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# TAKING TO THE SKIES:

## The Future of Renewed Air Drug Interdiction in Latin America

BY CAPTAIN KARINA OSGOOD



The current U.S. policy on aerial interdictions was made in haste after a tragic accident. Reconsideration of this policy is long overdue.

### AIRCRAFT DOWN

Early on April 20, 2001, an event occurred that would long mark the nature of U.S. support for foreign counternarcotic operations. An unidentified civil aircraft was sighted in Peruvian airspace. A series of communication errors led to a team of U.S. and Peruvian officials classifying the plane as suspect aircraft, but their attempts at radio contact never reached the civilian pilot. Believing that the apparently uncooperative pilot was a drug trafficker, Peru's A-37 shot down the aircraft, wounding the American pilot and killing two innocent passengers, an American Baptist missionary and her young daughter.<sup>[1]</sup> This tragedy was the unintended consequence of an effort to combat drug trafficking starting in the mid-1990s, known as the [Air Bridge Denial Program \(ABDP\)](#),<sup>[2]</sup> whereby the U.S. Air Force would provide partner air forces with flight paths, times, departure points, and destinations of suspicious

flights.<sup>[3]</sup> The goal was to deter the use of private aircraft to transport cocaine from Peru to Colombia.<sup>[4]</sup>

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After the 2001 incident, the United States suspended the ABDP and ultimately decided not to reinstate the program with Peru.<sup>[5]</sup> In 2003, it agreed to restart an ABDP with Colombia.<sup>[6]</sup> As part of this agreement, the parties outlined measures to prevent the tragedy in Peru from reoccurring, such as improved communication channels and enhanced foreign language training requirements.<sup>[7]</sup> Since then, the

(PHOTO) E-3 Sentry airborne warning and control system aircraft flies a surveillance mission over the eastern Pacific Ocean to find drug runners.  
(U.S. Air Force photo/Tech. Sgt. Cecilio Ricardo)

United States has not entered into similar ABDPs. Although aerial drug interdiction remains a lively issue for partner countries in the region, the legal authority to target civil aircraft within a country's airspace has received little attention here.[8] Events over the last 10 years, however, indicate that this issue deserves reconsideration. Several countries in the region are initiating or renewing aerial interdiction laws, which in turn will affect our ability to partner with them. The significance of this matter to U.S. national security interests extends far beyond Latin America.

## EXPAND YOUR KNOWLEDGE

### External Links to Additional Resources

- [CIA Procedures Used in Narcotics Air Bridge Denial Program](https://www.cia.gov/readingroom/docs/PROCEDURES%20USED%20IN%20NARCOTICS%20AIRBRIDGE%20DENIAL%20PROGRAM%20IN%20PERU%2C%201995-2001.pdf)  
<https://www.cia.gov/readingroom/docs/PROCEDURES%20USED%20IN%20NARCOTICS%20AIRBRIDGE%20DENIAL%20PROGRAM%20IN%20PERU%2C%201995-2001.pdf>
- [Senate Report on April 20, 2001 Civilian Aircraft Shootdown](https://www.intelligence.senate.gov/sites/default/files/publications/10764.pdf)  
<https://www.intelligence.senate.gov/sites/default/files/publications/10764.pdf>

## NARCOTICS TRAFFICKING AT A GLANCE

Latin America is the hub for global narcotics production. A common misconception is that the region's most commonly trafficked drug is heroin.[9] In fact, cocaine is, and Colombia, Peru, and Bolivia are its main purveyors.[10] Colombia remains the world's largest producer.[11] In 2019, it had 212,000 hectares dedicated to cultivation.[12] Despite hopes that production would decline with the 2016 signing of a peace treaty between Colombia and the Revolutionary Armed Forces of Columbia (FARC)[13], it increased from 877 to 936 metric tons from 2018 to 2019.[14] In 2015, 90 percent of all cocaine seized in the United States originated there.[15] Five years later, its share held steady at 89 percent.[16] **Globally, Colombia produces about 70 percent of cocaine.**[17] As part of the war on drugs, each year the President issues a memorandum classifying the major drug transit or producing countries.[18] For 2021, 22 such classifications were issued. More than half were in Latin America and these included Colombia, Peru, Bolivia, and Venezuela.[19]

