Protecting Non-US Citizens from Removal Terminating HIV/AIDS Treatment

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Abstract

Part I of this Note introduces the problem of removal of non-US citizens with HIV/AIDS in the United States to countries where treatment is unavailable, and discusses case law in which the European Court of Human Rights and the Inter-American Commission on Human Rights have recognized a protection from removal that would terminate HIV/AIDS treatment. Part II examines the US domestic legal protections potentially available to non-US citizens in the United States whose removal will terminate their HIV/AIDS treatment, as well as the application of each of these legal protections to those with HIV/AIDS contesting deportation to countries lacking adequate access to HIV/AIDS treatment. Part III argues that while legal protections available to non-US citizens in this situation have proven inadequate, the United States may expand US domestic law to prohibit removal terminating HIV/AIDS treatment. The United States may also apply the American Declaration consistently with Inter-American Commission on Human Rights case law, or recognize a customary international law that compels their protection under the prohibition of cruel and unusual punishment or treatment.
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INTRODUCTION

Millions of individuals worldwide struggle with human immunodeficiency virus ("HIV") and acquired immunodeficiency syndrome ("AIDS") in an epidemic that continues to present global economic and health problems as well as legal issues. Some governments strive to provide sufferers with the best possible access to treatment. Scholars have discussed the international legal right of persons with HIV/AIDS to have access to life-sustaining medical treatment. A sub-topic of this discussion is the assertion of a legal right of persons with HIV/AIDS who presently have access to such medical treatment, but who are subject to a state order of deportation to a country where such treatment is unavailable. Although this right applies to very specific circumstances, and few deportees have invoked it in either international or US domestic courts, the issue of whether such a right exists is monumental because of the stakes involved. Non-US citizens seeking legal protection from removal

1. See infra notes 31-40 and accompanying text (discussing the human immunodeficiency virus ("HIV") and acquired immunodeficiency syndrome ("AIDS") epidemic, resulting problems, and US and UK aid efforts).

2. See infra notes 39-40 and accompanying text (describing US efforts to provide treatment for HIV/AIDS abroad); see also notes 33-40 and accompanying text (discussing the HIV/AIDS epidemic, the limited access to treatment in parts of the world, and efforts by governments to expand access to treatment).


5. See infra Parts I. and II. (discussing claims in international and domestic case law, which contest removal that would terminate HIV/AIDS treatment).
that would terminate their HIV/AIDS treatment claim that removal would constitute a death sentence. Nonetheless, as demonstrated in both international and US domestic jurisprudence, protection from life-threatening removal under these circumstances is usually very limited where it exists at all.

In the United States, the issue of whether there exists a legal protection from removal that would terminate HIV/AIDS treatment has played out in a series of cases under US domestic law. Non-US citizens have, on various grounds, contested their removal under the cruel and unusual punishment clause of the Eighth Amendment to the US Constitution. All US Courts of Appeals, however, have held that the Eighth Amendment is inapplicable to deportation proceedings because, as the US Supreme Court has held, deportation does not constitute punishment for a crime. In *Fong Yue Ting v. United States*, the

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6. See infra note 27 (noting cases in which the petitioner claimed her removal amounted to a death sentence); see also infra notes 124–50 and accompanying text (implying that the Inter-American Commission on Human Rights found that Mortlock's removal amounted to a death sentence).

7. See infra Part I.C–E. (discussing protections from removal terminating HIV/AIDS treatment in three cases before international courts); Part II. (discussing US domestic protections from removal as applied to removal terminating HIV/AIDS treatment).

8. See infra Part II. (discussing US domestic case law as applied to removal terminating HIV/AIDS treatment).

9. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); see infra note 10 (citing cases in which non-US citizens have contested their removal under the Eighth Amendment to the US Constitution).

10. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) (holding that the purpose of deportation is to put an end to violation of immigration laws, not to punish past transgressions, and, accordingly, “various protections that apply in the context of a criminal trial do not apply in a deportation hearing”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime.... It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend.”); see, e.g., *Mayne v. Att'y Gen.*, 392 F. App’x 94, 98 (3d Cir. 2010) (holding that deportation is a civil matter, and therefore, may not violate the cruel and usual punishment clause); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 695 (7th Cir. 2008); *Stewart v. Gonzales*, 247 F. App’x 438, 440 (4th Cir. 2007) (“[T]he Eighth Amendment does not apply to deportation and removal proceedings.”); *Elia v. Gonzales*, 431 F.3d 268, 276 (6th Cir. 2005) (holding that the cruel and unusual punishment clause under the Eighth Amendment is inapplicable to deportation proceedings because “the Supreme Court has held, [that] deportation does not constitute punishment”); *LeTourneur v. INS*, 538 F.2d 1568, 1570 (9th Cir. 1976) (holding that deportation is “not cruel and unusual punishment under
US Supreme Court held that a deportation order is not punishment for a crime, but rather a method of enforcing immigration law by returning a non-citizen who has not complied with immigration law to his or her home country. Thus, non-US citizens in general, and those with HIV/AIDS whose removal will terminate their HIV/AIDS treatment, must invoke one of several US domestic laws: asylum, withholding of removal, and the law enacting the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

In some cases, courts have recognized that deportation terminating HIV/AIDS treatment violates domestic asylum law in the United States, which prohibits removal where a non-US citizen has a well-founded fear of persecution based on membership in a suspect category, such as people living with HIV/AIDS. In other cases, courts have reasoned that deportation would be illegitimate under the rubric of withholding of removal, which implements US obligations under the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention") through Section 241(b)(3) of the Immigration and Nationality Act ("INA"). Withholding removal countermands deportation that would result in threats to life or freedom because of membership in a suspect category.

the Eighth Amendment even though the penalty may be severe); Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) (holding that deportation is "classified as a civil rather than a criminal procedure"); see also Ingraham v. Wright, 430 U.S. 651, 667-68 (1977) ("In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable. Thus, in Fong Yue Ting v. United States, 149 U.S. 698 (1893), the Court held the Eighth Amendment inapplicable to the deportation of aliens on the ground that 'deportation is not a punishment for crime.'").

11. Fong Yue Ting, 149 U.S. at 730.
12. See infra Part II. (discussing the legal protections under US domestic law).
13. See infra notes 161-81 and accompanying text (discussing asylum law and cases in which courts have considered asylum claims of non-citizens with HIV/AIDS).
15. See infra notes 182-92 and accompanying text (discussing case law in which courts have considered withholding claims of non-citizens with HIV/AIDS).
Still, other cases have suggested that deportation under these circumstances would constitute torture, which is prohibited under international law by CAT and under US domestic law that enacted CAT.\textsuperscript{16}

As this Note demonstrates, asylum, withholding, and the law enacting CAT are limited in their applications to people living with HIV/AIDS in the United States who would lose access to medical treatment if removed.\textsuperscript{17} Asylum requires persecution, a standard which lack of medical care has generally failed to meet.\textsuperscript{18} Withholding requires that the government deliberately deny access to necessary amenities, while the law enacting CAT requires intentionally-inflicted torture.\textsuperscript{19} US federal case law has demonstrated that asylum, withholding of removal, and the law enacting CAT are too narrow to protect non-US citizens from removal terminating HIV/AIDS treatment.\textsuperscript{20}

In order to protect non-US citizens with HIV/AIDS from removal that will terminate treatment, the United States must either broaden US domestic law or invoke international law.\textsuperscript{21} Under domestic law, the United States may expand the laws of asylum or withholding, or the law enacting CAT, to protect non-US citizens from removal that will terminate HIV/AIDS treatment.\textsuperscript{22} Under international law, the United States may apply the American Declaration of the Rights and Duties of Man

\begin{footnotes}
\item[16] See infra notes 192-201 and accompanying text (describing the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and its application to cases of non-citizens with HIV/AIDS).
\item[17] See infra Part II. (discussing US domestic legal protections from removal); Part III.A. (arguing that these protections are inadequate in protecting non-US citizens from removal that will terminate HIV/AIDS treatment).
\item[18] See infra notes 168-70 and accompanying text (discussing two cases in which courts denied the asylum claims of non-citizens with HIV/AIDS based on lost access to medical care because they failed to demonstrate persecution).
\item[19] See infra notes 168–81 (describing the requirements of withholding that have limited this protection as applied to cases of non-citizens with HIV/AIDS, as well as an exceptional case); see also infra Part II.D. (discussing the intent requirement of claims under the law implementing CAT).
\item[20] See infra Parts II–III.A. (discussing asylum, withholding, and the law enacting CAT in the United States as applied to the removal of non-citizens with HIV/AIDS who face losing access to medical treatment if removed).
\item[21] See infra Part III.B–C. (discussing the broadening of US domestic law to recognize protection from removal terminating HIV/AIDS treatment, and solutions invoking international law).
\item[22] See infra Part III.B. (discussing potential US domestic protections from removal terminating HIV/AIDS treatment).
\end{footnotes}
"American Declaration") consistently with the jurisprudence of the Inter-American Commission on Human Rights. The United States may also recognize a protection under customary international law based on a conception that has already forged the holdings of two regional human rights courts—the European Court of Human Rights and the Inter-American Commission on Human Rights—in which people with HIV/AIDS have successfully challenged deportation. This conception is that deporting a person with HIV/AIDS to a country where they will not have access to life-sustaining medical treatment constitutes cruel and unusual punishment or treatment. By recognizing an emerging customary international norm, US policymakers and US federal courts may protect the lives of non-citizens with HIV/AIDS facing removal from the United States. This norm may, but need not, entail recognizing deportation under these circumstances as cruel or unusual punishment or treatment, which is independent of the ideas of asylum, torture, or withholding, because of a threat to life or dignity if deportation is carried out.

23. See infra note 231 and accompanying text (recommending US ratification of the American Declaration of the Rights and Duties of Man ("American Declaration").


26. See infra Part I.C-E. (discussing international case law); see also infra Part III.C. (discussing an emerging customary international law).

27. See infra note 85 and accompanying text (characterizing the right to die with dignity as a right to freedom from cruel and unusual punishment); see also infra Part II.B-D. (describing asylum, withholding, and CAT in the context of removal terminating HIV/AIDS treatment). Some articles have discussed deportation as punishment in general, but not within the context of losing HIV/AIDS treatment. See supra note 25; see also infra notes 227-29 and accompanying text (analytically distinguishing recognition of deportation in general as punishment, and recognition of deportation which terminates HIV/AIDS treatment as punishment); infra Part III.B-C. (arguing that the United States
Part I of this Note introduces the problem of removal of non-US citizens with HIV/AIDS in the United States to countries where treatment is unavailable, and discusses case law in which the European Court of Human Rights and the Inter-American Commission on Human Rights have recognized a protection from removal that would terminate HIV/AIDS treatment. Part II examines the US domestic legal protections potentially available to non-US citizens in the United States whose removal will terminate their HIV/AIDS treatment, as well as the application of each of these legal protections to those with HIV/AIDS contesting deportation to countries lacking adequate access to HIV/AIDS treatment. Part III argues that while legal protections available to non-US citizens in this situation have proven inadequate, the United States may expand US domestic law to prohibit removal terminating HIV/AIDS treatment. The United States may also apply the American Declaration consistently with Inter-American Commission on Human Rights case law, or recognize a customary international law that compels their protection under the prohibition of cruel and unusual punishment or treatment.

