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LETTER DATED 1 MARCH 1996 FROM THE PERMANENT REPRESENTATIVE OF CUBA TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

I have the honour to request that you have the attached annex circulated as a document of the Security Council.

(Signed) Bruno RODRÍGUEZ PARRILLA
Ambassador
Permanent Representative

ANNEX

When it comes to international legal instruments ...

The United States, in order to make the United Nations Security Council and the international community aware of the need to condemn Cuba for the incident that occurred on 24 February 1996, has proclaimed itself de facto depository and guarantor of two international legal instruments, the 1944 Chicago Convention on International Civil Aviation and its 1984 Protocol.

What is the intention of such juridical selectivity? It is to validate legally the gross manipulation of the principle of Sovereignty of States and to justify with a juridical subterfuge the claim that Cuba used excessive force against civil aircraft.

Cuba has not violated the existing international ethical norms on the use of weapons against civil aircraft, nor has it violated any international legal norm or precept related to the safeguarding of international civil aviation, or the Chicago Convention, much less article 3 bis of the 1984 Montreal Protocol, for very concrete and evident reasons:

- There is no existing treaty which categorically prohibits the use of weapons against intruding civil aircraft;

- The Chicago Convention on International Civil Aviation does not contain any prohibition whatsoever on this matter. Therefore, some States have suggested negotiating an amendment to the Convention through the 1984 Protocol (article 3 bis).

However, neither the above-mentioned Protocol nor, consequently, the amendment is in effect yet. Operative paragraph (b) of the Protocol states that for the said instrument to come into effect it must be ratified by 102 States. So far, 11 years after being opened for ratification, it has been ratified by only 83 States.

Even if article 3 bis were in effect, however, it would not prohibit the actions taken by the Cuban Government for two simple reasons. The first is of an elementary technical and formal nature, and the second is undeniably valid from a normative and legal standpoint:

1. Cuba has not ratified the 1984 Protocol. Consequently, this legal instrument is not part of its internal legislative system and does not constitute an international legal obligation for Cuba.

What is even more remarkable, however, in this campaign of political manipulation against Cuban sovereignty is the fact that the United States itself has not ratified the often cited 1984 Protocol with its article 3 bis. The President of the United States has not even signed the instrument, nor has he submitted it to the United States Senate for ratification.

How, then, can the United States demand that other States comply with sources of international law which are not in effect yet and which, in addition, the United States has not ratified?

2. The United States has invoked article 3 bis of the 1944 Chicago Convention on International Civil Aviation as if it were existing international law. But actually it is not.

Beginning in 1973, the Council of the International Civil Aviation Organization (ICAO), acting pursuant to chapter IV of the Chicago Convention, promulgated "special recommendations" and then "standards and recommended practices" on the question of interceptions. However, as chapter IV itself makes clear, these provisions do not have the force of law and are not binding in any sense; they are only recommendations.

International law does not provide the basis for categorically prohibiting the use of weapons against "civil aircraft".

Cuba has not violated international law. As a matter of fact, international law reaffirms Cuba's right to act as it did.

As the distinguished United States professor of international law Oliver J. Lissitzyn concluded in his often cited article, "The treatment of aerial intruders in recent practice and international law":

> "In times of peace, intruding aircraft whose intentions are known to the territorial sovereign to be harmless must not be attacked even if they disobey orders to land, to turn back or to fly even on a certain course ... In cases where there is reason to believe that the intruder's intentions may be hostile or illicit, a warning or order to land should normally be first given and the intruder may be attacked if it disobeys (emphasis added)".

Professor Lissitzyn explains that "illicit" intentions include "aid to subversive activities, smuggling, or calculated defiance of the territorial sovereign".

The Government of Cuba has sound and undeniable proof, from the legal and political points of view, that the acts of violation and aggression against Cuban airspace perpetrated for more than 35 years, and most recently by aircraft of "Brothers to the Rescue", have had a subversive, hostile, aggressive and terrorist character.

Cuba considers that the actions of "Brothers to the Rescue" are linked to the concept of "calculated defiance of the territorial sovereign" cited above.

It is precisely this linkage that demonstrates the political manipulation by the United States of the characterization of "Brothers to the Rescue" aircraft as allegedly "civil aircraft".

It is precisely this linkage which holds up to ridicule and destroys, technically and politically, the United States argument as to the "abusive" nature of the use of force by Cuba against the said aircraft.

First and foremost, the aviation of "Brothers to the Rescue" cannot be considered "civil aviation", not even under the 1944 Chicago Convention or the 1984 Protocol, or under international law.

The international legal instruments in question are exclusively applied to "civil aviation". They corroborate, in letter and spirit, the view shared by distinguished analysts of international law, including the renowned professor Michael Milde, Director of the Institute and Center of Air and Space Law of McGill University in Montreal, Canada, and the former Director of the Legal Bureau of the International Civil Aviation Organization, to the effect that, in order to determine the "nature" of an aircraft, we should base ourselves on a functional criterion rather than a formal characterization.

Consequently, it is not the technical design of the aircraft, its registration marks or its ownership or crew that determines the aircraft's nature, but the function for which it is used.

Hence the particular relevance of the element of intention and possible vice by origin and consent, which could condition or encourage the issuance or authorization of licences and flying permits by the corresponding aviation authorities of a State to alleged "civil aircraft" based and registered in its territory and under its flag.

The Government of the United States has abundant and undeniable proof, offered by the Government of Cuba itself for more than 37 years, of repeated acts of aggression, particularly its recent complaints to the United States authorities following the events of 24 February concerning the subversive, aggressive and terrorist character of the flights of the "Brothers to the Rescue" aircraft.

The Government of the United States and its aviation authorities should have seen to it that the possible and repeated commission of the new acts of aggression and air piracy against Cuba, this time by the aircraft of the terrorist organization in question, was discouraged and prevented.

Under law, vice by origin is not presumed but demonstrated. The Government of Cuba has undeniable proof with which it can demonstrate the vice by origin and consent that have been implicit for years and were also present in the case of the irresponsible authorization of the "Brothers to the Rescue" flights.

The most updated theory of international aviation law states than an aircraft designed for "civilian" air transport belonging to a private airline and operated by a civilian crew may in a particular situation be considered to be "State aircraft" if it performs a military, customs or police function ... Other aircraft, besides those involved in military, customs or police services, could also be considered "State aircraft" because the enumeration in the Convention is not preclusive.

"Brothers to the Rescue" have asserted that they were scanning the waters of the Florida straits hoping to rescue persons in distress - in particular, Cubans fleeing Cuba by boat or other means - and to alert the United States Coast Guard to the need for rescue operations. This is a traditional function of Governments, and, indeed, the United States Coast Guard itself carried out precisely the same identification and reporting missions on a systematic basis until recently.

Why did the Government of the United States permit "Brothers to the Rescue" to engage in such governmental functions?

Even if "Brothers to the Rescue" aircraft had been "civil aircraft", Cuba would not have violated international law in its actions against them.

Under established standards, the "Brothers to the Rescue" aircraft, when they violated Cuban airspace, did not enjoy the protection the Chicago Convention provides to "civil aircraft".

The United States will at least have to share responsibility for the use and "alleged excessive use" of weapons against "Brothers to the Rescue", inasmuch as the United States has permitted the said organization to engage in acts of piracy and aggression against Cuba's airspace. That is not only a violation of the letter and spirit of the relevant international instruments but also a blatant and evident violation of one of the basic principles of international law, of international relations and of peaceful coexistence among States, namely, the principle of Sovereignty.
