

1995

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Recommended Citation

Benenati, Margaret (1995) "The Exclusion of HIV-Positive Aliens: United States Immigration Policy and International Human Rights Law," *Florida State University Journal of Transnational Law & Policy*. Vol. 4: Iss. 1, Article 4.

Available at: <https://ir.law.fsu.edu/jtlp/vol4/iss1/4>

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THE EXCLUSION OF HIV-POSITIVE ALIENS: UNITED STATES IMMIGRATION POLICY AND INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

The United States policy mandating exclusion of Human Immunodeficiency Virus (HIV) positive immigrants has sparked sharp controversy since it was implemented in 1987.¹ Sentiments against the policy have become so strong that in 1990 the American Red Cross called for a boycott of the International Conference on AIDS in San Francisco.² In 1991, Harvard University moved the 1992 International Aids Conference from Boston to Amsterdam because England would otherwise have boycotted the conference in protest of the United States immigration and travel restrictions placed on HIV positive aliens at that time.³ In 1993, the Clinton Administration promised to remove HIV from the list of excludable diseases, but the exclusion was upheld by both the House and the Senate.⁴ The bill to lift the HIV exclusion policy, however, was added on to another bill in which the House and the Senate authorized the spending of up to 6.6 billion dollars on women's health issues and AIDS research.⁵

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1. Neil McKenna, *Britain Threatens to Boycott U.S. AIDS Conference*, THE INDEPENDENT, Aug. 9, 1991, at 6. Senator Jesse Helms proposed the amendment to the Immigration Reform and Control Act of 1986. It has been criticized by the World Health Organization, National AIDS Commission, and the International League of the Red Cross. *Id.*

2. Laurie Garrett, *U.S. Lifts AIDS Travel Restriction*, NEWSDAY, Jan. 5, 1991, at 9. The conference was boycotted by some countries, and was subject to many protests throughout, due to the HIV exclusion. Malcolm Gladwell, *AIDS Meeting to Move Abroad Due to U.S. Immigration Rules, Harvard Decides 1992 Conference Won't be in Boston*, WASH. POST, Aug. 17, 1991, at A2. The United States is the only developed nation that restricts people infected with HIV from temporary and permanent entry. *AIDS Meeting in Boston Canceled [sic] Over U.S. Policy*, CHI. TRIB., Aug. 17, 1991, at 4C.

3. Philip J. Hiltz, *U.S. Policy on Infected Visitors Keeps AIDS Meeting Out of the Country*, N.Y. TIMES, Aug. 17, 1991, at 6. Dr. Max Essex, chairman of the conference, stated that "[t]his is a clear statement that we don't feel comfortable with the policy and can't go ahead with it in place." *Id.*; see McKenna, *supra* note 1, at 6; David Perlman, *World AIDS Conference AIDS Meeting Opens with Blast as U.S. Experts in Amsterdam Urge End to Exclusion of Infected Visitors*, S. F. CHRON., July 20, 1992, at A1.

4. Adam Clymer, *House, Like Senate, Votes to Ban HIV Immigrants*, N.Y. TIMES, March 12, 1993, at 11.

5. *Id.*

Current immigration law provides two general methods for aliens to obtain authorization to enter the United States. First, non-immigrants may obtain visas to enter the United States for a temporary period of time but are restricted to the activity consistent with their visas.⁶ Examples of aliens granted nonimmigrant visas include: students, exchange visitors, persons attending business meetings and conferences (such as the international AIDS conferences), and athletic events (such as the Gay Games).⁷ There is a legal presumption in immigration law that all persons seeking entry are immigrants.⁸ Thus, to be granted a nonimmigrant visa, the consular officer must first make a determination that the nonimmigrant is not seeking to enter the United States permanently.⁹

Second, under certain conditions, an alien seeking permanent residence in the United States may obtain an immigrant visa.¹⁰ An applicant for an immigrant visa must demonstrate an intent to permanently reside in the United States and provide evidence supporting this intent.¹¹ Five categories of individuals may be granted immigrant visas: family-sponsored immigrants, employment-based immigrants, diversity immigrants, and refugees and asylees.¹² Family-sponsored immigrants consist of children, stepchildren, spouses, and parents of United States citizens and legal permanent resident aliens.¹³ Employment-based immigrants may be granted immigrant visas based on job preferences delineated by the Immigration and Naturalization Act (INA).¹⁴ Immigrant visas based on ethnic and racial diversity are granted based on the representation of immigrants from certain regions.¹⁵ The regions selected for

6. IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 1* (2d ed. 1991).

7. See 42 C.F.R. § 35 (1993); *Visa Rule to be Waived for the Gay Games*, N.Y. TIMES, March 23, 1994, at B5. Attorney General Janet Reno approved a waiver of the rule barring people with the AIDS virus from entering the United States. Visas granted under the waiver will allow stays of up to 10 days. Ms. Reno acted after the Centers for Disease Control advised her that no public health reason exists to prohibit the brief stays. The Department of Health and Human Services determined that visits up to 90 days would not harm public health. *Id.*

8. 8 U.S.C. § 1184(a)(2)(B) (1993).

9. See *id.*

10. 8 U.S.C. § 1101(a)(20) (1993).

11. See *id.*

12. 8 U.S.C. §§ 1151-59 (1993).

13. 8 U.S.C. § 1151(b) (1993).

14. 8 U.S.C. § 1153(b) (1993). For example, first priority or preference will be granted to persons of extraordinary ability, outstanding professors and researchers, and multinational executives and managers. 8 U.S.C. § 1153(b)(1)(A-C) (1993). Second preference immigrant visas are reserved for members of the professions holding advanced degrees or for aliens of exceptional ability. 8 U.S.C. § 1153(b)(2) (1993). Third preference is reserved for skilled workers, professionals, and other workers. 8 U.S.C. § 1153(b)(3) (1993).

15. 8 U.S.C. § 1153(c) (1993).

diversity immigration change every five years to ensure diversity in the nationalities immigrating to the United States.¹⁶ Refugee status may be granted to aliens fleeing political persecution in their countries of origin.¹⁷ Asylee status may only be granted to aliens who have fled persecution but already reside in the United States.¹⁸ Refugee and asylee status will be discussed later in the text as it applies to the exclusion of HIV positive aliens.

Each category of alien seeking permanent residence is subject to annual quotas.¹⁹ Family-sponsored immigrants are limited to 480,000 visas per year plus unused employment visas.²⁰ The statutory floor for visas issued to qualified family members is 226,000 per year.²¹ Employment visas are limited to 140,000 per year plus unused family visas.²² Forty-thousand visas are currently reserved for diversity immigrants and 55,000 visas will be reserved for diversity immigrants starting fiscal year 1995.²³ In total, 880,000 immigrants entered the United States in 1993. Of the 4,411 immigrants who appealed initial decisions but were still denied entry, only three were excluded for public health reasons. However, the INS does not maintain a statistical breakdown of the diseases for which aliens are excluded.²⁴

Under the United States Immigration and Naturalization Act, aliens seeking entry into the United States on immigrant visas, non-immigrant visas, and aliens who apply for refugee status may be excluded on public health grounds if they are found to be HIV positive.²⁵ The exclusion policy provides that any alien infected with

16. *Id.*

17. 8 U.S.C. § 1101(A)(42)(B) (1993).

18. 8 U.S.C. § 1158(a) (1993).

