

10-1-2000

Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force

Rachel Canty

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



Part of the [Law of the Sea Commons](#)

Recommended Citation

Rachel Canty, *Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force*, 31 U. Miami Inter-Am. L. Rev. 357 (2000)

Available at: <http://repository.law.miami.edu/umialr/vol31/iss3/2>

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 administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

ARTICLE

DEVELOPING USE OF FORCE DOCTRINE: A LEGAL CASE STUDY OF THE COAST GUARD'S AIRBORNE USE OF FORCE

RACHEL CANTY*

I. Introduction:.....	358
II. Part I: New Threats Lead to New Solutions: The Rise of the Go-Fast.....	361
III. Part II: Domestic Authority for Coast Guard Airborne Use of Force.....	365
A. U.S. Law Regarding the Use of Force in Law Enforcement	366
B. Developing a Continuum of Force for Use of Force from Helicopters.....	369
IV. Part III: International Law Considerations.....	371
A. Law of the Sea Regime: Flag State Jurisdiction and the Right of Visit	371
B. Lack of Use of Force Guidance for Law Enforcement Under International Law...374	
C. The Importance of the Use of Force to Maintaining the Law of the Sea Regime...377	
V. Conclusion	380

* The author is currently a staff attorney in the Office of Environmental Law, Coast Guard Headquarters. She received a B.S. from Emory University, a J.D. from the University of Florida and an L.L.M. from the University of Miami. She was the legal advisor in the Office of Law Enforcement, Coast Guard Headquarters at the time the initiative described in this article was undertaken. The views expressed in this article are solely those of the author and do not reflect the official views of the United States Coast Guard. The author gratefully acknowledges the assistance of Charles Michel and Wayne Raabe in both grappling with the legal issues associated with use of force initiative and the drafting of this article.

I. INTRODUCTION

During Fiscal Year 1999, which began October 1, 1998 and ended September 30, 1999, the U.S. Coast Guard seized a record 111,689 pounds of cocaine.¹ Even more remarkable than the total amount, was that over 2,000 pounds of that total were seized using a new interdiction method for the Coast Guard: the use of force from helicopters to stop fleeing vessels who refuse to do so upon a valid order of the United States.² As the primary U.S. agency for maritime law enforcement on the high seas, the Coast Guard has historically employed force from Coast Guard cutters when necessary to compel compliance with a lawful order, including warning shots and disabling fire directed at suspect vessels.³ However, until recently, Coast Guard policy prohibited helicopters and aircrafts from using any force for the purpose of law enforcement, although permitting the use of force in self-defense.⁴

1. U.S. Coast Guard, *Drug Seizure Record 62 Tons of Cocaine Seized by Coast Guard This Year* (Sept. 28, 2000), available at <http://www.uscg.mil/news/drugs2000/index.htm> (last visited Nov. 9, 2000). This total easily surpassed the records set in Fiscal Year 1997 and Fiscal Year 1991 of 103,617 pounds and 90,335 pounds respectively. Seizure data referring to the number of pounds seized is based on drug seizures in which the Coast Guard was a primary participant as reported in the Federal Drug Seizure System, which is managed by the El Paso Information Center.

2. Stout, David, *Coast Guard Using Sharpshooters to Stop Boats*, N.Y. TIMES, Sept. 14, 1999, at A18.

3. Warning shots and disabling fire were used extensively by the Coast Guard to enforce the Prohibition Law during the 1920's against vessels attempting to smuggle alcohol into the United States. See e.g., *Ford v. United States*, 273 U.S. 593 (1924) (warning shots); *United States v. 63 Kegs of Malt*, 27 F.2d 741 (2d Cir. 1928) (warning shots); *The Vincos*, 20 F.2d 164 (E.D.S.C. 1927), *aff'd*, *Gillam v. United States*, 27 F.2d (4th Cir. 1928), *cert. denied*, 278 U.S. 635 (1928) (warning shots and disabling fire). See also Donald L. Canney, *Rum War: The U.S. Coast Guard and Prohibition*, available at http://www.uscg.mil/hq/g-cp/history/h_rumwar.html (last modified June 2000).

4. U.S. Coast Guard Maritime Law Enforcement Manual COMDTINST M16247.1A [hereinafter MLEM] (unpublished, on file with author), at 4-3. The Coast Guard Historian's office believes that prior to the deployment of this new capability in 1999, the last time the Coast Guard authorized any use of force from an aircraft to disable vessels was in the 1920's when fixed-wing aircrafts were used to chase down and stop shipments of illegal alcohol. David Briscoe, *Coast Guard Using Sharpshooters to Knock Out Drug Boats* (Sept. 14, 1999), available at <http://www.caller.com/1999/september/14/today/national/785.html> (last visited Oct. 30, 2000).

Under the *U.S. National Drug Control Strategy (NDCS)*, the Coast Guard has been designated as lead federal agency for maritime drug interdiction in the transit zone, the maritime area between source countries where drugs are produced and the arrival zone off the coast of the United States.⁵ The core of the Coast Guard's drug interdiction strategy is the denial of maritime routes to smugglers. Maritime route denial is accomplished through law enforcement presence and interdiction activities that effectively deter and disrupt the smuggler's use of particular maritime routes. Disrupting drug traffickers forces them to develop new, more costly methods and routes, and can open them to additional risks. This is accomplished through drug seizure, disruption of trafficking operations, and route displacement. The pressure of these operations can reduce the flow of illicit drugs into the United States via maritime routes.⁶

While the mere presence of Coast Guard cutters and other assets patrolling at sea have some deterrent effect on smugglers, the best deterrent against illegal activity is penalizing those involved in the activity, including the arrest and prosecution of individuals and the seizure of vessels and contraband. Individuals are inhibited from conducting illicit activity when the perceived risk of apprehension and its negative consequences exceed the perceived benefits derived from the activity. Thus, deterrence is achieved when the perceived benefits of compliance outweigh the perceived benefits of illicit activity. Accordingly, making sufficient contact with actual or potential violators

5. Office of National Drug Control Policy, *National Drug Control Strategy 2000, Annual Report* [hereinafter *NDCS*], available at <http://www.whitehousedrugpolicy.gov/policy/ndc500/index.html> (last modified Sept. 29, 2000).

6. U.S. Coast Guard, *Counterdrug Strategic Plan 1998, Steel Web* [hereinafter *CDSWP*], at 9. The Coast Guard's strategy was designed to support *NDCS* Goal 4, "which is to shield America's air, land, and sea frontiers from the drug threat" and *NDCS* Goal 5, which is to "break foreign and domestic drug sources of supply." See Office of National Drug Control Policy, *NDCS, Strategic Goals and Objectives* available at <http://ea.usa.or.th/mirror/usinfo.state.gov/products/pubs/drugfact/ondcp.htm> (last visited Oct. 29, 2000). The Coast Guard's goal is in line with a statement which reaffirmed the basic elements of established U.S. drug policy issued by the press secretary and approved by President Clinton in November, 1993. Statement by the Press Secretary on Drug Control Policy, 29 WEEKLY COMP. PRES. DOC. 2253 (Nov. 3, 1993), available at <http://www.fas.org/irp/offdocs/pdd14.htm> (last visited Nov. 8, 2000) (stating that illegal narcotics are severely damaging to American society and a serious threat to national security and outlining a policy whereby the United States would provide assistance to those governments that demonstrate the political will to act against illicit cocaine production, trafficking, and abuse).

through presence of law enforcement assets and boardings of suspect vessels produces deterrence. A 1989 study sponsored by federal law enforcement agencies proposed a qualitative relationship between smuggler perceptions of the probability that they will be interdicted and the percentage of smugglers deterred.⁷ Interdiction rates are the rates at which vessels suspected of smuggling drugs are stopped and boarded by law enforcement authorities as a percentage of the total estimated number of vessels engaged in drug smuggling. Using interdiction rates as a proxy for the probability of actual interdiction indicates that a 40% probability of interdiction yields an 80% deterrent factor.⁸ In other words, interdiction of 40% of the estimated vessels engaged in maritime drug smuggling deters 80% of the potential smuggling vessels from engaging in the maritime movement of drugs.

