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THE TAMPA INCIDENT: IMO PERSPECTIVES AND RESPONSES ON THE TREATMENT OF PERSONS RESCUED AT SEA

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Abstract: The duty to provide aid to fellow seafarers in distress has long been enshrined in maritime tradition. The modern formalization of this duty in international law, however, has created a division between the duty to "provide assistance" and the obligation to "rescue." This division has created ambiguity and friction as the former duty applies to individuals and vessels whereas the latter obligation applies to states. In recent years, incidents involving two commercial vessels, the Tampa and the Castor, have starkly illustrated the extent to which this ambiguity and friction in international law translates into negative effects in the real world.

In response to these two incidents, the International Maritime Organization ("IMO") has begun to act to address dilemmas raised. The IMO has concluded that there is a true distinction between the duty to "assist" and the duty to "rescue." There is a valid rationale to maintaining that distinction. The solution to the problems faced by mariners in this area cannot and should not be solved by conflating the different requirements and powers implicated by rescue versus assistance. Rather, the solution lies in the creation of an obligation for coastal, port, and flag states to cooperate and coordinate solutions. This Article recommends that the Maritime Safety Committee embrace the outcomes developed at the informal meeting in Sweden in September 2002, which encompass the concept of finding solutions through international cooperation and coordination.

I. INTRODUCTION

Over the past two years, events involving the Tampa and the Castor triggered uneasy and complex international dilemmas on the high seas. In

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August 2001, the *Tampa*, a Norwegian cargo vessel, was denied admission to Australian waters in order to disembark the 438 people it saved from a sinking ferry in the Indian Ocean. In December 2000, the *Castor*, a Cypriot oil tanker, was denied entry into territorial waters and ports of several Mediterranean countries after it suffered severe structural hull damage during a winter storm at sea.

Both the *Tampa* and the *Castor* were denied permission from coastal authorities to enter territorial waters and ports. Each case highlights the question of when, if ever, a ship, without prior governmental authorization, may enter a coastal state's territorial waters and ports if the ship's captain believes it necessary for the protection of the vessel, its cargo, or the safety of those persons on board.¹ Both incidents expose the friction and ambiguity in international law regarding port entry in time of necessity when weighing the rights of coastal states and those of commercial vessels. These legal ambiguities compound and exacerbate the lack of cooperation and coordination between the coastal, port, and flag states involved.

The *Tampa* and *Castor* incidents have been a catalyst for debate and action at the International Maritime Organization ("IMO").² With the

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¹ In the maritime context, this concept is often described as *force majeure*. *Force Majeure* is a principle of international maritime law that allows a vessel to enter the territorial sea or ports of a state "when necessary for the safety of the vessel or persons on board." Edward Bonekemper III, *Any Port in a Storm*, NAVAL INSTITUTE PROCEEDINGS, Sept. 1991, at 97. *Force Majeure* originated in French law referring to "a superior force" and is defined as "[a]n event or effect that can neither be anticipated nor controlled; includes both acts of nature (floods, hurricanes), and acts of people (riots, strikes, war); Act of God." BLACK'S LAW DICTIONARY 263 (West 1996).

² In 1948, the United Nations Maritime Conference met in Geneva, Switzerland and adopted the convention that founded the IMO. KENNETH R. SIMMONDS, THE INTERNATIONAL MARITIME ORGANIZATION 2-4 (1994). See also D.H.N. Johnson, *IMCO: The First Four Years (1959-1962)*, 12 INT'L & COMP. L.Q. 31 (1963). This Convention, originally entitled the Convention on the Inter-Governmental Maritime Consultative Organization ("IMCO"), would take another ten years before it entered into force on March 17, 1958. The IMCO's first organizational meeting as a newly constructed UN entity was held on January 6, 1959. The original Convention called for the acceptance of "twenty-one States, of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping" before the Convention would enter into force. Convention on the Intergovernmental Maritime Consultative Organization, Mar. 17, 1958, art. 59, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48 [hereinafter IMO Convention]. In 1982, the name officially changed to the "International Maritime Organization." Amendments to the IMCO Convention, IMO Assembly Res. A. 358(IX) (Nov. 14, 1975) (entered into forced May 22, 1982), reprinted in 6A ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY 12-50 (M. Cohen rev. 7th ed. 1983) [hereinafter Res. A. 358]. The IMO is a United Nation's Specialized Agency originally created to promote safety at sea. SIMMONDS, supra note 2. The IMO's primary goal is to facilitate cooperation among maritime nations regarding technical and safety aspects of shipping. Id. Its general purpose is defined in Article 1(a) of the IMO Convention:

> to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping
Secretary-General's urging, the IMO has placed two topics, designated as "Treatment of Persons Rescued at Sea" and "Places of Refuge," high on the Organization's agenda. This Article examines the two responsibilities central to the Tampa incident: the duty to assist and the obligation to rescue. It also discusses the IMO's response to the perceived lapses in these duties and obligations that exacerbated the problems in both cases.

This Article argues that the appropriate solution to these problems is placing new obligations on coastal and port states to coordinate and cooperate in the resolution of these difficult situations. The authors further posit that this obligation should be coupled with the creation of a
standardized coordination mechanism. A suitable coordination mechanism has been proposed at the IMO in response to the Castor incident, which involves consideration of the rights of a vessel requiring assistance to enter a port. The IMO generally treats the duty to assist and the obligation to rescue as separate and independent. This Article will assert that important aspects of the Tampa and Castor cases are substantially linked and should be addressed concurrently. The Article concludes that this synchronized approach will ensure consistency and efficacy in developing appropriate international regimes and solutions.

II. THE TAMPA, THE DUTY TO ASSIST, AND THE OBLIGATION TO RESCUE

On August 26, 2001, the Australian Rescue Coordination Center alerted the M/V Tampa, a Norwegian cargo ship in Indonesian territorial waters, to a sinking ferry, the Palapa I, approximately one hundred miles northwest of Christmas Island in the Indian Ocean. The Tampa diverted from its course and, guided by an Australian aircraft, reached the troubled vessel shortly before dusk. The Tampa then successfully retrieved 438 men, women and children, largely hailing from Afghanistan, Pakistan, Iraq, and Sri Lanka.

Having found the sinking vessel in the Indonesia’s Search and Rescue (“SAR”) region, the Tampa, commanded by Arne Rinnan, originally intended to return the rescuees to Indonesia before resuming its voyage to its next port of call, Singapore. However, shortly after the rescue, a group of rescuees on board became alarmed and agitated at the prospect of returning to Indonesia. A few rescuees confronted the captain and threatened to take drastic action, including undertaking a hunger strike or throwing themselves overboard, if the ship did not head for “any Western country.” Due to the sheer number of persons on board and the need for food and medical supplies, Rinnan felt compelled to alter the ship’s course to the nearest

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3 Christmas Island is a small and remote Australian island 200 miles from the Indonesian island of Java and 930 miles west of the Australian mainland. Daniel Williams, Adrift and Unwanted; A Norwegian Ship Saves 438 Asylum Seekers—and Triggers an Ugly Diplomatic Row Over Their Fate, TIME (Int’l Ed.), Sept. 10, 2001, at 61
4 Id.
5 Id.
6 See infra note 75 and accompanying text for a discussion of the dispute over where the Palapa I was found.
7 Williams, supra note 3.
9 Williams, supra note 3.
(Western) port, at Christmas Island.10

The next day, August 27th, the Tampa was denied access to Australian territorial waters as it attempted to enter the port at Christmas Island.11 After two more days anchored fourteen nautical miles off the island,12 diplomatic negotiations remained deadlocked and the situation on board the Tampa worsened. Rinnan sent out a mayday call and proceeded to enter Australian waters, disregarding the Australian government’s decision to refuse entry.13 Subsequently, a forty-five-person military unit from the Australian Special Armed Services intercepted and boarded the Tampa, directing it to leave Australian waters.14 After an additional eight days at sea, a diplomatic accord was reached: the rescuees were transferred to the HMAS Manoora, an Australian naval vessel, by which 150 refugees were taken to New Zealand and 288 were taken to Nauru.15

Captain Rinnan’s actions received wide praise; he and his crew were hailed as heroes and commended.16 Captain Rinnan’s decision to divert his course to retrieve the survivors of the sinking ferry fulfilled his duty under international law. In the confusing and complicated aftermath, the heroic nature of his action became clear.

