



Fire and forget? Search and rescue obligations during an armed conflict at sea

by LCDR Simon Lindsay



Tac Talks

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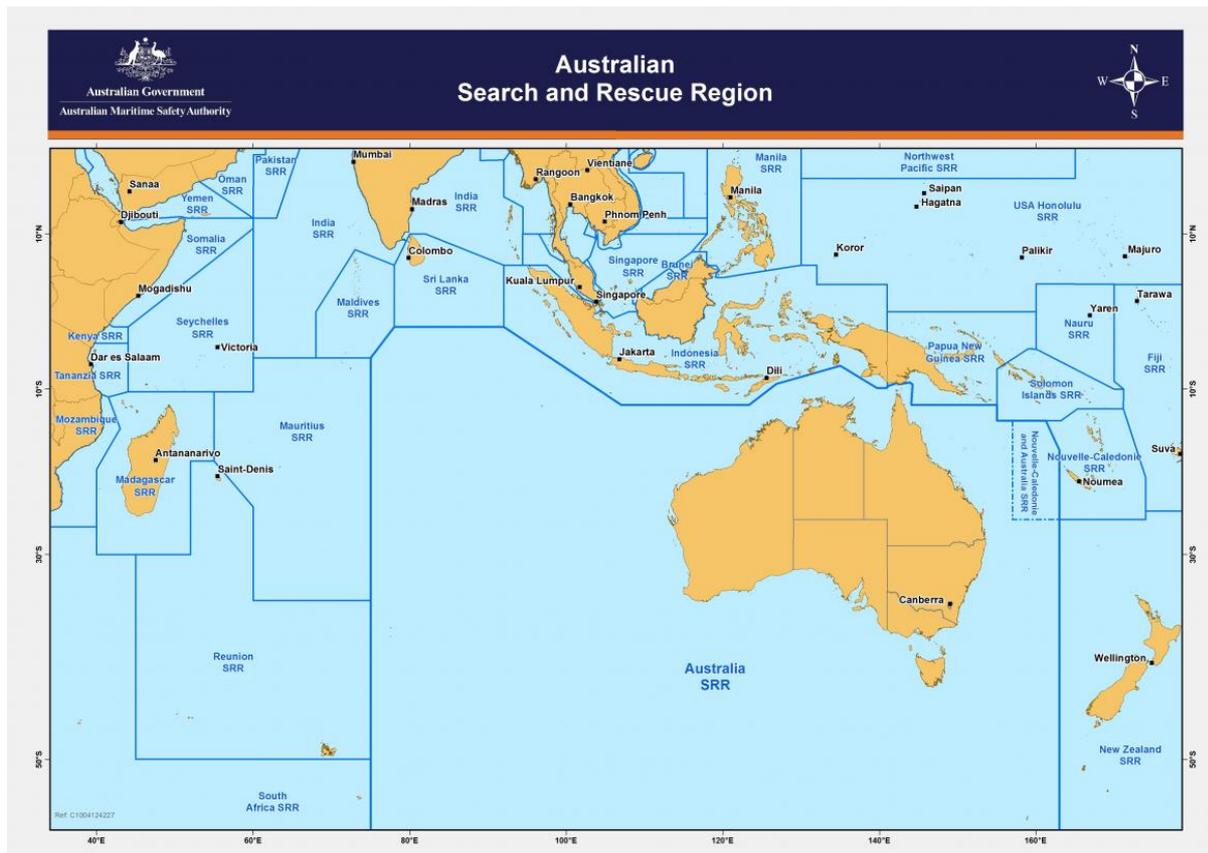


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Every sailor retains from the days of peace the view that rescue is the noblest and most honourable act he can perform - Grand Admiral Karl Dönitz

Introduction

Australia is the sixth-largest country in the world on a geographical basis, boasting a coastline of approximately 60,000 kilometres, and with a maritime jurisdictional area of more than 14 million square kilometres. Our search and rescue region is even larger, covering large areas of the Indian, Pacific and Southern Oceans as well as the Australian Antarctic territories. It borders the search and rescue regions of 10 other countries, encompassing an area of about 52.8 million square kilometres, or about one-tenth of the earth's surface.



