
Mandatory HIV/AIDS Testing and Exclusion from International Travel: A Human Rights Perspective

Dereje Shimeles^{*}

Introduction

Many countries in the world set up travel restriction policies upon people living with Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS) since the discovery of this pandemic in the 1980's. This initial understanding of the nature of HIV/AIDS pandemic has influenced many countries' immigration policies and their practice to date. This kind of travel restriction primarily takes the form of mandatory HIV- testing requirement for those who wish to enter the respective countries, declaration of one's status as free from HIV/ AIDS and the exclusion of those found to be positive from entering the state concerned. Presently, states that are executing either the policy or practice of HIV/AIDS -related travel restriction tried to legitimize their measure, setting the protection of public health at the forefront and economic cost view to avoid potential burden on the public and health care

^{*} LL.B (Jimma University), Junior Law Researcher at Tulane University Technical Assistance Program to Ethiopia (TUTAPE). This paper is a modified version of the senior research paper of the author submitted to the Faculty of Law, Jimma University, Ethiopia (December 2006). The research was the winner of certificate of merit from Academic and Research Affair and Student's Research Coordinator of Jimma University.

services supposed to be shared by HIV/AIDS entrants. Due to this kind mandatory HIV/AIDS testing and exclusion policy or practice that some countries continues to embark on people living with HIV/AIDS (PLHA), the World Health Organization (WHO) and other concerned United Nations (UN) specialized agencies called upon all these states to circumvent this entry restriction of PLHA as it is a threat to the enjoyment of human rights. In this article the author examines the grounds of public health protection and avoidance of economic cost in a human spectrum. It argues that mandatory HIV/AIDS testing and exclusion to protect the public health and to avoid economic cost are not consistent with the requirements for limiting human rights thereby abridges the enjoyment of fundamental rights by PLHA.

1. States' Discretion under International Law whether to Admit or Exclude Aliens.

Countries have no general obligation to allow entry by non-nationals (with certain exceptions for asylum seekers and refugees).¹ The international human rights instruments, in particular the UDHR and ICCPR, does not accord an absolute right to travel to other countries or the right to immigrate to another country. However, Art 14 of the UDHR guarantees a near absolute right to seek

¹ Lawrence O. Gostin and Zita Lazzarini, *Human Rights and Public Health in the AIDS Pandemic* (New York: Oxford University Press, 1997), P.87.

asylum in other country.² Article 14 provides that: “every one has the right to seek and enjoy in other countries asylum from persecution.”

Under international law, states have broad discretion to exclude, admit, expel and place conditions on the entry and stay of non-nationals.³ It is thus, a matter for states to decide who it will admit to its territory. However it doesn't mean to say that states can choose to admit or exclude aliens based on any criteria they like. Rather, states while exercising this discretionary power, should take some considerations in to account. In keeping with this logic of narrowing down the discretionary power of states the Human Rights Committee reiterated that:

The covenant [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a state party. It is in principle, a matter for state to decide whom it will admit to its territory. However, under certain circumstance an alien may enjoy the protection of the covenant even in relation to entry or residence for example, when consideration of non-discrimination,

² Id., P.21

³ UNAIDS/IOM, “*Statement on HIV/AIDS-Related Travel Restriction*,” June 2004, P.3; GPA, “Screening of international travelers for infection with human immunodeficiency virus,” Geneva, 1987, P. 10.

prohibition of inhuman treatment and respect for family life arise.⁴

Richard Plender, while focusing on exceptional duties to admit aliens provides that, "apart from these cases in which an obligation to admit an alien arises by reason of a treaty, there are a few instances in which general international law imposes on states special obligation in respect of the admission of defined categories of foreigners- like diplomats and consuls, armed forces and those who enjoy acquired rights."⁵

Therefore, states discretion in the present matter is compromised by the need to avoid non-discrimination, prohibition of inhuman treatment, respect for family life, obligation arising out of a treaty: *like the Treaty establishing the European community*⁶ and special category of individuals enjoying the right to enter a foreign country.

⁴ Human Right Committee, "General Comment 15, *The position of Aliens under the Covenant*," *Twenty-Seventh Session, 1986, UN. Doc. HR/1/Rev. 1, Para. 5.*

⁵ Richard Plender, *International Migration Law*, Revised second edition (Netherlands: Martinus Nijhoff Publishers, 1988), PP.159 et seq.

⁶ Treaty Establishing the European Community (as changed from the Treaty establishing the European Economic Community - Union Treaty) 1992, Art. 8.

For the purpose of advocating HIV/AIDS-related travel restriction, consideration by states' immigration officers on the principle of non-discrimination, among others, has a paramount importance. This is because, to begin with, international human rights law proscribe states from discriminating against a person in the enjoyment and exercise of his /her rights and freedoms on the basis of race, colors, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷ The UN Commission on Human Rights has confirmed that the phrase "other status" within the non-discrimination clauses of international human rights instruments should include health status, including HIV/AIDS.⁸ Accordingly states are duty bound not to discriminate non-nationals based on HIV/AIDS status. In addition, under international law, states power on the admission of aliens is narrowed by the principle of non-discriminatory requirement on entry to the country.

According to the UNAIDS/IOM statement, though there is no express right to enter a state, there are other rights

⁷ Universal Declaration of Human Rights (here after UDHR), U.N.GA, Resolution 217 A (III), U.N.Doc. A/810, Adopted 10 December 1948, Art.2; International Covenant on Civil and Political Rights (here after referred to as ICCPR), U.N.GA Resolution 2200 (XXI), U.N.Doc. A/6316, adopted in 1966, Art.2.

⁸ Commission on Human Rights, "*The Protection of Human Rights in the Context of Human ImmunoDeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS)*," Resolution 1995/44 of 3 March 1995, U.N Doc. RES/HS/95/ 124 and Resolution 1996 /143 of 19 April 1996, Para.1.

that may not be denied through the application of HIV-related travel restrictions.⁹ These rights are the principle of non-refoulement¹⁰, protection of the family and family unity, protection of the best interest of the child, the right to privacy (which should not be violated through mandatory testing and non-confidentiality of status, the right to freedom of association, right to information and protection of the right of migrant workers.

Therefore, restriction imposed on the international movement of PLHA based solely on their health status: being HIV – positive, is a violation of states obligation under international human rights law not to discriminate persons based on their HIV positive status. If any state is found to apply entry restriction based on one's HIV status, it would have many repercussions. Banning the international movement of PLHA where it is not legitimate has its own human rights implication: beginning from the right to be free from discrimination to the extent of burdening many human rights principles. We will come up the specific human rights violation under section 1.4.

States immigration policy, on the entry requirements of any aliens, among others carries the load of non-

⁹ UNAIDS/IOM, *supra*, note 3, P.6.

¹⁰ *Convention Relating to the Status of Refugees*, U.N.GA Resolution 429 (V), 1951, Art.33.

discrimination, non-refoulement of refugees and protection of the family and family unity.

2. Critics on HIV/AIDS-Related Travel Restriction as a Measure to Protect the Public Health.

The public health rationale has been frequently cited as a “legitimate” ground for limiting the enjoyment of certain human rights by PLHA.¹¹ Despite the fact that public health rationale has got convention recognition as a legitimate ground for limiting the enjoyment of certain human rights and the fact that some states are forwarding this justification to legitimize their measure to ban HIV-positive travelers, it doesn’t mean that there is no minimum supervisory standards which give the application of this ground for the attainment of public health profit.

This section will try to look at the relation that should exist between public health and human rights and analyses whether the public health justification to HIV/AIDS-related travel restriction is justified or not.

