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Thank you for inviting me to talk this morning. It is a real privilege to attend the Maritime Colloquium of the Franco-British Lawyers Society. I had the honour to speak to the society in 2008, when the Colloquium was held in the Naval College in Dartmouth, and I know that the society is blessed to be supported by a wide number of distinguished academics and practitioners, from both sides of the Le Manche. So to be asked to address you today is a very daunting prospect for a humble naval lawyer.

By way of introduction to myself, I should say that after being called to the Bar of England and Wales in 1999 I have served at sea and ashore in a number of posts, including as a lawyer in the Ministry of Defence; with British forces in Afghanistan; and on counter-piracy operations in the Indian Ocean. I currently hold the post of Fleet Legal Advisor and, together with my colleagues on the staff of the Director Naval Legal Services and our lawyers in theatre, I am responsible for delivering day to day legal advice to RN units around the world, including those involved in today's topic of counter-piracy.

At the outset, I should say that my focus will be on piracy off Somalia. But I think it is important to acknowledge that Somalian piracy accounts for only about 50% of all the maritime piracy that takes place throughout the world. The Malacca Straits, West Africa, South India, the South China Sea and the Caribbean are all areas where the last 10 years has seen an upsurge in pirate activity. But in these areas, the pirate threat is more sporadic and less well organised. And, particularly in the Malacca Straits, the regional response has been more effective. And, as the challenges off Somalia are, perhaps, greater, and certainly have attracted more of international community's attention, as well as the attention of most of the World's navies, it is to that topic that I will confine myself to today.

It is the lot of a naval officer to be expected to take the unexpected in his or her stride. And so it was that in June 2006, after receiving what is technically known as a 'peer-head jump', I was at short notice assigned as the Legal Advisor to Commander UK Maritime Forces, embarked in HMS ILLUSTRIOUS, one of the RN's aircraft carriers. I joined the ship in Mumbai and had only been onboard for about 45 minutes when I was whisked into the ops room to record an interview with Sky TV about the ship's counter-piracy mission. Over the next 15 minutes or so, Sky News's defence correspondent repeatedly put to me the line that it was problems with the law that were preventing the UK and its allies from effectively dealing with piracy.

As far as I know, my interview was never broadcast. And I suspect that was something to do with my refusal to give the interviewer the controversial line that he wanted. The line that I took then and the line that I take now remain the same: that although there are problems with the law when it comes to piracy, the law is not the biggest factor hampering our ability to effectively deal with pirates.

Nor do I believe – bringing me back to the context of this morning's session – that the challenges of territoriality are the biggest challenges that we face.

Much work has been done by the Contact Group on Piracy off the Coast of Somalia – the UN Body established following Security Council Resolution 1851 – into identifying and supporting the correct

legal framework for dealing with piracy and, in particular, the judicial disposal of pirates. And the fact that piracy is a criminal problem, with individual pirates to be dealt with as criminals, is at the heart of the international community's response to the problem. This approach is set out in Security Council resolution 1851, and other Resolutions on this subject. For example, Article 14 of UNSCR 1844:

“Calls upon all States... to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia...”

This focus on prosecution and criminal disposal of pirates is causing challenges to both the coastal states that receive the captured pirates and the navies whose job it is to catch them in the first place.

This counter-piracy policing role, although one that both the Royal Navy and the French Navy have performed over many centuries, is one that few of our current generation of Commanders expected to do when they embarked on their professional careers. It is a role that, until very recently, they were unfamiliar with and for which they had little training. The old Cold War certainties of fighting the Soviet hordes in the North Atlantic long ceased to apply. But also we do not have the comparative simplicity of dealing with the post-Cold War enemy of terrorists determined to attack our fundamental values.

The pirate 'enemy', so to speak, is a more fluid beast. He is motivated by profit, and in some cases, perhaps a genuine sense of desperation at the destruction of his livelihood by war on land and illegal fishing at sea.