Map showing Australia's search and rescue region, including the bordering search and rescue regions. (Image from [Australian Maritime Safety Authority website](http://www.amsa.gov.au))

As mariners, we are intimately familiar with our obligations to assist those in distress at sea. It is beyond doubt that the duty to rescue and save lives at sea is one of the oldest and best-established principles of customary international law of the sea. It is a duty that dates back centuries and has been further enshrined in numerous international treaties, including the *United Nations Convention on the Law of the Sea*, *International Convention for the Safety of Life at Sea*, and *International Convention on Maritime Search and Rescue*.

The ADF has a long and proud history of conducting search and rescue operations in support of the civil community, and we are regularly called on to assist, with notable cases including HMAS *Newcastle's* rescue of Tony Bullimore in 1997, Tiger 75's rescue of two sailors in the tragic 1998 Sydney to Hobart Yacht Race, and the search for the missing Malaysia Airlines flight MH370 in 2014.

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Tony Bullimore is helped by Royal Australian Navy rescuers 500 miles from Antarctica, 1997. (Image from [Telegraph UK](#))

Yet as familiar as we are with our routine peacetime obligations for maritime search and rescue, how many of us understand our obligations during periods of armed conflict at sea? This article will outline Australia's search and rescue obligations following engagements at sea in an armed conflict and discuss the relevant factors and considerations for command in assessing how to satisfy these obligations.

Summary of the obligation

Following an engagement at sea a party to an armed conflict has an obligation to, without delay, take all possible measures to search for and collect the shipwrecked, wounded or sick, or deceased, without discriminating between friendly and enemy personnel. This obligation applies to Australia.

This obligation should be interpreted as what would be expected of a reasonable commander in the given circumstances. What is considered 'possible' will be context-specific and ultimately based on a good-faith assessment.

If an individual commander assesses, on a good faith basis, that their ship or force cannot assist in the circumstances, then they are obliged to pass as much information to their higher headquarters to allow broader compliance with Australia's obligations. Commanders should also be prepared to pass such information to nearby coastal authorities, enemy or neutral vessels or humanitarian organisations who may be better placed to conduct search and rescue operations.

The relevant law

It is generally considered that international treaties continue to apply during peacetime and times of armed conflict to the extent that they are not inconsistent. As such, the customary and statutory duty to save life at sea will also apply. The obligation is clearly stated in an International Humanitarian Law (IHL) treaty, which is considered to be the 'specialist law' that applies during times of armed conflict and is applied by the ADF during its operations in armed conflict.

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In the naval context, any clash between the naval forces of two or more States may be said to be an armed conflict. It makes no difference how long the conflict lasts, or the volume of casualties. The parties to an armed conflict at sea are bound by the protective rules and principles of IHL from the moment that armed force is used.

The specific provision containing this obligation is found in Article 18 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II), which states that

'[a]fter each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled'.

This obligation is one of the most important provisions in IHL concerning armed conflict at sea and is key to achieving one of the main objectives of GC II, namely the protection of shipwrecked, wounded and sick.

After each engagement - when does the obligation apply?

In the context of an armed conflict, the term 'engagement' should be given its ordinary meaning of a battle between armed forces, that is, one that involves the use of means and methods of warfare between military units of Parties to the conflict. An 'engagement' in maritime warfare is not limited to a naval battle, but also includes any use of force from air or land that results in casualties or shipwrecked persons at sea. Unlike armed conflict on land, there is no obligation to undertake search and rescue activities during an engagement; the duty arises only once the engagement has ended. However, the length of the engagement, and therefore the moment the obligation arises, will be context-specific.

