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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**STRENGTHENING SEAFARERS' RIGHTS FOR  
RELEASE AND REPATRIATION: PIRACY IN  
THE GULF OF GUINEA**

By

**RAJINDER KUMAR  
INDIA**

A dissertation submitted to the World Maritime University in partial  
fulfillment of the requirement for the award of the degree of

**MASTER OF SCIENCE  
In  
MARITIME AFFAIRS**

**(MARITIME LAW AND POLICY)**

2019

## Declaration

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): 

(Date): Sept 24, 2019

Supervised by: Dr. Aref Fakhry

Supervisor's affiliation: Associate Professor, WMU

## Acknowledgements

**गुरुर्ब्रह्मा गुरुर्विष्णुः गुरुर्देवो महेश्वरः ।  
गुरुः साक्षात् परं ब्रह्म तस्मै श्री गुरवे नमः ॥**

The shloka in Sanskrit means, Guru (teacher) is verily the representative of God. He creates, sustains knowledge and destroys the weeds of ignorance. I salute such a Guru.

I would like to thank my supervisor Dr. Aref Fakhry for his valuable guidance and inspiring me to explore my research topic. I am grateful to him for providing timely course correction to steer clear and follow the direction of my research objectives. Insightful discussions and encouragement by him have led to the accomplishment of my dissertation.

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## **Abstract**

Title of Dissertation: **Strengthening Seafarers' Rights for Securing Release and Repatriation: Piracy in the Gulf of Guinea**

Degree: **Master of Science**

Maritime piracy is a reality for the shipping industry. The possibility of a pirate attack is a constant fear amongst seafarers and their families. The Gulf of Guinea has become a hotspot for piracy in recent years. Ships transiting the region are at high risk of being hijacked and their crew abducted for ransom. From internal water to the high seas of the Gulf of Guinea, seafarers are vulnerable to such attacks.

Though there has been much discussion on policies and preventive actions to stop pirate attacks, we have largely ignored the rights of the affected seafarers and their early release. This dissertation focuses on ways to strengthen the rights of seafarers and securing their release. Although there is an interplay of various factors in the issue, the discussion is limited to the role of the shipowner and his contractual agreement with the seafarer. In this regard, the Maritime Labour Convention (MLC 2006) has laid down guidelines stressing the role of shipowners in repatriating their seafaring crew.

The liability of the shipowner for fulfilling the terms of the duty of care was examined, and an attempt was made to find a legal remedy for seafarer under 'tort of negligence'. After examining various cases of piracy, it was seen that securing release by paying a ransom is the most viable solution. Various options for paying the ransom amount were explored: General Average, P & I clubs and Ransom insurance.

It is suggested that release and repatriation of seafarers can be secured by insuring against foreseeable perils, such as kidnapping of seafarers. Ransom insurance not only covers the ransom amount, it also provides for related expenses like cost of professional negotiators, liaising with government agencies, meeting the cost of logistics of ransom payments, treatment of injuries (physical and psychological).

It is vital that payment of ransom and other expenses be covered in the contract between the seafarer and shipowner so that the former can claim legal remedy if the shipowner fails to fulfil his liabilities.

**KEYWORDS:** Piracy, Release, Repatriation, Maritime Labour Convention, Duty of Care, Ransom, Insurance

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## List of Abbreviations

ATL	Actual Total Loss
BIMCO	Baltic and International Maritime Council
BMP	Best Management Practices
CBA	Collective Bargaining Agreement
CCS	Commercial Crime Services
CTL	Constructive Total Loss
EU	European Union
GA	General Average
GRT	Gross Registered Tonnage
HRA	High-Risk Area
H&M	Hull and Machinery
IBF	International Bargaining Forum
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
IG	International Group
ILO	International Labour organization
IMO	International Maritime organization
IMB	International Maritime Bureau
IMCA	International Marine Contractors Association
INTERCARGO	International Association of Dry Cargo Shipowners
INTERTANKO	International Association of Independent Tanker Owners
IRTC	International Recommended Transit Corridor
ISPS	International Ships and Port Facility Security Code
ISWAN	International Seafarers Welfare and Assistance Network
ITF	International Transport Workers' Federation
MARAD	Maritime Administration
MLC	Maritime Labour Convention
MoU	Memorandum of Understanding

MPHRP	Maritime Piracy-Humanitarian Response
MSC	Maritime Safety Committee
MV	Motor Vessel
NGO	Non-Governmental Organization
ONI	Office of Naval Intelligence
PMSC	Private Military and Security Companies
PRC	Piracy Reporting Centre
PSC	Port State Control
PTSD	Post-Traumatic Stress Disorder
P&I	Protection and Indemnity Insurance
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia
SEA	Seafarers' Employment Agreement
STC	Special Tripartite Committee
STCW	Standards of Training, Certification, and Watchkeeping
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKMTO	United Kingdom Marine Trade Operations
UNCLOS	United Nations Convention on the Law of the Sea
YAR	York Antwerp Rule

## Chapter 1 Introduction

Ninety-two percent of hostage-taking incidents in the shipping industry occurred in the Gulf of Guinea, making the region a hotspot for pirate attacks (Lloyd's List, 2019). Of the 75 seafarers kidnapped worldwide, 62 were taken hostage for ransom by their attackers off the coasts of the Gulf of Guinea (IMB, 2019).

In a recent incident, five Indian seafarers were kidnapped by pirates at Bonny Outer Anchorage, Nigeria on April 19, 2019. The pirates attacked the MT Apecus and broke a bottle on the captain's head and hit other crew members with rifle butts. Shrapnel from bullets that ricocheted off the floor struck three sailors of whom Ankit was one. He was hit in the left leg. The sailors were blindfolded and bundled into a speedboat.

It was just the beginning of a harrowing period that lasted 69 days. The captives were slapped, abused, mostly kept blindfolded and shackled to trees in a wooden enclosure. They received a single bowl of noodles and salty water. They were finally released on June 27, 2019 (Issar, 2019).

The pirates said that we could be captured by another gang or even be shot by the navy. They said that our survival is dependent on our luck,” Ankit recalled. “Now back in his home, he is haunted by the memories of captivity. His eyes are a sleep-starved red. He has lost 8 kg. He often shudders and wakes up from his sleep,” said his mother, Mrs.Usha (Avjit Ghosh, 2019).

Another seafarer, ‘Puncha Sai Avinash’, who was abducted with Ankit, narrated similar incidents. During an interview with a newspaper (Rao Ch Sushil, 2019), Avinash said, *“I practically asked the pirates to kill me and put an end to the suffering. That is how unbearable it became being in their custody”*.

Samuel Johnson had written in the 18th century, *“No man will be a sailor who has contrivance enough to get himself into a jail; for being in a ship is being in a jail, with*

*the chance of being drowned*” (Boswell, 1785). This even applies to the present era. The situation in the Gulf of Guinea is particularly bad. Besides the likelihood of drowning, a sailor also lives in fear of being attacked by kidnappers or hijacked (Abila & Tang, 2014). If he is kidnapped, the seafarer must endure physical injuries and mental agony (Jensen & Oldenburg, 2019). Seldom a compensation is provided for the injuries sustained, and the after-effects of the attack may lead to post-traumatic stress disorder (PTSD) (Seyle, Fernandez, Dimitrevich, & Bahri, 2018). The seafarer and his family struggle for financial and social security (Syrpis & Novitz, 2008).

Seafarers lead a life of isolation and dangers. This does mean that he must also be isolated from his legal rights (Fitzpatrick & Anderson, 2005). This dissertation aims at strengthening the rights of seafarers by suggesting legal remedies in cases of piracy and armed robbery. It proposes measures to secure the release and repatriation of seafarers by using the Maritime Labour Convention, 2006, tort of negligence under liability of shipowner and case laws related to the piracy incidents.

## **1.1 Background**

Piracy is one of the oldest problems in shipping history and equally so is the problem of repatriation of seafarers. Being held hostage during piracy and armed robbery is one of the worst nightmares for a seafarer (Bellamy, 2011). Release and repatriation of seafarers is one of the main issues in a hostage crisis and there are no standard responses. Though much has been said of policies related to combating piracy attacks and saving the ship from attempts of piracy, the human element is often neglected during policy planning. The release and repatriation of seafarers has been ignored.

World trade is depended on the professional acumen of the seafarer. Seafarers are responsible for the cargo carried onboard a ship; however, they live in fear and insecurity because of the conditions of their work (IMO, 2015). Ships cannot avoid operating in high-risk areas. The situation becomes worse if the shipowner has not insured the ship and the seafarer falls in the hands of kidnappers/ pirates (Couper,

1999). In the event of a hijack and hostage-taking and subsequent rescue, need for repatriation of the seafarers remains unaddressed. The seafarer is left to the mercy of the P&I clubs and insurance agencies (Koswig, 2010).

Cases of hijacking of ships and kidnapping of seafarers require more attention from the shipping industry and its stakeholders who have been largely silent on the issue. There is an urgent need to strengthen the rights of seafarers and securing their safe release in the case of hijacking and kidnapping due to piracy and armed robbery.

## **1.2 Worldwide trends of piracy - why to focus on the Gulf of Guinea?**

### **1.2.1 Four regions of piracy**

Piracy is prevalent mainly in four geographical regions (Gaibulloev & Sandler, 2016):

- (i) South Asia
- (ii) America Atlantic and the Carribean
- (iii) Horn of Africa, Somalia
- (iv) Gulf of Guinea

Since 2010, there have been 3,891 incidents of piracy and armed robbery at sea. Fifteen percent of piracy attacks have led to hijacking or kidnapping (ONI Piracy and Maritime Crime, 2019). In 2018, the number of such attacks went up to 210 as compared to 180 attacks in the previous year. 141 crew members were held hostage and 83 were kidnapped for ransom (James Gosling, 2019).

Attacks on ships are classified into four broad categories by the International Chamber of Shipping (ICS), London. Hijacking represents the situation wherein the perpetrators take over control of the ship. If attackers can access the ship, it is termed as boarding. The use of firearms fall in the category of fired-upon. Unsuccessful attempts at boarding are termed as attempted boarding or suspicious approach. The figure below

areas susceptible to piracy and the attacks on shipping in the year 2019 (ICC-CCS, 2019).



Figure 1: Piracy Map of the world 03 Jun 2019 (ICC-CCS, 2019)

### 1.2.2 Gulf of Guinea - a piracy hotspot

The characteristics of piracy vary from time to time and the patterns change with geographical locations. Piracy in Somalia, where seafarers used to be hijacked with the ship, differs from piracy in the Gulf of Guinea where sailors are abducted from ships for a ransom and have to endure severe violence (Morewitz, 2019). Slow-steaming vessels, vessels with low freeboard and fishing trawlers are easy prey for the armed robbers. There has been a decline in piracy in Somalia and South East Asia; however, the number of cases are increasing in the Gulf of Guinea (MSC, 2019). Figure - 2, shows the area of the Gulf of Guinea and the adjoining coastal states, which

extend from the northern part of Angola to Senegal. Nigeria is at the center and also, a prime location for pirate attacks.



Figure 2: Map of the Gulf of Guinea (GMSC, 2019)

The year 2018 witnessed a 15% increase in the number of seafarers affected by pirate attacks in the Gulf of Guinea. About 2,012 seafarers were affected in 2018 as compared to 1,726 in 2017. A fact-sheet based on studies are presented in the form of a descriptive figure in Appendix- 1A. It shows that piracy in the Gulf of Guinea is common. Unlike the Gulf of Aden, where the ships are attacked mainly in the high seas, the attackers in the Gulf of Guinea target ships in internal waters and the territorial waters of the coastal states, as well as in international waters. This makes the attacks unpredictable. Tankers are the main targets of attacks but other vessels are also affected. Thus, all vessels are vulnerable to pirate attacks, whether they are steaming or anchored. The various models of piracy that are prevalent in the Gulf of Guinea are discussed in the next section.

### **1.3 Aims and objectives**

The aim of this dissertation is to strengthen the rights of seafarers for securing their release and repatriation in the case of pirate attacks and armed robbery in the Gulf of Guinea. It draws attention to the liability of the shipowner for making provisions for the release and repatriation of the seafarers. Shipowner is liable in case of breach of 'duty of care'. They must take preventive measures and ensure repatriation under the Maritime Labour Convention (MLC) 2006. The convention suggests ways in which a shipowner can fulfil his obligations to get the seafarer repatriated. It also provides a legal remedy to the seafarer if shipowners do not fulfil their obligations. This is done by applying a set of legal principles derived from international instruments which are binding on shipowners. The case laws pertaining to the release and repatriation of seafarers were also studied as a part of this research to identify precedents and the challenges.

Much has been said about how to deal with piracy and armed robbery from the maritime security perspective, but little has been done to address the rights of seafarers to be repatriated. This study aims to fill the gap in the field of release and repatriation modalities from the perspective of seafarers and the shipowners.

### **1.4 Research questions**

The research question that is being addressed in this study is,

How a shipowner can fulfil his obligation to secure the release of seafarers and arrange their repatriation?

There are two related questions that need to be considered while trying to address the main research question:

1. How can legal remedy be provided to a seafarer as an obligation of a duty of care by shipowner after a pirate attack?



2. If paying a ransom is the best way to secure release, how can it be insured?

The discussions in the section following the present one will attempt to answer these questions.

## **1.5 Scope and limitations**

### **1.5.1 Focus on shipowners**

The study of cases of repatriation of seafarers in case of kidnapping and hijacking of the ship requires inputs from various sources like the flag State, a port State, shipping companies and insurance agencies. As it is not feasible to study the roles of all the stakeholders in this research, the scope is limited to the role of shipowners in securing the release and repatriation of the seafarers.

The focus on the role of shipowners is mainly because they are responsible for securing the release of their employees. They are obliged to repatriate seafarers as per the MLC 2006, 'A Seafarers Bill of Right'. They are contractually bound to fulfil their duty of care by securing their release and get them repatriated. The role of other stakeholders can be studied separately to find an optimum solution to the issue.

### **1.5.2 Limitation in the sharing of information (seafarers and policy makers)**

It was difficult to contact the seafarers who had been abducted in the pirate attack in Gulf of Guinea. Approval of Research Ethics Committee was obtained prior the interview. We have interviewed 05 seafarers who were abducted by pirates in the Gulf of Guinea. It formed the basis to focus on the topic of strengthening the rights of seafarer. During their interview they brought out the difficulties faced by the seafarers on being abducted. The interviews also portrayed the on ground situation in Gulf of Guinea. The summary of interview is placed at Appendix–1B.

The policies pertaining to the repatriation by states and shipping companies are confidential and not easily accessible. Due to this, the restrictions on sharing of data

by the stakeholders limited the scope of this dissertation. The maritime administration and shipping companies were approached but they were not able to share the information on this subject. Information is thus gathered mainly from publications and conventions available in the public domain.