The small, local vessel you spot on the Monday, could be a simple fisherman legitimately trying to earn a living, but on the Thursday the same vessel and the same fisherman could – either with cooperation or under coercion – be engaged in piracy. The scenarios our warships and their crews can find themselves in would challenge the most experienced police hostage negotiators. Kidnapping and ransom being the main *modus operandi* of the pirates, they know that the threat of force towards their captives can capture media attention, but they have been very careful not to gain a reputation for wanton cruelty. Only very rarely are crew members killed. With dozens of ships and hundreds of crew members being held hostage at any one point, they demand – and often receive – millions of dollars in ransoms. Ransoms which are usually covered by the ship's insurers. This is a well run and lucrative criminal business - one estimate puts the total value of ransoms paid in 2008 at over \$120 million - controlled by a few clan leaders, with safe havens in different parts of Somalia.

Nor must we underestimate the physical scale of the problem. The waters off Somalia susceptible to piracy are massive, over 1 million square miles – that is four times the area of France. Even the largest navies cannot provide anything like complete coverage. The International Maritime Organisation has estimated that the average time between a master spotting suspected pirates approaching his vessel and those pirates gaining control is between 15 and 30 minutes. When the *MV Mearsk Alabama* was attacked in 2009, the nearest warship, the *USS Bainbridge*, was over 300 nautical miles away. At maximum speed, it would take over 10 hours to get to the location of the attack. It is as much luck (aided by intelligence) that ships such as HMS CHATHAM and HMS LANCASTER were close enough to recent pirate attacks to be able to intervene and arrest the pirates on those occasions. And, as the UK found, when the a British couple, the Chandlers, were kidnapped in November 2009, even if there is a vessel close by – in that case the lightly crewed auxiliary ship *Wave Knight* – it can sometimes be impossible to intervene without putting the lives of the hostages at serious risk.

Let me for the rest of this talk address some of the legal issue, particularly those related to the question of territoriality.

I want to first comment on something that did generate a lot of discussion in the UK and between the UK and other states when we first became actively involved in counter-piracy missions: the difficulties of respecting Somalian sovereignty and its territorial seas when they are being used with impunity by pirates. Here the UK and US positions differed. The UK position was that, as there had been numerous Security Council resolutions calling on us to support the authority of the Transitional Federal Government, that we should not undermine that government by ignoring its rights over its territorial seas. The US position was that as, a failed state, there was no government and Somalia had effectively abandoned its territorial sea rights: on the face of it two very different positions. But in practice there was and is no question of a RN ship stopping just short of the 12 mile limit watching helplessly as pirates attacked another vessel. Either acting with the permission of the TFG, or in self-defence we would intervene. But as most attacks take place well into the Indian Ocean and only the most foolish master would sail so close to Somalian coast, this issue has not proven to be a problem.

Nor do I believe that there is an issue as to territoriality when it comes to intervening in Somalia itself. Of course, sovereign nations respect each other and their rights. But the UN, through US in the 1990s and the African Union most recently has regularly intervened in Somalia. With political will (and a Security Council resolution or two) these legal niceties can be set aside. The real problem, as AMISCOM experiences daily and the US found out is that the task of bringing peace and stability to a divided state that has been in chaos since the 1970s is no easy task. Without massive expenditure in manpower, resources, money and political capital no long term solution can be found.

But without these resources, the UK, France, the US, NATO, EUNAVFOR and all the other states that are faced with dealing with the most viable symptom of Somalia's disorder - piracy – have to wrestle with practical considerations of how to deal with pirates, and in particular, as the historic solution of summary execution is no longer an option, what legal mechanisms can operate to dispose of them.

The Legal Issues Working Group of the Contact Group on Piracy off the Coast of Somalia, when it met in August of last year, identified essentially three options: an International court; a Regional Court; or, domestic courts.

Let me say at the outset that I do not believe that regional courts or a new international court are practical solutions to the problem.

Whether the international community creates new bodies similar to the ICC, hybrid bodies, such as the Cambodia tribunal, or modifies and strengthens regional bodies, such as the African Court of Justice and Human Rights, a number of problems remain.