However, in order for Coast Guard efforts to achieve the desired results against drug smugglers, the Coast Guard must have the practical ability to board suspect vessels any time they have the legal authority to do so; a task that sounds simple, but can be difficult and dangerous when a suspect refuses to comply with a lawful order of the Coast Guard. Recent changes in tactics by maritime drug smugglers have rendered ineffective the Coast Guard's traditional methods of stopping uncooperative vessels.⁹ The ineffectiveness of the Coast Guard's traditional methods is particularly acute since the rapid rise in the use of fast, maneuverable "Go-Fast" vessels by drug smugglers. As a result, the Coast Guard decided that new capabilities and tactics were needed to regain a credible, maritime law enforcement presence.

This paper outlines the development of the Coast Guard's airborne use of force capability and doctrine from the legal perspective. Part I provides a general overview of the need for

7. *CDSP, supra* note 6, at 10. The study was commissioned by the Interdiction Committee (TIC) and conducted by Rockwell, International, Special Investigations Inc. Follow up studies needed for confirmation have been delayed due to funding concerns, but are scheduled to occur in the next few years. Founded in 1987, TIC is a multi-agency body of Federal agency leaders chartered by the ONDCP to discuss and resolve issues relating to the coordination, oversight and integration of international border and domestic interdiction efforts in support of the *NDCS*.

8. *CDSP, supra* note 6, at app. D2-3.

9. See Mike Emerson, *Coast Guard Helos: A Call to Arms*, 125/10/1,160 *PROCEEDINGS* 30 (1999).

the Coast Guard's development of the capability to use force from the air to counter the recent change in tactics by drug smugglers. Part II focuses on the legal regime of the United States underlying the Coast Guard's use of force, examining the statutory and constitutional basis for the use of force in law enforcement. This part also explores the development of the Coast Guard's continuum of force, which is designed to provide a wide range of options suitable for use in a variety of situations and enhance the Coast Guard's use of the minimum force necessary. Part III then examines the international law basis for this new capability, focusing on the use of force against apparently stateless vessels on the high seas. This part argues that even though the standard for the use of force in a law enforcement context is not well-defined under international law, the implied right to use force in such instances is crucial to ensuring the continued viability of the international law of the sea regime.

II. PART I: NEW THREATS LEAD TO NEW SOLUTIONS: THE RISE OF THE GO-FAST

The history of maritime law enforcement by the Coast Guard dates back to 1790 when its predecessor, the Revenue Marine, later renamed the Revenue Cutter Service was established to combat the smuggling of goods into the newly established United States.¹⁰ Initially, this protection involved the control of post-Revolution commercial smuggling and enforcement of customs laws. Later in the nineteenth century, interdicting slave traders became a mandated mission. From 1920 to 1933, the Coast Guard interdicted alcohol smugglers in support of the Volstead Act and the Prohibition Law.¹¹ During the 1970's, illegal drug smuggling of marijuana through the Caribbean and the Bahamas emerged as a significant threat, and the Coast Guard employed a "choke point" strategy to deny drug smugglers the easiest routes to the United States. As the drug smuggling threat grew, Coast Guard and other federal agency resources matched the threat with increased resources targeted at smugglers. Since the early 1970's, a substantial portion of the Coast Guard's maritime law

10. GEORGE E. KRIETMEYER, THE COAST GUARDSMAN'S MANUAL 5-6 (8th ed. 1991).

11. *Id.*

enforcement mission has been the interdiction of vessels attempting to smuggle drugs.¹²

In the late 1990's, Coast Guard enforcement activities in the Caribbean succeeded in hampering the efforts of drug smugglers since at that time drug smugglers used slow moving coastal freighters and fishing vessels. Faced with the loss of hundreds of millions of dollars in illicit cargoes, the smugglers shifted transportation modes to high-speed Go-Fast vessels, also called "cigarette boats." These vessels are specifically designed to make a quick transit across the Caribbean and are capable of carrying up to a ton of cocaine.¹³ Go-Fast vessels are typically equipped with powerful engines, a skeletal crew, and several extra fuel barrels to ensure sufficient fuel for the transit.¹⁴ Go-Fast vessels are extremely frustrating for law enforcement throughout the region since they are difficult to detect and even harder to stop, traditionally outrunning law enforcement vessel platforms.¹⁵

The difficulties encountered by law enforcement personnel have made the Go-Fast a preferred method for drug smugglers. Law enforcement officials estimate that between July 1998 and July 1999, drug smugglers completed 400 Go-Fast transits; U.S. law enforcement vessels pursued between fifty and sixty transits, actually boarding only sixteen of the Go-Fast vessels.¹⁶ The remaining suspects evaded apprehension because U.S. surface interdiction forces were generally unable to get close enough to the suspect vessels to compel them to stop. Even more alarming is the tenfold increase in Go-Fast activity in the last five years.¹⁷ Currently, Go-Fasts account for over half the cocaine flow to the United States.¹⁸ The Institute for Defense Analysis predicts that this rapid increase in the use of Go-Fasts to smuggle drugs will continue unabated until the smugglers see a visible deterrent, either through higher arrest rates of smugglers, unacceptably

12. U.S. Coast Guard, *Maritime Law Enforcement History*, available at <http://www.uscg.mil/hq/g-o/g-opl/mle/progov2.htm> (last modified May 5, 2000).

13. Emerson, *supra* note 9.

14. *Id.*

15. See Robert B. Watts, *Gotta Get the Go-Fasts* (Sept. 1999), available at <http://www.usni.org/Proceedings/PROwatts.htm> (last visited Nov. 7, 2000), for a discussion of the difficulty of interdicting Go-Fasts.