I. REMOVAL OF NON-CITIZENS WITH HIV/AIDS AND INTERNATIONAL RESPONSE

Despite recognizing the deleterious effects of HIV/AIDS and the potentially positive impact of treatment on individuals with HIV/AIDS, the United States may, in accordance with domestic law, deport non-US citizens with HIV/AIDS to countries where they will lose access to such treatment. In the...
United States and abroad, international bodies have prohibited removal in these circumstances under international law. Customary international law compels scrutiny of this trend and consideration of the impact it may or should have on US domestic jurisprudence. Section A of this Part first describes the current status of the HIV/AIDS epidemic and the problems presented by removal of persons with HIV/AIDS. It then introduces two international bodies that have recognized a legal protection from removal terminating HIV/AIDS treatment: the European Court of Human Rights and the Inter-American Commission on Human Rights. Section B discusses the two international documents under which these bodies found relief from removal for non-citizens with HIV/AIDS, namely, the European Convention on Human Rights of 1950 (“European Convention”), and the American Declaration. Sections C and D examine D. v. United Kingdom and N. v. United Kingdom, two cases in which the European Court of Human Rights recognized a legal protection from removal that terminates HIV/AIDS treatment. Last, Section E discusses an Inter-American Commission on Human Rights case, Andrea Mortlock, which recognized a protection from removal for an HIV-positive non-US citizen living in the United States.

A. The HIV/AIDS Epidemic

The HIV/AIDS epidemic stands out among public health problems not only because it claims millions of lives annually and presents a long-standing challenge in making treatment available, but also because it creates a crippling stigma for those it afflicts. HIV/AIDS has detrimental physical effects on sufferers. The World Health Organization reports that 1.8 million people died of AIDS-related illnesses in 2009.

30. See infra notes 61–66 and accompanying text (discussing the role of customary international law in US federal jurisprudence).
31. See infra note 35 (discussing discrimination against people with HIV/AIDS).
32. See Global Summary of the AIDS Epidemic, WORLD HEALTH ORGANIZATION, supra note 28 (quantifying annual AIDS-related casualties worldwide).
33. See Global Summary of the AIDS Epidemic, WORLD HEALTH ORGANIZATION, supra note 31 (providing statistics on HIV/AIDS-related fatalities); HIV Surveillance, Estimates, Monitoring and Evaluation, WORLD HEALTH ORGANIZATION, supra note 28 (explaining...
HIV/AIDS is economically detrimental both at household and national levels. Widespread discrimination also threatens those with HIV/AIDS in many parts of the world.45

Treatment significantly improves the quality and length of life for individuals living with HIV/AIDS.46 Treatment also decreases the visibility of symptoms, providing a check against some discrimination.47 Unfortunately, HIV/AIDS treatment is largely unavailable in many countries. According to a report by the World Health Organization, as of December 2009, fewer than half of the people in many low- and middle-income countries


36. See Novogrodsky, supra note 3, at 15 (stating that sustained treatment improves the quality of life for HIV-positive persons and allows them to "work, parent, and live as full a life as possible...."); HIV/AIDS Treatment, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/topics/treatment/index.htm (last visited Apr. 1, 2011) ("Although there is no cure for HIV infection, there are treatment options that can help people living with HIV experience long and productive lives."); Byron & Laput, supra note 35 ("Breakthroughs in HIV treatment allow patients to live longer, with no apparent symptoms."); Caitlin Hagan, CDC: HIV Testing on the Rise, CNN (Nov. 30, 2010, 12:36 PM), http://pagingdrgupta.blogs.cnn.com/2010/11/30/hiv-testing-on-the-rise ("Early treatment of HIV, before symptoms fully develop, can effectively prolong an individual's life an average of 39 years.").

37. See Novogrodsky, supra note 3, at 15 ("Sustained treatment ... renders symptoms largely invisible—an important check against some forms of abject discrimination ... .")
who needed antiretroviral therapy were receiving it.\textsuperscript{38} The United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008 ("US Leadership Against HIV/AIDS Act") states that "[l]ack of health capacity, including insufficient personnel and inadequate infrastructure, in sub-Saharan Africa and other regions of the world is a critical barrier that limits the effectiveness of efforts to combat HIV/AIDS, tuberculosis, and malaria, and to achieve other global health goals."\textsuperscript{39} The US Leadership against HIV/AIDS Act committed more than forty-eight billion dollars over five years to the President's Emergency Program for AIDS Relief ("PEPFAR"), "the most ambitious foreign public health program ever launched by the United States."\textsuperscript{40}

Despite the epidemic, many countries, including South Korea, the United Kingdom, and the United States deport non-citizens with HIV/AIDS.\textsuperscript{41} Commentators have discussed the
diminished access to life-sustaining treatment that results from removal. Some international human rights courts have considered whether there exists, or should exist, a legal protection from removal that terminates a non-citizen’s life-sustaining HIV/AIDS treatment. Several cases from the European Court of Human Rights, and one case from the Inter-American Commission on Human Rights, have recognized protections under the European Convention and the American Declaration, respectively.

The European Court of Human Rights is an international judicial body established in 1959 to rule on alleged state and individual violations of the European Convention. It has jurisdiction over states that have ratified the European Convention. The Parliamentary Assembly of the Council of Europe elects a judge from each state from a list of candidates provided by that state. The court thus has one judge for each state that has ratified the European Convention, presently forty-seven states.

The Inter-American Commission on Human Rights, also created in 1959, is an autonomous organ of the Organization of American States (“OAS”), a regional organization of which the United States is a member. The Inter-American Commission on

positive for HIV); see also infra note 146 and accompanying text (stating that until a change in the law in 2010, a non-citizen attempting to enter the United States was inadmissible because of his HIV-positive status).

42. See Novogrodsky, supra note 3, at 14 (discussing removal of people with HIV/AIDS as a subtopic of an emerging right to HIV/AIDS treatment in international law); Todorvs, supra note 4, at 22 (making recommendations for protecting people with HIV/AIDS from removal).


44. See infra Part I.B. (discussing the relevant provisions of those documents).


47. See id. (describing the election process).

48. See id.

Human Rights upholds human rights duties under the American Declaration, among other documents.\textsuperscript{50} It may only process individual cases where a petitioner alleges that an OAS member has violated her human rights.\textsuperscript{51} The United States has ratified the Charter of the Organization of American States and therefore the American Declaration has been considered binding upon the United States, despite US case law to the contrary.\textsuperscript{52} Because the United States is a member of the OAS, Andrea Mortlock, the applicant in the Inter-American Commission on Human Rights case discussed in Part I.E. below, was able to allege a violation of the American Declaration.\textsuperscript{53}

\section*{B. International Documents}

The European Court of Human Rights has protected a non-citizen with AIDS from removal under Article 3 of the European Convention, while the Inter-American Commission on Human Rights has protected a non-citizen with HIV under Article XXVI of the American Declaration and the OAS.

\textsuperscript{50} See What is the IACHR?, supra note 49 (explaining that the Inter-American Commission on Human Rights applies the American Declaration of the Rights and Duties of Man ("American Declaration") in cases brought against states not parties to the American Convention on Human Rights); see also Sarah H. Cleveland, 110 Colum. L. Rev. 225, 248 (2010) ("The United States has signed the American Declaration and the American Convention, but has not ratified the American Convention."); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int’l Conference of American States, Art. 23, O.A.S. Official Record, OEA/Ser.L/V/11.25 (May 12, 1948) [hereinafter American Declaration].

\textsuperscript{51} See What is the IACHR?, supra note 49 ("The Commission may only process individual cases where it is alleged that one of the member [s]tates of the OAS is responsible for the human rights violation at issue.").

\textsuperscript{52} See infra Part I.E. (discussing the Andrea Mortlock case, in which the Inter-American Commission on Human Rights ruled that the United States had violated the American Declaration).
of the American Declaration. Article 3 of the European Convention states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” In the case of deportation, the deporting state is responsible for even those acts of torture, ill-treatment or punishment of the receiving state. The European Court of Human Rights has held that it would not consider conflicting interests of the deporting state when considering whether a violation of Article 3 has occurred; the prohibition in that article is absolute. Article XXVI of the American Declaration, titled “Right to due process of law,” provides that “[e]very person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.” The Inter-American Commission on Human Rights has generally recognized violations of Article XXVI in cases involving torture, disappearances, and exile.

The European Convention does not bind US federal courts, and whether the American Declaration binds US federal courts is

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56. See generally Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (protecting from extradition a US citizen charged with murder who would likely receive the death penalty if returned to the United States); see also Gianluca Gentili, European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-Treatment is a Genuine Risk, 8 INT’L J. CONST. L. 311, 314 (2010) (“Under Article 3, even those acts of torture or ill-treatment carried out by the receiving state remain the responsibility of the deporting state.”).

57. See Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1855 (holding that the activities of the person who would be expelled, “however undesirable or dangerous, cannot be a material consideration” in determining whether the state has violated Article 3); see also Vilvarajah v. United Kingdom, 14 Eur. Ct. H.R. (ser. A) 248, 289 (1991) (characterizing Article 3 as absolute).

58. American Declaration of the Rights and Duties of Man, supra note 50, art. XXVI.

International case law under these documents, however, is relevant to removal of non-citizens from the United States to the limited extent that customary international law has force in US federal courts. Customary international law refers to the "soft, indeterminate" body of law which general customs and practices of nations, international conventions, and the teachings of legal scholars have created. A US court shall resort to customary international law only where there is no controlling executive or legislative act, judicial decision, or treaty. For example, in Fernandez v. Wilkinson, the District Court of Kansas prohibited the indeterminate detention of an excludable alien under customary international law, although US statutory and constitutional law did not prohibit his detention. Scholars, however, debate the extent to which US federal courts may apply customary international law. The status of the European

60. See European Convention on Human Rights, supra note 55 (stating that the governments signatory to the European Convention are members of the Council of Europe); see also supra note 52 (discussing whether the American Declaration binds US federal courts).

61. See infra notes 62-65 and accompanying text (discussing the role of customary international law in US domestic jurisprudence).