### **1.5.3 Mismatch of data**

Data on incidents of piracy incidents are available with various sources like the database of International Maritime Organisation (IMO), the International Maritime Bureau (IMB), Office of Naval Intelligence, U.S., The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) and also with various journals which study piracy. Moreover, many incidents of piracy in the Gulf of Guinea go unreported. It is possible that there is a slight mismatch of data while quoting multiple sources. However, this limitation does not limit discussions on the core issue of the Gulf of Guinea being a hot spot for piracy and that the issue of repatriation requires attention by the shipping community.

### **1.5.4 Law of the United Kingdom**

Shipping is an international activity by its nature and thus, so is the problem of the repatriation of seafarers. There are different segments of laws in different parts of the world. For the purpose of this dissertation, we will study the common law regime. I take the laws of the United Kingdom as a base for discussing various issues pertaining to repatriation. The UK was selected because of its long history of dealing with admiralty cases. It is also the hub for the court of arbitration for contractual issues under private international law.

### **1.5.5 Case laws from the Gulf of Guinea**

There are few case laws that are available on piracy in the Gulf of Guinea, which deal with the matter of repatriation of seafarers. Therefore, cases from other regions like

the Gulf of Aden and Malacca Straits are examined to understand the difficulties faced by seafarers in their repatriation.

#### **1.5.6 Legality of ransom payment**

One can only assume that pirates in the Gulf of Guinea are motivated by money. But there is no assurance that the ransom money will not be used for funding terror. For example, Nigeria has faced a serious problem of terrorist attacks by the Boko Haram (Weeraratne, 2017). Other countries also have active terrorist groups operating in them. Even if the shipowners are ready to pay the ransom, the flag or crew supplying state or the port state may not permit it. Such challenges need to be studied however it is kept out of the scope of the research.

#### **1.6 Research method**

The research uses a qualitative and doctrinal legal research method. It involves the study of repatriation of seafarers in the Gulf of Guinea. It combines a study of the operational capability of the stakeholders, modus operandi of the pirates, and interpretation of public and private international law. The relevant labor laws, including the MLC 2006, were studied to find if existing laws can be strengthened for securing the right of seafarers in case of their kidnapping and hijacking. The role of shipowners under the private international law in securing release and repatriation of the seafarer was also studied. Shipowner's role as an employer and his liability as the duty of care was emphasized in this study. Laws of common law countries were discussed and legislation in the UK studied for finding the legality of issues like payment of a ransom to the pirates.

This study provides a systematic exposition of the rules governing the right of seafarers to repatriation in the event of piracy and armed robbery. It precedes the relations between the rights of seafarers and the responsibility of the shipowner in securing their release and facilitating their repatriation. We studied the issues faced by seafarers who claimed negligence in duty of care by shipowners. Various case laws related to the

repatriation of the seafarer, and their claims after an attack, were studied to take precedence from the cases. The corroboration of various judgments will be used to bring out the difficulties faced by the seafarers and the remedies provided by the courts. Finally, it makes projections for the future of rights of the seafarers after a pirate attack and tries to find a solution for securing their release.

### **1.7 Expected results**

The outcomes of this dissertation are expected to provide a pathway to strengthen the rights of seafarers to repatriation after a pirate attack. It will examine the difficulties faced by the seafarers in claiming compensation after attacks and will try to find a remedy to negate these loopholes in the form of contracts. The contractual agreements between the shipowner and seafarer are expected to iron out all such inadequacies so that seafarers can assert their rights. A study of various possibilities to secure the release of the seafarer after a pirate attack will help in suggesting ways for an early release from the pirates' captivity. Payment of ransom through the insurance will be studied as an option to secure the release. The study will also bring out the difficulties faced by the shipowner in fulfilling his liability as duty of care.

### **1.8 Organization**

The dissertation is presented in five chapters, followed by a concluding chapter. The discussions in all chapters lead to a case for strengthening the rights of seafarers, especially in securing their release and repatriation.

#### **Chapter-1**

Chapter 1 introduces the aims and objectives of the dissertation. It presents the background of the problem of piracy and armed robbery in the Gulf of Guinea and tries to highlight the seriousness of the issue of repatriation of seafarers. The chapter also presents the scope of the study as well as its limitations. It also discusses the methodology adopted for the study of the subject.

## Chapter-2

The chapter is a discussion on the various models and modus operandi of piracy in the Gulf of Guinea. Further, it examines the effects of acts of piracy and kidnapping on the safety of the seafarer. Based on the study of these models, various situations are identified in which repatriation is necessary. Special focus is kidnapping and hijacking, and justification is given selecting some of the models for deeper study. The concluding part of the chapter discusses various stakeholders such as flag states, states of the nationality of seafarers, port state, in a system for securing the release of a seafarer. This is followed by a discussion that is focused on the shipowner.

## Chapter-3

Chapter 3 discusses the rights of the seafarers to be repatriated from the perspective of labor laws. It begins with presenting a historical perspective on the evolution of the law for the repatriation of the seafarers, and importance of the Maritime Labour Convention in strengthening the rights of the seafarers to repatriation. Various amendments to MLC (2006) and how they lead to provision of safe working conditions are also discussed. The role of Seafarers' Employment Agreements (SEA) and Collective Bargaining Agreements (CBA) is examined with the purpose of enabling seafarers to assert their rights with the shipowner. The role of shipowner as per MLC (2006) is also discussed in this chapter. The chapter concludes with a presentation of recommendations for improving the terms of contractual agreements as per MLC (2006) so that seafarers can be repatriated safely.

## Chapter-4

The focus of Chapter is on private law and its functioning in cases of piracy and armed robbery. It discusses the rights of seafarers after a pirate attack. The responsibilities of the shipowners and their obligations under the duty of care are also highlighted. In addition, the difficulties experienced by the seafarers in claiming their dues are studied using previous cases of repatriation after piracy. This chapter also focuses on the

obligation of the shipowner to secure the release of the seafarer from captivity. It discusses the various methods available for getting seafarers released and repatriated, as well as the advantages and limitations of each. It finds that payment of ransom is the most suitable method and establishes the basis for discussions in the next chapter on, how shipowner can subsidize the burden of payment of ransom through insurance.

#### Chapter-5

The chapter examines the various methods to pay the ransom. The discussions are initiated with an examination of the legality of paying a ransom. Then they move to finding a solution for ransom payment through the General Average and the limitations of finding a solution through the General Average, as well as how P&I clubs can provide solutions for paying the ransom. The discussions also lead to a suggestion for paying ransom through a customized ransom insurance scheme which assists the shipowner to pay the ransom amount for securing the release of the seafarers.

## **Chapter 2 Models of Piracy in the Gulf of Guinea**

### **2.1 Models of piracy in the Gulf of Guinea**

In the Gulf of Guinea, the location of attacks extends from internal waters to the high seas. Article 101 of UNCLOS provides the definition of piracy and treat it as an offence of the high seas (UNCLOS, 1982). It is further developed by the resolution of International Maritime Organization (IMO), which delineate such attacks in the territorial waters as ‘armed robbery’ (IMO Resolution A.1025(26), (2010)). The clauses of insurance covers both the armed robbery and piracy. Such attacks are described as pirate attacks in the ongoing chapters. When a ship operates in an area which is prone to pirate attacks, incidents may occur according to various patterns or models as described in the following sections. Each has distinct characteristics (Lydelle Joubert, 2019).

#### **2.1.1 Hijacking**

In the Gulf of Guinea, the most common prey to attackers are ships carrying petroleum. Hijacking of vessels is considered to be one of the more complex models of piracy. It requires cooperation and coordinated efforts from a variety of ‘stakeholders’ who have vested interest in the cargo of the hijacked vessel. The hijackers direct the crew to take the ship to a designated place. Three different situations arise out of such hijacking.

- (a) First, they will transfer the cargo to some ship or land-based storage facility (ONuOHA, 2012). The attackers usually have direct contact with the agents in the black market to whom they sell the cargo.

(b) Second, the vessel may not be having cargo and the hijackers capture the crew for ransom.

(c) The third is a combination of the first two possibilities. In such a scenario, the vessel is hijacked and the crew is taken hostage on the hijacked vessels. This is a high-risk model for both crew and the hostages as they are vulnerable when onboard a hijacked vessel. They can be tracked and intercepted by the Navy of the coastal state or other law enforcing agencies, which may result in apprehension of the attackers. The life of the crew is also at stake when such operations take place as the pirates can harm them or may use them as a human shield. Hijacking involves the seizure of a vessel, crew and its cargo. It may lead to the Actual Total Loss<sup>1</sup> (ATL) or Constructive Total Loss<sup>2</sup> (CTL) (Gauci, Gotthard Mark, 2019)

### **2.1.2 Kidnapping for ransom (KFR)**

In this scenario, the attackers board the vessel with an intent to kidnap the crew. Kidnapping in the Gulf of Guinea differs from piracy in Somalia. In Somalia, the crew

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<sup>1</sup> Actual total Loss is defined in section 57(1) of the Marine Insurance Act 1906 as, “Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss”.

<sup>2</sup> The Marine Insurance Act 1906 aimed to codify the law relating to marine insurance. Section 60 defines constructive total loss in the following words: (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. (2) In particular, there is a constructive total loss if (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or (ii) In the case of damage to a ship, where she is so damaged by a peril-insured against, that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or (iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.



would be taken hostage with the ship and were kept onboard the vessel till the time negotiations take place (Onuoha, 2013). In Somalia, attempts at kidnapping require huge investments and back support in terms of mother vessels to attack a merchant vessel at high seas, and then berthing the ship in Somalia where the crew would be kept captive for a long time, at times extending for years.

However, in the case of piracy in the Gulf of Guinea, the crew is kidnapped for ransom and then taken to land. They are frequently shifted from one place to another until the ransom demands are met. This may take time from one week to three months (Osinowo, 2015). Interviews of pirate gangs by Prof Bertrand Monnet in the Niger Delta reveal that there are about 10 pirate groups that are operating in Nigeria, making it a global hotspot for the kidnapping of the crew (The Maritime Executive, 2019). The attackers kidnap the Master and Chief Engineers as it is easy for them to bargain for a good amount for their release (ICS, 2018). The kidnappers kidnap seafarers of foreign nationalities so they can get a higher amount of ransom. They avoid kidnapping local crew. The focus is on a high-value transaction for the ransom payment.

The Niger Delta (shown in figure 2, para 1.2.2) is most vulnerable to incidents of 'kidnapping for ransom' attacks. It targets vessels with expatriate crew because of their potentially high ransom value. Often, they use mother ships to support small boats for carrying out fast and furious attacks on a vessel. With the help of mother ships, the small boats can operate up to 150 nautical miles from shore. They fire on a vessel before boarding it to create an atmosphere of fear and make it easy for them to board. The attackers usually kidnap two to eight crew members. Senior officers onboard like Master and Chief engineers are the first choice of the kidnappers. The kidnap victims are taken to shore in the Niger Delta. As kidnapping is motivated by ransom, the demand is for ransom payment in exchange of seafarers (MARAD US, 2019)

### **2.1.3 Petty theft and robbery**

An attack is termed as a robbery or petty theft when an armed attack takes place onboard a vessel with an intent to steal stores or the belongings of the crew. Such

attempts are petty thefts, usually for low-value items and in most cases, they go unreported by the ship and shipping companies. It can happen while the vessel is underway or at an anchorage. In the Gulf of Guinea, failed attempts of hijacking or kidnapping may lead to a situation of armed robbery. Ships, when at anchor or steaming at slow speed while operating close to harbour area, are more prone to such attacks. The risk to the life of crew is less but mistakes by crew members may lead to harmful situations as the attackers are generally armed with firearms and have hostile intentions in the Gulf of Guinea<sup>3</sup> (Ghosh, 2013; Hasan & Hassan, 2016).

#### **2.1.4 Failed attacks**

Attacks by pirates or armed robbers are not always successful. Attacks can be defended by proactive and trained responses by the crew, naval intervention or by the security measures like embarkation of armed guards (Osinowo, 2015).

#### **2.1.5 Suspicious approaches**

Suspicious approaches include close-quarter situations wherein it is believed by the crew that there was a possibility of attack. They may say this on the basis of previous knowledge or the gestures of the approaching vessels, display of arms or equipment like ladders which can be used for attacking and boarding a vessel (Oyewole, 2016). Such a situation does not affect the safety of the vessel but can impact the morale of the crew.

### **2.2 Cases of repatriation arising out of piracy models**

When a ship proceeds to an area susceptible to the attacks by pirates, one of the piracy models as discussed in chapter 2.1 may fit the description. Depending on the model that was identified, the condition of repatriation may fall into various types. From the time when the ship is scheduled to sail in a piracy prone region to the situation where

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<sup>3</sup> Same is verified during interview of kidnapped seafarers. Placed at Appendix – 1B

the crew is abducted till its release, there are various situations that demand appropriate provisions for repatriation. Some of these are discussed here.

### **2.2.1 Seafarer's unwillingness to sail in a piracy-prone area**

In this situation, the seafarer understands the risks of operating in a piracy-prone area. The incentives and provisions for safety provided by the shipping company are not adequate to induce him into operating in such an area and he refuses to sail on such ships. This is determined by the experience and risk-taking capability of the seafarer. He does not want him to be exposed to the risks of piracy. If a ship is covered by the ITF International Bargaining Forum (IBF) collective agreement a seafarer has a right to be repatriated on company expenses prior proceeding to HRA, except ship transits through International Recommended Transit Corridor (IRTC) (ITF, 2019). Such situations may be difficult for the shipping company because it has to find a substitute; but it is a relatively better option than to repatriate the seafarer at later stages.

### **2.2.2 Ship experiences a suspicious approach**

The crew senses the danger of piracy and does not want to operate in the area, which may be harmful to his safety. He/ she wants to discontinue and expects to be repatriated. This may involve a higher cost as he/she has been repatriated from a different place and a replacement needs to be provided in his/her place.

### **2.2.3 Repatriation after failed attacks**

In this situation, the crew was responsive enough to dodge a pirate attack. They could save the ship and themselves from a pirate attack; however, they may feel that they cannot be that lucky every time. Though the crew's training to resist piracy and the response mechanism of the shipping company worked in this time, the crew is not willing to take the risk again. The seafarer may want to quit and be repatriated.

#### **2.2.4 Repatriation after an armed robbery**

The crew has seen the attack by pirates. The seafarer wants to be repatriated as he believes that operation in such an area is detrimental to his safety.

#### **2.2.5 Kidnapped or hijacked and wants to be repatriated**

This is the most traumatic situation for the seafarer. The vessel is hijacked, or the crew is kidnapped. The crew needs to be first released and then repatriated.

The dissertation will focus on the issue of repatriation after kidnapping and hijacking; and the reasons for it are discussed in the paragraph below.