19. KURZBAN, *supra* note 6, at 355.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Statistics Department, Immigration and Naturalization Service, Washington D.C. (March 23, 1994). An alien may appeal exclusion by bringing a case before special immigration judges. *Id.*

25. 8 U.S.C. § 1182(a)(1)(1993). Other grounds for exclusion include: criminal grounds, security grounds, public charge grounds, labor certification, illegal entrants and immigration violators, documentation requirements, ineligible for citizenship, and miscellaneous. 8 U.S.C. § 1182(a)(2-7)(1993). The State Department is responsible for issuing immigrant and non-immigrant visas to foreigners at its consular posts overseas. The INS has jurisdiction over aliens once they arrive at a U.S. port of entry. At both stages, the agency with jurisdiction can make a decision to exclude an alien. Juan P. Osuna, *The Exclusion From the United States of Aliens Infected with the AIDS Virus: Recent Developments and Prospects for the Future*, 16 HOUSE J. INT. L. 1, 8 n.36 (1993). Applicants for a nonimmigrant visa, including tourists, may be excluded, but medical examination and testing for HIV is at the discretion of the consular. Thus,

a communicable disease of public health significance may be excluded.²⁶ The Public Health Service (PHS), of the Centers for Disease Control (CDC), within the department of Health and Human Services, has the authority to determine which diseases constitute a communicable disease of public health significance.²⁷ In June 1987, the PHS proposed adding AIDS to the list of excludable diseases.²⁸ However, before this proposal was adopted, the PHS proposed that HIV should replace AIDS on the list of excludable diseases.²⁹ The rationale for substituting HIV for AIDS was that any person infected with HIV could transmit the virus, but outwardly be asymptomatic for AIDS.³⁰

In spite of political pressures by activist groups and recommendations from the CDC that HIV should not be an excludable disease, HIV remains classified as a communicable disease of public health significance under the United States Immigration Act of 1990.³¹ Critics of the classification question the reliability, feasibility, and cost of HIV screening in foreign countries and the negligible public health benefits of excluding HIV infected aliens.³² Most significantly, many critics have concluded that the United States is violating international human rights law by excluding HIV infected aliens from immigrating to the United States.³³ Critics argue that the exclusion

it is unclear how the exclusion will impact tourists. 42 C.F.R. § 34.3(b)(ii)(1993); Mike McKee, *AIDS and Immigration*, LEGAL TIMES, July 1, 1991, at 17.

26. 8 U.S.C. § 1182(a)(1)(A) (1993). "Any alien, who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance." Diseases of public health significance include chancroid, gonorrhea, granuloma inguinale, human immunodeficiency virus, leprosy, lymphogranuloma venereum, syphilis, tuberculosis. 42 C.F.R. § 34.2(b) (1993).

27. See Osuna, *supra* note 25, at 7.

28. *Id.* at 8.

29. 52 Fed. Reg. 21,607 (1987) (codified at 42 C.F.R. § 34.2(b)).

30. Osuna, *supra* note 25, at 8.

31. 42 C.F.R. § 34.2(b) (1993); In 1991, the Secretary of Health and Human Services proposed removing all of the diseases from the list of communicable diseases, except tuberculosis. The rationale was that Tuberculosis is the only disease spread through the air. HIV and other communicable diseases are not spread by casual contact. 68 *Interpreter Releases* 55 (Jan. 14, 1991).

32. See Nancy J. Eckhardt, *The Impact of AIDS on Immigration Law: Unresolved Issues*, 14 BROOK. J. INT'L L. 223, 237-39 (1988); Court E. Golumbic, *Closing the Open Door: The Impact of the Human Immunodeficiency Virus Exclusion on the Legalization Program of the Immigration Reform and Control Act of 1986*, 15 YALE J. OF INT'L L. 163, 182 (1990). Immigrants are screened for HIV in their country and bear the cost. However, the Department of Justice will bear the cost of testing for refugees in an emergency situation, but only after the Attorney General consults with the Secretary of Health and Human Services and the Secretary of State. 42 C.F.R. § 34.3(b)(4) (1993); Comment, *AIDS and Immigration: The United States Attempts to Deport a Disease*, 20 U. MIAMI INTER-AMERICAN L. REV. 131, 157-58 (1988); see generally 68 *Interpreter Releases* 55 (Jan. 14, 1991) (stating HIV is not spread by casual contact).

33. See Golumbic, *supra* note 32, at 180; Douglas Scott Johnson, *The United States' Denial of the Immigration of People with AIDS*, 6 TEMPLE INT'L & COMP. L. J. 145, 155-61 (1992).

policy violates international human rights law by discriminating against immigrants based solely on their status, by invading privacy due to disclosure of HIV status as a requisite to immigration, by interfering with the individual's right to freedom of movement, and by placing HIV infected aliens at risk for discrimination and persecution in their countries of origin.³⁴

Although these are compelling concerns, it is possible to conclude that the United States exclusion policy is well within the bounds of international human rights law. Central to this conclusion are the ideas that each nation has the obligation to protect the rights of its citizens and that individuals do not have an absolute right to assert international human rights claims on foreign nations.³⁵ This article will analyze how the states' obligations to protect the rights of their citizens apply to international human rights documents in relation to the United States exclusion of HIV infected aliens. This article will also analyze other relevant provisions of the International Bill of Rights related to freedom of movement, public health, discrimination, and privacy and explore their role in the context of the HIV exclusion policy.

The sole focus of this article is HIV infected aliens seeking entry to the United States on immigrant visas. Thus, the analysis will not discuss applicants for nonimmigrant visas, such as students and exchange visitors³⁶, nor will it discuss immigration policy and procedure in full detail, unless it specifically relates to the exclusion of HIV positive aliens seeking entry to the United States on an immigrant visa.

Part one of this article summarizes the philosophical underpinnings and origin of the human rights documents. This part provides the basic premises of the analysis. Part two discusses states' obligations in protecting the human rights of their citizens, including HIV and AIDS victims. Part two also analyzes the potential for the United States to bear a disproportionate burden of protecting international human rights if it were to accept immigrants, HIV positive or otherwise, based solely on claims of human rights violations in their countries of origin. Part two further analyzes two ways that United States immigration policy might provide a means for the

34. See Johnson, *supra* note 33, at 155-61; Eckhardt *supra* note 32, at 239-40.

35. See generally LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS* 7 (1981).

36. The immigration policy excluding HIV positive aliens has been criticized for its inconsistency with regard to these groups. There is no HIV testing requirement or exclusion for aliens seeking entry with nonimmigrant visas. See Eckhardt, *supra* note 32, at 241. Further, it is quite possible that HIV-positive aliens residing in the United States and applying for legal residence contracted HIV while living in the U.S. See Columbic, *supra* note 32, at 181.

United States to protect the international human rights of aliens—refugee status and waivers from exclusion. However, the analyses of refugee status and waivers from exclusion are ideological and propositional because, in principle, HIV positive aliens have a potential escape from human rights violations in their countries of origin under the United States immigration law. A full discussion and analysis of these areas of the law is not within the scope of this paper.

Part three analyzes the historically and internationally recognized right to freedom of movement. This section will address the premise that nations do not have an obligation to accept immigrants under international human rights law. In addition, since public health is a legitimate ground for limiting freedom of movement, this article will explore HIV in a public health context, including the politics surrounding HIV and its role in diminishing the perception of HIV as a serious threat to public health. Finally, part three will close with an example of the difficulty in interpreting the human rights law and balancing the HIV positive alien's right to freedom of movement against the rights of citizens in the United States.

Part four further analyzes the public health ground for exclusion under the discrimination clause of the international human rights law. The analysis of the discrimination clause rests on the premise that exclusion of HIV positive aliens may be necessary for the public health because the prevalence of HIV is greater than previously estimated and the use of condoms to prevent the transmission of HIV is not as effective as originally believed.

Finally, part five discusses the right of privacy under the international human rights documents. This part offers recommendations for protecting the confidentiality of HIV positive aliens and discusses the use of the Rehabilitation Act and the Americans with Disabilities Acts as model legislation for other nations to follow in protecting HIV and AIDS victims from discrimination due to disclosure of HIV status as a requisite to immigration.

II. INTERNATIONAL HUMAN RIGHTS DOCUMENTS AND PHILOSOPHICAL UNDERPINNINGS

As a result of the atrocities committed during the Second World War, the United Nations Charter provided that one of the principle purposes of the UN is to "achieve international cooperation. . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language,

or religion."³⁷ As a follow up to the Charter, the United Nations Commission on Human Rights³⁸ drafted three documents, which together constituted the International Bill of Rights. In 1948, the Universal Declaration of Human Rights (Declaration) was adopted by the General Assembly.³⁹ In 1976, the final two documents were adopted. These are the International Covenant on Economic, Social and Cultural Rights (Economic Covenant) and the International Covenant on Civil and Political Rights (Covenant).⁴⁰ The Covenant on Economic, Social and Cultural Rights speaks to state parties, whereas the Covenant on Civil and Political Rights is drafted in terms of individual's rights.⁴¹

The Declaration was originally conceived as a common standard of achievement to which all nations should aspire.⁴² It was not originally intended to be binding on nations as a part of positive international law.⁴³ The Declaration is a compilation of resolutions set forth by the General Assembly.⁴⁴ Such resolutions are ordinarily not binding because they are philosophical assertions, and thus non-justiciable in international courts.⁴⁵ The Covenants, which include essentially the same content as the Declaration, are the binding documents of the International Bill of Rights.⁴⁶ However, over the years, the Declaration has been invoked with such frequency that, along with the Covenants, it is now considered by many in the legal community to be a part of the binding customary law of nations.⁴⁷

International human rights instruments do not legislate human rights; they simply recognize them and build upon that recognition.⁴⁸ They are designed to induce nations to remedy the inadequacies of their national laws so that human rights will be respected and vindicated.⁴⁹ Individuals must pursue their rights through the

37. John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 *Wm. & Mary L. Rev.* 527, 527 (1976). Mr. Humphrey was the Secretariat of the Division of Human Rights of the United Nations from 1946 to 1966. *Id.*

38. The Commission on Human Rights was set up by the Economic Social Council. President Truman called upon the Commission to draft the International Bill of Rights. *Id.* at 528.

39. *Id.*

40. *Id.*

41. See HENKIN, *supra* note 35, at 10.

42. *Id.* at 9.

43. Humphrey, *supra* note 37, at 529.

44. See *id.* at 529.

45. See *id.* at 529 n.13.

46. See *id.* at 529.

47. *Id.* at 528.

48. HENKIN, *supra* note 35, at 12.

49. *Id.* at 14.

laws provided in their respective nations.⁵⁰ If the domestic laws of a nation fail in protecting human rights, international laws cannot provide these rights, they can only be used to press the nation to provide them.⁵¹ Although human rights are considered universal, an individual can only impose human rights claims on his or her society, not on other societies.⁵² Under the international human rights law, an individual does not have an absolute right to seek these rights in another society.⁵³ A nation will be judged more by its consistent application of international human rights law to its own citizens than by its adherence to the international laws in the world at large.⁵⁴ It is with these principles underlying international human rights law that the following analysis is constructed.

III. BURDEN OF ENSURING HUMAN RIGHTS: STATE OBLIGATIONS

A. *Origin of State Obligation*

Since nations who have ratified the Covenants are bound by the provisions of the Declaration and Covenants, they have the obligation to protect the human rights of their citizens.⁵⁵ Article 2, section 1 of the Covenant provides that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵⁶

At first glance, the wording of this article might seem to indicate that the obligations of a state party to the covenant apply only to those individuals who are both within a state's territory and subject to its jurisdiction. However, this interpretation is short sighted and only serves to exclude citizens who are temporarily out of the country, from enjoying the protections of the Covenant.⁵⁷ Rather, article 2, section 1 should be read in *pare materia* such that each state party assumes the obligation to respect and to ensure to "all individuals

50. *Id.*

51. *Id.*

52. *See id.* at 7.

53. *Id.*

54. *Id.*

55. *See* Humphrey, *supra* note 37, at 529.

56. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. art. 2 (effective March 23, 1976), [hereinafter Covenant] (emphasis added).

57. *See* HENKIN, *supra* note 35, at 73-74.

within its territory" *in addition to* "all individuals subject to its jurisdiction."⁵⁸ A state party which denies an individual, *subject to its jurisdiction*, the rights guaranteed in the Covenant, violates its obligations even if the individual is not within its territory at the time the violation is committed.⁵⁹ Thus, immigrants who are denied entry into the United States at the consulate in their country of origin, at the United States border, or after temporarily residing in the United States while awaiting adjudication of a waiver hearing, must be afforded human rights protections by their country, because they are still subject to that country's jurisdiction.

B. Obligation to Protect Human Rights of HIV and AIDS Victims

The human rights protections afforded by article 2, section 1 of the Covenant also extend to immigrants infected with HIV and those who suffer from AIDS. On March 3, 1992 the Commission on Human Rights enjoined States to take steps to ensure the full enjoyment of civil, political, economic, social and cultural rights by people infected with HIV or AIDS, their families, those associated with them, and people presumed to be at risk of infection.⁶⁰ The Commission further requested that States pay particular attention to women, children and other vulnerable groups, to prevent discrimination against them.⁶¹ On July 20, 1992, the Economic and Social Council approved, by vote, the Commission's requests.⁶² If nations intend to conduct themselves according to the provisions of the International Bill of Rights, then they are compelled to actively protect the rights of their citizens who are HIV and AIDS victims. If a non-United States citizen exercises the right to emigrate or travel, but is denied admission to the United States due to HIV infection, the country of origin is obligated to protect the rights of the returning citizen. The country of origin, as a signatory to the International Bill of Rights, is obligated to protect the citizen's civil, political, economic, social, and cultural and privacy rights and to ensure that the citizen is protected from discrimination.

C. Sharing the Burden to Protect Human Rights

Since nations are obligated to ensure the human rights of their HIV and AIDS infected citizens, the United States should not adopt a

58. *Id.* at 74.

59. *See, e.g., id.* at 72-74.

60. *HIV and AIDS Related Discrimination*, 46 U.N.Y.B. 725 (1992).

61. *Id.*

62. *Id.*

blanket policy of accepting HIV infected aliens solely to ensure human rights. Such action might diminish other nations' ethical responsibilities and obligations to develop and implement human rights policies to protect their HIV and AIDS infected citizens. As other nations become less concerned with the human rights of HIV and AIDS victims, the burden would increasingly shift to the United States to protect the human rights of HIV and AIDS infected persons from other countries. As the United States takes on a heavier burden of ensuring human rights protections to HIV and AIDS aliens, other countries might have less incentive to develop and implement policies to protect the rights of their HIV and AIDS citizens. Moreover, HIV infected immigrants are not the only immigrants who may face human rights violations in their countries.

For example, persons with a physical or mental disorder may be excluded if they pose a threat to the property, safety, or welfare of themselves or others.⁶³ Thus, a suicidal, mentally ill immigrant could conceivably be denied entry, only to return to a country where the mental health care facilities are inadequate and the mentally ill face discrimination. The same could be true for drug addicted individuals or criminals.⁶⁴ If the United States were to adopt a blanket policy of accepting HIV infected aliens, the United States would then be obligated to accept anyone who might face a human rights violation in his own country. Any other course of action would be discriminatory. In fiscal year 1993, approximately 800,000 immigrants were turned away at the United States border and 4,411 were excluded after completing waiver hearings.⁶⁵ Only three were excluded for public health reasons.⁶⁶ It is impossible to determine how many of the 800,000 immigrants were infected with HIV and the INS does not keep a record of the diseases for which immigrants

63. 8 U.S.C. § 1182(a)(1)(A)(ii) (1993).

An alien who is determined (in accordance with regulations of the Secretary of HHS in consultation with the Attorney General): To have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety and welfare of the person or others or [h]as had such disorder and associated behavior in the past and it is likely to recur or to lead to other harmful behavior.

Id.

64. I.N.A. § 212(a)(1-2) (1993). "[A]ny alien who is determined . . . to be a drug abuser or addict." 8 U.S.C. § 1182 (a)((1)(A)(iii) (1993). "[A]ny alien who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense), or a violation or (conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802 (1993)))." 8 U.S.C. § 1182(a)(2)(i)(I-II) (1993).