62. See Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003) ("[C]ustomary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source."); see also Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), aff'd on other grounds, 654 F.2d 1382 (10th Cir. 1981) ("Principles of customary international law may be discerned from an overview of express international conventions, the teachings of legal scholars, the general custom and practice of nations and relevant judicial decisions.").

63. See TMR Energy Ltd. v. State Property Fund of Ukr., 411 F.3d 296, 302 (D.C. Cir. 2005) (citing The Paquete Habana, 175 U.S. 677, 700 (1900)) ("Customary international law comes into play only 'where there is no treaty, and no controlling executive or legislative act or judicial decision.'"); United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003) (citing The Paquete Habana, 175 U.S. at 700) ("It has long been established that customary international law is part of the law of the United States to the limited extent that 'where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.'").

64. Fernandez, 505 F. Supp. at 798 (recognizing a remedy under the Universal Declaration of Human Rights and the American Convention on Human Rights because, although the United States has not expressly consented to be bound by those documents, widespread prohibition of arbitrary detention among other nations created binding customary international law).

Convention as a source of customary international law is also unclear. The Sections that follow discuss three cases from which may be emerging customary international law prohibiting removal that terminates HIV/AIDS treatment. Specifically, the discussion includes two European Court of Human Rights cases, followed by one Inter-American Commission on Human Rights case.

C. D. v. United Kingdom

In D. v. United Kingdom, the European Court of Human Rights considered the removal of a non-citizen with AIDS who would lose access to medical treatment in the receiving country. The St. Kitts native, known as “D.,” sought temporary entry to the United Kingdom. Immigration authorities, however, found him in possession of cocaine at Gatwick Airport in London. He was arrested and charged with a drug offense. While serving his prison sentence, he suffered an attack of pneumocystis carinii pneumonia, and was subsequently diagnosed with HIV and as suffering from AIDS.

Based upon the advanced stage of his illness and the lack of medical treatment available in his native country, D. sought relief from removal from the Secretary of State and the Court of Appeal under the asylum law of the United Kingdom and Article 3 of the European Convention. These attempts were unsuccessful. The Secretary of State pointed out the unfairness of allowing an AIDS sufferer to remain in the country unlawfully.

REV. 815, 817 (1997) (“[Customary international law] should not have the status of federal common law.”).

66. Compare Fernandez, 505 F. Supp. at 797 (“Two other principle sources of fundamental human rights are the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and the International Covenant on Civil and Political Rights”), and Filartiga v. Pena-Irala, 630 F.2d 876, 883-84 (2d Cir. 1980) (citing American Convention and European Convention as sources of customary international law), with Chen v. Ashcroft, 85 F. App’x 700, 705 (10th Cir. 2004) (“As to the European Convention on Human Rights, it is an instrument applicable only to its regional state parties and not intended to create new rules of customary international law.”).


68. Id. at 782 (stating that he sought leave to remain in the United Kingdom for two weeks as a visitor).

69. Id.

70. Id. at 782-83.

71. Id. at 783-84.
so that he could receive treatment at public expense.72 The Court of Appeal deferred to the judgment of the chief immigration officer in the lower court, holding that although his life expectancy may well be shorter if he were removed than if he received care in the United Kingdom, he would not have been imprisoned and diagnosed in the United Kingdom if he had not smuggled drugs into the country.73 A professor of immunology subsequently reported that D.’s prognosis was limited to eight to twelve months on his current regimen, and withdrawal of his current treatment regimen would reduce his life expectancy by more than half.74

D. contested his removal before the European Court of Human Rights under Article 3 of the European Convention, which declares that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”75 He argued that his removal would violate Article 3 because of the advanced stage of his AIDS, the lack of available treatment in St. Kitts, and the lack of family to care for him there.76 The government of the United Kingdom argued that if D. were removed, his hardship and reduced life expectancy would stem from his illness combined with a deficient health and welfare system, which does not amount to inhuman or degrading treatment under Article 3.77 The government also disputed D.’s claim that he would lose access to AIDS treatment and that no family would care for him in St. Kitts.78

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72. Id. at 783 (“[W]e do not accept ... that it is right generally or in the individual circumstances of this case, to allow an AIDS sufferer to remain here exceptionally when, as here, treatment in this country is carried out at public expense, under the National Health Service.”).

73. Id. at 788-84 (“[H]e would not be here if he had not come on a cocaine smuggling expedition in 1993; and if he had not been imprisoned he would have gone back to St Kitts, if he ever had come here at all, long before his AIDS was diagnosed.”).

74. Id. at 784-85.


77. Id. at 790-91 (noting that the applicant would “find himself in the same situation as other AIDS victims in St. Kitts” if removed, and arguing that “[i]n fact he would have been returned in January 1993 to St. Kitts, where he had spent most of his life, had it not been for his prosecution and conviction”).

78. Id. at 791 (stating that the applicant had at least one cousin in St. Kitts and that hospitals in St. Kitts treated AIDS patients).
The European Court of Human Rights ultimately prohibited his removal under Article 3 of the European Convention. The court stressed that Article 3 prohibits "torture or inhuman or degrading treatment" in deportation cases in absolute terms, regardless of the conduct of the individual in question. The Court considered the applicant's grave prognosis, his lack of family members in St. Kitts who could care for him, and the overall lack of social and emotional support in his native country. The court held that it must scrutinize a claim under Article 3 even where, as here, the treatment in question in the receiving country does not itself violate Article 3, nor is the treatment the direct or indirect responsibility of public authorities in that country. The court concluded that, in light of the exceptional circumstances of the case and the critical stage of the applicant's AIDS, D.'s removal to St. Kitts would amount to inhuman treatment by the state in violation of Article 3.

_D. v. United Kingdom_ was a "landmark" case that at least one scholar has called extreme and exceptional. Commentators have remarked that the case revealed that Article 3 essentially

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79. Id. at 799. The European Court of Human Rights also considered, and ultimately declined to recognize, the alleged violations of Articles 8 and 13 of the European Convention. See id.

80. Id. at 792 (referencing Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, and noting "the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 (art. 3) prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question").

81. Id. at 795 ("Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St. Kitts."). The court stated that while the petitioner had a cousin in St. Kitts, there was no evidence that the cousin could attend to a terminally ill man. Id.

82. Id. at 792 ("[T]he source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of [Article 3].").

83. Id. at 793 ("In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3.").

prohibits interference with human dignity, or the right to die with dignity.85 Regardless of the case's exceptional nature, D. v. United Kingdom stands for the proposition that removal of a non-citizen to a country where she would lose access to life-sustaining AIDS treatment may constitute a violation of Article 3 of the European Convention.86

D. N. v. United Kingdom

The European Court of Human Rights also considered the issue in the case of N. v. United Kingdom, in which a citizen and national of Uganda with HIV, known as “N.,” made an analogous argument against her removal under Article 3 of the European Convention.87 A physician prepared an expert report stating that the medications N. needed were available in Uganda, but were quite costly and in limited supply in her home town.88 The physician further reported that “there was no provision for publicly funded blood monitoring, basic nursing care, social security, food, or housing” in Uganda.89 Prior to applying to the European Court of Human Rights, N. appeared in United Kingdom domestic courts claiming protection from removal both under asylum law and under Article 3 of the European Convention.90 The adjudicator in one such court allowed the appeal on Article 3 grounds by reference to D. v. United Kingdom and because, according to Asylum Directorate Instructions, leave to remain was mandated “[w]here there is credible medical evidence that return, due to the medical facilities in the country concerned, would reduce the applicant’s life expectancy and subject him to acute physical and mental suffering, in circumstances where the UK can be regarded as having assumed


88. Id. at ¶ 12.

89. Id. at ¶ 12.

90. Id. at ¶¶ 13, 17.
responsibility for his care.” The Secretary of State appealed to the Immigration Appeal Tribunal, which reversed upon a finding that medical treatment for HIV/AIDS is available in Uganda. N. appealed to two higher courts without success.

The European Court of Human Rights held that Article 3 only applies in an exceptional case, where the applicant’s illness had reached a very advanced or terminal stage, and the receiving state’s probable lack of medical care and social support, including support from family members, would deprive the applicant of “the most basic human dignity as his illness runs its inevitably painful and fatal course.” The Court discussed several other cases that had considered similar Article 3 violations. These included D. v. United Kingdom and B.B. v. France, in which the European Commission of Human Rights concluded that B.B.’s deportation would violate Article 3 of the European Convention because he would lack access to HIV/AIDS treatment and family support, compromising his human dignity as the illness ran its course. The court distinguished the present

91. Id. at ¶ 13 (citing D. v. United Kingdom, 1997-III Eur. Ct. H.R. 777 (1997)).
92. See id. at ¶ 14 (stating that although medical provision in the United Kingdom exceeds that in Uganda, Uganda has made great progress in that area and the applicant’s return there would not, therefore, lead to a “complete absence of medical treatment” as the Asylum Directorate Instructions prohibit).
93. See id. at ¶¶ 15, 17. The House of Lords dismissed the appeal on grounds that treatment in Uganda would not be altogether absent, and, therefore, this is not such an exceptional case that it should fall under Article 3 of the Convention. Id. at ¶ 17. “[Any extension of the D. principles] would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources . . . .” Id.
94. See id. at ¶ 22 (citing D. v. United Kingdom, 1997-III Eur. Ct. H.R. 777 (1997)) (noting that in previous cases, the European Court of Human Rights had focused more on the applicant’s present condition and prognosis than on the availability of treatment in the receiving country).
95. See infra note 96 (discussing cases that the European Court of Human Rights considered in N. v. United Kingdom, [GC], App. No. 26565/05, Eur. Ct. H.R. (2008)).
96. See B.B. v. France, 1998-VI Eur. Ct. H.R. 2596. In B.B. v. France, the applicant submitted physicians’ reports stating that he was suffering from AIDS and that treatment was unavailable in the Democratic Republic of Congo. Id. at 2603. The European Commission of Human Rights referred the case to the European Court of Human Rights upon a finding that the applicant’s removal would violate Article 3 of the European Convention. Id. at 2605. Before the European Court of Human Rights could rule, France responded by quashing the removal order. Id. See also Arcila v. Netherlands, App. No. 13669/03, Eur. Ct. H.R. (2008), 7–8 (distinguishing the case of an HIV-positive Colombian national from D. v. United Kingdom, 1997-III Eur. Ct. H.R. 777 (1997), and
case from *D. v. United Kingdom* and *B.B. v. France* because the applicant's illness was currently stable, she had family members in Uganda, and the treatment she required was available in Uganda, although costly. The court additionally distinguished the present case from *D. v. United Kingdom* because the latter case focused on "ensuring a dignified death rather than prolonging life." The court ultimately denied N. relief from removal under Article 3 because her case did not meet the "high threshold" that *D. v. United Kingdom* had established. The court held that the threshold in cases involving lost access to HIV/AIDS medications should remain high because the treatment in question involved a naturally occurring illness combined with lack of resources in the receiving country, rather than from "intentional acts or omissions." Together *D. v. United Kingdom* and *N. v. United Kingdom* demonstrate that while removal terminating life-sustaining HIV/AIDS treatment may violate Article 3 of the European Convention, protection is limited and reserved for exceptional cases.

