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An Unnecessary Sacrifice: Restrictions on the Right to Freedom of Movement in an Effort to Establish an Effective Global AIDS Policy

I. Introduction

In the years since the Human Immunodeficiency Virus (HIV) was first identified as the virus causing Acquired Immune Deficiency Syndrome (AIDS), HIV has evolved from a little known virus into a global pandemic crippling the world with fear.¹ In the early 1980s, the world gave little attention to the first cases of AIDS, cases primarily affecting young, gay males.² Ultimately, however, as the number of AIDS cases increased and HIV began to spread beyond the homosexual community, the public was forced to acknowledge AIDS as a serious communicable disease.³

In early 1992, 168 countries worldwide reported 501,000 AIDS cases.⁴ However, the World Health Organization (WHO) estimates that the actual cumulative total of AIDS cases is over 1.7 million.⁵ Even more significant, the number of AIDS patients worldwide only reflects a small fraction of those actually infected, since the virus has a latent stage that can last for years.⁶ WHO predicts that the number of HIV positive

1. HIV was discovered as the virus causing AIDS in 1983. Helena Brett-Smith & Gerald H. Friedland, *Transmission and Treatment*, in AIDS LAW TODAY, 18, 21, 23 (Scott Burris et al. eds., 1993). [hereinafter *Transmission and Treatment*] Recognition is given to Luc Montagnier and Robert Gallo for near simultaneous discover of the virus. *Id.* at n.12. Controversy surrounds theories on the evolutionary path of the virus. *Id.*

2. At first, the public did not seem to care if such a deadly disease was killing the homosexual community. Conceivably, this result may be attributed to the widespread discrimination directed toward the gay community.

3. As AIDS hit the larger heterosexual community, people began to realize their chance of personally contracting the disease. Larry Gostin, *Traditional Public Health Strategies*, in AIDS LAW TODAY 59 (Scott Burris et al. eds., 1993).

4. *WHO Warns of Rapid Growth in Numbers with AIDS*, THE IRISH TIMES, Dec. 2, 1992, available in LEXIS, News Library, ARCNWS File. Less than complete diagnosis and reporting, delays in reporting, varied definitions of AIDS, and social stigmas associated with the disease cause the discrepancies in the numbers. See *Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, U.N. ECSOC, 47th Sess., Agenda Item 12(k), U.N. Doc. E/1992/68 (1992).

5. *WHO Warns of Rapid Growth in Numbers with AIDS*, *supra* note 4. Only 1 in 10 people diagnosed with AIDS in the mid 1980s is still alive today. Luc Montagnier, *Profile of the AIDS Pandemic, 1993*, THE S.F. CHRON., April 28, 1993, available in, LEXIS News Library, CURNWS File. Presently, AIDS kill about 100,000 people a year. By the end of the century the number of deaths attributable to AIDS each year will rise to 400,000. *AIDS Seen Crippling Third World Development*, REUTERS LIMITED, Nov. 29, 1992 available in LEXIS New Library, ARCNWS File.

6. Montagnier, *supra* note 5. The number of AIDS cases worldwide more accurately reflects

individuals worldwide will increase from eleven to thirteen million currently, to thirty to forty million by the year 2000.⁷ Without a cure, all of those who become infected with HIV will develop AIDS and eventually die.⁸

As HIV and AIDS has spread throughout the world, developing countries have been the hardest hit by the disease.⁹ Indeed, developing countries with HIV and AIDS epidemics are experiencing a devastating spiral effect. AIDS generally hits the most economically productive section of the population in any country, namely those aged twenty to forty-five. The infection of these results in their loss of productivity or premature death.¹⁰ Such a drastic effect on the work force hurts the economy of the nation, thereby decreasing the amount of money available for health care.¹¹

The compelling need to address AIDS has triggered some nations to take a very aggressive approach to control the spread of the disease. While AIDS does create significant health concerns relating to preventing infection and controlling the spread of the disease, other important issues must also be considered. Around the world, people infected with HIV and AIDS suffer discrimination, scorn, and human rights violations.¹² In every nation, infected individuals face prejudice, including moral disapproval, quarantine, housing and labor discrimination, and denial of health care.¹³ In many countries, human rights of the infected individuals are sacrificed in the interest of nation's public health.

the number of individuals infected with HIV 10 years ago. *Transmission and Treatment*, *supra* note 1, at 19.

7. WHO Warns of Rapid Growth in Numbers with AIDS, *supra* note 4. The number of people infected with HIV represents close to 1 in 250 of the world's adult population. *Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, U.N. ECSOC, 47th Sess., Agenda Item 12(k), U.N. Doc. E/1992/68 (1992).

8. WHO Warns of Rapid Growth in Numbers with AIDS, *supra* note 4.

9. Eighty percent of HIV infections identified are in developing countries. *AIDS Seen Crippling Third World Development*, Reuters Limited, Nov. 29, 1992, available in, LEXIS, News Library, ARCNWS file.

10. Michael L. Closen & Mark E. Wojcik, *International Health Law, International Travel Restrictions and the Human Rights of persons with AIDS and HIV*, 1 TOURO J. TRANSNAT'L L. 285 (1990).

11. This impact on the work force and economy is greater in the developing countries. *Id.* at 298-299. The direct cost of AIDS treatment worldwide is estimated at \$2.6 to \$3.5 billion a year, most of which is paid for by the developed world. *Id.* As great as the direct cost of treating AIDS is, the indirect costs of HIV infection and AIDS are greater.

12. See generally Roberta Cohen & Laurie S. Wiseberg, *Double Jeopardy Threat to Life and Human Rights: Discrimination against Persons with AIDS*, HUM. RTS. INTERNET, Mar. 1990 [hereinafter *Double Jeopardy*] (providing an overview of the various forms of discrimination that HIV patients confront).

13. *Id.* at 3.

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However, in many cases, the individual rights sacrificed do not benefit the national health interest. Rather, because of the discrimination suffered by HIV-positive individuals, many avoid detection and treatment, resulting in a greater likelihood of epidemic infection.¹⁴ These dilemmas challenge the international community to develop an approach to AIDS that balances the prevention of HIV infection and the interest of public health with the human rights of those already infected with the disease.

Recently, the right to freedom of movement and the need to establish an international AIDS strategy have come into conflict. The compelling need to address AIDS has triggered some nations to take a very aggressive approach to controlling the spread of HIV. Attempting to prevent further infection of the population, countries have placed restrictions on the movement of those infected with HIV and AIDS, both within the state and abroad. Such restrictions violate the basic human right to freedom of movement and must be balanced against the public health interest they are designed to protect. When the restrictions do not substantially advance the public health interest, the right to freedom of movement must be preserved.

This Comment will examine the relationship between HIV prevention and restrictions on the freedom of movement. Part II will discuss HIV and AIDS, including methods of transmission. Part III will examine the international right to health and freedom of movement and the covenants that recognize these rights. In Part IV, this Comment will evaluate the efforts of Russia, the United States, and Cuba, three countries with unique approaches to the AIDS crisis. An evaluation of such HIV and AIDS policies reflects the conflict between nations' attempts to preserve the right to health and the right to movement, both intrastate and interstate. This conflict demonstrates the complexity of establishing an effective global AIDS policy. The final section of this Comment, Part V, will discuss the necessity of restrictions and the need for a flexible HIV prevention program that does not unnecessarily infringe on freedom of movement.

