

# **ARBITRARY, UNNECESSARY QUARANTINE: BUILDING INTERNATIONAL AND NATIONAL INFRASTRUCTURES TO PROTECT HUMAN RIGHTS DURING PUBLIC HEALTH EMERGENCIES**

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## I. THE EBOLA EPIDEMIC AND ITS PUBLIC HEALTH IMPLICATIONS

The Ebola Epidemic began in December 2013<sup>1</sup> and ended in December 2015 when Sierra Leone, Liberia, and Guinea were declared free of Ebola.<sup>2</sup> As of April 2016, the Center for Disease Control and Prevention (CDC) estimated that 28,652 individuals were infected and 11,325 died from the disease.<sup>3</sup> The virulence of the disease and the high case-fatality rate overwhelmed resources in the affected countries and experts largely view the World Health Organization's (WHO) initial response to the outbreak as a failure.<sup>4</sup> The report from the Independent Panel on the Global Response to Ebola characterized the epidemic by stating:

The west African Ebola epidemic . . . was a human tragedy that exposed a global community altogether unprepared to help some of the world's poorest countries control a lethal outbreak of infectious disease. The outbreak engendered acts of outstanding courage and solidarity, but also immense human suffering, fear, and chaos, largely unchecked by high-level political leadership or reliable and rapid institutional responses.<sup>5</sup>

<sup>1</sup> Tara Kirk Sell, *et al.*, *US State-Level Policy Responses to the Ebola Outbreak, 2014-2015*, 23 J. PUB. HEALTH MANAG. & PRAC. 11, 11 (2015).

<sup>2</sup> Centers for Disease Control and Prevention, *2014 Ebola Outbreak in West Africa - Case Counts* (Apr. 13, 2016), <https://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/case-counts.html>; Centers for Disease Control and Prevention, *CDC's Ongoing Work To Contain Ebola In West Africa*, Jun., 2016, <https://www.cdc.gov/vhf/ebola/pdf/cdc-ongoing-work.pdf>.

<sup>3</sup> Centers for Disease Control and Prevention, *2014-2016 Ebola Outbreak in West Africa*, Apr. 13, 2016, <https://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/>.

<sup>4</sup> Suerie Moon *et al.*, *Will Ebola change the game? Ten Essential Reforms Before the Next Pandemic: The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*, 386 THE LANCET 1, 3 (2015).

<sup>5</sup> *Id.* at 2205.

Ebola spreads through contact with the bodily fluids of individuals who are symptomatic or who have died from Ebola.<sup>6</sup> Once an individual is exposed, Ebola has an eight to twenty-one day incubation period in the human body.<sup>7</sup> During that time, a person exposed to Ebola is asymptomatic and cannot transmit the infection to others.<sup>8</sup> Within this incubation window, public health officials can intervene to prevent the infected asymptomatic individuals from coming into contact with others.<sup>9</sup> Prevention can be accomplished through contact tracing and quarantining individuals who were exposed to the symptomatic individual.<sup>10</sup> First, given a known infectious individual who is now isolated and receiving treatment, public health officials will identify all individuals who encountered that person while he or she was infectious.<sup>11</sup> Next, officials will contact exposed individuals and ask them to submit to voluntary quarantine to ensure that if they become symptomatic, they do not expose others to the infectious disease.<sup>12</sup> Quarantining all individuals and relying on the coercive power of the state to intervene when individuals do not cooperate can theoretically slow and eventually stop an outbreak.<sup>13</sup>

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<sup>6</sup> *What Do You Need to Know About Ebola*, CTRS. FOR DISEASE CONTROL AND PREVENTION 1, 1 (Dec. 10, 2015), <http://www.cdc.gov/vhf/ebola/pdf/what-need-to-know-ebola.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Legal Authorities for Quarantine and Isolation*, CTRS. FOR DISEASE CONTROL AND PREVENTION 1, 1 (Aug. 5, 2015), <https://www.cdc.gov/quarantine/pdf/legal-authorities-isolation-quarantine.pdf>.

<sup>10</sup> Vincent Wong, Daniel Cooney, & Yaneer Bar-Yam, *Beyond Contact Tracing: Community-Based Early Detection for Ebola Response*, 1 PLOS CURRENTS OUTBREAKS 1, 2 (May 19, 2016).

<sup>11</sup> *Id.*

<sup>12</sup> *Public health management of persons having had contact with Ebola virus disease cases in the EU*, EUR. CTR. FOR DISEASE PREVENTION AND CONTROL 1, 3 (Nov. 7, 2014), <http://ecdc.europa.eu/en/publications/publications/ebola-public-health-contact-management-update-10-november.pdf>.

<sup>13</sup> Adam Kucharski & Peter Piot, *Containing Ebola Virus Infection in West Africa*, 8 EUROSURVEILLANCE 1, 1 (Sept. 11, 2014), <http://www.eurosurveillance.org/ViewArticle.aspx?ArticleId=20899>; see generally Thaddeus Mason Pope & Heather Michelle Bughman, *Legal Briefing: Coerced Treatment and Involuntary Confinement for Contagious Disease*, 26 J. OF CLINICAL ETHICS 73, 73 (2014) (discussing voluntary and involuntary quarantine); see generally Wong, *supra* note 10, at 2 (discussing the efficacy of contract tracing in an urban Ebola epidemic. The number of individuals who are needed to undertake the tracing during the exponential growth phase of an epidemic is unattainable. Other community level policies may be more effective in those instances).

Global health preparedness and public health interventions are effective ways to limit the spread of infectious disease.<sup>14</sup> Emergency public health responses can become problematic if unnecessary measures increase distrust of healthcare workers and biomedical intervention.<sup>15</sup> In addition, public health responses can lead to increased stigma against exposed individuals.<sup>16</sup> This stigma can lead to social isolation and persecution of health workers or survivors.<sup>17</sup> Furthermore, individuals who have been stigmatized by their community may attempt to hide infected individuals or refuse to seek medical attention themselves.<sup>18</sup> Although quarantine is an important tool to limit the spread of infectious disease, like any coercive government action, its arbitrary or excessive use violates human rights.<sup>19</sup> As such, the imposition of quarantine in a public health emergency is limited by international and national

<sup>14</sup> See generally *A CDC Framework For Preventing Infectious Diseases: Sustaining the Essentials and Innovating for the Future*, CTRS. FOR DISEASE CONTROL AND PREVENTION 1, 3 (Oct. 2011), <https://www.cdc.gov/oid/docs/ID-Framework.pdf>.

<sup>15</sup> George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 NEW ENG. J. MED. 1337, 1340 (2002); George J. Annas, *Blinded by Bioterrorism: Public Health and Liberty in the 21st Century*, 13 HEALTH MATRIX 33, 55 (2003); U.N. High Commissioner for Human Rights, *A human rights perspective into the Ebola outbreak*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER 1, 5 (Sept. 2014), <http://www.globalhealth.org/wp-content/uploads/A-human-rights-perspective-into-the-Ebola-outbreak.pdf>.

<sup>16</sup> See Sarah Roache, Lawrence O. Gostin, Dan Hougendobler & Eric Friedman, *Lessons from the West African Ebola Epidemic: Towards a Legacy of Strong Health Systems*, O'NEILL INST. FOR NAT'L & GLOB. HEALTH L. 1, 3, 5 (Oct. 2, 2014), <http://www.law.georgetown.edu/oneillinstitute/resources/documents/Briefing10Ebola2inTemplate.pdf>; Fiona Fleck, *The Human Factor: Cheikh Niang Tells Fiona Fleck Why Listening to People and Helping Them Adapt Their Customs are Essential in the Fight against Ebola in Western Africa*, 93 BULLETIN OF THE WORLD HEALTH ORG. 2, 72 (2015); John Kabia, *The Human Rights Dimension of West Africa's Ebola Outbreak*, INT'L HUM. RIGHTS FUNDERS GRP. 1, 2 (Nov. 20, 2014), <https://ihrf.org.wordpress.com/2014/11/20/the-human-rights-dimension-of-west-africas-ebola-outbreak/>.

<sup>17</sup> Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 271 (2015); United Nations High Commissioner for Human Rights, *supra* note 15, at 5-6; see also Fleck, *supra* note 16, at 72.

<sup>18</sup> Annas, *supra* note 15, at 1340; United Nations High Commissioner for Human Rights, *supra* note 15, at 6; Médecins Sans Frontières, *Filovirus Haemorrhagic Fever Guideline*, MÉDECINS SANS FRONTIÈRES 1, 26 (2008), <http://www.slamviweb.org/es/ebola/fhffinal.pdf>; see also Penny Hitchcock et al., *Challenges to Global Surveillance and Response to Infectious Disease Outbreaks of International Importance*, 5.3 BIOSECURITY AND BIOTERRORISM: BIODEFENSE STRATEGY, PRACTICE, AND SCIENCE 206, 208 (2007).

<sup>19</sup> Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified*, 55 FLA. L. REV. 1105, 1138 (2003); see International Covenant on Civil and Political Rights, December 19, 1966, 6 ILM 368, 999 U.N.T.S. 171, 175 [hereinafter *ICCPR*] (delineating the protection of individuals from arbitrary restrictions of liberty).

standards, including the Siracusa Principles<sup>20</sup> and the International Health Regulations.<sup>21</sup> During the Ebola epidemic, human rights groups documented the arbitrary use of quarantine and other public health responses that violated affected individuals' human rights.<sup>22</sup>

Under international human rights law, quarantine and other coercive public health responses must be verified by medical evidence that demonstrates necessity and proportionality.<sup>23</sup> In the face of Ebola, however, Sierra Leone implemented quarantines covering one-quarter to the entirety of the population.<sup>24</sup> Similarly, in response to public hysteria and paranoia,<sup>25</sup> governors across the United States used their police powers to issue involuntary quarantine orders for returning healthcare workers serving in West Africa.<sup>26</sup> In both cases, these quarantines were

<sup>20</sup> ESCOR, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (Sept. 28, 1985) [hereinafter *Siracusa Principles*].

<sup>21</sup> World Health Organization [WHO], *International Health Regulations* art. 1, sec. 1 (2005) [hereinafter *IHR*].

<sup>22</sup> Human Rights Watch, *West Africa: Respect Rights in Ebola Response* 1, 5 (Sept. 15, 2014), <https://www.hrw.org/news/2014/09/15/west-africa-respect-rights-ebola-response>; see generally United Nations High Commissioner for Human Rights, *supra* note 15, at 5-6.

<sup>23</sup> LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *Human Rights: Advancing Dignity Justice and Security in Health*, in PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT, 277 (University of California Press 2016); Mark Rothstein, *Ebola, Quarantine, and the Law*, 45 HASTINGS CTR. REP. 5, 5-6 (2015); Diego S. Silva, & Maxwell J. Smith, *Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles*, 17 HEALTH AND H. R. 52, 53 (2014); Laura Sustersic, *Quarantine in Sierra Leone: Lessons Learned on the Use of Quarantine in Sierra Leone as a Support Measure During the Ebola Epidemic 2014-2015*, WELTHUNGERHILFE SIERRA LEONE 1, 7 (2014), [https://www.humanitarianresponse.info/en/system/files/documents/files/quarantine-lessons\\_ls.pdf](https://www.humanitarianresponse.info/en/system/files/documents/files/quarantine-lessons_ls.pdf).