While the narcotics trade has remained steady and even increased since the 2001 shootdown, the industry has encountered a setback with the ongoing COVID-19 pandemic. Lockdowns have disrupted international travel and border access, making trafficking less profitable. However, these obstacles are temporary. Cartels have a talent for circumvention. For example, only a few weeks into the initial pandemic lockdowns, U.S. Customs and Border Protection reported an increase in drone and light aircraft sightings along the border.[20]

As the world eventually returns to normal following the pandemic, **the question is whether the United States will remain committed to the war on drugs.** With an increasing focus on great power competition, will the Pentagon have the bandwidth for this mission? Is this a fight in which America is willing to continue investing resources and manpower? If the answer to those questions is yes, then determining the legality of aerial-shoot-down laws will be critical.

## THE RENEWAL: RETURNING TO AIR INTERDICTION

In recent years, various partner countries in Latin America have demonstrated renewed interest in air interdiction. Thus far, such efforts have taken place without notable U.S. interest. To the extent that the United States has been involved, it has been to maintain its longstanding policy of prohibiting cooperation with nations that have lethal aerial interdiction policies. If the United States is to retain a leadership role in the region—especially given increasing competition from Russia and China for influence—a reconsideration of these issues is past due.

In 2015, Peru passed legislation authorizing the FAP to target and shoot down small aircraft suspected of narco trafficking.[21] This legislation renewed the same policy that resulted in the 2001 shootdown.[22] The United States was opposed—arguing Peru had proven that it could effectively combat trafficking without a lethal aerial interdiction program[23]—and urged Peru to undertake practices consistent with international law and respect for human rights.[24]

**Renewed interested in air interdiction is not unique to Peru**; other Latin American countries have taken similar steps over the past decade. For example, in 2014, **Honduras** passed the “Law of Aerial Exclusion,” which permits its air force to target and shoot down aircraft.<sup>[25]</sup> Shortly after, **Bolivia** also passed a law giving the same authorization to its military to shoot down “hostile” aircraft whose pilots disregard warnings.<sup>[26]</sup> **Paraguay** enacted another such law, and it is also problematic.<sup>[27]</sup> **Argentina** has taken a slightly different approach in 2016. The president declared a state of emergency and on this basis authorized a shootdown policy.<sup>[28]</sup> Most recently, **Uruguay** passed legislation in 2020 that authorizes lethal aerial interdiction. Although it does not specifically cite anti-trafficking efforts as a basis for shoot-downs, its military now has authorization to conduct shoot-downs deemed “necessary.”<sup>[29]</sup>

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As Latin American countries renew or initiate aerial interdiction policies, unanswered questions spanning two decades resurface: **should international law approve of shootdowns of civil aircraft?** If so, under what conditions? Further, not everything that is allowed under the law makes good policy. So even if shoot-downs are permissible, what should U.S. policy be?

## THE JUSTIFICATION: SHOOTDOWNS UNDER INTERNATIONAL LAW

Establishing whether there is a legitimate basis for shootdowns under international law has been a topic of discussion for three decades. In 1994, the Department of Justice Office of Legal Counsel issued an opinion discussing ABDP operations and cautioning against the use of aerial interdictions.<sup>[30]</sup> This opinion remains the U.S. government’s

most comprehensive analysis of the issue and has been highly influential in policy debates. It should not, however, be taken as the final word on the subject.

