

REPORT Nº 63/08¹
CASE 12.534
ADMISSIBILITY AND MERITS (PUBLICATION)
ANDREA MORTLOCK
UNITED STATES
July 25, 2008

I. SUMMARY

1. On August 15, 2005 the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition lodged by Olivia Cassin, Esq. of The Legal Aid Society, in conjunction with Professor Richard J. Wilson of the International Human Rights Law Clinic, American University, Washington College of Law, and Sarah Loomis Cave, Esq. of Hughes Hubbard & Reed LLP (hereinafter "the Petitioners") against the United States of America (hereinafter the "United States" or "the State"). The petition was filed on behalf of Ms. Andrea Mortlock (hereinafter the "alleged victim"), a Jamaican national who remains under threat of deportation from the United States to Jamaica, the result of which would deny her medication critical to her treatment for AIDS/HIV, from which the alleged victim suffers. The diagnosis provided by the Petitioners in the event of denial of such medication is certain death. On August 19, 2005 precautionary measures were granted by the Commission requesting that the State refrain from deporting Ms. Mortlock pending the Commission's consideration of her petition.

2. The petition claimed violations of Articles XI and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration") based upon the alleged failure of the United States to guarantee Ms. Mortlock her right to health and the right to protection from cruel, infamous, and unusual punishment. The State alleged that the Petitioners' claims are inadmissible due to a failure to characterize violations of human rights and a lack of exhaustion of domestic remedies. The State also argued that the Commission lacks the competence to issue precautionary measures in respect of a non-state party to the American Convention on Human Rights (hereinafter "the Convention").

3. Owing to the exceptional circumstances of the case, the Commission decided to consider the admissibility of Ms. Mortlock's complaints together with the merits in accordance with Article 37(3) of the Commission's Rules of Procedure in the present report. Upon considering the petition, the Commission declared as admissible the claims presented on behalf of Ms. Mortlock in respect of Articles XI and XXVI of the American Declaration and found the United States responsible for the violation of Article XXVI of the American Declaration. The Commission also decided to transmit the report to the parties.

II. PROCESSING BEFORE THE COMMISSION

4. By note dated August 19, 2005, the Commission transmitted the pertinent parts of the petition to the State with a request for information within two months, as provided for in Article 30 of the Commission's Rules of Procedure. In the same communication, the Commission issued precautionary measures pursuant to Article 25(1) of the Commission's Rules of Procedure requesting the United States to refrain from deporting Ms. Mortlock pending the Commission's investigation of the allegations in her petition.

5. By note received August 23, 2005, the U.S. Mission to the OAS replied to the Commission's August 19, 2005 request for precautionary measures by indicating that it had been forwarded to the Department of Homeland Security and the Passaic County Jail Center in Patterson, New Jersey, where Ms. Mortlock was detained at that time. The Commission transferred the State's observations to the Petitioners by communication dated August 24, 2005.

¹ Commission President Paolo Carozza did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

6. By note received by the Commission on October 28, 2005, the United States indicated that "the Commission lacks the authority to issue precautionary measures against states not parties to the Convention and the Inter-American Court of Human Rights." Second, the State indicated that the Petitioners' allegations failed to characterize violations of human rights. Third, the State asserted that the Petitioners had failed to exhaust domestic remedies. The Commission transmitted the State's communication to the Petitioners in a note dated October 31, 2005.

7. By communication dated November 30, 2005, the Petitioners submitted a request to proceed with consideration of admissibility and the merits of the case. The Commission transmitted the Petitioners' communication to the State in a note dated December 5, 2005. Furthermore, in the same note, the Commission informed the parties that in light of the exceptional circumstances of the complaint, and applying Article 37(3) of its Rules of Procedure, it had decided to open a case designated N° 12.534 and to defer a decision as to its admissibility until the decision on the merits. Accordingly, pursuant to Article 38(1) of the Commission's Rules of Procedure, the Commission requested that the Petitioners present their additional observations on the merits within a period of two months.

8. In a note dated December 8, 2005, the Petitioners furnished additional information to the Commission, which was transmitted to the State in a communication dated December 12, 2005. Thereafter, in a note dated December 19, 2005, the Petitioners informed the Commission that the alleged victim waived her remaining time in the two-month period allotted for submission of additional information.

9. By note dated December 22, 2005, the Commission transmitted the Petitioners' communication to the State. Pursuant to Article 38(1) of the Commission's Rules of Procedure, the Commission requested the State present its additional observations on the merits within a period of two months.

10. By note dated February 13, 2006, the Commission responded to the Petitioners' communication of December 19, 2005 and scheduled a hearing in the matter to take place on March 13, 2006 during the Commission's 124th regular period of sessions.

11. Subsequently, by communication dated March 1, 2006 and received by the Commission on March 3, 2006, the State responded to the Petitioners' observations. The Commission provided the Petitioners with a copy of the State's response by letter dated March 6, 2006.

12. On March 13, 2006 the hearing before the Commission took place with the representatives of the Petitioners and the State in attendance. Both parties made written and oral representations to the Commission and responded to questions. Both the Petitioners and the State presented the Commission with a copy of their respective prepared statements.

13. In a letter dated April 14, 2006, the Petitioners submitted a written response to the State's presentation and submissions made during the hearing held on March 13, 2006. On April 28, 2006, a copy of that letter, with enclosures, was transmitted to the State. The Commission informed the State that it had one month to provide its observations. The State provided its observations on June 14, 2006.

II. POSITIONS OF THE PARTIES

A. Position of the Petitioners

14. According to the Petitioners, Andrea Marie Mortlock is a national and citizen of Jamaica. On December 20, 1979, at the age of 15, she entered the United States as a lawful permanent resident with her entire family and has resided in that country continuously since. She is the mother of two United States citizen children and has a sister and a half brother, both United States citizens, who live in the United States. The Petitioners indicate that in Jamaica, Ms. Mortlock has no family or acquaintances.

15. They indicate that in or about 1986 Ms. Mortlock became addicted to controlled substances and later to cocaine. As a result of her drug addiction she was convicted of several non-

violent offences. According to the petition, the former United States Immigration and Naturalization Service (“INS”) commenced deportation proceedings against Ms. Mortlock with the service of an Order to Show Cause, dated August 16, 1989 as a result of a conviction in 1987 for criminal sale of a controlled substance in Kings County, New York. On April 18, 1995, an immigration judge ordered Ms. Mortlock’s deportation *in absentia*. No appeal was taken and the order of deportation became final.

16. The petitioners indicate that in 1998 Ms. Mortlock tested positive for human immunodeficiency virus (“HIV”) and was diagnosed with Acquired Immune Deficiency Syndrome (“AIDS”) and began treatment for that illness. As a result of her condition, she has suffered from many opportunistic infections and related maladies, such as pneumonia, extreme wasting and neuropathy. Presently, according to the Petitioners, Ms. Mortlock relies on constant monitoring of her illness by a specialized physician and a complex regimen consisting of an array of anti-retroviral medications, to stay alive. Indeed, since the time of her diagnosis, Ms. Mortlock has received anti-retroviral triple drug therapy, which serves as an effective life-saving treatment for HIV and AIDS.²

17. In April 2000, Ms. Mortlock was arrested for (and entered a guilty plea to) criminal possession of stolen property in the fifth degree (a class A misdemeanor - N.Y. Penal Law § 165.40). As a result, the INS took Ms. Mortlock into custody where she was held from April 2000 for approximately two years.³

18. After several failed attempts to secure her release from INS custody, including the filing of a request for deferred action and for release from custody, Ms. Mortlock was released in February, 2003, thanks to a habeas corpus petition.⁴ In the petition, Ms. Mortlock sought release from custody on the ground that Jamaican authorities refused to issue travel documents for her repatriation, based on her dire medical condition.⁵

19. Subsequently, on August 11, 2005, Ms. Mortlock was unexpectedly taken into custody when she reported to her deportation officer in New York, pursuant to an order of supervision issued in February 2003.⁶ According to the Petitioners, Ms. Mortlock was detained in Passaic County Jail, Patterson, New Jersey and she was initially denied access to all of her medications. As a result, her physical condition deteriorated immediately.⁷

20. On August 19, 2005, the Commission issued precautionary measures requesting the United States to refrain from deporting Ms. Mortlock prior to its hearing of their petition. On September 13, 2005 the Department of Homeland Security (“DHS”) released Ms. Mortlock from detention.⁸ While the deportation order was stayed for a period of time, that stay was lifted in 2006 and the deportation order against Ms. Mortlock is now pending final execution by U.S. immigration authorities.