A pause in the fighting may be sufficient to conclude that a particular engagement has ended. It will ordinarily be up to the individual commander involved in the engagement to make a good-faith assessment of when it becomes possible to comply with the obligations, although a superior commander may direct that search and rescue attempts be made by specific task elements or units. It is clear though that the obligation arises on an 'engagement by engagement' basis, and the fact that further engagements may be planned or are foreseeable does not negate the obligation arising after the conclusion of each specific engagement. Instead, these may be factors that go to what actions are 'possible' which is discussed further below.

The geographic scope of the obligation arises in the location of the shipwrecked, sick or wounded that result from the engagement. Maritime geographic zones, areas of national search and rescue responsibility, and exclusion zones do not affect the existence of the obligation but may be relevant to command's considerations of what measures are 'possible' to comply with the obligation.

Parties to the conflict - on whom is the obligation imposed?

The obligations apply to the '*Parties to the conflict*', which are the States who are involved in, or 'parties to', the armed conflict. 'States' in this case refers to countries. For us, the obligation falls on Australia as a whole, represented by our federal Government. However, while this obligation is on Australia as a whole, it filters down through higher headquarters to individual commanders at the operational level, in and near the zone of combat, depending on the circumstances and location of the engagement.

It should be noted that the obligation applies to all parties to a conflict, not just the party who caused the situation in which there are shipwrecked, wounded or sick.

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During the armed conflict at sea, a commander's vessel may be the only entity sufficiently close to the shipwrecked, wounded or sick persons to search for and collect them. Equally, in the current age of long-range weapons, the target of the attack may be a significant distance from the unit which conducted the engagement. In each case, the obligation remains. If it is not possible for a given commander to attempt to search and rescue then the matter must be passed up the chain of command.

Shall - must we comply with the obligation?

The operative word 'shall' makes compliance mandatory. It is the scope of the compliance in the circumstances that will vary as determined by command.

Without delay - how quickly must we comply with the obligation?

The obligation to act 'without delay' should be given its ordinary meaning and interpreted strictly, however, the action required will be limited to what is within the possibilities of the parties. If the security situation means that a commander cannot comply personally with the obligation ('without delay') without exposing their vessel to attack, then it is reasonable to expect the commander to wait until the threat has subsided before assisting directly. In such a case, a commander is expected to inform their chain of command who may be able to provide or arrange other assistance 'without delay'.

All possible measures - what is the scope of the obligation?

The obligation on parties is limited to measures that are 'possible'. 'Possible' is given its ordinary meaning; that which is capable of existing, happening, or being achieved, and may be subject to practical and operational limitations. What is considered 'possible' is inherently context-specific, therefore the obligation should be interpreted as what would be expected of a reasonable commander, acting in good faith, based on the given circumstances and reasonably available information.

When considering what measures are possible, it is appropriate within an armed conflict to emphasise security considerations. It may be the case that measures become impossible due to the prevailing security situation and the necessity to ensure the safety and security of the rescuing vessel. However, if a Party to the armed conflict can locate and rescue survivors without major risk to their personnel or vessels, then it would be required to do so.

The mere fact that there may be further combat activities later or nearby does not necessarily render it 'impossible' for a commander to comply with the obligation. Only some missions are so imperative or necessary that they cannot be postponed or cancelled to search for or rescue shipwrecked, wounded or sick persons.

If a commander of a vessel or indeed a task group reasonably considers, in good faith, that they cannot comply with the obligation, this does not absolve higher headquarters, nor the State as a whole, from compliance with the obligation. In such a case, the commander is obliged to pass as much information to their higher headquarters to assess what possible measures can, and therefore must, be taken. This information should include the location of the attacked vessel or aircraft and measures taken to date if any. This will enable higher headquarters to arrange for appropriate measures in response. This may include disclosing the information to the State's land-based authorities or to other entities, including enemy and neutral vessels or impartial humanitarian organisations who may be capable of carrying out search and rescue operations.

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Applying the obligation to submarines

The obligation owed by submarines in determining the scope of the obligation for individual commanders is an area of contention. Although submarines are bound by the same obligations as surface vessels, compliance with the obligations can create significant practical difficulties for submarines as a consequence of their limited passenger-carrying capabilities and their desire to remain submerged. The process of determining what measures will be 'possible' will be the same, however, the additional requirement for a submarine not to expose itself to potential attack by revealing its position following an attack is a valid consideration that can be taken into account. Practically, in all likelihood, a submarine's actions would be limited to a notification to higher headquarters where possible. Even so, these actions should only be undertaken when 'possible' based on the prevailing threat and security situation.



German submarines U-156 (foreground) and U-507 pick up survivors from British troopship RMS Laconia on 15 September 1942, three days after an attack during WWII. (Image from [Wikipedia](#))

Shipwrecked, wounded and sick - to whom is the obligation owed?

The legal status of a person who is shipwrecked, wounded or sick is based on two cumulative criteria—first, their particular situation or medical condition, and second, their conduct, as it is a legal requirement that they abstain from any act of hostility to qualify for protection as a shipwrecked, wounded or sick person. There is, however, no distinction between civilians and combatants, as long as they meet the criteria of either shipwrecked, wounded or sick.

Shipwrecked

The definition of 'shipwrecked' as used in GC II is broader than the ordinary meaning. 'Shipwrecked', in this context, means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. It should be interpreted broadly. It includes forced landings at sea by or from aircraft, persons who find themselves involuntarily in the water or on-board a burning ship, on life rafts or lifeboats, persons on a fully disabled ship or a ship that has run aground, or persons stranded on a coast. A person need not be in an acute life- or health-threatening situation to be 'shipwrecked'.

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Wounded and sick

From a legal perspective, there is no difference between the concepts of 'wounded' and 'sick'. The words should be interpreted broadly, with the decisive criterion being simply any medical condition requiring care, no matter the severity. It is this need, and the corresponding vulnerability, that this obligation seeks to protect. For the avoidance of doubt, the threshold for 'wounded and sick' does *not* require an incapacitating medical condition and should *not* be equated with the test for when a person is *hors de combat*. As with 'shipwrecked' persons, the additional cumulative criteria of refraining from hostility also applies.

The requirement to refrain from any act of hostility

The requirement for a person who is shipwrecked, wounded or sick to refrain from any act of hostility is essential for that person to qualify for the relevant protection. The basis for this is that acts of hostility are incompatible with the protection that each status offers. For the avoidance of doubt, regardless of the situation in which they find themselves, no matter how perilous their situation at sea or how severe their medical condition, if they continue to engage in hostilities then they will *not* be considered to be shipwrecked, wounded or sick, and therefore will not be owed any obligation.

To protect them against pillage and ill-treatment, to ensure their adequate care - how should survivors be treated?

Regardless of the nationality or status of the survivor, once on-board they should be treated humanely, with respect and protected. The obligation to protect them against pillage and ill-treatment should be interpreted broadly, and appropriation of their property must only occur with consent (unless for reasons of safety or security). Commanders should also exercise sensitivity to the differing needs and capacities of men, women and minors in their care. The obligation to ensure 'adequate care' includes first aid and medical care, as well as provision of other similarly essential forms of non-medical care, such as food, drinking water, clothing, blankets and hygiene and sanitation items.

If adequate care cannot be provided on-board, then persons should be transported as rapidly as possible to a location where they can be cared for securely and under better conditions. Once collected, enemy personnel become prisoners of war, with all the corresponding rights and obligations owed to them. While the 'captor' may determine whether to hold rescued personnel onboard or convey them to a port, this determination should be made based on what is expedient in the circumstances. Factors to consider include operational reasons that may not allow the ship to divert from its current course or tasking, or were holding a person on-board is temporarily safer than the alternative. Any decision to hold persons on board should be a temporary measure only and limited to that which is necessary. Ultimately, they must be transferred ashore, as prisoners of war may only be interred on land.