10 Id.
13 Williams, supra note 3. The day before his mayday radio communications, Captain Rinnan reported that he had “10 unconscious people, two pregnant women with stomach cramps, an outbreak of scabies and widespread dysentery.” Ham & Walker, supra note 8.
15 Williams, supra note 3. Nauru admitted the persons rescued from the Tampa in exchange for “a payment of about $7 million worth of fuel, about $1.6 million for new generators, the cancellation of about $540,000 worth of hospital bills run up by Nauruans in Australia, refurbishments of the island’s sports oval, and the provision of sporting and educational scholarships for Nauruans to come to Australia.” Hathaway, supra note 14, at 40.
A. The Duty to Assist

1. Source of the Duty to Assist

The obligation on masters to render assistance at sea is one of the oldest and most deep-rooted maritime traditions. In the 1880 British case, *Scaramanga v. Stamp*, the court stated:

To all who have to trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations which may result to a ship or cargo from the rendering of the needed aid.

This basic tenant of British common law was later codified in a number of international conventions. The first international body to discuss the principle of rendering assistance at sea was the Brussels Salvage Convention in 1885. Slightly more than a decade later, in 1897, the Comite Maritime International ("CMI") held its first international conference in Brussels to advance issues regarding collisions and salvage, as well as the duty to render assistance at sea. Under the CMI's direction, on September 23, 1910, the final text of the Brussels Convention on Salvage ("Brussels Convention") was signed. In 1989, the IMO concluded the International Convention on Salvage ("1989 Salvage Convention"), which replaced the 1910 Brussels Convention.

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19 This body, which met again in 1888, considered the development of international law regarding collisions at sea and maritime salvage matters. INA H. WILDEBOER, THE BRUSSELS SALVAGE CONVENTION: ITS UNIFYING EFFECT IN ENGLAND, GERMANY, BELGIUM, AND THE NETHERLANDS 1 (1965).
20 Id. CMI held two more conferences, in 1900 and 1902, to draft an international convention on salvage, which was completed in 1902. Id. Further diplomatic sessions were held to further refine the convention between 1905 to 1910. Id. See also Alex L. Parks, The 1910 Brussels Convention, The United States Salvage Act of 1912, and Arbitration of Salvage Cases in the United States, 57 TUL. L. REV. 1457, 1458 (1983).
Prior to the Brussels Convention there were no formal international conventions that addressed rendering assistance at sea. The essential provision, as now set forth in Article 10 of the 1989 Salvage Convention, states:

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. . . . The owner of the vessel shall incur no liability for a breach of the master.23

The duty of a master to render assistance at sea is also defined in the International Convention on Safety of Life at Sea ("SOLAS Convention").24 Regulation V/33(a) of the SOLAS Convention states:

23 Id. art. 11. This article was incorporated into U.S. law under 46 U.S.C. § 2304 (formerly 46 U.S.C. § 728). Section 2304 reads:

(a) 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.

(b) A master or individual violating this section shall be fined not more than $1,000, imprisoned for not more than 2 years, or both.

Id. 24 International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, 164 U.N.T.S. 113, as amended (entered into force May 25, 1980) [hereinafter SOLAS Convention]. The genesis of SOLAS was the aftermath of the Titanic sinking on April 14, 1912. SIMMONDS, supra note 2, at 15. It is now arguably the most important international convention regarding maritime safety. In response to the Titanic, the United Kingdom called for a conference to provide dialogue and measures for preventing future loss of life at sea. Id. On November 12, 1913, delegations representing thirteen of the world’s various maritime powers met in London for the first SOLAS Convention. Id. The first SOLAS Convention was signed on January 30, 1914; however, formal ratification of the treaty never took place due to the outbreak of World War I. Id.

The second International Conference met again in London in April 16, 1929 and adopted its final draft on May 31, 1929. Id. The 1929 SOLAS Convention came into force in 1933. SOLAS: the International Convention for the Safety of Life at Sea, 1974, FOCUS ON IMO, Oct. 1998, at 1. Since then, the SOLAS Convention has been revised, re-adopted and re-ratified three more times (1948, 1960, and 1974). Id.

The 1974 SOLAS Convention, which entered into force in 1980, is the version currently in effect. SOLAS Convention, supra note 24. The SOLAS Convention has been adopted by 146 states encompassing 98.49% of world’s shipping tonnage. Summary of Status of Conventions, at www.imo.org/Conventions/mainframe.asp?topic_id=247 (last visited Jan. 3, 2003). As its name suggests, the SOLAS Convention largely deals with the safety of human life at sea, but also includes regulations governing ship construction, standardization of safety equipment, radiocommunications, and operations and navigation of ships.
The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal 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. 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 and, taking into account the recommendations of the Organization, inform the appropriate search and rescue service accordingly.25


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 . . . to render assistance to any person found at sea in danger of being lost. . . .28

These four international conventions are said to give "expression to the general tradition and practice of all seafarers and of maritime law regarding the rendering of assistance to persons or ships in distress at sea, and the elementary considerations of humanity."29 The 1989 Salvage

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25 SOLAS Convention, supra note 24, reg. V/33.
28 1958 Convention, supra note 26, art. 12(a); UNCLOS, supra note 27, art. 98(1).
29 THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 571 (Myron Nordquist ed., 1993). The duty to provide assistance at sea is also required during wartime among belligerent states. The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, states in Article 18:

After 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.
Convention posits a duty "to render assistance to any individual . . . found at sea in danger of being lost." The SOLAS Convention states that a master is "bound to proceed with all speed to the assistance of the persons in distress." The 1958 Convention and UNCLOS obligate a master "to render assistance to any person found at sea in danger of being lost." Thus, the duty placed on masters of vessels is only an obligation "to render assistance," not to "rescue." This distinction is important if the international community is to arrive at a solution to prevent a Tampa-like incident from recurring.

2. Scope of the Duty to Assist

While the duty to render assistance clearly exists, the scope of that assistance is not defined. It can be inferred from the text of the 1989 Salvage Convention, the SOLAS Convention, the 1958 Convention, and UNCLOS that the language adopted was purposefully vague to allow masters flexibility in their responses. Under the current language, masters can take into account various factors such as ship size, weather, number of persons in distress, the nature of distress, safety equipment on board, possible infectious diseases, and security concerns when responding to vessels in need. The Brussels Convention and the other international instruments that followed "obviously [did] not go any further into the manner in which the assistance can be rendered," because the possible actions to be taken "are too diverse in character to describe in a few words."

The calculated ambiguity of the phrase, "render assistance," allows the master of the vessel to consider the circumstances of each distress case and take the most prudent and practical action to relieve the distress of those in peril. Thus, a master may decide to tow the vessel to safety, extricate a

Id.

30 1989 Salvage Convention, supra note 22, art. 10(1).
31 SOLAS, supra note 24, reg. V/33.
32 1958 Convention, supra note 26, art. 12(a); UNCLOS, supra note 27, art. 98(a).
33 The actual effect of these articles in imposing a legal duty, as opposed to a mere moral duty, is somewhat unclear. Some scholars argue that the applicability of these articles is of importance with respect to tort law; that is, a master commits a tort if he/she does not comply with the obligation to render assistance to those in peril at sea. See Wildboer, supra note 19, at 267. However others note that traditional American tort principles do not impose civil liability on an individual failing to assist a stranger, even at sea. See generally Long, supra note 21. With regard to criminal sanction, the U.S. criminal statute, 46 U.S.C. § 2304, has never been enforced. Id.
34 See Wildboer, supra note 19, at 95.
35 Id.
grounded vessel, fight a fire aboard a ship, provide food and supplies, embark crewmen aboard to replace the tired or the missing, secure aid or assistance from other nearby ships, or simply stand-by to provide navigational advice. In short, there are a variety of acts that a master may take that may constitute “assistance.”

A vessel’s capability to assist may differ depending on the type and size of the ship, its crew, and its supplies. The ability to assist, once on scene, is a moral and operational judgment that must be made by the master depending on the circumstances of each case. In the case of the Tampa, Captain Rinnan more than met his obligations, taking all survivors on board and attempting to provide them with shelter, food, and medical care, even though doing so was far beyond vessel’s capabilities. He continued to fulfill his obligations even after the Australian Government refused to allow him entry and forced him to suffer costly delays. This, in no small measure, is where Captain Rinnan’s actions went from representing mere fulfillment of an obligation under the law to render assistance to an act of heroism. The economic and personal hardships faced by the Tampa’s crew and owners created a situation that most others would avoid, and these hardships could create a future disincentive for those at sea to render assistance at all.