### E. Andrea Mortlock

The Inter-American Commission on Human Rights also considered the issue in *Andrea Mortlock*, a case that involved a national and citizen of Jamaica who entered the United States as a lawful permanent resident with her family in 1979, when she...
was fifteen years old.\textsuperscript{102} Mortlock was later convicted of drug offenses\textsuperscript{103} and arrested for criminal possession of stolen property in the third degree, an offense to which she pled guilty.\textsuperscript{104} In 1998, Mortlock tested positive for HIV and was diagnosed with AIDS.\textsuperscript{105}

On the basis of Mortlock’s criminal convictions, US immigration authorities pursued a deportation order against her in 2006.\textsuperscript{106} In 2008, in an effort to prevent her removal, she appealed to the Inter-American Commission on Human Rights alleging that her removal to Jamaica, where she would lose access to life-sustaining HIV medication, would violate Article XXVI of the American Declaration, which prohibited “cruel, infamous or unusual punishment.”\textsuperscript{107} She argued that her removal would effectively result in her “protracted suffering and an unnecessarily premature death.”\textsuperscript{108}

The Inter-American Commission on Human Rights generally agrees to decide on a matter’s admissibility only upon determination that the applicant has exhausted domestic remedies in accordance with general principles of international law.\textsuperscript{109} In Andrea Mortlock, however, the Commission stated that a petitioner need not exhaust domestic remedies if such proceedings would “be obviously futile or have no reasonable prospect of success.”\textsuperscript{110} Mortlock’s complaint was essentially that her removal constituted cruel and unusual punishment, which

\begin{itemize}
\item \textsuperscript{103} Id. at ¶ 15.
\item \textsuperscript{104} Id. at ¶ 17.
\item \textsuperscript{105} Id. at ¶ 16.
\item \textsuperscript{106} Id. at ¶ 20.
\item \textsuperscript{107} American Declaration, supra note 50, at art. XXVI; see also Andrea Mortlock, at ¶¶ 21, 24 (presenting the petitioners’ allegations that a number of medications Mortlock required would not be available in Jamaica, nor did she have doctors, family, friends, or acquaintances there).
\item \textsuperscript{108} See Andrea Mortlock, at ¶ 21.
\item \textsuperscript{109} See Rules of Procedure of the Inter-American Commission on Human Rights, Inter-Am. Comm’n H.R., OAS, art. 31 (Oct. 28-Nov. 13, 2009), available at http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureACHR.htm (“In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.”); see also Andrea Mortlock, at ¶ 53 (discussing Article 51 of the Commission’s Rules of Procedure as a requirement for the Commission to consider a matter’s admissibility).
\item \textsuperscript{110} See Andrea Mortlock, at ¶ 66.
\end{itemize}
coincides with the Eighth Amendment to the US Constitution.\textsuperscript{111} The Commission noted that numerous US courts have held that the Eighth Amendment does not protect non-US citizens from removal from the United States.\textsuperscript{112} The Inter-American Commission on Human Rights accordingly concluded that presenting Mortlock’s case before the US Court of Appeals would be futile, and she could therefore present her case before the Inter-American Commission on Human Rights.\textsuperscript{113}

The Inter-American Commission on Human Rights acknowledged “that Member States have the right, as [a] matter of well-established international law, to control the entry, residence, and expulsion of aliens,” but that “in exercising this right to expel such aliens, the Member States must have regard to certain protections which enshrine fundamental values of democratic societies.”\textsuperscript{114} The Commission stated that it would consider customary international law, and \textit{D. v. United Kingdom} in particular, as a basis for deciding the case.\textsuperscript{115}

The United States asserted that the cruel and unusual punishment clause in the American Declaration does not protect Mortlock because removal does not amount to punishment for a crime.\textsuperscript{116} This is consistent with US Supreme and Circuit Court

\textsuperscript{111} Id. at ¶ 64 (“[T]he Commission observes that the essence of the complaint is that Ms. Mortlock’s removal to Jamaica would amount to cruel, inhumane punishment in violation of Article XXVI of the American Declaration, which conveniently coincides with the Eighth Amendment of the U.S. Constitution.”).

\textsuperscript{112} Id. at ¶ 64 & n. 43 (citing \textit{Elia v. Gonzales}, 418 F.3d 667, 675 (6th Cir. 2005)).

\textsuperscript{113} Id. at ¶ 65 (“Therefore, it is possible to conclude that issues similar to those brought before the Commission in Ms. Mortlock’s petition, have been the subject of unsuccessful litigation in domestic courts and that in the present case pursuing a remedy before a Court of Appeals would be futile and with no reasonable prospect of success.”); id. at ¶¶ 67-71 (noting that the Commission also considered that the claim was timely, colorable, and lacked duplication in concluding that the matter was admissible before the Commission).

\textsuperscript{114} Id. at ¶ 78.

\textsuperscript{115} Id. at ¶ 80 (“[I]n determining the present case, the Commission will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law.”).

\textsuperscript{116} Id. at ¶ 44 (“The State maintains that Article XXVI of the Declaration is a provision relating specifically to criminal prosecution, conviction and sentencing. Therefore, the Petitioners’ invocation of this article in the immigration context is improper since immigration removal of Ms. Mortlock can in no way be characterized as ‘punishment’ under Article XXVI of the Declaration.”).
rulings. The United States further asserted that *D. v. United Kingdom* was distinguishable as an exceptional case concerning death with dignity.

The Commission countered that deportation could be "tantamount to a form of punishment." Punishment, the Commission reasoned, "is the infliction of some kind of pain or loss upon a person in response to wrongdoing." Therefore, any detrimental change in the status quo of an alien facing deportation could be equivalent to punishment. The Commission stated that this punishment is particularly severe where, as here, the alien has lived in a country for thirty years and deportation would force her to leave her family and battle a potentially fatal disease without their support. The Inter-American Commission on Human Rights held that, although Mortlock’s death was not imminent, and therefore, did not concern "the dignity of death, it would be illogical to confine the scope of relief to such cases." In the instant case, the Commission emphasized, Mortlock’s removal and resulting loss of treatment could be fatal.

The Commission then defined the standard in the case as "whether, on humanitarian grounds, a person’s medical condition, [sic] is such that he or she should not be expelled unless it can be shown that the medical and social facilities that

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117. See Elia, 431 F.3d at 276 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984)) (holding that the cruel and unusual punishment clause under the Eighth Amendment is "inapplicable to deportation proceedings because, as the US Supreme Court has held, deportation does not constitute punishment"); LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976) (holding that deportation is not a "punishment under the Eighth Amendment even though the penalty may be severe."); see also supra note 27 (discussing deportation as punishment and surrounding debate).

118. See Andrea Mortlock, at ¶ 45 (stating that, in *D. v. United Kingdom*, 1997-II Eur. Ct. H.R. 777 (1997), the applicant’s final days upon removal would be extremely distressing, thus constituting inhuman treatment).

119. Id. at ¶ 85.

120. Id.

121. Id. ("[T]he Commission considers that a change in status quo to the detriment of an alien subject to a deportation procedure could be tantamount to a form of punishment.").

122. Id. (explaining that deportation must be examined on subjective terms, whereby a case such as this is not comparable to a case where someone is deported after three weeks, and noting the Commission’s position that "in the ancient legal traditions, banishment was considered the ultimate punishment.").

123. Id. at ¶ 90.

124. Id.
he or she undeniably requires are actually available in the receiving state." The Commission articulated that the case turned on "whether deportation will create extraordinary hardship to the deportee and her family and may well amount to a death sentence given... (1) the availability of medical care in the receiving country and (2) the availability of social services and support, in particular the presence of close relatives." The Commission then considered the advanced stages of Mortlock's illness, her lack of family or acquaintances in Jamaica, and her nearly thirty-year presence in the United States, concluding that HIV/AIDS treatment in Jamaica, although improved in recent years, was insufficient to meet Mortlock's needs. The stigma and discrimination that people with HIV/AIDS experience in Jamaica also troubled the Commission. Thus, the Commission held that her removal would violate the cruel, infamous, and unusual punishment clause in Article XXVI of the American Declaration.

From the decisions of the European Court of Human Rights and the Inter-American Commission on Human Rights discussed above have emerged a protection from removal that defies easy definition. The crux of the protection is recognition that removal that terminates life-sustaining medical treatment, sometimes coupled with social factors, constitutes a violation of rights. European Court of Human Rights case law suggests that this is the right to die with dignity, when a person's removal will exacerbate her already serious terminal illness in its advanced stages. The Inter-American Commission on Human Rights' decision in Andrea Mortlock defined the right as a right to be free from removal that would terminate life-sustaining medical treatment, combined with social factors, that effectively amounts

125. Id. at ¶ 91.
126. Id.
127. Id. at ¶ 92. ("The current quality of life she now enjoys results from the availability of treatment and medication in the United States and the care received from her family and support system.").
128. Id. at ¶ 93 ("[T]he country's health care system is still insufficient to meet Ms. Mortlock's medical needs.").
129. Id. ("Moreover of greater concerning, are the reports that people with HIV/AIDS in Jamaica suffer from stigma and discrimination.")
130. Id. at ¶ 102 ("The Commission hereby concludes that... the issuance of a deportation order against Ms. Andrea Mortlock violates the protection of Article XXVI of the American Declaration not to receive cruel, infamous or unusual punishment.").
to a death sentence. This Note now turns to US domestic legal protections from removal, and their consequences to non-US citizens with HIV/AIDS who face the loss of access to treatment upon removal.131

II. PROTECTIONS FROM REMOVAL OF NON-US CITIZENS WITH HIV/AIDS

The provisions that international bodies have invoked in protecting non-citizens from removal that would terminate HIV/AIDS treatment are reminiscent of the Eighth Amendment to the US Constitution, which prohibits “cruel and unusual punishments.”132 All US Courts of Appeals have held that a non-US citizen may not invoke the Eighth Amendment to contest deportation proceedings because, as the US Supreme Court held, deportation does not constitute punishment for a crime.133 Non-US citizens contesting their removal on the basis of termination of life-sustaining HIV/AIDS treatment, therefore, must contest their removal under one of three US domestic laws, namely, asylum, withholding of removal, and the law enacting CAT.134 Section A introduces the legal obstacles that non-US citizens must overcome to obtain legal status in the United States, namely inadmissibility grounds and statutory categories into which one must fit to become a US citizen. Section B discusses asylum law and its application to cases involving removal that terminates HIV/AIDS treatment. Section C explains protection from removal under the law of withholding of removal, and how withholding might be applied to cases involving removal that eliminates HIV/AIDS treatment. Lastly, Section D examines US domestic law that enacts CAT, and its application to removal that terminates HIV/AIDS treatment.

