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COMMENTS

AIDS Quarantine Law in the International Community: Health and Safety Measures or Human Rights Violations?

I. INTRODUCTION

Acquired Immune Deficiency Syndrome ("AIDS") is a disease of changing dimensions and definitions. The American Centers for Disease Control ("Center") originally defined AIDS as an immune deficiency disorder of unknown origin accompanied by a rare opportunistic disease such as Kaposi's sarcoma or Pneumocystis carinii pneumonia.¹ The Center now categorizes a person with AIDS as one who has a wide variety of infections and disorders *and* has tested positive for AIDS antibodies.²

A number of factors inherent in the disease have led to widespread public concern,³ characterized by some commentators as hysteria.⁴ First, the one constant in the changing definitions of AIDS is the result of the disease: it has always been considered fatal.⁵ Statistics bear out this assertion; by the end of 1989, over half of the 102,000 reported AIDS cases resulted in death.⁶

Second, persons infected with Human Immunodeficiency Virus

1. Ronald Kotulak, *New AIDS Definition Likely to Raise Toll*, CHI. TRIB., Sept. 1, 1987, at C5.

2. The new definition, which took effect January 1, 1993, adds to the list of illnesses several of which are often found in women and intravenous drug users, "who have been undercounted in the past." Sheryl Stolbert, *New AIDS Definition to Increase Tally*, L.A. TIMES, Dec. 31, 1992, at A1. The definition also includes HIV-positive individuals with a significantly lowered T-cell count who may be asymptomatic. *Id.*

3. See, e.g., Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U. L. REV. 441, 458 (1988).

4. Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

5. INSTITUTE OF MEDICINE & NATIONAL ACADEMY OF SCIENCES, *CONFRONTING AIDS: UPDATE 1988*, at 1 (1988) [hereinafter *CONFRONTING AIDS*].

6. HARRIS COUNTY MEDICAL SOCIETY & THE HOUSTON ACADEMY OF MEDICINE, *AIDS: A GUIDE FOR SURVIVAL 15* (1989) [hereinafter *GUIDE FOR SURVIVAL*].

("HIV"), the virus believed to cause AIDS,⁷ remain asymptomatic for months or years.⁸ Additionally, a time-lag between HIV infection and development of HIV antibodies renders serological tests conducted shortly after infection less than accurate.⁹

Third, there is neither a vaccine nor a cure for AIDS.¹⁰ HIV is a retrovirus, meaning it reproduces itself unlike most viruses.¹¹ Generally, viruses transmit from DNA or RNA to RNA. HIV, however, transmits itself from RNA to DNA.¹² The medical community's limited knowledge of such viruses makes the discovery of a cure or vaccine unlikely in the near future.¹³

These factors and others¹⁴ have led to public outcry for stringent means to control the spread of AIDS.¹⁵ Many commentators have suggested that quarantine measures serve as a means to this end.¹⁶

This Comment will trace the historical background and gradual erosion of traditional quarantine measures, as well as the emergence of several recently proposed and enacted AIDS quarantine laws. This Comment will then analyze the human rights issues implicated by such legislation, and the international agreements that purport to protect those rights. Quarantines implicate many of our most basic human rights, such as the right to privacy, to travel, and to family and intimate associations. While international agreements often purport to address the protection of these rights, many of these instruments grant governments broad license to restrict them. Finally, in light of this duality, this Comment concludes that, unfortunately, current AIDS quarantine laws do not violate these international agreements.

II. HISTORICAL BACKGROUND

The practice of quarantining individuals to prevent the spread of

7. See CONFRONTING AIDS, *supra* note 5, at 2.

8. GUIDE FOR SURVIVAL, *supra* note 6, at 41.

9. *Id.*

10. Scott Burris, *A Little Law for Non-Lawyers*, in AIDS AND THE LAW 1, 15 (Harlon L. Dalton et al. eds., 1987).

11. June E. Osborn, M.D., *The AIDS Epidemic: Discovery of a New Disease*, in AIDS AND THE LAW, *supra* note 10, at 17, 21.

12. *Id.*

13. *Id.* at 25.

14. Such factors include the lack of substantive success in treating the disease and its opportunistic infections. D.C. JAYASURIYA, AIDS - PUBLIC HEALTH AND LEGAL DIMENSIONS 10 (1988).

15. Parmet, *supra* note 4, at 53.

16. *Id.* at 53-54.

infectious disease can be traced back to the Bible.¹⁷ Biblical references to the isolation of lepers served as a guide throughout the Middle Ages to European countries seeking to isolate and limit the spread of not only leprosy but also the plague.¹⁸

England and the American colonies also implemented quarantine laws, many with harsh penalties for violation, in order to combat infectious disease.¹⁹ After independence in the United States, the individual states were primarily responsible for the promulgation and enforcement of quarantine laws. The federal government played a vital role in assisting and approving such measures.²⁰

The economic costs, international trade constraints, and limited effectiveness of quarantine measures combined to gradually erode their use in the nineteenth century.²¹ In recognition of the unfavorable cost-benefit ratio of quarantine restrictions, the first international public health conference convened in Paris in 1851.²² While the conference did not result in a ratified convention,²³ it did enunciate several important principles and goals. These goals included the reduction of quarantine restrictions as a means of fighting the international spread of infectious disease.²⁴ In the early twentieth century, a consensus was reached when representatives of twenty-one countries signed the International Sanitary Convention of 1903 ("Convention").²⁵ The Convention served as a means of safeguarding the public health against plague and cholera while reducing the use of quarantine and other regulatory measures regarded as obstructing international trade.²⁶ Seeking a method to internationally regulate the spread of communicable disease, the Convention required a partici-

17. The Bible states: "All the days wherein the Plague shall be in him he shall be defiled; he is unclean; he shall dwell alone; without the camp shall his habitation be." *Leviticus* 13:46 (King James).

18. Parmet, *supra* note 4, at 55.

19. *Id.* at 56.

20. Fallone, *supra* note 3, at 460. See also Parmet, *supra* note 4, at 57.

21. See generally Nancy E. Allin, *The AIDS Pandemic: International Travel and Immigration Restrictions and the World Health Organization's Response*, 28 VA. J. INT'L L. 1043 (1988).

22. *Id.* at 1047.

23. *Id.*

24. *Id.*

25. *Id.* (citing International Sanitary Convention, Dec. 3, 1903, 35 Stat. 1770, T.S. No. 466, 1 Bevans 359).

26. International Sanitary Convention, *supra* note 25, at 364. For instance, Article 7 of the Convention requires more than "a single case of plague or cholera" be identified in order for a signatory to institute quarantine or other defensive actions against another signatory country. *Id.*

pating country to notify all other signatories of outbreaks of specific illnesses,²⁷ and refrain from employing excessive measures to keep diseases out of its territory.²⁸

The formation of the World Health Organization ("WHO") at the United Nations International Health Conference of 1946²⁹ indicated a more widespread recognition of the foreign relations implications of quarantine practices.³⁰ The United Nations, recognizing the need for continued promotion of international cooperation in public health,³¹ called for the establishment of such a specialized health agency in the United Nations Charter.³² The WHO constitution emphasizes that promotion of health and control of disease through worldwide cooperation, informed opinion, and medical advancement is basic to the "harmonious relations and security of all peoples."³³ The WHO, through its World Health Assembly ("Assembly"), is authorized to adopt regulations concerning quarantine requirements and other procedures to prevent the spread of disease.³⁴ Health regulations promulgated by the Assembly are binding on all member states, absent specific reservations to the contrary.³⁵

Compared to these primarily economic foreign efforts, more recent international endeavors have focused on human rights identification and protection in the context of international peace.³⁶ This shift in policy emphasis, from economics to peace, foreshadowed the more recent international orientation toward protection of basic human rights as a policy objective in itself.³⁷ Several international declara-

27. *Id.* at 363. Article 1 provides: "Each government shall immediately notify the other governments of the first appearance in its territory of authentic cases of plague or cholera." *Id.*

28. *Id.* at 364. Article 7 states that "[t]he notification of a single case of plague or cholera shall not involve the application of" measures such as disinfection, prohibiting transit or entry, or detention at borders. *Id.* See also *id.* at 365-66.

29. Allin, *supra* note 21, at 1048.

30. *Id.*

31. U.N. CHARTER art. 55.

32. *Id.* art. 57.

33. WHO CONST. pmb., in WORLD HEALTH ORGANIZATION, BASIC DOCUMENTS 1 (1971).

34. *Id.* art. 21.

35. *Id.* art. 22. Health regulations adopted pursuant to Article 21 of the WHO Constitution are enforceable against all member states who have not, within the specified adoption period, notified the WHO Director-General of rejection or reservations. *Id.*

36. See, e.g., U.N. CHARTER art. 1. The U.N. Charter limits its human rights protection to situations that endanger international peace and cooperation. The Charter specifically excludes from its intervention powers any matter that is purely domestic.

37. See *infra* note 84 and accompanying text.

tions, conventions, and covenants reflect this new orientation.³⁸

III. RECENT USE OF QUARANTINE AGAINST AIDS

The rapid spread of AIDS worldwide has recently turned public attention and legislative efforts to the use of quarantine as a means to protect public health.³⁹ Prior to the advent of AIDS, significant medical advances and a decline in the incidence of infectious disease drastically curtailed the use of quarantine.⁴⁰ Consequently, in recent years, few governments or courts have formally addressed the human rights and liberties implicated in the practice of quarantine, particularly as applied to HIV infection and AIDS.⁴¹ The rights and liberties involved include, among others, the right to privacy and humane treatment, freedom from arbitrary detention, freedom of movement, and freedom from discrimination.⁴² While these rights are always at issue in the use of quarantine, they become particularly crucial in the case of AIDS and HIV, because the infection does not share many of the characteristics of epidemics that in the past have made strict quarantine measures feasible.⁴³ For instance, the disease is not spread by casual contact, making segregation unnecessary and over-restrictive.⁴⁴ Since transmissibility of the virus continues throughout the life of a person with AIDS, isolation would result in a permanent deprivation of personal liberty.⁴⁵ Additionally, the tremendous number of people currently capable of transmitting the virus makes general quarantine measures unmanageable.⁴⁶

A. Regulatory Spectrum

A number of countries and states in the United States have recently enacted or amended quarantine laws aimed at AIDS and HIV-infected individuals. The laws vary considerably in their restrictiveness, their procedural protections, and the individuals to whom the laws apply. In fact, existing and proposed AIDS quarantine laws span the regulatory spectrum. Some are narrowly tailored and only

38. See *infra* notes 86, 100-01, 125-27 and accompanying text.

39. Parmet, *supra* note 4, at 53-54.

40. Fallone, *supra* note 3, at 462. See also Parmet, *supra* note 4, at 56.

41. Parmet, *supra* note 4, at 56.

42. See *infra* notes 87-93 and accompanying text.

43. Parmet, *supra* note 4, at 83.

44. Larry Gostin, *Traditional Public Health Strategies, in AIDS AND THE LAW*, *supra* note 10, at 47, 60.

45. *Id.*

46. *Id.*

minimally restrict the exercise of basic human rights, while others are both overly inclusive and severely restrictive. The least restrictive laws prefer monitoring and reporting procedures to more restrictive institutional quarantines. The broadest and most restrictive laws often call for institutional supervision or incarceration at the discretion of health officials and impose constraints on even those suspected of carrying the virus. The regulations detailed below represent a cross-section of this spectrum.

B. Existing and Proposed AIDS Quarantine Laws

1. The People's Republic of China

In 1988, the People's Republic of China ("China") implemented a series of regulations aimed at identifying and confining HIV-infected individuals.⁴⁷ These regulations call for the monitoring and control of persons ill with AIDS, HIV-carriers, and even persons "in close contact with" AIDS patients and HIV-carriers.⁴⁸ While Article 21 of the regulations prohibits discrimination against "AIDS patients, AIDS carriers or their relatives,"⁴⁹ the regulations authorize public health officials and medical treatment personnel to isolate individuals with AIDS and to institute immediate medical treatment at a government-designated facility.⁵⁰ Additionally, authorities may restrict the "area or activities" of HIV-carriers as well as the activities of anyone suspected of being infected.⁵¹

Conflicting reports on China's management of AIDS cases may indicate government retreat from the strict policy enunciated in its

47. *Certain Rules on the Supervision, Testing and Management of AIDS*, in 5 STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA § 880114 (WEA Press Ltd. and Institute of Chinese Law (Publishers) Ltd., 1989).

48. *Id.* art. 2.

49. *Id.* art. 21.

50. *Id.* art. 23. Article 23 states: "Where sanitation, medical and health care authorities come across any AIDS patients, the authorities shall immediately effect measures to isolate the people in question and send them to the medical units designated by the public health administration departments for treatment." *Id.*

51. *Id.* art. 24. Article 24 states:

Where sanitation, medical and health care authorities come across any [AIDS patients, carriers of AIDS, or people in close contact with patients of AIDS], the authorities shall, in accordance with prevention needs, deal with the people in question by effecting all or some of the following measures:

- (1) placing them under custody for further examination;
- (2) limiting areas of activity;
- (3) placing them under medical observation;
- (4) visiting and observing them at regular or irregular intervals.

Id.

AIDS laws. While national health officials have reiterated that no one has a "right to refuse" testing or quarantine,⁵² other reports indicate that China has chosen not to implement the quarantine policy because health experts have concluded that such measures are ineffective.⁵³ In light of such reports, and given the closely guarded nature of the Chinese government, it is difficult to know with certainty whether China is implementing quarantine procedures.

