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Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts

I. Introduction

1. The present report is submitted pursuant to paragraph 26 of Security Council resolution 1976 (2011) of 11 April 2011, in which the Council requested the Secretary-General to report on the modalities for the establishment of "... specialized Somali courts to try suspected pirates both in Somalia and in the region, including an extraterritorial Somali specialized anti-piracy court, as referred to in the recommendations contained in the report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Mr. Jack Lang (annex to document S/2011/30), consistent with applicable human rights law ...". The request additionally specifies that the possible participation of international personnel and other international support and assistance should be included, that the work of the Contact Group on Piracy off the Coast of Somalia should be taken into account, and that concerned regional States should be consulted.

2. As the Special Adviser noted in his report,¹ the strengthening of the rule of law in Somalia remains the guiding principle underlying the proposal for the establishment of Somali specialized anti-piracy courts. The legal and the practical considerations for the establishment of such courts include the constitutional and the legal basis in Somalia, adequate criminal and procedural legislation for the prosecution of pirates, sufficient numbers of trained judges and other legal professionals, security, imprisonment facilities, financing, and the timeline for the establishment of such courts. These same considerations are also fundamental in respect of the establishment of an extraterritorial Somali court. These are the "modalities" that are the subject of this report.

3. Some of these matters are currently being addressed by the Somali authorities with the assistance of the United Nations Development Programme (UNDP), the United Nations Office on Drugs and Crime (UNODC) and the United Nations Political Office for Somalia (UNPOS) in the context of their work to develop the capacity of courts in "Somaliland" and "Puntland" to conduct piracy prosecutions. The report draws on that experience in assessing, in section II, the modalities for the establishment of specialized anti-piracy courts in Somalia, and in section III, the

¹ See S/2011/30, paras. 116-118.



modalities for the establishment of an extraterritorial Somali specialized anti-piracy court to sit in another State in the region.

4. There are also five annexes to the report. Annex I updates the information set out in the reports of the Secretary-General dated 26 July 2010 (S/2010/394) and 27 October 2010 (S/2010/556) concerning incidents of piracy off the coast of Somalia and numbers of prosecutions by States. Annex II describes the political and legal framework within Somalia, and the security situation. Annex III contains information provided by UNDP concerning the numbers and level of training of judges, prosecutors, defence lawyers and police investigators in each of the regions of Somalia, and information about legal professionals among the Somali diaspora. Annex IV contains information about the financiers and planners of piracy, and the scope for information sharing, investigation and prosecution of such acts. Annex V updates the information on piracy prosecutions by other States in the region and United Nations assistance to those States.

5. In the preparation of this report, the Legal Counsel and other senior officials of the Office of Legal Affairs have conducted a number of consultations, including through two trips to the region.² Those consulted were the Transitional Federal Government of Somalia, the regional authorities of “Somaliland”, “Puntland” and “Galmadug” within Somalia, a number of other regional States, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (ICTR), as it is identified in the report of the Special Adviser as a possible location for an extraterritorial Somali specialized anti-piracy court, and the Department of Safety and Security of the United Nations Secretariat. Through these consultations, the views of the Transitional Federal Government and the Somali regional authorities have been obtained on the possible establishment of an extraterritorial Somali anti-piracy court, and preliminary views of other regional States have been obtained on the possibility of hosting such a court in their territory. The Transitional Federal Government and the Somali regional authorities have also been consulted on the proposed establishment of specialized Somali courts to try suspected pirates in Somalia.

6. In this report, the term “United Nations participation” is used to refer to participation in a judicial mechanism by judges, prosecutors and/or staff selected by the United Nations. It is to be distinguished from “United Nations assistance”, which refers to technical assistance by the United Nations to assist a State or judicial mechanism to build its capacity.

II. Modalities for the establishment of Somali specialized anti-piracy courts in Somalia

7. The United Nations, through UNDP and UNODC, working in cooperation with the Transitional Federal Government and Somali regional authorities, are providing assistance to anti-piracy prosecutions in “Somaliland” and “Puntland”. This

² The consultations took place in Dubai on 18 and 19 April 2011, by telephone from New York on 4 May 2011, and in Nairobi on 26 May 2011.

assistance aims to build capacity in the assize sections of the regional and appeal courts in those regions as they are the courts that have jurisdiction over, and are currently prosecuting, acts of piracy. The assize sections also have jurisdiction over other serious crimes. The aim is to assist courts in each of these regions to conduct prosecutions of piracy and other serious crimes to international standards, in particular, fair trial and due process guarantees, so as to enable the transfer of suspected pirates by naval States to “Somaliland” and “Puntland” for trial.

8. The Special Adviser’s consultations with UNDP and UNODC during the preparation of his report focused on their work with the courts in “Somaliland” and “Puntland”. In this respect, UNDP and UNODC consider that their ongoing work is addressing the Special Adviser’s recommendation concerning the proposed establishment of specialized anti-piracy courts in Somalia.

9. If, on the other hand, the reference to the establishment of specialized anti-piracy courts in Somalia concerns the possible establishment of new additional Somali courts at the federal or regional level, dedicated to conducting piracy prosecutions, the Transitional Federal Government and the Somali regional authorities indicated in the course of consultations with the Office of Legal Affairs that new additional anti-piracy courts are not envisaged.³

10. The overall objective of the current United Nations support is to assist the Somali justice system to prosecute piracy suspects in accordance with international standards, in particular, fair trial and due process guarantees, and to imprison those convicted in accordance with international human rights standards, thereby enabling naval States to transfer piracy suspects to Somalia. The programmes aim in particular to develop the courts at Hargeysa and Berbera in “Somaliland”, and at Boosaaso and Garoowe in “Puntland”. UNDP and UNODC estimate that this support will enable “Somaliland” and “Puntland” to prosecute around 20 additional cases each per year. In general, each piracy case typically involves around 10 accused. Prosecutions in these regions focus on the “low-level” suspects rather than on more complex cases of financing and planning piracy.⁴

11. The modalities for the effective functioning of anti-piracy courts in “Somaliland” and “Puntland” include: consideration of the legal basis and jurisdiction of such courts; the need for an appropriate criminal and procedural legislative framework for piracy prosecutions; the need for reconstruction of courthouses and other infrastructure; the training of judges and other legal professionals; security; evidentiary and related matters; the time necessary to bring prosecutions up to international standards; cooperation with third States, particularly naval States; costs and financing; and imprisonment arrangements.

A. Legal basis and jurisdiction

12. The assize sections receiving assistance from UNDP and UNODC are within the existing regional and appeals courts in “Somaliland” and “Puntland”. These courts are already established within the existing Somali constitutional and legislative framework. The establishment of new Somali courts, or the establishment

³ The consultations were conducted in Nairobi on 26 May 2011.

⁴ See annex IV.

of new sections within the existing courts, on the other hand, either at the federal⁵ or the regional level, dedicated to or specializing in prosecuting piracy cases, would require a constitutional and legislative basis in Somalia. The Transitional Federal Government and relevant Somali authorities would need to establish such constitutional and legislative basis, and to consider whether there is a question of compatibility with the relevant provisions of the 1960 Constitution of the Somali Republic and the 2004 Transitional Federal Charter for the Somali Republic.⁶ The relevant Somali authorities would need to determine whether the establishment of new courts, or specialized sections within the existing courts, would require amendment of the Transitional Federal Charter.⁷ The power to amend the Transitional Federal Charter lies with the Transitional Federal Parliament. A motion for amendment requires the support of at least one third of the members, and for the motion to pass requires the support of at least two thirds of the members. UNPOS advises that this may be difficult in the current political climate.

13. While the “Somaliland” and “Puntland” assize sections both have jurisdiction over crimes of piracy, the territorial and personal scope of their respective jurisdictions differ. The “Somaliland” courts exercise jurisdiction exclusively in respect of offences where there is a connection with “Somaliland”. This includes, for example, offences committed on the territory of “Somaliland”, and offences where the perpetrators are from “Somaliland”. If this remains the case, any future agreements with naval States for the transfer to “Somaliland” of suspects for trial are likely to be similarly limited. The jurisdiction of the “Puntland” courts, on the other hand, is more extensive. They may also take jurisdiction over acts of piracy where there is no connection to Somalia or to “Puntland”. In the event of the establishment of new courts dedicated to the prosecution of pirates, the Transitional Federal Government and the Transitional Federal Parliament, and relevant regional authorities, as appropriate, would need to determine the territorial and personal scope of their jurisdiction.

B. Criminal and procedural legislative framework for the prosecution in Somalia of acts of piracy

14. UNDP and UNODC assessments⁸ indicate that the criminal and procedural codes across the three regions of Somalia are critically out of date, containing numerous inconsistencies and deficiencies. Only “Puntland” has a piracy law, but this contains a definition of piracy that is inconsistent with the provisions of the

⁵ The federal level courts provided for in art. 60 of the Transitional Federal Charter are the Transitional Supreme Court and the Transitional Appeal Court. However, the courts will not function until a new Somali Constitution is adopted and Parliament adopts legislation to constitute a federal judiciary.

⁶ Para. 1 of art. 95 (Unity of the Judiciary) of the 1960 Constitution, and para. 1 of art. 57 (Judicial Principles) of the 2004 Transitional Federal Charter prohibit the establishment of “extraordinary or special courts”; para 2 of art. 95 of the 1960 Constitution states that “[t]here may only be established, as part of the ordinary courts, specialized sections for specific matters [...]”; art. 57 of the 2004 Transitional Federal Charter has no equivalent provision.

⁷ Para. 2 of art. 71 of the Transitional Federal Charter states that “The 1960 Somalia Constitution and other national laws shall apply in respect of all matters not covered and not inconsistent with this Charter. It remains to be seen what the constitutional position will be following the end of the transitional period in August 2011.

⁸ Their assessments are set out in annex II.

United Nations Convention on the Law of the Sea. Prosecutions in the regions of Somalia to date have been conducted on the basis of other criminal offences, including illegal possession of weapons. The southern central region of Somalia has suffered an almost total absence of law reform for nearly 30 years. Progress on the adoption of adequate criminal and procedural legislation is therefore needed to provide a sound basis for piracy prosecutions in Somalia. In order to enable “Somaliland” and “Puntland” to receive the transfer of suspects from naval States, “Somaliland” and “Puntland” would need to prosecute piracy suspects in accordance with international standards. Through the Kampala process, UNPOS is encouraging the transitional federal institutions to pass counter-piracy legislation before the end of the transitional period.

15. UNDP and UNODC have brought together legal drafting experts from “Somaliland”, “Puntland” and southern central Somalia under the guidance of United Nations legal experts to draft legislation relevant to piracy prosecutions. The longer term aim is to ensure that all codes relevant for investigation, prosecution, trial and imprisonment provide an adequate legal and procedural basis. Although draft piracy legislation was agreed among the experts in the drafting process, only “Puntland” has adopted it. The Transitional Federal Parliament decided not to enact it, the “Puntland” parliament enacted the law in 2010, but changed the definition of “piracy” to include illegal fishing,⁹ and the “Somaliland” parliament is still considering it. As a necessary second step, a new Prisoner Transfer Law has been developed by the legal experts, and a Prison Law is being worked on.

C. Premises

16. “Somaliland” and “Puntland” have a shortage of useable courtrooms and other necessary infrastructure, and difficult working conditions in-country.¹⁰ A major element of the UNDP and UNODC programmes is therefore the construction or refurbishment of courthouses in each region. In “Somaliland”, the construction of a secure new courthouse in Hargeysa and the rehabilitation of the Berbera regional and appeal courts are complete. In “Puntland”, the rehabilitation of the Boosaaso regional and appeal courts is complete. The majority of piracy prosecutions to date have been heard in these courthouses. UNODC will be constructing further new courthouses in Hargeysa, “Somaliland”, and in Garoowe, “Puntland”. They are expected to be complete in early 2012. The next step will be to provide essential equipment, including equipment for recording trials, office furniture, computers and information technology equipment, and scanners for security.

