

**STOWAWAYS: A THREAT TO MARITIME SECURITY AND THE CURSE OF  
SHIPOWNERS**

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Signed at Durban on this 29th day of November 2018

## **DEDICATION**

This dissertation is dedicated to my wonderful children, Dara, Enenim and Eme. You make me proud and your unconditional love inspires me to be the best that I can be.

## **ACKNOWLEDGMENTS**

To my supervisor, Mrs Singh, I appreciate your guidance, invaluable advice, time, effort and most especially, your patience. Thank you for not giving up on me.

I am most grateful to my parents and siblings for their encouragement, love and support all through the years. You positively influenced me in no small measure.

Lastly, but by no means the least, I am immensely thankful to my awesome family. You folks have been nothing short of amazing. Dara, Enenim and Eme, you have and will forever be my biggest cheerleaders. Thank you for your encouragement and for putting up with me throughout this whole process. Akan, what can I say? I couldn't have asked for a better husband. Thank you for your support, financial and otherwise. I could never have done this without your approval and encouragement.

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## LIST OF ABBREVIATIONS AND THEIR MEANINGS

BIMCO	Baltic and International Maritime Council
CFR	Code of Federal Regulations
CSO	Chief Security Officer
EU	European Union
FAL	Facilitation
GISIS	Global Integrated Shipping Information System
HVR	Hague-Visby Rules
ICLJ	International Conference on Law and Justice
ICS	International Chamber of Shipping
IMO	International Maritime Organisation
ISPS	International Ship and Port Facility Security
ITF	International Transport Workers' Federation
NEPIA	North of England P & I Association
P & I	Protection & Indemnity
RO-RO	Roll on/ roll off
SOLAS	Safety of Life at Sea
UDHR	Universal Declaration of Human Rights
UK	United Kingdom

UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
USA	United States of America

## **ABSTRACT**

Stowing away is a means employed by people to get from one place to another without detection and without paying for passage. There are various reasons people stow away; some of which include, escaping from poverty, persecution and war. What stowaways see as a harmless means of getting to their destination, oftentimes, ends up creating unprecedented problems for shipowners. The shipping industry is equally affected, as stowaways represent a risk to maritime security.

This dissertation explores the ways in which stowaways constitute a threat to maritime security, the dangers they pose to cargo and the operational safety of ships, the legal and financial problems they cause to shipowners, the dangers they unwittingly cause to themselves, how they are treated when they are discovered, the legality or otherwise of the stowaway removal process and the challenges encountered by shipowners during the disembarkation and repatriation process.

To this end, some key research questions have been formulated, which the researcher attempts to answer throughout the dissertation. In the final chapter, the researcher will review the key research questions to determine whether they have been sufficiently answered or not.

## CHAPTER ONE: INTRODUCTION

### 1.1. Introduction

International shipping is crucial to the world economy as about ninety percent of world trade is carried out by sea.<sup>1</sup> Therefore, any disruption to international shipping could be detrimental to world trade. In order to ensure that world trade thrives, it is imperative that cargo ships, especially liner services, operate with minimal or no hindrance. Stowaways pose a risk to international shipping because they disrupt shipping schedules, cause delay to ships, and create financial and legal problems for shipowners. They endanger cargo and undermine the operational safety of ships; compromise the health and safety of the ships' crew members and put their own lives at risk, thereby constituting a threat to maritime security. The presence of stowaways on board a ship is a breach of the security provisions of the ISPS Code which seeks to, "prevent unauthorized access to ships, port facilities and their restricted areas".<sup>2</sup>

Stowaways remain a significant concern for shipowners as they are heavily burdened with the cost of their maintenance and repatriation. The disembarkation and repatriation process is a difficult one, largely due to the number of countries potentially involved and their different national legislations. Presently there is no international convention providing for stowaways. In 1957, an International Convention Relating to Stowaways was adopted in Brussels but did not enter into force because it did not receive the number of ratifications required to do so.<sup>3</sup> In 2002, the FAL Convention was amended to include new standards and recommended practices for dealing with stowaways (Resolution FAL) and entered into force on 1 May 2003.<sup>4</sup> Since then, the Resolution FAL has undergone a number of revisions, the most recent being the Resolution FAL 13 (42).<sup>5</sup>

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<sup>1</sup> ICS 'Shipping, world trade and the reduction of CO2 Emissions: United Nations Framework Convention on Climate Change (UNFCCC)' 3 available at <http://www.ics-shipping.org/docs/co2>, accessed on 29 July 2018.

<sup>2</sup> Section 1.3.3 Part A of the International Ship and Port Facility Security Code 2002.

<sup>3</sup> International Convention Relating to Stowaways (Brussels Convention) 1957, available at <http://www.refworld.org/docid/3ae6b3a80.html>, accessed 13 August 2018.

<sup>4</sup> Adoption of Amendments to the Convention on Facilitation of International Maritime Traffic, 1965, as Amended (Resolution FAL.7 (29)), available at [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Documents/FAL%20-%20Facilitation%20Committee/7\(29\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Documents/FAL%20-%20Facilitation%20Committee/7(29).pdf), accessed on 29 July 2018.

<sup>5</sup> Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases (Resolution FAL. 13 (42)), available at [http://www.imo.org/en/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/Resolution%20FAL.13%20\(42\).pdf](http://www.imo.org/en/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/Resolution%20FAL.13%20(42).pdf), accessed on 29 July 2018.

## **1.2. Research objectives**

The main objective of this dissertation is to identify the ways in which stowaways impact international shipping, and in particular, shipowners. This dissertation will explore in detail the ways in which stowaways cause delay to maritime trade and create economic and legal burden on shipowners. It will also examine the challenges encountered by shipowners in attempting to disembark and repatriate stowaways. For a problem of this magnitude, the issue of stowaways is not receiving the attention it deserves. So much has been written about maritime piracy, marine pollution and recently, the maritime refugee crisis as threats to maritime security but maritime stowaways have received minimal attention. This dissertation seeks to change this status quo by bringing to the fore, the risk that stowaways represent to the shipping industry.

## **1.3. Presentation of Key research questions**

This research seeks to answer the following key research questions:

### **1.3.1. Key Research Question 1**

In what ways do stowaways constitute a threat to cargo and the operational safety of the ship?

### **1.3.2. Key Research Question 2**

Why are shipowners heavily burdened with the penalties levied on their ships for entering into port with stowaways on board, and the financial cost involved in their disembarkation and repatriation despite their efforts in taking reasonable precaution to prevent them from gaining access to their ship?

### **1.3.3. Key Research Question 3**

Whether these stowaways upon discovery are treated in a manner which preserves their human rights and whether the process of their disembarkation and repatriation is carried out according to laid down procedure?

#### 1.3.4. Key Research Question 4

Whether there is need for a single unified international instrument dealing with stowaways as opposed to the various international instruments currently invoked upon to deal with the different situations?

#### 1.4. Research methodology and limitations

The research methodology employed in this dissertation is solely desktop. The writer finds this method more suited to this study because it involves the collation of existing data on stowaway incidents and statistics mainly from the IMO and P & I clubs. The researcher has made use of both primary and secondary sources research sources. The primary sources include the Resolution FAL.11 (37),<sup>6</sup> which is an amendment to the Convention on Facilitation of International Maritime Traffic,<sup>7</sup> the Universal Declaration of Human Rights,<sup>8</sup> the Convention Relating to the Status of Refugees,<sup>9</sup> and the Protocol Relating to the Status of Refugees,<sup>10</sup> Conclusions of the UNHCR Executive Committee on Stowaway Asylum-Seekers,<sup>11</sup> the UNHCR Practical Guidelines for Shipowners, their Agents and Shipmasters relating to Stowaway Asylum-seekers,<sup>12</sup> the International Ship and Port Facility Security Code,<sup>13</sup> the International Convention for the Safety of Life at Sea,<sup>14</sup> the US Code of Federal Regulations (CFR),<sup>15</sup> Hague-Visby Rules,<sup>16</sup> BIMCO Stowaways Clause for Time Charter Parties,<sup>17</sup> the Constitution of the Republic of South Africa<sup>18</sup> and the P & I Rules of the P & I clubs. The researcher also made use of information from secondary sources like textbooks

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<sup>6</sup> Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases (Resolution FAL.11 (37)) 2011, available at [http://www.imo.org/en/OurWork/Facilitation/Stowaways/Documents/Resolution%2011\(37\)\\_Revised%20guidelines%20on%20the%20prevention%20of%20access%20by%20stowaways%20and%20the%20allocation%20of%20responsibilities.pdf](http://www.imo.org/en/OurWork/Facilitation/Stowaways/Documents/Resolution%2011(37)_Revised%20guidelines%20on%20the%20prevention%20of%20access%20by%20stowaways%20and%20the%20allocation%20of%20responsibilities.pdf), accessed on 29 July 2018.

<sup>7</sup> Convention on Facilitation of International Maritime Traffic (FAL), 1965.

<sup>8</sup> Universal Declaration of Human Rights (UDHR) 1948.

<sup>9</sup> Convention Relating to the Status of Refugees (1951 Refugee Convention) 1951.

<sup>10</sup> Protocol Relating to the Status of Refugees (1967 Protocol) 1967.

<sup>11</sup> UNHCR *Stowaway Asylum-Seekers No. 53 (XXXIX) 1988, EC/SCP/51*, available at <http://www.unhcr.org/excom/exconc/3ae68c4374/stowaway-asylum-seekers.html>, accessed on 29 July 2018.

<sup>12</sup> Practical Guidelines for Shipowners, Their Agents and Shipmasters Relating to Stowaway Asylum-Seekers 1992, available at <http://www.refworld.org/docid/3ae6b31d1b.html>, accessed on 29 July 2018.

<sup>13</sup> International Ship and Port Facility Security (ISPS) Code 2002.

<sup>14</sup> International Convention for the Safety of Life at Sea (SOLAS) 1974.

<sup>15</sup> The Code of Federal Regulations (CFR) 2018, available at <https://www.ecfr.gov/cgi-bin/ECFR?page=browse>, accessed on 13 August 2018.

<sup>16</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague-Visby Rules) 1968.

<sup>17</sup> BIMCO Clause for Time Charter Parties 2009.

<sup>18</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

and online literature, e-journals, websites (IMO, P & I clubs, BIMCO, UNHCR), theses and online newspapers.

The writer has encountered some limitations in the course of this research which may, possibly, have affected its outcome. The most challenging of these limitations is a dearth of easily accessible and up-to-date published academic text and cases on the subject of maritime stowaways. For this reason, the researcher had to rely mostly on online sources and information found on P & I club websites.<sup>19</sup>

Another challenge is the downward trend of notification of stowaway incidents to the IMO by the P & I Clubs despite the new facility provided for by the IMO in the Global Integrated Shipping Information System (GISIS) which makes it easy to upload data on stowaway incidents onto their website.<sup>20</sup> This has, to some extent, influenced the accuracy of the report on the occurrence of stowaway incidents. For instance, not knowing the exact figures of stowaway occurrences makes it a challenge to determine whether the scourge is on the rise or decline. It would also be beneficial to this research to ascertain whether the recent humanitarian and refugee crisis in parts of Africa, Asia and the Middle East has, in any way, affected the stowaway pattern or trend.

## **1.5. Structure of the dissertation**

This dissertation is broken down into five chapters. Chapter one introduces the problem topic and provides the background to the stowaway problem. It states the research objectives, research methodology and limitations, and poses the key research questions.

Chapter two examines the concept of maritime security and how stowaways constitute a risk or threat to maritime security. It provides information on the various types of stowaways, their profiling, methods they employ to board ships, and stowaway statistics. It highlights how stowaways cause risk to cargo and the operational safety of ships and cause potential harm to all on board the ship, including themselves.

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<sup>19</sup> The researcher relied on information found on the P & I club websites because these mutual clubs have up-to-date first-hand knowledge of stowaway incidents as their correspondents (who report directly to them) are routinely called upon by shipmasters to assist with disembarkation and repatriation of the stowaways.

<sup>20</sup> IMO *Report of the Facilitation Committee on its forty-second session* 19 at para 10.14 available at <http://www.imo.org/en/OurWork/Facilitation/FALCommittee/Documents/FAL%2042-17.pdf>, accessed on 29 July 2018.

Chapter three deals exhaustively with the economic costs and legal liability which shipowners are subjected to as a result of having stowaways on board their ship.

Chapter four deals with the procedures laid down for the resolution of stowaway incidents. It investigates whether the proper procedures are followed in the disembarkation and repatriation of stowaways and whether the rights of the stowaways are protected during the removal process.

Chapter five concludes the dissertation. It restates the key research questions and the resulting conclusion and proffers recommendations on how to reduce stowaway incidents and alleviate the burden placed on shipowners.

## CHAPTER TWO: THE STOWAWAY PHENOMENON

### 2.1. Introduction

The act of stowing away is not a new phenomenon. Stowaways have been written about as early as the early 1800s and probably came into existence shortly after the first commercial ships began international commerce.<sup>21</sup> The act of stowing away is dangerous and costly as it undermines the safety of the ship, the crew members, and cargo on board the ship. It causes shipowners financial and legal problems. Stowaways are considered a threat to maritime security as they create a major problem for the shipping industry<sup>22</sup> and consequentially, world trade. Hence, in a bid to enhance maritime security, the IMO encourages Member States to fully implement the ISPS Code.<sup>23</sup> In order to determine whether stowaways constitute a threat to maritime security, we need to determine whether their presence on board ships has the potential to endanger shipping or affect it in a negative way.

### 2.2. What constitutes maritime security?

There is no definite meaning of the concept of maritime security.<sup>24</sup> Bueger refers to it as, “one of the latest buzzwords of international relations”.<sup>25</sup> Discourse on maritime security typically alludes to maritime threats.<sup>26</sup> There are two approaches on how to determine what constitutes maritime security; the negative or the laundry list approach and, the positive approach.<sup>27</sup> The negative approach identifies threats like “maritime inter-state disputes, maritime terrorism, piracy, trafficking of narcotics, people and illicit goods, arms proliferation, illegal fishing, environmental crimes, or maritime accidents and disasters”, and proposes that an absence of such threats constitutes maritime security.<sup>28</sup> The laundry list approach has been criticised as being insufficient and instead, creates problems as to which

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<sup>21</sup> M McNicholas *Maritime Security: An Introduction* 2 ed (2016) 182.

<sup>22</sup> IMO ‘Stowaways’, available at <http://www.imo.org/en/OurWork/Facilitation/Stowaways/Pages/Default.aspx>, accessed on 29 July 2018.

<sup>23</sup> *ibid.*

<sup>24</sup> Christian Bueger ‘What is Maritime Security?’ *Marine Policy* 53 (2015) 159, available at [https://ac.els-cdn.com/S0308597X14003327/1-s2.0-S0308597X14003327-main.pdf?\\_tid=92a3a446-a8a9-4c4d-a476-07a8c745e590&acdnat=1534761372\\_e5e25bc9339608da7193450ea92275d4](https://ac.els-cdn.com/S0308597X14003327/1-s2.0-S0308597X14003327-main.pdf?_tid=92a3a446-a8a9-4c4d-a476-07a8c745e590&acdnat=1534761372_e5e25bc9339608da7193450ea92275d4), accessed on 29 July 2018.

<sup>25</sup> *ibid* 159.

<sup>26</sup> *ibid* 159.

<sup>27</sup> *ibid* 159.

<sup>28</sup> *ibid* 159.

acts should be regarded as threats to maritime security.<sup>29</sup> The positive approach on the other hand defines maritime security as, “good” or “stable order at sea”.<sup>30</sup> The problem with this approach is that it neither explains nor specifies what comprises “good” or “stable order” or whose order it is supposed to be.<sup>31</sup>

The researcher submits that the argument in support of the laundry list approach is flawed because it is rather restrictive and tends to exclude some acts which would otherwise amount to a threat to maritime security, such as stowing away. The researcher advances the view that rather than creating a list of acts which constitute maritime threats or defining maritime security as the “good” or “stable order at sea”, maritime security should be regarded as any act or omission which, in any way, threatens or undermines, or has the potential to threaten or undermine shipping or the maritime industry. This approach is much more encompassing and includes acts which otherwise would have been overlooked as threats to maritime security. The determining factor as to what constitutes a breach of maritime security should be whether an act or omission does in fact, endanger or affect, or has the capability to endanger or affect shipping in a negative manner. If it does, then such act or omission should be regarded as a threat to maritime security.