16. David Abel, *Despite New Resolve, U.S. Lacks Firepower in Drug War*, DEFENSE WEEK, Sept. 20, 1999, at 1.

17. Emerson, *supra* note 9.

18. NDCS, *supra* note 5, at 79.

high losses of cargo resulting from seizures, or having to jettison narcotics to avoid law enforcement activity.¹⁹

The potential consequences of failing to stop drug smugglers are serious. Drug smuggling is a unique business that does not follow the traditional laws of supply and demand. In the world of illegal drugs, supply can drive demand, and a plentiful supply can actually create a demand. An instructive example of this theory can be found in the Caribbean island nations. For many years these nations saw illegal drugs as a scourge affecting only the United States, the origin of demand, until traffickers started paying island smugglers with cocaine.²⁰ No longer serving as just a transshipment point for smugglers, the introduction of cheap cocaine within these countries created demand problems where before none had existed. Caribbean governments now see illegal narcotics as one of their greatest challenges. The West Indian Commission, tasked to consider the future of the Caribbean, stated in its 1992 Report:

Nothing poses greater threats to civil society in CARICOM countries than the drugs problem. The damage. . .to democratic society itself from the drug problem is as great a menace as any dictator's repression. . .CARICOM countries are threatened today by an onslaught from illegal drugs as crushing as any military repression.²¹

The Prime Minister of Jamaica underscored this concern in a 1997 speech to the Caribbean Community and Common Market emphasizing that "[w]e cannot allow the drug cartels. . .operating in or across our borders to threaten our democratic institutions to pervert our system of justice and destroy the health and well-being of our citizens, young or old."²² The problems associated with drug smuggling are not limited to the Caribbean region. In 1997, there were about 780 homicides as a result of illegal

19. Emerson, *supra* note 9, at 32.

20. Conversation with CDR M. Emerson, Chief, Drug Interdiction Division, Office of Law Enforcement, Coast Guard Headquarters (1998-2000), [hereinafter CG Drug Interdiction Division]. This conversation took place during the development of the use of force capability from helicopters.

21. EU Experts Group, "*The Caribbean and the Drugs Problem*," April 1996, at 1.

22. The President's News Conference With Caribbean Leaders in Bridgetown, 33 WEEKLY COMP. PRES. DOC. 699, 700 (May 10, 1997).

drugs.²³ The annual social cost of drug use is estimated at \$110 billion – the consequence of drug related crime.²⁴

Knowing that a threat exists does not always result in the ability to counter the threat successfully. In a substantial number of instances where a suspect Go-Fast vessel was detected, Coast Guard helicopters or helicopter-equipped vessels were on the scene with the suspect or were within flying range, even though no surface asset could intercept the suspect.²⁵ However, because of the Coast Guard's policy barring helicopters from using force, there was no practical way to compel a non-cooperative suspect to stop and allow the Coast Guard to board. As a result, Coast Guard helicopters could do nothing more than report what they observed before returning empty-handed.

By the Spring of 1998, the Coast Guard realized that the only way to effectively counter the rapid rise in drug smugglers' use of faster and more maneuverable Go-Fast vessels was to develop the capability to stop suspect vessels from the air.²⁶ Doubts about whether it was possible to train crews to employ force safely from a helicopter without rising to the level of deadly force were put to rest by the fact that during 1998, both Colombia and Panama successfully and safely used warning shots from helicopters to stop over a dozen suspect Go-Fasts.²⁷ In August 1999, after much discussion and debate within the Coast Guard, the Commandant of the Coast Guard, Admiral James Loy, authorized the development of the capability for airborne use of force from helicopters. Admiral Loy explained his rationale for

23. U.S. Dep't of Justice, *Drugs and Crime Facts*, available at <http://www.ojp.usdoj.gov/bjs/dcf/contents.htm> (last modified June 21, 2000).

24. *Id.*

25. CG Drug Interdiction Division, *supra* note 20. One factor compounding the Coast Guard's inability to intercept suspects in a timely manner is the traffickers' willingness to exploit territorial boundaries. Although the Coast Guard has the authority to conduct Right of Visit boardings, as discussed *infra*, this same right does not exist in the territorial waters of other countries where the coastal state has primary jurisdiction. A smuggling vessel could travel through fourteen national jurisdictions on a voyage between Colombia and the U.S. Virgin Islands, easily frustrating the efforts of law enforcement personnel to maintain contact with it throughout its illicit journey. While traffickers move with impunity between national jurisdictions, foreign law enforcement units may not do so without prior approval of the territorial sovereign.

26. See Emerson, *supra* note 9, for a discussion of policy issues facing the Coast Guard as part of this decision. As with any policy change, the decision was controversial, especially among many within the Coast Guard's aviation community who expressed safety concerns.

27. *Id.* at 31.

this decision stating,

[f]or too long, we simply watched the narco-traffickers in 60-knot boats literally run away from us after excellent work had already been done to find them. . . . For those narco-traffickers who continue to use international waters to deliver their deadly cargoes: we will continue to use every tool in our arsenal to stop you.²⁸

The Commandant's decision was made with the clear understanding that safety was paramount and that the capability would be used only in conformance with a well-developed doctrine, following extensive evaluations, testing, and training.²⁹

III. PART II: DOMESTIC AUTHORITY FOR COAST GUARD AIRBORNE USE OF FORCE

One crucial aspect of the development of the capability to use force from helicopters for law enforcement was ensuring full compliance with U.S. and international law.³⁰ The Coast Guard's

28. Dave French, *America's Deadliest Imports* (Nov. 10, 1999), available at <http://www.uscg.mil/hq/g-cp/cb/NOV99/Drugs.html> (last visited Oct. 31, 2000).

29. Internal Coast Guard Memorandum from Admiral Loy, Commandant of the Coast Guard, to Rear Admiral Ruitta, Assistant Commandant for Operations (Sept. 1, 1998)(unpublished memorandum, on file with author). This memorandum approved the use of warning shots and disabling fire from helicopters for development and initial fielding of the capability. The memo required the development of an implementing doctrine and training protocol.

30. The use of force to compel compliance with legitimate law enforcement authority, whether the jurisdictional basis is that of a flag State, coastal State, or by any other means, should not be confused with force used in a military context. The goal of law enforcement is just that, the enforcement of an applicable law. The use of force as part of a law enforcement scenario is merely a means to an end; force is used to achieve the goal of enforcing a law. However, the use of force in a military context is used to accomplish a military objective, not the enforcement of an applicable law. This distinction is key since the use of force as part of a legitimate law enforcement activity is not the type of force contemplated by the various "peace-related" articles in the United Nations Convention on the Law of the Sea. See United Nations Convention on the Law of the Sea, art. 88, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 [hereinafter LOS Convention] (the reservation of the high seas for "peaceful purposes"); LOS Convention, art. 301 (requiring that states refrain from the use of force "in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations"). The United States has not ratified the LOS Convention, but has stated its intent to abide by the vast majority of the Convention and treat it as customary international law. President's Statement on United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983). Limitations on the use of force in a military context, also termed the law of

use of force policy regarding the employment of force from Coast Guard vessels has been carefully developed through the years to ensure compliance within a constitutional and statutory framework, as well as abiding by international law principles. Thus, there was a solid legal framework to build upon when developing the capability to use force from helicopters.