D. Training of judges and other legal professionals

17. UNDP’s assessment of the numbers and level of training of judges, prosecutors, defence lawyers and police investigators in each of the regions of Somalia is set out in annex III. Less than 10 per cent of judges and prosecutors in Somalia have undergone any formal legal training. The majority of judges have a limited understanding of criminal laws and court procedures, and are not equipped to hear serious criminal cases, including piracy.

⁹ “Puntland” Law No. 6 of 18 December 2010.

¹⁰ See annex II.

18. To address the limited number of qualified legal professionals in Somalia, UNDP and UNODC, in cooperation with local law faculties, are beginning training to enhance relevant capacities of judges, prosecutors, police investigators and defence counsel in “Somaliland” and “Puntland”. The programme begins with foundation training, including substantive laws, procedures and essential skills. Advanced courses, which will be facilitated by local law faculties and an international legal education expert, will start in mid-2011. A priority area will be the training of judges in criminal law, in particular piracy offences, rules of procedure and evidence, transfer arrangements from naval States, legal and statutory analysis, case management, and judicial ethics. An international judicial expert will also support the work of the High Judicial Councils in “Somaliland” and “Puntland” to assist them in understanding their role in overseeing the judiciary, developing best practices, and enhancing fair trials in accordance with international standards.

19. Prosecutors will be trained in the prosecution of piracy and organized crime, case preparation and advocacy. Training of the police in investigation techniques and forensics is under way. Significant numbers of police investigators in “Somaliland” and “Puntland” have been trained to the level where they are now competent to prepare a piracy trial.¹¹ In support of all training, legal resource materials will be provided, as will transportation to enable judges and prosecutors to attend trials.

20. Training of defence counsel has already been taking place through bar associations and university law faculties within Somalia. The number of trained defence counsel remains low, particularly in “Puntland”. This has led to the majority of piracy suspects in that region being without legal representation. To improve the situation, UNDP plans to provide paralegals to work in detention centres and prisons to provide advice and assistance to defence lawyers in the preparation of cases. UNDP is assisting in the funding of defence lawyers in both regions through the legal aid system.

E. International participation

21. Given the limited number of qualified local legal professionals, arranging for assistance to investigations and prosecutions by international experts may serve to speed up the timeline for attaining trials to international standards. To date, this has not formed part of the UNDP and UNODC programmes in Somalia, the focus of which is on training to increase the capacities of local legal professionals. International expertise is being used for training purposes rather than through assistance in the proceedings. UNODC consultations suggest that the authorities of both “Somaliland” and “Puntland” would welcome such assistance from international experts to assist and mentor the assize sections of the courts and police investigations. However, they do not favour foreign nationals participating in proceedings in judicial or prosecutorial posts, nor is there a current legislative basis for such participation.¹²

¹¹ See annex III.

¹² This is different from the situation in Seychelles, which has a small population and legal profession, and consequently, a tradition of accepting the participation of judges, prosecutors and police on secondment from other Commonwealth jurisdictions.

22. UNODC considers that assistance and mentoring by international experts could accelerate the achievement of international standards by the “Somaliland” and “Puntland” courts, and complement the capacity-building training that is being conducted. These individuals would need significant experience in conducting serious criminal cases, and an understanding of the Somali court system. Fluency in Somali would be an advantage, as all proceedings take place in this language. Nominations of suitable legal professionals by the African Union might be one possible source of expertise.

23. The Special Adviser recommended that international expertise be drawn from the Somali diaspora. To establish the extent to which it might be possible to identify and contact legal professionals among the diaspora, the Office of Legal Affairs sent enquiries to the “eminent persons” consulted by the Special Adviser and to 17 bar associations and law societies in countries in Europe, the Middle East and Africa with significant Somali populations.¹³ Through these enquiries, the Office of Legal Affairs was able to ascertain that there are a number of suitably qualified and experienced individuals living in Europe, the United States and Canada who could be contacted to determine whether they would be willing to assist and mentor local professionals or to serve in an extraterritorial court. Many of these had served as legal professionals in Somalia prior to the 1990s. The Somali Law Council, based in London, has made contact with lawyers in Somalia (Mogadishu and Garowe) and in Europe, including the United Kingdom, Italy and Sweden, and has identified 36 legal professionals, both male and female, who would be interested in participating in anti-piracy courts either inside or outside Somalia.

24. The Netherlands Bar Association noted that it would be difficult for it or any other bar association in the European Union to identify lawyers among their membership by reference to their national origin. The Canadian Bar Association similarly responded that its records were not kept in a manner that would allow for the identification of lawyers of Somali origin. The response rate from other bar associations and law societies was low.

25. If international participation in Somali courts were through United Nations-selected judges or prosecutors,¹⁴ then a Security Council mandate would be necessary for the Secretary-General to negotiate a suitable agreement with the Transitional Federal Government for this purpose. Such agreement would need to regulate the necessary modalities for the participation of the United Nations in a national court. It should be underlined that, while United Nations assistance has the purpose of enabling Somali courts to move towards the achievement of international standards of due process, United Nations participation in a Somali national court would require that the national court meet international standards. To this end, agreements between the United Nations and States concerning United Nations participation in courts have invariably established a framework for such participation within which the judicial decision-making procedures enable the international judges to ensure that international standards of due process are met.

¹³ The details of these consultations are set out in annex III.

¹⁴ Along the lines of the Extraordinary Chambers in the Courts of Cambodia.

F. Security

26. The security situation in Somalia, including in “Somaliland” and “Puntland”, is described in annex II. Pirates have a level of support among sections of the population, and terrorist threats have been associated with the prosecution of piracy suspects. Security for courthouses and for judges, other legal professionals and witnesses is therefore a matter to be addressed. Security considerations have been a major factor in the construction and refurbishment of courthouses in “Somaliland” and “Puntland”. The construction of courts has been proposed for Hargeysa in “Somaliland”, and Garoowe in “Puntland”, as the most secure locations in each region. Transportation of suspects to court has to take place under heavily armed guard.

27. The provision of security and the associated costs are matters that would also need to be taken into account when considering assistance by international experts in “Somaliland” and “Puntland”. UNDP and UNODC consider that the security situation in Mogadishu and in southern central Somalia prevents the delivery of assistance to courts situated in that region on the same scale as is proposed for “Somaliland” and “Puntland” at this stage.

G. Imprisonment

28. Increasing the capacity in “Somaliland” and “Puntland” to prosecute piracy suspects in accordance with international standards, and thereby enabling them to receive transfers of suspects from patrolling naval States, may meet a bottleneck if there are insufficient corresponding prison arrangements that meet international standards. One regional prosecuting State has made the availability of imprisonment in Somalia a precondition for accepting an increased number of piracy suspects from naval States for prosecution.¹⁵

29. UNODC has obtained some of the funding to build two new prisons, one in “Somaliland” and one in “Puntland”, to deliver a total of 1,000 prison spaces for pirates convicted outside Somalia. The prisons will be constructed, and their running mentored to ensure that they meet international standards. The programme will include training, law reform, assistance with transfers of prisoners, and independent monitoring of standards. It will take approximately two years for these prisons to be available for use.

30. Current prison capacity in “Somaliland” and “Puntland” is not sufficient and falls short of international standards.¹⁶ UNODC is renovating existing prison facilities, most of which lack basic medical facilities, water, sanitation and trained staff. UNODC is also conducting extensive training of “Somaliland” prison staff in modern custodial practices, and similar training has commenced at Boosaaso prison in “Puntland”.

31. UNODC recently opened a new prison in Hargeysa, “Somaliland”, and UNDP is working to open a new prison in Qardho, “Puntland”. Both of these facilities are required to house existing prisoners currently held in poorly maintained and overcrowded prisons. Among the prison population at the prison in Boosaaso,

¹⁵ Seychelles.

¹⁶ Assessments of prison conditions in this section were made by UNDP and UNODC.

“Puntland” is a small number of persons transferred by foreign naval forces. They are held there, both before and after trial, in extremely poor conditions. Improvements are under way but will create limited extra prison capacity to international standards. All of these prisons are primarily designed to hold the existing prison population in these regions. As such, they would not be able to accommodate further persons convicted of acts of piracy, whether by Somali courts or courts in other regional States.

H. Cooperation with third States

32. For the courts being developed in “Somaliland” and “Puntland” to be able to receive suspects captured at sea by naval forces for prosecution, and for “Somaliland” and “Puntland” prisons to be able to receive those convicted in third States for imprisonment, will require agreements between the relevant Somali authorities and third States. There are not yet any agreements between naval States and Somalia. There are, however, a number of precedents for agreements for the transfer of suspects from naval States and organizations to other States in the region for prosecution. These agreements provide a legal and procedural framework between the States and organizations concerned for the transfer of custody of the suspects and for their treatment and trial in accordance with applicable international human rights standards. Such precedents could be drawn on as a basis for the negotiation of similar transfer agreements by the Somali authorities.

33. The recent signing of memorandums of understanding between Seychelles, the Transitional Federal Government, “Somaliland” and “Puntland”, concerning the transfer of convicted persons from Seychelles to prisons in Somalia, in particular in “Somaliland” and “Puntland”, are the first such arrangements entered into by Somali authorities. Similar to arrangements entered into by States with the United Nations and United Nations-assisted criminal tribunals, these memorandums of understanding set out the agreement of the Somali authorities to consider any requests for the transfer of convicted persons on a case-by-case basis. They do not amount to agreements that all persons convicted in Seychelles will be received in Somalia. They provide a legal and procedural framework for such transfers to occur, and for the treatment of the convicted persons in accordance with applicable international human rights standards. The negotiation of the memorandums of understanding by the Somali authorities and Seychelles was assisted by the Chair of Working Group 2 of the Contact Group on Piracy off the Coast of Somalia,¹⁷ and by UNODC.

I. Evidentiary and related matters

34. In the course of discussions within Working Group 2 of the Contact Group on Piracy off the Coast of Somalia, a number of limitations and difficulties faced by national prosecutions have been identified and suggestions for improvements discussed. These have included: the gathering of evidence by naval States and its transfer to regional prosecuting States; the difficulties of securing attendance of witnesses at trials, and the possibility of witnesses giving evidence by video link.

¹⁷ Ambassador Thomas Winkler, Under Secretary for Legal Affairs, Ministry of Foreign Affairs of Denmark.

35. Initial problems associated with the gathering of evidence by naval forces and its transfer to the regional prosecuting States, in particular Kenya and Seychelles, appear to have been overcome by guidance developed by those States with the assistance of UNODC. The States concerned report that it is no longer the case that the quality of evidence gathered by naval forces is an obstacle to successful piracy prosecutions. In practice, as each of these States is a common law jurisdiction, the procedural and evidentiary requirements are largely similar and have not posed challenges to the naval forces in gathering evidence associated with different procedural or evidentiary requirements between these States. As the procedural aspect of Somalia's criminal law is based on the common law tradition, it is hoped that the development of new criminal legislation in "Somaliland" and "Puntland" will also provide for similar procedural and evidentiary rules to those of Kenya and Seychelles, and that guidance to be developed with UNODC will ensure that, in practice, naval forces do not face a multiplicity of evidentiary requirements.

