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# Shooting Down Drug Traffickers

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**T**HIS IS THE STORY of how a United States statute, enacted to combat sabotage of commercial airliners by terrorists, produced the completely unintended result of shutting down a major element of coalition counterdrug operations in South America for seven months. It is also the story of how the United States Government solved that problem, but left unresolved significant international law issues concerning the use of force against civil aircraft suspected of drug trafficking.

### Coalition Counterdrug Operations

There is no doubt that international drug trafficking causes significant harm to the United States. Illicit drug use by more than a million U.S. citizens creates crime and other serious social and public health problems, and the huge illegal profits generated by illicit drug trafficking present a threat to the integrity of financial institutions and public officials. As bad as the drug problem may be for the U.S., it is infinitely worse for the nations where illicit drugs are produced, processed, and transported. The wealth and extreme violence of drug gangs have corrupted and intimidated public officials, distorted national economies, denied the governments of these nations effective control over their borders

and large areas of their territory, and in some cases provided direct support for armed rebellions.

A number of nations in the Caribbean and in Central and South America, which together supply much of the illicit drugs entering the U.S., have agreed to cooperate with the United States in coalition counterdrug operations. With U.S. support, they have carried out some very significant drug suppression operations, including crop eradication, destruction of processing facilities, interference with the supply of precursor chemicals, interruption of transportation networks, seizure of drugs, confiscation of funds, and arrest, prosecution, and punishment of offenders. The United States has provided funds, equipment, training, technical advice, transportation, and intelligence to the effort. Host nations rely on such support to carry out operations involving direct confrontation with suspected traffickers, such as arrest, search, and seizure. Our personnel are limited to a support role out of respect, in part, for host nation sovereignty, which traditionally carries with it a monopoly on the exercise of police and military power within its borders. The restrictions are also a product of a broader policy against involving U.S. military units in arrests and seizures, whether in foreign nations, on the high seas, or within U.S. territory.<sup>1</sup>

For example, in a number of nations, U.S. military forces have provided and operated ground-based and aerial radar and communications interception facilities, the information from which has been supplied to the host nations. This information has been used to spot suspected drug trafficking flights and determine their routes and schedules, locate airfields, identify aircraft (sometimes leading to identification of their crew members and owners), force aircraft to land or to leave the nation's airspace, or execute an "end-game" in which host nation police or military forces have carried out raids on airfields and other facilities. In a statement to Congress on 10 March 1994, the Department of Defense "drug czar" said that a shift in counterdrug policy toward operations in the "source nations" would result in increasing this type of U.S. support to Colombia, Bolivia, and Peru, which were three source nations who had demonstrated the political will to combat narcotics trafficking.<sup>2</sup>

By early 1994, both Colombia and Peru had announced that they intended to shoot down suspected drug trafficking aircraft whose pilots ignored directions to land. On 1 May 1994, the United States stopped providing intelligence to Colombia and Peru concerning suspected drug trafficking flights. There were reports that the Departments of Defense and State vehemently disagreed on the wisdom of this action, but there appears to be no

dispute that the reason for this change in policy was centered on issues of domestic and international law.<sup>3</sup>

### The Domestic Criminal Law Issue

The U.S. domestic law problem had its origin in the Montreal Convention, which was concluded 23 September 1971 as a measure to combat terrorism against civilian airliners. Each contracting State is obligated to either prosecute or extradite persons found in its territory who are accused of placing bombs on civil aircraft or of damaging or destroying such aircraft. Under the Montreal Convention, a State has jurisdiction to prosecute an offender (1) when the offense was committed in its territory, (2) when the offense was committed against or on board an aircraft registered in that State, (3) when the aircraft on board which the offense was committed lands in its territory with the alleged offender still on board, or (4) when the aircraft was leased to a lessee which has its permanent place of business in that State. The Convention requires each Contracting State to make certain offenses punishable under its domestic criminal law "by severe penalties."<sup>4</sup>

In satisfaction of this obligation, and acting partly in reaction to the August 1983 Soviet shoot-down of Korean Air Lines Flight 007 (KAL 007), Congress enacted the Aircraft Sabotage Act of 1984, which, *inter alia*, makes it a crime to damage or destroy a civil aircraft registered in a country other than the United States.<sup>5</sup> Since 1956 it has been a violation of 18 U.S.C. § 32 to commit similar acts against aircraft registered or operated in the United States. The material provisions of the Aircraft Sabotage Act were codified at 18 U.S.C. § 32(b)(2).