<sup>24</sup> See Roache et. al., *supra* note 16, at 5; Adam Nossiter, *Sierra Leone to Impose 3-Day Ebola Quarantine*, N.Y. TIMES, Sep. 6, 2014, <https://www.nytimes.com/2014/09/07/world/africa/sierra-leone-to-impose-widespread-ebola-quarantine.html>; Kevin Hartnett, *With Ebola, Mass Quarantine is Back*, BOSTON GLOBE 1, 2 (Oct. 3, 2014), <https://www.bostonglobe.com/ideas/2014/10/03/with-ebola-mass-quarantine-back/dpLJ0IYYTwdHk1AFUY1QGP/story.html>; Umaru Fofana & Clair MacDougall, *Sierra Leone Army Blockades Ebola Areas, Liberia Declares Emergency*, REUTERS 1, 1 (Aug 7, 2014), <http://www.reuters.com/article/us-health-ebola-africa-idUSKBN0G70WW20140807> (stating army blockades of rural areas had been imposed).

<sup>25</sup> Moon, *supra* note 4, at 3.

<sup>26</sup> John Kraemer, Mark Siedner, & Michael Stoto, *Analyzing Variability in Ebola-Related Controls Applied to Returned Travelers in the United States*, 13 HEALTH SEC. 5, 4-5 (2015); Kaci Hickox, *Caught Between Civil Liberties and Public Safety Fears: Personal Reflections from a Healthcare Provider Treating Ebola*, 11 J. HEALTH & BIOMEDICAL L. 9, 11-12 (2015); see also Sell *supra* note 1, at 12; Moon *supra* note 4, at 2206.

likely unnecessary under international law.<sup>27</sup> Healthcare workers returning to the United States challenged the quarantine orders while they were in effect<sup>28</sup> and have sought damages for the unnecessary use of the coercive measure.<sup>29</sup> In contrast, the millions of individuals impacted by arbitrary quarantine orders in Sierra Leone did not have the legal means to challenge their state's action.<sup>30</sup> Without judicial oversight on public health powers—even if constrained to post-hoc review and reprimand of state action—the potential for abusive use of public health powers increases.<sup>31</sup>

The differences in the national laws governing the use of quarantine and the ability of individuals to challenge the imposition on their individual rights highlight the need for more robust systems to protect human rights during infectious disease outbreaks. The latest Ebola epidemic featured arbitrary and overly broad quarantine that adversely impacted already disadvantaged groups.<sup>32</sup> For example, Sierra Leone implemented a three-day quarantine for the entire country during which volunteers searched homes and removed any individuals with

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<sup>27</sup> See generally Hickox, *supra* note 26, at 12-15 (discussing inconsistent measures and the politicized quarantine of Kaci Hickox); Mayhew v. Hickox, No. CV-2014-36 at 3, (Me. Dist. Ct., Fort Kent, Oct. 31, 2014) (state had not met burden to show that quarantine was necessary).

<sup>28</sup> *Id.* at 3. (state had not met burden to show that quarantine was necessary).

<sup>29</sup> Hickox v. Christie, Civ. No. 15-7647 (KM) (D.N.J. Sept. 2, 2016) (motion to dismiss granted in part and denied in part, trial date has not been set).

<sup>30</sup> Philippe Calain & Marc Poncin, *Reaching Out to Ebola Victims: Coercion, Persuasion or an Appeal for Self-Sacrifice?*, 147 SOC. SCIENCE & MEDICAL 126, 129 (2015); Wairimu Munyinyi Wahome, *Quarantines in Sierra Leone: Putting People First in the Ebola Crisis*, OXFAM INTERNATIONAL, 2 (Dec. 9, 2014), <http://policy-practice.oxfam.org.uk/publications/quarantines-in-sierra-leone-putting-people-first-in-the-ebola-crisis-336992>; CONST. OF SIERRA LEONE Oct. 1, 1991, Act No. 6 of 1991, Chap. III, Art. 29(1)17.3 (granting limited judicial review of executive measures taken under during a Public Emergency).

<sup>31</sup> Erin M. Page, *Balancing Individual Rights and Public Health Safety During Quarantine: The U.S. and Canada*, 38 CASE WESTERN RES. J. INT'L L. 517, 525 (2006); Rebecca Haffajee, Wendy E. Parmet, & Michelle M. Mello, *What Is a Public Health "Emergency"?*, 371.11 NEW ENG. J. MEDICINE 986 *passim* (2014); Gregg Gonsalves & Peter Staley, *Panic, Paranoia, and Public Health—the AIDS Epidemic's Lessons for Ebola*, 371.25 NEW ENG. J. MEDICINE 2348, 2349 (2014); David P. Fidler, Lawrence O. Gostin, & Howard Markel, *Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law, and Ethics*, 35 J.L. MEDICINE & ETHICS 616, 622-23 (2007) (discussing procedural due process protections and the need for such to protect individual liberty interests during quarantine); see generally Calain, *supra* note 30, at 129.

<sup>32</sup> Human Rights Watch, *supra* note 22, at 5; see generally Rothstein, *From SARS To Ebola*, *supra* note 17, at 264 (discussing how in general quarantine measures affect those who are vulnerable and disadvantaged).

Ebola symptoms.<sup>33</sup> In an Oxfam report, Patrick Kamara provided a first-hand account of the impact of coercive quarantine measures, stating:

Quarantine is very difficult. I am a government worker. I have a family. I used to walk to work, and then got food for my family. But now we are in quarantine, and life is very difficult. We don't have any water to drink in our houses. We also need it to cook. We used to have breakfast in the morning, but now we have no provisions.<sup>34</sup>

Implementing such broad public health distancing measures without meaningful safeguards exacerbated poverty and raised serious human rights concerns.<sup>35</sup>

People who are marginalized—including older people, people living in poverty and people with chronic illness or disability—and communities are likely to be disproportionately affected by poorly managed quarantines. These communities struggle to access basic services and goods even in 'normal' times, the result of unequal distribution of resources pre-Ebola. This is exacerbated by the lack of a voice and space to channel their concerns and hold the government and various stakeholders to account.<sup>36</sup>

The derogation of human rights during a public emergency restricts the ability of individuals and civil society to challenge the human rights abuses that occur during emergency.<sup>37</sup> This is concerning because public health measures are more effectual when implemented with public support and acceptance.<sup>38</sup> The United Nations Office of the High Commissioner on Human Rights outlined that the misuse of public health interventions in West Africa led to a

<sup>33</sup> Pierre Ozer, Aline Thiry, Catherine Fallon, Julia Blocher, & Florence De Longueville, *Containment in Sierra Leone: The Inability of a State to Confront Ebola?*, 384 THE LANCET e47, e47 (Oct. 4, 2014); Nossiter, *supra* note 24; Hartnett, *supra* note 24.

<sup>34</sup> Thynn Thynn Hlaing, *Sierra Leone: Mass Quarantines Causing Unnecessary Hardship and Risk Further Spread of Ebola Warns Oxfam*, OXFAM INT'L (Dec. 5, 2014), <https://www.oxfam.org/en/pressroom/pressreleases/2014-12-05/sierra-leone-mass-quarantines-causing-unnecessary-hardship-and>.

<sup>35</sup> Calain, *supra* note 30, at 129; Wahome, *supra* note 30, at 2; United Nations High Commissioner for Human Rights, *supra* note 15, at 2; Human Rights Watch, *supra* note 22, at 5.

<sup>36</sup> Wahome, *supra* note 30, at 2.

<sup>37</sup> Wahome, *supra* note 30, at 1; *see also* Gregory P. Campbell, Note, *Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict*, 12 SAN DIEGO INT'L L.J. 497, 530 (2011) (discussing how mass quarantines would overwhelm judicial process and oversight within the United States).

<sup>38</sup> James G. Hodge, Jr., Leila Barraza, Gregory Measer, & Asha Agrawal, *Global Emergency Legal Responses to the 2014 Ebola Outbreak: Public Health and the Law*, 42 J. L., MEDICINE & ETHICS 595, 599 (2014); Annas, *Bioterrorism, Public Health, and Civil Liberties*, *supra* note 15, at 1340.

hostile mistrust towards governments and health care workers (HCW's). This mistrust has led to a strong opposition and a refusal of many affected communities to cooperate with government personnel and HCW's alike, making the task of dealing with the outbreak in certain areas nearly impossible . . . The current culture of fear among the affected populations is making people reluctant to seek medical assistance, out of fear of becoming infected with [Ebola] by HCW's or out of fear of being quarantined.<sup>39</sup>

Public health and human rights are inextricably intertwined; too much of one leads to the detriment of the other. Therefore, the two must work sustainably and compatibly for interventions to be effective.<sup>40</sup>

This Comment argues that preventing human rights abuses during public health emergencies requires amending international and national systems to outline substantive and procedural protections for individuals and populations. Part I details the existing international, regional and national legal protections for human rights in public health emergencies. Part II argues that specific changes to international legal principles and the WHO response to human rights can create the necessary political pressure to apply quarantine in a non-discriminatory manner. Additionally, civil society and non-governmental organizations (NGOs) should use provisions in the African Charter of Human and Peoples' Rights (ACHPR) to bring incremental change to protect human rights in Sierra Leone during public health emergencies. In conclusion, this Comment highlights the adverse effects of increased stigma and decreased treatment seeking that accompany arbitrary quarantine during a public health emergency.

## II. LEGAL SOURCES OF PROTECTION FOR INDIVIDUAL RIGHTS DURING PUBLIC HEALTH EMERGENCIES

### A. QUARANTINE: A PUBLIC HEALTH INTERVENTION THAT BURDENS INDIVIDUAL RIGHTS

The state uses quarantine as an important public health tool to combat the spread of infectious diseases.<sup>41</sup> The WHO defines quarantine

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<sup>39</sup> United Nations High Commissioner for Human Rights, *supra* note 15, at 5-6.

<sup>40</sup> Annas, *Bioterrorism, Public Health, and Civil Liberties*, *supra* note 15, at 1340.

as, “the restriction of activities and/or separation from others of suspect persons who are not ill . . . in such a manner as to prevent the possible spread of infection or contamination.”<sup>42</sup> In other words, during quarantine, the state stops individuals who may have been exposed from associating with others to prevent further infection.<sup>43</sup> This intervention goes beyond isolating symptomatic individuals who can infect others.<sup>44</sup> Therefore, for public health officials,

The initial purpose of quarantine is to slow the number of new infections to below the total number of deaths plus the total number of people who have recovered in a discrete period of time. To be successful, it is not necessary for a quarantine to eliminate all new cases immediately. Thus, even a “leaky quarantine” is valuable and has utility in the public health response to an epidemic.<sup>45</sup>

When used effectively, quarantine limits the opportunity for infection to spread and, along with contact tracing and medical treatment of infected individuals, allows public health and healthcare professionals to stop an epidemic.<sup>46</sup>

Although quarantine is a useful public health tool, it is an imposition on individuals’ human rights.<sup>47</sup> Quarantine orders are broad and can limit where individuals are able to travel, who they can associate with, and what they can do.<sup>48</sup> To advance public health, the state can enforce these quarantine orders with coercive action.<sup>49</sup> For example, upon returning home after working with Doctors Without Borders, Ms. Kaci Hickox was involuntarily quarantined, first by New Jersey and then by

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<sup>41</sup> Pope, *supra* note 13, at 73.

