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David W. Johnston

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# Cuba's Quarantine of AIDS Victims: A Violation of Human Rights?

## INTRODUCTION

In 1987, the Cuban regime became the first government in the world to implement a strict quarantine for all individuals infected with the Human Immuno-deficiency Virus (HIV).<sup>1</sup> To detect carriers of the virus, a precursor to Acquired Immuno-deficiency Syndrome (AIDS), Cuba instituted a national mandatory testing program.<sup>2</sup> The program required infected individuals to move to a former sanitarium outside of Havana for an indefinite period of time.<sup>3</sup> Contrary to the recommendations of the United Nations World Health Organization (WHO),<sup>4</sup> the policy continues today.<sup>5</sup>

The implementation of the quarantine policy raises a number of human rights issues. Foremost among them is the concern that the detention is arbitrary.<sup>6</sup> Most international scholars agree that an arbitrary detention constitutes a violation of international human rights law. Whether a particular detention is arbitrary, however, may be open to debate.<sup>7</sup> Some scholars, for example, believe education alone can halt the spread of AIDS.<sup>8</sup> Thus, a quarantine

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<sup>1</sup> Joseph B. Treaster, *Havana Reports 3 Cubans Dead of AIDS and Sets Up Isolation Unit*, N.Y. TIMES, Apr. 18, 1987, at A2.

<sup>2</sup> See *infra* text accompanying notes 97-107.

<sup>3</sup> See *infra* text accompanying notes 108-23.

<sup>4</sup> The World Health Organization (WHO) is a specialized agency of the United Nations with primary responsibility for international public health matters. See generally WORLD HEALTH ORGANIZATION, BASIC DOCUMENTS (1990). Created in 1948, 166 countries, including Cuba, are now WHO members. The objective of WHO is stated in article I of its Constitution as "the attainment by all peoples of the highest possible level of health." *Id.* at 2.

<sup>5</sup> See *infra* text accompanying notes 73-74; Jonathan M. Mann et al., *Global Coordination of National Public Health Strategies*, 18 LAW, MED. & HEALTH 20, 22 (1990); WORLD HEALTH ORGANIZATION, GUIDELINE FOR NURSING MANAGEMENT OF PEOPLE INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) 41 (1988) [hereinafter GUIDELINES FOR NURSING].

<sup>6</sup> See *infra* text accompanying notes 66-68. See also Ernesto F. Betancourt, *Cuba's Callous War on AIDS*, N.Y. TIMES, Feb. 11, 1988, at B2; M.D. Kirby, *AIDS Strategies and Human Rights Obligations*, 42 INT'L COMMISSION OF JURISTS REV. 42, 49 (1989).

<sup>7</sup> See *infra* notes 35, 92 and accompanying text.

<sup>8</sup> See *infra* text accompanying notes 75-76.

policy would be a disproportionate response to the AIDS threat and, therefore, arbitrary.<sup>9</sup> Others suggest that the international community must examine any policy designed to combat AIDS in light of a country's particular demographic, economic, political, and cultural composition before passing judgment.<sup>10</sup>

This Comment attempts to determine whether Cuba's quarantine program violates international human rights law. In order to establish that a body of international law exists upon which critics of the quarantine can base their claim, Part I provides an overview of the sources and development of internationally recognized human rights. Part II discusses the international response to AIDS and the impact of that response on the development and scope of human rights law as it applies to AIDS victims. Part III describes the Cuban quarantine policy, while Part IV analyzes the policy—and criticisms of it—in light of those political, social, and economic factors that are unique to Cuba. This Comment concludes that, considering the nature of the policy and Cuban society in general, its quarantine does not violate international human rights law.

## I. THE DEVELOPMENT AND SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW: AN OVERVIEW

### A. *The Development of Human Rights Law*

The idea that there exist certain immutable human rights which transcend national boundaries, and which all states must respect, is a relatively new phenomenon within the international community.<sup>11</sup> Prior to discovery of the Nazi atrocities inflicted upon millions of people, the only rights afforded individuals were those their national governments provided.<sup>12</sup> Documents such as the Magna Carta, the Bill of Rights, and the Charter of Privileges

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<sup>9</sup> See Kirby, *supra* note 6, at 50. Kirby argues: "The derogation from the human rights of persons compulsorily detained because of HIV infection is completely disproportional to the benefits secured thereby." *Id.*

<sup>10</sup> See, e.g., Maria Paalman, *Epidemic Control Through Prevention*, in *THE GLOBAL IMPACT OF AIDS* 215, 216–17 (Alan F. Fleming et al. eds., 1988); *infra* notes 87–88 and accompanying text.

<sup>11</sup> See Richard B. Bilder, *The Status of International Human Rights Law; An Overview*, in *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 1, 1 (1978).

<sup>12</sup> See *id.*; A.M. Stuyt, *Human Rights Sources—An Outline*, in *INTERNATIONAL LAW AND ITS SOURCES* 165, 165 (Wybo P. Heere ed., 1988).

address the rights of citizens living within a society as distinct from the rights of individuals as human beings.<sup>13</sup> Protecting the rights of individuals was not a traditional function of international law.<sup>14</sup>

The limited international concern for individuals which existed prior to the Second World War found expression in various treaties between states banning slavery and protecting certain ethnic minorities.<sup>15</sup> The individual, however, only found protection as a member of a group and exclusively through the establishment of treaties between states.<sup>16</sup> With the creation of the United Nations came the articulation of a principle upon which *individuals* could assert rights.<sup>17</sup> That principle, contained within the Preamble of the Charter of the United Nations (U.N. Charter or Charter), is that respect for the "human dignity" of individuals must be maintained by all states.<sup>18</sup> This essentially means that individuals no longer need rely on treaties between states to assert a right—the simple fact that they are human beings grants them that privilege.<sup>19</sup>

International human rights law is not as developed and coherent as other areas of international law, but it has "clearly reached a stage where it deserves and has received recognition as a specialized field of its own."<sup>20</sup> The number of specialized organizations, conferences, journals, academic literature, and courses devoted to furthering and defining international human rights law provides ample evidence of its legitimate standing in the wider sphere of international law.<sup>21</sup>

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<sup>13</sup> See Stuyt, *supra* note 12, at 165.

<sup>14</sup> See Bilder, *supra* note 11, at 1.

<sup>15</sup> *Id.* Governments used treaties to protect Jews in Russia, and Armenians in the Turkish empire, as well as to ban slavery. See, e.g., International Convention to Suppress Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

<sup>16</sup> See Bilder, *supra* note 11, at 1.

<sup>17</sup> See U.N. CHARTER pmbl.

<sup>18</sup> *Id.* The preamble states in part that one of the aims of the United Nations is "to reaffirm faith in fundamental human rights, in the dignity of worth of the human person . . ." *Id.* For a partial list of subsequent important documents which reaffirm the principle of inherent human dignity, see Stuyt, *supra* note 12, at 169.

<sup>19</sup> See Stuyt, *supra* note 12, at 168–69. For a discussion of methods by which individuals may attempt to remedy an abuse of their rights, see generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 (1987) [hereinafter RESTATEMENT].

<sup>20</sup> Bilder, *supra* note 11, at 3.