65. See Statistics Department, *supra* note 24.

66. *Id.*

were excluded.⁶⁷ However, if each one of the excluded immigrants could claim potential human rights violations upon returning to their country, then, to be consistent with granting HIV infected immigrants entry for human rights reasons, the United States might be obliged to accept all 804,411 immigrants. Given that 880,000 immigrants were admitted in fiscal year 1993⁶⁸, this means that 1,764,411 immigrants would have been admitted to the United States in 1993. If these numbers are relatively stable from year to year, the United States would be bearing a tremendous and disproportionate burden to ensure the human rights of all immigrants. This burden should be shared by all the nations that are signatories to the International Bill of Rights.

D. Refugee Status: The United States Shares the Burden

Although the United States might incur a disproportionate burden in protecting international human rights if it were to adopt a policy of admitting all immigrants seeking entry, the Immigration and Naturalization Act (INA) does provide protection for persons seeking refuge or asylum in the United States. Under the INA, a "refugee" is a person outside his or her country of nationality and not within the U.S. or at the borders of the U.S., who is unable or unwilling to return to his home country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion.⁶⁹ An "asylee" is an alien who meets the definition of a refugee, but who is physically present in the United States, or is at a land border or port of entry at the time refuge is sought.⁷⁰ Under the Department of Justice guidelines, a person who has suffered past persecution is presumed to have a well-founded fear, unless it is proven by a preponderance of the evidence that conditions have changed in the country of origin to such an extent that the person no longer has a well-founded fear.⁷¹ Even if conditions have changed, a person can be granted asylum if he or she demonstrates compelling reasons for being unable to return due to past persecution.⁷² A person who has not suffered past persecution must present evidence in which a

67. *Id.*

68. *Id.*

69. 8 U.S.C. § 1101(a)(42)(B) (1993).

70. 8 U.S.C. § 1158(a) (1993).

71. 8 C.F.R. § 208.13(b) (1993).

72. *Id.*

reasonable fact finder would have to conclude that the requisite fear of persecution existed.⁷³

The definition of "refugee" in the Immigration and Naturalization Act closely follows the wording of the definition in the international treaties relating to the status of refugees, the Convention Relating to the Status of Refugees (Refugees Convention) and the Protocol Relating to the Status of Refugees (Protocol). Article 1 of the Refugees Convention applies the term "refugee" to "any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . is unable to or . . . unwilling to avail himself of the protection of that country . . ." ⁷⁴ The Protocol adopts this language.⁷⁵ Also, article 14 of the Declaration provides that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution."⁷⁶ However, this right may not be invoked if the persecutions arise from non-political crimes or from acts contrary to the purposes and principles of the United Nations.⁷⁷ Thus, a person who has suffered past persecution in another country or who has a genuine fear, apprehension, or awareness of danger in another country can be granted asylum or refuge under the Immigration and Naturalization Act, and in keeping with the international treaties and Declaration.

These principles were recently applied to HIV positive Haitians seeking refuge in the United States. In *Haitian Centers Council, Inc. v. Sale*,⁷⁸ the United States District Court for the Eastern District of New

73. See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). In *Elias-Zacarias*, a refugee was returned to Guatemala because he could not meet the standard of well founded fear. Guerrillas had asked him to join their fight and he had refused. The guerrillas then told him to "think about it." Respondent stated he did not want to fight because he was afraid of government retaliation. The guerrillas were fighting for political reasons. The Court said that it is the political opinions of the person fleeing persecution that are at issue, not the political opinions of potential persecutors. The respondent in this case had no particular political opinion for which he was being persecuted. See *id.*

74. Convention Relating to the Status of Refugees, July 28, 1951, 18 U.N.T.S. 150 (effective April 22, 1954). The United States did not ratify. *Id.*

75. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, art. 1 (entered into force for U.S. Nov. 1, 1968). The United States ratified with reservation reserving to tax refugees who are not residents of the United States in accordance with rules relating to non-resident aliens. *Id.*

76. Universal Declaration of Human Rights, G.A. Res. 217A(III), 3 U.N. GAOR, 3rd Session, art. 14 at 71, U.N. Doc. A/810 (1948) [hereinafter Declaration]. Article 14 refers to right of non-refoulement, in which a person has the right to not to be returned to that individual's country if that person fears persecution there. See Johnson, *supra* note 33, at 159 n.119.

77. Universal Declaration of Human Rights, *supra* note 76; see 8 U.S.C. § 1101(a)(42)(B) (1993).

78. 823 F. Supp. 1028 (E.D.N.Y. 1993). In *Haitian Centers*, a group of 200 HIV-positive Haitian refugees who were seeking entry into the United States were held in detention in Guantanamo Bay for nearly two years.

York held, *inter alia*, that since HIV positive Haitian detainees seeking refuge in the United States expressed a credible fear of returning to Haiti, the Attorney General had abused her discretion by denying parole to the HIV positive Haitians in detention.⁷⁹ The court also held that there is no mandatory HIV exclusion for individuals seeking refuge or asylum in the United States.⁸⁰ The court interpreted the Immigration and Naturalization Act as merely making aliens with certain communicable diseases excludable from admission to the United States.⁸¹ The court explained that the classification of HIV as a communicable disease does not mandate exclusion.⁸² Having found in favor of the detained HIV positive Haitians with regard to the many issues in the case, the court ordered that the detained HIV positive Haitians be immediately released "to anywhere but Haiti."⁸³

Although the court stated that the INA does not require mandatory exclusion of HIV positive aliens, the court did not expressly order that the HIV positive aliens be admitted to the United States. Thus, the court impliedly left it within discretion of the INS to grant the Haitians admission to the United States. In this regard, at least with respect to refugees and asylees, that outcome is possible. Under *Haitian Centers*, nonresident aliens located outside the United States who are adversely affected or aggrieved by agency action have standing to challenge the legality of such action.⁸⁴ According to the United States district court, the Administrative Procedure Act grants courts the authority to set aside and hold unlawful any agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, at the request of aggrieved persons.⁸⁵ Thus, HIV positive aliens seeking entry into the United States, who would otherwise face exclusion, may have firm ground to challenge exclusion if they are refugees or asylees who has suffered past persecution or have a well-founded fear of persecution upon returning to their home country. This could apply to HIV infected aliens who face persecution either because of their HIV status or for other reasons.

79. *See id.* at 1047-49.

80. *Id.* at 1049.

81. *Id.*

82. *Id.*

83. *Id.* at 1050.

84. *See id.* at 1046.

85. *Id.*

E. Waivers: Potential Avenue of Ensuring Human Rights

Although difficult to obtain, the availability of a waiver from exclusion on public health grounds may be helpful in preventing arbitrary exclusion of HIV positive aliens and allocating the burden of ensuring human rights. Under the Immigration and Naturalization Act, the Attorney General may grant waivers for humanitarian purposes, to assure family unity, and when it is otherwise in the public interest.⁸⁶ The IMMACT of 1990 amended the Immigration and Naturalization Act to give the Attorney General discretion to waive the communicable disease ground for exclusion.⁸⁷

In addition to the statutory waiver provisions, the Immigration and Naturalization Service has established a second set of criteria for determining the issuance of a waiver to otherwise HIV excludable aliens. Under these criteria the Attorney General has the discretion to waive the health related grounds for exclusion if the alien can show that:

- (1) the danger to the public health of the United States created by the alien's admission is minimal,
- (2) the possibility of the spread of the infection created by the alien's admission to the United States is minimal, and
- (3) there will be no cost incurred by any level of government agency of the United States without prior consent of that agency.⁸⁸

It has been suggested that under these conditions, the exclusion of HIV infected aliens is absolute.⁸⁹ A prospective immigrant who is infected with HIV might be unlikely to prove that he will not endanger the public health or foster the spread of the disease, regardless of any well meaning intent to behave in a scrupulous manner.⁹⁰ Further, with the cost of treating persons having early HIV infections, up to full blown AIDS ranging from \$70,000-\$102,000 over the course of the illness,⁹¹ it will be difficult to argue that HIV infected aliens will not impose a cost on a government agency. However, under *Haitian*

86. 8 U.S.C. § 1225(a)(d)(2) (1993).

87. 8 U.S.C. § 1182(g)(2) (1993).