Stowaways do, in fact, affect shipping on a large scale as they can cause delays to ships resulting in disruption of shipping schedules, loss or damage to cargo, loss of revenue, legal issues, and human rights violations arising from repatriation issues such as non-acceptance of stowaways by some coastal countries for disembarkation in their ports. They also endanger the ship, crew members and themselves. They should, therefore, be recognised as a threat to maritime security.

### **2.3. International legal instruments**

There are, currently, no international conventions on stowaways. In 1957, the International Convention Relating to Stowaways<sup>32</sup> was adopted but never entered into force, owing to the fact that it received only nine out of the ten ratifications required to bring it into force.<sup>33</sup> In

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<sup>29</sup> *ibid* 159.

<sup>30</sup> *ibid* 159.

<sup>31</sup> *ibid* 159.

<sup>32</sup> Note 3 above.

<sup>33</sup> UNHCR ‘Note on stowaway asylum-seekers EC/SCP/51’ para 5, available at <http://www.unhcr.org/excom/scip/3ae68cbf8/note-stowaway-asylum-seekers.html>, accessed on 29 July 2018.

order to fill the lacunae created by a lack of an international instrument relating to stowaways, the IMO in 2002 decided to amend the 1965 Convention on Facilitation of International Maritime Traffic (hereafter referred to as the FAL Convention) to include new Standards and Recommended Practices for dealing with stowaways.<sup>34</sup>

### **2.3.1. The FAL Convention**

The amendment to the FAL Convention introduced a new section 4 to its Annex: Adoption of Amendments to the Convention on Facilitation of International Maritime Traffic, 1965, as Amended (Resolution FAL.7 (29)) which entered into force on 1 May 2003.<sup>35</sup>

The Resolution FAL.7 (29) was amended by the Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases (Resolution FAL.11 (37)) which was adopted on 9 September 2011<sup>36</sup> and became effective on 1 October 2011.<sup>37</sup> This resolution specifically addresses both countries that are not parties to the FAL Convention and those that are parties to the FAL Convention, and have either notified or are yet to notify the Secretary-General in accordance with articles VIII(1) & VIII(3) of the FAL Convention.<sup>38</sup>

The Resolution FAL.11 (37) was recently amended by the Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases (Resolution FAL. 13 (42)) which was adopted on 8 June 2018.<sup>39</sup> Resolution FAL.13 (42) has not yet entered into force, and until it does, Resolution FAL.11 (37) remains applicable.

### **2.3.2. The ISPS Code**

As a result of the September 11 terrorist attacks on the United States, the International Convention for the Safety of Life at Sea 1974 (hereafter referred to as SOLAS Convention) was amended to include the International Ship and Port Facility Security (ISPS) Code in

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<sup>34</sup> FAL.7 (29) (note 4 above).

<sup>35</sup> *ibid.*

<sup>36</sup> FAL.11 (37) (note 6 above).

<sup>37</sup> *IMO Report of the Maritime Safety Committee on its ninetieth session* para 4.1, available at <http://www.crs.hr/Portals/0/MSC%2090-28.pdf>, accessed on 29 July 2018.

<sup>38</sup> FAL.11 (37) (note 6 above) paras (a) & (b) pg. 2 of the preamble.

<sup>39</sup> FAL.13 (42) (note 5 above).

order to enhance maritime safety and security.<sup>40</sup> The ISPS Code was adopted on 12 December 2002 and came into force on 1 July 2004.<sup>41</sup> The ISPS Code is implemented through chapter XI-2 of the SOLAS Convention and applies to ships and port facilities.<sup>42</sup> It is made up of parts A & B: Part A contains mandatory provisions while part B contains guidance regarding the application of the provisions of part A. Under security level 1, provision is made for the control of access to ships,<sup>43</sup> control of embarkation of persons and their effects,<sup>44</sup> and monitoring of restricted areas to ensure that they are accessed only by authorised personnel.<sup>45</sup> The presence of stowaways on ships is a breach of the Ship Security Plan (SSP) and a clear violation of the ISPS Code.

### **2.3.3. Other international instruments applicable to stowaways:**

- i. The United Nations Declaration of Human Rights.<sup>46</sup>
- ii. The United Nations Convention relating to the Status of Refugees.<sup>47</sup>
- iii. The United Nations Protocol relating to the Status of Refugees.<sup>48</sup>
- iv. Conclusions on the United Nations High Commissioner for Refugees Executive Committee on Stowaway Asylum-Seekers No. 53 (XXXIX).<sup>49</sup>
- v. The United Nations High Commissioner for Refugees Practical Guidelines for Shipowners, their Agents and Shipmasters relating to Stowaway Asylum-seekers.<sup>50</sup>
- vi. International Convention for Safety of Life at Sea.<sup>51</sup>

The above mentioned instruments will be explored throughout this dissertation, with special focus on these instruments in chapter four.

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<sup>40</sup> Preamble to the ISPS Code.

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

<sup>43</sup> Section 7.2.2.

<sup>44</sup> Section 7.2.3.

<sup>45</sup> Section 7.2.4.

<sup>46</sup> UDHR (note 8 above).

<sup>47</sup> 1951 Refugee Convention (note 9 above).

<sup>48</sup> 1967 Protocol (note 10 above).

<sup>49</sup> Note 11 above.

<sup>50</sup> Note 12 above.

<sup>51</sup> SOLAS Convention (note 14 above). The SOLAS Convention does not make provisions for stowaways *per se* but is applicable to them with respect to the use of life-saving equipment in cases of emergency. It is cited in this chapter under paragraph 2.11.1.

## 2.4. Legal definition of a stowaway

A stowaway is defined under the Resolution FAL.11 (37) as:

“A person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities.”<sup>52</sup>

The following are key elements in the above definition:

- i. the person or persons must have boarded the ship “without the consent” of the ship owner, or master or any other responsible person;<sup>53</sup>
- ii. the person or persons must have been discovered “after the ship has departed” from a port;<sup>54</sup> or
- iii. the person or persons must have been discovered “in the port of arrival”;<sup>55</sup> and
- iv. the person or persons “must be reported as a stowaway(s)” by the master to the appropriate authorities.<sup>56</sup>

Where an unauthorised person is discovered on board a ship while it is still in the port, such a person does not qualify as a stowaway but as an attempted stowaway.<sup>57</sup>

## 2.5. Categorisation of stowaways

The main reason people stowaway is the need to escape impoverishment.<sup>58</sup> McNicholas paints a very grim picture of the sordid and sub-human conditions some of these stowaways

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<sup>52</sup> Section 2.6.

<sup>53</sup> *ibid* section 2.6.

<sup>54</sup> *ibid* section 2.6.

<sup>55</sup> *ibid* section 2.6.

<sup>56</sup> *ibid* section 2.6.

<sup>57</sup> *ibid* section 2.1.

<sup>58</sup> W Walters ‘Bordering the sea: shipping industries and the policing of stowaways [1]’ (2008) 7 (1)

Borderlands e-journal 3, available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.522.6383&rep=rep1&type=pdf>, accessed on 29 July 2018.

live in.<sup>59</sup> The desperation to escape these squalid living conditions fuels their determination to leave their countries and seek a better life elsewhere, no matter what or how long it takes.<sup>60</sup>

It is very difficult to ascertain the status of a stowaway.<sup>61</sup> Stowaways that do not possess the documents required to enter a country are deemed illegal entrants and will as such, be dealt with according to the national legislation of that country.<sup>62</sup> Stowaways can be categorised as refugees, asylum-seekers, economic migrants, illegal migrants, criminals or terrorists.

### 2.5.1. Refugees

A refugee is defined as a person who:

“. . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.<sup>63</sup>

Refugees cannot return to their countries of origin because of existing problems which could be of a political or military or religious nature.<sup>64</sup> They enjoy international protection and the accompanying fundamental human rights.<sup>65</sup>

### 2.5.2. Asylum seekers

Not to be confused with refugees, asylum seekers have sometimes been referred to as “political refugees” by some scholars because of their socio-political beliefs and ideologies.<sup>66</sup>

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<sup>59</sup> McNicholas (note 21 above) 183.

<sup>60</sup> *ibid* 183.

<sup>61</sup> ITF Seafarers ‘ITF policy on stowaways’ para 13, available at <http://www.itfseafarers.org/files/seealsodocs/453/Stowaways.pdf>, accessed on 29 July 2018.

<sup>62</sup> Section 3.6 Resolution FAL.11 (37).

<sup>63</sup> Article 1 A. (2) of the 1951 Refugee Convention.

<sup>64</sup> UNHCR A pocket guide to refugees 3 ed (2008)15, available at <http://www.unhcr.org/afr/publications/brochures/48737cbe2/pocket-guide-refugees.html?query=what%20is%20the%20difference%20between%20a%20migrant%20and%20an%20economic%20migrant>, accessed on 29 July 2018.

<sup>65</sup> *ibid* 5.

<sup>66</sup> S T Maksen *Transportation of stowaways, drugs and contraband by sea from the Maghreb region: legal and policy aspects* (unpublished LLM dissertation, World Maritime University, 2007) 37 available at [http://commons.wmu.se/cgi/viewcontent.cgi?article=1032&context=all\\_dissertations](http://commons.wmu.se/cgi/viewcontent.cgi?article=1032&context=all_dissertations), accessed on 29 July 2018.

They run to other countries in search of protection.<sup>67</sup> Like refugees, they enjoy the right to legal protection pending the completion of the process of verification of their refugee status.<sup>68</sup> An asylum seeker is therefore a person who has made a claim for refugee status but whose claim is yet to be determined.<sup>69</sup>

The right to seek asylum is firmly entrenched in the UDHR.<sup>70</sup> Resolution FAL.11 (37) acknowledges stowaway asylum-seekers. It provides that, “Stowaway asylum-seekers should be treated in accordance with international protection principles as set out in international instruments, such as the provisions of the United Nations Convention relating to the Status of Refugees of 28 July 1951 Convention and of the United Nations Protocol relating to the Status of Refugees of 31 January 1967 and relevant national legislation”.<sup>71</sup>

### **2.5.3. Economic migrants**

The term “economic migrants” is sometimes erroneously used interchangeably with the term “refugees”.<sup>72</sup> There is, however, a significant distinction between the two.<sup>73</sup> This distinction is underscored by voluntariness.<sup>74</sup> An economic migrant (for purely economic reasons) makes a choice to leave his or her country in pursuit of a better life elsewhere while a refugee is forced to leave his or her country to escape persecution. It is imperative to note yet another crucial distinction between refugees and migrants: whereas refugees enjoy the protection of international law, migrants, on the other hand, do not.<sup>75</sup>

The 1951 Refugee Convention offers further protection by prohibiting the expulsion or return of refugees: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.<sup>76</sup>

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<sup>67</sup> UNHCR (note 64 above) 11.

<sup>68</sup> *ibid* 11.

<sup>69</sup> *ibid* 11.

<sup>70</sup> Article 14(1).

<sup>71</sup> Section 3.7.

<sup>72</sup> UNCHR (note 64 above) 24.

<sup>73</sup> *ibid* 24.

<sup>74</sup> *ibid* 24.

<sup>75</sup> The 1951 Refugee Convention, Article 1 A. (2).

<sup>76</sup> *ibid* article 33.

#### **2.5.4. Illegal immigrants**

Stowing away is closely tied to illegal migration. Walters is of the view that stowing away is no longer a means of escape but signifies an “unannounced arrival”.<sup>77</sup> The tightening of border control to keep out persons without proper documentation or socio-economic status or “wrong” nationality and the difficulty in gaining asylum have caused the act of stowing away to become a significant element of migration.<sup>78</sup> Illegal immigrants would typically try to enter a country undetected.<sup>79</sup> They are often smuggled into via cargo containers<sup>80</sup> and are usually part of an organised human trafficking operation.<sup>81</sup>

#### **2.5.5. Criminals**

These types of stowaways are usually dangerous and may be part of an organised or international crime syndicate, or absconders or deserters fleeing from punishments from the outcome of a trial under an administration.<sup>82</sup> They could be individuals or gang members and would most likely exploit vulnerable avenues in the maritime security chain to gain access to commercial ships.<sup>83</sup> They are considered aggressive, violent and uncooperative when accosted by the ship’s crew members or the authorities.<sup>84</sup> In some cases, stowaways who cannot afford to pay passage to the stowaway smuggling organisations may, as an alternative, volunteer to become drug couriers in exchange for payment.<sup>85</sup>

#### **2.5.6. Terrorists**

These are the most dangerous and bothersome of all stowaways. Following the Sept 11 attacks on USA, it has been extremely difficult for foreigners (especially those with a criminal history or deemed as potential threats to national security) to gain entry into the

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<sup>77</sup> Walters (note 58 above) 3.

<sup>78</sup> *ibid* 3.

<sup>79</sup> NEPIA ‘Stowaways’ Loss Prevention Briefing July 2008 at 3, available at <https://maritimecyprus.files.wordpress.com/2015/10/noe-stowaways-loss-prevention-briefing-july-08.pdf>, accessed on 29 July 2018.

<sup>80</sup> Report of the Committee on Government Reform submitted by its Subcommittee on criminal justice, drug policy and human resources on ‘Federal law enforcement at the borders and ports of entry: challenges and solutions’ U.S. House of Rep., 107<sup>th</sup> Cong. (H. Rpt. 107-794) (2003) 31, available at <https://www.congress.gov/107/crpt/hrpt794/CRPT-107hrpt794.pdf>, accessed on 29 July 2018.

<sup>81</sup> McNicholas (note 21 above) 183.

<sup>82</sup> Maksen (note 66 above) 38.

<sup>83</sup> *ibid* 38.

<sup>84</sup> *ibid* 38.

<sup>85</sup> McNicholas (note 21 above) 184.

USA.<sup>86</sup> Terrorists looking to gain entry into the USA have therefore, resorted to resourceful ways to do so. In May of 2002, 25 Islamic extremists reportedly entered parts of Florida, Georgia and California by hiding on cargo containers.<sup>87</sup> Some of them were disguised as stevedores.<sup>88</sup> In another instance, an Egyptian-born Canadian living in a container on a cargo ship that had been loaded in Egypt bound for Canada was discovered by an official in Southern Italy.<sup>89</sup> The container was furnished with sanitary facilities, a bed, a laptop computer, airport maps and security passes.<sup>90</sup> This category of stowaways is not only problematic to the USA but also other countries as a result of the international range of terrorist attacks.

## **2.6. Stowaway profiling**

Most stowaway incidents are linked to organised human smuggling activities run by human or drug trafficking organisations.<sup>91</sup> Pirates have also embarked on stowaways and human trafficking business.<sup>92</sup> An example is an incident reported by BIMCO involving eight stowaways who gained entry into a ship's rudder room during the course of a pirate attack.<sup>93</sup> All evidence pointed to the fact that the stowaways boarded the ship while the pirates were attacking the ship.<sup>94</sup> There have also been other reported cases where piracy was used as a cover for human trafficking.<sup>95</sup> According to McNicholas, the following are the most common characteristics of the average stowaway:

- “Male;
- 15-35 years old;
- Economically poor;
- May have some type of national identification but no passport;
- Carries a minimal amount of water, food and clothing;
- Has point-of-contact information in the country of destination;

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<sup>86</sup> Report of the Committee on Government Reform (note 8080 above) 31

<sup>87</sup> *ibid* 32.

<sup>88</sup> *ibid* 32.

<sup>89</sup> *ibid* 32.

<sup>90</sup> *ibid* 32.

<sup>91</sup> McNicholas (note 21 above) 183.

<sup>92</sup> *ibid* 181.

<sup>93</sup> *ibid* 181.

<sup>94</sup> *ibid* 181.

<sup>95</sup> *ibid* 181.

