

INTERNATIONAL LAW AND SEARCH AND RESCUE

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Office of the Secretary
Washington, D.C.
November 15, 1897*

Sir: The best information obtainable gives the assurance of truth to the reports that a fleet of eight whaling vessels are icebound in the Arctic Ocean, somewhere in the vicinity of Point Barrow, and that the 265 persons who were, at last accounts, on board these vessels are in all probability in dire distress. These conditions call for prompt and energetic action, looking to the relief of the imprisoned whalemens. It therefore has been determined to send an expedition to the rescue. Believing that your long experience in arctic work, your familiarity with the region of Arctic Alaska from Point Barrow, south, and the coast line washed by the Bering Sea, from which you but recently returned, your known ability and reputation as an able and competent officer, all especially fit you for the trust, you have been selected to command the relief expedition. Your ship, the Bear, will be officered by a competent body of men and manned by a crew of your own selection. The ship will be fully equipped, fitted, and provisioned for the perilous work in view, for such it must be under the most favorable conditions. . . .

You are hereby given full authority and the largest possible latitude to act in every emergency that may arise, and while impossibilities are not expected, it is expected that you, with your gallant officers and crew, will leave no avenue of possible success untried to render successful the expedition which you command. . . .

Mindful of the arduous and perilous expedition upon which you are about to enter, I bid you, your officers and men, Godspeed upon your errand of mercy, and wish you a successful voyage and safe return.¹

The search for and rescue of persons in distress is a centuries-old, time-honored tradition. The above instructions provided to Captain Francis Tuttle of the U.S. Revenue Cutter Service over a century ago, as he prepared his crew to rescue whalers trapped in ice in the Arctic Ocean, epitomize the dedicated efforts of mariners and coastal states in saving lives at sea.

This lifesaving tradition continues unabated today, albeit with new challenges. The long-standing challenges provided by harsh weather and sea conditions, long distances, and limited available search-and-rescue (SAR) resources remain the same. However, since Captain Tuttle's successful rescue, international and national SAR organizations, practices, procedures, capabilities, and technologies have continued to improve. There is now a greater commitment and resolve by the international community to work together to save lives at sea.

Owing to the unique hazards encountered by ships as they ply the world's oceans and by aircraft on transoceanic flights, as well as the challenges to coordinating and conducting maritime lifesaving operations, coastal states implemented national SAR systems and SAR organizations to search for and rescue those in distress at sea. However, prior to the 1970s there was no standardized system globally for organization, coordination, and conduct of SAR operations. Seeking to harmonize these organizations and procedures, the international community, through the International Maritime Organization (IMO), established in 1979 the International Convention on Maritime Search and Rescue (SAR Convention). The SAR Convention provides an internationally standardized foundation and framework for coastal states to work together in implementing a global maritime SAR system.² The IMO describes how the SAR Convention was developed to provide a plan for and implementation of a system to save the lives of persons in distress at sea more effectively:

The 1979 Convention . . . was aimed at developing an international SAR plan, so that, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighbouring SAR organizations.

Although the obligation of ships to go to the assistance of vessels in distress was enshrined both in tradition and in international treaties . . . there was, until the adoption of the SAR Convention, no international system covering search and rescue operations. In some areas there was a well-established organization able to provide assistance promptly and efficiently, in others there was nothing at all.³

Under the internationally recognized foundation provided through the SAR Convention, each coastal state organizes its maritime SAR authorities and organization on the basis of its available SAR resources, unique geographic challenges, political considerations, cultural influences, available funding, and domestic SAR legal framework. Each country's national and agency-specific SAR organizations then develop policies, procedures, tactics, and training to implement their respective national SAR system, which then becomes an integral component of the global SAR system. Through this internationally standardized and organized framework, coastal states work together in responding to and rescuing those imperiled at sea.

This article pursues several objectives. First, it seeks to provide a broad overview of the global SAR system's international framework and organization as set forth in the annex to the SAR Convention and implemented by coastal states. Despite that implementation over the past forty-five years, many people remain unaware of the existence of a standardized, global, maritime SAR system. While not perfect, the global SAR system provides an important basis on which coastal states can build cooperative relationships to enable them to conduct this important lifesaving mission more effectively.

Second, the article focuses on the specific SAR responsibilities and international legal requirements placed on shipmasters and coastal states as they work together in coordinating and conducting maritime SAR operations; both are important lifesaving partners. Passenger ships, cargo ships, and warships of all types transit across the world's oceans every day. In many instances, one of these ships may be the only available SAR resource in the vicinity of a person in distress, and could make the difference between life and death. The coastal state is responsible for coordinating the SAR operation and supporting the responding shipmaster. The article discusses several international conventions that form the legal basis for this important lifesaving relationship. The responsibilities of a warship in rendering assistance to persons in distress also are considered.

This section also will discuss the tragic issue of mixed migration by sea from a SAR perspective. The question that needs to be considered is whether these mixed-migration incidents—in which thousands of persons are taking to the sea, in many instances fleeing for their lives—and the ensuing response actions should even be considered SAR operations conducted under the SAR Convention, or instead law-enforcement / national border security incidents.

Third, this article will address two additional situations that SAR legal advisers and policy makers should consider and for which they should develop policy and prepare SAR responders.

First, under international law the responsibilities and requirements of a ship or aircraft when conducting a rescue operation within another coastal state's territorial sea will be considered. The shipmaster's duty to render assistance to persons in distress does not stop at a coastal state's territorial sea boundary. When such a situation occurs, can a ship at sea, on being notified of persons in distress, enter a coastal state's territorial sea to render assistance? Can an aircraft enter into a coastal state's airspace over its territorial sea to assist in a rescue operation? Seven different scenarios will be presented to highlight the distinctions and limitations of rescue operations within a coastal state's territorial sea.

Second, this article will address the issue of forcibly evacuating a person from a vessel when doing so is, in the judgment of the SAR responders on scene, the only way to save the person's life. May the SAR responder use force to compel a

person to abandon his vessel? What type of force should be considered? SAR authorities should develop policies and procedures in preparation for the day when a person in distress does not want to leave his vessel even in a life-threatening situation.

This article does not provide exhaustive legal analyses of these various issues. Its purposes are to provide a synopsis of the international law addressing these subjects, and to address questions that SAR authorities and responders should consider in developing future SAR policies and procedures. It is my hope that this article will provide the reader with a better understanding of the legal framework for the global SAR system and serve as an impetus for further discussion of these important topics.

OVERVIEW: GLOBAL SEARCH-AND-RESCUE SYSTEM

The thing I constantly think about—we were so, so very lucky. The difference between our ship and the Titanic is we weren't caught in the middle of the ocean. . . . If we had been caught in the middle of the ocean, most of these people wouldn't have survived.

MIKE KAJIAN, PASSENGER ON BOARD COSTA CONCORDIA

The world's oceans constitute a dangerous environment that covers approximately 70 percent of the earth's surface.⁴ The centuries-old duty of the mariner transiting the world's oceans to render assistance to those in distress at sea was implemented formally through several international conventions.⁵ However, large-scale disasters at sea in the early twentieth century, many involving significant loss of life, continued to plague the shipping community. The continued loss of life made it apparent that, alone, this duty to render assistance was insufficient; an international SAR system for organizing, coordinating, and conducting rescues at sea was required.

Before the adoption of the SAR Convention, there was no overarching international plan for coordinating the conduct of maritime lifesaving operations. Some maritime regions did have coastal states that implemented robust, effective, national SAR systems, while others had very limited or no SAR resources or coordinating structures to render assistance to persons in distress. There was no internationally recognized system to coordinate and conduct SAR operations, because there was no governing international regime to standardize SAR processes and procedures.

The adoption of the SAR Convention filled this gap by instituting a framework under which coastal states could implement their respective national SAR systems,⁶ including the establishment of rescue coordination centers (RCCs) and rescue sub-centers (RSCs) to coordinate operations within a coastal state's SAR region.⁷

Soon after the IMO's SAR Convention came into force in 1985, it became apparent that additional guidance was required. To assist states in meeting their SAR obligations under the SAR Convention, as well as the comparable requirements the International Civil Aviation Organization (ICAO) mandated in the Convention on International Civil Aviation ("Chicago Convention"),⁸ both organizations jointly developed the three-volume *International Aeronautical and Maritime Search and Rescue Manual* (IAMSAR manual).⁹ This reference provides guidelines and procedures to assist states in developing and harmonizing their respective aeronautical and maritime SAR organizations, planning, and operations, as well as providing the basis for coordinating and conducting SAR operations among states.

Developed for the SAR manager, the IAMSAR manual, volume 1 (*Organization and Management*), "attempts to ensure that managers understand the basic concepts and principles involved in SAR, and to provide practical information and guidance to help managers establish and support SAR services."¹⁰ Volume 2 (*Mission Co-ordination*) provides guidance and information to personnel who plan and coordinate SAR operations.¹¹ Volume 3 (*Mobile Facilities*) was developed for carriage on board vessels and aircraft that may be called on to assist in a SAR operation.

Volume 1 explains the IMO and ICAO's purpose for developing the IAMSAR manual:

ICAO and IMO jointly developed this Manual to foster co-operation between themselves, between neighbouring States, and between aeronautical and maritime authorities. The goal of the Manual is to assist State authorities to economically establish effective SAR services, to promote harmonization of aeronautical and maritime SAR services, and to ensure that persons in distress will be assisted without regard to their locations, nationality, or circumstances. State authorities are encouraged to promote, where possible[,] harmonization of aeronautical and maritime SAR services.¹²

Within the global SAR system, roles and responsibilities also have been developed to provide for the efficient organization and implementation of a coastal state's national SAR system. There are three primary levels of coordination: (1) the SAR coordinator (SC) is that person or agency with the responsibility for the management and oversight of a coastal state's SAR organization;¹³ (2) the SAR mission coordinator (SMC) is the official temporarily assigned to coordinate, direct, and supervise a SAR operation;¹⁴ and (3) an on-scene coordinator (OSC) may be assigned by the SMC to coordinate SAR operations on scene when multiple resources are working together within a specified area.¹⁵ Additionally, an aircraft coordinator (ACO) can be assigned by the SMC or OSC in a SAR operation if the response involves multiple aircraft. The ACO would be responsible for flight safety and for ensuring effective use of the aircraft in the conduct of the operation.¹⁶

Search-and-Rescue Regions

Implementation of the international SAR framework mandated by the SAR Convention necessitated the division of the world's oceans into a patchwork quilt of maritime SAR regions in which each coastal state assumed responsibility for coordinating and conducting SAR operations.¹⁷ It is commonly assumed that coastal states establish their SAR regions unilaterally. However, SAR region lines of delimitation are only provisional; the SAR Convention mandates that coastal states with adjacent SAR regions enter into cooperative agreements to establish their respective SAR regions formally.¹⁸ These SAR agreements not only delimit the SAR regions but ideally serve as the basis for cooperation and coordination between coastal states in the conduct of SAR operations.¹⁹

One practical benefit in developing a global SAR system is that with the world-wide assignment of maritime SAR regions, states are not required to provide SAR services for their own citizens wherever they travel. Coastal states provide SAR services to anyone in distress within a SAR region, without regard to the person's nationality, status, or circumstances.²⁰

Two other important factors need to be understood regarding coastal states' implementation of SAR services within their maritime SAR regions.²¹ First, a maritime SAR region is not an extension of a coastal state's national "boundaries" but rather a geographic area in which the coastal state accepts responsibility to coordinate SAR operations.²² This is an especially important concept to understand, since a coastal state may extend a large portion of its maritime SAR region into the high seas.²³ Second, the SAR Convention does not mandate that a coastal state must have all the SAR resources necessary to respond to a distress within its entire maritime SAR region. As previously stated, SAR regions only define a geographic area in which a coastal state is responsible for "coordinating" SAR operations.²⁴ The requirements of the SAR Convention build on the time-honored tradition of shared responsibility for coordinating and conducting lifesaving operations at sea. All available resources should be used to save lives: local, regional, national, and international; volunteer; commercial and shipping; aircraft; etc.²⁵ The circumstances of a particular distress incident should dictate what available resources can and should be used most effectively.