The **Chicago Convention** is the lodestar in defining states’ obligations as to civil aviation under international law.<sup>[31]</sup> These include a duty to establish regulations that ensure “due regard” for the safe navigation of civil aircraft.<sup>[32]</sup> In the past, the United States interpreted this to mean the establishment of some sort of regulatory regime, which could include rules of engagement.<sup>[33]</sup> More recently, it has interpreted this provision more restrictively such that the U.S. government now holds that ABDP-style shootdowns are generally forbidden.<sup>[34]</sup>

Forty years after the Chicago Convention was signed, the **Montreal Protocol** amended its requirements, adding that states must “refrain from resorting to the use of weapons against civil aircraft in flight and that, in the case of interception, the lives of persons on board and the safety of aircraft must not be endangered.”<sup>[35]</sup> Of relevance to the question of shootdowns, the Montreal Protocol noted that this provision should not be construed so as to modify states’ rights under the U.N. Charter,<sup>[36]</sup> referring to a sovereign nation’s inherent right to self-defense.<sup>[37]</sup> Apart from this one qualification, though, neither the Chicago Convention nor the Montreal Protocol addresses the question at issue. Hence, if there is colorable authority for shootdowns other than in cases of genuine self-defense,<sup>[38]</sup> it must originate from other sources.

In what is still the seminal article on the question of shootdowns, the author examined the various sources that could be used to **justify aerial anti-narcotics operations**. He found that the best authority would be the state of necessity exception<sup>[39]</sup> as codified in Article 25 of the Draft Articles of State Responsibility for Internationally Wrong Acts.<sup>[40]</sup> To invoke this exception, a state must show that (1) the act is the “only way ... to safeguard an essential interest against a grave and imminent peril” and that (2) doing so would not “seriously impair an essential interest” of the state itself, its obligations to other states, or the international community.<sup>[41]</sup>

In the commentary on Article 25, an “essential interest” can be applied to a “wide variety of interests.”<sup>[42]</sup> These include “safeguarding the environment, preserving the very existence of the State and its people in a time of public emergency, and ensuring the safety of a civilian population.”<sup>[43]</sup> Such peril requires being “objectively established,” not merely possible.<sup>[44]</sup> In addition, the threat must be imminent.<sup>[45]</sup> Finally, the vital interest must “outweigh all other considerations.”<sup>[46]</sup> This determination entails a “reasonable assessment of the competing interests, whether these are individual or collective.”<sup>[47]</sup>

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Based on this guidance, the question becomes whether the drug war constitutes a “grave and imminent peril” that threatens an “essential interest.”<sup>[48]</sup> As noted, Argentina declared a state of emergency in 2016, claiming drug trafficking constitutes a “threat to national sovereignty.”<sup>[49]</sup> While other countries have not issued such formal declarations, renewed interest in interdiction policies suggests that they share Argentina’s concerns about the threat posed by the drug trade. Similarly, when Colombia asked the United States to restart the ABDP in 2003, its justification was that this program was necessary to combatting drug trafficking.<sup>[50]</sup> To this evidence can be added support even from the U.S. President.<sup>[51]</sup> An analysis applying the necessity test to the conditions in each country would exceed the scope of this essay. However, taken collectively, the facts seem to support findings of necessity similar to what Colombia first articulated in 2003 such that shoot-downs of drug traffickers are sometimes permissible under international law.<sup>[52]</sup>

So far it has been suggested that shooting down civil aircraft operating in support of the drug trade could be justified under international law. But this is not only a question of *law*, either international or domestic. The U.S. armed forces cannot provide material support to allies if they enact aerial interdiction laws because U.S. *policy* creates a presumption of wrongdoing.<sup>[53]</sup> The legislature could easily change that policy. Further, Congress has already granted the President authority to make exceptions when a determination is made that trafficking poses an extraordinary national security threat to partner nations.<sup>[54]</sup> For two decades, every year the President has signed such a determination memorandum for Colombia.<sup>[55]</sup> He could do the same for Peru, Brazil, Uruguay, and other key regional partners. What is lacking is not the authority for making such a determination but the political will to do so.

## CONCLUSION

The current U.S. policy on aerial interdictions was made in haste after a tragic accident. Reconsideration of this policy is long overdue. In the two decades since, safeguards have been developed that reduce risks of accidents.<sup>[56]</sup> Threats have also evolved, as have strategic priorities.<sup>[57]</sup> The U.S. government’s prohibition on assisting nations with aerial interdiction laws has less to do with the outward requirements of international law and more to do with inward policy. That policy needs a fresh look to determine if it is still consistent with U.S. strategic goals. Arguably, it is not.