<sup>21</sup> *Id.*

## B. *The Sources of Human Rights Law*

International law is derived from three principal sources: international treaties, international custom, and the general principles of law recognized by "civilized nations."<sup>22</sup> Judicial decisions and the treatises of the most qualified scholars serve as secondary sources.<sup>23</sup> Because the scope of international human rights is still evolving, various human rights treaties, declarations, and instruments provide the most useful means for determining the extent of those rights.<sup>24</sup>

### 1. Treaties

The substantial number of human rights treaties currently in force, when viewed together, place a significant number of legal obligations upon states.<sup>25</sup> The most important treaty, to which most states are parties, is the U.N. Charter.<sup>26</sup> Nevertheless, while the Charter is legally binding on all U.N. members, its human rights provisions are too broad for use in defining the scope of those rights.<sup>27</sup> There are two conventions in force, however, which enlarge into detailed treaty form not only the skeletal human rights provisions of the Charter, but many provisions of the Universal Declaration of Human Rights (Universal Declaration).<sup>28</sup> These conventions are the International Covenant on

<sup>22</sup> See Statute of the International Court of Justice, Oct. 24, 1945, art. 38, 59 Stat. 1055, T.S. No. 993 [hereinafter I.C.J. Statute]. See also JOHN HUMPHREY, *NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS* 156 (1989).

<sup>23</sup> See I.C.J. Statute, *supra* note 22, at art. 38.

<sup>24</sup> See Bilder, *supra* note 11, at 4. It is not practical to examine in detail the full range of international human rights rules, procedures, and precedents that may affect the Cuban quarantine policy. Instead, it is more useful to focus on those instruments used by opponents of the policy to substantiate their contention that quarantine is a violation of international human rights.

<sup>25</sup> See *id.* at 4, 7. For a listing of U.N. human rights treaties in force see RESTATEMENT, *supra* note 19, at Part VII Introductory Note.

<sup>26</sup> See Bilder, *supra* note 11, at 7.

<sup>27</sup> See U.N. CHARTER art. 55(c). Article 55(c) of the U.N. Charter contains its most explicit reference to human rights, stating that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.*

<sup>28</sup> See JOSEPH M. SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 632 (3d ed. 1988). See also *infra* text accompanying notes 42-45.

Economic, Social, and Cultural Rights<sup>29</sup> and the International Covenant on Civil and Political Rights (Covenants).<sup>30</sup>

The importance of the Covenants in regard to Cuba's quarantine policy rests in the assertion that they are binding on Cuba even though it is not a signatory.<sup>31</sup> According to some commentators, the provisions of the Covenants represent international customary law.<sup>32</sup> This argument, however, is subject to debate.

The Covenants became effective in 1976, and approximately ninety nations have ratified them.<sup>33</sup> Portions of the Covenants, such as provisions banning slavery, torture, and systematic racial discrimination, represent international customary law and are, therefore, binding on all states regardless of whether they signed the Convention.<sup>34</sup> The international community, however, recognized these compelling provisions as customary law prior to, and not as a result of, ratification of the Covenants.<sup>35</sup> Less com-

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<sup>29</sup> International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>30</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force, Mar. 23, 1976) [hereinafter ICCPR].

<sup>31</sup> See Kirby, *supra* note 6, at 48.

<sup>32</sup> *Id.* Kirby states: "For all countries, whether they have ratified these international instruments or not, the International Covenants . . . provide statements of rules which are legally binding because they are now part of international law." *Id.*

<sup>33</sup> See RESTATEMENT, *supra* note 19, at Part VII Introductory Note.

<sup>34</sup> See B. G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 59 (1987). See also HUMPHREY, *supra* note 22, at 156. There is little agreement regarding the meaning or character of custom in international law. Nevertheless, a precise definition of the concept is not necessary in the context of this Comment. Any references to standards of conduct as customary international law are made only when those standards have been widely recognized as such. See, e.g., *infra* note 35 and accompanying text.

<sup>35</sup> See LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518-19 (1973). The international community recognized such provisions as part of customary international law following the adoption of the Universal Declaration of Human Rights. *Id.* See also RESTATEMENT, *supra* note 19, at § 702. The American Law Institute takes the position that there are certain fundamental human rights that are now part of customary international law. A violation occurs if a state practices, encourages, or condones (a) genocide; (b) slavery or slave trade; (c) the murder or causing disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; or (g) a consistent pattern of gross violations of internationally recognized human rights.

The customary international law of human rights creates obligations by each state for all other states. Thus, every state may, in principle, pursue remedies against any other state that violates the human rights of those individuals subject to its jurisdiction. In practice, however, states will usually attempt to vindicate only those wrongs committed against individuals in whom the vindicating state has a special interest—that is, their own nationals. See RESTATEMENT, *supra* note 19, at § 701.

pling provisions of the Covenants, which quarantine critics use to attack the policy, include the "right to gain a living by work freely chosen."<sup>36</sup> The status of such provisions is widely debated, but it may be premature to claim that they constitute customary international law.<sup>37</sup> At most, they represent an ideal which non-signatories should consider when formulating national policies.<sup>38</sup>

## 2. Declarations

Along with international treaties, there exist a large number of international declarations that the United Nations or other international organizations have adopted.<sup>39</sup> While not drafted in binding language, these declarations contribute to the establishment of minimal standards of conduct for all peoples and all nations.<sup>40</sup> Human rights activists often invoke various provisions of these declarations as expressions of international law.<sup>41</sup> This is especially true of the Universal Declaration, which the U.N. General Assembly adopted in 1948.<sup>42</sup>

While the drafters of the Universal Declaration expressly denied that it represented a binding international document, it eventually acquired a moral and political authority equal to that of the Charter.<sup>43</sup> Not only has the Universal Declaration inspired a large number of international conventions, but it is reflected in national constitutions, legislation, and in the decisions of national

<sup>36</sup> Kirby, *supra* note 6, at 51; ICESCR, *supra* note 29, at art. 6(1).

<sup>37</sup> See RESTATEMENT, *supra* note 19, at § 702 cmt. a. The American Law Institute does not include the "right to gain a living by work freely chosen" among those rights considered part of customary international law.

<sup>38</sup> See RAMCHARAN, *supra* note 34, at 59. Ramcharan states: "The International Covenants are, in principle, legally binding only upon the States which have expressly ratified or acceded to them except to the extent that some provisions of the Covenants might represent international customary law." *Id.*

<sup>39</sup> See Bilder, *supra* note 11, at 5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* See also RESTATEMENT, *supra* note 19, at § 701; PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 53-55 (1983); Robert M. Jarvis, *Advocacy for AIDS Victims: An International Law Approach*, 20 INTER-AM. L. REV. 1, 9-11 (1988). See also *infra* note 42 and accompanying text.

<sup>42</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. Sieghart asserts: "Between 1958 and 1972, references to [the Universal Declaration] were included in 25 new national constitutions and 8 domestic legislative acts." SIEGHART, *supra* note 41, at 53 n.9.