After Peru and Colombia announced their shoot-down policies, officials in several agencies became concerned that 18 U.S.C. § 32(b)(2) might make military members and other government officials and employees subject to U.S. criminal prosecution if they supplied intelligence information or other assistance to a foreign government knowing that the government concerned intended to use it to shoot down civil aircraft. Ultimately, the Deputy Attorney General wrote to the Deputy National Security Adviser that it was "imperative" to cut off the supply of the radar information.<sup>6</sup> The analysis underlying this position is stated in a 14 July 1994 memorandum from the Department of Justice's Office of Legal Counsel, the conclusions of which can be briefly summarized as follows:

(1) 18 U.S.C. § 32(b)(2) was intended by Congress to apply extraterritorially. This is clear from its language, from the prior existence of a separate statute that prohibited similar acts within the territory of the United

States, and from the statute's purpose, which was to satisfy U.S. obligations under the Montreal Convention.

(2) The statute applies to government actors, including law enforcement officers and military personnel of foreign countries such as Colombia and Peru.

(3) U.S. Government personnel who supply intelligence to another government with reason to believe it will be used to commit violations of 18 U.S.C. § 32(b)(2) may be subject to prosecution as an aider or abettor under 18 U.S.C. § 2(a) or as a conspirator under 18 U.S.C. § 371.

(4) If a death results, the death penalty or life imprisonment may be authorized under 18 U.S.C. § 34.

(5) No exemption was provided in the statute for military members or other U.S. Government officers or employees, or for law enforcement, intelligence, or national security activities.<sup>7</sup>

This concern for the possible criminal liability of U.S. officials, including military members, seems to have been the primary motivation for the cutoff of radar generated information on 1 May 1994. The Governments of Peru and Colombia objected strongly,<sup>8</sup> and the reaction of members of Congress was no less heated. The chairmen of the House Foreign Affairs Subcommittee on the Western Hemisphere and of the Subcommittee on International Security—both members of the President's party—denounced the Administration's position as "absurd."<sup>9</sup> The Administration's effort to obtain passage of remedial legislation was greatly hampered by the strongly held opinion among many Congressmen that 18 U.S.C. § 32(b)(2) was never intended to apply to coalition counterdrug operations, and that Congress had more important things to do than to pass a remedial statute to satisfy the Administration's overcautious approach to the problem. In any event, however, Congress enacted Section 1012 of the National Defense Authorization Act for Fiscal Year 1995,<sup>10</sup> which provided for a drug interdiction exemption once the President makes certain determinations. This provision is codified at 22 U.S.C. § 2291-4, which reads in part:

Official Immunity for authorized employees and agents of the United States and foreign countries engaged in interdiction of aircraft used in illicit drug trafficking

(a) Employees and agents of foreign countries

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of a foreign country (including members of the

armed forces of that country) to interdict or attempt to interdict an aircraft in that country's territory or airspace if —

(1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and

(2) the President of the United States, before the interdiction occurs, has determined with respect to that country that —

(A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and

(B) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft.

(b) Employees and agents of the United States

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of the United States (including members of the Armed Forces of the United States) to provide assistance for the interdiction actions of foreign countries authorized under subsection (a) of this section. The provision of such assistance shall not give rise to any civil action seeking money damages or any other form of relief against the United States or its employees or agents (including members of the Armed Forces of the United States).