### **2.3 Focus area - release and repatriation after kidnapping or hijacking**

Section 2.2 explains the various models of piracy that exist in the Gulf of Guinea and the situations which demands for repatriation. Of these, the kidnapping or Hijacking model, and the conditions arising with the abduction of crew which requires their release and repatriation will be the focus area for this study for the following reasons:

(a) Directly affects the seafarer. The study of the kidnapping model of piracy shows that it is the most detrimental factor to the safety of the crew. It does not require the robust infrastructure necessary for hijacking a vessel. In such cases, a few crew members are abducted. The operation of the vessel is not affected as it does when it is hijacked. The shipping companies are relatively under less pressure in this situation than they would be when the ship is hijacked. Kidnapping is more beneficial to the attackers as it reduces the chances of the use of firearms by security agencies, making it easier for them to flee and negotiate a good ransom in exchange of seafarers.

(b) Requires more than repatriation. The other models of attacks show that if the seafarers want to leave the ship, it can be facilitated by repatriation which involves some cost but which can be materialized within the terms of the

contract. However, in the case of kidnapping, the situation becomes complex as it involves two steps i.e. the release of the seafarer and then the condition of repatriation can be applied. The present trends of contracts and policies address the situation of repatriation separately, whereas release is also important to the process of repatriation. In order to perform the function of repatriation, we shall discuss release and repatriation together instead of just repatriation.

(c) Beyond the capacity of a seafarer. The situation goes completely out of the hands of the seafarer when he is kidnapped. It then becomes the responsibility of various stakeholders to extricate him from the situation. The terms of the contract and laws should be amended so that the seafarer can be released and repatriated.

## **2.4 Ascertaining responsibility**

Responsibility for repatriation flows from various channels. Private international law tries to improve the safety standards of the seafarers through international cooperation and developing minimum international standards for the safety of seafarers (Piñeiro, 2015b). Private international law provides the best set of rules in case of weak links in international situations in private matters (Muir Watt, 2015). The terms and conditions are based on individual employment contracts. There exists an international jurisdiction over individual employment contracts in the form of International Labour Laws. Maritime Labour Convention, 2006 specify the conditions for the Seafarers' Employment Agreements (SEA) in Regulation 2.1 Standard A2.1 and make it part of the minimum labour standards that must be complied with by the member States. The Seafarers' Employment Agreement is also complemented by the Collective Bargaining Agreements (CBA), and it is incumbent on national labour laws of the seafarer-supplying to adhere them.

The release and repatriation of seafarers involve many stakeholders and hence, requires a collective effort to provide a favourable working environment for the

seafarers. As per Standard 2.5 of MLC 2006, it is the responsibility of the shipowner to repatriate a seafarer. The flag states are responsible for ensuring a regime that makes it incumbent on the ship owners to repatriate the seafarer. In case the flag state is not able to perform its function of repatriation, it becomes the responsibility of the coastal state where the incident has happened or the state of the nationality of the seafarer to repatriate the seafarer. Therefore, the member states are responsible for the repatriation of seafarers. The various stakeholders involved in the process of release and repatriation of seafarers are shown in the figure-3 below. The best solution to the problem can be achieved with the cooperation amongst various stakeholders described in the figure below but the scope is limited to the shipowner for further discussions in following Chapters.

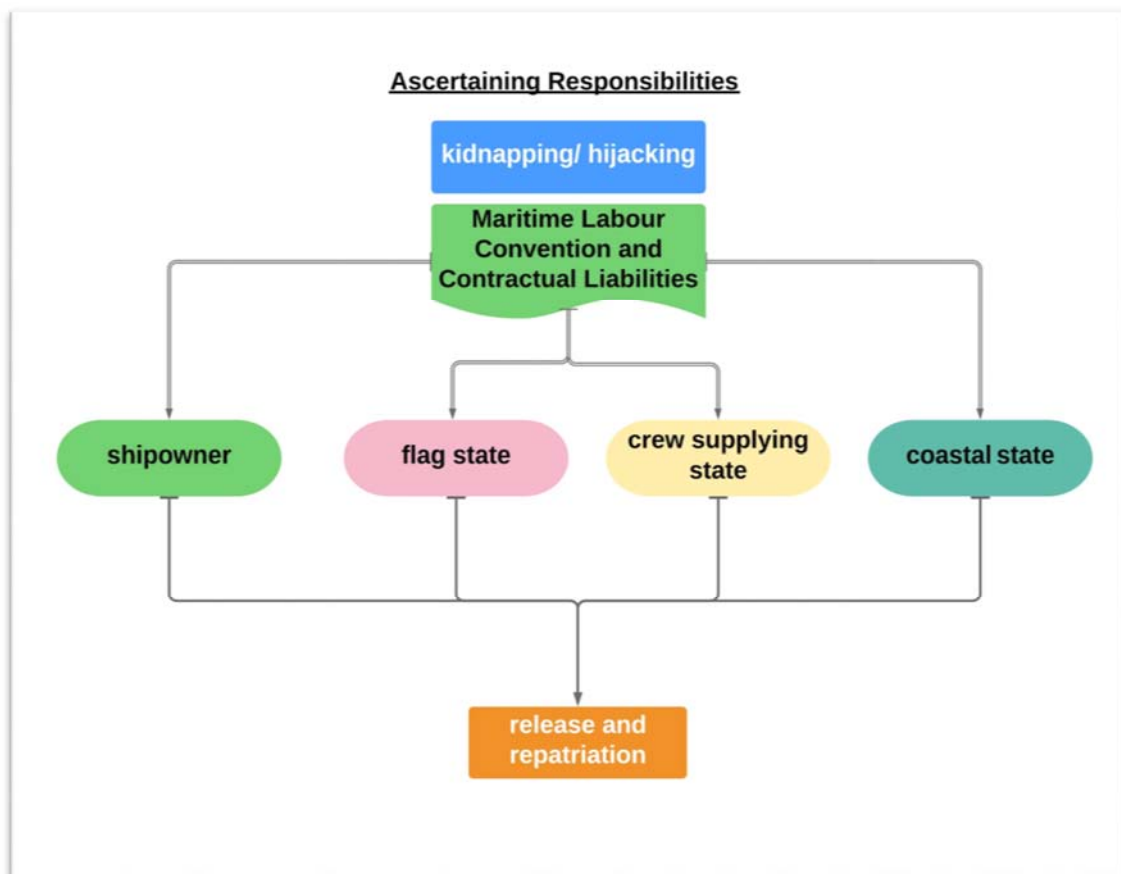


Figure 3: Schematic showing stakeholders involved in repatriation (prepared by author)

## **Chapter 3 Repatriation - genesis and strengthening of labour laws**

### **3.1 Evolution of the term repatriation for seafarers**

*“Repatriation refers to the act of a person returning to his or her country of origin or nationality, either voluntarily or through deportation by a government”* (Gorman, 2019).

We find this definition of repatriation applied to asylum seekers. It can also be used in the context of repatriation of seafarers. Repatriation requires the seafarer to return to his/ her own country on completion of the contract. When the issue of repatriation is viewed as a labour right of the seafarers, we find that it is deeply rooted in various labour conventions, beginning with the Repatriation of the Seaman Convention (No. 23), 1926 (ILO, 1926). Repatriation is an evolving issue. It was included in the MLC 2006 as Regulation 2.5. To strengthen the labour rights of seafarers in case of piracy and armed robbery, there is a need to strengthen the regulations.

This chapter will describe the evolution of the use of the term ‘repatriation of seafarers’. We emphasized the need for amendments to address the necessity for repatriation of seafarers in the event of piracy and armed robbery (discussed in section 2.2). We also presented recommendations for strengthening the rights of the seafarer for the cases of kidnapping and hijacking of seafarers in the last part of the chapter.

#### **3.1.1 Chronology of previous instruments**

Whenever a seafarer leaves his or her home country on a voyage, the provision for his return are mentioned in the contract. The contract mentions the place of return of the

seafarer, which can be his/her home country or an agreed-upon destination. This process is called repatriation (Lefkowitz, Slade, & Redlich, 2015). The provisions for repatriation have been evolving since 1926. Today, there are about 1.6 million seafarers in the shipping industry. Given these numbers, repatriation is a vital aspect of the seafarers' employment agreement. The rules for repatriation which can secure his safe return to his/her home country or the agreed place of return are essential for keeping up the morale of the seafarer (BIMCO, 2016). Various instruments of the International Labour Organization discussed in chronological order here.

#### *3.1.1.1 Repatriation of Seamen Convention, 1926 (No. 23)*

The 1926 convention was the first by the International Labour Organization (ILO) which regulated the right of seafarers to repatriation. It applies to seagoing vessels with the exception of warships, leisure yachts, fishing vessels, and vessels of Gross Registered Tonnage (GRT) below 100 tons (ILO, 1926). The convention also excluded training vessels. The convention affirmed that seamen must be repatriated to their own country during and on expiry of the terms of engagement. The cost of repatriation would be paid as per the National Legislation, but not from the account of a seafarer. The seafarer was exempted from paying if he has been left behind due to an injury which he has suffered as a service to the ship. In the situation of shipwreck and illness (except because of his willful act or the cause for which he cannot be made liable), the seaman is exempted from paying the cost of his repatriation. The convention made the flag state responsible for repatriation irrespective of the nationality of seafarers when conditions warrant advance payment of the expenses.

#### *3.1.1.2 Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27)*

This convention provides the right of repatriation to the masters and Apprentices as per the terms of condition of repatriation of seaman convention, 1926 (ILO, 1926).



### *3.1.1.3 Repatriation of Seafarers Convention (Revised), 1987 (No. 166)*

This convention resulted in improvements in the term repatriation of seafarers. The limitations of the type of vessels were tried to be overcome by making it applicable to all vessels engaged in commercial navigation. Fishing vessels were also included in the scope of repatriation. The convention widened the scope of the definition of seafarer as “*any person employed, in any capacity, onboard a seagoing vessel*”. It also clarified the circumstances in which seafarers can exercise their right to repatriation and the place of repatriation. With this convention, the shipowners were made responsible for arranging the repatriation of the seafarer and prohibited ‘seafarers from for their repatriation in advance. But an exception was made in the case of ‘serious default by the seafarer (ILO, 1987).

### *3.1.1.4 Repatriation of Seafarers Recommendation, 1987 (No. 174)*

The 1987 recommendation aimed at providing a solution to a situation where the shipowner and flag states fail to fulfil their obligation of repatriating a seafarer. According to the Recommendation, the state from where the seafarer is required to be repatriated or the State of the nationality of a seafarer is responsible for arranging the repatriation of the seafarer. The cost can be later recovered from the flag State by the State which arranges the repatriation (Christodoulou-Varotsi & Pentsov, 2007).

## **3.1.2 Maritime Labour Convention, 2006 (MLC, 2006)**

The Maritime Labour Convention, 2006, aims at providing decent working conditions and ensuring a fair framework for the shipowners who are operating their ships under the flag states that have ratified MLC, 2006 (Adăscăliței, 2014).

We have addressed the repatriation of seafarers through various instruments, as discussed in section 3.1.1. All the instruments discussed here could achieve the purpose of repatriation only to a limited extent. The ILO revised them in the form of the Maritime Labour Convention (MLC), 2006. The MLC (2006) is one of the key

conventions in the maritime field that addresses the issues related to the human element (Wu & Jeng, 2012). Its adoption has proved significant for improving the rights and welfare of seafarers in the maritime industry (Zhang & Zhao, 2015).

### **3.1.3 Repatriation and seafarers bill of right**

Kidnapping of the seafarer is an occupational hazard for seafarers and is the outcome of a pirate attack or armed robbery. MLC (2006) has also been acclaimed as the “seafarers bill of right”. However, we opine that it has limited applicability in ensuring the fair treatment of the seafarer in the case of kidnapping and hijacking because of a pirate attack.

Though the convention specifies the role of the flag state, port state and crew supplying state, it does not empower them enough to ensure that the seafarers can be released and repatriated after an attack (Walters & Bailey, 2013). The convention was amended in 2014 and again in 2018 to improve the conditions of the seafarer. But requires further improvements for addressing cases of release and repatriation of seafarers. MLC (2006) must strengthen the rights of seafarers so that it becomes the duty of the shipowner to arrange repatriation and that the seafarer can seek a legal remedy for failure of the shipowner to fulfil his obligations. The shipowner shall provide him help to overcome the physical and mental pain he went through by providing social and financial benefits. This section studies the policies that pertain to the seafarers’ employment agreement, provisions for financial and social security, as well as the clauses of repatriation in MLC (2006) along with the amendments. The insights will help in strengthening the rights of seafarers and identify pathways for improving processes for release and repatriation of seafarers. Additionally, it will attempt to provide a contractual remedy for the seafarer who is now denied his fundamental rights.

Regulation 2.5 of the MLC, 2006 provides provisions for the repatriation of seafarers. To quote Standard A2.5 para 1,

*“Each Member shall ensure that seafarers on ships that fly its flag are entitled to repatriation in the following circumstances:*

*(a) if the seafarers’ employment agreement expires while they are abroad;*

*(b) when the seafarers’ employment agreement is terminated:*

*(i) by the shipowner; or*

*(ii) by the seafarer for justified reasons; and also*

*(c) when the seafarers are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances”.*

The regulation provides for the right of the seafarer to be repatriated with a cost to the individual concerned. It also specifies the circumstances and conditions of repatriation. The regulation also gives an opportunity to the shipowner to recover the cost, but this provision can be applied only in the case of serious default by the seafarer in fulfilling his obligations under the terms of his employment. Standard A2.5 para 1 (b) and (c) of MLC (2006) specifies that member states shall ensure the repatriation of seafarers onboard their flagged vessels. It states that repatriation can take place on termination of the employment agreement by the shipowner or by the seafarer and also the specific circumstances under which the seafarer is unable to perform his duties. These conditions are further simplified in Guidelines B2.5.1 (Entitlements).

Regulation 2.5, paragraph 2, provides for the financial security of seafarers by the Flag state, which is required to repatriate the seafarer. The amendments adopted in June 2014 strengthened the regulation by providing concrete solutions to the problem of the abandonment of the seafarer and establishing who will cover the cost of maintenance, support, unpaid salary during the period of repatriation (Exarchopoulos, Zhang, Pryce-Roberts, & Zhao, 2018). The convention also widened the scope of definition of ‘seafarer’ by applying it to “*any person who is employed or engaged or works in any capacity onboard a ship to which this Convention applies*”.

The recent instances of armed robbery and piracy show that these enhanced provisions are not enough to secure the rights of a seafarer. It was found that the shipowners are not able to fulfil their duty of care and that the flag states are not able to provide adequate solutions to this problem. The problem becomes acute when the ship is hijacked or the seafarer is kidnapped and the contract is terminated by the shipowner. This required amendments to the seafarers' employment agreement to include provisions for securing their wages. The amendments made in 2018 to MLC, 2006 is considered as a crucial step in securing the wages of seafarers while they are in captivity.

### **3.2 Repatriation in case of piracy - amendments to SEA**

The right of repatriation is a fundamental right of the seafarer and is governed by international regulations (Christodoulou-Varotsi & Pentsov, 2007). Despite this, the right to repatriation has been prejudiced in various incidents (Fotteler, Jensen, & Andrioti, 2018). Generally, the contracts do not cover provisions for repatriation, especially when a ship is hijacked or its crew is abducted (IMCA, 2018).