36 Id. See also MARTIN J. NORRIS, THE LAW OF SALVAGE 15-31 (1958).
38 Michael Richardson, In Migrant’s Plight, a Sea of Trouble for Skippers; Australian Case Shows Rescues Can Be Costly, INT’L HERALD TRIBUNE, Sept. 6, 2001.
39 Id.
40 Numerous examples exist of cases in which vessels have failed to stop to render assistance to those in peril at sea, especially after collisions. See, e.g., Jane Fritch, Balian Guilty in Viet Boat Case, to Get Reprimand, L.A. TIMES, Feb. 24, 1989 (a U.S. Navy vessel failed to stop and assist Vietnamese refugees at sea); Pamela Ferdinand, Canada Charges 3 Russians In Sinking of U.S. Fishing Boat; 3 Americans Were Killed in Collision off Newfoundland, WASH. POST, August 16, 2001 (Cypriot tanker failed to acknowledge U.S Coast Guard requests for assistance after the tanker collided with a fishing vessel); Andrew Osbourn, Norway’s shame on the high seas: Collision with French vessel that left four dead leads to bitter diplomatic row, OBSERVER, Sept. 1, 2002 (Norwegian tanker continued on its voyage without stopping after colliding with a fishing vessel). Further, although stowaways have a different status than those rescued at sea, finding stowaways on board creates an economic burden on masters and shipowners, because, under most domestic regimes, the master or owner is responsible for repatriating the stowaway. See 8 U.S.C. §§ 1227(a), 1323. This economic burden has led some masters to throw stowaways overboard, if discovered while the ship is at sea. See Elissa Steglich, Note, Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways Through Expanded Criminal Jurisdiction, 78 TEX. L. REV. 1323 (2000). The thought of these actions being repeated in the context of persons rescued at sea is chilling. Martin Davies, Obligations and Implications for Ships Encountering Persons in need of Assistance at Sea, 12 PAC. RIM L. & POL’Y J. 109 (2003).
Certainly, one can only expect so much of a master who renders assistance to those in need at sea, especially when the numbers of survivors are great and the capabilities of the ship are limited. There must be some mechanism for the master of a merchant vessel who renders assistance at sea to be relieved of that burden. Assumption of that burden must necessarily fall on governments, instead of individual masters.

Most of the actions contemplated by the above international instruments, however, fall short of "rescue" as defined in the only treaty to address the term in detail, the International Convention on Maritime Search and Rescue ("SAR Convention"). The SAR Convention defines "rescue" as "an operation to retrieve persons in distress, provide for the initial medical or other needs, and deliver them to a place of safety."\(^4^1\) As discussed infra Part II.B.1., the obligation to rescue is on coastal states, not ships. However, as the Tampa case has shown, even if the obligation to rescue was placed on ships individually, the stumbling block would remain: "delivery to a place of safety."\(^4^2\) The Tampa, after declaring distress, was obviously not a suitable long-term holding area for the rescuees, and thus was not a place of safety.

B. The Obligation to Rescue

1. Source of the Obligation

The same conventions placing a duty on the master to assist also place obligations on coastal and port states. The 1948 SOLAS Convention ("SOLAS 48") was the first instrument calling for the establishment of


\(^{42}\) This conclusion is further reached in Annex, para. 4.8.3 of the SAR Convention regarding termination of successful search and rescue operations, stating:

> When a rescue co-ordination center or rescue sub-center considers, on the basis of reliable information, that a search and rescue operation has been successful, or that the emergency no longer exists, it shall terminate the search and rescue operation and promptly so inform any authority, facility or service which has been activated or notified.

*Id.*, Annex, para. 4.8.3.

Under this definition, a search and rescue operation is terminated after the "emergency no longer exists." *Id.* Thus a ship that has been provided with needed food and supplies is deemed a "successful" search and rescue operation without the need to take the person or ship ashore. *Id.*
coastal maritime search and rescue ("SAR") services.\textsuperscript{43} Chapter V, Regulation 15, for the first time required each signatory to maintain adequate search and rescue assets and equipment along its coast.\textsuperscript{44} This new regulation was the first attempt of the international maritime community to establish a system where governments had responsibility for rescue, rather than making masters legally responsible for rescue.\textsuperscript{45} Today's version of the governmental obligation to rescue is found in Chapter V, Regulation 7 of the SOLAS Convention ("SOLAS Reg. V/7")\textsuperscript{46} and incorporates concepts of cooperation and rescue zones among search and rescue organizations, a result of the SAR Convention coming into force. SOLAS Reg. V/7.1 states:

Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such

\textsuperscript{43} International Convention for the Safety of Life at Sea, June 10, 1948, (entered into force Nov. 19, 1952) 164 U.N.T.S. 113 [hereinafter SOLAS 48] (SOLAS 48 was superseded by the 1974 SOLAS Convention, see supra note 24.

\textsuperscript{44} Chapter V, Reg. 15 of SOLAS 48 read:

(a) Each Contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of person in distress at sea round its coasts. These arrangements should include the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, afford adequate means of locating and rescuing such persons.

(b) Each Contracting Government undertakes to make available information concerning its existing rescue facilities and plans for change therein if any.


\textsuperscript{45} Of course, at the time, many countries had well-established search and rescue agencies with extensive capabilities to provide assistance to those in distress at sea. For example, the United States, either through the efforts of individual states, or through the United States Coast Guard and its predecessor agencies has been providing search and rescue services since the 1800s. See Noble, A Legacy, The United States Lifesaving Service, http://www.uscg.mil/hq/g-cp/comrel/factfile.

persons. (emphasis added).

The phrase "establishment, operations and maintenance" was later adopted in the text of Article 98(2) of UNCLOS, which reads:

Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighboring States for this purpose.

However, where UNCLOS requires states only to "promote" maritime SAR services, SOLAS requires each contracting state to "undertake" such services "to ensure necessary arrangements are made." Details about exactly what SAR services are necessary to fulfill the requirements of SOLAS, however, are conspicuously absent.

Instead, those details are contained in the SAR Convention. Prior to the development of the SAR Convention in 1979, the obligations to establish maritime search and rescue facilities as stipulated in UNCLOS Article 98(2) and SOLAS Reg. V/7 lacked coordination, links of communication, and standardization between individual implementing states. As a result, national maritime services advanced in different directions causing operational difficulties.

The SAR Convention was designed to correct these deficiencies. Its primary aim, as stated in its preamble, is to establish "an international maritime search and rescue plan responsible to the needs of maritime traffic for the rescue of persons in distress at sea."

The goal of the SAR Convention was to create a framework to coordinate rescue efforts through a comprehensive maritime search and

47 SOLAS Convention, supra note 24, ch. V, reg. 7.1. The SOLAS Convention, Reg. V/7 states "[r]efer to the International Convention on Maritime Search and Rescue (SAR), 1979, and to the following resolutions adopted by the Organization: Homing capability of search and rescue (SAR) aircraft (Res. A.225(VII)), Use of radar transponders for search and rescue purposes (Res. A.530(13)), Search and rescue homing capability (Res. A.616(15)) and International Aeronautical and Maritime and Search and Rescue (IAMSAR) Manual (Res. A.894(21))."

48 UNCLOS, supra note 27, art. 98(2).


50 Id.

51 SAR Convention, supra note 41, pmbl.
rescue system\textsuperscript{52} that could reach any maritime emergency no matter where it occurred globally.\textsuperscript{53} The SAR Convention called for the world’s oceans to be divided into thirteen SAR areas, where coastal states would be responsible for specific SAR zones.\textsuperscript{54}

This laudable goal, however, proved difficult to achieve, even though more states have become parties to the SAR Convention since it was revised in 1998.\textsuperscript{55} Because the 1979 SAR Convention placed significant and potentially costly obligations on signatories, many littoral countries have not ratified or acceded to the Convention. Two of the three primary players in the Tampa drama—Australia and Norway—are parties. Indonesia is not.\textsuperscript{56}

\textbf{C. The Difference Between the Duty to Assist and the Obligation to Rescue}

The 1998 revisions to the SAR Convention, most importantly in the context of the Tampa incident, created definitions for the terms “search”\textsuperscript{57} and “rescue”\textsuperscript{58} which in turn clarified the responsibilities of coastal states.\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{52} The revised SAR Convention elucidates states’ duties to “participate in the development of a search and rescue service.” \textit{Id.} at 2.1.1. The revised version accents a regional and cooperative approach to maritime search and rescue by stating each State Party “shall, individually or in cooperation with other States, ensure search and rescue regions are established within each sea area…” \textit{Id.} at 2.1.3. Also, Parties “shall coordinate their search and rescue organizations and should, whenever necessary, coordinate search and rescue operations with those of neighboring States.” \textit{Id.} at 3.1.1. In addition, the SAR Convention prescribes that “[P]arties shall ensure the closest practicable coordination between aeronautical services” and nautical services. \textit{Id.} at 2.4.1.
  \item \textsuperscript{54} \textit{See supra} note 53.
  \item \textsuperscript{55} By 1995, due to its slow pace of acceptance, the international maritime community was ready for a comprehensive review of the SAR Convention. Also in 1995, the tragedy of the Estonia, where over 900 people lost their lives after a “roll-on roll-off” (“Ro-Ro”) ferry sank in the Baltic Sea, prompted the IMO Secretary-General to establish a panel of experts on Ro-Ro safety to discuss and propose improvement design and equipment to Ro-Ro ferries. The panel of experts proposed initial amendments to the SAR Convention. A complete rewrite of the 1979 SAR Convention was then prepared at an intersessional working group (“ISWG”) established by the Maritime Safety Committee in October 1995. In May 1997, the draft text was officially approved at the sixty-eighth session of the MSC and adopted in the sixty-ninth session in May 1998. On January 1, 2000, the revised SAR Convention entered into force.
  \item \textsuperscript{56} \textit{Shipping Emergencies—Search and Rescue and the GMDSS}, \textit{FOCUS ON IMO}, Mar. 1999, at 3; U.S. DEPT. OF STATE, \textit{supra} note 21, at 417.
  \item \textsuperscript{57} Chapter 1.3.1 of the SAR Convention defines “Search” as “An operation, normally coordinated by a rescue coordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress.” SAR Convention, \textit{supra} note 41, ch. 1.3.1.
  \item \textsuperscript{58} \textit{See, infra} Part II.C.
  \item \textsuperscript{59} The revised Chapter 2, dealing with organizational structure, requires parties, “either individually or, if appropriate, in cooperation with other State parties, to establish the following basic elements of search and rescue services,” which are identified as: “a legal framework; assignment of responsible authority; organization of available resources; communication facilities; coordination and operational functions; and
The creation of a definition of "rescue" which applies only to governments also appears to have created a legal distinction between the duty governments have to rescue and the "assistance" required of shipmasters. Nowhere in the SAR, SOLAS, and Salvage Conventions is the term "rescue" associated with a merchant ship.