2.1 Harmonizing Human Rights and Public Health.

“One clear message needs to be sent: respect for human rights and advancement of the public health are not in

¹¹ OHCHR and UNAIDS, *HIV/AIDS and Human Rights International Guidelines* (New York and Geneva: United Nations, 2004), Para. 83.

conflict, but in harmony.”¹² As discussed by Professor Gostin and Ms Lozzarini,¹³ international human right law seeks to promote and protect individual’s right against states’ interference or neglect. The area of public health, in contrast, encompasses efforts by state to ensure the conditions under which people can be healthy and often includes governmental intervention in to individuals live to protect the community’s health. Thus, the two competes, human rights law, among others, protect the rights of individuals and public health on the other hand protects the collective good.¹⁴ However, the critical analysis of both fields leads us to conclude that, though human rights and public health may be overlooked as they are in conflict, both fields strive to the attainment of the public good complementarily. That is why, peter Piot Executive Director of UNAIDS and Jose Ayala – Lasso-former Director of OHCHR- concludes above that public health and human rights are in harmony. The HIV/AIDS and Human Rights International Guidelines in its part underscore that:

Public health interests do not conflict with human rights. On the contrary it has been

¹² Peter Piot and Jose Ayala – Lasso, Foreword, *Human Rights and Public Health in the AIDS pandemic*, By Lawrence O.Gostin and Zita Lazzarini (New York: Oxford University Press,) 1997, at vii.

¹³ Gostin and Lazzarini, supra, note 1,P. 43.

¹⁴ *Ibid.*

recognized that when human rights are protected, fewer people become infected and those living with HIV/AIDS and their families can better cope with HIV/AIDS;¹⁵

Today we are living in a quite different world than the traditional public health policies were adopted. Before the advent of AIDS epidemic, public health laws and measures were not evaluated by human rights criteria¹⁶ Evolving approaches to public health, however, emphasizes respect for individual rights, trust between public health personnel and the community, conditions of non-discrimination and adequate access to health care and education.¹⁷ Thus, it could be said that, by large, it is with the AIDS pandemic that public health measures, which were characterized by coercive and restrictive responses, begun to be weigh up against human rights criteria.

Under international human rights law there are conditions, which must be fulfilled before the onset of restricting human rights. The restrictive human rights law provisions are interpreted to require the fulfillment of three elements to justify an action that limits some one's rights or freedoms: (1) that the action must be provided for by a specific law; (2) that such law can be shown to be strictly required to achieve a legitimate purpose of society for which a pressing social need could clearly be

¹⁵ OHCHR and UNAIDS, *supra*, note11, Para.15 (b).

¹⁶ Faizan Mustafa, *International Human Rights Law: Teaching Materials* (Addiss Ababa: ECSC, unpublished, 2003), Week 12.

¹⁷ Gostin and Lazzarini, *supra*, note1, P.13.

shown; and (3) that the restriction is proportional to the benefit to be obtained by such a measure and it is the least intrusive and restrictive measures available.¹⁸ In addition, the Human Rights Committee¹⁹ and the *Syracusa Principles*²⁰ points out the above 3 cumulative conditions to the legitimate limitation of the enjoyment of individuals' rights and freedoms. It is therefore, not hard to imagine that public health officials or other government departments have no unfettered power to limit human rights and freedoms under the guise of public health and other grounds of limitations.

However, some public officials or government department personnel's charged with authority, some times limits the rights of PLHA on the ground that minorities' rights and freedoms may be compromised due to public health protection. This is the reason why the public health rationale has been frequently cited by authorities for the limitation of the rights of PLHA.²¹ This

¹⁸ WHO, "AIDS and Human Rights: International Consultation on AIDS and Human Rights," Geneva, 26- 28 July 1989, HR/AIDS /1989, P.3; OHCHR and UNAIDS, supra, note 11, Para. 82.

¹⁹ Human Right Committee, "General Comment 27, Freedom of Movement," U.N.Doc. CCPR /C/ 21 / Rev-1/ Add.9 (1999), Paras.11-14.

²⁰ *Syracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, U.N Doc.E/CN.4/1984/4 (1984), Paras.10 et seq.

²¹ OHCHR and UNAIDS, Supra, note 11.

has happened may be because the persons charged with the authority have no or little knowledge of international human rights law. They may not be aware of the conditions attached to the limitation of rights or of subsequent development of human rights in the international arena, which may not be familiar with their career. The fact that persons, knows that public health protection could be used as a ground for limiting human rights is “adequate” justification for them.

The conditions listed above on the limitation of individual rights manifests the complementarity between protecting human rights and public health needs. On this issue Gostin and Lazzarini concludes by saying that “efforts to resolve conflicts between human rights and public health should seek to maximize public health efficacy while minimizing human rights incursions.”²²

2.2 Exposing the Myth: Travel Restriction on seropositive individuals and the Protection of Public Health.

One of the reasons offered by states for screening prospective immigrants and banning those found to be HIV-positive is for the public health interest.²³ Most

²² Gostin and Lazzarini, *supra*, note 1, P.44

²³ Barry Hoffmaster and Ted Schreker, *An Ethical Analysis of the Mandatory Exclusion of Refugees and Immigrants Who Test HIV Positive* (Ontario, Canadian Strategy on HIV/AIDS, 2000), P.6.

often, a person, who is infected with HIV, may infect others through sexual intercourse or blood transfusion. Therefore, ideally, persons infected with the virus are a threat to the public health.

In spite of the fact that public health has been used as a “scapegoat”, is not in fact a blind justification that doesn't tolerate the consideration of other various factors. Establishing a mere public health rationale without substantiating variable factors does not in itself guarantee the limitation of human rights. Any policy or practice providing a motto of public health benefit as antithesis to the protection and promotion of individual rights is not proper. Rather it is made clear that, “there is increasing recognition that the public health often provides an added and compelling justification for safeguarding human rights...”²⁴ In addition, it is firmly acknowledged that, “any legal or policy response to HIV/AIDS, particularly the coercive use of state power, should not only be pragmatic in the overall pursuit of public health but should also conform to international human rights norm.”²⁵

²⁴ Peter Piot and Mary Robinson, Fore word, *HIV/AIDS and Human Rights: International Guidelines*, By OHCHR and UNAIDS (New York and Geneva: United Nations) 2004, p.6.

²⁵ *UNAIDS, Criminal Law, Public Health and HIV Transmission: A Policy Option Paper* (Geneva, UNAIDS) 2002, P.45.

Under this section we will see how the public health justification for mandatory HIV testing and the exclusion of those individuals who are HIV positive is not in line with the International Health Regulations as envisaged by the International Human Rights which claims the satisfaction of various requirements than the aforementioned restrictions do.

2.2.1 The International Health Regulations.

The *Siracusa Principles*, under para.26, while dealing with public health ground of limiting rights provides that, "due regard shall be had to the international health regulation of the World Health Organization." The global infectious disease threat directly implicates the IHR, which constitute the only international health agreement on communicable disease that is binding on WHO member states.²⁶ In accordance with the power granted by WHO Constitution,²⁷ the WHA²⁸, adopted the *International Sanitary Regulations* in 1951 and in 1969, as part of a revision effort, WHA renamed the

²⁶ David P. Fidler, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence* (New York: Transitional Publishers Inc, 2000), P.129.

²⁷ WHO Constitution, 1984, Art.21 (1).

²⁸ The WHA is one of the three organs created by WHO constitution under article 9 (a).

