



**Submission to the Human Rights
Committee Regarding the Forced and
Coerced Sterilisation of Women Living with
HIV/AIDS in Namibia**
Submitted in advance of the consideration of the list
of Issues for Namibia's 2nd Periodic

By the Southern Africa Litigation Centre (SALC)

Endorsed by:

The Namibian Women's Health Network (NWHN),
The International Community of Women Living with HIV (ICW),
The International Community of Women Living with HIV - Southern Africa (ICW-SA),
and Her Rights Initiative, South Africa

SOUTHERN AFRICA LITIGATION CENTRE

Contents

Submission to the Human Rights Committee Regarding the Forced and Coerced Sterilisation of Women Living with HIV/AIDS.....	2
Introduction	2
Background.....	2
Forced/coerced sterilisation of women living with HIV as violation of the right to non-discrimination (Articles 2, 3 and 26)	3
Forced/coerced sterilization of women living with HIV as a violation of Articles, 7, 17 and 23	4
Failure to report on forced/coerced sterilisation and take measures to prevent further violations, including under articles 6 and 7	5
Conclusion.....	6
Proposed questions.....	6

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg,
South Africa

PO Box 122 Parklands 2121 South Africa

T: +27 (0) 10 596 8538

www.southernafricalitigationcentre.org

An initiative of the International Bar Association and the Open Society Initiative of Southern Africa
NPO 138-655

SOUTHERN AFRICA LITIGATION CENTRE

Submission to the Human Rights Committee Regarding the Forced and Coerced Sterilisation of Women Living with HIV/AIDS

Introduction

The Southern Africa Litigation Centre (SALC) would like to bring to the attention of the Human Rights Committee (the Committee) its continued concerns regarding the forced and coerced sterilisation of women living with HIV/AIDS in Namibia. SALC is aware of the recent developments in the country regarding this issue, specifically the decision of the Supreme Court which held that three women living with HIV/AIDS had been sterilised without their adequate consent. However, the organisation remains concerned that the human rights violations associated with this practice have not been resolved for the majority of women living with HIV/AIDS in the country and that their rights continue to be violated. SALC is particularly concerned about the failure of the government of Namibia to provide information about forced/coerced sterilization in its report to the Committee; to recognize this forced/coerced sterilization of these women as constituting unfair discrimination against them; as well as to put into place policies to ensure the practice does not continue and that other rights are not violated.

SALC is a non-governmental organization based in Johannesburg, South Africa. SALC aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers and local civil society organisations in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers and civil society organisations in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC has been working on addressing the coerced sterilisation of women living with HIV in southern Africa since 2008.

SALC submits this information in advance of the consideration of Namibia's second periodic report to the Committee under section 40 of the International Covenant on Civil and Political Rights (ICCPR). The organisation requests the Committee members to raise these concerns with the government of Namibia.

This submission has been endorsed by) the Namibian Women's Health Network (NWHN), the International Community of Women Living with HIV (ICW) the Southern Africa office of the ICW, ICW-Southern Africa and Her Rights Initiative, South Africa.

Background

The sterilisation of women living with HIV/AIDS in Namibia first became evident in 2008, during a workshop organized by the International Community of Women Living with HIV/AIDS (ICW). In this workshop a number of women living with HIV/AIDS reported being subjected to sterilisation in a manner which indicated lack of adequate informed consent. Since then, dozens of cases of women living with HIV being subjected to coerced or forced sterilisation have been

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg,
South Africa

PO Box 122 Parklands 2121 South Africa

T: +27 (0) 10 596 8538

www.southernafricalitigationcentre.org

An initiative of the International Bar Association and the Open Society Initiative of Southern Africa
NPO 138-655

SOUTHERN AFRICA LITIGATION CENTRE

documented, including by SALC, the ICW, the Namibian Women's Health Network (NWHN) and the Legal Assistance Centre (LAC). Although Namibian law requires consent to be obtained before any medical procedure is carried out, including sterilisation, in all these documented cases consent was inadequately obtained because:

- it was obtained under duress, for example while a woman was in labour or on her way to the operating theatre;
- the woman was not informed of what she was signing; and/or
- there was a failure to provide full and accurate information regarding the sterilisation procedure, including the nature of the procedure and that it is permanent.¹

This forced/coerced sterilisation appears to have been a widespread practice carried out on women living with HIV/AIDS. Those who reported being sterilised stated that the reason given for their sterilisation was their HIV status.

In 2012, the High Court in Namibia in *LM and Others v Namibia*, held that the three HIV-positive women were sterilised without their informed consent in violation of their rights under Namibian law.² The state appealed and the decision was upheld by the Supreme Court in November 2014. Both Courts, however, stated that based on the information before them, a finding of discrimination against women living with HIV/AIDS could not be made.