<sup>42</sup> IHR, *supra* note 21, at art. 1, sec. 1, p. 9; *see also Understand Quarantine and Isolation: Questions and Answers*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://emergency.cdc.gov/preparedness/quarantine/qa.asp> (last updated Feb. 10, 2014); *see also* Martin Cetron & Julius Landwirth, *Public Health And Ethical Considerations in Planning for Quarantine*, 78 Y.J. BIOLOGY & MEDICINE 325, 325 (2005).

<sup>43</sup> Cetron, *supra* note 42, at 326; Pope, *supra* note 13, at 73.

<sup>44</sup> IHR, *supra* note 21, at art. 1, sec. 1, p. 8; (“[I]solation’ means separation of ill or contaminated persons or affected baggage, containers, conveyances, goods or postal parcels from others in such a manner as to prevent the spread of infection or contamination”); *see also* Centers for Disease Control and Prevention, *supra* note 42.

<sup>45</sup> Rothstein, *From SARS To Ebola*, *supra* note 17, at 236.

<sup>46</sup> Kucharski, *supra* note 13, at 1; Rothstein, *From SARS To Ebola*, *supra* note 17, at 236.

<sup>47</sup> Rothstein, *From SARS To Ebola*, *supra* note 17, at 236; Wendy E. Parmet, *AIDS and Quarantine: A Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 54 (1985).

<sup>48</sup> Parmet, *supra* note 47, at 72; Cetron, *supra* note 42, at 326; *See* Fidler, *supra* note 31, at 623.

<sup>49</sup> Rothstein, *Ebola, Quarantine, and the Law*, *supra* note 23, at 6.

Maine.<sup>50</sup> The quarantine order was imposed because state governments were afraid that returning healthcare workers would be infectious, despite being asymptomatic.<sup>51</sup> Ms. Hickox never developed Ebola,<sup>52</sup> but state officials calculated that the risk of potential Ebola infections outweighed her individual rights.<sup>53</sup>

A goal of public health intervention is preventing harm to the public.<sup>54</sup> When quarantine orders are imposed arbitrarily, however, officials violate individual rights, resulting in increased harm to individuals and communities.<sup>55</sup> Coercive measures can work against successful implementation because many interventions rely on the public's acceptance of its necessity.<sup>56</sup> Public health officials have long accepted that:

Quarantine done poorly can induce people to mistrust and avoid the public health system—and if this happens, then quarantine is not merely ineffective, it can actually feed the spread of the disease as frightened people break quarantine, flee and disperse into the population.<sup>57</sup>

Therefore, to ensure public acceptance, a state must simultaneously promote public health and respect human rights.<sup>58</sup> To maintain this balance, international law imposes legal limits on a state's power to issue quarantine orders by: (1) international principles,<sup>59</sup> (2) the WHO's

<sup>50</sup> Hickox, *supra* note 26, at 10; States have varying standards for quarantine: 40 states followed CDC guidelines, 10 states used exposure categories to differentiate which social distancing measures to impose on individuals returning from West Africa; *See* Sell, *supra* note 1, at 14-15.

<sup>51</sup> Hickox, *supra* note 26, at 11-14.

<sup>52</sup> Hickox, *supra* note 16, at 13.

<sup>53</sup> Patty Wight, *Maine Judge Rejects Nurse's Quarantine Order*, NPR (Oct. 31, 2014), <http://www.npr.org/2014/10/31/360461264/maine-judge-rejects-nurses-quarantine-order> (Governor LePage stating, "This ruling is a basis on what is more important - individual rights or public safety? And I contend that the decision was in favor of the individual rights").

<sup>54</sup> James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L. MEDICINE & ETHICS 170, 171 (2002).

<sup>55</sup> Jonathan M. Mann, *Medicine And Public Health, Ethics And Human Rights*, 27 HASTINGS CTR. REP. 6, 9 (1997); Rothstein, *From SARS To Ebola*, *supra* note 17, at 253; Campbell, *supra* note 37, at 530 (describing increased disease spread after imposition of mass quarantine during the SARS epidemic).

<sup>56</sup> Hodge, *supra* note 38, at 599.

<sup>57</sup> Matthew K. Wynia, *Ethics and Public Health Emergencies: Restrictions on Liberty*, 7 A. J. BIOETHICS 1, 2 (2007).

<sup>58</sup> Mann, *supra* note 55, at 10.

<sup>59</sup> *See generally* Siracusa Principles, *supra* note 20, at 1.

Constitution and International Health Regulations,<sup>60</sup> (3) regional human rights charters,<sup>61</sup> and (4) national law or state law.<sup>62</sup>

#### B. INTERNATIONAL PRINCIPLES FOR LIMITING HUMAN RIGHTS IN A PUBLIC HEALTH EMERGENCY

International law regarding state action during public health emergencies emerges from multiple international treaties,<sup>63</sup> their interpretation,<sup>64</sup> and the Universal Declaration of Human Rights.<sup>65</sup> Generally, international law limits state action by identifying human rights and compelling states to justify burdening those rights.<sup>66</sup> As applied to the International Covenant on Civil and Political Rights, the Siracusa Principles outline a limitation analysis to justify burdening human rights during a public health emergency.<sup>67</sup> To limit human rights under the Siracusa Principles, a state must demonstrate that the limit is strictly necessary and is the least restrictive means.<sup>68</sup> To be necessary a limit: “(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim.”<sup>69</sup> Each component of this analysis limits the adverse effects for individuals from the state’s actions. As such, the Siracusa Principles provide a framework for protecting human rights based on the strict necessity of state action during a public health emergency.<sup>70</sup>

The rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) provide the substantive human rights that can

<sup>60</sup> See generally CONSTITUTION OF THE WORLD HEALTH ORGANIZATION July 22, 1946, 14 U.N.T.S. 185.

<sup>61</sup> See generally AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982), <http://www.achpr.org/instruments/achpr/> [hereinafter *ACHPR*].

<sup>62</sup> Kraemer, *supra* note 26, at 4.

<sup>63</sup> See generally *ICCPR*, *supra* note 19.

<sup>64</sup> Office of the High Commissioner for Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc.

<sup>65</sup> See generally G.A. Res. 217A (III) (Dec. 10, 1948); see generally Silva, *supra* note 23.

<sup>66</sup> Annas, *Bioterrorism*, *supra* note 15, at 1340; see, e.g., Silva, *supra* note 23.

<sup>67</sup> *Siracusa Principles*, *supra* note 20, at Part I. Art. A. ¶ 1-14.

<sup>68</sup> *Siracusa Principles*, *supra* note 20, at Part II. Art. C. ¶ 51; Rothstein, *From SARS to Ebola*, *supra* note 17, at 250.

<sup>69</sup> *Siracusa Principles*, *supra* note 20, at Part I, Art. A, ¶ 10.

<sup>70</sup> *Siracusa Principles*, *supra* note 20, at Part II, Art. C, ¶ 51.

be limited in a public emergency.<sup>71</sup> The ICCPR allows a state to limit an individual's right to move, express, and assemble due to public health concerns, when the limit is imposed according to national law.<sup>72</sup> Inherent to these built-in limits is the recognition that the state can act when the public's health is in jeopardy.<sup>73</sup> A limitations analysis asks what mischief the action aims to respond to and whether that aim is legitimate.<sup>74</sup> In the context of a public health emergency, these questions seem self-evident. In most cases, the mischief the action responds to is the infectious disease threatening the life or health of the public, and, with the aim of saving lives.<sup>75</sup>

Depending on the disease, identifying the mischief and determining whether the aim is legitimate becomes more nuanced. In the case of Ebola, an infectious disease that spreads easily through a population and has a high case-fatality rate, the state's aim of saving lives through coercive interventions can be regarded as a legitimate function of government.<sup>76</sup> Yet, despite this legitimate purpose, quarantine is a restrictive intervention that can be imposed on individuals who were never infected and would never become ill.<sup>77</sup> These individuals will never actually pose a danger to the public's health, but their rights are still limited.<sup>78</sup>

<sup>71</sup> ICCPR, *supra* note 19, at Art. 21.

<sup>72</sup> ICCPR, *supra* note 19, at Art. 21.

<sup>73</sup> Allyn Taylor, International Law and Public Health Policy, 3 *ENCYCLOPEDIA OF PUB. HEALTH*, 667, 669 (2008) (recognizing that states acting as sovereigns can no longer act in their traditional capacity to protect public health due to globalization); Tina Batra Hershey et al., *Putting the Law into Practice: A Comparison of Isolation and Quarantine as Tools to Control Tuberculosis and Ebola*, J. PUB. HEALTH MGMT. PRAC. 1, 2 (2015); Lawrence O Gostin, *Public Health Law In A New Century: Part II: Public Health Powers and Limits*, 283, no. 22 J.A.MED. ASS'N. 2979, 2980 (2000); Jorge E. Galva, Christopher Atchison, & Samuel Levey, *Public Health Strategy And The Police Powers Of The State*, 120 no. 1\_suppl PUB. HEALTH REP. 20, 20 (2005) ("The application of police power has traditionally implied a capacity to (1) promote the public health, morals, or safety, and the general well-being of the community; (2) enact and enforce laws for the promotion of the general welfare; (3) regulate private rights in the public interest; and (4) extend measures to all great public needs . . . More specifically, public health police power allows the states to pass and enforce isolation and quarantine, health, and inspection laws to interrupt or prevent the spread of disease." ).

<sup>74</sup> Hershey, *supra* note 73, at 2.

<sup>75</sup> Silva, *supra* note 23, at 55.

<sup>76</sup> Rothstein, *From SARS to Ebola*, *supra* note 17, at 255-56 (discussing when coercive measures are proportional and necessary to take within the context of Ebola); *see also* Calain, *supra* note 30, at 128 (discussing quarantine as a disputed measure by public health officials, whereas isolation is assumed to be an "absolute necessity").

<sup>77</sup> *See generally* Centers for Disease Control and Prevention, *supra* note 42; Pope, *supra* note 13, at 73.

<sup>78</sup> Rothstein, *From SARS to Ebola*, *supra* note 17, at 236.

As asymptomatic individuals are impacted by state responses, the final factor—whether the limitation is proportional to the purpose—is the fulcrum of the limitations analysis that protects human rights.<sup>79</sup> For example, in *Enhorn v. Sweden*, the European Court of Human Rights (ECrHR) determined that the isolation of an HIV-positive individual was not proportionate to the state's purpose of improving public health.<sup>80</sup> The ECrHR held:

[T]he compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had not been considered and found to be insufficient to safeguard the public interest. Moreover, the Court considers that by extending over a period of almost seven years the order for the applicant's compulsory isolation, with the result that he was placed involuntarily in a hospital for almost one and a half years in total, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.<sup>81</sup>

This highlights another important aspect of the proportionality analysis: the intervention must be the least restrictive measure.<sup>82</sup> For example, to prevent HIV, the state can utilize less restrictive alternatives than curtailing association, especially given the proven effectiveness of other interventions.<sup>83</sup> Taken together, the proportionality and the least restrictive alternative analyses ask whether the chosen means are well suited to accomplish the aim and best protect individual rights given the risk.<sup>84</sup> The balancing of individual rights and public health is not always applied in the same manner. For example, in *Harris v. Thigpen*, the United States Court of Appeals for the Eleventh Circuit held that the mandatory testing and isolation of HIV-positive individuals in Alabama prisons was constitutional.<sup>85</sup> The court stated:

The DOC's more conservative approach in separating all known seropositives is not in itself constitutionally violative. To the extent that the segregation policy encroaches upon the privacy rights of

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<sup>79</sup> *Siracusa Principles*, *supra* note 59, Part I, Art. A, ¶ 10; Rothstein, *From SARS to Ebola*, *supra* note 17, at 255-56 (overview of proportionality).