36. In practice, the task of ensuring attendance of military witnesses at trials in regional States has fallen to the naval States concerned, and UNODC has taken on the task of facilitating the attendance of civilian witnesses. Similar arrangements are anticipated for trials in "Somaliland" and "Puntland". Although it can take considerable effort and significant time, the attendance of all witnesses at the trials in Kenya and Seychelles to date has been secured. In the course of Working Group 2 discussions, the shipping industry has been encouraged to assist by looking at possible contractual means of facilitating the availability of merchant seamen.

37. A suggestion that has been made a number of times in Working Group 2 discussions and in the report of the Special Adviser (S/2011/30) is that there should be greater use of witness evidence by video link. It is anticipated that the code of criminal procedure to be developed with the Somali regional authorities will permit such evidence. However, experience from Kenya and Seychelles, where video link evidence is permissible, would suggest that it is of limited use in practice. The common law tradition is that contested evidence should normally be given in person to allow for cross-examination before the judge. It is a matter for the discretion of the judge whether to allow video evidence on a case-by-case basis. Further, video evidence is subject to a number of technical challenges, given the lack of suitable wide bandwidth infrastructure in many regional States, including Somalia, and the need to ensure that compatible infrastructure and equipment exists at the witness' location.

J. Timeline

38. Immediate steps have been initiated under these programmes of assistance in "Somaliland" and "Puntland", including work on law reform, commencement of the training of judges, prosecutors and other legal professionals, the provision of further basic infrastructure, and the building of new prisons. Further initial steps will take place within 12 months, such as foundation training for judges and other legal professionals. Additional prison capacity will be available in around two years. The full programmes of assistance in "Somaliland" and "Puntland" will run for three years, after which time UNDP and UNODC estimate that piracy trials in these regions will achieve international standards. An additional programme of assistance to the assize sections by appropriately experienced international experts to shorten this timeline to some extent could be considered. Additional funding over and above

that requested by UNDP and UNODC might also help to accelerate progress and shorten the timeline.

39. In the event of a decision that United Nations-selected judges or prosecutors should participate in these courts, the Secretary-General would require a mandate from the Security Council to negotiate an agreement to this effect with the Transitional Federal Government, in consultation with the relevant Somali regional authorities. A constitutional and legislative basis for such participation in national courts would be needed, and the Government and the relevant Somali authorities would need to determine whether there is an issue of compatibility with the provisions of the 1960 Constitution and the Transitional Federal Charter, and, if necessary, to consider amendment of the Transitional Federal Charter by the Transitional Federal Parliament. United Nations participation in a national court would require special decision-making rules to provide a framework within which the international judges could ensure that international standards of due process are met. It is not possible at this stage to predict how long such negotiation might take. Previous negotiations of agreements between the United Nations and States have taken between one and nine years.¹⁸

K. Costs and financing

40. The costs of implementing the above programmes in “Somaliland” and “Puntland” over the next 12 months are estimated as follows. The cost of the UNDP programme to enhance the capacity of the judiciary and police, the High Judicial Council, defence counsel, and the provision of basic infrastructure to the courts is estimated at \$8,500,000 over three years. This would include \$2,686,000 in the first year, \$3,261,000 in the second year and \$2,561,000 in the third year. The UNDP costs figures break down as follows: personnel and training, \$1.9 million; judicial and court reform, \$0.9 million; legislative reform, \$0.5 million; legal defence, \$0.8 million; prosecution, \$1.1 million; protection of judicial personnel, \$1.4 million; independent monitoring of trial proceedings, \$0.15 million; UNDP staff, security and travel, \$1.2 million; and UNDP support costs, \$0.558 million. UNDP has received \$908,567.59 from the Trust Fund, which allows for commencement of phase one of this programme.

41. The cost of the UNODC programme is estimated at \$12,406,640 for the first year, \$1,964,040 for the second year, and \$1,564,040 for the third year. So far, \$8 million has been pledged. The UNODC costs figures break down as follows: personnel and training, \$1 million; construction of prisons and courthouses, \$11 million; operations, \$0.8 million; law reform, \$0.1 million; independent monitoring of prisons, \$0.15 million; flights for transfer of suspects, \$0.75 million; and UNODC project support costs, \$3 million.

42. The total cost of all UNDP and UNODC programmes over three years to develop the courts in “Somaliland” and “Puntland” and prison facilities will therefore amount to \$24,434,720. These figures do not include the salary and other costs for Somali staff, which are met by the Somali authorities. UNPOS has underlined that continuing funding will be required to ensure that new and upgraded facilities are sustained beyond the programmes.

¹⁸ See annex I of S/2010/394.

43. The salary and security costs associated with any assistance by international legal experts, or through participation in the courts by United Nations-selected judges or prosecutors, would be in addition to these figures. The closest comparisons with other courts or tribunals where there has been international participation may be the Special Panels established in East Timor, and the Bosnia War Crimes Chamber. The cost of the Special Panels in East Timor for the period 2003 to 2005 was \$14.3 million. The average annual cost of the Bosnia War Crimes Chamber for the period 2005 to 2009 was 13 million euros.¹⁹ In the event of participation by United Nations-selected judges and prosecutors in national courts in Somalia, the closest comparison may be the Extraordinary Chambers in the Courts of Cambodia, which is a Cambodian national court with participation by United Nations-selected judges and a prosecutor, and also United Nations staff. It has a total budget (for the international and national components) of \$92.3 million for the biennium 2010-2011.

44. The funding for the UNDP and UNODC programmes to develop the courts in “Somaliland” and “Puntland” comes from voluntary funding, and has been requested from the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia, administered by the United Nations. The Trust Fund has been an instrumental mechanism to support projects in this field. The objective of the Trust Fund is to support prosecution and detention-related activities as well as other priorities related to implementing Contact Group objectives concerning combating piracy in all its aspects. If there were participation in Somali national courts by United Nations-selected judges or prosecutors, it would be for Member States to determine whether the costs associated with the international component of such courts should be met from voluntary contributions or from United Nations assessed contributions.

45. Since its inception, the Trust Fund has supported 15 projects with a total value of around \$7 million. The approved projects include initiatives aimed at strengthening the criminal justice and law enforcement systems for combating piracy in Somalia, Kenya and Seychelles. The Trust Fund is a central financing instrument for the implementation of the recommendations of the report of the Special Adviser. The Security Council, in resolution 1976 (2011), has urged support through the Trust Fund for the recommended judicial and detention-related projects.

III. Modalities for the establishment of an extraterritorial Somali specialized anti-piracy court to sit in another State in the region

46. The Special Adviser identified the advantages of an extraterritorial court as being to help strengthen the rule of law in Somalia, acting as a focal point for regional and international support to that end, and as being swift and inexpensive to establish if located within the premises of ICTR in Arusha, but without United Nations participation in the court. The Security Council, in paragraph 26 of resolution 1976 (2011), requested the Secretary-General to consult concerned regional States as potential host States for the extraterritorial court. To this end, the consultations conducted by the Legal Counsel and other senior officials of the

¹⁹ Ibid.

Office of Legal Affairs have included the Transitional Federal Government and the regional authorities within Somalia, Kenya, the United Republic of Tanzania, Seychelles, Mauritius and Djibouti. The ICTR, the Department of Safety and Security, UNDP, UNODC, UNPOS and the Department of Political Affairs have also been consulted.

47. The proposal is for an extraterritorial Somali specialized anti-piracy court. This could refer either to an existing Somali court, to be located extraterritorially, or to a court or special section of a court established for the purpose. In practice, the existing courts in Somalia are regional courts. Although federal level courts are provided for in the Transitional Federal Charter, these will not function until a Somali constitution is adopted and a Somali parliament constitutes the judiciary. UNODC consultations with the Special Adviser during the preparation of his report suggested that an extraterritorial court might be a court of southern central Somalia,²⁰ located extraterritorially, rather than of “Somaliland” or “Puntland”, as the courts in those regions are being developed in situ. The security situation in “Somaliland” and “Puntland” permits such development, whereas the security situation in southern central Somalia does not at this stage.²¹

48. If, on the other hand, the extraterritorial court were to be a newly established Somali court, or a newly established special section of an existing court, either at the federal or the regional level, dedicated to or specializing in piracy prosecutions, then the Transitional Federal Government and the relevant Somali authorities would need to determine firstly how to establish its constitutional and legislative basis in Somalia. They would also need to address the question of whether there is an issue of compatibility with the provisions of the 1960 Constitution and the Transitional Federal Charter of the establishment of extraordinary or special courts, and whether any amendment of the Transitional Federal Charter would be required.

49. The modalities for the establishment and effective functioning of an extraterritorial court include consideration of the views of the Somali authorities and of potential host States, the legal basis and jurisdiction of the court, the need for an appropriate criminal and procedural legislative framework for piracy prosecutions, premises, security, the need for trained judges, prosecutors and other legal professionals, cooperation with third States, evidentiary and other issues, detention and imprisonment arrangements, the time necessary for the establishment and functioning of the court, and costs and financing.

A. Views of the concerned States

50. Since the proposal is for the establishment in a third State of a Somali court, it follows that the support of the Transitional Federal Government would be needed and, if intended to be a court of one of the Somali regions, possibly the southern central region, consultations also with the authorities of the region in question. The agreement of the authorities in “Somaliland” and “Puntland” would also be

²⁰ The Special Adviser recommended that the extraterritorial court be temporarily located outside Somalia and eventually transferred to Mogadishu (see S/2011/30, paras. 119-120). Further, he recommended that the judges be appointed by the Transitional Federal Government on a representative basis (see S/2011/30, para. 124). These factors might imply that the intention was to establish a federal level court.

²¹ See annex II.

necessary in practice, given their likely role in the imprisonment of those convicted. As the court would be located extraterritorially, the proposal would also depend on the willingness and the ability of a third State in the region to host the court.

51. In each of the consultations with concerned States, it was explained that many aspects of the proposal for an extraterritorial court remain necessarily uncertain. It was explained, for example, that issues arise as to whether the court would have jurisdiction to try a large number of “low level” persons suspected of committing acts of piracy off the coast of Somalia, whether it would have jurisdiction to try a more limited number of persons suspected of financing and planning acts of piracy, or whether its jurisdiction would cover both of these possibilities. Further, it was explained that issues arise as to whether the court would consist entirely of Somali judges, prosecutors and staff, or alternatively would have assistance or participation by international judges, prosecutors or staff, possibly drawn from the Somali diaspora.

Consultations with the Transitional Federal Government and the Somali regional authorities

52. In consultations with the Legal Counsel in Dubai on 18 April 2011, the Deputy Prime Minister and Minister for Foreign Affairs of the Transitional Federal Government²² stated that Somalia was opposed to the establishment of an extraterritorial court and that there was no justification for structures to be placed outside of Somalia. He considered that “Somaliland” was a viable alternative for conducting prosecutions for all of Somalia. The “Puntland” Minister of Maritime Transport, Ports and Counter-Piracy²³ and the President of “Galmadug”²⁴ agreed that Somalia was opposed to the creation of extraterritorial courts, and stated that they clearly preferred courts to be located in Somalia. The “Puntland” Minister of Maritime Transport, Ports and Counter-Piracy noted that the question had been discussed among the Somalis many times and that they had never agreed to the concept of an extraterritorial court.

53. In subsequent consultations by the Assistant Secretary-General for Legal Affairs, conducted by telephone on 4 May 2011, the Transitional Federal Government Deputy Prime Minister and Minister of Development²⁵ confirmed that the Government was opposed to the establishment of any Somali court outside Somalia. In the same consultations, the “Puntland” Deputy Prime Minister and Minister of Maritime Transport, Ports and Counter-Piracy confirmed that “Puntland” was opposed to the establishment of any Somali court outside Somalia. He stated that the “Puntland” authorities were ready and willing to host a Somali court in “Puntland”, and had issued a statement to that effect.²⁶ He also stated that the city of Garoowe, “Puntland” would be the right location to host a Somali court and associated prison facilities. The “Galmadug” Minister for Fisheries²⁷ confirmed that “Galmadug” was opposed to the establishment of any Somali court outside Somalia. Any such court should be within Somalia, preferably in “Galmadug”. He stated that

²² Mohamed Omaar.