Forced/coerced sterilisation of women living with HIV as violation of the right to non-discrimination (Articles 2, 3 and 26)

The ICCPR calls upon governments to respect and to ensure to all individuals the rights recognized in the Covenant, without distinction of any kind;³ to ensure the equal right of men and women to the enjoyment of all rights in the Covenant;⁴ and to ensure all persons are equal before the law and have equal protection of the law without discrimination.⁵ Although HIV status is not specifically included as a prohibited ground for discrimination, the UN Commission on Human Rights has

¹ For further information see the report by the International Community of Women Living with HIV/AIDS, "The forced and coerced sterilization of HIV positive women in Namibia",

<http://www.icw.org/files/The%20forced%20and%20coerced%20sterilization%20of%20HIV%20positive%20women%20in%20Namibia%2009.pdf>

² *LM and Others v. the Government of the Republic of Namibia* (I 1603/2008, I 3518/2008, I 3007/2008) [2012] NAHC 211 (30 July 2012) <http://www.saflii.org/na/cases/NAHC/2012/211.html>

³ Article 2 (1) of the ICCPR, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁴ Article 3 ICCPR, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

⁵ Article 26 ICCPR, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg, South Africa

PO Box 122 Parklands 2121 South Africa

T: +27 (0) 10 596 8538

www.southernafricalitigationcentre.org

An initiative of the International Bar Association and the Open Society Initiative of Southern Africa

NPO 138-655

SOUTHERN AFRICA LITIGATION CENTRE

confirmed that the term “or other status” used in non-discrimination clauses “should be interpreted to include health status, such as HIV/AIDS.”⁶

While the Committee has stated that not every differentiation of treatment constitutes discrimination, it has also stated that “the criteria for such differentiation [must be] reasonable and objective and ... the aim [must be] to achieve a purpose which is legitimate under the Covenant.”⁷ A 2014 UN interagency statement by the Office of the High Commissioner for Human Rights (OHCHR), UN Women, UNAIDS, the UN Development Program (UNDP), the UN Population Fund (UNPF), UNICEF and the World Health Organisation (WHO) refers to forced/coerced sterilisation of women living with HIV/AIDS as being based on, “pervasive misconceptions among policy-makers and healthcare providers regarding HIV transmission”. This statement points to studies which indicate that safer infant feeding practices and antiretroviral treatments, when effectively provided, can reduce the rates of transmission of HIV from mothers to children to less than 5%. It further calls on health-care providers to be “non-coercive and respectful of autonomy, privacy” and not to restrict reproductive freedom “as part of a family planning, HIV prevention or other public health agenda.”⁸ The forced/coerced sterilisation of women living with HIV/AIDS therefore does not meet the criteria set out by the Committee for differentiation. To date the government has failed to recognise the forced/coerced sterilisation of women living with HIV/AIDS as a violation of the right to non-discrimination.

Forced/coerced sterilization of women living with HIV as a violation of Articles, 7, 17 and 23

The Committee in its General Comment 28 states, “Article 3 [of the ICCPR] implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality.”⁹ The forced/coerced sterilisation of women living with HIV/AIDS is not only discriminatory and a violation of articles 2, 3 and 26 of the ICCPR; but also has the effect of depriving these women of enjoyment of other rights contained therein.

Article 7 of the ICCPR prohibits torture and other cruel, inhuman and degrading treatment. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Committee against Torture have both held that forced sterilization is a violation of

⁶ Commission on Human Rights resolutions 1990/65, 1992/56, 1993/53, 1994/49, 1995/44 and 1996/43. Relevant reports of the Secretary-General submitted to the Commission on Human Rights are E/CN.4/1995/45 and E/CN.4/1996/44 and E/CN.4/1997/37. See also 3 Office of the UN High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version (Geneva 2006), page 108,

<http://www.ohchr.org/Documents/Issues/HIV/ConsolidatedGuidelinesHIV.pdf>

⁷ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), paragraph 13

⁸ Eliminating forced, coercive and otherwise involuntary sterilization, an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, © World Health Organization 2014, page 4, http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf

⁹ Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paragraph 2

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg, South Africa

PO Box 122 Parklands 2121 South Africa

T: +27 (0) 10 596 8538

www.southernafricalitigationcentre.org

An initiative of the International Bar Association and the Open Society Initiative of Southern Africa

NPO 138-655

SOUTHERN AFRICA LITIGATION CENTRE

this right to be free from torture and other cruel, inhuman and degrading treatment or punishment.¹⁰

In addition, forced/coerced sterilisation is a violation of the rights to non-interference with the family¹¹ and the right to protection of the family and to found a family¹² contained in articles 17 and 23 respectively. The Committee has stated that the protection the family is entitled to includes freedom from arbitrary or unlawful interference.¹³ It has further stated that, “the right to found a family implies, in principle, the possibility to procreate ...” and that family planning policies “should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.”¹⁴ Forced/coerced sterilisation constitute unlawful interference with the family and permanently deprive one of the possibility to procreate.

