

INTERNATIONAL LEGAL REVIEW TOWARDS FORCED STERILIZATION IN SOUTH AFRICA BASED ON CEDAW



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2024



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TITLE PAGE

INTERNATIONAL LEGAL REVIEW TOWARDS FORCED STERILIZATION SOUTH AFRICA BASED ON CEDAW

As a Final Project in the Context of Completion of Undergraduate Studies
of the Department of International Law, Legal Studies Program.

Prepared and Submitted by :

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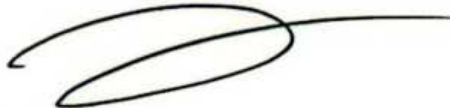
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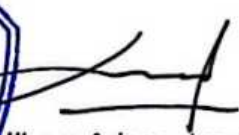
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FOREWORD

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Assalamu'alaikum Warahmatullahi Wabarakatuh.

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Mama and Papa. Thank you for the author's younger siblings, h and Asfawardani, who always support and accompany during up by going through various problems with the author. Also, the

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Hopefully all the kindness and sincerity that has been given to the author can be rewarded with the appropriate kindness from Allah SWT. Wassalam.

Best regards,

Asdayani



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ABSTRACT

ASDAYANI (B011201391) “International Legal Review Towards Forced Sterilization South Africa Based on Cedaw”. Supervise by **lin Karita Sakharina**.

This study aims to determine to provisions under international legal review towards forced sterilization south africa based on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)

This study uses normative research using statute approach and historical approach. The types and sources of legal materials that used in this study are primary and secondary legal materials. The method used to collect those legal materials is by using literature research method then analysed by using descriptive method.

As the results of this study is this research is a discussion related to the concept of International Law regarding the position of International Organizations and the international community as Subjects of International Law who have Legal personality and Legal Capacity for women's human rights against forced sterilization in South Africa. Therefore, it is necessary to know the arrangements related to forced sterilization in international law.

Keywords: Forced Sterilization, South Africa, CEDAW.



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CHAPTER I

INTRODUCTION

A. Background

International human rights as set of norms regulating certain standards of human behavior protected under international law and subjected to be applicable universally. Here, human rights emphasizes the recognition of the equal and inalienable rights of human.¹ The development of international human rights law has expanded the interpretation and implementation of human rights.

To guarantee the protection of human rights, the international community already agree to be bound with international human rights law. Started with the establishment of Universal Declaration of Human Rights 1948 (UDHR) shows that the enjoyment of human right is become the global concern. Here, UDHR fundamentally built based on four pillars which represents an ideal and essential to the enjoyment of individual life. Those pillars are dignity, liberty, equality and brotherhood.²

The position of the UDHR as a legal umbrella for human rights is considered non-binding, because it is "soft law". Referring to Article 38 of the Statute of the International Court of Justice, declarations are not included in one of the sources of international law. However, practically, the UDHR has been recognized by state practice in several cases and has been



haw, Malcom, 2008. "International Law." Cambridge University Press. Sixth 269.

ray, M. 2004. "What are Human Rights? Six Historical Controversies." Journal of ghts. Vol. 3(3). p. 359.

used, such as in *Filartiga v. Pefia-Irala* (1980).³ Furthermore, the UDHR was also a reference in the formation of the draft International Covenant on Civil and Political Rights. Thus, the UDHR meets two elements of customary international law, namely state practice and opinion juris,⁴ thus, the UDHR has legal binding power in accordance with Article 38 (1) (b) of the ICJ Statute.

A year after the establishment of UDHR, in 1945 the United Nations Charter (UN Charter) reiterated Charter parties to respect and observance human rights and fundamental freedoms without distinction as the purpose of the UN Charter.⁵ It aims to promote and encourage for human rights and fundamental freedom for individuals.⁶ Therefore, there are several multilateral conventions as vehicles for enacting UN purposes, such as the International Covenant on Civil and Political Rights (1966), the Declaration on the Elimination of Violence against Women, the Convention on the Elimination of All Forms of Discrimination Against Women (1979), Optional Protocol of CEDAW, and the Convention against Torture and Other Cruel, and Inhumane or Degrading Treatment or Punishment (1984).

However, State sovereignty can hinder the implementation of an agreement, for example through reservations to a convention. Article 2(7)

³ *Filartiga v. Pefia-Irala*. 1980 ; Hannum, H. "The Status of the Universal Declaration of Human Rights in National and International Law." *Journal INT'L & COMP. L.* Vol 24 95.
⁴ United Nations General Assembly. 2018. "Identification of Customary International Law."
⁵ Article 1 Paragraph 3 of United Nations Charter.
⁶ Manek, K. 2000. "New Trends in the Enforcement of Erga Omnes Obligation." *Yearbook of United Nations* 4. p. 2.



of the UN Charter as the basic rule of international law gives no right to encroach upon the preservation of internal affairs against other states. Nevertheless, if it is subjected to the human rights field, this rule is no longer applied. The international concern to the human rights situation cannot thereafter claim that the acts constitute interference with domestic affairs.⁷ Such rights entitled non-derogation is stipulated under Article 4 (2) of the ICCPR, whereas no derogation applies to:

1. Right to life (Article 6);
2. Cannot be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7);
3. Prohibition against slavery (Article 8(1));
4. Prohibition to perform forced labour (Article 8(2));
5. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11);
6. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence (Article 15); and
7. Right to freedom of thought, conscience and religion (Article 18).

Beside no derogable rights, Bruno Simma found that the human rights are also protected by *jus cogens* (peremptory norm) and *erga omnes* obligations.⁸ In *Al-Adsani v. the United Kingdom*, the Court emphasized that



ha v. Equatorial Guinea. 1994, Human Rights Committee, p. 63.
ingsbury, Benedict, and Megan Donaldson. 2019. 'From Bilateralism to
s in International Law'. Journal Oxford

the *jus cogens* is a norm with a higher status in the source of customary international law.⁹ Legal developments occur in line with developments in types of crimes against human rights, such as the rights of women as fundamental human rights.¹⁰

Historically, before the establishment of human rights legal instrument, women's right is limited. In 1929, a woman named Emily Murphy was refused to apply position in Canadian Parliament because at that time, the judges declared that women is not considered as "persons" based on Canadian Law.¹¹ Beside that, in 1913, women were not allowed to vote for election. However, the activists campaigned for women's right to vote. More than a decade later, in 1928, Britain finally gain right to vote with men. This also become the background of the establishment Article 3 Protocol 1 of the European Convention on Human Rights concerning the right to vote and stand for election in Europe.

Violation against rights of women today is not only an individual or national matter, but it is a global problem. Many terms are used to edentify this type of violence, such as violence against women, gander based

Academic, <https://doi.org/10.1093/acprof:oso/9780199588817.003.0008>, accessed 26 Mar. 2024.

⁹ European Court of Human Rights in *Al-Adsani v. the United Kingdom*, Application no. 35763/97, Judgment of 21 November 2001, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2001-XI, p. 60.



ichmitz, C., Gabel, S. 2023. "Women, Human Rights, and Gender Equality." Human Rights and Social Work. p. 359.

mnesty International. "Seven Reasons we still need to Fight for Women's Human Rights Online." <<https://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-n-reasons-we-still-need-fight-womens-human-rights>>. Accessed on 27 March

violence, domestic violence and etc.¹² The unequal relationship between women and men, which ultimately gives rise to male domination and discrimination against women, with such power relations. Thus, women are often victims of sexual harassment and coercion.¹³ The background results in widespread discrimination, exploitation, marginalization, and ongoing violations against women.¹⁴ Therefore, in 1979, the General Assembly adopted the resolution 34/180 concerning the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and entry into force in 1981.

As state party towards the CEDAW, states have obligation to conduct or a duty to claim its performance by other contracting states of *erga omnes* obligation that has been set out by the CEDAW. Simply, the *erga omnes* means protect common interest of such convention.¹⁵ In its relation, CEDAW's interest is to tackle the issue concerning discrimination against women and promote gender equality.

One form of discrimination that makes women subjects is forced sterilization. Sterilization is a way to prevent reproduction in susceptible

¹² Muladi. 1997. Human rights, politics and the criminal justice system. Semarang: Universitas Diponegoro Press, p. 31.

¹³ Henny Wiludjeng. 2005. The Impact of Gender Role Recognition on Lower Class Women. Library of Community Development Studies, Unika Atmajaya Jakarta in collaboration with the Legal Aid Institute of the Indonesian Women's Association for Justice, p. 2

¹⁴ Schmitz, C., Gabel, S. 2023. "Women, Human Rights, and Gender Equality." Human Rights and Social Work. p. 359.

¹⁵ Emanek, K. 2000. "New Trends in the Enforcement of Erga Omnes Obligation." Jk UNYB 4. p. 5-6.



individuals and populations.¹⁶ Meanwhile, forced sterilization is a situation where a person is sterilized without her consent.¹⁷ In 1930s to 1980s sterilization in such states are permissible if people diagnosed with a mental illness, disabled person, have specific physical illness, and racial minorities, as they believed should not be permitted to reproduce.¹⁸ Recently, forced sterilization cases targeting women with HIV, minority women, disabilities women, and poor women.¹⁹

In supporting sterilization as a violation of human rights, especially women, South Africa ratified CEDAW, and then established laws concerning the prohibition of forced sterilization.²⁰ Despite of South Africa's progressive laws, the enforcement is very lacking. From 1990s to 2000s forced sterilization occurred in South Africa, for reasons of preventing the spread of HIV. In line with that, the World Health Organization (WHO) reported that South Africa is the largest HIV epidemic in the world with more

¹⁶ Newton, L. *et al.* 2019. "Revisiting the 'Sterilising Cure' Terminology: a call for more patient-centered perspectives on HIV Cure-related Research." *Journal of Virus Eradiction*. Vol. 5(2). p. 122.

¹⁷ Kendall, T., Albert, C. 2015. "Experiences of Coercion to Sterilize and Forced Sterilization among Women Living with HIV in Latin America. *Journal of the International Aids Society*. Vo. 18 (1). p. 1.

¹⁸ Patel, P. 2017. "Forced Sterilization of Women as Discrimination." *Public Health Reviews*. p. 2.

¹⁹ Open Society Foundations. *Against her will: forced and coerced sterilization of women worldwide*. 2011. Online.

www.opensocietyfoundations.org/publications/against-her-will-forced-and-sterilization-womenworldwide>. Accessed 26 March 2024.

trode A, Mthembu S, Essack Z. 2012 "She made up a choice for me": 22 HIV-women's experiences of involuntary sterilization in two South African provinces. *Health Matters*.20(39). p. 62.



than 7 million people suffering from HIV disease and around 19% of HIV sufferers worldwide live in that country.²¹

The data from the South Africa Stigma Index Study, by the Human Sciences Research Council, in 2015, stated that women with HIV were forced to sterilization.²² This report led an investigation by the Commission for Gender Equality (CGE) in 2015 until 2020. The CGE found and confirmed that HIV positive women were subjected to forced sterilization.²³

The forced sterilization treatment carried out by South Africa also attracted the sympathy of the United Nations in South Africa. Here, the UN Special Rapporteur on torture and other cruel, inhumane, or degrading treatment or punishment, emphasized that forced sterilization categorized as violation of gross human rights and medical ethics, which is also described as an act of torture, cruel, and degrading treatment.²⁴

²¹ Zuma K, Simbayi L, Zungu N, Moyo S, Marinda E, Jooste S, North A, Nadol P, Aynalem G, Igumbor E, Dietrich C, Sigida S, Chibi B, Makola L, Kondlo L, Porter S, Ramlagan S, 2022. On Behalf Of The Sabssm V Study Group Contributors. The HIV Epidemic in South Africa: Key Findings from 2017 National Population-Based Survey. Int Journal Environ Res Public Health. 1;19. p. 13.