II. Understanding AIDS

To examine the national and international legal issues that surround AIDS, a basic understanding of HIV and AIDS is required. When HIV

14. At times HIV positive individuals and people suffering from AIDS have refused to participate in studies on the disease and clinical trials for treatment because they feared discrimination in other realms of their lives if their HIV or AIDS status was disclosed. *Id.* at 11.

enters the body it alters the DNA in the host cell. After the DNA is altered, the cell begins to produce new virus particles, which in turn infects more cells.¹⁵ The cells targeted by HIV are those that organize normal immune responses.¹⁶ Thus, the body's ability to fight secondary infections decreases.¹⁷

Despite public hysteria surrounding the transmission of HIV, it can not be transmitted through casual contact.¹⁸ Infection occurs when an infected person's body fluids come into intimate contact with the blood or mucus membranes of an uninfected person.¹⁹ The basic methods of transmission are: (1) intimate sexual contact;²⁰ (2) needle sharing among intravenous drug users; (3) mother-to-infant transmission;²¹ and (4) blood product transfusions.²² There is no actual AIDS test. However, the commonly used ELISA (Enzyme-linked Immunosorbent Assay) and Western Blot blood tests can detect antibodies created by the immune system in response to HIV infection.²³ ELISA, which can be completed in a few hours,²⁴ is usually the first AIDS test performed. If the ELISA test result is positive, it is followed by more specific Western Blot test.²⁵ The Western Blot test does not produce results as quickly

15. *Transmission and Treatment*, *supra* note 1, at 21.

16. *Id.* at 22.

17. *Id.* at 22-23.

18. In the earliest years of the AIDS epidemic, the public feared that HIV could be spread through casual contact similar to contact that spreads the virus that causes the common cold. *Id.* at 24.

19. *Id.* at 23. Body fluids include the following: blood, semen or vaginal secretions, sweat. Tears and saliva are not infectious bodily fluids. *Transmission and Treatment*, *supra* note 1, at 23.

20. Sexual contact (both homosexual and heterosexual) is responsible for the largest number of HIV infections worldwide. *Id.* at 24. Two thirds of all HIV infections are due to heterosexual transmission. *Id.* at 24. By the year 2000, this proportion is expected to increase to 75 to 80%. *Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, U.N. ECSOC, 47th Sess., U.N. Doc. A/47/289/E/1992/68, at 5 (1992). An individual's overall risk of contracting HIV increases with the number of sexual partners and the prevalence of the infection in the population. *Transmission and Treatment*, *supra* note 1, at 24.

21. As the spread of HIV increases through heterosexual contact, the number of children contracting HIV prenatally from an infected mothers increases. *The Coordination of HIV/AIDS Related Policies and Activities Carried out By the United Nations System* U.N. ECSOC, 47th Sess., at 11, U.N. Doc. E/1992/67 (1992).

22. *Transmission and Treatment*, *supra* note 1, at 24. Prior to nationwide screening for the AIDS antibodies that began in 1985, blood and blood product transfusion led to an increased risk that actual infected blood was transfused. *Id.* at 28-29. Currently, in the United States, the risk of transmission through blood transfusion is a range between 1 in 35,000 to 1 in 150,000 per unit of blood. *Id.* at 29.

23. *Id.* at 32.

24. *Id.* at 32.

25. *Transmission and Treatment*, *supra* note 1, at 32.

as the ELISA, but it produces fewer false positive results.²⁶ With the current testing methods, ninety-five percent of those who will eventually develop HIV infection will test positive within six months of exposure.²⁷

III. Toward an International Standard for AIDS Policy that Balances the Right to Health and Right to Freedom of Movement

As individual nations implement AIDS policies, they should incorporate international human rights guidelines to form an effective policy. At present, some national policies do not follow international guidelines and in fact, are in violation of basic human rights, most notably, the right to freedom of movement.

A. *International Documents Protecting Basic Human Rights*

Although each nation acts independently in developing a national HIV and AIDS policy, there are internationally-recognized human rights that must be protected, such as the right to health and well-being and the right to freedom of movement. Several international covenants recognize and seek to protect these basic rights, as discussed below.

1. *The Right to Health.*—The International Bill of Human Rights establishes the international basis for the right to health and well being.²⁸ Article 25.1 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including . . . medical care.”²⁹ The International Covenant on Economic, Social and Cultural Rights further expands the right to health.³⁰ In particular, it provides that each nation “to the maximum extent of its available resources” should undertake to take steps to achieve the “highest

26. *Id.*

27. *Id.*

28. *The International Bill of Human Rights*, U.N. GAOR, 3d Sess., Supp. No. 1, U.N. Doc A/565 (1948) includes the following: *The Universal Declaration of Human Rights*, U.N. GAOR, 3d Sess., 67th plen. mtg. at 1, U.N. Doc. A/811 (1948) [hereinafter *The Universal Declaration*]; *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200a(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6313 (1966); *The Optional Protocol to The International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 599, U.N. Doc. A/6316 (1966).

29. *The Universal Declaration of Human Rights*, *supra* note 28, art. 25.1. The Universal Declaration does not explicitly guarantee the right to health, but rather the right to health obtained through an adequate standard of living. *Id.* art. 25.

30. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 28, art. 12.

attainable standards of physical and mental health.³¹ To effectuate full realization of these rights, article 12.2 of the Covenant designates that nations should work toward the following:

- (1) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (2) the improvement of all aspects of environmental and industrial hygiene;
- (3) the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases; and
- (4) the creation of conditions which would assure all medical services and medical attention in the event of sickness.³²

Although there is no organization which can create and implement an international health policy addressing the many facets of AIDS, the United Nations has provided guidance for countries and has facilitated an international standard for developing AIDS policy.³³ In addition, the United Nations sought to ensure the right to health and well-being by establishing the World Health Organization in 1946.³⁴ The WHO is a special agency primarily responsible for international public health concerns.³⁵ WHO's main objective is assuring the highest level of health for people worldwide.³⁶ Planning and coordinating global health policies, WHO promotes medical research, promulgates regulations for international travel, and monitors communicable diseases.³⁷

Consequently, when AIDS became a crisis of global scale, WHO began developing, directing, and coordinating a global fight against the disease. WHO established a Special Programme on AIDS in 1987 to create global leadership for programs controlling and preventing AIDS.³⁸

31. See *The International Covenant on Economic, Social, and Cultural Rights*, *supra* note 28, arts. 2.1, 2.2, 12. For a detailed analysis of national and international obligations under the *International Covenant on Economic, Social and Cultural Rights* see, Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 156 (1987).

32. *The International Covenant on Economic, Social, and Cultural Rights*, *supra* note 28, arts. 12.2.

33. Closen & Wojcik, *supra* note 10.

34. The International Health Conference convened by the Economic and Social Council of the United Nations adopted the Constitution of the World Health Organization on July 22, 1946. 1948 U.N.Y.B. 180, U.N. Sales No. 1949.1.13.

35. *Id.*

36. WORLD HEALTH ORGANIZATION CONST. art. 1, *reprinted in* 1946 U.N.Y.B. 793, U.N. Sales No. 1947.1.18.

37. *Id.* art. 2.

38. *The Coordination of HIV/AIDS Related Policies and Activities Carried out By the United*

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The Global AIDS Strategy sets forth three main objectives: 1) to prevent infection with HIV; 2) to reduce the personal and social impact of HIV infection; and 3) to mobilize and unify national and international efforts against AIDS.³⁹

2. *The Right of Freedom of Movement.*—Recognizing that discrimination against HIV and AIDS patients is an obstacle to effective treatment and prevention, WHO urges nations to prevent such discrimination.⁴⁰ In addition to the WHO resolution, however, other international agreements operate to protect the rights and dignity of HIV and AIDS patients. Notably, all of these agreements call for the protection of the right to freedom of movement. For example, article 9 of the Universal Declaration of Human Rights provides that “no one shall be subjected to arbitrary arrest, detention, or exile.”⁴¹ This provision would prevent patients from being detained on the basis of infection with HIV. Article 9 of the International Covenant on Civil and Political Rights reiterates this right.⁴² The right of freedom of movement, both within the state and abroad, is established in the Universal Declaration of Human Rights.⁴³ This right is again recognized in the International

Nations System U.N. ECSOC, 47 Sess., Provisional Agenda Item 3, U.N. Doc. E/1992/67 (1992). The Special Program on AIDS was created to lend support to national programs addressing AIDS issues and to coordinate international cooperation in the fight against the spread of HIV infection.
Id.