<sup>43</sup> HUMPHREY, *supra* note 22, at 154.

and international tribunals.<sup>44</sup> Contrary to the drafters' stated intentions, many of the Declaration's provisions are now part of customary international law.<sup>45</sup>

### 3. Decisions, Resolutions, and Recommendations

Another category of instruments which contribute to the body of international human rights law are those decisions, resolutions,<sup>46</sup> and recommendations generated by various U.N. organs or international agencies that deal with human rights problems.<sup>47</sup> There are essentially three points of view regarding the impact of resolutions on international law: a resolution's provisions (1) are legally binding on states; (2) possess only political and moral significance; or (3) contain a legal element, but are not legally binding.<sup>48</sup>

The most widely accepted position is that resolutions have only political and moral force.<sup>49</sup> To the extent that a single resolution has any bearing on international law, it is that it gives a state the right to act in ways consistent with that resolution.<sup>50</sup> Actions states take in accordance with such resolutions, therefore, cannot be legally challenged.<sup>51</sup>

While a single resolution may be relatively insignificant, some commentators believe that several identical resolutions can, taken as a whole, provide evidence of customary law.<sup>52</sup> However, "[r]esolutions, as a rule, do not result from state practice; they are recommendations for the future."<sup>53</sup> The resolutions become

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<sup>44</sup> See *id.* at 155.

<sup>45</sup> *Id.*; SIEGHART, *supra* note 41, at 54–55.

<sup>46</sup> The U.N. General Assembly's adoption of a resolution concerning AIDS makes resolutions—as opposed to decisions and recommendations—particularly relevant. See *infra* text accompanying notes 78–80.

<sup>47</sup> See Bilder, *supra* note 11, at 5. For a detailed discussion of the impact of resolutions and recommendations on international law, see generally G.I. Tunkin, *The Role of Resolutions of International Organisations in Creating Norms of International Law*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 5 (W. E. Butler ed., 1987); Ingrid Delupis, *The Legal Value of Recommendations of International Organisations*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 47 (W. E. Butler ed., 1987).

<sup>48</sup> See Tunkin, *supra* note 47, at 5.

<sup>49</sup> See *id.* at 7.

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.*

<sup>52</sup> See Delupis, *supra* note 47, at 47.

<sup>53</sup> Tunkin, *supra* note 47, at 13.



binding only when, in the course of practice, states gradually recognize them as binding.<sup>54</sup>

## II. THE INTERNATIONAL RESPONSE TO AIDS

### A. *The U.N. Charter, the Universal Declaration, the Covenants, and AIDS*

Some opponents of AIDS quarantine programs like Cuba's support their contention that the policy violates international human rights law by citing various articles of the U.N. Charter, the Universal Declaration, and the Covenants.<sup>55</sup> The Charter's human rights provisions, however, are too broad to add significant weight to anti-quarantine arguments. Thus, critics rely chiefly on the Universal Declaration and the Covenants.<sup>56</sup>

The most important articles of the Universal Declaration used to support claims of human rights violations address the right to freedom of movement,<sup>57</sup> the right to be free from arbitrary detention,<sup>58</sup> the right to privacy,<sup>59</sup> and the right to marry.<sup>60</sup> Because these "rights" are contained within the Universal Declaration, it is possible to argue that they have obtained the force of customary international law.<sup>61</sup> With the exception of the right to be free from arbitrary detention, however, they merit only a brief examination where quarantine is concerned.<sup>62</sup>

<sup>54</sup> *Id.* at 14.

<sup>55</sup> *See, e.g.*, Kirby, *supra* note 6, at 48-51; Jarvis, *supra* note 41, at 8-13.

<sup>56</sup> For a discussion of quarantine critics' use of the Covenant, see *supra* text accompanying notes 29-38.

<sup>57</sup> *See* Universal Declaration, *supra* note 42, at art. 13. Article 13 states: "(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." *Id.* *But see* ICCPR, *supra* note 30, at art. 12(3). Article 12(3) provides a number of exceptions permitting restrictions, including restrictions to protect public health.

<sup>58</sup> *See infra* text accompanying note 66.

<sup>59</sup> *See* Universal Declaration, *supra* note 42, at art. 12. Article 12 states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence . . . ."

<sup>60</sup> *See id.* at art. 16 ("Men and women of full age . . . have the right to marry and to found a family.").

<sup>61</sup> *See* SIEGHART, *supra* note 41, at 54; *supra* text accompanying note 57.

<sup>62</sup> The rights to privacy and marriage do not belong to that category of rights that are never subject to derogation. *See* RESTATEMENT, *supra* note 19, at § 702, note 11. The Universal Declaration states that rights may be limited by law for purposes of meeting "the just requirements of morality, public order and the general welfare . . ." of the state. Universal Declaration, *supra* note 42, at art. 29(2). Infringement on the rights to privacy

The right to freedom of movement is set forth in article 13 of the Universal Declaration.<sup>63</sup> Opponents of quarantine policies argue that this gives AIDS victims the right to leave a country to avoid detention.<sup>64</sup> While this argument bears some merit, it is less compelling in a country such as Cuba where no one is afforded freedom of movement.<sup>65</sup> Restrictions on the freedom of movement out of the country have no special applicability to AIDS patients. Such policies are essentially unrelated to the AIDS quarantine, and therefore are beyond the scope of this Comment's analysis.

Article 9 of the Universal Declaration states: "[n]o one shall be subjected to arbitrary arrest, detention or exile."<sup>66</sup> Most scholars agree that this article represents customary international law.<sup>67</sup> If the quarantine policy is arbitrary, it would, therefore, constitute a human rights violation. On the other hand, if the detention is not arbitrary, the policy is legitimate, and there is no need to examine the claims of a right to privacy or a right to marry. These individual rights may be restricted for legitimate reasons.<sup>68</sup> The dispositive question, then, is whether the AIDS quarantine is an arbitrary detention.

### B. WHO's View of Quarantine Policies

In 1985, as the global scope of the AIDS crisis became apparent, WHO drafted a global strategy for the prevention and control of AIDS.<sup>69</sup> Its objectives are threefold: "(a) to prevent HIV

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and marriage, then, would be acceptable for maintaining public health if it represents the only means to do so.

Quarantine critics might also argue that it constitutes cruel, inhuman, and degrading treatment, a more serious violation of international human rights law. See *supra* note 35 and accompanying text. Critics could not persuasively argue that the policy is, by definition, cruel or degrading if it is not arbitrary, or, stated positively, if it is legitimate. A stronger argument would focus on the way the interned are treated. Even such an approach, however, would probably not reveal a violation of human rights law given Cuba's apparent effort to treat the interned humanely. See *infra* text accompanying notes 114-18. For a discussion of what constitutes cruel, inhuman, and degrading treatment, see generally *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. (ser. A) at 25 (1978).

<sup>63</sup> See *supra* text accompanying note 57.

<sup>64</sup> See, e.g., Jarvis, *supra* note 41, at 10; Kirby, *supra* note 6, at 50-51.

<sup>65</sup> See HUGH S. THOMAS ET AL., THE CUBAN REVOLUTION 50 (1984).

<sup>66</sup> Universal Declaration, *supra* note 42, at art. 9.

<sup>67</sup> See RESTATEMENT, *supra* note 19, at § 702.

<sup>68</sup> See *supra* note 62 and accompanying text.

<sup>69</sup> See World Health Organization, *Fortieth World Health Assembly, Geneva, 4-15 May 1987, Resolution and Decisions, Annexes* (WHA.40/1987/REC/1); Mann et al., *supra* note 5, at 20.

infection; (b) to reduce the personal and social impact of HIV/AIDS; and (c) to unify national and international efforts against AIDS.<sup>70</sup> A number of guidelines determine the manner in which states can realize the objectives, including assertions that education is the key to AIDS prevention, that public health must be protected, that human rights must be respected, and that discrimination must be prevented.<sup>71</sup>

WHO has directly addressed the social aspects of AIDS prevention and control in its publications.<sup>72</sup> WHO's literature states that no public health rationale justifies quarantine or any discriminatory measures based solely on the fact that a person is known to be HIV-infected.<sup>73</sup> WHO further asserts that "persons suspected or known to be HIV-infected should remain integrated within society to the maximum possible extent. . . ."<sup>74</sup> Thus, WHO strongly discourages the methods used by Cuba to prevent the spread of AIDS.