Failure to report on forced/coerced sterilisation and take measures to prevent further violations, including under articles 6 and 7

In General Comment 28 on the equality of rights between men and women, the Committee, calls on States parties to provide it with information on measures taken to prevent forced sterilisation. This information includes measures of protection, including legal remedies for those women whose rights have been violated.¹⁵ However, in its current report to the Committee, the government of Namibia fails to provide any information regarding forced sterilisation in the country or steps being taken to prevent it. In fact, despite a clear finding by the courts that at least three women living with HIV were sterilised without their informed consent and clear evidence submitted to the government of Namibia by SALC and three other organisations¹⁶ of additional cases of these women being coercively sterilised in public hospitals throughout Namibia, the government does not appear to have taken any action to address the practice, provide redress to those women whose rights were violated, or to provide training to medical personnel on what constitutes informed consent. While the courts in *LM and Others v Namibia* set out guidelines regarding informed consent and provided legal remedies for the three women in that case, other women subjected to forced/coerced sterilisation have been left without a legal remedy.

¹⁰ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, 15 January 2008, A/HRC/7/3, paragraphs 38 and 39; and UN Committee against, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2 paragraph 22

¹¹ Article 17 ICCPR, “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.”

¹² Article 23 ICCPR, “(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2) The right of men and women of marriageable age to marry and to found a family shall be recognized.”

¹³ Human Rights Committee, General Comment 19, Article 23 (Thirty-ninth session, 1990), paragraph 1

¹⁴ Ibid, paragraph 5

¹⁵ Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paragraph 11

¹⁶ The Legal Assistance Centre (LAC), the International Community of Women Living with HIV/AIDS (ICW) and the Namibian Women’s Health Network (NWHN)

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg, South Africa

PO Box 122 Parklands 2121 South Africa

T: +27 (0) 10 596 8538

www.southernafricalitigationcentre.org

An initiative of the International Bar Association and the Open Society Initiative of Southern Africa

NPO 138-655

SOUTHERN AFRICA LITIGATION CENTRE

Furthermore, in the aftermath of the High Court decision in 2012, SALC has received reports from partners working in Namibia that women seeking sterilisations from public hospitals are being told by medical personnel that they would have to obtain an affidavit from the police indicating their desire for the procedure. The Committee has stated that the imposition of such general requirements on women for sterilisation is prejudicial to other rights in the Covenant, such as the rights to life and not to be subjected to torture, cruel, inhuman and degrading treatment or punishment.¹⁷

Conclusion

The practice of forced sterilisation of women living with HIV in Namibia constitutes a violation of Namibia's human rights obligations under the ICCPR. While the decision of the courts in *LM and Others v Namibia* is a positive step, Namibia still has to adopt policies to prevent further cases whilst ensuring other rights of these women are not violated. It is not enough to have one favourable judgement in the courts. This court judgement must be followed by positive action by the government.

Proposed questions

SALC requests the Committee to include the concerns raised in this submission in the list of issues for consideration of Namibia's report. SALC specifically requests the Committee to enquire from the government of Namibia:

- The measures that have been taken to ensure health practitioners are aware of the options available to women living with HIV in reducing the risk of mother to child transmission and to ensure these options are made available to women and men living with HIV.
- The measures taken to ensure that all options for contraception are available and accessible to women living with HIV?
- The measures that have been put in place to ensure medical practitioners obtain full and informed consent from all individuals, regardless of their gender or HIV status, before sterilisation and the requirements for such full and informed consent.
- The steps the government has taken to investigate and provide redress –including reversal of the procedure where possible - to those women who have been subjected to coerced sterilization, and whether this also covers those whose cases have prescribed.

Submitted by the Southern Africa Litigation Centre

www.southernafricalitigationcentre.org

Contact: Muluka Miti Drummond

Email: mulukam@salc.org.za

¹⁷ General Comment 28, *Ibid*, paragraph 20

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg, South Africa

PO Box 122 Parklands 2121 South Africa

T: +27 (0) 10 596 8538

www.southernafricalitigationcentre.org

An initiative of the International Bar Association and the Open Society Initiative of Southern Africa
NPO 138-655

SOUTHERN AFRICA LITIGATION CENTRE

Date submitted: 17 April 2015

This submission has been endorsed by the following organisations:

The Namibian Women's Health Network (NWHN),
The International Community of Women Living with HIV (ICW),
The International Community of Women Living with HIV - Southern Africa (ICW-SA), and
Her Rights Initiative, South Africa

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg,
South Africa

PO Box 122 Parklands 2121 South Africa

T: +27 (0) 10 596 8538

www.southernafricalitigationcentre.org

An initiative of the International Bar Association and the Open Society Initiative of Southern Africa
NPO 138-655