CASE OF CRISTAL TOVAR V. DEMOCRATIC REPUBLIC OF EXCLUTIA[1]

Bench Memorandum

2014 INTER-AMERICAN MOOT COURT COMPETITION

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

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3.

A. INTRODUCTION

1. This memorandum is intended to be a guide for the judges of the Inter-American Human Rights Moot Court Competition to the main arguments of the parties, with respect to substantive and procedural issues, in the hypothetical case of Cristal Tovar v. Democratic Republic of Exclutia.

2. This year, the issue being examined by hundreds of students and professors in the Americas and other countries concerns the rights of persons with disabilities.[2] In the opinion of the authors of the case and this memorandum, this opportunity will undoubtedly serve to bring attention to the situation faced by persons with disabilities in relation to the violation of their human rights. The issues addressed herein consist of the analysis of the main rights that mark the paradigm shift in the treatment of persons with disabilities. For centuries, they have been seen as "objects of welfare programs." Now, following the adoption of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter "CRPD"), these people are seen and treated as individuals with rights and obligations.

3. This memorandum contains the standards that the Inter-American Human Rights System has developed in this field. Nevertheless, considering that the standards derived from the CRPD confer greater protection to persons with disabilities, this document is based mainly on that international instrument, which is considered by the United Nations to be a historical treaty given the great number of ratifications by the States within a short period of time. Standards from the universal and European human rights systems are also used. Each section has a general framework on the thematic principles addressed in the hypothetical case, which is followed by possible arguments that both the State and the representatives could make with respect to the facts of the case.

4. The case of , unfortunately, is not as fictitious as it may seem. This case reflects the current situation of thousands of people with disabilities who are subjected to long-term institutionalization, in this hemisphere and around the world. It is important that in studying this issue we are aware of the systematic violation of their rights and that we help give voice to those persons with disabilities—in institutions as well as in their own homes—who are prevented from exercising their most basic life decisions and from being part of a society that, moreover, would benefit from their inclusion.

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[2] Regarding the term "persons with disabilities," it is important that the judges avoid using expressions that are inconsistent with the human rights focus, such as "disabled," "handicapped," "invalid," and similar terms. With respect to the disability, in is important to bear in mind that it is the result of attitudinal and environmental deficiencies and barriers that hinder their full and effective participation in society on an equal basis with others. For more information, see paras. 21-23.

B. GENERAL FRAMEWORK

1. The Inter-American Human Rights System and the rights of persons with disabilities

5. The Inter-American Human Rights System began to address the rights of persons with disabilities prior to the entry into force of the Inter

mistreatment, medical negligence, malpractice, and instances of involuntary manslaughter, as well as the lack of diligent investigation into those acts[9]

8. The rights of persons with disabilities have also been advocated through the friendly settlement mechanism of the Inter-American Commission. On July 21, 2011, the IACHR approved the initial agreement in a friendly settlement entered into as the result of a petition that alleged the violation of the right to equality of a person with a disability (Friendly Settlement Report No. 86/11[10]). In 1998, María Soledad Cisternas Reyes, an attorney with total blindness and the current Chairperson of the United Nations Committee on the Rights of Persons with Disabilities, asked her travel agent to make an airline ticket reservation to the city of Montevideo, Uruguay. The airline LAN Chile made the reservation on the condition that she travel accompanied by another passenger or a service dog, and that she pay for the additional fare. After exhausting the available domestic remedies, Ms. Cisternas availed herself of the inter-American system, alleging discrimination.

9. In an agreement signed on December 11, 2003, the State agreed to review, update, and improve regulations concerning the air travel of persons with disabilities through a Study Committee created within the Civil Aviation Administration of Chile (DGAC), in which Ms. Cisternas took part, and to broadly disseminate the provisions that enable the proper air travel of persons with disabilities. In April 2008, in compliance with the friendly settlement agreement, the DGAC published the aviation regulations govern

sexual and reproductive rights of persons with disabilities in Colombia,[21] human rights of persons with disabilities in Cuba,[22] and legal capacity and access to justice of persons with disabilities in Latin America.[23]

15. Additionally, the Inter-American Commission has begun to include the perspective of the rights of persons with disabilities in its country reports. For example, in its Report on the Situation of Human Rights in Jamaica, the IACHR dedicated a chapter to examine the rights of persons with disabilities, making reference to the progress and challenges in the field.[24]

2. Convention on the Rights of Persons with Disabilities (CRPD) and its paradigm shift[25]

2.1. Relevance of the CRPD

16. The Convention on the Rights of Persons with

17. Mexico advocated for this Convention by presenting a resolution before the United Nations General Assembly in 2001 to request the creation of an committee for the consideration of proposals for the drafting of a new treaty—in addition to the eight thematic human rights treaties in existence at the time—that would focus on protecting the rights of persons with disabilities

the inter-American system has not yet established any criterion on the matter, this section will make use of the standards provided for in Article 12 of the CRPD ("Equal recognition before the law"). This article provides the basis for a degree of protection that is absolute and without exception, so that persons with disabilities can exercise their right to legal capacity on an equal basis with others. The CRPD Committee is of the opinion that legal capacity "includes the capacity to be both a holder of rights and an actor under the law."[41]