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## ENDNOTES

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- [2] *Id.* See also Darren C. Huskisson, *The Air Bridge Denial Program and the Shootdown of Civil Aircraft under International Law*, 56 A.F. L. REV 109 (2005).
- [3] See STATE DEP'T PERU REPORT, *supra* note 1.
- [4] *Id.*
- [5] GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: DRUG CONTROL 1 (Sept. 2005), <https://www.gao.gov/products/gao-05-970> [hereinafter GAO REPORT].
- [6] *Id.* at 1, 5.
- [7] *Id.* at 7.
- [8] Although there have been several law review articles that have considered the question of aerial interdiction from a legal standpoint, these are dated and thus fail to consider the current geopolitical competition as longstanding partners consider whether to realign themselves with our strategic rivals. See, e.g., Brian E. Foont, *Shooting Down Civilian Aircraft: Is There an International Law?*, 72 AIR L. & COM. 695 (2007); Robin Geiss *Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3bis of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz"*, 27 MICH. J. INT'L L. 227 (2005); Huskisson, *supra*, note 2; Masahiko Kido, *The Korean Airlines Incident on September 1, 1983, and Some Measures Following It*, 62 J. AIR L. & COM. 1049 (1997).
- [9] Adam Isacson, *Four Common Misconceptions about U.S.-Bound Drug Flows through Mexico and Central America*, WASH. OFF. LATIN AM. (June 17, 2017), <https://www.wola.org/analysis/four-common-misconceptions-u-s-bound-drug-flows-mexico-central-america/>.
- [10] *Id.*
- [11] DEP'T STATE, 2021 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: VOL. I, DRUG AND CHEMICAL CONTROL 113 (2021), <https://www.state.gov/wp-content/uploads/2021/02/International-Narcotics-Control-Strategy-Report-Volume-I-FINAL-1.pdf> [hereinafter DEP'T STATE CONTROL STRATEGY REPORT].
- [12] *Id.*
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- [15] Isacson, *supra* note 9.
- [16] See DEP'T STATE CONTROL STRATEGY REPORT, *supra* note 11, at 113.
- [17] Chris Dalby & Laura Alonso, *Small Drop in Colombia's Coca Crops Little Cause for Cheer*, INSIGHT CRIME, (Jul. 19, 2019), <https://insightcrime.org/news/analysis/small-drop-colombia-coca-crops-little-cause-cheer/>.
- [18] DEP'T STATE CONTROL STRATEGY REPORT, *supra* note 11, at 14.
- [19] *Id.*
- [20] *Id.* Further evidence of such adaptability includes reports from Guatemala, where in 2020 police seized 20 aircraft used for drug smuggling, 15 of which were jets instead of the light propeller planes commonly used. Alessandro Ford, *Drug Flights Climb Again in Honduras and Guatemala*, INSIGHT CRIME, (Oct. 14, 2020), <https://insightcrime.org/news/analysis/aerial-cocaine-trafficking-honduras-guatemala/>.
- [21] *Peru's Congress Approves Shooting Down of Narcotics Planes*, REUTERS (Aug. 21, 2015), <https://www.reuters.com/article/uk-peru-drugs-flights/perus-congress-approves-shooting-down-of-narcotics-planes-idUKKCN0QQ00720150821>; see also Simeon Tegel, *Is Peru's New Anti-Drug Policy Too Tough Even for Washington?*, THE WORLD (Aug. 22, 2015), <https://www.pri.org/stories/2015-08-22/peru-s-new-anti-drug-policy-too-tough-even-washington>.
- [22] REUTERS, *supra* note 21.
- [23] Tegel, *supra* note 21.
- [24] *Id.* Peru's renewed aerial interdiction law prescribes a series of steps to ensure the country's compliance with international law. These include identification, intervention, persuasion, and neutralization. See *Aprueban Norma que Permite el Derribo de las "Narcoavionetas"*, LA REPÚBLICA (Aug. 21, 2015), <https://larepublica.pe/politica/578844-aprueban-norma-que-permite-el-derribo-de-las-narcoavionetas/>.