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131. See infra Parts II–III. (describing domestic protections from removal and their degrees of success and arguing that the United States should recognize a protection under customary international law against removal in this context).
132. U.S. CONST. amend. VIII; see supra Part I.B. (discussing the relevant provisions of the European Convention and the American Declaration).
133. See supra note 10 (discussing consideration of Eighth Amendment protections in the context of deportation proceedings).
A. Obstacles to US Citizenship

According to its longstanding jurisprudence, the United States excludes non-citizens in the name of national sovereignty and in the interest of national security. The Department of Homeland Security, via Immigration and Customs Enforcement ("ICE"), enforces immigration laws in order to prevent terrorism and protect borders against illicit trade, travel, and finance. ICE's objectives include, as stated by the Counterterrorism and Criminal Exploitation Unit, preventing "terrorists and other criminals from exploiting the nation's immigration system." Legal protection from removal terminating HIV/AIDS treatment could have the unintended consequence of encouraging illegal immigration of non-US citizens with HIV/AIDS who hope to secure treatment in the United States. This would arguably be an exploitation of US immigration law, and would also increase commitment of US resources to HIV/AIDS treatment. Non-US citizens compete with these interests and concerns when they attempt to gain US citizenship or contest removal, particularly where they require HIV/AIDS treatment.

A non-US citizen living in the United States must overcome two obstacles in order to gain legal status in the United States.

135. See, e.g., Galvan v. Press, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."); Harisiades v. Shaughnessy, 342 U.S. 580, 588 (1952) (holding that expulsion of aliens is a weapon of defense inherent in every sovereign state).


138. See supra note 93 and accompanying text (describing this argument as made by the House of Lords in an appeal preceding N. v. United Kingdom, [GC], App. No. 26565/05, Eur. Ct. H.R. (2008)).

139. See supra note 93 and accompanying text (arguing that protecting people with HIV/AIDS from removal terminating treatment "would result in a very great and no doubt unquantifiable commitment of resources").

140. See infra notes 144-46 and accompanying text (discussing criminal grounds of inadmissibility in the United States); cf. supra notes 136-37 and accompanying text (discussing the right of the United States to exclude non-citizens and the rationale for doing so).

First, she must not fall within any of the inadmissibility grounds provided in section 212(a) of the Immigration and Nationality Act. Second, she must fit within one of the qualifying statutory categories.

Inadmissibility grounds may be criminally related or health-related. The health-related grounds provide that a non-US citizen is inadmissible if she is determined, in accordance with regulations prescribed by the Secretary of Health and Human Services, to have a "communicable disease of public health significance." The Department of Health and Human Services has provided a list of such illnesses that make a non-US citizen inadmissible, and HIV was on that list until November 2, 2009, when it was removed to reduce stigma associated with the disease and to encourage HIV testing. The removal of HIV from the list of communicable diseases took effect on January 4, 2010, and consequently non-US citizens with HIV/AIDS are no longer inadmissible because they have HIV/AIDS.

142. See Legomsky & Rodriguez, supra note 14, at 7 (stating that inadmissibility grounds include, for example, grounds relating to crime, national security, health, and public assistance, but explaining that these grounds may be overcome via statutory waivers to inadmissibility grounds). See Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (2006) for a complete list of grounds of inadmissibility.

143. See Legomsky & Rodriguez, supra note 14, at 7 ("To qualify for admission . . . he or she must fit within one of the statutory pigeonholes.").


145. See id.

146. See Barack Obama, President of the United States, Remarks by the President at Signing of the Ryan White HIV/AIDS Treatment Extension Act of 2009 (Oct. 30, 2009), in 2009 Daily Comp. Pres. Doc. 00864 ("Now, we talk about reducing the stigma of this disease, yet we’ve treated a visitor living with it as a threat . . . [eliminating the HIV travel ban is] a step that will encourage people to get tested and get treatment, it’s a step that will keep families together, and it’s a step that will save lives."); Human Immunodeficiency Virus (HIV) Infection Removed from CDC List of Communicable Diseases of Public Health Significance, U.S. Citizenship & Immigr. Serv., http://www.uscis.gov/uscis-ext-templating/usr cis/ (search "HIV," then follow “Human Immunodeficiency Virus (HIV) Infection Removed from CDC List of Communicable Diseases and Public Health Significance") (last updated May 18, 2010) (describing the change in law and discussing the consequences of this change for non-citizens).

147. See 42 C.F.R. § 34.2 (2010) (showing HIV is no longer listed as an illness the diagnosis of which bars admission to the United States); Medical Examination of Aliens-Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance, 74 Fed. Reg. 56, 547 (Nov. 2, 2009) (to be codified at 42 C.F.R. pt. 34) ("Through this final rule, the Centers for Disease Control and Prevention (CDC), within the U.S. Department of Health and
A non-US citizen with HIV/AIDS who is admissible must still overcome a second legal obstacle in order to gain legal status and remain in the United States: she must fit within one of the qualifying statutory categories. These categories include employment, family reunification, and asylum. Non-US citizens living in the United States with HIV/AIDS who face removal have several potential legal protections based on their HIV/AIDS status. These legal protections include asylum, withholding of removal, and 8 C.F.R. sections 208.16-208.18, which enacted CAT.

B. Asylum

The law of asylum in the United States derives from two international law documents, the Refugee Convention and the United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"). These two documents advance the principle of non-refoulement, which prohibits the return of refugees to countries where they face persecution based on their race, religion, nationality, membership in a particular social group, or political opinion. The United States incorporated provisions of the Refugee Protocol under the Refugee Act of

Human Services (HHS), is amending its regulations to remove 'Human Immunodeficiency Virus (HIV) infection' from the definition of communicable disease of public health significance and remove references to 'HIV' from the scope of examinations for aliens.

148. See AIENIKOFF ET AL., supra note 141, at 122 ("An alien . . . must show initially that he or she qualifies for admission by meeting certain categorical qualifying requirements . . . ."); LEGOMSKY & RODRIGUEZ, supra note 14, at 7-8 (describing the three main programs of statutory pigeonholes as family reunification, employment, and diversity).

149. See LEGOMSKY & RODRIGUEZ, supra note 14, at 7-9 (outlining the programs under which a non-citizen may obtain legal immigration status in the United States).

150. See infra Part II.B-D. (discussing the applications of asylum law, withholding, and the law enacting CAT to cases in which a non-citizen would lose access to needed HIV/AIDS treatment if removed).

151. See infra Part II.B-D. (discussing asylum, withholding, and CAT and their application to removal, which would terminate HIV/AIDS treatment).


153. See Hughes, supra note 14, at 229 (discussing the sources of US asylum law and defining non-refoulement).
1980 ("Refugee Act"). Under the Refugee Act, the US Attorney General may grant asylum to a claimant determined to be a "refugee." The Refugee Act defines "refugee" as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

In at least some circumstances, US courts have accepted HIV-positive status as a basis for "membership in a particular social group" for purposes of asylum law. Oftentimes an asylum applicant with HIV/AIDS claims status as an HIV-positive homosexual, and homosexuality may be the basis of an asylum claim based on membership in a particular social group.

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154. See id.
157. See Karouni v. Gonzales, 399 F.3d 1163, 1171 (9th Cir. 2005) ("[T]he INS recognized that 'in certain circumstances ... persons with HIV or AIDS may constitute a particular social group under refugee law."); Ostracism, Lack of Medical Care Support HIV-Positive Alien's Asylum Quest, IF Rules, 78 INTERPRETER RELEASES 229, 233-35 (2001) [hereinafter Ostracism] (reporting that an immigration judge granted asylum based on a non-citizen's HIV-positive status); If Grants Asylum to HIV Positive Man, General Counsel Issues HIV Instructions, 73 INTERPRETER RELEASES 889, 901-02 (1996) [hereinafter If Grants Asylum] (reporting that an immigration judge granted asylum on the basis of membership in a particular social group—people infected with HIV).
158. See, e.g., Ixtlilco-Morales v. Keisler, 507 F.3d 651, 655-56 (8th Cir. 2007) (denying the asylum claim of a non-US citizen who alleged that he feared persecution based on his homosexuality and HIV-positive status); Paredes v. Att'y Gen., 219 F. App'x 879, 888 (11th Cir. 2007) (holding that substantial evidence supported the immigration judge's determination that the non-citizen would not be persecuted based on his homosexuality and HIV-positive status); Boer-Sedano v. Gonzales, 418 F.3d 1082, 1090-91 (9th Cir. 2005) (granting asylum based on the non-citizen's homosexuality and HIV-positive status).
159. See Maldonado v. Att'y Gen., 188 F. App'x 101, 104 (3d Cir. 2006) (citing Amanfi v. Ashcroft, 328 F.3d 719, 730 (3d Cir. 2003) ("Maldonado's homosexuality can be the basis for an asylum claim based on membership in a 'particular social group.'"); Uribe v. Ashcroft, 105 F. App'x 941, 942 (9th Cir. 2004) ("[S]exual assault and beatings on account of homosexuality can qualify as persecution on account of membership in a particular social group." (citing Hernandez-Moncul v. INS, 225 F.3d 1084, 1093-94 (9th Cir. 2000), overruled on other grounds by Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005)).
After demonstrating membership in a particular social group, asylum applicants must also show persecution or a well-founded fear of persecution based on that membership in a particular social group. US federal courts have defined persecution as "infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds in the refugee definition." US federal courts have held that low-level intimidation and harassment alone do not comprise the persecution required under US asylum law. Well-founded fear of persecution has an objective and subjective component; the applicant must demonstrate both actual fear and objective facts supporting that fear.

Asylum applicants with HIV/AIDS often attempt to demonstrate persecution by showing multiple factors, including inadequate medical care, employment and medical care discrimination, or physical harm or detention based on their HIV/AIDS status.