39. *Id.* at 7.

40. *Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS)*, U.N. GAOR, 46th sess., Agenda Item 12, A/RES/46/203 (1992). The resolution urges member states:

- (a) [to] continue to give the AIDS pandemic top priority and to speak openly about AIDS and sexual behavior within the context of their sexual, cultural and religious norms;
- (b) to continue to develop strong national AIDS programmes with priority placed, in particular on prevention of sexual transmission through the promotion of safer sexual practices, including responsible sexual behavior, as well as on measures to prevent transmission through intravenous drug use and unsafe medical practices;
- (c) to develop services, in particular for the young, in regard to information, sex education and counselling on contraception and sexually transmitted diseases, as well as on other aspects of HIV transmission, within the context of their sexual, cultural and religious norms;
- (d) to ensure a multisectoral response to the socio-economic consequences of AIDS through the mobilization of all sectors of society;
- (e) to encourage the private sector, community groups and non-governmental organizations to participate actively in the national response to AIDS and HIV infections by providing, *inter alia*, support, care, education, counselling and resources;
- (f) to reinforce efforts to combat denial and complacency.

Id. at 3.

41. *The Universal Declaration*, *supra* note 28, art. 9.

42. *The International Convention on Civil and Political Rights* *supra* note 28, art. 9.

43. *The Universal Declaration*, *supra* note 28, art. 13. Article 13 provides that “(1) [e]veryone has the right to freedom of movement and residence with the borders of each state. [and] (2)

Covenant on Civil and Political Rights.⁴⁴ Finally, the right to work is protected by both the Universal Declaration of Human Rights and The International Covenant on Economic, Social, and Cultural Rights.⁴⁵ Thus, HIV infected patients should not be denied the right to travel freely or to work.

While recognized internationally, these basic human rights are often difficult to enforce. Articles 41 and 42 of the International Covenant on Civil and Political Rights establish that the Commission on Human Rights can monitor state compliance with the provisions of the covenant.⁴⁶ Though compliance is monitored, the individual states have some freedom in their recognition of these rights. For example, the right to freedom of movement is subject to restrictions provided by law that are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.⁴⁷ Such qualifications make it difficult in some situations to definitively say that a nation is failing to comply with right to freedom provisions, since the determination of what is in the best interest of the nation is left to the discretion of the nation itself.

[e]veryone has the right to leave any country, including his own, and to return to his country." *Id.*

44. *The International Covenant on Civil and Political Rights*, *supra* note 28, art. 12. Article 12 provides that:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*order public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Id.

45. The Universal Declaration provides that "[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment." *The Universal Declaration*, *supra* note 28, art. 23.1. The International Covenant on Economic, Social and Cultural Rights provides that "[t]he State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." *International Covenant on Economic, Social, and Cultural Rights*, *supra* note 28, art. 6.

46. *International Covenant on Civil and Political Rights*, *supra* note 28, arts. 41 and 42. The Commission on Human Rights is a sub commission of the Economic and Social Council created in 1946 to focus on human rights issues. HELLE KANGER, HUMAN RIGHTS IN THE U.N. DECLARATION 16 (1984).

47. *International Covenant on Civil and Political Rights*, *supra* note 28, art. 12.3.

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B. Towards a Global AIDS Strategy

WHO's global strategy for AIDS integrates the need to balance fundamental rights with an aggressive program to prevent the spread of HIV and protect the right to health. Beside working with individual nations and developing an international AIDS policy, WHO also encourages non-governmental organizations to address AIDS issues at the national and international level.⁴⁸ In 1992, for instance, WHO and the U.N. Department of Economic and Social Development began a study of the socioeconomic impact of AIDS. The study results should provide insight into the long range effects of AIDS on the economy, society, and culture.⁴⁹ Once it is understood how societal and cultural differences affect the spread of HIV infection, then WHO and the Economic and Social Commission can tailor effective prevention programs in each nation.⁵⁰

The search for a worldwide policy that adequately balances the interests of the state in public health and the rights of the individual is complicated by the fact that HIV and AIDS are impacting countries differently. For instance, HIV infection in most African countries and many Asian countries is spread through heterosexual contact.⁵¹ In contrast, in the United States, HIV infection initially was associated with homosexual contact and intravenous drug use, but now has been increasing in the heterosexual community as well.⁵² Further, in Eastern Europe, many of those with HIV or AIDS were infected through

48. *Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, U.N. ECSOC, 47th Sess., Agenda Item 12(k), U.N. Doc. E/1992/68 (1992).

49. *Id.* at 20.

50. The Economic and Social Council and the Commission on Human Rights have acknowledged that a global AIDS policy must not only address health care and HIV prevention, but must also confront human rights, discrimination, economic, social, and cultural concerns to effectively combat the consequences of the pandemic. *Review of Further Developments in Fields with which the Sub Commission has been concerned: Discrimination against HIV Infected People or People with AIDS*, U.N. ECSOC, 47th Sess., U.N. Doc. E/CN.4/Sub.2/1992/10 (1992). Both the Economic and Social Council and the Commission on Human Rights are working to help create an international policy that balances the duty of the State to protect the public health and the duty to protect individuals from discrimination and human rights violations. *Id.*

51. The instances of mother-to-infant transmission increase greatly when the primary method of infection is heterosexual contact. *The Coordination of HIV/AIDS Related Policies and Activities Carried out By the United Nations System* U.N. ECSOC, 47th Sess., at 11, U.N. Doc. E/1992/67 (1992).

52. *Id.*

improper medical procedures.⁵³ As a result, this population is wary of seeking testing and treatment for HIV and AIDS.⁵⁴

IV. The Conflict Between an Effective National AIDS Strategy and Freedom of Movement

In the wake of the WHO guidelines for a global AIDS strategy, each country must strive to formulate a national AIDS policy that complies with international standards on human rights, yet effectively addresses HIV and AIDS issues on a national level. Accordingly, each country's policy will be unique and may not be successful if attempted in another country. In order to illustrate the complexity of establishing an AIDS policy that is effective, both internationally as well as nationally, it is instructive to look at the efforts of various countries.

A. AIDS Policy In Russia

1. *The Absence of a National AIDS Prevention Policy.*—The Russian situation is unique since the nation currently faces the challenge of developing a national AIDS policy. As a member of the Union of Soviet Socialist Republics (USSR) before the collapse of communism, Russia had a strong unified central government to address the AIDS epidemic. Since the collapse of communism in eastern Europe, however, Russia has become far more vulnerable to the spread of HIV and AIDS.⁵⁵

Before the collapse of the USSR, the country had very efficient control and monitoring of HIV and AIDS, resulting in relatively few cases of HIV infection or AIDS.⁵⁶ With the fall of communism, newly convertible currencies and freer travel are encouraging drug trade and

53. David Tuller, *AIDS Problem Growing*, ST. PETERSBURG TIMES, November 7 1991, available in LEXIS, News Library, ARCNWS File.