UNCLOS, however, slightly blurs this distinction. Article 98(1)(b) provides that every state must require masters of ships flying their flags "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 be reasonably expected of him." 61

UNCLOS does not specify whether the expectation in the last clause refers to "rescue" or to "assistance." 62 However, the 1998 amendments to the SAR Convention appear to have created a new legal landscape where "masters assist" and "parties rescue." 63 If this is so, then the action referred to in the last clause of UNCLOS Article 98(1)(b) would refer to merchant ships "rescuing," "in so far as such action may be reasonably expected of them," that is, if the merchant ship can be considered a "place of safety." 64
Moreover, the structure of UNCLOS Article 98 places the determination of whether "rescue" may be reasonably expected of a ship on the flag state, not the coastal state.\(^{65}\)

Thus, in the *Tampa* case, when Captain Rinnan declared his vessel in distress, a condition which Norway, the flag state, supported,\(^{66}\) the vessel was not a place of safety, and Australia could not reasonably conclude that a "rescue" had occurred. More to the point, Australia's determination would seem to require consultation and coordination with the flag state.

Chapter 3 of the Annex to the SAR Convention, hopefully titled "Co-Operation between States," unfortunately does not address resolution of situations such as those faced by the *Tampa*, where a vessel rendering assistance seeks disembarkation of survivors (in essence, final "rescue"). Other than a very general call for states to enter into agreements, where appropriate, to strengthen search and rescue cooperation and coordination, Chapter 3 mainly concerns entry into the territorial seas of one party by search and rescue units\(^{67}\) of another party.\(^{68}\) Since the *Tampa* would not meet the definition of a search and rescue unit,\(^{69}\) Chapter 3 would not apply.

During the revision of the SAR Convention at COMSAR 1, the United States introduced proposed language in Chapter 3 of the SAR Convention that read:

> In implementing provisions of [chapter 3], Parties should bear in mind... the necessity of balancing concerns of sovereignty and concerns for saving lives, obligations of ship masters regarding response to persons in distress, and the time-critical nature of many rescue operations.\(^{70}\)

However, it does not appear that the interpretation posited in this paper would prejudice any rights or obligations of vessels. They would still be required to "proceed with all possible speed to the rescue of persons," but if they were not a "place of safety" it could not be expected for them to complete the rescue, only assist. This does not appear to be inconsistent with UNCLOS, nor does it raise any conflict with UNCLOS or the SAR Convention.

\(^{65}\) UNCLOS, supra note 48, art. 98. The coastal state is not referred to in this Article.

\(^{66}\) See IMO Circular Letter No. 2363 (Feb. 1, 2002) (containing Notes Verbale dated September 1, 2001 and January 29, 2002 from the Royal Ministry of Foreign Affairs of the Kingdom of Norway to the Embassy of Australia, Oslo, Norway).

\(^{67}\) A "search and rescue unit" is defined as "a unit composed of trained personnel and provided with equipment suitable for expeditious conduct of search and rescue operations." SAR Convention, supra note 41, Annex, ch. 1.3.8. Because the *Tampa* was not properly equipped to conduct a "rescue" under the SAR Convention, it would not be considered a search and rescue unit.

\(^{68}\) SAR Convention, supra note 41, Annex, para. 3.1.1 - 3.1.5.

\(^{69}\) See supra note 67.

The language proposed touches most, if not all, of the issues raised by the Tampa case, and likely would have facilitated discussion at the IMO after the Tampa incident occurred. But the language was not adopted.

III. THE IMO RESPONSE TO THE TAMPA

A. Calls for Action, Review and Proposals

The IMO became involved in facilitating solutions to the Tampa Incident within days of its occurrence, with the receipt of copies of Notes Verbale exchanged between Norway and Australia, which both countries asked to be circulated to all IMO members. The Notes Verbale were careful to distinguish between the “assistance” rendered by the Tampa, and “rescue.” However, among other disputed facts within the Notes, Australia argued that the rescue was complete when the refugees were aboard the Tampa, despite Captain Rinnan’s declaration of distress due to overloading and lack of supplies. Norway, on the other hand, charged that Australia had created “a most unwelcome obstacle to prevent seafarers from being rescued when they are in distress or shipwrecked.” This obvious friction, directly implicating one or more instruments administered by the IMO, led Secretary General William O’Neill to act.

71 See IMO Circular Letter No. 2363, supra note 66; IMO Circular Letter No. 2345 (Oct. 15, 2001) (containing a Notes Verbale between the Embassy of Australia, Copenhagen, Denmark and the Royal Ministry of Foreign Affairs of the Kingdom of Norway, Oslo).
72 Id.
73 IMO Circular Letter No. 2345, supra note 71, at 2.
74 IMO Circular Letter No. 2363, supra note 66, at 2.
75 The Notes Verbale differ in the facts of the case in a number of instances, including in whose search and rescue zone the Tampa was located at the time of the distress call (Australia or Indonesia), the actual communications, and the direction (if any) the Tampa received from Australian search and rescue authorities. See supra note 67; see supra notes 66 & 71.
76 Indeed, Australia continues to argue that a foreign merchant ship should provide rescue services without the coordination or consent of the flag state. In June 2002, the Australian Department of Transport and Regional Services published its Protocol for Commercial Shipping Rescuing Persons at Sea In or Adjacent to the Australian Search and Rescue Region, http://www.dotrs.gov.au/transinfra/sea_rescue_protocol.htm [hereinafter Australian Protocol]. While recognizing that all search and rescue operations must be cases prosecuted in accordance with international law, it creates a three-stage system for merchant vessels to effect “rescue,” including a mandate that “Ships (including available naval ships) according to international conventions and deviate from courses to effect rescue. Normal proactive would be for the Master to advise the Owner of the deviation. If no ships
In November 2001, Secretary General O’Neill approached the IMO Council, which approves the committee work programs and sets the IMO’s overall agenda. In Council Paper C/ES.21/24(a), O’Neill asked that the Council forward to the Assembly a Draft Resolution calling for the Maritime Safety Committee (“MSC”), the Legal Committee, and the Facilitation Committee to review all relevant IMO instruments under their scope for any legal deficiencies, with outcomes to be reported to the IMO Assembly in November 2003. Further, the Secretary General informed the Council that he had notified other competent U.N. specialized agencies, including the U.N. High Commissioner for Human Rights, and would coordinate with them. The Secretary General urged the IMO member states to heed its concerns that “[u]nless the matter is considered in all its respects and action is taken at the appropriate level, such incidents may have a negative impact on the integrity of the search and rescue system which the [IMO] has put in place globally to assist those found in distress at sea.”