*International Sanitary Regulations as the International Health Regulations.*²⁹

Following Article 21(1) of the WHO constitution, which give the WHA the power to adopt regulations concerning sanitary and quarantine requirements and other procedures designed to prevent the international spread of diseases, the IHR was adopted, among others, to govern the pattern of infectious diseases and to adopt measures on the movement of individuals with infectious disease in the international level. According to this regulation the three diseases that are subject to infectious diseases control are Plague,³⁰ Cholera³¹ and Yellow Fever.³² Of these diseases, even, mandatory testing and the requirement to produce certificate for international travel is required only for yellow fever.³³ As of November 1997, 194 states were bound by the IHR.³⁴

Perusal of all the provisions of the IHR discloses nowhere that HIV/AIDS is subject to the disease dealt with under IHR nor as to the Writers knowledge, there is later development under the auspice of WHO to include HIV/AIDS under the diseases subject to the IHR. Gostin

²⁹ Fidler, *supra*, note 26.

³⁰ WHA, International Health Regulation, 1969, Arts.50-60.

³¹ *Id.*, Arts.61-64.

³² *Id.*, Arts.65-76.

³³ *Ibid.* Art.66 (1); David P. Fidler, *International Law and Infectious Diseases* (New York: Oxford University Press, 1999), P.61.

³⁴ Fidler, *supra*, note 29.

and Lazzarini, surprised by the deviation of states from the IHR, provide that:

Regarding HIV infection, the world health organization has stated that “no country bound by the Regulation may refuse entry in to its territory to a person who fails to provide a medical certificate stating that he or she is not carrying the AIDS virus”. Unfortunately, the Regulations have been widely disregarded. Many countries have restricted entry by persons known or suspected to have HIV or AIDS.³⁵

Fidler on his part points out that, “as HIV/AIDS spreads globally, many states adopted exclusionary policies that, according to experts violated the provisions of the health regulations.”³⁶ Therefore, for those states which are party to the IHR, the requirement of mandatory HIV testing and the production of HIV free certificate for entry or residence has no public health ground under the IHR and there for in violation of their commitment under the regulation.

2.2.2 International Human Rights Law.

³⁵ Gostin and Lazzarini, *supra*, note 1, P.21.

³⁶ Fidler, *supra*, note 26, P.61.

HIV/AIDS-related mandatory testing and exclusion of travelers on the ground of public health is also short of satisfying the international human rights law. As the Writer have made clear above, the restrictive international human rights law provisions are interpreted to require the fulfillment of three cumulative elements to justify an action that limits some one's rights or freedom³⁷: (i), the action must be provided for by the law; (ii), such law should be adopted to achieve legitimate purpose of society for which a pressing social need could clearly be shown; and (iii), the restriction is proportional to the benefit to be obtained by such a measure and it is the least intrusive and restrictive measures available. Whether or not, public health rational, for mandatory HIV testing and exclusion of HIV- positives, is as envisaged under the international human right law needs through scrutiny.

The above three requirements including their application for legitimate restriction on the enjoyment of rights and freedom are recounted among other, on one important national case that is relevant to the present discourse. The Supreme Court of Canada in *R v Oakes*³⁸ held that, in order for a restriction or denial of benefit to be justified:

³⁷ WHO, supra, note 18; OHCHR and UN AIDS, Supra, note18.

³⁸ Canadian HIV/AIDS Legal Network. "*HIV/AIDS and Immigration: Final Report*," 2001, P.93. [accessed 11 August

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- First, the objective which the denial of benefit is designed to serve must be sufficiently pressing and substantial to warrant the overriding of a constitutionally protected rights and freedoms;
 - Second, the means chosen must be “carefully” designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational consideration;
 - Third, if the means are rationally connected to the objective in question, they should impair as little as possible the right or freedom in question;
 - Finally, “there must be proportionality between the effects of the measures which are responsible for limiting the freedom and the objective which has been identified as of sufficient importance.”

The limitations which are set forth by the Supreme Court of Canada above also have got recognition from the ICCPR and the *Syracusa Principles*.³⁹ However, HIV/AIDS-related travel restriction to protect the general public from infectious disease does not meet the above cumulative criterions, which can be shown from the forth-coming discussion.

Among the conditions listed above, the most important in examining HIV/AIDS- related travel restrictions are the second and third points. These remarks embrace the

2006]. Available at < www.aidslaw.ca/Maincontent/issues/Immigration/finalreport/toc.htm >.

³⁹ Human Right Committee, *supra*, note19; *Syracusa Principles*, *supra*, note20.

message that, the means chosen must be carefully designed to achieve the objective in question and despite the means are connected to the objective in question, they should impair as little as possible among the available measures.

The most pressing reason why HIV/AIDS is not a threat to public health is that, it is not a disease which can be transmitted by casual contact: like Tuberculosis and SARS and other similar communicable diseases which are transmitted by the simple presence of an infected individual. HIV transmits through some identified modes, which is a result of the joint behavior of the person from whom the virus is transmitted and the person to whom the virus is transmitted.⁴⁰ When transmission can be avoided by modifying the behavior of local population, public health efforts should focus on promoting safe behavior in their attempt to prevent spread, which is referred to as a “new” public health approach-one that relies less on exclusion and screening and moves more to inclusion and co-operation with the relevant sub-section.⁴¹

The new model is based on measures such as education, voluntary testing and counseling and protection of privacy. Fidler quoted that, “while recognizing a legacy

⁴⁰ Selamawit Tesfaye, *The Legality of HIV/AIDS Testing Requirements* (Addis Ababa University: unpublished, 2004), P.44.

⁴¹ Canadian HIV/AIDS Legal Network, *supra*, note38, P.37.

of neglect of human behavior in traditional public health, modern public health is working to correct that situation by emphasizing the critical importance of behavior for health."⁴² This can be achieved through various means like engaging in safe sex, restraining from using shared injection equipments and by ensuring that donated blood are screened. So that, HIV/AIDS-related travel restriction is not the means carefully designed to achieve public health profit.

The attempt to exclude travelers is also in effective because the design of screening policies may arbitrarily by political, diplomatic, economic or other necessity, exempt some groups from screening, in particular states may not, under international law, exclude returning nationals who are HIV- infected.⁴³ There for it is safe to say that mandatory HIV testing and exclusion of those found to be positive on the ground of public health is not a means, which is carefully designed to achieve the objective in question. Also HIV/AIDS- related travel restriction is not one that is necessary to protect public health⁴⁴ and it is not appropriate to achieve its protective function.⁴⁵

In addition, HIV/AIDS-related travel restriction is not the least restrictive measure to serve the public health interest. This restriction infringe on the principle of non-

⁴² Fidler, *supra*, note33, P.6.

⁴³ Canadian HIV/AIDS Legal Network, *supra*, note38, P.97.

⁴⁴ Human Right Committee, *supra*, note 19, Para.14.

⁴⁵ *Ibid*.

discrimination, for example when HIV status is used as the basis for differential treatment with regard to travel and asylum.⁴⁶ Encouraging all individuals to undergo voluntary testing and to avoid risky behaviors is a less impairing and far more effective way to protect members of the public from contracting HIV.⁴⁷ In its *Statement on Screening of International Travelers for Infection with Human Immuno-Deficiency Virus*, WHO concludes that screening is ineffective, impractical and wasteful?⁴⁸

It is following the above reasons that many academics, public health experts, inter-governmental and nongovernmental organizations concludes that there is no public health justification to HIV/AIDS-related travel restriction based on HIV status. Among others WHO is consistently repeating that there is no public health rational for the restriction,⁴⁹ the International Guidelines quoted that "there is no public health rational for restricting liberty of movement or choice of residence on the ground of HIVstatus,"⁵⁰ the International IOM points out that there is no public health basis for mandatory or routine HIV- testing of all persons seeking entry in to a

⁴⁶ OHCHR and UNAID, *supra*, note 11, Para. 83.

⁴⁷ Canadian HIV/AIDS Legal Network, *supra*, note 38, P.101.

⁴⁸ WHO, *supra*, note 18.

