

2-1-2017

Forewarned War: The Targeting of Civilian Aircrafts in South America and the Inter-American Human Rights System

Alonso Gurmendi Dunkelberg

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

 Part of the [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Alonso Gurmendi Dunkelberg, *Forewarned War: The Targeting of Civilian Aircrafts in South America and the Inter-American Human Rights System*, 48 U. Miami Inter-Am. L. Rev. 1 (2017)
Available at: <http://repository.law.miami.edu/umialr/vol48/iss2/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of Institutional Repository. For more information, please contact library@law.miami.edu.

**FOREWARNED WAR: THE TARGETING OF CIVILIAN AIRCRAFTS
IN SOUTH AMERICA AND THE INTER-AMERICAN HUMAN RIGHTS
SYSTEM**

Alonso Gurmendi Dunkelberg*

Throughout the War on Drugs, South American governments have fought a difficult and many times losing battle against drug trafficking. Lack of resources and policing capabilities have lead a growing number of States to adopt so called “Shoot-Down Laws”, legislation designed to authorize use of lethal force against “hostile” aircraft suspected of being involved in narco-trafficking. This article examines said laws from the viewpoint of international law, humanitarian law and human rights law. The article makes the point that mere transportation of narcotics cannot be reason enough to authorize use of lethal force and that “Shoot-Down Laws” constitute both a violation of the right to life and a misuse of the law of armed conflict to justify military action against civilian aircraft. The article claims that other alternatives, such as closer bilateral cooperation and enforcement, must be explored if these governments want to avoid being sued for human rights violations at the Inter-American level.

1. THE SOUTH AMERICAN DRUG MARKET	3
2. THE USE OF FORCE AGAINST CIVILIAN AIRCRAFT UNDER INTERNATIONAL LAW	6
a) <i>Self-Defense and the Jus Ad Bellum</i>	8
b) <i>Self-Defense and Human Rights</i>	12
3. MISUSE OF INTERNATIONAL HUMANITARIAN LAW	15

* Professor of International Law, Universidad del Pacífico (Lima, Peru). I wish to thank Ms. María Fe Alvarez Calderón for her help in the drafting of this article.

4. UNINTENDED CONSEQUENCES OF “SHOOT-DOWN” LAWS18
 5. A FOREWARNED WAR.....23

People in South America have a saying: ‘*Guerra avisada no mata gente*,’ which roughly translates to ‘a forewarned war never kills anyone.’ It is a call for preparedness for an upcoming and unavoidable evil. He who takes early precautions for a known misfortune will no longer suffer its consequences in the future. It is the South American equivalent to the old adage that ‘knowing is half the battle,’ or as Latin Americans would have it, the entire war. This paper will analyze one such example of a forewarned calamity. One not related to war though, but to the misuse of the law of war, or international humanitarian law -as it is also called- by South American governments in the fight against narco-traffic.

Countries in South America face a steep challenge to curb the spread of drug production within their borders. Inaccessible jungles and lack of resources prevent law enforcement agencies from carrying out normal policing actions in drug producing regions. In such areas, organized criminal groups operate with fair amounts of impunity, sometimes even guarded by insurgent groups or mercenary forces. Because of this, cocaine production in the region has remained stable, despite international efforts and considerable funds invested to stop it.

In order to counter this trend, since the early nineties, up to five different South American states have legislated with regards to what they call “*leyes de derribo*”, which literally translates to “Shoot-Down” laws. These laws, in essence, authorize the use of deadly force against civilian aircraft suspected of being involved in narco-trafficking. Its defenders claim that such a measure is the only thing that can guarantee the rule of law in South American jungles.

In this article, I will argue against these laws both from a legal and a policy perspective. From a legal point of view, I maintain that use of lethal force against civilian –albeit criminal– aircraft constitutes both a violation of the international law of civilian aviation as well as human rights law. Specifically, I take issue with the blatant manipulation of law of war concepts of “hostilities” and “hostile acts” employed by these laws. From a policy perspective, I will argue that any perceived advantage that the downing of suspicious aircraft might create, would be offset by the unintended consequence

of empowering domestic armed groups, which will be now in charge of protecting drug caravans through the jungle to the detriment of local civilian populations.

If fully applied, it is only a matter of time before these laws reach international fora, where they will be rapidly, and swiftly, declared contrary to international law. This is, with all certainty, a forewarned war, and one that South American governments are destined to lose. Instead of stubbornly pursuing a legally unsound course of action, South American governments should increase multilateral cooperation and establish multilateral agreements that allow them to tackle the problem of narco-trafficking within the framework of human rights law. Not doing so will simply mean legal defeat at the hands of human rights law, which in turn would spike the growing anti-human rights rhetoric already prevalent in the South-American sub-continent. These problems are entirely predictable and avoidable. *“Guerra avisada no mata gente.”*

1. THE SOUTH AMERICAN DRUG MARKET

Before I can explain the legal issues affecting “Shoot-Down” laws, it is important to first understand the underlying problem of the drugs that birthed them. The drug problem in South America is that of cocaine. Currently, the 132,300 hectares of cocaine bush cultivation areas in the world are distributed between just three countries: Colombia (52%), Peru (32%) and Bolivia (15%).¹ These three countries produce an estimated 943 tons of cocaine every year, with authorities being able to intercept between 43 and 68% each year (i.e. between 405 and 641 tons per year).² It is estimated that the U.S. –the largest cocaine consumption market in the world- needs only 196 tons to satisfy its demand.³ Thus, even assuming authori-

¹ *World Drug Report 2016*, U.N. OFFICE ON DRUGS AND CRIME, 35-36 (May 2016), http://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf.

² *Id.* at 36.

³ Keegan Hamilton, *The Golden Age of Drug Trafficking: How Meth, Cocaine, and Heroin Move Around the World*, VICE NEWS (Apr. 25, 2016), <https://news.vice.com/article/drug-trafficking-meth-cocaine-heroin-global-drug-smuggling>.

ties manage to intercept its maximum load of 641 tons, narco-traffickers would still possess 302 tons; more than enough to satisfy their American consumers. The South American cocaine flow therefore consists of making sure that at least 196 tons out of those 943 produced get safely to the U.S. and send any surplus to Europe and Brazil.