On 1 December 1994, the President signed Determination of President No. 95-7, "Resumption of U.S. Drug Interdiction Assistance to the Government of Colombia,"<sup>11</sup> in which he made the necessary determinations under the statute. On 8 December 1994, a similar determination was signed for Peru.<sup>12</sup> The United States promptly resumed providing radar information to Colombia and Peru, and it is reported that in 1995 Peru and Colombia seized or destroyed thirty-nine aircraft carrying drugs, driving drug traffickers to rely almost exclusively on land and water means of transport in those countries.<sup>13</sup>

This seems to be a happy ending, but fans of this legislative fix should take careful note of its two major limitations, both of which were clearly quite intentional. First, it does not apply to nations for which the necessary Presidential determinations have not been made. For example, in May 1995 the Mexican government announced that its military aircraft would be used to

“intercept” aircraft suspected of transporting cocaine through Mexican airspace.<sup>14</sup> Both Mexican policy in this area and U.S. military support for Mexican counterdrug operations are in their formative phases, and only time will tell whether Presidential determinations will be sought for Mexico or other nations. The second major limitation is that the statutory exception applies only when the aircraft intercepted “is reasonably suspected to be primarily engaged in illicit drug trafficking.” If a host nation uses U.S. intelligence or other assistance to shoot down civil aircraft for any other purpose, such as enforcement of other criminal laws, no exception to the application of 18 U.S.C. § 32(b)(2) would appear to be available.

This entire episode demonstrates once again the Iron Law of Unintended Consequences, as a statute enacted for an indisputably worthy purpose turns out to have unfortunate and wholly unintended consequences when its plain language is applied in unforeseen circumstances.<sup>15</sup>

### **International Law Issues**

The principal international law issue is the question of when—if ever—force can be used against civil aircraft. The Chicago Convention of 1944, which established the legal framework for international civil aviation, contains only one reference to the relationship between State aircraft and civil aircraft—Article 3(d) provides that the contracting States must operate their state aircraft with “due regard” for the safety of civil aircraft.<sup>16</sup> There is strong support for the view that this provision is merely declarative of customary international law, but as with most invocations of customary international law, there have been sharp differences of opinion as to its practical application.

The positions taken by various nations in response to a number of post-World War II incidents in which scheduled airliners were fired upon indicate a majority view that there is an international legal obligation not to use force against civilian airliners in international service, but that this obligation is subject to the inherent right of self-defense recognized in Article 51 of the UN Charter. The right of self-defense, however, is strictly limited by the principles of necessity and proportionality, and every reasonable precaution must be exhausted in order to avoid the loss of life. These precautions include communicating with the aircrew to divert it away from sensitive areas, escorting it out of national airspace, requiring it to land, or—as a last resort—firing warning shots. When Bulgaria shot down an El Al airliner in 1955, Israel shot down a Libyan airliner over the Sinai in 1973, the Soviet Union crippled a Korean airliner in 1978, and the Soviet Union

destroyed KAL 007 in 1983, their actions were all roundly condemned. In each case, there appeared to be an international consensus that the actions taken were not justified as self-defense.<sup>17</sup>

The International Civil Aviation Organization (ICAO) was created by the Chicago Convention to serve as a policy forum for its member nations and as a mechanism to promote technical cooperation for the conduct of international civil aviation. After military aircraft of the Soviet Union shot down KAL 007 on 13 August 1983, killing its 269 passengers and crew, the resulting international outrage led to the unanimous adoption by the 152-member International Civil Aviation Organization of a new Article 3 *bis* to the Chicago Convention, intended to more specifically address the existence of an international legal obligation to refrain from using force against civil aircraft:

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

(c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

(d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose

inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.<sup>18</sup>

The United States has not yet ratified Article 3 *bis*, and the number of ratifications is still well short of the 102 needed to bring it into effect. Nevertheless, there is strong support for the view that it is merely declarative of existing customary international law.<sup>19</sup>

There are two distinctly different views concerning whether or not the obligation stated in Article 3 *bis* to refrain from using weapons against civil aircraft in flight remains subject to a right of self-defense. One view—that the obligation not to use force is subject to no exception for self-defense—is expressed in various ICAO publications. ICAO regularly issues a number of publications that, while not legally binding in themselves, are some evidence of the member States' understanding of applicable international law. For example, there is an ICAO publication entitled *International Standards—Rules of the Air (Annex 2 to the Convention on International Civil Aviation)*. This publication contains provisions adopted by the ICAO Council from time to time, acting in a “quasi-legislative function,” which creates an expectation that contracting States will comply within their territories with the standards approved by the Council unless they file a “difference” concerning particular rules.<sup>20</sup>