²² Cloete A., Simbayi L., K Zuma K., et al. 2014. 'The People Living with HIV Stigma Index: South Africa, Human Sciences Research Council, South Africa, and the South African AIDS Council.

²³ Commission for Gender Equality. 2020. 'Investigation Report on the Forced Sterilisation of Women Living with HIV/AIDS in South Africa, Complaint Ref No: 414/03/2015/KZN; Her Rights Initiative, "Forced Sterilisation of HIV Positive Women 4th Universal Periodic Review of South Africa." Online. < [https://www.upr-info.org/sites/default/files/country-document/2022-](https://www.upr-info.org/sites/default/files/country-document/2022-statement_Presession41_Incountry_SouthAfrica.pdf)

[atement_Presession41_Incountry_SouthAfrica.pdf](https://www.upr-info.org/sites/default/files/country-document/2022-statement_Presession41_Incountry_SouthAfrica.pdf)>. Accessed on 26 March

United Nations South Africa. 2020. "United Nations in South Africa concerned Reports of Forced Sterilization in Public Hospital." Online. [unthafrica.un.org/en/107041-united-nations-south-africa-concerned-about-
ced-sterilization-public-hospitals](https://www.un.org/en/107041-united-nations-south-africa-concerned-about-forced-sterilization-public-hospitals)>. Accessed on 26 March 2024.



South Africa has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 10 December 1998. CAT is an international legal instrument that aims to prevent torture from occurring throughout the world. According to Article 1 of the CAT, torture interpreted as any act carried out intentionally, thereby causing extraordinary pain or suffering, both physical and spiritual, to a person in order to any reasons based on discrimination.

Through the linked of various human rights law instruments, South Africa have a responsibility and an erga omnes obligation to carry out its obligations under the Convention that has been ratified. Even if forced sterilization occurs due to financial incentives or other forms of pressure, including misinformation, the “forced” element is still a breach of human rights law, especially it categorized as no derogable right.

It is noted that the relative and unequal position of women in society not only increases their vulnerability to HIV, but also limits their power in making decisions about their sexual and reproductive health. Our research shows that to what extent the international law can protect women who experience forced sterilization. This research intends to analyze the implementation of steps that must be taken according to relevant international human rights law instruments, to conquer forced sterilization in South Africa.



B. Research Questions

Based on the background described above, the author in this study took the following research questions:

1. What is the legal protection of women rights against forced sterilization based on Convention on the Elimination of All Form of Discrimination against Women (CEDAW)?
2. How is the Cedaw implementation forced sterilisation of human rights in south Africa?

C. Research Objectives

Based on the problem statements above, author has the following research objectives:

1. To know about the legal protection of women rights against forced sterilization based on Convention on the Elimination of All Form of Discrimination against Women (CEDAW).
2. To know about the cedaw to implementation of forced sterilisation human rights in south Africa.

D. Research benefits

Moving on from the purpose of this research, it is expected to provide theoretical and practical benefits, namely as follows:

1. This research is expected to be a source of information, knowledge, and understanding for the work of Hasanuddin University towards the development of international law, especially related to concerns over forced sterilisation of women in South Africa.



2. The findings of this research are expected to contribute to public understanding of international human rights, especially those related to the prevention of torture against women.

E. Research Originality

This research was conducted by the author in looking at legal issues regarding discrimination against women in forced sterilisation in south Africa. Based on the author's analysis to provide an overview of the comparison, presented with previous research on forced sterilisation in Africa, the author attaches previous research as a comparison for the current author:

Author Name	: Farida Aligy Ussen Mamad	
Title	: <i>forced sterilization of women living with hiv/aids in africa (human rights and democratization in africa</i>	
Category	: Dissertation for the Degree LLM	
Year	: 2009	
College	: Faculty of Law and Management, University of Mauritius, Mauritius	
	Description	Previous research
Issues and Problems	: 1. Why is sterilization performed in Africa? 2. Does forced sterilization violate reproductive rights of women living with HIV/AIDS or other human rights?	Research Plan 1. What is the legal protection of women rights against forced sterilization based on Convention on the Elimination



	3. What are the available human rights instruments and mechanisms to address such violation?	of All Form of Discrimination against Women (CEDAW)?
Research Methods	: Normatif	Normatif
Results & Discussion	: 1. The discussion of the writing is to explain the act of forced sterilization of women living with HIV/AIDS Positive is limiting reproductive rights as the principle of autonomy. 2. This discussion also discusses information related to public health to victims of forced sterilization causing someone to become infertile. This is done by surgical removal of the ovaries or inactivation by irradiation or by trying or removing part of the	I am write by analyzing human rights instruments especially for women with international and regional regulations with the existence of conventions that have been ratified into the main human rights system. Additional, the Maputo Protocol provides extensively for sexual and reproductive health and rights of African women, addressing the health needs of women within the member states. And then, Recently, forced sterilization cases



reproductive organs or uterine tract.	targeting women with HIV, minority women, disabilities women, and poor women for improve the race to make certain population groups, considered to have genetic defects, unable to have offspring.
---------------------------------------	--

Author Name	: Emmi Neunsinger	
Title	: <i>A case study of forced and coerced sterilisation in Post-Apartheid South Africa</i>	
Category	: Bachelor Thesis	
Year	: 2022	
College	: Department of Government, Uppsala Universitet	
	Descriptions	Previous research
Issues & Problems	: 1. On what frames is the discourse built that justifies the forced and	Research Plan 1. How is the Cedaw implementation forced



<p>coercive sterilisations of HIV-positive women in Post--Apartheid South Africa?</p> <p>2. Are the frames comparable to the frames of Apartheid population control?</p>	<p>sterilisation of human rights in south Africa?</p>
<p>Research Methods : Normatif</p>	<p>Normatif</p>
<p>Results & Discussion : This paper has demonstrated patterns of discourse between the narratives found within the Namibian healthcare sector and the experiences of victims of forced spaying in South Africa. It has shown that healthcare staff not only impose permanent procedures out of medical necessity but also on the basis of normative judgment,</p>	<p>My second discussion in my research is how CEDAW is implemented in the form of forced sterilization in South Africa against women as a form of human rights violation against legal instruments that have been binding on state parties. In this case, South Africa as a state party that violates victims of forced sterilization that violates the rights to privacy, health, and</p>



<p>and consequently violate patient autonomy.</p>	<p>information has an obligation to provide reparations to victims who are put forward directly by the CGE as The CGE is an independent statutory body established in terms of Section 187 of the Constitution of South Africa.</p>
---	---

Based on the originality above, it can be concluded that there is a difference between the author's research and previous research. With this, it can be concluded that the author's research can be accounted for its authenticity in accordance with the provisions of the principles of science, namely honesty, rationality, objectivity and openness. Therefore, if in the future similar research is found, it is hoped that this author's research can complement previous research.



CHAPTER II

LITERATURE REVIEW

A. General Review of International Human Rights

1. Definition of Human Rights

International law is a collection of applicable legal provisions maintained by the international community. As a collection of legal provisions, international law is part of the law. With this, the purpose of this law is to create order and justice in the community where the law applies.²⁵ The term human rights is a translation from a foreign language, namely "human rights" (English) or "les droits de l'homme" (French) or "diritti dell'uomo" (Italian). In modern European languages, the term only consists of two words: human and right.

Theoretically, human rights essentially govern the relationship between individuals and the state. Human rights have been recognised as international law and have become the gold standard for how states should treat individuals within their jurisdiction. Human rights provide moral and legal guarantees to individual human beings to control and promote respectful rules and practices of power, ensure individual freedom in relation to the state and require the state to fulfil the basic rights of individuals within its jurisdiction.²⁶



Yugeng Istanto, 2014, *Hukum Internasional*, Cahaya Atma Pustaka, Yogyakarta, yafi'i. M. 2012. Human rights legal instrumentation, the establishment of human protection institutions in Indonesia and the role of the Constitutional Court. *Jurnal* , 9(4), p. 687.

In addition, some of the terminology often used in academic circles relates to the identification of human rights. Some of these terms include natural rights, human rights, civil rights, natural rights, and so on. Basically, these terms have the same meaning, differing only in terminology. Several experts have provided definitions of human rights, including:

A. Soedjono Dirdjosisworo:

Human rights are inherent in every human being from birth, cannot be limited, reduced or circumscribed by anyone, because they are the values and human dignity of every individual.²⁷

B. Jack Donnely

Human rights are rights that humans have simply because they are human. Human beings have them not because they are given to them by society or by positive law, but because of their dignity as human beings.²⁸

C. Soetandyo Wignjosoebroto

Fundamental rights that are universally recognised as rights inherent in human beings because of their nature as human beings.²⁹

²⁷ Soedjono Dirdjosisworo, 2004 Paper: HAM, Demokrasi dan Tegaknya Hukum Dalam Konteks Ketahanan Nasional Indonesia, Paper on Upgrading and Workshop on Citizenship Lecturers in West Java, p. 2

hona K.M. Smith, 2008 "Hak Asasi Manusia", PUSHAM – Pusat Studi Hak Asasi - Universitas Islam Indonesia, Yogyakarta, p. 28.

Soetandyo Wignjosoebroto 2003, Hak-hak Asasi Manusia: Konsep Dasar Dan lainnya Yang Klasik Pasa Masa masa Awal Perkembangannya dalam Toleransi dan, Dalam: Rahayu, "Hukum Hak Asasi Manusia (HAM)", Universitas Diponegoro, Cet. II, 2012, p. 2.



D. Office of the high commissioner for human rights, The United Nations Human Rights Office:

Human rights are rights that we have simply because we exist as human beings. These universal rights are inherent in all of us, regardless of nationality, gender, national or ethnic origin, colour, religion, and all other statuses. They range from the most fundamental - the right to life - to other rights that make life worth living, such as the rights to food, education, work, health, and freedom.³⁰

With development, respecting the value and dignity of humanity is a duty that must be protected by the state, although there are exceptions to the enforcement of human rights when a state faces emergency conditions that allow for rights to be excluded. The fundamental idea of human rights is the concept that every individual has certain rights that should be recognised because of their human nature. All people have equal and inherent rights from birth. Therefore, it is important that every individual is treated with respect and equality.. D.F. Scheltens said that There are distinctions between the ideas of human rights and fundamental rights, it should be recognized.³¹

From the various definitions of human rights, it can be concluded that these rights are an integral part of human nature, as a gift from God that



Office of the United Nations High Commissioner for Human Rights. Accessed 25
2014. Available <https://www.ohchr.org/EN/Issue/Pages/whatarehumanrights>.
Lasyhur Effendi, 1994, *Dimensi dan Dinamika Hak Asasi Manusia dalam Hukum
dan Internasional*, Ghalia Indonesia, Jakarta, p. 2

must be recognised, safeguarded and preserved by every individual, community and state.

