



**General Assembly
Security Council**

Distr.
GENERAL

A/50/1008
S/1996/577
22 July 1996
ENGLISH
ORIGINAL: SPANISH

GENERAL ASSEMBLY
Fiftieth session
Agenda item 140
UNITED NATIONS DECADE OF
INTERNATIONAL LAW

SECURITY COUNCIL
Fifty-first year

Letter dated 17 July 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 document, dated 17 July 1996, circulated as a document of the General Assembly, under agenda item 140 of the fiftieth session, and of the Security Council.

(Signed) Bruno RODRÍGUEZ PARRILLA
Ambassador
Permanent Representative

ANNEX

[Original: English]

RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
ATTORNEYS AT LAW
740 BROADWAY AT ASTOR PLACE
NEW YORK, N.Y. 10003-9518

TELEPHONE (212) 254-1111

CABLE "RABOUDIN N.Y." TELEX 225028

FACSIMILE (212) 674-4614

LEONARD B. BOUDIN (1912-1989)
MICHAEL KRINSKY
ERIC M. LIEBERMAN
HILLARY RICHARD

THOMAS C. VILES
LAURIE EDELSTEIN
CAROLINE RULE
MICHAEL LUDWIG
LAURENCE HELFER*

COUNSEL
VICTOR RABINOWITZ
MICHAEL B. STANDARD
LEONARD I. WEINGLASS
ELLEN J. WINNER
DEBRA EVENSON
TERRY GROSS

*ADMITTED IN PENNSYLVANIA AND
NEW JERSEY ONLY

From: Michael Krinsky and Larry Helfer
Date: July 16, 1996
Re: Actions the Federal Aviation Administration Could Have
Taken Prior to February 24, 1996 to Prevent Flights by
Brothers to the Rescue

In a prior memorandum dated March 12, 1996 we provided a preliminary analysis of the various ways in which the United States could have prevented the flights by Brothers to the Rescue before February 24, 1996. We have now reviewed (1) the June 20, 1996 ICAO Report concerning the events of February 24th; (2) the May 16, 1996 Emergency Order of Revocation issued by the FAA revoking Jose Basulto's pilot's license; and (3) the July 5, 1996 decision of the National Transportation Safety Board's administrative hearing officer which limited the FAA's order to a 150-day suspension of Basulto's license. These materials confirm and reinforce our original conclusion that the United States had both the authority and the factual basis to prevent Brothers to the Rescue from flying on February 24, 1996.

The following analysis of the ways in which the United States could have prevented the February 24th flights is presented in a form which might be appropriate for public use in whole or in part. We believe the conclusions expressed below to be sound and defensible and therefore have stated the arguments in forceful terms.

1. The United States Had the Legal Authority to Prevent Brothers to the Rescue Flights on February 24, 1996

The FAA could have taken several possible enforcement actions against Basulto and Brothers to the Rescue to prevent the flights of February 24, 1996.

First, the FAA could have suspended or revoked Basulto's pilot's certificate if it believed that "safety in air commerce or air transportation and the public interest require that action." 49 U.S.C. § 44709(b)(1)(A). The FAA could have done so without providing Basulto with notice and a hearing if it considered the situation to be an "emergency." 49 U.S.C. § 44709(c). As discussed more fully below, the United States had ample grounds to have considered the situation to be an "emergency" warranting immediate revocation or suspension of Basulto's license as early as July 1995 and in all events on the day before the February 24th flights.

Second, the FAA could have summarily seized Brothers to the Rescue aircraft. 49 U.S.C. § 46304(b) and 14 C.F.R. § 13.17. Such seizures are permitted for violations of United States laws and regulations relating, *inter alia*, to the safety of air commerce and the qualifications of pilots. 49 U.S.C. §§ 44701(a)(5); 44703. As discussed below, the United States has made clear that violation of Cuban airspace is a sufficient ground for immediate seizure of civil aircraft.

Third, because on July 13, 1995 and again on January 9 and 13, 1996 Basulto and Brothers to the Rescue filed flight plans falsely stating their route or destination, the United States could have arrested and then prosecuted them under a general criminal statute prohibiting the making of a false statement to a government agency:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

In addition to the above measures, the United States could have manifested its intent vigorously to enforce its laws by

/...

bringing a judicial proceeding against Brothers to the Rescue and Basulto seeking civil penalties of \$1,000 for violating the laws and regulations described above. 49 U.S.C. § 46301(a)(1). A separate violation is deemed to occur for each day that the violation continues, or for each flight involving the violation. 49 U.S.C. § 46301(a)(4). In addition, the United States could have brought a criminal proceeding seeking to impose criminal fines against Basulto and Brothers to the Rescue for violating regulations issued by the FAA. 49 U.S.C. § 46316.