<sup>80</sup> *Enhorn v. Sweden*, 2005 Eur. Ct. H.R. 56529 at ¶ 29 (2005).

<sup>81</sup> *Id.* at ¶ 55.

<sup>82</sup> *Id.*; *see also* Silva, *supra* note 23, at 54.

<sup>83</sup> *See generally* Cynthia M. Lyles et al., *Best-Evidence Interventions: Findings From a Systematic Review of HIV Behavioral Interventions for US Populations at High Risk, 2000–2004*, 97 AM. J. PUB. HEALTH 133, 133 (2007).

<sup>84</sup> *See* Silva & Smith, *supra* note 23, at 54.

<sup>85</sup> *See Harris v. Thigpen*, 941 F.2d 1495, 1517 (11th Cir. 1991).

HIV-positive inmates, it is a reasonable infringement in light of the inmate interests at stake (both seropositive and general population), and the difficult decisions that the DOC must make in determining how best to treat and control within Alabama correctional facilities the spread of a communicable, incurable, always fatal disease.<sup>86</sup>

The court's balancing approach compared the interests of the HIV-positive inmates and the general prison population to conclude that the response was appropriate.<sup>87</sup> The contrasting approaches of the ECrtHR and the Eleventh Circuit demonstrate that the same infectious disease can justify varying public health responses.

The limitations analysis outlined by the Siracusa Principles ensures that the intervention is "not arbitrary, unreasonable, or discriminatory."<sup>88</sup> To enforce these limits, there must be an objective process to verify the limitations.<sup>89</sup> While the Siracusa Principles mandate an objective process to guarantee the necessity of the limitations, the implementation depends on the member states.<sup>90</sup> This is problematic because the states that are more likely to take arbitrary, unreasonable, or dangerous actions in the name of protecting public health are the same states that are unlikely to have formal objective processes in place to assess the limitations.<sup>91</sup> Likewise, it is important to remember that the individuals affected by quarantine orders will most likely face physical barriers, which, at times, may be enforced by law enforcement or military personnel.<sup>92</sup> Therefore, even if there is a legal process to challenge the order, it is unlikely that individuals can access it.

#### C. WORLD HEALTH ORGANIZATION'S CONSTITUTION AND INTERNATIONAL HEALTH REGULATIONS

The WHO plays a fundamental role in marshaling an international effort to combat the spread of infectious disease.<sup>93</sup> The organization's legal framework and regulations augment broader international principles.<sup>94</sup> Moreover, given the on-the-ground role and

<sup>86</sup> *Id.* at 1521.

<sup>87</sup> *Id.* at 1514-21.

<sup>88</sup> Silva & Smith, *supra* note 23, at 53 (citation omitted).

<sup>89</sup> ESCOR, *supra* note 59, at pt. I, art A, para. 10.

<sup>90</sup> See Human Rights Watch, *supra* note 22 (quarantine orders subject to review).

<sup>91</sup> See generally Calain & Poncin, *supra* note 30, at 129.

<sup>92</sup> See Human Rights Watch, *supra* note 22 (security forces maintain quarantine).

<sup>93</sup> See IHR, *supra* note 21, at 1.

<sup>94</sup> See *id.*

technical assistance the WHO gives to states in a public health emergency, it is important to pay attention to its human rights policies. The objective of the WHO, outlined in its Constitution, is the “attainment by all peoples of the highest possible health.”<sup>95</sup> The WHO Constitution does not acknowledge individual rights, outside of the right of individuals to achieve the highest attainable health as a fundamental right.<sup>96</sup> This lack of focus on human rights highlights the traditional institutional belief that the WHO is a medical organization rather than an international legal entity.<sup>97</sup>

The WHO promulgates regulations through its legislative body, the World Health Assembly, pertaining to best practice models for monitoring, implementing quarantines, and otherwise intervening during public health emergencies.<sup>98</sup> In 2005, the World Health Assembly passed the International Health Regulations (IHRs), “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”<sup>99</sup> This purpose limits the scope of the IHRs to public health risks and responses in order to not interfere with other international goals.<sup>100</sup> The IHRs detail how international and national governments can work together to respond to the international spread of disease. Particularly, the IHRs obligate member states to build core public health capacities, which, if implemented, work in concert with the international interventions to prevent the spread of infectious disease.<sup>101</sup> The IHRs define specific terms including: “isolation,”<sup>102</sup> “public health emergency of international concern,”<sup>103</sup> “public health risk,”<sup>104</sup> and

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<sup>95</sup> WHO, *supra* note 60 at art. 1.

<sup>96</sup> *See id.* at 1.

<sup>97</sup> *See* Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301, 303 (1992).

<sup>98</sup> *See* IHR, *supra* note 21, at 1; *see* WHO, *supra* note 60, at art. 21.

<sup>99</sup> IHR, *supra* note 21, at art. 2.

<sup>100</sup> *See id.*

<sup>101</sup> *See id.* at 4, para 5 (1).

<sup>102</sup> *Id.* at art. 1.

<sup>103</sup> *Id.* (“[P]ublic health emergency of international concern’ means an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.”).

<sup>104</sup> *Id.* (“[P]ublic health risk’ means a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger.”).

“quarantine.”<sup>105</sup> These definitions are important because they underpin when the WHO will intervene in a crisis, and how they structure their response.

Using the IHRs, the WHO can detail non-binding recommendations that a state in crisis may adopt.<sup>106</sup> The aim of the recommendations is to provide guidance and technical assistance for the state during the emergency.<sup>107</sup> The state, however, is under no obligation to follow the recommendations<sup>108</sup> or temporary recommendations.<sup>109</sup> The IHRs recommendation process underscores the nature of the WHO as a medical organization, which creates policy through a best practice model. In terms of human rights, the IHRs designate “[t]he implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.”<sup>110</sup> This protection of human rights during implementation is important because the regulations operationalize the WHO’s response during a public health emergency. The IHRs, however, do not establish a system wherein individuals can challenge the implementation when human rights violations occur.<sup>111</sup>

#### D. AFRICAN CHARTER OF HUMAN AND PEOPLE’S RIGHTS

The African Charter for Human and Peoples’ Rights (ACHPR) entered into force in 1986, providing a legal framework for human rights within the African Union.<sup>112</sup> The ACHPR lists the rights and freedoms guaranteed to every individual in Africa.<sup>113</sup> The state parties are responsible for the implementation of the charter.<sup>114</sup> The structural

<sup>105</sup> *Id.* (“‘[Q]uarantine’ means the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination.”).

<sup>106</sup> *See id.* at art. 15.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* at arts. 1, 3 (4).

<sup>109</sup> *Id.* at art. 1 (“‘[T]emporary recommendation’ means non-binding advice issued by WHO pursuant to Article 15 for application on a time-limited, risk-specific basis, in response to a public health emergency of international concern, so as to prevent or reduce the international spread of disease and minimize interference with international traffic.”).

<sup>110</sup> *Id.* at art. 3(1).

<sup>111</sup> *See id.* at art. 3(4) (stating that states have obligation to implement legislation, but remaining silent on providing due process or judicial oversight of implementation).

<sup>112</sup> *See ACHPR, supra* note 61 at 1.

<sup>113</sup> *See id.* at arts. 2–17.

<sup>114</sup> *See id.* at art. 1.

system of the ACHPR includes both the African Court on Human Rights and the African Commission on Human Rights (the Commission).<sup>115</sup> Currently, the Commission has fact-finding responsibilities and works with the African member states to establish records regarding their state's protection of human rights.<sup>116</sup> For example, Sierra Leone's record details the civil war and the abuses that occurred within the country during the conflict, while also noting the state's Constitution seeks to ensure human rights in compliance with the ACHPR.<sup>117</sup> The work of the Commission has been strengthened by the implementation of the African Court on Human Rights;<sup>118</sup> although member states are still in the process of ratifying the African Court Protocol, making the impact of the Court relatively untested.<sup>119</sup> Throughout Africa, the Commission has taken incremental steps to improve human rights despite dictatorial governments and a lack of political will.<sup>120</sup> For example, the impact of the Commission is apparent in the incremental changes in human rights protections in Nigeria during its dictatorship.<sup>121</sup>

The unique substantive provisions of the ACHPR potentially increase the impact of the protection of human rights. The ACHPR lays out the rights, freedoms, and duties for individuals, communities, and member states.<sup>122</sup> The ACHPR approach imposes rights and duties between individuals; the horizontal application of rights is not prevalent in other regional human rights charters.<sup>123</sup> Unlike other regional human rights charters, the ACHPR does not have a general derogation provision, which means the ACHPR's provisions apply even when circumstances

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<sup>115</sup> See Organization of African Unity [OAU], Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights art. 1, June 10, 1998, [hereinafter Protocol to the African Charter]; see *id.* at art. 30.

<sup>116</sup> See ACHPR, *supra* note 61, at art 45.

<sup>117</sup> See generally SIERRA LEONE, AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: INITIAL TO DATE FOLLOWING ARTICLE TO THE CHARTER REPORT SUBMITTED BY SIERRA LEONE 3 (2013), [http://www.achpr.org/files/sessions/57th/state-reports/1st-1983-2013/sierra\\_leone\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/57th/state-reports/1st-1983-2013/sierra_leone_state_report_eng.pdf).

<sup>118</sup> See OBIORA CHINEDU OKAFOR, THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS 67 (2007).

<sup>119</sup> See Press Release, Afr. Court on Human and People's Rights, President Of Republic Of Chad Assures Of Ratification Of African Court Protocol By Early Next Year (Dec. 23, 2015), <http://en.african-court.org/index.php/news/press-releases/item/58-president-of-republic-of-chad-assures-of-ratification-of-african-court-protocol-by-early-next-year>.

<sup>120</sup> See OKAFOR, *supra* note 118, at 93

<sup>121</sup> See *id.* at 96–97.

<sup>122</sup> See generally ACHPR, *supra* note 61, at pt. I.

<sup>123</sup> See *id.* at art. 27.

threaten the life or health of a nation.<sup>124</sup> In contrast, the ECHR includes a general derogation provision excepting the Right to Life and the Right to be Free from Torture.<sup>125</sup> The ACHPR's lack of a general derogation provision creates the goal that human rights will be upheld even within conflicts and emergencies.<sup>126</sup>

Following other human rights charters, most of the rights and freedoms outlined in the ACHPR contain an internal limitation provision that provides the circumstances wherein a state can limit the right.<sup>127</sup> In several clauses of the ACHPR, the limitation provisions are quite broad and allow for any limit that is proscribed by law.<sup>128</sup> In contrast, the right to freely assemble can only be proscribed by "necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."<sup>129</sup> Given the clause's reliance on the word "necessary," it is likely that the Court will follow the example of the ECHR and utilize a proportionality assessment when determining if the limit imposed by the state was justified.

