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MEDIA STATEMENT ISSUED BY THE SA HUMAN RIGHTS COMMISSION TO CALL FOR THE
UPHOLDING OF CASTER SEMENYA'S RIGHT TO PRIVACY AND DIGNITY

Date: Friday, September 11, 2009

The South African Human Rights Commission calls upon and encourages the international community, South Africans and the media to uphold Caster Semenya's right to dignity and privacy.

The Caster Semenya saga has raised a number of questions that have human rights implications for the international community and for South Africans. To what extent does our society embrace diversity? What happens to those who fit uneasily into the categories of male and female? The reality is that sex is a continuum from male to female, with intersex lying somewhere in the middle. The binary distinction between male and female does not reflect that reality, and cannot accommodate intersex persons. Consequently, intersex persons are one of the most invisible minorities in the world and discrimination against them exists in all societies.

For a number of years the Commission has conducted work assisting persons who are intersex. It is noted that the current debate in which it is being reported that Caster Semenya may be intersex is taking place within a discourse that promotes stigma and discrimination towards persons who are intersex. The Commission is thus of the view that it needs to issue this statement.

Caster Semenya's story provides an opportunity for South Africans and the world to question whether this male/female dichotomy is correct and reflective of the myriad ways of being human. Regardless of whether Caster Semenya is or is not intersex, she has been a catalyst for this important debate to take place. Sex is a constitutionally prohibited ground of discrimination, on a par with discrimination based on race or sexual orientation. South Africans who are intersex live in the only country in the world that provides very specific and direct legal protection to intersex persons against discrimination. The South Africa Human Rights Commission, in conjunction with intersex activists, was at the forefront of an amendment to the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA or the Equality Act), whereby a definition of "sex" was included in the Act. The definition recognizes sex as male, female, and intersex. Thus, in terms of protecting persons who are intersex, a legal framework has already been laid in South Africa and we are far ahead of other countries in the world.

The Commission reiterates that it supports Caster Semenya's rights to dignity and privacy in what must be a difficult period in her life. The current focus needs to be on South Africans demonstrating to the world that we embrace everyone who lives in our country, be they male, female, or intersex.

ENDS

Contact persons
Commissioner Pregs Govender, 082 441 2281

“B”

Proposed Amendments to the
Human Rights Commission Act No.54 of 1994

1. I seek to propose amendments to the Human Rights Commission Act No.54 of 1994, by adding the following clause to Subsection 7(e)

7(e) may bring proceedings in a competent court or tribunal, including international courts and tribunals, in its own name, or on behalf of a person or a group or class of persons

“C”

African Court of Justice and Human Rights (ACJHR)

There is much anticipation that the African Court on Human and Peoples' Rights will contribute substantively to the protection of human rights on the African continent. However no cases have been heard since it's inception on the 25th of January, 2004.³ Also, there was uncertainty over the Courts future functioning after it was disclosed in an AU Summit meeting in 2005 that the African Court on Human and Peoples' Rights would merge with the African Court of Justice (ACJ) in the interest of consolidating limited resources.⁴ This was confirmed once more at the AU's 11th summit in July 2008 with the adoption of the Protocol on the Statute of the African Court of Justice and Human Rights. The new court will be known as the African Court of Justice and Human Rights. The merger is yet to take place. There are currently 23 states that have subjected themselves to the court's jurisdiction, including South Africa. Considering the current state of human rights abuses in Africa, there is a need for the Court to become operational and functioning as soon as possible. However, the Court is yet to finalize its rules of procedure⁵ and there are already concerns about the Courts capacity to be effective considering its insufficient budget within the AU's limited resources.

*Nairobi Declaration on an Effective African Court on Human and Peoples' Rights*⁶

The 2005 Nairobi Declaration on an Effective African Court on Human and Peoples' Rights, the outcome of a Conference on this topic made a number of recommendations, including the need to:

- proceed without further delay with the operationalization of the African Court;
- ensure that the African Courts' budget includes provision for legal aid;

³ The African Court on Human and Peoples' Rights, "African International Courts and Tribunals,"

http://www.aicd-cla.org/courts_contact.php?chose_home.html

⁴ African Court on Human and Peoples' Rights, "International Justice,"

<http://www.rnw.nl/internationaljustice/organisatie/AfricanCourtHumanPeoplesRights/>

⁵ A Critical Analysis of the African Court on Human and Peoples' Rights, "The South African Institute for Advanced Constitutional, Public, Human Rights and International Law,"

⁶ Nairobi Declaration on an Effective African Court on Human and Peoples' Rights, Section E (1), (2), (8),

10 April, 2005.

- Consider enabling NGOs and individuals to directly access the African Court
- Develop an integrated business plan for the African Commission and the African Court for the next five years that would include a strategy and plan for fund-raising.