A. *U.S. Law Regarding the Use of Force in Law Enforcement*

Domestic, statutory law clearly authorizes the Coast Guard to use force, if necessary, for law enforcement purposes.³¹ The Coast Guard is authorized to “use all necessary force to compel compliance” in making “inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction for the prevention, detection, and suppression of the violations of the laws of the United States.”³²

The Coast Guard’s policy for use of force is based on the premise of minimum force necessary.³³ Personnel are trained to view the use of force as a continuum, escalating from low-levels of force, such as officer presence and verbal commands, to higher levels depending on the circumstances. The highest end of the continuum, minus deadly force, is the use of warning shots and disabling fire against a vessel. Warning shots, which the Coast

armed conflict, seek to prevent purposeless, unnecessary destruction of life and property and to ensure violence and are used only to defeat the enemy’s military forces. See Thomas & Duncan, Annotation, *The Commander’s Handbook on the Law of Naval Operations*, 73 INTL LAW STUDIES 289, 289-321 (1999) [hereinafter *Commander’s Handbook*], for a discussion of the principles underlying the law of armed conflict. See also R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 307-314 (3d. ed. 1988), for a discussion regarding the use of force associated with military use of the high seas.

31. 14 U.S.C. § 89 (1990).

32. *Id.* at § 89(a) (emphasis added). Generally, in the case of vessels suspected of transporting narcotics, the underlying U.S. law being enforced is the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 1903-1904 (1994). However, the constitutionality of the Coast Guard’s ability to conduct boardings in both U.S. waters and on the high seas and to conduct a document check even when there is no suspicion of a violation of law is well established. See *e.g.*, *Maul v. United States*, 274 U.S. 501 (1927)(upholding Coast Guard boarding of U.S. vessel outside 12 miles); *United States v. Villamonte-Marques*, 462 U.S. 579 (1983)(evidence obtained by a Coast Guard boarding to check a vessel’s documentation under authority of 19 U.S.C. § 1581, when the Coast Guard acts as a customs agent is not excludable since the search did not violate the Fourth Amendment).

33. MLEM, *supra* note 4, at 4-2.

Guard considers to be a signal and not a use of force, consist of firing shots from a weapon in front of a vessel as a signal to immediately stop, maneuver in a particular manner, or cease activity.³⁴ Disabling fire is the firing of a weapon at a vessel and not at people with the intent to disable the vessel, with minimum injury to personnel or damage to the vessel.³⁵ The use of weapons in this context is specifically authorized by statutory law, which permits a Coast Guard vessel or aircraft to "fire at or into" a vessel that does not stop after warning shots have been used.³⁶

Being authorized by statute to use force is not the only standard that must be met. The proposed use of force must also adhere to the Fourth Amendment of the Constitution of the United States.³⁷ In *Tennessee v. Garner*, the Supreme Court

34. *Id.* at 4-4.

35. *Id.*

36. 14 U.S.C. § 637 (1990), provides, in pertinent part:

"(a) Whenever any vessel liable to seizure or examination does not stop on being ordered to do so or on being pursued by an authorized vessel or authorized aircraft which has displayed the ensign, pennant, or other identifying insignia prescribed for an authorized vessel or authorized aircraft, the person in command or in charge of the authorized vessel or authorized aircraft may, after a gun has been fired by the authorized vessel or authorized aircraft as a warning signal, fire at or into the vessel which does not stop. . . . (c) A vessel or aircraft is an authorized vessel or authorized aircraft for the purposes of this section if—

(1) it is a Coast Guard vessel or aircraft. . . ."

It should be noted that as a matter of policy, most U.S. federal law enforcement entities, including the Department of Justice, the Department of Treasury, and the Department of Transportation prohibit the use of warning shots or disabling fire against moving vehicles. However, the Department of Treasury allows Customs agents to use warning shots against vessels on the open waters, and the Department of Transportation policy specifically allows the use of warning shots and disabling fire by the Coast Guard. Dep't of Justice, Resolution 14 (Oct. 16, 1995) (DOJ Policy); Treas. Dep't Order No. 105-12, 60 FR 54569 (Oct. 24, 1995); Transp. Dep't Order 1660.2A (Oct. 14, 1997). The use of warning shots and disabling fire against a vessel on the open water with a low likelihood of potentially injuring bystanders is quite different than the use of warning shots or disabling fire against a fast moving vehicle in a potentially crowded street environment. Coast Guard policy recognizes the need to minimize risk to persons and does not authorize the use of warning shots or disabling fire when there is a significant possibility of injury to a person. MLEM, *supra* note 4, at 4-4.

37. It is arguable whether the constitutional standards under the Fourth Amendment for search and seizure actually apply to non-U.S. citizens aboard vessels not registered in the United States and located outside of U.S. waters. See *United States v. Verdugo Urquidez*, 505 U.S. 1201 (1992), *remanded to United States v. Verdugo Urquidez*, 939 F.2d 1341 (9th Cir. 1991). However, at least as a matter of policy, the Coast Guard conducts all of its law enforcement actions in conformance with the requirements of the U.S. Constitution. Because Coast Guard officers rarely know whether a U.S. citizen is on board any vessel encountered, they must as a practical matter take a cautious approach.

ruled that the use of deadly force to affect a seizure was subject to the Fourth Amendment's reasonableness standard.³⁸ In its opinion, the court stated that the use of deadly force to stop a fleeing suspect was only reasonable to prevent an escape, when the law enforcement officer has probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others.³⁹ In *Graham v. Connor*, the Supreme Court reiterated that the Fourth Amendment's reasonableness standard should be applied to any claim that a law enforcement officer used excessive force during the course of an arrest, investigatory stop, or any type of "seizure."⁴⁰ Thus, it is clear that under a Fourth Amendment analysis, a Coast Guard officer would not be authorized to use deadly force, force likely to cause death, or serious bodily injury, solely to stop a vessel for the purpose of a Coast Guard examination, except in the rare case where the officer believed the suspect posed a significant risk to that officer or others.

Courts have rarely questioned the appropriateness of the use of warning shots and/or disabling fire to compel a subsequent boarding.⁴¹ In cases where a court has examined the reasonableness of the force used, the Coast Guard's use of warning shots and disabling fire has been found to meet Fourth Amendment requirements. For example, in *United States v. Del Prado-Montero*, the court examined the boarding and seizure of a vessel, which stopped only after the Coast Guard employed both warning shots and disabling fire and found that "the boarding and the seizure [of the M/V Ranger] were not in conflict with [U.S.] statutes, international treaties or conventions, or the Constitution."⁴² In *United States v. Streifel*, the court upheld the use of warning shots, which were fired to compel the M/V

38. 471 U.S. 1 (1985). Previously, the Supreme Court held that whenever a law enforcement officer has stopped a person's ability to walk away, the action should be analyzed as a "seizure" under the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

39. See *Tennessee*, 471 U.S. at 7-12.

40. 490 U.S. 386, 388 (1989).

41. See, e.g., *United States v. Potes*, 880 F.2d 1475 (1st Cir. 1989)(warning shots and disabling fire); *United States v. Kelly*, 749 F.2d 1541 (11th Cir. 1985), *cert. denied*, 484 U.S. 966 (1987)(use of warning shots and disabling fire); *United States v. Dominguez*, 604 F.2d 304 (4th Cir. 1979), *cert. denied*, *Sarmineto v. United States*, 444 U.S. 1014 (1980)(warning shots); *United States v. Munoz* 16 F.3d 1116 (11th Cir. 1994), *cert. denied*, 513 U.S. 852 (1994)(warning shots).

42. 740 F.2d 113, 115 (1st Cir. 1984), *cert. denied*, 469 U.S. 1021 (1984).