⁴⁹ *Ibid.*

⁵⁰ OHCHR and UNAID, *supra*, note 11, Para.105.

country;⁵¹ public health experts have long mentioned that no public health rationale justifies restricting the rights and liberties of people solely because they have HIV infection or AIDS;⁵² the Sub-Commission on the Promotion and Protection of Human Rights expressed its concern that, the issue of discriminatory travel restriction which have no ground in public health and are contrary to the WHO policies and guidelines.⁵³ Finally Hoffmaster and Schrecker and Gostin and Lazzarini goes on to say that being HIV positive can not in itself be a threat to the public health.⁵⁴

Bearing in mind, the potential threat of HIV/AIDS to the public health and the in appropriate or the unnecessary restrictive measures imposed up on PLHA in terms of international travel, alternative policies that would enhance the public health interest and human rights protection of PLHA should be available. In general, the grounds for denial of rights of PLHA are either based on irrational fear that arises from ignorance of HIV/AIDS and even if it is based on a real fear, it is avoidable

⁵¹ IOM, "IOM Position Paper on HIV/AIDS and Immigration," Eighty Fourth Session, 17 October 2002, Para.13.

⁵² WHO, "*Social Aspects of AIDS Prevention and Control Programme*," WHO special programme on AIDS, Geneva, 1 Dec. 1987, WHO/SPA/ GIO/87, P.2.

⁵³ U.N Sub-Commission on the Promotion and Protection of Human Rights, "*Sub Commission to review implementation of International Guidelines on HIV/AIDS*," Fifty-First Session, P.4.

⁵⁴ Hoffmaster and Schreker, *supra*, note 23, P.43; Gostin and Lazzarini, *supra*, note1, P.43.

otherwise than restricting the rights of PLHA.⁵⁵ Then the issue comes, what alternative policies should be in place satisfying both the public health and human rights protection?

2.2.3. Favored policies.

It is true that a policy of exclusion or coercive measures satisfy the public health need in terms of contagious diseases. States also effectively control or maintain the status –quo of disease prevalence that could otherwise be aggravated by the international movement of people living with the disease, through banning entry of these sections of the society. In spite of the fact that this policy achieves what is relevant to the public health interest human rights encroachment should not shout in the other corner.

The same goal may be achieved by exclusionary policies in the context of HIV/AIDS. There are two approaches, which came in to view as response to the AIDS pandemic. The compulsory (exclusive) approach and the voluntary (inclusive) approach.⁵⁶ The exclusive approach can be paraphrased as one which prevails in paragraph one above of this section. According to this approach to fight the HIV/AIDS pandemic, the exclusion of people

⁵⁵ Wondosen Demissie, *The Role of Law in the National AIDS Control* (AAU: unpublished, 1998), P.19.

⁵⁶ *Id.*, P.23.

with the AIDS virus from full participation in the society in order to safeguard health and lives of others is crucial.⁵⁷ This approach thus used PLHA, more instrumental to fight the pandemic than fighting the disease itself. On the other hand the inclusive approach advocates that HIV transmission can be prevented by bringing about behavioral change and object the exclusive approach as an approach which doesn't understand the nature of the virus.⁵⁸ This approach, – bringing behavioral change – could be achieved through education of the local population about nature of AIDS, ways of transmission and the means of combating HIV transmissions.

As it is made clear from the background and chapter three, the above two approaches to the fight against the AIDS pandemic in terms of travel restriction continues surfacing our world. There are countries adopting exclusionary policy of PLHA like U.S.A. with its “flocks” and on the other camp there are counties featuring inclusive approach like France and the Netherlands. For the purpose of the present discourse, thus, weighing the merits of the two approaches and their de- merits (if any) has a paramount relevance. The excusive approach, while it may satisfy the public health interest it burdens the human rights violation (see section 4.4). Yet, cocreive and discriminatory powers do not necessarily promote public health, rather by driving

⁵⁷ Ibid.

⁵⁸ Id., P.24.

people away from prevention and treatment service, can fuel the HIV/AIDS pandemic.⁵⁹ However, on the other hand the inclusive approach or policy while maintaining the achievement of compelling public health interest can protect discrimination and the incursion of other human rights. This is because, the inclusive approach like education and counseling, can achieve the behavioral change of the local population and they are the least restrictive measures that is in line of the requirement of international human rights law, which impairs no rights.

Gostin and Lazzarini, paying due recognition for the marginal public health benefit and the significant human rights burden of limiting the movement of persons with HIV infection, forwards alternative policies as:

Other policies—such as education, counseling and voluntary testing – are more appropriate for people who cross international borders. Educating people about the risks of HIV infection encourages them to protect themselves (and other) from possible transmission during sexual intercourse or drug use. Voluntary testing based on informed consent respects individual dignity and autonomy ... each of these alternatives

⁵⁹ Piot and Lasso, *supra*, note 12.

potentially prevents new infections, uses recourses wisely and encourages cooperation between government's authorities and persons who might have HIV infection.⁶⁰

Therefore, the incursive approach which has no human rights implication on those PLHA and which is effective in achieving the public health objective should be adopted by states. This is because the principle of the least intrusive measure under international human rights law to the restriction of Freedom of movement recommends the adoption of least intrusive but equally effective policy.⁶¹

3. Critics on the Current HIV/AIDS-related Travel Restriction to Avoid Economic Cost.

In addition to the public health justification, the other rational set forth by states for immigration ban of HIV-positive travelers is the economic consideration that intending immigrants will potentially be a burden to the government sponsored health and other social services. As it is evident from chapter three, the economic cost justification for banning HIV- positive travelers is provided by policies in some countries and other set forth this rational in practice and the public charge rational to exclude persons with disease mostly in the case of

⁶⁰ Gostin and Lazzarini, *supra*, note 1, PP. 90-91.

⁶¹ *Id.*, P.146.

applicants who are intending to stay for longer period. This is because the issue of economic cost is not an issue for visitors and other short – term travelers.⁶²

The issue of whether states should deny permanent residence to people with HIV on the ground that they are likely to place an excessive burden on health or social services is complex.⁶³ On the one hand, states have no international obligation to give entry to their country for those who are non- national and in particular for those aliens living with HIV / AIDS, which claims potentially high medication cost. On the other hand, it is not sound to select out only those PLHA for this measure and to consider them as one only seeking assistance from the government or other party by ignoring that they can contribute their part to the national economy of one country and ignoring the fact that same immigrants may be financially self – sponsored.

The *International Guidelines on HIV/AIDS and Human Rights* alarmed by the then immigration policies or practice as HIV/AIDS-related travel restrictions were justified by economic considerations provides that:

Where states prohibit people living with HIV/AIDS from long term residency due to concern about economic cost, states should not single out HIV/AIDS, as opposed to

⁶² IOM, *supra*, note 51.

⁶³ Canadian HIV/AIDS Legal Network, *supra*, note38, P.102.

comparable conditions for such treatment and should establish that such costs would indeed be incurred in the case of individual alien seeking residency. In considering entry application, humanitarian concerns, such as family reunification and the need for asylum, should outweigh economic consideration.⁶⁴

Had it not been for the neglect of the recommendations on the public health ground of travel restriction and also the above Guidelines which is intended primary to support states' policies to go in harmony with human rights protection, the HIV/AIDS-related travel restrictions in the world would not be as prevalent as it is now.

The above Guidelines, which call for national immigration policies or practice to be pro-human rights and fundamental freedoms, incorporate crucial components. In the first place it advocates that states should not single out HIV/AIDS, as opposed to other comparable situations for such treatment. If governments were really concerned with cost, they would ban all persons with chronic disease that require expensive treatments (such as heart or kidney diseases or cancer).⁶⁵ In this sense, had governments were really bothered about economic cost that would be borne by immigrants, mandatory medical testing would be carried indiscriminant than selecting HIV only. This measure is contrary to para.9 of the *Siracusa principles* which

⁶⁴ OHCHR and UNAID, *supra*, note 11, Para.106.