Perhaps the most significant practical one is: who will arrest the pirates, gather the evidence and prosecute the case. Without strong regional coast guards and navies at sea or land authorities ashore, these bodies will sit in judicial splendour without very much to do. Are the major powers to continue to police the seas in the way that they are doing now? If so, speaking from the perspective of somebody who has to advise our ships at sea doing this today, what benefits does a new tribunal, regional or international bring? Will a new court provide a faster means of disposal? I suspect not. The ICC was set up in 2002 yet, so far, not a single prosecution has concluded. And the experience of Yugoslavia, Rwanda and Cambodia suggests that the ICC is not alone in demonstrating that international justice does not run quickly.

And it should not be forgotten that tribunals such as those in Cambodia or the Former Yugoslavia only came about after the re-establishment of order and civil society. Conditions distinctly lacking in Somalia.

Will a new tribunal be cheaper? The ICC costs the best part of \$100 million per year. The ICTY has run at almost \$300 million. Even the Extraordinary Chamber of the Courts of Cambodia will cost \$20 million per year. Compare those costs to the \$8 million per year that the UN Office for Drugs

and Crime are putting into their efforts in supporting the authorities and courts in Kenya, Tanzania, the Seychelles and Somalia in their efforts to tackle the problem. If there are tens or hundreds of million of dollars to spend on a new court, I would argue that it would be far better spent on training and equipping the Kenyan and Seychelles coast-guards.

And what law will apply? The international tribunals that have been set up to deal with criminal matters have built on a long tradition of international humanitarian law and practice that had a defining event in Nuremberg. They have comparatively long jurisprudential traditions. They have dealt with the most serious of crimes, crimes against humanity and war crimes.

There are loud voices advocating that the ICC should be empowered to deal with a number of international crimes beyond the domain of war crimes. Human trafficking, arms and drugs smuggling and waste dumping are as equally threatening to the parts of the world where they happen as piracy. Is it right that an enhanced ICC or a new tribunal be limited to only one of these illegal activities?

No comparable court has existed before to deal with piracy. Admiralty courts and domestic courts have applied laws and practice of one jurisdiction (most frequently the British common law tradition). Is there really an appetite in the international community to create a new set of rules for evidence and procedure for such trials? The circumstances of a pirate attack are very different from a massacre in a Croatian village, and a wholesale adoption of practices and procedures from 'war crimes' courts would not, I suggest, be a practical approach. Similarly, do we need new statutes as to what actually amounts to piracy? Is UNCLOS Article 101 sufficient? It certainly isn't if the intention is to prosecute the leaders of the pirate clans. Even if the international political will is there to overcome these difficulties is there, I come back to my first point, it won't happen quickly. And with well over 100 suspected pirates in custody awaiting trial at the moment it is a problem that needs solutions sooner rather than later.

Some states, notably Germany and Russia have pushed for a new court, established under a UNSCR or a new treaty. So what is driving the move towards new courts? Is it problems of territoriality?

But if there is one crime in international law where territoriality should not be a problem it is piracy. For hundreds, if not thousands of years, pirates have been regarded as *hostes humani generis*, liable to the jurisdiction of every state. This concept is enshrined into modern law in Article 105 of the UN Convention on the Law of the Sea:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship ... and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed...

Article 100 of UNCLOS even goes as far as imposing a duty on all states to "cooperate to the fullest possible extent in the repression of piracy".

But what the upsurge of pirate activity over the last 10 years has revealed is that most states had done very little to take these commitments further.

Whilst the UK did incorporate the UNCLOS definition of piracy into domestic law in the Merchant Shipping and Maritime Security Act 1997, there is no single statutory offence of piracy. And some six or seven years ago, when I was asked to prepare a briefing note for the First Sea Lord and Ministers on the subject, I found myself exploring the dusty realms of the Territorial Waters Jurisdiction Act 1878, the 1837 Piracy Act, and even the 1536 Offences at Sea Act. And whilst the Piracy Acts of 1698 and 1721 have been repealed, there is no doubt that piracy *jure gentium* is recognised as an offence in English law. A English law equally recognises a very broad jurisdiction to try pirates, even if the piratical act was not committed by British subjects, or against a British ship, or in British waters. So, in theory, territoriality, does not present a problem to the prosecution of pirates in the UK.

