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**PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME**

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**SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL**

Mandate of the Special Rapporteur on the independence of judges and lawyers

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Dear Mr. Salomão,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 17/2.

As you may be aware, my mandate addresses the independent and proper functioning of domestic courts as well as international tribunals, as highlighted in a number of reports to the Human Rights Council and the General Assembly (for instance A/HRC/11/41, paras. 85-94; A/HRC/8/4, paras. 55-57; A/HRC/14/26, paras. 81-90; A/64/181, paras. 91-101). In this connection, I would like to draw your attention, in your capacity of Executive Secretary of the Southern African Development Community (SADC), to information I have received regarding the moratorium imposed on the SADC Tribunal on the hearing of new and pending cases, and on the non-reappointment of its former President and members, namely **Justices Ariranga G. Pillay, Rigoberto Kambovo, Onkemetse B. Tshosa and Frederick Chomba**.

According to the information received:

On 19 May 2011, the Council of Ministers of the SADC allegedly took the following decisions which were subsequently endorsed by the Summit of Heads of State and Government at its extraordinary meeting on 20 May 2011: 1) not to re-appoint members of the SADC Tribunal whose term of office had expired on 31 August 2010; 2) not to replace members of the Tribunal whose term of office had expired on 31 October 2011; and 3) to bar the Tribunal from hearing new or pending cases, until completion and approval of a revision of the SADC Protocol on the Tribunal.

According to article 3 of its Protocol, the SADC Tribunal is to be composed of no less than ten members (five "regular" and five 'additional' members). It is reported that all members of the Tribunal were appointed in August 2005. Yet, contrary to requirements under Article 6(1) of the Protocol on the Tribunal, no lot was drawn to designate the 4 members (2 regular and 2 additional) who would

only serve a term of office of 3 years, as opposed to the 5 year regular term of office. The lot was allegedly finally drawn in October 2008, after an amendment was made to Article 6(2) of the Protocol which reads that: “In the event that the draw of the lot is not done pursuant to paragraph 1, for members of the Tribunal whose term of office is to expire at the end of three years, their term of office shall be deemed to be extended for a period that would have elapsed between the date of first appointment and the date of making the draw.”

As a result, the term of office of the members appointed in August 2005 for the regular five-year term expired on 31 August 2010, whereas the term of office of those members who were drawn by lot to serve the shorter three-year term expired on 31 October 2011. Judges Pillay, Kambovo, Tshosa and Chomba were among the members to serve the regular five-year term of office. It is also reported that Justice Pillay was appointed President of the Tribunal on 27 November 2008 for a period of three years in accordance with article 7(1) of the Protocol, which means that his term of office as President expired on 27 November 2011.

The Executive Secretary of the SADC reportedly put the issue of the reappointment of Judges Pillay, Kambovo, Tshosa and Chomba as an item on the agenda of the August 2010 meeting of the Council of Ministers, since their term of office was to expire at the end of the same month. It is reported that the Council of Ministers made no decision on the matter, arguing that this particular item should first have been discussed and approved by the Ministers of Justice/Attorneys General of the SADC Member States. Nevertheless, the Executive Secretary allegedly put the item on the agenda of the August 2010 Summit of Heads of State and Government.

At their August 2010 Summit, the Heads of State and Government reportedly commissioned a review of the SADC Tribunal’s role, responsibilities and terms of reference to be conducted by an independent consultant. In this context, the Heads of State and Government allegedly decided that, pending completion of the independent review, the issue of the reappointment of members, whose term of office would expire on 31 August 2010, would be deferred and that, in the interval, the four judges concerned - namely Justices Pillay, Kambovo, Tshosa and Chomba - should remain in office and could hear pending cases but not new ones.

As a result, Judges Pillay, Kambovo, Tshosa and Chomba remained in office as President and members of the Tribunal, in spite of the expiry of their term of office, and the Tribunal was not barred from hearing pending cases. Yet, since August 2010, the Tribunal, still nominally functioning, was unable to hear any pending cases because of lack of financial resources, which were allegedly withheld, despite the Tribunal’s many requests to the Secretariat of the SADC.