The problem of the kidnapping of seafarers is a serious one and was discussed at the 107th annual meeting of the International Labour Conference in June 2018. A successful attempt was made to amend the MLC (2006) regarding the continuation of the Seafarers' Employment Agreement (SEA) in cases of piracy and armed robbery. These, the third set of amendments, are pragmatic as they do not require any new certification or insurance (Exarchopoulos, Zhang, Pryce-Roberts, & Zhao, 2018). The amendments are likely to come into force in January 2021 (ILO, 2018).

According to the amendments of 2018, it was agreed by the Special Tripartite Committee (STC) that if a seafarer is held captive on or off the ship due to piracy or armed robbery against the ship, the SEA will continue to be in effect. As per the amendment which is inserted as para 7 to Standard A2.1, "*Each Member shall require that a seafarer's employment agreement shall continue to have effect while a seafarer*

*is held captive on or off the ship as a result of acts of piracy or armed robbery against ships, regardless of whether the date fixed for its expiry has passed or either party has given notice to suspend or terminate it,”.*

These amendments are considered being a big step towards codifying the protection of financial security to the seafarer. The amendments will close existing gaps and provide seafarers the right to draw wages in case they are kidnapped (Dolumbia-Henry, 2018). They will ensure continued payment of wages to the seafarer during the period of captivity. The seafarer or his family will continue to draw wages and other entitlements (including remittance of allotments) from the shipowners under the SEA. The relevant CBA and national law of the flag state for the period of unlawful captivity will also continue to apply. These entitlements will continue to be paid until the seafarer is released from the captivity of his attackers and duly repatriated. In case of death of the seafarer during captivity, the wages and other entitlements will be paid until the day of death as per the national laws. The amendments will also ensure that the appropriate party fulfils its responsibility and thus, is expected to be an effective tool for strengthening the labour rights of a seafarer.

### **3.3 Shipowner’s liability for repatriation under MLC, 2006**

The shipowner is liable for the safety of his/ her crew. Title 4 of the MLC,2006 deals with health protection, medical care, welfare, and social security protection. Regulation 4.2 under this title provides provisions for the shipowners’ liability. This regulation is based on the revision of the Sickness Insurance (Sea) Convention, 1936 (No. 56).

The convention (No. 56) provides financial security in the form of independent and compulsory insurance or through an independent provider linked to the crew-supplying state (Piñeiro, 2015). But compulsory insurance was undermined in the MLC (2006) because it was brought under the Guidelines which is non-compulsory in nature instead of making it as Standard in the convention.

Standard A4.2(a) makes the shipowner liable for the injury and sickness of seafarers from the date of commencement of duty until repatriation. Standard A4.2(b) is mainly concerned with financial security. It provides assured compensation for occupational injury, illness or hazards which lead to death or long-term disability. These conditions are decided as per the SEA. Therefore, national laws and CBAs play an important role in ensuring financial security to the seafarer through the provisions of this convention.

### **3.4 Conclusion**

According to the MLC, 2006 the shipowner has the liability to provide financial security to the seafarer for occupational hazards, as well as in the event of piracy and armed robbery. The shipowner is also supposed to arrange for the repatriation of his crew. But repatriation can be secured only if the seafarers are released by the attackers.

The shipowner is obligated under various conventions to fulfil his duty of care for his employees. The provisions can be further strengthened if the shipowner arranges insurance for his employees because there always exists the possibility of failure to provide compensation. While dealing with the cases of pirate attacks in the Gulf of Guinea more the piracy models of the kidnapping and hijacking should be focused.

MLC, 2006 and its amendments provide for a structure under Public International Law. This should be supported with contractual agreements between the seafarer and the shipowner. Insurance is a vital aspect of financial security in the case of hijacking or kidnapping of the seafarer. The regulations 2.1, 2.5 and 4.2 shall be discussed together when the study examines the case for release and repatriation of seafarers. Insurance for financial security shall be made part of the Seafarers' Employment Agreement. Financial security for the seafarer shall include expenditure on his release, subsequent release followed by compensation for treatment of rehabilitation from PTSD. The obligations on the shipowner are discussed in the next chapter. It has been studied with the help of various case laws. Figure 4 describes the major milestones in

the evolution of regulations concerning repatriation of seafarers, as well as highlighting the areas that need addressing and improvement.

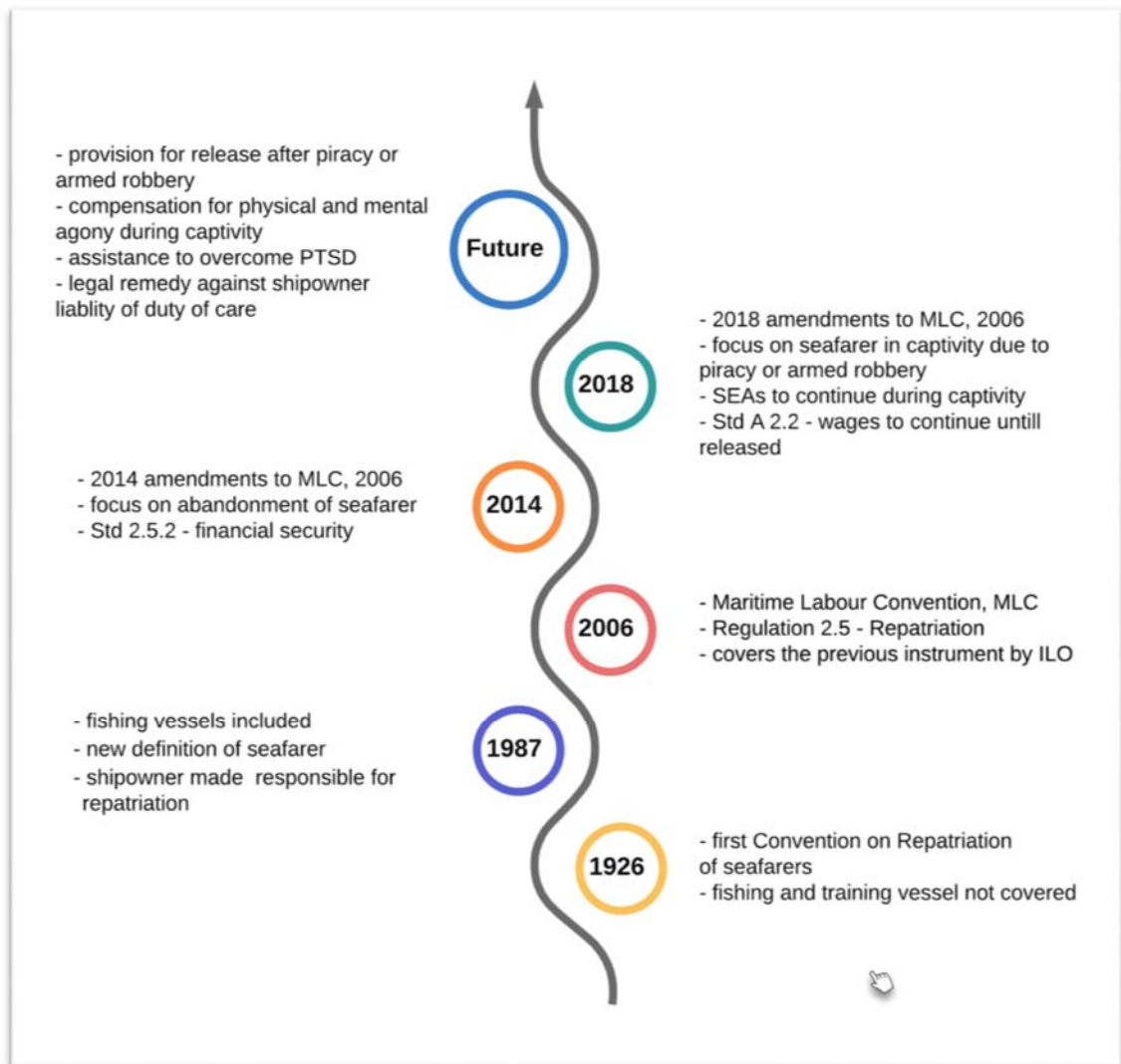


Figure 4: Timeline showing seafarer rights and repatriation since 1926 (prepared by author)

## **Chapter 4 Shipowners' Liability and Seafarers Rights**

Pirate attacks in the Gulf of Guinea pose a potent threat to shipowners in fulfilling their liability as a duty of care for their employees (Young R., 2019). It is the shipowner who is primarily responsible for the repatriation of the seafarer and thus, he plays a vital role in obtaining his/her release from the attackers and repatriate him/her safely to the home country. This chapter discusses the shipowner's 'duty of care' and the need for strengthening the rights of seafarers in case of hijacking and kidnapping by the attackers.

Seafarers have the right to a safe and secure working environment, decent living and working conditions, contractual fairness with the employer, medical care, financial and social security (ITF, 2011). It is the duty of shipping companies to provide safe and decent working conditions to the seafarers. The steps that must be taken before and after an incident are specified in the guidelines to shipowners and normative framework laid down by IMO (Khanna, 2019). The present chapter mainly discusses preventive measures as a duty of care and actions taken by the shipowner to secure the release of the seafarer after the incident. It aims to strengthen the right of a seafarer and assist him in proceeding with contractual claims of occupational illness (physical or mental) resulting from piracy and armed robbery.

The Collective Bargaining Agreements (CBAs), Seafarers' Employment Agreements (SEAs) and private international law provide a basis for seeking a legal remedy for a seafarer (Moira L. McConnell, Dominick Devlin, & Cleopatra Doumbia-Henry, 2017). The analysis is based on labour laws, international laws for the safety of seafarers, best management practices and the various guidelines issued by IMO that deal with the duties of a shipowner. It tries to establish a basis for seafarers to claim



legal remedy in the event of kidnapping or hijacking if the shipowner fails to fulfil his duty of care obligations by neglecting preventive measures. The various options available are discussed in the sections that follow.

#### **4.1 Surfacing legal Issues due to pirate attack**

As described in the Introduction chapter, pirate attacks in the Gulf of Guinea invariably results in mistreatment and torture of seafarers. Besides injuries, the victims also suffer from mental stress, Post-Traumatic Stress Disorder (PTSD) and sometimes, even death seafarer (Abila & Tang, 2014). Several legal issues under private international law arise from the plight of the seafarers. Therefore, it is imperative that their rights are strengthened by providing appropriate legal remedies against negligence in ensuring the duty of care by the shipowner. The central question in this regard is,

Is the shipowner liable for the negligence of the duty of care under private international law and up to what extent?

The shipowner owes a duty of care for seafarers if it has been mutually agreed upon, as mentioned in the seafarers' employment agreement (SEA) between the shipowner and the seafarer. If the ship is going on a voyage in piracy-prone waters or a High-Risk Area (HRA), the shipowner informs the seafarer that the ship will be travelling through waters in which the risk of violent attacks is high. It is the shipowners' responsibility to take preventive measures like training the crew, providing additional security through armed guards, reporting to the coastal surveillance network while transiting through their area of responsibility, and activate other mechanisms to deter an attack.

Legal issues surface when a ship is attacked by pirates and the seafarers are kidnapped. The question that arises in this situation is whether the shipowner had taken appropriate steps as his duty of care. To address this, it is necessary to divide the post-incident situation into two broad issues: whether adequate preventive measures were taken to deter the attack and second, the arrangement a shipowner must make to secure

the release of his employees and repatriate them. These are discussed in the sections that follow. They show how a seafarer can claim legal remedy under case law and private international law if a shipowner has not taken appropriate preventive measures.

#### **4.2 Shipowners' liability and duty of care**

The duty of care agreement between the shipowner and seafarer is well-established under law (Gold, 2016). The schematic below shows the four essential elements contributing to the tort of negligence by the shipowner.

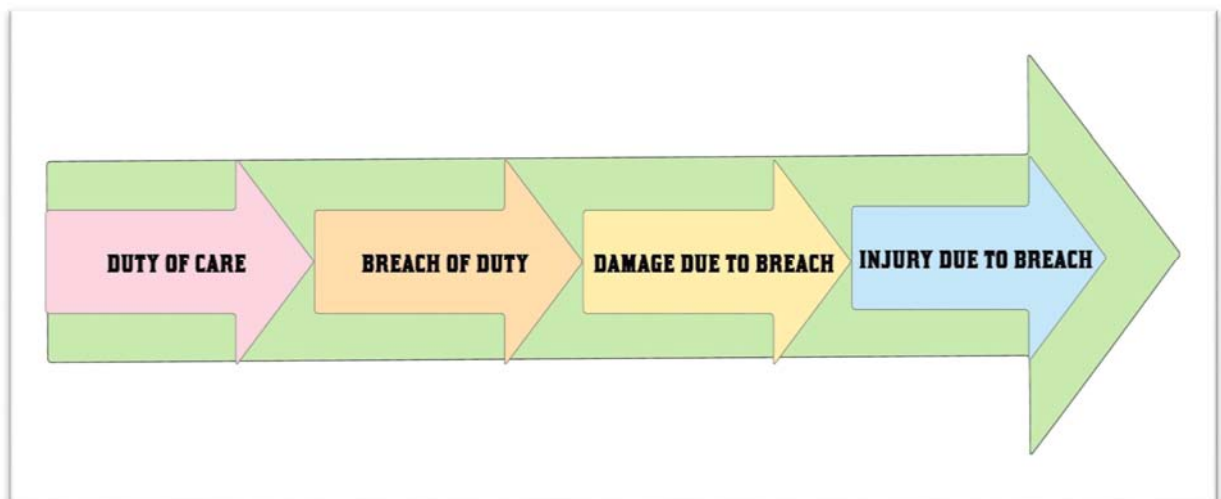


Figure 5: Contributing factors to tort of negligence (prepared by author)

The absence of these elements may prevent a seafarer from seeking compensation for kidnapping or hijacking. Therefore, it is essential that the conditions of the duty of care are established beforehand so that the seafarer can seek remedy for the shipowner's negligence.

When a ship is hijacked or its crew is kidnapped, the shipowner is obligated to take some actions as his duty of care. The schematic below shows the measures he must take. Legal action against negligence towards duty of care can be expedited if it can be established that the shipowner has not taken appropriate preventive measures. There are few preventive measures as per the International Ship and Port Facility Security

code (ISPS) 2003 and Standards of Training, Certification, and Watchkeeping (STCW) 1978 but have been kept out of the scope of research.