The ACHPR applies to all individuals and communities without distinction and without discrimination against "race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."<sup>130</sup> This non-discrimination guarantee is reinforced by the individual duty to "respect and consider his fellow beings without discrimination."<sup>131</sup> It is further enhanced by the overall declaration that "all peoples shall be equal; they shall enjoy the same respect and shall have the same rights."<sup>132</sup> These non-discrimination provisions detail a complete picture of equality. States have the duty to ensure rights for all without discriminating on one of the enumerated grounds, groups of peoples are all held to have the same rights, and individuals have a duty to not discriminate against other individuals. Not only is this a powerful call for non-discrimination in the application of

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<sup>124</sup> OKAFOR, *supra* note 118, at 69.

<sup>125</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>126</sup> OKAFOR, *supra* note 118, at 84.

<sup>127</sup> See generally ACHPR, *supra* note 61, at pt. I.

<sup>128</sup> See, e.g., *id.* at art. 14.

<sup>129</sup> *Id.* at art. 11.

<sup>130</sup> *Id.* at art. 2.

<sup>131</sup> *Id.* at art. 28.

<sup>132</sup> *Id.* at art. 19.

these rights, but it also ensures that there is complete vertical and horizontal application of the equality provisions of the ACHPR, which creates the opportunity to challenge state action based on discriminatory intent or impact.

#### E. NATIONAL PUBLIC HEALTH AUTHORITY AND PROTECTION OF INDIVIDUAL RIGHTS

As previously discussed, the international and regional legal systems leave the implementation of both public health interventions and human rights protections to national governments. This section will contrast the national limits on public health interventions in the United States and Sierra Leone.

##### 1. *Quarantine Law and the Protection of Individual Liberty in the United States*

In the United States, the authority to take actions to protect the public's health—including the authority to implement quarantine—is a state police power.<sup>133</sup> Each state has the statutory authority to intervene in a public health emergency, although the statutory language and requirements vary from state to state.<sup>134</sup> As Justice Harlan summarized in *Jacobson v. Massachusetts*, “According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”<sup>135</sup> Although the power to quarantine is a state power, the protections against unreasonable application of that power derive from the Constitution. As detailed by the Court in *Jacobson*, the Constitution affords protection when “the police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the

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<sup>133</sup> See Lawrence O. Gostin & Eric A. Friedman, *State Quarantine Powers Under the Constitution: Fear in an Age of Ebola*, AM. CONSTITUTION SOC'Y FOR L. & POL'Y: BLOG (Nov. 4, 2014), <http://www.acslaw.org/acsblog/state-quarantine-powers-under-the-constitution-fear-in-an-age-of-ebola>; Pope & Bughman, *supra* note 13, at 74. There are also federal quarantine powers that this article does not discuss.

<sup>134</sup> See Sell et al., *supra* note 1, at 11. See generally Kraemer et al., *supra* note 26, at 298–99.

<sup>135</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

interference of the courts to prevent wrong and oppression.”<sup>136</sup> The protected liberty interest, however, does not allow, “a minority, residing or remaining in any city or town where [an infectious disease] is prevalent, . . . [to] defy the will of its constituted authorities acting in good faith for all, under the legislative sanction of the State”<sup>137</sup> unless the quarantine is applied in an “arbitrary, unreasonable manner, or . . . go[es] so far beyond what was reasonably required for the safety of the public.”<sup>138</sup>

Under the Equal Protection Clause, the United States prohibits the discriminatory use of quarantine against an insular minority. An egregious case was *Jew Ho v. Williamson*, in which San Francisco quarantined all individuals living in Chinatown.<sup>139</sup> The circuit court held that the quarantine was unreasonable, discriminatory, and therefore, unconstitutional.<sup>140</sup> The court found that the quarantine was unreasonable because the city quarantined an entire district, but failed to curtail the movement of the individuals within the district. The court reasoned:

[I]f a large section or a large territory is quarantined, intercommunication of the people within that territory will rather tend to spread the disease than to restrict it. If you place 10,000 persons in one territory, and confine them there, as they have been in prisons and other places, the spread of disease, of course, becomes increased, and the danger of such spread of disease is increased, sometimes in an alarming degree, because it is the constant communication of people that are so restrained or imprisoned that causes the spread of the disease.<sup>141</sup>

The goal of the quarantine was to prevent the spread of bubonic plague, but the application of the mass quarantine in San Francisco ultimately spread the plague.<sup>142</sup> Therefore, the court found that the quarantine was unreasonable.<sup>143</sup>

The court went on to hold the racially based application of the quarantine ordinance against individuals of Chinese descent was unconstitutional. Citing the United States Supreme Court in *Yick Ho v. Hopkins*, the court outlined the standards for equal protection:

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<sup>136</sup> *Id.* at 38.

<sup>137</sup> *Id.* at 37.

<sup>138</sup> *Id.* at 28.

<sup>139</sup> *See Jew Ho v. Williamson*, 103 F. 10, 12–13 (C.C.N.D. Cal. 1900).

<sup>140</sup> *See id.* at 26.

<sup>141</sup> *Id.* at 22.

<sup>142</sup> *See id.* at 22–23.

<sup>143</sup> *See id.* at 23.

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>144</sup>

The court ultimately held that the quarantine was not permitted under the Equal Protection Clause of the Fourteenth Amendment, stating, “[T]he board of health has no authority or right to enforce any ordinance in this city that shall discriminate against any class of persons in favor of another.”<sup>145</sup> The lesson from *Jew Ho* is clear: mass quarantines targeting insular minorities may rise to unreasonable levels and violate the Fourteenth Amendment’s protection against discrimination.

The *Jacobson* standard still provides the Constitutional framework for quarantine law in the United States. As it stands, whether the deprivation of liberty by a public health authority is Constitutional depends on an individualized risk assessment, a showing that quarantine is the least restrictive means, and a finding that procedural due process requirements were met.<sup>146</sup> These standards largely mirror the international principles for limiting civil rights; however, the requirements for scientific necessity are more stringent, and a large component of the rights protection comes from the procedural safeguard of judicial review. These factors do not stop states from using quarantine against at-risk populations without scientific necessity, as evidenced by Ms. Hickox’s involuntary quarantine.<sup>147</sup> Ms. Hickox, however, was able to challenge the quarantine order in court and through this challenge, lift the quarantine order.<sup>148</sup>

## 2. Public Health Authority and Protection of Human Rights in Sierra Leone

In contrast to the United States, Sierra Leone’s Constitution allows the national government to limit human rights to protect the public’s health.<sup>149</sup> The Sierra Leone Constitution provides that the

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<sup>144</sup> *Id.* at 23-24 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

<sup>145</sup> *Id.* at 24.

<sup>146</sup> Gostin & Friedman, *supra* note 133; Pope & Bughman, *supra* note 41, at 75.

<sup>147</sup> *See* Order Pending Hearing, *supra* note 27, at 3.

<sup>148</sup> *See id.* at 1, 3.

<sup>149</sup> *See* CONSTITUTION OF SIERRA LEONE, 1991, ch. III (revealing limitations inherent in human rights protections).

government can limit human rights that protect against the freedom of movement,<sup>150</sup> the privacy of home and other property,<sup>151</sup> the freedom of conscience,<sup>152</sup> the freedom of expression and the press,<sup>153</sup> and the freedom of assembly and association.<sup>154</sup> Under the Sierra Leone Constitution, the justification for limiting rights differs depending on the right at issue. For example, protection from deprivation of property can be limited if it is in the best interest of the public's welfare,<sup>155</sup> whereas freedom of assembly and association can only be limited if "reasonably required" and justified in a democratic society.<sup>156</sup> Overall, this limitation scheme is similar to the human rights protections offered in Canada's Charter of Rights and Freedoms<sup>157</sup> and South Africa's Constitution.<sup>158</sup>

The Sierra Leone Constitution also grants the Executive the exclusive power to declare a Public Emergency.<sup>159</sup> The President can declare a Public Emergency when, in the President's opinion, there is the "occurrence of imminent danger, or the occurrence of any disaster or natural calamity affecting the community."<sup>160</sup> After declaring a Public Emergency, the President can "make provision for the detention of persons, the restriction of the movement of persons within defined localities . . . [and] the taking of possession or control on behalf of the Government of any property or undertaking."<sup>161</sup> There is limited judicial review applicable to detained individuals.<sup>162</sup> During a Public Emergency, a detained individual has a right to a hearing before an independent tribunal who will make recommendations regarding the detainment; however, the "authority shall not be obliged to act in accordance with

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<sup>150</sup> See *id.* at art. 18(2)–(3).

<sup>151</sup> See *id.* at art. 22(2)(a).

<sup>152</sup> See *id.* at art. 24(5)(a).

<sup>153</sup> See *id.* at art. 24(2)(a)(i).

<sup>154</sup> See *id.* at art. 26(2)(a)(i).

<sup>155</sup> See *id.* at art. 21(1)(a).

<sup>156</sup> *Id.* at art. 26(2).

<sup>157</sup> See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>158</sup> S. AFR. CONST., art. 36, 1996.

<sup>159</sup> CONSTITUTION OF SIERRA LEONE, *supra* note 149, at art. 29(1)(a) ("Whenever in the opinion of the President a state of public emergency is imminent or has commenced, the President may, at any time, by Proclamation . . . declare that— a state of public emergency exists either in any part, or in the whole of Sierra Leone").

<sup>160</sup> *Id.* at art. 29(2)(a)–(f). There are other listed conditions for imposing a public emergency that provide the President a broad scope to intervene. See *id.*

<sup>161</sup> *Id.* at art. 29(6)(a)–(b).

<sup>162</sup> See *id.* at art. 29(17).

any such recommendation.”<sup>163</sup> Essentially, during a Public Emergency, the executive authority has almost no limits to what interventions it takes in the name of public welfare, and judicial review of those actions is very limited.<sup>164</sup>

In response to the Ebola outbreak and under the Public Emergency Power, Sierra Leone President Ernest Bai Koroma designated the “Public Emergency Regulations, 2014.”<sup>165</sup> These regulations authorized public health authorities to isolate individuals with Ebola, restricted the movement of individuals to and from regions with Ebola, allowed for homes and individuals to be quarantined, and prohibited public meetings and gatherings.<sup>166</sup> The application of the Public Emergency Regulations raised concerns with human rights groups. Amnesty International reported that the Public Emergency Regulations were used to justify the detention of a journalist who had been critical of the government’s response to Ebola and to justify “holding eight people from Kono [who] were detained for six months without charge following disorder linked to a suspected Ebola case.”<sup>167</sup> The Human Rights Commission of Sierra Leone raised concerns about the application of the emergency regulations:

The Human Rights Commission of Sierra Leone (HRCSL) is concerned about the implementation of the Public Emergency Regulations 2014 by the Sierra Leone Police (SLP), particularly the discriminatory application of Section 15 which derogates the Right to Freedom of Assembly and Association. HRCSL observes that some groups of the citizenry have been allowed to assemble and exercise their rights to express their views without hindrance, other groups

<sup>163</sup> *Id.* at art. 29(17)(c).

<sup>164</sup> *See id.* at art. 29(17). However, the President should inform the United Nations as to the reasons for its derogation from the ICCPR, a measure that it failed to take before enacting the Public Emergency Regulations. *See* Human Rights Council, Working Grp. on the Universal Periodic Review, *Compilation Prepared by the Office of the United Nations High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21*, at para. 5, UN Doc A/HRC/WG.6/24/SLE/2 (Nov. 23, 2015).