88. 8 U.S.C. § 1182(d)(3) (1988).

89. See Golumbic, *supra* note 32, at 179; Carol Leslie Wolchok, *AIDS at the Frontier*, 10 J. LEGAL MED. 123, 130 (1989); Comment, AIDS and Immigration: *The United States Attempts to Deport a Disease*, 20 U. MIAMI INTER-AM. L. REV. 131, 142 (1988).

90. See Golumbic, *supra*, note 32, at 179.

91. *AIDS Treatment Bill to Soar*, PLAIN DEALER, Jan. 12, 1993, at 6F. It is estimated that when HIV becomes AIDS, the patient will have about 20 months to live. *Id.*; Ted Z. Manuel, *Condom TV ADS*, CHI. TRIB., Jan. 14, 1994, at N16.

Centers and the human rights documents,⁹² the Attorney General would be guilty of abusing her discretion in denying a waiver to an HIV positive alien seeking entry to join qualified family members or to escape discrimination or persecution in his or her country of origin. Thus, the aggrieved or adversely affected alien would have firm legal grounds on which to challenge the denial.

IV. FREEDOM OF MOVEMENT

The United States immigration policy with regards to HIV has been most commonly criticized for violating the international human right of freedom of movement. Proponents of this argument have interpreted the Declaration and the Covenant to mean that individuals must be allowed to travel and reside wherever they desire. Although there is an internationally recognized right to freedom of movement, the right is limited only to the freedom to leave one's country, the freedom to re-enter one's country, and the freedom to reside anywhere in one's own country.

A. Historical Background

The legal right to freedom of movement was recognized as early as 1215 in the English Magna Carta. Section Forty Two of the Magna Carta provides for the liberty to enter or leave England:

It shall be lawful in the future for anyone to leave our kingdom and to return, safely and securely, by land or by water, and without violating our trust, but not during war or for some other brief period, nor if the good of the kingdom will be affected.⁹³

The exceptions were prisoners, outlaws, and natives of a country which were at war with England.⁹⁴

Although there is no reference to the freedom of movement in any of the older national constitutions,⁹⁵ Emmerich de Vattel, an eighteenth century Swiss diplomat and writer, explored the principle of the right to travel, especially the right to leave one's own

92. For example, under article 17, section 1 of the Covenant, "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence" Covenant, *supra* note 56 (emphasis added).

93. Suzanne McGrath Dale, *The Flying Dutchman Dichotomy: The International Right to Leave v. The Sovereign Right to Exclude*, 9 DICK. J. INT'L. L. 359, 360 (1991) (citing Magna Carta (1215)), reprinted in W.S. McKechnie, *MAGNA CARTA; A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (1905) (trans. S. McGrath Dale).

94. *Id.* at 360.

95. PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 180 (1983). There is no reference to freedom of movement in the French Declaration of Human Rights (1789) or the American Bill of Rights (1791). *Id.*

country.⁹⁶ De Vattel reasoned that the right to emigrate might be derived from the laws of nature as according to the standards of civilized society. It might also be a result of state law or may be voluntarily granted by the sovereign. He felt so strongly about the right to emigrate that he stated that any sovereign who interferes with a citizen's right to immigrate does that citizen a great wrong. De Vattel's views still pervade current U.S. immigration policy.⁹⁷

B. International Bill of Rights and the Freedom of Movement: No Obligation to Allow Immigration

Because states do not have an obligation to allow immigration, the United States policy excluding HIV positive aliens does not violate the Declarations' or the Covenants' provisions concerning the freedom of movement. Article 13, section 1 of the Declaration provides that "[e]veryone has the right to freedom of movement and residence within the borders of each State."⁹⁸ Section 2 provides that "[e]veryone has the right to leave any country, including his own and to return to his country."⁹⁹ Article 9 states that "[n]o one shall be subjected to arbitrary arrest, detention or exile."¹⁰⁰ Article 12 of the International Covenant on Civil and Political Rights 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 . . . , 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.¹⁰¹

Nowhere in the freedom of movement articles is there language, either explicit or implicit, which indicates that a sovereign has an obligation to allow people into its country. Nor has any State

96. See Dale, *supra* note 93, at 360-61.

97. See *id.* 360-65.

98. Declaration, *supra* note 76, at 71.

99. *Id.* art. 13, § 2.

100. *Id.* art. 9.

101. Covenant, *supra* note 56, art. 12.

accepted any express obligation to allow aliens to enter its territory in any international human rights treaty.¹⁰²

The Covenants have not yet been ratified by the United States. To be binding upon a sovereign, the Covenants must be ratified. Upon ratifying the Covenants, a sovereign may claim reservations and/or reject most of the provisions concerning international implementation.¹⁰³ Thus, if the United States were to ratify the Covenant, it may claim any reservation that might oblige the U.S. to accept aliens. This would not even be necessary, however, since freedom of movement is limited to the freedom to leave and re-enter one's country. Even if ratified with no reservations, the human rights implementation provisions have very little power in actually ensuring implementation of either the Declaration's or the Covenants' provisions.¹⁰⁴

C. Freedom of Movement and Public Health

Article 12 of the Covenant provides that restrictions may be placed on freedom of movement to protect public health.¹⁰⁵ Since HIV is a disease of public health significance, under both immigration law and by epidemiological standards,¹⁰⁶ the United States can legitimately restrict HIV positive aliens from entering the country under international human rights law. The Human Rights Commission of the United Nations has expressed the view that "where an alien is expelled in accordance with the procedures laid down by a State's domestic law, it is not for the Committee to evaluate whether the competent authorities of that State have correctly interpreted and applied that law, unless it is established that they have acted in bad faith or abused their power."¹⁰⁷ Critics of HIV exclusion might argue the United States' exclusion policy is an abuse of power and may

102. See Sieghart, *supra* note 95, at 179.

103. See Humphrey, *supra* note 37, at 530-33. Nations are required to periodically report their progress in implementing human rights protections. This is the one implementation provision about which nations cannot make any reservations when ratifying international human rights documents. *Id.*

104. *See id.*

105. Covenant, *supra* note 56, at art. 12, para. 3; *see supra* part II.

106. *See* Johnson, *supra* note 33, at 147. There are 1.5 million cases of AIDS world wide. *Id.* There are 8 to 10 million people infected with HIV. *Id.* One million people in the United States are infected with HIV. *The Politics of AIDS Prevention at the Centers for Disease Control: Hearing before the Human Resources and Intergovernmental Relations Subcommittee on the Committee on Government Operations House of Representatives*, 102d Cong. 2d Sess. 64 (1992) [hereinafter *Politics of AIDS Prevention*] (statement by William L. Roper, M.D., M.P.H., Director, CDC).

107. SIEGHART, *supra* note 95, at 185.

deny HIV infected aliens proper medical treatment.¹⁰⁸ However, the Covenant's provision that restrictions may be placed on freedom of movement to protect public health or to protect the rights and freedoms of others may serve to shield the policy from such an attack.¹⁰⁹

The world wide incidence and epidemiology of HIV infection provide justification for the classification of HIV as a communicable disease of public health significance. The World Health Organization estimates that approximately 14 million people have been infected with HIV, and by the year 2000, the number of infected people could rise as high as 40 million.¹¹⁰ HIV infects the body's immune system by attacking T4 helper cells, which are special white blood cells that distinguish between normal body cells and disease organisms. With the T4 helper cells weakened, the body's immune system can no longer distinguish between normal cells and disease organisms. Thus, the body becomes susceptible to life-threatening opportunistic infections, which generally do not occur in people with healthy immune systems.¹¹¹

HIV is transmitted through sexual contact with the exchange of body fluids, sharing contaminated needles, exposure to contaminated blood products, through the placenta from mother to child, and through breast milk.¹¹² The early stages of HIV infection are marked by generalized symptoms, such as weight loss, fever, fatigue, malaise, and diarrhea.¹¹³ AIDS is the final stage of HIV infection.¹¹⁴ Unfortunately, to date, there is no cure for AIDS and it is always fatal. In light of the progressive and deadly nature of HIV infection and the increasing world wide incidence of HIV, the Public Health Service was correct in determining that HIV is a disease of public health significance.