“Shoot-Down” laws were created as a law enforcement tool for South American nations to disrupt this drug trail through the destruction of airplanes carrying processed cocaine to other points of embarkation. It is important to note, however, that while in the early days of the drug business, cocaine smuggling in direct flights from the Andes to the United States was possible, increased demand and more stringent airport and airline controls have rendered this option impractical, if not virtually impossible. “Shoot-Down” laws are thus not meant to address any form of large cargo planes, but rather small bi-rotor airplanes that engage in short flights from one country to another in specific portions of an otherwise longer trip.

Drug transportation is a complex and time consuming endeavor, requiring the moving of large quantities of merchandise through several different countries. This task, therefore, is much better suited for maritime transportation, where larger quantities can be moved than by air. In fact, according to a 2010 United Nations report, cocaine is typically transported from Colombia to Mexico or Central America by sea and then onwards by land to the United States and Canada, with 90% of cocaine leaving from Colombia via either the Pacific or the Atlantic sea-routes; and 10% via Venezuela, through the use of aircraft.⁴ It would thus be an over-simplification and a mistake to state that shooting down planes is an essential component to fighting the spread of drugs in the world. Rather, airplanes play a very specific role in very specific stages of the cocaine flow. In order to understand which, one has to properly understand the cocaine trail.

⁴ *The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, U.N. OFFICE ON DRUGS AND CRIME, 87-88 (June 2010), https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf; see also *Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment*, U.N. OFFICE ON DRUGS AND CRIME, 32 (Sept. 2012), https://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf.

Cocaine usually starts its life as a coca leaf on a plantation, typically in the Peruvian VRAEM region,⁵ but also in southwestern Colombia or central Bolivia. Peruvian coca leaves and coca paste must then be shipped to cocaine production areas in Bolivia and Colombia. Once in Colombia, cocaine is transported by sea in semi-submersible vessels or so-called “go-fast” boats hopping through the coast of Panama until they get to Costa Rica and Nicaragua.⁶ In these countries, cocaine is moved onwards in a wide set of air, land, and sea transports to Honduras, where it meets with air-transported cocaine coming directly from Venezuela and ultimately imported to Guatemala, where flows are bottlenecked for later land transportation into Mexico and the United States.⁷

On this route, aircraft are mostly relevant in two points of the trip: (i) transportation of coca paste to Bolivia and Colombia and (ii) transportation of cocaine from Venezuela to Honduras. In both of these cases, however, the choice of air transportation does not seem to respond to any specific need other than expediency. If denied access to air transport, traffickers would likely be able to devise alternative transportation mechanisms.

Take for example the situation in Venezuela, which is becoming a larger hub for cocaine shipments to Central America over the years not because it is a more convenient route, but mainly because of porous law enforcement. According to a 2016 Department of State Report, “public corruption is a major problem in Venezuela that makes it easier for drug-trafficking organizations to move and smuggle illegal drugs.”⁸ In fact, according to the Department of State, “[c]redible reporting indicates that individual members of the

⁵ VRAEM is a Spanish acronym for “Valle de los Ríos Apurímac, Ene y Mantaro.” Jose Luis Pardo & Alejandra S. Inzunza, *Peru’s VRAEM Region: The Home of Miss Coca*, INSIGHT CRIME (June 17, 2014), <http://www.insightcrime.org/news-analysis/perus-vraem-region-the-home-of-miss-coca>.

⁶ *Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment*, *supra* note 4, at 32-40.

⁷ *Id.*

⁸ *International Narcotics Control Strategy Report: Drug & Chemical Control*, U.S. DEP’T OF STATE BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS 296 (Mar. 2016), <http://www.state.gov/documents/organization/253655.pdf>.

government and security forces [are] engaged in or facilitated drug trafficking activities.”⁹

In the case of Peruvian traffic to Bolivia and Colombia, if denied air transportation capabilities, Peruvian narco-traffickers would engage in land transportation. This, in fact, has already happened. According to the Department of State, since early 2015, just a few months before the approval of Peru’s “Shoot-Down” law¹⁰ aerial activities in coca producing regions declined due to increased military and police activity, aggressive destruction of clandestine airstrips and the installation of radar facilities.¹¹ In response, trafficking organizations simply began moving cocaine base overland to clandestine airfields further east, closer to Bolivia.¹²

2. THE USE OF FORCE AGAINST CIVILIAN AIRCRAFT UNDER INTERNATIONAL LAW

Civilian Aircraft are specifically protected by customary law and applicable treaties, such as the 1944 Chicago Convention on International Civil Aviation.¹³ These norms reflect an international legal order profoundly concerned with the safety of civilian air traffic. While international law does give States the option of requiring an unauthorized aircraft to land at an airport of choosing, it does not authorize use of force, except in instances of self-defense.¹⁴ Thus, under Article 3*bis* of the Chicago Convention, States must “refrain from resorting to the use of weapons against civil aircraft in flight [and], in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.”¹⁵

⁹ *Id.* at 16.

¹⁰ Ley No. 30339, Aug. 29, 2015, Diario Oficial El Peruano [D.O.] (Peru).

¹¹ *International Narcotics Control Strategy Report: Drug & Chemical Control*, *supra* note 8, at 250.

¹² *Id.*

¹³ *See generally* Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295.

¹⁴ Protocol to the Convention on International Civil Rights, art. 3*bis*, May 10, 1984, 15 U.N.T.S. 295 (“[t]his 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.”).

¹⁵ *Id.*

Article 3*bis* was negotiated in the wake of the downing of Korean Airlines Flight 007 in 1983, when a Soviet fighter mistook it for a spy-plane.¹⁶ Member States to the Chicago Convention met in April 1984, in Montreal, to negotiate a new clause for the Convention to specifically address the protections afforded to civilian aircraft.¹⁷

At the negotiating table, most parties were in agreement that their task was merely to codify an already existing customary legal regime. In his Opening Statement during the First Plenary Meeting, the Acting President of the Assembly confidently affirmed that “[t]here is no doubt that these humanitarian principles concerning the protection of human life are deeply rooted in customary international law.”¹⁸ His main motivation for the meeting was his belief that “[a] written rule of law is far superior to general principles recognized as customary law because frequently the very existence of a customary law or its exact scope and content may remain subject to challenge.”¹⁹ These thoughts were echoed by other delegations present in Montreal. The Chief Delegate of the United Kingdom added that “the development of international law, particularly during this century, has made it clear beyond doubt that in time of peace, the use of force against civil aircraft is subject to very severe limitations.”²⁰ Discussions at the Montreal meeting mostly revolved around the actual necessity to amend the Chicago Convention, not the existence of a rule of international law banning use of force against civilian aircraft.²¹

For the negotiating States at the Montreal meeting, self-defense was the only acceptable reason for using force against a civilian aircraft.²² This authorization, however, was to be construed narrowly. The delegation of Belgium, for example, stated that the notion of

¹⁶ Thom Patterson, *The Downing of Flight 007: 30 Years Later, a Cold War Tragedy Still Seems Surreal*, CNN (Aug. 31, 2013), <http://edition.cnn.com/2013/08/31/us/kal-flight-007-anniversary/>.

