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FROM : Department of State

DATE:

SUBJECT : Aircraft Hijacking -- US Sanctions Proposal

REF : STATE 166440

Attached is statement by U.S. Representative to ICAO Legal Committee in London, John B. Rhineland, Deputy Legal Adviser, explaining U.S. Draft Sanctions Convention. Posts may find this statement useful in any ensuing discussions with host governments on this subject.

ROGERS

Attachment:
Statement.

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In Out

Drafted by: L/E: JG Carter:ma

Drafting Date: 10/26/70 Phone No.: 23551

Contents and Classification Approved by: L/E - Mr. Carter

Clearances: E/OA - Mr. Meadows

yes

LC/Working Draft No. 791
19/10/70

LEGAL COMMITTEE

EIGHTEENTH SESSION

(September - October 1970)

STATEMENT OF THE U.S.A. DELEGATE,
MR. JOHN B. RHINELANDER MADE ON 15 OCTOBER 1970

DRAFT CONVENTION REGARDING THE SAFETY AND SECURITY OF
INTERNATIONAL CIVIL AIR TRANSPORT SERVICES

In introducing the draft convention which is set forth in our working paper LC/Working Draft No. 776, I would like to limit my remarks this afternoon to two basic subjects.

First, a brief review of the provisions in the U.S. draft so that this Committee will be better able to understand and reach agreement on some principles during this session, and clearly identify the major unresolved issues; and

Second, an indication of what we believe should be the result of our discussions of the U.S. working paper here in London.

I do not believe it is necessary to dwell on the question of urgency in my initial statement. The resolution adopted by the Council on October 1 by vote of 14 in favour, 3 opposed and 10 abstentions speaks for itself.

As you are no doubt aware, President Nixon released a seven-point policy statement on September 11 which described concrete steps the United States was going to take to combat air piracy. One of these points was a call on the international community to take joint action in cases of hijackings for international blackmail purposes. On September 18, our Secretary of Transportation, Mr. Volpe, requested at a special session of the Council that the Council adopt a resolution calling upon States to agree to the principle of taking joint action in certain circumstances and directing the Legal Committee to prepare a draft convention. While the resolution, which was seconded by Guatemala when formally introduced was clarified and amended in several respects over the course of the next two weeks, the resolution as passed contained the basic concepts that my government originally proposed.

As this time, I would like to read a letter from President Nixon to President Binaghi of the Council released yesterday by the White House. It reads:

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"Dear Mr. Binaghi:

"It was deeply gratifying for me to learn that the Council of the International Civil Aviation Organization had called upon States to take strong, concerted measures to deter hijacking for international blackmail purposes. The Council's concern with this threat to the safe and orderly growth of international civil aviation, its recognition of state responsibility for taking all appropriate action against this menace, and its acknowledgment of the need for joint action to enforce state responsibility constitute a significant advance in the effort to secure the safety of the international air traveller.

"In accordance with the Council's Resolution, I have instructed my representatives to put before the Organization's Legal Committee a draft convention which would implement these principles. It is my hope that the participating States will take rapid and affirmative action on this proposal.

"Sincerely, signed Richard Nixon"

Before summarizing for you the key elements in the draft convention we have prepared, I would like to note that we have cabled the text to our Embassies around the world and through them have made copies available to each of the governments represented here on the Legal Committee. In addition, we have made copies available to your Embassies in Washington, to our Mission to the United Nations in New York and to our permanent representative to the Council in Montreal. We believe that dissemination of the draft directly to your governments should aid each of you in the formulation of your position.

Let me note at this point two typing errors in the present working document. They appear in each of the three languages. First, on page 2, the last clause in Article 1 which provides in the English, "whether or not such State is a party to this Convention", should be dropped down a line and moved out to the margin to indicate that this clause modifies both subparagraph (a) and subparagraph (b) of Article 1.