The Declaration also addresses the role of NHRIs and encourages these institutions to engage their governments on the establishment of an effective African Court and once the court is established by filing cases and following up on recommendations.

“D”

Do other HRCs have international jurisdiction?

1. Canada

In Canada, the Commission can deal with complaints that are committed outside of national borders granted the victim is a Canadian citizen or permanent resident at the time of the act or omission.

Canadian Human Rights Act, 1985

40. (5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred in Canada and was a discriminatory practice within the meaning of section 5, 8, 10, 12 or 13 in respect of which no particular individual is identifiable as the victim; or

(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

2. New Zealand

In New Zealand, it is only explicitly stated that the Commission may bring civil proceedings before the national Human Rights Review Tribunal. The Tribunal may also state a case for the High Court regarding questions of law, however, no international court of tribunal option is offered.

Human Rights Act, 1993

92(b)(1) If a complaint referred to in section 76(2)(a) has been made, the complainant, the person aggrieved (if not the complainant), or the Commission may bring civil proceedings before the Human Rights Review Tribunal—

122(1) The Tribunal may, at any time, before or during the hearing or before delivering its decision, on the application of any party to the proceedings or of its own motion, state a case for the opinion of the High Court on any question of law arising in any proceedings before the Tribunal.

3. Australia

In Australia, the Human Right Commission Act only permits a person to make an application to the Federal Court or the Federal Magistrates Court if the complaint has been unlawfully terminated. The Commission's jurisdiction internationally is in no way alluded to.⁹

Australian Human Rights Commission Act, 1986

⁹ <http://gw6.justice.gc.ca/en/ShowFullDoc/cst/h-6/20091005/en>

¹⁰ http://www.legislation.gov.au/nz/ac/publish/1993/00/82/laws/DLM304212.html?search=cs_act_human+rights+act_&cs=1&cs=1

¹¹ <http://www.comlaw.gov.au/compaw/legislation/ActCompilation.nsf/013856413809E66A0C4257607002738B03?OpenDocument>

46PO Application to court if complaint is terminated

(1) If:

(a) a complaint has been terminated by the President under section 46PE or 46PH; and
(b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination;

any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

5. Kenya

In Kenya, the Human Rights Act makes no mention of the Commission being permitted to bring proceedings to international courts or tribunals.¹⁰ Furthermore, it states that the Commission should not involve itself in matters involving the Government, foreign governments, or international organizations.

Kenya National Commission on Human Rights Act, 2002

25. The Commission may take any of the following steps after completing an inquiry into a complaint under this Act -

(b) in its own name, commence and prosecute appropriate proceedings in the High Court under section 84(1) of the Constitution for such orders, writs or directions as may be appropriate; or

32. The Commission shall not investigate -

(b) a matter essentially involving the relations or dealings between the Government and the Government of foreign state or international organization recognized as such under international law;

6. Uganda

The Ugandan Constitution grants the Ugandan Human Rights Commission the same powers of a court. One may appeal only to a national High Court if they are dissatisfied with the Commission's decision.¹¹ The Constitution also makes clear that the Commission shall not investigate matters between the Government and the Government of any foreign State or international organization. The Ugandan Human Rights Commission Act makes no reference to bringing matters before any court, let alone international court or tribunal.¹²

The Constitution of the Republic of Uganda, 1995

53. (1) In the performance of its functions, the Commission shall have the powers of a court-
(3) A person or authority dissatisfied with an order made by the Commission under clause (1) of this article, has a right to appeal to the High Court.

(4) The Commission shall not investigate-

(b) a matter involving the relations or dealings between the Government and the Government of any foreign State or international organization; or

¹⁰ http://www.knchr.org/documents/knchr_Act.pdf

¹¹ <http://www.hrbpund.gov.ug/constitu/constitu/uganda/uganda-e.htm>

¹² http://www.ullr.org/ug/legis/consol_act/coppo200024187/