



EXCISE

May 10, 1994

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ACTION MEMORANDUM
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TO: The Secretary
THROUGH: G - Mr. Wirth
P - Mr. Tarnoff
FROM: ARA - Alexander F. Watson
EB - Daniel K. Tarullo
INM - Robert S. Gelbard
L - Conrad K. Harper
SUBJECT: Use of Weapons Against Civil Aircraft
ISSUE FOR DECISION

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and resubmit when
of appropriate.*

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Whether to continue to provide "real-time" radar tracking information to two countries (Colombia and Peru) that have adopted anti-narcotics air interdiction policies authorizing the use of weapons as a measure of last resort against aircraft suspected of carrying drugs and which fail to respond to host country orders to land.

ESSENTIAL FACTORS

For many years, the USG has actively encouraged and assisted Latin American countries to develop policies to interdict narcotics trafficking aircraft. Since 1990, the United States, through a DOD radar network, has provided host governments with real-time tracking information about the location of aircraft suspected of drug activity.

In the past year, Peru adopted a policy under which its military aircraft intercept aircraft suspected of carrying drugs. Should an aircraft fail to obey properly issued instructions to land, the Peruvian government has authorized the use of warning shots. Should these fail to elicit an appropriate response, the GOP Air Force units may be authorized to fire on the suspect aircraft. Colombia recently announced a similar policy, but has not yet implemented it.

The United States has long opposed the use of weapons against civil aircraft. (A 1989 Position Paper on possible weapons use by USG aircraft is attached at Tab 2.) The United States argued vigorously after the Soviet downing of KAL 007 that such actions violate Article 3(d) of the 1944 Convention on International Civil Aviation and customary international law. Previous Administrations

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have opposed legislation that would authorize USG aircraft to fire weapons at aircraft suspected of drug trafficking.

Ordinarily, the U.S. Government would have no legal obligation to prevent another sovereign state from violating international law. By providing real-time tracking information to Peru and Colombia, however, the United States is closely involved in the operation and arguably bears some responsibility. [

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] The USG previously confronted this issue with Colombia. In 1990, shortly before the USG initiated the USG tracking program, Colombia announced a similar policy to shoot down suspect civil aircraft. In a demarche, our Ambassador explained the international legal prohibitions on the use of weapons against civil aircraft and informed the GOC that if it "misuse[d] the intelligence information we are providing you and innocent people are killed or injured, it will be very difficult for us to continue providing you with that information." (Tab 3)

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] In January, a USG interagency group began to formulate a response to Peru, and later Colombia's, new policies. On April 20, DOD Under Secretary Wisner sent a letter to the Department stating DOD's belief that the use of weapons against civil aircraft was inconsistent with international law and stated that "DoD intends to cease providing real-time tracking data to host nations that use weapons against civil aircraft in flight unless assurances are received from the host nations that they will abide by international law norms and practice." (Tab 4)

On May 1, DoD ceased providing real-time tracking data to the governments of Peru and Colombia. Peruvian and Colombian officials have reacted angrily -- the Colombian MOD was said to have "exploded." [

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Although all bureaus take exception to the unilateral way in which DoD took action, they do not agree on whether the Department as a matter of policy should accept the DoD position. At a recent IWG, DOJ and Customs representatives associated themselves with the DOD position. We also understand that the Department of Transportation and FAA support DOD's action and that the Intelligence Community's Counter Narcotics Center is opposed.

Options favored by ARA and INM and by EB and L, respectively, are described more fully at Tab 1. All options deal only with the USG's response to countries that have adopted shutdown policies and not with the question of whether the USG should encourage other countries to adopt such policies.

ARA AND INM POSITION

ARA and INM believe there are three fundamental U.S. interests at issue: 1) aggressive interdiction to stem the flow of South American drugs that are killing American citizens; 2) preventing loss of innocent life in the air over Colombia and Peru; and 3) ensuring, to the extent possible, USG compliance with international law. ARA and INM believe that the DOD position undercuts the first two interests in an overreaction to the third.

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The current, more aggressive policy of Peru is working. Prior to a decision to use force, both rigorously follow internationally recognized procedures for signalling an order to land. While there have been very few incidents in which Peruvian aircraft have fired on traffickers, and none of which we are aware in Colombia, INM and ARA believe that the very threat has had a positive effect in compelling traffickers to land as directed. The GOP has informed us that in each of the several instances in which its units have forced down an aircraft, the aircraft has proven to be a narcotics trafficker. Furthermore, the GOP's more aggressive policy has resulted in a clear shift in air trafficking

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away from economical, favored routes into Colombia, to routes through southern Peru -- from which traffickers try to enter Brazil to avoid detection.