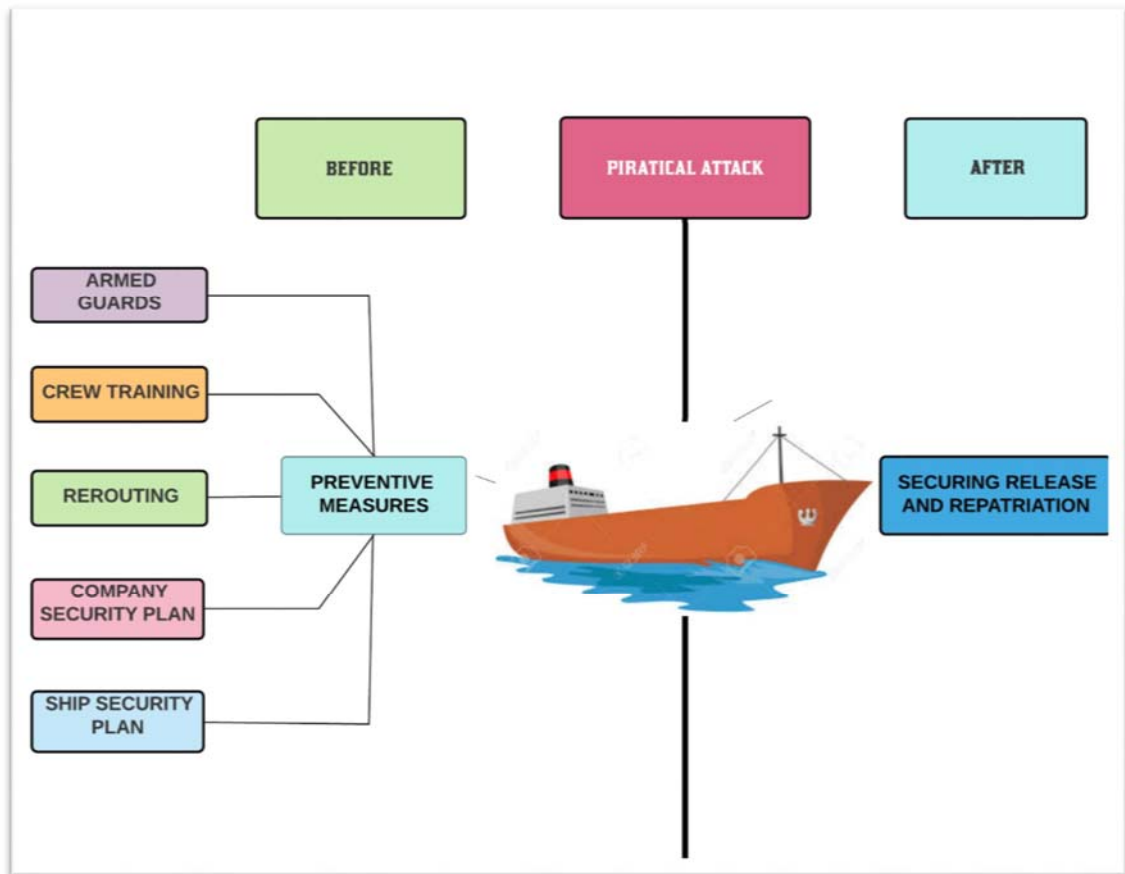


Figure 6: Actions that can be taken by shipowner – preventive and post-attack (prepared by author)

### 4.3 Opportunities and hurdles for seafarer

A seafarer can claim legal remedies if he can prove that the shipowner had not taken preventive measures because of which the ship fell victim to piracy or armed robbery. Some important points that must be considered while pursuing the matter are:

#### **4.3.1 International guidelines for shipowners**

Seafarer can also claim remedy if the shipowner does not perform his duty of care as per standard international guidelines. The list of guidelines for the shipowner is placed in Appendix-4A. The seafarer can claim a remedy for the breach of the duty of care if the shipowner has not followed these guidelines. The shipowner may argue that he is unaware of such procedures that must be followed as preventive measures. He may argue in defense that because of the prevailing circumstances, it was not feasible to follow the advisories (the guidelines referred to are also advisories). The argument in support of compensation for the seafarer will be on firm ground if it can be established that there exists a mutual agreement between the shipowner and seafarer. However, to strengthen his claim, the seafarer must prove that these guidelines follow standard customs and are widely accepted.

#### **4.3.2 Deployment of armed guards**

Deploying armed guards onboard is one of the preventive steps to protect a ship and her crew from pirate attacks. However, the situation is different in the Gulf of Guinea, Nigeria, which is a hub for pirate attacks in the Gulf of Guinea, prohibits the use of Armed Guards (Firearms Act, Laws of the Federal Republic of Nigeria, 1990). The State law says that *“armed guards of any kind, hired contractors, police or military forces, are not allowed on merchant vessels in Nigerian waters. In particular, no private security company has the right to place armed guards on board merchant vessels”* (Wilson, B. & Jacobson, 2019).

It gives an opportunity to the shipowner to plead in his defense that due to the regulations of the port state, armed guards could not be provided as a preventive measure. The seafarer can claim that the port state must provide security patrol through their navy. The Nigerian Navy Operations Directorate, in a press release, clarified that *“as an alternative to embarked PMSCs, the Nigerian Navy supports contracted maritime security services through a network of 20 licensed escort vessel operators. These hired patrol vessels are manned and commanded by Nigerian Navy personnel,*

*with assistance from civilian seafarers” (The Maritime Executive, 2017).* Therefore, if the shipowners cannot provide security as advised by the port state in this case and the ship is attacked, the seafarer can claim for breach of the duty of care by shipowner (INTERTANKO, 2015).

#### **4.3.3 Vicarious liabilities**

A seafarer can claim vicarious liabilities from the shipowner even if he/ she has delegated a few of his duties to the master of a vessel under the doctrine of vicarious liabilities. As per this doctrine, the shipowner is liable for the actions of his employees even if the authority for certain operations is delegated. It is further strengthened by the example of judgment in the case of MV ‘The Maersk Alabama’ which was hijacked by Somali pirates in the Gulf of Aden. In this incident, the Master of the vessel took a shorter route instead of a safe route which is 600 nautical miles from the shore as he found it to be expensive and time consuming. The crew filed a lawsuit against Maersk Line, Ltd. for alleged breach of duty of care. They also alleged that the Master wrongfully transited through a pirate-infested track and because of his wrongdoing, Maersk Line, Ltd. should be held liable under the doctrine of vicarious liability. In its judgment, the court said, *“considering that the employer's duty of care is generally considered non-delegable and that the doctrine of vicarious liability would hold the shipowner liable for the master's actions, Maersk Line, Ltd. is liable for the action of the Master”* (Cabrera Dayan, 2017). Using this judgment as a precedent, the seafarer may use the doctrine of vicarious liability as a tool to claim legal remedy and strengthen his/her case against the shipowner.

#### **4.3.4 Causation**

It is one of the main hurdles to file a case of negligence of duty of care by the shipowner (Liss & Sharman, 2015). If seafarer wants to find a legal remedy, he must prove causation. The seafarer must make convincing remarks to prove that the shipowner had breached the duty of care which resulted in a pirate attack on the vessel (Rose,

2013). If the shipowner had met his obligations as described in the figure 6 above, causation is difficult to prove.

#### **4.3.5 Assumption of risk**

If the shipowner claims assumption of risk as a defense against the claim of a seafarer who had suffered in a pirate attack, it becomes another legal hurdle for the seafarer in claiming negligence of duty of care. As per the assumption of risk clause, if the shipowner is able to prove that the seafarer was well aware that the ship was at risk of pirate attack which can result in injuries but still volunteers to sail, in such situations. The SEA in the mutually agreed contract between seafarer and shipowner will bar the seafarer from applying for any remedy for his injuries. The seafarer will have a weak defense if the terms of the contract clearly mentions the nature of voyage and potential threats. It gets further weakened if the contract, which the seafarer has accepted, specifies the monetary compensation and treatment for personal injuries.

It is, therefore, clear that the shipowner is responsible for providing duty of care to his employees. A seafarer can claim a legal remedy for negligence in ensuring preventive measures that lead to a pirate attack.

On his part, there are a few actions that a shipowner must take after a pirate attack which resulted in hijack of the ship and/or kidnapping of the crew. First, he must take steps to ensure the release and repatriation of the seafarers. Here, the contractual agreement between the seafarer and shipowner can help in initiating assertive action. The clear indication of the process of release and repatriation will make it easy for the seafarer to claim compensation. A few options available to the shipowner after kidnapping or hijacking are discussed in the following paragraphs.

#### **4.4 Securing release and repatriation**

It is essential to find the best way to seek early release of the kidnapped crew. There are various perspectives that need to be understood.

#### **4.4.1 Irresponsible shipowner and abandoned seafarers**

The most irresponsible action is the shipowner's refusal to pay or negotiate release. It is the cheapest but also the riskiest as there a high chance of loss of ship, cargo and crew. The case MV Albedo exemplifies the consequences of exercising this option. Twenty-three crew of MV Albedo were captured in November 2010. The Iranian owners of this Malaysian-flagged vessel, which was hijacked by Somali pirates, refused to pay the demanded ransom of \$8 million. It was found that the vessel was operating without adequate insurance (Freeman Colin & Pflanz Mike, 2014). As no attempt was made by the ship owners to get the seafarers released, the hijacking proved to be a deadly ordeal for the crew. *“Early on in the hijacking, one crewman was shot dead by the pirates in an apparent fit of anger after negotiations with the ship's owners broke down. Then, the vessel sank in a storm, resulting in five of the crew drowning along with five of the pirates as they abandoned ship<sup>4</sup>”* (Weldemichael, 2019).

#### **4.4.2 Military response**

Military action can be considered if the port state has a strong military which is trained for handling incidents like kidnapping. A Memorandum of Understanding (MoU) can be entered into with other countries who have a vested interest in the maritime safety of the area so that joint operations can be planned and executed. The coastal state where the kidnapped crew were taken, plays an important role in the case of armed robbery. The modus operandi of the pirates is always changing and hence, the operational philosophy of military action must also adapt itself to the changes. The main hurdles include allowing the military of other nations to play an active role because they may pose a challenge to the sovereignty of the port state. Military operations can be a potent deterrent to miscreants and may result in success, such as one of the Naval operation by the Spanish navy. *“A joint Spanish and Equatorial*

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<sup>4</sup> The Case of Hijacking in Somalia taken as reference

*Guinea naval operation has rescued 20 crew members on a merchant ship from a hijacking by pirates in the Gulf of Guinea*” (Hellenic Shipping News, 2019). However, if circumstances go against the operation, it can also prove disastrous for the innocent seafarers (World Maritime News, 2017). Military operations can be deterrent, but they will yield better results only at the preventive stage. They are detrimental to the safety of crew, cargo and the vessel. Reimbursement of damages caused due to such operation which may lead to the actual or constructive total loss of the vessel and cargo will be difficult to claim by the shipowner. Overall, it appears that the shipping industry has no appetite for such risky solution (Murphy, 2011).

#### **4.4.3 Payment of ransom**

The safest solution, considering the circumstances, is to negotiate and pay a ransom to get the crew, cargo and vessel released (in the Gulf of Guinea, the chances of getting the cargo back is difficult if it is petroleum products). There is a high chance of securing the safe release of the seafarers if the way for paying the ransom can be settled if there is reasonable assurance in this regard. The shipowners will also be willing to pay a ransom if some alternatives can be found to share the financial burden (Gold, 2016).

In view of the discussion above, we can make out that the payment of ransom is one of the best ways to secure release of a hijacked vessel and abducted crew.

#### **4.5 Conclusion**

After obtaining the release of the crew on payment of ransom, they can be repatriated according to the terms of the contract, and compensating them for the agony (physical and mental) they have undergone. In addition, assistance may also be provided for treatment of PTSD. As a normal practice, these are separate actions and are independent of each other in terms of contract. However, it also needs to be appreciated that they are important for the wellbeing of the seafarer and thus, be treated as a contractual remedy. A ship owner is liable to pay compensation to a seafarer if there



is a mutually agreed contract between them. From the perspective of private international law, the Seafarers' Employment and Collective Bargaining Agreements may help provide the contractual remedy to compensate a seafarer.

The ambiguity in interpretation of the term 'duty of care' by shipowner arises when the agreements between shipowner and seafarer do not contain provisions for hostage situations arising from kidnapping or hijacking for ransom. Though the duty of care is an established factor under the tort of negligence, its extent remains unclear if the clauses for piracy and armed robbery are not made part of the contractual agreements. The ambiguity can be clarified by including the terms of the release and repatriation of seafarers in the SEAs.

Managing the ransom amount may pose a major problem for the shipowner. The payment of ransom itself is an issue that is being debated and different countries have different views regarding its legality. One possible way forward is the establishment of a combined fund by shipowners which can be used to pay the ransom amount. Financial help may also be sought from the flag state, the state of nationality of the seafarer, or cargo interests. Insurance is another option. Resolution of this question is not easy. It requires careful deliberation within the ambit of international law.

The next chapter discusses the insurance regime for making ransom payments.

## **Chapter 5 Insuring the Ransom - A Solution to Release and Repatriation**

Kidnappings in the Gulf of Guinea are motivated by ransom. Past cases of hostage-taking show that hostages are usually released after payment of ransom by the shipping company (Cornell, 2018). Delay in payment of ransom is one of the main reasons why some hostages are released after a long duration in captivity (Dua, 2019). The aim of this chapter is to propose payment of ransom as a solution for securing the release and repatriation of seafarers. For the purpose of discussion, it is assumed that the shipowners understand their duty of care for their employee seafarers.

The chapter first discusses the legality of paying a ransom to the pirates for securing the release of hostages. Later, it discusses the various ways in which payment can be made and how assistance can be arranged to reduce the burden of the shipowner whose employees are held in captivity. The discussion then leads to examining the feasibility of insurance. Then, the chapter discusses a solution with the help of general average, or applying the concept of P and I insurance so that the burden can be eased off. In addition, a customized insurance policy is proposed for making the necessary ransom payment to secure the release of the seafarers followed by their repatriation, and compensation and assistance for treatment of PTSD.

### **5.1 Is paying ransom legal?**

When a ship is hijacked and the crew taken hostage, if the owners (of the ship and/or cargo) want the crew, cargo and vessel back, they may do it by paying the ransom demanded. Sometimes this is the only way to resolve the situation. The question that arises is whether payment of ransom is legal (Dutton & Bellish, 2014).

Ransom payment is viewed differently in various parts of the world and it is not possible to examine how the law in each country deals with this scenario. For the purpose of discussion in this dissertation, the legislation of the UK is studied.

### **5.1.1 UK law on ransom**

According to UK law, it is an offense to make ransom payments to terrorists (or terror financing) (Mitsilegas & Gilmore, 2007).

Section 15 (3) of the Terrorism Act (2000) decrees,

A person commits an offense if he

(a) provides money or other property, and

(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism

Section 1 of the same Act provides a definition of the term ‘terrorism,’ which was amended in the Counter-terrorism Act 2008, as being

the use or threat of action which is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and is made for the purpose of advancing a political, religious, racial or ideological cause.

From the understanding of the piracy models in the Gulf of Guinea, it is evident that the kidnapping or hijacking is done purely for monetary not political gains (Whiteneck, Ivancovich, & Hall, 2011). Unlike the piracy model in Somalia where former US President Barak Obama had associated piracy with terrorism, the attacks in the Gulf of Guinea are piratical in nature and hence do not fall under the category of terrorist

attacks (Kraska & Wilson, 2008). Therefore, ransom payments to pirates may not be considered as illegal under UK law.