Dr. Jonathan M. Mann, former Director of WHO's Global Program on AIDS, has advanced at least two reasons why AIDS-infected people should remain in society.<sup>75</sup> First, the AIDS virus is not dangerous, provided society is educated about the means of transmission.<sup>76</sup> Second, the threat of quarantine will drive the problem "underground," effectively thwarting testing strategies and educational efforts.<sup>77</sup>

In 1987, the U.N. General Assembly adopted a resolution commending WHO for its efforts toward global AIDS prevention and control.<sup>78</sup> Moreover, the resolution confirms that WHO should direct and coordinate the global battle against AIDS and

<sup>70</sup> Mann et al., *supra* note 5, at 20.

<sup>71</sup> *Id.* at 21.

<sup>72</sup> See GUIDELINES FOR NURSING, *supra* note 5, at 41-42. See generally WORLD HEALTH ORGANIZATION, AIDS PREVENTION AND CONTROL (1988).

<sup>73</sup> GUIDELINES FOR NURSING, *supra* note 5, at 41.

<sup>74</sup> *Id.* at 42.

<sup>75</sup> See Jonathan M. Mann, *A Global Strategy for a Global Challenge*, WORLD HEALTH, Mar. 1988, at 4.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *Prevention and control of acquired immune deficiency syndrome (AIDS)*, G.A. Res. 42/8, U.N. GAOR, 42d Sess., Supp. No. 49, at 19, U.N. Doc. A/42/49 (1987) [hereinafter Resolution]. The Resolution recognizes the "established leadership and the essential global directing and coordinating role of . . . [WHO] in AIDS prevention, control and education . . . ." *Id.*

it commends those governments whose AIDS programs are in harmony with WHO's strategy.<sup>79</sup> The General Assembly reaffirmed in 1988 and 1989 "the established leadership and the essential role of . . . [WHO] in the global direction and coordination of AIDS prevention . . . ."<sup>80</sup> Statements from various international assemblies also support WHO's efforts.<sup>81</sup>

The international support shown for WHO's strategy has led some commentators to argue that the strategy amounts to a requirement under international human rights law.<sup>82</sup> This is a tenuous assertion, however, considering that many of the countries supporting the General Assembly resolution have adopted the same preventative measures WHO discourages.<sup>83</sup> As indicated above, General Assembly resolutions may impose on U.N. members an "obligation to take [the resolution] into consideration."<sup>84</sup> Such resolutions, however, would not bind states to introduce specific legislation even if they had voted for the resolution. This is not to say that the position concerning quarantine expressed by WHO is without significance. It is simply not the *sole* approach to AIDS prevention consistent with international human rights.

### C. *Individual State Considerations*

A fundamental concern expressed in WHO's AIDS program is that states should protect human rights and preserve the dignity of those who have the disease.<sup>85</sup> Almost all states would agree that these goals are of prime importance.<sup>86</sup> Deciding how best to achieve them is another matter. As Maria Paalman, Director of the Dutch Foundation for STD Control, has written, "[o]ne global

<sup>79</sup> *Id.*

<sup>80</sup> See Mann et al., *supra* note 5, at 22.

<sup>81</sup> See *id.* at 20. The strategy has been approved and adopted by the World Health Assembly (May 1987), the Venice Summit of the Heads of State of Government (June 1987), the Economic and Social Council of the United Nations (July 1987) and the World Summit of Ministers of Health on Programmes for AIDS Prevention (London, Jan. 1988).

<sup>82</sup> See, e.g., Kirby, *supra* note 6, at 48.

<sup>83</sup> See Michael Micklin & David F. Sly, *International Population Movements and AIDS: Patterns, Consequences, and Policy Implications*, in *THE GLOBAL IMPACT OF AIDS* 67, 76 (Alan F. Fleming et al. eds., 1988) (pointing out the large number of countries which have some form of mandatory AIDS screening contrary to WHO's policy recommendations). See also Jarvis, *supra* note 41, at 1009-11.

<sup>84</sup> See Delupis, *supra* note 47, at 52.

<sup>85</sup> See Mann et al., *supra* note 5, at 21.

<sup>86</sup> See generally Resolution, *supra* note 78.

strategy for AIDS prevention is neither possible nor desirable.”<sup>87</sup> Common sense dictates that there is a need to consider state-specific factors when designing a prevention strategy.<sup>88</sup> Thus, determining whether Cuba’s quarantine policy is consistent with international human rights law requires viewing it not only in light of WHO’s guidelines, but against factors particular to Cuba. These factors include Cuba’s political structure and principles, its educational and cultural environment, the prevalence of the HIV virus, and the strengths and weaknesses of Cuba’s national health care system.<sup>89</sup>

Examination of Cuba’s quarantine program in light of the above factors permits testing of the premises behind the assertion that no public health rationale exists to justify the policy.<sup>90</sup> If, for example, most Cubans would not heed warnings of infection even if informed, then one of the underlying reasons for WHO’s strategy is lost.<sup>91</sup> Studying the performance of the Cuban education system and its impact on Cuban society should help determine whether AIDS can be successfully fought through education. In essence, analyzing Cuba’s quarantine policy in this manner will provide a means by which to determine whether the detention is arbitrary.<sup>92</sup>

<sup>87</sup> Paalman, *supra* note 10, at 218. See also Robert J. Earickson, *International Behavioral Responses to a Health Hazard: AIDS*, 31 SOC. SCI. & MED. 960 (1990).

<sup>88</sup> See Earickson, *supra* note 87, at 960. Earickson states: “Differences have been documented in individual responses to natural hazards in developing and developed countries. Similarly, there are different cultural responses to AIDS in these nations.” *Id.*

<sup>89</sup> The factors selected do not exhaust the possibilities. Nevertheless, they represent factors likely to influence the effectiveness of the AIDS prevention program employed.

<sup>90</sup> See Mann, *supra* note 75, at 4.

<sup>91</sup> *Id.* Some individuals will fail to act responsibly even if they know the risks. See, e.g., *infra* note 147 and accompanying text. Failure to reach a few individuals through education does not, however, make reliance on education as a means of preventing AIDS unsound. Yet, if the number of individuals ignoring the message becomes significant, then it would be irresponsible to continue making education the sole element of the anti-AIDS strategy.

<sup>92</sup> In its treatment of article 9 of the Universal Declaration, the American Law Institute offers a definition of arbitrary, but only as it pertains to the detention of alleged criminals. See RESTATEMENT, *supra* note 19, at § 702 cmt. h. The U.N. Commission on Human Rights has also studied the concept of arbitrary detention, but its study is also largely concerned with criminal detention. See generally UNITED NATIONS, STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION AND EXILE, 1964 [hereinafter STUDY]. The study only briefly discusses detention of persons afflicted with infectious diseases, concluding that detainees must be treated with dignity. *Id.* at 182. Thus, for the purposes of this Comment, an arbitrary health policy will be defined as one that will not work, or if it does work, is more restrictive or harsh than is necessary.

