

DRAFT

EXCISE

February 9, 1994

Dept. of State, RPS/IPS, Margaret P. Grafeld, Dir.

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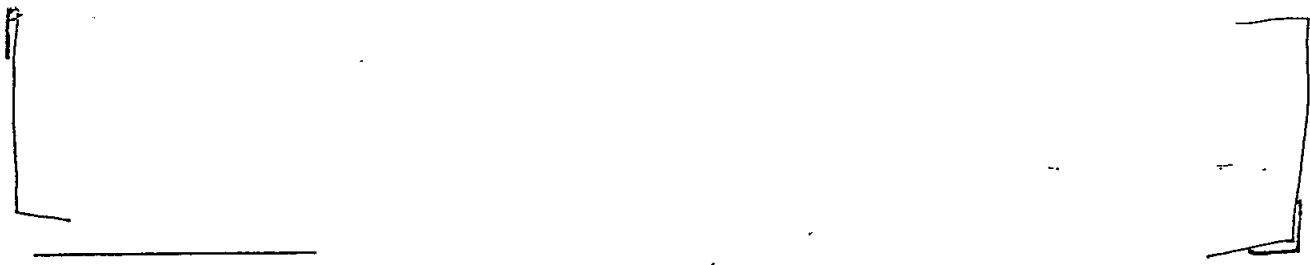
FORCEDOWN POLICY: OPTIONS FOR COLOMBIA AND PERU

ISSUE

The Government of Peru has adopted a policy permitting the use of weapons against certain aircraft which are suspected of carrying drugs and which fail to respond to orders to land. The Government of Colombia is in the final stages of adopting a similar policy. For legal and policy reasons, the United States has long opposed the use of weapons against civil aircraft in flight. (A 1989 State Department position paper is attached at Tab 1.) A summary of some international law considerations associated with the provision of U.S. assistance to Peruvian and Colombian air interception efforts is attached at Tab 2.

OPTIONS 1/

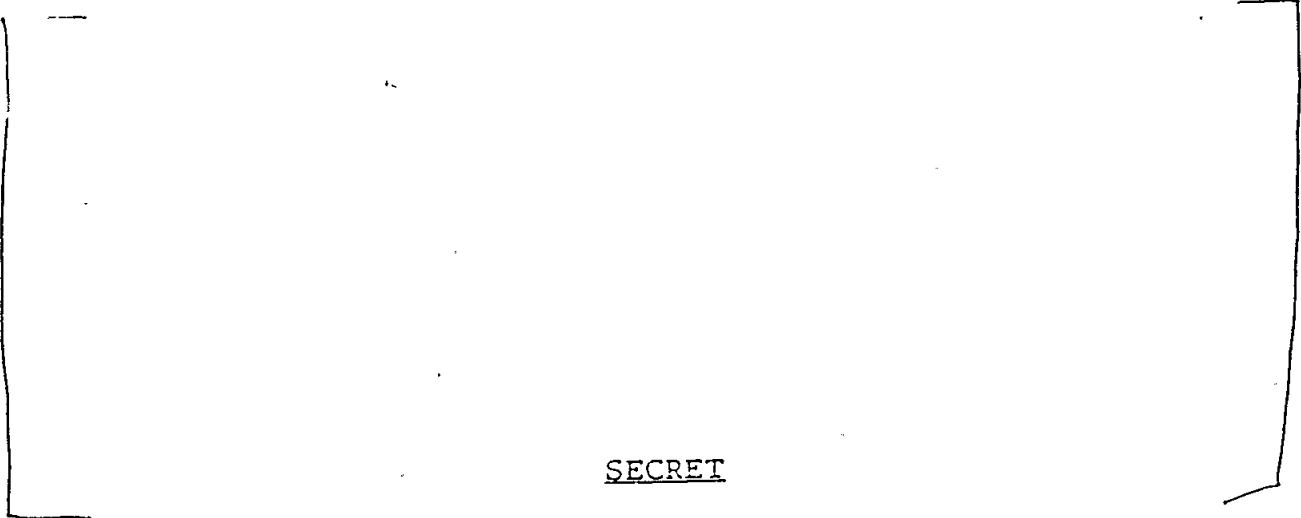
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1/ The options appearing below are provided for discussion purposes. Unless otherwise stated, no attempt is made to provide argumentation for or against options or to indicate whether an option is defensible under international law.

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TAB 2

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Tab 1 D-2APOSITION PAPER ON THE USE OF WEAPONS AGAINST
AIRCRAFT SUSPECTED OF CARRYING DRUGSSUMMARY

On October 13, the Coordinating Sub-Group on Drugs requested agency views on legislation sponsored by Senator McConnell and similar proposals that would authorize U.S. law enforcement agencies (i.e., Customs, Coast Guard, and DEA) to shoot at or into aircraft that are suspected of carrying drugs and which fail to follow instructions to land (A copy the McConnell bill is attached at Tab 1). Although the Department of State strongly supports efforts to enhance the ability of the United States Government to stem the flow of illegal drugs into this country, it opposes this amendment for the reasons set forth below.

DISCUSSION

The United States has long opposed the use of weapons against civil aircraft. Under international law generally, and in particular under Article 3(d) of the 1944 Convention on Civil Aviation (the "Chicago Convention"), states are obligated to have due regard for the safety of civil aviation in directing their military, customs, and police aircraft. The United States has long been in the forefront of international efforts to enhance respect for and observance of this obligation. Accordingly, the USG strongly condemned the Soviet shutdown of KAL Flight 007, despite that government's assertion that the aircraft's entry into Soviet air space was a criminal offense under Soviet law.