Appendix 1 to the *Rules of the Air* provides standard visual signals for use when civil aircraft are intercepted by State aircraft. Appendix 2 contains the following provision, which was added as Amendment 27 to the *Rules of the Air* by vote of the ICAO Council on 10 March 1986:

### 1. Principles to be observed by States

1.1 To achieve the uniformity in regulations which is necessary for the safety of navigation of civil aircraft due regard shall be had by Contracting States to the following principles when developing regulations and administrative directives:

- a) interception of civil aircraft will be undertaken only as a last resort;
- b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated airdrome;
- c) practice interception of civil aircraft will not be undertaken;

d) navigational guidance and related information will be given to an intercepted aircraft by radiotelephony, whenever radio contact can be established, and

e) in the case where an intercepted civil aircraft is required to land in the territory overflown, the aerodrome designated for the landing is to be suitable for the safe landing of the aircraft type concerned.<sup>21</sup>

This provision has been controversial. The United States and a number of other members have stated that they consider this action by the ICAO Council to be *ultra vires*, in that Article 3(a) of the Chicago Convention states clearly that the Convention applies only to civil aircraft, and not to state aircraft. When the Council adopted the language, the U.S. informed the ICAO Secretary General that it disapproved of Amendment 27 on this basis. The majority view in the ICAO Council, however, was that the provision in Article 3(d), requiring member States to operate their state aircraft with “due regard” for the safety of civil aircraft, provided authority for the adoption of Amendment 27.<sup>22</sup>

Other ICAO publications are prepared by the Secretariat and are only advisory in nature. Among these are a *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*,<sup>23</sup> and a *Manual Concerning Interception of Civil Aircraft*.<sup>24</sup> The latter publication describes in considerable detail the circumstances in which interception may occur (including a suspicion that an aircraft is transporting illicit goods) as well as detailed discussions of radio signals, flight plans, publication of information about restricted areas, position reporting systems, radar identification, enhancement of visual markings, procedures to be followed when radio communications fail, procedures for interception, and related topics. A reminder is included that intercepted aircraft may not comply with the instructions given by ground controllers or by intercepting aircraft because of confusion, inability to interpret visual signals correctly, linguistic misunderstanding of radio messages, hypoxia, or because of inability to comply due to malfunction, hijacking, or inadequate fuel. Finally, advice is given as to the action to be taken by the intercepting pilot in the event of noncompliance:

4.1.2.16 In the event that an intercepted aircraft fails to respond to repeated attempts to convey instructions by visual signals or radiotelephony, the intercepting aircraft should continue to observe the intercepted aircraft until it lands or leaves the restricted or prohibited airspace. A full report on the incident should then be submitted to the appropriate authority to the State of registry for action (see 2.10, Article 3 bis).<sup>25</sup>

Any mention of the possibility of firing a weapon at a nonresponsive aircraft is conspicuously absent from this publication. This is fully consistent with the published views of the former Director of the ICAO Legal Bureau, Dr. Michael Milde, who has written that an intercepting aircraft may use reasonable force to enforce compliance by an intercepted aircraft, but not if it involves the use of weapons against it.<sup>26</sup> One presumes this means that a display of force, including the firing of warning shots, forms the outer permissible limit of “reasonable force,” and that weapons fire directed at a noncomplying aircraft will always be deemed to exceed “reasonable force.”

A resolution adopted by the ICAO Council in response to the destruction by Cuba of two U.S.-registered civil aircraft on 24 February 1996 provides further support for the view that there is an absolute prohibition against firing weapons at civil aircraft. The relevant paragraphs are as follows:

THE COUNCIL

...

2. REAFFIRMS the principle that States must refrain from the use of weapons against civil aircraft in flight and that, when intercepting civil aircraft, the lives of persons on board and the safety of the aircraft must not be endangered;

...

4. REAFFIRMS its condemnation of the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in Article 3 *bis* of the Convention on International Civil Aviation, and the Standards and Recommended Practices set out in the Annexes to the Convention;<sup>27</sup>

...

