

TERRORISM PREVENTION (AMENDMENT) BILL 2021: CRIMINALISING THE PAYMENT OF KIDNAP RANSOMS

1. The Nigerian Senate is the second arm of Nigeria's bicameral legislature.
2. A bill is a draft of a proposed law presented to the Nigerian legislature for consideration and which may or may not be passed by the Nigerian legislature.
3. Emmanuel Akogba "Senate proposes 15 years imprisonment for anyone who pays ransom to kidnapers" (Vanguard, May 19 2021 <<https://www.vanguardngr.com/2021/05/senate-proposes-15-years-imprisonment-for-anyone-who-pays-ransom-to-kidnappers/>> accessed May 28 2021
4. The report is accessible at https://www.iccwbo.org/reports/2020_Annual_Piracy_Report.pdf
5. ICC, "Gulf of Guinea remains world's piracy hotspot in 2021, according to IMB's latest figures" (www.iccwbo.org, April 14 2021) <<https://www.iccwbo.org/media-wall/news-speeches/gulf-of-guinea-remains-worlds-piracy-hotspot-in-2021-according-to-imbs-latest-figures/>> accessed May 29, 2021
6. http://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=161626
7. Including Bloomfield LP.
8. BIMCO, "Gulf of Guinea Declaration on Suppression of Piracy" (www.bimco.com, May 17, 2021) <<https://www.bimco.org/GoGDeclaration>> accessed May 28, 2021.
9. Festus Iyorah "Nigeria's booming kidnap-for-ransom enterprise threatens security" (Al Jazeera, March 23, 2021) <<https://www.aljazeera.com/news/2021/3/23/nigeria-booming-kidnap-for-ransom-enterprise-threatens-security>> accessed May 28, 2021
10. https://gcaptain.com/denmark-to-send-navy-frigate-to-combat-piracy-in-gulf-of-guinea/?utm_source=BenchmarkEmail&utm_campaign=SHORELINE_Daily_News_Bulletin_May_27_2021&utm_medium=email

Overview

The Nigerian Senate¹ is considering the Terrorism Prevention (Amendment) Bill 2021 (the "Bill"²) which seeks to amend the Terrorism (Prevention) Act 2011 (the "Terrorism Act") to criminalise the payment of ransom to secure the release of a kidnapped person. The Bill, inter alia, seeks to replace Section 14 of the Terrorism Act with the following provision:³

"Anyone who transfers funds, makes payment or colludes with an abductor, kidnapper or terrorist to receive any ransom for the release of any person who has been wrongfully confined, imprisoned or kidnapped is guilty of a felony and is liable on conviction to a term of imprisonment of not less than 15 years."

This article provides background context for the introduction of the Bill, provides a comparative analysis of how other jurisdictions deal with the criminalisation of ransom payments, and finally provides commentary on possible effects of the Bill, should it be passed into law in its current form.

Background

The Bill is being introduced at a time when Nigeria is faced with increasing insecurity, within its waters. The Gulf of Guinea, particularly Nigerian waters, has become a hotbed of piracy and armed robbery at sea. The International Chamber of Commerce ("ICC") - International Maritime Bureau's Piracy and Armed Robbery Against Ships Report - 01 January to December 31, 2020 reported that there were sixty-two (62) incidents of kidnapping in Nigeria making up forty-six per cent (46%) of the one hundred and thirty-five (135) incidents of kidnapping at sea globally.⁴

In April 2021, the ICC reported that forty (40) crew members had been kidnapped at sea in 2021, all within the Gulf of Guinea.⁵ Recently, there were reports of the kidnapping of a Korean captain and four (4) crew members from a fishing boat on or about May 19, 2021.⁶

As expected, this problem has attracted international furore and key maritime organisations have repeatedly emphasised the need to improve security and deal with increasing incidents of maritime crime, off the Gulf of Guinea. In response to growing international concern about the increasing attacks in the Gulf of Guinea, maritime organisations, flag states administrators and individual stakeholders in the maritime industry, including the Baltic and International Maritime Council ("BIMCO"), signed the Gulf of Guinea Declaration on Suppression of Piracy. By signing up, the signatories (two hundred and eighty-one (281) of them⁷ as at the date of this article) committed themselves to tangibly supporting the antipiracy law enforcement as mandated by international law.⁸

A report by SB Morgen Intelligence, a Lagos-based risk analysis, estimated that at least Eighteen Million and Thirty-Four Thousand United States Dollars (US\$18,034,000) had been paid as ransom to kidnapers in Nigeria between June 2011 and March 2020.⁹ The Head of Research at SB Morgen Intelligence, while speaking with Al Jazeera, stated that the majority of these kidnaps were economically motivated.