Roondiep to stop since firing warning shots was reasonable within the Fourth Amendment and was the least drastic way to force the ship to stop.⁴³

B. Developing a Continuum of Force for Use of Force from Helicopters

The fundamental challenge facing the Coast Guard in implementing the policy change allowing the use of force from helicopters was determining that the employment of potentially deadly weapons could be done safely in a non-lethal capacity. Therefore, a critical element in developing the Coast Guard's new airborne use of force capability was training and testing Coast Guard personnel's ability to employ a weapon from a moving helicopter in front of, or into the engine of, a moving vessel, in a safe but effective manner. To determine whether Coast Guard crews were able to safely employ force from the air, a variety of tests, using both static and moving targets were conducted.⁴⁴ This phase of the development was derived from the vast experiences of the Department of Defense personnel who use weapons from the air. The resulting tactics developed by the Coast Guard personnel were specifically tailored to the Coast Guard's unique operating environment.

To augment helicopter crews' capability to stop suspect vessels, the Coast Guard tested an array of other tools termed "less intrusive means," also referred to as non-lethal technologies, to provide on the scene Coast Guard officers with a full continuum of force.⁴⁵ Although these tools as designed are

43. 665 F.2d 414, 424 (2d Cir. 1981).

44. CG Drug Interdiction Division, *supra* note 20.

45. *Id.* This testing and evaluation relied heavily on the work of individuals at the Coast Guard Research and Development Center and was greatly assisted by the Department of Defense's Joint Non-Lethal Weapons (NLW) Program. While the Joint NLW Program is focused on developing tools for use in a military context, the reasons for the Department of Defense's focus on this emerging area of weapons technology, set forth in the Joint Concept for Non-Lethal Weapons, which was derived from Joint Vision 2010, are equally as valid in a non-military, law enforcement context:

"Non-lethal weapons expand the number of options available to commanders confronting situations in which the use of deadly force poses problems. They provide flexibility by allowing U.S. forces to apply measured military force with reduced risk of serious noncombatant casualties, but still in such a manner as to provide force protection and effect compliance This allows U.S. forces to retain the initiative and reduce their own vulnerability. Thus, a robust non-lethal capability will assist in bringing into balance the conflicting requirements of mission accomplishment, force protection, and

unlikely to cause death or permanent physical injury, no one can guarantee that they will be non-lethal one hundred percent of the time.⁴⁶ For this reason, the continuum of force was designed to start at a low-level, such as verbal commands, using tools with the least risk, and gradually increasing in level of force in order to compel compliance. Available tools include nets to entangle engines and small rubber balls, generally referred to as “sting balls,” originally designed to control riots. The philosophy behind the development of the continuum of force was best expressed by Captain Anthony Tangeman, Chief Coast Guard Office of Law Enforcement from 1995-2000 and project manager for the development of this new capability, when he stated that “[o]ur goal is to protect our people and stop [G]o-Fast boats without firing a shot, but if necessary be able to use force effectively and safely.”⁴⁷

Once it was demonstrated that the right combination of weapons and techniques were capable of being used safely, in a non-lethal manner from helicopters, the pilots and gunners responsible for firing the weapons underwent extensive training to ensure practical capability to employ the weapons, thorough knowledge of Coast Guard use of force policy, and that the individuals possessed the required judgment to assess potential self-defense situations.⁴⁸ The extensive training and testing

safety of noncombatants.”

Id. at *4-5; R. Steele, *A Joint Concept for Non-Lethal Weapons* (Jan. 5, 1998), available at http://www.fas.org/man/dod_101/sys/land/docs/NONLETH.HTM (last modified Jan. 26, 1998).

46. *Id.* at *3. The Department of Defense has defined “non-lethal weapons” as “weapon systems that are explicitly designed and primarily employed so as to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.” Defense Dep’t Directive Number 3000.3, *Policy for Non-Lethal Weapons*, July 9, 1996.” DOD policy also recognizes that it is impossible to guarantee that no deaths would occur through the use of these tools stating that “[n]on-lethal weapons shall not be required to have a zero probability of producing fatalities or permanent injuries. However, while complete avoidance of these effects is not guaranteed or expected, when properly employed, non-lethal weapons should significantly reduce them as compared with physically destroying the same target.” *Id.*

47. M. Emerson and A. Tangeman, *End Game Success: Operation New Frontier*, FLIGHTLINES (forthcoming Fall/Winter 2000) (manuscript at 4, on file with author).

48. The Supreme Court has recognized the pivotal role of training. See *Canton v. Harris*, 489 U.S. 378 (1989); *Collins v. Harker Heights*, 503 U.S. 115 (1992); *County of Sacramento v. Lewis*, 200 U.S. 833 (1998). In these cases the Court highlighted the importance of use of force training for law enforcement personnel, stating that law enforcement agencies may be held liable for constitutional violations due to excessive force that results from a deliberate failure to train law enforcement officers.

performed by the Coast Guard prior to the initial deployment of the capability to use force from helicopters, combined with a use of force policy, which emphasizes the minimum force necessary, gave the Coast Guard confidence that fielding this new capability was in full compliance with the law of the United States.

IV. PART III: INTERNATIONAL LAW CONSIDERATIONS

There were two international law considerations at issue during the development of the Coast Guard's capability to use force from helicopters: the Coast Guard's authority to exercise jurisdiction over a non-U.S. vessel, including the right to board the vessel, and the authority to use force, if necessary, to compel a vessel subject to Coast Guard jurisdiction to stop upon being ordered to do so.⁴⁹ The Coast Guard's authority to issue a lawful order to a non-U.S. vessel to stop and allow a boarding is based upon the carefully crafted international law of the sea regime, codified in two major treaties: the 1958 United Nations High Seas Convention and the 1982 United Nations Law of the Sea Convention.⁵⁰

On the other hand, and unlike U.S. domestic law, the international legal regime concerning the permissible use of force in a law enforcement context against private actors is not well-defined. Although the use of force for law enforcement purposes is recognized in customary international law, almost no international treaties deal with the issue, and it is not well-defined in case law. However, the ability to use force when needed to enforce international rights and compel compliance with lawful orders of a State is essential to maintaining the viability of the carefully crafted law of the sea regime.

A. *Law of the Sea Regime: Flag State Jurisdiction and the Right of Visit*

The international maritime law regime is founded on the principle of exclusive flag State jurisdiction within international

49. Coast Guard authority over U.S. flag vessels is clear under domestic law and international law as the flag State. 14 U.S.C. § 89 (1994); LOS Convention, art. 92, *supra* note 30, at 1287.

