Co-ordinating an International Approach to the Payment of Ransoms:

Policy Options for Preventing the Payment of Ransoms

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25 May 2012
INTRODUCTION

This paper is the first in a series of three documents setting out and assessing the policy options for governments seeking to better coordinate their stances on the payment of ransoms in maritime piracy kidnap-ransom situations.

These papers should not be considered as endorsements of the methods analysed, but tools for policymakers to judge the potential for effectiveness in employing such measures in their efforts to combat maritime piracy¹.

This paper will assess potential options for the prevention of ransom payments through unilateral or multilateral action.

1. BACKGROUND

1.1 Average ransom demands have continuously risen since the emergence of the Somali piracy phenomenon in 2005

The international community has expressed growing concern about the persistent rise in the amounts paid in ransoms to secure the release of vessels, cargo and crew during piracy incidents. Commonly cited figures indicate that ransom payments have risen from an average of about US$ 500,000 per vessel captured in 2007 to US$ 4.97 million in 2011. Reports of record payments up to US$ 14 million indicate that this upward trend is unlikely to alter, and ransoms could continue to rise unchecked.

The payment of large sums to individuals clearly acting outside of the law is seen as rewarding criminality. Ongoing ransom payments also have political implications. The London Conference on Somalia in February 2012 signalled the international community’s commitment to support efforts to build stability and peace in Somalia. The concurrent growth of a criminal industry such as piracy, particularly if the international community appears passive on the issue, poses serious threats to these efforts.

1.2 Ransom payments are seen by the shipping industry as a necessity

The shipping industry strongly maintains that paying a ransom is the only reliable method for securing the safe release of captured vessels. A judgement at the Court of Appeal of England and Wales, which found that ransom payments do not go against public policy, supports the industry position. In the case of Masefield vs Amlin (2010), it was argued that ‘the only option’

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¹ Throughout this paper series, the term ‘piracy’ refers to the definition as specified by the United Nations Convention on the Law of the Sea (UNCLOS), but should also be taken to encompass acts of armed robbery at sea. While the scope of this paper is not confined to piracy emanating from Somalia’s coast, as the majority of hijacking incidents are carried out by Somali pirates, it is ransom payments for vessels captured by Somali groups which are the primary subject of this discussion.
to ensure the release of crews was to pay a ransom, adding that failure to do so could jeopardise the safety of other seafarers.

1.3 Blocking ransom payments might undermine the attractiveness of piracy

Piracy remains a criminal act driven by commercial interests. The millions of dollars received when ransoms are paid is divided up between various interested parties within a pirate network and diffused via often opaque connections throughout Somalia and into regional states such as Kenya and Ethiopia, the United Arab Emirates and beyond.

In addition to concerns that the amount demanded and paid out in ransoms seems to be rising unchecked, it is the reinvestment of ransom money into equipment useful for further hijacks which has led some policymakers to argue that paying ransoms endangers the lives of other seafarers.

Parts of the international community are pushing for ransom payments to be prevented, arguing that this could disrupt the pirate business model, starving it of funding and demonstrating to pirates that kidnap for ransom is no longer financially lucrative. African states affected by Somali piracy played a key role in raising these concerns at the London Conference, and actively sought agreements to outlaw ransom payments. However, it is equally possible that attempting to prevent ransom payments could push pirates to make even greater demands and to mistreat seafarers more heavily in their efforts to extract payment.

2. UNILATERAL ACTION TO PREVENT RANSOM PAYMENTS

2.1 Practical methods for a unilateral approach

A state wishing to unilaterally prevent ransom payments related to Somali piracy would need to introduce a framework of domestic legislation prohibiting private individuals or companies within its jurisdiction from making payments to entities or individuals specifically for the release of vessels, cargo and crew in piracy incidents off the coast of Somalia. This stipulation is quite specific, and a prevention of ransoms may actually be possible through the expansion or adaptation of existing legislation.

Whilst the international community’s initiatives to curb the funding of terrorism may provide lessons for similar efforts against piracy, it is a generally accepted notion that no strategic link can be ascertained between piracy and terrorism. Governments with tried and tested legislation on the proceeds of crime and on money-laundering may find these laws more useful for stopping ransom payments.

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2 This is not to assert that the separation is always clear-cut – a situation may become blurred if, for example, hostages captured by al Shabaab are transferred on to pirate groups.
For example, the European Union's (EU) anti-money laundering regulations identify certain sectors, including financial institutions and the legal sector, which have a particular obligation to put in place systems to report any suspicious transactions. Reports are then filed with the domestic government agency responsible for monitoring serious organised crime. If an EU Member government could, within its own jurisdiction, extend such a list to include industries likely to be the target of ransom demands from Somalia, this could have a prohibitive effect on ransom payment.

However in a situation where a state must introduce new legislation, for example where ransom payments are not already illegal, the state’s policymakers would need to make certain that any new legislation does not contradict existing laws, particularly those pertaining to human rights, as this could leave it open to challenge. For example, member states of the Council of Europe are bound by the European Convention on Human Rights (ECHR). In a situation where a European citizen has been captured by Somali pirates but ransom payments have been banned by their government, the right to life and to freedom of torture as set out in Article 2 and 3 of the ECHR could be used to challenge in court the state’s prohibition on the payment of ransom for that citizen’s release.

While the situation differs between states, to introduce new legislation making an act a criminal offence requires significant capacity from the legal and governmental bodies responsible for its drafting and implementation.

Italy and Colombia are examples of states which have introduced unilateral anti-ransom legislation. Although the motivation in each case was domestic, laws including the automatic freezing of the assets of a hostage and their family, and the banning of kidnap and ransom insurance could be replicated today by a state seeking to halt ransoms being paid to Somali pirates.

2.2 Situations in which unilateral sanctions have been effective

Existing unilateral attempts to sanction certain behaviours have had some impact when introduced by a state that wields enough economic and political clout internationally to induce the compliance of stakeholders based in other jurisdictions.

This was illustrated by the reaction to the United States Office of Foreign Assets Control (OFAC) regulations concerning individuals deemed to be undermining Somalia’s political stability, introduced in April 2010 by Presidential Executive Order 13536. The shipping industry expressed concerns that the regulations indicated the US authorities’ desire to eventually enforce a ransom ban, but there was industry compliance due to fear of jeopardising business interests in the US. It could be argued that if such regulations can be effective in helping policymakers to garner information from industry, then extending to a full ban on ransoms is unnecessary.

Politically speaking, the effectiveness of such sanctions can also be increased if they correspond with predominant international feeling.
2.3 Limitations to a unilateral approach
The highly internationalised nature of shipping would be the chief limitation to any attempt by a state to unilaterally ban the payment of ransoms in piracy cases. As a ship-owner, its insurer, the cargo owner, buyer and insurer, the vessel's crew and the flag of the ship could belong to different jurisdictions, the practical application of a ban would be particularly difficult for a state to unilaterally enforce. The international dimension of shipping would also make it relatively easy for a shipping company to move away from a state which had introduced bans on ransoms.

The time it would take for a government to decide to introduce a ban, for it to be implemented, and for there to be any observed effect on the piracy business model cannot be predicted. Even at the implementation stage, the government bodies responsible could face practical issues associated not only with the introduction of new measures but also with the particularities of Somali piracy. These could include: lacking the capacity to cope with a high number of requests from companies seeking to ensure that their activities do not breach any ban, the difficulty of identifying proscribed individuals where information is so limited and where stakeholders may be unwilling to share information.

3. MULTILATERAL ACTION TO PREVENT RANSOM PAYMENTS

3.1 Multilateral approach through international forum
A multilateral approach to prohibiting ransom payments would most likely begin through discussions at United Nations Security Council (UNSC) level. The UN has an existing sanctions regime on Somalia, initiated through UNSC Resolution 733 (1992).

3.2 Incorporating pirates under existing sanctions
Any sanctions regime imposed to prevent Somali pirates from making financial gain is likely to be targeted; focusing on prohibiting the transfer of funds or assets to specific designated individuals in a format similar to the UN’s ‘List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 1, 3 and 7 of the Security Council Resolution 1844 (2008)’, rather than focusing on particular economic sectors or a state or region as a whole.

UN Resolution 1844 stipulates that Member States should take necessary measures to freeze the economic resources and prevent the travel of any entity or individual perceived to be ‘engaging in or providing support for acts that threaten the peace, security or stability of Somalia’³. Pirates could clearly be designated as such individuals.

Paragraph 1 of the more recent Resolution 2002 (2011) broadens the number of factors for which states could take action against individuals or entities, meaning that if sanctions were

³ UN Security Council Resolution 1844 (2008), 8 (a)
sought multilaterally through the United Nations, figures deemed to be participating in piracy could be added to the existing list of proscribed individuals without the need for a further UN Resolution.

Issues would arise in states where ransom payments are not domestically illegal. The government agencies tasked with preventing organised crime have to deal with the problematic fact that the physical cash paid in ransom is not considered criminal, but this money is going toward people engaged in criminal activity. Organised crime agencies’ abilities to creatively deal with this issue will be crucial for effective implementation of any sanctions.

3.3 Potential limitations of multilateral sanctions
A key challenge would lie in the difficulty of identifying the individuals who should be targeted by sanctions, due largely to the opaque nature of the financial flows associated with piracy, and the proliferation of pirate networks over recent years.