² For example, in 2002, Ms. Mortlock received Combivir, Novir, Crixivan, Epivir, Zerit and Sustiva. See Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, submitted before the United States District Court Middle District of Pennsylvania, dated May 22, 2002, at para. 11.

³ Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, submitted before the United States District Court Middle District of Pennsylvania, dated May 22, 2002 paragraphs 4 and 23.

⁴ Petitioners’ brief dated November 30, 2005. Exhibit A (Affidavit of Ms. Olivia Cassin, dated August 14, 2005).

⁵ In August 2001, and again on January 23, 2002, Ms. Mortlock requested documents to return to Jamaica. By letter dated March 1, 2002, the Jamaican Consulate informed her that “the Jamaican Consulate General would not be in a position to issue such a document to facilitate the return of petitioner to Jamaica” because “the necessary medical treatment for her is not available in Jamaica. Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, dated May 22, 2002, presented to the United States District Court Middle District of Pennsylvania, para. 28.

⁶ The allegations indicate that Ms. Mortlock had been scheduled to meet with her deportation officer on August 15, 2005 in New York. On or around August 10, 2005, Ms. Mortlock’s deportation officer contacted her treating physician, Dr. Gabriela Rodríguez-Caprio, to request that she report. This, Ms. Mortlock did within 24 hours of the request.

⁷ Petitioners’ brief dated November 30, 2005, page 5.

⁸ Petitioners’ brief dated November 30, 2005, pages 2 - 5.

21. The Petitioners argue that because Ms. Mortlock's condition is life-threatening, the consequence of the United States enforcing the deportation order against her would be tantamount to condemning her to protracted suffering and an unnecessarily premature death. A number of the medications required by Ms. Mortlock would not be available to her in Jamaica. In addition, Ms. Mortlock has no doctor, family, friends or acquaintances in Jamaica as she and her family have lived in the United States for nearly 30 years. The Petitioners argue that the standard of health treatment that would be available to Ms. Mortlock in Jamaica is inadequate, and she would have no means of supporting herself. Moreover, they argue that there is evidence documenting the poor treatment and discrimination that sufferers of HIV/AIDS receive in Jamaica due to the social stigma associated with the condition.⁹

22. As a consequence of the aforementioned, in their petition and subsequent submissions, the Petitioners allege that if the State were to deport Ms. Mortlock from the United States to Jamaica, it would be responsible for violating Ms. Mortlock's rights under Articles XI and XXVI of the American Declaration. This argument is founded on the following two arguments.

23. First, if deported to Jamaica, Ms. Mortlock would be prevented from receiving necessary medical care to treat her illnesses, thereby violating Article XI. In addition, such a measure would threaten her personal safety. The Petitioners argue that Article XI implicates the treatment of HIV/AIDS as a right to health under numerous human rights dimensions. In particular, while it is accepted that there is not a specific international covenant focusing on the obligations of the State, the United Nations International Guidelines on HIV/AIDS and Human Rights address a State's role *vis-à-vis* the epidemic, as does Article XI of the American Declaration.¹⁰ In this respect, the petitioners make reference to a decision adopted by the Commission regarding the right to health of the Yanomami Indigenous People in Brazil,¹¹ as well as to its practice regarding the issuance of precautionary measures to protect the lives of HIV patients by requesting OAS member states to follow the standards established by the Pan American Health Organization.

24. Second, the Petitioners argue that removing Ms. Mortlock from the United States to Jamaica would withdraw her essential medical care and expedite her death, and therefore her deportation would amount to "cruel, infamous or unusual punishment" in violation of Article XXVI of the American Declaration.¹²

25. With regard to the admissibility of the petition, the Petitioners argue that Ms. Mortlock has exhausted available domestic remedies, and she has alternatively shown sufficient cause why exhaustion in her case would be futile. On September 13, 2005, Ms. Mortlock was issued with an administrative stay of removal, pursuant to the Immigration and National Act ("INA") (8 U.S.C. § 121(c)(2)). However, such a stay provides no permanent security, and can be revoked at the government's discretion. According to the Petitioners, the applicable regulation states: "Deputy Executive Associate Commissioner for Detention and Removal... may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate... Neither the request nor failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal." Accordingly, Petitioners' position is that the stay could be lifted at any time without notice. Hence, the stay provides no lasting protection of her health and well-being and should not be seen as a "remedy" of any kind.¹³

26. To address the deportation order that Petitioners say threatens Ms. Mortlock's health, applications were made in 2000, 2001 and 2005 by Ms. Mortlock's attorney to request that the Department of Homeland Security reopen the case and overturn the *in absentia* order, based on

⁹ Petitioners' brief dated November 30, 2005, page 2.

¹⁰ Petitioners' brief dated November 30, 2005, page 6.

¹¹ IACHR Resolution No. 12/85, Case N° 7615, Brazil, *Annual Report of the IACHR 1984-1985 OEA/Ser.L/V/III.66 Doc. 10 rev. 1, 1 October 1985*.

¹² Petitioners' brief dated November 30, 2005, page 9.

¹³ Petitioners' brief dated November 30, 2005, pages 3 and 20.

humanitarian reasons. All requests were denied, notwithstanding her deteriorating health. On February 27, 2006 an immigration judge rejected Ms. Mortlock's motion to reopen her case. On that occasion, the judge terminated her own stay of removal that had been in effect while the motion to reopen was pending, and ordered Ms. Mortlock to be deported.¹⁴ Thus, as matters stand today, there is a final deportation order against Ms. Mortlock, the definitive execution of which remains outstanding.

27. The Petitioners address the issue of whether further domestic recourse against the deportation order would be worthwhile, or even possible. Petitioners argue that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") gives immigration judges limited discretion to reopen cases.¹⁵ In particular, it is claimed that a broad deference is afforded to administrative decisions, except in circumstances where the immigration judge has abused his/her discretion. According to the Petitioners, in her case, Ms. Mortlock has no issue for appeal because there is no colorable basis to maintain that the Immigration Judge abused her discretion in her review of the facts.

28. The Petitioners allege that appealing either to the Board of Immigration Appeals (BIA) or the Court of Appeals would not provide adequate or effective administrative or judicial remedies as these entities do not consider international principles or humanitarian relief. Therefore, even if the State's contentions (see *infra* Position of the State) that she could appeal to the BIA or the Court of Appeals were true, the grounds on which an appeal would be granted are so narrow as to constitute "illusory relief."¹⁶ Accordingly, domestic appeals would be futile as they provide no means to protect Ms. Mortlock's rights under Articles XI and XXVI, thereby meeting the exemption to the rule on exhaustion of domestic remedies provided for in Article 31(2) of the Commission's Rules of Procedure.

29. With regard to the merits of their claim, first, the Petitioners argue that the State is obliged *erga omnes* to respect essential individual rights ahead of any sovereign privilege to deport individuals within its territory.¹⁷ They allege that the State should protect the right to health and the right to protection from cruel, infamous or unusual punishment, recognized in Articles XI and XXVI of the American Declaration. The Petitioners assert that the protection of an individual from "punishment" (as provided for in Article XXVI of the Declaration), is not limited to protection in criminal proceedings only. Rather, the protection also applies to civil proceedings, and to non-nationals.¹⁸ Therefore, this would include the circumstances in which Ms. Mortlock finds herself.

30. The Petitioners allege that in a case like this, these rights under the Declaration should be interpreted in light of the case law of the European Court of Human Rights ("ECHR") in *D v. United Kingdom* where a test of extreme circumstances was established.¹⁹ The European Court in *D v. United*

¹⁴ Petitioner's response to the presentation and submissions of the Government of the United States during the hearing held on March 13, 2006, dated April 14, 2006, at page 3.

¹⁵ Pub. L. No. 104-208, 110 Stat. 3009; See 8 U.S.C. § 1252(e).

¹⁶ Petitioners' brief dated March 13, 2006, page 5.

¹⁷ ICJ, *Barcelona Traction, Light and Power Company Ltd. (Second Phase) (Belgium v. Spain)*, Judgment, 1970, Rep., 3 (February 5, 1970), as cited in Petitioner's brief dated April 14, 2006, page 7.

¹⁸ IACHR Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr. (2002), para. 401, cited in Petitioner's brief dated April 14, 2006, page 10.

¹⁹ *D v. United Kingdom*, 24 Euro. Ct. H.R. 423 (1997). In this case the European Court considered the circumstances of a man who was convicted of drug smuggling. While in prison, D was diagnosed with HIV/AIDS. As his disease progressed, D requested that the United Kingdom refrain from deporting him to his country of citizenship, St. Kitts. The reason D gave for this request was because he would not have access to medical care there, to treat his condition caused by HIV/AIDS. The European Court held that "the abrupt withdrawal of these [medical] facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death." See *D v. United Kingdom*, 24 Eur. Ct. H.R. 423 (1997), para. 52. D faced homelessness, given the lack of friends, family or support D had in St. Kitts. D also provided evidence of discrimination against HIV/AIDS sufferers in St. Kitts, resulting in reduced employment opportunities. Ultimately, the European Court recognized that D's quality of life depended on "the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by charitable organizations." *D v. United Kingdom*, 24 Eur. Ct. H.R. 423 (1997), at para. 51. Furthermore, the European Court held that these extreme circumstances, when combined, would amount to inhumane treatment and would, therefore, violate Article 3 of the European Convention. Petitioner's brief dated, April 13, 2006, pages 9 and 10.

Kingdom, considered the question of whether the deportation of D would be tantamount to a denial of treatment, since on one interpretation, it would not directly cause a denial of treatment in St. Kitts. According to the Petitioners, the European Court gave great weight to the State's right to "control the entry, residence, and expulsion of aliens."²⁰ In turn, this purportedly contributed to the European Court's restrictive interpretation of the case, and its holding that only in "very exceptional circumstances" could the removal of the alleged victim from a country constitute inhumane treatment.²¹

31. The Petitioners argue that Ms. Mortlock's case is directly comparable to that adjudged in *D v. United Kingdom*. Ms. Mortlock's treatment consists of a complex regimen of twelve prescribed medications, nutritional supplements, growth hormones and vitamin supplements. This medical care, required every day, is provided to her in the United States. According to her doctor, "missing these medications will lead to rapid progression and death."²² An affidavit from Dr. Farley Cleghorn, on behalf of the Petitioners, indicates that "there is no comprehensive system of care for people with HIV/AIDS to get anti-retroviral treatment in Jamaica... Anti-retroviral drugs remain unavailable to most Jamaicans who need them, despite discounts of up to 90% recently offered by major pharmaceutical companies." Furthermore, Dr. Cleghorn also indicated that "there is no system in Jamaica to detect and treat opportunistic diseases" associated with HIV/AIDS.²³

32. They also argue that, according to Human Rights Watch, Ms. Mortlock might risk harassment and discrimination in Jamaica based on her HIV/AIDS status that will put her health and security in jeopardy.²⁴ Given the visible nature of Ms. Mortlock's physical condition (*i.e.*, the limp caused by neuropathy, rashes and skeletal appearance caused by her wasting disease), it is alleged that the risks to which she is exposed are expected to be even more tangible.²⁵

33. Petitioners consider that the test in *D v. United Kingdom* was not intended by the European Court to be limited to "death bed cases; that would be a course rule and an unwise one: there may be other instances which press with equal force."²⁶ Thus, critical to the assessment of Petitioners' case is the state of health care that Ms. Mortlock would receive in Jamaica, in the event she is deported. The Petitioners' position is that despite recent efforts, the comprehensive system of medical care Ms. Mortlock needs to survive is still not available in Jamaica.

34. The State's position (explained below) is that there are improvements for the position of people suffering from HIV/AIDS who live in Jamaica. Notwithstanding such assertions, the Petitioners maintain that there is considerable evidence to suggest that Ms. Mortlock would suffer from such discrimination that gaining access to medical care would be prevented. This, in part, is due to claims that it is often health care providers that discriminate against HIV/AIDS sufferers. Furthermore, the Petitioners argue that the country's health care system is still insufficient to meet Ms. Mortlock's very serious medical needs.

²⁰ See *D v. United Kingdom*, 24 Eur. Ct. H.R. 423 (1997), para. 49.

²¹ The European Court held that three factors were relevant to whether the removal of the alleged victim from a country would result in inhumane treatment: (1) the late stage of the plaintiff's terminal disease; (2) the absence of family or friends in the receiving country; and (3) the lack of medical care available to the plaintiff in that country. The European Court also found it relevant in *D v. United Kingdom* that D's condition would be negatively affected by the "lack of shelter and proper diet as well as exposure to the health and sanitation problems which beset the population of St. Kitts." See *D v. United Kingdom*, 24 Eur. Ct. H.R. 423 (1997), para. 52.

²² Petitioner's brief dated November 30, 2005, page 10.

²³ Affidavit of Farley R. Cleghorn, MD, MPH, paras. 5 and 6, Exhibit F, page 11, footnote 36.

²⁴ Petitioner's brief dated November 30, 2005, page 12, footnote 10, and Exhibit D. Dr. Cleghorn also adds that "Jamaican society shuns persons with HIV/AIDS, who are often disowned by their families, evicted from their homes, rejected by friends, fired from their jobs, and even physically attacked. They become outcasts and are literally left to die, even if admitted to hospital." Exhibit F, para. 7.

²⁵ Petitioner's brief dated November 30, 2005, page 12.

²⁶ See *D v. United Kingdom*, 24 Eur. Ct. H.R. 423 (1997), para. 18.

35. The Petitioners concede that the cost of anti-retroviral medication has been discounted, although three-drug combinations for anti-retroviral treatment is insufficient for a woman who requires up to twelve daily medications to live. Furthermore, notwithstanding the discounted price of approximately US\$1,000/month, this remains a very high price to pay for someone with no resources, employment in Jamaica, and arguably no prospect of employment in Jamaica. Separately, statistical information that the Petitioners have recognized, in the Petitioners' argument, would suggest that some Jamaicans are theoretically able to access free medication. For example, Dr. Ytades Gebre, Senior Medical Officer/Executive Director of Jamaica HIV/AIDS Prevention and Control Project, states that 500 people received free anti-retroviral medication in 2005, and that the government intends to make this available to 1,000 people in 2006.

36. The Petitioners' position is that given there are apparently 8,000 people waiting for the drug treatment, according to the same Dr. Ytades Gebre, Ms. Mortlock would likely never see the end of the waiting list because the medicine would not get to her before she dies. The Petitioners indicate that even if recent initiatives for AIDS support improved the situation regarding the distribution of medication, such initiatives would not reduce the discrimination that Ms. Mortlock might suffer. In support of the broad contention regarding the system of healthcare that would be available to Ms. Mortlock in Jamaica, Dr. Cleghorn testified that "in 2006, there is still no comprehensive system of care for people with HIV/AIDS to get anti-retroviral treatment in Jamaica [and] "a woman such as Ms. Mortlock – who with adequate treatment in the United States, has been able to live for several years with the disease – would not be able to survive in her native country and most likely would die quickly in terrible conditions."