- Paid for the opportunity (e. g., professional human trafficking organisation, security guard at gate, crew member on ship, etc.);
- May be trading right of passage for smuggling a modest amount of illegal narcotics;
- Has made multiple prior attempts;
- Generally nonviolent (will immediately try again if caught so there is no need for violence)".<sup>96</sup>

## 2.7. Stowaway hotspots

In 2010 the International Group of P & I Clubs (IG Clubs) carried out a research study, based on claims experience to identify the top ten ports of stowaway boarding world-wide.<sup>97</sup> Results showed that all of these ports were in Africa.<sup>98</sup> There was a slight difference in 2012. The majority of the stowaway boarding still occurred in African ports. However, now, a few (4 out of 51 incidents) occurred in Non-African ports in Bangladesh, Belgium and China.<sup>99</sup> In 2013, they published further stowaway data which showed that there had been no substantial difference in the ports of embarkation, nationality and number of stowaways.<sup>100</sup> In 2017 however, West of England P & I Club carried out an analysis of the stowaway claims experience for 2016 which indicated that the number of stowaway incidents have increased significantly in European ports.<sup>101</sup> There is no explanation given for this trend of events. One may infer that this could be as a result of the refugee crisis in Europe; although it is a well-known fact that refugees from Syria, Afghanistan, Somalia, and South Sudan travel to Europe on unseaworthy boats rather than stowing away on ships. That notwithstanding, African ports still have the highest number of stowaway boarding with Lagos in the lead.<sup>102</sup>

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<sup>96</sup> *ibid* 183.

<sup>97</sup> West of England ‘Stowaways’ Loss Prevention Bulletin at 2, available at <http://www.westpandi.com/globalassets/loss-prevention/loss-prevention-bulletins/west-of-england---loss-prevention-bulletin---stowaways.pdf>, accessed on 29 July 2018.

<sup>98</sup> *ibid* 2.

<sup>99</sup> *ibid* 2.

<sup>100</sup> *ibid* 2.

<sup>101</sup> West of England P & I Club ‘Stowaways – problematic ports’ West of England News 21 August 2017 at 2, available at <https://www.westpandi.com/globalassets/pdf/20170818-152857-stowaways---problematic-ports.pdf>, accessed on 29 July 2018.

<sup>102</sup> *ibid* 2.

## 2.8. Stowaway statistics

For several years, stowaway incidents were reported to the IMO on a quarterly and yearly basis. With the introduction of the new GISIS system, that method of reporting was discontinued.<sup>103</sup> The IMO Facilitation Committee at its fortieth session encouraged member States and international organisations to utilise the GISIS module and upload data on stowaway incidents directly onto the system.<sup>104</sup> A summary of stowaway incidents reported to the IMO between 2010 and 2017 is illustrated in the table below:<sup>105</sup>

Year	2010	2011	2012	2013	2014	2015	2016	2017
Stowaway cases	253	73	90	70	61	28	55	63
Stowaways	721	193	166	203	120	80	163	157

Source: IMO Facilitation Committee (2018)

There is a noticeable underreporting of stowaway incidents, despite the new GISIS which makes it easy and effective to upload stowaway incidents onto the system.<sup>106</sup> In fact, the IMO Facilitation Committee stated that the total number of stowaway incidents reported to them up till 31 December 2017 was 4,577, involving 14,270 stowaways.<sup>107</sup>

## 2.9. Techniques and Tactics Employed by Stowaways to Board Ships

Despite the introduction of the ISPS Code, stowaways continue to find ingenious places to hide away without detection. Their hideouts are largely determined by factors like the type of ship and its size, and the time it spends alongside the harbour or in anchorage.<sup>108</sup> Maksen lists the types of ships that stowaways usually board in their order of preference. In his words, “Ro-Ro cargo ships are the ones that are singled out the most, followed by ferries,

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<sup>103</sup> IMO Report of the Facilitation Committee on its forty-first session para 8.2, available at <http://www.imo.org/en/OurWork/Facilitation/FALCommittee/Facilitation/FAL%2041-17%20-%20Table%20of%20contents%20%28Secretariat%29.pdf>, accessed on 29 July 2018. Data on stowaway incidents for 2018 can be viewed on the GISIS system. Available data go as far back as 1900 and can now be accessed by members of the public on <https://gis.imo.org/Public/FAL/Stowaways/Default.aspx>.

<sup>104</sup> IMO Report of the Facilitation Committee on its fortieth session paras 8. 2 & 8.8, available at <http://www.imo.org/en/OurWork/Facilitation/FALCommittee/Documents/FAL%2040-19.pdf>, accessed on 29 July 2018.

<sup>105</sup> IMO (note 20 above).

<sup>106</sup> IMO (note 20 above) para 10.14.

<sup>107</sup> *ibid* para 10.14.

<sup>108</sup> Maksen (note 66 above) 34.

containerships and general cargo ships”.<sup>109</sup> The reason for these preferences is that these types of vessels make short voyages, have short transit times and operate at high speed and this information is easily available to stowaways.<sup>110</sup> Another reason is because these kinds of vessel provide many access points, both authorised and unauthorised, to stowaways.<sup>111</sup> McNicholas gives an exhaustive list of the methods that stowaways use to get on to ships and the places they hide away once they get on board. These include; passing themselves off as stevedores or day labourers and boarding the ship under the guise of authorised personnel, hiding in cargo pallets, rudder compartments, crawl spaces, inside life boats and the smoke stack access hatch, accommodation areas of crew members, hanging beneath a trailer or chassis equipment, to mention a few.<sup>112</sup>

Most stowaway incidents are actually organised human smuggling carried out by organised human smuggling operations.<sup>113</sup> These operations are run by local or international human or drug trafficking rings.<sup>114</sup> Port security guards or police officers may be involved in the racket to make money and would pay the supervisor to be stationed near the dock in order to receive large amounts of bribes from both the stowaways and the criminal organisations which organise stowaways.<sup>115</sup>

The human smuggling organisations usually have on their payroll, contacts that work at the ports.<sup>116</sup> The stowaways are charged a fee, which covers the cost of passage, logistics and bribes.<sup>117</sup> Those who cannot afford this fee are made to pay for their passage by being drug mules.<sup>118</sup> The transit fee per stowaway to the United States could range from US\$2,000 in a Colombian port to US\$60,000 in a Chinese port.<sup>119</sup>

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<sup>109</sup> *ibid* 34.

<sup>110</sup> *ibid* 34.

<sup>111</sup> McNicholas (note 21 above) 186 & 187.

<sup>112</sup> *ibid* 187-197.

<sup>113</sup> *ibid* 183.

<sup>114</sup> *ibid* 183.

<sup>115</sup> *ibid* 183 & 184.

<sup>116</sup> *ibid* 184.

<sup>117</sup> *ibid* 184.

<sup>118</sup> *ibid* 184.

<sup>119</sup> *ibid* 184.

On August 16 2014, news headlines were made when frantic screams and banging was heard coming from a container on board the *Norstream*, in the Port of Tilbury.<sup>120</sup> When emergency workers pried open the container, they discovered 35 adults and children inside.<sup>121</sup> One man was already dead and the rest were taken to hospital to be treated for dehydration and hypothermia.<sup>122</sup> The logical question in this case is, “How did so many people get into the container unnoticed and travel all the way from Belgium to Essex without being discovered?” This researcher opines that perhaps they were already in the container when it was dropped off with other containers at the port.

## **2.10. The scope of the problem**

The problems that stowaways cause are far-reaching. The International Transport Workers’ Federation (ITF) at its Seafarers’ Section Conference at Singapore listed them as follows:

- “inter-personal problems (especially for the master, the crew and the stowaways on board);
- legal problems;
- financial problems for ship owners and States’ authorities in ports of call (i.e. costs of maintenance and repatriation of a stowaway and/or fines); and
- the number and/or behaviour of stowaways may endanger the safety of the crew and/or the ship”.<sup>123</sup>

The process of disembarkation and repatriation of stowaways is made particularly difficult as a result of:

- “the growing problem of refugees, immigrants and asylum seekers;
- the tightening of regulations by governments to reduce the number of illegal immigrants;
- the fines and costs imposed on masters and shipowners by some authorities when entering port with a stowaway on board;

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<sup>120</sup> Tom Harper & Joe Krishnan ‘Tilbury Docks; Man dies as 35 stowaways are found ‘screaming and banging’ in container’ *The Independent* 16 August 2014, available at <https://www.independent.co.uk/news/uk/crime/tilbury-docks-man-dies-as-35-stowaways-are-found-screaming-and-banging-in-container-9673860.html>, accessed on 29 July 2018.

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> ITF Seafarers (note 61 above) para 6.

- the lack of identity documents of stowaways; and
- the lack of internationally agreed regulations”<sup>124</sup>.

## **2.11. The dangers of stowing away**

Stowing away is a harmful practise which can be dangerous to the ship and its operational safety, cargo and crew members, and sometimes, the stowaways themselves.

### **2.11.1. Risk to cargo**

Stowaways tend to cause damage to cargo when they hide amongst it. In *American Home Assurance Co. v Sletter M/V*,<sup>125</sup> the defendant vessel, laden with coffee from Santos, Brazil, on its way to the United States, made a stop at Puerto Cabello, Venezuela, where nine stowaways stole aboard the vessel and hid in the cargo holds. On arrival at New Orleans the stowaways were discovered, along with 800 plus bags of coffee which had been contaminated with their urine and faeces and therefore, had to be destroyed, causing a huge financial loss to the cargo interests.

The risk to cargo is not always physical but can come about as a result of a lengthy voyage where the ship deviates to disembark stowaways.

### **2.11.2. Risk to the ship and its operational safety**

Stowaways pose a risk to the operational safety of a ship when they stowaway on commercial ships which are neither equipped nor certified to carry passengers.<sup>126</sup> In *United Brands Co. v M. V. Isla Plaza*,<sup>127</sup> stowaways snuck onto the defendant vessel and lit a fire, in a bid to keep warm. The fire got out of hand, destroying the cargo of bananas along with the ship and killing the stowaways in the process.

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<sup>124</sup> *ibid* para 8.

<sup>125</sup> 1995 WL 18503; 43 F.3d 995.

<sup>126</sup> F O de Rozas *Stowaways: The legal problem* (unpublished LLM thesis, University of Oslo, 2009) 5 available at <https://www.duo.uio.no/bitstream/handle/10852/22856/florencia.pdf?sequence=1&isAllowed=y>, accessed on 29 July 2018.

<sup>127</sup> 1994 WL 114825; A.M.C. 763

Interfering with the proper manning of a ship can also jeopardise its operational safety.<sup>128</sup> Because cargo ships do not have extra accommodation to detain stowaways, the crew members may have to move from their accommodation to guard them; and may get distracted from the duties which they are trained to perform.<sup>129</sup>

### **2.11.3. Risk to crew members.**

There is a possibility of harm to crew members where stowaways outnumber them or exhibit violent behaviour.<sup>130</sup> Some stowaways have violent origins and could injure or worse, kill a crew member.<sup>131</sup> The health and sanitary conditions of stowaways often leave a lot to be desired, hence, crew members run the risk of being infected with diseases from sick stowaways.<sup>132</sup> A case in point was an incident involving two stowaways that boarded a ship at Dakar, Senegal at the peak of the Ebola virus crisis.<sup>133</sup> They were not discovered until the next African port where the port authorities denied them landing for the reasons that: (a) they may have the virus; and (b) they did not have any form of documentation on them.<sup>134</sup> No port would allow them to be disembarked until finally, they were returned to West Africa, after being stuck on the ship for six months.<sup>135</sup>

There are safety measures put in place to ensure the safety of passengers on board a ship. The SOLAS Convention 1974 provides for both passenger and cargo ships to be equipped with personal life saving appliances which should be readily available in cases of emergency.<sup>136</sup> All ships are mandated to carry on board a life-jacket for *every* person on board.<sup>137</sup> Furthermore,

“Every cargo ship . . . shall carry lifeboats on each side of the ship of such aggregate capacity as will accommodate all persons on board, and in addition shall carry liferafts [sic] sufficient to accommodate half that number. Provided that, in the case of such cargo ships engaged on international voyages between near neighbouring countries, the Administration, if it is satisfied

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<sup>128</sup> De Rozas (note 126 above) 5.

<sup>129</sup> *ibid* 5.

<sup>130</sup> ITF Seafarers (note 61 above) 1.

<sup>131</sup> McNicholas (note 21 above) 185.

<sup>132</sup> *ibid* 185.

<sup>133</sup> *ibid* 186.

<sup>134</sup> *ibid* 186.

<sup>135</sup> *ibid* 186.

<sup>136</sup> Chapter III part A regulation 4 (a).

<sup>137</sup> *ibid* regulation 22 (a).

that the conditions of the voyage are such as to render the compulsory carriage of liferafts [sic] unreasonable or unnecessary, may to that extent exempt individual ships or classes of ships from this requirement".<sup>138</sup>

In essence, ships are usually equipped with sufficient life-jackets for all persons whose names are on the manifest and no more than that. Moreover, there is no strict requirement by law to carry additional life rafts to supplement the life boats. Thus, in emergency situations where everyone is required to abandon ship, the safety of the crew members or the stowaways could be compromised if the number of all on board the ship outnumbers the lifesaving equipment available because of the presence of stowaways.

#### **2.11.4. Risk to self**

Each time people stowaway, they unwittingly expose themselves to danger. Stowaways stand the risk of losing their lives in a number of ways. They could lose their lives in a fire,<sup>139</sup> or from suffocation,<sup>140</sup> or as a result of inhaling noxious gases used in fumigating cargo against infestation,<sup>141</sup> or by being set adrift by crew members and left to the mercy of the unforgiving seas,<sup>142</sup> or murdered and thrown overboard.<sup>143</sup>

#### **2.12. Treatment of Stowaways upon Discovery**

According to Gard, once stowaways are discovered, the master is advised to notify the shipowner, the P & I Club or their local correspondents right away.<sup>144</sup> The reason for this is to enable the CSO to notify the authorities at the next port of call of the stowaway's presence, and to let their local correspondents kick-start the repatriation process.<sup>145</sup> The stowaways

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<sup>138</sup> *ibid* part C regulation 35 (a)(i).

<sup>139</sup> *United Brands Co. v Isla Plaza* (note 127 above).

<sup>140</sup> Severin Carrell 'Stowaways may have suffocated in ship's hold' *The Guardian* 28 May 2008, available at <https://www.theguardian.com/uk/2008/may/28/immigration.scotland>, accessed on 29 July 2018.

<sup>141</sup> Celia W. Dugger '3 Stowaways Found Dead in Ship's Hold' *The New York Times* 20 March 1996, available at <http://www.nytimes.com/1996/03/20/nyregion/3-stowaways-found-dead-in-ship-s-hold.html>, accessed on 29 July 2018.

<sup>142</sup> Ellen Knickmeyer 'Ships' crews set stowaways adrift to avoid fines' *Los Angeles Times* 19 January 1997 para 7, available at [http://articles.latimes.com/1997-01-19/news/mn-20020\\_1\\_romanian-stowaway](http://articles.latimes.com/1997-01-19/news/mn-20020_1_romanian-stowaway), accessed on 29 July 2018.

<sup>143</sup> Nick Davies 'Trial of the crew who murdered stowaways' *The Guardian* 1 November 1995, available at <http://www.nickdavies.net/1995/11/01/trial-of-the-crew-who-murdered-stowaways/>, accessed on 29 July 2018.

<sup>144</sup> Gard 'Gard Guidance on Stowaways', para 3.15, available at <http://www.gard.no/Content/13385148/Guidance%20on%20stowaways.pdf>, accessed on 29 July 2018.

<sup>145</sup> *ibid* para 3.15.1.

should be searched for identification documents (which should be seized by the master if found as they tend to destroy or conceal them) and drugs.<sup>146</sup> Where drugs are found on them, the master should take photographic or audio visual evidence, and write down the circumstances under which they were found. Gard advises that threats or violence must never be resorted to when dealing with the stowaways.<sup>147</sup> They should be treated humanely at all times<sup>148</sup> Masters are enjoined to, “take appropriate measures to ensure the security, general health, welfare and safety of the stowaway until disembarkation, including providing him/her with adequate provisioning, accommodation, proper medical attention and sanitary facilities”.<sup>149</sup>

Some masters may mistreat their stowaways in utter disregard of this provision. There have been cases where stowaways have been thrown into the sea to avoid the payment of fines levied against ships with stowaways, and repatriation costs. In 2012, four stowaways from Africa were thrown overboard by a ship’s crew members after it came to the captain’s knowledge that repatriation costs could go as high as \$50,000 per stowaway, and the amount could double if cargo was delayed.<sup>150</sup>

In extreme cases, stowaways have been murdered.<sup>151</sup> There is a conflict between the rules on land and the realities at sea.<sup>152</sup> Ship masters are penalised or fined for arriving at ports with stowaways on board their ships and yet they are prohibited from jettisoning them.<sup>153</sup> Ships coming into a port with stowaways on board are liable to fines and fees.<sup>154</sup> To avoid payment of such fines or the loss of their jobs, some shipowners and crew members resort to unscrupulous acts to ensure that stowaways do not make it to port.<sup>155</sup>

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<sup>146</sup> *ibid* para 3.15.1.