2. Instrument of International Human Rights

Instrument can be interpreted as a tool and foundation for something. Law as Mochtar Kusumaatmadja expresses is a set of rules and principles governing human life in society which must include the institutions and processes needed to realise the law in reality. Legal instruments here mean the foundation and tools of the law. Meanwhile, human rights means the rights that humans have solely because they are human. Human beings have them not because they are given to them by society or based on positive law, but solely based on their dignity as human beings.³²

The sources of international human rights law, usually referred to as IHRs, generally have something in common with the sources of international law. According to J.G. Starke, the determination of the law applicable to a particular event or situation allows for the general classification of international law into five categories, namely:³³

- a. Custom;
- b. Treaty
- c. Court decision or arbitration decision;



ack Donnelly, 2003, *Universal Human Rights in Theory and Practice*, Ithaca and Cornell University Press, p. 7.

.G Starke, 2014, *Pengantar Hukum Internasional*, 10th edition, Translated by Iriana Djajatmaja, Sinar Grafika, Jakarta, p. 42

- d. Legal works;
- e. International organization decisions.

International legal instruments that explicitly portray equality between men and women are stated in the Charter of the United Nations, which is repeated in the Universal Declaration of Human Rights, then refined and extended in the International Covenant on Civil and Political Rights (ICCPR).³⁴

The following will describe some of the most widely recognised human rights instruments by states:

A. Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948. The document they considered, and which would later become the Universal Declaration of Human Rights, was taken up at the first session of the General Assembly in 1946. The Universal Declaration of Human Rights in 1948, contained universal traits and was directed towards humanity as a whole, which ended all claims that the validity of human rights was only exclusively for certain communities or countries.³⁵



de Rover, de Boer. 1998. To Serve and to Protect: Acuan Universal n HAM, International Committee of the Red Cross. Geneve. Jakarta: PT. Raja Persada, p. 342
eter Baehr, et.al. 2001. Basic International Human Rights Instruments. Jakarta: Obor Indonesia, p. 59

The first draft of the Declaration was proposed in September 1948 with over 50 Member States participating in the final drafting. UN Charter said declaration of human rights 1948 (UDHR) sebagai *a common standard of achievement for all peoples and nation* by its resolution 217 A (III) of 10 December 1948, the General Assembly, meeting in Paris, adopted the Universal Declaration of Human Rights.³⁶

The UDHR has a universal nature that serves as a basic reference for human rights documents. Although this human rights instrument is only in the form of a declaration, it has the validity and legal force that binds countries based on the principles of customary international law. The Declaration includes 30 articles that affirm the rights of individuals. These 30 articles are now known as the 30 Universal Declarations of Human Rights or the 30 Human Rights. They include the right to life, the right to education, the right to organise, and the right to be treated fairly. The 30 Universal Human Rights also include freedom of opinion, expression, thought, and religion.

B. International Covenant on Civil and Political Rights (ICCPR)

Pursuant to UN Resolution 2200A (XXI) of 1966, the ICCPR was approved by the UN General Assembly on 16 December and entered into force on 23 March. By January 2023, 173 countries had signed the



United Nations of Human Rights. Available at: www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx, Accessed 24 March 2024.

Covenant. The Covenant expands on the Universal Declaration of Human Rights' elaboration of civil, political rights and freedoms.

The *civil and political rights* include five relating to physical integrity (rights to life; freedom from torture; freedom from slavery; freedom from arbitrary arrest or detention; and the right to humane treatment under detention).

The human rights included in the ICCPR include the right to life and the preservation of human dignity, equality before the law, freedom of speech and assembly, the right to assembly and association, freedom of religion, freedom from torture and inhumane treatment, freedom from arbitrary detention, gender equality, the right to a fair trial, the right to a healthy and intact family life, and the protection of minority rights in all countries that have ratified the ICCPR.

The Covenant has a human rights committee that studies reports submitted by countries regarding actions taken to implement the provisions of the agreement.³⁷

The position of ICCPR has set out specific rights that emphasize the inalienable protection of the state from its citizens. The ICCPR specifically categorises certain rights as (non-derogable rights), meaning these rights cannot be restricted. While other rights, in certain situations, can still be reduced or restricted by the state (derogable right).



oer Mauna, 2013, International Law: Definition, Role and Function in the Era of
amics, Alumni, Jakarta, p. 682.

Non derogable rights are fundamental human rights that remain unaffected by emergencies, referring to rights that must still be fulfilled by the state without restriction or reduction, even in emergencies. In this case, the right to protection to live without discrimination without any difference must be fulfilled by the state. Some of the non-derogable rights include:

1. the right to life;
2. the prohibition of torture;
3. the abolition of slavery; and
4. the ban on retroactive application of criminal laws;

Conversely, derogable rights are those that can be restricted or waived in the interest of public safety. However, such limitation or deferral must be compatible, required, and must not be detrimental to the fundamental principles of the right. Rights that can be curtailed include:

1. The right to liberty and security of person;
2. The right of freedom of expression;
3. The right of freedom of movement.

It is important to note that the right to liberty and security of person as a derogable right means that governments may temporarily restrict this right in times of emergency or public threat, but all restrictions must be reasonable, necessary, and non-discriminatory. In other words, any restrictions on human freedom and security must be reasonable, have

impact, and not be based on factors that may offend any group of including race, ethnicity, or religion.