37. According to the Petitioners, immigration policy is just a policy, and fundamental rights cannot be balanced against policy decisions.²⁷ Thus, the domestic laws cited by the State apply only to situations where the power to regulate immigration does not interfere with its obligations to protect internationally recognized human rights. Hence, the State does not have an "inherent and inalienable power" to violate Ms. Mortlock's fundamental human rights.²⁸ Accordingly, their position is that the transcending qualities of the international law of human rights should supersede the State's position under the immigration policy affecting Ms. Mortlock.

B. Position of the State

38. The State's case does not dispute the medical condition in which Ms. Mortlock finds herself, nor does it dispute the basic factual background of the Petitioners' case. The State does dispute the ability of the Commission to issue precautionary measures, the admissibility of the petition and its legal grounds.

39. In its observations in the present complaint, the State provides the following factual and procedural history of Ms. Mortlock's case:

Ms. Mortlock is a forty-one year old native and citizen of Jamaica. She was admitted as a lawful permanent resident on December 20, 1979. She was first placed in deportation proceedings in 1989, having been charged as deportable under section 241(a) (11) of the Immigration and Nationality Act (INA), for sale of cocaine. At that time, she conceded deportability and sought relief from deportation under INA section 212(c), a discretionary form of relief from deportation. However, she failed to appear at her hearing and was ordered deported *in absentia*. In 1992, Ms. Mortlock's case was reopened, but she again failed to appear for a hearing on the merits of her 212 (c) application. In 1995, she was again ordered deported *in absentia* and was deemed to have abandoned all applications for relief.

In 1987, Ms. Mortlock was convicted for the criminal sale of a controlled substance (cocaine) and given a five-month sentence and five years probation. In 1988, she violated her probation and was

²⁷ Petitioners' brief dated April 14, 2007, page 7. See also I/A Court HR, Advisory Opinion OC-18/03 Juridical Condition and Rights of Undocumented Migrants, para. 73.

²⁸ Petitioners' brief dated April 14, 2007, page 7.

resentenced to a term of one to three years. After being released from prison on parole in 1990, Ms. Mortlock was arrested and convicted five times for petit larceny.

The U.S. Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) took custody of Ms. Mortlock in April 2000, but upon a successful Writ of Habeas Corpus, she was ordered released in March 2003 under an order of supervision. After securing a proper travel document, ICE again took Ms. Mortlock into custody in August 2005 to effectuate the outstanding 1995 deportation order. On August 14, 2005, Ms. Mortlock filed a motion to reopen with the immigration court and requested a stay of removal. She argued that humanitarian grounds warranted the reopening of the case *sua sponte*. The immigration judge granted the stay pending the consideration of the motion to reopen. The ICE submitted its brief in opposition and requested that the stay be lifted. On September 13, 2005, ICE's Office of Detention and Removal released Ms. Mortlock under an order of supervision pending the immigration judge's decision on her motion to reopen.

40. Moreover, the State indicates that after Ms. Mortlock initiated proceedings before the Commission, during the pendency of her motion to reopen, Ms. Mortlock was charged and arrested for criminal possession of a controlled substance and for criminal trespass. In an apparent plea deal, she pleaded guilty to criminal trespass on November 26, 2005. Additionally, on January 30, 2006, Ms. Mortlock was arrested and initially charged with criminal possession of a controlled substance, criminal possession of marijuana, and attempted sale of a controlled substance. As of March 13, 2006, the final disposition of the criminal charges stemming from her arrest was currently pending.

41. With regard to the question of the Commission's authority to issue precautionary measures, the State argues that the Statute of the Commission refers to precautionary measures only in the context of State Parties to the American Convention on Human Rights. Article 20(b) of the Commission's Statute provides for the Commission to have the power "to make *recommendations* to [non-parties to the American Convention], when it finds this appropriate, in order to bring about more effective observance of fundamental human rights."²⁹ Accordingly, the State's position is that for non-State Parties to the American Convention, such as the United States, there is no provision in the Commission's organic document, the American Convention on Human Rights, or the Commission's Statute, which would provide specific authority for the Commission to request precautionary measures. Therefore, the State argues that because the United States is not party to the American Convention, and neither is it a party to any other convention that would confer upon the IACHR the authority to request that precautionary measures be taken by the State, such an action would constitute *ultra vires* action by the Commission.³⁰

42. Separately, the State sustains that one of the fundamental issues concerning Ms. Mortlock's case is the issue of state sovereignty and the state's ability to control immigration. The State indicates that it has been settled repeatedly that Congress has power to exclude any and all aliens from the United States, to prescribe the terms and conditions on which they may enter or on which they remain after having been admitted, to establish the regulations for deporting such aliens as have entered in violation of law, and to commit the enforcing of such laws and regulations to executive officers. In sum the State argues that the right to exclude or expel all aliens or any class of aliens, absolutely or upon certain circumstances, is an inherent and inalienable right of a sovereign and independent nation, essential to its safety, its independence, and its welfare.

43. With regard to admissibility, the State argues that the Petitioners have not exhausted domestic remedies. The State alleges that customary international law and the Inter-American Court's decisions uphold the principle that international tribunals are not intended to replace national adjudication, the exhaustion requirement before the State's courts must be observed.³¹ Specifically, the State alleges

²⁹ Emphasis added.

³⁰ See Presentation of the Government of the United States of America to the Inter-American Commission on Human Rights regarding Andrea Mortlock, dated March 13, 2006, at page 1.

³¹ Presentation of the Government of the United States of America to the Inter-American Commission on Human Rights regarding Andrea Mortlock, dated March 13, 2006, at page 3.

that Ms. Mortlock continues to benefit from review of her claims and the State's immigration courts have jurisdiction to consider any and all defenses Ms. Mortlock may proffer.

44. In relation to the Petitioners' reliance on the 1997 decision by the European Court of Human Rights in the case of *D v. United Kingdom*, the State indicates first that unlike citations to soft law, the decisions of the ECHR are binding to those States that have accepted the Court's jurisdiction. The United States, however, is not a state party to the European Convention on Human Rights and, furthermore, the State maintains that the Petitioners' equating Article XXVI's protections with those of the section of the European Convention central to the *D* decision is unsupported by the plain language of the texts. The State points out that Article 3 of the European Convention provides that "[n]o one shall be subjected to torture or to inhuman or degrading *treatment or punishment*,"³² where as Article XXVI of the American Declaration is limited to "cruel, infamous or unusual *punishment*."³³ The State maintains that Article XXVI of the Declaration is a provision relating specifically to criminal prosecution, conviction and sentencing.³⁴ 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. According to the State, for this reason alone, the ECHR case law is inapplicable for comparison purposes.

45. The State further alleges that the Petitioner's reliance on *D v. United Kingdom* is misplaced. In particular, the State argues that *D* was about death with dignity; the case concerned a man whose illness had reached a terminal stage, hospitalized at the time of the hearing, with no prospect of any medical care or family support in his country of origin in what would be his final days. Under these "exceptional circumstances", the ECHR found that his removal would "expose him to a real risk of dying under the most distressing circumstances and thus would constitute inhuman treatment" under Article 3 of the European Convention. The State points out that in subsequent cases, however, the ECHR, consistently citing *D v. U.K.* as an "exceptional case," has applied it very narrowly, refusing to generalize from it a broader "entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance."³⁵

46. According to the State, those numerous claims rejected on the merits contained circumstances similar to those of Ms. Mortlock more so than *D*. Specifically, while acknowledging the seriousness of Ms. Mortlock's medical diagnosis, the State alleges that there is no evidence indicating she is in an advanced or terminal stage of HIV/AIDS requiring hospitalization. Therefore, there is no life-threatening situation that would outweigh the public interests of the United States in protecting public order. The State also alleges that, unlike the situation in *D*, in Jamaica medical care is provided by the Government; antiretroviral drugs are available although in many cases patients must pay for them with their own resources; and non-profit organizations provide them with antibiotics and some care at a small hospice. The State emphasizes that—as more recent ECHR decisions refusing to extend *D* point out—the fact that the alien's circumstances would be less favorable in his or her country of origin cannot be regarded as decisive in finding removal inhuman.³⁶

47. Finally, with regard to the allegation that Ms. Mortlock's removal to Jamaica would constitute a violation of the right to the preservation of health and to well-being established in Article XI of the American Declaration, the State argues that the Declaration is a non-binding document that creates

³² Emphasis added.