The link between ransom payments and a rise in terrorism is internationally recognised. The foregoing is further reinforced by the recent news that Denmark has agreed to send a Navy frigate to the Gulf of Guinea to combat the scourge of piracy and crew kidnappings in the region.¹⁰



11. Sections 17 and 18 of the UK Terrorism Act 2000.
12. <https://www.un.org/press/en/2014/sc11262.doc.htm>
13. Patrick L. Brockett, Linda L. Golden, Stephan Zaporolli, Jack M. Lum, "Kidnap and ransom insurance: A strategically useful, often undiscussed marketplace tool for international operations" (2019) *Risk Management and Insurance Review* <<https://onlinelibrary.wiley.com/doi/10.1111/rmir.12134>> accessed May 28, 2021
14. Yvonne M. Dutton and Jon Bellish, "Refusing to Negotiate: Analysing the Legality and Practicality of a Piracy Ransom Ban" (Cornell International Law Journal, 2014) <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1842&context=cilj> accessed May 29, 2021
15. *ibid*
16. Celestine Bohlen, Italian Ban on Paying Kidnappers Stirs Anger, N.Y. TIMES (February 1, 1998), <http://www.nytimes.com/1998/02/01/world/italian-ban-on-paying-kidnappers-stirs-anger.html>
17. Al Jazeera Investigative Unit "Exclusive: Italy paying ransoms in Syria and Somalia" (Al Jazeera, October 9, 2015) <<https://www.aljazeera.com/news/2015/10/9/exclusive-italy-paying-ransoms-in-syria-and-somalia>> accessed May 29, 2021.

It is, therefore, understandable why the Nigerian Senate seeks to take steps to curb kidnapping incidents in Nigeria (including Nigerian waters).

The Legality of Ransom Payments in the United Kingdom, the United States of America and Other Notable Jurisdictions

In justifying its necessity, the Bill's sponsor referenced laws and policies against payment of ransom in the United Kingdom ("UK") and the United States of America ("USA"). However, neither the UK nor the USA has enacted any legislation that imposes a blanket ban on ransom payments and criminalises the act of private citizens or entities paying ransoms to secure the release of kidnapped individuals, without more.

In the UK, the Terrorism Act 2000 (as amended) (the "UK Terrorism Act") criminalises the act of providing money or other property to fund terrorism, as well as money laundering to support terrorism and insurance company's reimbursing ransom payments used to support terrorism.¹¹ One important point to note is that the UK Terrorism Act requires actual or constructive knowledge that the provision of money or other property or other action would or may be used for terrorism. Additionally, the definition of terrorism also serves to limit the situations where prosecution will arise. Terrorism comprises actions or threats of action involving, inter alia, serious violence against a person or to property, which is designed to influence the government or to intimidate the public or a section of the public to advance a political, religious, racial, or ideological cause.

As such, individuals or corporations can only be prosecuted in the UK for paying ransoms to secure the release of a kidnapped person where they knew or had reasonable cause to suspect that it would be or may be used for actions that would constitute terrorism under the UK Terrorism Act.

As with the UK, no law institutes a blanket ban on the payment of kidnap ransoms in the USA. The Office of Foreign Assets Control ("OFAC"), a financial intelligence and enforcement agency of the USA's Treasury Department, compiles various sanctions lists of individuals, foreign governments, and organisations which Americans are barred from dealing with. Legislation such as the USA's Trading with the Enemy Act of 1917 make it illegal for American citizens, companies incorporated in or with a nexus to the USA to transact with citizens or organisations on any sanctions list. Individuals and entities can, thus, be fined or prosecuted for any kidnap ransom paid to any entity on the OFAC's sanctions list.

The OFAC has some discretion on whether to impose fines or pursue criminal prosecution of persons deemed to have transacted with a sanctioned individual or sanctioned entity. The OFAC developed enforcement guidelines which provide factors that OFAC will consider in determining whether to penalise erring persons. These factors include the actual or constructive knowledge of the person, the economic or other benefit obtained by the person from the non-compliance as well as whether the non-compliance was in furtherance of a humanitarian purpose.

Interestingly, the United Nations ("UN") Security Council, in 2014, unanimously passed Resolution 2133 (2014), which called upon states to prevent and suppress the financing of terrorist acts, and refrain from providing support to any entity or person involved thereto. Additionally, the aforesaid UN resolution called on states to prohibit their nationals, or any persons or entities within their territories, from making funds, financial assets or economic resources available for the benefit of those involved in terrorist acts.¹²

As with the laws in the UK and the USA, the resolution only addresses ransoms paid for kidnaps tied to terrorism and does not address other forms of kidnapping.

It is thus clear that the jurisdictions cited by the sponsor of the Bill cannot be used as justification for the Bill and its proposed purport. The Bill attempts to criminalise any act of payment of ransoms to secure the release of kidnapped persons, without the need for any connection with terrorism or the need for actual or constructive knowledge on the part of the payer. This contrasts with the laws in the UK and the USA which require the recipient of ransom payments to be tied to terrorism (UK) or the OFAC's sanctions lists which contain individuals/entities tied to terrorism, narcotics trade, or other activities posing threats to national security (USA).