Rescue Coordination Center / Rescue Sub-center

The coastal state's RCCs and RSCs are the backbone of the global SAR system. They are responsible for the organization of SAR services and the coordination and conduct of SAR operations within maritime SAR regions.²⁶ The annex to the SAR Convention requires assignment of one RCC or RSC to each maritime SAR region.²⁷ The RCC should be located where it can perform its coordination function most effectively, have twenty-four-hour availability, be staffed with trained

personnel, have the ability to receive distress alerts, and maintain plans of operation for different types of distress scenarios.²⁸

In situations in which an RCC may not be able to coordinate SAR services effectively over a specific geographic area within its SAR region, a coastal state's SAR authority can establish an RSC to exercise responsibility for coordinating SAR operations within a designated search-and-rescue subregion (SRS).²⁹ The RSC, which can be just as capable as an RCC, may be delegated authority to coordinate SAR operations independently within its SRS. However, an RSC generally has fewer responsibilities than its associated RCC.³⁰

The global SAR system, while not perfect, continues to improve every year as nations work together to save lives at sea. SAR authorities worldwide understand their responsibilities under the SAR Convention. Lessons learned from SAR cases are developed and shared among international SAR authorities and organizations. Coastal states in many regions of the world are realizing that effective SAR services cannot be provided independently. In these regions, coastal states are working together to develop regional SAR plans and cooperative arrangements to implement regional SAR systems based on the framework mandated in the SAR Convention. There is still plenty of work to be accomplished, but through the IMO and ICAO positive improvements to the global SAR system continue to be made.

OBLIGATIONS OF THE SHIPMASTER AND THE COASTAL STATE: PERSONS RESCUED AT SEA

In May 2014, a U.S. rescue coordination center was notified that a passenger ship, transiting on the high seas, had come across what appeared to be a dilapidated vessel with a large number of persons on board in the vicinity of a coastal state. On the basis of the size and condition of the vessel and the presence of thirty-nine persons on board, the passenger ship embarked the persons, consistent with its international obligation to render assistance to those in distress at sea.

Even though the passenger ship was in the vicinity of this coastal state, the rescue of the thirty-nine survivors occurred in the maritime SAR region of a second coastal state. After the thirty-nine survivors were safely on board, the passenger ship resumed its transit to the second coastal state, its next port of call. During its transit, the shipmaster notified the authorities of the rescue and that his ship had embarked the thirty-nine survivors. However, upon arrival, the authorities made no effort to coordinate the disembarkation of the survivors in their country or to another place of safety, as required by the SAR Convention. As a result, the passenger ship was forced to retain the thirty-nine survivors on board when it departed for its next port of call, in the United States.

Because of the coastal state's failure to meet its obligation to coordinate the disembarkation of the survivors to a place of safety as required by the SAR Convention, the passenger ship was forced to continue to bear the burden of caring for the thirty-nine survivors upon departure. Subsequently, the U.S. Coast Guard was notified of the situation, contacted the passenger ship, and arranged for a rendezvous at sea between the passenger ship and a Coast Guard cutter. As planned, the passenger ship met with the cutter, which facilitated the at-sea transfer of the thirty-nine survivors without incident.

In effect, the United States, in particular the U.S. Coast Guard, was forced to assume the responsibility to coordinate the disembarkation and disposition of the survivors rescued by the passenger ship on behalf of the coastal state. Once the transfer was complete, the passenger ship was released from its obligations and continued its transit to the United States.³¹

This actual incident illustrates what is required of ships transiting the world's oceans and of coastal states implementing the global SAR system. In this incident, the shipmaster fulfilled his duty to render assistance to persons rescued at sea. However, the coastal state refused to assist in coordinating the disembarkation of the survivors or to relieve the shipmaster of his obligation to care for the survivors. As a result, in this instance the global SAR system failed. It cannot be stressed enough that both the shipmaster *and* the coastal state must be active participants in the global SAR system—both must be committed to saving lives at sea.

What follows is a description of the duties and obligations of shipmasters and coastal states in ensuring the success of maritime lifesaving operations. It is important for both to be cognizant of their responsibilities, as well as for each to develop processes and procedures to implement the global SAR system.

Shipmaster

Ships at sea are the eyes and ears of the global SAR system. In many instances, it is ships that receive notification of persons in distress, and they can be the first SAR resources available to render assistance. Ships conduct lifesaving operations every day in the world's oceans, and generally welcome the opportunity to save lives.

Three international conventions formally enshrine in international law the important duty of the shipmaster to render assistance to persons in distress at sea.³² Compliance with this duty is essential to preserving the integrity of the global SAR system.

First, the Safety of Life at Sea (SOLAS) Convention of 1974 is one of the most important treaties concerning merchant ship safety.³³ Chapter V, regulation 33, states:

The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.³⁴

Second, the United Nations Convention on the Law of the Sea (UNCLOS), in article 98, provides that shipmasters have a duty to render assistance to persons in distress:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.³⁵

Note that article 98 is addressed to the flag state; it is the flag state that must ensure that any ship flying its flag renders assistance to persons in distress at sea. The shipmaster has the duty to render assistance “so far as he can do so without serious danger to the ship, the crew or the passengers.”³⁶

Third, the Salvage Convention in article 10 states:

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.³⁷

Notably, there are circumstances in which a shipmaster would *not* be duty bound to aid persons in distress. For example, a shipmaster is not required to place his ship and crew in undue peril in order to attempt to render assistance.³⁸

In addition, there is no duty to attempt to render assistance in instances where doing so would be impracticable or futile.³⁹

All three conventions affirm the shipmaster's duty to render assistance to persons in distress at sea and to treat any rescued survivors humanely while on board the ship.⁴⁰ Most shipmasters realize that, if the situation were reversed and they themselves were in distress, they would want another ship to provide the same assistance.⁴¹

Does the same treaty law concerning the shipmaster's duty to render assistance to persons in distress apply to warships?⁴² The complex nature of military operations at sea means that diverting a warship to assist in a SAR operation and embark survivors can pose a challenge, especially when attempting to coordinate survivor disembarkation with a coastal state's SMC. And while conducting a maritime SAR operation can be difficult for a warship during peacetime, it can be even more complicated during armed conflict.

Interestingly, the SOLAS (chapter V, regulation 33) and Salvage (article 10) Conventions do not apply to warships and other noncommercial, state-owned vessels; the conventions do not mandate that these classes of vessels render assistance to persons in distress.⁴³ However, it remains customary international law⁴⁴ for states to ensure their warships act in a manner consistent with this requirement.⁴⁵ By comparison, UNCLOS does impose this obligation on the flag state to require masters to comply with article 98. The SAR Convention, as previously stated, provides the framework for coastal states to implement the global SAR system; however, it does *not* "carve out" an exemption for certain classes of vessels from complying with its requirements. A party to the SAR Convention is obligated to ensure that *all* ships under its flag render assistance to persons in distress.⁴⁶

Under the SAR Convention, a coastal state may receive notification of a person in distress, assume the role of SMC, and have its RCC contact a warship in the vicinity of a distress incident to divert and render assistance. If the warship is in a position and is able to render the assistance, the commanding officer (CO) should do so when the SMC so requests. If it is the CO who becomes aware of persons in distress, he should contact the coastal state whose SAR region the ship is transiting and relay any information concerning the distress incident. The coastal state would assume SMC and coordinate the response with the CO, including the disposition of any survivors once embarked on the warship.

Can the CO of a warship at sea decide *not* to render assistance to persons in distress, even if the warship is in a position to do so and could provide timely assistance, but—owing to other "operational commitments"—is considered "not available"? Who would decide, in a particular instance, whether the CO of a warship can be relieved of his duty to render assistance to persons in distress?

While this may be considered a difficult situation, the overall answer is *no*. For example, under U.S. Navy and Coast Guard policy, the CO always retains the duty to render assistance to persons in distress at sea if able to do so.⁴⁷ It also can be argued that, with this historical and universal principle enshrined in the SOLAS Convention, the Salvage Convention, and UNCLOS, the CO's duty to render assistance to persons in distress constitutes customary international law as well. This is especially relevant during peacetime when, considering the circumstances of the distress incident, a warship may be the only available resource capable of conducting a lifesaving operation. The circumstances on scene and the CO's coordination with the SMC and his operational chain of command should dictate the best course of action to ensure that persons in distress are rescued.

The Coastal State

Under the SAR Convention, a state has the responsibility to implement the global SAR system.⁴⁸ To fulfill this mandate, the coastal state establishes a national SAR system that effectively coordinates SAR operations to render assistance when notified of persons in distress.⁴⁹ If the most effective SAR resource available for a particular SAR operation is a merchant ship (or any other vessel best suited to render the assistance), the SMC should divert the ship to save lives.

As the shipmaster fulfills this duty to render assistance to persons in distress, he has an expectation that the coastal state will fulfill its own obligation to assist in coordinating the disembarkation of survivors rescued at sea to a place of safety and to minimize the impact on his ship. For example, the SMC should do everything possible to limit the deviation of a ship from its intended course to assist persons in distress. Granted, there are times when a particular ship is the only SAR resource available. However, diversion of a merchant ship in particular should be limited, if at all possible. Additionally, the SMC should reconsider ever diverting a merchant ship from its intended port of call to a different port to disembark rescued survivors. Such a diversion can cause significant logistical and liability challenges for the ship, shipping company, and shipping agent, and should be avoided.⁵⁰ While these types of SAR cases may be challenging for the SMC, who very well may be required to coordinate survivor disembarkation and disposition with another coastal state, the global SAR system will benefit when the shipmaster knows the SMC will minimize the impact on his ship's intended voyage when he renders assistance to persons in distress.⁵¹

This relationship between the shipmaster and the coastal state is crucial to the effectiveness of the global SAR system. While the shipmaster has the duty to render assistance to persons in distress, the coastal state is obligated to coordinate the SAR operation effectively and efficiently in support of the responding shipmaster. Without a cooperative relationship, a ship has limited incentive to render

aid to a distressed vessel, as opposed to passing by so as to meet its arrival time at its next port of call. Coastal-state support of ships saving lives at sea is a critical component of the global SAR system, and is enshrined in the SAR Convention:⁵²

Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety. . . . In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.⁵³

As mentioned above, a "place of safety" is an important concept in the global SAR system for both the coastal state and the shipmaster. The IAMSAR manual, volume 1, describes a "place of safety" as

[a] location where rescue operations are considered to terminate; where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met; and, a place from which transportation arrangements can be made for the survivors' next or final destination. A place of safety may be on land, or it may be on board a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked at their final destination.⁵⁴

Identifying a place of safety should be coordinated between the shipmaster and the coastal-state SMC responsible for coordinating the SAR operation. The priority always should be to minimize the impact on the ship that conducted the rescue and has survivors on board.⁵⁵ A place of safety may not be necessarily a location that is most advantageous to the survivors. However, it should be a location where all the criteria defining a place of safety can be achieved. It cannot be overemphasized that the SMC has the primary responsibility for determining the place of safety, in coordination with the ship that rendered the assistance.⁵⁶

Additionally, the coastal state's SMC, in coordinating a SAR operation, must remember that under the SAR Convention a ship diverted to render assistance⁵⁷ is considered a *SAR facility*, not a *SAR unit*, and should not be considered necessarily a place of safety simply because the survivors are no longer in distress.⁵⁸ Unlike a SAR unit, which has the equipment and trained personnel to conduct SAR operations, a ship diverted to render assistance to persons in distress may not have the resources on board to care for what may be large numbers of survivors properly, nor to meet the criteria for a place of safety.⁵⁹ When a ship is diverted to render assistance, the coastal state, in coordinating disembarkation,

should take into consideration the number of survivors rescued, the ship's estimated time of arrival at its next port of call, the survivors' condition, and other critical factors.⁶⁰ Normally, the SMC would coordinate survivor disembarkation at the ship's next port of call or with another coastal state⁶¹ to limit complications and minimize the impact on the ship that conducted the rescue.⁶²

If either the coastal state or the shipmaster fails to fulfill the obligations under international law, the global SAR system becomes ineffective. If a shipmaster ignores persons in distress because of the potential time delay and logistical challenges associated with rescuing the survivors, or if the coastal state does not fulfill its obligation to coordinate SAR operations within its maritime SAR region as well as to disembark rescued survivors, the system is threatened—and lives imperiled on the world's oceans can be lost. Both the shipmaster and the coastal state are responsible for saving lives at sea.