³³ Emphasis added.

³⁴ Article XXVI of the American Declaration of the Rights and Duties of Man specifically states: Every accused person is presumed to be innocent until proven guilty. Every 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.

³⁵ *Ndangoya v Sweden* (dec.), no. 17868/03, ECHR 2004. United States' submission dated March 16, 2006, page 7.

³⁶ *Amegnigan v The Netherlands* (dec.), no. 25629/04, ECHR 2004; *Ndangoya v Sweden* (dec.), no. 1786/03, ECHR 2004; *Henao v The Netherlands* (dec.), no. 13669/03, ECHR 2003; *Bensaid v United Kingdom*, no. 44599/98, ECHR 2001.

no right to health or medical care and acknowledges limits to any purported health right.³⁷ Additionally, the State maintains that universal access to health care is not currently provided to all, and consistent with Article XI, is not “permitted by public and community resources.”

48. In conclusion, the State argues that, as a threshold matter, the Commission does not have the authority to request precautionary measures against a non-State Party to the American Convention; that the Petitioners have failed to exhaust domestic remedies; that for the IACHR to act on this petition would signal a rejection of the principle of international respect for independent judicial processes of a sovereign State; that the ability to control immigration is inherent to the sovereign power of every Member State of the OAS; and that the U.S. has not violated the rights of Ms. Mortlock. Furthermore, the State alleges that the Petitioners’ reliance on a case before the European Court of Human Rights is both inapplicable and distinguishable on the facts in particular because there is no provision in the American Declaration which contains comparable protections to Article 3 of the European Convention and there is no evidence to indicate that Ms. Mortlock is in advanced or terminal stage of HIV/AIDS requiring hospitalization. The State also maintains that, since 2002, the situation for persons living with HIV/AIDS in Jamaica has improved dramatically, and antiretroviral drugs are available from the Ministry of Health at reduced cost or free of cost. For these reasons, the petition should be dismissed as inadmissible and lacking merit.

III. COMPETENCE AND ADMISSIBILITY

49. The Commission has considered the admissibility of the present complaint pursuant to Articles 30 and 34 of its Rules of Procedure and makes the following determinations.

A. Competence of the Commission *ratione personae, ratione materiae, ratione temporis* and *ratione loci*

50. The Commission is competent to examine the petition in question. Under Article 23 of the Rules of Procedure of the Commission, the Petitioners are authorized to file complaints alleging violations of rights protected under the American Declaration. The alleged victim, Andrea Mortlock, is a person whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission’s Statute and Article 49 of the Commission’s Rules of Procedure. The United States has been subject to the jurisdiction of the Commission since the Commission’s creation, as a Member State of the OAS that deposited its instrument of ratification of the OAS Charter on June 19, 1951.³⁸

51. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after Ms. Mortlock was first ordered to be deported in 1995. The facts alleged, therefore, occurred subsequent to the date on which the United States’ obligations under the American Declaration took effect.

52. The Commission is also competent *ratione loci*, given that the petition indicates that the alleged victim was under the jurisdiction of the United States at the time the alleged events occurred, which reportedly took place within the territory of that State. Finally, inasmuch as the Petitioners have

³⁷ Article XI of the American Declaration of the Rights and Duties of Man, *Right to the Preservation of health and well-being* specifically provides: Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

³⁸ Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate in order to bring about more effective observance of fundamental human rights. See also Charter of the Organization of American States, Arts. 3, 17, 106; Rules of Procedure of the Inter-American Commission on Human Rights, Articles 26, 51-54; I/A Court H.R., Advisory Opinion OC-10/89 “Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,” July 14, 1989, Ser. A No. 10 (1989), paras. 35-35; IACHR, James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87 paras. 46-49.

filed complaints alleging violation of Articles XI and XXVI of the American Declaration, the Commission is competent *ratione materiae* to examine the complaint.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

53. Article 31(1) of the Commission's Rules of Procedure specifies that in order to decide on the admissibility of a matter, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law. Article 31(2) of the Commission's Rules of Procedure, however, specifies that this requirement does not apply if the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

54. Additionally, domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they are designed.

55. Further, when the petitioner alleges that he or she is unable to prove exhaustion, Article 31(3) of the Commission's Rules of Procedure provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the record.

56. The United States is not a party to the American Convention. However, for purposes of analysis the Commission refers to the *Velasquez Rodriguez Case* in which the Inter-American Court construed Article 46 of the American Convention on the issue of exhaustion of domestic remedies, provisions similar to Article 31 of the Commission's Rules of Procedure. In the *Velasquez case* the Inter-American Court stated that for the rule of prior exhaustion of domestic remedies to be applicable, the domestic remedies of the State concerned must be available, adequate and effective in order to be exhausted. The Court also opined that upon the party raising an allegation of non-exhaustion because of the unavailability of due process in the State, the burden of proof shifts to "the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective."

57. In the present matter, the Petitioners argue that the instant case is admissible because Ms. Mortlock has effectively exhausted all effective domestic remedies and alternately has shown that further appeals in her case would be futile in respect of the complaints contained in the petition. In particular, the Petitioners allege that the February 27, 2006 final deportation order issued against Ms. Mortlock should be considered the final decision in terms of the exhaustion of domestic remedies pursuant to Article 31 of the Commission's Rules of Procedure. They argue that further submissions to the BIA or to the Court of Appeals would be futile since their decisions cannot be based upon humanitarian principles.

58. For its part, the State has opposed the admissibility of the petition on the basis that Ms. Mortlock has not met the exhaustion of domestic remedies requirement under Article 31 of the Commission's Rules of Procedure. More particularly, the State argues that the alleged victim failed to pursue all of the administrative and judicial mechanisms available to her in the immigration process context. The State also objects on the basis that the alleged victim is able to raise challenges relating to her removal order, such as filing a petition for review before the Court of Appeals.

59. Regarding a possible appeal before the administrative entities, the information in the record before the Commission indicates that the Board of Immigration Appeals limits its review of cases to the determination of whether the crime or crimes for which the applicant has been convicted constitute "aggravated felonies". Should the tribunal find the definition of aggravated felonies to have been satisfied

in the circumstances of the applicant's case, it simply dismisses the applicant's appeal. After considering the information available regarding the situation of Ms. Mortlock and her convictions, the Commission finds that the administrative appeal mechanism provided for under current immigration legislation does not appear to provide an effective remedy to address in substance the claims raised in the petition before the Commission.

60. Regarding the judicial remedies available, the Commission considers that the provisions of the recently enacted REAL ID Act of 2005 that pertain to judicial review of immigration decisions under the Immigration and Nationality Act (INA) are relevant to the analysis of the present claim and its context.

61. The REAL ID Act of 2005 was enacted in response to the Supreme Court's June 25, 2001 decision in *INS v. St. Cyr*³⁹, which established that the preclusion of direct review in the courts of appeals did not bar an alien from bringing claims within the traditional scope of habeas corpus to challenge removal orders in the district courts. In other words, with *INS v. St. Cyr*, the Supreme Court held that non-citizens removable on the basis of certain criminal convictions could still obtain habeas corpus review in the district courts because Congress had not expressly precluded habeas corpus jurisdiction by a "clear statement."