The preliminary recommendations made by the independent consultant were allegedly discussed at a workshop of senior legal officials of SADC member States, where they were also amended and approved. One of the recommendations

requested that the Ministers of Justice/Attorneys General recommend to the Summit of Heads of State and Government to finalize the reappointment and replacement of the members of the Tribunal in accordance with the Protocol on the Tribunal. The Ministers of Justice/Attorneys General allegedly endorsed the recommendation, mentioning that reappointments and replacements should be finalized in light of their own recommendation to review and amend the relevant SADC legal instruments.

Yet, contrary to the recommendation in this regard, the Council of Ministers allegedly decided not to reappoint or replace members of the Tribunal at their meeting of 19 May 2011. The decision was reportedly endorsed by the Summit of Heads of State and Government at their extraordinary meeting on 20 May 2011.

It is reported that the judges were only informed that they would not be reappointed by press release and that they were given neither a reason nor explanation for the decision. Furthermore, until 13 June 2010, the judges had reportedly not received any official communication from the Executive Secretary regarding their non-reappointment. It is reported that the judges have been denied a hearing, legal redress and the possibility of collecting their personal belongings left at the Tribunal.

It is alleged that, in the circumstances described above and without indication to the contrary, judges Pillay, Kambovo, Tshosa and Chomba had a legitimate and reasonable expectation that their term of office would be renewed. The decision of the Council of Ministers, later endorsed by the Summit of Heads of State and Government, not to reappoint or replace judges members of the Tribunal was reportedly made in breach of the Protocol on the Tribunal whose article 3 stipulates, *inter alia*, that the Tribunal “shall consist of no less than 10 members”, and article 8 states, *inter alia*, that “no member of the Tribunal may be dismissed unless in accordance with the rules” and that “notwithstanding the expiration of his or her term of office, a member shall continue to hear and complete those cases partly heard by him or her” and allegedly constituted an act *ultra vires*.

At their extraordinary summit on 20 May 2011, the Heads of State and Government reportedly also endorsed the decision of the Council of Ministers to mandate the Ministers of Justice/Attorneys General of SADC Member States to initiate their own review process to amend the SADC legal instruments relevant to the Tribunal – i.e. the SADC Treaty and the Protocol on the SADC Tribunal. The Ministers of Justice/Attorneys General of SADC Member States were requested to submit a progress report on this review to the Summit of Heads of State and Government in August 2011 and a final report on the review to the Summit of Heads of State and Government in August 2012.

The decision to prohibit the Tribunal to hear new and pending cases until completion of the revision process launched in May 2011 is also reported to have been made *ultra vires* and in breach of the Protocol on the Tribunal. The Summit of Heads of State and Governments allegedly does not have the power to restrict

the jurisdiction of the Tribunal, but only to amend the SADC Treaty and the Protocol on the Tribunal, following the procedures foreseen in the instruments, which excludes suspension of the Tribunal activities pending a revision of its instruments.

Both decisions on the non-reappointment of judges and the moratorium on the Tribunal's activities are reported to amount to a *de facto* dissolution of the SADC Tribunal. A Tribunal with a different jurisdiction and new membership will reportedly be created after the final report of Ministers of Justice/Attorneys Generals of the SADC member States in August 2012.

I wish to express my concern about the moratorium on the main activity of the Tribunal, namely hearing new and pending cases, and the lack of funds provided to the Tribunal for the discharge of its functions. Suspending the activities of an independent judiciary may undermine the rule of law and impede access to justice. It may also constitute a violation of the right to an effective remedy, as enshrined in article 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR), especially because the Tribunal can receive individual complaints. The SADC Tribunal is a mechanism that was legally constituted by the SADC member States who voluntarily accepted the jurisdiction of the Tribunal. Therefore, these States have an obligation to respect their engagement to submit themselves to the jurisdiction of the Tribunal and may not interfere with its activities. Moreover, I believe that the decision to declare a moratorium on cases to be heard by the Tribunal is in breach of the member States' obligation under article 16 of the SADC Treaty according to which they agreed to constitute "the Tribunal to ensure adherence to and the proper interpretation of the provisions of this treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it", and article 4(c) which enshrines the obligation to respect principles of human rights, democracy and the rule of law.