Mixed Migration by Sea

Mixed migration by sea is a difficult problem that afflicts many regions of the world.⁶³ Tragically, lives are lost every year when overloaded boats are overturned and hundreds, if not thousands, of people perish; others perish in extremely poor and hazardous conditions in overloaded boats unfit to make an ocean voyage. People engage in at-sea migrations for many reasons; these include desperate pursuit of a better life, if not survival. Regional problems and challenges have resulted in these mass migrations; proposing solutions goes well beyond the scope of this article. However, the sheer number of “persons in distress” has stretched the limits of the global SAR system. Merchant ships, other vessels, and coastal-state resources are tasked to render assistance. Many are not equipped or manned to support dozens, if not hundreds, of persons who may remain on board an assistance-rendering vessel for several days.

In March 2015, a meeting to address unsafe mixed migration at sea took place at IMO headquarters on Albert Embankment, London, United Kingdom.⁶⁴ Participants at the meeting included representatives of the IMO member states, intergovernmental organizations, and nongovernmental organizations, as well as senior representatives from the IMO, the UN High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and several other UN agencies. Challenges concerning mixed migration at sea were discussed. In his opening address, Koji Sekimizu, IMO secretary-general, succinctly stated the problem: “The issue of mixed migration by sea, including irregular migration, has been a serious concern for decades—if not longer. But, in recent years, it has reached epidemic proportions, to the extent where the whole system for coping with such migrants is being stretched up to, and sometimes beyond, its breaking point.”⁶⁵

Several statistics presented at the meeting highlight the critical nature of this problem:

- “The conflict in Syria, which enters its fifth year in March 2015, has caused the largest displacement crisis of our time. There are now more than 3.2 million Syrian refugees, a number that is growing by 100,000 every month.”⁶⁶
- In 2014, over two hundred thousand people were rescued and over three thousand deaths were reported in the Mediterranean Sea alone as a result of unsafe, irregular, and illegal sea passages.⁶⁷
- In the first six months of 2015, 137,000 refugees and migrants crossed the Mediterranean Sea.⁶⁸ This compares with 75,000 in the same period in 2014, marking an 83 percent increase over 2014.⁶⁹
- More than 1,800 migrants have perished in at-sea migration attempts so far in the first six months of 2015.⁷⁰
- In mid-April 2015, eight hundred people died in the largest maritime refugee disaster on record, highlighting the significant increase in migrants dying or missing at sea.⁷¹
- There are reports of dozens of migrants dying from hypothermia after being recovered by SAR resources, demonstrating the dangerous nature of these unsafe maritime transits in dilapidated vessels.⁷²
- In the first three months of 2015, over seven hundred merchant vessels were diverted from their routes to recover and rescue migrants making unsafe passages just in the Mediterranean Sea alone.⁷³

The interplay between mixed migration by sea and SAR presents an extremely difficult challenge because of the complex humanitarian nature of these operations. Many coastal states consider each mass migrant incident a SAR case that should be conducted under the SAR Convention and coordinated by a coastal-state SMC, through the RCC. However, this is not the case.⁷⁴ Some incidents may include persons in distress; however, many more appropriately could be considered law-enforcement or border security events.⁷⁵ In addition, care must be taken to ensure that migrants are not refugees.⁷⁶ Refugees should be afforded the protections required under the Convention Relating to the Status of Refugees, 1951 (Refugee Convention).⁷⁷

The condition of the vessel, the weather on scene, and the persons on board as well as the judgment of the SAR unit or facility on scene and the SMC should dictate whether a migrant incident triggers the rendering of assistance to persons in distress under the SAR Convention or its treatment as a national border / law-enforcement action. Determining whether large numbers of persons in a

mass-migration scenario are in distress can be particularly challenging for the SMC. The global SAR system is activated when a person declares he is in distress or when SAR authorities are notified of a person in distress. However, in many recent mixed-migration-at-sea operations, migrant vessels have been declaring that they are “in distress” so that their “survivors” will be transferred to a merchant ship or other SAR unit and transported to a place of safety. This continues to be an ongoing, difficult problem in the Mediterranean Sea, in particular.

Another difficulty is that, while the shipmaster is required to embark persons assisted, the coastal state has no specific international mandate to receive the survivors from the ship.⁷⁸ The RCC is required to coordinate the disembarkation of rescued survivors; however, some coastal states refuse to assist the ship and receive the migrants. Unfortunately, the SAR Convention does not impose a duty for a coastal state to accept migrants from a merchant ship, even if the incident occurred within the coastal state’s SAR region.⁷⁹ Kathleen Newland provides a good summary of this problem:

The intersection of maritime law and refugee law thus leaves ship owners, masters, and crews in a quandary. They must pick up refugees and asylum seekers whose lives are in danger, but no state is required to take them in.

The ship itself cannot be considered a “place of safety”—indeed, carrying a large number of unscheduled passengers may endanger the crew and passengers themselves, owing to overcrowding, inadequate provisioning, and the tensions of life in close quarters. The inability to disembark rescued passengers in a timely fashion and return to scheduled ports of call creates a profound disincentive for the maritime industry to engage actively in search and rescue missions.⁸⁰

The IMO may want to consider developing an international convention to provide the international community with a basis for coordinating and conducting these challenging mixed-migration-at-sea operations.⁸¹

ASSISTANCE ENTRY

The United States Coast Guard received notification that a vessel was hard aground on rocks in a coastal state’s territorial sea, with three persons on board. The Coast Guard diverted a Coast Guard cutter that was available to render assistance. The Coast Guard notified the coastal state’s authorities of the incident. The Coast Guard cutter arrived, remained outside the territorial sea, and established communications with the vessel aground. Those on the vessel communicated their concern regarding the deteriorating condition of the vessel and adverse weather conditions. The vessel stated that the coastal state’s authorities were on scene but were not providing any assistance. The coastal state’s authorities notified the Coast Guard that the on-scene Coast Guard cutter was not authorized to enter the state’s territorial

sea to conduct a rescue operation, and indicated that the vessel in distress should arrange for local commercial salvage.

Because of the deteriorating on-scene conditions, in which the vessel was listing sixty degrees and taking on water; the adverse weather; the lack of support from the coastal state's authorities on scene in assisting the vessel; and the presence on board of a sixty-five-year-old crewmember who began to experience symptoms of a heart attack, the Coast Guard cutter made the decision to enter the territorial sea to conduct a rescue operation. The Coast Guard cutter rescued the three persons on board and their personal property.⁸²

The incident described above highlights the complex challenges, from an international law and policy perspective, facing any shipmaster or aircraft commander attempting to fulfill his duty to render assistance to persons in distress, particularly in another coastal state's territorial sea.⁸³ Does the shipmaster have a duty to rescue persons in distress even in another coastal state's territorial sea? Are aircraft also obliged to conduct these types of rescue operations? What are the implications for a warship or military aircraft conducting a rescue operation in a coastal state's territorial sea?⁸⁴ The problem is that these rescue operations can cause unintended concern for the coastal state if the ship's or aircraft's purpose for entering its territorial sea is misconstrued.

While not specifically defined, the principle of assistance entry (AE) is established through international conventions⁸⁵ and customary international law.⁸⁶ In support of this mandate to rescue persons in distress anywhere on the seas, the U.S. Coast Guard developed policy for the conduct of AE rescue operations within a coastal state's territorial sea by Coast Guard ships and aircraft.⁸⁷ To ensure compliance with international conventions, AE rescue operations policy should respect three principles: (1) the sovereign right of a state to control and regulate entry into its territorial sea; (2) the humanitarian need to assist persons in distress quickly and effectively without regard to nationality or circumstances; and (3) that entry into a coastal state's territorial sea does not require seeking or receiving permission from the coastal state to conduct the rescue operation in its territorial sea.⁸⁸

What follows is seven different AE scenarios that SAR authorities and legal advisers should consider in developing national and agency-specific AE policies, accompanied in each case by an overview of the applicable international legal and policy concerns. It is important to work through the issues and prepare positions that can be provided to the shipmaster and the aircraft commander for guidance. When persons are in distress and a government ship or aircraft is in a position to render assistance, valuable time should not be wasted seeking guidance and legal advice before rendering the necessary assistance.⁸⁹ These discussions should

occur; however, legal positions and policies should be developed *before* any of these scenarios are encountered.

Scenario A

A government ship transiting on the high seas receives a distress broadcast and diverts to render assistance to a person in distress in a coastal state's territorial sea. Does the ship need to obtain the coastal state's consent to enter its territorial sea to render assistance to the person in distress?

In this scenario, the government ship would not be required to obtain consent from the coastal state before rendering assistance to persons in distress in the coastal state's territorial sea. However, the shipmaster should notify the coastal state of his intention to render the assistance, the approximate distress location, and the ship's intention to transit into the state's territorial sea to conduct the rescue operation. UNCLOS and the SOLAS and Salvage Conventions mandate that the shipmaster has the duty to render assistance to persons in distress throughout the oceans.⁹⁰

While the coastal state exercises sovereignty over its territorial sea, that sovereignty is not unlimited. In the case of AE, the coastal state has limited ability to interfere with the entry of a ship conducting a rescue operation.⁹¹ Likewise, the assisting ship is also limited in its operations within a coastal state's territorial sea. For example, (1) there must be persons in distress before a government ship may enter into a coastal state's territorial sea to render assistance, and (2) there is a limitation on what activities the ship may conduct during an AE rescue operation. Specifically, the government ship is limited to *rescuing* persons in distress only.

There are conditions that should be met for a ship to conduct AE. For example, U.S. Coast Guard policy affirms that a Coast Guard SAR unit may conduct AE into a coastal state's territorial sea to render assistance to a person in distress if, in the judgment of the CO, the on-scene situation meets the following three criteria: (1) there is reasonable certainty (on the basis of the best available information, regardless of source) that a person is in distress; (2) the distress location is reasonably well known; and (3) the SAR unit (or SAR facility) is in position to render timely and effective assistance.⁹²

Additionally, because of the urgency to take immediate action to rescue persons in distress, AE should not be delayed while the coastal state is notified of the government ship's intention to render assistance in its territorial sea. Even if the assistance to a person in distress already is being coordinated by the coastal state's RCC, as envisioned in the SAR Convention, the government ship's duty to render timely assistance remains.⁹³

Scenario B

A government ship transiting on the high seas receives a distress broadcast and diverts to render assistance to a person in distress in a coastal state's territorial sea. Can the ship use its embarked helicopter and small boat to assist in the rescue operation? Can a military aircraft transiting in oceanic airspace also divert and enter a coastal state's airspace to assist in the rescue operation, or must the aircraft first obtain permission from the coastal state? Can a military aircraft enter a coastal state's territorial sea even if no surface unit is participating in the rescue operation?

There is no international instrument that expressly prevents a government ship from using its embarked aircraft or small boat in rendering assistance to a person in distress. Embarked aircraft and small boats should be considered an extension of the ship;⁹⁴ all available resources necessary to the lifesaving operation should be used, even if the location of the distress incident is in a coastal state's territorial sea.⁹⁵

In addition to a ship using an embarked aircraft for an AE rescue operation, any other available aircraft made aware of a distress can and should divert to render assistance in a coastal state's territorial sea.⁹⁶ The use of an aircraft for an AE rescue operation would be governed by the same criteria placed on use of a surface rescue unit.⁹⁷

The legal justification for the use of an aircraft in the conduct of an AE rescue operation cannot rest solely on UNCLOS; both articles 18 and 98 are silent on whether aircraft can assist persons in distress in a coastal state's territorial sea.⁹⁸ However, the SAR Convention *does* consider the use of aircraft in the conduct of SAR operations.⁹⁹ This makes sense, since the purpose of the SAR Convention is to implement the global SAR system, which provides the international framework for organizing and standardizing SAR processes and procedures in the coordination and conduct of lifesaving operations. To carry out this purpose, the SAR Convention supports the use of any and all rescue capabilities that can be used during a SAR operation, including rescue operations within any coastal state's territorial sea.¹⁰⁰

Scenario C

Can a government ship "rescue" property while rendering assistance to a vessel in distress (e.g., personal property on board the vessel, floating in the water, etc.) in a coastal state's territorial sea, in addition to rendering assistance to persons in distress? To render the necessary assistance, can the ship tow the imperiled vessel into safe waters? After the ship brings any survivors on board, can it "rescue" the vessel and property, if they are still salvageable?¹⁰¹

The international conventions mandating a shipmaster's duty to render assistance to persons in distress do not contemplate the "rescue" or "recovery" of

property in an AE rescue operation in a coastal state's territorial sea.¹⁰² It is a person in distress who is assisted, not property. Therefore, the requirements for the conduct of an AE rescue operation should not be applied to the recovery of property. However, it can be argued that the recovery of property incidental to the conduct of an AE rescue operation is appropriate. This may include, for example, the recovery of critical medicine a survivor may require, towing a vessel that would facilitate the rescue of the persons in distress, and towing a disabled vessel.

Unless other arrangements are made between the shipmaster and the coastal state, the government ship contemplating the recovery of property *not* incidental to the AE rescue operation and within the coastal state's territorial sea should (1) complete the AE rescue operation, (2) depart the coastal state's territorial sea, and (3) seek permission to reenter the territorial sea to recover or salvage the property. This also would include the recovery of illegal contraband that could be used for any prosecution of the survivors if they were conducting a smuggling operation (e.g., narcotics).

Scenario D

A government ship transiting on the high seas receives a distress broadcast and enters a coastal state's territorial sea to render assistance to a person in distress. After a reasonable amount of time, it cannot locate the distress incident location. Can the ship conduct a search in an attempt to locate the person in distress?

While no international instrument permits a coastal state to refuse entry of a government ship into its territorial sea to conduct an AE rescue operation, the SAR Convention does require authorization from the coastal state to conduct a search for persons in distress. If the ship conducting the AE rescue operation is unable to locate the persons in distress in a reasonable amount of time, then the proper course of action would be (1) to depart the coastal state's territorial sea and (2) to seek permission to conduct a search coordinated by the coastal state's SMC through the RCC responsible for the SAR region in which the person in distress is (presumably) located.¹⁰³

Scenario E

A government ship transiting on the high seas receives a distress broadcast from a vessel taking on water in a coastal state's territorial sea. The shipmaster notifies his command authority that he is diverting to render assistance. The command authority coordinates notifying the coastal state that the ship is entering its territorial sea to render assistance to the vessel. The coastal state notifies the command authority that its SAR facility is en route to provide assistance and advises the ship that its assistance is not required. What should the shipmaster do? What should the ship's command authority do?

A government ship's duty to conduct an AE rescue operation is not nullified because the coastal state reports it has dispatched SAR facilities or units to rescue a person in distress. If, in the judgment of the shipmaster, the coastal state's assistance is inadequate or not timely, then the distress still may be ongoing, and his duty would continue regardless of the coastal state's assertions or intent. This decision must rest with the shipmaster on scene, who has the duty to render the assistance.¹⁰⁴ However, if the coastal state's SAR unit is able to arrive on scene and conduct the rescue, the shipmaster's duty to render assistance is fulfilled.

Scenario F

Do the same requirements for a government ship to render assistance in a coastal state's territorial sea apply in international straits while transiting?¹⁰⁵

The shipmaster's duty to render assistance to persons in distress applies throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone, or on the high seas.¹⁰⁶

Scenario G

A government ship transiting on the high seas receives a distress broadcast from a vessel under attack by armed robbers while transiting through a coastal state's territorial sea. The government ship diverts to render assistance. Would this incident be considered an AE rescue operation?

This scenario should not be considered AE; UNCLOS (article 98), as well as the SOLAS (chapter V, regulation 33) and Salvage (article 10) Conventions, would not apply. Additionally, if the incident is not considered a rescue operation, then the SAR Convention also would not apply.¹⁰⁷ The issue is whether a vessel under attack should be considered to be "in distress" (from a SAR perspective), with any response to be coordinated under the requirements of the SAR Convention. Interestingly and appropriately, there is no formal definition of *distress* in the SAR Convention or any other international convention.¹⁰⁸ This gives a person in extremis wide latitude in determining whether to declare distress and seek assistance. However, a vessel under attack should not be considered in distress, with any response to be coordinated under the SAR Convention; it would be more appropriate to consider this type of incident a law-enforcement or military operation.¹⁰⁹

This does not mean, however, that a coastal state's RCC cannot coordinate a response in support of law-enforcement authorities or military resources that may be used to assist the ship under attack. The coordination and conduct of this type of operation would be implemented through a coastal state's national policies and procedures. In addition, if persons are injured during the response, the operation could include the medical transport of injured persons, which would be considered a SAR operation.

This position—that a vessel under attack is not considered “in distress”—was affirmed in a 2015 legal ruling in the U.S. Court of Appeals for the Fourth Circuit. The case highlighted the important distinction among antipiracy, law-enforcement, and military actions and SAR operations. The court’s ruling provides an important distinction that warrants consideration by law-enforcement, military, and SAR authorities; in some coastal states, the coordination, policies, processes, procedures, and resources used to conduct these types of actions very well may not be the same as those used to conduct SAR operations.¹¹⁰

In 2011, during NATO-conducted antipiracy operations in the Gulf of Aden and the Indian Ocean, a U.S. warship engaged *Jin Chun Tsai 68* (*JCT 68*), a fishing vessel from Taiwan that pirates had hijacked more than a year earlier and were using as a mother ship for pirate operations. On board *JCT 68* were pirates and three hostages; the latter consisted of the original shipmaster, Wu Lai-Yu, and two Chinese crewmembers. During the engagement, the warship used disabling fire to stop the vessel. After the pirates surrendered, the warship’s boarding team went on board *JCT 68*. Three of the pirates and Wu had been killed during the warship’s use of disabling fire. Subsequently, the pirates and the two remaining Chinese crewmembers were removed from the vessel. The following day, *JCT 68* was sunk intentionally—with Wu’s body still on board, as the NATO task force commander directed.

Wu’s widow subsequently initiated legal action against the United States in the District Court for the District of Maryland, seeking damages for her husband’s death and the loss of *JCT 68*. The court granted the government’s motion to dismiss the legal action, reasoning that the complaint was not a legal issue to be decided in a court of law. Wu’s widow appealed the ruling in the Court of Appeals for the Fourth Circuit; the court of appeals affirmed the district court’s decision to grant the government’s motion. In determining whether a vessel under attack is considered “in distress,” any response to which would fall under the requirements of the SAR Convention, the court of appeals affirmed an important distinction concerning the action the warship in question conducted:

Plaintiff is likewise mistaken in categorizing the USS *Groves*’s engagement with the *Jin Chun Tsai 68* as a “Good Samaritan” action, or a “rescue operation” analogous to the rescue by the U.S. Coast Guard of distressed mariners. . . . The focus of the USS *Groves*’s operation was to stop the depredations of the pirates, in part by depriving the pirates of their stolen mother ship. Sinking the *Jin Chun Tsai 68* was part of the course of action worked out by the military commanders to further maritime security. The district court correctly recognized that because the *Jin Chun Tsai 68* was sunk under direct NATO orders, the court could not adjudicate plaintiff’s claim that the decision to sink the vessel was negligent or unlawful.¹¹¹

This distinction is important when considering the conduct of SAR operations under the SAR Convention. Some coastal states may train and equip SAR units that would be responsible for conducting SAR operations only, not law-enforcement or military actions. Additionally, SAR authorities may rely on volunteer SAR organizations or seek the assistance of Good Samaritans in the vicinity of a vessel or persons in distress to assist in a particular SAR operation. The global SAR system was never envisioned to support other types of actions.¹¹²

In summary, any ship or aircraft conducting an AE rescue operation must notify the coastal state of the intended course of action. Because of the perceived imminence of the distress and the urgency to take immediate action, the shipmaster or aircraft commander is not required to seek permission from the coastal state to fulfill his duty to render assistance and save lives. Even if the coastal state notifies the ship or aircraft rendering assistance that it has dispatched a SAR unit, if the shipmaster or aircraft commander believes the coastal-state SAR unit will not arrive in a timely manner, the duty to render assistance remains, and the shipmaster or aircraft commander must continue the rescue operation. The SAR Convention was never intended to limit or restrict a ship or aircraft that is available to render assistance to persons in distress. However, it would be appropriate for the shipmaster to coordinate the AE rescue operation with the coastal state's RCC, which should assume SMC of the SAR case. The shipmaster or aircraft commander, in communicating his actions to the coastal state, must ensure there is no misunderstanding about the craft's intent to conduct an AE rescue operation. Saving lives is the priority, even in a coastal state's territorial sea.

FORCIBLE EVACUATION FOR SAR

In 2011, the U.S. Coast Guard was notified that a twenty-four-foot sailboat registered in the United States and with one person on board was possibly in distress. The reporting source had received a voice mail from the person's satellite phone late in the evening stating, "Emergency, emergency," and nothing more. The last report received placed the sailboat seventy miles south of the United States and thirty miles offshore. The Coast Guard assumed SMC for the SAR operation and launched a Coast Guard aircraft and diverted a Coast Guard cutter to render assistance.

The aircraft located the sailboat, was able to see the person moving on deck, but was unable to hail him on the radio. It did appear to the aircraft that the sailboat's boom was damaged. The Coast Guard cutter arrived on scene and sent a boarding team to the sailboat to assess the situation. The boarding team confirmed the boom was destroyed and the sailboat's only outboard engine had fallen off the vessel.

The boarding team advised the person that he should evacuate the vessel for his own safety, but he refused. However, the Coast Guard cutter and its boarding team on the sailboat realized that due to the condition of the sailboat the person's

*life was in jeopardy. In consultation with the Coast Guard SAR chain of command, the Coast Guard cutter compelled the person to depart the sailboat with the cutter's boarding team. The cutter determined that the sailboat was in such a dilapidated state that it was unsalvageable; the sailboat was marked and abandoned at sea. The survivor was transferred to the Coast Guard cutter and returned to the United States.*¹¹³

Finally, this article considers the challenge of compelling a person to abandon his vessel to save his life. Thankfully, SAR authorities encounter such situations only infrequently; a person in distress who requests assistance normally wants to leave his vessel if the SAR responders on scene believe it necessary for his safety.¹¹⁴

The international conventions do not address specifically the use of force to compel a person to abandon his vessel in a life-threatening situation. The intent here is to provide a very brief overview and discussion of this issue, in order for coastal states and SAR authorities to consider whether national and agency-specific SAR policies are adequate and well understood by all levels in the SAR chain of command. As can be seen in the scenario related above and in the fishing vessel *Northern Voyager* SAR case described below (which resulted in a lawsuit against the U.S. Coast Guard), these incidents can and do occur.

SAR authorities should consider several questions:

- What if an SMC is notified that a vessel is in distress and dispatches a SAR unit to render assistance, but the vessel's captain refuses to disembark, even though in the judgment of the SAR unit on scene he will perish if he does not abandon the vessel?
- What if a merchant ship is diverted to render assistance, but the vessel's captain refuses to abandon the vessel? The ship's crewmen most likely would not be trained in the use of force; they are merely fulfilling their duty to assist in the lifesaving operation. What advice should the SMC give to the shipmaster?
- What if the crew or passengers wish to evacuate a vessel in distress, but the vessel's captain refuses to allow them to depart? What should the SAR unit or SAR facility on scene do? Should the use of force be contemplated to allow passengers and crewmembers to disembark the vessel in distress?
- If necessary, should force be used to compel the person in distress to leave his vessel? Does it matter whether the SAR unit is trained in the use of force? What type of force and extent of use should be contemplated?
- What are the legal implications of compelling a person against his will to abandon his vessel in what is perceived to be a life-threatening situation?

- What if the forcible evacuation of a person is being contemplated on a vessel of a different flag state?¹¹⁵ How does that complicate the proposed use of force?

These are difficult questions applied to challenging, life-threatening situations—and SAR authorities should address them before this type of incident occurs. Forcibly compelling a person to abandon his vessel presents the SAR responder on scene who is attempting to provide the lifesaving assistance with a difficult situation, and may result in controversy, property loss, and litigation.

In the United States, there is only one lawsuit that primarily discusses a SAR unit compelling a person in distress to abandon his vessel to save his life. In *Thames Shipyard and Repair Company v. United States*, the owner and insurer of the U.S.-documented fishing vessel *Northern Voyager* sued the United States, alleging that the disabled vessel sank, in part, because the U.S. Coast Guard compelled the vessel's captain to leave against his will.¹¹⁶

In November 1997, after losing its starboard rudder off the northeastern coast of the United States, the 144-foot *Northern Voyager* experienced significant flooding in the steering compartment, which was threatening to flood the vessel's engineering compartment as well. *Northern Voyager's* captain notified the Coast Guard of the situation, which assumed SMC and dispatched two SAR units to provide additional pumps and render any other assistance *Northern Voyager* might require. Despite the crew's attempts to curtail the progressive flooding, the fishing vessel developed a port list, settled further in the water, and was threatening to capsize and sink without warning with the crewmembers and Coast Guard personnel on board. The SAR units on scene, in contact with the SMC at the RCC coordinating the response, decided the only course of action left was to evacuate the remaining crewmembers before the vessel sank. When the Coast Guard personnel on *Northern Voyager* informed the captain that it was time to abandon ship, he refused to leave. The Coast Guard personnel informed him that if he did not cooperate, he would be compelled to depart, using force if necessary. As a result, the remaining members of *Northern Voyager's* crew, the captain, and the assisting Coast Guard personnel evacuated the vessel. The fishing vessel sank a short while later.

Both the district court and the court of appeals held that U.S. law protected the Coast Guard's decision to evacuate the captain forcibly from the life-threatening situation that occurred on *Northern Voyager*.¹¹⁷ The Supreme Court of the United States declined to review the case.¹¹⁸

In contemplation of both the operational and legal difficulties involved in forcibly evacuating a person from his vessel, even in a life-threatening situation, the Coast Guard does provide guidance to SAR units and the Coast Guard SAR

chain of command. Coast Guard policy provides that, if time permits, the SAR unit on scene should consult with the SMC; but that the SAR unit can evacuate a person forcibly from his vessel if it judges that (1) a true life-threatening situation exists, and (2) the vessel to be abandoned in fact does require immediate assistance.¹¹⁹ If time further permits, the decision to evacuate a person forcibly from his vessel should be made at the most competent operational and legal level in the SAR chain of command.¹²⁰

In summary, SAR authorities should consider whether their current SAR policies and procedures provide adequate guidance for this challenging “forcible evacuation” scenario; if not, they should give further thought to developing new or improved policies and procedures for their SAR chain of command.

The global SAR system, while not perfect and in need of continuous improvement, does provide a means of notification about and response to persons in distress at sea. As long as people continue to sail the world’s oceans, there will be a need to provide effective lifesaving services to those who need assistance.

International conventions provide the legal foundation for each coastal state to implement a national SAR organization. Coastal states must develop the SAR processes and procedures and provide the ships, boats, aircraft, and dedicated personnel that conduct lifesaving operations at sea. Ships plying the world’s oceans are important contributors to the global SAR system and normally are willing to come to the aid of those in distress. When ships render assistance in a SAR operation, the SMC must work with the shipmaster to coordinate the response and delivery of the survivors to a place of safety, thereby limiting the impact on the shipmaster.

This article considered the conduct of AE rescue operations in a coastal state’s territorial sea and some different AE scenarios that may be encountered. While AE rescue operations occur infrequently, SAR authorities nonetheless should develop national and agency-specific policies for ships and aircraft that may be required to conduct these operations and ensure their commanders understand them.

Finally, this article discussed the difficult situation of a person who refuses to abandon his vessel even when the SAR unit on scene believes that evacuation is the only option left to save lives. While SAR authorities encounter such situations very infrequently, national and agency-specific policies and guidelines should be developed to address this type of incident.

NOTES

1. Lyman J. Gage, U.S. Secretary of the Treasury, to Captain Francis Tuttle, Revenue Cutter Service, "Letter of Instructions," 15 November 1897, in *Report of the Cruise of the U.S. Revenue Cutter Bear and the Overland Expedition for the Relief of the Whalers in the Arctic Ocean, from November 27, 1897, to September 13, 1898* (Washington, DC: Government Printing Office, 1899), pp. 5–10, available at www.uscg.mil/.
2. International Maritime Organization [hereafter IMO], *International Convention on Maritime Search and Rescue, 1979*, 2006 ed. (London: IMO, 2006). Entered into force: 22 June 1985; number of contracting states: 106.
3. "International Convention on Maritime Search and Rescue (SAR)," *International Maritime Organization*, www.imo.org/.
4. Epigraph: Meg Jones, "A Year Later, Oshkosh Survivor of Cruise Ship Crash Still Cruising," *Milwaukee-Wisconsin Journal Sentinel*, 14 January 2013, available at www.jsonline.com/.
5. These international conventions will be discussed in greater detail later in this article.
6. The annex to the SAR Convention mandates (paragraph 2.1.2) that "Parties shall either individually or, if appropriate, in co-operation with other States, establish the following basic elements of a search and rescue service: 1) legal framework; 2) assignment of a responsible authority; 3) organization of available resources; 4) communication facilities; 5) co-ordination and operational functions; and 6) processes to improve the service including planning, domestic and international co-operative relationships and training. Parties shall, as far as practicable, follow relevant minimum standards and guidelines developed by the Organization."
7. The annex to the SAR Convention provides (paragraphs 1.3.4, 1.3.5, and 1.3.6, respectively) the following definitions: "Search and Rescue Region: An area of defined dimensions associated with a rescue co-ordination centre within which search and rescue services are provided"; "Rescue co-ordination centre: A unit responsible for promoting efficient organization of search and rescue services and for co-ordinating the conduct of search and rescue operations within a search and rescue region"; "Rescue sub-center: A unit subordinate to a rescue co-ordination center established to complement the latter according to particular provisions of the responsible authorities."
8. Convention on International Civil Aviation, 7 December 1944, 9th ed. 2006, ICAO doc. 7300.
9. IMO / International Civil Aviation Organization, *International Aeronautical and Maritime Search and Rescue Manual* [hereafter IAMSAR manual] (Croydon, U.K.: CPI Group, 2013).
10. The annex to the SAR Convention defines (paragraph 1.3.3) *search and rescue service* as "[t]he performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, vessels and other craft and installations."
11. IAMSAR manual, vol. 1, p. v.
12. *Ibid.*, p. 1-1 (paragraph 1.1.3). It should also be noted (paragraph 1.3.1) that SAR services can be established by individual states or regionally: "These services can be provided by States individually establishing effective national SAR organizations, or by establishing a SAR organization jointly with one or more other States."
13. *Ibid.*, p. xiii. The SC is defined as "[o]ne or more persons or agencies within an Administration with overall responsibility for establishing and providing SAR services and ensuring that planning for those services is properly co-ordinated." Volume 2 goes on to state (paragraph 1.2.2) that "SCs have the overall responsibility for establishing, staffing, equipping, and managing the SAR system, including providing appropriate legal and funding support, establishing RCCs and rescue sub-centres (RSCs), providing or arranging for SAR facilities, co-ordinating SAR training, and developing SAR policies. SCs are the top level SAR managers; each State normally will have one or more persons or agencies for whom this designation may be appropriate."
14. *Ibid.*, vol. 1, p. xiii. The SMC is defined (paragraph 1.2.3) as "[t]he official temporarily

- assigned to co-ordinate response to an actual or apparent distress situation.” See also *ibid.*, vol. 2, p. 1-2.
15. *Ibid.*, vol. 1, p. xii. The OSC is defined (paragraph 1.2.4) as “[a] person designated to co-ordinate search and rescue operations within a specified area.” See also *ibid.*, vol. 2, p. 1-3.
 16. *Ibid.*, vol. 1, p. xi. The ACO is defined (paragraph 1.2.5) as “[a] person or team who co-ordinates the involvement of multiple aircraft in SAR operations in support of the SAR mission co-ordinator and on-scene co-ordinator.” See also *ibid.*, vol. 2, p. 1-3.
 17. Comparable to the annex to the SAR Convention, the Chicago Convention’s annex 12 (Search and Rescue) provides the framework for contracting states to implement an aeronautical global SAR system. The SAR system under the Chicago Convention also has aeronautical SAR regions worldwide, in which contracting states are responsible for coordinating SAR operations. This global aeronautical SAR system complements, or stands in parallel to, the maritime system.
 18. The annex to the SAR Convention states (paragraph 2.1.4): “Each search and rescue region shall be established by agreement among Parties concerned. The Secretary-General shall be notified of such agreements.”
 19. SAR agreements can be bilateral or multilateral. For example, in 2011, the eight Arctic nations (Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States) concluded an agreement that delimited the entire Arctic region into aeronautical (Chicago Convention) and maritime (SAR Convention) SAR regions between the parties. It also formalized SAR cooperation and coordination among the eight states. Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, 12 May 2011, available at oarchive.arctic-council.org/.
 20. IAMSAR manual, vol. 1, p. 1-5 (paragraph 1.6.3).
 21. See note 10 for a definition of *search and rescue service*. The coastal state is responsible for the coordination and conduct of SAR operations within its SAR region.
 22. The annex to the SAR Convention (paragraph 2.1.7) is very clear on this point: “The delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States.” The IAMSAR manual, vol. 1, p. 2-8 (paragraph 2.3.15[e]) goes on to state that “[a]n SRR [SAR region] is established solely to ensure that primary responsibility for co-ordinating SAR services for that geographic area is assumed by some State. SRR limits should not be viewed as barriers to assisting persons in distress. . . . In this respect co-operation between States, their RCCs and their SAR services should be as close as possible.”
 23. The High Seas Convention, article 1, defines *high seas* as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.” Convention on the High Seas, 29 April 1958, U.N.T.S. 450, p. 11, available at treaties.un.org/. Entered into force: 30 September 1962; number of parties: 77. UNCLOS, which replaced the High Seas Convention, states in article 86: “The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” United Nations Convention on the Law of the Sea, 10 December 1982 [hereafter UNCLOS], available at treaties.un.org/. Entered into force: 16 November 1994; number of parties: 167.
 24. The annex to the SAR Convention (paragraph 2.1.9) states: “Parties having accepted responsibility to provide search and rescue services for a specified area shall use search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea.” (See note 58 for the definition of *SAR facilities* and *SAR units*.) The annex to the SAR Convention allows for the use of any resources to save lives at sea. The national administration must be able to coordinate the response to persons in distress though the RCC/RSC.
 25. The IAMSAR manual, vol. 1, paragraph 2.1.1, provides an excellent overview when describing SAR as an international *system*: “The SAR system, like any other system, has individual components but must work together to provide the overall service. Development of a SAR system typically involves establishment of one or more SRRs, along with capabilities to receive alerts and to co-ordinate and

provide SAR services within each SRR. Each SRR is associated with an RCC. For aeronautical purposes, SRRs often coincide with flight information regions (FIRs). The goal of ICAO and IMO conventions relating to SAR is to establish a global SAR system. Operationally, the global SAR system relies upon States to establish their national SAR systems and then integrate provision of their services with other States for world-wide coverage.”

26. *Ibid.*, p. 2-3, paragraph 2.3.1.

27. The annex to the SAR Convention (paragraph 2.3.1) states: “Parties shall individually or in co-operation with other States establish rescue co-ordination centres for their search and rescue services and such rescue sub-centres as they consider appropriate.” It should be noted that under the Chicago Convention’s annex 12, the global aeronautical SAR system also requires contracting states to make provision for an aeronautical RCC (ARCC); one ARCC is assigned for each aeronautical SAR region. By comparison, under the global maritime SAR system, a maritime RCC (MRCC) coordinates maritime SAR operations in a designated maritime SAR region. When nations implement a national SAR system in which a particular RCC coordinates both aeronautical and maritime SAR, it is known as a joint RCC. Where a coastal state has instituted both ARCCs and MRCCs, aeronautical and maritime SAR authorities must work closely together to ensure the various types of SAR operations with overlapping aeronautical and maritime SAR regions are effectively coordinated. When considering the coordination between aeronautical and maritime SAR services, the annex to the SAR Convention (paragraph 2.4.1) states: “Parties shall ensure the closest practicable co-ordination between maritime and aeronautical services so as to provide for the most effective and efficient search and rescue services in and over their search and rescue regions.” This same imperative is established as a recommendation in the Chicago Convention’s annex 12, paragraph 3.2.2.

28. IAMSAR manual, vol. 1, pp. 2-4–2-5.

29. *Ibid.*, p. xiv. *Search-and-rescue subregion* is defined as “[a] specified area within a search and rescue region associated with a rescue sub-centre.” For example, the U.S. Coast Guard maintains two RSCs (RSC San Juan,

Puerto Rico, and RSC Guam) that coordinate SAR operations with their respective RSCs.

30. *Ibid.*, p. 2-9.

31. The facts portrayed in this vignette are known by the author, who attests to their accuracy. The vignette is presented for consideration of the legal and policy issues involved.

32. *Oxford Dictionary*, s.v. “international law,” www.oxforddictionaries.com/: “A body of rules established by custom or treaty and recognized by nations as binding in their relations with one another.” *The Commander’s Handbook on the Law of Naval Operations* further describes international law as “that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, nations comply with international law because it is in their interest to do so. Like most rules of conduct, international law is in a continual state of development and change.” U.S. Navy / Marine Corps / Coast Guard, *The Commander’s Handbook on the Law of Naval Operations* (2007) [hereafter *Commander’s Handbook*], p. 20, available at www.jag.navy.mil/.

33. The IMO website explains that “[t]he SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The first version was adopted in 1914, in response to the *Titanic* disaster, the second in 1929, the third in 1948, and the fourth in 1960. The 1974 version includes the tacit acceptance procedure—which provides that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties. As a result the 1974 Convention has been updated and amended on numerous occasions. The Convention in force today is sometimes referred to as SOLAS, 1974, as amended.” “International Convention for the Safety of Life at Sea

(SOLAS), 1974,” *International Maritime Organization*, www.imo.org/.

34. IMO, *SOLAS, Consolidated Edition, 2009* (London: IMO, 2009), p. 268. The SOLAS Convention applies to vessels on international voyages, commercial vessels in particular. SOLAS allows exceptions for warships (and others) but encourages these ships to act in a manner consistent with its provisions. Entered into force: 25 May 1980; number of contracting states: 162.
35. UNCLOS, article 98.
36. *Commander’s Handbook*, p. 1-1, states: “Although the United States is not a party to the 1982 LOS Convention, it considers the navigation and overflight provisions therein reflective of customary international law and thus acts in accordance with the 1982 LOS Convention, except for the deep seabed mining provisions.” Additionally, the duty for U.S. shipmasters to render assistance is stipulated in the United States Code (USC); 46 USC § 2304(a)(1) states: “A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master’s or individual’s vessel or individuals on board.” Additionally, “A master or individual violating this section shall be fined not more than \$1,000, imprisoned for not more than 2 years, or both.” However, as further stated in 46 USC § 2304, this obligation does not apply to U.S. warships.
37. International Convention on Salvage, 28 April 1989, available at www.imo.org/. Entered into force: 14 July 1996; number of contracting states: 67.
38. E.g., the Salvage Convention, article 10, requires a shipmaster to render assistance “so far as he can without serious danger to his vessel, her crew and her passengers.” This is also stipulated in the SOLAS Convention, chapter V, regulation 33, paragraph 1, quoted in the text above, where the shipmaster must make a determination about whether he can render assistance to a person in distress.
39. E.g., the annex to the SAR Convention (paragraph 4.8.1) states: “Search and rescue operations shall continue, **when practicable**, until all reasonable hope of rescuing survivors has passed” (emphasis added). According to paragraph 4.8.4, “If a search and rescue operation on-scene becomes **impracticable** and the rescue co-ordination centre or rescue sub-centre concludes that survivors might still be alive, the centre may temporarily suspend the on-scene activities pending further developments, and shall promptly so inform any authority, facility or service which has been activated or notified” (emphasis added).
40. SOLAS Convention, chapter V, regulation 33, paragraph 6, states: “Masters of ships who have embarked persons in distress shall treat them with humanity, within the capabilities and limitations of the ship.”
41. IMO Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea* (adopted 20 May 2004), provides general guidance (paragraph 5.1) for shipmasters. “SAR services throughout the world depend on ships at sea to assist persons in distress. It is impossible to arrange SAR services that depend totally upon dedicated shore-based rescue units to provide timely assistance to all persons in distress at sea. Shipmasters have certain duties that must be carried out in order to provide for safety of life at sea, preserve the integrity of global SAR services of **which they are part**, and to comply with humanitarian and legal obligations” (emphasis added).
42. UNCLOS, article 29, defines *warship* as “a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.” See also *Commander’s Handbook*, p. 2-1.
43. The SOLAS Convention, chapter I, regulation 3, lists the following classes of ships that are exempted from complying with the regulations unless specifically stated in a particular regulation: (1) ships of war and troopships; (2) cargo ships of less than five hundred gross tons; (3) ships not propelled by mechanical means; (4) wooden ships of primitive build; (5) pleasure yachts not engaged in trade; and (6) fishing vessels. Additionally, the Salvage Convention, article 4, details the nonapplicability of the convention to “State-owned vessels”: “1. Without prejudice to article 5, this Convention shall not apply to warships

or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise.

“2. Where a State Party decides to apply the Convention to its warships or other vessels described in paragraph 1, it shall notify the Secretary-General thereof specifying the terms and conditions of such application.”

44. In *Hasan v. United States of America* (2010), the U.S. District Court for the Eastern District of Virginia, in its opinion and order, provided an overview of customary international law: “[the] body of rules that nations in the international community universally abide by, or accede to, out of a sense of legal obligation and mutual concern.” Available at www.unicri.it/. In addition, the Statute of the International Court of Justice, article 38(1) (b), describes customary international law as “a general practice accepted as law.” Available at www.icj-cij.org/. This understanding of customary international law is further affirmed in the *Commander's Handbook*, which states (p. 20): “The general and consistent practice among nations with respect to a particular subject, which over time is accepted by them generally as a legal obligation, is known as customary international law. Customary international law is the principal source of international law and is binding upon all nations.”
45. For example, in the United States, the requirement for COs of warships to render assistance to persons in distress at sea is mandated in *U.S. Navy Regulations* (1990), article 0925 (Assistance to Persons, Ships and Aircraft in Distress): “1. Insofar as can be done without serious danger to the ship or crew, the commanding officer or the senior officer present as appropriate shall: a) proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance, insofar as such action may reasonably be expected of him or her; b) render assistance to any person found at sea in danger of being lost; c) afford all reasonable assistance to distressed ships and aircraft; and d) render assistance to the other ship, after a collision, to her crew and passengers and, where possible, inform the other ship of his or her identity.”
- U.S. Coast Guard Regulations* (1992), article 4.2-5 (Assistance), provides a similar mandate for the COs of U.S. Coast Guard ships to render assistance to persons in distress. These respective regulations make no distinction between peacetime and wartime operational requirements. (Note: rendering assistance to persons in distress under the law of armed conflict is not considered within the scope of this article.)
46. The annex to the SAR Convention applies to its contracting states. It is the contracting state that is obligated to ensure its ships comply with their obligation to render assistance at sea. See also paragraph 2.1.10.
47. The disembarkation of survivors can be conducted in several ways: (1) by the warship transferring survivors at sea to another craft to ensure it can resume normal operations; (2) by the SMC coordinating disembarkation with the coastal state that would be the warship's next port of call; or (3) in any other way that would relieve the warship of its burden to care for the survivors. As stated previously, the SMC should strive to minimize the impact on the warship (SAR Convention, paragraph 3.1.9).
48. The annex to the SAR Convention (paragraph 2.1.1) states: “Parties shall, as they are able to do so individually or in co-operation with other States and, as appropriate, with the Organization, participate in the development of search and rescue services to ensure that assistance is rendered to any person in distress at sea.”
49. Additionally, the coastal state must coordinate the SAR response regardless of who the persons in distress are. The annex to the SAR Convention (paragraph 2.1.10) makes this requirement very clear: “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.”
50. A more appropriate course of action than diverting a ship from its next port of call would be to have the ship rendezvous with and transfer SAR survivors to a SAR unit for further transport to a place of safety.
51. IMO Resolution MSC.167(78) provides the priorities for rendering assistance to persons

rescued at sea. Paragraph 3.1 states in part: “When ships assist persons in distress at sea, co-ordination will be needed among all concerned to ensure that all of the following priorities are met in a manner that takes due account of border control, sovereignty and security concerns consistent with international law: 1) **Lifesaving**: All persons in distress at sea should be assisted without delay; 2) **Preservation of the integrity and effectiveness of SAR services**: Prompt assistance provided by ships at sea is an essential element of global SAR services; therefore it must remain a top priority for shipmasters, shipping companies and flag States; and 3) **Relieving masters of obligations after assisting persons**: Flag and coastal States should have effective arrangements in place for timely assistance to shipmasters in relieving them of persons recovered by ships at sea” (emphasis added).

52. The SAR Convention is the means by which parties have agreed to fulfill their duty to render assistance in most circumstances. However, the duty to render assistance continues to exist for every mariner. If it appears that the process agreed to in the SAR Convention will not result in timely and effective assistance in a particular situation, a shipmaster is still under obligation to come to the aid of the person in distress.
53. Annex to the SAR Convention, paragraph 3.1.9.
54. IAMSAR manual, vol. 1, p. xiii.
55. A place of safety very well may be the ship’s next port of call. The goal of the SAR Convention is to minimize the impact on the ship. However, a life raft, even with ample rations, is *not* considered a place of safety. According to the SOLAS Convention, a life raft is considered a lifesaving appliance and does not meet the requirements for or the definition of a place of safety. The SOLAS Convention, chapter III, regulation 3, explains that a lifeboat or life raft is a *survival craft*, “capable of sustaining lives of persons in distress from the time of abandoning the ship.” Persons afloat in a life raft must still be considered “in distress” until appropriate assistance is rendered and the persons are delivered to a place of safety.
56. The Convention on Facilitation of International Maritime Traffic of 1965 mandates that it states that must coordinate the disembarkation of persons rescued at sea. Section 7.C (Emergency Assistance) affirms this important requirement, stating in part, “7.8 Standard. Public authorities shall facilitate the arrival and departure of ships engaged in: . . . the rescue of persons in distress at sea in order to provide a place of safety for such persons.” In addition, standard 7.9 states, “Public authorities shall, to the greatest extent possible, facilitate the entry and clearance of persons, cargo, material and equipment required to deal with situations described in Standard 7.8.” Convention on Facilitation of International Maritime Traffic, 9 April 1965, available at www.ifrc.org/. Entered into force: 5 March 1967; number of contracting states: 115.
57. Or any other vessel that diverts to render assistance to persons in distress.
58. The annex to the SAR Convention (paragraph 1.3.7) defines *search and rescue facility* as “[a]ny mobile resource, including designated search and rescue units, used to conduct search and rescue operations.” By comparison, *search and rescue unit* is defined (paragraph 1.3.8) as “[a] unit composed of trained personnel and provided with equipment suitable for the expeditious conduct of search and rescue operations.” The IAMSAR manual, vol. 1, goes on to state (p. 2-10, paragraph 2.5.3) that SAR units “may be under the direct jurisdiction of the SAR service or other State authorities or may belong to non-Governmental or voluntary organizations.”
59. IMO Resolution MSC.167(78) stipulates (paragraph 6.13) that “[a]n assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made.”
60. IMO Resolution MSC.167(78) further explains (paragraph 6.15) this important aspect of coordinating the disembarkation of any persons rescued at sea: “The Conventions, as amended, indicate that delivery to a

place of safety should take into account the particular circumstances of the case. These circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors.”