62. However, on May 11, 2005 the U.S. Government adopted the REAL ID Act of 2005 which, contrary to what the Supreme Court decided in *INS v St.Cyr*,⁴⁰ eliminated habeas corpus review of orders of removal (deportation) and replaced it with what Congress believed to be a constitutionally adequate alternative: direct circuit review of "constitutional claims or questions of law." Thus, the REAL ID Act provides that challenges to final orders of removal, deportation, or exclusion must be filed in the appropriate courts of appeals via a petition of review. Rather than eliminating judicial review entirely, Congress granted jurisdiction exclusively to the courts of appeals. Specifically, the REAL ID Act of 2005 provides:

(D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS:

[n]othing in subparagraph (B) [precluding review of denials of discretionary relief] or (C) [precluding review of removal orders against non-citizens for criminal offenses], or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of **constitutional claims or questions of law** raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.⁴¹

63. Therefore, the issue which the Commission must address at this point is whether a petition of review before a Court of Appeals in Ms. Mortlock's case would constitute an effective and adequate remedy in respect of the claims that the Petitioners have raised before the Commission.

64. On this point, the 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

³⁹ *INS v. St. Cyr*, 121 S. Ct. 2271 (2001). The respondent in the *St. Cyr* case was a lawful permanent resident in the United States who had pleaded guilty to a criminal charge that made him deportable under U.S. immigration law. He would have been eligible for a waiver of deportation under the immigration law in effect at the time when he was convicted, but his removal proceedings were commenced after the effective dates of the AEDPA and IIRIRA, which the Attorney General claimed withdrew his authority to grant a waiver. The respondent brought a habeas corpus application in the U.S. District Court challenging the circumstances of his deportation based upon the alleged retroactive application of the deprivation of consideration for a humanitarian waiver. *St. Cyr* succeeded before the District Court and the U.S. Court of Appeals and the matter was ultimately appealed to the U.S. Supreme Court. The Supreme Court held in its June 25, 2001 decision that the IIRIRA did not remove the federal court's jurisdiction to review administrative actions by way of habeas corpus under 28 U.S.C. 2241. The Court also held that the legislative provisions in issue could not be interpreted so as to give retroactive effect to the waiver revocation under the new legislation. This conclusion was based principally upon the Court's finding of lack of clear language in the legislation to this effect, together with the unfairness that would result if people like the respondent entered into plea agreements with prosecutors without possibly being aware of the future immigration consequences, namely the revocation of the authority to waive deportation in respect of such crimes. See IACHR Report No. 19/02, case 12.379 – United States, Annual Report of the IACHR 2002.

⁴¹ 8 U.S.C. §1252 (a)(2)(D) (as amended) (emphasis added).

the American Declaration, which conveniently coincides with the Eighth Amendment of the U.S. Constitution.⁴² According to recent U.S. jurisprudence interpreting the Eighth Amendment in cases involving deportation proceedings, however, such a contention would not stand in federal courts. Specifically, numerous courts, following the *St. Cyr* decision mentioned above, have continued to hold that the Eighth Amendment does not apply to deportation proceedings, accepting the argument that such proceedings are not criminal in nature and do not result in the imposition of punishment.⁴³

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.

66. In these circumstances, the Commission cannot consider the administrative and judicial appeal mechanisms under the INA and other applicable legislation to constitute effective remedies to address the alleged violations of the American Declaration, within the meaning of Article 31 of the Commission's Rules of Procedure. As stated above, the Commission considers, in accordance with general principles of international law, that a petitioner need not exhaust domestic remedies if on the evidence such proceedings would be obviously futile or have no reasonable prospect of success. Consequently, based upon the information and arguments before it, the Commission finds that the requirements of Article 31 of the Commission's Rules of Procedure have been satisfied.

⁴² The Eighth Amendment of the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁴³ See *e.g.*, *Elia v. Gonzales*, 418 F.ed 667, 675 (6th Cir. 2005) ("[T]he Eighth Amendment is inapplicable to deportation proceedings because as the Supreme Court has held, deportation does not constitute punishment"); *Cadet v. Bugler*, 377 F.3d 1173,1196 (11th Cir. 2004) ("[B]ecause immigration proceedings are not criminal and do not constitute punishment, [Petitioner's] argument that his removal ... will violate the Eighth Amendment lacks merit.").

2. Timeliness of the Petition

67. Article 31(1) of the Commission's Rules of Procedure require that for a petition or communication to be admitted by the Commission, it must be lodged within a period of six months from the date on which the alleged victim of a rights violation was notified of the final judgment. In the instant case, domestic remedies were exhausted on February 27, 2006 once Ms. Mortlock's motion to reopen her case was rejected and her deportation order stood as final and the petition was lodged with the Commission on August 15, 2005. Therefore, the Commission concludes that the petition is not barred from consideration under Article 32 of the Commission's Rules of Procedure.

3. Duplication

68. The Petitioners have indicated that the subject matter of Ms. Mortlock's complaint has not been previously submitted to the Commission or before any other intergovernmental organization of which the United States is a member.⁴⁴

69. In the present case, the record indicates that Ms. Mortlock has not previously lodged a complaint with the Commission, therefore, the Commission finds no bar to the admissibility of the Petitioners' claims under Article 33 of its Rules of Procedures.

4. Colorable Claim

70. The Commission has outlined in this Report the substantive allegations of the Petitioners, as well as the State's responses to those allegations. After carefully reviewing the information and arguments provided by the parties in light of relevant principles and jurisprudence, and without prejudging the merits of the matter, the Commission finds that the petition states facts that tend to establish violations of rights under the American Declaration and is not manifestly groundless or out of order. While the Commission will not undertake a fourth instance review of domestic courts acting within their competence and with due judicial guarantees,⁴⁵ the Commission is empowered to undertake its own evaluation of the evidence presented in the proceedings before it, in light of the principles and jurisprudence of the Inter-American human rights system and international law, in order to determine whether a violation of a state's international commitments may be involved.⁴⁶ In light of the allegations and information submitted by the Petitioners in this matter and existing jurisprudence relating to the issues raised by the Petitioners, the Commission considers that the petition raises colorable claims of violations of the American Declaration that should be evaluated on the merits of this case. Accordingly, the Commission concludes that the Petitioners' petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

C. Conclusions on Admissibility

71. In accordance with the foregoing analysis of the requirements of Articles 30 to 34 of the Commission's Rules of Procedure, and without prejudging the merits of the matter, the Commission decides to declare as admissible the claims presented on behalf of Ms. Mortlock in respect of Articles XI and XXVI of the American Declaration and continue with the analysis of the merits of the case.

IV. MERITS

72. The Petitioners allege that the State is responsible for violating Ms. Mortlock's rights under Articles XI and XXVI of the American Declaration. They argue that should Ms. Mortlock be deported, she would be prevented from receiving necessary medical care to treat her illness and therefore subject to "cruel, infamous or unusual punishment" within the meaning of Articles XI and XXVI

⁴⁴ Petitioners' Brief dated November 2005, page 22.

⁴⁵ IACHR Report No. 39/96 (Santiago Marzioni), *Argentina, Annual Report of the IACHR 1996*, paras. 48-52.

⁴⁶ IACHR Report 74/03 (Chief Grand Michael Mitchell), *Canada, Annual Report of the IACHR 1993* para. 37.

of the American Declaration, given the uncertainties confronting her in Jamaica through shortage of the necessary drugs and medical facilities available there.

73. Article XXVI. Right to Due Process of law reads as follows:

Every accused person is presumed to be innocent until proved guilty.
Every 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.

Article XI. Right to the preservation of health and to well-being reads as follows:

Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical aid to the extent permitted by public and community resources.