25. In order for persons with disabilities to be able to exercise their legal capacity in accordance with Article 12 of the CRPD, the States are required to provide access to support—commonly known as "decision-making support"—so that they can make their own decisions. In those cases in which the decisions and choices of persons with disabilities cannot be understood by third parties at a given time, and in spite of the efforts made to support them in their decision, "the State may have to resort to 'best interests' reasoning trying our best to find out what the person would have wanted, if we had been able to understand him or her. However, this does not mean that States can continue to deprive this group of their legal capacity."[42]

26. The perspective offered by the CRPD

on the need to interpret Article I.2(b) of the Inter-American Convention in the context of Article 12 of the CRPD. It stated that the provision " measures should have been put into place according to her needs, so she could fully exercise her right to the recognition as a person before the law

33. In addition, and regardless of the fact that any imposition of this type of substitution of will is contrary to international standards, the petitioners could also argue that the determination of Cristal Tovar's "incapacity" to make decisions for herself was based solely on an expert medical report, and on the assertions of the director of "La Casita." Moreover, no other steps were taken that could have provided greater certainty regarding Cristal's alleged "incapacity," and at no time during the process was her opinion on the matter considered.

34. The petitioners could further argue that, irrespective of the State's draft amendment of Article 41 of the Civil Code—submitted to the IACHR on June 13, 2013—that seeks to improve the proceedings for determining the scope of the system of guardianship, the State continues to carry out a policy of welfarism and substitution of the will of persons with disabilities.[52]

35. With respect to the previous point, another element to which the petitioners could refer is the fact that even though the State of Exclutia submitted that draft amendment, the Commission found that it was not compatible with the relevant international standards. This shows that the actions that the State is taking with respect to the matter are not consistent with the standards to which it is bound under the instruments it has ratified.

36. It is also essential that the petitioners keep in mind the importance of the relationship of this right to the exercise of other rights, such as the right to personal liberty and access to justice. This is bearing particularly in mind that Cristal Tovar, upon being institutionalized, was prevented from exercising those rights.

ii) State

37. The State could argue that the imposition of the system of guardianship arose from the intent to protect Cristal Tovar because she was prevented, due to her health condition, from making the best personal decisions. In that respect, it could argue that the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities provides for the possibility of declaring persons with disabilities incompetent. With regard to the assertion in the General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities that that provision of the treaty is incompatible with the CRPD, the State could argue that that instrument is no98c3.06 250[(98c3.)-1488Tc[(,.944 m556)] T(98c3.06 250[bin4 5474

2. Right to personal liberty of persons with disabilities in cases of institutionalization

39. The Inter-American Court has held that the essential content of Article 7 of the American Convention is the protection of individual liberty from the arbitrary or unlawful interference of the State and, simultaneously, the guarantee of the individual's right of defense.[53]

40. In this respect, Article 7 of the American Convention regulates the guarantees necessary to safeguard personal liberty.[54] As the Court has established, personal liberty is not an absolute right; rather, its restriction is legitimate provided that certain requirements are met.[55] Accordingly, clauses 2 through 6 refer to the specific conditions that must be present in order to legitimately restrict the right to personal liberty.[56]

41. The case law of the Inter-American Court has addressed detentions in the context of criminal or administrative cases. Nevertheless, the Court has not yet ruled on the scope of the right to personal liberty of persons with disabilities. For its part, the IACHR

been established, the parties should determine whether in this case Cristal Tovar was institutionalized and whether that situation, as well as her subsequent "stay at Casita" was a legitimate restriction of her right to personal liberty.

2.1. Lawfulness and non-arbitrariness of the institutionalization of persons with disabilities

56. The State could maintain that, even if Cristal Tovar was institutionalized without her consent, the restriction of her right to personal liberty is legitimate. It could argue that the institutionalization was legal because of the "Sheltering Our Poor" initiative of the government of Inclutiarán, which permitted the placement of persons in shelters. Additionally the State could argue that Cristal Tovar's institutionalization was not arbitrary, given that every possible measure was first taken to contact her relatives and allow for her to live with them, but that her only surviving relatives had stated that they were unable to "take care of her."

57. In addition, it could assert that the document from the CRPD Committee (see para. 50) cannot be taken as a doctrinal source because it is not even a General Comment but rather a draft. It could argue that Article 5.1.e of the European Convention itself establishes the possibility of restricting the liberty of a "person of unsound mind,"[69] a terms that the European Court has understood in some cases as a person with a mental disability.[70] The State could ask the Inter-American Court to interpret the American Convention with that scope.