2. The United States Has Conceded That it Had the Legal Authority to Prevent the February 24, 1996 Flights

By its actions subsequent to the events of February 24, 1996, the United States has expressly acknowledged that it has the authority to take the enforcement measures described above to prevent violations of United States laws and regulations, including in particular violations of Cuban airspace.

Conclusively, on May 16, 1996, the FAA issued an Emergency Order of Revocation against Basulto for his violations of Cuban airspace on July 13, 1995 and February 24, 1996. The Order stated that Basulto had flown into "restricted" or "prohibited" areas during the July 13th flight. The Order also stated that Basulto had operated his aircraft on both occasions "in a careless or reckless manner so as to endanger the life or property of another" and that these actions demonstrated that he "lack[ed] the care, judgment, and responsibility required of the holder of a commercial pilot certificate." Order, Paragraph 23(a), (b). A significant aspect of the May 16, 1996 order is that the FAA acted pursuant to its emergency powers to revoke Basulto's license. By acting on an emergency basis, Basulto was not given an opportunity to contest the FAA's actions in advance, which would have had the effect of delaying the revocation of his pilot's certificate.

The findings contained in the May 16th order, sufficient for an emergency revocation, were made as to the July 13, 1995 incident as well as the February 24, 1996 incident. It follows ineluctably that the FAA could have revoked or suspended Basulto's license immediately after July 13 and was not required to wait more than ten months before taking action. Indeed, the National Transportation Safety Board's administrative hearing officer has found that Basulto's actions on July 13th were more egregious and a more serious violation of United States law than those of February 24th. (Transcript at 1871-72, 1882-87.) Had the FAA summarily revoked or suspended Basulto's license at any time prior to February 24, 1996, Basulto would not have been able to lead the Brothers to the Rescue flight on that date.

Equally telling are two Notices to Airmen which were published by the FAA on March 1 and March 7, 1996. Pilots of United States-registered aircraft were advised that violations of Cuban airspace would be punished by the revocation of airmen certificates on an emergency basis. ICAO Report, Paragraphs 2.7.8 and 2.7.9. These Notices provide further evidence that the FAA could have acted well before February 24, 1996 because of the July 13, 1996 violations.

Similarly, on February 29, 1996, the FAA issued an Emergency Cease and Desist Order and Notice of Enforcement Policy in which it reiterated that unauthorized operation of United States-registered civil aircraft in Cuban airspace is prohibited. ICAO Report, Paragraph 2.7.7. The Order specifically stated that any person who violates its commands will be subject to enforcement action "to the maximum extent permitted by law," including (1) immediate revocation of pilot certificate; (2) maximum civil penalties; (3) seizure of aircraft involved in such a violation; and (4) appropriate judicial remedies (which include civil penalties of up to \$1,000 per violation of United States law). Thus, these same actions could have been taken on the basis of the July 13th violations.

3. Long Before February 24, 1996, the United States Had a More Than Sufficient Basis to Act

It is undisputed and has been conclusively established by testimony before the National Transportation Safety Board's administrative hearing officer and by information submitted to ICAO that Basulto violated Cuban airspace on July 13, 1995. Moreover, there is no doubt that, at that time, the FAA knew that Basulto's actions in flying into Cuban airspace were a deliberate violation of United States law and one that was likely to be repeated. There was thus a more than sufficient basis on that date and thereafter for the FAA to take emergency measures to prevent any further flights by Basulto.

Although not in any way necessary for the United States to act, subsequent events provided further support for the United States taking adequate action against Basulto. These events included incursions into Cuban airspace on January 9 and 13, 1996 as well as the United States' own contemporaneously-held belief on February 23, 1996 that an additional incursion into Cuban airspace was likely if Basulto was permitted to fly the next day.

a. July 13, 1995 Violation of Cuban Airspace

The testimony before the administrative hearing officer of the National Transportation Safety Board confirms that the United States unequivocally knew that Basulto's violation of Cuban

airspace on July 13th was deliberate, knew that he was unrepentant, and knew that he felt no inhibition from continuing to violate Cuban airspace again to advance his political goals.

At the hearing, Basulto admitted that he intended to fly into Cuban airspace on July 13, 1995. (Transcript of Findings at 1855, 1869). He also stated that he met with FAA officials two days before the scheduled flight on July 11, 1995 and "he told them of the BTTR's intentions" because "he wanted to make sure that at the last moment, the FAA was not going to stop the Brothers to the Rescue's airplanes." *Id.* at 1853. According to Basulto's testimony, the FAA officials stated that "they were going to hold him responsible for complying with the FARs [Federal Aviation Regulations]," although they did not "say specifically what the sanctions should be for non-compliance." *Id.* Basulto and the FAA officials "parted on good terms" and the FAA "did not interfere" with the illegal flights two days later. *Id.*

Aviation Safety Inspector Charles H. Smith testified that he met with Basulto in July 1995 and told him to stay out of Cuban airspace on July 13th. According to Smith, Basulto "indicated he understood, but he had to do what he had to do. Smith said that he understood that to mean that [Basulto] meant that *he had a mission and would complete it, even if it meant violating regulations.*" (Transcript at 1824) (emphasis added). Michael C. Thomas, the manager of the FAA's Miami Flight Service District Office, met with Basulto on the same day. He testified that he discussed with Basulto his obligation to comply with the FARs and he told him that "they would be sitting at opposite ends of the table if he did not comply with the [FARs], no matter how noble his cause." *Id.* at 1812. According to Thomas, Basulto responded that "he had his rules and the FAA had its rules. He said that he understood what rules are for, but *sometimes it is necessary to break rules.*" *Id.* (emphasis added).