⁶⁵ Gostin and Lazzarini, *supra*, note1, P.88.

provides that, "no limitation on a right recognized by the Covenant shall discriminate contrary to Art.2 (1)." Therefore, the above conclusion that, the ground for denial of rights of PLHA is based on irrational fear that arises from ignorance of HIV/AIDS ⁶⁶ holds true. This pattern of action results to ignite the feeling of PLHA as de-humanized and fuels discrimination and aggravates the impact of HIV/AIDS than harnessing its spread. In addition, the fact that PLHA are singled out, ignoring comparable conditions, for exclusion on the ground of economic cost is discriminatory, ⁶⁷and compromises the ability of PLWA of their social participation.

The other point, which has got outstanding consideration in the Guidelines, is that, states are required to undergo scrutiny that the individual seeking entry genuinely will place the alleged cost. This criterion must be seen from individual perspective. It is because not all persons with HIV will demand on health or social services.⁶⁸ Many countries currently including U.S.A fail to consider this principle and they are following blanket restriction on those PLHA. However, the principle of non-discrimination requires, at a minimum, that when states exclude persons with medical conditions or disabilities, they must do so based on actual costs that the person is reasonably expected to place on publicly funded services

⁶⁶ Wondosen Demissie, *supra*, note55.

⁶⁷ OHCHR and UNAID, *supra*, note 50.

⁶⁸ Canadian HIV/AIDS Legal Network, *supra*, note38, P.103.

and not on assumption and generalization about persons with particular medical conditions.⁶⁹

Therefore the mere fact that a person is suffered from a disease does not guarantee automatic exclusion or inadmissibility on the ground of his /her HIV-status. GPA also took a stance that economic grounds to exclude HIV – positive immigrants from international travel should not be discriminatory and should be assessed on individual basis.⁷⁰

Apart from the blanket exclusionary policy or practice of some states, what must not be neglected in relation with the present issue is that the contribution side of the intending immigrants should be taken in to consideration. Given the current development of HIV/AIDS medication to which Anti-retroviral therapies can suppress the virus even below levels of detection, PLHA enables to manage a healthy, prolonged and productive life.⁷¹ Keeping with this medical fact it is wise to expect that immigrants will contribute a lot to the national economy. that they are intending to live permanently and that they can afford to cover their medical expenses. WHO has stated that when a state considers excluding a person on “excessive demand” ground, it should so only if “the cost of the financial support exceeds the benefits that are expected from the traveler.”⁷² Therefore, if the goal of any exclusion

⁶⁹ Id., P.38.

⁷⁰ GPA, supra, note 3, P.1.

⁷¹ Gostin and Lazzarini, supra, note1, P.70.

⁷² Canadian HIV/AIDS Legal Network, supra, note38, P.104.

is indeed to protect the public health care system, then contribution of immigrants to the economy of the receiving country, for stronger reason to the health care system, must also be taken in to account.

However, if we choose to see national immigration policies or practice on this issue, we find no country's policy or practice, which appeals to the contribution side of immigrant while they are examining medical inadmissibility.

Hoffmaster and Schreker made clear the issue that:

Determination of excessive demand therefore requires a comparison of potential benefits and costs. Moreover, that comparative judgment must be made on individual, not a class basis and the relevant issue is whether this particular immigrant would contribute more than he/she would cost.⁷³

In addition UNAIDS and IOM in a joint statement provides that:

⁷³ Hoffmaster and Schreker, *supra*, note 23; P.19.

Given the economic benefit of the international movement of people (contributing to national revenue, taxes and productivity; contributing to labor supply and helping to correct a specific shortage of skills; contributing to cultural diversity as well as to the extended productivity and longevity of people living with HIV/AIDS in light of improved HIV therapies, it is increasingly difficult to be certain that people living with HIV/AIDS will incur more costs than produce benefits over long-term stay or residency.⁷⁴

From the above positions we can easily understand that while states are justifying restriction on economic burden, they should look in to individual potential contribution in different respects. If there is no expected demand on public resources or no entitlement to them, or if the individual or accompanying family members offset this demand through positive contribution, economic consideration for exclusion should not apply.⁷⁵ What is evident, any ways, is there is no country which looks in to these relevant considerations.

⁷⁴ UNAIDS/IOM, *supra*, note 3, P.9.

⁷⁵ *Ibid.*

The last point outlined by the Guidelines is that, in considering entry application, humanitarian concerns such as family reunification and the need for asylum should outweigh justifications forwarded by states. Therefore, the fact that the intending immigrant with humanitarian need actually demands economic support from the government sponsored services; this demand should be disregarded to give credit to the humanitarian needs in question.

Finally, assuming that even if exclusion based on economic cost is assessed on individual basis, immigration policies or practices that single out HIV/AIDS for special treatment ignoring comparable conditions claiming even more medical cost remains discriminatory.

4. Specific Human Rights under the Risk of violation.

As we have seen above, the two high points raised by states as legitimate restriction of the immigration ban of HIV-positive entrants are not satisfactorily justified. It is because mandatory HIV-testing and the attendant exclusion of those found to be positive has no public-health ground and the current policies /or practice of countries of immigration ban on the ground of economic cost is found to be discriminatory and is not the one which can appreciate who will be real burden to the available health or other social services.

Given the fact that there is no public health rationale for mandatory HIV-testing and exclusion and discriminatory and arbitrary criteria of avoiding economic burden, human rights are there left with no or unsatisfactory justification. It is obvious that if human rights limitations were not up to the legitimate requirements of international human rights law, violation would be inevitable.

In particular restricting freedom of movement of PLHA violated the international human rights law and significantly burdens basic human rights.⁷⁶ Should mandatory HIV-testing fails to satisfy the requirement of protection of the public health and should the economic cost ground fails to be acceptable, the fact of its violation of personal autonomy and privacy would in no way be underestimated. Individuals with HIV-infection would endure life long burden on human rights, including the right to family unity, work, education and free exchange of information particularly scientific and medical knowledge and advances.⁷⁷ Gostin and Lazzarini further goes on to say, such burdens would extend to future generation, children would suffer from broken families from their parents' inability to obtain work or necessary treatment, and from stigmatization as result of exclusions.⁷⁸

⁷⁶ Gostin and Lazzarini, *supra*, note 1, P.88.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

This section will emphasize on some specific human rights under risk of violation due to HIV/AIDS-related restrictions, which has got neither public health nor economic cost grounds.

4.1 The Right to Privacy.

The right to privacy is found to be very important principle in examining the mandatory HIV/AIDS testing entry requirement. One aspect of the right to privacy is defined as:

The right to be free from unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affair with which the public has no legitimate concern, or the wrongful intrusion in to one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.⁷⁹

This definition of the right to privacy surfaces a wide range of issues extending from one's personality and state of private affair to the personal activities carried out by an individual. But what is not dealt under this definition is the protection of one's family, home or correspondence from unlawful or arbitrary interference, which is

⁷⁹ Selamawit Tesfaye, *supra*, note 40, P.85.

irrelevant to the present discourse. So the concept of privacy extends not only to physical space with in one's home, but also to personal information, including health information.⁸⁰

Article 17 of the ICCPR, which is almost identical with Art 12 of the UDHR, provides that, "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attack on his honor and reputation. Every one has the right to the protection of the law against such inter fences or attacks." During the preparatory work of the ICCPR, there was a debate over the words "arbitrary or unlawful" and it is resolved that the use of both words is not redundant but has two implications. One is that 'arbitrariness' may include invasions of privacy which are committed within the law, particularly when an abuse of administrative discretion is involved; the other is that, 'unlawful' includes invasions of privacy by entities other than government and impose an obligation on states to provide laws to protect their inhabitants against such invasions.⁸¹ As far as we are dealing with the government intrusion upon the right to privacy of immigrants in the context of mandatory HIV-testing, what is relevant for the present issue, thus, is the phrase arbitrary interference with individual private under Art 17 of ICCPR to which

⁸⁰ Gostin and Lazzarini, *supra*, note1, P.16.