More successful interdiction means that lives are being saved, and they are the lives of Americans. In a perverse way, the DOD position increases the risk of loss of innocent life in the Andes. DOD provides excellent real-time tracking data. By terminating it, they do not necessarily force the Colombian and Peruvian Governments to cease their policies. [

~~believe that the Colombians and Peruvians will still intercept~~] We
over their air space, but they will be more likely to intercept innocent aircraft [B1]

The Colombian and Peruvian Governments argue that their policies conform to international law. L disagrees. ARA and INM are obviously in no position to question L's legal interpretation. We agree that USG policy and operations should strive to comport to the extent possible with international law. We believe that it should be possible to fashion a policy to reduce our international law exposure while preserving our narcotics interdiction effort in South America. For this reason INM and ARA have developed two options, both of which allow us to continue to support our allies in this struggle -- but to varying degrees. These appear as options 2 and 3 at Tab 1. ARA and INM would prefer the expanded flexibility of Option 3.

L AND EB POSITION

L and EB support the DOD position, which is similar to Option 1 at Tab 1. As noted above, the USG has been uncompromising in its opposition to the use of weapons against international civil aircraft. The nature of the international law prohibition is categorical and strongly felt by governments and international aviation interests (e.g., airlines, airline employee unions). The prohibition applies whether or not the aircraft in question is suspected of engaging in criminal activity. The rule developed in this way both because the sanction applied by the state which shoots down a suspect aircraft (i.e., the death of passengers and crew) would almost always be disproportionate to the crime and because there is a risk of killing people not involved in criminal activity. Although Peru and Colombia have justified their policies on grounds of national sovereignty and have argued for a law enforcement exception to the customary international law rule, L finds these arguments unconvincing and believes that they would find virtually no support internationally.

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We do not agree that there are only three fundamental U.S. interests at issue. As the leading international civil aviation power in the world, the United States has strong policy interests in protecting the safety of international civil aviation. In this context, the United States has supported a bright line rule against the use of weapons against civil aircraft, except when necessary and proportionate to respond to an armed attack, as provided for in Article 51 of the UN Charter. Options 2 and 3 as outlined in Tab 1, however, would both involve attempts to carve out additional exceptions to this rule. Specifically, Option 2 would allow Colombia and/or Peru to use weapons against any civil aircraft not identified by USG sources and against civil aircraft identified by USG sources if the aircraft are of their own national registry. Option 3 contemplates both of these exceptions and states that if Colombia and/or Peru were to declare a national emergency under Article 89 of the Chicago Convention, they could use weapons against any civil aircraft identified by the USG if the aircraft entered a declared emergency zone.

Since these exceptions are not internationally recognized, both options suggested by INM and ARA would envisage host country violations of customary international law. Moreover, once the United States argues for exceptions in one context, other countries may adopt similar or even broader exceptions, which would undermine the safety of civil aviation. In addition, L and EB believe that mistakes are likely to occur under any policy that contemplates the use of weapons against civil aircraft in flight, even as a last resort. DOD's accidental shutdown of the Iran Air Airbus and the recent "friendly fire" tragedy in Iraq underscore that even the best trained and equipped personnel can make mistakes. A shutdown leading to the death of innocent persons would likely be a serious diplomatic embarrassment for the United States, subject the USG to intense criticism before the International Civil Aviation Organization, and undermine our efforts in the Iran Air proceeding at the World Court.

We do not believe that circumstances have changed sufficiently since 1990 to justify a change in policy. It has always been known that shutdowns provide the strongest inducement for aircraft to land. In 1990, however, it was recognized that the costs and risks of supporting shutdowns outweighed the benefits of such a policy. We believe that cost-benefit calculation has not changed.

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RECOMMENDATIONS

OPTION 1

That the State Department support the DOD position on the merits. (Option 1 at Tab 1). (EB and L support; INM and ARA oppose.)

APPROVE _____

DISAPPROVE _____

OPTION 2

Alternatively, that the State Department inform DoD and other agencies that it does not concur with the DOD position and that the USG should reinitiate real-time radar tracking data in accordance with Option 2 at Tab 1. (INM and ARA support; EB and L oppose.)

APPROVE _____

DISAPPROVE _____

OPTION 3

Alternatively, that the State Department inform DoD and other agencies that it does not concur with the DOD position and that the USG should reinitiate real-time radar tracking data in accordance with Option 3 at Tab 1. (INM and ARA support; EB and L oppose.)

APPROVE _____

DISAPPROVE _____

Attachments:

- Tab 1: Options Paper
- Tab 2: 1989 State Department Position Paper
- Tab 3: 1990 State Cable to Colombia
- Tab 4: April 20, 1994 Under Secretary Wisner Letter

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