<sup>147</sup> *ibid* para 3.15.1.

<sup>148</sup> Section 5.1.9 Resolution FAL.11 (37).

<sup>149</sup> *ibid* section 5.1.7.

<sup>150</sup> Ian Urbina ‘Stowaways and crimes aboard a Scofflaw ship’ *The New York Times* 17 July 2015 para 65, available at <http://mobile.nytimes.com/2015/07/19/world/stowaway-crime-scofflaw-ship.html?referer=&r=0>, accessed on 29 July 2018.

<sup>151</sup> Davies (note 143 above).

<sup>152</sup> Urbina (note 150 above) para 64.

<sup>153</sup> *ibid* para 64.

<sup>154</sup> Knickmeyer (note 142 above).

<sup>155</sup> *ibid* para 7.

Perhaps the most unfortunate case is that of the eight African stowaways who were brutally murdered, and their dead bodies tossed overboard by the crew members of the MC-Ruby.<sup>156</sup> The accused persons were tried in a French court and found guilty of various offences ranging from complicity to murder, extortion, kidnapping and acts of piracy.<sup>157</sup> The Captain and the ship officer were sentenced to life imprisonment whilst the other three crew members were each sentenced to twenty years imprisonment.<sup>158</sup> The accused persons admitted to killing the stowaways because of the heavy fines imposed on carriers. The MC Ruby had been caught with stowaways four times in the previous two years, and the last captain demoted for his “failure to deal with them.”<sup>159</sup>

### **2.13. Conclusion**

It is an indisputable fact that stowaways constitute a threat to maritime security and the shipping industry; as they have the capability to endanger ship and cargo and interfere with the smooth running of shipping operations. Their presence on board a ship is disadvantageous to all involved; from shipowners to cargo interests. The cost of repatriating a single stowaway can run into thousands of US dollars, in addition to the loss of revenue resulting from lengthy delays, the risk of legal action against shipowners, and the unwillingness of most countries to accept them for disembarkation and repatriation. As a result, some unconscientious shipowners and crew members have resorted to desperate measures to circumvent the payment of fines and penalties levied against them and avoid the difficulty and cost involved in the stowaway removal process by getting rid of the stowaways by any means necessary. The financial and legal cost that stowaways foist upon shipowners will be addressed in detail in the next chapter.

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<sup>156</sup> Davies (note 143 above).

<sup>157</sup> Julian Nundy ‘Stowaways ‘Killed and thrown overboard’ *Independent* 27 November 1994, available at <http://www.independent.co.uk/news/world/stowaways-killed-and-thrown-overboard-1439970.html>, accessed on 19 May 2018.

<sup>158</sup> Davies (note 143 above).

<sup>159</sup> *ibid.*

## CHAPTER 3: THE ECONOMIC AND LEGAL COST OF STOWAWAYS

### 3.1. Introduction

Stowaways put cargo at risk of loss or damage thereby exposing shipowners to economic costs and legal liabilities. The economic cost of having stowaways on a ship involves: the cost of looking after the stowaways, the cost of their disembarkation and repatriation, payment of fines for arriving at ports with stowaways and, additional fines for escaped stowaways.<sup>160</sup> Legal liabilities, on the other hand, arise when shipowners are unable to fulfil their contractual obligations towards cargo interests due to the damage the stowaways cause to cargo, or the delay deviation to disembark them. Due to the excessive cost involved in resolving stowaway cases, and also to cover potential loss or damage to cargo, shipowners require mutual maritime insurance cover from P & I Clubs. These clubs provide cover for third-party liabilities (including stowaways)<sup>161</sup> and also play a crucial role in the stowaway removal process through their correspondents.<sup>162</sup>

### 3.2. P & I Insurance

Commercial ships usually have two different kinds of insurance: hull and machinery insurance and liability risks.<sup>163</sup> The former provides the ship with cover against the risk of damage or loss while the latter provides indemnity to shipowners against third party liabilities.<sup>164</sup> Protection and Indemnity insurance provides shipowners with cover against a wide range of liabilities beyond that provided by their Hull and Machinery insurance like, “death and personal injury of seamen, passengers and third parties, liabilities in respect of stowaways or persons saved at sea, liabilities arising from collisions, liabilities arising from groundings, liabilities arising from damage to fixed and floating objects, liabilities arising from pollution, liabilities arising from wreck removal, liabilities arising from towage

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<sup>160</sup> NEPIA (note 79 above) 11.

<sup>161</sup> Robert C. Seaward ‘The role of Protection and Indemnity (P & I) Clubs’ at 2 available at <http://www.itopf.com/fileadmin/data/Documents/Papers/seaward.pdf>, accessed on 29 July 2018.

<sup>162</sup> Gard (note 144 above) para 4.6.

<sup>163</sup> M Davies ‘Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea’ (2003) 12(1) *Pac Rim L & Pol’y J* 109, 137 & 138, available at <https://www.heinonline-org.ukzn.idm.oclc.org/HOL/Page?collection=journals&handle=hein.journals/pacrimlp12&id=150>, accessed on 29 July 2018.

<sup>164</sup> *ibid* 137 & 138.

operations, liabilities to cargo; together with other legal and other costs associated with dealing with these claims.”<sup>165</sup>

### **3.2.1. The scope of P & I cover for stowaways**

Provisions for P & I club insurance for stowaway incidents can be found in their Association Rules.<sup>166</sup> The cover includes, “costs and expenses directly and reasonably incurred in consequence of the Ship having stowaways . . . but only to the extent that the member is legally liable for the costs and expenses or they are incurred with the approval of the Association”.<sup>167</sup> It includes diversion costs to land stowaways<sup>168</sup> but not cost ensuing from loss of profit or depreciation.<sup>169</sup> It also does not cover costs which are recoverable from another party or insurer<sup>170</sup>, or those suffered as a result of loss of freight or hire for the ship<sup>171</sup> or demurrage on, detention of or delay to the vessel.<sup>172</sup> The club’s board of directors reserve the right to exercise absolute discretion to either reject or reduce cover if they believe the shipowner did not take sufficient steps to prevent the stowaways from gaining access to the ship.<sup>173</sup>

### **3.3. Non-legal Consequences of Stowaways on shipowners**

The non-legal consequences of having stowaways on board ships will be discussed below under economic costs, immigration and repatriation issues.

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<sup>165</sup> Seaward (note 161 above) 2.

<sup>166</sup> Although the wordings of these rules may slightly differ, the provisions are essentially the same hence the decision to only cite the provisions of the Rules from a few clubs.

<sup>167</sup> Rule 32 Gard Rules 2018, available at [http://www.gard.no/Content/24908198/Rules\\_2018\\_web.pdf](http://www.gard.no/Content/24908198/Rules_2018_web.pdf), accessed on 29 July 2018; rule 2 (8) UK P & I Club Rules 2018, available at, [https://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/2018/RULES/Final\\_Rulebook\\_2018.pdf](https://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/2018/RULES/Final_Rulebook_2018.pdf), accessed on 29 July 2018.

<sup>168</sup> Rule 19 (6) (b) North of England P & I Rules 2018-19, available at <http://www.nepia.com/media/885602/NORTH-PI-Rules-2018-19-Full-online-30-April.PDF>, accessed on 29 July 2018; rule 11.1.2 (c) Skuld P & I Rules 2018, available at [https://www.skuld.com/contentassets/5cd37a56fa33442baec07c16ee4ac936/2018\\_skuld\\_rules.pdf](https://www.skuld.com/contentassets/5cd37a56fa33442baec07c16ee4ac936/2018_skuld_rules.pdf), accessed on 29 July 2018.

<sup>169</sup> Rule 32 Gard Rules (note 167 above).

<sup>170</sup> Rule 11.2.1 Skuld P & I Rules (note 168 above).

<sup>171</sup> *ibid* rule 11.2.2 (a).

<sup>172</sup> *ibid* rule 11.2.2 (b).

<sup>173</sup> Rule 19 (5) North P & I Rules 2018-19.

### **3.3.1. Economic costs**

A shipowner on whose ship a stowaway is discovered has a responsibility, “to cover any applicable costs relating to the removal, detention, care and disembarkation of the stowaway in accordance with the legislation of the States which may be involved”.<sup>174</sup> P & I clubs cover most but not all costs relating to stowaways, e.g., repairs to damage caused by stowaways on an entered ship,<sup>175</sup> and as mentioned earlier, consequential loss of profit or depreciation,<sup>176</sup> costs recoverable from another party or insurer and, “the loss of freight or hire for the entered vessel or demurrage on, detention of or delay to the vessel”.<sup>177</sup>

Some of the costs incurred by members which are covered by P & I clubs would include, expenses for feeding, clothing and provisions for the stowaways, penalties levied on them for having stowaways aboard their ship, the cost of hiring security personnel to keep the stowaways from making a getaway (a prerequisite in some ports), jail or detention costs, plane tickets for stowaways to return to their country, plane tickets and the cost of lodging for the security personnel accompanying the stowaways, and expenses incurred by agents, insofar as they are directly associated with the stowaways.<sup>178</sup>

### **3.3.2. Immigration and repatriation issues**

With regards to the resolution of stowaway cases, all the entities involved namely:

“Masters, shipowners, public authorities, port authorities and other stakeholders, including those providing security services ashore, have a responsibility to cooperate to the fullest extent possible in order . . . to resolve stowaway cases and secure that an early return or repatriation of the stowaway will take place. All appropriate measures should be taken in order to avoid situations where stowaways must stay on board ships indefinitely”.<sup>179</sup>

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<sup>174</sup> Section 5.2.3 Resolution FAL.11 (37).

<sup>175</sup> NEPIA (note 79 above) 11.

<sup>176</sup> Gard Rules (note 167 above).

<sup>177</sup> Skuld P & I Rules (note 168 above).

<sup>178</sup> NEPIA (note 79 above) 11.

<sup>179</sup> Section 1 Resolution FAL.11 (37).

Notwithstanding this provision, it is the prerogative of the country where entry or arrival of such illegal entrants occurs to deal with stowaways arriving at their countries as they see fit.<sup>180</sup> For instance, under the U. S. law, it is provided that:

“The owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft . . . bringing any alien stowaway to the United States is required to detain the stowaway on board the vessel or aircraft at the expense of the owner of the vessel or aircraft, until completion of the inspection of the alien by an immigration officer”.<sup>181</sup>

Where however it is not feasible to detain an alien stowaway on board the ship pending inspection, “the carrier shall advise the Service of this fact without delay, and the Service may authorise that the carrier detain the stowaway at another designated location, at the expense of the owner, until the immigration officer arrives”.<sup>182</sup>

In *Dia Nav. Co., Ltd. v Pomeroy*,<sup>183</sup> four stowaways were discovered on the appellant’s ship (Dia Navigation Co., Ltd) and requested political asylum. The appellant, in accordance with the existing INS policy took responsibility for the expenses incurred by the stowaways pending their asylum hearings. At the conclusion of the hearings, two of the stowaways were granted asylum and the other two repatriated at the expense of the appellant. The stowaways were in custody for 54 days and the appellants ended up spending USD\$127, 580 on detention related expenses.<sup>184</sup>

Stowaways require the correct travel documents in order to be granted permission to travel back to their countries.<sup>185</sup> These travel documents are temporary and are usually issued by the embassy or consulate of the stowaway’s home country.<sup>186</sup> As a matter of practice, the P & I club and/or their correspondents will apply for travel documents at the embassy after the stowaway’s identity has been established and documented.<sup>187</sup> It is the duty of the master, “to make every effort to establish the identity, including the nationality/citizenship and the right

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<sup>180</sup> *ibid* section 3.6.

<sup>181</sup> 8 CFR 1 section 241.11(a) (2018), available at [https://ecfr.io/Title-08/se8.1.241\\_111](https://ecfr.io/Title-08/se8.1.241_111), accessed on 13 August 2018.

<sup>182</sup> *ibid* section 241.11 (a).

<sup>183</sup> 34 F.3d 1255 (3d Cir. 1994).

<sup>184</sup> *ibid*.

<sup>185</sup> Gard (note 144 above) para 4.2.

<sup>186</sup> *ibid* para 4.2.

<sup>187</sup> *ibid* para 4.2.

of residence of the stowaway”.<sup>188</sup> This process may require a series of interviews, photographs of the stowaways and the help of a professional to determine the stowaway’s nationality.<sup>189</sup>

It is advisable for the master to notify the P & I club, as soon as possible, to make arrangements for travel before the ship calls at the next port, so as to reduce the length of time it takes for the travel papers to be issued.<sup>190</sup>

Most countries, save for Brazil, South Africa and some West African countries, do not allow the disembarkation of stowaways without documents.<sup>191</sup> The only exceptions are cases where the stowaways are requesting political asylum or require medical attention.<sup>192</sup>

Some jurisdictions may impose fines on ships that arrive at ports with stowaways on board. For example, ships arriving at Jeddah, Saudi Arabia are fined a sum of US\$1, 333 per stowaway by the immigration department and doubled to US\$2, 666 where prior notification is not given to the local agents before the ship arrives at port.<sup>193</sup> A specific example involves a bulk carrier at a West African port where the shipowners were fined for entering the port with two stowaways on board, despite disembarking them without delay.<sup>194</sup>

As at 2013, the average insurance cost of a single stowaway according to Gard, a P & I Club, was approximately US\$22, 000 and in cases where several stowaways have to be taken care of and repatriated, these costs could go as high as US\$100, 000 or more.<sup>195</sup> The cost of repatriating a single stowaway between Durban and Tanzania is in the vicinity of US\$10, 000 to US\$12,000.<sup>196</sup> In Brazil, a straightforward repatriation can cost in excess of US\$30, 000

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<sup>188</sup> Section 5.1.2 Resolution FAL.11 (37).

<sup>189</sup> Gard (note 144 above) para 4.2.

<sup>190</sup> *ibid* para 4.2.

<sup>191</sup> *ibid* para 4.2.

<sup>192</sup> *ibid* para 4.2.

<sup>193</sup> UK P & I Club ‘Stowaway repatriation from Jeddah – Saudi Arabia’ Loss Prevention Bulletin 386 – 10/04, available at [https://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/LP\\_Bulletins/Bulletin%20386.pdf](https://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/LP_Bulletins/Bulletin%20386.pdf), accessed on 29 July 2018.

<sup>194</sup> UK P & I Club ‘Lessons learnt: stowaway incident’ available at <https://www.ukpandi.com/knowledge-publications/article/lessons-learnt-stowaway-incident-139668/>, accessed on 29 July 2018.

<sup>195</sup> McNicholas (note 21 above) 185.

<sup>196</sup> Sibonakalise Msane ‘Unwanted passengers a costly affair’ *Independent Online* 29 April 2014, available at <https://www.iol.co.za/news/south-africa/kwazulu-natal/unwanted-passengers-a-costly-affair-1681695>, accessed on 29 July 2018.

per stowaway.<sup>197</sup> Where, however, the stowaway is detained for any particular length of time, the fee increases.<sup>198</sup>

The P & I Clubs submitted the result of a data collection exercise carried out by them to the IMO Facilitation Committee showing how much stowaways cost them for the policy years 2007/2008, 2011/2012 and 2014/2015.<sup>199</sup> The cost is shown in the table below:

Period of collection	Number of incidents	Number of stowaways	Total cost
2007/2008	842	1,955	\$14.3 million
2011/2012	774	1,640	\$15.3 million
2014/2015	503	1, 274	\$9.3 million

Source: IMO Facilitation Committee (2018)

The P & I Clubs admitted that as much as stowaways have cost them, the total cost to shipowners was considerably more.<sup>200</sup>

### **3.4. Legal or contractual liability**

Legal or contractual liability may arise out of failure on the part of the shipowner to fulfil his obligations arising from shipping contracts such as charterparties and bills of lading due to interference from stowaways.<sup>201</sup>

#### **3.4.1. Liability for Deviation**

In general, deviation in order to disembark stowaways is not encouraged except in certain situations. The master is obligated,

“Not to depart from the planned voyage to seek the disembarkation of a stowaway discovered on board the ship after it has left the territorial waters of the State where the stowaways embarked unless permission to disembark the stowaway has been granted by the public authorities of the

<sup>197</sup> Amanda Hastings ‘Stowaways: a real and ongoing risk that can prove expensive for shipowners’, available at <https://www.ukpandi.com/knowledge-publications/article/stowaways-a-real-and-ongoing-risk-that-can-prove-expensive-for-shipowners-134074>, accessed on 29 July 2018.