### III. CUBA'S QUARANTINE

Prior to 1986, Cuba had no program designed to address the AIDS crisis.<sup>93</sup> In fact, Cuban authorities thought of AIDS as a "Western" disease, the result of decadent behavior.<sup>94</sup> By mid-1986, however, Cuban authorities began to formulate a concerted plan of action against the AIDS problem.<sup>95</sup> Part of the program is designed to educate the public about the dangers of AIDS, but it is not the crux of the strategy.<sup>96</sup>

By early 1987, the Cubans made the focus of their strategy known. The government announced that it would test Cuba's entire population.<sup>97</sup> Consequently, all Cubans returning from visits abroad, all Cubans admitted to any hospital for any reason, and all Cubans likely to have contact with foreigners are tested for HIV infection.<sup>98</sup> In addition to testing its own population, the government requires foreigners planning to stay in the country for more than three months to have a blood test upon entering Cuba.<sup>99</sup> The government does not, however, plan to test vacationing tourists who enter the country.<sup>100</sup>

As with other public health campaigns in Cuba, these efforts enlist the help of "mass organizations" such as the Committees for the Defense of the Revolution, the Women's Federation, and various trade unions.<sup>101</sup> Cuban officials state that it is unnecessary to test people through coercion because all Cubans come into contact with the medical system, whether through the workplace, at school, or for medical treatment.<sup>102</sup> Additionally, informed consent is not required. According to Dr. Hector Terry, Cuban

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<sup>93</sup> See Nick Caistor, *Treatment for Life*, NEW SCIENTIST, Feb. 18, 1989, at 65; Anne McElvoy, *Soldiers of Misfortune*, THE TIMES (London), Nov. 10, 1989, at 14E.

<sup>94</sup> See OFFICE OF RESEARCH & POLICY RADIO MARTI PROGRAM, CUBA ANNUAL REPORT: 1986 481 (1990) [hereinafter RADIO MARTI].

<sup>95</sup> Caistor, *supra* note 93, at 65.

<sup>96</sup> See Ronald Bayer & Cheryl Heaton, *Controlling AIDS in Cuba*, 320 NEW ENG. J. OF MED. 1022, 1022 (1989).

<sup>97</sup> See Treaster, *supra* note 1, at A2.

<sup>98</sup> See N.Y. TIMES, Jan. 22, 1989, at E24, col. 5; Bayer & Heaton, *supra* note 96, at 1022.

<sup>99</sup> Caistor, *supra* note 93, at 65.

<sup>100</sup> Eliseo J. Perez-Stable, *Cuba's Response to the HIV Epidemic*, AM. J. OF PUB. HEALTH, May, 1991, at 565.

<sup>101</sup> See Bayer & Heaton, *supra* note 96, at 1022. These organizations are called upon to help perform various non-specialized functions, such as compiling lists of persons who have served outside of Cuba since 1975.

<sup>102</sup> *Id.* at 1022-23.

Vice-Minister of Health,<sup>103</sup> “[p]hysicians undertake the tests that they consider crucial. It is not for patients to make such determinations.”<sup>104</sup>

The Cuban government uses a variety of testing methods similar to or the same as those used by other countries.<sup>105</sup> Despite the medical system’s best efforts, however, both false positive and false negative readings are possibilities.<sup>106</sup> The consequence of a false positive, if authorities do not later discover the error, is quarantine.<sup>107</sup>

Once AIDS carriers are identified, cases come under the jurisdiction of the Ministry of the Interior.<sup>108</sup> Anyone who tests HIV positive is “asked” to move to Finca Los Cocos, a former plantation and sanitarium outside of Havana.<sup>109</sup> Some reports indicate that those who refuse to go are brought by force, although this has not been confirmed by any human rights organizations.<sup>110</sup> According to Rodolfo Rodriguez, head of the AIDS testing program, doctors and nurses are sent to convince AIDS carriers that “it is better to go . . . .”<sup>111</sup> While he denies that force or coercion is used, the fact that everyone depends on the state for their livelihood is likely to induce cooperation.<sup>112</sup>

Given the controlled nature of Cuban society, it is difficult to determine effectively the nature of the care AIDS patients re-

<sup>103</sup> *Id.* at 1023.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* See also Perez-Stable, *supra* note 100, at 564. Cuba’s testing program identifies AIDS carriers through the use of domestically developed enzyme-linked immunosorbent assay (ELISA), Western blot assay, and antigen tests. The Cuban tests meet international standards, according to Cuban authorities. Nevertheless, even if the tests meet international standards and stringent laboratory procedures are maintained, approximately one in every 135,000 persons will, at least initially, receive a false positive test result.

<sup>107</sup> Perez-Stable, *supra* note 100, at 565. Cuban authorities are aware of the possibility of false positive and negative results. To guard against internment of uninfected persons, multiple screening tests are conducted on individuals who test positive. It is impossible to know, however, how carefully the tests are performed.

<sup>108</sup> See Betancourt, *supra* note 6, at 2.

<sup>109</sup> Caistor, *supra* note 93, at 65.

<sup>110</sup> See Bayer & Heaton, *supra* note 96, at 1024; Betancourt, *supra* note 6, at 2; *infra* note 123 and accompanying text.

<sup>111</sup> Caistor, *supra* note 93, at 65.

<sup>112</sup> *Id.* On the other hand, the Cuban people, including those who are often critical of the government, seem to accept the quarantine policy, and patients may indeed believe it is best to separate themselves from society. See Perez-Stable, *supra* note 100, at 566.

ceive.<sup>113</sup> A number of U.S. health professionals have visited Los Cocos, however, and report that living conditions, by Cuban standards, appear clean and humane.<sup>114</sup> Patients questioned generally spoke as though they were willingly cooperating with the authorities, although they made their statements in the presence of sanitarium staff members.<sup>115</sup> A doctor at the sanitarium said that the patients receive the wages they did previous to their internment.<sup>116</sup> The authorities allow visits to local shops in the company of an attendant, and patients with families can visit them for up to five days, again with a chaperone, if they sign a promise to abstain from any sexual relations.<sup>117</sup> The Cuban doctor also said that the staff provides both medical treatment and psychological counseling to the patients.<sup>118</sup>

With no cure for AIDS in sight, Cuba's isolation of AIDS carriers is indefinite.<sup>119</sup> Naturally, this has resulted in escape attempts, reportedly leading to massive man-hunts.<sup>120</sup> Dr. Terry stated that there had been escapes from the sanitarium, but that the fugitives returned after recognizing their need for care at the center.<sup>121</sup> Other sources report that the treatment of escapees is harsh, and includes imprisonment.<sup>122</sup> Again, independent human rights organizations have been unable to confirm the allegations.<sup>123</sup>

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<sup>113</sup> Foreigners who were allowed to visit Los Cocos were accompanied by authorities. See Bayer & Heaton, *supra* note 96, at 1023-24. Nevertheless, considering the world-wide attention AIDS is receiving and the desire of the Cuban government to present its medical system in the best possible light, it is doubtful that the government would allow the patients to be mistreated. See *infra* note 172 and accompanying text.

<sup>114</sup> See Betancourt, *supra* note 6; Bayer & Heaton, *supra* note 96, at 102; N.Y. TIMES, *supra* note 98, at E24, col. 5. The officials who visited Cuba include two medical doctors and two public health specialists from Columbia University.

<sup>115</sup> See Bayer & Heaton, *supra* note 96, at 1023.