54. *Id.* Medical transmission may also cause health care providers to discriminate against HIV and AIDS patients for fear of becoming infected. Stephanie Simon, *Soviets Turn Blind Eye Toward AIDS Awareness and Treatment*, CHI. TRIB., Dec. 1, 1991, at C26. In Russia, more than 300 children are HIV positive. Judith Perera, *Control of Aids is More Difficult After the Break-Up*, INTER PRESS SERVICE, July 28, 1992, available in LEXIS New Library, ARCNWS file. Most of them became infected in hospitals due to the lack of clean needles and proper use of syringes. *Id.*

55. Rachel Fixsen, *Eastern Europe AIDS Levels Low, But Prevention Needed*, REUTER LIMITED, June 3, 1993, available in LEXIS, New Library, CURNWS file.

56. Perera, *supra* note 54. Some experts dispute the incidents of AIDS in the Soviet population, citing Soviet laws making homosexuality illegal and years of official propaganda characterizing AIDS as a "capitalistic phenomenon" affecting only "negative, immoral members of society" as discouraging people from being tested. Simon, *supra* note 54, at C26.

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prostitution, thereby increasing the risk of HIV transmission.⁵⁷ In June 1993, Russia had not yet adopted a state plan to combat AIDS, as continued political unrest and economic hardship have focused national attention on other issues.⁵⁸ Without a strong state plan for the prevention of HIV infection, Russia is likely to fall victim to the severe consequences of the AIDS epidemic.

To fully determine the type of HIV and AIDS policy that would be effective in both preventing HIV infection and complying with internationally-recognized standards, it is necessary to briefly review the predominate methods of transmission of HIV infection and AIDS in Russia and the previous HIV and AIDS policy of the former USSR. In Russia, shortages of basic medical supplies have largely contributed to the number of individuals who have become HIV infected through medical procedures.⁵⁹ About 300 children have been infected while hospitalized.⁶⁰ Attitudes toward sexuality have also affected HIV infection in Russia. Casual sex among Russians is on the rise, but there has not been a corresponding rise in the use of condoms.⁶¹ The recent flood of western culture has brought sexuality into a country that previously was almost devoid of sexuality. Such evolving sexual attitudes and behaviors impact HIV infection through both homosexual and heterosexual contact.

The AIDS policy of the former USSR was aggressive. Laws on preventive measures guaranteed citizens the right to medical examinations, including anonymous examination, to diagnose HIV infection.⁶² Furthermore, citizens were required to undergo a diagnostic examination if there were sufficient grounds for believing that the individual was infected with HIV.⁶³ In particular, Soviet laws mandated HIV testing of surgery patients, pregnant women, and citizens returning

57. Fixsen, *supra* note 55.

58. Olga Veldina, *Not Yet Epidemic, But ...*, BIZEKON NEWS, June 2, 1993, available in LEXIS, News Library, NON-US File.

59. Doctors in Russia can only get less than half the syringes they need. This forces doctors to choose between not giving an injection and reusing the syringe. Sabine Russel, *Russian Doctors Say Shortages Slow AIDS Fight*, S.F. CHRON., Jan. 28, 1992.

60. See Perera *supra* note 54.

61. *Id.* The lack of a corresponding increase in the use of condoms reflects the traditional attitudes towards sexuality as well as the fact that reliable condoms are not widely available in Russia. *Id.*

62. *Law of the Union Soviet Socialist Republics: On Preventive Measures Against Aids*, THE CURRENT DIGEST OF THE SOVIET PRESS, June 27, 1990, art. 1, available in LEXIS, News Library, NON-US File [hereinafter *Law of the Union Soviet Socialist Republics*].

63. *Id.* art. 3.

from more than three months broad.⁶⁴ Moreover, article 4 of the *Law of the Union Soviet Socialist Republics: On Preventative Measures Against AIDS* provided that individuals who the health care officials had determined were HIV infected or suspected to be HIV-infected, could be taken into custody to receive medical attention at a health care facility.⁶⁵ Under article 6, anyone who was HIV positive and knowingly placed another person at risk of infection or infected another with HIV was criminally liable for the infection.⁶⁶

When the Soviet Union collapsed, this AIDS policy was abandoned, and the economic and political hardships that faced the new Russian state prevented the development of a new AIDS prevention policy. With no official state policy on the prevention of HIV and AIDS, Russia is in danger of an explosion of HIV infections and AIDS patients, as there is now no state regulations of HIV and AIDS preventative measure or anti-AIDS discrimination.⁶⁷ As such, with no official policy, patients currently suffer extreme discrimination.⁶⁸ Additionally, there is no official regulation of free intra- or interstate movement based on HIV status. Any movement restrictions based on HIV infection are the remnants of the aggressive policy of the USSR rather than the products of a new national approach to AIDS prevention.

The United Nations urges each member state to follow WHO guidelines to prevent further HIV infections.⁶⁹ Thus, Russia's failure to establish even the most basic HIV prevention program is a flagrant violation of the WHO resolution, which calls on each nation to take steps to prevent HIV infection and reduce the personal and social impact of AIDS.⁷⁰ Likewise, Russia's failure to acknowledge an AIDS crisis and enact preventive measures further violates the WHO global strategy by

64. Simon, *supra* note 54.

65. *Law of the Union Soviet Socialist Republics*, *supra* note 62, art. 4. Article 8 provided that every citizen shall have the right to medical and social assistance and prohibited discrimination of any type based on HIV or AIDS status. *Id.* art. 8. See Jeff Sommer, *Aids and the Soviet Union*, NEWSDAY, Mar. 1, 1992, at 7, for a more detailed account of one woman's experience of forcefully being taken into custody to receive medical care when it was determined, through partner tracking, that she might be HIV infected.

66. *Law of the Union Soviet Socialist Republics*, *supra* note 62, art. 6.

67. Eileen Acinar, *AIDS in Russia is Greater Problem Than Figures Show*, CNN News, May 11, 1992, transcript no. 38-4, available in LEXIS, News Library, ARCNEWS file.

68. Almost all HIV infected people suffer from labor and housing discrimination. *Id.* Indeed, most lose their jobs and housing virtually as soon as they are diagnosed. Some patients even have trouble finding doctors to treat them. *Id.*

69. *Prevention and control of acquired immunodeficiency syndrome(AIDS)*, U.N. GAOR, 46th sess., Agenda Item 12, A/RES/46/203 (1992).

70. *The Coordination of HIV/AIDS Related Policies and Activities Carries out by the United Nations System* U.N. ECSOC, 47 Sess., Provisional Agenda Item 3, U.N. Doc. E/1992/67 (1992).

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failing to combat HIV and AIDS discrimination. The WHO resolution against the discrimination of people with AIDS specifically calls on nations to protect the human rights and dignity of HIV and AIDS patients and foster a spirit of understanding and compassion for them.⁷¹ Therefore, Russia has failed to address discrimination against HIV and AIDS patients since there is no national policy. By failing to establish any legislation or regulation that addresses the both discrimination and the lack of availability of medical care, Russia continues to violate the WHO directive against HIV discrimination.

Finally, Russia's lack of a national policy violates the right of everyone to the enjoy the highest attainable level of physical and mental health, as provided for in the International Covenant on Economic, Social, and Cultural Rights,⁷² which was ratified by the former Soviet Union.⁷³ Russia is still bound by the Covenant, as it is a signatory to the Minsk Agreement. Under article 12 of the Minsk Agreement parties "guarantee the fulfillment of the international obligations binding upon them the treaties and agreements of the former USSR."⁷⁴ Consequently, Russia still has the obligation to undertake steps for the "prevention, treatment, and control of epidemic" as provided for in the International Covenant on Economic, Social, and Cultural Rights.⁷⁵ Failure to take any action to prevent the spread of HIV infection is a clear violation of the duty under the International Covenant.