50. United Nations Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2313, 450 U.N.T.S. 82 [hereinafter High Seas Convention]; LOS Convention, *supra* note 30.

waters. This means that outside of waters where a coastal State may exercise sovereignty, such as territorial seas, only the country where a vessel is registered, the flag State, may exercise jurisdiction.⁵¹ However, in cases where a vessel does not claim protection of any flag state because it is either not registered in any State or claims registry in more than one State, also termed a stateless vessel, international law fills this legal vacuum by authorizing the exercise of jurisdiction by any country over such vessels.⁵²

The typical Go-Fast vessel suspected of transporting narcotics or in some cases actually carrying bales of narcotics in plain view displays no indicia of nationality, fails to fly a flag or display a home port on the stern, nor makes a claim of a country of registry when questioned. In these circumstances, exercise of jurisdiction over that vessel based on assimilation to stateless status would appear to be easily justified. However, because the concept of flag State authority is so fundamental to the law of the sea regime, international law provides a mechanism to allow government officials to board vessels suspected of being stateless in order to better determine whether a vessel is legitimately registered in any country. This examination, termed "Right of Visit," is embodied in Article 22 of the High Seas Convention and Article 110 of the Law of the Seas Convention. Pursuant to this right, a duly authorized government vessel or aircraft may send a boarding team to examine the registry of a vessel when there is reasonable grounds to suspect a vessel is engaged in piracy, the

51. High Seas Convention, art. 6, *supra* note 50, at 2315; LOS Convention, art. 92, *supra* note 30, at 1287. A state has complete sovereignty over its own territorial seas subject to the right of innocent passage and therefore may exercise jurisdiction over foreign-flag vessels for violations of its own laws in its territorial sea without flag State consent. High Seas Convention, art. 1, *supra*, note 50, at 2314; LOS Convention, art. 2, *supra* note 30, at 1272. A flag State may exercise its jurisdiction by authorizing a different State to take specified law enforcement actions on its behalf. *See, e.g.*, LOS Convention, art. 108, *supra* note 30, at 1289 (stating any State which has reasonable grounds for believing a vessel registered in that State is engaged in illicit traffic of narcotic drugs "may request the cooperation of other States to suppress such traffic"); United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances, Dec. 19, 1988, art. 17, 28 I.L.M. 497, 518 [hereinafter Vienna Convention]; *see also infra* note 53.

52. LOS Convention, art. 92, *supra* note 30, at 1287; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW sec 522(2)(b), reporter's note 7 (1986). *But see* CHURCHILL & LOWE, *supra* note 30, at 172. *See also* Rachel Canty, *Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas*, 23 TUL. MAR. L.J. 123 (1998), for a more complete discussion of the law of the sea jurisdictional regime on the high seas.

slave trade, unauthorized broadcasting, of being without nationality, or though flying a foreign flag or refusing to show its flag, the vessel is, in reality, the same nationality as the warship.⁵³

A Right of Visit boarding of a vessel suspected of being stateless by the Coast Guard usually begins with an inspection for documents, registration numbers, or similar evidence. If any evidence of registry is found or a claim of nationality is made by the master of the vessel, that evidence is forwarded to the claimed flag State with a request to verify registry. However, if there is no evidence or claim of registry, or if the claim is refuted by the flag State, the vessel may be deemed stateless, and as such any State may exercise jurisdiction over the vessel.⁵⁴ In this

53. See Louis B. Sohn, *Peacetime Use of Force on the High Seas*, Comment, 64 INT'L LAW STUDIES: THE LAW OF NAVAL OPERATIONS 38, 38-59 (1991), for an in depth discussion of the evolution of this concept. But see, D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA II* 802 (I.A. Shearer ed., 1982); MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 886-893 (1987), for arguments that the Right of Visit only applies during wartime. This right should not be confused with the concept of "Visit and Search," which is often also referred to as a "Right of Visit" under the Hague Convention. The concept of "Visit and Search" provides the basis for belligerent warships or military aircraft to determine the character, enemy or neutral, of merchant ships and their cargo. Hague Convention No. XIII Concerning the Rights and Duties of Neutral Parties in Naval War, art. 2, Oct. 18, 1907, 36 Stat. 2415. See *Commander's Handbook*, *supra* note 30, at 7-23, for a general overview of the right of "Visit and Search."

54. Interestingly, considering the importance placed on flag State jurisdiction, little guidance is provided in either the High Seas Convention or the LOS Convention regarding how to determine whether a vessel is truly stateless. These conventions contain considerably greater, detailed guidance regarding how government officials may exercise jurisdiction if a vessel is engaged in other activities for which a Right of Visit boarding is allowed. LOS Convention, art. 99, 105-107, *supra* note 30, at 1288-1289 (slavery and piracy); High Seas Convention, art. 13-21, *supra* note 50, at 2316-2321 (slavery and piracy). Additionally, the LOS Convention contains similar guidance for vessels engaged in unauthorized radio broadcasts. LOS Convention, art. 109, *supra* note 30, at 1289. The problem of unauthorized broadcasting arose between the drafting of the High Seas Convention and the LOS Convention.

To fill in this gap, other international treaties have addressed the issue of determining whether a vessel is stateless, most notably Article 17 of the Vienna Convention. Article 17 of the Vienna Convention provides a framework for confirming or refuting registry of a vessel and requesting authorization from the flag State to take certain limited enforcement actions. Article 17(2) of the Vienna Convention significantly expands the rights of non-flag States encountering vessels suspected of engaging in illicit traffic from Article 108 of the LOS Convention, which merely provides that States shall cooperate in the suppression of narcotics trafficking. Article 17(2) provides not only that flag States may request assistance from other States in suppressing the illicit traffic of narcotics, but also that the same request may be made by States encountering vessels displaying no flag or marks of registry suspected of illicit narcotics trafficking. Article 17(2) also requires

scenario, a Right of Visit boarding by the Coast Guard often leads to an assertion, in accordance with international law, of U.S. jurisdiction over that vessel.⁵⁵

Inherent in the right of States to conduct a Right of Visit boarding is an obligation on the part of the vessel to allow the boarding. However, in most cases, Go-Fast vessels detected by the United States are hailed and ordered to stop with no response. Generally, Go-Fasts blatantly ignore a valid order of the United States to stop, few answering hails or taking any action, such as stopping or slowing their vessels.⁵⁶ Besides the sheer frustration of watching suspected drugs traffickers operate unimpeded, the inability of the Coast Guard to stop apparent stateless Go-Fasts under circumstances where the United States had a right to do so, seriously undermines the credibility of the international and U.S. law of the sea enforcement regime.

B. Lack of Use of Force Guidance for Law Enforcement Under International Law

In the international law context, there is minimal guidance concerning the use of force for the enforcement of laws, whether established by treaty, customary international law or domestic law, or by clearly defined rights. Neither the High Seas Convention nor the Law of the Sea Convention specifically addresses acceptable levels of force to implement the rights and

that States so requested "shall render such assistance within the means available to them." Important provisions in the remainder of Article 17 set forth procedures for confirming a registry claim and requesting authorization from the claimed flag State to take measures against the suspect vessel, including boarding and searching of the vessel, underscoring the need for expeditious responses to a request for registry and authorization, encouraging States to enter into bilateral or regional agreements, and specifically stating that actions under Article 17 "shall be carried out only by warships or military aircraft" or other clearly marked government vessels or aircraft. Although not specifically stated in Article 17, it is implied that if the suspect vessel is without a valid flag State registry either because a claim is refuted by the alleged flag State or no claim is made, the vessel is stateless, and therefore, under international law principles, any State may exercise jurisdiction. See Vienna Convention, *supra* note 51, at 518-520.