<sup>165</sup> *See* Dr. Ernest Bai Koroma, *The Public Emergency Regulations, 2014*, SUPPLEMENT TO SIERRA LEONE EXTRA GAZETTE, Aug. 18, 2014 [hereinafter *Public Emergency Regulations*]. United Nations Country Team in Sierra Leone, UNCT Submission to UPR Sierra Leone para. 2 (2016), [http://www.upr-info.org/sites/default/files/document/sierra\\_leone/session\\_24\\_-\\_january\\_2016/unct\\_sierra\\_leone\\_upr24\\_sle\\_e\\_main.pdf](http://www.upr-info.org/sites/default/files/document/sierra_leone/session_24_-_january_2016/unct_sierra_leone_upr24_sle_e_main.pdf).

<sup>166</sup> *See* Public Emergency Regulations, *supra* note 165, at paras. 3–8.

<sup>167</sup> Amnesty Int’l, *Sierra Leone: Ebola Regulations and Other Laws Must Not be Used to Curtail Freedom of Expression and Assembly* (May 4, 2015), <https://www.amnesty.org/en/latest/news/2015/05/sierra-leone-ebola-regulations-and-other-laws-must-not-be-used-to-curtail-freedom-of-expression-and-assembly/>.

have been denied the opportunity to do so by the SLP. HRCSL reminds Government of its obligations under International Law to protect, respect and fulfill basic rights and fundamental freedoms even during State of Emergencies, such as: Freedom from discrimination.<sup>168</sup>

The United Nations Office of the High Commissioner on Human Rights also detailed the prevalence of discrimination regarding Ebola stating, “Due to misinformation and the overall climate of fear, numerous reports of groups being discriminated for their connection to [Ebola] have been received.”<sup>169</sup> The issues highlighted by human rights groups surrounding the implementation of public health responses throughout the Ebola outbreak raise questions regarding whether Sierra Leone took the necessary measures to protect human rights. To ensure that the public health infrastructure protects human rights during infectious disease outbreaks, legislative and litigation initiatives should be undertaken to compel international, regional, and national systems to recognize and protect human rights.

### **III. BUILDING A LEGAL INFRASTRUCTURE TO PROTECT HUMAN RIGHTS DURING PUBLIC HEALTH EMERGENCIES**

In order to integrate human rights into the international and state responses to infectious disease outbreaks, legal systems must respond to the human rights violations that occur under the guise of protecting public health. In addition, civil society, international NGOs, and affected individuals should challenge human rights violations through litigation at the African Court on Human Rights and ultimately seek to change norms by creating internal networks around human rights to enact policy change.

#### **A. INTERNATIONAL HUMAN RIGHTS INFRASTRUCTURE: LEGISLATIVE OPPORTUNITIES**

##### *1. International Recognition of Mass Quarantines and Guidance through*

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<sup>168</sup> Brima A. Sheriff, *Human Rights Commission: Implementation of the Public Emergency Regulations 2014 (Press Release)*, AWARENESS TIMES NEWSPAPER FREETOWN (Apr. 24, 2015, 5:10 PM), [http://news.sl/drwebsite/publish/printer\\_200527502.shtml](http://news.sl/drwebsite/publish/printer_200527502.shtml).

<sup>169</sup> Brima A. Sheriff, *Human Rights Commission: Implementation of the Public Emergency Regulations 2014 (Press Release)*, AWARENESS TIMES NEWSPAPER FREETOWN (Apr. 24, 2015, 5:10 PM), [http://news.sl/drwebsite/publish/printer\\_200527502.shtml](http://news.sl/drwebsite/publish/printer_200527502.shtml).

*Specific Limitations*

The Siracusa Principles provide a framework for states that seek to limit human rights during a public health emergency. In total, these Principles aim to prevent arbitrary, unreasonable, or dangerous state actions in the name of protecting the public's health.<sup>170</sup> The Principles contemplate quarantine as a particularized concept that will affect discrete potentially contagious populations and individuals.<sup>171</sup> The imposition of quarantine orders for healthcare workers returning to the United States and the coercive state action imposed in Sierra Leone are antithetical to the Siracusa Principles. For example, applying the Siracusa Principles to Sierra Leone, the quarantine orders are arguably lacking scientific evidence, disproportionate, and not the least restrictive measure available for public health authorities.<sup>172</sup> Furthermore, there is evidence that the application of the Sierra Leone quarantine orders occurred in a discriminatory manner and had a discriminatory impact.<sup>173</sup> It is problematic that the international legal system, through the Siracusa Principles, does not provide a population-level means to challenge the imposition of a mass quarantine. Solely relying on the state's democratic process is not an adequate remedy for such harm. Therefore, enforcing the Principles during public health emergencies remains a challenge. States are expected to integrate this framework into national law, but outside of another state alleging harm to their citizens by another state's failure to implement these international standards, it is difficult to force enforcement.

As written, the Siracusa Principles are abstract and offer standards for the imposition of individual quarantines, failing to provide guidance to states that are implementing mass quarantines. The Siracusa Principles should be amended to offer more stringent criteria, or an outright ban against the imposition of mass quarantine. The necessity of taking such a clear position against the imposition of mass quarantine is illustrated by the West Point Quarantine in Liberia.<sup>174</sup> When faced with the potential of Ebola within the urban slum of West Point:

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<sup>170</sup> See Silva & Smith, *supra* note 23, at 53.

<sup>171</sup> See *Siracusa Principles*, *supra* note 59, at pt. I, art A, para. 10.

<sup>172</sup> See Calain & Poncin, *supra* note 30, at 129.

<sup>173</sup> See Sheriff, *supra* note 168; United Nations High Commissioner for Human Rights, *supra* note 15, at 11–12.

<sup>174</sup> See Rothstein, *From SARS To Ebola*, *supra* note 17, at 274–76.

Liberia's President . . . reportedly rejected the recommendation of international experts and her own public health officials, and imposed the quarantine at the urging of the army. In theory, if the infection could be localized and contained, then it could "burn out" before spreading to the rest of Monrovia and beyond. This rationale was unsupported by the conditions of the Ebola epidemic, however, as the virus was not localized in West Point. Furthermore, because people in West Point live so close together and formed angry crowds to protest the quarantine, the increase in close human contact actually increased the risk of transmission.<sup>175</sup>

Officials in Liberia quickly realized the harm that the action caused, and the quarantine served as a cautionary example throughout the outbreak. In contrast, officials in Sierra Leone did not integrate the lessons learned by Liberia into their response.<sup>176</sup>

At a minimum, the international negotiations to update the Siracusa Principles should discuss the legal justification for a government's decision to take coercive action against a significant part of its population in a public health emergency. Any updates should also create applicable guidance for the nations that continue to respond to public health emergencies in this manner. Delineating these criteria in an international principle will allow international scrutiny to occur when violations are apparent. Although amending the Siracusa Principles to address mass quarantine will prompt engagement around this issue, it will fail to fully address the human rights concerns raised by mass quarantines.

## 2. *Integrating Human Rights into the WHO and the International Health Regulations*

As human rights play a fundamental role in the successful implementation of a public health intervention, it is essential that the WHO integrate protecting human rights into its organizational structure, regulations, and responsibilities during public health emergencies. As previously discussed, the WHO Constitution does not acknowledge individual rights outside of the right to health.<sup>177</sup> Furthermore, the

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<sup>175</sup> *Id.* at 274.

<sup>176</sup> See Assessment Capacities Project [ACAPS], *Ebola Outbreak in West Africa Lessons Learned from Quarantine: Sierra Leone and Liberia*, 2, 3, 6 (Mar. 19, 2015), [http://www.acaps.org/img/documents/t-acaps\\_thematic\\_note\\_ebola\\_west\\_africa\\_quarantine\\_sierra\\_leone\\_liberia\\_19\\_march\\_2015.pdf](http://www.acaps.org/img/documents/t-acaps_thematic_note_ebola_west_africa_quarantine_sierra_leone_liberia_19_march_2015.pdf).

<sup>177</sup> See *supra* notes 95–96 and accompanying text.

operation of the WHO as a medical organization limits its current capacity to advocate for and protect human rights.<sup>178</sup> While the WHO's current system provides medical and technical support, monetary assistance, and outlines for best practices, it does not create a legal institutional structure. Yet, the WHO can adapt its institutional capacity to fill a critical need in protecting human rights during public health emergencies. It is important for the WHO to take on the role of protecting human rights because the WHO staff are on the ground working with governments and public health authorities during the first stages of disease outbreaks. As such, they are a pertinent and legitimate actor, with access and influence that may not be granted to NGOs.<sup>179</sup> Promoting the right to health through medical interventions and protecting human rights are not mutually exclusive goals and the failure to protect human rights can result in adverse health outcomes for individuals and communities.<sup>180</sup> This is not an argument that the WHO Constitution should be amended to acknowledge fundamental human rights or set out their protection as a goal. Within the scheme of promoting the right to health, the WHO should act through the World Health Assembly to integrate promoting the protection of human rights into the WHO's responsibilities during a public health emergency.<sup>181</sup>

The IHRs aim to provide public health responses to public health risks in ways that are "commensurate with international traffic and trade."<sup>182</sup> The IHRs broadly define public health risks to mean, "a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger."<sup>183</sup> This broad definition is important because it brings the negative impacts of violating human rights into the scope of a public health risk and, as such, taking action to protect human rights could fall within the purpose of the IHRs and the WHO. The IHRs allow the WHO to give non-binding advice to member

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<sup>178</sup> See Taylor, *supra* note 97, at 303.

<sup>179</sup> See Calain & Poncin, *supra* note 30, at 128.

<sup>180</sup> See Mann, *supra* note 55, at 9; See generally Rothstein, *From SARS To Ebola*, *supra* note 17, at 253; Calain & Poncin, *supra* note 30, at 126. See ACAPS, *supra* note 176, at 6; see also Leickness C Simbayi et. al, *Internalized Stigma, Discrimination, and Depression Among Men and Women living with HIV/AIDS in Cape Town, South Africa*. 9 SOC. SCI. & MED. 1823, 1830 (2007).

<sup>181</sup> As previously discussed, the IHRs do have an implementation principle that calls for the protection of human rights. See *supra* note 110 and accompanying text.

<sup>182</sup> IHR, *supra* note 21, at art. 2.

<sup>183</sup> *Id.* at art. 1.

states regarding time-limited and risk-specific public health emergencies.<sup>184</sup> Defining human rights violations as a public health risk would allow the WHO to give recommendations in this area.

Using recommendations as a mechanism to protect human rights is not a legally binding measure and would not create rights for individuals or obligations for member states. Furthermore, under the current IHRs, the member state must request the WHO to give recommendations regarding a public health emergency. Still, broadening the scope of the WHO to include human rights is a powerful intervention. The WHO is a global authority on public health and generally uses its position to pressure reluctant states into compliance.<sup>185</sup> Countries who are in the middle of a public health emergency and have asked the WHO to “develop and recommend . . . critical health measures for implementation by States Parties during such an emergency” depend on those recommendations.<sup>186</sup> Even if the recommendations are not ultimately adopted, integrating the protection of human rights alongside technical health recommendations will increase international scrutiny of potential abuses and outline best practice models that will potentially overcome the assumption that public health interventions cannot work alongside human rights.