1. IMO Assembly Action

In response to the Secretary General’s request, the Assembly, during its twenty-second session in November 2001, adopted Assembly Resolution A.920(22), entitled “Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea.” The Resolution instructs the committees identified by the Secretary General “to review, on a priority basis, the international conventions... and any other IMO instruments under the scope for the purpose of identifying any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies.” The purpose of this review respond to the distress alert AusSAR [the Australian Search and Rescue Service] will examine any available ship in the general area to see if they can attend to the rescue.” (emphasis added). Id. The Australian Protocol is silent on the situation where the ship is unable to effect a SAR Convention rescue because it does not qualify as a place of safety, nor does is make any allowances for ships for which rescue could not be reasonably expected, as described in UNCLOS, supra note 41, art. 98(1)(b).
was to ensure that three international principles were fully realized, namely that:

(1) survivors of distress incidents are provided assistance regardless of nationality or status or the circumstances in which they are found,
(2) ships, which have retrieved persons in distress at sea, are able to deliver the survivors to a place of safety, and
(3) survivors, regardless of nationality or status, including undocumented migrants, asylum seekers and refugees, and stowaways, are treated, while on board, in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions.\(^8\)

The negotiating history of the Secretary General’s proposed resolution sheds light on what is really the crux of the issue regarding persons rescued at sea. During consideration of the Resolution at Council and at Assembly, Norway proposed a number of changes to the Secretary General’s original draft, many of which were accepted.\(^8\) These included requests that the MSC, the Legal Committee, and the Facilitation Committee, when undertaking their reviews, take into account the rules and principles of general international law with respect to the duty to render assistance to distressed persons\(^5\) and to identify needs for possible codification and development of these rules and principles. Norway also proposed that the second operative paragraph of the Assembly Resolution, requesting that the committees take appropriate action so that ships retrieving persons at sea are able to deliver the survivors to a place of safety, be amended so that the language would read “ships which have retrieved persons in distress at sea are able to deliver the survivors ashore with no undue delay.”\(^6\)

The Norwegian proposal that included the concept of delivery ashore in the Assembly Resolution was questioned by a number of delegations, including those of the United States and Australia.\(^7\) The reasoning was,

\(^8\) Id.
\(^6\) See infra Part III.A.3
\(^7\) IMO Assembly Doc. A 22/C.1/3-A, supra note 84.
\(^8\) Personal observation of the authors.
rather than embodying this new concept in an Assembly Resolution, which would impact the immigration policies and procedures in many countries, the more appropriate course of action was to consider the concept as a potential amendment to the SAR Convention, specifically the definition of "rescue." This compromise was accepted and the Resolution was adopted without the "delivery ashore" language.

2. Facilitation Committee Action

After the adoption of Assembly Resolution A.920(22), the IMO Committees and Subcommittees began consideration of the issue in earnest. The Facilitation Committee was the first with competence over the issue to meet after the adoption of Resolution A.920(22). The Committee recognized that the Convention on Facilitation of International Maritime Traffic ("FAL Convention"), the only relevant convention under its competence, contained no provisions for the landing of persons rescued at sea. However, many delegations pointed out that the purpose of the FAL Convention was to facilitate and expedite international maritime traffic. Therefore, consideration of the changes to SOLAS and the SAR Convention might be more appropriate, although outside the scope of the FAL.

During the Facilitation Committee meeting, Denmark proposed an amendment to the FAL Convention stating that when a ship has retrieved persons in distress at sea, public authorities in the next port of call or the nearest port shall allow disembarkation of such persons. The public authorities shall decide whether they are admissible according to national law and if not, shall arrange for their reception in a third country. The Facilitation Committee noted that these concepts were a possible way forward, but took no decisions on the matter.

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88 For example, the United States has a policy of intercepting illegal migrants on ships while they are still at sea and repatriating them, usually without these migrants touching U.S. territory. Alien Migrant Interdiction, Overview, http://www.uscg.mil/hq/g-o/g-opl/mle/AMIO.htm.
90 Cf. Review of Safety Measures and Procedures of the Treatment of Persons Rescued at Sea, supra note 81.
92 Id.
93 Id., para. 9.2.
3. **COMSAR Action**

In February 2002, the Sub-Committee of Radio-Communications and Search and Rescue ("COMSAR") began the comprehensive review mandated by the Assembly. Its Working Group on Search and Rescue considered two proposals regarding amendments of the SOLAS and SAR Conventions. The first of these was from Norway, which proposed amending the SAR Convention along the lines they had proposed for resolution A.920(22). A second, more detailed proposal from France was considered. Some aspects of these proposals seem fairly non-controversial, such as a conforming amendment in SOLAS to match the SAR requirement that persons in distress at sea receive assistance regardless of their nationality or status. However, France also proposed more controversial amendments to SOLAS Chapter V, Regulation 33, regarding a master's responsibilities to render assistance at sea, stating that "masters of ships who have rescued survivors of a shipwreck must be able to land them at the nearest suitable place, taking into account the number of survivors, the size of the vessel and its route." France proposed that an affected coastal state's rescue coordination centers determine the most suitable place to land survivors. In making that determination, parties should endeavor to

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94 COMSAR had been tasked with the comprehensive review of the SOLAS and SAR Conventions at an extraordinary meeting of the Maritime Safety Committee held in conjunction with the 22nd Assembly. Report of the First Extraordinary Session of the Maritime Safety Committee, 1st Extraordinary Sess., Agenda Item 4, Maritime Safety Committee Document MSC/ES.1/4, para.3.8 (Nov. 28, 2001).

95 Draft Proposal by Norway to Amend IMO Convention, Feb. 8, 2002 (paper on file at Office of Maritime and International Law, United States Coast Guard Headquarters, Washington D.C.). This proposal was submitted at COMSAR 6 during the SAR Working Group deliberations.


97 Id.

98 Id.

99 Id. The text of the French proposal reads:

SAR proposal: add the following paragraphs:

3.1.6.4 To take the steps necessary, with the assistance of rescue co-ordination centers (or other regular points of contact) in the countries concerned, to determine the most suitable place to land survivors of a shipwreck, taking into account, inter alia, their number, the conditions on board the rescue ship and its first port of call.

3.1.9 The Parties try, in so far as they are able, to respond positively to requests from their own rescue co-ordination centers, and those of other countries, for permission to land rescued shipwreck survivors, even though it may lead to their freedom being restricted when the law of the host country is applied, should not be used as an argument for refusing them permission to land.
respond positively to requests to land survivors. If the survivors’ legal status in the port of landing would lead to their freedom being restricted, this should not be used as a reason to refuse permission to land.

The delegation of Australia, supported by the United States, opposed proposals to amend SOLAS and SAR that would have the effect of extending the convention obligations to encompass disembarkation of rescued persons at a particular port. This objection also encompassed including in any convention an implied or direct provision that the master of the rescuing vessel should have the ultimate right to decide the time and place of landing. Both countries expressed views that this was the responsibility of the coastal state to arrange on a case-by-case basis, coordinating with all interested countries including the flag state of the rescuing vessel. The complexity of the issues and the effects outside the scope of the SAR and SOLAS Conventions and the Sub-Committee, such as the status of persons rescued, and refugee issues, would be directly raised by giving masters the right to land survivors. In the view of the opposing countries, this was beyond IMO’s reach. However, there was full agreement by the Sub-Committee that any action taken should not have the effect of deterring the master from fulfilling the obligation to render assistance to persons in distress, nor should the global SAR system currently in place be compromised.

4.8.5 The rescue co-ordination center of sub-center, on behalf of the ships that have rescued the survivors of a shipwreck, searches for the most suitable place to land them, taking into account, inter alia, the captain’s wishes, the number of survivors, their needs, the conditions on board the rescue ship and its first port of call. It then informs the ships concerned.

This proposed text was considered in detail by the informal group meeting in Noorkoping, Sweden in September 2002, described infra, Part V. That group recommended to the IMO that this text not be considered further. See Outcome of Informal Meeting on “Safety Measures and Procedures for the Treatment of Persons Rescued at Sea,” 76th Sess., Agenda Item 22, Maritime Safety Committee Doc. MSC 76/22/11 (Sept. 27, 2002).

Id.

Id.


Id.

Id.

Id.

Id.

Report to the Maritime Safety Committee, 6th Sess., Agenda Item 12, Sub-Committee on Radiocommunications and Search and Rescue Doc. COMSAR 6/12 (Mar. 8, 2002).
Based on these discussions, COMSAR made a number of decisions, including the need to clarify the term "place of safety" in the definition of "rescue" in the SAR Convention and elsewhere.\footnote{Id.} The U.S. position was that a place of safety could include transfer to another vessel that is equipped to care for the survivors until a final landing port can be established.\footnote{Id. U.S. COMSAR Position Paper, supra note 102.} Other decisions of COMSAR were that the relevant Rescue Coordination Centers should coordinate where to deliver persons after their rescue, that the complexity of the issues required that MSC revisit the need to amend any instruments, and that intersessional meetings, along the lines proposed in Resolution A.920(22), might be required.\footnote{Id. Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, Maritime Safety Committee Doc. MSC 75/11/1 (Mar. 4, 2002) (submitted by France).}

4. Maritime Safety Committee Action

The seventy-fifth session of the MSC, the parent committee for COMSAR, met in May 2002 and continued review of the issue. France submitted an amended version of their COMSAR proposal, adding suggestions for conforming amendments to the Facilitation Convention to complement their proposals for the SOLAS and SAR Conventions.\footnote{Id. Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, Maritime Safety Committee Doc. MSC 75/11/2 (Mar. 11, 2002) (submitted by Germany).} Germany submitted a paper supporting the French position, including a suggestion for intersessional meetings.\footnote{Id. Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, Maritime Safety Committee Doc. MSC 75/2/2/Add.2 (Mar. 12, 2002) (submitted by Norway) [hereinafter Norwegian Safety Measures and Procedures].} Norway took a more forward approach in its submission to MSC, proposing amendments to both SOLAS and SAR that would create both a right of masters to deliver rescued persons to the closest or a more convenient port for the rescuing ship, and creating an obligation on contracting states to accept survivors in ports decided upon by the master.\footnote{Id. Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, Maritime Safety Committee Doc. MSC 75/2/2/Add.2 (Mar. 12, 2002) (submitted by Norway).}

(a) The master of a ship having retrieved persons in distress at sea has the duty and the right to deliver these persons to a place of safety with no undue delay. In such circumstances the master of the ship having retrieved persons in distress is entitled to decide as follows:
.1 to deliver those persons to a suitable port or in the territorial waters being closest to the position where the persons were retrieved, or
.2 to deliver those persons to a suitable port or in its territorial waters being closest in case the ship continues its planned voyage towards its next port of call in accordance with the master's decision.

