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August 25, 1972.

MEMORANDUM FOR THE MINISTER

Unlawful Interference with Civil Aviation (Hijacking):
September 4-15 ICAO Meeting in Washington

As you are aware, the ICAO Council adopted on June 19 a resolution, proposed by the United States and co-sponsored by Canada, directing ICAO's Legal Committee "...to convene immediately a special Sub-Committee to work on the preparation of an international convention to establish appropriate multilateral procedures within the ICAO framework for determining whether there is a need for joint action..." against states which fail to live up to legal obligations pertaining to international civil aviation. The Special Legal Sub-Committee, which at American invitation will meet in Washington from September 4 to 15, will be composed of delegations from Canada, Brazil, Chile, Congo (Brazzaville), Egypt, India, Israel, Japan, Netherlands, Spain, Tanzania, the U.S.A. and U.S.S.R., with France, the U.K. and Jamaica represented as ex officio members.

2. You will recall that in April of last year representatives of Canada and the United States, in an earlier ICAO Legal Sub-Committee, co-sponsored a working paper containing a draft multilateral convention creating international machinery for enforcing, against those states failing to live up to them, the legal obligations pertaining to international civil aviation contained in relevant international conventions. However, after the initiative encountered opposition from a number of countries (including the U.S.S.R., France and Arab countries), the ICAO Assembly voted last summer, over the strong opposition of Canada, to remove the subject from the active list on the ICAO Legal Committee's work programme. Taking their usually strict interpretation of the U.N. Charter, the U.S.S.R. and France argued that ICAO should not get involved in enforcement since the subject of "sanctions" is reserved to the U.N. Security Council. Canada and the U.S.A., however, contended that since under international law each state has exclusive sovereignty over its own air space, it is open to any state to become a party to a multilateral convention providing for the suspension of air services against states not living up to their international legal obligations. Although we gained a procedural victory when the ICAO Council voted on June 19 to again assign a high priority to the question of joint action, the basic substantive differences remain and will have to be bridged if the Special Sub-Committee which will meet in Washington is going to make any progress.

3. In preparation for the Washington meeting a series of inter-departmental meetings has been held under the chairmanship of MOT's Director General of Civil Aeronautics and attended by officials from Transport, the CTC, Justice and External Affairs. On July 24 Canadian officials hosted their U.S.A. counterparts in Ottawa for a preliminary exchange of views on tactics to be pursued at the Washington meeting.

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After this meeting United States and Canadian Embassies were instructed to make parallel approaches in the capitals of countries which will participate in the Washington meeting designed to see if there are possibilities for bridging differences in order that a substantive step forward can be taken in Washington. Once the results of these approaches have been evaluated, U.S.A. officials intend to invite officials from Canada and a few other like-minded Sub-Committee members to come to Washington August 30, prior to the start of the Sub-Committee meeting, to concert tactics, review the Canada-United States draft convention to determine whether modifications can be made to make it more generally acceptable, and consider whether there are effective alternatives if the approach embodied in the Canada-United States draft gets bogged down again at the Washington meeting.

4. There appear to be three main courses of action which can be pursued at the Washington meeting, each of which has a number of variations and none of which is mutually exclusive. These are:

First, we can put forward again the Canada/United States draft convention after having made modifications to make it more generally acceptable. However, we are coming to the conclusion that, although it may be necessary tactically to start by putting it forward in order to create pressure for achieving something positive albeit less ambitious, there is little likelihood of reaching agreement on the draft without emasculating it completely. Too many states seem to be unwilling to enforce international obligations (to return hijacked aircraft, crews and passengers and to either prosecute or extradite hijackers) against states which have never accepted these obligations either bilaterally or by becoming parties to the relevant multilateral conventions.

Second, in order to remove the main difficulty posed for a number of states by the approach embodied in the Canada/United States draft, we could propose a different multilateral convention under which air services would only be suspended against defaulting states which have previously accepted this contingency either bilaterally or multilaterally, with parties to the convention accepting the obligation to insert an enforcement clause in each future bilateral air agreement into which they enter or which they may renew with countries not parties to the convention. It may turn out that this type of bilateral approach incorporated in a multilateral convention, while avoiding the constitutional objections raised by a number of states, may still go further than many states are willing to go for political reasons. However, it is worth exploring with other states.

Third, consideration could be given to establishing machinery (preferably within the framework of ICAO without the need to have a new multilateral convention) for investigating cases where it is alleged that states have failed to co-operate in combating and deterring unlawful interference with, or violence against international civil aviation, and for making an objective determination of fault. Once a determination of fault is made and a report thereon submitted to all

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ICAO States and possibly to the U.N. Security Council, there may exist a possibility of "joint action" in different forms within the ICAO framework, particularly if some amendments are made to the Chicago Convention. Although it is unlikely that the U.N. Security Council would take enforcement action in specific cases, the objective finding of fault and accompanying publicity would at least increase international pressure on the defaulting State to conform to international standards, and could also serve as an objective basis for taking action by those States, such as the United States, which consider that they are justified under international law in taking unilateral action to preserve air security. Moreover, the establishment of fault-determining machinery could at a later stage be supplemented, if future developments so warrant, by a stronger multilateral enforcement system.

5. We recommend that the Canadian delegation be instructed, therefore, to work actively to promote general agreement on the highest possible common denominator that can be achieved from the above three approaches or any new alternatives that emerge that will enhance the safety of international civil aviation through the prevention or discouragement of acts of unlawful interference. Do you agree?

6. The interdepartmental working group which has been preparing the Canadian position recommends that the Canadian delegation be headed by Mr. D.M. Miller, Director of our Legal Operations Division, and include officials from MOF, Justice, the CTC and an officer from our Embassy in Washington. Do you agree?

7. It is obvious that the problem of unlawful interference with civil aviation has to be attacked from a variety of directions at the same time. Whether or not we are successful in Washington in moving forward in the area of ex post facto measures to enforce international obligations, it is clear that the most effective way of dealing with the problem is by promoting the implementation of more rigorous national and international preventive security measures. Accordingly, we shall be cooperating with MOF's Director General of Civil Aeronautics in exploring the possibility of a Canadian initiative within ICAO to secure more effective international security standards.

8. A similar memorandum is being submitted by MOF officials to the Minister of Transport.

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