¹⁷ See generally Int’l Civil Aviation Org. [ICAO], *Assembly 25th Session Plenary Meetings*, ICAO Doc. 9437-A25-Res., P-min. (Apr. 24 - May 10, 1984) [hereinafter *ICAO 25th Session*].

¹⁸ *Id.* at 20.

¹⁹ *Id.*

²⁰ *Id.* at 27.

²¹ *Id.* at 26-27.

²² *ICAO 25th Session, supra* note 17, at 29.

self-defense should be limited to extreme cases and that it had to be exercised in good faith and be commensurate with the attack.²³ The United Kingdom also clarified that “you cannot kill a trespasser unless he poses an imminent threat to your life.”²⁴ It even stressed that:

If the aircraft merely enters the State’s airspace without permission, whether by mistake or deliberately, there can be no justification for using force against it, even if it is being used for activities inconsistent with its status as a civil aircraft. Provided it is not endangering the lives of persons not on board, the use of force against it cannot be regarded as permissible.²⁵

The legal regime recognized at Montreal is thus fairly straightforward: A State may not use force against a civilian aircraft save in cases of self-defense, whether within the meaning of Article 51 of the UN Charter, or as a means of protecting individuals not on board the intercepted plane. These two instances relate to the right to self-defense both in terms of the *jus ad bellum* and human rights law. I will analyze both concepts below.

a) *Self-Defense and the Jus Ad Bellum*

At the time of the Montreal conference, the delegation of New Zealand was one of the few Western States to take a critical view of mentioning self-defense as an authorization for the use of force against civilian aircraft. For New Zealand, “it was impossible . . . that civil aviation could ever give rise to circumstances in which self-defence could be justified.”²⁶ In its view, an aircraft engaged in civil aviation was unable to carry out or participate in an armed attack, and thus could not be able to trigger Article 51 of the UN Charter.²⁷

Such a determination seemed accurate. Ten years prior to the Montreal meeting, the UN General Assembly had defined “aggression” as “the use of armed force by a State against the sovereignty,

²³ *Id.* at 71.

²⁴ *Id.* at 29.

²⁵ *Id.* at 30.

²⁶ *Id.* at 106.

²⁷ *ICAO 25th Session, supra* note 17, at 107.

territorial integrity or political independence of another State.”²⁸ This definition was quickly understood to inform the requirements for self-defense against an armed attack under Article 51 of the UN Charter,²⁹ something that the International Court of Justice (ICJ) would ultimately confirm in its decision in the *Military and Paramilitary Activities in and Against Nicaragua* case a mere seven months after the Montreal meeting.³⁰ Such a definition of self-defense clearly restricted it to armed attacks carried out by States, not private actors or civilian aircraft. Nowadays, however, in this post-9/11 world, the situation has become somewhat less straightforward.

Immediately after the 9/11 terrorist attacks, the United Nations Security Council passed Resolution No. 1368.³¹ The resolution’s third perambulatory clause specifically recognized the application of the “inherent right of individual or collective self-defence in accordance with the Charter.”³² This was the first time that such a right had been invoked for an armed attack launched by a non-state actor, such as al-Qaeda. Such a recognition was the starting point for what has become a vigorous and challenging debate within the international legal community as to whether self-defense against a non-state actor can be invoked as a justification for the use of force in the territory of another State.

Up until this point, all prior precedents such as Israel’s actions against the Palestine Liberation Organization in Tunisia in 1985, had been met with strong condemnation by the international community.³³ Under the prevailing view of the time, as explained by the ICJ in its Nicaragua decision, a non-state actor could only engage in an armed attack if such an attack could be attributed to another state.³⁴ For attribution to exist, the state had to exercise effective

²⁸ G.A. Res. 3314 (XXIX), at 143 (Dec. 14, 1974).

²⁹ David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 161-62 (1980).

³⁰ *See generally* *Military and Paramilitary Activities in and Against Nicaragua* (Nica. v. U.S.), Judgment, 1984, I.C.J. Rep. 70. (Nov. 26) (Jurisdiction of the Court and Admissibility of the Application).

³¹ S.C. Res. 1368, (Sept. 12, 2001).

³² *Id.*

³³ S.C. Res. 573, (Oct. 4, 1985).

³⁴ *Nica. v. U.S.*, *supra* note 30, at ¶ 195.

control over the military or paramilitary operations to a degree that exceeds mere logistical support.³⁵

Since 9/11, and in some cases even since as far back as the late nineties, this position has been increasingly challenged both in literature and by state practice.³⁶ Cases of States attacking non-state actors in the territory of another state now include the United States' ongoing airstrikes against al-Qaeda in Pakistan and ISIS in Syria, Israel's 2006 attack against Hezbollah in Lebanon, Russia's 2007 attack against Chechen rebels in Georgia, Turkey's 2007 attack against the PKK in Northern Iraq, and Colombia's 2008 attack against FARC terrorists in Ecuador.³⁷ Some sectors of the international legal community also seem to be leaning towards a new understanding of armed attack that accepts the use of force in response to an attack by a non-state armed force in such instances where the host state is either unwilling or unable to address the threat.³⁸

The so-called "unwilling or unable standard" however has received strong criticism in scholarship³⁹ and has thus far been unable to consolidate as a serious legal theory in today's *jus ad bellum*.⁴⁰ If anything, the ICJ has continued to apply its restrictive approach to the use of force in its subsequent case law. For instance, in its 2005 decision for the *Armed Activities in the Territory of the Congo* case, the ICJ rejected Uganda's claim that its attack on the Allied Democratic Forces (ADF) armed group within the Democratic Republic of Congo (DRC) was an example of self-defense. The Court said:

³⁵ See *id.* at ¶¶ 109-15 (detailing account of pre-9/11 *jus ad bellum*); see generally Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359 (2009).