Over twenty years of lacking state infrastructure has also left Somalia without records for its citizens, and so the international community is unlikely to glean information about Somalis suspected of piracy through its engagement with the Transitional Federal Government of Somalia (TFG). The TFG draws legitimacy almost solely from its international recognition, and on the ground it does not wield influence much further than the boundaries of Mogadishu. For government agencies responsible for enforcing sanctions against piracy, it would be expedient to liaise with the semi-autonomous administrations in Puntland and Galmudug regions where the vast majority of pirate attacks are launched from. Acknowledging the potential benefits of closer coordination with these authorities would not necessitate a recognition of their claims to autonomy.

A further factor which could limit the effectiveness of multilateral sanctions is the nature in which ransom payments are negotiated and transacted. Shipping industry figures who have been involved in negotiating for the release of hijacked vessels since the mid-2000s will have been in contact with individuals of interest to governments, but may be unwilling to hand over full details of interactions if it is perceived that this information might be used in a way that does not serve the industry’s interests.

Finally, there must be careful consideration of the position in the pirates’ financial network of the individuals or entities to be sanctioned. As well as those conducting hijacks and receiving the physical cash, sanctions could be placed on a variety of actors including interpreters and negotiators acting for the pirates, individuals supplying the ship with goods during the hijack and entities enabling cash to leave Somalia through unregulated hawala operations.

3.4 Likely consequences if a sanction on ransom payments is breached
A breach of sanctions would require criminal investigation. In deliberations surrounding whether a ban should be introduced, policymakers must take into account the views of their
law enforcement agencies. It is conceivable that law enforcement bodies would not see it as in the public interest to prosecute a shipping company or a family who have secured the safe release of their family members or employees through payment.

However, the government agencies responsible for the implementation of sanctions can put in place mechanisms to ensure that no party is unduly penalised for unintentional or unavoidable breaches of sanctions. For example, in the UK some prohibitive legislation entails defence clauses, allowing parties to defend themselves in cases where extenuating circumstances led to a sanctions breach.

While the obligation to ensure compliance is usually placed on a company or individual, agencies will provide support to sectors particularly vulnerable to sanctions. For example, in the UK the Financial Standards Authority actively ensures that banks have systems in place to avoid suspicious or illegal transactions.

Variations in interpretations of the sanction regime between signatory states may also cause inadvertent breaches, as multinational companies attempt to stay within the boundaries of slightly varying legislations. For example, in the UK sanction regimes have allowed contracts made prior to the introduction of sanctions to be honoured.

3.5 Drawbacks of sanctions

Although a multilateral approach could lessen the negative impacts of banning ransom payments on any particular state, in practice reaction to such a ban would still negatively affect states which are major locations to shipping industry sectors, particularly shipping insurers, such as the UK.

Regulation may also appear unclear in states which become signatories to multilateral sanctions on the banning of ransoms, when paying ransom is not against domestic law. The UK is just one state in which the payment of ransoms is not illegal.

Governments could be seen as criminalising victims of extortion.

CONCLUSION

While the most plausible method of preventing ransom payments would be through the introduction of international sanctions, the practical effectiveness of such actions would be curtailed by different governments’ reactions to the particular circumstances of any hijacking affecting its citizens or businesses within its jurisdiction, and the lack of guarantee that such measures will affect the piracy industry in the ways intended.
Because of the highly multi-national and, therefore, multi-jurisdictional nature of shipping, a ban that was only complied with by some states would undermine the ambition to make piracy completely unattractive, as for pirates there would still exist the possibility of capturing a vessel for which a ransom might be paid. Partial compliance could also increase the risk to captured seafarers, as those from states that prohibited ransom payments would become worthless to the pirates.

Public pronouncements of a commitment to end the payment of ransoms to pirates are not necessarily indicative of the actions that a government might take when its citizens or a vessel under its jurisdiction are in danger. Differences in the capabilities of states’ institutions responsible for the implementation of a ransom ban may also hinder efforts to prevent pirates receiving cash for release.

The evolution of piracy off the coast of Somalia since 2005 demonstrates the highly adaptable nature of those engaging in piratical activity. An international ban on ransom payments may disrupt the piracy business model as it currently exists, but could also push those involved to extort money through methods unforeseen and more difficult to track.

It is important to note that although piracy is a criminal activity buoyed by the promise of financial gain, this does not necessarily mean that solutions to it are best found through means of curbing those gains. Piracy is made possible by the trickle-down effects of ineffective governance and the lack of a formal state structure in Somalia, and so only if tackling the financing of the pirate business model comes as part of a multi-dimensional approach, can success be guaranteed.