(b) In cases as described in paragraph 1(a) above, Parties shall allow such ships access to the territorial waters and to the ports decided by the ship in accordance with those provisions. Parties shall receive the persons rescued with no undue delay, and shall provide for their medical care and other needs in a place of safety. If such a ship has proceeded to territorial waters not provided with a port suitable for the ship in question, the Party shall provide the assistance necessary for the people rescued to disembark safely and rapidly. ¹¹³

During the plenary discussion of the issue at the seventy-fifth session of the MSC, many countries presented lengthy, detailed interventions, supporting differing views. ¹¹⁴ The Norwegian/French proposals were not fully embraced by Australia, the United States, and others. ¹¹⁵ Given this

¹¹³ Id. See also Outcome of Informal Meeting on "Safety Measures and Procedures for the Treatment of Persons Rescued at Sea," supra note 99 (where the informal group meeting in Nookoping, Sweden in September 2002, discussed infra, Part V brought this language forward for further consideration by the MSC).

¹¹⁴ Australia, the United States, Norway, Malta, Turkey, and Singapore all made statements. Report of the Maritime Safety Committee, 75th Sess., Maritime Safety Committee Doc. MSC 75/24, para. 11.53 (May 29, 2002) [hereinafter MSC 75/24]; Personal observations of the authors.

¹¹⁵ Statement of Rear Admiral Paul Pluta, U.S. Coast Guard, Assistant Commandant for Marine Safety and Environmental Protection and Head of the U.S. Delegation to seventy fifth session of the MSC, before the plenary session May 16, 2002 (transcript on file at the U.S. Department of State, Office of Oceans Affairs, Washington, DC). The statement included the following:

The United States fully supports the legal obligation for masters to assist persons in distress at sea as set forth in SOLAS and UNCLOS, and further agrees that such rescue efforts should be undertaken without regard to the nationality, status or circumstances of the persons in distress, as provided in SAR Convention. Our primary concern is to promote safety at sea and humanitarian principles. When a ship is involved in a rescue, at no time will the United States permit the lives of those rescued or of others on board the ship to be jeopardized. Current United States practice on the disposition of persons rescued at sea is determined on a case-by-case basis, with our Rescue Coordination
wide gulf of legal opinion, the Committee, with the assistance of the Swedish Maritime Administration, agreed to hold an informal meeting to develop and refine the matters within the scope of Resolution A.920(22).  

Centers serving as the primary coordination point for delivering survivors to a place of safety.

Management of such cases must consider many factors, including the safety and humanitarian treatment of persons rescued, commercial interests, and ability of those rescued to legally enter a particular jurisdiction. Other legitimate factors may also affect the time and place where survivors are delivered. Substantial time is sometimes needed to conduct the international coordination required to determine where survivors should ultimately be delivered. In such cases, the practice of the United States is remove the survivors from the rescuing ship if it is a commercial vessel, sometimes transferring survivors to government vessels, and provide for their temporary care. We give high priority to the security, safety and care of survivors.

Because of the varied nature of cases encountered, the U.S. does not support the creation of new obligations requiring a coastal State to respond in a particular manner regarding delivery of persons rescued without regard to the circumstances of the individual case. We do not agree that the master of a ship or any other single entity should be given authority to decide where to deliver survivors. This must be a coordinated decision among the governments involved. Instead, we believe that the current obligation in the SAR Convention requiring delivery to a place of safety adequately captures the obligations of masters and governments, because a place of safety can also include an appropriately staffed and equipped rescue vessel that can provide for the basic human needs of survivors until their final destination can be determined.

Id.  

116 MSC 75/24, supra note 114. The terms of reference were laid out in the MSC Report, which included:

To continue the review of the provisions of the SOLAS and SAR Conventions regarding the treatment of person rescued at sea. The review should be given high priority and should be completed at COMSAR 8. The results to be reported the Committee should, if appropriate, include specific proposals for amendments to these Conventions.

To consider whether additional guidance should be devolved for shipmasters, RCCs, coastal States and other interested parties to ensure that persons rescued at sea are delivered to a place of safety;

To identify other issues raised during its debate and include them in the report to MSC 7 as issues that the Organization should forward to other international organizations that have a responsibility related this issue.

To also consider the possible need for, or desirability of, effecting amendments to the FAL and Salvage Conventions regarding provisions relating to persons rescued at sea or in distress at sea. This task, which would involve the FAL and LEG Committees respectively, should be given lower priority than the review of the SOLAS and SAR Conventions.
The significant outcome of that informal meeting is described in Part V, infra.

At MSC, the Secretary General noted that the issue of persons rescued at sea was brought to the attention of other competent U.N. specialized agencies and pointed out the need for a coordinated U.N. inter-agency approach. The Secretary General also proposed establishing a coordinated mechanism within the United Nations to ensure a consistent response to any future globally urgent situations.

B. Analysis of Actions Proposed and Taken

The French and Norwegian proposals to allow masters assisting persons rescued at sea to determine their port of disembarkation, if accepted, would represent a significant change in traditional international maritime law. While the discretion of a ship's master to take appropriate action to ensure the safety of his or her ship is extremely broad, it is not unfettered, and should not include the absolute right to enter any port of the master's choosing. Although UNCLOS is silent on the right of port entry in cases of distress, most commentators view it as a customarily accepted "universal right." However, this right is not absolute. The ship may not have the right where human life is not at risk, or where entry into the port would impact the safety and health of the port and the citizens of the port state. Churchill and Lowe noted that the decision to allow a ship to enter port in these circumstances "should be taken by weighing the gravity of the ship's situation against the probability, degree and kind of harm to the coastal state that would arise were the ship allowed to enter."

While Churchill and Lowe imply that this analysis would be undertaken in cases where the threat of pollution exists, in the case of the Tampa it seems Australia undertook the same analysis regarding the entry of undesired persons into a port. Although Captain Rinnan had declared a
distress aboard *Tampa* because of overloading, the lack of medical supplies and food, Australia concluded either that no lives were in danger of being lost, or that entry into Australian territory at Christmas Island threatened the safety of that port.\(^{123}\) Whatever Australia's legal justification for denial, the result was the same: a merchant vessel, in fulfilling its duty to render assistance under international law was, for a time, left to fend for itself until a solution to could be developed. This is the primary similarity between the *Tampa* and the *Castor*.

The Norwegian proposal brought forward at the MSC places tremendous discretion in the hands of masters, including rights to deliver persons to a place of safety (mixing the SAR Convention obligation on coastal states with master's obligations in SOLAS and elsewhere), and the right to unilaterally decide which port to enter to disembark survivors.\(^{124}\) Under the proposal, port and coastal states would be largely be required to comply with the wishes of the master.\(^{125}\) Such a result would turn international law on its head, subordinating the sovereignty of the coastal state to govern their own waters to the desires of the master of a foreign ship. Further, creating such rights in the master also creates a great potential for abuse. Captain Rinnan, who acted with only the highest regard for the tradition of assisting persons in need at sea, could likely have benefited from exercising rights such as those proposed by Norway. However, an unscrupulous master could use these rights as a vehicle to create distress situations, then exercise the rights to land migrants seeking to enter countries illegally. Given this potential for abuse, a more measured requirement for coordination and cooperation to relieve masters of their responsibilities after assisting persons in distress seems necessary.

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\(^{123}\) The *Note Verbale* from Australia to Norway indicates both bases, noting that "the rescue had been completed" and that its "international search and rescue obligations were concluded at that point" and that the direction for the *Tampa* not to enter Australian territorial waters "was made in view of the fact that the vessel was carrying intended unauthorized arrivals who wished to enter Australia illegally." IMO Circular Letter 2345, *supra* note 71.