²³ Said Mohamed Rageh.

²⁴ Mohamed Ahmed Alin.

²⁵ Mohamed Ali Abdi Welli.

²⁶ Statement dated 25 April 2011.

²⁷ Mohamed Warsame.

a possibility would be to host a Somali court in the city of Gaalkacyo, which was calm, and which straddled the boundary with “Puntland”. It was also apparent from these consultations that there is opposition to such a court being established in “Somaliland” because that region claimed not to be part of Somalia.

54. The Director of the Division for Ocean Affairs and Law of the Sea of the Office of Legal Affairs followed up these consultations with a further meeting with the Transitional Federal Government and the Somali regional authorities²⁸ in Nairobi on 26 May 2011, facilitated by UNPOS under the Kampala process framework. The Government Counter-Piracy Task Force Chair,²⁹ the “Puntland” Director-General for Counter-Piracy,³⁰ the “Galmadug” Justice Minister³¹ and the “Galmadug” Minister for Fisheries³² reiterated their opposition to an extraterritorial Somali court. They considered that the court would be better located within Somalia, and expressed concern about diverting capacity-building resources from Somalia. Each suggested that a Somali court could be located on territory within their respective control. They expressed a willingness to work together to agree on a location. The “Somaliland” Minister for Foreign Affairs³³ stated that “Somaliland” did not in principle oppose the idea of an extraterritorial Somali court, but thought that it was not a good idea. He further stated that “Somaliland” was not prepared to host such a court, but was open to continuing piracy prosecutions in “Somaliland” courts.

55. The Transitional Federal Government Counter-Piracy Task Force Chair, the “Puntland” Director-General for Counter-Piracy, the “Galmadug” Minister for Fisheries, the “Galmadug” Justice Minister and the “Somaliland” Minister for Foreign Affairs confirmed their understanding that no new additional specialized anti-piracy courts within Somalia should be established pursuant to the Special Adviser’s recommendations. They favoured strengthening existing court structures, as was being done currently by UNDP and UNODC in “Somaliland” and “Puntland”. The “Somaliland” Minister for Foreign Affairs stated that, in the discussions with the Special Adviser, this is what had been envisaged.

Consultations with other regional States

56. In the consultations with the Legal Counsel on 18 April 2011, the Minister for Foreign Affairs and International Cooperation of the United Republic of Tanzania³⁴ indicated that Tanzania would welcome the possibility of an extraterritorial court. Tanzania wished to communicate to the international community its willingness to assist under the right conditions. Tanzania’s primary concerns were security and the need to reach international standards. He indicated that his Government had collected views from the judiciary, prisons authority and navy on what would be needed to achieve these elements. The prisons needed sufficient facilities and the navy needed a ship to defend the coast. It was important that suspected and convicted pirates be spread around the country to ensure more security, and four or five new facilities might be needed. A naval vessel could initially be leased.

²⁸ The meeting comprised the participants in the Kampala process.

²⁹ Muyadin Ali Yusuf.

³⁰ Abdirizak M. Ahmed.

³¹ Sheikh Hijazi Malm.

³² Mohamed Warsame.

³³ Dr. Mohammed Abdillahi Omar.

³⁴ Bernard Kamillius Membe.

57. In a letter to the Legal Counsel dated 5 May 2011, the Minister for Foreign Affairs and International Cooperation of Tanzania indicated that Tanzania in principle welcomes the proposal to establish an extraterritorial Somali specialized anti-piracy court. The establishment of this court would serve best as a temporal measure and would augment the ongoing measures to build regional capacity of affected countries to prosecute piracy. The Government of Tanzania expressed its readiness to host the said court within the current premises of ICTR in Arusha. The Government was of the view that the court should be given a mandate to try pirates who commit offences at sea, as well as suspects who provide logistical support, intelligence and financing to acts of piracy off the coast of Somalia. In terms of composition, the court should have a mix of Somali, international and local Tanzanian judges, prosecutors and personnel for the court to benefit from wide experience and diversity. Tanzania would prefer that captured suspected pirates be delivered to the Tanzania Police Force upon arrival. The Minister further stated that critical to the success of the court would be the availability of a clear funding mechanism and the funding itself, under the framework of the United Nations, and the availability of persuasive and/or direct evidence. It was also imperative that ongoing construction work in “Puntland” be completed on time to avoid suspects and convicts being held in Tanzanian penitentiaries for a long time.

58. The Minister for Home Affairs, Environment and Transport of Seychelles³⁵ stated that Seychelles wished to concentrate on, and increase, its own national prosecutions, including, most recently, efforts to prosecute leaders and financiers of piracy. It had reached agreements with the Transitional Federal Government, “Puntland” and “Somaliland” for the return of convicted pirates to serve their sentences in Somalia. In a letter dated 12 May 2011 to the Legal Counsel, the Minister for Home Affairs, Environment and Transport further stated that Seychelles had carefully considered the proposal for a Somali anti-piracy court outside the territory of Somalia and believed that the matter needed substantial further discussion and consultation before any substantive reply could be prepared for the Security Council. Seychelles would be submitting a detailed discussion document reflecting on the modalities of prosecution mechanisms, on the participation of international personnel and on other international support and assistance.

59. The Principal Assistant Secretary in the Prime Minister’s Office of Mauritius³⁶ stated that Mauritius also wished to focus on national prosecutions. Negotiation of an agreement with the European Union to receive suspects captured by naval forces was in its final stages.³⁷ In a letter dated 20 May 2011 to the Legal Counsel, the Minister for Foreign Affairs, Regional Integration and International Trade stated that Mauritius supports the establishment of an extraterritorial Somali anti-piracy court. However, Mauritius was faced with a number of practical difficulties and capacity constraints, in view of which it was not in a position to host the extraterritorial court at this stage. Mauritius was, however, willing to cooperate with such a court if it were established in another State in the region.

³⁵ Joel Morgan.

³⁶ Motichah Seebah.

³⁷ Replies to written enquiries have not been received from Kenya and Djibouti.

B. Legal basis and jurisdiction

60. An extraterritorial Somali anti-piracy court would require a legal basis in the constitutional and legislative framework of Somalia, a legal basis within the host State for its functioning in the territory of that State, and an agreement between Somalia and the host State to regulate the respective rights and obligations of the two States.

61. An extraterritorial court might be an existing Somali court located extraterritorially in a third State, or a specially established new court or a new section of an existing court, either at the federal or regional level, dedicated to or specializing in conducting piracy prosecutions. The existing courts are, in practice, regional courts. They have their legal basis in the constitutional and legislative framework of Somalia. To relocate such a court, for example, a court of the southern central region, to a third State, would require action by the regional authorities concerned and a legislative basis within Somalia, and therefore the support of the Transitional Federal Government and the Transitional Federal Parliament. UNPOS advises that the enactment of the necessary legislation in the current political climate might be challenging. The Transitional Federal Government and the relevant Somali authorities would need to consider whether relocating such a court in a third State would raise issues of compatibility with the provisions of the 1960 Constitution and the Transitional Federal Charter, and whether an amendment of the Transitional Federal Charter by the Transitional Federal Parliament would be needed.

62. The establishment of a new court, or a new section of an existing court, either at the federal or regional level, dedicated to or specializing in conducting piracy prosecutions, would similarly require a constitutional and legislative basis in Somalia. The Transitional Federal Government and the relevant Somali authorities would need to consider whether the establishment of such a court or section and its location in a third State would raise issues of compatibility with the provisions of the 1960 Constitution and the Transitional Federal Charter, and whether an amendment of the Transitional Federal Charter by the Transitional Federal Parliament would be needed.

63. As for the jurisdiction of any such extraterritorial court, whether it is a relocated, an existing, or a new court or new section, a key question to determine from the outset would be whether the jurisdiction of the court should be over a potentially large number of persons suspected of committing acts of piracy off the coast of Somalia, over a more limited number of persons suspected of financing and planning such acts, or whether it should have jurisdiction over both. For an existing Somali regional court, relocated to a third State, these questions may already be determined by its current jurisdiction. In the case of a newly established extraterritorial court, or a newly established extraterritorial section of a court, such questions could be determined by the Transitional Federal Government and the Transitional Federal Parliament when establishing its constitutional and legislative basis.

64. Consultations conducted with a number of Member States of the International Police Organization (INTERPOL), UNODC, the Department of Political Affairs and the Monitoring Group of the Security Council Committee established pursuant to

resolution 751 (1992) concerning Somalia³⁸ suggest that the identities of key leaders of pirate networks and their locations and political connections are widely known. Many of them are reportedly within Somalia. Further, the consultations indicate that increased attention to the investigation and prosecution of the relatively small number of individuals who provide the leadership and financial management of piracy may be both a strategically effective and a cost-effective means of supplementing the current prosecution efforts. Those consulted recognized that more sophisticated investigative, prosecutorial and judicial expertise was needed for these more complex crimes. Further, the Security Council has encouraged information sharing on piracy in general, and on the facilitators, financiers and planners of piracy in particular.³⁹

65. UNODC organized a conference on the issue of illicit financial flows linked to piracy off the coast of Somalia from 17 to 19 May 2011 in Nairobi. Possible operational guidelines for enhanced coordination and information sharing among the private sector, law enforcement agencies, and relevant international and regional organizations were discussed, along with proposals to strengthen anti-money-laundering capacity in the region. Some of the conference recommendations aim in particular at facilitating the investigation of pirate leaders, organizers and financiers, and will be further discussed during a second meeting of the Contact Group on Piracy off the Coast of Somalia ad hoc group on illicit financial flows, to be held in Seoul, on 29 June 2011.

66. In addition to the establishment of a constitutional and legislative basis in Somalia for an extraterritorial Somali court, provision would also be required under Somali law for Somali police to exercise powers of arrest and investigation extraterritorially. The ongoing piracy prosecutions in other regional States have shown that the evidence that is transferred by naval forces to prosecuting States requires follow-up by the police authorities of prosecuting States before a trial can be commenced. For example, the police interview suspects and conduct a forensic examination of any seized weapons or other property used in the alleged piracy attack. In the context of an extraterritorial Somali prosecution, these police investigation activities would be a further exercise of extraterritorial authority that would require a legislative basis in Somalia.

67. The host State would also require a national legislative basis to permit the establishment and functioning of a Somali court on its territory. Matters to be regulated by such legislation would flow from the terms of the agreement that would need to be negotiated between the two States to regulate their respective rights and obligations in relation to the extraterritorial court. Drawing on the precedent of the Agreement concluded between the United Kingdom and the Netherlands for the establishment of a Scottish court in the Netherlands to prosecute those suspected of the bombing of Pan Am flight 103,⁴⁰ such matters are likely to include the exercise of Somali jurisdiction within a specified location within the host State, the receipt and the transfer of suspects through the territory of the host State to the court, the exercise of investigation powers by Somali police in the host State's territory,

³⁸ See annex IV.

³⁹ See Security Council resolutions 1950 (2010) and 1976 (2011).

⁴⁰ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands concerning a Scottish Trial in the Netherlands, done at The Hague on 18 September 1998.

security of premises and persons, privileges and immunities, cooperation between the two States, and responsibility for costs. It would be necessary for the host State to ensure that it has a national legislative basis to be able to carry out its responsibilities under such agreement with Somalia.