2. Cuba

Cuba maintains a similarly restrictive system, although unlike China, a positive HIV-test is required to trigger quarantine measures.⁵⁴ Mandatory testing and quarantine procedures have been in place since 1987.⁵⁵ The Cuban government encourages, and, by some reports, forces⁵⁶ identified HIV-carriers to move to a sanitarium where they must stay indefinitely. The sanitariums allow patients brief respites to visit family, shop, or conduct other outside activities, but a chaperon must accompany the patient on these excursions.⁵⁷ Little else has been ascertained about the Cuban program. The sanitariums have been described as "pleasant,"⁵⁸ "clean and humane,"⁵⁹ and many patients appear to voluntarily cooperate with the quarantine program,⁶⁰ yet there are also reports of coerced confinement, as well as imprisonment and harsh treatment of recaptured "escapees."⁶¹

There is some evidence that Cuba is also becoming less strict in its control of AIDS. One recent report notes that the country is relaxing its quarantine policy on a "case-by-case basis."⁶² Patients who are "trusted" to take measures not to spread the virus are allowed to

52. *China Adopts Strict AIDS Law*, L.A. TIMES, Feb. 22, 1989, at A2. Nan Junhua, a government health official, was quoted as saying "[i]f any Chinese is found to be an AIDS sufferer, he will be quarantined and will not be allowed to continue working or going to school." *Id.*

53. Steve Sternberg, *AIDS in China: The First Tremors of an Epidemic*, ATLANTA CONST., Mar. 24, 1991, at A1.

54. See David W. Johnston, Comment, *Cuba's Quarantine of AIDS Victims: A Violation of Human Rights?*, 15 B.C. INT'L & COMP. L. REV. 189, 201 (1992) (citing Nick Caistor, *Treatment for Life*, NEW SCIENTIST, Feb. 18, 1989, at 65).

55. *Id.*

56. *Id.* at 202.

57. *Id.* at 203.

58. Robert Bazell, *Happy Campers*, NEW REPUBLIC, Mar. 3, 1992, at 14.

59. See Johnston, *supra* note 54, at 203.

60. See Bazell, *supra* note 58, at 13-14.

61. Johnston, *supra* note 54, at 203.

62. Anne-Marie O'Connor, *Cuba Changes Its Tack on AIDS Patients*, ATLANTA CONST., Aug. 14, 1991, at A2.

visit family more frequently and, in some cases, to leave the sanatoria permanently.⁶³

3. Sweden

Sweden implemented a selective quarantine for HIV-positive individuals refusing medical supervision.⁶⁴ Opponents claim the government is reviving the practice of exiling lepers.⁶⁵ The government defends its action by asserting that the isolation site, an island twenty-five miles west of Sweden, serves as a care center, but admits that patient freedom is "restrained."⁶⁶

Additionally, in 1988, a Swedish court ordered that a prostitute infected with HIV be isolated to keep her from spreading the disease.⁶⁷ The court order was based on a Swedish law allowing authorities to restrict the movement of people with contagious diseases who ignore medical advice on how to avoid infecting others.⁶⁸ The woman protested that she had abandoned prostitution and therefore posed no threat to others.⁶⁹

Interestingly, while such isolation measures are judiciously imposed, the country also mounted a huge program of education and prevention.⁷⁰ This suggests that Sweden, like many countries, is trying a combination of methods to effectively stem the spread of the virus.

4. Japan

Japan implemented laws allowing physicians to report the names of patients likely to spread the AIDS virus. These laws also authorize officials to quarantine or bar foreigners who test positive for the AIDS virus.⁷¹ Although relatively few cases of the disease have been reported within the country's borders,⁷² the government adopted the

63. *Id.*

64. *The New Lepers?*, NAT'L REV., Jan. 22, 1988, at 52.

65. *Id.*

66. *Id.*

67. *Isolate AIDS Patient, Swedish Court Rules*, SAN JOSE MERCURY NEWS, Feb. 26, 1988, at A18.

68. *Id.*

69. *Id.*

70. *See, e.g., AIDS Conferees May Learn from Sweden; Frankness Marks Nation's Campaign*, SACRAMENTO BEE, June 11, 1988, at A5.

71. Fred Hiatt, *Japanese Set Strict AIDS Law*, PHILA. INQUIRER, Feb. 19, 1989, at A9.

72. *Japan Plans Measures to Fight Spread of AIDS*, SAN JOSE MERCURY NEWS, Feb. 25, 1987, at A14.

measures as part of a "plan to prevent the spread of AIDS."⁷³ The regulations also propose various educational measures, again suggesting a combined approach to controlling the disease.⁷⁴ A Japanese legislator warned, however, that the measures will "increase the stigma of AIDS."⁷⁵

5. United States

Several states in the United States have passed or amended quarantine legislation in order to include AIDS among the illnesses subject to quarantine.⁷⁶ Colorado, Connecticut, Indiana, and Florida are among the states that have enacted statutes providing for the isolation of infectious disease carriers.⁷⁷

The Colorado statute illustrates how these regulations deal with HIV and AIDS.⁷⁸ If the executive director of the state or local department of health believes that the conduct of an HIV-infected person endangers others and the individual refuses to comply with orders to cease the conduct, the director may impose "such restrictions . . . as are necessary to prevent the specific conduct which endangers the health of others."⁷⁹ The restrictions may include placing the infected person in a facility approved by the executive director.⁸⁰

IV. RECENT INTERNATIONAL HUMAN RIGHTS AGREEMENTS, COVENANTS, AND DECLARATIONS

Perspectives on human rights vary greatly in both substance and

73. *Id.*

74. *Id.*

75. Hiatt, *supra* note 71.

76. John A. Gleason, *Quarantine: An Unreasonable Solution to the AIDS Dilemma*, 55 U. CIN. L. REV. 217, 228 (1986).

77. CONFRONTING AIDS, *supra* note 5, at 83.

78. COLO. REV. STAT. §§ 25-4-1401 to -1410 (1989).

79. *Id.* § 25-4-1406(3).

80. *Id.* § 25-4-1407. This section provides, in part:

(1) When the procedures of section 25-4-1406 have been exhausted or cannot be satisfied . . . and the executive director of the state . . . or . . . local department of health . . . knows or has reason to believe . . . that a person has HIV infection and that such person presents an imminent danger to the public health, the executive director . . . may bring an action in district court . . . to enjoin such person from engaging in . . . specific conduct which endangers the public health.

(2) Under the circumstances outlined in subsection (1) . . . the district court may issue other appropriate court orders including . . . an order to take such person into custody . . . and place him in a facility designated or approved by the executive director.

sanctity around the world. In some countries and regions, fundamental human rights are paramount and cannot be impinged on, absent a compelling government interest and the absence of any less restrictive means to achieve these interests.⁸¹ In other countries, "due regard to the national sovereignty . . . ; to the particular economic, social and national circumstances prevailing . . . ; and . . . the duties of citizens to their country" are conditions inextricably tied to the granting of fundamental human rights.⁸²

These national views represent a sliding scale toward the preservation of human autonomy and freedoms, which can be further analyzed within the context of recent international declarations and conventions on human rights. Notably, this analysis results in the conclusion that *some* form of quarantine could be declared legitimate in virtually every region of the world.

A. Global Perspective

Recent international agreements have recognized the importance of fundamental human rights within the broad context of international "cooperation."⁸³ Rather than focusing on either the economic or foreign relations aspects of human rights, these recent efforts advocate a "universal respect for and observance of human rights and freedoms."⁸⁴

1. Universal Declaration of Human Rights

Respect for human rights is a core value of the United Nations' Universal Declaration of Human Rights ("Declaration").⁸⁵ In adopting the Declaration, most member states of the United Nations⁸⁶ agreed that all people are entitled to a number of basic human rights and freedoms. The articles most important and relevant to the analysis of AIDS quarantine measures include Article 3, granting the right

81. Fallone, *supra* note 3, at 480 (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973)).

82. 1948-49 U.N.Y.B. 528-29, U.N. Doc. A/c.3/400/Rev. 1.

83. *Universal Declaration of Human Rights*, G.A. Res. 217 (III)A, U.N. Doc. A/810, at 71 (1948), reprinted in 1948-49 U.N.Y.B. 535, U.N. Doc. A/810.

84. *Id.* pmbl.

85. *Id.* The Preamble to the Declaration recognizes the "inherent dignity" and "equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice and peace in the world . . ." *Id.*

86. 1948-49 U.N.Y.B., *supra* note 82, at 528. The Declaration was adopted by 48 member nations; eight members abstained, among them Czechoslovakia, Poland, Saudi Arabia, the Union of Soviet Socialist Republics, the Union of South Africa, and Yugoslavia. *Id.*

to life, liberty and security of person;⁸⁷ Article 7, granting the right to equal protection of the law;⁸⁸ Article 9, recognizing freedom from arbitrary arrest, detention or exile;⁸⁹ Article 12, according freedom from arbitrary interference with privacy, family, home or correspondence;⁹⁰ Article 13, recognizing freedom of movement and residence within and between the borders of each State;⁹¹ Article 25, granting the right to "a standard of living adequate for the health and well-being of [oneself] and of [one's] family;"⁹² and Article 27, granting the right to participate in the cultural life of the community.⁹³

Because they protect persons from arbitrary arrest, detention or exile, and guarantee freedom of intrastate and interstate movement, "Articles 9 and 13 clearly prohibit countries from either advocating or implementing programs to keep AIDS victims out of their territory or confining them to remote quarantine centers."⁹⁴ Although the Declaration is not legally binding on, or enforceable against, United Nations members,⁹⁵ it serves as a "recommendation" to member states.⁹⁶ As such, it is primarily a policy statement, carrying moral rather than legal weight.⁹⁷

Counterbalancing the grant of specific human rights, the Declaration contains broad qualifications in Article 29.⁹⁸ Article 29 provides that the rights are subject to "such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."⁹⁹ This limitation or "escape" clause provides ample

87. *Universal Declaration of Human Rights*, *supra* note 83, art. 3.

88. *Id.* art. 7.

89. *Id.* art. 9.

90. *Id.* art. 12.

91. *Id.* art. 13.

92. *Id.* art. 25.

93. *Id.* art. 27.

94. Robert M. Jarvis, *Advocacy for AIDS Victims: An International Law Approach*, 20 U. MIAMI INTER-AM. L. REV. 1, 10 (1988). Article 9 of the Universal Declaration of Human Rights reads: "No one shall be subjected to arbitrary arrest, detention or exile." Article 13 provides that "1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own, and to return to his country." *Universal Declaration of Human Rights*, *supra* note 83, art. 13.

95. 1948-49 U.N.Y.B., *supra* note 82, at 525.

96. *Id.*

97. *Id.*

98. *Universal Declaration of Human Rights*, *supra* note 83, art. 29.

99. *Id.*

leeway to member states to legislate quarantine, justified by the requirements of "public order" or morality, as discussed below.

2. Human Rights Covenants

The United Nations followed up the Declaration nearly twenty years later with the promulgation of two covenants on human rights, the Covenant on Civil and Political Rights¹⁰⁰ and the Covenant on Economic, Social and Cultural Rights.¹⁰¹

These covenants echo the concerns of the Declaration in many respects.¹⁰² For example, the Covenant on Civil and Political Rights recognizes a number of rights and liberties contained in the Declaration. These rights include the right to life;¹⁰³ the right to liberty and security of person against arbitrary arrest or detention;¹⁰⁴ the right to freedom from cruel, inhuman, or degrading treatment or punishment;¹⁰⁵ the right to freedom of movement and residence;¹⁰⁶ and the right to freedom from arbitrary interference with privacy, family, home or correspondence.¹⁰⁷

The International Covenant on Economic, Social and Cultural Rights recognizes several additional rights, such as the right of self-determination;¹⁰⁸ the right to work under just and favorable conditions;¹⁰⁹ the right to an adequate standard of living, including food, clothing and housing;¹¹⁰ the right to a high standard of physical and mental health;¹¹¹ and the right to take part in cultural life.¹¹²

Notably, the Covenants were designed to provide both an international code of human rights and the "practical realization" of the

100. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), reprinted in 6 I.L.M. 368 (1967).

101. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), reprinted in 6 I.L.M. 360 (1967).

102. Jarvis, *supra* note 94, at 11.

103. *International Covenant on Civil and Political Rights*, *supra* note 100, at 370.

104. *Id.* at 371.

105. *Id.* at 370.

106. *Id.* at 372.

107. *Id.* at 373.

108. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 101, at 360.

109. *Id.* at 362.

110. *Id.* at 363.

111. *Id.*

112. *Id.* at 365.

principles proclaimed in the Declaration.¹¹³ This is effectuated in two ways. Under the International Covenant on Economic, Social and Cultural Rights, signatories to the Covenant are required to report to the United Nations Secretary-General their progress in achieving observance of the enumerated rights.¹¹⁴ The Economic and Social Council may make recommendations and reports to the General Assembly regarding progress made by signatories to the Covenant.¹¹⁵ The Council may also work with specialized agencies within the United Nations to develop further recommendations for implementing the provisions of the Covenant.¹¹⁶

The International Covenant on Civil and Political Rights calls for a different approach to implementation and enforcement. While parties to the Covenant must also periodically submit reports (in this case to the Human Rights Committee),¹¹⁷ the Civil and Political Rights Covenant goes further by establishing a Human Rights Committee ("Committee") elected by parties to the Covenant.¹¹⁸ This Committee may receive written communication from one party regarding alleged violations of another party, so long as both have recognized the competence of the Committee to hear such complaints.¹¹⁹ If parties on their own cannot achieve an amicable solution,¹²⁰ the Committee may appoint an ad hoc conciliation commission to work with the parties in achieving a solution.¹²¹ The conciliation commission may issue a report of factual findings and recommendations for possible solutions.¹²²

B. Regional Human Rights Measures

In addition to the United Nations' efforts to enumerate and in some measure protect human rights, "the subject [of human rights] has come to be embraced by . . . a host of regional organizations,"¹²³ resulting in "over forty pronouncements on the subject of interna-

113. 1948-49 U.N.Y.B., *supra* note 82, at 538.

114. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 101, at 365.

115. *Id.*

116. *Id.* at 366.

117. *International Covenant on Civil and Political Rights*, *supra* note 100, at 378.

118. *Id.* at 376.

119. *Id.* at 378-80.

120. *Id.* at 379-80.

121. *Id.* at 380.

122. *Id.* at 380-81.

123. Jarvis, *supra* note 94, at 7.

tional human rights."¹²⁴ The best known of these pronouncements include the European Convention for the Protection of Human Rights and Fundamental Freedoms;¹²⁵ the American Convention on Human Rights;¹²⁶ and the Banjul Charter on Human and Peoples' Rights.¹²⁷ While these documents, like the United Nations' Charter and the Declaration, make sweeping declarations on the importance of preserving fundamental rights, "[t]he more difficult task . . . is turning these rules into concrete action."¹²⁸ This is particularly true with regard to quarantine laws, often regarded as "the paradigmatic exercise of the State's police power."¹²⁹

1. European Convention on Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") and its Protocols identify many of the same rights and liberties as the Declaration. Article 3 of the European Convention grants all persons the right to be free from torture, inhumane or degrading treatment and punishment;¹³⁰ Article 5 grants the right to liberty and security of person;¹³¹ Article 8 grants the right to privacy;¹³² and Article 14 grants the right to be free from discrimination based on any ground.¹³³ Article 2 of Protocol 4 of the European Convention guarantees the right to freedom of movement and a number of other rights.¹³⁴ These rights, however, are subject to several limitations. The right to liberty and

124. *Id.*

125. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

126. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, reprinted in 9 I.L.M. 673 (1970) (entered into force on July 18, 1978) [hereinafter American Convention].