When they adopted this resolution, the members of the ICAO Council may have intended to reaffirm the view that the prohibition against using weapons against civil aircraft is not subject to any exception such as self-defense. On the other hand, they may have decided the issue of self-defense was not fairly raised by the facts of the incident, and therefore it need not be discussed. Cuba maintained that it had acted “in defense of its sovereignty,”<sup>28</sup> but it was clear that the previous acts of the Brothers to the Rescue in Cuban territory, the most egregious of which apparently consisted of dropping subversive leaflets, were not much of a threat to Cuban national security. Furthermore, there was

no evidence that the planes that were attacked by Cuba had, during that particular flight, engaged in such conduct, and they appear to have been outside of Cuban territorial airspace at the time of the attack.

The view that the obligation to refrain from using force against civil aircraft is subject to at least one exception—the inherent right of self-defense—is supported by the broad language of Article 51 of the United Nations Charter<sup>29</sup> and by the second sentence of paragraph (a) of Article 3 *bis*: “This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.” The sentence appears to have been added to the text expressly to make it clear that Article 51 applies. It is also interesting to read the various commentaries on the Soviet shootdown of KAL 007; none of them take the absolute position that there could never be a right to fire weapons in self-defense against a civil aircraft. Rather, they go to some lengths to demonstrate that there was no factual basis for any argument that the shoot-down was necessary, and that obvious alternatives that would have avoided innocent loss of life were not exhausted.<sup>30</sup>

The U.S. statute authorizing assistance to countries who have adopted a shoot-down policy can be read as relying on the rationale of self-defense. This view is supported by the requirement that the President find, *inter alia*, that there is an “extraordinary threat posed by illicit drug trafficking to the national security of that country.” The international law doctrine of self-defense, however, does not provide a particularly good fit for the drug shoot-down problem, for the following reasons:

- *First*, there has been a long-standing controversy about whether the right to use force in self-defense can exist in the absence of an *armed attack*. This argument usually arises in connection with anticipatory or preemptive self-defense, but it clearly has considerable force when the issue is whether force can be used against aircraft that in most cases have not displayed or used armed force, and are not expected to do so.
- *Second*, while the drug problem as a whole may pose an extraordinary threat to the national security of a country, it will probably be hard to argue that any individual aircraft flight presents the sort of urgent danger that has traditionally been considered necessary to trigger the right to use force in self-defense.<sup>31</sup>
- *Third*, the offenders typically are not members of the armed forces of another nation, or even armed agents as envisaged in the term “state-sponsored terrorism.”<sup>32</sup> While drug traffickers have cozy relationships with the governments of a number of nations, they are not generally operating as proxies for those governments in the execution of national policy. They are criminals, not actors, on the international political scene.

In fact, the law of international civil aviation, including Article 3 *bis*, will not apply at all to many shoot-down incidents when the traffickers are nationals of the nation shooting them down, when their aircraft are not registered in another nation, and when their flights do not cross national borders. International law regulates the conduct of nations in their dealings with one another and with each other's nationals, property, and corporations. With the limited exception of human rights law, international law does not attempt to regulate a nation's dealings with its own citizens. The negotiating history of Article 3 *bis* makes it quite clear that it is intended to apply only to "foreign aircraft" and not to aircraft of a state's own registration engaged in purely domestic traffic.<sup>33</sup> For such flights, the primary law to be applied is the nation's domestic law, including its law governing the permissible use of force against a fleeing suspected felon.<sup>34</sup> Where an aircraft does not display any registration number or flag and does not otherwise communicate any claim to be registered in another nation or to be engaged in an international flight, it would be hard to quarrel with a presumption by the local authorities that it is a domestic flight.

It is also clear that foreign civil aircraft are generally subject to the criminal law of any nation in whose territory they operate. The primary international law question is how domestic criminal law can be practically enforced against foreign aircraft.<sup>35</sup> The ultimate issue becomes whether Article 3 *bis* and customary international law prevent law enforcement authorities of a nation from using weapons against foreign aircraft in its territory even though such use of force is authorized under its domestic law.