68. If an extraterritorial court were to have international participation, for example, in the form of seconded experts from other jurisdictions, it would be for the host State to determine whether it would need any legislative or other basis to accept such experts practising within its territory. If there were to be participation in an extraterritorial court by United Nations-selected judges or prosecutors, the Secretary-General would first require a mandate from the Security Council to negotiate the necessary agreement or agreements to this effect with Somalia and the host State. Drawing on the precedent of the Extraordinary Chambers in the Courts of Cambodia, important aspects of such agreement would include the requirement that trials be conducted to international standards, and that the procedures establish a framework for judicial decision-making that would enable the international judges to ensure that international standards are met. It would be for the host State to ensure that it has a national legislative basis sufficient for the presence in its territory of a United Nations component in the extraterritorial court, including such matters as the inviolability of the premises and the privileges and immunities of United Nations officials and staff.

C. Criminal and procedural legislative framework

69. With regard to the criminal and procedural law that would apply, an extraterritorial court would remain a Somali court, exercising Somali jurisdiction and applying Somali criminal law and procedures. The inconsistencies and deficiencies of Somali legislation⁴¹ remain to be resolved. The absence so far of adoption by the Transitional Federal Parliament, and the regional parliaments, of piracy legislation consistent with the provisions of international law presents a challenge equally to the establishment and functioning of an extraterritorial court as it does to the development of courts within Somalia. UNODC will continue to work for progress in this regard with the Transitional Federal Government and the regional authorities.

70. While it might be possible, with a mandate from the Security Council, for the Secretary-General to negotiate with the Transitional Federal Government a suitable agreement setting out a criminal and procedural “Statute” as a basis upon which an extraterritorial court could function, if the court is to be a Somali court, such agreement and Statute would require a legislative basis in Somalia. Consideration and adoption by the Transitional Federal Parliament into Somali law would be required.

D. Premises and security

71. Piracy prosecutions in a third State in the region would entail security considerations given the support for piracy suspects among some Somali

⁴¹ See annex II.

communities.⁴² Security measures would need to include the protection of witnesses. All courts in Somalia conducting piracy prosecutions have protection provided by armed police, including with heavy weapons mounted on vehicles.⁴³

72. Pending a decision on a host State, it is not possible to be specific, but security requirements, and the associated costs, for premises, judges, prosecutors and other staff, witnesses and victims, and for the transport of suspects across the host State until their transfer to the custody of the extraterritorial court, would require consideration. The security aspects of an extraterritorial court are an area where international assistance and support may well be needed.

73. The Special Adviser recommended that an extraterritorial court be located at the premises of ICTR in Arusha. The Government of Tanzania has also expressed its readiness to host such a court at those premises. The Office of Legal Affairs has consulted the Tribunal and the Department of Safety and Security. Considerations include security, the availability of courtrooms, the availability of office space, the availability of detention facilities, the effect of the Tribunal's remaining trial schedule on each of these issues, and the effect of the anticipated co-location with the Tribunal, from 1 July 2012, of the International Residual Mechanism for Criminal Tribunals established by the Security Council in its resolution 1966 (2010) of 22 December 2010.

74. ICTR considered it difficult to advise on the proposal with any level of certainty at this stage, as its feasibility depends primarily on the projected caseload of the Tribunal and of the proposed extraterritorial court, and on a full security risk assessment. The Tribunal rents its premises from the Arusha International Conference Centre, which it shares with other international bodies. The Tribunal's caseload is decreasing as it progresses towards completion of its work, and a courtroom and office space could therefore be made available to an extraterritorial Somali anti-piracy court. However, the Tribunal is concerned that locating such a court within the Arusha International Conference Centre premises would expose the Tribunal, and United Nations officials and staff, to serious security threats. A full security risk assessment would be needed. The Tribunal's preliminary assessment is that significant investment in security capacity at the Arusha International Conference Centre and the Tribunal's detention facility would be needed.

75. The ICTR premises have four courtrooms. Courtrooms 1 and 3 are used fully, and such use is anticipated to continue until the end of December 2013. Courtroom 2 has been dismantled and its space returned to the Arusha International Conference Centre. It could be re-equipped as a courtroom at minimal cost. Courtroom 4 will be used to house the ICTR archives until a permanent archives building is constructed. If a current application in the *Uwinkindi* case for referral to Rwanda were denied by the ICTR Trial Chamber, that case would require full use of a courtroom until the end of the third quarter of 2012. The potential caseload of the Residual Mechanism is not known at this stage. However, the projected caseload includes the possible trial of two high-level fugitives, preservation of evidence hearings in seven cases,

⁴² Information in this para. was provided by UNODC.

⁴³ Piracy prosecutions in Kenya have been linked to possible, although unconfirmed, terrorist threats. The level of the security concern has required the construction of a new secure courthouse by UNODC within the Shimo La Tewa Prison compound, near Mombasa, and funding for the Kenyan authorities to hire a private security company for the main court in Mombasa. Suspects are transported to the Mombasa court under armed guard.

appeals in a number of contempt cases, and a possible appeal in the *Uwinkindi* case if tried by the Tribunal. In summary, therefore, it appears that only courtroom 2, which has been surrendered to the Arusha International Conference Centre, would be available immediately for the use of a Somali extraterritorial anti-piracy court.

76. By the last quarter of 2011, 800 to 1,000 square metres of office space will be available, and a further 800 to 1,000 square metres will be available by June 2012. Unless otherwise decided, vacated space will be returned to the Arusha International Conference Centre in accordance with the ICTR downsizing and completion strategy. For safety and security reasons, piracy suspects would be held separately from ICTR suspects. Thus, although the detention facility has a total of 90 cells and currently 36 inmates, there would only be available space for 30 piracy suspects. More cells will become available during 2012 and 2013 as more ICTR judgments are rendered.

77. The Department of Safety and Security agrees that a full security risk assessment would be needed. However, for planning purposes, it considers that it can be assumed that locating a Somali extraterritorial anti-piracy court with ICTR would increase dramatically the risks to the Tribunal, and potentially to the United Nations more widely. The anticipated co-location of the Residual Mechanism with the Tribunal would be an important part of the security planning. A significant increase in security infrastructure would be needed, and a substantial increase in security costs could be expected. If the extraterritorial court is a Somali court, and not a United Nations court, responsibility for its security would not fall to the Department of Safety and Security. Security provided by the Government of the United Republic of Tanzania would be highly likely to need to increase. The premises are a shared tenancy location, not a stand-alone facility, which limits the ability to upgrade the security. If the establishment of the extraterritorial Somali court proceeds, the Department of Safety and Security recommends that stand-alone premises be found for it. Such stand-alone premises would either need to be an existing courtroom, refurbished as necessary, or premises that require conversion for use as a courtroom. In either case, appropriate security would need to be provided. Premises for use as a detention facility with appropriate security would also be required.

78. A further consideration that would require discussion with the Tanzanian authorities in the context of the security concerns that it has raised, and discussion also with patrolling naval States, would be the issue of transportation of suspects to Arusha, which is roughly 500 kilometres from the coast. Many naval vessels have helicopters on board, and it would need to be explored with them whether they would be willing in principle to take on this role, and whether they would have the capacity in terms of guards for the suspects, and the range to reach Arusha from the Tanzanian coast. The alternative would be for naval States to transfer suspects at the port of Dar es Salam, from where they would be either transported over land to Arusha, which takes around eight hours, or by plane, which would involve different cost considerations. All of these options raise security considerations.

79. Dar es Salam is likely to be distant from the patrol area of the naval vessel concerned. An alternative might therefore be to transfer suspects from naval vessels in Djibouti,⁴⁴ and to fly them from there to Arusha. This would also involve costs

⁴⁴ Transfer in Djibouti has taken place on around three occasions to date.

and security considerations for discussion among the States concerned. An agreement would be likely to be necessary between Djibouti, Tanzania and Somalia to determine the conditions of such transfers, including security arrangements, the custody of the suspects, contingencies such as escape or medical emergencies during transit, and to determine who would meet the costs.

E. Judges, prosecutors, investigators and defence counsel

80. As an extraterritorial Somali court would be exercising Somali jurisdiction and applying Somali law, the judges, prosecutors, defence counsel and other legal professionals should ideally be Somalis, qualified in Somali law, and with professional experience of practising Somali law. As detailed in annex III,⁴⁵ there is a shortage of qualified legal professionals in Somalia. For this reason, we examined the prospects for (a) assistance by international experts and (b) participation by the United Nations.

81. The training of judges, prosecutors, investigators and defence counsel has begun in “Somaliland” and “Puntland”. UNDP and UNODC consider that progress can be made within one year, and estimate that it will take around three years of training to achieve trials to international standards in “Somaliland” and “Puntland”. Training on the same scale in southern central Somalia is not possible at this stage given the security challenges of working in that region. The timeline for an extraterritorial court might be reduced to some extent through allowing it priority in drawing on those judges, prosecutors and other legal professionals within Somalia who complete their training with UNDP and UNODC first.

82. Assistance or participation by international experts, possibly drawn from the Somali diaspora,⁴⁶ may also assist an extraterritorial court to achieve international standards more rapidly. As with the development of courts in “Somaliland” and “Puntland”, such participation might have a capacity-building benefit for Somali legal professionals working within the extraterritorial court. The experts would need appropriate experience in conducting serious criminal cases, an understanding of the Somali court system, and, ideally, competency in the Somali language. Again, nominations of suitable legal professionals by the African Union might be a possible source of expertise. Security considerations may make it easier to recruit international experts, including those from the Somali diaspora, to assist a court located outside Somalia.

83. Participation in an extraterritorial court by United Nations-selected judges and prosecutors could take place if the court meets international standards of due process, and would require procedures for judicial decision-making that would enable the international judges to ensure that such international standards are met.

F. Cooperation with third States

84. As with anti-piracy courts within Somalia, an extraterritorial Somali anti-piracy court would require cooperation from naval States for the transfer of suspects and evidence to the court. In addition, cooperation would be required with

⁴⁵ Annex III contains assessments made by UNDP and UNODC.

⁴⁶ See annex III for information concerning the Somali diaspora.

the host State and any neighbouring State for transit of the suspects through their territory, and from the Transitional Federal Government and “Somaliland” and “Puntland” to receive those convicted for imprisonment, and those released or acquitted for repatriation.

85. This would require the negotiation of transfer arrangements between the naval States, Somalia and the host State. These arrangements would regulate the respective rights and obligations of the States concerned, the transfer of the suspects and of evidence gathered, and the standards of treatment of the suspects. There are a number of precedents available of transfer arrangements between naval States and other regional States that could be drawn upon to inform the process of negotiation of such arrangements with an extraterritorial Somali court. For many naval States, the negotiation of transfer arrangements is conditional upon the trial proceedings and any subsequent imprisonment meeting international standards, so that the rights of the suspects are respected.

86. Such naval States also frequently require permission to be sought by the prosecuting State before those convicted can be transferred to any third State. This latter provision may be unnecessary where both the prosecuting State and the imprisoning State would be Somalia. Arrangements for the transfer of those convicted to Somalia are dealt with in the next section.

G. Detention and imprisonment arrangements

87. Any State willing to host an extraterritorial court would need to have in place detention facilities with suitable security, for detention before and during trial. The willingness of any State to host an extraterritorial Somali court would almost certainly depend either on international funding and training to build and staff significant numbers of detention and prison facilities to international standards, or on an agreement that those convicted will be returned to Somalia to serve their sentences, and that those released or acquitted will be repatriated to Somalia. UNDP and UNODC report that it will be around two years before increased capacity to international standards for additional convicted persons is available. Many of the existing prisons lack basic medical facilities, water, sanitation and trained staff.