127. Banjul Charter on Human and Peoples' Rights, adopted June 27, 1981, reprinted in 21 I.L.M. 59 (1982) [hereinafter Banjul Charter].

128. Jarvis, *supra* note 94, at 18-19.

129. Eric S. Janus, *AIDS and the Law: Setting and Evaluating Threshold Standards for Coercive Public Health Intervention*, 14 WM. MITCHELL L. REV. 503, 505 (1988).

130. European Convention, *supra* note 125, at 224.

131. *Id.* at 226.

132. *Id.* at 230.

133. *Id.* at 232. Such grounds include "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.*

134. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, reprinted in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 130 (1977) [hereinafter Protocol No. 4].

security of person may be infringed where detention is necessary to achieve certain specified goals. These goals include the incarceration of convicted criminals, prevention of crime, and the "prevention of the spreading of infectious diseases."¹³⁵ Additionally, the privacy rights guaranteed by Article 8 may be impinged upon where government action is in accordance with law and necessary to preserve national security, public safety, economic well-being, protection against disorder or crime, or protection of the health, morals, rights or freedoms of others.¹³⁶

The Fourth Protocol to the European Convention grants freedom of movement which may be restricted by law "in particular areas" where "justified by the public interest . . ."¹³⁷ This right is also subject to restrictions pursuant to law which are necessary to prevent crime, protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.¹³⁸ Moreover, an escape clause in Article 15 of the European Convention provides that during wartime or "other public emergency threatening the life of the nation," any high contracting party may derogate its obligations under the European Convention to the extent *strictly* required by the situation.¹³⁹

To ensure that government actions limiting enumerated rights may be challenged in an international tribunal or subjected to review by the rest of the European Council, certain procedural protections are built into the European Convention.¹⁴⁰ The European Conven-

135. European Convention, *supra* note 125, art. 5, at 226. Article 5(1) of the Convention states that deprivation of liberty and security of person is authorized where the deprivation is in accordance with a procedure of law and is designed to achieve at least one of six specified purposes. *Id.*

136. *Id.* art. 8(2), at 230.

137. Protocol No. 4, *supra* note 134, art. 2(4), at 130.

138. *Id.*

139. European Convention, *supra* note 125, art. 15(1), at 232.

140. *Id.* art. 19, at 234. Article 19 establishes a European Commission of Human Rights and European Court of Human Rights. The Commission may accept written communications regarding alleged violations of the Convention. *Id.* art. 25, at 236-38. The European Court of Human Rights hears cases referred to it by the European Commission on Human Rights or a high contracting party. *Id.* art. 44, at 246. Article 50 provides that

[i]f the Court finds that a decision . . . by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and . . . allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Id. art. 50, at 248. Furthermore, the judgment of the Court is final and binding on all high contracting parties which recognize the competence of the Court. *Id.* art. 52.

tion specifically guarantees prompt notice, a speedy trial, and a fair hearing to individuals detained under the exceptions of Article 5.¹⁴¹ Additionally, any high contracting party who acts under the escape clause of Article 15 must fully inform European Council officials of the reason, nature, and duration of such actions.¹⁴²

2. American Convention on Human Rights

The American Convention on Human Rights ("American Convention") guarantees virtually all of the rights the European Convention does. However, the American Convention can be distinguished from the European Convention in several ways.

First, the American Convention grants a greater right to privacy, immune from the limitations allowed under the European Convention.¹⁴³ Second, the American Convention, in contrast to the European Convention, allows state parties a great deal more discretion to limit personal liberty and security. Under the European Convention, individuals can be detained or restricted only for specific enumerated reasons; under the American Convention, so long as such a restriction is pursuant to a State party's constitution or pre-established laws, the American Convention is not violated.¹⁴⁴ Furthermore, while the American Convention, like its European counterpart, establishes the

141. *Id.* art. 5, at 226. Article 5, sections 2 through 4 state:

(2) Everyone who is arrested shall be informed promptly in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear to trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Id.

142. *Id.* art. 15(3), at 233. Section 3 of Article 15 states:

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Id.

143. American Convention, *supra* note 126, art. 11, at 679. Article 11 states:

1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.

Id.

144. *Id.* at 677.

right to a fair and speedy trial, the American Convention allows State parties to detain individuals for virtually any reason as long as the detained party is informed of the reason for detention.¹⁴⁵

State parties to the American Convention, like high contracting parties to the European Convention, may also take measures derogating from their obligations under the American Convention during times of war or other threatening emergencies.¹⁴⁶ Unlike the European Convention, however, the American Convention expressly prohibits any measures that discriminate on the basis of race, color, sex, language, religion, or social origin.¹⁴⁷ Like the European Convention, legitimate governmental interests may not impinge upon critical liberties such as the right to life, the right to humane treatment, rights of the family, freedom from ex post facto laws, and "the judicial guarantees essential for the protection of such rights," among others.¹⁴⁸ The procedural protection of the American Convention against government interference with these rights are in harmony with the European Convention,¹⁴⁹ as are the bodies established to assure the fulfillment of the American Convention.¹⁵⁰

3. Banjul Charter on Human and People's Rights

In most respects, the Banjul Charter on Human and People's Rights parallels the European and American conventions.¹⁵¹ How-

145. *Id.* Article 7 states: "Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him." *Id.* The European Convention, on the other hand, allows detention *only* for certain specified reasons, such as conviction of a crime, noncompliance with a court order or obligation, reasonable suspicion of a crime, prevention of infectious disease, or deportation or extradition. *See* European Convention, *supra* note 125, at 226.

146. American Convention, *supra* note 126, at 683. Article 27(1) states:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin.

Id.

147. *Id.*

148. *Id.* at 683.

149. *Id.* at 677-78.

150. *Id.* at 685. Article 33 establishes the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. These bodies have the same responsibilities and function in much the same manner as the European Commission on Human Rights and the European Court of Human Rights. *Id.* at 685-94. *See also supra* note 140 and accompanying text.

151. Banjul Charter, *supra* note 127, at 59. For instance, the Charter grants the right to

ever, a few distinctions are worth noting. First, the Banjul Charter does not include the right to privacy in its provisions.¹⁵² Secondly, the right to liberty and security of person granted by the Banjul Charter provides less protection than either the European or American Conventions. While restrictions on this liberty may not be arbitrary and must be pursuant to existing law,¹⁵³ the Banjul Charter does not require that a person detained be informed of the reason for detention as does the American Convention.¹⁵⁴ Nor does it specify legitimate grounds for detention as does the European Convention.¹⁵⁵ Additionally, a provision of the Banjul Charter provides that "states will take necessary measures to protect the health of their people . . ." ¹⁵⁶ This represents a broad grant of authority to government that could prove critical in analyzing a country's quarantine law.