55. U.S. courts have agreed that the United States has jurisdiction in such circumstances. See, e.g., *United States v. Romero-Galue*, 757 F.2d 1147 (11th Cir. 1985). Some statutes specifically provide for U.S. jurisdiction over stateless vessels. See, e.g., *Maritime Drug Law Enforcement Act*, 46 U.S.C. app. § 1903(c) (2000).

56. CG Drug Interdiction Division, *supra* note 20. Generally, the only Go-Fast vessels that would stop upon being hailed by a U.S. government vessel were ones with mechanical problems, often the result of prolonged transits at high speeds in an attempt to outrun law enforcement assets.

duties set forth in the agreements.⁵⁷ There is also no guidance regarding the use of force in the principal international treaty regarding international cooperation to suppress the trafficking of narcotics, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, also called the Vienna Convention.⁵⁸ Additionally, the primary international convention governing air operations, the Convention on International Civil Aviation of 1944, also referred to as the Chicago Convention, does not prohibit the use of force for law enforcement from aircraft directed at vessels in international waters, as long as the operations are conducted with due regard for the safety of navigation of civil aircraft.⁵⁹ Coast Guard air assets are prohibited from using force against other air assets except in self-defense.⁶⁰

The minimal guidance which exists under international law regarding the use of force in a law enforcement context is very broad. The only multi-lateral international treaty which addresses the issue provides little detail. Article 22(f) of the Agreement for the Implementation of the Provisions of the

57. Despite the obvious need for duly authorized government ships to have the capability to use force to enforce the international maritime legal regime, the LOS Convention never specifically addresses the issue of what measures can be taken against uncooperative vessels to enforce the legal regime the Convention establishes. It could be argued that Article 110 of the LOS Convention obliquely acknowledges that force may be used to stop a vessel subject to boarding since paragraph 3 of the article specifically provides that if suspicions resulting in a boarding prove to be unfounded and the ship has not committed any act justifying them, the ship should be compensated for any loss or damage which may have been sustained. LOS Convention, art. 110, *supra* note 30, at 1289. Additionally, although the Vienna Convention requires states to "co-operate [sic] to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea," the convention fails to define what "suppression" may entail. See Vienna Convention, *supra* note 51, at 518.

58. See *supra* note 54.

59. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. Although the Chicago Convention does not apply to military aircraft, the Coast Guard considers the convention as binding on Coast Guard operations except when military necessity or search and rescue operations requires non-compliance. COAST GUARD AIR OPERATIONS MANUAL, COMDTINST M3710.1D. Under the Chicago Convention, however, military flight operations still must be conducted in accordance with "due regard for the safety of navigation of civil aircraft." Chicago Convention, art. 3(d).

While Article 3 of the Chicago Convention, which codifies the customary international law principle prohibiting the use of weapons against civil aircraft, generally prohibits using force against civil aircraft in flight, the Coast Guard's airborne use of force capability does not use force against aircraft; rather it merely provides a new platform for the delivery of force against suspect vessels.

60. MLEM, *supra* note 4, at 4-4.

United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, commonly referred to as the "Straddling Stocks Convention," provides that inspecting States shall ensure that duly authorized inspectors "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required under the circumstances."⁶¹ By contrast, the use of force to stop non-compliant vessels is specifically authorized in eighteen bilateral maritime drug interdiction agreements between the United States and other States in South America, Central America, and the Caribbean.⁶²

The broad language of the Straddling Stocks Convention is generally reflective of the few decisions of international courts where the use of force was an issue. A 1999 decision by the Law of the Sea Tribunal described customary international law as requiring that "the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."⁶³ The decision went on to describe the normal practice for stopping vessels at sea for law enforcement purposes, a process which reflects U.S.

61. Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 34 I.L.M. 1542, 1566. Interestingly, it is U.S. policy, as reflected in Coast Guard policy, to generally not use force in pure fishery cases. MLEM, *supra* note 4, at 4-8. This policy serves as a positive example in the international community, particularly with respect to a number of States who have used inappropriate force in fishery cases, such as firing into the pilothouse of a vessel. Additionally, it relieves public concern regarding the use of force only to protect fishery resources and recognizes that force has not historically been necessary to enforce fishery laws.

62. The agreements generally authorize the use of force to compel compliance, including warning shots and disabling fire, in conformance with the domestic law of the State employing the force. See UNITED STATES TREATY INDEX 555-56 (Igor I. Karess ed., 1998). These include agreements with Antigua, Bahamas, Barbados, Belize, Colombia, Costa Rica, Dominica, Dominican Republic, Grenada, Jamaica, Netherlands Antilles, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent/Grenadines, Trinidad and Tobago and the United Kingdom. See, e.g., Agreement Between The Government Of The United States Of America And The Government Of Antigua And Barbuda Concerning Maritime Counter-Drug Operations, June 3, 1996, Hein's No. KAV 4625, Temp. State Dep't No. 96-116, at 2-3.

63. The M/V Saiga (No.2) (St. Vincent and the Grenadines v. Guinea), 1999 available at LOS Tribunal Website, <http://www.un.org/Depts/los/index.htm> (last visited Oct. 12, 2000).

Coast Guard standard practice:

[f]irst to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including firing shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessels may, as a last resort, use force. Even then, appropriate warnings must be issued to the ship and all efforts should be made to ensure that life is not endangered.⁶⁴

The Tribunal found that the use of force in the instant case was excessive since the officials using force fired at the vessel without any warning, and fired “indiscriminately” once on board the vessel despite no signs of resistance from the crew.⁶⁵

C. The Importance of the Use of Force to Maintaining the Law of the Sea Regime

Although there is little guidance under international law regarding the use of force to compel compliance, the ability to use force when necessary is fundamental to maintaining a stable and viable law of the sea regime. This ability is even more critical when dealing with actors, such as stateless vessels, which are outside the normal bounds of the legal regime. The existence of a State’s right to take specified actions against a private actor, such as the authority to conduct a Right of Visit boarding, is meaningless without a viable means of enforcement.

The international law regime is generally viewed as outlining norms of acceptable behavior between States, and not as concerned with the acts of private individuals.⁶⁶ As a result,

64. *Id.* at *44 (citing *I’m Alone* (Can. V. U.S.), 3 U.N. Rep. Int’l Arb. Awards 1609 (1935) and *The Red Crusader* (Denmark v. U.K.), 35 I.L.R. 485, 499 (Commission of Enquiry 1962)).

65. *Id.* The use of force against the *I’m Alone* and the *Red Crusader* were also found to be excessive as the officials using the force did not exhaust all other available means of stopping the vessels. *Red Crusader*, 35 I.L.R. at 499; *I’m Alone*, 3 U.N. Rep. Int’l Arb. Awards at 1615. The Commission in the *I’m Alone* case noted, however, that if the force used was “necessary and reasonable” for the purpose, the pursuing vessel would not be liable if an incidental sinking of the suspect vessel occurred. *I’m Alone*, 3 U.N. Rep. Int’l Arb. Awards at 1615. See Canney, *supra* note 3, for a detailed account of the events surrounding the seizure of the *I’m Alone*.