H. Evidentiary and related matters

88. The evidentiary and related issues discussed in Working Group 2 of the Contact Group on Piracy off the Coast of Somalia,⁴⁷ would also be relevant in the context of an extraterritorial Somali court. Guidance could be developed by the Somali authorities and UNODC to assist naval States in the gathering and the transfer of evidence to the extraterritorial court. Such guidance for other regional prosecuting States has been successful in improving the quality of evidence gathered by naval forces such that it is no longer an obstacle to successful piracy prosecutions. As Somalia’s code of criminal procedure is based on the rules of procedure and evidence of the United Kingdom,⁴⁸ UNODC considers that such guidance on evidentiary issues would be similar to that produced for the common

⁴⁷ Set out in paras. 32-35.

⁴⁸ See annex II.

law jurisdictions of Kenya and Seychelles, and would therefore not, in practice, present naval forces with a multiplicity of evidentiary requirements.

89. Consideration would need to be given as to where the responsibility for the attendance of witnesses at an extraterritorial court lies. In other regional States, the practice is that responsibility for the attendance of military witnesses falls to the naval States concerned, and UNODC takes on the task of facilitating the attendance of civilian witnesses. Through these arrangements, the attendance of all witnesses at the trials in Kenya and Seychelles to date has been secured. The permissibility of video link evidence before the extraterritorial court might also be considered. If the extraterritorial court does have procedures based on the common law, experience from other regional prosecuting States suggests that it may be of limited use in practice. The common law tradition is that contested evidence should normally be given in person to allow for cross-examination before the judge. It is a matter for the discretion of the judge whether to allow video evidence on a case-by-case basis. Consideration would also need to be given to the availability of wide bandwidth infrastructure in the host State so as to support video link use.

I. Timeline

90. It is not possible at this stage to set out a definitive timeline for the establishment and functioning of an extraterritorial Somali court. The considerations that would affect this timeline would include: negotiations between the Somali authorities and the host State for the establishment of the court; the need for a Somali constitutional and legislative basis for the extraterritorial court; the need for Somali criminal and procedural legislation for the conduct of piracy prosecutions; negotiations between naval States, the Somali authorities and the host State for the transfer of suspects; the training of Somali judges, prosecutors and other legal professionals, and possible recruitment of international experts; the need to find suitable premises, to construct or refurbish courtrooms and detention facilities, and to put security arrangements in place; and the need to ensure that sufficient prison capacity to international standards is available in Somalia.

J. Costs and financing

91. The Special Adviser has estimated that the annual costs for an extraterritorial Somali court would be \$2,725,000 for its first year of operation, and \$2,325,000 for each year thereafter. UNODC understands that these figures are projected from the UNODC estimates for the functioning of the courts in "Somaliland" and "Puntland". It is not possible at this stage to comment authoritatively on these costs figures. The Department of Safety and Security preliminary assessment suggests that a potential substantial increase in security costs should be taken into account if the court is located in the Arusha International Conference Centre building in Arusha, but that the security assessment is likely to be such that the court should be located in stand-alone premises. If existing United Nations premises and security such as that at ICTR are not available to an extraterritorial Somali court, the costs associated with other premises and the necessary security would need to be taken into account. Further, if it is necessary to attract legal professionals from the Somali diaspora to work at the court, and possibly also other international experts, the remuneration

necessary to attract such professionals would also be a consideration to be taken into account.

92. As with the development of the courts in “Somaliland” and “Puntland”, the closest comparisons with other courts or tribunals where there has been international participation may be the Special Panels established in East Timor, and the Bosnia War Crimes Chamber.⁴⁹ The cost of the Special Panels in East Timor for the period 2003-2005 was around \$14.3 million. The average annual cost of the Bosnia War Crimes Chamber for the period 2005-2009 was 13 million euros. In the event of participation by United Nations-selected judges and prosecutors in an extraterritorial Somali court, the closest comparison would be the Extraordinary Chambers in the Courts of Cambodia, which is a Cambodian national court with participation by United Nations-selected judges and a prosecutor, and also United Nations staff. It has a total budget (for the international and national components) of \$92.3 million for the biennium 2010 to 2011.

93. The costs associated with the establishment and functioning of an extraterritorial Somali court may be met from voluntary funding, and might be requested from the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia administered by the United Nations. If there were participation in an extraterritorial Somali court by United Nations-selected judges or prosecutors, it would be for Member States to determine whether the costs associated with the international component of such court should be met from voluntary contributions, or from United Nations assessed contributions.

IV. Conclusions

94. With respect to the establishment of specialized Somali courts in Somalia, piracy trials are currently being conducted by courts in “Somaliland” and “Puntland” and, with United Nations assistance, these trials are expected to reach international standards in around three years. This schedule may be accelerated if suitable international experts, including from the Somali diaspora, can be identified and recruited. This will open the way for naval States to enter into agreements for the transfer of suspects apprehended at sea to the courts in these regions of Somalia for prosecution. It remains necessary for Somali law to be revised to provide a sound criminal and procedural basis for such prosecutions. Construction, refurbishment and training will result in increased prison spaces to international standards in “Somaliland” and “Puntland” in around two years. The total cost of UNDP and UNODC assistance in relation to the courts and prison facilities in “Somaliland” and “Puntland” over three years will be \$24,434,720.

95. It is not possible to determine at this stage the timeline for the establishment and functioning of an extraterritorial Somali anti-piracy court in another State in the region. The factors affecting this determination would include the views of the concerned States and relevant Somali regional authorities, the need for a Somali constitutional and legislative basis for such court, the need for an adequate criminal and procedural basis in Somali law for piracy prosecutions, the need to negotiate a suitable agreement with a host State to regulate all matters associated with the functioning of the court, and the need for sufficient prison spaces to international

⁴⁹ See S/2010/394, annex I.

standards, ideally in Somalia. Sufficient funding and security to attract international legal experts, including from among the Somali diaspora, may help to shorten the timeline for establishment and functioning.

96. A key question would be whether the extraterritorial court should have jurisdiction to prosecute large numbers of low-level perpetrators of acts of piracy, a more limited number of financiers and planners of piracy, or both. Whatever the jurisdiction of an extraterritorial court, consultations conducted by the Office of Legal Affairs indicate a widely held view that information sharing, and the investigation and prosecution of the financiers and planners of piracy by States, would be both a strategically effective and cost-effective means of supplementing current prosecution efforts.

Annex I^a

Incidents of piracy off the coast of Somalia and numbers of prosecutions by States

1. Since the publication of the reports of the Secretary-General of 26 July 2010 (S/2010/394) and 27 October 2010 (S/2010/556), piracy attacks off the coast of Somalia have continued to increase, as have the geographical range of the attacks and the level of violence used. Since 1 January 2011, there have been 177 attacks, of which 18 were successful. As of May 2011, 26 ships are held by pirates, with a total of 601 hostages. The geographical area of the attacks now stretches to 2.8 million square miles, an area that is increasingly difficult for naval forces to patrol.

2. The increased range of attacks has been achieved through the use of mother ships. Pirates are currently using large vessels with supplies for smaller pirate vessels used in attacks, and with as many as a hundred pirates on board to guard hostages and to deter rescue attempts. Pirate attacks now often involve the use of overwhelming force to overcome security personnel on board merchant ships. Hijacked crews have been used as “human shields” against military intervention, and have been threatened as a means to deter military attack. One Filipino crew member was summarily executed on 26 January 2011, and four United States citizens were killed on 22 February 2011. The level of ransoms demanded continues to increase. Since late 2010, reports have been received from released crew of systematic threats and violence during captivity, particularly during protracted ransom negotiations.

3. Naval forces estimate that there are about 50 main pirate leaders, around 300 leaders of pirate attack groups, and around 2,500 “foot soldiers”. It is believed that financing is provided by around 10 to 20 individuals. In addition, there is a large number of armed individuals guarding captured ships, and numerous ransom negotiators.

4. Since the publication of the report of the Secretary-General of 26 July 2010 (S/2010/394), the number of States prosecuting acts of piracy off the coast of Somalia in their courts has risen from 10 to 20, and the total number of prosecutions taking place has nearly doubled, from 528 to 1,011. The following table sets out a breakdown of these figures.

<i>Country</i>	<i>Number held</i>	<i>Notes</i>
Belgium	1	
Comoros	6	
France	15	
Germany	10	
India	119	
Japan	4	
Kenya	119	50 convicted

^a The information in the present annex is based on situation reports from the International Maritime Organization and additional information provided by the Department of Peacekeeping Operations of the United Nations Secretariat.

<i>Country</i>	<i>Number held</i>	<i>Notes</i>
Madagascar	12	
Malaysia	7	
Maldives	34	Awaiting deportation in absence of law under which to prosecute
Netherlands	29	5 convicted
Oman	12	All convicted
Seychelles	64	41 convicted
Somalia	290	Approximately 240 convicted
Puntland	94	68 convicted
Somaliland	18	Status of trial unclear
South Central		
Republic of Korea	5	
Spain	2	
Tanzania	12	6 convicted
United Arab Emirates	10	
United States	28	8 convicted
Yemen	120	All convicted
Total States: 20	1 011	

Annex II^a**Somalia political and legal context**

1. Somalia has not had an effective central government since the demise of the Siad Barre regime in 1991. Since then it has been gradually trying to establish a central government. However, continuing internal conflict and the absence of the rule of law in many regions of the country have challenged this process. Currently, the Transitional Federal Government, established as a result of the 2008 Djibouti Agreement and the Transitional Federal Charter adopted in February 2004 by the Transitional Federal Parliament, is the internationally recognized Government of the Republic of Somalia. The transitional period will end in August 2011, and discussions on the post-transition political dispensation are ongoing.

2. Somalia is composed of 18 administrative regions. “Puntland”, located in northern Somalia, considers itself as an autonomous state within Somalia, whereas “Somaliland”, located in north-west Somalia, declared independence shortly after the demise of the Siad Barre regime in 1991. In central Somalia, just south of “Puntland”, “Galmadug” has emerged as another de facto regional entity.

3. The United Nations has continued to support Somalia’s efforts to draft a new constitution. A political road map elaborating the broad steps of the various components of the process has been drafted and is being discussed, and requires the active engagement and support of the country’s political leadership at national and regional levels, the ownership and the support of the Somali people, and commitment to the peace process.

4. In February 2011, the Transitional Federal Parliament decided to extend its own term for three years. The President of the Transitional Federal Government refused to sign the relevant parliamentary bill. “Puntland” condemned the decision of the Parliament to extend itself, stating that it could prevent Somalia from moving to a successful post-transitional period. Partners and international stakeholders described the extension of the Transitional Federal Parliament as a unilateral act as it was taken without consultations and the necessary reforms. This decision prompted the Transitional Federal Government Council of Ministers to announce its intention to extend its own term by one year, until August 2012. The Special Representative of the Secretary-General for Somalia, Augustine Mahiga, is leading the discussions with the transitional federal institutions, regional stakeholders and international partners on the arrangements to end the transition.

5. Relations between the Transitional Federal Government and the main regional authorities within Somalia are complex. “Somaliland” has not been recognized as a State by the Transitional Federal Government nor internationally, but is de facto self-governing. The transitional regional constitution of semi-autonomous “Puntland” provides that it will contribute to the establishment and protection of a Somali Government based on a federal system, reserving the right to review this provision should instability continue or Somalis fail to agree on a federal system. The Transitional Federal Government’s relations with the “Puntland” authorities worsened this year after the latter severed relations on 16 January 2011, and barred

^a The present annex contains information provided by the Department of Political Affairs, UNODC and UNDP.

the Transitional Federal Government political leadership and civil servants from entering “Puntland” territory.

6. In southern central Somalia, many of the administrative regions are under the control of Al-Shabaab, who oppose the Transitional Federal Government. In February 2011, after a military offence launched by Transitional Federal Government forces and supported by the African Union Mission in Somalia against Al-Shabaab, the Government made significant territorial gains. The general security situation in Mogadishu remains unstable and volatile, thus affecting the safe conduct of United Nations operations. The recent territorial gains considerably reduced the risk of direct fire and mortar attacks against the airport of Mogadishu and its immediate environs. “Somaliland” enjoys relative stability, but “Puntland” continues to experience insecurity. “Puntland” is alleged to be a base for human trafficking, as well as piracy.

7. UNODC has undertaken a comprehensive assessment of the Somali legal system, which comprises three elements: the formal legal sector, sharia law, and customary law. These three elements operate in parallel, and the distinction in their application is not always clear. The formal justice system is not administered systematically. This is so even where more formal governmental structures are in place in “Somaliland” and “Puntland”. Clan and sub-clan relationships continue to be fundamental to Somali social and legal culture.

8. Within the framework of its formal legal system, Somali law is pluralistic, as it reflects a combination of both common law and civil law traditions inherited from its twin colonial past (the United Kingdom and Italy). At the time of independence in 1960, new codes were adopted that reflected this mixed heritage. The present Somali Penal Code is based on the Italian Penal Code, while its Code of Criminal Procedure is based on the rules of procedure and evidence in the United Kingdom. These two Codes continue to form the basis of penal law in all of Somalia today. They have not been updated and are still not available in the Somali language.

9. In view of its claim to independence, “Somaliland” regards its constitution as the supreme law in the region. The “Puntland” transitional regional constitution, on the other hand, stresses the pre-eminence of the constitution of the Federal Republic of Somalia and Islamic sharia law. The importance of Islamic sharia law is enshrined in the constitution and the Transitional Federal Charter of Somalia, and in the constitutions of “Puntland” and “Somaliland”. Sharia law is integrated into “*Xeer*” through application by lower court judges, who are often not knowledgeable of formal laws.

10. *Xeer* is based on an oral tradition, developed by elders to mediate peaceful relations between Somalia’s competitive clans and sub-clans. It is the law applied in around 80 to 90 per cent of all disputes and criminal cases. It is used in practice to fill in the gaps in State administration and is perceived as highly effective and efficient, receiving wide local support. As it is based on the idea of collective responsibility rather than individual rights, *Xeer* may sometimes conflict with international human rights law.

11. The Transitional Federal Charter provides for a federal court structure, consisting of the Transitional Supreme Court and the Transitional Appeals Court. However, these courts will not function until a new Somali constitution is adopted and the parliament constitutes the judiciary. In practice, therefore, the court

structure in Somalia consists of the regional courts, which are autonomous. Each region of Somalia has its own court structure, with only minor differences between the regions. Generally speaking, there are district courts, regional courts, which include an assize section, appeals courts, which also include an assize section, and supreme courts, which hear all cases from the appeals courts. The assize sections hear piracy cases because they have jurisdiction over crimes that are punishable by more than 10 years imprisonment or the death penalty.

12. The ruling bodies of the judiciaries in the regions are called the Judicial Service Council, and in “Somaliland” and “Puntland”, the High Judicial Council. These bodies administer the judiciary, and oversee disciplinary issues and matters such as standards and best practices.

13. Criminal and procedural law across Somalia is fractured and out of date, containing numerous inconsistencies and deficiencies. UNDP and UNODC have assisted legal experts from the Transitional Federal Government, “Somaliland” and “Puntland” to form a Somalia law reform programme expert group. The Group drafted and agreed upon an anti-piracy law and submitted it to the Transitional Federal Government and the regional authorities in “Somaliland” and “Puntland” for discussion in the respective parliaments. The Transitional Federal Parliament has not adopted the law. The “Puntland” parliament has adopted the anti-piracy law, although it did so with changes that made it inconsistent with the United Nations Convention on the Law of the Sea. It changed the definition of “piracy” to include illegal fishing. The “Somaliland” parliament is still considering it. The group then drafted and agreed on a prison transfer law and is currently working on a prison law. The prisoner transfer law has been brought before parliament in “Somaliland” for consideration. Consideration of other codes relevant to addressing piracy will follow to attempt to improve the legal framework of the Transitional Federal Government and the regions.

Annex III^a

Numbers and level of training of legal professionals in each of the three regions of Somalia, and information about legal professionals among the Somali diaspora

A. Numbers and level of training of prosecutors, judges and defence lawyers in each of the three regions of Somalia

“Somaliland”

1. There are 36 prosecutors, six of whom are law graduates, and 14 of whom have completed UNDP-accredited legal training from the University of Hargeysa. There are currently 120 judges, 7 of whom are legally qualified and 10 of whom have completed United Nations-accredited legal training from the University of Hargeysa. There are currently 162 lawyers registered in “Somaliland”, 72 of whom are law graduates, and the remainder have been given practising certificates based on their experience working in the judiciary or prosecution service. There are currently 312 graduates from law schools in “Somaliland”, 141 of whom are women.

2. A training programme is ongoing in “Somaliland”, facilitated by law faculties. This programme is designed to put every judge and prosecutor through a foundation programme, including substantive laws and procedures, as well as essential legal and courtroom skills. Advanced courses facilitated by law faculties and an international legal education expert will start in mid-2011.

3. In seeking additional information regarding the willingness and the availability of Somali lawyers to participate in an extraterritorial court, the Office of Legal Affairs contacted the Somaliland Lawyers’ Association. The Association indicated that its 120 members would be interested in participating in anti-piracy courts both inside and outside Somalia, and that the organization has extensive experience in providing free legal defence services to persons accused of piracy over the last five years.

“Puntland”

4. There are currently 86 judges,^b 5 of whom have a law degree (LL.B.), 10 of whom have a sharia law degree, and 17 of whom have completed a United Nations-accredited legal training. There are currently six judges attending a law degree course (LL.B.) who will complete their degree in 2012-2013. There are currently six prosecutors, none of whom have a law degree. There are 14 lawyers registered with the Puntland Bar Association, all of whom have a law degree.

5. A training programme is ongoing in “Puntland”, facilitated by law faculties. This programme is designed to put every judge and prosecutor through a foundation programme, including substantive laws and procedures, as well as essential legal

^a Sect. A of the present annex is based on information provided by UNDP, and sect. B contains information obtained from consultations conducted by the Office of Legal Affairs.

^b On 21 May 2011, the President of “Puntland” issued a presidential decree dismissing 21 judges. The judges have protested the decision, and intend to bring their case to the “Puntland” parliament, which they consider the only institution competent to decide the matter.

and courtroom skills. Advanced courses, which will be facilitated by law faculties and an international legal education expert, will start in mid-2011. The first law students are expected to graduate in 2012.

Southern central Somalia

6. There are currently 43 judges, 20 of whom have a law degree (LL.B.), 5 of whom have degrees in sharia law, and the remainder of whom have informal backgrounds in law. There are 11 prosecutors/deputy Attorneys-General in Mogadishu, all of whom have a law degree. There are 38 lawyers with law degrees practising in southern central Somalia, all in Mogadishu.

7. A training programme is ongoing in Mogadishu, facilitated by law faculties. This programme is designed to put every judge and prosecutor through a foundation programme, including substantive laws and procedures, as well as essential legal and courtroom skills. Advanced courses, which will be facilitated by law faculties and an international legal education expert, will start in 2012.

Numbers and level of training of police investigators in each of the three regions of Somalia

8. There are 30 police investigators in “Somaliland”, and 60 police investigators in “Puntland”, who have received training with the newly introduced Somali Police Investigative Management Model developed by UNDP. They are now competent to prepare a piracy trial. Specific piracy case studies were executed with 30 police investigators in “Puntland” in February 2011. In the next 12 months, a total of 100 police investigators in each of “Somaliland” and “Puntland” will be trained. This training will include investigation of money-laundering crimes. There is a plan to train police investigators and mid-rank police officers in southern central Somalia when the funding and security situation permit.

B. Legal professionals among the Somali diaspora

9. In seeking further information about the availability and the willingness of legal professionals among the Somali diaspora to participate in an extraterritorial court, the Office of Legal Affairs informally contacted the “eminent persons” consulted as experts by the Special Adviser and sent enquiries to 17 bar associations and law societies in countries in Europe, the Middle East and Africa with significant Somali populations.

10. One of the experts consulted by the Special Adviser^c indicated in his personal capacity that there are a number of suitably qualified and experienced individuals living in Europe, the United States and Canada who would be willing to serve in an extraterritorial court. Many of those individuals of whom the expert is aware had served as legal professionals in Somalia prior to the 1990s. The expert provided the names and the contact details of several Somali legal professionals living abroad who have indicated their willingness to serve as focal points in identifying and contacting additional such professionals.

^c Judge Abdulqawi Ahmed Yusuf, Judge of the International Court of Justice, a Somali national.

11. The Somali Law Council, based in London, informed the Office of Legal Affairs that it had made contact with lawyers in Somalia (Mogadishu and Garoowe) and in Europe, including the United Kingdom, Italy and Sweden, and identified 36 legal professionals, both male and female, who would be interested in participating in anti-piracy courts both inside and outside Somalia. The Secretary of the Somali Law Council believed that more legal professionals would be interested as more information becomes available regarding the arrangements.

12. The Netherlands Bar Association noted that it would be difficult for it or any other bar association in the European Union to identify lawyers among their membership qualified in the European Union by reference of their national origin. This is because European bar associations only admit to membership lawyers who have qualified within a European Union member State. Any person who had previously practised law in Somalia would therefore have to qualify in the European Union, and upon doing so would be indistinguishable from any other member of the association. Moreover, European bar associations would not maintain any information about the national origins of their members. The Canadian Bar Association similarly responded that its records are not kept in a manner that would allow for the identification of Somali lawyers. The response rate from other bar associations and law societies was low.

Annex IV^a**Financiers, facilitators, leaders and planners of piracy**

1. One of the considerations when establishing or developing Somali-specialized anti-piracy courts, and for other States engaged in piracy prosecutions, is whether such prosecutions should focus on the perpetrators of acts of piracy at sea, on the financiers and planners of piracy, or on both. In this respect, the Office of Legal Affairs has consulted a number of Member States, INTERPOL, UNODC, the Department of Political Affairs and the Monitoring Group of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia on the issue of the financiers, the facilitators and the planners of acts of piracy off the coast of Somalia.
2. The Monitoring Group has identified not only the key leaders of pirate militias and networks, but also their location and political connections. Many of them are reportedly within Somalia. It has found that ransoms are shared among several different actors, including financiers and sponsors, maritime militia, ground militia that protect seized vessels pending payment of ransoms, and associates in the local communities.^b
3. All of those consulted considered that, while counter-piracy actions at sea help to protect mariners and to apprehend and prosecute those involved in attacks, it is important that States also take steps to disrupt land-based pirate activities and the associated financial flows. It was considered that increased attention to the investigation and prosecution of the relatively small number of individuals who provide the leadership and the financial management of piracy would be both a strategically effective and cost-effective means of supplementing the current prosecution efforts.

Prosecutions in Somali courts

4. In resolution 1950 (2010), the Security Council called on all States to assist Somalia, at the request of the Transitional Federal Government and with notification to the Secretary-General, to strengthen capacity in Somalia, including its regional authorities, to bring to justice those who are using Somali territory to plan, facilitate or undertake piracy. More specifically, by resolution 1976 (2011), the Security Council invited States and regional organizations, individually or in cooperation with, among others, UNODC and INTERPOL, to assist Somalia and other States of the region in strengthening their counter-piracy law enforcement capacities, including implementation of anti-money-laundering laws, the establishment of Financial Investigation Units and strengthening forensic capacities, as tools against international criminal networks involved in piracy. The Council stressed in this context the need to support the investigation and the prosecution of those who illicitly finance, plan, organize or unlawfully profit from pirate attacks off the coast of Somalia.