Notably, the Banjul Charter contains no derogation clause in case of war or emergency. Thus, a party's means to restrict enumerated rights are more limited than in the European or American Conventions.¹⁵⁷

In recent years, the various efforts of international bodies to enumerate human rights have had little application to quarantine laws, which are often regarded as "the paradigmatic exercise of the State's police power."¹⁵⁸ The following section analyzes such laws within the context of these international documents.

V. HUMAN RIGHTS IMPLICATIONS OF AIDS QUARANTINE MEASURES

Analyzing actual and proposed AIDS quarantine laws requires the recognition that such laws may be broadly or narrowly tailored.¹⁵⁹ The broadest quarantine laws would permanently isolate all known

liberty and security of person, humane treatment, freedom of movement, and freedom from discrimination. *Id.* at 60-61.

152. *Id.* at 59.

153. *Id.*

154. See *supra* note 145 and accompanying text.

155. See note 135 and accompanying text.

156. Banjul Charter, *supra* note 127, at 61.

157. See notes 139, 146 and accompanying text.

158. Janus, *supra* note 129, at 505.

159. See, e.g., Parmet, *supra* note 4, at 72-74. Parmet notes that a state could impose a quarantine on anyone who tested positive for HIV, only on individuals clinically diagnosed as having AIDS, or only on infected individuals who refuse to stop "engaging in activities that spread the disease . . ." *Id.*

and suspected HIV-carriers.¹⁶⁰ The narrowest laws would quarantine for a limited time only those knowing HIV-carriers who insist upon engaging in repeated high-risk behavior.¹⁶¹ Regardless of how carefully such laws are constructed, however, any quarantine measure is bound to infringe upon the most basic human rights. The real question in the international context is whether these infringements constitute violations of the declarations, covenants, and treaties which purport to protect those rights.

The United Nations' Universal Declaration of Human Rights and the other international agreements discussed provide a number of loopholes or escape clauses which afford governments ample legitimate means to impair fundamental human rights through the imposition of AIDS quarantines. The derogation clauses and exceptions contained in the Universal Declaration,¹⁶² as well as the regional agreements,¹⁶³ clearly could be used to justify quarantine laws.

A. United Nations Agreements

1. Universal Declaration of Human Rights

The Universal Declaration and its covenants guarantee several liberties which would be invaded by a national quarantine law.¹⁶⁴ In particular, an AIDS quarantine could significantly impair the right to privacy, as well as the right to freedom from arbitrary arrest or detention.¹⁶⁵ It could also implicate the right to freedom from torture or cruel, inhuman or degrading treatment, as well as the right to freedom from discrimination.¹⁶⁶ Additionally, a quarantine could impinge upon the procedural guarantees of a fair trial enumerated in the Declaration if imposed without any means for challenging the

160. For instance, China's regulations call for isolating those who test positive for HIV, and limiting the activities of those suspected of HIV infection. *Supra* notes 47-51 and accompanying text.

161. See Fallone, *supra* note 3, at 448 (that quarantining recalcitrant HIV-carriers would be an effective means of slowing the spread of AIDS).

162. See *supra* notes 98-99 and accompanying text.

163. See *supra* notes 138-39, 146, 153-56 and accompanying text.

164. For example, the rights of privacy, family, home, personal liberty and security, the freedom of movement and residence, the freedom from arbitrary arrest and detention, and the right to participate in the cultural life of the community could all be infringed by a broad-based quarantine law.

165. See *supra* notes 42-47 and accompanying text. China's regulations allow the detention of anyone when public health officials suspect of being infected. See *supra* notes 47-51 and accompanying text.

166. *International Covenant on Civil and Political Rights*, *supra* note 100.

action.¹⁶⁷

Notably, however, limitations on these rights contained in Article 29 of the Declaration could provide a legitimate means for governments to institute extensive quarantine laws.¹⁶⁸ For instance, where public hysteria over AIDS is rampant, governments could enact provisions that would justify quarantine laws calling for the isolation of certain suspect groups to restore public order.¹⁶⁹ Quarantine laws could also be justified as protecting the "rights of others," including both those persecuted for their high-risk status as well as society as a whole.¹⁷⁰

The conduct of governmental agencies in response to acts of violence against those suspected of carrying HIV conveys with it a message to their citizens. As one author has asserted, "judging from the public hysteria already prompted by journalistic reports . . . state inaction may have an equally negative impact on the public's perception of AIDS carriers."¹⁷¹ Thus, a government seeking to punish or discriminate against a particular group could engender public hysteria through subtle or blatant propaganda, in order to justify a broad quarantine of the targeted group on the grounds of preserving or restoring order.¹⁷²

The morality clause of the Universal Declaration may represent the greatest danger of discrimination against, and infringement upon,

167. *Id.*

168. *Universal Declaration of Human Rights, supra* note 83. Article 29(2) provides that: [I]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Id.

169. An example of such breakdown of public order concerns residents of the Kalmyk Autonomous Republic, where there is a heavy incidence of AIDS, who have reportedly been stoned by residents of neighboring areas to segregate the Kalmyks within their own community. L.A. TIMES, Feb. 24, 1989, at A2.

170. Notably, this sort of "pressing public necessity" was one of the justifications for upholding the United States' internment of citizens of Japanese ancestry in World War II. John A. Gleason, *Quarantine: An Unreasonable Solution to the AIDS Dilemma*, 55 U. CIN. L. REV. 207, 233 (1986) (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

171. Fallone, *supra* note 3, at 458-59.

172. See Parmet, *supra* note 4, at 64. Parmet notes that in quarantining prostitutes to prevent the spread of venereal disease, some United States courts have held that local boards of health has discretion over the question of whether an emergency exists to justify a quarantine, and is thus unreviewable. By declaring an emergency, a local health agency could create a state of public hostility toward a particular group, and then justify a quarantine as necessary to restore order and protect the targeted group. *Id.*

the rights of actual and potential HIV and AIDS carriers.¹⁷³ A government could justify the removal of suspect groups from the rest of society to preserve national "morality," thus side-stepping the guarantee against discrimination of Article 2 of the Declaration. One author notes that "the association of AIDS with groups that are socially disfavored, such as drug addicts and homosexuals, suggests that there is a serious danger that quarantine will be used as a tool of prejudice."¹⁷⁴

Furthermore, a government could also impose a broad-based quarantine measure, particularly where it is tailored to high-risk groups, based on the "general welfare" clause.¹⁷⁵ For instance, the AIDS quarantine law implemented in China, which targets both known and suspected HIV-carriers, purports to protect and safeguard the health of its citizens.¹⁷⁶ In fact, in earlier decades, "quarantine was seen as emanating from the 'higher ground of public welfare' when epidemics were common and no one was immune from their terror."¹⁷⁷ Thus, the practice of quarantine was seldom challenged, and almost never invalidated.¹⁷⁸

Lessening the risks to human rights inherent in the Universal Declaration escape clause is the requirement that restrictions against these rights be designed "solely" to serve certain specific purposes.¹⁷⁹ However, an enterprising government seeking to impose widespread limitations on the human rights of specific groups could overcome even this safeguard. As demonstrated, where public hysteria and anti-AIDS sentiment has grown to a point at which informational efforts are ineffective, a government could assert that wide-spread segregation of specifically threatened groups is required for the purpose of restoring the "public order" or protecting the rights of others. Like-

173. *Universal Declaration of Human Rights*, *supra* note 83, at 537.

