter extradite or prosecute, hijackers involved in blackmail and saboteurs causing serious harm.

* Sabotage is not covered by the ICAO Resolution, but is an equally serious threat to civil aviation. Similarly, we would have no objection to broadening the provisions of the proposed convention to cover all failures to prosecute or extradite in hijack cases if this proved tactically feasible.

(C) Decision-making machinery to take joint action, including suspending air services, is binding on States upon vote by a majority.

While the convention may appear "tough" to other governments, you should be aware of several important points. First, even if ratified by some states, a convention cannot bind states not parties to it to take joint action. Second, while the draft convention is designed to deter air piracy by making states live up to their international obligations, unfortunately the underlying obligations are full of loopholes. For instance, in many cases the laws of a particular state (limited jurisdiction of their criminal laws, exceptions in bilateral extradition agreements) are legally inadequate to deal with the extradition or prosecution of aircraft hijackers or saboteurs, and the key multilateral treaties in the extradition/prosecution areas (Unlawful Seizure and Unlawful Interference Conventions) have not yet been finally negotiated. Third, since we do not expect any obvious "target" state will likely become a party to the draft convention, the convention cannot dispose of the legal arguments raised by many states (including Canada, our strongest supporter) that their bilaterals with "target" states would prevent them from suspending the airline services of the "target" state. Our attempt to dispose of this argument will probably not be accepted as valid by many.

In summary, we are tabling a draft convention which we believe appears comprehensive, fair and tough. However, appearance and posture may be more important at this time than any immediate expectation that an effective sanctions convention will come into effect.

On another front, several states (notably the Philippines, Japan and the Netherlands) have inscribed a hijacking item on the calendar of the United Nations General Assembly. We are actively engaged in efforts to direct this initiative toward a resolution supporting the ICAO initiative.

While it is almost certain that there will be efforts to talk our proposal to death at the legal committee meeting and that enthusiasm for the full scope of our

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draft will be limited, we believe that given the added thrust of a Presidential letter and the recent efforts of Secretary Volpe there may, nevertheless be an opportunity for progress at the ICAO legal committee meeting.

To obtain optimum tactical benefit from the Presidential letter, we believe it could be desirable for it to be released to the press at 9:00 A.M. on Monday, October 12. We would have this followed up with background material at the "noon-briefing" at the Department of State.

Drafted by:

~~XXXXXXXXXXXXXXXXXXXX~~ E/OA/AVP - Mr. Silberstein E/TT - Mr. Rein

L - Mr. Rhineland