In the absence of an official state policy on the prevention of the spread of HIV and AIDS, Russia should follow the international guidelines established by WHO. The WHO guidelines on medical procedures should be enacted at once to prevent further infection through improper medical procedures. Additionally, the WHO guidelines on the prevention of discrimination against people with HIV and AIDS should be enacted to attack prejudices that might prevent those at risk for infection from seeking testing and medical care.

Russia has an obligation to the maximum extent of available resources, to undertake steps to prevent further infection and to provide

71. *Id.*

72. *International Covenant on Economic, Social, and Cultural Rights*, *supra* note 28, art. 12.

73. The Soviet Union ratified both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights on October 16, 1973. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 28; *International Covenant on Civil and Political Rights*, *supra* note 28.

74. The Minsk Agreement, Dec. 8, 1991, art. 12, U.N. Doc. A/46/771 (1991) (establishing a Commonwealth of Independent States).

75. *International Covenant on Economic, Social, and Cultural Rights*, *supra* note 28, art. 12.2.

adequate medical attention to those already infected by the HIV epidemic.⁷⁶ The resources of WHO and other international AIDS organizations are accessible to Russia to help develop national legislation and regulation of preventive measure.

If Russia does not act quickly to enact the international guidelines or develop a national HIV and AIDS policy, HIV and AIDS will continue to spread through the country unchecked. Further, as a result of the increasing number of young adults contracting AIDS who will eventually be forced to leave the work force, Russia's lack of AIDS policy will also hurt its struggling economy.

2. *Potential Violations of the Right to Freedom of Movement in an Attempt to Control HIV Infection.*—The former Soviet Union severely limited the rights and freedoms of HIV individuals. Under Soviet policy, anyone merely suspected of having AIDS could be taken into custody for medical treatment.⁷⁷ Since the fall of USSR, many societal changes have contributed to the increase in the AIDS epidemic in Russia. In particular, there has been an increase in sexual transmission of the disease.⁷⁸ Consequently, Russia may be tempted to reinstate the aggressive travel restrictions of the former USSR in an attempt to limit the spread of HIV through sexual contact.⁷⁹

Restrictions of movement into the country might also be appealing to Russia. By prohibiting the movement of HIV-positive individuals into the country, Russia could limit infection from outside the country. Although these tourist travel restrictions would obviously violate both the WHO's prohibition on AIDS discrimination and the right to freedom of movement between nations, as conferred by the Universal Declaration of Human Rights,⁸⁰ such restrictions would control the flow of convertible currency and tourist trade that encourages drug trade and prostitution, the two primary contributors to the increase in HIV infection in Russia.⁸¹

Restricting the movement of people into and within Russia is not likely to effectively reduce the spread of AIDS, as the virus is already existent in the Russian population and therefore will be further spread by heterosexual and homosexual contact or through needle sharing in intravenous drug use. Accordingly, Russia would be more successful in

76. *International Covenant on Economic, Social, and Cultural Rights*, *supra* note 28, art. 12.

77. See Sommer, *supra* note 65.

78. Perera, *supra* note 54.

79. Limited medical facilities may encourage Russia to require all HIV and AIDS patients to be centrally located near a medical center equipped to treat HIV infected patients.

80. *The Universal Declaration*, *supra* note 28, art. 13.

81. Fixen, *supra* note 55. See Perera *supra* note 54.

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stopping the spread of infection through educating its people on AIDS prevention.

B. HIV Prevention in the United States

1. *The Current United States Response to AIDS.*—Although AIDS was recognized in the United States in the early 1980s, the nation was slow to develop an AIDS policy.⁸² Only after HIV began to spread rapidly throughout the country and infect a large cross section of the population, rather than merely the “high risk” groups, did the country begin to formulate AIDS legislation, policy, and regulations.⁸³ For instance, the United States has attempted to prevent HIV infection via blood transfusion by requiring that all donated blood be tested for HIV, utilizing established procedures.⁸⁴ This regulation has been relatively effective in preventing further infections through tainted blood, although cases are still arising from blood tainted in the early 1980s.⁸⁵

It remains to be seen what ramifications will arise from establishing criminal liability for intentional infection with HIV. Several states now have criminal statutes addressing intentional infection.⁸⁶ For example, a Georgia statute makes knowing infection with HIV a felony punishable by up to ten years in prison.⁸⁷ Illinois has also criminalized knowing transmissions of HIV, providing that criminal transmission of HIV is a felony.⁸⁸ Further, under the Illinois statute actual infection with HIV does not have to occur for a person to commit criminal transmission of HIV.⁸⁹

This relatively new concept of imposing criminal liability for intentional transmission of HIV may discourage individuals from being tested for the virus. If criminal liability is premised on individuals’ knowledge that they are HIV positive, some may simply avoid testing in order to avoid liability. This avoidance could lead to inadvertent transmission. Thus, although there is a need to confront the possible

82. *Transmission and Treatment supra* note 1, at 18-23.

83. Those in the traditional “high risk” groups include homosexual males, intravenous drug users, and prostitutes.

84. See 21 C.F.R. § 610.45 (1992) (setting forth guidelines for testing blood products for HIV infection).

85. *Transmission and Treatment, supra* note 1, at 28-29.

86. GA. CODE ANN. § 16-5-60 (1993); IDAHO CODE § 39-608 (1994); ILL. REV. STAT. ch. 720, para. 12-16.2 (1993) and; OKLA. STAT. tit. 21 § 1192.1 (1994).

87. GA. CODE ANN. § 16-5-60 (1993) (making reckless infection a misdemeanor and intentional or knowing infection a felony).

88. ILL. REV. STAT. ch. 720, para. 12-16.2 (1993).

89. *Id.*

intentional infection, legislators need to be aware of the possible negative consequences of criminal liability.

2. *Restrictions on Freedom to Movement and Current United States Policy.*—The United States has received international criticism for its addition of HIV to the list of dangerous and contagious diseases used by the Immigration and Nationalization Service (INS) to deny admission of aliens to the United States.⁹⁰ In 1987, the Senate approved an amendment to a bill requiring the President to add HIV to the list of dangerous and contagious diseases.⁹¹ HIV remained on this list for two years, almost without notice, until a foreign HIV positive health worker attempted to enter the country to attend a health conference.⁹² After the incident, HIV and AIDS activists crusaded to have HIV removed from the list.

In 1990, the Centers for Disease Control requested that HIV be removed from this list of diseases.⁹³ That same year, Congress passed the Immigration Act of 1990 that granted the Health and Human Services Secretary the power to revise the list of diseases comprising grounds for exclusion.⁹⁴ Under the Act, aliens would be excluded for having “a communicable disease of public health significance” rather than for being “afflicted with any dangerous contagious disease.” Before HIV was actually removed from the list, public opposition to the change forced the removal to be postponed.⁹⁵

The policy was again forced into the spotlight when HIV infected Haitian refugees sought political asylum in the United States.⁹⁶ Several lawsuits have been filed on behalf of the Haitians detained at the U.S.

90. Anthony S. DiNota, *The World Health Organizations' Resolution Condemning AIDS-Related Discrimination and Ongoing United States Noncompliance at the Border*, 12 N.Y. L. SCH. J. INT'L & COMP. L. 151, 172 (1991).

91. Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391 (1987). The list of diseases includes the following: chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, syphilis, infectious leprosy, active tuberculosis, and human immunodeficiency virus (HIV). See Medical Examination of Aliens, 42 C.F.R. § 34.2 (1992).