174. Parmet, *supra* note 4, at 82.

175. *Universal Declaration of Human Rights*, *supra* note 83, at 537.

176. *See Certain Rules on the Supervision, Testing and Management of AIDS*, *supra* note 47. Article 1 of China's regulation states: "[T]hese Regulations are formulated to prevent the AIDS virus from spreading into China from abroad or from occurring and becoming prevalent in China and to safeguard the health of the people." *Id.*

177. Parmet, *supra* note 4, at 60.

178. *Id.*

179. *Universal Declaration of Human Rights*, *supra* note 83. Article 29 states that such limitations may only be imposed where they are "determined by law *solely* for the purpose of securing" the rights and freedoms of others, as well as meeting the requirements of morality, public order, and general welfare. *Id.* (emphasis added).

wise, a government could assert that it promulgated such a law solely to preserve morality or the general welfare.

In the final analysis, the Universal Declaration represents, at best, a minimal safeguard against arbitrary government action. Since the Declaration is not legally binding,¹⁸⁰ there are no established means to enforce its provisions. Thus, the concept of human rights is still "elastic and can mean many things to many people."¹⁸¹ Unfortunately, to many the concept appears to exclude those infected with the AIDS virus.

2. The International Covenants

The International Covenant on Economic, Social, and Cultural Rights ("CESCR") and the International Covenant on Civil and Political Rights ("CCPR") also offer only minimal protection against government imposed quarantines. While some provisions of the Covenants are considered international customary law and thus binding on all United Nation member states, "[l]ess compelling provisions of the Covenants, which quarantine critics use to attack the policy," represent "[a]t most . . . an ideal . . ."¹⁸²

While the reporting requirements and conciliation procedures incorporated into the Covenants provide some enhanced protection against quarantine laws,¹⁸³ the effectiveness of these measures depends on interpretations of the Covenants' provisions. Like the Universal Declaration, several escape clauses in the Covenants, if read liberally, could allow implementation of broad-based national AIDS quarantines. For instance, Article 4 of the CESCR allows limitations on enumerated rights so long as such limitations are "compatible" with the promotion of the general welfare.¹⁸⁴ Additionally, Article 12 authorizes parties to take steps for "the prevention, treatment and control of epidemic . . . and other diseases."¹⁸⁵

The CCPR contains a general derogation clause similar to that in the Universal Declaration.¹⁸⁶ Under Article 4 of the CCPR, parties

180. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, REVIEW OF UNITED NATIONS CHARTER S. DOC. NO. 164, 83d Cong., 2d Sess. 312 (1955).

181. *Id.*

182. Johnston, *supra* note 54, at 193-94.

183. See *supra* notes 114-22 and accompanying text.

184. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 101, at 361.

185. *Id.* at 364.

186. *Universal Declaration of Human Rights*, *supra* note 83.

may minimize their obligations under the Covenant during times of "public emergency" to the extent strictly required by the situation, as long as the measures implemented do not conflict with international law or discriminate on the basis of race, color, sex, language, religion, or social origin.¹⁸⁷ The rights of free association and peaceful assembly are also subject to specific limitations. Where necessary to protect national security, public safety, public order, public health or morals, or the rights and freedoms of others, parties to the Covenant may restrict these enumerated rights.¹⁸⁸

Taken together, these escape clauses and limitations provide a formidable armor to governments implementing a broad-based AIDS quarantine. Therefore, the primary check on such government-imposed AIDS quarantines lies with the agencies created by the Covenants to review these actions. Only through strict interpretation of the derogation and escape clauses will parties to the Covenants be taken to task for such actions.

B. Regional Conventions

Similar to their United Nations counterpart, the European, American, and Banjul Conventions define human rights and freedoms. These regional Conventions guarantee virtually identical rights and freedoms, although there are differences in the means by which government can limit these rights.¹⁸⁹

1. Impact of Quarantine on Enumerated Rights and Freedoms

The rights granted by the Conventions most relevant to an AIDS quarantine law are the right to liberty and security of person,¹⁹⁰ the right to privacy,¹⁹¹ the right to humane treatment,¹⁹² the right to freedom of movement,¹⁹³ and the right to be free from discrimination

187. *International Covenant on Civil and Political Rights*, *supra* note 100, at 369-70.

188. *Id.* at 374.

189. The European and American Conventions provide that signatories can derogate from their duties during times of war or public emergency when "strictly necessary" to preserve public order, welfare, health, or morals. *See supra* notes 136, 146-47 and accompanying text. While the Banjul Convention does not include such a clause, it allows extensive restrictions on the liberty and security of a person, and allows governments to take necessary measures to protect the health of the people. *See supra* notes 152-55 and accompanying text.

190. *See supra* notes 131, 144, 153-54 and accompanying text.

191. *See supra* notes 132, 143. As noted, the Banjul Convention grants no such right. *See supra* note 151 and accompanying text.

192. *See supra* notes 130, 148, 151 and accompanying text.

193. *See supra* notes 134, 151 and accompanying text.

based on traditional physical and social characteristics, as well as "other status."¹⁹⁴

Clearly, a quarantine law that isolates individuals based on mere suspicion of HIV-positive status violates both the right to liberty and security against detention and the right to be free from discrimination. Such a law would be inherently arbitrary, and could easily discriminate against disfavored groups, leaving them permanently stigmatized.¹⁹⁵ As one author has asserted, "if an uninfected individual is quarantined, he or she probably will be branded for life."¹⁹⁶ Since groups traditionally discriminated against have a higher incidence of HIV infection, the likelihood of long-lasting stigma is even more pronounced.¹⁹⁷ As one author notes, "[t]he official imprimatur of state action may encourage the trend of violence and discrimination against AIDS victims."¹⁹⁸ Even if later proven to be uninfected, the individual falsely quarantined will likely remain stigmatized by the experience.¹⁹⁹ Moreover, the mere threat of a stigma may drive the problem of AIDS and the control of HIV infection "underground, thus thwarting the whole purpose of a quarantine policy."²⁰⁰

Additionally, such a law would infringe on the individual's right to privacy.²⁰¹ This infringement has led one author to comment that a government should implement AIDS quarantine laws only where the intervention will have "a material effect" on the course of the epidemic, and no other means of control is available.²⁰² Finally, such a law would severely restrict the right to freedom of movement granted by the Conventions, and depending on conditions of the imposed isolation, could violate the right to humane treatment.

2. Use of Limitations on Enumerated Rights to Implement Quarantine

Both the European and American Conventions generally allow governments to restrict the exercise of the enumerated rights in times of war or public emergency, where such restrictions are necessary

194. See *supra* notes 133, 147, 151 and accompanying text.

195. Janus, *supra* note 129, at 507.

196. Gleason, *supra* note 76, at 232.

197. Janus, *supra* note 129, at 508.

198. Fallon, *supra* note 3, at 455.

199. Gleason, *supra* note 76, at 232.

200. Johnston, *supra* note 54, at 198.

201. See *supra* notes 132, 143 and accompanying text.

202. Janus, *supra* note 129, at 514.

considering the "exigencies" of the situation.²⁰³ However, such measures may *not* subvert the right to humane treatment or fair judicial process, and under the American Convention, such measures must not be used to discriminate.²⁰⁴ The Conventions do not define the term "public emergency." Given the elasticity of such a general phrase, the drastically rising incidence of AIDS could be deemed such an emergency, thus allowing a government to implement a wide-ranging quarantine of suspected or actual HIV-carriers.