108. International Covenant on Economic Social and Cultural Rights *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, art. 12, para. 1 (effective Jan. 3, 1976). "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." *Id.* Article 12(2)(c) provides: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: the prevention, treatment and control of epidemic, endemic, occupational and other diseases." *Id.*

109. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. 3, art. 12, para. 3 (effective March 23, 1976); *see* discussion *supra* part II.

110. *40 Million May Have AIDS by 2000*, ATLANTA J. & CONST., May 22, 1993, at A15.

111. Golumbic, *supra* note 32, at 170-71. Some examples of opportunistic infections are: pneumocystis carinii pneumonia (a rare form of pneumonia), kaposi's sarcoma, meningitis, encephalitis. These diseases can be caused by organisms such as candidiasis, cytomegalovirus, toxoplasmosis. AIDS: CASES AND MATERIALS 133 (1989) [hereinafter AIDS].

112. Golumbic, *supra* note 32, at 171.

113. AIDS, *supra* note 111, at 133.

114. *Id.*

Article 12 of the Covenant also provides that restrictions may be placed on the freedom of movement to protect the rights of others.¹¹⁵ In 1991, the Public Health Service proposed removing HIV from the list of excludable diseases.¹¹⁶ As a result, the Centers for Disease Control received 42,000 letters from citizens expressing their fear and concern over the consequences of removing HIV from the list.¹¹⁷ Although some may argue that such public outcry is reactionary and based on fear and ignorance,¹¹⁸ citizens nonetheless have the right to be protected from life threatening diseases which endanger the public health.¹¹⁹

D. Public Health and Politics

The decision to keep HIV on the list of excludable diseases can also be considered consistent with the idea that HIV is a disease of public health significance, requiring aggressive budgetary and public health measures to control its spread. Deleting HIV from the list could possibly send a message that HIV is not of great concern to the American public health. Further, to say that HIV infection is not a disease of public health significance would be succumbing to the political pressures surrounding the disease and would be a great disservice to those infected with HIV or AIDS.¹²⁰ Because of the politics surrounding the disease, the federal response in controlling the epidemic has been hesitant at best. In the past, the federal government has provided the CDC with sufficient funding to aggressively pursue and control much less deadly epidemics and viruses, despite the significant cost associated with such measures.¹²¹ The CDC's program budget for AIDS, however, during the Reagan and Bush Administrations was often dictated by what the Administration thought was politically advantageous rather than what was best for the public health.¹²² For example, while counseling and education, needle exchange programs, and promotion of condom use have been

115. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. art. 12, para. 3 (effective March 23, 1976); see discussion *supra* part II.

116. 42 C.F.R. § 34.2(b) (1991); see *Interpreter Releases*, *supra* note 31, at 55.

117. *Interpreter Releases*, *supra* note 31, at 55.

118. See Leon Eisenberg, *The Genesis of Fear: AIDS and the Public's Response to Science*, 14 LAW, MED. AND HEALTH CARE 243 (1986) (edited and reprinted in AIDS: CASES AND MATERIALS 181-83 (1989)).

119. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. art. 12, para. 3 (effective March 23, 1976); see discussion, *supra*, part II. A.

120. See AIDS, *supra* note 111, at 177-262; *Politics of AIDS Prevention*, *supra* note 106, at 49-51 (Statement of Dr. Donald P. Francis, M.D., DSc.).

121. *Politics of AIDS Prevention*, *supra* note 106, at 49. Small pox receives more funding for epidemic control yet is far less deadly a disease. *Id.*

122. *Id.* at 50.

shown to be effective public health measures to control the spread of HIV, politicians have remained more concerned with promoting sexual abstinence or determining what would be appropriate language to use in a counseling program.¹²³ In the midst of political bickering, aggressive measures to protect the public health have taken a back seat. Meanwhile, the public suffers the terrible consequences of HIV infection and AIDS. In the words of Dr. Donald P. Francis, "[a] society which allows narrow political vision to guide public health policy is doomed to succumb to disease."¹²⁴

E. Freedom of Movement versus the Rights of Citizens: Interpretation and Balancing

Even if freedom of movement were construed to extend to immigration, the right of an alien to enter the country is not absolute. Due to the loose construction of the human rights documents, situations could arise where nations must balance the rights of their citizens against the rights of foreigners. The following example illustrates how such conflicts might arise with regard to immigration.

Article 25 of the Covenant provides that citizens have the right to "take part in the conduct of public affairs, directly or through freely chosen representatives"¹²⁵ and Article 21 of the Declaration provides that "everyone has the right to take part in the government of his country"¹²⁶ In 1990, the PHS took recommendations from the CDC to remove HIV, and the other sexually transmitted diseases from the list of diseases of public health significance. The PHS proposed that only tuberculosis should be on the list, since it is airborne, and thus more easily contracted.¹²⁷ The proposal to remove HIV from the list of excludable diseases was posted in the Federal Register,¹²⁸ which provides a uniform system for informing the public of regulations and legal notices issued by Federal agencies. In response, a number of citizens wrote letters to the PHS expressing concern over the proposed removal of HIV from the list excludable

123. *Id.*; *AIDS Epidemic: Hearing before the Committee on Labor and Human Resources, United States Senate*, 103d Congress, 1st Sess. 65 (1987) (statement by Chairman of the Comm.). "[O]ne of the knottiest problems that we face, it seems to me, is how to conduct a comprehensive education program without offending the sensibilities of many people on these delicate subjects." *Id.* Here the chairman seemed more concerned with appropriate language in an education program than the urgency of the AIDS epidemic.

124. *Politics of AIDS Prevention*, *supra* note 106, at 50.

125. *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 99 U.N.T.S. art. 25 (effective March 23, 1976).

126. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), 3 U.N. GAOR, 3rd Session, art. 21, U.N. Doc. A/810 (1948).

127. *Interpreter Releases*, *supra* note 31, at 55.

128. 56 Fed. Reg. 2483-86 (1991).

diseases. These citizens were exercising their right to "directly participate in the conduct of public affairs" or "to take part in the government" As a result, the PHS decided not to remove HIV from the list of excludable diseases. By doing so, the PHS was respecting the right of citizens to participate in the government under Article 25 of the Covenant and Article 21 of the Declaration.

One of the cardinal principles of interpreting a human rights instrument is that it should be construed in keeping with its primary purpose.¹²⁹ The primary purpose of the Covenant is to protect individuals from governmental excess.¹³⁰ Article 5, section 1 provides that "[n]othing in the present Covenant may be interpreted as implying for any State, . . . any right to engage in any activity . . . aimed at the destruction of any of the rights and freedoms recognized herein" ¹³¹ Article 2, section 1 mandates that nations respect and ensure the rights of all individuals within their territory and subject to their jurisdiction.¹³² Thus, the PHS, by its actions, implicitly gave more weight to the right of United States citizens to participate in government than the right of HIV infected aliens to immigrate. Since the Covenant does not deal with conflicts of rights, it is unclear which rights should be recognized at the expense of other rights. However, limitations on rights and departures from state obligations are only allowed to the extent that they are strictly required.¹³³ Although it is highly unlikely that the PHS engaged in such an analysis when making its decision to retain HIV on the list of excludable diseases, this example provides some insight into the difficulty in applying and interpreting international human rights documents and to the delicate balancing process in applying their provisions.

V. DISCRIMINATION AND PUBLIC HEALTH

It has been argued that, by refusing immigration to HIV positive aliens, the United States discriminates against these aliens on the basis of their HIV status.¹³⁴ Article 26 of the Covenant provides that:

All persons are equal before the law and are entitled *without any discrimination* to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons

129. See HENKIN, *supra* note 35, at 26.

130. *Id.*

131. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. art. 5, para. 1 (effective March 23, 1976).

132. *Id.* at art. 2, para. 1.

