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January 5, 1973

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MEMORANDUM FOR THE MINISTER

File
Diary
Div

Unlawful Interference with Civil Aviation (Hijacking):
Special Session of ICAO Legal Committee, January 9-30, Montreal

As you are aware, for the past two years Canada and the U.S.A. have been pressing for a new convention to establish international machinery for taking joint action against states which detain hijacked aircraft, passengers or crew or fail to either extradite or prosecute persons who have committed acts of unlawful interference with civil aviation. Last June we supported a successful move to have the ICAO Council re-assign a high priority to the consideration of a joint action convention by the ICAO Legal Committee.

2. In September a Special Subcommittee of the ICAO Legal Committee met in Washington. The Subcommittee's report contains the text of draft articles which could form the basis of a new convention which would establish (1) a "commission of experts" which would be convened to determine whether an accused state has contributed to a threat to the safety of civil aviation, and (2) machinery (proposed by Canada, the U.S.A., Netherlands and U.K.) for taking joint action after a determination of fault has been made under stage (1). Although no general agreement was reached on the substance of these draft articles, the Subcommittee at least decided that the subject of a convention was "ripe for study by the ICAO Legal Committee" and that the draft article on joint action was "ready for presentation to the Legal Committee for its consideration". Accordingly, on November 1 the ICAO Council decided to convene this month a Special Session of the ICAO Legal Committee "to work on" the Washington report, and to schedule provisionally a diplomatic conference from August 21 to September 11, 1973.

3. It is obvious that if any new joint action machinery is going to be effective, it must command general support. To date, it has been impossible to attract this general support because:

(1) some countries take the position that enforcement action is the exclusive responsibility of the U.N. Security Council (we take the position that it has primary but not exclusive responsibility);

(2) other countries are reluctant to take joint action against states which do not become parties to the conventions creating international offences (i.e. the Tokyo, Hague and Montreal Conventions) nor to any new convention authorizing joint action. The Canada-U.S.A.-Netherlands-U.K. draft article on joint action tries to remove this reluctance by providing that joint action could be taken against a state which, although it does not become a party to the joint action convention, is found to be in breach of its duty as a member of ICAO (i.e. under the Chicago Convention) not to contribute to a threat to the safety of civil aviation; and

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(3) as illustrated by the opposition at the 27th UNGA to proposals for taking steps to combat international terrorism, many countries are suspicious of any initiative the aim of which is to come to grips with specific types of terrorism and, as proof of their revolutionary solidarity are willing to write off any positive proposal as being a Western-inspired attempt to protect vested interests.

4. The Canadian delegation to the ICAO Legal Committee will have to be flexible in exploring the possibilities of reaching general agreement on joint action machinery. Of course, the limit of this flexibility must be that the details of any approach which the delegation supports must be practical and effective. I would recommend that the delegation should:

First, continue to support the Washington draft articles as the basis of a new convention, but indicate its willingness to be flexible on details in order to attract general support.

Second, indicate its willingness to consider in detail any feasible alternative approaches. The French have circulated a proposal which would involve amending the ICAO Constitution (Chicago Convention) rather than having a new convention. Under Article 94 (b) of the Chicago Convention, the ICAO Assembly would be able to decide by a simple majority that when these amendments come into force after having been ratified by 2/3 of the ICAO members, members which have not ratified them within a specified period will cease to be members of ICAO. It is open to question whether it would ever be possible to get 2/3 of the ICAO members to ratify especially if they know that states that do not ratify will cease to be members. One positive aspect of the French proposal is that it would remove the constitutional objections of a number of countries (including of course, France which has been one of the most influential opponents) since joint action would be taken only against states parties to the Chicago Convention. However, a number of details of the French proposal would cause problems: it covers only acts of hijacking but not acts of sabotage to civil aircraft; relatively rapid action against offending states could be frustrated easily since all action would be halted pending the resolution of appeals of the ICAO Council's decisions; and, under the Chicago Convention the main penalty which can be taken against defaulting states is suspension of voting power in the ICAO Assembly, which penalty would not be too effective.

Third, if it becomes clear that it will be impossible to secure general support for a new convention, explore the possibilities of amending the Chicago Convention in order to establish effective joint machinery along the lines of the Washington draft articles (or a modified version thereof) or by using existing ICAO machinery with appropriate modifications or innovations.

5. The Interdepartmental Working Group which has been preparing for the Special Session of the ICAO Legal Committee recommends that the delegation should be composed of:

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Mr. D.M. Miller	(Director, Legal Operations Division, External Affairs)	Chief Delegate
Mr. P. Sorokan	(Justice)	Alternate Chief Delegate
Mr. G.I. Warren	(Legal Operations Division, External Affairs)	Alternate Chief Delegate
Mr. Peter Wallis	(CTC)	Delegate
Mrs. M. Temple	(MOT)	Delegate
Mr. P.B. Sheppard	(MOT)	Delegate
Mr. J.J. Guss	(Legal Operations Division, External Affairs)	Delegate

The delegation is rather large in order to ensure that delegates will be available if more than one working group is established to study various aspects of the problem. Every effort will be made to limit the maximum number in Montreal at any one time to five delegates.

6. A similar memorandum has been submitted by MOT officials to the Minister of Transport.

7. Do you approve the instructions for the delegation (paragraph 4) and the composition of the delegation?

A.E. RITCHIE

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