Beyond issuing recommendations for a state during a public health emergency, the WHO should also consider including human rights monitoring and reporting as a responsibility under the Emergency Response Framework. This framework establishes how the WHO will implement emergency risk management measures. In a public health emergency, the WHO works at the epicenter of the outbreak to actively conduct risk assessments, monitor the progression of the emergency, and report on the conditions.<sup>187</sup> The WHO’s frontline officials work alongside the local public health authorities and the health structure to implement the national and international response.<sup>188</sup> The structure of the WHO response is outlined in the Emergency Response Framework.<sup>189</sup> Intriguingly, the scope of the risk assessments is broad and includes

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<sup>184</sup> See *id.* at arts. 1, 3 (4), 15.

<sup>185</sup> See WHO, Frequently Asked Questions about the International Health Regulations (2005), at 3, (2009) [hereinafter FAQ], <http://www.who.int/ihr/about/FAQ2009.pdf>.

<sup>186</sup> See *id.* at 4.

<sup>187</sup> See EMERGENCY RESPONSE FRAMEWORK 15, WHO (2013), [http://www.who.int/hac/about/erf\\_.pdf](http://www.who.int/hac/about/erf_.pdf).

<sup>188</sup> See *id.* at 14.

<sup>189</sup> See *id.* at 14.

“potential down-stream public health consequences” with technical input from “behavioral/social interventions experts.”<sup>190</sup> The WHO already acknowledges the social aspect of an infectious disease and while the WHO’s technical capacity would have to expand to include expert knowledge in human rights, the Emergency Response Framework could be amended to include protecting human rights as a fundamental aspect of the strategic response plan.

Existing international infrastructure can be substantively and procedurally amended to include protecting human rights as an integral aspect of promoting public health during public health emergencies. Other international organizations—such as the United Nations High Commissioner’s Office for Human Rights—will continue to play a meaningful role in protecting human rights. The unique on-the-ground role of the WHO, the WHO’s authority as a medical and technical expert, and capability to make recommendations and outline responses grants the organization a powerful pulpit to highlight human rights violations during epidemics to obtain compliance. The implementation of the human rights protections ultimately depends on states to have substantive protections for human rights, and grant access to objective legal opportunities to challenge quarantine orders.

#### B. UTILIZING THE AFRICAN HUMAN RIGHTS SYSTEM: EMPOWERING CIVIL SOCIETY TO PUSH FOR LIMITS OF RIGHTS IN PUBLIC HEALTH EMERGENCIES BASED ON THE PRINCIPLE OF NON-DISCRIMINATION

The human rights system created by the ACHPR provides another opportunity to challenge the state’s arbitrary or unreasonable use of quarantine. As previously discussed, there is no general derogation provision to the ACHPR. The state, communities, and individuals must uphold their obligations even during a public health emergency that threatens the life and health of the nation.<sup>191</sup> This means that the ACHPR applies even when Sierra Leone’s own constitutional protections do not.

<sup>190</sup> *Id.* at 46.

<sup>191</sup> See OKAFOR, *supra* note 118, at 84. The African Commission on Human and Peoples’ Rights explains that “[t]he African Charter, unlike other human rights instruments, does not allow for State parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.” *Commission nationale des droits de l’Homme et des libertés v. Chad*, Communication 74/92, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], at para. 21 (Oct. 11, 1995), [http://www.achpr.org/files/sessions/18th/comunications/74.92/achpr18\\_74\\_92\\_eng.pdf](http://www.achpr.org/files/sessions/18th/comunications/74.92/achpr18_74_92_eng.pdf).

Sierra Leone's general claw-back provision for rights in a public health emergency limits the constitutional protections for individuals. As such, the claw-back provision directly conflicts with the Charter and provides an excellent opportunity for civil society and an active judiciary to challenge whether the Constitution of Sierra Leone complies with the ACHPR. Regardless of the potential for Constitutional change, the rights protected by the ACHPR always apply in spite of a state of emergency or the State's resulting actions.<sup>192</sup> The continuing application of the rights, even during a state of emergency, allows activists, NGOs, or other states to bring challenges to use of quarantine orders under the Charter.

The ACHPR grants jurisdiction to a wide variety of parties ranging from individuals to international NGOs and internal civil activists.<sup>193</sup> Structurally, the Commission serves as an important gatekeeper that investigates and informs the claims.<sup>194</sup> This gatekeeper role also buttresses individual jurisdiction because the Commission's investigative capacity greatly expands the petitioner's ability to fully illustrate the extent of the human rights abuses that have occurred.<sup>195</sup> The Commission therefore serves in a name and shame role. The tactic of naming and shaming is perhaps the most important role of the ACHPR because the Commission and the Court have not been wildly successful in compelling states to comply with the specific provisions of the ACHPR.<sup>196</sup> Therefore, exposing human rights abuses using the investigatory weight of the Commission and informing both internal and international networks allows activists to build political pressure to change the accepted standards for human rights within a state.

One strategy to changing a State's actions regarding human rights is to use the Court and the Commission as partners and key political players that view improving human rights as a conversation between interested parties, not as a traditional judicial system.<sup>197</sup> Unlike an internal judicial decision, the decisions of the Court and the Commission rely on the political will of a non-compliant State to comply with the recommendations and make the necessary changes to become

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<sup>192</sup> See OKAFOR, *supra* note 118, at 84.

<sup>193</sup> See Protocol to the African Charter, *supra* note 115, at 2.

<sup>194</sup> See Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and People's Rights*, 31 HOW. L.J. 643, 651-52 (1988).

<sup>195</sup> See OKAFOR, *supra* note 118, at 86-87.

<sup>196</sup> See *id.* at 68.

<sup>197</sup> See *id.* at 3-4.

compliant.<sup>198</sup> This model is common in regional human rights systems and the ECtHR uses this model with great success in pressuring states to implement the recommendations or decisions that the Court makes.<sup>199</sup> In contrast, compliance with the African Commission's decisions has continually been an issue.<sup>200</sup> As compliance has remained an issue, viewing the implementation of the Court as a panacea that will change human rights conditions within Africa is ignorant of the long-term process necessary to affect change.<sup>201</sup> Instead, using the African System as a partner for internal networks of activists—while continuing to build political will for states to comply with decisions made by the Court—will create opportunities for incremental change.<sup>202</sup>

In comparison to other human rights courts such as the ECtHR, the African System is perceived as ineffective and lacking enforcement powers.<sup>203</sup> Critics of the ACHPR note that Commission recommendations have commonly been ignored.<sup>204</sup> Other commenters are more optimistic about the actual impact of the ACHPR on its member states. Obiora Chinedu Okafor, for instance, argues that comparing the African System to the European System misses the manner in which the African System has begun to seep into the norms and legal fabric of the member states.<sup>205</sup> He outlines that, to measure the impact of the ACHPR, it is necessary to look at how the legal mechanisms of the African System have established a correspondence with the member states to implement incremental changes in their approach to protecting human rights.<sup>206</sup> A correspondence model measures the impact of a human rights system by tracing the interplay between the actors in the system and the impact of that interplay on civil society and activist networks within the state in question.<sup>207</sup> In this way, the impact is measured not by tracing compliance with the terms of a recommendation, but instead through whether the aspirations and norms outlined in the ACHPR are promoted and adopted within the legal fabric of the state.<sup>208</sup>

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<sup>198</sup> See *id.* at 81.

<sup>199</sup> See *id.* at 42.

<sup>200</sup> See *id.* at 78.

<sup>201</sup> See *id.* at 74–75.

<sup>202</sup> See *id.* at 90.

<sup>203</sup> See *id.* at 67.

<sup>204</sup> See *id.* at 72.

<sup>205</sup> See *id.* at 90.

<sup>206</sup> See *id.* at 4.

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* at 287.

In this correspondence process, it is essential to engage the civil society of a state so that lawyers and the judiciary use the ACHPR to advance the interpretation of the Sierra Leone Constitution consistent with the ACHPR.<sup>209</sup> By challenging state action at the national level and invoking the ACHPR as the legal basis for the challenge, civil society can create a space for the judiciary to read the principles of the ACHPR into the national jurisprudence.<sup>210</sup> As detailed by Okafor, this correspondence process was clearly seen in Nigeria, where civil society and an active judiciary brought incremental changes to the legal norms surrounding human rights during the dictatorship in the 1990s.<sup>211</sup>

Applying the correspondence process to Ebola, there is a huge base of academic interest, literature, and international activism that has mapped the human rights conditions during the outbreak.<sup>212</sup> Capitalizing on the resources that are engaged and invested in improving conditions following the end of the epidemic, civil society within Sierra Leone has an incredible opportunity to challenge the legal norms that allowed the imposition of arbitrary quarantines. Throughout this process, civil society must be aware that creating legal precedent or gaining a declaratory judgment against the state does not mean that the norms or the executive and or legislative actions will change in a subsequent emergency.

An active civil society and judiciary is only one half of the necessary political machinery to push for changing national norms within a public health emergency. It is equally important that local individuals negatively affected by the public health responses build networks as community activists in order to amplify their message and illustrate the potential political consequences of not addressing these issues. Numerous discrete populations felt the impact of the Ebola crisis and were stigmatized and discriminated against due to the fear and mistrust of the disease and government intervention.<sup>213</sup> The United Nations Office of the High Commissioner for Human Rights detailed those affected as:

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<sup>209</sup> See *id.* at 286.

<sup>210</sup> See *id.* at 288.

<sup>211</sup> See *id.* at 96–97.

<sup>212</sup> See generally Moon et al., *supra* note 4, at 2204; Human Rights Watch, *supra* note 22; United Nations High Commissioner for Human Rights, *supra* note 15, at 3; Oxfam, *Quarantines in Sierra Leone*, *supra* note 30, at 3; Oxfam, *Sierra Leone: Mass Quarantines*, *supra* note 34; Hodge et al., *supra* note 38, at 595; Rothstein, *From SARS To Ebola*, *supra* note 17, at 228–29; Rothstein, *Ebola, Quarantine and the Law*, *supra* note 23, at 6.

<sup>213</sup> See United Nations High Commissioner for Human Rights, *supra* note 15, at 12.

Children of whose parents are sick or have deceased are left to fend for themselves because people believe they might be infected as well, impacting children's rights. HCW's, E[bola] survivors, and family members of E[bola] patients are discriminated against and forced from their rental homes or fired from their jobs, impacting the right to housing and the right to work.<sup>214</sup>

The Treatment Action Campaign of South Africa (TAC) successfully used the model of building networks of affected individuals and mobilizing those individuals to force a national change in policy regarding the treatment of HIV.<sup>215</sup> To decrease the incidence of mother-to-child transmission of HIV, the TAC pushed the government to grant access to nevirapine for HIV-positive mothers.<sup>216</sup> The TAC used a combination of political pressure, grassroots coalition building, and litigation to eventually prevent the government from denying access to the antiretrovirals.<sup>217</sup> This activist push occurred after the democratic transition in South Africa and relied on the right to health outlined in the South African Constitution.<sup>218</sup>

To create a similar activist push to change the accepted practices during a public health emergency, activists should use the framework of the ACHPR to ensure the non-discriminatory and non-arbitrary application of quarantines. Examples of incremental changes throughout Africa illustrate that when civil society and an active judiciary couple with networks of local activists, the human rights goals of the ACHPR can be woven into the norms and legal framework of the nation.<sup>219</sup> To prevent further human rights abuses from occurring during subsequent public health emergencies, on-the-ground forces must begin the process of organizing, litigating, and lobbying.