³⁶ Tams, *supra* note 35, at 380.

³⁷ Theresa Reinold, *State Weakness, Irregular Warfare and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 246 (2011).

³⁸ Ashley Deeks, "Unwilling or Unable": Towards a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 503 (2012).

³⁹ Kevin Jon Heller, *Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test*, OPINIO JURIS (Dec. 15, 2011), <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> (arguing that proponents of the unwilling or unable standard have been unable to offer a careful analysis of state practice and opinion juris).

⁴⁰ Tams, *supra* note 35, at 382 (arguing that "states and courts have been clear [in that] they have treated the new practice under the rubric of self-defence, and have not 'invented' new exceptions to the use of force.").

[W]hile Uganda claimed to have acted in self-defense, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The ‘armed attacks’ to which reference was made came rather from the ADF. The Court has found above (. . .) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC (. . .). The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.⁴¹

This is a clear restatement of the “effective control” standard set out in the Nicaragua case two decades before.⁴² The ADF, on its own, was unable to commit an armed attack that could trigger Uganda’s right to self-defense under the UN Charter.

This decision was not absent of controversy. ICJ Judge Bruno Simma even appended an individual opinion in which he criticized the Court’s “restrictive reading of Article 51.”⁴³ For Judge Simma, “in the light of more recent developments not only in State practice but also with regard to accompanying *opinion juris*, [the international law on self-defence] ought urgently be reconsidered.”⁴⁴ Judge Kooijmans agreed with him, stating that whenever a government lacks almost all authority in a specific part of its territory, and “armed attacks are carried out by irregular bands from such territory against a neighbouring State, [then] they are still armed attacks even

⁴¹ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶¶ 146-47 (Dec. 19).

⁴² See Military and Paramilitary Activities in and Against Nicaragua, *supra* note 30, at ¶ 99.

⁴³ Armed Activities on the Territory of the Congo, *supra* note 42, at ¶ 11 (separate opinion by Simma, J.).

⁴⁴ *Id.*

if they cannot be attributed to the territorial State.”⁴⁵ He thus concluded that “[i]t would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require.”⁴⁶

For the time being, however, the ICJ remains unconvinced by such arguments. And given its highly authoritative position within international law, the best one can say is that while the law is currently “in a state of flux”⁴⁷ it still has not accepted any deviation from the traditional understanding of self-defense. This means, therefore, that Article 51 will continue to be restricted to armed activities between states, even despite the growing trend of contrary scholarship.⁴⁸

If applied to the case of “Shoot-Down” laws, it is evident that mere possession of narcotics by a transnational criminal organization (or the commission of any other such common crime, for that matter) would fall immensely below the threshold required to activate the right to self-defense under international law. Indeed, if the ICJ is still unable to accept that an organized armed group in control of part of the territory of another state waging war against the defending state is still not sufficiently organized to commit an armed attack, then a transnational criminal gang operating from within the intercepting state and dedicated to the mere manufacture and transport of narcotics would be even less able to commit one. In simple terms, therefore, it would be impossible for a State to argue that it is authorized by the international law of self-defense to target and destroy a civilian aircraft transporting narcotics. New Zealand still prevails.

b) *Self-Defense and Human Rights*

Another case in which “Shoot-Down” laws may be legal is in cases where law enforcement officers need to use lethal force in order to protect themselves or other citizens. In this version of self-defense, *jus ad bellum* plays no part at all, and rather, human rights

⁴⁵ *Id.* at ¶ 30 (separate opinion by Kooijmans, J.).

⁴⁶ *Id.*

⁴⁷ Tams, *supra* note 35, at 382.

⁴⁸ See e.g. Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 Int'l. L. Stud. 1, 6 (2015).

law does. Under human rights law, States have an obligation to respect the right to life of its citizens. The International Covenant on Civil and Political Rights affirms that “[e]very human being has the inherent right to life . . . No one shall be arbitrarily deprived of his life.”⁴⁹ In the context of South America, the same is true for the American Convention on Human Rights. Article 4 states in similar terms that “[e]very person has the right to have his life respected . . . No one shall be arbitrarily deprived of his life.”⁵⁰

Human rights tribunals have interpreted the concept of “arbitrary deprivation of life” to great detail, determining that use of lethal force in times of peace is only legal if undertaken as a last resort. Indeed, the Inter-American Court of Human Rights has stated that “[t]he use of force by law enforcement officials must be defined by exceptionality and must be planned and proportionally limited by the authorities.”⁵¹ This means that lethal force must only be used “to the minimum extent possible in all circumstances and never exceed the use which is absolutely necessary in relation to the force or threat to be repealed”⁵² and that “force or coercive means can only be used once all other methods of control have been exhausted and have failed.”⁵³

The threshold of “absolute necessity” is shared by all major human rights institutions and is a very stringent limitation on law enforcement activity. For example, the UN Rapporteur on Extrajudicial, Summary, or Arbitrary Executions’ 2014 Report strictly stated that the principle that life must be protected “demands that lethal force may not be used intentionally merely to protect law and order or to serve other similar interests”, adding that “it may not be used only to disperse protests, to arrest a suspected criminal, or to safeguard other interests such as property . . . A fleeing thief who poses

⁴⁹ United Nations International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵⁰ United Nations American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁵¹ *Zambrano Vélez et al. v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 166, ¶ 83 (July 4, 2007).

⁵² *Id.* at ¶ 84 (internal quotations omitted).

⁵³ *Id.* at ¶ 83.

no immediate danger may not be killed, even if it means that the thief will escape.”⁵⁴

This standard has been codified by the UN in what is known as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, often referred to as the Basic Principles in short.⁵⁵ Principle 9 restates the use of force standard as follows:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁵⁶

Under such rules, the transportation of narcotics falls flatly outside of any valid justification for the use of lethal force by law enforcement officials in self-defense. Mere commission of a non-violent crime cannot be disproportionately handled by law enforcement through lethal violent means without violating proportionality. Law enforcement officials intercepting narco-traffickers would require further action from the aircraft in question that puts their own life or the life of others in danger before actually opening fire.

⁵⁴ Human Rights Council, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 72, U.N. Doc. A/HRC/26/36, (Apr. 1, 2014), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-36_en.doc [hereinafter Rep. of the Special Rapporteur on Extrajudicial].