^a The present annex contains information received from a number of Member States, INTERPOL, UNODC and the Monitoring Group of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia.

^b See S/2008/769 and S/2010/91.

5. More sophisticated investigative, prosecutorial and judicial expertise is needed for these more complex crimes. UNODC assesses that it would not be feasible at this stage for the assize sections of the courts in “Somaliland” and “Puntland” to handle such cases. In particular, the training necessary would need to come at a later stage, when training related to the prosecution of acts of piracy at sea is at a more advanced stage. In addition, effective prosecution would require broader criminal legislation, including crimes of extortion, kidnapping, conspiracy and money-laundering. Given the fact that, thus far, the Transitional Federal Parliament and the regional parliaments have not adopted effective anti-piracy legislation, UNODC considers that adoption of legislation covering these more complex crimes is unlikely at this stage.

Prosecution in other national jurisdictions

6. The Security Council, in its resolution 1950 (2010), urged all States to take appropriate actions under their existing domestic law to prevent the illicit financing of acts of piracy and the laundering of its proceeds. It also stressed the need to support the investigation and the prosecution of those who illicitly finance, plan, organize or unlawfully profit from piracy attacks off the coast of Somalia. More recently, in resolution 1976 (2011), the Security Council emphasized the importance of criminalizing incitement, facilitation, conspiracy and attempts to commit acts of piracy under domestic laws. The Council also underlined the need to investigate those who illicitly finance, plan, organize or unlawfully profit from pirate attacks off the coast of Somalia, recognizing that individuals and entities who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law.

7. Domestic jurisdictions have begun to play a role in prosecuting financiers, planners and facilitators of piracy. The United States has indicted two alleged pirate negotiators.^c INTERPOL has also issued three Red Notices seeking the provisional arrest for the extradition of individuals who have been identified as alleged financiers or facilitators of piracy. One of these individuals has since been arrested by a State in the Middle East and is awaiting extradition to a European State. Several countries are also conducting investigations against financiers and facilitators of piracy.

Information-sharing

8. The Security Council encourages information-sharing on piracy in general and on facilitators, financiers and planners in particular. By resolution 1950 (2010), the Security Council urged all States, in consultation with INTERPOL and the European Police Office (Europol), to further investigate international criminal networks involved in piracy off the coast of Somalia, including those responsible for illicit financing and facilitation. The Council also called upon all States to cooperate in the investigation and the prosecution of all persons responsible for acts of piracy and armed robbery off the coast of Somalia, including anyone who incites or facilitates

^c *United States of America v. Ali Mohamed Ali*, also known as Ismail Ali, also known as Ahmed Ali Adan, United States District Court for the District of Columbia, Criminal No. 11-106 (PLF); and *United States of America v. Mohammad Saaili Shibin*, also known as Khalif Ahmed Shibin, also known as Shibin, United States District Court for the Eastern District of Virginia, Criminal No. 2:11cr33.

an act of piracy. Recently, in resolution 1976 (2011), the Security Council specifically urged States and international organizations to share evidence and information for anti-piracy law enforcement purposes with a view to ensuring effective prosecutions.

9. Within the framework of the Contact Group on Piracy off the Coast of Somalia, the United States recently hosted an ad hoc meeting of experts on piracy financial flows to discuss mechanisms by which the international community could address this aspect of Somali piracy. The plenary meeting of the Contact Group held in New York on 21 March 2011, approved the recommendations of the ad hoc meeting and invited Italy to circulate a road map to States willing to engage on the matter. As a follow-up, an informal working group will develop actionable projects to disrupt pirate financial flows, and another ad hoc meeting will be held in Seoul on 29 June 2011, to lay the groundwork for the adoption and the approval of the group's work at the 9th plenary meeting of the Contact Group.

10. Building on these developments and to contribute to the work of the informal working group, UNODC hosted a conference from 17 to 19 May 2011 to determine what is known about financial flows related to piracy, and the transit and destination countries. The conference was attended by more than 90 delegates from 30 States, various international and regional organizations, and participants from the private sector. The conference approved a list of operational recommendations aimed at enhancing information-sharing and cooperation between private and public actors and relevant law enforcement agencies. These include key areas for specific anti-money-laundering capacity-building in the region. UNODC was tasked with providing a detailed overview of the existing regional initiatives on tracking the illicit financial flows linked to piracy, and to conducting further research in close cooperation with the World Bank on the channels used by these illicit flows, in particular alternate remittance systems and money service providers.

Targeted sanctions

11. The Monitoring Group on Somalia has stated that some leading figures involved in financing and planning piracy are responsible for arms embargo violations, and should be considered for targeted sanctions imposed by Security Council resolution 1844 (2008).^d In resolution 1976 (2011), the Security Council expressed its intention to keep under review the possibility of applying targeted sanctions to individuals and entities who illicitly finance, plan, organize, or unlawfully profit from pirate attacks off the coast of Somalia, if they meet the listing criteria set out in paragraph 8 of resolution 1844 (2008).

^d See S/2008/769, para. 123.

Annex V^a**Update of United Nations assistance to States in the region to prosecute and imprison**

1. In May 2009, the United Nations began, through the United Nations Office on Drugs and Crime, a programme of assistance to States in the region to prosecute and imprison persons suspected of acts of piracy. The programme focuses in particular on States that have agreed to receive suspects arrested by naval forces. The programme improves capacity to conduct such prosecutions through legislative assistance, the training of judges, prosecutors, police investigators, defence counsel and prison staff, and investment in courthouses, prisons and other infrastructure. Assistance is being provided in Kenya and Seychelles, and will soon extend to Mauritius. A needs assessment has been completed at the request of the Government of the United Republic of Tanzania of their capacity to prosecute piracy cases.

2. In none of these States is the assistance being provided to establish dedicated piracy chambers or courts. Development of capacity to prosecute piracy cases is taking place within the context of the States' existing court structures, and the judges and prosecutors concerned also conduct prosecutions of other serious crimes. This is in accordance with the wishes of the States concerned.

Kenya

3. In March 2010, Kenya gave six months' notice of its withdrawal from the arrangements that it had entered into with Canada, China, Denmark, the European Union, the United Kingdom and United States, for the transfer of piracy suspects. However, Kenya continues to accept pirates from naval forces for trial on an ad hoc basis. The prosecutions of 50 accused in six trials have been completed, and there are 9 ongoing prosecutions of 69 piracy suspects. Kenya has six judges and six prosecutors who specialize in piracy cases, although not exclusively. Judges, prosecutors and police have received training to assist them in conducting piracy investigations and prosecutions to international standards. Training has been delivered to the police in modern investigatory procedures, intelligence analysis, receipt of piracy suspects from naval forces in Mombasa, and the handling of evidence. Kenya has declined offers of international experts to assist in these prosecutions. Defence counsel have been funded by UNODC in those cases where defendants lack representation.

4. Prosecutions are taking place at the new courthouse constructed by UNODC at Shimo La Tewa Prison, near Mombasa, and at Mombasa Court Centre, refurbished by UNODC. As security is a concern, the Shimo La Tewa courthouse has been built within the secure perimeter of the prison. Responsibility for the transportation of suspects to the court (a 100-metre walk at Shimo La Tewa, and a 12-kilometre drive to Mombasa Court Centre) rests with the Kenya Prison Service, which has been provided with vehicles by UNODC for this purpose. UNODC funds a private security firm to provide security guards at Mombasa Court Centre during trials. All those piracy suspects on trial are held at Shimo La Tewa Prison, while those convicted are held at three other prisons in central Kenya, which are also being refurbished by UNODC. Kenya does not yet have any agreement with Somalia for

^a The present annex contains information received from UNODC.

the transfer of prisoners convicted in Kenya back to Somalia to serve prison sentences, but discussions with the assistance of UNODC are expected to start shortly.

Seychelles

5. Seychelles has arrangements with Denmark, the European Union, the United Kingdom and the United States for the transfer of piracy suspects for prosecution. Seychelles' willingness to accept the transfer of suspects under these arrangements is contingent upon being able to transfer convicted persons to Somalia to serve their prison sentences there. The recent signing by Seychelles of memorandums of understanding with the Transitional Federal Government, "Puntland" and "Somaliland" to enable such transfers of convicted persons is therefore a significant development. These memorandums of understanding set out the agreement of the Somali authorities to consider any requests for the transfer of convicted persons on a case-by-case basis. They are not agreements that all convicted persons will be received in "Somaliland" or "Puntland". Further, there is currently insufficient prison capacity in "Somaliland" and "Puntland" to accept more than a limited number of convicted persons. UNODC is seeking funding to construct two new prisons, one in "Somaliland" and one in "Puntland", to receive persons convicted outside Somalia of piracy. These prisons will be ready for use approximately two years from receiving full funding.

6. Seychelles has completed the prosecution of 41 accused in four trials, and is now conducting three further prosecutions of 23 suspects. The UNODC programme of assistance began in January 2010, and has included drafting legislative amendments, and providing training to judges, prosecutors and police to assist them in conducting piracy investigations and prosecutions to international standards. As with Kenya, training has been delivered to the police in modern investigatory procedures, intelligence analysis, receipt of piracy suspects from naval forces, and the handling of evidence.

7. There are two judges and one prosecutor specializing in piracy prosecutions, although not exclusively. Funding for the provision of defence lawyers through the legal aid system has also been provided by UNODC. In Seychelles, there is a tradition of receiving secondments of judges and lawyers from other Commonwealth countries, and there is provision in the law for them to be admitted to practise. UNODC has assisted in arranging such secondments into the Seychelles police force and the office of the Director of Public Prosecutions.

8. The Seychelles' prison staff have been trained, and refurbishment of the main prison block is under way. Construction of a new prison block has commenced and will be complete in July 2011. However, prison capacity is limited, and the ability of Seychelles to play a significant role in prosecutions will turn on the success of its memorandums of understanding with the Transitional Federal Government, "Puntland" and "Somaliland". There is a requirement in most transfer arrangements concluded by Seychelles with naval States that permission be sought before convicted persons can be transferred to a third State.

Mauritius

9. Mauritius is engaged in the final stages of negotiations with the European Union to accept the transfer of piracy suspects for prosecution. In parallel with these

negotiations, UNODC and the European Union have developed a programme of assistance that is fully funded, which will be implemented as soon as a transfer agreement is signed. The programme will include similar elements to those in Kenya and Seychelles.

United Republic of Tanzania

10. The United Republic of Tanzania has prosecuted and convicted six pirates, and is prosecuting six further suspects. These persons were all captured by Tanzanian law enforcement officials. In response to a request from the Government of Tanzania, UNODC has examined Tanzania's capacity to accept piracy suspects from foreign naval forces for prosecution. That assessment is complete and the report has been passed to the Government. Security is one of the Government's major concerns, both in relation to domestic prosecutions and the possibility of an extraterritorial Somali court. A number of potential donors have indicated their willingness to fund a programme of assistance for Tanzania.

Maldives

11. Maldives currently holds 34 Somali men who it suspects were involved in piracy. Maldives has no piracy law and cannot prosecute, so UNODC is assisting with their repatriation to Somalia. Maldives has asked UNODC to assist with the introduction of a piracy law and has had some discussions about assisting with piracy prosecutions. UNDP is involved in judicial capacity-building in Maldives. Maldives has signed a memorandum of understanding with the Transitional Federal Government and "Puntland" for the return of persons convicted to serve their sentences in "Puntland".