<sup>198</sup> *ibid.*

<sup>199</sup> IMO (note 20 above) para 10.16.

<sup>200</sup> *ibid* para 10.17.

<sup>201</sup> De Rozas (note 126 above)

State to whose port the ship deviates, or repatriation has been arranged elsewhere with sufficient documentation and permission given for disembarkation, or unless there are extenuating safety, security, health or compassionate reasons”.<sup>202</sup>

Deviation implies a departure from the scheduled voyage and can expose the ship and its cargo to new risks.<sup>203</sup> As a result, the shipowner is liable for any loss or damage arising therefrom.<sup>204</sup> Deviation can lead to delay as a result of lengthy negotiations involved in the disembarkation and repatriation process.<sup>205</sup> It also creates extra expenses for the shipowner.<sup>206</sup>

### 3.4.1.1. Deviation under the Common Law

A shipowner or carrier impliedly makes an undertaking that the ship will neither voluntarily nor unjustifiably deviate from its proper course of voyage.<sup>207</sup> Any deviation from its proper course changes the essential elements of the contract of affreightment or the original risk of the voyage and cargo insurance and could render the insurance policy invalid.<sup>208</sup> The doctrine of deviation can be invoked if the deviation is both ‘voluntary’ and ‘unjustified’.<sup>209</sup>

The implied undertaking not to deviate under the common law is subject to two exceptions:

1. Where the deviation was to save life and not just property; or
2. In cases of real danger where deviation will safeguard the voyage.<sup>210</sup>

Accordingly, any deviation to land a stowaway would be justified if the purpose was to save his life in the event that he is injured or sick and in need of urgent medical attention. A geographical deviation from the agreed route deprives the carrier of the right to invoke any exclusions, exemptions or limitations in the contract.<sup>211</sup> Thus, in order to avoid the operational restrictions imposed on a carrier by reason of the implied undertaking to remain

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<sup>202</sup> Section 5.1.5 Resolution FAL.11 (37).

<sup>203</sup> De Rozas (note 126 above) 7.

<sup>204</sup> *ibid* 7.

<sup>205</sup> *ibid* 7.

<sup>206</sup> *ibid* 7.

<sup>207</sup> GK Ndi & TS Alawneh *Is deviation a fundamental breach of the contract of carriage by sea? A critical analysis of current law*. ICLJ (Colombo 24-25 July 2013) 330, 331, available at <http://uniqueca.com/archieves/pdf/2013/Law%20&%20Justice%202013.pdf#page=338>, accessed on 29 July 2018.

<sup>208</sup> *ibid* 331; *Hain Steamship Co. Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597.

<sup>209</sup> *ibid* 331.

<sup>210</sup> J Hare *Shipping law and admiralty jurisdiction in South Africa* 2 ed. (2009) 644.

<sup>211</sup> *ibid* 645.

on a usual route, most carriage contracts contain a liberty clause enabling the carrier to deviate in certain situations.<sup>212</sup>

### **3.4.1.2. Deviation under the Hague-Visby Rules**

Deviation is not defined under the Hague-Visby Rules (hereafter referred to as the HVR) however, provision is made for what constitutes a justifiable deviation: “Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of the Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”.<sup>213</sup>

A deviation is unjustified if it is undertaken to save time and money, e. g., where a ship deviates to disembark a stowaway.<sup>214</sup> An unjustified deviation under the HVR divests a shipowner of the right to rely on the available limitation or the immunity and liability exceptions due to him therein.<sup>215</sup> By operation of Article IV (4), deviation would be justifiable if the purpose is to save or attempt to save the life of a stowaway and any resultant damage or consequential loss would not render the shipowner liable.

### **3.4.1.3. Deviation under a charterparty agreement**

The law of deviation is well developed in relation to charterparties, especially in voyage charterparties, where the charterer and the shipowner usually have a clear expectation of the route the ship will take.<sup>216</sup>

A deviation may be justified wherein a liberty clause is contained in the charterparty or bill of lading, but these liberty clauses are characteristically limited in scope. Thus, an unjustified or unlawful deviation can have disastrous effects under the charterparty and bills of lading

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<sup>212</sup> *ibid* 644.

<sup>213</sup> Article IV (4) HVR.

<sup>214</sup> Rule 4.8.3.4 the Swedish Club *P & I Rules and Exceptions: Guidelines to the understanding and practical application of the Swedish Club Rules for P & I Insurance 2012*, 3 ed (2012), available at [https://www.swedishclub.com/upload/491/re\\_2012\\_webb.pdf](https://www.swedishclub.com/upload/491/re_2012_webb.pdf), accessed on 29 July 2018.

<sup>215</sup> The immunities available to a shipowner are listed under article IV (2) HVR.

<sup>216</sup> Hare (note 210 above) 644.

(especially where the ship is loaded with cargo)<sup>217</sup> like depriving a shipowner of the right to rely on defences or rights of limitation which he, otherwise, would have had recourse to.<sup>218</sup>

Most commercial ships operate under a time charterparty<sup>219</sup> under which a shipowner agrees to let the time charterer employ the services of his ship in exchange for payment of hire.<sup>220</sup> Time charterparties contain an “off-hire clause” which specifies circumstances under which the time charterer is exempted from paying hire.<sup>221</sup> If a ship goes off-hire by an occurrence specified in the clause, the shipowner will not receive “hire” the time charterer but if it remains on hire, the time charterer will keep paying hire nonetheless.<sup>222</sup>

Where a ship goes off-hire as a result of deviation or delay associated with stowaways, the shipowner will personally bear the cost of the delay<sup>223</sup> as the P & I clubs do not cover claims for loss of hire or freight.<sup>224</sup> They will however, cover expenses incurred as a result of diversion to disembark stowaways.<sup>225</sup> These expenses include:

“Port and other charges solely incurred for the purpose of landing stowaways or refugees, or others saved at sea, or, with the agreement of the managers, a deceased person, or landing or securing the necessary treatment for an injured or sick person, other than the crew, including the net loss to the member in respect of fuel, insurance, wages, stores and provisions incurred for such purpose”.<sup>226</sup>

A shipowner will, however, not be covered by his club where:

- (a) he takes advantage of the deviation to attend to some other at the unscheduled port, e.g., loading or discharging cargo or buying bunkers;<sup>227</sup>

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<sup>217</sup> The Standard Club ‘Deviation expenses for landing sick, injured or deceased people’ Personal Injury Bulletin April 2016 at 9, para 1, available at <http://www.standard-club.com/media/2096558/personal-injury-bulletin-april-2016.pdf>, accessed on 29 July 2018.

<sup>218</sup> Gard (note 144 above) para 5.3.

<sup>219</sup> Davies (note 163 above) 134.

<sup>220</sup> *ibid* 135.

<sup>221</sup> *ibid* 135.

<sup>222</sup> *ibid* 135.

<sup>223</sup> *C. A. Venezolana de Navegacion v Bank Line Ltd (Roachbank)* [1988] 2 Lloyd’s Rep. 337(Eng. C. A.).

<sup>224</sup> Rule 11.2.2 (a) Skuld P & I Rules 2018 (note 168 above); NEPIA (note 51 above) 11.

<sup>225</sup> Rule 19 (6) North of England P & I Rules 2018-19; (note 168 above); Rule 11.1.2 (c) Skuld P & I Rules 2018.

<sup>226</sup> Rule 3.4 the Standard P & I and Defence Rules and Correspondents 2018/19, available at <http://www.standard-club.com/media/2663541/pi-and-defence-rules-and-correspondents-201819pdf.pdf>, accessed on 29 July 2018; rule 31 Gard Rules 2018; rule 11.1.2 Skuld P & I Rules 2018.

<sup>227</sup> The Standard Club (note 217 above) 10, para 7.

- (b) Such diversion is simply opportunistic, i.e. diversions just to get a stowaway off the ship because the opportunity to do so presents itself.<sup>228</sup> This would amount to an unjustified deviation and in the event that the ship runs aground and her cargo damaged or lost, the shipowner may become liable “unconditionally and without limitation.”<sup>229</sup>

No matter how convenient and tempting it may seem to divert to disembark a stowaway discovered shortly after the ship leaves port, the idea should be disregarded as consequences could be severe.<sup>230</sup> Where a doctor has so ordered, a shipowner has a basic obligation to follow such order to divert a sick or injured stowaway in need of medical attention to the nearest suitable port to receive proper care.<sup>231</sup> Failure to follow a doctor’s orders to land a sick stowaway in order to receive proper medical care may make the shipowner susceptible to liability.<sup>232</sup>

Diversion to land stowaways must be approved by the club.<sup>233</sup> Before deviating from the contracted voyage, it is imperative that a shipowner inform his club of the intended deviation to verify that his P & I cover will still be intact.<sup>234</sup> In order to be approved and covered by the club, diversion must be justified and since the purpose of diverting stowaways is to save cost for the shipowner, such deviation shall be deemed unjustified if in the process, the ship runs aground and cargo is damaged or lost.<sup>235</sup>

### **3.4.2. Liability for Delay**

No direct reference is made to delay under the HVR. Stowaways may cause delay to ships as their presence tends to disrupt the ship’s schedule and can result in significant losses for cargo interests.<sup>236</sup> Deviation in order to disembark stowaways coupled with the lengthy negotiations involved in the disembarkation process all amount to significant delay.<sup>237</sup> Delay is the most common consequence of deviation and would amount to a deviation when it is

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<sup>228</sup> Rule 3.8.2.8 the Swedish Club P & I Rules and Exceptions (note 214 above).

<sup>229</sup> *ibid* rule 3.8.2.8.

<sup>230</sup> Gard (note 144 above) para 4.5.

<sup>231</sup> Rules 3.11.1 & 3.11.2 the Swedish Club P & I Rules and Exceptions (note 214 above).

<sup>232</sup> *ibid* rule 3.11.1.

<sup>233</sup> *ibid* rule 3.11.3.

<sup>234</sup> The Standard Club (note 217 above) 9, para 3.

<sup>235</sup> Rule 3.11.3 the Swedish Club P & I Rules and Exceptions (note 214 above).

<sup>236</sup> De Rozas (note 126 above) 16.

<sup>237</sup> *ibid* 45.

such as to substitute an entirely different service from that contemplated in the voyage contract.<sup>238</sup>

Delay imposes costs on a shipowner through:

- i. personal expenses, e.g., payment for fuel required to operate the ship, money spent on victuals for persons on board while the ship is not engaged in service, and extra port charges paid to divert refugees (or stowaways as the case may be) to unscheduled ports of call;<sup>239</sup> and
- ii. loss of hire.<sup>240</sup>

Loss by delay is not only borne by shipowners, cargo interests can equally suffer loss in one of the following ways:

- i. Direct physical damage caused by the stowaways themselves. See *United Brands Co. v Isla Plaza*<sup>241</sup> & *American Home Assurance Co. v Sletter M/V*;<sup>242</sup>
- ii. indirect damage caused while carrying out searches for stowaways inside trailers and containers;<sup>243</sup>
- iii. damage to cargo due to a lengthy voyage;<sup>244</sup> or
- iv. loss of profit due to change in market conditions as a result of cargo arriving too late<sup>245</sup>.

The burden of proof rests upon the claimant to prove in what way and to what extent he suffered a loss as a result of the delay.<sup>246</sup> Where he successfully proves he suffered a loss, he must go further to show that such loss was caused as a consequence of the delay, e.g., where he has to purchase the same goods from somewhere else to fulfil his contractual obligation to deliver the goods on time to his buyer.<sup>247</sup> A shipowner's liability for delay is subject to the applicable liability exception available under Article IV (2) HVR.<sup>248</sup>

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<sup>238</sup> *Thorley v Orchis* [1907] 1 KB 660.

<sup>239</sup> Davies (note 163 above) 133 & 134.

<sup>240</sup> *ibid* 134.

<sup>241</sup> 1994 WL 114825; A.M.C. 763

<sup>242</sup> 1995 WL 18503; 43 F.3d 995.

<sup>243</sup> De Rozas (note 126 above) 11.

<sup>244</sup> *ibid* 11.

<sup>245</sup> *ibid* 11.

<sup>246</sup> The Swedish Club P & I Rules and Exceptions (note 214 above) Rule 5.4.

<sup>247</sup> *ibid* rule 5.4.

<sup>248</sup> *ibid* rule 5.3.

### 3.4.3. Liability for Loss or Damage

Contrary to popular belief, a shipowner has no strict liability for cargo entrusted to him and therefore is not liable to the cargo owner or underwriter for all damage or loss which occurs on his ship or in his custody.<sup>249</sup> His liability is determined by the applicable law<sup>250</sup> and the discharge of the burden of proof.<sup>251</sup> The initial burden of proof lies on the cargo interest.<sup>252</sup> If he is able to discharge this burden, it then shifts to the shipowner or whomever is claiming an exemption under the article to prove the exercise of due diligence.<sup>253</sup>

Under the HVR, a shipowner's liability for damage or loss is predicated on seaworthiness.<sup>254</sup> He has two basic obligations in relation to cargo: (i) the exercise of due diligence to provide a sea and cargo worthy ship "before and at the beginning" of the voyage;<sup>255</sup> and (ii) the duty of care of the cargo which involves the duty to, "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried".<sup>256</sup>

He can escape liability if he successfully proves that the cargo was lost or damaged as a result of one of the perils listed under Article IV (2).<sup>257</sup> For a cargo owner to claim for damages caused by stowaways against a shipowner, it will have to be analysed first whether the carrier can be held liable for the presence of stowaways on the ship.<sup>258</sup> Such analysis will determine the steps the carrier took to prevent stowaways from boarding the ship and whether he fulfilled his duties with regards to that.<sup>259</sup> Shipowners and masters have a responsibility to make sure that adequate security arrangements are in place to prevent intending stowaways from gaining access to the ship.<sup>260</sup> In addition,

"When departing from a port, where there is risk of stowaway embarkation, a ship should undergo a thorough search in accordance with a specific plan or schedule, and with priorities given to

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<sup>249</sup> *ibid* rule 4.1.2.1.

<sup>250</sup> *ibid* rule 4.1.2.1.

<sup>251</sup> *ibid* rule 4.1.4.3.1.

<sup>252</sup> *ibid* rule 4.1.2.3. See rule 4.1.2.2.4.

<sup>253</sup> *ibid* rule 4.1.2.3; article IV (1) HVR.

<sup>254</sup> *ibid* article IV (1).

<sup>255</sup> *ibid* article III (1).

<sup>256</sup> *ibid* article III (2).

<sup>257</sup> Rule 4.1.8 the Swedish Club P & I Rules and Exceptions (note 214 above) 115; article IV (2) (1) is directly applicable where the loss or damage occurred as a result of the ship's deviation to save the life of a stowaway.

<sup>258</sup> De Rozas (note 126 above) 13.

<sup>259</sup> *ibid* 13. This duty is one that must be taken seriously as its breach amounts to a breach of the ISPS Code.

<sup>260</sup> Section 4. 2. 1 FAL 11 (37)

places where stowaways might hide. Search methods, which are likely to harm secreted stowaways, should not be used”.<sup>261</sup>

Secondly, a cargo interest can make a successful claim against the shipowner if he can show that, the shipowner is liable for cargo that was damaged by stowaways while the ship was performing carriage.<sup>262</sup> In *American Home Assurance Co. v Sletter M/V.*, the issue for determination was whether a shipowner or a time charterer was responsible for damage to cargo caused by stowaways.<sup>263</sup> Some stowaways had boarded a ship and damaged 800 plus bags of coffee with their excrement and urine, resulting in the cargo being destroyed.<sup>264</sup> The plaintiff (insurers of the cargo) paid for the damage and consequently sued both the first defendant (the shipowner) and the second defendant (the time charterer) for reimbursement.<sup>265</sup> Both defendants were in agreement of settlement sum of \$75,983. 17, but disagreed as to what portion each was liable for.<sup>266</sup> The second defendant argued that the issue was not who was liable for causing damage to the cargo but rather, who was liable for keeping the stowaways from getting onto the ship.<sup>267</sup> The court found that the captain and crew had been diligent in discharging their duties and held that even if they were negligent, their negligence would be attributed to the second defendant since he was the charterer and the captain and crew were under his direction as per the charter agreement.<sup>268</sup> In dismissing the argument, the trial court held the liability for the damaged cargo rested solely on the second defendant.<sup>269</sup>

The second defendant appealed, on the basis that the first defendant was liable because the damage to cargo was as a result of the captain and crew members negligently allowing stowaways to board the ship.<sup>270</sup> He argued, *inter alia*, that the trial court erred in ruling that any negligence or fault of the captain in keeping the stowaways from boarding the ship was attributable to him instead of the first defendant.<sup>271</sup>

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<sup>261</sup> *ibid* section 4.2.3.