⁵⁵ See U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Aug. 27 - Sept. 7, 1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.

⁵⁶ *Id.* at ¶ 9.

3. MISUSE OF INTERNATIONAL HUMANITARIAN LAW

As I have shown above, use of lethal force against an aircraft suspected of transporting narcotic drugs is generally illegal under both *jus ad bellum* and human rights law. Law enforcement officials simply cannot engage civilian (albeit criminal) aircraft in such a way. It is because of this, however, that all “Shoot-Down” laws in South America include a provision that seeks to quite purposefully de-civilianize these criminal aircraft by means of declaring them “hostile.” Once hostility has been determined, these laws seek to pluck the aircraft from the reach of the Chicago Convention and insert it within the scope of international humanitarian law (“IHL”)—the body of laws that regulates the conduct of belligerents in an armed conflict.

Under IHL, the legal regime applicable to the use of lethal force changes entirely, from one of absolute necessity, last resort, and self-defense to one of “status based targeting,” as it is called.⁵⁷ Reduced to its simplest explanation, under status based targeting, parties to an armed conflict are allowed to use lethal force against their enemy based solely on its identity as a participant in the conflict.⁵⁸ If the parties are two states—if the conflict is of an international character—then their soldiers are authorized by international law to open fire against anyone who qualifies as a combatant under the terms of the Third Geneva Convention.⁵⁹ If the parties are a state and a non-state organized armed group—a non-international armed conflict—then government forces can use lethal force against anyone directly participating in hostilities.⁶⁰ In both cases, however, use of lethal force directly against innocent, or even indirectly participating civilians, is strictly forbidden.⁶¹

⁵⁷ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 187 (Cambridge University Press, 1st ed. 2010).

⁵⁸ *Id.* at 188 (arguing that “[c]ombatants may be attacked at any time until they surrender or are otherwise hors de combat, and not only when actually threatening the enemy.”).

⁵⁹ Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)]

⁶⁰ SOLIS, *supra* note 57, at 188.

⁶¹ *Id.*; see generally Geneva Convention (III), *supra* note 59 (civilians can, however, be the subject of non-intentional attack, as part of collateral damage for a proportional attack against a combatant).

The concept of direct participation in hostilities (“DPH”) is complicated to grasp. Under IHL, DPH “refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”⁶² In order to qualify as DPH, the International Committee of the Red Cross (ICRC)—an authoritative entity in the field of IHL—states that a specific act must:

1. be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁶³

Thus, for example, a farmer sympathetic to a rebel force who, upon seeing government forces, grabs a pistol and decides to open fire against them, immediately becomes a direct participant in hostilities even if he never actually joined the rebel force in the first place. Indeed, he is inflicting death upon the specific soldiers, and, therefore, meets the threshold of harm: there is a direct causal link between his squeezing the trigger and the harm he is causing on the soldiers, and, he is acting specifically to benefit one side of the conflict and injure another, thus meeting the belligerent nexus requirement.

⁶² Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, INT’L COMMITTEE OF THE RED CROSS 45 (2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

⁶³ *Id.* at 46.

The requirement of a belligerent nexus, however, is important. As stated by the ICRC, many activities during armed conflict cause harm and yet are not considered DPH.

For example, the exchange of fire between police and hostage-takers during an ordinary bank robbery, violent crimes committed for reasons unrelated to the conflict, and the stealing of military equipment for private use, may cause the required threshold of harm, but are not specifically designed to support a party to the conflict by harming another.⁶⁴

Under such a framework, therefore, a narco-trafficking organization committing common crimes in the course of an armed conflict would not generally be engaging in DPH, unless it specifically decided to engage in violence in support of the rebel group opposing the government. Moreover, management of a drug smuggling business as a means of financing an insurgent group would not count as *direct* participation either. As stated by the ICRC, “the financing or production of weapons and the provision of food to the armed forces may be indispensable, but not directly causal, to the subsequent infliction of harm.”⁶⁵

This idea of a belligerent nexus, however, brings forth an important reality of all “Shoot-Down” laws: of the five South American nations that have regulated them, only one—Colombia—is currently engaged in an armed conflict of any sort. Brazil, Bolivia, Peru, and Venezuela are simply managing domestic crime, not an armed conflict.⁶⁶ This means, therefore, that save for the case of Colombia, talking of hostile aircraft in these countries is simply an absurd legal impossibility because there are no hostilities in which to participate directly in. Indeed, as stated by the ICRC:

The notion of direct participation in hostilities essentially comprises two elements, namely that of ‘hostilities’ and that of ‘direct participation’ therein.

⁶⁴ *Id.* at 60-61 (footnotes omitted).

⁶⁵ *Id.* at 54.

⁶⁶ *See generally Colombia: Recognition of Armed Conflict a Positive Step*, ICTJ (May 12, 2011) <https://www.ictj.org/news/colombia-recognition-armed-conflict-positive-step>.

While the concept of ‘hostilities’ refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy, ‘participation’ in hostilities refers to the (individual) involvement of a person in these hostilities.⁶⁷

Simply put, without a collective engaging in hostilities against the government, one single individual or criminal enterprise cannot be accused of being hostile. They are not attacking the government with intent to defeat an enemy, but rather breaching its legislation with intent to generate wealth. In essence, a declaration of hostility in time of peace is impossible. Use of lethal force under a status targeting standard, or any other manner outside the absolute necessity criteria of human rights law, would simply amount to an extrajudicial execution. In other words, in times of peace, violent acts are not hostile acts subject to lethal targeting, but criminal acts, subject to arrest and prosecution.

4. UNINTENDED CONSEQUENCES OF “SHOOT-DOWN” LAWS

Supporters of “Shoot-Down Laws” argue that they are mostly a dissuading tool that would seldom be used in practice. This was, for example, a significant component of the campaign in favor of approving Peru’s law.⁶⁸ The argument, as it goes, states that criminal organizations would be less prone to use aircrafts for their illegal activities if they knew they can be shot down for doing so, thus reducing crime altogether.

As I mentioned above, however, air transportation is not an essential component of cocaine flows in South America. If forced to choose alternative means of transportation, narco-traffickers would be entirely able to do so. And as with any economic choice, this decision will have both seen and unseen effects. Indeed, legal rules exist in order to change how the people affected by them act.⁶⁹ The

⁶⁷ *Id.* at 43 (footnotes omitted).