66. Most definitions of international law reflect this view. International law has

international law does not provide guidance regarding traditional "police powers" aimed at punishing private individual violators, but instead focuses on the actions of States.⁶⁷ There are a variety of generally recognized inducements besides traditional police authority which significantly affect State actions. Such inducements include concepts such as "enlightened self interest," which is the risk of losing on a single issue as offset by the benefit of living in a world society with a known set of rules for peaceable settlement of disputes among States, necessity to predict behavior of nations in decision making, credibility among other "peer" States, habit among decision makers to rely on such norms, world opinion, social acceptance, and the possibility of negative reactions.⁶⁸

These "inducements," with the exception of possible negative consequences, have little or no affect on private actors. A study sponsored by the National Institute of Justice confirmed that the primary means of discouraging illicit behavior is the certainty of punishment.⁶⁹ That is, as the certainty and severity of punishment increases, the probability that an individual will commit the crime in question decreases.⁷⁰ The extraordinary jurisdictional exception which allows any State to exert jurisdiction over a stateless vessel on the high seas arose precisely to deal with the potential consequences of allowing the unhampered operation of stateless vessels on the high seas not operating within the boundaries of established international law. Therefore, stateless vessels are not influenced by the normal inducements which lead States to voluntarily comply with international law. The entire law of the sea regime, with its fundamental reliance on flag State responsibilities, falls apart if there is no viable enforcement mechanism against stateless vessels. The recognition of the potential impact unimpeded

been defined as a body of principles, customs, and rules which is recognized as effectively binding obligations by sovereign states and any other such entities that have been granted international status. GERHARD VON GLAHN, *LAW AMONG NATIONS* 3 (1981). "International law consists of a body of rules governing the relationship between states." G.H. HACKWORTH, *1 DIGEST OF INTERNATIONAL LAW* 1, (1944).

67. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW* § 102 (1987).

68. VON GLAHN, *supra* note 66, at 6-7.

69. J.L. Miller & A.B. Anderson, *Updating the Deterrence Doctrine*, 77 *J.CRIM. L. & CRIMINOLOGY* 418 (1986).

70. *Id.* This study supports the conclusions of the 1989 study of deterrence in the drug smuggling context discussed *supra*.

stateless vessels could have on the carefully crafted law of the sea regime is what ultimately led the drafters of the Law of the Sea Convention to include suspicion of being stateless as permissible grounds for a Right of Visit boarding.⁷¹ The U.S. Commentary on the Law of the Sea Convention makes clear the high value the United States places on this right:

WARSHIP'S RIGHT OF APPROACH AND VISIT (ARTICLE 110): Article 110 of the Convention reaffirms the right of warships, military aircraft or other duly authorized ships or aircraft to approach and visit other vessels to ensure that they are not engaged in various illegal activities. This is a right of great importance to the United States. Article 110 permits the right of visit to be exercised if there are reasonable grounds for suspecting that a foreign flag vessel is engaged in piracy, the slave trade, or unauthorized broadcasting; is without nationality; or is, in reality, of the same nationality as the warship. The maintenance and continued respect for these rights are essential to maritime counternarcotics and alien smuggling interdiction operations.⁷²

Traditional methods of enforcement under the international law regime are not viable in the context of stateless vessels. These mechanisms generally consist of a range of diplomatic and judicial actions and include diplomatic protests; third party mediation, including referral to a specialized tribunal or panel of experts and referral to an international court; or action, such as sanctions, by the United Nations or any other universal or regional agency.⁷³ Many of these mechanisms anticipate a State against whom a protest can be lodged or a claim can be filed. In the case of a stateless vessel, there is no State against whom such action can be taken. Unless the vessel and persons on board ultimately end up in the hands of some government, such as voluntarily stopping or becoming disabled, there is virtually no chance of determining the identity or nationality of any persons involved in the criminal activity. Additionally, some scholars have argued that the fundamental right of freedom of navigation

71. Sohn, *supra* note 53, at 59.

72. Message From The President Of The United States And Commentary Accompanying The United Nations Convention On The Law Of The Sea And The Agreement Relating To The Implementation Of The Part XI Upon Their Transmittal To The United States Senate For Its Advice And Consent, 7 GEO. INT'L ENVTL. L. REV. 77, 119 (1994)(emphasis added).

73. VAN GLAHN, *supra* note 66, at 8.

on the high seas under the law of the sea regime is solely applicable to vessels legitimately registered in a State, and therefore, stateless vessels do not enjoy this freedom under international law.⁷⁴ Accordingly, the use of force to compel a vessel to stop and submit to a Right of Visit boarding, or any other exertion of authority over a stateless vessel, is an essential component of maintaining a viable law of the sea regime.

V. CONCLUSION

During the later half of 1999 and early 2000, the Coast Guard successfully deployed armed helicopters on three occasions, targeting smugglers using Go-Fasts to transport narcotics in the Caribbean. During those initial deployments, the armed helicopters were involved in six cases involving Go-Fast vessels, using disabling fire from helicopters on two occasions to stop a suspect vessel.⁷⁵ As a result of those six interdictions, the Coast Guard seized six vessels, 11,710 pounds of marijuana, 4,475 pounds of cocaine, and arrested twenty individuals.⁷⁶ Commander Mike Emerson, Chief of the Drug Interdiction Division in the Coast Guard's Office of Law Enforcement during the time the capability was developed and first deployed, summed up the results succinctly: "We're obviously pleased with the results. These new capabilities give us a credibility to conduct law enforcement that we haven't had before."⁷⁷ Based on the success of the initial deployments, the Coast Guard is establishing a permanent squadron of specially equipped helicopters and specially trained pilots devoted full time to this mission area.⁷⁸

Prior to the initial deployment, Coast Guard officials engaged in extensive outreach with key components of the U.S. government, including members of Congress and other federal agencies and departments. Critical to the decision to go forward

74. See LOS Convention, art. 87, 90, *supra* note 30, at 1286-1287 (Article 87 states that the "high seas are open to all States," and Article 90 states that "[e]very State . . . has the right to sail ships flying its flag on the high seas.") (emphasis added).

75. Disabling fire employed from new Coast Guard fast boats was employed to stop two of the Go-Fasts as well.

76. U.S. Coast Guard, *7.5 Tons of Narcotics Netted by New Coast Guard Tactics* (Mar. 15, 2000), available at <http://www.uscg.mil/news/cgnews.htm> (last visited Oct. 12, 2000).

77. Nowhere to Run, Out of Time, COAST GUARD, May 2000, at 9-11.

78. *Id.*

with the deployment of the use of force from helicopters was the acquiescence from both the Department of State and the Department of Justice. Coast Guard representatives had to convince the Attorney General, among others, that this new capability would employ weapons in a proficient and precise manner with limited risk to suspects. Moreover, had the Attorney General not expressed her confidence in the Coast Guard's initiative, the project would have been terminated.⁷⁹

The Coast Guard's new capability to use force from helicopters in order to compel compliance with a lawful order is not only legal, but also serves to strengthen the law of the sea regime by providing an effective tool for the enforcement of a right recognized by international law. The establishment of these rights by international instruments, such as the Law of the Seas Convention, and by customary international law are soon eroded if there is no enforcement mechanism to ensure compliance with lawful actions of any State. By carefully developing a new force capability and a well thought out application of that force, the Coast Guard is ensuring the viability of the law of the sea regime in the future.

79. The author was a member of many of the outreach briefings, including a briefing to key members within the Department of Justice.