<sup>262</sup> De Rozas (note 126 above) 12.

<sup>263</sup> 1995 WL 18503; 43 F.3d 995.

<sup>264</sup> *ibid*.

<sup>265</sup> *ibid*.

<sup>266</sup> *ibid*.

<sup>267</sup> *ibid*.

<sup>268</sup> *ibid*.

<sup>269</sup> *ibid*.

<sup>270</sup> *ibid*.

<sup>271</sup> *ibid*.

In considering the argument on the issue of negligence of the respondent put forward by the appellant, the appeal court reasoned that since the captain was overseeing the off-loading of the cargo when it was allegedly damaged, any negligence or fault by the captain and crew was attributed to the appellant and not the respondent.<sup>272</sup> The appeal court affirmed the judgment of the trial court.<sup>273</sup>

### **3.5. Allocation of responsibilities between shipowners and charterers under a time charter agreement.**

Where stowaways are found hiding in containers, the question could arise as to who should bear the costs and expenses involved in their repatriation; the shipowners or charterers?<sup>274</sup> In principle, shipowners are responsible for “all” costs incidental to stowaways but some charterparty agreements allocate responsibilities to charterers for all costs under a stowaway clause.<sup>275</sup> The ship is primarily the shipowner’s responsibility and it is typical for the crew members to carry out a search for stowaways before the ship leaves port.<sup>276</sup> The charterers on the other hand are in control of the employment of the vessel and checking the contents of the containers falls under their exclusive preserve.<sup>277</sup> They are thus in a better position to keep stowaways from hiding in the containers.<sup>278</sup>

In a bid to resolve the issue of allocation of responsibilities between shipowners and charterers in stowaway cases, BIMCO introduced the Stowaways Clause for Time Charter Parties in 1993.<sup>279</sup> Over time, there was a spike in the stowaway incidents resulting from the economic climate and the Clause could no longer adequately address the stowaway situation, therefore it was revised by the BIMCO Stowaways Clause for Time Charter Parties 2009 (hereafter referred to as the Stowaways Clause).<sup>280</sup> The Stowaways Clause has been considerably shortened into two sub-clauses and provides thus:

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<sup>272</sup> *ibid.*

<sup>273</sup> *ibid.*

<sup>274</sup> Rule 3.8.2.9 the Swedish Club P & I Rules and Exceptions (note 214 above) 88.

<sup>275</sup> Gard (note 144 above) para 5.2.

<sup>276</sup> Rule 3.8.2.9 the Swedish Club P & I Rules and Exceptions (note 214 above) 88.

<sup>277</sup> *ibid* rule 3.8.2.9.

<sup>278</sup> *ibid* rule 3.8.2.9.

<sup>279</sup> BIMCO ‘Stowaway Clause for Time Charter Parties 2009’ para 1 Explanatory notes, available at [https://www.bimco.org/contracts-and-clauses/bimco-clauses/stowaways\\_clause\\_for\\_time\\_charter\\_parties\\_2009](https://www.bimco.org/contracts-and-clauses/bimco-clauses/stowaways_clause_for_time_charter_parties_2009), accessed on 29 July 2018. (The BIMCO website requires registration to access contents).

<sup>280</sup> *ibid.*

- (a) “If stowaways have gained access to the Vessel by means of secreting away in the goods and/or containers or by any other means related to the cargo operation, this shall amount to breach of charter. The Charterers shall be liable for the consequences of such breach and hold the Owners harmless and keep them indemnified against all claims; costs (including but not limited to victualling costs for stowaways whilst on board and repatriation); losses; and fines or penalties, which may arise and be made against them. The Charterers shall, if required, place the Owners in funds to put up bail or other security. The Vessel shall remain on hire for any time lost as a result of such breach.
- (b) Save for those stowaways referred to in sub-clause (a), if stowaways have gained access to the vessel, all expenses including fines or penalties, shall be for the Owners’ account and the Vessel shall be off hire for any time lost.”<sup>281</sup>

What this Clause aims to achieve is two-fold:

1. To better apportion liability on both shipowners and charterers according to the manner in which the stowaways managed to gain access to the ship, e.g., if they gained access through any method involving cargo operation, liability for such breach of charter falls upon the charterers.<sup>282</sup> The shipowner shall, in this case, be held harmless and indemnified against all claims against him.<sup>283</sup> Furthermore, the vessel shall not go off-hire for anytime lost due to such breach.<sup>284</sup> On the other hand, if the stowaways boarded the ship by any means not relating to cargo operations, the liability for all expenses, will accrue to the shipowner and the vessel shall be off-hire for any time lost;<sup>285</sup> and
2. To give P & I Clubs recourse to claim against the charterers where it is proved that they (the charterers) were responsible for the stowaways boarding the ship.<sup>286</sup>

### **3.6. Defences available to a shipowner**

A shipowner is entitled to defences and limitation of liability under the HVR.<sup>287</sup> These defences are available under Article IV (2). A shipowner shall not be responsible for loss or

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<sup>281</sup> *ibid.*

<sup>282</sup> *ibid* para (a) Stowaway Clause.

<sup>283</sup> *ibid* para (a) Stowaway Clause.

<sup>284</sup> *ibid* para (a) Stowaway Clause.

<sup>285</sup> *ibid* para (a) Stowaway Clause.

<sup>286</sup> *ibid.*

damage occurring as a result of, “saving or attempting to save life or property at sea”.<sup>288</sup> By the same token, he cannot be held liable for loss or damage to cargo which occurred as a result of saving or attempting to save a stowaway’s life.

### **3.6.1. Limitation of liability under the HVR**

Where a master deviates in order to save or attempt to save a stowaway’s life, such deviation is not deemed to be an infringement of the Rules or the contract of carriage and therefore does not make the shipowner responsible for any damage or loss resulting therefrom.<sup>289</sup> If the deviation was for a reason other than to save a stowaway’s life, the shipowner shall be liable for the resultant damage or loss of cargo. He may, however, limit his liability. His right to limit his liability against a third party can be exercised either according to the weight of the cargo or the time frame within which the action is brought.<sup>290</sup>

The reason for limitation of liability by shipowners is to encourage the development of commercial shipping and enable liability insurance to be made available at a reasonable cost.<sup>291</sup>

#### **3.6.1.1. Weight limitation**

Where the value of the cargo is declared by the shipper and shown on the bill of lading, the shipowner’s liability will be calculated according to the declared value. Where, on the other hand, the value is not declared,

“ . . . neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is higher”.<sup>292</sup>

A similar provision is made regarding consolidated cargo. Where cargo is packed in a pallet or container, the liability of the shipowner shall be calculated according to the number of

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<sup>287</sup> Article IV bis (1) HVR.

<sup>288</sup> *ibid* article IV (2) (1).

<sup>289</sup> *ibid* article IV (4).

<sup>290</sup> A shipowner may avail himself of this provision in order to reduce or be completely discharged from liability against cargo interests.

<sup>291</sup> Rule 2.11.7 the Swedish Club P & I Rules and Exceptions (note 214 above) 37.

<sup>292</sup> Article IV (5) (a) HVR.

items listed on the bill of lading as contained in such pallet or container.<sup>293</sup> Where however, the number of items in the pallet or container is not listed on the bill of lading, the container shall be regarded as an item and the shipowner's liability shall be calculated accordingly.<sup>294</sup> The container itself shall be deemed an item if it ends up lost or damaged and does not belong to the shipowner.<sup>295</sup> For bulk cargoes that are not packaged, the shipowner's liability will be limited to the unit on which the freight was calculated.<sup>296</sup>

Taking into consideration the nature of the different types of cargo transported on ships, it is not always easy to determine what constitutes a package; therefore it is up to the courts to do so, based on the facts of each case before them.<sup>297</sup> Essentially, this means that the definition of what constitutes a package will differ from jurisdiction to jurisdiction and thus create complexities in handling claims.<sup>298</sup>

### **3.6.1.2. Time limitation**

Claims for loss or damage to cargo can be time barred under Article III (6) HVR. A shipowner is wholly discharged from liability if an action has not been instituted against him within the specified period:

“Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen”.<sup>299</sup>

However, a cargo interest can still go ahead and institute a claim against a shipowner if certain conditions are fulfilled:

“An action for indemnity against a third person may be brought even after the expiration of the year . . . if brought within the time allowed by the law of the court seized of the case. However, the time allowed shall not be less than three months, commencing from the day when the person bringing such

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<sup>293</sup> *ibid* article IV (5) (c).

<sup>294</sup> *ibid* article IV (5) (c).

<sup>295</sup> Rule 4.1.9.3.5 the Swedish Club P & I Rules and Exceptions (note 185 above) 122.

<sup>296</sup> *ibid* rule 4.1.9.3.5.

<sup>297</sup> *ibid* rule 4.1.9.3.5.

<sup>298</sup> *ibid* rule 4.1.9.3.5.

<sup>299</sup> *ibid* article III (6).

action for indemnity has settled the claim or has been served with process in the action against him”.<sup>300</sup>

### **3.7. Conclusion**

The cover provided by the P & I clubs provide for their members regarding stowaways is not an absolute one. As a result, shipowners are left to bear the cost of the uncovered risks. Beyond the legal liability and the financial cost borne by the shipowner lies the more thorny issue of refusal of some countries to allow the disembarkation and repatriation of stowaways. Most countries are unwilling to accept them and as a result, the stowaways sometimes end up being stuck on a ship for an unreasonable length of time, being passed around from one country to another. In order to avoid the costs and nightmares associated with stowaways, shipowners are advised to act prudently when handling matters concerning stowaways. They are urged to make every effort and utilise every available resource at their disposal to nip the problem in the bud. Masters and crew members should always carry out a thorough search and take all necessary steps to ensure that their ships are free of stowaways before leaving the port. This would save shipowners valuable time and resources and, spare them the hassles associated with the stowaway removal process.

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<sup>300</sup> Article III (6) bis.

## **CHAPTER FOUR: PROCEDURES FOR THE DISEMBARKATION AND REPATRIATION OF STOWAWAYS**

### **4.1. Introduction**

Repatriation is a component of national immigration policy and as such, carried out by State governments.<sup>301</sup> In South Africa, for instance, repatriation of illegal foreigners is carried out by immigration officers<sup>302</sup> except in cases where the Director-General requires someone, who is not an immigration officer, to take an illegal immigrant to some place outside of the country.<sup>303</sup> To this end, such a person shall be regarded as an immigration officer only for the purpose of carrying out the repatriation.<sup>304</sup> In the maritime industry however, repatriation may be carried out by non-state agencies like the P & I Clubs through their international network of local correspondents.<sup>305</sup> These local correspondents possess the mastery required to facilitate the stowaway removal process. In the words of Walters, they are:

“Local problem-solvers based in the ports who know the right people, who ‘call in favours’ from local embassy officials, harbourmasters, immigration officials, etc. Their task is to acquire the necessary emergency travel papers for the migrant, get them off the vessel as quickly as possible, and ultimately on a flight back to their ‘home’ state. If a stowaway claims refugee status, all the better: the local correspondent will pressure the local authorities for a refugee hearing which, if successful, will often relinquish the ship owners of their burden”.<sup>306</sup>

This chapter deals with the practical issues involved in the disembarkation and repatriation of stowaways as it affects both shipowners and stowaways alike.

### **4.2. The regulatory framework**

The process of the disembarkation and repatriation of stowaways will be discussed under the Resolution FAL. 11 (37),<sup>307</sup> The 1951 UN Refugee Convention and its 1967 Protocol,<sup>308</sup> Conclusions of the United Nations High Commissioner for Refugees Executive Committee

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<sup>301</sup> Walters (note 58 above) 12.

<sup>302</sup> Section 34 (1) Immigration Amendment Act 13 of 2002.

<sup>303</sup> *ibid* section 34 (9) c.

<sup>304</sup> *ibid* section 34 (9) c.

<sup>305</sup> Walters (note 58 above) 13.

<sup>306</sup> *ibid* 13-14.

<sup>307</sup> Note 6 above.

<sup>308</sup> Note 9 & 10 above.

on Stowaway Asylum-Seekers No. 53 (XXXIX) 1988,<sup>309</sup> the United Nations High Commissioner for Refugees Practical Guidelines for Shipowners, their Agents and Shipmasters relating to Stowaway Asylum-seekers,<sup>310</sup> and the United Nations Declaration of Human Rights.<sup>311</sup> The position of South Africa with regards to these regulatory frameworks is as follows:

1. Although a member of the IMO, South Africa is not a Contracting State to the 1965 FAL Convention. That notwithstanding, it can follow the Guidelines under Resolution FAL.11 (37), by virtue of the fact that the provisions of the Resolution are equally relevant to, “Member States which are not Contracting Governments to the FAL Convention”.<sup>312</sup>
2. South Africa acceded to the UN Refugee Convention and its Protocol on 12 January 1996 and therefore, bound by them.<sup>313</sup>
3. South Africa has neither signed nor ratified the UDHR, but is bound by its provisions, as a member of the community of States and by virtue of section 232 of the Constitution of the Republic.<sup>314</sup>

#### **4.2.1. Under the Resolution FAL. 11 (37)**

There are certain basic principles that should be followed in order to ensure the speedy resolution of stowaway cases under the Resolution FAL 11 (37), “Stowaway incidents should be dealt with in a manner consistent with humanitarian principles. Due consideration must always be given to the operational safety of the ship and to the safety and well-being of the stowaway”.<sup>315</sup> The master of a ship with stowaways on board is particularly urged, “To ensure that stowaways are treated humanely, consistent with the basic principles”.<sup>316</sup> It is very vital that stowaways be treated humanely, no matter how much they bother everyone on board or how difficult they get.<sup>317</sup> Masters have a responsibility, “to take appropriate

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<sup>309</sup> Note 11 above.

<sup>310</sup> Note 12 above.

<sup>311</sup> Note 8 above.

<sup>312</sup> Para (a) pg. 2 of the preamble.

<sup>313</sup> UNHCR ‘State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol’, available at <http://www.unhcr.org/3b73b0d63.pdf>, accessed on 13 August 2018.

<sup>314</sup> Note 18 above. Section 232 recognises customary international law in the Republic except where it is inconsistent with the Constitution or an Act of Parliament.

<sup>315</sup> Section 3.1.

<sup>316</sup> Section 5.1.9.

<sup>317</sup> Gard (note 144 above) para 3.

measures to ensure the security, general health, welfare and safety of the stowaway until disembarkation, including providing him/her with adequate provisioning, accommodation, proper medical attention and sanitary facilities”.<sup>318</sup> More of the basic principles are contained under Section 3 and include *inter alia*:

1. All the entities involved in stowaway cases should give their unreserved cooperation to ensure a speedy resolution of the cases and a timeous return of the stowaways to their respective countries.<sup>319</sup>
2. Every necessary precaution should be taken against any situation where stowaways have to stay on board the ship for an indefinite period.<sup>320</sup>
3. “Stowaway asylum-seekers should be treated in accordance with international protection principles as set out in international instruments such as the provisions of the United Nations Convention relating to the Status of Refugees of 28 July 1951 and of the United Nations Protocol relating to the Status of Refugees of 31 January 1967 and relevant national legislation”.<sup>321</sup>
4. Port countries should work together with shipowners to facilitate the disembarkation of stowaways in order to avoid them being detained on the ship for an indeterminate period;<sup>322</sup>
5. Countries are obligated to accept stowaways who are their citizens or legitimate residents.<sup>323</sup>
6. Where it has not yet been determined that a stowaway is from a particular country or legally has the right to reside therein, the country of embarkation should allow the return of that until the case has been determined.<sup>324</sup>

Port countries, starting with the first country on the voyage plan, (after a stowaway has been discovered) are charged with the responsibility to “accept the stowaways for examination,”<sup>325</sup> and “favourably consider” permitting their disembarkation, subject, of course, to their

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<sup>318</sup> Section 5.1.7.