⁶⁸ *Humala: ‘Ley Para Derribar Narcoavionetas en Perú es una Medida Disuasiva’*, PERÚ21 (Aug. 22, 2015), <http://peru21.pe/politica/humala-ley-derribar-narcoavionetas-peru-medida-disuasiva-2225851>.

⁶⁹ DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 3-4 (Princeton University Press 2000).

problem, however, is that legal rules do not always manage to create the result they intended, but instead create one entirely different that its drafters simply never foresaw. That is, for example, to some degree, the case regarding minimum-wage laws. Legislators want to increase the wellbeing of workers. In practice however, there comes a point where any additional increase to the minimum wage would hurt, rather than help, workers, as it incentivizes businesses not to hire any additional workers.

This same line of reasoning is applicable to “Shoot-Down” laws. While these laws intend to improve society by making narco-traffickers stop transporting drugs, chances are narco-traffickers will adapt rather than stop. And the means through which they decide to adapt may be worse for society as a whole than the *status quo*.

Take for example the usually undiscussed reality of non-state armed groups in the Andes region. In Peru, remnants of the Maoist Shining Path terrorist organization continue to operate in the coca producing valleys of the central Andes.⁷⁰ In Colombia, both FARC terrorists and former (and supposedly de-mobilized) paramilitary forces known as *bacrim* or *bandas criminales* also operate in coca areas.⁷¹ Their presence provides narco-traffickers with a wide array of adaptation tools that defenders of “Shoot-Down” laws seldom discuss. Indeed, the main incentive “Shoot-Down” laws create for narco-traffickers is to even out the stakes: if authorities are now authorized to shoot narco-traffic suspects, then they must make sure that not everyone inside the aircraft is guilty of narco-trafficking. It is not difficult to see narco-traffickers in the near future working closer with these other criminal organizations to secure kidnapped individuals to carry with them in their planes. Authorities would not be able to shoot down aircraft that contain innocent people inside. The *status quo* would continue, only this time, with kidnappings.

Even if one assumes that “Shoot-Down” laws can incentivize narco-traffickers to abandon air-transportation altogether, however, it would be a mistake to assume that less planes means less drugs.

⁷⁰ *Shining Path, Tupac Amaru (Peru, leftists)*, COUNCIL ON HEMISPHERIC AFFAIRS (Sept. 28, 2008) <http://www.coha.org/shining-path-tupac-amaru-peru-leftists/>.

⁷¹ *See generally Bandas Criminales*, STANFORD UNIVERSITY, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/607> (last updated Aug. 28, 2015).

Narco-traffickers will simply need to begin transporting the same amounts of drug through land, and, in order to do that, they will need to secure the collaboration of armed groups. This would empower and enrich such groups to the detriment of the civilian population, and simultaneously increase the point of sale price of cocaine once it arrives in the United States, making it a more profitable business. Instead of curbing crime, “Shoot-Down” laws would incentivize new crimes without doing much to stifle the overall coca trade in the region.

For these reasons, alternative measures must be explored: specifically, placing greater emphasis on multi-lateral cooperation. The three most relevant countries—Bolivia, Colombia, and Peru—have signed various bilateral and multilateral agreements on the fight against narco-trafficking, all of which require, in one way or another, information sharing.⁷² Article IV of the Peru-Colombia agreement states: “For the achievement of this agreement’s objectives, competent services will grant mutual technical-scientific assistance and shall exchange information on individual and associated producers, processors and smugglers”.⁷³ Article VII sets out an obliga-

⁷² Convenio entre la República de Colombia y la República de Bolivia sobre Cooperación para el Control de Tráfico Ilícito de Estupefacientes, Sustancias Psicotrópicas y Delitos Conexos, Prevención del Consumo, Rehabilitación y Desarrollo Alternativo, Colom.-Bol., Mar. 12, 2001, *available at* http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/BOLIVIA_B-CONVENIOCOOPSUSTANCIASPSICOTROPICAS2001-TEXTO.PDF [hereinafter Convenio entre Colombia y Bolivia]; Convenio entre la República del Perú y la República de Bolivia sobre Cooperación en Materia de Desarrollo Alternativo, Prevención del Consumo, Rehabilitación, Control del Tráfico Ilícito de Estupefacientes y Sustancias Psicotrópicas y sus Delitos Conexos, Bol.-Peru, June 9, 2000, *available at* <http://www.devida.gob.pe/wp-content/uploads/2014/10/Bolivia-Convenio-de-Cooperaci%C3%B3n-Bilateral.pdf> [hereinafter Convenio entre Perú y Bolivia]; Convenio Administrativo entre la República Peruana y la República de Colombia para el Control, la Prevención y la Represión del Uso y Tráfico Ilícito de Sustancias Estupefacientes y Psicotrópicas, Colom.-Peru, Mar. 30, 1979, *available at* <http://www.devida.gob.pe/wp-content/uploads/2014/10/1279-Convenio-Administrativo-para-el-Control-la-Prevenci%C3%B3n-y-la-Represi%C3%B3n-del-Uso-y-Tr%C3%A1fico-Ilícito...pdf> [hereinafter Convenio entre Perú y Colombia].

⁷³ Convenio entre Perú y Colombia, *supra* note 72, at art. IV (translation from original text in Spanish: “Para el logro de los objetivos del presente Convenio, los

tion to cooperate whenever undertaking specific operations in frontier areas, and Article XI establishes a Mixed Peru-Colombia Commission in charge of advising both countries on which mechanisms and policies should be pursued.⁷⁴

While this is a pattern shared by the Colombia-Bolivia and Peru-Bolivia agreements as well, not all agreements are as specific with regards to the issue of aircraft and the specific measures that should be taken to address the problem. The Colombia-Bolivia agreement, for example, requires the parties to merely “grant assistance for the exchange of information related to criminal *modus operandi*, routes, identification of individuals, methods to strengthen illicit drug trafficking . . . with the objective of detecting organizations dedicated to illicit trafficking of drugs and psychotropic substances . . .”⁷⁵ On the contrary, the Peru-Bolivia agreement specifically mentions aircraft detection, stating that “the parties shall cooperate with one another to provide information on the routes of ships and aircraft suspicious of being used for illicit drug-trafficking, psychotropic substances and other conducts . . . so that the competent authorities can adopt the measures they consider necessary.”⁷⁶

These different approaches to information sharing and bilateral cooperation as well as the general nature of obligations undertaken contribute to making aircraft interdiction a primarily domestic endeavor. The aircraft involved in narco-trafficking are short-range

servicios competentes se otorgarán mutua asistencia técnico-científica, e intercambiarán informaciones sobre productores, procesadores y traficantes individuales y asociados.”).