In addition, I wish to express my concern regarding the possible lack of implementation of the decisions of the Tribunal. Decisions of a legally constituted judicial mechanism should not become defunct even if the Tribunal itself has, otherwise the principles of the rule of law and legal continuity would be jeopardized. Article 32 of the SADC Protocol on the Tribunal specifically requires SADC Member States and institutions to take "all measures necessary to ensure execution of decisions of the Tribunal."

In this connection, I wish to refer you to principle 4 of the Basic Principles on the Independence of the Judiciary which provides that "[T]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law." Under the SADC Treaty, the Summit of Heads of State and Government can amend the treaty and its Protocols in relation to future cases brought to the Tribunal, but they do not have the right to ignore their obligations until such amendments are made. Neither the SADC Treaty, nor the SADC Tribunal Protocol, gives the Summit the explicit power to suspend the operations of other organs, in this

case the Tribunal. In this context, I also wish to draw your attention to the general principle of international law, reaffirmed by the International Court of Justice, which states that organs of international organizations can only exercise the powers they have and must not act *ultra vires*.

I also wish to express my concern about the decision not to reappoint Justices Ariranga G. Pillay, Rigoberto Kambovo, Onkemetse B. Tshosa and Frederick Chomba as members of the SADC Tribunal and not to replace judges whose term of office expired at the end of October 2011, and its impact on the security of tenure of members of the Tribunal. I would like to stress that security of tenure is one of the basic conditions for judges to retain their independence. I also wish to recall that the independence of judges derives from the basic principles of the rule of law, and in particular the principle of separation of powers. In this view, I believe that the decisions were taken in breach of the SADC Treaty, in particular article 4(c) where respect for the principles human rights, democracy and the rule of law are enshrined, and the Protocol on the Tribunal, in particular article 3(1) which stipulates that the Tribunal shall consist of no less than 10 members.

I wish to draw your attention to the Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) whose principle 1 stipulates that “The independence of the judiciary shall be guaranteed by the State” and that “[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.” Principle 11 states that “[T]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.” Principle 12 further provides that “[J]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”

In its General Comment No. 32 on article 14 of the ICCPR, the Human Rights Committee also underlined that the requirement of independence of the judiciary refers, *inter alia*, to the procedures for appointment of judges and guarantees relating to their security of tenure, conditions governing suspension and cessation of their functions, and to the actual independence of the judiciary from political interference by the executive branch and legislature (CCPR/C/GC/32, para. 19).

Moreover, it is my responsibility under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. Since I am expected to report on these cases to the Human Rights Council, I would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the above summary of the case accurate?
2. Please provide detailed information on the decision of the Council of Ministers, endorsed by the Summit of Heads of State and Government, not to

reappoint Judges Pillay, Kambovo, Tshosa and Chomba for another term of office and not to replace members of the Tribunal whose term of office expired on 31 October 2011. What were, in particular, the legal basis and reasoning behind this decision?

3. Please indicate if Judges Pillay, Kambovo, Tshosa and Chomba have had access to legal remedy.
4. Please provide detailed information on the decision of the Council of Ministers, endorsed by the Summit of Heads of State and Government, to put a moratorium on the SADC Tribunal's hearing of new and pending cases. What were, in particular, the legal basis and reasoning behind this decision?
5. Please indicate what measures have been taken to ensure legal continuity for cases currently pending before the Tribunal.
6. Please indicate whether there have been any developments in the process of establishing a new Tribunal, and how it would differ from the previous one, in particular with regard to its objectives and mandate.

I would appreciate a response within sixty days. I undertake to ensure that your response to each of these questions is accurately reflected in the reports I will submit to the Human Rights Council for its consideration.

A copy of this communication was shared with all Member States of the SADC for their information, namely the Governments of Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

Please accept, Mr. Salomão, the assurances of my highest consideration.

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers