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REMARKS

*Attached is a copy of
the shoot down memo as
finalized + sent to Jack
Kenny. The final full
page has been modified
slightly at the request of
Mary Lee.*

DO NOT use this form as a RECORD of approvals, concurrences, disposals,
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U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

May 29, 2001

MEMORANDUM

TO: John C. Keeney
Acting Assistant Attorney General

THROUGH: Mary Lee Warren
Deputy Assistant Attorney General

FROM: James S. Reynolds, Chief
Terrorism and Violent Crime Section

SUBJECT: Review of Peru's Counter-Narcotics Air
Interdiction Procedures

On April 20, 2001, a Peruvian military jet shot down a civilian plane carrying American missionaries flying over northern Peru. A woman and her 7-month-old daughter were killed by rounds fired from the Peruvian aircraft. The pilot of the missionary plane was injured in the attack, but was able to land the plane on the Amazon River. The deceased missionary's husband survived, as did their other child who was aboard the aircraft.

At the time of this tragic incident, the Peruvian military aircraft was involved in a U.S. supported counter-narcotics mission, in accordance with Peruvian law that permits the use of force against civil aircraft suspected of narcotics trafficking. U.S. support, which is indispensable to the Peruvian interdiction program, is predicated on a 1994 Presidential Determination that Peru has appropriate procedures in place to protect against innocent loss of life. It is that Presidential Determination which, pursuant to 22 U.S.C. § 2291-4, immunizes the involved U.S. and Peruvian personnel from the criminal sanctions of 18 U.S.C. § 32, which comprehensively preclude the use of force against civil aircraft in flight anywhere in the world.

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Published reports indicate that some of the precautionary procedures were not followed prior to the April 20 shoot down of the missionary plane. In the wake of that shoot down, a U.S.-Peruvian interagency investigation was undertaken under the leadership of State Department Assistant Secretary Rand Beers. Mr. Beers recently advised this Department that investigators have uncovered documents which suggest that the procedures on which the 1994 Presidential Determination was based were subsequently modified to relax the precautions to be observed by the Peruvian military.

In the event such an unauthorized modification of the procedures did, in fact, occur, the April 20 shoot down--and perhaps others before it--are potentially subject to the criminal sanctions of 18 U.S.C. § 32. Additionally, those involved in making any such modifications are potentially subject to additional federal criminal sanctions. This memorandum proposes a course of action designed to place us in a position to make a threshold assessment of the potential criminal ramifications of this matter, so that we can determine what, if any, investigative action should be undertaken.

Background

In 1990, soon after the United States began assisting foreign governments in identifying possible airborne drug couriers, it became necessary to orally warn the Colombian government against use of the U.S. intelligence information to effect shoot downs of the identified aircraft. On May 1, 1994, DOD suspended its assistance programs to Peru and Colombia based on information that Peru had used weapons against aircraft suspected of drug trafficking and that Colombia intended to do so.

Shortly after DOD's suspension of assistance, an interagency lawyers group concluded that U.S. aid to a shoot down program was probably unlawful. Further, pertinent U.S. agencies were of the view that the use of force against civil aircraft violated customary international law, except in the limited circumstance of self defense against an aircraft with hostile intent. On May 26, 1994, this Department advised all relevant agencies that assistance programs supportive of shoot downs should be suspended pending a thorough review by OLC of applicable legal issues.

On July 14, 1994, OLC issued an opinion which concluded that the Aircraft Sabotage Act of 1984 applies to police and military

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personnel of foreign governments, and proscribes shoot downs of civil aircraft suspected of transporting illegal drugs. The opinion noted that 18 U.S.C. § 32(b)(2), which was enacted by the 1984 Act, prohibits the willful destruction of civil aircraft that are in service and registered outside the United States. Consequently, any support of the interdiction program of Colombia or Peru by the United States could also expose U.S. employees to criminal charges.

On October 5, 1994, Congress enacted a statute immunizing employees or agents of a foreign country from criminal liability for shooting down aircraft in that country's airspace if, and only if: (1) the aircraft is reasonably suspected of being primarily engaged in drug trafficking; and (2) the President of the United States has certified before the interdiction: (a) that the interdiction program is necessary because of the extraordinary threat that drug trafficking poses to the national security of that country; and (b) the country has appropriate procedures in place to protect against innocent loss of life, including effective means to identify and warn the aircraft. 22 U.S.C. § 2291-4(a). The statute also exempts U.S. employees or agents from both criminal and civil liability for providing assistance to a foreign country's air interdiction actions authorized by the statute. Id. § 2291-4(b).

On December 8, 1994, President Clinton signed Presidential Determination No. 95-9 which found that the requirements set out in § 2291-4 had been satisfied with respect to Peru. The Presidential Determination was predicated upon a Justification Memorandum which advised the President that the Government of Peru had procedures and laws which were accurately summarized in the memorandum and would be followed to protect against the loss of innocent life. The procedures as summarized are in four phases: (1) detection and monitoring systems which find and track aircraft passing through specially designated Peruvian airspace during daylight hours; (2) identification of an aircraft as a legitimate flight, which includes determining whether the aircraft is on a previously filed flight plan, and attempting to establish radio contact with the aircraft; (3) directing the launch of interceptor aircraft to visually identify the civil aircraft, verify its registry, attempt to establish radio contact, and cause the aircraft to proceed to a safe and adequate air strip by using a series of internationally recognized visual contact procedures; and (4) the use of weapons, including warning shots and finally force applied to disable the aircraft, if it

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continues to disobey instructions issued by the intercepting aircraft.

The Presidential Determination allowed for the resumption of assistance by the U.S. Government to Peru in furtherance of its air interdiction program. The U.S. Government role has included the provision of airborne tracking aircraft and radar and communication systems and associated government personnel or U.S. government contractors. Peruvian personnel normally accompany U.S. Government surveillance aircraft overflying Peru. As part of the operating instructions established in 1994, all U.S. Government personnel in jointly manned facilities and airborne platforms are required to regularly monitor compliance with the agreed interdiction procedures, and immediately report irregularities through their chain of command.

Discussion

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WITHHOLD IN FULL

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