\(^{124}\) *Norwegian Safety Measures and Procedures, supra* note 112.

\(^{125}\) *Id.*
IV. THE CASTOR AND PLACES OF REFUGE

A. A Cracked Hull and Nowhere to Go

In December 2000, the Castor, a Cypriot flagged tanker with 29,500 tons of gasoline, departed Constanza, Romania en route to Lagos, Nigeria. While underway in the Mediterranean Sea, the Castor, built in 1977, developed a twenty-six meter crack in the hull of the ship that ran from port to starboard halfway along its length. The structural damage placed the vessel in jeopardy of breaking up, risked an explosion, and caused a large oil spill.

Escorted by a rescue tug, the Castor spent over a month navigating the Mediterranean, seeking a port that would accept it in order to offload its cargo and make repairs. However, the Castor’s request fell on deaf ears. The Mediterranean countries of Morocco, Algeria, Greece, Italy, Malta, Tunisia, and Spain, and the territory of Gibraltar all rejected the Castor’s appeals to enter their ports.

After forty days and over a thousand miles aimlessly navigating the Mediterranean, the Castor’s owners contracted for commercial salvage. With some assistance from Spanish authorities, the Castor was towed to a sheltered area off the coast of Tunisia, where its cargo was safely offloaded to two small tankers without a spill.

B. The IMO Response—Places of Refuge

The concept of providing places of refuge for ships in need of assistance was a natural outgrowth of the general international law principle that foreign ships in distress should be allowed into port, except in extraordinary circumstances. Indeed, the IMO had begun consideration of the issue prior to the Castor incident. The Working Group on Oil Tanker

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126 Donald Urquhart, Stricken Vessel Off Europe Denied Refuge, BUS. TIMES (SINGAPORE), Jan. 12, 2001, at 1.
127 Id.
129 Urquhart, supra note 126.
130 Brian Reyes, Salvage: Salvage Chief Warns that "Leper" Ship Will Sink, LLOYD'S LIST, Jan. 29, 2001, at 3. See also Urquhart, supra note 126.
131 Reyes, supra note 130; Urquhart, supra note 126.
132 Sheltered Waters, supra note 128.
133 See infra Part II.A.1.
Safety and Environmental Matters was established by the MSC in November, 2000, to consider safety-related issues in the wake of the catastrophic T/V Erika oil spill off the coast of France. Among the issues identified by the Working Group was “the examination of the need to establish principles for coastal states, acting either individually or on a regional basis, to review their contingency arrangements regarding provision of ports of refuge.” The Castor incident, where the ship was unable to locate a place of refuge and had to effect a response on the high seas added to the urgency of that need. At the first opportunity after the Castor, Secretary General O’Neill stated “the time had come for [the IMO] to undertake, as a matter of priority, a global consideration of the problem.” He further suggested “measures be developed to ensure that, in the interests of safety of life and environmental protection, coastal states review their contingency arrangements so that disabled ships can be provided with assistance and facilities appropriate to the circumstances.”

The first country to take a formal position on the issue at the IMO was Spain, one of the coastal states refusing entry to the Castor, but the state that eventually provided the most assistance to the stricken ship. The Spanish Government opined that:

[[the right of a vessel in distress to enter a port, place of refuge or territorial waters must be interpreted solely as the right to preserve or save the lives of its crew and its passengers, and . . . such right of entry cannot exist when measures have already been taken to save persons onboard.]]

\[134\] See Report of the Maritime Safety Committee on its Seventy-third Session, 73rd Sess., Agenda Item 21, Maritime Safety Committee Doc. MSC 73/21 (Dec. 12, 2000). The T/V Erika was a Maltese-flagged tanker that broke up off the coast of France in December 1999, causing extensive damage to the marine environment. See e.g., Peter Shard, 15,000 Birds Die in Oil Slick, DAILY TELEGRAPH, Dec. 28, 1999.


\[136\] The first opportunity was a meeting of the Subcommittee on Fire Protection, which met in January 2001. See Report to the Maritime Safety Committee, 45th Sess., Agenda Item 16, Sub-Committee on Fire Protection Doc. FP 45/16, 1.3 – 1.5 (Feb. 2001).

\[137\] Post "Erika" Safety-Related Matters-Ports/Places of Refuge, supra note 135, para. 3.

\[138\] See discussion supra Part III.A.

\[139\] Designation by Coastal States of Places of Refuge for Vessels in Distress Where There is Risk of Pollution, 74th Sess., Agenda Item 2, Maritime Safety Committee Doc. MSC 74/2/4, para. 11 (Feb. 11, 2001).
Although Spain made these statements in the context of places of refuge for a potential pollution incident, the rationale is quite similar to that used by Australia in denying *Tampa* entry into port because of unwanted persons. Another statement made by Spain in their paper that also could be used in the context of *Tampa* was:

[t]aking into account that in Spain, as in most States with a coastline, a large part of the population live[s] [sic] in coastal towns, it would be hard to justify to public opinion, after creating such a substantial rescue service at public expense, that a vessel in distress should be allowed to enter its territorial waters solely for the purpose of trying to save that vessel and/or its cargo, i.e., protect the economic interests to the detriment of the general public interest.\(^{140}\)

The application of that sentiment in the context of the *Tampa*, is a chilling prospect; however, the economic interests protected would be those of the assisting vessel and its ability to conduct its trade without major interruption. Should the weight of public opinion be against bringing survivors ashore because of their status as illegal entrants, the potential to create a disincentive for vessels to respond to those in need becomes dangerously great.\(^{141}\)

Spain's proposed resolution to facilitate assistance to vessels in distress was to have coastal states:

[i]n the waters over which they exercise sovereignty or jurisdiction, to the extent possible, identify places of refuge specially selected for their favorable weather conditions, distance from populated areas and absence of fishing or tourist resources, for the purpose of the rescue of the persons on board and salvage of the ship and/or cargo.\(^{142}\)

However, the concept of pre-designated places of refuge was not embraced by the IMO.\(^{143}\) Instead, the MSC decided that any guidance

\(^{140}\) *Id.*, para. 10.2.

\(^{141}\) *See generally* Davies, *supra* note 40 (discussing commercial disincentives for ship masters to effect rescues).

\(^{142}\) *Id.*, para 12.1.

\(^{143}\) Countries opposed to the concept of pre-designated places of refuge included the United States, who stated that pre-designation led to two significant problems: the first the "not in my backyard
coming from the IMO would be non-mandatory, and would focus on the coordination aspects of determining a place of refuge for vessels in need of assistance or in distress.\textsuperscript{144} The MSC designated the Subcommittee on the Safety of Navigation ("NAV") as the coordinating body for the development of the guidelines. The terms of reference developed by NAV concerned:

.1 actions a master of a ship should take when in need of a place of refuge (including actions on board and actions required in seeking assistance from other ships in the vicinity, salvage operators, the flag State and coastal States).

.2 the evaluation of risks associated with the provision of places of refuge and relevant operations in both a general and case by case basis; and

.3 actions expected of coastal States for the identification, designation and provision of such suitable places together with any relevant facilities.\textsuperscript{145}

In July 2001, the NAV developed an outline of these guidelines. Topics addressed included, \textit{inter alia}, appraisal of the situation and assessment of risks by both the ship and the coastal state including environmental and social factors, identification of required actions, establishment of responsibilities, and communications with all parties involved.\textsuperscript{146} As the NAV continued its work at its forty-eighth session in July 2002, these concepts were broadened to include direction on topics such as guidance for masters for contacting authorities of coastal states and

\footnotesize{syndrome," and the second, that a "cookie cutter approach" to pre-designation, when each incident was better handled on a case-by-case basis. \textit{U.S. Negotiating Position Paper for the IMO for Maritime Safety Committee, 74th Sess., Agenda Item 2 & 11 (May 2002)} (on file at the Office of Maritime and International Law, U.S Coast Guard Headquarters, Washington, D.C.) [hereinafter MSC 74 Position Paper]. Although ultimately not accepted, Spain did receive some support for its concept. \textit{See e.g., Designation by Coastal States of Places of Refuge for Vessels in Distress where there is a Risk of Pollution, 74th Sess., Agenda 2, Maritime Safety Committee Doc. MSC 74/2/7} (submitted by Germany, Apr. 6, 2001) (supporting the views by Spain and providing criteria for pre-designation of places of refuge).}

\footnotesize{\textit{Report of the Maritime Safety Committee on its Seventy-Fourth Session, 74th Sess., Agenda Item 24, Maritime Safety Committee Doc. MSC 74/24, para. 2.15-2.32} (June 13, 2001).}

\footnotesize{\textit{Report to the Maritime Safety Committee, 47th Sess., Agenda Item 13, Sub-Committee on Safety of Navigation Doc. NAV 47/13, Annex 18} (July 26, 2001).}

\footnotesize{\textit{Id., Annex 19}.}
the decision-making process for designating a place of refuge. The United States noted that many of these considerations could also be used in the resolution of Tampa-like persons rescued at sea. The key contribution of the IMO’s response to the Castor incident is the possibility of creating a similar coordination mechanism for cases such as the Tampa. That link should continue to be utilized.