Second, on page 3 in the fifth line from the bottom in the English text of paragraph C of Article 2, there should be a period after the word "voting" and the word "Unless" should begin a new sentence.

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Let me now turn to the text itself.

I do not want to spend unnecessary time on the Preamble, but believe it is important to note two points:

- the preamble refers to certain principles in the Tokyo Convention, the Unlawful Seizure Convention and the Unlawful Interference Convention
- the preamble also sets forth two findings of a threat to international civil aviation resulting from the failure of States to observe the principles of these three Conventions.

In short, the draft convention we have proposed recognizes the obligations of States to observe certain basic principles and the right of States to take joint action against any State which fails to do so.

Article 1 contains the two key definitions used throughout the Convention--they are Interested State and Air Service State. These definitions reflect our view of those States which should participate in consultations. I believe the definitions are self-explanatory except for the fact we have raised the question, which we have not resolved, whether States with non-scheduled carriers should be included in the term Air Service State.

I would like to emphasize at this time that both of these definitions, when read with other articles, permit States whether or not a party to the convention to participate in the consultation and decision-making process. We believe that the Convention would not provide a realistic framework for consultation, let alone the taking of decision, if it excluded States which had not ratified or acceded.

Turning to Article 2, the first point to note is our view that the consultation and fact-finding process in cases of detention of passengers, crew or aircraft for international blackmail cases should be considered separately from cases of failure to take into custody, or thereafter to extradite or prosecute, which are dealt with in Article 3. In cases involving detention, where the safety and well-being of passengers and crew and the aircraft are at stake, we believe it is essential that consultations begin as quickly as possible by use of a near automatic, simple mechanism.

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In this connection, you should note that consultations under Article 2 of the Convention may begin within 48 hours from the time notice is first given.

In addition, we have proposed, in our draft, a double voting procedure in Article 2 to determine detention for international blackmail purposes contrary to the principles of Article 11 of the Tokyo Convention. These provisions are found in paragraph C of Article 2. First, a factual determination by majority vote whether passengers and crew have been permitted to continue on their journey and the aircraft returned to possession of its owner. Second, a legal conclusion for purposes of the draft convention that this factual determination shall establish unlawful detention for international blackmail purposes, contrary to the provisions of Article 11 of the Tokyo Convention. This conclusion follows from the initial vote unless a two-thirds majority determines to the contrary.

In a more general vein, Article 2 is premised on the basic concept in international law of State responsibility. While its provisions may appear complex, I think it reflects the kind of responsible and reasoned conclusions which States should reach pursuant to any Convention before moving to the drastic step of taking joint action.

While somewhat out of order, I would like to note at this time that paragraph D of Article 6 permits the State alleged to be in default to participate in consultations and to vote on determinations made under paragraph C of Article 2. This parallels the right of the State allegedly in default under article 3 to have one of its nationals a member of the Inquiry Commission which is described in the Annex.

Let me turn to Article 3 which deals with the determination of default in cases involving the failure, contrary to the principles in the conventions on Unlawful Seizure or Unlawful Interference, to take into custody, or thereafter to extradite or prosecute, individuals who have either committed an unlawful seizure for international blackmail purposes or an unlawful interference which causes death or physical injury to persons or damage to the aircraft.

We have proposed a different procedural machinery for determining default under Article 3 for two reasons. First, we recognize the difficulty of the factual and legal issues involved. Second, we do not believe these kinds of cases call for the same kind of extraordinary, emergency consultations and decisions as detention cases which are handled under Article 2. Accordingly, we have proposed, in Article 3, a five-member Inquiry Commission to make a final and binding determination of the question of default in cases of failure to take into custody or thereafter to extradite or prosecute.

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Page 6
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The Annex at the end of the draft provides one means of establishing such an Inquiry Commission.