133. *Id.*, at art 4, para. 1. Limitations on rights should be narrowly construed. See HENKIN, *supra* note 35, at 24-26.

134. See Johnson, *supra* note 33, at 159.

equal and effective protection against discrimination on any ground such as race, colour [sic], sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.¹³⁵

The rationale behind the discrimination argument is that HIV infection is a status, thereby placing infected individuals in the "other status" category, which violates international human rights law.¹³⁶

The Committee on Human Rights expressed the view that a non-discrimination clause should not be construed as prohibiting measures to control aliens and their enterprises.¹³⁷ However, restrictions on aliens should be permissible only to the extent that they are "strictly necessary." Under Article 26, if these restrictions are strictly necessary, the aliens are not considered as being denied equal protection of the laws.¹³⁸ Considering the inconsistencies in the immigration law regarding HIV positive aliens, it is arguable that the exclusion of HIV positive aliens is not strictly necessary to protect the public health. Many aliens, who are HIV positive, may enter the country on nonimmigrant visas.¹³⁹ Also, since HIV is not spread by casual contact, exclusion may not be strictly necessary to prevent the spread of the disease.

Nonetheless, given that HIV is a fatal, incurable virus,¹⁴⁰ such exclusion is arguably strictly necessary to protect the public health. The HIV infection has spread rapidly in the past decade, and each year, the number of AIDS-related deaths rises. The estimated number of deaths from AIDS-related illnesses at the end of 1993 is between 285,000 and 340,000.¹⁴¹ In 1994, the estimated number of AIDS victims is 86,000 and in 1995, 97,000.¹⁴² In 1989, the CDC estimated that between 1 and 1.5 million Americans have been infected with AIDS.¹⁴³ The Centers for Disease Control and the World Health Organization have established AIDS case definition surveillance guidelines to estimate the prevalence and track the course of the HIV epidemic.¹⁴⁴ However, the CDC acknowledges that their case

135. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. art. 26 (effective March 23, 1976) (emphasis added).

136. See Johnson, *supra* note 33, at 159.

137. See HENKIN, *supra* note 35, at 263.

138. *Id.*

139. See Eckhardt, *supra* note 32, at 241-42.

140. See *Politics of AIDS Prevention*, *supra* note 106, at 49 (statement by Dr. Francis).

141. *Id.* at 64 (statement by Dr. Roper).

142. See *AIDS Treatment Bill to Soar*, *supra* note 91, at 6F.

143. Golumbic, *supra* note 32, at 183 (citing Centers for Disease Control, HIV/AIDS Surveillance Rep., March (1989)).

144. *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 MORBIDITY AND MORTALITY WKLY. REP., Aug. 14, 1987, supp. 4s-6s; *Acquired*

definition of AIDS is not inclusive of all possible AIDS cases.¹⁴⁵ Thus, the number of AIDS cases and resulting deaths is likely to be higher than estimated from CDC surveillance data. This conclusion validated by a British study, which indicated that more people are dying as a result of AIDS than is reflected by the number of deaths among reported cases meeting the World Health Organization's definition of AIDS.¹⁴⁶ However, in 1992, the CDC expanded its case definition of AIDS to include persons with a T-cell count of less than 200. This includes a larger population than just persons with AIDS-defining clinical conditions. Thus, surveillance should become more accurate over time.¹⁴⁷

The World Health Organization and the Centers for Disease Control recommend counseling and education to prevent the spread of HIV and promote the public health.¹⁴⁸ The CDC specifically recommends the use of condoms in preventing HIV.¹⁴⁹ If the Justice Department and the PHS applied the World Health Organization's and CDC's recommendations to immigration policy, they could conceivably remove HIV from the list of excludable diseases by providing extensive education and counseling to each HIV infected alien admitted to the United States.

Immunodeficiency Syndrome, WKLY. EPIDEMIOLOGICAL REC., Mar. 7, 1986, at 1. "For national reporting, a case of AIDS is defined as an illness characterized by one or more of the following "indicator" diseases, depending on the status of laboratory evidence of HIV infection . . ." *Id.* The surveillance guidelines list three categories: "without laboratory evidence regarding HIV infection, with laboratory evidence for HIV infection and with laboratory evidence against HIV infection. *Id.* Listed under each category are diseases and criteria used to diagnose AIDS. These include descriptions of clinical syndromes. *Id.*

145. *Revision of CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, *supra* note 144, at 75. "To avoid confusion about what should be reported to health departments, the term "AIDS" should only refer to conditions meeting the surveillance definition. This definition is intended only to provide consistent statistical data for public health purposes. Clinicians will not rely on this definition alone to diagnose serious diseases caused by HIV infection in individual patients because there may be additional information that would lead to a more accurate diagnosis. For example, patients who are not reportable under the definition because they have either a negative HIV-antibody test or, in the presence of HIV antibody, an opportunistic disease not listed in the definition as an indicator of AIDS, may nonetheless be diagnosed as having serious HIV-related diseases on consideration of other clinical or laboratory characteristics of HIV infection or a history of exposure to HIV." *Id.*

146. Anna McCormick, *Estimating the Size of the HIV Epidemic by Using Mortality Data*, B 325 PHIL. TRANS. R. SOC. LOND. 163 (1989) (discussing evidence obtained through mortality data of 95 cases of death which were likely associated with HIV infection).

147. Centers for Disease Control, 41 MORBIDITY AND MORTALITY WKLY. REP. PR-17, 1-2 (Dec. 18, 1992).

148. Centers for Disease Control, 42 MORBIDITY AND MORTALITY WKLY. REP. PR-14, 2-7 (Sept. 24, 1993); see Jonathan Mann, et al., *Global Coordination of National Health Strategies*, 18 LAW, MED. AND HEALTH CARE 20, 22 (1990).

149. Centers for Disease Control, *supra* note 148, at 4.

However, there is no guarantee that such education and counseling would ensure low risk sexual behavior on the part of the immigrants,¹⁵⁰ and even if every HIV infected alien vowed to abide by the recommended practices,¹⁵¹ research indicates that condoms may not be as effective in preventing HIV infection as originally thought.¹⁵² One problem is the small size of the AIDS virus compared to the surface porosity of latex, which means that condoms may leak HIV. Also, new data indicate that HIV leakage may not necessarily be related to whether condoms are made of latex.¹⁵³ A meta-analysis of 16 *in vivo* condom effectiveness studies suggested that condoms may reduce the risk of contracting HIV by 69%. True effectiveness may range between 46% and 82%.¹⁵⁴ Thus, even though counseling and education may change a person's behavior, more may be necessary to protect the public health.¹⁵⁵ Thus, as indicated previously, a policy of strict exclusion may be necessary to protect the public health of citizens already residing in the United States.

VI. ARBITRARY INTERFERENCE AND PRIVACY

A. Arbitrary Interference

Article 17 of the Covenant provides that "[n]o one shall be subjected to *arbitrary* or unlawful interference with his *privacy*, family, home or correspondence, nor to unlawful attacks on his honor and reputation."¹⁵⁶ The concept of arbitrariness is central to the objectives of Article 17.¹⁵⁷ Congressional power to regulate immigration

150. See generally Susan C. Weller, *A Meta-Analysis of Condom Effectiveness in Reducing Sexually Transmitted HIV*, 36 (12) *Social Science Medicine* 1635 (noting that the majority of AIDS cases both nationally and internationally are due to sexual transmission).

151. Immigrants who may be intravenous drug users are not discussed because drug addiction is an absolute bar to entry. No waivers are available. 8 U.S.C. § 1182(a)(2)(C) (1993).

152. See Weller, *supra* note 150, at 1635, 1640-42.

153. *Id.* at 1635.

154. *Id.* at 1641. Analysis of condom studies indicates that condoms are only 87% effective in reducing the risk of pregnancy. *Id.* at 1636.

155. It is important to note that condoms *reduce the risk* of contracting HIV, which is distinctly different than *preventing* HIV. It is a great disservice to the public to advertise that condoms will prevent HIV. Celibacy or long term monogamy, in which the partner is at low risk for HIV infection, is more effective in preventing HIV than condoms. See *id.* at 1642.

156. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S. art. 17 (effective March 23, 1976) (emphasis added).

157. See HENKIN, *supra* note 35, at 191. It means without legal grounds, contrary to law or tyrannical. *Id.*

is derived from several enumerated powers in the Constitution,¹⁵⁸ and has been subsequently held by the Supreme Court to be inherent in national sovereignty and separate from any Constitutional grant.¹⁵⁹ The Court has also ruled that the immigration power is both plenary and unqualified.¹⁶⁰ Thus, the HIV exclusion, which requires serologic testing, is not arbitrary since it does not violate any existing law and it is not without legal grounds. However, actions by immigration officials are arbitrary when they abuse discretion vested in them by law, or when they manipulate legal procedures.¹⁶¹ Thus, it is possible for an immigration officer to abuse his or her discretion in excluding an HIV positive alien, which would constitute arbitrary action and a violation of Article 17 of the Covenants. An example of such abuse would be the arbitrary denial of a waiver to an HIV positive alien, who was seeking the waiver to join qualified family members in the United States, and who met the INS waiver criteria. Another example is *Haitian Centers Council, Inc. v. Sale*, where the Attorney General abused her discretion by refusing to release HIV positive refugees from detention.¹⁶²

B. Invasion of Privacy and Subsequent Discrimination

It has been argued that disclosure of an alien's HIV status for immigration purposes violates Article 17 because it is an invasion of an immigrant's privacy, which may subject the immigrant to discrimination and other severe consequences in the country of origin.¹⁶³ Under the INA, aliens applying for immigrant visas must undergo a

158. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause authorizes Congress "[t]o regulate commerce with foreign Nations and among the several States." *Id.* The Naturalization Clause empowers congress to "establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4.

159. *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892).

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

Id. at 659 (citation omitted).

See also *U.S. v. Curtiss-Wright Corp.*, 229 U.S. 304 (1936). There the Court stated that

"the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war . . . , if they had never been mentioned in the Constitution, would have been vested in the federal government as necessary concomitants of nationality."

Id. at 318.

160. See *The Chinese Exclusion Case*, 130 U.S. 581 (1889). "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Id.* at 604 (citation omitted).

161. HENKIN, *supra* note 35, at 191.

162. See *supra* note 78 and accompanying text.

163. See *Johnson, supra* note 33, at 159.

medical examination in their country of origin, which includes serologic testing for HIV if the alien is over the age of 15.¹⁶⁴ For aliens examined abroad, serologic testing must be conducted abroad and the cost is borne by the alien.¹⁶⁵ For refugees in emergency situations, the Attorney General, after consulting with the Secretary of State and the Secretary of Health and Human Services, may permit serologic testing for HIV in the United States.¹⁶⁶ If the applicant is found to have a communicable disease of public health significance, the medical examiner must report the findings to the consular officer or the INS.¹⁶⁷

Although disclosure of an immigrant's HIV status to a consular or the INS is a requisite for admission to the United States, nations who have ratified the Covenants can protect their citizen's privacy by enacting legislation making prospective immigrant's HIV status confidential outside the consular, and prohibiting discrimination against HIV positive individuals within their country. Once the consular is notified of the HIV status of the immigrant, there is no reason for the consular to divulge this information, except to the INS if the immigrant applies for a waiver or arrives at the United States border. Once the immigrant is aware of his or her HIV status, the consular or INS should advise the prospective immigrant of the conditions delineated by the INS which must be met to obtain a waiver. Then, the prospective immigrant may choose whether or not to go forward with the process. If the prospective immigrant chooses to proceed to apply for a waiver, the immigrant's HIV status should stay within the confidence of the consular or the United States Immigration and Naturalization Service. Discrimination within the country of origin as a result of the immigrant's HIV status should be unlawful.

The United States has enacted legislation that would be useful models for other countries to follow in preventing discrimination against HIV infected individuals. The Rehabilitation Act of 1973 has been interpreted by courts to include HIV and AIDS as disabilities, thereby prohibiting discrimination against HIV and AIDS victims.¹⁶⁸ The Rehabilitation Act applies to federal employment, federal contractor employment, and all programs receiving financial

164. 42 C.F.R. § 34(b)(i) (1991). Medical examination also includes students, exchange visitors, and other applicants for a nonimmigrant visa who are required by a consular authority to have a medical examination; aliens outside the United States who apply for refugee status; applicants in the United States who apply for adjustment in status. *Id.* § 34(b)(i-iv).

165. 42 C.F.R. § 34(b)(4) (1994).

166. *Id.* § 34.3(b)(1)(v).

167. *Id.* § 34.4(b)(1)(i).

168. *See AIDS, supra* note 111, at 33.

assistance.¹⁶⁹ In 1990, the Americans with Disabilities Act (ADA) was enacted, which expanded disability discrimination prohibition to include private sector employment, public accommodations, public services, and insurance benefits.¹⁷⁰ Unlike the Rehabilitation Act, the ADA was carefully constructed to include HIV infection and AIDS, so there should be no need to litigate whether these are disabilities.¹⁷¹

Under the ADA and the Rehabilitation Act, a disabled or a handicapped person is one who has a physical or mental impairment that substantially limits one or more of the major life activities of the individual.¹⁷² There are many symptoms of HIV or AIDS that result in physical or mental impairment, such as severe fatigue, chronic infections, and dementia. Further, under the ADA and the Rehabilitation Act, a disability includes a person who is "regarded as having a physical or mental impairment."¹⁷³ Thus, discrimination based on a person's *perceived* HIV status is unlawful, regardless of whether the person is actually infected. Areas of protection for individuals under the ADA include employment, public services and accommodations, and insurance benefits.¹⁷⁴ Since individual nations are obligated to protect the human rights of their citizens,¹⁷⁵ enacting such legislation is a logical measure to implement human rights, in keeping with the Declaration and the Covenants. Although the United States has been criticized for setting a negative example by excluding HIV positive aliens,¹⁷⁶ the American with Disabilities Act provides a positive example to countries concerned with preventing discrimination against HIV positive individuals.

VII. CONCLUSION

Central to the international human rights law is the idea that each nation has the obligation to protect the human rights of its citizens. While citizens of nations do not have an absolute right to assert individual human rights claims on other nations, this should not absolve nations from considering the rights of individuals both inside and outside of their borders. When possible, each nation should protect the rights of all individuals regardless of their race,

169. 29 U.S.C. §§ 701-97 (1993).

170. 42 U.S.C. § 12101-12213 (1993).

171. AIDS, *supra* note 111, at 31.

172. 42 U.S.C. §12102(2)(A) (Supp. 1993); 29 U.S.C § 706 (26)(B) (Supp. 1993).

173. 29 U.S.C. § 706(26)(B) (Supp. 1993) (emphasis added).

174. AIDS, *supra* note 168, at 31-33. Much of the precedent for including HIV under the ADA has been established under the Rehabilitation Act. *Id.* at 33.

175. SIEGHART, *supra* note 95, at 69.

176. See generally Comment, U. MIAMI INTER-AM. L. REV., *supra* note 32, at 157.

color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. When a nation chooses, in the balance, to consider its citizens' rights over the rights of potential immigrants, in accordance with the law of that nation, a per se violation of international human rights law has not necessarily been committed. Although the United States has been criticized for violating international human rights law with respect to HIV positive aliens, other analyses of the human rights documents are possible, and lead to the conclusion that the United States is well within the bounds of international law. HIV is a pandemic, which has no hope of disappearing any time soon. A policy on the part of the United States to allow all HIV infected aliens to immigrate to the United States on human rights grounds would disproportionately shift to the United States the burden to ensure human rights for, not only HIV victims, but all immigrants who may face human rights violations in their countries of origin. If the genuine concern is the protection of the human rights of HIV infected individuals across the world, then the United States should be a leader in protecting the human rights of its citizens with HIV and AIDS, and in pressing other nations to abide by the International Bill of Rights in protecting the rights of their citizens with HIV and AIDS.