⁷⁴ *Id.* at art. VII, art. XI.

⁷⁵ Convenio entre Colombia y Bolivia, *supra* note 72, at art. II(3) (translation from original text in Spanish: “Las Partes se prestarán asistencia para el intercambio de información relacionada con modalidades delictivas, rutas, identidades de personas, métodos para fortalecer el tráfico ilícito de drogas a que se refiere este Convenio, con el fin de detectar organizaciones dedicadas al tráfico ilícito de estupefacientes y sustancias sicotrópicas . . .”).

⁷⁶ Convenio entre Perú y Colombia, *supra* note 72, at art. II(2) (translation from original text in Spanish: “Las Partes cooperarán entre sí para brindarse información sobre rutas de naves y aeronaves de las que se sospeche están siendo utilizadas para el tráfico ilícito de estupefacientes, sustancias psicotrópicas y demás conductas descritas en el numeral 1 artículo 3 de la Convención, a fin de que las autoridades competentes puedan adoptar las medidas que consideren necesarias.”).

vehicles that must land at some point. Shared intelligence and sufficient allocated resources would be enough to be sure that an operation can be launched at the landing strip of choice. The problem for law enforcement is that they either do not have the means to conduct these sting operations or they have to lose track of the aircraft once it crosses an international border. Shooting it down is the simple way out of these problems, but it is also not the legal one.

Bolivia, Colombia, Peru, and perhaps even Brazil, therefore, need to increase multilateral cooperation with regard to radar intelligence and multinational sting operations. Procedures need to be harmonized and a permanent multilateral law enforcement organization or unit needs to be created to allow for effective cooperation. This way, when a Peruvian radar detects a suspicious aircraft and moves to intercept it, it can call upon its Bolivian counterpart to loiter nearby the border and continue pursuing until it lands, where law enforcement agents can later conduct the arrest. In the same vein, better radar technology can be used to preventively detect and destroy illegal landing strips used by narco-traffickers.

Latin American governments have created similar task forces for various important topics in the past. The Permanent Commission for the South Pacific, which integrates Peru, Chile, Colombia, and Ecuador, seeks to coordinate “regional maritime policies in order to adopt concerted positions of its Member States . . . in international negotiations, development of the Law of the Sea, International Environmental Law and other multilateral initiatives”.⁷⁷ Other exam-

⁷⁷ *Regional Fishery Bodies Summary Descriptions: Permanent Commission for the South Pacific* (CPPS), FOOD & AGRICULTURE ORG. OF THE UNITED NATIONS, <http://www.fao.org/fishery/rfb/cpps/en> (last visited Dec. 28, 2016) (explaining that the Permanent Commission for the South Pacific was established through the Declaration of Santiago in 1952 by the States of Chile, Colombia, Ecuador and Peru. Its role is to coordinate regional maritime policies in international negotiations, development of the Law of the Sea, International Environmental Law and other multilateral initiatives).

ples, set up at the United Nations level, include the Economic Commission for Latin America⁷⁸ and the Latin American and Caribbean Forestry Commission.⁷⁹

An inter-governmental regional organization that tackles aerial drug intervention on a permanent basis would address the issues directly and have a broader impact in the region, as it would be able to integrate security policies with local development initiatives and demand suppression strategies.

5. A FOREWARNED WAR

If a militarized policy of responding to criminal activity with lethal force is continued, however, it will only be a matter of time before one of these cases reaches international fora; specifically, the Inter-American Human Rights System (IAHRS). The IAHRS is comprised of two bodies, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR), and is one of the most renowned and respected

⁷⁸ The Economic Commission for Latin America was created by Economic and Social Council resolution 106(VI) with the purpose of contributing with the economic development of the region. The Member States of the Commission are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, United States, France, Germany, Granada, Guatemala, Guyana, Haiti, Honduras, Italy, Jamaica, Japan, Mexico, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, United Kingdom and Northern Ireland, Republic of Korea, Dominican Republic, Saint Kitts and Nevis, San Vicente y las Granadinas, Saint Lucia, Spain, Suriname, Trinidad y Tobago, Uruguay and Venezuela. *See About ECLAC*, ECONOMIC COMM'N FOR LATIN AMERICA & THE CARIBBEAN, <http://www.cepal.org/en/about> (last visited Dec. 28, 2016).

⁷⁹ In 1948 the Latin American and Caribbean Forestry Commission was established by FAO to provide a policy and technical forum to discuss forest issues on a regional basis. The State Members of the Commission are: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, United States, France, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, United Kingdom, Dominican Republic, Saint Kitts y Nevis, San Vicente y las Granadinas, Saint Lucia, Suriname, Trinidad y Tobago, Uruguay and Venezuela. *See Latin American and Caribbean Forestry Commission*, FOOD & AGRICULTURE ORG. OF THE UNITED NATIONS, <http://www.fao.org/forestry/31106/en/> (last updated Feb. 27 2015).

human rights protection systems in the world.⁸⁰ Its jurisprudence has been instrumental for the elaboration and development of doctrines related to forced disappearances as a human rights violation,⁸¹ the responsibility of the state for the actions of non-state armed groups,⁸² reparations,⁸³ the illegality of military trials,⁸⁴ and the unenforceability of blanket amnesty laws.⁸⁵ Throughout this vast jurisprudence, however, one thing is manifestly clear: use of lethal force by law enforcement officials must be *ultima ratio*.

As stated above, the IACHR recognizes the human rights standard of absolute necessity.⁸⁶ This standard directly contradicts the policy set out by “Shoot-Down” laws. These laws do not limit the downing of civilian aircraft to extraordinary circumstances, but rather merely to situations of suspicion of a crime. They also do not establish an “absolutely necessary” standard, given that by definition it is not absolutely necessary to shoot down an airplane when one can arrest the crew upon landing.

While there is no precedent that deals with the exact same situation, the case of *Armando Alejandro & others v. Cuba* can offer some insights.⁸⁷ That case deals with the 1996 downing of an Amer-

⁸⁰ Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L. J. 1203, 1203 (2011) (stating that “[t]he Inter-American Court of Human Rights has proven a particularly active defender of human rights in Latin America” and that “[l]egal scholars have praised the Inter-American Court for its effective protection of human rights”) (footnote omitted).