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- [31] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat.1180, 15 U.N.T.S. 295.
- [32] *Id.*, art. 3(d).
- [33] See Michael Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago OPUS 3*, 66 J. AIR L. & COM. 885, 926–27 (2001).
- [34] State Department Memorandum, Position Paper on the Use of Weapons Against Aircraft Suspected of Carrying Drugs (1989), reprinted in State Department Memorandum, Forcedown Policy: Options for Colombia and Peru (1994).
- [35] *Amendment of the Convention International Civil Aviation with Regard to Interception of Civilian Aircraft*, ICAO Doc. 9437, A25-Re., art. 3bis (May 10, 1984), reprinted in 23 Int’l Leg. Material 705 (1984).
- [36] U.N. Charter art. 51 (recognizing a nation state’s “inherent right of . . . collective self-defence” when it is attacked). For a discussion of the right of collective self-defense, see for example Jack M. Beard, *America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL’Y 559 (2002); Thomas M. Franck, *Terrorism and the Right to Self-Defense*, 95 A.J.I.L. 839 (2001).
- [37] OFF. LEGAL COUNSEL OP., *supra* note 30, at 150.
- [38] Compare Sompong Sucharitkul, *Procedures for the Protection of Civil Aircraft in Flight*, 16 LOY. L.A. INT’L & COMP. L.J. 513, 516 (1994) (arguing that shootdowns of civil aircraft are permissible *only* under international law in cases of self-defense) with Huskisson, *supra* note 2, at 142–43 (arguing that international law is broad enough to also allow shootdowns in order to protect a state’s vital interests). Compare also Steven B. Stokdyk, *Airborne Drug Trafficking Deterrence: Can a Shootdown Policy Fly?*, 49 UCLA L. REV. 1287, 1309 (1991) (arguing that because the U.N. Charter is an agreement among nations, it would not authorize shootdown actions against private persons) with Huskisson, *supra* note 2, at 144–46 (countering that Stokdyk’s position would have left the United States without recourse on 9/11 and arguing that there is growing consensus that a state’s right to self-defense extends to defending itself from private, non-state actors).
- [39] Huskisson, *supra* note 2, at 154–63.
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- [42] COMMENTARIES TO THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 83 (2001), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).
- [43] *Id.*
- [44] *Id.*
- [45] *Id.*
- [46] *Id.* at 83–84 (establishing that the necessity element requires proving that “the conduct in question must not impair an essential interest of the other State or States concerned”).
- [47] *Id.* at 84.
- [48] See Huskisson, *supra* note 2, at 158–63.
- [49] Woody, *supra* note 28.
- [50] GAO REPORT, *supra* note 5, at 5.

- [51] DEP'T STATE CONTROL STRATEGY REPORT, *supra* note 11, at 14 (stating in 2020, “Illicit drugs inflict enormous harm on the health and safety of the American people and threaten the national security of the United States.”).
- [52] *See also* Huskisson, *supra* note 2, at 154–63 (applying each element of the necessity test to the circumstances in Latin America and finding that there is a strong argument that shootdown operations are lawful under international law because they may be the only way to combat the drug trade effectively); Stokdyk, *supra* note 38, at 1308 (holding that drug trafficking can be tantamount to an armed attack).
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- [56] For example, there have been advances in theoretical understanding of international law on this question, *see, e.g., supra* note 8, and more importantly countries that are contemplating initiating or reinitiating interdiction laws have drafted more sophisticated legislation that arguably both achieves their strategic purposes and is also more consistent with the requirements of international law.
- [57] Donald J. Trump, *National Security Strategy of the United States of America* 38–39, 50 (Dec. 2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> (holding that America seeks to “encourage aspiring partners,” stating that Chinese and Russian competition makes this effort more urgent, and establishing that in the western hemisphere such efforts would include assisting partner nations with the fight against organized crime and illicit drug trafficking).