<sup>319</sup> Section 3.5.

<sup>320</sup> *ibid* section 3.5.

<sup>321</sup> Section 3.7.

<sup>322</sup> Section 3.8.

<sup>323</sup> Section 3.9.

<sup>324</sup> Section 3.10.

<sup>325</sup> Section 5.3.1.

national legislation.<sup>326</sup> Where the stowaways do not have identity documents, the country of the first port of call, the country of nationality or right of residence of the stowaways, and the ship's flag State, should endeavour to verify their identity and their real countries or the countries they legally reside in.<sup>327</sup> The country of embarkation is under an obligation to accept a stowaway that has been positively identified as their citizen or has the right to legally reside therein.<sup>328</sup> It is not permissible to return such a stowaway to a country that had hitherto found them unacceptable.<sup>329</sup>

#### **4.2.2. Under the 1951 Refugee Convention and its 1967 Protocol**

There are no internationally recognised rules dealing with stowaway asylum-seekers, but the 1951 Refugee Convention and its 1967 Protocol contain principles that are relevant to them. Stowaway asylum-seekers are protected by the principle of non-refoulement under the 1951 Convention, "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>330</sup>

Refoulement is a principle of customary international law and thus binding on all countries irrespective of whether they assented to the 1951 Refugee Convention and its 1967 Protocol or not.<sup>331</sup> It is regarded as the bedrock of asylum and international refugee law. Stowaways seeking asylum or claiming refugee status must not be repatriated to their country or any other country where their lives could be in danger as doing so constitutes a violation of the refoulement principle.<sup>332</sup> Refusal of admission of a refugee or asylum-seeking stowaway or disclaiming responsibility by a flag State where proceeding to the country of the next port of call could jeopardise his life or freedom is equivalent to refoulement.<sup>333</sup> It is often difficult to obtain authorisation from countries to disembark stowaway refugees and asylum-seekers,

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<sup>326</sup> Section 5.3.2.

<sup>327</sup> Sections 5.3.3, 5.6.1 & 5.7.1.

<sup>328</sup> Section 5.5.1.

<sup>329</sup> Section 5.5.2.

<sup>330</sup> Article 33 (1).

<sup>331</sup> UNCHR (note 33 above) para 15.

<sup>332</sup> *ibid* para 17.

<sup>333</sup> *ibid* para 17.

thus compelling masters to leave them on board for an extended length of time, usually under unfavourable conditions.<sup>334</sup>

#### **4.2.3. Under the Conclusions of the UNHCR Executive Committee on Stowaway Asylum-Seekers No. 53 (XXXIX) 1988**

In light of the fact that there were no general and internationally recognised rules dealing specifically with stowaway asylum-seekers, the UNHCR Governing Executive Committee on October 1988 published some conclusions based on real cases of stowaway asylum-seekers.<sup>335</sup> These conclusions recommended that the following guidelines be taken into consideration when dealing with stowaway asylum-seekers:

1. “Like other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.
2. Without prejudice to any responsibilities of the flag State, stowaway asylum-seekers should, whenever possible, be allowed to disembark at the first port of call and given the opportunity of having their refugee status determined by the authorities, provided that this does not necessarily imply durable solution in the country of the port of disembarkation.
3. Normally, UNHCR would be requested to assist in finding a durable solution for those found to be refugees, based on all relevant aspects of the case”.<sup>336</sup>

#### **4.2.4. Under the Practical Guidelines for Shipowners, Their Agents and Shipmasters Relating to Stowaway Asylum-Seekers**

In January 1992, the UNHCR published a more comprehensive document titled, “Practical Guidelines for Shipowners, Their Agents and Shipmasters Relating to Stowaway Asylum-Seekers”.<sup>337</sup> Its opening paragraph echoes the provisions of Article 33 (1) of the UN Refugee Convention, but this time, makes reference to stowaway asylum-seekers.<sup>338</sup> It provides that:

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<sup>334</sup> UNHCR *Rescue at sea, stowaways and maritime interception: Selected reference materials* 2 ed (2011) 4, available at <http://www.refworld.org/pdfid/4ee087492.pdf>, accessed on 29 July 2018.

<sup>335</sup> UNHCR (note 11 above).

<sup>336</sup> *ibid.*

<sup>337</sup> Note 12 above.

<sup>338</sup> *ibid* para (a).

“Under no circumstance should the stowaway asylum-seeker be returned to the country of origin or disembarked in any other country from where s(he) would risk to be returned to the country of origin or where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion”.<sup>339</sup>

The disembarkation process at the next safe port of call should involve a UNHCR representative<sup>340</sup> who shall be contacted by the shipowners or their agents with as much information as possible supplied by the stowaway as to the reason for requesting refugee status.<sup>341</sup> An interview to ascertain the stowaways’ claims should be carried out, in the presence of a UNHCR officer or their attorney, by immigration authorities qualified to handle asylum claims.<sup>342</sup> In the event that the immigration authorities are unable to conduct the interview, it should be conducted by a UNHCR officer or their attorney.<sup>343</sup>

Some countries will not allow the disembarkation of asylum-seekers at their port. Where that is the case, the stowaway will be interviewed on board the ship in the presence of the UNHCR’s officer and attorney.<sup>344</sup> At the conclusion of the interview, if a stowaway does not qualify as a refugee, he would be treated like any other stowaway and remain the shipowner’s responsibility.<sup>345</sup>

#### **4.2.5. Under the UDHR**

Stowaways are protected under the UDHR by virtue of the fact that it contains, “inalienable rights of all members of the human family”.<sup>346</sup> Stowaways like everyone else are entitled to the right to life, liberty and security of person.<sup>347</sup> These rights are violated when stowaways get killed or thrown overboard by masters and crew members to avoid the costs and hassles involved in entering ports with the stowaways on board their ship.<sup>348</sup>

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<sup>339</sup> *ibid* para (a).

<sup>340</sup> *ibid* para (b).

<sup>341</sup> *ibid* para (c).

<sup>342</sup> *ibid* para (g).

<sup>343</sup> *ibid* para (g).

<sup>344</sup> *ibid* para (h).

<sup>345</sup> *ibid* para (j).

<sup>346</sup> Preamble to the UDHR.

<sup>347</sup> Article 3 UDHR.

<sup>348</sup> Davies (note 143 above).

They are also violated (in the case of stowaway asylum-seekers) when stowaways are inadvertently confined on board ships, for an extensive period, as a result of the disagreement amongst the countries as to which of them should accept the stowaways for return.<sup>349</sup>

Stowaway asylum-seekers and refugees are especially provided for under the UDHR: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.<sup>350</sup>

#### **4.3. Challenges associated with disembarkation and repatriation of stowaways**

A major challenge encountered by shipowners in the disembarkation and repatriation of stowaways is the refusal of some countries to allow the landing of stowaways in their ports without identification papers or travel documents. With the exception of South Africa, Brazil and some West African countries, most countries do not accept stowaways without proper identification.<sup>351</sup> Therefore when stowaways are discovered, masters are advised to do all they possibly can to establish their true identities.<sup>352</sup> They are to carry out a search on the stowaways and their hiding places for identification documents, which must be confiscated if found as they would usually try to either hide their nationality or destroy their identity papers.<sup>353</sup> Some countries like Japan, Taiwan, Korea and Singapore would however still not allow the disembarkation of stowaways in their ports, even with identification documents.<sup>354</sup> The solution to this problem is the issuance of a covering letter by the country of the first port of call, to the agent handling the removal process. The country of the first port of call has a responsibility to:

“make every effort to cooperate in establishing the validity and authenticity of a stowaway’s documents and, when a stowaway has inadequate documents, to whenever practicable and to an extent compatible with national legislation and security requirements, issue a covering letter with a photograph of the stowaway and any other important information. The letter, authorising the return of the stowaway either to his/her State of origin or to the point where the stowaway commenced his/ her journey . . . should be handed over to the operator affecting the removal of the stowaway.

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<sup>349</sup> UNHCR (note 33 above) para 3.

<sup>350</sup> Article 14 (1) UDHR.

<sup>351</sup> Gard (note 144144 above) para 4.2.

<sup>352</sup> *ibid* para 4.2.

<sup>353</sup> *ibid* para 3.15.1.

<sup>354</sup> *ibid* para 4.2.

This letter will include information required by the authorities at transit points and/or the point of disembarkation<sup>355</sup>”.

It should be noted that the provisions of the Resolution FAL. 11 (37) are mere guidelines which seek to provide guidance and recommendations to be applied in the resolution of stowaway cases.<sup>356</sup> Countries that are Contracting Governments to the FAL Convention and those that are not, are urged by the Facilitation Committee to incorporate the Guidelines into their national legislation in order to give effect to them.<sup>357</sup> Being advisory in nature, countries are not legally bound to follow the provisions of the Resolution FAL.11 (37). Consequentially, the refusal of some countries to allow the disembarkation of stowaways at their ports frustrates the purpose of the Guidelines and invariably leads to stowaways being confined on board the ship; a clear violation of their fundamental human rights to liberty and security of person.<sup>358</sup>

An illustration is given by Walters about two Iraqi stowaways who boarded a Panamanian registered ship in Limassol, Cyprus.<sup>359</sup> They were denied disembarkation in Spain, Ireland, the UK and the Netherlands.<sup>360</sup> Eventually, they were allowed to disembark in Gothenburg after over two weeks of trying to do so.<sup>361</sup> In another, more recent, case two Moroccans with no identification documents stowed away on board a ship at Morocco and were discovered in Gibraltar.<sup>362</sup> Eight different countries were considered in the repatriation process and most of them refused to allow them disembark.<sup>363</sup> The stowaways were denied disembarkation in Gibraltar, Malaysia and India.<sup>364</sup> The Indian authorities requested that the ship be guarded by local guards for the duration of her stay at the port.<sup>365</sup> Even though she may have been granted permission to disembark her stowaways, the Singaporean authorities required the ship to remain in Singapore until the stowaways were back in their country and also

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<sup>355</sup> Section 5.3.4.

<sup>356</sup> See page 2 of the preamble.

<sup>357</sup> *ibid* paras (a) & (b) pg. 3 of the preamble.

<sup>358</sup> Article 3 UDHR.

<sup>359</sup> Walters (note 58 above) 5.

<sup>360</sup> *ibid* 5.

<sup>361</sup> *ibid* 5.

<sup>362</sup> Chloe Townley ‘A case study: stowaways – what to do when it is already too late?’ Steamship Mutual Loss Prevention September 2017, available at <https://www.steamshipmutual.com/pdf.htm?id=578662&pdf=true>, accessed on 19 January 2018.

<sup>363</sup> *ibid*.

<sup>364</sup> *ibid*.

<sup>365</sup> *ibid*.

demanded that the master pay a bond of US\$10, 000 per stowaway.<sup>366</sup> At her first port of call in Malaysia, she was detained by the authorities who requested an ISPS audit and security guards to be carried on board for the rest of her stay in Malaysian waters.<sup>367</sup> Finally, the stowaways were able to disembark at Sri Lanka after being on board for forty six days.<sup>368</sup>

Another challenge is the lack of consensus between the countries involved, as to where to disembark stowaway asylum-seekers.<sup>369</sup> The Resolution FAL.11 (37) recognises this challenge and acknowledges that:

“The resolution of stowaway cases is difficult because of different national legislation in each of the several potentially involved States: the State of embarkation, the State of disembarkation, the flag State of the ship, the State of apparent, claimed or actual nationality/citizenship or right of residence of the stowaway, and States of transit during repatriation”.<sup>370</sup>

As a result of the absence of agreement amongst the countries as to which of them has the obligation to accept the stowaways, orbit cases are created, whereby stowaway asylum-seekers are confined on board ships for lengthy periods of time being moved around from one country to another.<sup>371</sup>

Some countries argue that the responsibility lies with the Flag State; some argue that it lies with the country of first port of call while others argue that it is to be determined by the circumstances of each case.<sup>372</sup> Given that the flag State reserves exclusive jurisdiction over births, contracts, crimes and apparently stowaways, one could submit that the responsibility should rest on it but taking into account the pervasive use of flags of convenience it would seem less than prudent to entrust it with this responsibility.<sup>373</sup> The argument that the responsibility rests on the country of the first port of call is not very sound as it may not necessarily be the safest place to disembark the stowaway asylum-seeker. The soundest argument, in the researcher’s opinion, is that which suggests that the appropriate country should be determined by looking at the circumstances surrounding each case. Thus, in order

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<sup>366</sup> *ibid.*

<sup>367</sup> *ibid.*

<sup>368</sup> *ibid.*

<sup>369</sup> UNCHR (note 33 above) para 2.

<sup>370</sup> Section 1.1.3.

<sup>371</sup> UNCHR (note 33 above) para 3.

<sup>372</sup> *ibid* para 2.

<sup>373</sup> *ibid* paras 10 & 11.

to determine which country is best suited to assume responsibility; consideration should be given as to whether disembarkation in such a country would undermine the principle of refoulement.

#### **4.4. The stowaway removal process**

P & I clubs routinely release Loss Prevention Bulletins which serve as a source of information and practical guide on topical issues affecting shipping and ways of dealing with them. These publications cover a wide range of topics from oil tanker mishaps and oil spills to stowaway hotspots and ways to minimise stowaway incidents. One of such publications by Seasia (a P & I club) is titled, “Stowaways: Repatriation Corridors from Asia and the Far East”<sup>374</sup> and contains information on the disembarkation and repatriation practices in Asian and the Far Eastern ports. The information includes which ports are likely to allow disembarkation of stowaways and which ones are not. Seasia divides the different ports into three groups of:

1. Viable exit;
2. Potential exit; and
3. No exit.

Countries that fall under the viable exit group include: Australia, Bangladesh, Cambodia, India, Indonesia, Malaysia, Pakistan and Philippines. These countries would allow disembarkation and repatriation if the shipowners have obtained travel documents and made the necessary travel arrangements for the stowaways. Some of these countries have stringent requirements, like India and Pakistan which require that the stowaways be kept aboard the ship under the watch of guards and the ship be detained for the duration of its stay in the country.<sup>375</sup> Cambodia on the other hand does not have strict requirements. Stowaways can be disembarked in Cambodia with neither valid travel documents nor repatriation arrangements in place.<sup>376</sup> Disembarkation and repatriation of stowaways are pretty much guaranteed provided, “the matter is handled through the correct channels.”<sup>377</sup> Once disembarked,

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<sup>374</sup> R Gordon et al *Stowaways: Repatriation corridors from Asia & the Far East* 6 Ed (2005) 8, available at [http://www.kpiclub.or.kr/board/data/file/Library\\_02/2039258253\\_VOoYhdJu\\_Stowaways\\_Repatriation\\_Corridors\\_from\\_Asia\\_26\\_the\\_Far\\_East\\_287th\\_Edition29.pdf](http://www.kpiclub.or.kr/board/data/file/Library_02/2039258253_VOoYhdJu_Stowaways_Repatriation_Corridors_from_Asia_26_the_Far_East_287th_Edition29.pdf), accessed on 29 July 2018.

<sup>375</sup> *ibid* 43 & 74.

<sup>376</sup> *ibid* 25 para 1.3.