### **5.1.2 Masefield v Amlin (2011)**

The decision of the English High Court in the case of Masefield v Amlin (2011) supports the payment of ransom as a measure to release the vessel, cargo and the seafarers.

MV Bunga Melati Dua was hijacked by somali pirates in the Gulf of Aden on August 19,2008. Pirates took the vessel to Somali waters. The pirates released the vessel on Sept 29, 2008 after six weeks of captivity.

As regards the payment of ransom, Rix, LJ said that

there is no universal morality against the payment of ransom, the act not of the aggressor but of the victim of piratical threats, performed in order to save property and the liberty or life of hostages ... there is no universally recognized principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead the courts, as matters stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition. There are only elements of conflicting public interests, which push and pull in different directions, and have yet to be resolved in any legal enactments or international consensus as to a solution (Masefield ag v. Amlin Corporate Member Ltd.,2011).

In systems where the payment of ransom is not regarded as a solution, the consequence will be that the captured ships and crew will be left to an uncertain future. The systems

nescient about the safety of seafarers and their human rights may resolve to such solutions. Terming the payment of ransom as illegal amounts to outlawing a viable—and often the only—solution for releasing the victims of kidnapping (Dubner & Fredrickson, 2012).

### **5.1.3 Cost of ransom**

The ransom amount, if accepted, can put a heavy monetary burden on shipowners. The ransom amount from case to case. In one case of kidnapping for ransom (KFR), the crew of MT Kalamos, flying the Maltese flag, was abducted off the coast of Nigeria on February 20, 2015. The shipowner paid a ransom of \$400,000 which is quite high, for the safe release of the seafarers from the captivity of attackers (Gardner F., 2016). The amount varies from case to case

Moreover, the process of getting the seafarers released from captivity also depends on factors that are not in the direct control of a shipowner. Liaison and coordination with various authorities are necessary, and there are other risks and expenses like loss of ransom amount in transit and operational expenses of ship, which are required to be paid by the shipowner (Bruce J., 2009).

The question arises is that who will pay the cost of ransom? The amount is required to be paid by the shipowner. He may pay it through insurance and it will reduce the financial burden on shipowner. Thus, there must be a suitable arrangement for sharing the cost through insurance. This leads to the time-tested principle of general average.

## **5.2 Ransom through general average**

This section aims at solving an age-old problem of piracy with an ancient phenomenon similar to insurance which has been used to provide security against maritime risks and has an element of deliberate sacrifice for the common safety.

### 5.2.1 Contributing factors to general average

General average can be considered as a basic form of insurance where the risk is spread among the various interests all of whom protect one another (Wilson, Cooke, & Lowndes, 1990). The term ‘average’ has roots in the Italian word ‘*avere*’, meaning owning a property. It may also have originated from the Arabic word ‘*awar*’, meaning damage. References to General Average may also be found in Roman Law (*lex rhodia de iactu*, from Sanborn, 2002). Rhodian law decrees that “*if in order to lighten a ship, merchandise has been thrown overboard, that which has been given for all should be replaced by the contribution of all*” (Bolanca, Pezelj, & Amizic, 2017). Brett M.R., in the Court of Appeal in *Burton & Co v. English & Co*, expressed the same opinion. In his judgement, Brett M.R. observed that

Rhodian law had been incorporated in English law as the law of the ocean. It is a consequence of a common danger in which natural justice requires that all should contribute to indemnify the loss of property which is sacrificed by one in order to save the whole (*Burton v. English*, 1883)

In a similar case, *Birkley v. Presgrave*, Lawrence, J., made the famous statement that “*all loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested*” (*Birkley v. Presgrave*, 1801).

These observations were strengthened by the Marine Insurance Act 1906 which provides a statutory definition in section 66(2). It states that

there is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperiled in the common adventure.

This idea of peril to the common adventure is contained in the York-Antwerp Rules (YAR) 1974. Rule 'A' of YAR 1974 states that

the general average is applicable only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure (YAR, 2004).

In general average, the practical rules and underlying principles determine the balance of rights and liabilities among the participants to a common maritime adventure (Rose, 2017).

### **5.2.2 General average and piracy models**

Of the various piracy models discussed in this dissertation, hijacking and kidnapping of crew are the most prevalent forms in the Gulf of Guinea. The circumstances may well justify at times the payment of ransom to obtain the release of the crew, the cargo and/or the ship and; fulfil the prerequisites for initiating the general average clause. General average can be used to raise the ransom amount if there is an involvement of property (vessel and cargo). In *Birkley v. Presgrave* (1801) 1 East 220, Lawrence, J, stated that "*all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested.*"

However, the concept of general average assumes a different connotation when pirates kidnap crews only. Invoking the general average clause when a ship is hijacked and her crew taken hostage is discussed in the following paragraphs.

### **5.2.3 Hijacking and invoking general average**

One of the preferred approaches of the pirates is to hijack the ship and its crew. This offers several advantages for the pirates which are described in the section on piracy models in the Gulf of Guinea (section 2.1.1). If a pirate attack is treated as a ‘maritime peril’ and payment of ransom as an ‘extraordinary sacrifice made’ or ‘expenses incurred’ for the common safety of the crew, ship and cargo, the losses incurred due to the payment of ransom could be covered by the principle of general average. This approach can reduce the financial burden of the ship owner and may motivate him/her to pay the ransom (Gauci, Gotthard Mark, 2019).

### **5.2.4 Additional expenses and general average**

As discussed in section 5.1.3, various other expenses besides ransom are incurred during the processes of negotiation and release of the crew. It is difficult for the shipowner to convince the other stakeholders that these expenses were necessary. However, the court’s judgment in ‘The Longchamp’ case provides relief (Mitsui & Co Ltd v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG, 2017).



### Fact sheet MV Longchamp

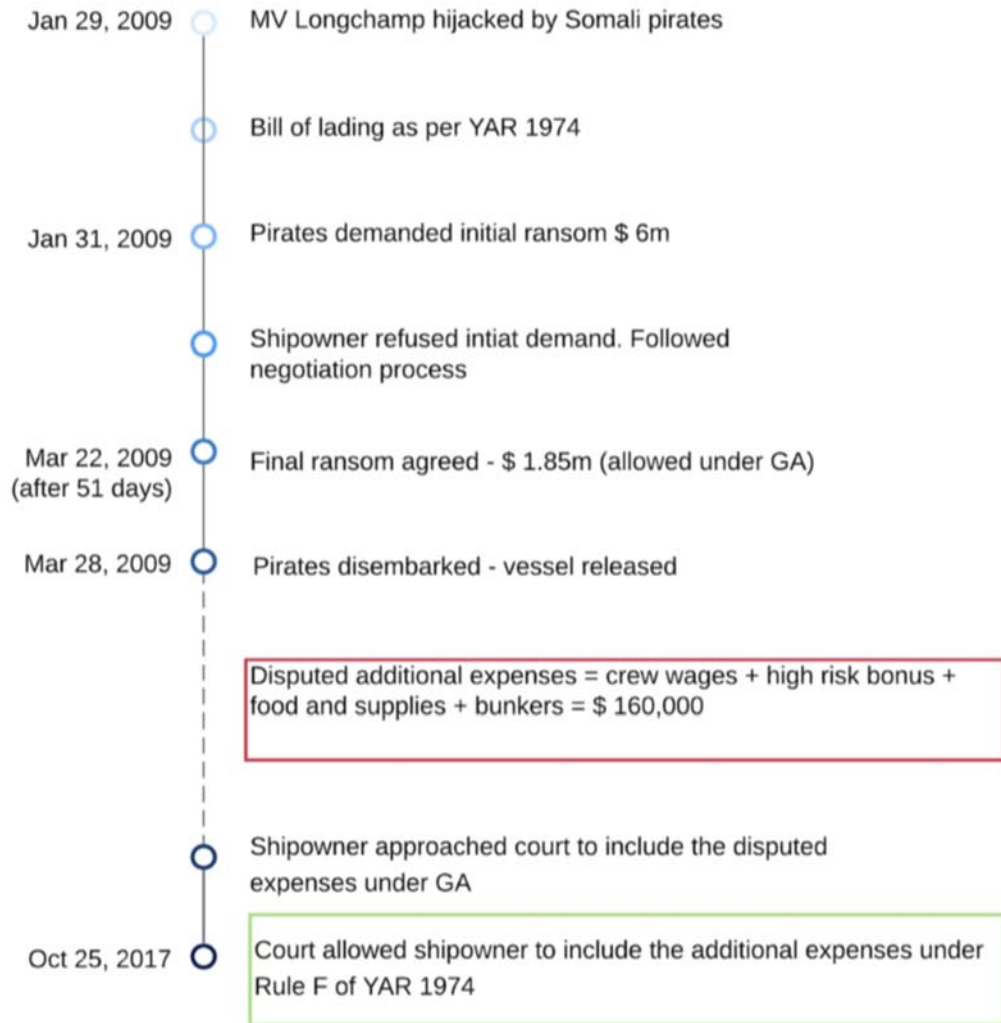


Figure 7: Timeline of the MV Longchamp case (prepared by author)

In this case, Rule F of the York-Antwerp Rules (YAR), 1974 was interpreted by the UK Supreme Court in the context of hijacking of a vessel by Somalian pirates. The court held that a shipowner's claim for operating expenses, which were incurred during the period of captivity while negotiations were taking place between the shipowner and pirates, were allowable as General Average under Rule F of the Rules, which provides that

Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided (Mitsui & Co Ltd v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG, 2017).

### **5.2.5 General average - case of kidnapping of only seafarers**

Pirates operating in the Gulf of Guinea prefer kidnapping seafarers for ransom over all other criminal acts in the high seas (reasons explained in section 2.1.2 ). But in such cases, the principles of general average have only limited applicability. The reason is that in most cases, the vessel and its cargo are safe from pirates and thus, if a replacement crew can be provided, the vessel can sail again and continue on its voyage. It is difficult to cover kidnapping for ransom under general average when only the crew is abducted. The principles of general average principles do not apply to the preservation of life unless it is linked to the preservation of property (O'Hare, 1979). Generally, when a calculation for general average is made, the cost of human life are part of it but it cannot be taken as an entity for the calculation (Hudson & Harvey, 2017) Therefore, it is necessary to consider alternative methods for paying the ransom amount and ensuring release of the seafarers.

### **5.2.6 Limitations of general average**

Although the concept of general average rests on the strong pillars of justice and equity, there are certain limitations to apply it in cases of armed robbery and kidnapping for ransom. The insurer may not have expertise to check the indemnification of general average contributions (Kendall, Boykin, & Heller, 2011). The calculations involved in general average may take a long time, resulting in delays. Moreover, it is the responsibility of the ship owner to provide justification for the reasonableness of the expenditure. In case of hijacking of the ship it is difficult to prove that the decision made by the shipowner for paying the ransom amount was intentional and reasonable, especially if the other stakeholders were not consulted before the payment was made.

## **5.3 Ransom through P & I**

Marine insurance usually covers hull insurance, liability insurance, cargo insurance, container insurance, loss of hire, etc. The laws of insurance are also applicable to acts of piracy on the high seas, as well as in territorial waters. Data presented in the appendix show that the Gulf of Guinea has witnessed pirate attacks in both territorial waters and on the high seas. Therefore, the laws governing insurance are applicable to such attacks. The scope of discussions on insurance in this section is limited to cases of ransom.

### **5.3.1 Repatriation and P & I liabilities**

P&I clubs do not provide insurance for seafarers. The liabilities of shipowners are covered under liability and indemnity insurance (Pearson & Doe, 2015). Pirate attacks are not only detrimental to the safety of a ship's hull, but also to the ship owner's liability to ensure the safety of its crew as a duty of care. Piracy is not an excluded risk by the P&I clubs. It may be used as one way to claim a ransom amount. This indemnifies the shipowner from the legal liability incurred in failure to discharge his duty of care. The liability of the duty of care between shipowner and seafarer is due to

a contractual agreement between them (McConnell, 2016). The contract is guided by statutory laws, collective bargaining agreements and provisions of labour conventions by ILO. Therefore, the release and repatriation of seafarers is a part of shipowner's liability as a duty of care. (Petrinović, Lovrić, & Perkušić, 2017).

Repatriation is covered by the provisions of the Maritime Labour Convention MLC (2006) (Regulation 2.5.1). As P&I clubs covers the liability of shipowners, they provide repatriation for seafarers in case of abandonment due to insolvency of the shipowner (Martin & Manuel, 2011). The cover is not available, or is limited, if the repatriation is caused by the willful misconduct of the seafarer, acts of terror, war or bio-chemical attack (Primorac, 2014).

### **5.3.2 'Sue and Labour Clause' and War risk insurance for ransom**

Kidnapping for ransom can be covered under Hull and Machinery in 'sue and labour expenditure', "*which allows the insured to recover from the insurer any reasonable expenses incurred by the insured in order to minimize or avert a loss to the insured property, for which loss the insurer would have been liable under the policy*" (Huybrechts & Nikaki, 2016). Payment of ransom for the safety of crew, cargo and vessel can be considered as a reasonable expense incurred by the shipowner in order to minimize damage to, or avoid loss of the vessel and is, therefore, permissible under the 'sue and labour clause'. A shipowner can get reimbursement of the amount of ransom under sue and labour costs if it is pre-approved under the omnibus rule and does not overlap with other sources from where the ransom amount can be claimed.

Overlap is likely when piracy is included as a specifically named risk by War risk P & I underwriters and is covered under IG clubs. The violent methods used by the armed pirates operating in the Gulf of Guinea are covered under war risks. It becomes applicable when a ship transits through a high-risk area (HRA) (Risks–Rule, 2018). P&I War Risk cover can be used to pay the ransom amount if pirates use 'weapons of war' while carrying out a raid on an insured vessel (Semark, 2013).

P&I insurance does not explicitly cover kidnapping and armed robbery. Gaps exist in the various 'P&I rules of cover' because of their interpretation to include cover for the payment of ransom and various other expenditures associated with kidnapping or hijacking. To overcome the difficulties in P and I hull and war risk insurance, it is necessary to customize insurance for the cover of risks and expenditures incurred when a vessel is hijacked and/or seafarers abducted in the Gulf of Guinea.

To avoid the gaps in P&I, Hull and War Risk insurance, Marine Kidnap and Ransom (K&R) Insurance is being used. This category of insurance covers ransom payments and the costs associated with negotiations and delivery of cash to the drop point. A detailed description for K&R insurance is being provided in the following paragraph.

#### **5.4 Kidnapping for Ransom Insurance**

Insurance for kidnapping for ransom and hijacking is a customized solutions which fill the gaps observed in General Average and P & I insurance for securing the release and repatriation of seafarers (Young Richard, 2019). This category of insurance manages the conditions and assets after a kidnapping or hijacking incident so that the crew can be brought back unharmed and assets can be secured. It helps to address the significant threat which seafarer and his/her family faces when a vessel is hijacked and/or the crew abducted. This insurance assists the shipowner in getting back its crew, cargo, and vessel from the captivity of pirates, as well as in fulfilling its 'duty of care' liability for the crew.