A nation's interests in a law enforcement situation differ markedly from those involved in a border intrusion. When a nation is primarily concerned with ending an isolated unauthorized intrusion into its territorial airspace, that interest is served if the intruder departs. In a drug trafficking situation, the nation's interest in suppressing persistent drug trafficking is not served by simply escorting individual aircraft out of its territory, especially if that was the aircraft's intended destination. Reliance on enforcement actions by the aircraft's state of registry will in most cases be fruitless. The result may be that the nation concerned may have no practical enforcement option except to shoot down the suspected drug trafficker. It appears to this author that an attempt to apply Article 3 *bis* and customary international law in a manner that deprives nations of any practical remedy adequately serving their vital interests is doomed to failure.

The international community should also recognize that the use of force against civil aircraft involved in drug trafficking does not necessarily threaten the safety of legitimate civil aviation. Drug traffickers generally operate unregistered aircraft, or obscure any identifying markings. They typically file no

flight plans, refuse to communicate with ground controllers or intercepting aircraft, and disregard instructions to land at designated airfields. So long as the pilot of an innocent aircraft complies with ICAO standards in these areas, it will be perfectly safe from attack by a nation that follows procedures of the sort whose existence the President must certify under the U.S. statute. The greatest contribution of the statute may turn out to be that it requires both the U.S. and the nations it assists to focus on these precautions.

Accordingly, the most promising approach to understanding the international law issues raised by the use of weapons against drug trafficking aircraft appears to be a law enforcement perspective, rather than a self-defense analysis. If a nation's domestic law permits using force against a suspected drug trafficking aircraft that refuses to comply with instructions from an intercepting aircraft, and if it observes rigorous precautions against mistakenly attacking innocent aircraft, the use of force in these circumstances should be regarded as legitimate.

In support of this conclusion, one could argue further that the language of Article 3 *bis* to the effect that the phrase "This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations," not only preserves the right of nations to use force in self-defense, but that it also preserves their immunity from outside interference in "matters which are essentially within the domestic jurisdiction of any State" as guaranteed in Article 2 (7) of the Charter. The administration of criminal law within a nation's borders has traditionally been considered such a matter.

Additionally, there is very little likelihood that a nation adopting a policy of shooting down drug trafficking aircraft will be subject to serious criticism or sanctions from the international community. Drug traffickers have no vocal champions among the family of nations, and the interests of legitimate civil aviation will not be threatened as long as appropriate precautions are in place. In fact, there appears to be no record to date that any nation has protested the shoot-down policies adopted by Peru and Colombia, or the assistance provided to them by the United States. The only event likely to precipitate such a protest would be a ghastly mistake in which a planeload of innocents is blown out of the sky.

Whatever one may think of the urgency of solving the domestic law issues raised by the U.S. policy of assisting other nations which shoot down drug trafficking aircraft, they appear to have been solved by the

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1994 statute codified at 22 U.S.C. § 2291-4. The international law issues raised by a drug shoot-down policy are still unsettled, but such a policy should be accepted as a legitimate law-enforcement measure so long as rigorous precautions are in place to prevent the loss of innocent life.

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### Notes

1. See generally, Chapter 18 of Title 10 U.S.C.; Thomas S. M. Tudor & Mark E. Garrard, *The Military and the War on Drugs*, 37 AIR FORCE L. REV. 267 (1994).

2. DEFENSE ISSUES, vol. 9, no. 21 (1994) [Prepared statement of Brian E. Sheridan, Deputy Assistant Secretary of Defense for Drug Enforcement Policy and Support, to the House Appropriations Defense Subcommittee].

3. *Feud Hurts Bid to Stop Drug Flow*, WASH. POST, May 29, 1994, at 1; *U.S. Halts Flights in Andes Drug War Despite Protests*, N. Y. TIMES, June 4, 1994, at 1.

4. The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), September 23, 1971, 24 U.S.T. 564.

5. 18 U.S.C.A § 32(b) (West Supp. 1996).

6. A.M. Rosenthal, *Saving the President*, N. Y. TIMES, June 17, 1994, at 31.

7. There was also discussion of possible civil liability for U.S. government agents, either in U.S. courts or in those of other nations. The remedial statute ultimately passed by Congress included immunity from civil suit. In addition, there was some concern expressed about whether the United States wanted to associate itself with law enforcement measures taken by other governments which would violate the U.S. Constitution when engaged in by U.S. law enforcement officials within the United States. For example, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court ruled that the use of deadly force to prevent a criminal suspect's escape was a violation of the Fourth Amendment unless the law enforcement officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. The U.S. Constitution clearly does not apply to the actions of another nation's officials within its own territory, but it raises a policy issue for U.S. officials which to this point has gotten relatively little attention.