The ICCPR divides rights into two categories: non-derogable rights and derogable rights. Non-derogable rights are unalterable rights that state parties may not restrict, not even in an emergency. The second classification is derogable rights, which can be reduced or restricted by state parties.

The existence of the state's responsibility to guarantee the fulfilment of human rights protection is based on the main principles of human rights that become the standard reference for the implementation of international and national human rights, namely;

a. Universality

Human rights are universal, which means that everyone in the world has a right to them. In this context, universality refers to the extent to which human rights may be applied, combining the broadest possible *ratione personae* and *ratione loci*. In a strict sense, the geographic reference is redundant because the fact that human rights apply to everyone, without exception, implies that they do so wherever that person may be.³⁸

The universality of human rights is encompassed in the words of Article 1 of the *Universal Declaration of Human Rights* : “All human beings are born free and equal in dignity and rights.”



Arms, E., 2001, *Human Rights: Universality and diversity* (Vol. 66). Martinuss publishers, p. 4.

b. Inalienability

Human rights violations have the same meaning as a violation of state obligations because the party authorized to maintain and protect human rights is the state (state responsibility). Human Rights as an absolute right, its existence cannot be ignored considering that human rights are an absolute right that must be respected, upheld, and protected by law in a country. The existence of human rights cannot be ruled out (interrogable), and must not be violated by any party.

c. Interdependence and interrelation

By independence, one is referring to a legal concept and it is no deviation from independence to be subject to the rules of international law. Any political or economic dependence that may in reality exist does not affect the legal independence of the state, unless that state is formally compelled to submit to the demands of a superior state, in which case dependent status is concerned.

The notion of independence in international law implies a number of rights and duties: for example, the right of a state to exercise jurisdiction over its territory and permanent population, or the right to engage upon an act of self-defence in certain situations. However, the sovereignty of the state is still concerned with all forms of human rights of its people, this is based on the recognition of the state based on the declaration of the

ent with other countries that south Africa has ratified the conventions



of all forms of human rights protection in the country. This implies an obligation and responsibility to be open in all matters.

d. Equality and non-Discrimination

The definitions of the term "equality" include "the same as," "equivalent," "matching," and "identical." When applied to the concept of human rights, the term "equality" suggests that despite our differences, we are all of equal worth. The principle of equality requires uniform application of rules when dealing with similar situations.

All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.

The exercise of fundamental rights and freedoms is conditional upon equality and the elimination of discrimination. One of the most important clauses in the UDHR is the principle of non-discrimination, which serves as both a substantive right and a guiding principle for the interpretation of all other human rights in the document. In accordance with UDHR Article 2,

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent,



trust, non-self-governing or under any other limitation of sovereignty.”

It and equality were linked during a large portion of the UDHR writing process as they were two sides of the same coin. Eventually, equality and non-discrimination were separated, and Article 2 of the UDHR, which is specific to UDHR rights, became the vehicle for this separation. In accordance with Article 7 of the UDHR, which states the following:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

The principle of equality is known as affirmative action (positive discrimination). This happens when someone from a different position is treated the same.³⁹ Discrimination is a gap between treatment and treatment that should be the same or equivalent.⁴⁰

e. State Responsibility and Rule of Law

The nature of sovereignty in international society needs to be explained given the important role of the state in today's society and international law.⁴¹ Although southern Africa is a democracy, it is in essence a denial of international law as a binding law for states in their relations with each other. Therefore, Africa itself has key legal instruments for the promotion of human rights in Africa.



auhariah, 2016, *Dinamika Hukum & HAM*, Cintya Press, Jakarta, p. 79.
Adnan Buyung Nasution and A. Patra M. Zen, 2006, *Instrumen Internasional k Asasi Manusia*, Yayasan Obor Indonesia, Jakarta, p. 23.
Lochtar Kusumaatmadja, & Etty R. Agoes, 2012, *Pengantar Hukum Internasional*, ni. Bandung, p. 16.

The African Charter on Human and People's Rights (Charter) is the foremost legal instrument for the promotion of human rights in Africa. It was approved by the OAU's Assembly of Heads of State in 1981 and entered into force on 21 October 1986 after being ratified by a majority of members. In 1999 all OAU members had ratified the Charter and at present, only Africa's newest independent state, South Sudan, has yet to ratify it. A Protocol allowing the creation of the African Court on Human Rights has been subsequently adopted.

The Charter establishes duties for states and individuals and recognises the most universally accepted civil and political right (ICCPR). Acknowledging the indivisibility and the collective dimension of rights such as self-determination.

The African Commission confirmed that forced sterilization is an act of sexual or gender-based violence that may amount to torture or inhuman treatment. The Commission reiterated that States must adopt measures of prevention, protection, and redress.

B. General Review of Convention on the Elimination of All Form of Discrimination against Women (CEDAW)

1. Development of Convention on the Elimination of All Form of Discrimination against Women



→ adoption of the Convention on the Elimination of All Forms of Discrimination against Women by the UN General Assembly on 18

December 1979 was the culmination of decades of international efforts to protect and advance the rights of women worldwide. It was the result of initiatives taken by the UN Commission on the Status of Women (CSW), a body established within the UN system in 1946 to consider and make policy recommendations to improve the status of women.

The Convention goes beyond the guarantees of equality and equal protection before the law in existing legal instruments, and sets out measures to achieve equality between men and women, regardless of their marital status, in all aspects of political, economic, social and cultural life. States parties have an obligation to eliminate discrimination against women through legal measures, policies and programmes. This obligation applies to all spheres of life, as well as matters relating to marriage and family relations, and includes the obligation to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.