To search for the dead and prevent their being despoiled - to whom is the obligation owed?

While the focus of this article is the obligation to search for and collect the shipwrecked, wounded and sick, Article 18 of GC II also contains a distinct obligation to 'search for the dead and prevent their being despoiled'. The obligation logically also includes their collection. The purpose of this obligation is to ensure respect for the dignity of the dead and prevent people from going 'missing' so that families of the deceased can know with certainty the fate of their relatives. The consideration of whether such actions are 'possible' will need to be determined by the commander in the same way as the obligation to search for and collect shipwrecked, wounded and sick persons. In the event there are limited resources or assets available, a commander should prioritise saving survivors.

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If a commander determines to bury the dead at sea, this should be preceded by a careful examination (a medical examination if possible) of the body to confirm the death, establish identity and allow for the compilation of a report. If double identity discs are used, one half should remain on the body.

While the remainder of this article will continue to focus on the obligation to survivors, commanders should remain cognisant of the obligation to the dead, and be prepared to consider relevant factors for their search and collection, including mortuary facilities on-board.

When is the obligation discharged?

It depends. This will be a factual question depending on the surrounding circumstances. If a commander can reasonably determine that there are no survivors following an engagement, then this determination may be enough to discharge the obligation (subject of course to the obligation to search for the dead). If there are survivors, then a commander's obligation will continue until they either rescue the survivors themselves or they have exhausted all 'possible' actions within their control. This includes passing the information to a higher headquarters if it is not possible for them to assist directly.

At a minimum, commanders should expect to conduct an initial search to inform an assessment of whether there are any survivors, and then react accordingly depending on the circumstances. While conducting a battle damage assessment is a standard part of our TTPs following an engagement, the initial search to determine whether there are any shipwrecked, wounded or sick persons should also be a deliberate response once they assess that the engagement has concluded.

Relevant factors and considerations when discharging the obligation

There will be several relevant factors and considerations that a commander will need to take into account when determining what actions are 'possible' to discharge their obligation. These might include:

- the location of the engagement
- the location of own and allied forces
- the enemy's disposition
- local and task group force protection
- security considerations and the prevailing threat to own forces
- the proximity of other engagements
- the commander's mission
- the vessel's operating capacity and ability to provide appropriate care and protection for survivors
- the proximity of the engagement to other forces, agencies or vessels that may be able to assist, and
- environmental factors, such as water temperature, daylight, weather conditions.

This list is by no means exhaustive, and different factors may apply differently depending on the individual circumstances. For example, one vessel may be able to take survivors on-board, while another may only be able to provide lift rafts, food and water and then 'shepherd' the lift rafts until further assistance arrives.

Conclusion

When faced with an occasion in which this obligation arises, it is neither possible nor desirable to attempt to codify what actions individual commanders should take in specific circumstances. To resolve the ethical and legal dilemmas that are posed by the obligation to rescue and the

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contrasting duty to safeguard the integrity of their ship will draw upon a commander's skill, experience and judgment. It is up to the commander to assess, in good faith, their mission, the surrounding circumstances, the assets available, and the safety of their ship and shipmates to determine whether they can personally discharge the obligation to search and rescue or whether to refer it to higher headquarters, a third party vessel or authority, or even the enemy themselves, to fully comply with this mandatory and important humanitarian obligation.

Recommendations

1. The requirement to plan for and conduct a search and possible subsequent rescue of shipwrecked, wounded or sick following an engagement during an armed conflict at sea should be integrated into our TTPs to ensure compliance with this obligation becomes routine.
2. Further naval exercises, such as FCP 21, should include scenarios where ships are required to search for and then recover shipwrecked, wounded, sick, or deceased personnel to test internal TTPs and demonstrate our ability to practically comply with this obligation.

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