⁸¹ James Michael, *Privacy and Human Rights: An International and Comparative Study with Special Reference to Developments in Information Technology* (Great Britain: UNESCO publishing, 1994), P.20.

in particular abuse of discretionary powers of immigration or public health officials may be manifested. As it is made clear, the invasion of privacy to one's health information is committed in the guise of protecting public health and/or health services, which has got no legal justification

4.1.1 Mandatory HIV- testing.

Mandatory testing is a process where testing is either a necessary prerequisite for a person to obtain a specified status, benefit, service or access to a given situation, or is a necessary consequence of being provided with one or more of these in which the element of choice rests with person considering the “ service”, “benefit” or “specified status”⁸²

In the context of travel – restriction mandatory HIV testing is, thus, a process or requirement where by an intending traveler is required to undergo HIV-testing to obtain leave to enter a specified country. Among 185 countries in the world, during 2003 more than 61 countries provide HIV- testing prior to entry, on arrival or

⁸² Selamawit Tesfaye, *supra*, note 40, P.19.

an application for residency.⁸³ However, travelers can avoid mandatory HIV – testing at the expense of keeping themselves aloof of engaging in international travel in the respective counties demanding this test.

Should an individual undergo mandatory HIV- testing, his privacy of whether or not he is HIV – positive would be encroached. This however, does not mean that the right to privacy is an absolute right to which it does not tolerate any limitation. From the wordings of Art 17 of ICCPR and 12 of UDHR it is not hard to understand that an individual's privacy may be subject to proper and lawful grounds of limitations. Therefore invasion of the rights to privacy may be made on the basis of public interest including national security, public safety and economic well being of a country, prevention of disorder or crime, protecting health or morals and the enforcement of an order or a final decision by a competent court or other all authority.⁸⁴ Keeping with this assertion, if mandatory- HIV testing is undertaken as a profit to one of the above listed public interests, its legality would no longer be questioned. However, it has been said already that the alleged grounds of public health and avoiding the burden on health service to conduct mandatory HIV- testing of travelers in no way serve its dream.

⁸³ Gerald Stine, AIDS update 2003: *An Annual Overview of Acquired Immune Deficiency Syndrome* (New Jersey: Pearson Education Inc, 2003), P. 472.

⁸⁴ Selamawit Tesfaye, *supra*, note 40, P.87.

Apart from the above points, according to the Guidelines, "the right to privacy encompasses obligating to respect physical privacy, including the obligation to seek informed consent to HIV – testing and privacy of information; including the need to respect confidentiality of all information relating to a persons HIV status."⁸⁵

4.1.2. Informed Consent.

The concept of informed consent has got prominence in respect of those who are expected to undergo HIV-testing.⁸⁶ In this context individuals must be left free to voluntarily decide whether or not they need HIV-testing. However, as it is clearly pointed out above, government may restrict this right for the fulfillment of legitimate public interest.

The idea of informed consent incorporates the existence of adequate information- as the word informed indicates- about the nature and consequence of HIV-testing which enables an individual to know the benefit or risk of testing, the person must be competent to give his consent because it is only a competent person that can understand its own decision and give its consent freely. Therefore, the requirement of informed consent to undergo HIV-testing requires information, competency, and voluntary

⁸⁵ OHCHR and UNAIDS, *supra*, note 11, Para. 97.

⁸⁶ *Ibid.*

assent to intervention, absence of undue influence, duress or coercion.⁸⁷ Given the fact that the alleged rationale for mandatory HIV- testing does not serve their objective and as the word indicates mandatory testing does not satisfy the consent requirement for those who want to depart one country to obtain leave to the receiving country.

Finally, it is safe to conclude all the above points by the following assertion, which provides that:

... The right to privacy is known to have been restricted through mandatory testing.... Although such measures may be effective in the case of diseases, which are contagious by causal contact and susceptible to cure, they are ineffective with regard to HIV/AIDS since HIV is not casually transmitted. In addition such coercive measures are not the least restrictive measures possible and are often imposed discriminatory against already vulnerable groups...⁸⁸

4.2. Right to Non – Discrimination and Equality.

The principle of non- discrimination under international human rights law has been endowed with a paramount

⁸⁷ Gostin and Lazzarini, *supra*, note 1, P.15; Selamawit Tesfaye, *supra*, note 40, P.16.

⁸⁸ OHCHR and UNAIDS, *supra*, note 11, Para. 83.

significance in the context of HIV/AIDS pandemic. As we can see from the proceeding relevant chapters, the concept of non-discrimination has come to be known as one of the “weapons” used to fight against HIV/AIDS pandemic and its adverse socio- economic impacts.

The right to non- discrimination under international human rights regime has got its foundation during the human rights revolution- since 1945- to which Articles 56 of the *United Nations Charter* provide that, “all the members of the UN pledge to promote respect for human rights and fundamental freedoms for all regardless of race, sex, language or religion. Following the UN charter, the UDHR under article 2 provides that; “every one is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race; color, sex, language, religion, political or other status”. The UDHR has thus come up with various additional determinants upon which discrimination is proscribed.

The ICCPR⁸⁹ also guarantees the right to be free from discrimination in almost identical words with the UDHR. The Human Rights Committee defines the discrimination clause of ICCPR as, “any distinction exclusion, restriction or preference which is based on any ground of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other

⁸⁹ ICCPR, Art.2.

status.”⁹⁰ What is very crucial in the context of HIV/AIDS here is that the UN Commission on Human Rights, in its resolution confirmed that the term “other status” in the non – discrimination provisions of human rights instruments should be interpreted to include health status, including HIV/AIDS.⁹¹ Gostin and Lazzarini add that, in their role as interpreters of human rights language and norms, *the Commission on Human Rights and its Sub – Commission on Prevention of Discrimination and Protection of Minorities* has confirmed that under existing international law, discrimination on the basis of “other status” is prohibited, which include health status and infection or perception of infection with HIV/AIDS.⁹²

However, the law always curses not all discrimination and differential treatments. Just like other qualified human rights discrimination may also be legitimate to follow the pressing needs recognized by the law. In keeping with the rule of restriction or limitation of human rights, the *Human Rights Committee* observed that, “not every distinction will constitute discrimination: if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.”⁹³ Thus, it is up on the

⁹⁰ Human Rights Committee, “*General Comment 18: Non-discrimination*,” Thirty-seventh session, 1989, Para.7.

⁹¹ Commission on Human Right, *supra*, note 8.

⁹² Gostin and Lazzarini, *supra*, note 1, PP. 18-19.

⁹³ Human Rights Committee, *supra*, note 90, Para.13; OHCHR and UNAIDS, *supra*, note 11, Para.87.

satisfaction of these conditions that discrimination would enjoy legitimacy.

As it is evident above, the UN Commission on Human Rights through its interpretive activism brings HIV/AIDS within the ambit of discrimination clause of international human rights instruments. Therefore, any discrimination or differential treatment by states based on HIV/AIDS status and which is not in pursuance of reasonable and objective criteria's to achieve a purpose which is legitimate under the law is thus discriminatory and a violation of states international obligation. Here what must be made clear is that, traditionally the purpose that is branded as legitimate for limitations of certain rights are public order, morality, public health and rights and freedom of other.⁹⁴

The Guideline points out that discrimination on any of the prohibited grounds: including on the status of HIV, is not wrong in itself but also creates and sustains conditions leading to social vulnerability to infection by HIV, including lack of access to an enabling environment that will promote behavioral change and enables people to cope up with HIV/AIDS.⁹⁵

It is obvious from the preceding relevant sections that, persons infected with HIV are banned from engaging in

⁹⁴ UDHR, Art.29.