61. On 10–11 December 2014, the U.S. Coast Guard participated in the annual Dialogue on Protection Challenges, in Geneva, Switzerland, on the theme “Protection at Sea.” The meeting, sponsored by the UNHCR, focused on mixed migration at sea. During the meeting, an International Chamber of Shipping (ICS) representative made an excellent point: It is the shipmaster who must determine whether to deviate from his intended voyage and transit to the “nearest port of call” or to continue to the ship’s “next port of call.” Coastal states need to understand and support the shipmaster’s decision, which will take into account important on-scene conditions as well as other logistical and risk factors. The “nearest port” may not be a viable option for the shipmaster. The coastal state needs to respect the shipmaster’s decision and coordinate disembarkation of survivors accordingly. “Shipping Industry Calls on Governments to Address Migrants at Sea Crisis,” *International Chamber of Shipping*, www.ics-shipping.org/.
62. In 2015 IMO/UNHCR/ICS jointly published an excellent resource: *Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants (2015 Rescue at Sea Guide)*. In discussing the action required by governments and RCCs in coordinating a merchant ship rendering assistance to persons in distress, it states: “Governments have to coordinate and cooperate to ensure that Masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship’s intended voyage, and have to arrange disembarkation as soon as reasonably practicable.” It goes on to state (p. 12) that “the Government responsible for the SAR region in which the rescued persons were recovered is primarily responsible for providing a place of safety or ensuring that such a place of safety is provided.” Available at www.imo.org/.
63. Judith Kumin, “The Challenge of Mixed Migration by Sea,” *Forced Migration Review*, no. 45 (February 2014), available at www.fmreview.org/, provides a good overview of what is considered *mixed migration by sea*: “Contemporary irregular migration is mostly ‘mixed,’ meaning that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of travel and vessels. They cross land and sea borders without authorisation, frequently with the help of people smugglers. IOM and UNHCR point out that mixed flows can include refugees, asylum seekers and others with specific needs, such as trafficked persons, stateless persons and unaccompanied or separated children, as well as other irregular migrants. The groups are not mutually exclusive, however, as people often have more than one reason for leaving home. Also, the term ‘other irregular migrants’ fails to capture the extent to which mixed flows include people who have left home because they were directly affected or threatened by a humanitarian crisis—including one resulting from climate change—and need some type of protection, even if they do not qualify as refugees.”
64. IMO Secretariat, “Outcome of the Inter-agency High-Level Meeting to Address Unsafe Mixed Migration by Sea: Note by the Secretariat” (LEG 102/INF.3), *Legal Committee 102nd Session* (9 March 2015), pp. 1–2, available at www.imo.org/.
65. Koji Sekimizu, IMO Secretary-General, opening comments (High-Level Meeting to Address Unsafe Mixed Migration by Sea, London, March 2015), p. 1, available at www.imo.org/.
66. Glauca Boyer, “Development Dimensions of Mixed Migration” (presentation, High-Level Meeting to Address Unsafe Mixed Migration by Sea, London, March 2015), p. 10, available at www.imo.org/. Mrs. Boyer added, “The scale and protracted nature of the crisis is challenging the ability of the international community to meet the continuing need for essential, life-saving humanitarian aid.”
67. Sekimizu, opening comments, p. 1.
68. United Nations High Commissioner for Refugees [hereafter UNHCR], *The Sea Route to Europe: The Mediterranean Passage in the*

- Age of Refugees* (1 July 2015), p. 2, available at www.unhcr.org/.
69. “Unsafe Mixed Migration by Sea,” *International Maritime Organization*, www.imo.org/.
 70. *Ibid.*
 71. UNHCR, *The Sea Route to Europe*, p. 2.
 72. IMO Secretariat, “Outcome of the Inter-agency High-Level Meeting,” p. 2.
 73. *Ibid.*
 74. The summary conclusions from an 8–10 November 2011 UNHCR experts meeting in Djibouti, “Refugees and Asylum-Seekers in Distress at Sea—How Best to Respond?,” state (paragraph B.7): “The specific legal framework governing rescue at sea does not apply to interception operations that have no search and rescue component.” Available at www.unhcr.org/.
 75. Considering the level of concern for the safety of persons or craft that may be in danger, the SMC will determine in which emergency phase (uncertainty, alert, or distress) to classify the SAR incident. (IAMSAR manual, vol. 2, paragraph 3.3.1.) In particular, the annex to the SAR Convention (paragraph 1.3.13) defines *distress phase* as “[a] situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.” In many mixed-migration operations the SAR Convention would not apply necessarily because the circumstances of the incident may not meet the criteria for any of the three emergency phases.
 76. It is important to understand the differences among *refugees*, *asylum seekers*, and *economic migrants*. (1) The *2015 Rescue at Sea Guide* provides a good description of the difference between a refugee and an asylum seeker. An asylum seeker is a person who “is seeking international protection and whose claim has not yet been finally decided. Not every asylum-seeker will ultimately be recognized as a refugee. Refugee status is ‘declaratory’—that is, determining refugee status does not make a person a refugee, but rather recognizes that a person is a refugee.” The guide goes on to state that “[r]escued persons who do not meet the criteria of the 1951 Refugee Convention definition of a ‘refugee,’ but who fear torture or other serious human rights abuses or who are fleeing armed conflict may also be protected from return to a particular place (‘refoulement’) by other international or regional human rights or refugee law instruments.” (2) There is also a difference between refugees and economic migrants. In its fiftieth-anniversary issue, “The Wall behind Which Refugees Can Shelter,” of its *Refugees* publication the UNHCR states: “An economic migrant normally leaves a country voluntarily to seek a better life. Should he or she elect to return home they would continue to receive the protection of their government. Refugees flee because of the threat of persecution and cannot return safely to their homes in the circumstances then prevailing.” “Most Frequently Asked Questions about the *Refugee Convention*,” *Refugees*, no. 123 (2001), p. 16, available at www.unhcr.org/.
 77. The Refugee Convention, article 1A(2), defines *refugee* as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.” Available at www.unhcr.org/. Convention entered into force: 22 April 1954; number of parties: 145.
 78. Annex to the SAR Convention, paragraph 3.1.9.
 79. Patricia Mallia, “The MV *Salamis* and the State of Disembarkation at International Law: The Undefinable Goal,” *American Society of International Law Insights* 18, no. 11 (15 May 2014), www.asil.org/. Ms. Mallia adds that “the SAR Convention only lays down an obligation of coordination and cooperation and does not necessarily entail an explicit duty to allow disembarkation in a particular port.”
 80. Kathleen Newland, “Troubled Waters: Rescue of Asylum Seekers and Refugees at Sea,” *Migration Information Source* (1 January 2003), www.migrationpolicy.org/. This was also affirmed in the report (paragraph C.10) from the previously mentioned UNHCR experts meeting in Djibouti in 2011: “Fundamentally, a core challenge in any particular rescue at sea operation involving asylum-seekers and refugees is often the timely identification of a place of safety for

disembarkation, as well as necessary follow-up, including reception arrangements, access to appropriate processes and procedures, and outcomes. If a shipmaster is likely to face delay in disembarking rescued people, he/she may be less ready to come to the assistance of those in distress at sea. Addressing these challenges and developing predictable responses requires strengthened cooperation and coordination among all States and other stakeholders implicated in rescue at sea operations.”

81. The IAMSAR manual, vol. 2, p. xviii, defines *mass rescue operation* (MRO) as “[s]earch and rescue services characterized by the need for immediate response to large numbers of persons in distress, such that the capabilities normally available to search and rescue authorities are inadequate.” The question is whether a mixed-migration-at-sea incident would actually include “persons in distress”; and, if there are large numbers of persons involved, would the incident be classified as an MRO? In many instances, these incidents could be considered illegal trafficking in persons; it would seem that the United Nations Convention on Transnational Organized Crime (TOC Convention)—in particular annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children—would be more applicable than the SAR Convention. The TOC Convention and protocols are available at www.unodc.org/. Entered into force: 29 September 2003; number of parties: 185. If mixed-migration-by-sea incidents do not primarily constitute the rescue of persons in distress, and are not adequately addressed in the TOC Convention, the international community may want to consider developing an international instrument that would serve as the basis for the coordination and conduct of these maritime operations.
82. The facts portrayed in this vignette are known by the author, who attests to their accuracy. The vignette is presented for consideration of the legal and policy issues involved.
83. In defining *territorial sea*, UNCLOS, article 2, states: “1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.” Article 3 continues, “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”
84. The *Commander’s Handbook* (paragraph 2.4.1) defines *military aircraft* as “all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline.”
85. For example, AE is envisioned in UNCLOS. In describing innocent passage, article 18 provides for the assistance of persons in distress: “2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by **force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress**” (emphasis in bold added).
86. At the 1991 convening of IMO’s Sub-Committee on Lifesaving, Search and Rescue, the United States submitted to the subcommittee a note, “SAR on or over Foreign Territorial Seas” (LSR 22/8/4, 19 January 1991), which argued (paragraph 3) the U.S. position that “[t]he obligation to rescue persons in distress regardless of nationality is based on the principle and time-honored tradition that those at sea will, wherever they can without undue risk, assist others in danger or distress. . . . Thus, coastal state’s right to control activities in its territorial seas is balanced with the requirement to rescue those in distress from perils of the sea.” This U.S. paper was also discussed at the sixty-fifth session of IMO’s Legal Committee (1991) and duly recorded in its “Report of the Legal Committee on the Work of Its Sixty-Fifth Session” (LEG 65/8, 11 October 1991). While several delegations shared the U.S. position, the committee agreed “that there existed no right of assistance entry in public international law **at present**; this principle is neither embodied in any convention, nor established by customary law. Many delegations emphasized in this connection that it was important not to upset the delicate balance between the duty

to render assistance, on the one hand, and the sovereign right of coastal States to control entry into or operation in their waters on the other” (emphasis added). Over the two decades since the Legal Committee reached this conclusion, the concept of AE has continued to become established as a standard principle enshrined through international conventions and customary international law.

87. This article uses the term “AE rescue operation,” not “SAR operation.” When a ship or aircraft enters a coastal state’s territorial sea to render assistance to persons in distress, the purpose is to *rescue*, not *search* for, survivors. Scenario D addresses this distinction further.
88. *United States Coast Guard Addendum to the United States Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual*, COMDTINST M16130.2F (January 2013) [hereafter *USCG Addendum*], p. 1-45, paragraphs 1.8.1.4 and 1.8.1.5, available at www.uscg.mil/. See also the Chairman of the Joint Chiefs of Staff instruction *Guidance for the Exercise of Right-of-Assistance Entry*, CJCSI 2410.01D (3 September 2013) [hereafter *CJCSI*], p. 2, available at www.dtic.mil/. Note: the U.S. Coast Guard uses the term “assistance entry” (AE), while the U.S. Department of Defense (DoD) uses the term “right of assistance entry” (RAE) when discussing the conduct of rescue operations in a coastal state’s territorial sea.
89. The SOLAS Convention does not apply to warships. UNCLOS and the Salvage Convention do not limit what types of vessels can conduct an AE rescue operation in a coastal state’s territorial sea. However, the emphasis of this article is on AE rescue operations conducted by government ships (including warships).
90. UNCLOS, article 98(1)(a), specifically states that the shipmaster has a duty to “render assistance to any person found at sea in danger of being lost” (emphasis added). The SOLAS Convention, chapter V, regulation 33, requires “[t]he master of a ship at sea, which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, . . . to proceed with all speed to their assistance” (emphasis added). Similarly, the Salvage Convention, article 10, paragraph 1, requires “[e]very master . . . , so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea” (emphasis added). All three conventions make no geographical distinction concerning the obligation of the shipmaster to render assistance to persons in distress. The duty to render assistance should be considered to apply on the high seas and territorial sea of any coastal state.
91. For example, UNCLOS, article 2, states: “The sovereignty over the territorial sea is exercised **subject to this Convention and other rules of international law**” (emphasis added).
92. *USCG Addendum*, p. 1-46, paragraph 1.8.2.4. As will be discussed later in this section, U.S. Coast Guard and DoD SAR policy allows for both aircraft and surface units to conduct AE rescue operations.
93. The SAR Convention was never intended to limit or restrict any available warship or other ship in the conduct of immediate lifesaving assistance to persons in distress, even in a coastal state’s territorial sea. The annex to the SAR Convention (paragraph 4.3) states: “Any search and rescue unit receiving information of a distress incident shall initially take immediate action if in the position to assist and shall, in any case without delay, notify the rescue co-ordination centre or rescue sub-centre in whose area the incident has occurred.”
94. CJCSI, paragraph 4.d.
95. It should be emphasized that UNCLOS and the SOLAS and Salvage Conventions were never intended to restrict or hamper a ship’s use of its available SAR resources (e.g., embarked aircraft or small boat) that could be used in a lifesaving operation.
96. The use of U.S. military aircraft in the conduct of RAE operations is also contemplated. CJCSI, paragraph 6.c(2), states, “An operational commander may render immediate rescue assistance by deploying a U.S. military aircraft (including aircraft embarked aboard military ships conducting RAE operations) into the national airspace within U.S.-recognized foreign territorial seas or archipelagic waters when all four of the following conditions are met:
- “(a) A person, ship, or aircraft within the foreign territorial sea or archipelagic waters is in danger or distress from perils of the sea and requires immediate rescue assistance;

- “(b) The location is reasonably well known;
 “(c) The U.S. military aircraft is able to render timely and effective assistance; and,
 “(d) Any delay in rendering assistance could be life-threatening.”