The date of 10 December 1999 is significant for all those who seek to advance the enjoyment of women's human rights for women. The Optional Protocol to the Convention was opened for signature, ratification and accession by States that have become parties to the Convention. In countries that are party to the Protocol, women whose rights have been violated and who have exhausted national remedies may seek redress from



pendent international body - the Committee on the Elimination of
ation against Women. The Protocol also authorises the Committee

to investigate on its own motion gross or systematic violations of the provisions of the Convention. The 1979 Convention on the Elimination of All Forms of Discrimination against Women has been ratified by 175 countries.

B. Ratification of CEDAW in South Africa

On 15 December 1995 the South African parliament ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) without any conditions and in March 2005, South Africa also ratified the Optional Protocol to CEDAW without reservation.

South Africa became a constitutional democracy in 1994 and was founded on the rule of law, the advancement of human rights and the principles of non-racialism and non-sexism. The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) has been guided by a range of international and human rights instruments, including CEDAW.

The Bill of Rights in the Constitution ensures the foundation for a non-racist, non-sexist, and human rights-based society where race, class, gender, sexual orientation, disability, diversity, age, social security and protection from harm are, among others, primary considerations. It forms the bedrock of the developmental state – especially with respect to

on, governance, sustainable development considerations, and
tic institutions of the State. These include oversight and monitoring
he media and those in civil society.



South Africa is firm in its commitment to the full implementation of CEDAW and other international, regional and sub-regional instruments in the promotion of women's rights to which it is a signatory. However, it is not possible that there will be no discrimination against women because to date discrimination against women in South Africa is number one in the world. The process of reporting any victim who feels abused in South Africa is of concern to the world and the CEDAW committee must act on the basis of humanity in South Africa. CEDAW Committee has explicitly noted that countries should not permit forced or coerced sterilization.⁴²

CEDAW prohibits discrimination against women in accessing healthcare services. General Recommendation 19 of the CEDAW Committee states that :

*“Discrimination against women includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”*⁴³

The Constitutional Court has interpreted the constitutional provisions on equality to give effect to substantive equality. Many of the landmark court decisions on equality have fundamentally advanced de jure and de facto equality between women and men.



Committee on the Elimination of Discrimination against Women (CEDAW). Recommendation no. 24: Article 12 of the convention (women and health). 1999. Accessed 24 June 2024.

Committee on the Elimination of Discrimination against Women. General Recommendation no. 19: violence against women. 1992. Accessed 24 June 2024.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also guarantees women the right to adequate services for maternal health.

The definition according to international law of discrimination, namely:

“Implying any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁴⁴

C. Definition of Women’s Rights to CEDAW

The ideals of equality and women's rights are integrated into the international legal system through CEDAW. The six sections of the Convention contain thirty articles that cover everything from the non-discrimination principle to women's equality in the home and public spheres. The principles of gender equality and the outlawing of discrimination based on gender are incorporated into national laws of member nations of CEDAW through mandates. It also governs how states may change or do away with laws and policies that discriminate against women.⁴⁵



asiva, F, 2012. Robbed of choice: forced and coerced sterilization experiences living with HIV in Kenya, African Gender and Media Initiative. p. 5
ayu Nanda Saraswati, 2022, The Discourse of Reservations to CEDAW on Rights in Malaysia, Brunei, and Indonesia, Indonesia Journal of International Law. p. 3.

CEDAW became a human rights treaty that provided space for women to be free from all forms of trafficking and exploitation of women.⁴⁶ Then, in line with the goals of the UN, CEDAW describes fundamental human rights, especially equal rights between men and women.⁴⁷

This document defines discrimination against women in article 1 (one) as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁴⁸ Thus, CEDAW focuses on the international provisions related to women's rights and how states take policies in order to fulfil and enforce these rights.

Through this convention, women should legally be protected and not subjected to discriminatory behaviour. Increased attention to equality issues in both developing and developed countries has resulted in increased access to information related to cases of discrimination against women.

⁴⁶ Vijayarasa, R. 2021. Quantifying CEDAW : Concrete Tools for Enhancing Accountability for Women's Rights. Harvard Human Rights Journal, p. 34.

⁴⁷ Nurjannah Abdullah & Muhammad Fajhriyadi Hastira, 2023, Perbandingan tasi the convention on the elimination of All forms of discrimination against (CEDAW) dalam pemenuhan hak politik dan ekonomi perempuan di arab saudi Hasanuddin Journal of International Affairs. Makassar. p. 32.

osanti, Pingkan Cahya. 2018. UN Women's efforts with the Government of India ting the CEDAW Convention in reducing Discrimination of women in India. Script rahyahyangan University. p. 17.



C. Forced Sterilization

1. Definition of Forced Sterilization

Forced and coerced sterilisation is a violation of fundamental human rights that occurs when a medical procedure eliminating an individual's ability to bear children is performed without informed consent, in instances where the individual is unaware of the fact that they will be sterilised and only learns of the sterilisation after the surgery.⁴⁹ Forced sterilisation occurs when misinformation, intimidation tactics, financial incentives, access to healthcare or employment are used to force individuals to consent to the procedure.⁵⁰

Well, provisions prohibiting forced sterilisation are also outlined in regional human rights instruments such as the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on the Rights of Women (Maputo Protocol). Additionally, in 2013, the African Commission adopted Resolution 260 on Forced Sterilisation, a resolution condemning forced sterilisation as a gross human rights violation.⁵¹

South Africa was one of the group of 20 countries, right above Indonesia, Saudi Arabia and India, because it has Some of the highest rates



Lair P. 2010. Litigating against the forced sterilization of HIV-positive women: developments in Chile and Namibia. *Harv Hum Rights Journal*. p. 23
Open Society Foundation. 2011. Against her will: forced and coerced sterilization worldwide.
Urojaye E. 2017. Involuntary sterilisation as a form of violence against women in *Journal Asian Afr Stud*. p. 12.

of sexual and gender-based violence in the world, a blight on a country where women are well represented in politics.