74. The Petitioners allege that Ms. Mortlock is terminally ill and faces deportation to Jamaica where she will not receive the specialized treatment she requires to stay alive, and where she has no support network. They indicate that Ms. Mortlock has no doctor, family, friends, or acquaintances in Jamaica as she and her family have lived in the United States for nearly thirty years. They indicate that her health continues to deteriorate and the setbacks from her time in jail have had a marked affect on her mental and physical health. The Petitioners further argue that Ms. Mortlock has become increasingly sick and listless to the extent that removal by the United States would be nothing short of a death sentence. Knowingly sending her to Jamaica with the knowledge of her current health care regime and the country's sub-standard access to comparable health care for those with HIV/AIDS would violate Ms. Mortlock's rights, and would constitute a *de facto* sentence to protracted suffering and an unnecessarily premature death. The Petitioners also argue that those living with AIDS in Jamaica suffer from stigma and discrimination that may put their general safety at risk.

75. While acknowledging the seriousness of Ms. Mortlock's medical diagnosis, the State alleges that there is no evidence indicating she is in an advanced or terminal stage of HIV/AIDS requiring hospitalization. Therefore, there is no life-threatening situation that would outweigh the public interests of the United States in protecting public order.⁴⁷ The State also indicates that the Jamaican Government provides medical care, antiretroviral drugs are available but patients must pay for them out of their own resources, and non-profit organizations provide antibiotics, some care, and a small hospice. In any case, the State alleges that the fact that the alien's circumstances would be less favorable in his or her country of origin cannot be regarded as decisive in finding removal inhuman.⁴⁸

76. With regard to the allegation that Ms. Mortlock's removal to Jamaica would constitute a violation of the right to the preservation of health and to well-being established in Article XI of the American Declaration, the State argues that the Declaration is a non-binding document that creates no right to health or medical care and acknowledges limits to any purported health right. Additionally, the State maintains that universal access to health care is not currently provided to all, and consistent with Article XI, is not "permitted by public and community resources."

77. Separately, the State argues that the sovereign right to formulate and implement immigration policy is a right that should prevail irrespective of the physical condition of the alleged victim. By contrast, the Petitioners argue that immigration is a *policy*. Such an emphasis (employed by the Petitioners) is designed to distinguish a policy from a fundamental right protected by the American Declaration. In effect, it is to assert a hierarchy between immigration laws of the State, and the fundamental human rights protected by the State.

⁴⁷ United States' submission at the hearing held on March 13, 2006.

⁴⁸ *Amegnigan v The Netherlands* (dec.), no. 25629/04, ECHR 2004; *Ndangoya v Sweden* (dec.), no. 1786/03, ECHR 2004; *Henao v The Netherlands* (dec.), no. 13669/03, ECHR 2003; *Bensaid v United Kingdom*, no. 44599/98, ECHR 2001.

78. In this regard, the Commission acknowledges that Member States have the right, as matter of well-established international law, to control the entry, residence, and expulsion of aliens. However, in exercising this right to expel such aliens, the Member States must have regard to certain protections which enshrine fundamental values of democratic societies. The Commission recognizes that the individual State determines its immigration policies, although within limits such that it may not infringe upon the rights of nationals to exit and enter the country nor to settle anywhere within. This immigration policy must grant foreign nationals the right not to be deported without a decision firmly supported by the law, and it must prohibit the collective expulsion of foreign nationals, irrespective of their legal status. Likewise, the immigration policy must guarantee to all an individual decision with the guarantees of due process; it must respect the right to life, physical and mental integrity, family, and the right of children to obtain special means of protection. Finally, the execution of this immigration policy cannot give rise to cruel, degrading and inhumane treatment nor discrimination based on race, color, religion or sex.⁴⁹

79. Therefore, the Commission must determine whether there is a real risk that the applicant's removal may infringe her right to due process of law and the preservation of her health in light of the most recent information on Ms. Mortlock's state of health, the medical treatment available in Jamaica, and the Ms. Mortlock's family situation in Jamaica.

80. In the instant case, the Petitioners have relied substantially on the European Court's decision in *D v. United Kingdom*, as a basis for the assessment of whether Ms. Mortlock should be deported or not. While the organs of the Inter-American System are not bound to follow the judgments of the European Court of Human Rights, the Commission has also previously held that the jurisprudence of other international supervisory bodies can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems.⁵⁰ Therefore, it is wholly appropriate and established practice for the Commission to consider authorities originating from the European Court as well as other international courts, to the extent the decisions are relevant to the obligations owed by the State to the alleged victim. Accordingly, in 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.

81. The European Court of Human Rights has established that aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances, an implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of the right not to be subject to cruel or inhumane treatment.⁵¹ Such exceptional circumstances were deemed to be present in a case where the applicant was suffering from the advanced stages of AIDS. It was established that an abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate

⁴⁹ See, in general, IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, *OEA/Ser.L/V/II.106 Doc. 40 rev.*, February 28, 2000.

⁵⁰ IACHR Report 1/95 (Peru), *Annual Report of the IACHR 1994*; Report 63/99 (Victor Rosario Congo), Ecuador, *Annual Report of the IACHR 1998*; Report 98/03 (Statehood Solidarity Committee), United States, *Annual Report of the IACHR 2003*, paras. 91-93.

⁵¹ The European Court in *D v. United Kingdom* noted in para.49 of its judgment that:[i]t is true that this principle [Article 3] has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection." [...] "Aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinizing an applicant's claim under Article 3 where the 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 that Article. To limit the application of Article 3 in this manner would be detrimental to the absolute character of its protection *D v. United Kingdom* (1997), para. 49.

facilities as well as any form of moral or social support in the receiving country would hasten the applicant's death and subject him to acute mental and physical suffering.⁵²

82. The State argues that these standards are inapplicable to Ms. Mortlock's case on various grounds. To begin with, the State argues that the remit of Article XXVI is limited to criminal prosecution, conviction, and sentencing, and not to Ms. Mortlock's situation since a deportation order is the result of a civil proceeding. The State further highlights that Article 3 of the European Convention contemplates "treatment or punishment." However, Article XXVI of the American Declaration is limited to "cruel, infamous, or unusual *punishment*." According to the State, the immigration removal of Ms. Mortlock can in no way be characterized as "punishment" under Article XXVI. It sustains that there is no Article in the American Declaration comparable to Article 3 of the European Convention, and for this reason alone, the ECHR case law is inapplicable even for comparative purposes.

83. Regarding the issue of deportation as a civil procedure and the protections of due process afforded by the Declaration, the Commission has held that Article XXVI is applicable to civil as well as to criminal cases.⁵³ Indeed, to deny an alleged victim the protection afforded by Article XXVI simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the individuals under the State's jurisdiction are established.

84. In this particular case, however, the Commission finds that the initiation of immigration proceedings and the resulting deportation order are the direct consequence of a criminal conviction against Ms. Mortlock. Therefore the protections afforded by Article XXVI of the American Declaration are particularly relevant to the examination of her case.

85. As stated above, the State also argues that Article XXVI fails to protect individuals from cruel, infamous, or unusual treatment and only protects them against cruel, infamous, or unusual punishment, and adds that deportation cannot be considered a form of punishment. In objective terms, punishment is the infliction of some kind of pain or loss upon a person in response to wrongdoing. In this regard, the 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. In every case, the removal of an alien must be considered in subjective terms: the situation of a deportee who has remained in the territory of the State concerned for, for example, three weeks is not comparable to the situation of an individual who has remained there for 30 years and would be forced to leave her immediate family behind while facing a potentially fatal disease. In the last case, deportation can be considered a form of severe punishment. In fact, in the ancient legal traditions, banishment was considered the ultimate punishment.

86. Therefore, the Commission finds that the protections enshrined in Article XXVI of the American Declaration are applicable to Ms. Mortlock's case.