97. For example, the *USCG Addendum*, paragraph 1.8.2.5, states that “Coast Guard rescue aircraft may conduct an AE rescue operation in a coastal State’s territorial sea, when in the judgment of the aircraft commander: (a) There is reasonable certainty (based on the best available information regardless of source) that a person is in distress; (b) The distress location is reasonably well known; and (c) The SAR unit (or SAR facility) is in position to render timely and effective assistance.”
98. Article 18(2) of UNCLOS concerns *ships* in the conduct of innocent passage in a coastal state’s territorial sea. See also note 83.
99. The annex to the SAR Convention promotes using all available means for rendering assistance to persons in distress. For example, in the conduct of search operations, paragraph 3.1.3 states: “Unless otherwise agreed between the States concerned, the authorities of a Party which wishes its rescue units to enter into or over the territorial sea or territory of another Party solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties, shall transmit a request, giving full details of the projected mission and the need for it, to the rescue co-ordination centre of that other Party, or to such other authority as has been designated by that Party” (emphasis added). While paragraph 3.1.3 describes the requirement for aircraft entering into a coastal state’s territorial sea for the purpose of *searching*, the aircraft would not be required to seek permission for the conduct of an AE rescue operation. The criteria for the conduct of an AE rescue operation by an aircraft should be met prior to rendering any assistance in a coastal state’s territorial sea (see notes 96 and 97).
100. The *USCG Addendum* does provide a note of caution on the use of aircraft and ships in the conduct of an AE rescue operation. Paragraph 1.8.1.6 states: “Customary practice for aircraft conducting AE rescue operations in a coastal State’s territorial sea is not as fully developed as for vessels (e.g., nations may recognize the right to conduct AE rescue operations more readily for vessels than for aircraft). In addition, the conduct of AE rescue operations by nonmilitary vessels is apt to cause less coastal State concern than entry by military vessels. Therefore, safety of the rescue unit must be considered in light of the views of the coastal State whose territorial sea or overlying airspace is being entered.”
101. The Salvage Convention, article 1(a), defines *salvage* as “any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.”
102. It is at this point where U.S. Coast Guard and DoD AE policy set forth in CJCSI 2410.01D differ. The *USCG Addendum* states (paragraph 1.8.2.6[b]) that Coast Guard rescue assets shall not conduct an AE rescue operation “[t]o rescue (or salvage) property (other than in limited cases, such as for the retrieval of medical supplies, or other property that may assist in the conduct of the lifesaving operation).” In contrast, CJCSI 2410.01D allows for the rescue of property: “RAE applies only to rescues in which the location of the persons or property in danger or distress is reasonably well known” (emphasis added). As mentioned previously (note 88), another difference is that the Coast Guard uses the term “assistance entry,” while DoD uses “right of assistance entry.” The Coast Guard prefers *AE*, believing the term advances the service’s objectives in international engagements. Many nations view AE solely as a duty, not a right, even a limited one. While the distinction between a “duty” and “right” has legal significance, the practical distinctions are minimal, since international support exists for entry into a coastal state’s territorial sea to render assistance to those in distress.
103. The annex to the SAR Convention (paragraph 3.1.2) states: “Unless otherwise agreed between the States concerned, a Party should authorize . . . immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of **searching** for the position of maritime casualties and rescuing the survivors of such casualties” (emphasis added). As previously noted (note 99), the annex continues (paragraph 3.1.3): “Unless otherwise agreed between the States

- concerned, the authorities of a Party which wishes its rescue units to enter into or over the territorial sea or territory of another Party solely for the purpose of **searching** for the position of maritime casualties and rescuing survivors of such casualties, shall transmit a request, giving full details of the projected mission and the need for it, to the rescue co-ordination centre of that other Party, or to such authority as has been designated by that Party” (emphasis added). In addition to Coast Guard policy not authorizing the conduct of an AE rescue operation to recover property or to search for persons in distress, the *USCG Addendum* also states (paragraph 1.8.2.6) that an AE rescue operation cannot be conducted (1) to assist persons not in distress, or (2) within a coastal state’s internal waters or over its landmass.
104. The SOLAS Convention, chapter V, regulation 33, requires the master of a ship at sea that is in a position to render assistance to persons in distress to provide that assistance. Stating that the *master* is required to render assistance demonstrates that it is the master who determines whether a person is in distress.
105. The *Commander’s Handbook*, paragraph 2.5.3.1, describes *international straits* as follows: “Straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone are subject to the legal regime of transit passage. Transit passage exists throughout the entire strait (shoreline-to-shoreline) and not just the area overlapped by the territorial sea of the coastal nation(s). Under international law, the ships and aircraft of all nations, including warships, auxiliary vessels, and military aircraft, enjoy the right of unimpeded transit passage through such straits and their approaches.” *Transit passage* is defined as “the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage.” See also UNCLOS, part III (Straits Used for International Navigation).
106. Myron H. Nordquist, series ed., Satya N. Nandan and Shabtai Rosenne, general eds., *United Nations Convention on the Law of the Sea: A Commentary*, vol. 3, *Articles 86 to 132* (The Hague, Neth.: Martinus Nijhoff, 1995), p. 177.
107. While the annex to the SAR Convention does not explicitly state that law-enforcement actions are not coordinated and conducted within the framework of the global SAR system, the IAMSAR manual, vol. 2, does provide guidance for assistance in “other than SAR operations” (see note 112). Another excellent guide for determining what generally would be considered a “SAR case” is paragraph 4.c of CJCSI 2410.01D, which states that RAE is conducted by U.S. military ships in support of “the time-honored mariners’ duty under customary international law of rendering rapid and effective assistance to persons, ships, or aircraft in imminent **peril at sea** without regard to nationality or location” (emphasis added). The CJCSI goes on (paragraph 5.c) to define *perils of the sea* as “accidents and dangers peculiar to maritime activities including storms, waves, and wind; grounding; fire, smoke, and noxious fumes; flooding, sinking, and capsizing; loss of propulsion or steering; and other hazards of the sea.” This definition provides not only a good understanding of when U.S. military ships should conduct AE rescue operations, but also a broad characterization for when the SAR Convention would apply and when activation of the global SAR system is warranted.
108. The annex to the SAR Convention does provide (paragraph 1.3.13) a definition of *distress phase* (see note 75). The coastal-state SMC makes the determination of whether this definition applies considering the circumstance of a particular SAR operation. If a person declares that he is in distress, the SMC normally would activate the coastal state’s distress phase processes and procedures to provide the necessary assistance.
109. George K. Walker, *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (Boston: Martinus Nijhoff, 1995), p. 169, provides a good overview of what should be considered a distress: “‘Distress,’ as used in UNCLOS Articles 18, 39, 98 and 109, and as incorporated by reference in UNCLOS Articles 45 and 54, means an event of grave necessity, such as severe weather or mechanical failure in a ship or aircraft; or a human-caused event, such as a collision with another

- ship or aircraft. The necessity must be urgent and proceed from such a state of things as may be supposed to produce in the mind of a skillful mariner or aircraft commander a well-grounded apprehension of the loss of the vessel or aircraft and its cargo, or for the safety or lives of its crew or its passengers.”
110. Wu Tien Li-Shou, plaintiff-appellant, v. United States of America, defendant-appellee, on appeal from the U.S. District Court for the District of Maryland, brief for the United States of America, appellee, No. 14-1206 (4th Cir., 23 January 2015).
111. *Ibid.*, p. 38.
112. The IAMSAR manual, vol. 2, also recognizes this important distinction. In paragraph 7.4.2 it states: “In situations such as piracy or armed robbery against ships where the ship or crew is in grave and imminent danger, the master may authorize the broadcasting of a distress message, preceded by the appropriate distress alerts (MAYDAY, DSC, etc.), using all available radiocommunications systems. Also, ships subject to the SOLAS Convention are required to carry equipment called the Ship Security Alert System (SSAS) for sending covert alerts to shore for vessel security incidents involving acts of violence against ships (i.e., piracy, armed robbery against ships or any other security incident directed against a ship). . . . National procedures can vary but the role of the RCC, if involved, is usually to receive the SSAS alert and inform the security forces authority that will be in charge of the response. Actions taken by the RCC upon receiving a covert SSAS alert include: . . . **place SAR resources on standby, if appropriate, since it may become a SAR case**” (emphasis added). This section in vol. 2 is placed in chapter 7, which is titled “Emergency Assistance Other than Search and Rescue,” emphasizing that a law-enforcement action should not initially be considered a SAR operation as envisioned in the SAR Convention; however, a SAR case may arise out of a law-enforcement action.
113. The facts portrayed in this vignette are known by the author, who attests to their accuracy. The vignette is presented for consideration of the legal and policy issues involved.
114. This discussion is based on SAR cases that would be coordinated and conducted under the SAR Convention and would not normally apply to a mixed-migration-at-sea incident, which might or might not constitute a SAR case. The unique nature of mixed-migration-at-sea operations would require development of unique processes and procedures to meet the requirements of those types of operations.
115. The UN Convention on Conditions for Registration of Ships (not in force), article 2, defines *flag State* as “a State whose flag a ship flies and is entitled to fly.” Article 1 indicates that a flag state must “exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters.” Additionally, UNCLOS article 91 states: “1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
- “2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.” Walker, *Definitions for the Law of the Sea*, pp. 193–95, provides a detailed explanation of the term *flag State* as used in UNCLOS.
116. Thames Shipyard and Repair Company, plaintiff in cross-claim, appellant, v. United States, defendant, appellee; Northern Voyager Limited Partnership; OneBeacon America Insurance Company f/k/a Commercial Union Insurance Company, plaintiffs, appellants, v. United States, defendant, appellee, 350 F.3d 247 (1st Cir., 26 November 2003).
117. In particular, both the district court and the court of appeals held that the discretionary function exception to liability under 46 USC § 742 (the Suits in Admiralty Act, which allows for a limited waiver of the U.S. federal government’s sovereign immunity from civil lawsuits) and 46 USC § 781 (the Public Vessels Act, which allows for legal action against the United States for damages caused by a public vessel) protected from further judicial review the Coast Guard’s decision to evacuate the master forcibly from *Northern Voyager*.
118. The court of appeals brief included the following comment: “The facts of this case lead

us to conclude that the Coast Guard reacted rationally, and that human life could reasonably have been deemed to be at serious risk had Captain Haggerty and his crew not been removed. The *Northern Voyager*, without steering, was rolling in six to eight foot ocean seas. Water was pouring in. She was developing an increasing port-side list. The fishing boat's only access port was on the starboard side. The Coast Guardsmen on the vessel reported progressive flooding, raising the possibility that the ship would capsize, trapping all on board. While arguments can perhaps be made in light of 20-20 hindsight tending to minimize the potential dangers had the master and his fellows been allowed to remain, we see no basis to doubt the objective reasonableness of the Coast Guard's on the scene decision to remove them." However, Judge Torruella on the Court of Appeals concurred in part in and dissented in part from the majority's recognition of the Coast Guard's authority to compel the master forcibly to abandon his ship, thus preventing him from continuing efforts to save it. He wrote: "With due respect, there is no authority in law, practice, or maritime tradition that validates such action by the Coast Guard, nor am I aware of the government's having claimed such extraordinary powers before the inception of the case." He concluded that the discretionary function exception did not shield the United States from liability, because a decision cannot be shielded from liability if the decision maker is acting without actual authority. In the judge's view, "Such a momentous shift in policy and such an extraordinary grant of authority should not be undertaken absent a clear legislative mandate expressed both in the text of the statute and in its legislative

history." For those interested in this issue, this case is well worth reading.

119. Coast Guard SAR policy states that a voluntary evacuation of a person should be considered the preferred alternative to removing the person forcibly from his vessel. The *USCG Addendum* (paragraph 4.2.2) states: "Although the Coast Guard does have the authority to compel a mariner to abandon their vessel in a life threatening situation, it is always preferable that a mariner voluntarily evacuate when necessary. Coast Guard personnel should endeavor to use all means, including powers of persuasion, to encourage a mariner to evacuate, when appropriate. Forcible and/or compelled evacuations should only be conducted when a life-threatening emergency exists, and there is an immediate need for assistance or aid." Additionally, the decision to evacuate a person forcibly from his vessel to save his life should, if possible, be made in consultation with the SMC. The SMC, if time permits, should consult legal counsel. However, if time is of the essence and the situation is life threatening, then SAR policy should allow the SAR unit on scene to make the decision to remove a person forcibly from his vessel to save his life. Policies, procedures, and training must be developed and implemented to ensure that SAR units, SMCs, legal counsel, and the SAR organization chain of command can effectively manage this type of scenario.
120. It should also be noted that from a U.S. legal perspective, a person who refuses to abandon his vessel at the request of the U.S. Coast Guard to save his own life has committed no crime, which makes the contemplated use of force even more difficult.

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