⁹⁵ OHCHR and UNAIDS, *supra*, note 11, Para.85.

international travel due to their health status as HIV – positive. While nationals are not under such restriction⁹⁶, this-immigration ban is applicable to foreigners. This is formally discrimination based on one’s health status as HIV- positive, which is proscribed by international human rights law. The immigration ban of those PLHA is consistently, however, been justified by public health and economic cost grounds. Because of their down side as ‘legitimate’ grounds, these two rational are found not to cope up with the law. This is in turn because the public health rational and the current economic burden grounds of some states suffers from lack of careful observation and it is branded as arbitrary criteria’s, which should not however the case in international human rights law.

Therefore, following all the critics and loopholes of the justification for HIV/AIDS- related immigration ban the Guidelines reiterated that, “... making such restrictions, however, infringe on the principle of non-discrimination, for example when HIV status is used as the basis for differential treatment with regard to access to... travel ... and asylum...”⁹⁷ The Guideline adds on that, “... Therefore, any restrictions on these rights [Liberty of movement and choice of residence] based on suspected or real HIV status alone, including HIV screening of international travelers, are discriminatory and can not be justified by public health concerns.”⁹⁸

⁹⁶ ICCPR, Art.12 (4); UDHR, Art.13 (2).

⁹⁷ OHCHR and UNAIDS, *supra*, note 11, Para.83.

⁹⁸ *Id.*, Para.105.

Finally, the Guideline goes deeply on the issue and provides vividly that:

The Human Rights Committee has confirmed that the right to equal protection of the law prohibits discrimination in law or in practice in any fields regulated and protected by public authorities. These would include travel regulations, entry requirements, and immigration and asylum procedures. Therefore, although there is no right of aliens to enter a foreign country or to be granted asylum in any particular country, discrimination on the grounds of HIV status in the context of travel regulations, entry requirements, immigration and asylum procedures would violate the right to equality before the law.⁹⁹

4.3. Freedom of Movement.

The right to freedom of movement incorporates various types of travels: the right to move and reside freely with the border of one state and it extends to the right to leave any country, and the right to enter one's own country.

⁹⁹ Id., Para.109.

Each of these is regulated differently as between nationals of a state concerned and aliens.¹⁰⁰

The UDHR provides that; “every one has the right to freedom of movement and residence within the borders of each state. Every one has the right to leave any country, including his own, and to return to his country.”¹⁰¹ The ICCPR also provides the right to freedom of movement in almost similar manner.¹⁰² These two provisions guarantee various rights within the ambit of freedom of movement: right to enter one’s own country freedom of movement within a territory and to choose residence, and the right to leave any state, including one’s own country. Of these rights, the right to enter a country is reserved only for citizens. Therefore aliens have no absolute right to enter a country under international human rights law.

In addition to the UDHR and ICCPR, despite the fact that it doesn’t enjoy legal enforceability, *AIDS and HIV charter* provides that, “no restriction should be placed on the free movement of persons within and between states on the ground of HIV/AIDS.”¹⁰³ The *Declaration of Rights for People Living with HIV/AIDS* also provides, “the right of people living with HIV/AIDS to freedom of international movement and migration privilege, as

¹⁰⁰ Abebe Asmara, *AIDS and the Law* (AAU: Unpublished, 1992), P.95.

¹⁰¹ UDHR, Art.13.

¹⁰² ICCPR, Art.12

¹⁰³ *AIDS and HIV Charter*. South Africa., Section 1.2.[accessed 26 June 2006]. Available at <www.napwa.org.za>

accorded any other individuals and the right to seek asylum and not to be refused on the basis of their HIV status.”¹⁰⁴ No matter how these declarations have no legal enforceability, they may be cited as shining inspiration to the right of PLHA to freedom of movement.

Among the above inter-related types of travel right, what is important to deal with in the context of HIV/AIDS-related travel restriction is the right to leave any country. Even if every one has the right to leave any country, the right to enter a country is confined to nationals of the state concerned and no where in any international human rights treaty has any state accepted an express obligation to allow aliens to enter its territory.¹⁰⁵ However, as shown from section 4.1, states are imposed with the obligation not to discriminate on any ground, including on HIV/AIDS status, in time of entry application.

As we can understand from the preceding chapters, currently some states are experiencing the policy of mandatory HIV tests and exclusion of person living with HIV/AIDS on the ground of unjustified public health and economic cost basis (see section 4.2 and 4.3). Given the

¹⁰⁴ National Association of People Living with HIV/AIDS. *“Declaration of Rights for People Living With HIV/AIDS”* 18 Nov 2005, Para.18. [accessed 26 June 2006]. Available at <[http:// www. napwa.org.au](http://www.napwa.org.au)>

¹⁰⁵ GPA, *supra*, note 3, P.10.

fact that PLHA are banned from engaging in international migration on the ground, which has got no legitimate justification; it is inevitable that there would necessarily be human rights violation. Due to this travel restriction, thus, it is not unsound to expect that the right to leave a country be violated manifestly.

States that are party to the WHO also runs a risk of disobedience to the IHR duly ratified by the respective states. This is because, according to the *Weekly Epidemiological Records of 4 October 1985*, no country bound by the regulation may refuse entry in to its territory a person who fails to provide a medical certificate stating that she/ he is not carrying the AIDS virus.¹⁰⁶ This is in its turn because, according to the current IHR, the only disease that requires a certificate for international travel is yellow fever.¹⁰⁷ There fore, a state that claims HIV-free certificate and a state, which proscribe HIV- positive individuals from entry, violate its international obligation of the IHR and thus the right to leave any country enjoyed by all individuals.

4.4 Other Rights.

Other various human rights are also endangered due to the irrational public health and economic cost justification for banning HIV- positive travelers. These human rights are, however, not violated independently.

¹⁰⁶ Gostin and Lazzarini, *supra*, note 1, P.21.

¹⁰⁷ OHCHR and UNAIDS, *supra*, note 11, Para.105.

These rights are endangered because they highly interact with freedom of movement. Violation of freedom of movement thus implicates to human rights having relation with the former.

The Human Rights Committee while dealing with the interaction of other human rights with freedom of movement and the implication of unlawful restriction of freedom of movement to other various human rights provides that, "... it interacts with several other rights enshrined in the covenant, as it is often shown in the committees practice in considering reports from states parties and communication from individuals..."¹⁰⁸ Therefore, any burden on the enjoyment of freedom of movement can never be self-contained. Rather, it has various ramifications on the enjoyment of other human rights principle enjoying a special link with the freedom of movement.

Of these various human rights principles, which are under risk of violation due to the non-enjoyment of freedom of movement by PLHA, the most relevant of them are discussed by the *Human Rights Education Associates* (HREA)¹⁰⁹ and they are provided below.

¹⁰⁸ Human Right Committee, supra, note 19, Para.1.

¹⁰⁹ Human Rights Education Associates. "Freedom of movement," 2003. [accessed 26 June 2006]. Available at <[http:// www. hrea. org](http://www.hrea.org) >

The right to seek asylum is guaranteed by the UDHR. It provides clearly that, "every one has the right to seek and to enjoy in other countries asylum from persecution."¹¹⁰ All people have thus the right to seek another state asylum if their rights in their home country are being violated or threatened. Therefore, should HIV- related travel restriction is employed upon HIV-positive asylum seekers their right to seek other countries asylum from persecution' would be violated.