87. The test employed by the European Court to determine whether the circumstances affecting the alleged victim make his or her case "exceptional" rely on three key factors: (1) the appellant's present medical condition (advanced or terminal stage); (2) the availability of support in the country of return (presence of family or friends); and (3) the availability of medical care in that country.⁵⁴

⁵² See *D v. United Kingdom*, para. 54. The European Court in *D v. United Kingdom*, restricted the scope of protection by reference to "very exceptional circumstances." In *D v. United Kingdom*, concerning the expulsion of an AIDS sufferer to St. Kitts, the Court was asked to determine whether there was a real risk that the applicant's removal would be contrary to the standards in Article 3 "in view of his present medical condition (para.50)." In its determination, the Court noted that the applicant was "in the advanced states of a terminal and incurable illness" (p.51); that his illness had reached a "critical stage" (53); that abrupt withdrawal of his present treatment facilities "will entail the most dramatic consequences for him", would "reduce his already limited life expectancy" and subject him to acute mental and physical suffering (52)." The Court concluded, therefore, that in view of these exceptional circumstances and bearing in mind what it described as "the critical stage reached the applicant's fatal illness" it would be a breach of article 3 for him to be removed to St. Kitts.

⁵³ IACHR Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr. (2002), para. 401.

⁵⁴ For the circumstances to be "very exceptional," it would need to be shown that the applicant's medical condition had reached such a critical stage that there are compelling humanitarian grounds for not removing him or her to a place which lacks the
continued...

88. The Commission understands that there is considerable discomfort with the notion that States could have a legal duty to provide indefinite healthcare to individuals such as Ms. Mortlock, because the circumstances of healthcare elsewhere (*i.e.*, Jamaica) are of a lesser standard. On this point, the European Court has consistently held that the fact that the applicant's circumstances would be less favorable than those he enjoys in the expelling state cannot be regarded as decisive from the point of view of Article 3 of the European Convention. The notion is particularly controversial when the issue is prompted by the State's desire to exercise its inherent right to control immigration and regulate the provision of health care.

89. Notwithstanding such challenges, an "exceptional" test must be employed to evaluate the consequences faced by a deportee in these circumstances, in light of the protections established by Article XXVI of the American Declaration. Consideration of whether a violation of Article XXVI has occurred permits the Commission to identify whether unusual punishment will result from the State's measures. This is consistent with the need to establish "exceptional circumstances" before the implementation of the decision to remove the applicant could be considered a violation of Article XXVI, given compelling humanitarian grounds.

90. Ms. Mortlock's case raises serious concerns regarding her state of well-being in the event the State executes the deportation order pending against her. While Ms. Mortlock's case is not one dealing with the dignity of death, it would be illogical to confine the scope of relief to such cases. On this point, the Commission notes that due to the recent medical advancements, HIV/AIDS can be effectively and indefinitely treated by the administration of antiretroviral drugs and, therefore, in most cases while the treatment is being delivered the patient will be found in good health. However, stopping the treatment would lead to a revival of the symptoms and an earlier death. Therefore, even though the risk of death may not be so imminent in the case of Ms. Mortlock, the effects of terminating the antiretroviral treatment may well be fatal.

91. Accordingly, the Commission considers that the appropriate test is whether the humanitarian appeal of the case is so powerful that it could not reasonably be resisted by the authorities of a civilized State. More specifically, the question to answer is whether, on humanitarian grounds, a person's medical condition, is such that he or she should not be expelled unless it can be shown that the medical and social facilities that he or she undeniably requires are actually available in the receiving state. Therefore, the applicable standard will consist of whether the deportation will create extraordinary hardship to the deportee and her family and may well amount to a death sentence given two principal considerations: (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.

92. The Commission notes that based upon the information provided by the Petitioners', Ms. Mortlock is in the advanced stages of a terminal and incurable illness. 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. Likewise, Ms. Mortlock has no doctor, family, friends, or acquaintances in Jamaica as she and her family have lived in the United States for nearly thirty years.

93. According to the information provided, conditions for people with HIV in Jamaica have improved since 2002, but the country's health care system is still insufficient to meet Ms. Mortlock's medical needs. Moreover of greater concerning, are the reports that people with HIV/AIDS in Jamaica suffer from stigma and discrimination.⁵⁵

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medical and social services which he would need to prevent acute suffering while he is dying. See *Amegnigan v The Netherlands* (dec.), no. 25629/04, ECHR 2004; *Ndangoya v Sweden* (dec.), no. 1786/03, ECHR 2004; *Henao v The Netherlands* (dec.), no. 13669/03, ECHR 2003; *Bensaid v United Kingdom*, no. 44599/98, ECHR 2001.

⁵⁵ Petitioners' brief dated November 30, 2005.

94. Under these circumstances, the Commission finds that knowingly sending Ms. Mortlock to Jamaica with the knowledge of her current health care regime and the country's sub-standard access to similar health for those with HIV/AIDS would violate Ms. Mortlock's rights, and would constitute a *de facto* sentence to protracted suffering and unnecessarily premature death.

95. As far as the allegations regarding the applicability of Article XI are concerned, the Commission finds that Ms. Mortlock's situation does not involve infringements in the right to health as provided for in the American Declaration since she has not been denied access to medical care in the United States.

V. PROCEEDINGS SUBSEQUENT TO REPORT N° 64/07

96. On July 27, 2007, the Commission adopted Report N° 64/07 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record and findings. In the Report, the Commission concluded that, in view of the circumstances of the case, the issuance of a deportation order against Ms. Andrea Mortlock violated the protection of Article XXVI of the American Declaration not to receive cruel, infamous or unusual punishment. Therefore the Commission recommended that the United States "refrain from removing Ms. Andrea Mortlock from its jurisdiction pursuant to the deportation order at issue in this case."

97. By communication dated October 4, 2007, the Commission transmitted Report N° 64/07 to the State and requested information within 60 days as to the measures adopted to implement the Commission's recommendation, pursuant to Article 43(2) of its Rules of Procedure. On the same date, the Commission notified the Petitioners of the adoption of Report N° 64/07, in accordance with Rule 43(3) of its Rules of Procedure. The State did not present a response within the time period specified in the Commission's note of October 4, 2007.

98. On February 15, 2008, the Commission invited the parties to a working meeting regarding case 12.534. By note dated March 3, 2008, the United States expressed that it "respectfully disagrees with and declines the recommendations of the Commission in the above-referenced case and denies any violation of the protections set forth in the American Declaration of the Rights and Duties of Man." That position was reiterated by the representative of the State during the working meeting that took place on March 11, 2008, during the Commission's 131st regular period of sessions.

99. On their part, the Petitioners informed the Commission by note of December 20, 2007, and during the working meeting of March 11, 2008, that Ms. Andrea Mortlock was reporting to the United States' Immigration and Customs Enforcement three times a week, and "[was] susceptible to deportation."

100. During its 130th sessions the Commission examined the information received from both parties and found that the State had failed to take measures to fully comply with its recommendation. Therefore, on March 13, 2008 the Commission adopted Report N° 19/08 pursuant to Article 45(1) of its Rules of Procedure and ratified the conclusions and reiterated the recommendation of Report N° 64/07 in this Final Report. On March 21, 2008, the Commission transmitted Report N°19/08 to the parties in accordance with Article 45(2) of its Rules of Procedure, and requested the presentation of information on compliance with the recommendation within one month from the date of transmittal.

101. The parties did not submit further information on compliance with the recommendation. Accordingly, based upon the information available, the Commission decided to ratify its conclusions and reiterate its recommendation in this case, as set forth below.

VI. CONCLUSIONS

102. The Commission hereby concludes that, in view of the circumstances of this case, 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.

VII. RECOMMENDATIONS

Based on the analysis and the conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS HEREBY REITERATES ITS RECOMMENDATION THAT THE UNITED STATES:

1. Refrain from removing Ms. Andrea Mortlock from its jurisdiction pursuant to the deportation order at issue in this case.

VIII. NOTIFICATION

103. In light of the above and in accordance with Article 45(3) of its Rules of Procedure, the Commission decides to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendation until they have been complied with.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 25th day of July, 2008. (Signed): Luz Patricia Mejía Guerrero, First Vice Chairwoman; Felipe González, Second Vice Chairman; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentin Meléndez, and Victor E. Abramovich, members of the Commission.