92. Hans Paul Verhoef spent six days in prison while awaiting a judge's ruling on the INS regulation. He was eventually allowed to attend the conference, but his experience forced the U.S. policy into the international spotlight. *Double Jeopardy*, *supra* note 12, at 35.

93. DiNota, *supra* note 90, at 172.

94. 8 U.S.C. § 1182(a) (1988), as amended by Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

95. *Id.* In 1991, the Health and Human Services Secretary proposed to the State and Justice Departments that all diseases be removed from the list, including HIV, except tuberculosis. DiNota, *supra* note 90, at 172-173. This motion was tabled when the government received 40,000 comments in opposition of the removal of HIV from the list of diseases. *Id.*

96. See generally Elizabeth M. McCormick, *HIV Infected Haitian Refugees: An Argument Against Exclusion*, 7 GEO. IMMIGR. L.J. 149 (1993).

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naval base in Guantanamo, Cuba to challenge the U.S. immigration restriction. These lawsuits allege deprivation of the right to counsel and discriminatory treatment based on their HIV status.⁹⁷ The most recent case challenging the immigration restriction was *Haitian Centers Council, Inc. v. Chris Sale, Acting Comm'r, Immigration and Naturalization Services*, decided on June 8, 1993.⁹⁸ In *Haitian Centers Council, Inc.*, the plaintiffs claimed the immigration restrictions were discriminatory and in conflict with political asylum procedures.⁹⁹ Specifically, the refugees charged that the Immigration and Naturalization Service's procedures were violative of their due process rights.¹⁰⁰ The HIV-positive Haitian refugees also charged that they were not receiving adequate medical care and were indefinitely detained.¹⁰¹

The Haitian cases focused attention on the U.S. travel restrictions, causing opponents of the immigration policy to become vocal. Opponents of the policy argue that the immigration and travel policy violates the WHO guidelines and discourages international dialogue and collaboration on AIDS research.¹⁰² Although WHO does not advocate travel and immigration restrictions, activists have not been successful in removing the HIV restriction in the U.S. immigration policy.¹⁰³ Additionally, the U.S. action to include HIV on the list of excludable diseases violates the right to freedom of movement between nations established by the Universal Declaration of Human Rights.¹⁰⁴

The interest of the state in preserving public health and preventing the spread of HIV must be balanced against international standards and the human rights of those infected. Activists charge that the U.S.

97. See, e.g., *Haitian Centers Council, Inc. v. Chris Sale, Acting Comm'r, Immigration and Naturalization Serv.*, 823 F. Supp. 1028 (E.D.N.Y. 1993), *vacated*, *Sale v. Haitian Ctrs. Council, Inc.*, 125 L. Ed. 2d 716, 113 S. Ct. 3028, (U.S. 1993); *Haitian Refugee Center, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992), *stay granted*, 120 L. Ed. 2d 932, 113 S. Ct. 3 (U.S. 1992), *mot. denied*, 120 L. Ed. 2d 933, 113 S. Ct. 4 (U.S. 1992), *cert. granted*, 121 L. Ed. 2d 22, 113 S. Ct. 52 (U.S. 1992), *rev'd*, 125 L. Ed. 2d 128, 113 S. Ct. 2549 (1993); *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 117 L. Ed. 2d 477, 112 S. Ct. 1245 (1992); *Haitian Refugee Center, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992).

98. *Haitian Centers Council, Inc. v. Chris Sale, Acting Comm'r, Immigration and Naturalization Serv.*, 823 F. Supp. 1028 (E.D.N.Y. 1993) *vacated*, *Sale v. Haitian Ctrs. Council, Inc.*, 125 L. Ed. 2d 716, 113 S. Ct. 3028, (U.S. 1993).

99. 823 F. Supp. at 1028.

100. *Id.* at 1034.

101. *Id.* at 1040-47.

102. See DiNota, *supra* note 90.

103. Public outcry against removing HIV from the list of diseases has prevented any action, although the Centers for Disease Control have suggested that only tuberculosis remain on the list. See generally DiNota, *supra* note 90.

104. *The Universal Declaration*, *supra* note 28, art. 13.

immigration policy encourages discrimination against HIV and AIDS patients within the United States and prevents aliens from seeking health care within the United States.¹⁰⁵ As a result, this policy violates an individual's right to freedom of movement between states.

Nevertheless, it does not appear likely that the United States will reverse the policy. To the contrary, on February 18, 1993, the Senate voted 76-23 to add a statutory requirement that HIV infection be included on the list of excluded diseases. At present, the House of Representatives has not taken a final vote on the measure.¹⁰⁶

Although it has not been ratified, the United States has signed on to The International Covenant on Civil and Political Rights, which specifically recognizes the right to freedom of movement between nations. Thus, the United States is obligated to sustain this right.¹⁰⁷ The enactment of a statute including HIV on the list of excluded diseases would codify a violation of the right to freedom of movement and disregard basic rights of those infected.

When formulating a national HIV prevention policy, methods of transmission must be considered. HIV is spread by behaviors, rather than casual contact.¹⁰⁸ Thus, the risk of infection comes from the behavior of the infected person not the nationality.¹⁰⁹ Those in favor of the ban on HIV infected immigrants argue that testing is necessary since a large number of HIV positive aliens do not know they are infected and will not modify their behavior. If the testing was used to provide education on the prevention of infection and to provide medical treatment and not to exclude immigrants, the policy would not violate the right to freedom of movement. As the policy is currently enforced, however, it operates as a type of inverse quarantine by preventing those infected from entering the country.

Moreover, there is no conclusive data available on the public health benefits or effectiveness of the exclusion policy.¹¹⁰ That is, there is no evidence that the policy is effective in preventing further HIV infection. Thus, such a policy violates both the WHO guidelines proscribing AIDS discrimination and the right to freedom of movement recognized in the Universal Declaration of Human Rights.

105. See generally *Double Jeopardy supra* note 12.

106. Pub. L. 103-43 (1993), available in LEXIS, Codes Library, PUBLAW File.

107. *International Covenant on Civil and Political Rights, supra* note 28.

108. See *Transmission and Treatment, supra* note 1 and accompanying text.

109. *Id.*

110. It has not been shown that allowing HIV infected aliens to immigrate would substantially increase the transmission of HIV. The concern of many people is the financial burden of caring for those infected once they developed AIDS.

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Currently, the House of Representative is formulating a nationwide HIV prevention program. The Comprehensive HIV Prevention Act of 1993 was introduced on March 30, 1993.¹¹¹ The measure requires the coordination of HIV prevention activities of the Centers for Disease Control, the Health Resources and Services Administration, the National Institute of Health and the Substance Abuse, and the Mental Health Services Administration.¹¹² Each agency must prepare a comprehensive plan of activities including community based counseling, testing, referrals, partner notification, and information and education on prevention of HIV.¹¹³ This legislation would be a step towards establishing a national HIV prevention program that would both comply with the WHO guidelines and recognize the right to freedom of movement, as conferred by the Universal Declaration of Human Rights.

C. *The Cuban Approach to AIDS*

1. *Cuba's National AIDS Prevention Policy.*—In contrast to both Russia and the United States, Cuba has taken an atypical approach to a national HIV and AIDS policy. Cuba, most noted for its aggressive quarantine approach to the HIV and AIDS crisis,¹¹⁴ has an extensive testing program.¹¹⁵ Until recently, Cuba required that after a period of six months to one year of HIV testing to confirm HIV positive test results, all HIV infected individuals are assigned to a residential sanatorium where they remain to receive lifetime medical care.¹¹⁶ Such a controversial policy was attacked as violating the basic human rights of those infected with HIV and AIDS.¹¹⁷

111. H.R. 1538, 103rd Cong., 1st Sess. (1993). The Comprehensive HIV Prevention Act of 1993 amends the Public Health Services Act to replace the title relating to the prevention of acquired immune deficiency syndrome (AIDS) with a new title on the prevention of human immunodeficiency virus (HIV) infection.