This concern has been echoed by Interpol which recently dubbed South Africa 'the world's rape capital', where a woman is sexually assaulted every 17 seconds. mortality and domestic violence and also bring to the fore new work on under-examined issues such as cervical cancer and coercive sterilisation, especially as these affect women living with HIV.

For women subjected to forced sterilisation, recognition from the courts that they are discriminated against because of their special status confirms their experiences and marginalisation. It can also be a response to discrimination in society signalling to the general public that discrimination even if not overt based on health status or ethnicity does occur and should be rejected.

It is important that the UN, as the official and authoritative body of CEDAW, acts to find violations of the right to freedom from discrimination to address the underlying reasons for the practice of forced sterilisation of women in South Africa. The excuse of women having HIV is not the basis for forced sterilisation because the actions taken by some hospitals are very inhumane and practice behind closed doors without the consent of the victims for the sterilization.



o date, the country that has received the most attention from media
ers regarding forced sterilisation is southern Africa due to the irony

of its highly progressive laws regarding women's sexual and reproductive rights. However, there are still many acts of public hospitals carrying out arbitrary forced sterilisation without the consent of the victims.⁵² Hal ini, Doctors who perform forced sterilisation are not only violating internationally recognised human rights, but also their duties as medical professionals. Autonomy, as recognised by Amnesty International, is the right to make "choices free from external pressure or violence, whether mental or physical".⁵³

Well, the use of forced sterilisation is a widespread violation of internationally recognised human rights. As recommended by Lindsay McLaughlin, laws should be made or amended to prohibit sterilisation without consent, and penalties for breaking these laws should be made stricter.⁵⁴

Forced and compelled sterilization is essentially a discriminatory practice. The reason motivating forced and coerced sterilization is to accept the ability of certain populations to reproduce due to the perception that they are not ideal members of society.



McLaughlin LC. 2014. The price of failure of informed consent law: coercive ns of HIV-positive women in South Africa. *Law Inequal*. p. 71-72.
mnesty International. 2015. Respect my rights, respect my dignity: module three- d reproductive rights are human rights. p. 53
id, p.87-88.

D. Instrument Law of South Africa

The African Charter on Human and Peoples' Rights (hereinafter *the African Charter* or *Charter*), at the very core of the African human rights system, has reached full ratification status. The African Commission on Human and Peoples' Rights (hereinafter *the African Commission*), established under Article 30, is the treaty body monitoring.⁵⁵

Implementation of the African Charter. Set up in 1987, it is mandated to watch over states' compliance of the human and peoples' rights therein contained and to ensure their protection. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter *the Women's Protocol*), was adopted in Maputo, Mozambique, in 2003 and entered into force on 25 November 2005. So far, 26 countries have ratified the Women's Protocol.⁵⁶

In addition to the broad provisions regarding the right to equality and freedom from discrimination, the African Charter contains only one specific Article referring to women in its 68 Articles. More precisely, it provides that; the state shall ensure the elimination of every discrimination against women



African Commission on Human and Peoples' Rights. 2002. *Compilation of Communications of the African Commission on Human and Peoples' Rights 1*. Banjul: Institute for Human Rights and Development in Africa.

African Commission on Human and Peoples' Rights. 2008. *Decisions of the Commission on Human and Peoples' Rights on Communications 2002–2007*. Institute for Human Rights and Development in Africa.

and also ensure the protection of the rights of the woman and the child as stipulated in the international declarations and conventions.⁵⁷

Including women's rights in the context of articles that refer to families and other vulnerable is considered problematic and inadequate. Furthermore, juxtaposing women could be interpreted as disadvantaging more than half of the African population, as it lacks the specificity necessary to enhance the effective enjoyment of their rights.⁵⁸ As a result, the African Commission's jurisprudence on women's rights is almost non-existent.

On the other hand, the African Charter can be considered a catalyst for better protection of women's rights through the adoption of the Protocol on the Rights of Women in Africa. The Protocol provides some progress both for women in Africa and for those outside the continent.

The preamble of the Protocol recalls that women's rights have been recognised and guaranteed in all international human rights instruments as inalienable, interdependent and indivisible.⁵⁹ State parties are, firmly convinced that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated.⁶⁰ And then, states parties are,



Protocol on the Rights of Women in Africa, Article 18 Paragraph 3.
Geetharuth, 2009. *Major African legal Instrument*, Journal United National
Fund. p.181
Protocol to the African Charter on Human and Peoples' Rights on the Rights of
Africa, Preambular paragraph. 5.
id, paragraph. 13.

determined to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.⁶¹

The state parties to this protocol, the considering about the that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination based on the race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status and south africa one of the parties in Maputo protocol by African charter must to The call for all States Parties to eliminate discrimination against women aligns with various international declarations and conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

This emphasizes the importance of ensuring women's rights and promoting gender equality. States are urged to implement measures that protect women from discrimination in all forms, including legal, social, and economic spheres, and to create an environment where women can fully enjoy their rights without fear of discrimination or violence.

Recalling, that women's rights are acknowledged and protected in various international human rights documents, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of



id, paragraf. 14.

Discrimination Against Women and its Optional Protocol, as well as other international and regional agreements concerning women's rights, which are recognized as inalienable, interdependent, and indivisible human rights.



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