Additionally, the UK's requirement for actual or constructive knowledge of the payer and OFAC's enforcement guidelines which provide guidelines on when OFAC should prosecute persons who pay ransoms to such sanctioned individuals, both serve to limit the instances in which persons can be prosecuted for paying ransoms. The fact that payment of kidnap ransom is not, in and of itself, illegal in countries like the UK and the USA can also be seen from the existence of kidnap and ransom insurance policies in these countries, with some reports estimating that about seventy-five per cent (75%) (or more) of Fortune 500 companies continue to purchase kidnap and ransom insurance in support of their operations.¹³

Effects of Enforcement of the Bill

Although, the Nigerian Government is making concerted efforts towards improving security, especially in its territorial waters, kidnapping, especially at sea, remains a significant insecurity problem in Nigeria. In the maritime sector, payment of ransom is often the only way owners or charterers of vessels can secure the release of kidnapped crew members and proceed with their journey. Where the payment of ransom simpliciter is criminalised without the need for proof of ties to terrorism and knowledge thereof, there could be significant effects on maritime industry as companies may be unable to provide adequate protection for their crew and this would lead to an increase in freight.

Similar concerns were raised by the International Association of Independent Tanker Owners ("Intertanko") in opposition to the work of the International Piracy Ransoms Task Force work on developing policy proposals to avoid, reduce or prevent the payment of ransom. Intertanko was quoted stating that:

"We must be certain that we can do whatever is necessary to secure [crews'] release in the event they are taken hostage. Payment of ransoms is the only guaranteed way to secure our seafarers' lives."¹⁴

Intertanko also stated that banning ransoms would not necessarily result in a reduction in incidents of kidnapping at sea, rather it could encourage increased violence in pirates to force owners/charterers or the crew's family to eventually pay up the ransoms.¹⁵

The problem with the ban on ransom payments can also be seen in Italy, one of the few nations which has a blanket ban on ransom payments without the requirement for ties to terrorism and whose laws also allow the government to freeze the assets of the kidnapped victim's family.¹⁶ Despite the aforesaid law, it is reported that Italy has paid ransoms to secure the release of kidnapped Italians. An investigation conducted by Al Jazeera discovered that the Italian government had paid millions of United States Dollars in ransom to terrorist groups in Syria and Somalia to secure the release of kidnapped Italians.¹⁷



This shows the complex issues which arise with any attempt to ban or criminalise ransom payments.

The economic considerations are also in addition to public policy considerations and public perception of prosecuting individuals or entities for merely trying to secure the safe return of their loved ones or employees who have been kidnapped. Although many countries have a government policy of not negotiating with terrorists or paying ransom, very few countries would be willing to prosecute individuals or entities for doing so. It should also be noted that majority of the conversations surrounding the criminalisation of ransom payments have been focused on the payment of ransom to secure the release of data stolen through cyber-attacks, where the only risk is to the economic interests of an organisation rather than a risk to life.

There may also be practical issues with enforcement of the Bill, including the definition of 'ransom' and where payments must be made in order to fall within the territorial jurisdiction of the Terrorism Act. The limited details provided about the Bill to date, do not provide sufficient information on how these issues will be handled. Existing legislations such as the Suppression of Piracy and other Maritime Offences Act ("SPOMO Act") do not define ransom either and in any event, only criminalises the act of receiving or demanding ransom in connection with piracy, not the payment of ransom.

Another possible negative consequence of enacting the Bill can be seen from the enforcement of Section 16(5) of the SPOMO Act which criminalises the failure to disclose information necessary to prevent the commission of or secure the apprehension of a person who has committed an offence under the SPOMO Act – in other words, failure to disclose details of ransom payment, where requested by the authorities, is a crime. In August 2020, three (3) people pleaded guilty and were convicted by the Federal High Court (Port Harcourt Judicial Division) pursuant to Section 16(5) of the SPOMO Act. However, the convicted individuals were alleged private security personnel who were engaged to negotiate the ransom for the kidnapped crewmen and to procure the said crewmen after their release.

At the maiden Nigerian Admiralty Law Colloquium organised for judges by the Nigerian Maritime Administration and Safety Agency ("NIMASA"), participants raised concerns as to the effect of convictions pursuant to Section 16(5) of the SPOMO Act on maritime business in Nigeria considering the spate of kidnapping within Nigerian waters. In response, the Director-General of NIMASA, Dr Bashir Jamoh, stated that the Agency was reviewing Sections 15 and 16 of the SPOMO Act and a draft bill will be sent to the National Assembly with a view to address this anomaly.

Conclusion

In conclusion, whilst the Senate's motives for introducing the Bill are laudable, there must be a greater appreciation for the multi-faceted causes of kidnapping in Nigeria and the need to find ways to address these issues, particularly improving the security apparatus in Nigeria (like NIMASA's ongoing Deep Blue Project), before seeking to convict those who pay ransoms.

For more information on this Article, please contact



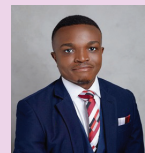
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