112. *Id.*

113. *Id.*

114. Elinor Burkett, *Cuba's AIDS Weapon: Confinement*, ORLANDO SENTINEL TRIB., November 17, 1991, at A10.

115. All patients of sexually transmitted disease clinics, women's clinic patients, hospitalized patients, blood donors, hemophiliacs, identified sexual contacts of HIV-positive individuals, pregnant women, Cubans traveling or working abroad, and people with clinical signs indicating possible infection are tested for HIV. Cuban Information Project, 5 CUBA ACTION, Winter/Spring 1993, at 11.

116. NATIONAL DIVISION OF EPIDEMIOLOGY, REPUBLIC OF CUBA MINISTRY OF PUBLIC HEALTH: NATIONAL PROGRAM FOR THE PREVENTION AND CONTROL OF AIDS (1991) [hereinafter MINISTRY OF PUBLIC HEALTH PROGRAM].

117. See generally David W. Johnston, *Cuba's Quarantine of AIDS Victims: A Violation of Human Rights?*, 15 B.C. INT'L & COMP. L. REV. 189 (1992) (providing a general overview of the AIDS situation in Cuba).

The major complaint against the quarantine is that it violated the freedom the movement within the state, which is established in the International Covenant on Civil and Political Rights.¹¹⁸ Further, WHO does not advocate quarantining HIV infected patients or AIDS patients, as no public health rationale justifies a quarantine.¹¹⁹ Nevertheless, the Cuban Ministry of Public Health defended the national quarantine policy as “protect[ing] the interests of the vast majority of the Cuban people, including those with AIDS.”¹²⁰

Cuba's national policy has been successful in controlling the spread of HIV and AIDS in the Cuban population.¹²¹ The Ministry of Public Health has set forth detailed procedures for the treatment of HIV and AIDS patients.¹²² Once HIV-positive individuals are identified, they are assigned to a sanatorium where they receive free comprehensive medical treatment.¹²³ Originally, HIV-positive patients remained at the sanatoriums, while all AIDS patients received specialized hospital care.¹²⁴ Patients in the sanatoriums are provided with ample food and live in relative comfort compared to the rest of the country. While there, they also receive the salary that they would have received if they remained in the work force.¹²⁵

In June of 1993, the Ministry of Public Health announced a modification in the quarantine policy.¹²⁶ In an effort to reintegrate HIV and AIDS patients back into society, patients will return to their communities after an initial diagnostic and educational period at the sanatorium.¹²⁷ The goal of the sanatorium program is to provide the best medical care to patients, to educate them about the disease, and to modify behaviors that risk infecting others.¹²⁸

118. Although over 100 states have ratified the Covenant on Civil and Political Rights, Cuba has not ratified the Covenant and is not a signatory.

119. *Double Jeopardy*, *supra* note 12, at 19.

120. *Cuba Says Quarantine Slows Spread of AIDS*, THE WASHINGTON TIMES, December 2, 1992, at A2 (quoting Dr. Hector Terry Molinert, Deputy Health Minister).

121. Cuba has a population of 10.5 million people. As of May 1993, there were 927 HIV-positive people and only 187 cases of AIDS. CUBAN INFORMATION PROJECT, *supra* note 115.

122. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116.

123. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 19-20.

124. Cuban Information Project, 6 CUBA ACTION, Fall 1993, at 4.

125. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 19-20.

126. See Cuban Information Project, 6 CUBA ACTION, Fall 1993, at 4.

127. *Id.* The new program would require patients to remain at the sanatorium for several months while they received precautionary medical treatment and education preventing further infection. *Id.* The population of Cuba has been slow to accept the use of condoms to prevent the spread of HIV, as the influence of the Catholic Church and the attitudes toward sexuality have made the education process difficult. *Id.*

128. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 19-20.

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In addition to the sanatorium programs, the Ministry of Public Health regulates the health care profession to avoid infection of health workers.¹²⁹ Cuba has also been successful in preventing the spread of HIV through contaminated blood by establishing regulations for handling the blood supply.¹³⁰

Moreover, the Ministry of Public Health has issued supplemental resolutions and provisions regarding AIDS, including mandatory testing for all Cuban citizens returning from endemic areas¹³¹ and mandatory testing for foreign visitors who will remain in the country for more than three months.¹³²

In addition, Cuba has addressed the criminal aspects of HIV and AIDS. Failing to comply with the provision of the health authorities for the prevention of a transmissible disease is a criminal offense under the Penal Code of Cuba.¹³³ This provision applies to the prevention of any transmissible disease. Unlike the U.S. criminal statutes, the criminal act is failing to comply with preventive provisions, not the actual infection of another with HIV. The Cuban criminal statute does not discourage individuals from being tested or seeking treatment and thus, does not violate WHO guidelines or accepted international human rights.

Finally, the Cuban Ministry of Health has also established detailed guidelines for education on AIDS.¹³⁴ The regulations to prevent infection of health care workers and the guidelines for education have not been challenged as violating international AIDS or human rights standards.

2. *Violations of the Right to Freedom of Movement.*—The Cuban Constitution provides that everyone is guaranteed free medical and hospital care.¹³⁵ Since the State is paying for the care of all HIV and

129. *Id.* at 24-31.

130. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 24-31.

131. REPUBLIC OF CUBA MINISTRY OF PUBLIC HEALTH, MINISTERIAL RESOLUTION No. 42 (1986).

132. REPUBLIC OF CUBA MINISTRY OF PUBLIC HEALTH, MINISTERIAL RESOLUTION No. 144, *cited in* MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 33-34.

133. Article 187 of the Penal Code of Cuba states that:

Whoever fails to comply with the measures or provision issued by competent health authorities for the prevention and control of transmissible diseases, and with the programs or campaigns aimed at controlling or eradicating serious or hazardous diseases or epidemics may be sentenced to three months to one year in prison or fined 100-300 quotas.

MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 33 (citing Chapter Five of the Code, titled Propagation of Epidemics).

134. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 21-23.

135. CUBA CONST., arts. 43, 50, *reprinted in* FBIS-LAT-92-226-S, Nov. 23, 1992.

AIDS patients, it has a vested interest in making sure that all people infected with HIV receive the best medical care and education on prevention of infection.¹³⁶ By providing adequate medical care for HIV infected individuals, the Cuban policy does maintain everyone's right to enjoy the highest attainable standard of physical and mental health, as established in the International Covenant on Economic, Social, and Cultural Rights.¹³⁷ Indeed, in Cuba, HIV and AIDS patients receive complete medical care, including treatment with the most current drugs free of charge. Additionally, by Cuban standards, AIDS patients live in fairly comfortable facilities.¹³⁸

However, the WHO has rejected quarantine as an effective or necessary step in controlling the spread of HIV infection. Consequently, Cuba's quarantine policy is discriminatory, as it is a violation of the right to freedom of movement within the state.¹³⁹ Specifically, critics of the quarantine program view it as a flagrant violation of the fundamental right to be free from arbitrary detention¹⁴⁰ and the right to freedom of movement and residence within the borders of each state.¹⁴¹ According to some human rights activists, the quarantine policy also violates the right to work by restricting the movement of HIV patients to specified areas and limiting job possibilities.¹⁴²

Although no testing procedure is completely free of false positive results, the Cuban testing policy established by the Ministry of Public Health does provide for repeated testing over time to confirm a positive result.¹⁴³ Given the confirmation of positive results and the requirement that the population continually be retested, it does not appear that the actual detention is arbitrary, although the necessity of quarantining HIV infected patients is questionable.¹⁴⁴ The Ministry of Health has taken measures through repeated testing to ensure that only HIV infected individuals are placed in the sanatoriums.