That said, however, there are some very practical legal considerations that we must deal with, in the form of the Human Rights Act and the Police and Criminal Evidence Act.

Dealing with PACE first, from the moment that pirates are captured, their vessel and the vessel being attacked are treated as a crime scene and a burden is placed on the RN crew, and the service police man or woman onboard to gather evidence to support a prosecution. Witness statements have to be taken, photographic evidence recorded and weapons and other evidence seized. And whilst the UK position is that PACE does not apply extra-territoriality, it still provides the bench mark against which our police gather the evidence. So far, the conviction of a number of pirates before the Kenyan courts based on evidence provided by British ships shows that this approach is a practical one, but it remains to be seen if any failures in our ability to apply PACE in full would be fatal to any prosecution in the UK.

As for the Human Rights Act, considerable effort is made and guidance is given to our COs to ensure that the human rights of any pirates brought onboard a British warship are respected. From ensuring that the individuals are kept securely but safely, that they do not become the subject of unwarranted gawking by members of the ship's company, to provision of culturally sensitive meals, the task of keeping suspected pirates onboard a warship not designed for that sort of task for days or weeks presents some serious challenges to the RN.

And I am not revealing any state secrets to say that there have been some very different positions taken between the MOD on one part and the Department for Transport – the UK government department with the lead on piracy – over certain aspects of the Human Rights Act and our obligations under the ECHR: on issues such as the need to bring a detainee before a judge within 48 hours, for example. And we noted with considerable interest the decision of the Grand Chamber in the case of *Medvedyev v France*.

So whilst there is no problem with jurisdiction, we do recognise that there are potential legal difficulties with a prosecution in the UK. Nor, can we completely rule out political considerations that might preclude against the prosecution of pirates in the UK. One can just imagine the *Daily Mail* headline when the first Somalian pirate claims asylum in the UK before or after his trial.

But there is no need to bring pirates to the UK. A solution already exists in the form of the prosecutions in the domestic courts of the regional states.

Kenya has been at the forefront of these prosecutions. So far there have been 18 convictions and a further 105 suspected pirates are in custody awaiting trial. In the Seychelles there are 31 suspects also awaiting trial.

The UNODC has, as I have already mentioned, spent millions of dollars in improving the capacity for prosecution in the region. These countries start from a very low base, but they share a willingness to be part of the solution to piracy in the Indian Ocean. Memoranda of Understanding are in place between the UK, the USA and other powers and the Kenyan and Seychelles's governments. These Memoranda guarantee certain rights and ensure that the evidence presented to the local authorities by navies is in a way that can be used in local courts. Royal Navy officers have appeared as witnesses in court in Kenya and naval barrister colleagues of mine as well as from the Crown Prosecution Service have worked with prosecutors in Kenya and the Seychelles to improve their capacity to handle these, often complex, trials.

It is still early days, and these prosecutions have not been without their hiccups, both legally and politically, but there have been modest but genuine successes. And the fact that other states in the region are showing a willingness to get involved demonstrates, I think, that this approach is the right one.

Let me conclude by echoing the comments I made at the start of this talk and say that legal issues, whether of territoriality or otherwise are not fundamental blockers to dealing with piracy. Capturing

the pirates, prosecution and prison are not long term solutions. All piracy whether that of the Barbary States, in the Caribbean, or even, dare I mention, between England and France in the 13th and 14th Centuries, has only been resolved through political reform and development within the 'pirate' states, and the imposition of effective sovereign government. As Admiral William Gortney, Commander of US Naval Forces Central Command said before the US Congress:

“Ultimately, piracy is a problem that starts ashore and requires an international solution ashore.”

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