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160. See infra notes 169–71 and accompanying text.
161. Cf. Ixtlilco-Morales, 507 F.3d at 655–56 (denying the petition of an HIV-positive citizen of Mexico because the record supported the Board of Immigration Appeals' conclusion "that Morales failed to establish that inadequacies in health care for HIV-positive individuals in Mexico was an attempt to persecute those with HIV"); Paredes, 219 F. App'x at 888 (denying the petition of an HIV-positive homosexual citizen of Venezuela because he "failed to establish past persecution in Venezuela, or a well-founded fear of future persecution if he returned to Venezuela, on account of his membership in a particular social group, namely, HIV-infected homosexual men").
162. Li v. Gonzales, 405 F.3d 171, 177 (4th Cir. 2005); see Regalado-Garcia v. INS, 305 F.3d 784, 787 (8th Cir. 2002) ("Persecution is the infliction or threat of death, torture, or injury to one's person or freedom, on account of race, religion, nationality, membership in a particular social group, or political opinion.").
163. See, e.g., Makatengkeng v. Gonzales, 495 F.3d 876, 882 (8th Cir. 2007) ("Low-level intimidation and harassment alone do not rise to the level of persecution."); Nelson v. INS, 232 F.3d 258, 263 (1st Cir. 2000) ("To qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering.").
164. See, e.g., Carcamo-Flores v. INS, 805 F.2d 60, 64 (2d Cir. 1986) (requiring an applicant to show both a subjective fear of persecution and objective facts supporting that fear); Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986) ("An alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country.").
165. See Tafzil, supra note 4, at 519 (providing a table of the number of asylum cases based on HIV-positive status and the makeup of bases for claims). Eighty-five percent of cases uncovered were claims of inadequate medical care, and this includes cases involving additional claims. Id.; see also Boer-Sedano v. Gonzales, 418 F.3d 1082,
that their removal from the United States would result in loss of life-sustaining HIV/AIDS treatment have had mixed results.\textsuperscript{166} At least two of these claims have succeeded when combined with ostracism based on HIV/AIDS status.\textsuperscript{167}

US federal courts have denied asylum claims that have relied on inadequate medical care in the home country because inadequate medical care does not amount to persecution under US asylum law.\textsuperscript{168} In \textit{Ixtlilco-Morales v. Keisler}, the Eighth Circuit upheld the Board of Immigration Appeals' determination that "to the extent that Morales's claim was based on a lack of medical care for HIV-positive persons in Mexico, . . . Morales did not establish that the lack of care was an attempt to persecute homosexuals or those with HIV."\textsuperscript{169} In \textit{Paredes v. Attorney General}, an HIV-positive homosexual of Venezuelan citizenship applied for asylum, arguing that the Venezuelan government prioritized HIV medication distribution such that women and children were served first and, therefore, HIV-positive homosexual men were often left untreated.\textsuperscript{170} The Eleventh Circuit denied asylum because at least one organization provided HIV medications and thus "it is at least possible for HIV-infected homosexual men to obtain medications through means other than the Venezuelan government."\textsuperscript{171} In \textit{Hernaez v. INS}, the Ninth Circuit denied asylum to an HIV-positive homosexual man who claimed that medical treatment for HIV is not available in his home country of

\textsuperscript{1091} (9th Cir. 2005); \textit{infra} notes 174–81 and accompanying text (discussing \textit{Boer-Sedano}, 418 F.3d 1082).

\textsuperscript{166} See \textit{infra} notes 170–81 and accompanying text (discussing cases based on loss of HIV/AIDS treatment).

\textsuperscript{167} See \textit{Ostracism, supra} note 157, at 233 (reporting that an immigration judge ruled "that the likelihood that an alien would face serious ostracism in her native country due to her HIV-positive status and the lack of appropriate medical care for her condition were sufficient to support the alien's claim for asylum"); \textit{If Grants Asylum, supra} note 157, at 901 (reporting that an immigration judge granted asylum based on the applicant's HIV status, the testimony that "drugs to treat his illness are either scarce or nonexistent" in his home country, and that HIV-positive people experience ostracism based on their HIV status).

\textsuperscript{168} See \textit{infra} notes 168–73 and accompanying text (discussing cases where US courts denied relief).

\textsuperscript{169} \textit{Ixtlilco-Morales v. Keisler}, 507 F.3d 651, 653 (8th Cir. 2007).

\textsuperscript{170} 219 F. App'x 879, 888 (11th Cir. 2007).

\textsuperscript{171} \textit{Id.}
the Philippines. The court did not address that portion of his claim directly, but held that he failed to show a well-founded fear of persecution based on his status as an HIV-positive homosexual.

In granting asylum to a homosexual Mexican national in Boer-Sedano v. Gonzales, the US Court of Appeals for the Ninth Circuit considered inadequate access to HIV/AIDS treatment, but not in the context of determining whether the non-citizen had been persecuted. In this case, the applicant testified that while he was in Mexico, a police officer stopped him on nine occasions over three months and forced him to perform oral sex on the officer. The court held that sexual assault, including forced oral sex, may constitute persecution, and, therefore, these encounters rose to the level of persecution. The burden then shifted to the government to demonstrate that relocation within Mexico was reasonable under the circumstances, and based on inadequate medical care, the court found that the government failed to meet its burden. Boer-Sedano’s doctor testified that Boer-Sedano’s AIDS was resistant to virtually all licensed AIDS medications. The medications the doctor prescribed to him were investigational medications, which were unavailable in Mexico even for purchase, and the doctor testified that Boer-Sedano’s condition would “rapidly deteriorate” without them. Furthermore, the applicant demonstrated hostility towards and discrimination against HIV/AIDS patients in Mexico, and testified that his status as a homosexual with AIDS would make it impossible to find a job to provide health insurance or funds needed to import the drugs from elsewhere. Although some asylum applicants have been successful on grounds related to lost

172. 244 F.3d 752, 755 (9th Cir. 2001) ("Petitioner claimed that medical treatment for HIV is not available in the Philippines and that he has a well-founded fear of persecution in that country.").
173. Id. ("[T]he BIA [Board of Immigration Appeals] found that Petitioner’s evidence showed nothing more than occasional discrimination and harassment, which alone do not constitute persecution.").
175. Id. at 1086.
176. Id. at 1088.
177. Id. at 1090–91.
178. Id. at 1091.
179. Id.
180. Id.
HIV/AIDS treatment, the persecution requirement has presented a considerable hurdle.\textsuperscript{181}

C. Withholding of Removal

Like asylum law, withholding of removal protects non-US citizens from persecution they may face if removed under the Refugee Convention and the principle of non-refoulement.\textsuperscript{182} Under the withholding of removal statute, the US Attorney General may not remove an alien to a country if she decides that the alien's life or freedom would be threatened in that country because of their race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{183} This standard is similar to, but higher than, the standard under asylum law.\textsuperscript{184} Application procedures for both legal protections are exactly the same, and an application for asylum is automatically treated as an application for withholding of removal.\textsuperscript{185} Whether HIV/AIDS status qualifies a non-US citizen for membership in a particular social group under the withholding statute is not entirely clear.\textsuperscript{186}

While the language of the withholding statute is broad, "threat to life or freedom" is limited in its application to

\begin{itemize}
\item \textsuperscript{181} See supra notes 161-63 and accompanying text (discussing the persecution requirement generally); see also supra notes 168-73 and accompanying text (discussing cases in which removal terminating HIV/AIDS treatment did not satisfy the persecution requirement under asylum law).
\item \textsuperscript{182} See LEGOMSKY & RODRIGUEZ, supra note 14, at 892 (discussing asylum and withholding of removal as two remedies potentially available to non-US citizens living in the United States who seek protection from persecution); Hughes, supra note 14, at 253 ("Withholding of removal under INA § 241(b)(3) implements US obligations of non-refoulement under Article 33 of the Refugee Convention."); supra notes 161-64 and accompanying text (discussing the persecution requirement under asylum law).
\item \textsuperscript{183} See 8 U.S.C. § 1231(b)(3) (2006).
\item \textsuperscript{184} See Prela v. Ashcroft, 394 F.3d 515, 519 (7th Cir. 2005) ("The standard for withholding of removal is more stringent than that for granting asylum."); see also Sylla v. INS, 89 F. App'x 502, 504 (6th Cir. 2004) (holding that an alien who fails to establish eligibility for asylum is unable to meet the more rigorous standard required for withholding of removal).
\item \textsuperscript{185} See 8 C.F.R. § 208.3 (2000) ("An asylum application shall be deemed to constitute at the same time an application for withholding of removal, unless adjudicated in deportation or exclusion proceedings commenced prior to April 1, 1997."); LEGOMSKY & RODRIGUEZ, supra note 14, at 892 ("The application procedures for the two remedies are exactly the same.").
\item \textsuperscript{186} See In re Argueta, 2005 WL 23521910, at *2 (B.I.A. Nov. 14, 2003) ("We begin by accepting for the purposes of argument the notion that persons living with AIDS in Honduras constitute a 'social group' within the meaning of the Act.").
\end{itemize}
withholding claims. A 1978 US House of Representatives Report stated that "the harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life." In order for lack of life-saving medical care to qualify as threat to life or freedom, the government of the receiving country must deliberately withhold treatment, and the lack of treatment must be "the result of discrimination as opposed to general economic strife applicable to the population at large." The requirement that treatment be deliberately withheld, and the apparent indifference to lack of treatment resulting from poverty rather than a human actor, generally precludes people from availing themselves of the withholding protection where HIV/AIDS treatment is unavailable in the home country.

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187. See infra notes 188-91 and accompanying text (describing the parameters of "threat to life or freedom" in the withholding statute).
189. See Manani v. Filip, 552 F.3d 894, 903 (8th Cir. 2009) ("Manani has not shown a clear probability that the Kenyan government, or private actors that the Kenyan government is unable or unwilling to control, would deliberately deprive her of access to life-sustaining medical care . . . . Nor has Manani shown that any inadequacies in Kenya's health care system result from an effort to persecute persons diagnosed with HIV."); Ixtilco-Morales v. Keisler, 507 F.3d 651, 653 (8th Cir. 2007) (holding, in a case in which the non-citizen testified that he was beaten by family members and raped by a neighbor on account of his homosexuality, that his asylum and withholding claims should fail because he "did not establish that the government was the source of his persecution or that the government was unable or unwilling to control his attackers specifically, or, more generally, those elements of society responsible for victimizing gay men").
190. In re Argueta, 2003 WL 23521910, at *3 ([T]he widespread poverty and unemployment in Honduras make it difficult to conclude that the lack of medical and economic resources that the respondent may face is the result of discrimination as opposed to general economic strife applicable to the population at large.").
191. But see Bosede v. Mukasey, 512 F.3d 946 (7th Cir. 2008). The court remanded where an immigration judge denied petitioner's withholding claim, which was based on insufficient medical treatment. Id. at 952. Petitioner testified that he would be imprisoned upon his return to Nigeria under a law that provides for a five-year sentence for "any Nigerian citizen found guilty in any foreign country of an offense involving narcotic drugs or psychotropic substances." Id. at 949. He submitted evidence that HIV-infected prisoners in Nigeria lack access to doctors and medication, and that death rates among that group are high. Id. The Seventh Circuit remanded, calling into question the fairness of the proceedings before the Immigration Judge and whether they comported with minimum due process standards. Id. at 951-52.
D. Convention against Torture

The Convention against Torture is an international treaty that the United States has ratified and implemented by statute. The aim of CAT is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." The United States ratified CAT in 1990, subject to certain reservations and understandings. The US Senate agreed to its ratification subject to a declaration that it would not be self-executing. The United States has implemented provisions of CAT by rules: 8 C.F.R. sections 208.16-208.18 and 1208.16-1208.18, and 22 C.F.R. section 95.2.