V. AN OBLIGATION TO COORDINATE?

As the IMO experience in response to both the Tampa and Castor cases demonstrated, any attempt to create an absolute right in the master to enter port to disembark persons receiving assistance at sea, or to create an absolute obligation for coastal states to accept such persons is unlikely to attract the level of consensus needed for the IMO to take any effective action. Since the consensus approach dominates the IMO landscape, and votes are rare, an acceptable solution palatable to all must be devised.

148 MSC 74 Position Paper, supra note 143.
149 See A.O. Adede, Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience, 17 VA. J. INT’L L. 201 (1977). Consensus is particularly important in the IMO context because most IMO treaties, including the Annexes to the SOLAS Convention and, with exceptions described below, the Annex to the SAR Convention operate under the procedure of tacit amendment. The IMO is primarily a technical body. Thus most of the conventions administered by the IMO have detailed technical specifications regarding the design, construction, operation and equipping of ships. In order to keep up with changing technology, the technical aspects of the instruments must be able to be amended fairly quickly. To achieve this result, the IMO has incorporated the "tacit acceptance" procedure for amending most of its technical Conventions. Both SOLAS and the SAR Convention allow for a tacit amendment procedure, whereby once an amendment has been adopted by the Maritime Safety Committee or by an IMO conference, the amendment automatically enters into force for all parties without a further act of ratification or acceptance being required, unless more than one-third of the parties for the SAR Convention and one-third of the parties representing fifty percent of the world’s tonnage for SOLAS specifically object. To get an amendment to the SOLAS or SAR Conventions approved by the Maritime Safety Committee, and to ensure that, after approval, objections are not filed, consensus must be reached before adoption of the amendments.

The tacit amendment procedure applies to the provisions of SOLAS regarding coastal states and the shipmaster’s international duty to render assistance to those in distress at sea, indeed both these regulations were the subject of a tacit amendment procedure in 2000, entering into effect this July 2002. Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended, IMO Maritime Safety Committee Res. MSC.99(73) (adopted Dec. 5, 2000). However, the provision of the annex to the SAR Convention that requires parties to ensure that assistance be provided to any person in distress at sea, regardless of the nationality or status of the person or the circumstances in which they are found, section 2.1.10, is specifically not subject to tacit amendment procedure. In order to change that section, two-thirds of the parties must specifically ratify the amendment, a much more cumbersome and potentially time-consuming procedure. Importantly, though, the definition of "rescue" in the annex to the SAR Convention, section 1.3.2, which is defined as "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety," is subject to tacit amendment.
The desire to find a consensus solution brought many of the countries interested in the issue to the informal meeting hosted by Sweden in September 2002. The meeting was first suggested at the seventy-fifth session of the MSC as a way to make progress. Those in attendance agreed that the ultimate goals of the IMO review process mandated by Resolution A.920(22) should be:

1. to save the lives of persons in distress at sea;
2. to ensure a situation in which the master of a ship continues to readily come to the assistance of persons in distress;
3. to ensure the least inconvenience/delay to assisting ships;
4. to ensure the integrity of the [search and rescue] system.

The informal group noted the important difference between the duty to assist and the obligation to rescue, and considered the use of the shore-side focal points discussed in the context of places of refuge, as a means for establishing communications between ship and shore to determine procedures after persons rescued have been taken out of danger.

In sum, it was the view of the informal group that the more quickly a merchant vessel master could have those assisted removed from the ship for further screening, status assessment, delivery ashore, etc., the less burden would be placed on masters, and the more likely the integrity of the duty to render assistance and the search and rescue system as a whole could be maintained.

To implement this concept, the informal group has proposed a two-part solution to the IMO. First, amendment of the SOLAS Convention (and

150 The meeting was held in Noorkoping, Sweden, September 2-6, 2002. The following countries were represented: Australia, France, Germany, Nigeria, Norway, Sweden, the United Kingdom, and the United States. Observers from the IMO, the United Nations High Commissioner for Refugees, the International Chamber of Shipping, and the International Federation of Sailing Masters Associations also attended. See Outcome of Informal Meeting on "Safety Measures and Procedures for the Treatment of Persons Rescued at Sea," supra note 99, para 1.2.
151 MSC 75/24, supra note 114, para. 1.8.
152 Id., para. 2.1.
153 Id., paras. 2.3 - 2.5.
154 Id., para. 3.3.
possibly the SAR Convention) is needed to place an obligation on Parties to relieve masters of their burden as quickly as possible, with a further obligation to coordinate so that such relief is effected. The proposed change to the SOLAS Convention reads:

$p$arties shall co-ordinate and co-operate to ensure that Masters of ships providing assistance by embarking onboard 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 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 occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case. In these cases the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.\(^{155}\)

The group noted that the proposed text "went a long way to reassure a master that he would be able to disembark persons retrieved from distress at sea at the earliest opportunity."\(^{156}\) But more than reassurance, the obligation to coordinate, with specific responsibilities given to a specific coastal state (that in whose search and rescue region the incident occurs) will be the linchpin in any mechanism by which future Tampa-like incidents can be avoided.\(^{157}\) To accomplish the necessary coordination, standardized procedures must be developed so that masters and coastal and flag states will know what to expect and what is expected of them. In that respect, although the informal group was unwilling to take the similarity too far, the work on places of refuge could be emulated to develop such procedures.\(^{158}\) However, the topics for guidance described supra Part IV.B., for places of refuge, such as social factors, identification of required actions, and establishment of responsibilities and communications with all parties involved are equally

\(^{155}\) *Id.*, Annex 1, pp. 2.

\(^{156}\) *Id.*, para. 3.11.

\(^{157}\) Of course, in the Tampa situation itself it is disputed in whose search and rescue zone the rescue actually occurred. See supra note 75 and accompanying text.

\(^{158}\) *Id.*, para. 4.2. The informal group also noted that the International Air and Maritime Search and Rescue Manual might be the appropriate location for such procedures.
applicable to the scenario of the treatment of persons rescued at sea.\textsuperscript{159}

Although the group recognized that in most cases a "place of safety" as defined in the SAR Convention would be located ashore, they also agreed that it could be a properly equipped and staffed ship. This was a particularly important point to the United States, a country which routinely embarks migrants in distress at sea, provides shelter, food, and medical care, and then returns them to their country of origin without landing the survivors in the United States.\textsuperscript{160} As the group felt that creation of the new obligation on coastal states to coordinate and cooperate would largely alleviate issues of determining a place of safety, it was agreed that it was not necessary to define "place of safety" in the SAR Convention.\textsuperscript{161} However, defining this term may help to avoid confusion in the future.

VI. CONCLUSION

The need for coastal, port, and flag states to cooperate and coordinate is the key to resolving situations such as the \textit{Tampa} and the \textit{Castor}. The creation of new, absolute rights will not foster that coordination and cooperation, but an obligation to coordinate and cooperate might. Few, if any, countries want merchant vessels to be left "holding the bag" in cases where the master and crew have taken potentially heroic action to save lives at sea. Further, the possibility that mariners could be left holding that bag creates a financial disincentive against one of the oldest traditions of the sea.\textsuperscript{162} Hopefully, the IMO will recognize that coordination and cooperation can resolve many \textit{Tampa}-like cases, and it is recommended that the Maritime Safety Committee embrace the outcomes developed in Sweden.

\textsuperscript{159} While the topics and guidance may be the same, they might need to be addressed in separate chapters of the most widely used field procedures manual on these subjects: \textit{INTERNATIONAL MARITIME ORGANIZATION & INTERNATIONAL CIVIL AVIATION ORGANIZATION, THE INTERNATIONAL AERONAUTICAL AND MARITIME SEARCH AND RESCUE MANUAL}, (1988).

\textsuperscript{160} \textit{Id.}, para 3.4. \textit{See also Alien Migrant Interdiction, Overview, http://www.uscg.mil/hq/g-o/g-opl/mle/AMIO.htm.}

\textsuperscript{161} \textit{Id.}, para. 3.5.

\textsuperscript{162} David Cockroft, the General Secretary of the International Transport Workers’ Federation, made a particularly poignant statement in that regard: “That it has reportedly cost a responsible operator like [Tampa] hundreds of thousands of dollars to do the right thing could send out a terrible signal, especially to the shabbier and more cutthroat end of the market: ‘humanity costs.’ Will those bad operators now pressure their crews to pass by and ignore ships in distress?” Richardson, \textit{supra} note 38.