As you all recognize, Article 4 is the key article in the draft Convention. Rather than review it in detail, I want to note the two key concepts. First, Article 4 will come into play in a given case only if there has been a finding of default under Article 2 in detention cases or under Article 3 in cases involving failure to take into custody or thereafter to extradite or prosecute. Second, a decision by a majority of States participating in a vote to take joint action under this Article is binding on all States entitled to participate if those States are parties to this Convention.

We believe a decision by majority vote, including States not parties to the Convention, makes practical sense in the context of the kind of cases we would be dealing with. We recognize, but do not believe realistic, the theoretical possibility that a State not party to the Convention could vote in favour of joint action, but then not act accordingly even though a majority concurred. In brief we believe States which have air services with the defaulting State should be permitted to participate in any actual decision made under the Convention, even though not a party, since joint action, to be effective, requires the concerted actions of the international community.

I do not believe it is necessary to review Article 5 which deals with modification, suspension or termination at this point. It is self-explanatory.

I have previously referred to paragraph D in Article 6 and indicated that a State alleged to be in default in a detention case may participate in consultations and vote in determining default in Article 2. I would like to add at this point that we do not believe it appropriate that a defaulting State should participate in any actual vote on whether or not to take joint action. However, paragraph D of Article 6 does permit the State in default to submit documentation and make an oral statement to States deciding whether joint action is appropriate.

Article 7 is included in the draft to cover two separate points. The first sentence provides the legal justification for any joint actions taken under the draft Convention. The second sentence of Article 7 has a different thrust. It is an undertaking not to include any provision inconsistent with the draft convention in any future bilateral agreements. This principle is closely related, of course, to the Canadian proposal, but is based on a multilateral approach.

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There is no need to comment at this stage on a provision for judicial or arbitral review which would be inserted in proposed Article 8, except to say we believe this would be an essential part of the Convention.

General Comments

At this stage, I think it would be appropriate to make a few general comments on both our draft convention and what we would expect this Committee to accomplish during the remainder of the week and next week.

We hope that Delegates here will focus on the proposed scope and framework in our draft and not get bogged down at the beginning on questions of small detail. For example, I do not believe it would be useful to discuss the particulars set forth in our Annex on the Inquiry Commission, such as whether or not the President of the International Court of Justice or someone else ought to select the panel members.

Let me turn now to what we hope this Committee will accomplish during this Session. We believe it essential to discuss thoroughly the basic framework and scope of our proposal.

Moreover, we believe that we should be able to reach agreement here in London on certain basic points which are relatively non-controversial, assuming that this Committee is ready to move forward on a convention based on the "Calls Upon" paragraph of the Council Resolution. Let me suggest just a few examples:-

First, we would hope to reach agreement that the definitions of Interested State and Air Service State in Article 1 basically reflect those States which should participate in consultations, whether or not party to the Convention. This agreement in principle can be reached independent of the question of voting procedures and rights.

Second, we would hope to reach agreement that the Convention should provide separate machinery, as we have proposed in Article 2 and 3, for determination of default in cases of detention of passengers, crew and aircraft on the one hand, and failure to take into custody or thereafter extradite or prosecute in cases of both unlawful seizure and unlawful interference, on the other hand.

Third, we would hope to reach agreement that the Convention should provide for a two-step procedure -- the first to make a determination of default; the second to provide for decisions on joint action.

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 consistent with the basic purposes

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Fourth, we would hope to reach agreement that the mechanism for initiating consultations in detention cases should be principally based on a straight-forward determination whether or not passengers etc. are being detained.

We hope that the report of this Committee will indicate agreed views on these and other aspects of the framework and scope of the Convention, and at the same time clearly set forth those provisions which will require careful consideration by policy-makers.

Finally, I would like to suggest that the Committee adopt flexible procedures so that full consideration can be given to both the U.S. and Canadian working papers.

Mr. Chairman, the Council resolution of October 1 approved the important principle that joint action by States is appropriate in certain circumstances. I believe the draft convention we have introduced today represents a comprehensive and fair proposal fully consistent with the basic purposes of the resolution.

- END -