Insurance of this type also protects the shipping company from possible financial losses that arise from incidents of hijacking and kidnapping for ransom. It covers various expenditures which are associated with the release and repatriation of seafarers. K&R insurance provides for the cost of ransom, as well as expenses of crisis consultants and capable persons who can negotiate the ransom amount (Bowden, Hurlburt, Aloyo, Marts, & Lee, 2010).

The ransom amount is not paid immediately on demand. As standard practice, the first demand made by the pirates is refused. The negotiation process starts only then. Negotiations are conducted with the assistance of professional negotiators who handle such cases. This helps in reducing the burden of ransom to a significant extent. However, the negotiation process may also be detrimental to the safety and wellbeing of the kidnapped crew. The risks increase with time or in the likelihood that the negotiations do not yield any significant outcomes. Thus, K & R insurance provides for capable negotiators who are familiar with the legalities and the mindset of the criminals (Guilfoyle, 2013). Their crisis handling skills and negotiating acumen increase the chance of safe release of the hijacked vessel and its crew.

The insurance cover depends on the event that the shipowner wants to insure. K & R insurance provides cover for the incident and the actions following kidnapping and hijacking. It also covers the cost of rehabilitation and assists the seafarer in his/her rehabilitation from PTSD. The scope of K & R cover varies, depending on the insurance company. Figure 8 shows the various provisions of K & R insurance cover which help the shipowner to get his/her crew released from captivity, meet the cost of repatriation and arrange treatment for injuries sustained during the crew member's captivity and PTSD conditions (if they are diagnosed).



Figure 8: Aspects covered by K & R insurance (prepared by author)

The insurance companies provide a combined cover for war and piracy, the limits being USD 15,000,000 for piracy cover. A combined policy may have limits up to USD 75,000,000 (The Swedish Club, 2018). Premiums for such cover are substantial and it is up to the shipowner to take out an insurance policy that will help it to fulfil its duty of care by securing the release and repatriation of the seafarers (Morewitz, 2019).

## **5.5 Conclusion**

If a ship carrying cargo is hijacked, the amount of ransom can be covered by General Average (Gold, 2016). In these circumstances, it is accepted that payment was made for the release of crew, cargo and the vessel. The provisions under General Average entitle the shipowner to recover via contributions the amount paid as ransom. The judgement in the Longchamp case has removed ambiguity in interpretation of Rule F of the York-Antwerp Rules, 1974 and allowed claiming additional expenses which are incurred for the release of the vessel. P & I clubs are responsible for repatriation and cases that arise from the contractual liability of the shipowner. The clubs may pay ransom to get the kidnapped crew released, as well as freeing the ship. Additionally, a seafarer can claim compensation for the loss of effects, physical injuries and mental agony suffered in the act of piracy.

K & R insurance is an optimum solution for getting the release of a hijacked ship and/or its abducted crew. Besides paying ransom for the release of seafarers, it also covers other expenses which are difficult to claim under other arrangements, such as General Average and P & I. K & R insurance also provides for the post-release treatment of crew. It covers may cover expenses like psychiatric care, and providing them with financial and social security. At the same time, it needs to be acknowledged that the amount of premium is a point of concern because it is a significant extra cost. Therefore, the shipowner must take an informed decision after considering the risks and its obligation to fulfil duty of care requirements which include securing the release of the crew if they are kidnapped.



## **Summary and Conclusions**

The rights of seafarers after a piracy incident have a chequered history. Piracy is one of the worst nightmares a seafarer or his family goes through. This dissertation focused on strengthening the rights of seafarers in securing their release and repatriation after a pirate attack.

The Gulf of Guinea has become a piracy hotspot. The Gulf of Guinea is a hotspot for piracy. A study of the models of piracy prevailing in the region showed that attacks are often violent and detrimental to the safety and wellbeing of ships and their crews, as well as undermining the health of the shipping industry. At the same time, it needs to be acknowledged that there are multiple stakeholders in the issue who can play an important role in strengthening the rights of seafarers. However, this study has limited its scope to discussing the obligations of the shipowners.

For understanding the prevailing models of piracy in the Gulf of Guinea, we gave special attention to cases of kidnapping and hijacking since they cause the most harm and endanger the seafarers. The treatment of the crew and his rights after the incidents were discussed in order to find a remedy for a seafarer who has gone through such attack for the cases wherein, shipowner has not fulfilled his duty of care and not taken appropriate preventive actions.

As our aim was to strengthen the rights of the seafarer so we have started with the various instruments of the International Labour Organization (ILO) which deals with the process of repatriation of seafarers. It takes us to the seafarer's bill of right, the Maritime Labor Convention, MLC, 2006. We have studied the clauses of the repatriation from the perspective of MLC. Regulations on Seafarers' Employment, Agreements, wages, financial security, and social security were focused. The amendments of 2014 and 2018 which deals with the situation of abandonment and piracy respectively, show the acuteness of problem repatriation of seafarers. The responsibility of the shipowner in securing the repatriation has brought out the

importance of contractual agreements in strengthening the rights of seafarers after a pirate attack.

Now, the question arises about the extent of the liability of shipowners in a case of the release and repatriation of seafarers. The discussion moves in the direction of the liability of shipowner as the duty of care. When a seafarer goes through a pirate attack, he can find a legal remedy under the 'tort of negligence' for shipowners liability as the 'duty of care'. We have discussed it with the help of various opportunities and hurdles faced by seafarers in claiming a legal remedy as a duty of care by the shipowner. We have discussed it with the issues and concepts of deployment of armed guards, vicarious liability, causation, assumption of risk and international guidelines for shipowners to prevent the pirate attacks.

We also discuss the difficulties faced by the shipowners to achieve a balanced study about a legal remedy for seafarers after a pirate incident. We find that after the incident of piracy, a shipowner has liability under the duty of care. He is supposed to fulfill it by taking preventive actions and if he does not perform it, then the affected seafarer can find a legal remedy in tort of negligence. A shipowner is expected to repatriate the seafarer if held captive due to the pirate attack. Further, insurers also expect that the shipowner should provide minimum safeguards or take reasonable precautions to avert pirate attacks. In case of an attack, the Insurer can reject claims if he feels that the ship sailed in dangerous water without a proper risk preparedness.

In cases of kidnapping and hijacking, we can only do repatriation if the seafarer is first released by the pirates. We have discussed various options for the release of seafarers with the help of policies of states and case laws. We have discussed responses in the previous incidents to reach an optimum solution. We opine that the payment of ransom is the most viable way to secure the release of a seafarer keeping in view seafarers' safety.

Now the question arises is whether the payment of ransom for securing the release of seafarers? This concept varies with different policies of states in terms of payment of

ransom. We studied the law of the UK and found that the payment of ransom is legal if the funds are not contributing to terrorism. Therefore, payment of ransom is a legal and one of the effective option to secure the release of a seafarer.

Therefore, the question arises is how to pay the cost of ransom?

The previous cases have been studied, and we found that the cost of ransom is about US\$5 million and it varies from case to case. But one thing was sure that the amount is huge and it will be difficult for a shipowner to pay that amount on its own. Also, we found that it's not only the ransom but other associated expenditures like negotiation, liaison cells, operational expenses, which are to be taken care of, which adds to the burden of a shipowner. Shipowner follows the process of negotiation instead of directly bowing down to the first demand of pirates. The delay in payment of ransom is one of the main causes of the delay in the release of a seafarer and detrimental to their safety while in captivity.

We explored the method of payment of ransom by the applicability of insurance to reduce the burden of the shipowner. First, we have studied it to arrange ransom from the General Average. We studied this ancient concept to find a solution to an age-old problem of piracy. We found the concept of GA to be fruitful for cases when pirate hijacks a vessel along with crew and cargo. General Average does not account for the life of a seafarer as it deals with the property as an insured interest. We have also studied general average with the help of case law of MV Longchamp, wherein the court has allowed the operational charges and additional expenses under the Rule-F of York-Antwerp Rules, YAR,1974. The general average found to be fulfilling the obligations when crew and cargo are involved, moreover; It takes care of additional expenditures that occurred during the process of negotiation for reducing the price of ransom.

The study then focused on cases when pirates kidnap seafarers only. such cases are not covered by the general average. We tried to find a solution for these cases under the P and I cover. P & I club do not cover seafarers directly but are responsible for the claims

arising out of the liability of shipowner as a third party liability. Sue and labour clauses under H&M and the war risk clauses were also found to be promising to provide the ransom amount.

We found that the payment of ransom and securing the release of a seafarer after kidnapping or hijacking is a tedious process. It is difficult for a shipowner to cope up with the situation of kidnapping and hijacking as it envelops various aspects like payment of ransom, providing ransom at the dropping point, able negotiators, liaison with local authorities, the safety of vessel and crew after the release.

We found a suitable solution in the form of K & R insurance. Various clubs are providing the K & R insurance covering the incident of piracy. Its various aspects were studied, and we found that the amalgamation of K & R with other insurance covers like the war insurance will give an optimum solution for the ransom. It will allow a shipowner to fulfill his liability as a duty of care. It will lead to the release of a seafarer after a pirate attack and will add to strengthening his labour rights.

The dissertation can be summarized in the form figure 8, 9 and 10 which describes the focus area of the discussion. The diagrams also provide the flow of the discussion in the form of coloured boxes connected through red lines. It provides links between chapters and focal points which were emphasized for strengthening the rights of seafarers after a piracy incident. We can conclude the dissertation with the remarks that it will be best for the seafarer we discuss if his release and repatriation before he proceeds to such area. When a ship suffers a pirate attack and the seafarers are kidnapped or hijacked. Besides repatriation, we shall compensate a seafarer for the agony he goes through. We shall provide him with financial and social security. It should assist him to come out of PTSD and get back to his seafaring career. We shall include these provisions as a contract between a seafarer and his shipowner. It will come with assertiveness in the SEAs and CBAs. It will assist him to seek a legal remedy if shipowners do not perform his duty of care as repatriating a kidnapped

seafarer. It will strengthen the rights of seafarers in case of pirate attacks and will ensure their release and repatriation.

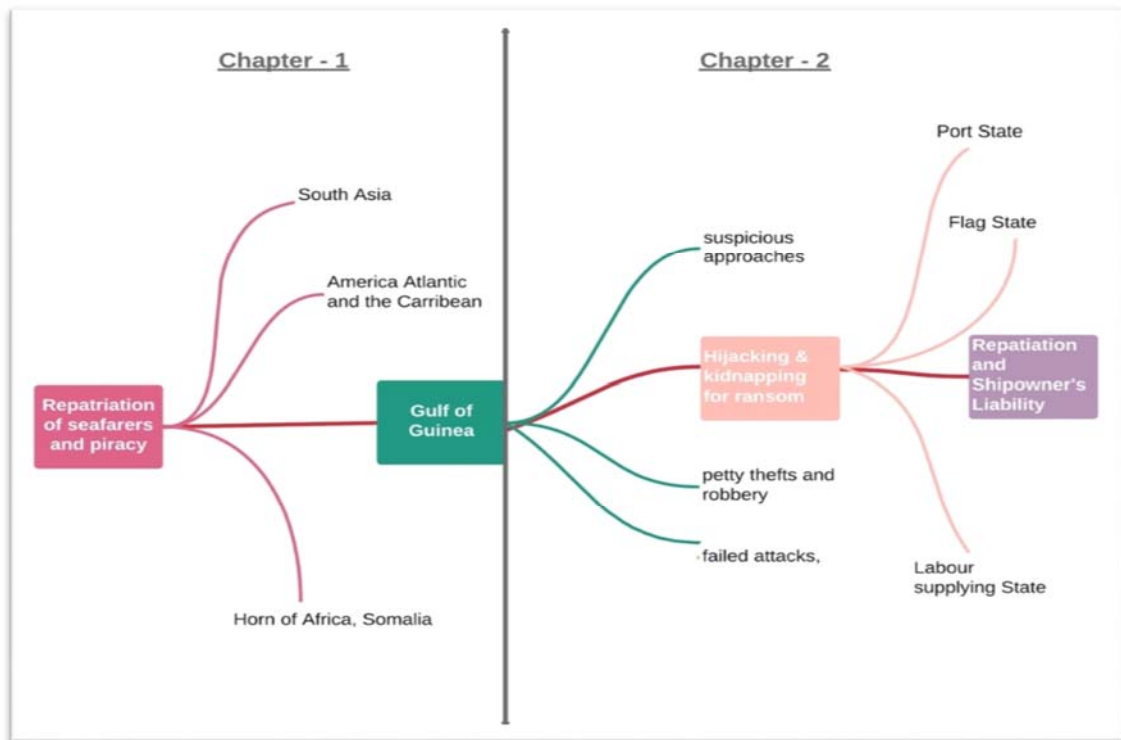


Figure 9: Piracy, seafarers and shipowners' liability (prepared by author)

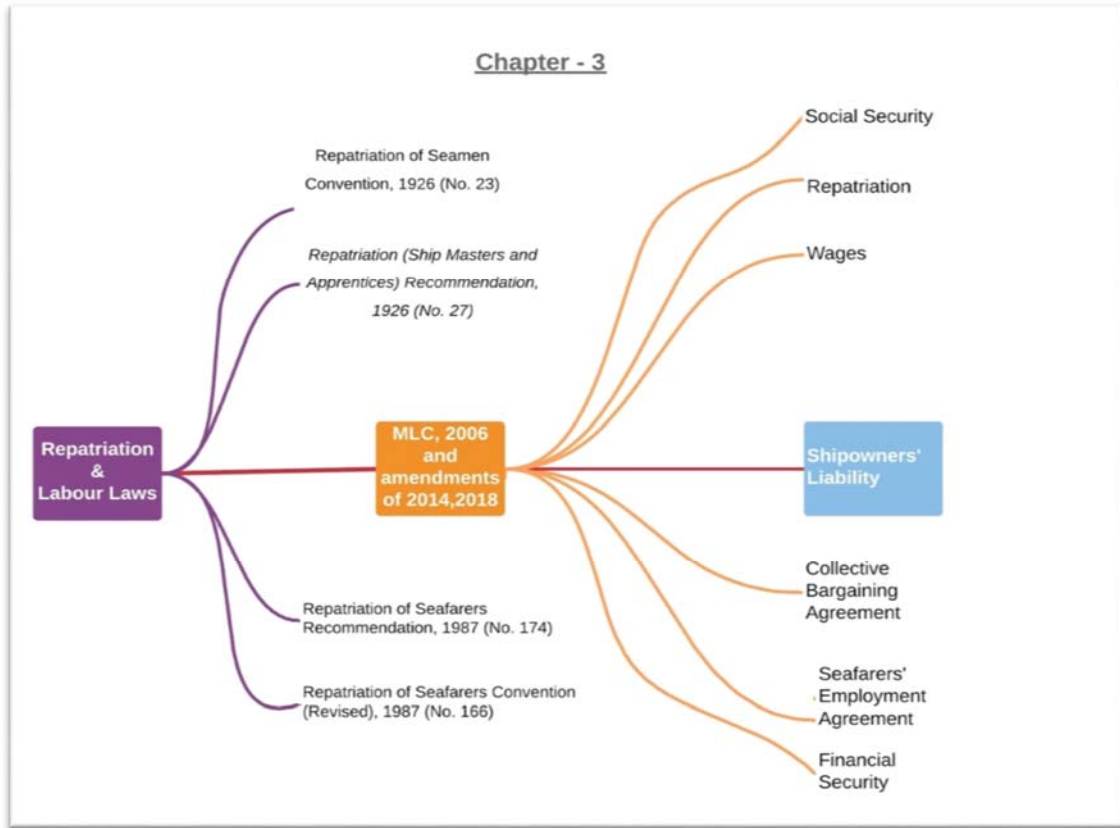


Figure 10: Maritime labour laws, repatriation and shipowners (prepared by author)