Article 3 bis of the Chicago Convention, adopted by the International Civil Aviation Organization ("ICAO") to codify international law in the wake of the KAL 007 shutdown, is perhaps the most significant result of this campaign to date. Article 3 bis provides 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." As reflected in Article 3 bis, the use of force in self-defense against armed attack under Article 51 of the U.N. Charter is the only generally recognized exception to this rule, and this can only be determined on a case-by-case basis.

In addition to the problems associated with the direct use of weapons against civil aircraft, the firing of "warning

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shots* as a means of compelling compliance to land has long been opposed by the United States and the world aviation community. The USG has expressed to ICAO its opposition to warning shots or tracer bullets because of the hazards live ammunition pose to aircraft, their crew and passengers, and persons on the ground. A single tragic accident from the use of tracer bullets (regardless of the best intentions of those in command of the pursuing aircraft) would, needless to say, be disastrous in every respect.

Enactment of the amendment would subject the United States to intense international criticism and undermine longstanding U.S. efforts to ensure the safety of civil aviation. Indeed, both ICAO and the International Air Transport Association recently communicated their opposition to the proposed legislation. This international criticism surely would grow more intense should the provision be enacted.

It should also be noted that the U.S. could not adopt such a policy without signalling its appropriateness for other nations, some that would be far less careful than the United States. For many years, we have opposed for both legal and safety reasons Cuba and other countries' occasionally announced intentions to shoot at civil aircraft. Once such a practice begins, it will have dangerous and widespread consequences that could affect the safety of innocent U.S. citizens. As the world leader in civil aviation, the United States would have more to lose than any other country in the development of such a practice.

The Department notes that the United States Department of Justice, in a September 8 letter to Senate Armed Services Committee Chairman Nunn, opposed the McConnell bill because it "would obviate the many procedural safeguards fundamental to our system of criminal jurisprudence." Justice specifically questioned whether the probable cause threshold set forth in the legislation and the taking of lives without due process of law would be held constitutional by the courts. The Department of State agrees with the Department of Justice on these points. State also notes with concern that the bill seemingly would authorize the use deadly force outside of U.S. airspace. Although the amendment's sponsors have added a section of "procedural safeguards," those provisions do not solve the bill's fundamental problem, that it would be highly difficult for law enforcement officers to exercise such lethal authority in a manner that would not jeopardize innocent lives.

For the reasons set forth above, the Department of State believes that the Executive Branch should oppose enactment of the McConnell bill.

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Cleared: L:ADSofer
L:ERindskopf
L:MYoung
L/LEI:ASurena
L/EBC:TABorek
L/PM:ECummings
INM:PBorg
EB/TRA/AVP:GGriffiths
EB/TRA:Cangevine
PM:EGVerville
H:THauser
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USE OF WEAPONS AGAINST CIVIL AIRCRAFT:
INTERNATIONAL LAW ISSUES

- o My discussion will focus on the international law dimension related to the use of weapons against civil aircraft in flight. I will not speak to potential domestic law issues, such as tort liability of foreign governments, the U.S. government, or U.S. employees.
- o The United States Government has opposed the use of weapons against civil aircraft. There are two bases for this under international law.

I. RELEVANT LAW

- o Chicago Convention: Under Article 3(d) of 1944 Convention on International Civil Aviation ("Chicago Convention"), states are obligated to have "due regard" for the safety of civil aviation in directing their military, customs, or police aircraft.
 - Although the term "due regard" in other contexts does not necessarily connote a particularly categorical standard, the international community and ICAO has interpreted it's use in Article 3(d) quite strictly.
- o Customary International Law: In the aftermath of the former Soviet Union's shutdown of KAL 007, the United States and other countries characterized the USSR's conduct as unlawful under Article 3(d) and under general principles of international law.
 - In response to KAL 007, ICAO member States believed that the Chicago Convention should be amended to codify customary international law. Article 3 bis of the Chicago Convention, adopted by ICAO, provides 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."
 - As reflected in Article 3 bis, the use of force in self-defense against armed attack under Article 51 of the UN Charter is the only generally recognized exception to this rule.
- o ICAO Standards and Recommended Practices: In carrying out its responsibilities to adopt international standards dealing with, among other subjects, the rules of the air,

ICAO has promulgated standards (which are binding on parties) and guidance material on the subject of the interception of civil aircraft. ICAO standard 3.8 in Annex 2 provides that Contracting States, when drafting rules for their state aircraft in intercepting civil aircraft, shall "have due regard for the safety of navigation of civil aircraft." Separate and elaborate guidance material provides specific procedures for interception. Section 8 of that guidance recounts Article 3 bis prohibition on the use of weapons against civil aircraft.

- o U.S. Participation In Act of Another. Generally, the U.S. is not under a legal obligation to ensure that other sovereign governments comply with international law. Whether or not to do so is a policy decision. Depending on the circumstances, however, U.S. involvement in the activities of another government could implicate the USG in those activities. In 1990, concern was raised at USG provision of real time intelligence information to the Government of Colombia, which at that time announced that it was adopting a shutdown policy. The concern raised at that time was that such provision would make the USG complicitous in the acts of the GOC.

II. EXCEPTIONS

- o Chicago Convention: War or Declaration of Emergency. Chicago Convention Article 89 provides that the provisions of the Convention shall not affect the freedom of action of any contracting State in the case of war or which has declared a state of national emergency and notified the fact to the ICAO Council. This would not affect the customary international law prohibition.
- o National Aircraft. Commentators (including the ICAO Secretariat) have argued that the protection of civil aircraft extend to foreign aircraft and not to a state's actions against aircraft of its registry in its territory.

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