In addition to the general derogation clauses, specific rights within all three Conventions are subject to restrictions. Parties to the three Conventions may infringe upon the right to liberty and security of person in a variety of ways. Under the European Convention, this right may be imposed on to stem the spread of infectious disease, as well as to effectuate other authorized purposes and goals.²⁰⁵ Under the American and Banjul Conventions, any limitation, so long as established by pre-existing State constitutional or statutory law and even-handedly applied, is presumed valid.²⁰⁶ Thus, participating governments have an immense amount of discretion in imposing quarantine laws within their territories.

The European Convention grant of a right to privacy also allows ample opportunity for government intrusion. Officials may act in accordance with the law as necessary to preserve national security, prevent public disorder or crime, protect the health and morals of the country, and preserve the rights and freedoms of others.²⁰⁷ The Convention's "public order" limitation, like that of the Universal Declaration, could prove extremely manipulable in the hands of an enterprising government organization seeking to exclude suspect groups from its social order through quarantine.²⁰⁸ Additionally, one could defend a quarantine measure as a means to protect the public health and morals.²⁰⁹

203. See *supra* notes 137, 146-52 and accompanying text.

204. See *supra* notes 133, 147 and accompanying text.

205. See *supra* note 135 and accompanying text.

206. See *supra* notes 144-56 and accompanying text.

207. European Convention, *supra* note 125, at 230. Article 8(2) states:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

208. See *supra* notes 138-39 and accompanying text.

209. *Id.*

While no one has challenged the quarantine measures under the three Conventions, there are indications that review of such laws would be deferential. For instance, in all cases involving restrictions on the right of freedom of movement granted by the European Convention and its Protocols,²¹⁰ courts have ruled that the laws are "in accordance with the law and necessary in a democratic society, *inter alia* for the maintenance of *ordre public*."²¹¹ While none of the cases dealt with confinement or quarantine on the basis of risk of infection, as would be the case with a broad AIDS quarantine, the approval of the restrictions is a strong indicator of the deference granted to the acts of governments that are parties to the three Conventions.

Of course, most allowances for government intrusions in the three Conventions require that restrictive measures be "necessary" for the legitimate purpose.²¹² It is arguable whether an AIDS quarantine law could be justified as necessary for any of the legitimate purposes. For instance, it is by no means clear that a government could justify quarantine measures as necessary to protect the public morals. When efforts to educate the public or instill moral values fail, it seems unlikely that the isolation of certain "immoral" groups would achieve that purpose.²¹³ Instead, such efforts would likely only exacerbate the moral dilemma by driving unpopular attitudes and activities underground, leaving the national morality unaffected.

Many commentators agree that a quarantine measure based upon actual or suspected HIV-status alone is unjustified as necessary for the public welfare.²¹⁴ "HIV-infected individuals have the capability to eliminate any risk of viral transmission . . . so isolation would further no public health benefit to justify the massive infringement on individual liberty it entails."²¹⁵ The same rationale applies to quarantine measures imposed only on high-risk groups or those with full-blown AIDS.²¹⁶ While a government could argue that it has a duty to protect society from dangerous infected individuals, a quarantine based strictly on HIV or AIDS status is too broad a means of reaching this

210. See *supra* note 134 and accompanying text.

211. COUNCIL OF EUROPE, CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: CASE LAW TOPICS 52 (1973).

212. See *supra* notes 137-39 and accompanying text.

213. See, e.g., *supra* notes 67-69 (detailing reports that Sweden quarantined a prostitute).

214. See, e.g., AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE 3-19 (Paul Albert et al. eds., 2d ed. 1988).

215. *Id.*

216. Fallone, *supra* note 3, at 444.

goal.²¹⁷ Alternative measures, such as mandatory testing and reporting procedures, coupled with education, monitoring, and when necessary, isolation of those who *actually* present a risk by knowingly engaging in high risk behavior, would probably provide an equal level of protection with less severe liberty restrictions. This is particularly true in light of “[t]he modern emphasis on health as a matter of *individual* concern and responsibility” which “makes quarantine appear more drastic and intrusive on individual rights”²¹⁸

However, it is important to note that the “necessary” standard enunciated in the Conventions is manipulable. The final outcome often depends on the standard of review judges give to the restrictions.²¹⁹ However, today’s emphasis on individual liberties, along with the availability of increasingly sophisticated scientific data on not only AIDS, but also a variety of other medical problems, may lead to strict scrutiny of such laws.²²⁰ Under such heightened review, only quarantine measures strictly necessary to preserve public health and safety may be validated under the Conventions. Such a law should be limited to recalcitrant HIV-carriers (those who persist in knowingly putting others at risk of infection), and would require exhaustive procedural protection to meet the “necessary” standard.²²¹ Even then, there is a danger that such a law would be underinclusive, and “would do little more than scapegoat particular individuals.”²²²

VI. CONCLUSION

While judicial authority is sparse in the area of quarantine laws as international human rights violations, full-scale quarantining of high-risk groups, HIV-infected individuals, and AIDS patients is repugnant to most visions of these rights. Governments throughout the world certainly have a valid concern for public health and safety in

217. See, e.g., Parmet, *supra* note 4, at 73-74.

218. *Id.* at 77. See also Gleason, *supra* note 76, at 232. The author notes that while the individual’s rights must be subordinated for the health of the general public, “the individual’s suffering [under a lifetime quarantine] would be far greater than the corresponding benefit to the public.” *Id.*

219. Parmet, *supra* note 4, at 77-78. If a “rational basis” standard is used, the United States experience indicates that any quarantine law would pass muster. The author notes that the courts have “invariably upheld the mandate of the state’s legislature” where quarantine laws have been constitutionally challenged. *Id.*

220. *Id.* at 75-76.

221. See, e.g., Fallone, *supra* note 3, at 478-83 (discussing procedural and substantive concerns associated with the practice of quarantine).

222. Parmet, *supra* note 4, at 87.

the face of such a life-threatening contagious disease. Nevertheless, any such measures must be narrowly tailored to the specific dangers involved so as to minimally impinge on fundamental human rights. As one author has stated, "[n]owhere is achieving the proper balance between individual and collective rights more difficult or more important than when a state acts to protect the public health."²²³

Unfortunately, the reserved rights of governments as parties to these international instruments are both broad and discretionary. These reservations, as well as the deference shown to government infringement on enumerated human rights, indicate a global reluctance to grant truly inalienable rights to the individual. Sadly, the established and rigid hierarchy of global politics, in which government rights always dominate those of the individual, has often led to excessive restraints on international human rights. In the case of AIDS, it seems unlikely that this trend will be reversed. As one author asserted, when the public demands government action to stem the spread of AIDS, "the cheapest place to take from [is] the realm of individual rights."²²⁴

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223. Gostin, *supra* note 44, at 59.

224. MONROE E. PRICE, SHATTERED MIRRORS 82 (1989).