The quarantine policy as originally implemented was an absolute violation of the right to free movement within the state. HIV and AIDS

136. *Id.*

137. *The International Covenant on Economic, Social and Cultural Rights*, *supra* note 28, art. 12.

138. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 19-20.

139. *Double Jeopardy*, *supra* note 12, at 19.

140. *The Universal Declaration*, *supra* note 28, art. 9; *The International Covenant on Civil and Political Rights*, *supra* note 28, art. 9.

141. *The Universal Declaration*, *supra* note 28, art. 13; *The International Covenant on Civil and Political Rights*, *supra* note 28, art. 12.

142. *See Double Jeopardy*, *supra* note 12, at 35-38.

143. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116.

144. *See Johnston*, *supra* note 117.

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patients were confined to the sanatoriums for life and were allowed only brief visits with families.¹⁴⁵ In theory, the new quarantine policy, requiring a minimum stay at the sanatorium, then allowing patients to return to their communities, does not violate the universal right to freedom of movement and residence. The International Covenant on Civil and Political Rights provides that the right to freedom of movement within a state "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national . . . public health or morals . . ." ¹⁴⁶ Thus, some restriction of movement within the state may be justified if necessary to preserve the public health.¹⁴⁷ The question then becomes whether it is necessary to restrict the movement and residence of those infected with HIV to preserve public health. The Ministry of Health has determined that some restriction of movement is necessary, since the educational efforts of the Ministry outside the sanatoriums have not been very successful.¹⁴⁸

It remains to be seen if the new policy will unjustly violate HIV and AIDS patients' rights to free movement within the state. In the Cuban political system, the collective good and interest of public health in confining HIV patients for education and treatment may outweigh the temporary restrictions on movement and residence within the state. Although activists charge that confinement to the sanatoriums breaches the basic right to work provided in the International Covenant on Economic, Social, and Cultural Rights, patients continue to draw their previous salaries, and patients who remain in the sanatoriums are allowed to work within the facilities.¹⁴⁹

A final concern of the sanatorium program is that it may encourage discrimination against HIV and AIDS patients since they receive a great deal of attention and are removed from society for some time. Although it is conceivable that removing HIV patients from society may increase discrimination, some patients in the sanatoriums do not feel safe on the street.¹⁵⁰ Since the HIV and AIDS effort has been concentrated on the sanatoriums, the public still harbors fear and ignorance which is projected

145. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116.

146. *International Covenant on Civil and Political Rights*, *supra* note 28, art. 12.3.

147. *Id.*

148. MINISTRY OF PUBLIC HEALTH PROGRAM, *supra* note 116, at 4-6.

149. Cuban Information Project, 6 CUBA ACTION, Fall 1993, at 4; Cuban Information Project, 5 CUBA ACTION, Winter/Spring 1993, at 11.

150. Anne-Marie O'Connor *Cuba Changes its Tack on AIDS; Patients No Longer required to Live in State Sanatoriums*, THE ATLANTA J. AND CONST., August 14, 1991, available in LEXIS, News Library, ARCNWS File.

on HIV and AIDS patients outside the sanatoriums.¹⁵¹ Sanatorium patients also complain that they will not receive the same quality of medical care outside the institutions.¹⁵²

The Cuban immigration testing policy also violates the right of freedom of movement. The policy of testing only those foreigners planning to remain in the country more than three months has been criticized as discriminatory and arbitrary, since HIV could just as easily be spread through contact with foreign tourists who will be in the country for less than three months.¹⁵³ Moreover, this policy restricts the movement among states, which violates the right to freedom of movement recognized by The Universal Declaration.¹⁵⁴ This violation must be balanced with the benefit to the state's interest in protecting public health. Since Cuba only requires testing of foreigners planning to remain in the country more than three months and HIV can easily be transmitted by any tourist, it seems that this provision is not effective. Therefore, the interest of the state is not served. The Ministry of Public Health may not require all tourists to be tested since it would be extremely burdensome and tourism is an extremely important source of hard currency. However, this does not justify the ineffective testing of foreigners planning a long term visit.

Although Cuba's approach to the AIDS crisis has been effective, the quarantine of those infected and the testing of aliens do violate the right to freedom of movement both inside and outside the borders of the state. With these two basic human rights in conflict, namely the right to health and the right to freedom of movement, the state must resolve the conflict in a manner that places the least restriction on the right to freedom of movement, while effectively protecting the individual and national right to health. Since there is not a recognized public health reason for quarantining HIV and AIDS patients, Cuba should adopt the least intrusive method of effectively educating those infected on preventing further transmission and providing adequate medical care for the infected. Further, since testing for foreigners is not uniform, the restraints placed on international travel are unjustified. HIV is already present in the Cuban population, and it is unlikely that restricting the travel of those infected has a significant impact on the rate of infection.¹⁵⁵ Nationwide

151. *Id.*

152. *Id.*

153. Cuba does not accept reciprocal testing. All foreigners except tourists must be tested by Cuban health officials upon arrival. *Bureau of Consular Affairs*, U.S. DEP'T ST., March 6, 1990.

154. *The Universal Declaration*, *supra* note 28, art. 13.

155. *See generally* Johnston, *supra* note 117.

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education of prevention of transmission would probably be more effective.

To those outside the country, Cuba's AIDS policy may seem to violate international human rights standards and ignore the WHO guidelines for a global AIDS strategy. However, the policy has been extremely successful in slowing the spread of HIV and AIDS within the country.¹⁵⁶ Both Cuba's geographic and political situations contribute to the success of a program, which would not effectively translate to other nations.¹⁵⁷ Nevertheless, while the policy has been successful in addressing the spread of HIV and AIDS, it does violate the right to freedom of movement, and therefore, should be restructured to eliminate unnecessary violations of rights.

V. Conclusion

It is imperative that HIV and AIDS be attacked globally to avoid complete devastation, as the world will be moving toward thirty to forty million HIV-positive individuals by the year 2000.¹⁵⁸ However, the conflict between the right to movement and the need for an effective global AIDS strategy to ensure the right to health illustrates the complexity involved in developing international standards. The HIV and AIDS policies of all three countries considered in this Comment violate a fundamental human right. The U.S. and Cuban travel restrictions violate the right to freedom of movement, and Russia's failure to form an AIDS policy violates the right to health.

Because the WHO can not legally enforce the global guidelines for the prevention of HIV and AIDS infection, nations must take the responsibility for establishing a national strategy for the prevention of infection. These national policies must work effectively to prevent the spread of HIV, as well as conform to WHO guidelines and international rights to freedom of movement.

In forming their policies, nations must determine what will work given both their countries' primary means of AIDS transmission and their nation's culture. While general international standards can provide guidance for nations when developing HIV prevention policies, ultimately each nation will need to assess how they can best combat AIDS, while ensuring that fundamental human rights are not sacrificed. Due to the difference in transmission and culture, each nation must assume full

156. *Id.*

157. CUBA CONST., pmbl., reprinted in FBIS-LAT-92-226-S, Nov. 23, 1992.

158. WHO Warns of Rapid Growth in Numbers with AIDS, *supra* note 4, at 8.

responsibility for combatting AIDS, while guaranteeing that fundamental human rights are only minimally sacrificed.

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