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<sup>214</sup> *Id.*

<sup>215</sup> See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 134–135, 140–143 (2010) (describing the TAC protests and discussing the social movement campaign); see also *Minister of Health v. Treatment Access Campaign* 2002 (5) SA 721 (CC) at para. 3 (S. Afr.).

<sup>216</sup> See *Minister of Health v. Treatment Access Campaign*, (5) SA at para. 10.

<sup>217</sup> See Mark Heywood, *South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health*, 1 J. HUM. RTS. PRAC. 14, 22 (2009).

<sup>218</sup> See *id.* at 20–21.

<sup>219</sup> See *id.* at 20–21.

C. NATIONAL HUMAN RIGHTS INFRASTRUCTURE: CREATING  
OPPORTUNITIES FOR LEGAL CHALLENGES AND POST-QUARANTINE  
REMEDIES

The most pressing national policy change in Sierra Leone is the elimination of the overarching claw-back provision that allows the complete derogation from human rights protections during public emergencies. Not only is this provision contradictory to the terms of the ACHPR, but it also eliminates post hoc review of the actions taken by the executive to alleviate the emergency.<sup>220</sup> Because the president in a public emergency does not have to give any deference to the judiciary's opinion on the veracity of its actions, the lack of judicial safeguards for individuals affected by the executive's actions ensures that the judiciary cannot protect arbitrary violations of individual's human rights.<sup>221</sup> In this regard, working with the African Commission to bring the Constitution of Sierra Leone in line with the ACHPR and thereby eliminating the general claw-back provision would create the possibility for judicial review of human rights violations during public health emergencies.

Access to the judiciary is, of course, not a panacea against an arbitrary application of a quarantine order. Despite American jurisprudence that limits the state's use of quarantine, healthcare workers returning from West Africa to the United States were quarantined despite the clear lack of medical necessity.<sup>222</sup> For example, in the case of Ms. Hickox, the governors of both New Jersey and Maine ordered her quarantine despite the lack of medical necessity.<sup>223</sup> Ms. Hickox challenged the order through a preliminary injunction and now seeks civil redress for the harm that she suffered from the arbitrary imposition of quarantine.<sup>224</sup> As demonstrated in the case of Ms. Hickox, the American process allows for independent review both during the quarantine and after it has ended to ensure the states actions were

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<sup>220</sup> See Amnesty Int'l, *supra* note 167.

<sup>221</sup> The general derogation can be directly contrasted to the United States jurisprudence. As the assertion in *Jacobson v. Massachusetts* is that courts must have the power to review the use of public health police powers to ensure their reasonable use, procedural due process remains the cornerstone of American jurisprudence. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

<sup>222</sup> See AM. CIVIL LIBERTIES UNION, FEAR, POLITICS, AND EBOLA: HOW QUARANTINES HURT THE FIGHT AGAINST EBOLA AND VIOLATE THE CONSTITUTION 36 (2015) [hereinafter ACLU], [https://www.aclu.org/sites/default/files/field\\_document/aclu-ebolareport.pdf](https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf).

<sup>223</sup> See *id.* at 4.

<sup>224</sup> *Id.* at 39.

reasonable.<sup>225</sup> Access to the judiciary also forces the state to justify why it acted.<sup>226</sup> It is unlikely that Ms. Hickox will raise a discrimination angle within her case because healthcare workers are not a protected constitutional class in the United States. The American Civil Liberties Union reported stigmatization and discrimination against immigrants from Western Africa although there was no indication that they posed a threat to public health.<sup>227</sup> For example, “stigma was especially rife in states with large populations of West African immigrants, such as New York. Two young brothers in the Bronx, who recently emigrated from Senegal, were beaten to the point of serious injury while being called ‘Ebola.’”<sup>228</sup> Perhaps a non-discrimination angle could be used in a case against the public health authorities with an argument that, by implementing arbitrary quarantines and other public health measures, the authority reinforced the stigma facing these individuals.

Within the ACHPR, the substantive clauses that protect human rights each have an internal limitations provision that allows a state to protect the public’s health.<sup>229</sup> For example, the freedom of association can be limited when there are, “necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”<sup>230</sup> If the African Commission and Court interpret the “necessity” element of the limitations clause in the same manner as other international courts, the Court will likely use a proportionality assessment to review the state’s actions.<sup>231</sup> Proportionality is a more rigorous process than rational review of determining if the state’s actions were justified. The state must be able to point to a reason conceived before the state took action that is proportional to the limits imposed on the right.<sup>232</sup> Proportionality review may provide more protection to human rights because it may force the state to provide a clearer explanation about the state’s decision to impose public health interventions. While it remains true that quarantine is an

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<sup>225</sup> See Kraemer et al., *supra* note 26, at 298. See generally Sell et al., *supra* note 1, at 2 (detailing the overturn of Ms. Hickox’s quarantine by the Maine District Court, and explaining the states’ various policies, methods, and implementation regarding quarantine of returning healthcare workers).

<sup>226</sup> American Civil Liberties Union, *supra* note 222 at 39.

<sup>227</sup> See *id.* at 29–30.

<sup>228</sup> *Id.* at 30.

<sup>229</sup> See generally ACHPR, *supra* note 61, at pt. I.

<sup>230</sup> *Id.* at art. 11.

<sup>231</sup> See Rothstein, *From SARS To Ebola*, *supra* note 17, at 254–55.

<sup>232</sup> See *id.* at 255.

essential part of the state's ability to protect the public's health during an epidemic, it is unlikely that a challenge regarding the state's decision to implement a quarantine provision will gain much political traction within Sierra Leone. The celebration that has occurred following the end of the epidemic will make it more difficult to challenge the policy decisions of the state. Outside of the lack of political will, proving how the imposition of arbitrary quarantines harmed individuals will be factually fraught.

Perhaps the most interesting angle for activists, NGOs, and affected states to challenge the arbitrary imposition of quarantine is by looking at discriminatory application or impact. As previously discussed, the ACHPR includes equality and non-discrimination duties for states, communities, and individuals.<sup>233</sup> This strong universal stand for equality is important because, if activists can show that quarantines were imposed in a discriminatory manner or had a discriminatory impact against a protected class, then a case can be brought in the African System based primarily on that discrimination. The non-discrimination and equality principles do not have internal limitations clauses.<sup>234</sup> Therefore, once proven, the formal clauses in the ACHPR do not provide an opportunity for the state to justify why it took action. A complaint based on non-discrimination highlights the true issue: that Sierra Leone's decisions caused increased harm to populations who were already marginalized, violating their right to human dignity. This line of reasoning can also illustrate the consequences of this arbitrary imposition of quarantines on a wide population, demonstrating that individuals affected by these violations had less trust in the healthcare system and were not willing to comply with healthcare workers.<sup>235</sup> Consider, for example, that reports indicated individuals hid family members who were ill or who had died from healthcare workers out of fear.<sup>236</sup> The non-discrimination approach must allow for further investigation to determine whether the quarantines were implemented with discriminatory intent, or had a discriminatory impact.<sup>237</sup> The ACHPR does not formally distinguish between

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<sup>233</sup> See *supra* note 113 and accompanying text.

<sup>234</sup> See ACHPR, *supra* note 61, at arts. 2, 19.

<sup>235</sup> See United Nations High Commissioner for Human Rights, *supra* note 15, at 2.

<sup>236</sup> Margaret Chan, *Ebola Virus Disease In West Africa—No Early End to the Outbreak*, 371, no. 13 NEW ENGLAND J. OF MED., 1183, 1183 (2014); Christine Mai-Duc & Paul Olund, *Unprecedented Ebola Outbreak In West Africa: What You Need to Know*, LA TIMES, (Oct. 29, 2014), <http://www.latimes.com/world/africa/la-ebola-outbreak-facts-20140725-htm1story.html>.

<sup>237</sup> In the case of the West Point quarantine in Liberia it seems clear that the intent of the quarantine was discriminatory, and a challenge to this action under the equality or non-discrimination

discriminatory intent and impact, so pushing this issue could both advance the jurisprudence of the African System and illustrate the importance of equality provisions. Finally, the non-discrimination approach acknowledges the breadth of the issue, as any discriminatory impact based on the economic status of the neighborhoods placed into quarantine will illustrate the enormity of the population harmed by the state's actions.

#### IV. CONCLUSION: FAILING TO PROTECT HUMAN RIGHTS CAUSES ADVERSE EFFECTS AND UNDERMINES PUBLIC HEALTH GOALS

Isolation, contact tracing, and quarantine during a disease outbreak unequivocally save lives. When used in an arbitrary and unreasonable manner, these measures can increase stigma, decrease treatment seeking, and work against public health goals.<sup>238</sup> Misinformation, hysteria, and fear built around the Ebola epidemic as a result of the poorly executed response to the disease.<sup>239</sup> In response to this public hysteria, quarantine, and other coercive public health measures were inappropriately used, thereby violating individuals' human rights. In response to these violations, a class action suit was filed against Connecticut for their quarantined policies for individuals returning from West Africa.<sup>240</sup> While this approach may produce an update to archaic jurisprudence in the United States, a wider scope is necessary to prevent human rights violations during public health emergencies. Furthermore, the same public scrutiny is not being imposed on the arbitrary and unnecessary quarantine measures imposed in West Africa.<sup>241</sup>

Overall, integrating a human rights approach into the many interlocking systems fighting the spread of infectious disease will require changes to international legal frameworks. First, the Siracusa Principles should be amended to offer clear guidance on the issue of mass quarantine. Second, the WHO should integrate human rights into the IHRs and the Emergency Response Framework. Even with the changes

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provisions of the Charter is likely to be successful. *See generally* Rothstein, *From SARS To Ebola*, *supra* note 17, at 271 (discussing incidents of discrimination).

<sup>238</sup> *See* Wynia, *supra* note 57, at 2–3. *See generally* Parmet, *supra* note 47, at 84; Lawrence Gostin & Jonathan M. Mann, *Towards the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Public Health Policies*, 1 HEALTH & HUM. RTS. 58, 64 (1994).

<sup>239</sup> *See* ACLU, *supra* note 222, at 29–30.

<sup>240</sup> *Liberian Cmty. Ass'n of Conn. v. Malloy*, No. 3:16-cv-00201, 2016 WL 491742, at \*3 (D. Conn. Feb. 8, 2016).

<sup>241</sup> *See* Calain & Poncin, *supra* note 30, at 131.

to international law, civil society and NGOs must compel national compliance with these principles by engaging in education and selective litigation. In this area, the unique provisions of the ACHPR may offer a compelling approach to achieve compliance. Medical advances such as effective treatment and vaccination may eliminate Ebola as a potential public health threat, but the emergence of new infectious diseases like Zika virus and drug-resistant tuberculosis will continue to challenge global health practitioners. It is well documented that coercive public health actions that violate individuals' human rights lead to harm. Creating and implementing solutions to prevent these violations from occurring will increase the effectiveness of public health initiatives and, ultimately, save lives.