<sup>116</sup> Caistor, *supra* note 93, at 65.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> "Indefinite" does not necessarily mean "until a cure is found." Cuban authorities are exploring the possibility of allowing individuals to return to their families in certain cases. See Bayer & Heaton, *supra* note 96, at 1024; Perez-Stable, *supra* note 100, at 566. See also *infra* note 183 and accompanying text.

<sup>120</sup> See Betancourt, *supra* note 6, at 2; Bayer & Heaton, *supra* note 96, at 1024.

<sup>121</sup> See Bayer & Heaton, *supra* note 96, at 1024.

<sup>122</sup> Betancourt, *supra* note 6, at 2.

<sup>123</sup> Bayer & Heaton, *supra* note 96, at 2. Americas Watch, a human rights group concerned about Cuban prison conditions, has been unable to substantiate the allegations. Telephone Interview with Mary-Jane Camejo, Americas Watch (Oct. 8, 1991).



#### IV. FACTORS INFLUENCING THE CHOICE OF STRATEGY: IS THE DETENTION ARBITRARY?

##### A. *The Political System and Ideology*

Cuba's political system is decidedly Marxist-Leninist.<sup>124</sup> As such, individual rights are subservient to the needs of the state.<sup>125</sup> While this does not eliminate individual rights, it does mean that collective interests weigh heavily in the event that the two require balancing.<sup>126</sup>

Marxist-Leninist ideology makes government actions relatively easy to justify on grounds of the "collective good." This, in turn, makes individual human rights violations difficult, though not impossible, to establish in Communist countries.<sup>127</sup> Cuba is known to have perpetrated human rights abuses on individuals in the name of state interests.<sup>128</sup> The concern about Cuba's quarantine policy is that the government is using the "public good" to justify what is actually an arbitrary detention.

Critics of the quarantine policy may point to past oppressive treatment of homosexuals as proof that the Cuban government is using public health and safety as a pretense for continued persecution. In the early 1970s, the government began a campaign designed to eliminate homosexuality because it represented Western decadence and was, therefore, counter-revolutionary.<sup>129</sup> Homosexuals were "arrested in the streets, seized from their homes, and sent to reeducation camps."<sup>130</sup> While the repression lasted only two years, the attitudes reflected in the policy may still be held by members of government, if not society as a whole.<sup>131</sup>

<sup>124</sup> See THOMAS ET AL., *supra* note 65, at 48.

<sup>125</sup> *Id.*

<sup>126</sup> See Bayer & Heaton, *supra* note 96, at 1024. In the context of AIDS prevention, this philosophy favors public health over individual freedom.

<sup>127</sup> See, e.g., Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 476, 486-87 (R. Falk et al. eds., 1985) (referring to the Soviet Union's use of an *order public* caveat in the ICCPR to justify strict emigration restrictions).

<sup>128</sup> See THOMAS ET AL., *supra* note 65, at 48-49 (discussing political prisoners who are classified as "counterrevolutionaries"); *infra* note 129 and accompanying text.

<sup>129</sup> THOMAS ET AL., *supra* note 65, at 48-49. See JACOBO TIMERMAN, CUBA: A JOURNEY 57 (1990). Timerman states: "The problem of homosexuals was always linked in revolutionary morality and political analysis to the relations existing between prostitution and corruption as controlled by the U.S. East Coast Mafia." TIMMERMAN, *supra*, at 57.

<sup>130</sup> TIMERMAN, *supra* note 129, at 58.

<sup>131</sup> *Id.*

This might be a powerful argument except for the fact that the majority of all internees are not homosexual.<sup>132</sup> Educational pamphlets and materials distributed by the government “stress that AIDS is not a disease exclusively of homosexuals and can affect any person.”<sup>133</sup> Additionally, initial government claims that AIDS is a “Western” disease have ceased.<sup>134</sup>

### B. *Education and Culture*

At first glance, Cuba would appear to have the very kind of education system needed for an effective fight against AIDS.<sup>135</sup> Cuba has reportedly excelled in education.<sup>136</sup> In 1961, the government stunned the world when it announced a reduction in illiteracy to just 4 percent from a rate of 25 percent in 1957.<sup>137</sup> In the 1958–1959 school year there were 17,355 teachers in Cuba. Ten years later the number had risen to 47,876. The number of primary school students jumped from 700,000 to 1.4 million during the same period. Despite these achievements, however, there are serious problems with the system.

While school enrollment during the 1960s increased dramatically, in the 1970s over 70 percent of elementary and 85 percent of high school age students dropped out of school.<sup>138</sup> There is a lack of teaching materials, graduation requirements are substandard, and behavioral problems are extensive.<sup>139</sup> Academic fraud and cheating is widespread, involving both students and teachers.<sup>140</sup> Frustration with the education system is expressed at the highest levels of government.<sup>141</sup>

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<sup>132</sup> See Bayer & Heaton, *supra* note 96, at 1023. Authorities stated that approximately one-third of the 171 male residents at Los Cocos were homosexual or bisexual.

<sup>133</sup> *Id.* at 1022.

<sup>134</sup> See Betancourt, *supra* note 6, at 2.

<sup>135</sup> Given Cuba's 94 percent literacy rate, dissemination of AIDS information should not be a problem. For a comparison of Cuba's literacy rate with that of other Latin American countries, see SANDOR HALEBSKY & JOHN M. KIRK, *TRANSFORMATION AND STRUGGLE: CUBA FACES THE 1990S* 144 (1990).

<sup>136</sup> See THOMAS ET AL., *supra* note 65, at 42.

<sup>137</sup> *Id.* at 41.

<sup>138</sup> *Id.* at 51.

<sup>139</sup> See RADIO MARTI, *supra* note 94, at 108.

<sup>140</sup> THOMAS ET AL., *supra* note 65, at 42. According to official sources, 34 percent of all secondary schools were involved in fraud or cheating.

<sup>141</sup> See RADIO MARTI, *supra* note 94, at 108. Castro himself has described the shortcomings of the Cuban system: “The quality of our education still leaves much to be desired. Some classes are still mediocre or poor; notes rather than textbooks, are often relied upon

Adding to this frustration may be the Cuban government's inability to re-shape "unhealthy" Cuban societal and cultural practices through "re-education" campaigns.<sup>142</sup> One of these campaigns was aimed at reducing or eliminating prostitution in Cuba.<sup>143</sup> Despite extensive government efforts, prostitution remains prevalent.<sup>144</sup>

The failure of the Cuban education system may have contributed significantly to the government's decision to employ quarantine as the primary means of controlling AIDS. The government simply has no faith in the ability of its educational system to change undesirable behavior.<sup>145</sup> Cuba is concerned that even those who know they have the disease might not alter their behavior.<sup>146</sup> Considering that such irresponsibility is not uncommon, their concern is not unfounded.<sup>147</sup>

On the other hand, Cubans arguably might respond differently if confronted with a sexually transmitted disease that causes death. As indicated above, however, Cubans are frustrated with and unresponsive to their educational system.<sup>148</sup> While the government is reluctant to acknowledge the possibility, it may fear

. . . . Problems persist in the cultivation of proper social conduct, even in the case of teachers as [with] some young people." *Id.*

<sup>142</sup> See TIMERMAN, *supra* note 129, at 57.

<sup>143</sup> *Id.* at 92.

<sup>144</sup> *Id.* Timerman, who traveled extensively throughout Cuba with the government's permission, writes: "I don't understand why Castroism insists that the Revolution has eliminated prostitution through a reeducation campaign . . . . In Cuba you encounter prostitutes everywhere." *Id.* See also MAX AZICRI, CUBA: POLITICS, ECONOMICS AND SOCIETY 161-62 (1988).