<sup>377</sup> *ibid* para 2.1.

stowaways can be detained in a prison pending such a time as the shipowner is able to make arrangements for their repatriation.<sup>378</sup> They can also issue entry visas to anybody on the provision of appropriate financial incentive.<sup>379</sup> It is thus regarded as the “ideal corridor” for landing and detaining stowaways, prior to repatriation.<sup>380</sup> The main reason Cambodia is regarded as ideal is because the stowaway can be detained in the country while the ship carries on with her commercial operations.<sup>381</sup> Caution must however be exercised in carrying out disembarkation and repatriation in Cambodia. Seasia advises that “special arrangements must be made through the appropriate officers to ensure a smooth operation of disembarking and repatriating through Cambodia. Otherwise, should your arrangements backfire; you could end up with an even bigger problem”.<sup>382</sup>

Countries under the potential exit group include: China, Hong Kong, Saudi Arabia, Sri Lanka, Taiwan and Thailand.<sup>383</sup> Disembarkation and repatriation under this group can prove to be quite rigorous but not guaranteed. As a rule, China does not permit repatriation due to commercial convenience, the exception being for medical emergencies only.<sup>384</sup> Hong Kong imposes criminal penalties and fines on ships that fail to notify the appropriate authorities of the presence of stowaways on board.<sup>385</sup> What is peculiar about Hong Kong though is that stowaways themselves are also penalised under their Stowaways Ordinance.<sup>386</sup> Taiwan, on the other hand, does not guarantee repatriation even where all the requirements have been met, the exception being medical emergencies.<sup>387</sup>

The no exit group countries include Japan, Myanmar, Singapore, South Korea and Vietnam.<sup>388</sup> Even though Singapore falls under the no exit group, repatriation can be allowed but only under the strictest of conditions.<sup>389</sup> Only ISPS certified ships will be allowed to repatriate stowaways and the shipowner must post a security bond to the immigration

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<sup>378</sup> *ibid* 25.

<sup>379</sup> *ibid* 26. It is unclear whether this refers to a bribe.

<sup>380</sup> *ibid* 26 para 2.1.

<sup>381</sup> *ibid* 27 para 2.4.

<sup>382</sup> *ibid* 26 para 2.3.

<sup>383</sup> *ibid* 13.

<sup>384</sup> *ibid* 28.

<sup>385</sup> *ibid* 34.

<sup>386</sup> *ibid* 34.

<sup>387</sup> *ibid* 90.

<sup>388</sup> *ibid* 13.

<sup>389</sup> *ibid* 84.

authorities;<sup>390</sup> the ship must also undergo physical clearance on both arrival and departure from the port.<sup>391</sup>

The rationale behind the publication of Stowaways Repatriation Corridors has been criticised by Walters who likens it to the mentality adopted by the European Union (EU) with regards to criminal networks involved in illegal immigration in which countries are regarded as entry points to be negotiated.<sup>392</sup> That may be so but the fact of the matter remains that publications like these are essential to shipowners and the shipping industry as it provides invaluable information on issues regarding stowaways, and suggests ways to reduce the difficulties and frustrations suffered by shipowners in attempting to disembark and repatriate stowaways, who have no business being on their ships in the first place. He further questions the legality of the methods employed by local correspondents in negotiating the disembarkation and repatriation of stowaways and calls for further investigation of the matter.<sup>393</sup> In the researcher's humble opinion, if countries were more cooperative with shipowners on the disembarkation and repatriation process, there would be little or no room for correspondents to employ illegal methods to get the job done. That is not to say that the researcher condones any shady and under-handed practice which jeopardises the fundamental human rights of the stowaways.

Another problem pointed out by Walters is the manner in which correspondents carry out the stowaway removal process. According to him, it is an art which they have so perfected and is, "as much cultural as geographical".<sup>394</sup> He gives an example of a South African correspondent who blames the difficulty encountered in managing stowaways on the strengthening and protection of the human rights of stowaways.<sup>395</sup> This kind of attitude must in no way be encouraged as doing so would be most detrimental to the welfare and human rights of the stowaways.

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<sup>390</sup> *ibid* 84.

<sup>391</sup> *ibid* 84.

<sup>392</sup> Walters (note 58 above) 15.

<sup>393</sup> *ibid* 15.

<sup>394</sup> *ibid* 14.

<sup>395</sup> *ibid* 14.

#### **4.5. Conclusion**

The way in which the disembarkation of stowaways is carried out in practice leaves a lot to be desired. It would seem accurate to surmise that correspondents place the interests of shipowners over and above the welfare of stowaways. This may be attributable to the fact that these correspondents are employed by P & I clubs to protect the interests of their members (the shipowners) and so their loyalties and sympathies lie with the shipowners. Also, the stringent requirements and outright refusal of some countries to allow the disembarkation of stowaways in their ports, serves no purpose but to create hardship for shipowners and even endanger international trade hence the need for an international instrument which will adequately address the problem.

## **CHAPTER FIVE: CONCLUSION**

### **5.1. Introduction**

This research set out to examine the ways in which stowaways affect maritime security, disrupt international shipping and create problems for shipowners. Thus, some key research questions were posed in the introduction of this dissertation which the researcher attempted to answer within the dissertation. The researcher reiterates below, the key research questions and resulting conclusions to determine whether these questions have been sufficiently answered or whether they have fallen short of the objectives. As stated in chapter one, the outcome of this research may have been affected as a result of the paucity of current texts and cases on stowaways and the downward trend of notification of stowaway incidents to the IMO, which makes it difficult to ascertain whether stowaway incidents are on the increase or decline.

### **5.2. Key research questions and the resulting conclusions:**

#### **5.2.1. In what ways do stowaways constitute a threat to cargo and the operational safety of the ship?**

Stowaways can cause damage to cargo directly or indirectly. Direct damage to cargo can occur when, stowaways in an attempt to hide inside containers, break the seals and physically damage the goods inside. It can also occur where they hide within perishable or consumable cargo, in which case, the whole of the cargo would have to be declared unsafe for consumption and destroyed. Indirect damage to cargo can occur where cargo is inadvertently damaged in the process of searching for stowaways or as a result of delay caused by deviation to disembark stowaways. A good example of direct physical damage to cargo was seen in *American Home Assurance Co. v Sletter M/V*<sup>396</sup> where some 800 plus bags of coffee beans had to be destroyed because they were contaminated by the stowaways' urine and excrement.

In disregard to the operational safety of the ship, stowaways usually stow away on container or cargo ships which are neither equipped nor certified to carry passengers on international voyages. Some stowaways may conceal themselves in unsafe or unauthorised access areas of the ship and could cause damage to the ship. Their presence hampers the smooth running of

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<sup>396</sup> 1995 WL 18503; 43 F.3d 995.

the ship. Due to lack of extra accommodation on cargo ships, crew members may have to move quarters to keep a keen eye on the stowaways thereby running the risk of being distracted from the duties they have been trained to do. In extreme cases, crew members could be endangered if the stowaways outnumber them or exhibit violent behaviour. An example of risk to the operational safety of the ship was seen in *United Brands Co. v Isla Plaza*<sup>397</sup> where in a bid to keep warm, the stowaways started a fire which got out of hand and burned down the ship.

### **5.2.2. Why are shipowners heavily burdened with the penalties levied on their ships for entering into port with stowaways on board and the financial cost involved in their disembarkation and repatriation despite their efforts in taking reasonable precaution to prevent them from gaining access to their ship?**

It is the responsibility of shipowners to bear all costs pertaining to the maintenance, custody or removal of stowaways found on their ship.<sup>398</sup> Most of these costs are, in actuality, covered by the shipowner's P & I club but only to the extent that they are directly incurred as a result of having stowaways on board. For example, the cost of feeding, clothing and general maintenance of the stowaways, medical care, fines for entering into ports with stowaways on board their ship, costs of guards employed to prevent stowaways from escaping, the cost of acquiring identification and travel documents, detention expenses, cost of returning the stowaways back to their country including return tickets and accommodation for the security escorts, etc., would typically be covered by the P & I clubs.<sup>399</sup> Any other expenses incurred beyond these, like consequential loss of profit or depreciation arising from deviation to disembark stowaways,<sup>400</sup> loss of freight or hire for the entered vessel<sup>401</sup> or demurrage on, detention of or delay to the vessel,<sup>402</sup> repairs to damage caused by stowaways on an entered ship<sup>403</sup> and any legal costs, are personally borne by the shipowners.

Under the BIMCO Stowaways Clause, where cargo is damaged or lost, liability for such loss or damage is apportioned between the shipowner and charterer depending on which part of

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<sup>397</sup> 1994 WL 114825; A.M.C. 763.

<sup>398</sup> Section 5.2.3 Resolution FAL.11 (37).

<sup>399</sup> NEPIA (note 79 above) 11.

<sup>400</sup> Rule 19 (6) (b) North P & I Rules (note 168 above).

<sup>401</sup> Rule 11.2.2 (a) Skuld P & I Rules (note 171 above).

<sup>402</sup> *ibid* rule 11.2.2 (b).

<sup>403</sup> NEPIA (note 79 above) 11.

the ship the stowaways conceal themselves.<sup>404</sup> Where stowaways are discovered hidden in containers or cargo holds, the charterers are responsible for any loss or damage resulting therefrom (including fines or penalties).<sup>405</sup> The reason being that charterers and their agents have control of the cargo operations and full access to the containers, they are therefore in a better position to prevent stowaways hiding in them. Stowaways found hidden in any other part of the ship besides the cargo holds and containers remain the responsibility of the shipowners.<sup>406</sup> Thus, depending on where a stowaway is discovered, the charterers may end up bearing the costs which the shipowners would otherwise have borne.

### **5.2.3. Whether these stowaways upon discovery are treated in a manner which preserves their human rights and whether the process of their disembarkation and repatriation is carried out according to laid down procedure?**

This research question is two-pronged: (1) Are stowaways treated in a manner consistent with the preservation of their fundamental human rights; and (2) Is the disembarkation and repatriation of stowaways carried out according to laid down procedure? On paper, the rights and welfare of stowaways and stowaway asylum-seekers are sufficiently provided for under the UDHR,<sup>407</sup> the UN Refugee Convention and its Protocol,<sup>408</sup> the Conclusions of the UNHCR Executive Committee on Stowaway Asylum-Seekers No. 53 (XXXIX) 1988,<sup>409</sup> the UNHCR Practical Guidelines for Shipowners, their Agents and Shipmasters relating to Stowaway Asylum-seekers,<sup>410</sup> and the Resolution FAL.11 (37).<sup>411</sup> In practice however, these rights are sometimes violated. There have been instances where in order to avoid the hassles and cost of disembarkation and repatriation and the heavy fines levied on shipowners, some unscrupulous shipmasters and crew members have set stowaways adrift on makeshift rafts or thrown them overboard and left them at the mercy of the elements or even killed them and then had their bodies thrown overboard.<sup>412</sup>

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<sup>404</sup> BIMCO (note 279 above) paras (a) & (b).

<sup>405</sup> *ibid* para (a).

<sup>406</sup> *ibid* para (b).

<sup>407</sup> Note 8 above.

<sup>408</sup> Note 9 & 10 above.

<sup>409</sup> Note 11 above.

<sup>410</sup> Note 12 above.

<sup>411</sup> Note 6 above.

<sup>412</sup> Davies (note 143 above).

On the issue of whether the disembarkation and repatriation of stowaways is carried out according to laid down procedure, the researcher notes that due to the difficulties and frustrations encountered by shipowners in attempting to resolve stowaways cases,<sup>413</sup> some P & I correspondents may sometimes resort to questionable methods to negotiate and accelerate the disembarkation process so as not to unduly disrupt the shipping schedule. Also, in cases involving stowaway asylum-seekers, it is often difficult to agree on which country is best suited to disembark the stowaways, given the number of countries involved in the process. This inability to reach a decision as to which country is best suited to receive the stowaways, creates orbit cases where the stowaways end up stuck on board the ship and bounced around from one country to another, in clear violation of their fundamental right to life, liberty and personal security.

#### **5.2.4. Whether there is need for a single unified international instrument dealing with stowaways as opposed to the various international instruments currently invoked upon to deal with the different situations.**

There is currently no international convention dealing with stowaways. In 1957, an International Convention Relating to Stowaways was adopted in Brussels but up till date, has not entered into force because it failed to get the number of ratifications required to do so.<sup>414</sup> Currently, stowaway cases are governed by the Resolution FAL.11 (37),<sup>415</sup> the UN Refugee Convention and its Protocol,<sup>416</sup> the UDHR,<sup>417</sup> the Conclusions of the UNHCR Executive Committee on Stowaway Asylum-Seekers No. 53 (XXXIX) 1988,<sup>418</sup> and the UNHCR Practical Guidelines for Shipowners, their Agents and Shipmasters relating to Stowaway Asylum-seekers,<sup>419</sup> and the ISPS Code.<sup>420</sup> With the exception of the ISPS Code, the UN Refugee Convention and its Protocol and the UDHR, the rest of the aforementioned instruments are merely Guidelines which are non-binding and thus, do no more than provide moral obligation. The researcher therefore submits that there is an urgent need for an all-inclusive legally binding document which adequately addresses the stowaway problem.

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<sup>413</sup> This is as a result of the involvement of so many port countries in the stowaway removal process and their different national legislations. See section 1.1.3 Resolution FAL.11 (37).

<sup>414</sup> UNHCR (note 33 above) para 5.

<sup>415</sup> Note 6 above.

<sup>416</sup> Note 9 & 10 above.

<sup>417</sup> Note 8 above.

<sup>418</sup> Note 11 above.

<sup>419</sup> Note 12 above.

<sup>420</sup> Note 13 above.

### 5.3. Recommendations

Several suggestions have been put forward by writers and P & I Clubs on the various ways to prevent or limit instances of stowaways gaining access to ships; and the methods of carrying out searches to discover them while the ship is still in port. The researcher agrees with these suggestions and methods, provided they do not cause harm to the stowaways.<sup>421</sup>

In addition, the researcher recommends that the responsibility for stowaways be apportioned between shipowners and the country of embarkation, if the shipowner can show that he took reasonable steps to prevent them from getting on board the ship. The reason for this recommendation is that the presence of stowaways on board a ship is as much a breach of the ship security as it is port security. Both shipowners and port authorities have equal responsibility of ensuring that necessary action is taken to prevent access of unauthorised persons into the port facilities or onto the ship.

It would be stating the obvious to point out that stowaway incidents occur more in non ISPS compliant ports and terminals than in ISPS compliant ones. Hence the researcher argues that stowaways are only able to get onto ships by gaining entry into the port facility. Since the shipowner has no control over port security, he can only focus his efforts and resources on taking all reasonable steps to ensure that stowaways do not gain access to his ship. If stowaways still manage to get on the ship, despite his best efforts, the shipowner shall be equally burdened with the ports authority, in the country of embarkation, with the responsibility for such stowaways.

The need for the adoption of an international convention on stowaways cannot be overemphasized. It is therefore proposed that a new convention be adopted which should include a shared responsibility between the shipowner and the port authority in the country of embarkation, as suggested above. It is also recommended that countries make national legislation which allows for the prosecution of stowaways, attempted stowaways, and individuals or groups that aid such stowaways or attempted stowaways. The researcher believes that making the act of stowing away a prosecutable offence will, to some extent, serve as a deterrent to would-be stowaways.

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<sup>421</sup> Section 4.2.3 Resolution FAL 11 (37) provides that search methods which are potentially harmful to stowaways shall not be employed.

The problem of stowing away should not be viewed solely as one affecting the maritime industry alone, but as a human population reassignment issue which affects a lot of countries and therefore requires the concerted efforts of all involved to resolve. Where the stowaway threat is solely perceived as a maritime problem, the resultant effect is that the onus of repatriation is placed on the shipowner who then engages the services of non-government officials, namely P & I correspondents to carry out the repatriation of stowaways. Countries that have not already given effect to the amended FAL Convention through their national legislation are advised to do so and work together with shipowners and all the stakeholders involved, in resolving the problem. The researcher hopes that this research lends itself to further research on any issues affecting stowaways, shipowners and the shipping industry.

In conclusion, it is impossible to completely eliminate stowaway incidents regardless of the amount of resources and effort channelled into combating this scourge. The reason is simple. Stowing away is a means to an end; the end being the need to escape harm or unfavourable living conditions. Therefore, as long as poverty, conflicts, wars and persecution exist, people will always flee from such conditions (by any means necessary) to seek a better living elsewhere. Despite this reality, the researcher is of the view that putting these recommendations into action will considerably reduce stowaway incidents and thus alleviate the burden placed on shipowners.

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29 July 2015

Ms Nkechi Miriam Aguocha (211560753)  
School of Law  
Howard College Campus

Dear Ms Aguocha,

Protocol reference number: HSS/0980/015/M  
Project title: Slowways: A threat to Maritime Security and the curse of ship owners

**Full Approval – No Risk / Exempt Application**

In response to your application received on 23 July 2015, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted FULL APPROVAL.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment / modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shenuka Singh (Chair)

/ms

Cc: Supervisor: Ms Priya Pravesh Singh  
Cc: Academic Leader Research: Dr Shannisa Dinsch  
Cc: School Administrator: Mr Pradeep Ramsewak

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