The other human rights principle, which is threatened due to HIV/AIDS-related travel restriction, is the right to education. This right guaranteed by the UDHR¹¹¹ and ICESCR.¹¹² The right to education is threatened when countries follow HIV/AIDS-related travel restriction policy or practice. This can be discerned when individuals country of origin does not provide high quality school or universities, then they should be allowed to leave and pursue an education in order to raise their standard of living.

The third right, which runs a risk of violation due to HIV/AIDS-related travel restriction, is the right to family.¹¹³ This right would be violated if HIV- positive individual were banned from entering any country. HREA provides that

¹¹⁰ UDHR, Art.13 (1).

¹¹¹ UDHR, Art.26.

¹¹² ICESCR, Art.13.

¹¹³ ICESCR, Art.10.

Citizens have the right to care for their families in the best way that suits them and meets all of their needs. If that means moving to a new country, they should be allowed to do that and establish a new residence in that country without blockades.¹¹⁴

Therefore HIV/AIDS-related travel restrictions, which have no ground in international human rights law, violate individual rights to family protection.

The other human right principle, which is threatened by states policy of restricting HIV-positive travelers, is the right to work and wage earning.¹¹⁵ This can be seen from the fact that being all human family accorded with the right to make a living as best they can do and to provide for themselves and their families, if they can not move about to find jobs then this is in violation of their human rights.

Therefore, burden on the freedom of movement of PLHA based on irrational grounds of justification violates various human rights principles, which has got a logical connection with the enjoyment of freedom of movement.

¹¹⁴ Human Rights Education Associates, *supra*, note 109.

¹¹⁵ UDHR, Art23; ICESCR; Art.6.

In conclusion, states power in time of admission or exclusion of alien under international law is down played to avoid, among others, discrimination, non-refoulment of refugees and protection of the family and family unity. The pretext of public health and/or economic cost rational for HIV/AIDS-related travel restriction does not satisfy the requirements of the law. To begin with, public health ground is not up to the requirement of the law because this kind of restriction is not a means carefully designed to achieve public health profit and is not the least intrusive measure available. This is in turn because , measures like education, counseling and achieving behavioral change, among others, are the least intrusive measures and proper policies to be followed in achieving public health and human rights protection. This restriction is also inconsistent with IHR which does not require mandatory HIV-test and HIV free certificate for international travel. The economic cost rational is also only pragmatic in a sense that it is discriminatory and does not take in to account factors to be taken in to consideration. Therefore, these groundless justifications violate PLHA's rights to freedom of movement, non-discrimination, equality, privacy and other relevant rights having logical connection with freedom of movement.

Conclusion and Recommendations

In the context of human rights law, with the acknowledgment already given to health as a human rights issue, the rights-based approach, which appeals to a human rights understanding of issues related to

HIV/AIDS, is found to be an effective legal response to HIV/AIDS. This approach is alarmed by the incursion of human rights against PLHA experienced, particularly with regard to non-discrimination, equality, privacy and confidentiality of HIV status, barriers to international movement and employment. The rights-based approach, which claims the observance of all civil, political, economic, social and cultural rights relevant to PLHA reveals the key human rights principles pertinent in terms of HIV/AIDS. Of these rights, freedom of movement, non-discrimination, equality and privacy rights are the most relevant in terms of HIV/AIDS – related travel restriction. These human rights, which are documented by many international and regional instruments, can only be limited in line with the conditions attached by the law and they should not only be pragmatic to the triumph of the public good. Therefore, measures taken to attain the public interest should be advantageous to the public at large and should guard human rights of individuals.

HIV/AIDS-related travel restrictions go against the requirements for limiting human rights thereby abridging the enjoyment of fundamental rights by PLHA. To begin with, the discretionary power of states when they admit or exclude aliens is narrowed, essentially, to avoid discrimination and refoulement of refugees and for the sake of protection of the family. The ‘good reasons’ forwarded as a pretext for HIV/AIDS-related travel restriction: the protection of public health and avoidance

of economic cost, by themselves fall short of fulfilling the conditions looked-for by international human rights law.

Even though, public health protection is a justifiable ground for limiting certain rights, such limitation must stick to the requirements considered necessary by the law. As such, mandatory HIV-testing and exclusion of HIV-positive prospective travelers should not only be pragmatic but also be consistent with the requirements of the law. In the first place, the IHR, to which *Syracusa principles* while considering public health justification of limiting certain rights cross refer, does not necessitate an international traveler to undergo mandatory HIV-testing and to produce HIV-negative certificate for international travel. Rather, the only disease required for free-infection certificate is yellow fever. Taking in to account the harmony and complementarities of public health and human rights protection, for the limitation of certain human rights that international human rights law requires, among others, the means chosen for the attainment of the objective in question ("public health" for the present purpose) to be carefully designed and be the least intrusive measure available to achieve the desired goal. However, where educating, counseling and voluntary testing which geared towards behavioral change and which are endowed with the capability to achieve public health protection are in place, mandatory HIV- testing and exclusion of HIV-positive individuals are found to be measures which are arbitrarily chosen and highly intrusive of human rights to achieve the public health goal. Therefore, public health interests cannot justify

HIV/AIDS-related travel restriction through mandatory HIV-testing and exclusion of HIV-positives.

The economic cost excuse also runs into various criticisms. To start with, the very act of singling out HIV/AIDS from, among others, equally fatal illness such as, cancer, heart and kidney which claim by far a higher cost and thereby subjecting PLHA to differential treatment amounts to discrimination. So, the prevailing blanket restriction on all PLHA is indeed illegal. Let alone the issue of discrimination, this kind of restriction is also illogical. First, assessment of whether or not the cost will be incurred ought to be done on individual basis than by blanket restriction. Secondly, considering the development of HIV/AIDS therapies like ARV's, it should be realized that PLHA contribute to the national revenue, through increase in the size of the tax-base and productivity, to labor supply and help in correcting specific shortage of skills. Moreover, given the possibility that such PLHA could be self-sponsored (as can be ascertained by requiring financial statement), blanket ban on international travel turns out to be outrageous. Therefore, it is very hard to be certain that international travelers with HIV are a burden to the receiving government health services. Thus, the contribution side should be taken in to account.

Since the public health interest necessitating mandatory HIV-testing and banning the international movement of

PLHA does not have sound legal ground and the economic cost justification is found to be discriminatory and short of taking stock of the aforementioned elements, HIV/AIDS- related travel restriction contravene the right to freedom of movement, non-discrimination, equality, privacy and other rights connected with the right to freedom of movement like the right to seek asylum, the right to education, the right to family protection and the right to work and wage earning.

Finally, having examined both the positive and negative aspects of a range of state practices pertaining to matters affecting the rights of PLHA, the author wishes to forward the following high points by way of recommendation as deserving urgent attention from concerned organs:

- States parties to the IHR, as they commit them selves to observe this legally binding regulation, should observe the same so that there is no requirement of HIV- free certificate for international travel which is currently required by many states.
- States should not restrict PLHA from international travel through mandatory HIV-testing and exclusion of HIV-positive individuals on the ground of public health protection. After all PLHA does not constitute a threat to public health and safety solely because they are HIV – positive. Therefore, public health–related legislations should recognize human behavior by adopting a policy of education, voluntary testing,

counseling and other means's of achieving behavioral change.

- Finally, states raising the economic burden justification, should not discriminatorily single out HIV/AIDS, thereby PLHA for such treatment leaving other comparable diseases, which claim even more cost than HIV/AIDS. Be this as it may, assessment of potential demand on health and other social services should take each person's individual circumstances than generalizing all PLHA and also the contribution side of each individuals and humanitarian needs should also be considered.