8. Lawrence J. Speer, *"Incoherent" U.S. Drug Policy Angers S. America*, WASH. TIMES, June 23, 1994, at 15.

9. Thomas W. Lippman, *U.S. Refusal to Share Intelligence in Drug Fight is Called "Absurd,"* WASH. POST, August 4, 1994, at 12.

10. Pub. L. No. 103-337.

11. 59 Fed. Reg. 64,835 (1994).

12. Determination of President No. 95-9, *Resumption of U.S. Drug Interdiction Assistance to the Government of Peru*, 59 Fed. Reg. 65,231 (1994).

13. Chris Black, *South American Drug Route Targeted*, BOSTON GLOBE, June 26, 1996, at 11.

14. Tim Golden, *Mexico Plans Bigger Role for Military against Drugs*, N. Y. TIMES, May 23, 1995, at 3.

15. As another current example, several U.S. statutes threaten to create problems in the burgeoning field of information warfare. The U.S. criminal statutes prohibiting interception of or interference with communications, whose drafters carefully provided exemptions for criminal investigators and counterintelligence operatives to perform certain acts after authorization by a court or by specified intelligence officials, contain no exception for other national security activities. [See, e.g., 47 U.S.C.A. § 333 (West 1991) (Interference with

licensed radio communications); 50 U.S.C. § 1809 (West 1991) (Electronic surveillance of communications); Electronic Communications Privacy Act 18 U.S.C.A. § 2510–2522 (West 1970 & Supp. 1996).] Another example is 18 U.S.C. § 1367, which makes it a crime to interfere with the operation of a weather or communications satellite. Once again, an exemption is provided for “lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency or of an intelligence agency of the United States,” but a broader national security exception will be needed if U.S. policy makers ever decide to implement meaningful space control programs. Most readers could probably supply examples of their own.

16. Convention on International Civil Aviation, December 7, 1944, 59 Stat. 1693 [hereinafter Chicago Convention].

17. For an excellent discussion of post-WW II incidents in which civilian airliners were shot down by various nations, and the applicable legal principles, see Bernard E. Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace*, 30 AIR FORCE L. REV. 49 (1989).

18. Protocol relating to an Amendment to the Convention on International Civil Aviation, 10 May 1984, ICAO Doc. 9436.

19. Ghislaine Richard, *KAL 007: The Legal Fallout*, IX ANN. OF AIR & SPACE L. 147 (1984); Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation*, XI ANN. OF AIR & SPACE L. 105, 113 (1986).

20. *Id.* at 105–106. Under Article 12 of the Chicago Convention, the standards approved by the Council are absolutely binding over the high seas.

21. Annex 2 to the Convention on International Civil Aviation, 9th ed., July 1990.

22. Milde, *supra* note 19, at 114–122.

23. ICAO Document 9554-AN/932, 1st ed., 1990.

24. ICAO Document 9433-AN/926, 2nd ed., 1990.

25. *Id.* at 4–5.

26. Milde, *supra* note 19, at 127.

27. ICAO LIBRARY BULLETIN, July 8, 1996.

28. John M. Goshko, *Cuban Aide Defends Air Attack*, WASH POST, February 29, 1996, at 16.

29. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .”

30. See Donahue, *supra*, note 17; Masukane Mukai, *The Use of Force against Civil Aircraft: The Legal Aspects of Joint International Actions*, XIX-II ANN. OF AIR & SPACE L. 567, 569 (1994).

31. For an excellent discussion of the international law of self-defense, see, Timothy Guiden, *Defending America's Cambodian Incursion*, 11 ARIZ. J. INT. & COMP. L. 215 (1994).

32. For an excellent discussion of right to use force in response to state-sponsored terrorism, see, RICHARD J. ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* (1989).

33. Milde, *supra* note 19.

34. It is beyond the scope of this article to pursue the question of what limitations on the use of force against fleeing felons—if any—are imposed by international human rights law.

35. Milde, *supra* note 19, at 123–124.