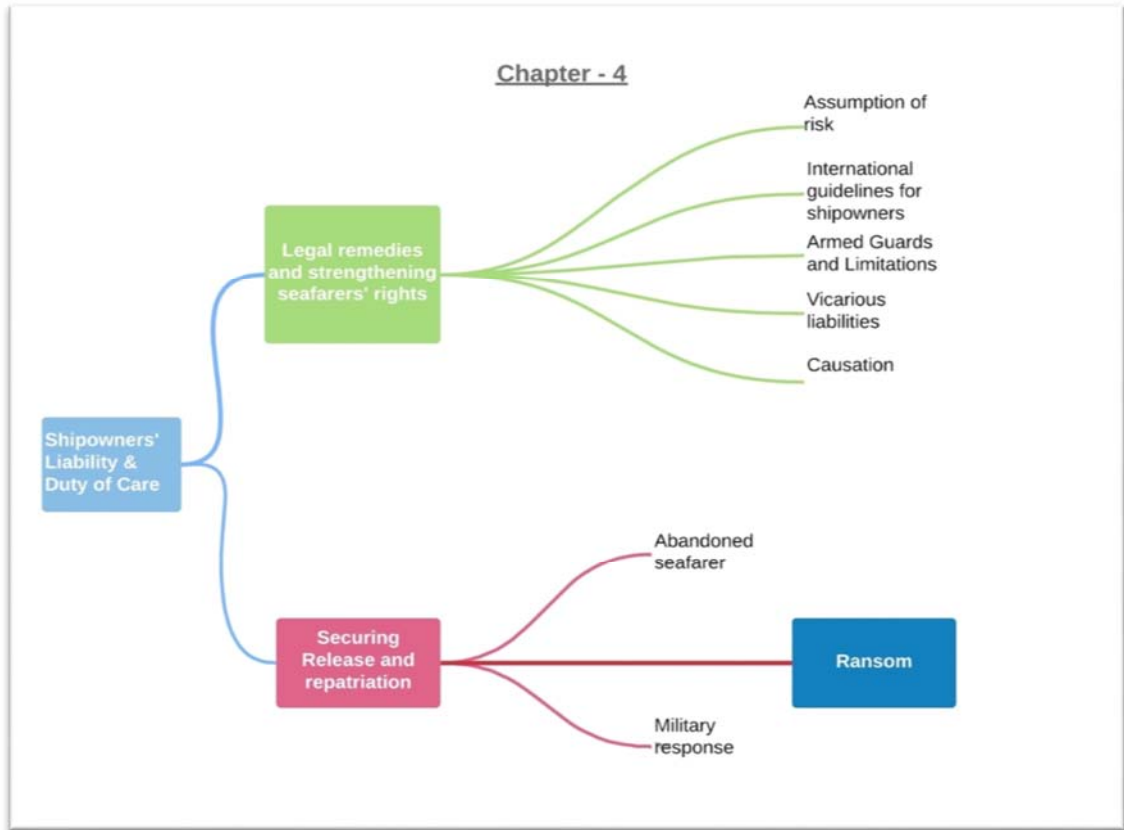


Figure 11: Preventive measures and repatriation (prepared by author)

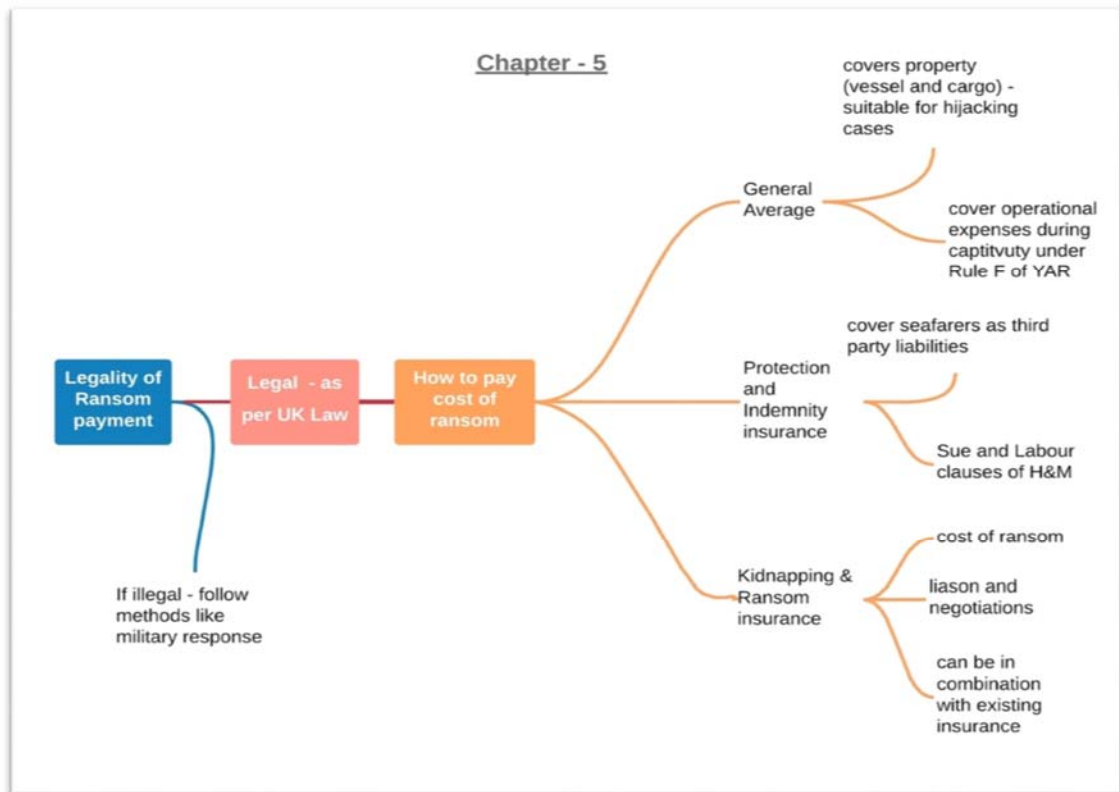


Figure 12: Ways to manage the cost of ransom (prepared by author)

Another side of the story

We have suggested the payment of ransom through insurance as a method for the release and repatriation of the seafarer. We also suggested that we should include the release and repatriation in the SEAs. It will bring contractual certainty for the release and repatriation between seafarer and shipowner. It will strengthen seafarers' rights as he can seek a legal remedy if shipowner does not fulfill his liability of repatriation under the duty of care.

In contrast, someone may argue that this process will systemize the procedure of demand for ransom by pirates. There is a growing concern that the readiness to meet the ransom demand is only fueling such attacks in the Gulf of Guinea (Denton & Harris, 2019). They may also say that it will motivate the pirates to continue with this



modus operandi of demanding the ransom for the crew, cargo, and vessels. Stakeholders should continue to take preventive steps to curb piracy in the Gulf of Guinea and to prevent pirate attacks on ships. We shall take payment of ransom as a measure only for the incidents when seafarers are kidnapped or vessel is hijacked. We may consider it a measure to secure the release of seafarers when they are kidnapped or hijacked.

#### Future research

Strengthening the rights of seafarers in cases of piracy and armed robbery is a collective responsibility of the stakeholders like flag state, port state, the state of nationality of labor supplying state. This dissertation focused on the role of the shipowner and contractual liabilities between shipowner and seafarer. We can find the optimum solution to the problem of strengthening the rights of seafarers and securing their release when the roles of other stakeholders will also be studied. This gives birth to the new research on this topic with a focus on the role of flag state and state of nationality of a seafarer. Once we reach an optimum solution for the cases of Kidnapping and hijacking in the Gulf of Guinea, it can be taken as a precedent for the other regions where piracy is prevalent which again paves the way for further research on the subject and piracy in other piracy prone zones.

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## Appendices

(Appendix-1A; Ref Ch. 1.2.2)

**PIRACY/ROBBERY INCIDENTS BY LOCATION (2018)**



- [69] Territorial
- [41] International
- [2] Internal

**PIRACY/ROBBERY INCIDENTS BY VESSEL MOVEMENT (2018)**



- [49] Steaming
- [47] Anchored
- [12] Berthed
- [4] Drifting

**TOTAL INCIDENTS OF PIRACY/ROBBERY (2015 - 2018)**



- [54] 2015
- [95] 2016
- [97] 2017
- [112] 2018

**PIRACY/ROBBERY INCIDENTS BY VESSEL TYPE (2018)**



- [49] Tanker
- [15] Bulk Carrier
- [13] Tug/OSV
- [11] Cargo
- [9] Fishing Vessel
- [8] Container Ship
- [5] Passenger Boat
- [1] Patrol Boat
- [1] Yacht

Fact sheet showing type of attacks in the Gulf of Guinea (Lydelle Joubert, 2019)

**Summary of Interview of Abducted Seafarer**

Names of Seafarers

- (a) Sudeep Kumar Choudhary
- (b) Chirag Jadhav
- (c) Moogu Ravi
- (d) Ankit Hooda
- (e) Putcha Sai Avinash

On March 25, 2019, Captain Akpata Uduyaiye took over as a new Master for the vessel MT Apecus. We started our voyage on March 27, 2019, for Bonny offshore. After reaching there we waited at 30 nautical miles off Bonny for 2 days. Then, because of a heated argument between Captain and Chief Engineer, owner instructed us to go Lagos anchorage. We stayed there for around 6 to 7 days. Chief engineer, 2<sup>nd</sup> engineer, and electrician signed off and a new crew came on board. We went to Bonny again, stayed there a few hours. Two new passengers came onboard. They were with no authorization; We objected it but Captain didn't listen to us and said its owner's instructions. Again two more persons came onboard when the ship reached off Calabar. We waited there up to Apr 17, 2019, and the owner instructed us to go to Bonny. We dropped anchor near Bonny channel at around 06 am on Apr 19, 2019. At around 01 pm Captain shouted pirates. There were about 4 to 5 Nigerian navy gunboats operating in the area, but nobody came to rescue. We five out of six Indian crew members, Chirag, Ankit, Ravi , and Avinash ran to the engine room and hide in a storeroom. Sixth Indian crew Sankar couldn't listen to my voice and went to some other place to hide. Three pirates along with Captain came to us after 10 mins. They started bursting guns pointing at our legs. We surrendered. They took us to the main deck and then pushed us to their boat on gunpoint. They blindfolded us and started their boat. They were 9 persons. After around 5 hours, they took us to a river creek on a small island. It has 03 huts. They prayed to their god and offered alcohol and cigarettes. They even offered them their blood. We stayed there for a night. Next day

their whole gang came. They were around 50 to 60 people. They were heavily armed with automatic weapons and grenade launchers. They fired continuously in the air for 30 minutes for celebrations. They took us to the boat and shifted us to another location. They gave us one bowl of noodles and told us to share among us (05 members). It was for the entire day and it remained the same for the next days of captivity. There was no drinking water, so we survived on the salty and muddy water from the creek. They have shifted us five times during the period of captivity. The name of the pirate gang was Okelele marine. They were violent and rude. They slapped us, hit us with rifle butts and tree branches. Three weeks before our release we heard that Charles is coming. Charles was the mediator who was supposed to provide the ransom amount to pirates, but he didn't come on time and the pirates were furious about his delay. After he reached they took him to custody, stabbed him in his leg and asked us to enter the boat. After two hours of boat drive they dropped us in a village. The village people helped us and arranged a boat for us. Four villagers came along with us. They took us to Bayelsa town and kept us in a hotel. They even stayed there that night. Captian of MT Apecus came to us and said we should not talk to anyone until our lawyer arrives. On Jun 27, 2019 we were contacted by the embassy and then were taken to Port Harcourt. Thereafter, arrangements were made for our return to India.



Map showing prime locations described in the summary. (Source: Google Maps)

Details of the vessel are as follows:

Name	: MT Apecus
Type of Ship	: Oil Products Tanker
IMO	: 7333810
MMSI	: 511011015
Flag	: Palau [PW]
Call Sign	: T8WU
AIS Vessel Type	: Tanker
Gross Tonnage	: 1533 T
Deadweight	: 3075 T
Length Overall x Breadth Extreme	: 86.62 Mtr × 12.65 Mtr
Year Built	: 1973

Various guidelines which are relevant for the ship owner to deal with situations arising out of piracy and armed robbery are as follows:

1. IMO 'Guidance to Shipowners and Ship Operators, Shipmasters and Crew on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships,' which outlines recommendations for shipowners in reducing and responding to attacks (MSC.1/Circ.1334, Jun 23, 2009).
2. IMO 'Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area,' which details recommendations for the hiring of private armed security guards, necessary training and the transport and use of firearms (MSC.1/Circ.1405/Rev.2, May 25, 2012).
3. International Seafarers Welfare and Assistance Network ('ISWAN') and Maritime Piracy-Humanitarian Response ('MPHRP') Good Practice Guide, which takes specific account of the human element: the seafarers' well-being before, during and after an attack and what the shipowner should do to prepare for an attack, keeping in mind the seafarers' (ISWAN, 2011).
4. Best Management Practices for Protection against Somalia Based Piracy ('BMP 4'), which establishes how shipowners and crew members can best deter armed robbery and piracy attacks in the HRA and the severe consequences of not following the BMP 4, which could also be useful and applicable to non-HRA waters, such as the Gulf of Guinea (BIMCO, C., IMEC, & UKMTO, 2011).
5. The 'Guidelines for Owners, Operators and Masters for Protection Against Piracy in the Gulf of Guinea Region' ('GoG Guidelines'), which are to be read in conjunction

with BMP 4 but which BIMCO, the International Chamber of Shipping, INTERCARGO and INTERTANKO have tailored to the Gulf of Guinea region and the armed robbers' and pirates' *modus operandi*, in order to assist shipowners and crew members in preventing and reducing armed robbery or piracy attacks and how to prepare for and react to such attacks (ICS & IMO, 2018).