<sup>145</sup> See Bayer & Heaton, *supra* note 96, at 1024; TIMERMAN, *supra* note 129, at 88. Timerman states that while government ideology has altered many elements of Cuban culture, "[t]he Revolution could do nothing to steer or rechannel the energy which Cubans assign to eroticism." TIMERMAN, *supra* note 129, at 88. See also Perez-Stable, *supra* note 100, at 564. The Interior Ministry's greatest concern is "that of irresponsible sexual behavior among men characterized by the machismo cultural trait who are likely to seek extramarital sexual partners." Perez-Stable, *supra* note 100, at 564.

<sup>146</sup> See Caistor, *supra* note 93, at 65. This is amply illustrated by Cuba's use of chaperones and written promises to abstain from sexual relations whenever AIDS patients leave Los Cocos.

<sup>147</sup> See Earickson, *supra* note 87, at 957. Earickson states: "It is clear that some people are reluctant to alter their behavior even when damage to property or a threat to life is at stake." *Id.* The number of documented cases of informed AIDS carriers behaving irresponsibly is not insignificant. For a brief discussion of international reaction to such cases, see Robert M. Jarvis, AIDS: A Global View, 12 NOVA L. REV. 979, 1007-08 (1988).

<sup>148</sup> See *supra* text accompanying notes 138-41.

that society will perceive its warnings concerning AIDS as nothing more than Revolutionary rhetoric.<sup>149</sup>

Given the failure of the Cuban education system to curb undesirable and risky social behavior,<sup>150</sup> it seems inappropriate to fault the government for having little faith in education as a means to prevent the spread of AIDS. Nevertheless, even if education efforts would not effectively halt the spread of AIDS in Cuba, questions surrounding the efficacy of its quarantine remain.<sup>151</sup>

### C. *The Prevalence of AIDS and the Health System's Capabilities*

Critics argue that quarantine is ineffective because people will avoid testing out of fear.<sup>152</sup> They also argue that mandatory testing will not guarantee prevention of the spread of the disease for two reasons. First, they argue that transmission may occur after testing, and second, that the tests may yield false negative readings. Finally, they claim that the costs of quarantine will be prohibitive.<sup>153</sup> These blanket predictions are unconvincing. Cuba's method of coping with the medical challenge of AIDS must be analyzed in light of the prevalence of the disease and the capabilities of its medical system.

The prevalence of the AIDS virus in Cuba is difficult to measure because only tightly controlled government statistics are available.<sup>154</sup> The government asserts that it has completed mandatory testing of more than 90 percent of its 10.4 million citizens.<sup>155</sup> Over 400 Cubans have tested HIV positive,<sup>156</sup> and as of December 31, 1990, seventy-three Cubans had contracted AIDS.<sup>157</sup> The number of AIDS cases per capita is far lower than the figures reported by other Caribbean nations, a fact the Cu-

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<sup>149</sup> See THOMAS ET AL., *supra* note 65, at 51.

<sup>150</sup> See *supra* notes 141, 145 and accompanying text.

<sup>151</sup> See *infra* text accompanying notes 152-53.

<sup>152</sup> See Mann, *supra* note 75, at 4.

<sup>153</sup> Mass HIV testing costs the Cuban government about \$2 million per year. Perez-Stable, *supra* note 100, at 564.

<sup>154</sup> See Treaster, *supra* note 1, at A2. See also *infra* note 158 and accompanying text.

<sup>155</sup> See McElvoy, *supra* note 93, at 14E.

<sup>156</sup> See Perez-Stable, *supra* note 100, at 563.

<sup>157</sup> See World Health Organization, WEEKLY EPIDEMIOLOGICAL RECORD, July 5, 1991, at 198.

bans attribute to their health care system generally and, specifically, their quarantine policy.<sup>158</sup>

The Cuban government is said to have made extraordinary gains in health care since Fidel Casto seized power in 1959.<sup>159</sup> The health care system is extensive and still growing. By the year 2000, Cuba plans to have one doctor per 173 inhabitants, the highest ratio of doctors per capita in the world.<sup>160</sup> Cuba recently instituted a new family physician program which places a general practitioner and nurse in offices located on every city block and in every rural neighborhood.<sup>161</sup> In addition to creating an extensive medical system, utilizing the most advanced medical technology is a priority in Cuba. The government is allocating resources to such activities as genetic engineering, basic biological research, and specialized training in advanced diagnostic and research techniques.<sup>162</sup> The government expects accomplishments in these areas to reinforce the image of a Cuba so advanced that it can provide excellent medical care to its entire population.<sup>163</sup>

Although the government is promoting Cuba as a major medical power, it is failing to meet some of its society's basic health needs.<sup>164</sup> The quality of health care is affected by the unavailability of even basic medical supplies, the poor maintenance of equipment, and the substandard hygienic conditions existing in some facilities.<sup>165</sup>

Such conditions reveal the underlying fragility of the Cuban medical system. A large scale outbreak of AIDS, such as that experienced by other Carribean nations, could strip Cuba of the resources needed to preserve its medical achievements and ad-

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<sup>158</sup> *Id.*; See also THE WORLD ALMANAC AND BOOK OF FACTS 688-716 (1990). Cuba has acknowledged 73 AIDS cases in a population of 10.4 million. By comparison, the Dominican Republic has 1,506 cases in a population of 7.2 million; Haiti has 3,086 cases in a population of 6.4 million; and Jamaica has 201 cases in a population of 2.5 million. Some Cuban observers have questioned the accuracy of the Cuban government's figures. See Antonio M. Gordon & Reinaldo Paya, *Controlling AIDS in Cuba*, 321 NEW ENG. J. MED. 829 (1989). The Pan American Health Organization has, however, confirmed the government's accuracy in reporting on other diseases. Some view this as evidence that the government is honest in reporting AIDS cases. See Perez-Stable, *supra* note 100, at 564.

<sup>159</sup> See Bayer & Heaton, *supra* note 96, at 1022; THOMAS ET AL., *supra* note 65, at 44.

<sup>160</sup> See RADIO MARTI, *supra* note 94, at 263.

<sup>161</sup> See HALEBSKY & KIRK, *supra* note 135, at 253.

<sup>162</sup> See *id.* at 257, 260.

<sup>163</sup> See RADIO MARTI, *supra* note 94, at 616.

<sup>164</sup> *Id.* at 107. See also TIMERMAN, *supra* note 129, at 117.

<sup>165</sup> See RADIO MARTI, *supra* note 94, at 107.

dress its failures.<sup>166</sup> The Cuban government has, therefore, attacked the threat of AIDS through methods that the medical system can handle without undue strain.<sup>167</sup>

The mandatory testing program is relatively inexpensive and easy.<sup>168</sup> While Cuban officials recognize that some individuals will try to avoid testing, the highly controlled nature of the society makes avoidance difficult.<sup>169</sup> There is every indication that the Cuban health care system can effectively account for all of its citizens.<sup>170</sup> While the system is in a state of material disrepair, it is still extensive.<sup>171</sup> High level attention and support for the program is virtually guaranteed by the high profile nature of the disease and the government's desire to be a "medical power."<sup>172</sup> Moreover, because it is an island, the government can easily limit unmonitored travel in and out of the country.<sup>173</sup>

Cuban health officials are presumably aware of the possibility of infection after testing and false negative readings.<sup>174</sup> Whether they plan to periodically re-test the population is uncertain.<sup>175</sup> There is strong consensus among health care experts that mandatory testing must continue for the program to work.<sup>176</sup> Given

<sup>166</sup> The costs of AIDS are high. In the United States the costs of health care and lost income were estimated at over \$6 billion for the first 10,000 cases. See John C. Moskop, *Restrictive Public Health Measures and AIDS: An Ethical Analysis*, in *THE MEANING OF AIDS* 119, 119 (Eric T. Juengst & Barbara A. Koenig eds., 1989).