CAT and its enacting law forbid states from returning a person to another country where there are substantial grounds for believing that she would be in danger of being subjected to...
torture there. Article 1 of CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted." US federal courts have held that torture requires specific intent to accomplish a result, and mere knowledge that one's act causes physical or mental suffering will not suffice. The Third Circuit has held that pain and suffering due to lack of medical care does not satisfy the specific intent requirement of torture and, therefore, does not fall under the law enacting CAT. This holding implies that suffering due to lack of HIV/AIDS treatment in the country to which a non-US citizen suffering from HIV/AIDS is removed does not constitute torture as defined by the law enacting CAT.

Under the three US domestic laws discussed above, non-US citizens with HIV/AIDS have had varying degrees of success in contesting their removal on the basis of lost HIV/AIDS treatment. Claims of asylum on grounds of lost HIV/AIDS treatment have been successful, but only when combined with other factors. The persecution requirement under asylum law has proven to be another obstacle to claims based on lost

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197. See Convention against Torture, supra note 193, at 114.
198. Id. at 113.
199. See Urquia-Rodriguez v. Att'y Gen., 372 F. App'x 256, 259 (3d Cir. 2010) ("Because we find that Urquia-Rodriguez failed to demonstrate specific intent, a required showing in order to obtain relief under CAT ... Urquia-Rodriguez did not meet her burden of establishing that it is more likely than not that she will be tortured if returned to Honduras."); Pierre v. Att'y Gen., 528 F.3d 180, 188-89 (3d Cir. 2008) ("Mere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture.").
200. See Pierre, 528 F.3d at 189 (holding a Haitian national ineligible for relief under the law enacting CAT based on the pain and suffering he would likely experience in Haitian prison due to lack of medical treatment for his esophagus injury).
201. But see Bosede v. Mukasey, 512 F.3d 946 (7th Cir. 2008). Bosede's claim was both under withholding and the law enacting CAT; remand was in response to both claims. Id. at 948; see Jean-Pierre v. Att'y Gen., 500 F.3d 1315 (11th Cir. 2007). Jean-Pierre claimed that he would "likely be tortured in a Haitian prison when his AIDS infection, unchecked by life-saving medication, infects his mind and causes him to behave inappropriately or erratically." Id. at 1323. The Eleventh Circuit remanded upon a finding that the Board of Immigration Appeals, which denied Jean-Pierre's claim under the law implementing CAT, failed to analyze the most important facts presented in the case. Id. at 1326.
203. See supra notes 165-67 and accompanying text (discussing claims of asylum seekers with HIV/AIDS based on multiple factors).
HIV/AIDS treatment.\textsuperscript{204} Withholding of removal requires a threat to life or freedom that is deliberately inflicted, and results from discrimination.\textsuperscript{205} The law enacting CAT requires intentionally-inflicted torture, which loss of medical care has generally failed to meet.\textsuperscript{206}

III. \textit{INADEQUACY OF US DOMESTIC PROTECTIONS AND AN EMERGING INTERNATIONAL HUMAN RIGHT}

While domestic laws in the United States have protected people with HIV/AIDS from removal in some circumstances, each legal protection from removal is limited in its application to people with HIV/AIDS who would lose access to life-sustaining treatment.\textsuperscript{207} Section A concludes that present domestic legal protections are inadequate for non-US citizens with HIV/AIDS in the United States who would lose access to HIV/AIDS treatment if removed. Section B discusses possible adaptations of US domestic law that could provide a source of protection to non-US citizens with HIV/AIDS whose removal would cut off their HIV/AIDS treatment. Section C discusses sources of a new protection from removal from the United States under international law, including applying the American Declaration consistently with Inter-American Commission on Human Rights case law, and recognizing an emerging legal protection from removal under customary international law.

A. \textit{Limitations to US Domestic Law}

No protection from removal in US domestic law speaks directly to the loss of life-sustaining treatment that may result from removal.\textsuperscript{208} Asylum requires a well-founded fear of persecution based on the applicant’s membership in a suspect

\begin{itemize}
\item \textsuperscript{204} See supra notes 168–73 and accompanying text (discussing unsuccessful asylum claims).
\item \textsuperscript{205} See supra notes 187–89 and accompanying text (discussing requirements of the threat to life or freedom under withholding law).
\item \textsuperscript{206} See supra notes 197–201 (discussing the intent requirement under the US law implementing CAT, and its implications for applicants contesting removal that would terminate HIV/AIDS treatment).
\item \textsuperscript{207} See infra Part III.A. (describing the limitations on US domestic law as applied to removal terminating HIV/AIDS treatment).
\item \textsuperscript{208} See supra Part II. (discussing cases in which the United States has protected non-US citizens with HIV/AIDS from removal).
\end{itemize}
class.\textsuperscript{209} Lack of HIV/AIDS treatment in the receiving country alone has never satisfied the persecution requirement.\textsuperscript{210} Withholding, which requires a threat to life or freedom on the basis of membership in a suspect class, is also inadequate.\textsuperscript{211} Loss of medical treatment does not support a withholding claim unless it results from discrimination or government action.\textsuperscript{212} Courts considering withholding claims have expressed indifference to harm caused by loss of medical treatment that results from poverty rather than from a human actor.\textsuperscript{213} Furthermore, as applied, the law enacting CAT fails to protect non-US citizens from removal that terminates HIV/AIDS treatment because it requires intentionally inflicted torture to support a claim.\textsuperscript{214} Asylum, withholding, and the law enacting CAT are too narrow to protect non-US citizens with HIV/AIDS from removal that terminates life-sustaining HIV/AIDS treatment.

Through the commitment of billions of dollars to PEPFAR, the United States has demonstrated an interest in extending access to HIV/AIDS treatment to more parts of the world. A corollary of that interest should be an interest in ensuring treatment to those non-US citizens presently receiving HIV/AIDS treatment in the United States where facilities in the home country are critically inadequate.\textsuperscript{215} The United States may recognize a legal protection from removal that terminates HIV/AIDS treatment by either adapting US domestic law to meet

\textsuperscript{209} See supra notes 152-64 and accompanying text (discussing the elements of asylum law and the corresponding standards of review).

\textsuperscript{210} See supra notes 165-73 and accompanying text (discussing asylum cases where loss of medical care was a factor, but never the sole factor, in a successful claim).

\textsuperscript{211} See supra Part II.C. (discussing claims of withholding applicants with HIV/AIDS who would lose access to medical treatment if removed).

\textsuperscript{212} See supra notes 188-90 and accompanying text.

\textsuperscript{213} See supra note 190 and accompanying text (describing a case in which the Board of Immigration Appeals withholding claim was unsuccessful because the non-US citizen failed to show that lack of medical treatment in his home country was discriminatory, rather than the result of economic strife).

\textsuperscript{214} See supra notes 198-201 and accompanying text (discussing the intent requirement of the law enacting CAT).

\textsuperscript{215} See supra notes 38-40 and accompanying text (describing shortages of HIV/AIDS treatment, and US measures to extend access to HIV/AIDS treatment abroad).
the need for such a protection, or implementing international law.216

B. Solutions under US Domestic Law

While asylum, withholding, and the law enacting CAT in the United States are currently inadequate to meet the needs of non-US citizens with HIV/AIDS whose removal will end their life-sustaining HIV/AIDS treatment, US courts or policymakers may respond with law favorable to individuals in this position. The aim of asylum and withholding is rooted in the principle of non-refoulement, which prohibits returning people to countries where they will face persecution.217 Courts have recognized persecution and thus granted asylum claims based on lack of HIV/AIDS treatment combined with ostracism.218 Asylum claims based on lost HIV/AIDS treatment alone, however, have never been successful. While ostracism may be threatening, both socially and emotionally and even perhaps physically, inadequate HIV/AIDS treatment presents a physical threat that is likely to exceed the threat of ostracism. Non-US citizens whose removal will terminate their HIV/AIDS treatment should not have to demonstrate ostracism in order to prevail. If social acceptance of people with HIV/AIDS exceeds the progress of worldwide access to HIV/AIDS treatment, thus reducing the occurrence of ostracism of people with HIV/AIDS, asylum seekers may have more difficulty preventing removal that will terminate treatment. US courts or lawmakers may respond by expanding the concept of persecution under asylum law to include life-threatening termination of medical treatment. A change to withholding of removal law in the United States may also protect non-US citizens with HIV/AIDS from their life-threatening removal. The plain meaning of the language in the withholding law, “threat to life or freedom,” seems amenable to a change that would allow inclusion of termination of HIV/AIDS treatment.219 By relaxing

217. See supra note 153 and accompanying text (discussing non-refoulement).
218. See supra note 167 and accompanying text (discussing successful US asylum claims based on lack of medical care combined with ostracism).
the requirement that amenities be deliberately withheld or motivated by discrimination in order to grant withholding claims, US courts may protect non-US citizens with HIV/AIDS from removal that will terminate life-sustaining treatment.\footnote{See supra notes 189–90 and accompanying text (describing the requirement under withholding law that amenities are deliberately withheld or motivated by discrimination).}

Arguing that lack of adequate medical care constitutes torture under the law enacting CAT is more difficult, considering both the plain language meaning of the word torture and treatment of the term in US case law.\footnote{See supra notes 198–201 and accompanying text (discussing the definition of torture under the law implementing CAT).} The standard under asylum law, however, is already easier to satisfy than the standard under withholding of removal, and asylum claims based on termination of HIV/AIDS treatment combined with ostracism have been successful. A change in asylum law, accordingly, seems to be the most feasible way the United States could adapt US domestic law to protect non-citizens from removal terminating needed HIV/AIDS treatment.