The United States' response, however, was far from adequate. The FAA simply issued a letter to Basulto dated August 3, 1996 which stated that he was "under investigation" regarding violations of United States law by unauthorized flights in Cuban airspace. On August 31, 1995, the FAA issued a "Notice of Proposed Certification Action" in which it set forth in detail the violations committed by Basulto on July 13th, including operating a civil aircraft within a foreign country so as to endanger the life or property of another. The FAA proposed to issue an order suspending Basulto's commercial pilot certificates for 120 days. However, the FAA chose not to proceed against Basulto on an emergency basis. The effect of this decision was that Basulto was free to continue flying pending further proceedings.

Then, the FAA permitted its proceedings against Basulto to languish. Thus, although on September 21, 1995 Basulto

requested an informal conference with the FAA concerning the suspension, that conference was never held. ICAO Report, Paragraph 2.7.3. More importantly, no other proceedings were pursued to implement the Notice of Proposed Certification Action. Indeed, as late as February 20, 1996, the State Department indicated in a Diplomatic Note that the FAA was continuing its investigation of Basulto for the flight of July 13, 1995. ICAO Report, paragraph 2.1.3.7.

b. January 9 and 13, 1996 Incursions into Cuban Airspace

On January 9 and 13, 1996, two Brothers to the Rescue aircraft overflew the territory of Havana Province and released leaflets. ICAO Report, paragraph 2.1.3. Basulto confirmed the existence of these flights, although he alleged, incredibly, that the leaflets had been dropped over international waters and carried by the wind to Havana. Paragraph 2.1.3.3. The Government of Cuba responded with a Diplomatic Note dated January 16, 1996 in which it reminded the United States of prior incursions and demanded that it adopt additional measures necessary for the immediate halt of any future overflights. Paragraph 2.1.3.4. The United States responded in a diplomatic note in which it advised Cuba that the FAA had been informed of the incidents on January 9 and 13 and was compiling information relating to the incidents. Paragraph 2.1.3.5.

It must be stressed that although the events of January 9 and 13 gave the United States a basis, both in themselves and in conjunction with the July 13 incursions, for immediately seizing Brothers to the Rescue aircraft and revoking the certificates of the pilots involved, the United States had no need to rely on those events. The July 13 incursion was in itself a sufficient basis for emergency action.

c. The United States' Own Assessment on February 23, 1996 of the Risk to Safety

According to authorities in the United States, an organization in Cuba had been denied permission by the Cuban Government to hold a public meeting planned for February 24, 1996. Brothers to the Rescue had publicly stated their support for this group. As a result, the Department of State's Office of Cuban Affairs contacted the FAA's Office of International Aviation to indicate that "because of the crackdown against dissidents in Havana the Brothers to the Rescue might attempt a flight to demonstrate solidarity with dissidents in defiance of the Cuban government during the following days." ICAO Report, paragraph 2.2.2 (emphasis added). The Department of State also advised the FAA that "information suggests that the Cubans are in a rough mood." *Id.*

The Office of International Aviation then sent a message to FAA Headquarters and the FAA office in Miami indicating that

it would not be unlikely that the BTR attempted an unauthorized flight into Cuban airspace tomorrow, in defiance of the [Government of Cuba] and its policies against dissidents. State Department cannot confirm that this will happen and is in touch with local law enforcement agencies to better determine what is the situation.

ICAO Report, paragraph 2.2.3 (emphasis added).

Given both the State Department's and the FAA's own assessment, together with past incursions, the United States clearly could have treated the situation as an emergency justifying immediate suspension or revocation of Basulto's license or seizure of the Brothers to the Rescue aircraft prior to their February 24th departure, which both the State Department and the FAA closely monitored. Paragraphs 2.2.4 and 2.3.2.1.

The additional statement in the communication quoted above -- that "the FAA cannot PREVENT flights such as this potential one, but that we'll alert our folks in case it happens and we'll document it (as best we can) for compliance/enforcement purposes," *id.* -- is patently baseless and in direct conflict with the provisions of United States law discussed above, with the FAA's subsequent emergency actions against Basulto, and with its subsequent public notice of intent to exercise its emergency powers for violations of Cuban airspace.