<sup>167</sup> See *infra* note 168 and accompanying text.

<sup>168</sup> A routine HIV antibody screening test costs about \$6.00 in the United States. See Lorraine Day, *What the Government Doesn't Tell You About AIDS*, *NEW DIMENSIONS*, Feb: 1991, at 75. In Cuba, however, voluntary help received from various "mass organizations" such as the Committees for the Defense of the Revolution probably reduce the cost significantly. See Bayer & Healton, *supra* note 96, at 1022.

<sup>169</sup> See THOMAS ET AL., *supra* note 65, at 48-49.

<sup>170</sup> See Bayer & Healton, *supra* note 96, at 1022.

<sup>171</sup> See HALEBSKY & KIRK, *supra* note 135, at 253.

<sup>172</sup> See RADIO MARTI, *supra* note 94, at 616. Cuba uses its medical accomplishments to try to reinforce its image as a country which takes a rigorous scientific approach toward public health.

<sup>173</sup> The fact that Cuba is an island is an important factor lending credibility to the mandatory testing program. If persons infected with AIDS were able to enter the country by land—that is, relatively easily—the effectiveness of the mandatory testing program would be significantly degraded.

<sup>174</sup> See Day, *supra* note 168, at 76. A person may test negative for months or sometimes years after becoming infected.

<sup>175</sup> Cuban officials are aware that false negative readings occur, but they have not indicated how they plan to deal with the problem. See Bayer & Healton, *supra* note 96, at 1023.

<sup>176</sup> See Caistor, *supra* note 93, at 65; Bayer & Healton, *supra* note 96, at 1024.

that the apparatus is in place, it is hard to believe that the government would leave the task half finished.<sup>177</sup>

The monetary costs of quarantine are not prohibitively high. If the number of AIDS patients remains low, the government will be able to finance the cost of housing and medical care without excessive strain.<sup>178</sup> Moreover, the government would probably argue that by taking action now it is saving itself enormous financial outlays in the future.<sup>179</sup> Ultimately, there is no decisive way to determine how much money is saved or lost through quarantine. It is notable, however, that most observers admit that the Cuban policy to date has significantly reduced the threat of an epidemic.<sup>180</sup>

#### D. *Less Restrictive Measures*

It is arguable that less restrictive measures than strict quarantine could effectively stop the spread of AIDS. One suggested alternative to quarantine involved placing a discreet tattoo on the AIDS carrier to alert potential partners of the carrier's infection.<sup>181</sup> Certainly, there are moral and ethical problems with such a measure. Additionally, it would not be difficult for a carrier to hide the tattoo, especially considering the circumstances under which many sexual encounters take place.<sup>182</sup>

Another less restrictive measure might be quarantine of only those carriers who knowingly engage in risky sexual behavior.<sup>183</sup> The risks inherent in this option, however, are unacceptably high

<sup>177</sup> The Cuban government is not impervious to criticism. See *infra* note 188 and accompanying text. In light of the embarrassment that failure of the policy would bring, it is unlikely that the authorities will disregard the need for re-testing. See *supra* note 172 and accompanying text.

<sup>178</sup> See *supra* note 153 and accompanying text. Housing and medical care are socialized, thus the quarantine itself probably adds little to the overall budget. The government will lose money, however, by paying salaries to the interned if they are not employed in some capacity. On the other hand, jobs within the compound could defray these costs.

<sup>179</sup> See Pramilla Senanayake & Anthony Klonda, *AIDS and Family Planning Programs*, in *THE GLOBAL IMPACT OF AIDS* 107, 115 (1988). The costs of medical treatment for patients is proportionally higher in developing countries than it is in developed countries.

<sup>180</sup> Bayer & Heaton, *supra* note 96, at 1024.

<sup>181</sup> See William F. Buckley, *Crucial steps in combatting the AIDS epidemic: Identify all the carriers*, N.Y. TIMES, Mar. 18, 1986, at A27.

<sup>182</sup> For other criticisms of this suggestion, see Moskop, *supra* note 166, at 126.

<sup>183</sup> See Jarvis, *supra* note 147, at 1007-09.

to the Cuban government.<sup>184</sup> Halting the spread of the disease would not be possible until carriers are identified. Considering the prevalence and acceptance of prostitution in Cuba, the time required to identify carriers could render the policy ineffective.<sup>185</sup> Thus, alternative policies are unlikely to be as successful as the current policy.<sup>186</sup>

### E. *Continuing Efforts*

Potential for success of the quarantine policy does not negate concern for the welfare of those interned. International human rights law requires respect for their dignity.<sup>187</sup> By providing humane living conditions and health care for the interned, the Cuban government is fulfilling this responsibility.<sup>188</sup>

There are problems with the Cuban program, for example, the government's decision not to test tourists. Unless recurrent testing is conducted in those areas that tourists frequent, quarantine could be rendered ineffective and, thus, arbitrary. It remains to be seen how the government will address this problem.

Despite such concerns, the Cuban quarantine policy does not appear, at this time, to constitute an arbitrary detention. Whether the policy remains legitimate depends on future decision-making. The government must maintain humane treatment of AIDS patients. It must continue to test the general population and continue to explore less draconian alternatives. Finally, it must ensure, through multiple tests, that no one who is uninfected is mistakenly interned.

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<sup>184</sup> See Bayer & Heaton, *supra* note 96, at 1024. The justification for quarantine "assumes that since it is impossible to determine which infected persons can be trusted to behave in a responsible way sexually, they all have to be restricted and treated as a hazard." *Id.*

<sup>185</sup> See *supra* note 144 and accompanying text.

<sup>186</sup> This does not mean that variations of a strict quarantine cannot be explored. See Bayer & Heaton, *supra* note 96, at 1024. For example, if after observation and counseling at Los Cocos, doctors determine that a patient would not engage in risky behavior, the patient should be allowed to live at home. Cuban authorities say they are exploring such possibilities.

<sup>187</sup> See Stuyt, *supra* note 12, at 169; STUDY, *supra* note 92, at 182.

<sup>188</sup> See Caistor, *supra* note 93, at 65; Bayer & Heaton, *supra* note 96, at 1024. Cuban authorities are well aware of the criticism their policy has provoked. They insist that they are exploring less extreme measures, but that for the present they have chosen the best course.



## CONCLUSION

Cuba's response to the AIDS epidemic warrants strict scrutiny. As implemented to date, however, it is not a violation of international human rights law. The strong potential for rapid spread of the disease, the likelihood that educational efforts will be ignored, the policy's likely success, and the overall humane treatment carriers receive are factors which, taken together, legitimize the detention. Certainly quarantine would not work and would thus be arbitrary if employed in most nations. Cuba presents a unique situation, however, which for now, justifies its unique approach to the AIDS crisis.

*David W. Johnston*