⁸¹ *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 7 (July 21, 1989), http://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf (citing paragraph 2 of the Resolution of Jan. 20, 1989).

⁸² *Id.*

⁸³ See generally Thomas Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351 (2008), available at <http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1313&context=faculty>.

⁸⁴ *Castillo Petruzzi et al. v. Peru*, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 132 (May 30, 1999), http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf.

⁸⁵ *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 75, ¶ 1 (Mar. 14, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf.

⁸⁶ *Zambrano Vélez et al. v. Ecuador*, *supra* note 51, at ¶ 84.

⁸⁷ See Armando Alejandro Jr., Carlos Costa, Mario de la Peña, and Pablo Morales v. Cuba, Case 11.589, Inter-Am. Comm’n H.R. Report No. 86/99,

ican civilian aircraft looking for Cuban rafters in international waters by the Cuban air force.⁸⁸ Without any justification and without warning, the Cuban air force simply scrambled Mig-29 fighter jets and opened fire, killing all the occupants.⁸⁹

The IACHR stated in its report on the merits that “[these] actions were a clear violation of established international rules, which require all measures to be exhausted before resorting to aggression against any airplanes and utterly forbid the use of force against civilian aircraft.”⁹⁰

In any case, “Shoot-Down” laws seem to be gaining increasing levels of attention.⁹¹ It is therefore unlikely that the IAHRs would consider them legal in any way, and, in all likelihood, a government accused of shooting down a civilian airplane would decidedly lose its case.

This is important because, as of late, the IAHRs has been under much pressure from unsatisfied governments that complain the system is biased against them and that it is impossible for them to receive a fair trial. In 2012, for example, Venezuela denounced the Pact of San José, the agreement granting jurisdiction to the IACHR, accusing the Court of being “held captive by a small group of callous bureaucrats who have blocked, hampered, and prevented necessary changes.”⁹² Ecuador’s President, Rafael Correa, has in turn com-

OEA/Ser.L./V/II.106 doc.3 (1999), <https://www.cidh.oas.org/annualrep/99eng/Merits/Cuba11.589.htm>.

⁸⁸ *Id.* at ¶ 1

⁸⁹ *Id.*

⁹⁰ *Id.* at ¶ 8.

⁹¹ Rep. of the Special Rapporteur on Extrajudicial, *supra* note 54, at ¶ 31-32 (arguing that “While many States have reformed their laws during the last few decades to give greater expression to the international rules and standards . . . in some cases, progress that has been made is under threat . . . There is a danger that laws such as the one recently adopted by Honduras entitling the State to shoot down civilian airplanes may be used to violate the right to live, for example in the name of drug control.”).

⁹² Nicolás Maduro Moros, Letter to José Miguel Insulza of the Organization of American States (Sept. 6, 2012), http://www.oas.org/dil/nota_república_bolivariana_venezuela_to_sg_english_part_1.pdf.

plained about alleged bias at the heart of the Inter-American System,⁹³ while Brazil got in a spat with the Commission when it ordered a halt in the construction of the multi-million dollar Belo Monte Dam project.⁹⁴

All of these problems have led several states to promote profound reform proposals that in some instances threaten to weaken the independence of the system.⁹⁵ They have also withheld contributions to the system⁹⁶ to the point of risking its bankruptcy and massive layoffs.⁹⁷

The aforementioned analysis with regards to “Shoot-Down” laws can give context to these heated accusations. After all, in many instances, the alleged bias revolves around cases where governments specifically went against clear-cut prohibitions in international human rights law or in the long-held jurisprudence of the

⁹³ Agencia de Noticias Públicas del Ecuador (Andes), *Rafael Correa Cuestiona la Comisión Interamericana de Derechos Humanos*, AMÉRICA ECONOMÍA (Mar. 30, 2013), <http://www.americaeconomia.com/politica-sociedad/politica/rafael-correa-cuestiona-la-comision-interamericana-de-derechos-humanos>.

⁹⁴ Mari Huayman, *Brazil Breaks Relations With Human Rights Commission Over Belo Monte Dam*, LATIN AMERICA NEWS DISPATCH (May 3, 2011), <http://latindispatch.com/2011/05/03/brazil-breaks-relations-with-human-rights-commission-over-belo-monte-dam/>.

⁹⁵ *Ecuador Will Insist on a Comprehensive Reform to the Inter-American Human Rights System During the 46th OAS Assembly*, ANDES (Oct. 6, 2016), <http://www.andes.info.ec/en/news/ecuador-will-insist-comprehensive-reform-inter-american-human-rights-system-during-46th-oas>.

⁹⁶ Daniel Cerqueira, *Brazil, Ecuador, and the Inter-American Human Rights System*, AMERICAS QUARTERLY (Mar. 6, 2015), <http://www.americasquarterly.org/content/brazil-ecuador-and-inter-american-human-rights-system>.

⁹⁷ Press Release, *Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff*, ORG. OF AMERICAN STATES (May 23, 2016), http://www.oas.org/en/iachr/media_center/preleases/2016/069.asp.

Court. None of these cases, not Ecuador's lack of respect for freedom of expression,⁹⁸ nor Venezuela's disregard for political dissent,⁹⁹ nor Brazil's negligence with indigenous rights was an unpredictable or extraordinary result. These cases were more the result of governments ignoring existing law, rather than an overreaching Court.

The same problem is beginning to arise with "Shoot-Down" laws. South American governments are designing a legal regime manifestly incompatible with Inter-American case law. These laws are destined to be deemed unlawful at the IAHRs, yet these states insist on pursuing them. When the time comes, once the cases are lost and the laws are annulled by the IACtHR, they will accuse it of bias. This is, for all intents and purposes, a forewarned war, and "*guerra avisada, no mata gente.*"

⁹⁸ *Ecuador's President Wins Libel Lawsuit Against Newspaper*, CNN (July 20, 2011), <http://www.cnn.com/2011/WORLD/americas/07/20/ecuador.libel.lawsuit/>.

⁹⁹ Catalina Lobo-Guerrero, *La Policía de Maduro Detiene al Alcalde Opositor de Caracas*, EL PAÍS (Feb. 20, 2015), http://internacional.elpais.com/internacional/2015/02/20/actualidad/1424386802_955983.html.