This raises the issue of what the parameters of a legal protection from removal terminating HIV/AIDS treatment should be. The United States may, in remaining consistent with \textit{D. v. United Kingdom}, prohibit removal of an applicant in the advanced stages of AIDS to a country with poor medical care and lack of family support because it compromises her right to die with dignity.\footnote{See supra notes 80–83 and accompanying text (discussing the holding of the European Court of Human Rights in \textit{D. v. United Kingdom}, 1997-II Eur. Ct. H.R. 777 (1997)).} A broader protection from removal may follow the lead of Andrea Mortlock and prohibit removal that, because of lack of family ties and medical care in the receiving country, amounts to what applicants have called a “death sentence.”\footnote{See supra note 27 (noting cases in which the petitioner alleged that her removal amounted to a death sentence based on termination of HIV/AIDS treatment).}

In defining the parameters of a legal protection, the United States should consider counterarguments to recognizing such a protection, specifically, concerns of US national security and of encouraging illegal immigration of non-US citizens with HIV/AIDS who hope to secure treatment in the United States,
never to be returned to their home countries.\footnote{224 See supra notes 136-40 and accompanying text (discussing US counterarguments to the recognition of a new or extended protection from removal).} A narrower protection analogous to that in \textit{D. v. United Kingdom} would alleviate these concerns, as successful applicants will be in the advanced stages of AIDS, arguably compromising their abilities both to travel to the United States to seek protection, and to threaten US national security. Other requirements may also alleviate these concerns, including requiring a negative HIV diagnosis during the non-citizen's residence in the United States, or balancing the benefit to the non-citizen's life by prohibiting their removal with the threat they present to US national security.

Another, albeit less feasible, way to recognize a legal protection is for US federal courts to revisit the issue of whether removal may ever constitute cruel and unusual punishment under the Eighth Amendment to the US Constitution.\footnote{225 See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").} The United States currently does not recognize protections from cruel and unusual punishment under the Eighth Amendment in removal proceedings.\footnote{226 See supra note 10 and accompanying text (discussing US federal case law on removal as punishment and application of the Eighth Amendment to removal proceedings).} Research, however, has revealed no claim under the cruel and unusual punishment clause that is grounded in the argument that removal is likely to, or will, hasten death.\footnote{227 But see supra notes 116-18 and accompanying text (discussing the US government's position in Mortlock that removal does not constitute punishment even here, where the claimant argued her removal may be fatal).} By analytically distinguishing the idea that removal is punishment from the concept that removal that hastens death is cruel and unusual punishment, US courts may recognize an Eighth Amendment violation in certain, perhaps extreme, circumstances. The US Supreme Court's posture on removal as punishment in general is analytically distinguishable from barring deportation that would cut off life-sustaining HIV/AIDS treatment under a punishment rhetoric. To call the act of deportation alone punishment is to say that requiring someone to leave a country where she would like to stay is a punitive measure the US government takes in response to the
non-US citizen's criminal act. As the US Supreme Court stated in *Fong Yue Ting v. United States*,

The order of deportation is not a punishment for crime . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government . . . has determined that his continuing to reside here shall depend.228

In the case of HIV/AIDS infections, deportation is distinguishable because not only does it enforce a non-citizen's return to her home country because she has not complied with the requirements of legal immigration status, but because her removal would directly result in the loss of life sustenance and would thus constitute what non-citizens in this position have called a "death sentence."229 US courts should recognize an exception where non-citizens successfully argue that their removal amounts to a death sentence.

C. Solutions under International Law

The United States may remedy the inadequate legal protections for non-US citizens with HIV/AIDS by looking to international law standards. The European Court of Human Rights and the Inter-American Commission on Human Rights have both recognized legal protections from removal based on termination of HIV/AIDS treatment under the European Convention and the American Declaration, respectively.230 The United States may recognize a similar protection through the lens of the American Declaration, which under Article XXVI prohibits cruel, infamous, and unusual punishment.231 By applying the American Declaration consistently with the Inter-American Commission in the *Andrea Mortlock* case, the United

228. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); see supra note 10 (discussing *Fong Yue Ting v. United States*).

229. See supra note 27 (noting cases in which the petitioner claimed her removal amounted to a death sentence); see also supra notes 124–30 (implying that the court found that Mortlock’s removal amounted to a death sentence).


231. See American Declaration, supra note 50, at art. XXVI.
States may protect a non-citizen from removal that would terminate HIV/AIDS treatment and therefore hasten death.\textsuperscript{232}

The United States’ posture on cruel and unusual punishment as applied to removal proceedings complicates this solution. Under US law, deportation is not punishment for a crime, and therefore, the United States will not recognize removal as cruel, infamous, or unusual punishment.\textsuperscript{233} Furthermore, US Courts of Appeals have held that the cruel and unusual punishment clause under the Eighth Amendment does not protect non-citizens from removal.\textsuperscript{234} In order to employ a legal protection from removal under Article XXVI of the American Declaration, and leave intact the United States’ position on removal as punishment, the United States may execute Article XXVI with a law that uses narrower language. Such a law could prohibit, for example, removal of a non-citizen that would hasten death by means of the non-citizen’s terminal illness in combination with the termination of access to treatment that would result from removal. This may or may not be limited to cases where the terminal illness is HIV/AIDS. While this Note focuses on termination of HIV/AIDS treatment, protecting people from removal that terminates life-sustaining treatment for any illness is obviously desirable in the interest of saving lives of non-US citizens living on US soil.

The United States may also recognize an emerging protection from removal in customary international law.\textsuperscript{235} In Andrea Mortlock, the Inter-American Commission protected a woman from her effectively life-ending removal under the cruel and unusual punishment clause of the American Declaration.\textsuperscript{236} In D. \textit{v. United Kingdom}, the European Court of Human Rights reached the same outcome by recognizing a right to be free from

\textsuperscript{232} See supra text accompanying note 58 (providing the language of Article XXVI of the American Declaration); see also Part I.E. (discussing the Andrea Mortlock case).

\textsuperscript{233} See supra note 10 and accompanying text (discussing US federal case law surrounding removal as punishment in general).

\textsuperscript{234} See supra note 10 and accompanying text (discussing US federal case law on applicability of the Eighth Amendment’s cruel and unusual punishment clause to removal proceedings).

\textsuperscript{235} See supra notes 62-66 and accompanying text (discussing customary international law and its applications in US domestic courts).

\textsuperscript{236} See supra notes 107-30 and accompanying text (identifying Mortlock’s claim before the Inter-American Commission on Human Rights and the Commission’s holding).
cruel and unusual punishment and treatment.\textsuperscript{237} The United States does not recognize either right in removal proceedings.\textsuperscript{238} Customary international law, furthermore, is only binding where no executive or legislative act or judicial opinion controls.\textsuperscript{239} One may argue that US federal case law, which has asserted that removal does not constitute punishment, precludes application of customary international law on this issue.\textsuperscript{240} Conversely, however, the United States may recognize a legal protection from removal under customary international law, consistent with \textit{Andrea Mortlock} and \textit{D. v. United Kingdom}, which does not rely on the cruel and unusual punishment rhetoric that US courts have rejected in the removal proceedings context, and does not have the broad legal implications that such rhetoric entails.\textsuperscript{241}

The case law of the European Court of Human Rights coupled with the \textit{Andrea Mortlock} case raises doubts about the parameters of the protection that may be emerging in customary international law.\textsuperscript{242} In \textit{D. v. United Kingdom} and \textit{N. v. United Kingdom}, the European Court of Human Rights defined a protection from removal that would exacerbate a non-citizen’s already serious terminal illness in its advanced stages, thus compromising the non-citizen’s right to die with dignity.\textsuperscript{243} The Inter-American Commission on Human Rights’ decision in \textit{Andrea Mortlock} recognized a broader protection from removal


\textsuperscript{238} See supra note 10 and accompanying text (discussing US treatment of the Eighth Amendment in removal proceedings).

\textsuperscript{239} See supra note 63 and accompanying text (describing the status of customary international law in US federal law).

\textsuperscript{240} See supra note 11 and accompanying text (discussing US federal case law on removal as punishment).

\textsuperscript{241} See supra Part IB-E. (discussing international jurisprudence and the document provisions under which international legal bodies have recognized protections from removal terminating HIV/AIDS treatment).


that turns not on the gravity of the prognosis but on the fact that removal terminates life-sustaining HIV/AIDS treatment and thus may well be fatal.\textsuperscript{244} The United States may enact a statute that specifies the scope and standard of the legal protection that the United States wishes to provide.\textsuperscript{245}

The United States has several options in protecting non-US citizens with HIV/AIDS from removal that will terminate HIV/AIDS treatment. In addition to recognizing such a removal as a violation of US asylum, withholding, or CAT laws, the United States may utilize international laws in recognizing a new protection.\textsuperscript{246} This may entail applying the American Declaration consistently with the jurisprudence of the Inter-American Commission on Human Rights, or recognizing a right under customary international law.\textsuperscript{247} As Andrea Mortlock demonstrates, the punishment rubric has proven problematic in protecting non-citizens in the United States from removal in even the most extreme cases.\textsuperscript{248} The finding by the US Supreme Court that removal does not constitute punishment has disastrous consequences here, and the United States must find a way around that position to prevent removal that is effectively a death sentence.

CONCLUSION

That a woman in Andrea Mortlock's position could fall through the cracks in US domestic immigration law and be condemned to death in her home country is appalling. That her death would result from an absence of adequate medical care

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\item \textsuperscript{244} See supra notes 123-30 and accompanying text (discussing the parameters of the legal protection which the Inter-American Commission on Human Rights recognized in Andrea Mortlock, and the standard of review the Commission applied).
\item \textsuperscript{245} See supra notes 222-24 and accompanying text (discussing concerns and interests that the United States should consider in defining the parameters of a protection from removal terminating HIV/AIDS treatment).
\item \textsuperscript{246} See supra Part III.B. (discussing protections from removal that the United States may recognize under US domestic law); Part III.C. (discussing protections based on international law).
\item \textsuperscript{247} See supra text accompanying notes 230-45 (discussing US ratification of the American Declaration, and customary international law as a source of protection from removal terminating HIV/AIDS treatment).
\item \textsuperscript{248} See supra notes 116-18 and accompanying text (discussing the US government's position in Andrea Mortlock that removal does not constitute punishment even here, where the claimant argued her removal may be fatal).
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rather than from a human actor does not change the result for Mortlock upon her return to her home country, and should not change the result when she seeks legal protection from removal on those grounds in the United States. The United States should protect non-US citizens from removal in circumstances such as those in Andrea Mortlock, that is to say, where removal will terminate life-sustaining HIV/AIDS treatment and hasten death. The United States may do this by adapting US domestic laws to prohibit removal that terminates HIV/AIDS treatment, or by recognizing an Eighth Amendment protection in removal proceedings that seriously endanger a life. Alternatively, the United States may apply the American Declaration consistently with the Inter-American Commission of Human Rights decision in Andrea Mortlock, or recognize an emerging customary international law that prohibits removal terminating life-sustaining HIV/AIDS treatment.