58. The State could argue that the European Court recently left open the possibility that a person with a mental disability could be institutionalized if he or she suffers from a "serious mental disorder."[71] It could therefore assert that the seriousness of the disability depends on the decision of each domestic legal system and that, in the case of Cristal Tovar, major depression could fall within that scenario.

2.2. Other guarantees of the right to personal liberty

59. Paragraphs 4, 5, and 6 of Article 7 of the American Convention establish positive obligations that impose specific requirements on both agents of the State and on third parties that act with the tolerance or acquiescence of the State and are responsible for a person's detention.[72]

60. Paragraph 4 of Article 7 of the American Convention establishes the right of every person to be informed of the reasons for his detention and of his rights.[73] Additionally the Court has held that when a person is deprived of his liberty he must be advised of his right to contact a third person such as a relative or an a.n23ive his69e5(.n23ie7 ET [(a)-3( )-49(rel)] TJ 3( )-49(a)-3(n)-49(a)-3(.n23

61. For its part, the European Court has found that when a person is detained, he must be told in a simple manner, in clear and non-technical language, the legal basis and the facts that gave rise to his detention,[75] in order to be able to challenge that detention.[76]

62. Article 7(5) refers to the need for judicial oversight, and provides that every detention must be subject to judicial review without delay, as a suitable means of control to prevent arbitrary or unlawful arrests. Accordingly, a person who is deprived of his liberty without judicial oversight must be released or brought before a judge immediately.[77] Immediate judicial oversight enables the judge to guarantee the rights of the detainee, authorize the adoption of precautionary measures or measures to secure a defendant's future appearance when strictly necessary, and aim, in general, for the defendant to be treated in a manner consistent with the presumption of innocence.

63. In the case of persons with disabilities, the CRPD maintains previously existing procedural guarantees, such as the right to be heard by an independent and impartial authority prior to being admitted to a facility.[78]

64. The international

67. The remedy of must serve as the suitable means of guaranteeing liberty, overseeing respect for the life of the person, and preventing his disappearance or the uncertainty of his place of detention[81]

2.2.1. Possible arguments of the parties

i) Representatives

68. The representatives could argue that the guarantees set forth in paragraphs 4 through 6 of Article 7 of the American Convention also apply to cases involving the involuntary institutionalization of persons with disabilities. It could thus be asserted that on August 3, 2006, the

74. The State could assert that, consistent with Article 7(5) of the American Convention, Cristal Tovar was institutionalized only until it was possible to determine her legal status. In this respect, it could maintain that the judicial review of her institutionalization was ensured when Dr. Lira, the director of "La Casita," requested that Cristal Tovar be declared incompetent.

75. The State could argue that the facts of the case provide no evidence that Cristal Tovar called into question her institutionalization. It could argue that it is impossible to say that an appeal filed by her would be dismissed, since it was never in fact filed and there is no precedent in that respect. The State could further indicate that any interested person could have filed a writ of on her behalf.

Likewise, the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has addressed the issue by stating that:

> As a result of increased knowledge about mental disability and new models of community

disabilities. The Committee on Economic, Social and Cultural Rights has indicated that in order to "remedy past and present discrimination, and to deter future discrimination," it is essential for States to enact comprehensive anti-discrimination legislation that provides for social policy programs which enable persons with disabilities to live "an integrated, self-determined and independent life."[90] Similarly, the Special Rapporteur on the right to health has indicated that the United States should take steps to ensure a full package of community-based mental health care and support services conducive to health, dignity, and inBT 1.lv5nr004C00a full packaed mental 05 0 90

86. They could assert that institutionalization

these measures, the pressure is taken off the States to develop genuine community alternatives, and real bridges are not built between the individual and the community.[104]

91. The State could argue, without prejudice to the above, that it allocated $200,000 in its budget to remodel the infrastructure of

96. Consequently, it could be argued that the right to informed consent to medical treatment must be examined in light of the rights to humane treatment and privacy established in Articles 5 and 11 of the American Convention.

107. Finally, the representatives could argue that this case in no way involved an exceptional or emergency situation. As such, they could argue that it is not possible to justify the immediate administration of the medication to Cristal Tovar.

ii) State

108. The State could argue that the medical staff at "La Casita" did comply with the requirements established in the international case law in order for Cristal Tovar to be able to provide informed consent. It could argue that, according to the facts of the case, the attending physician explained to the alleged victim the treatment that was going to be provided to her. The State could maintain that Cristal Tovar even had the opportunity to ask questions about the treatment.

109. It could assert that consent can also be verbal and not just written, especially considering Cristal Tovar's disability. The State could also argue that there was never any kind of coercion or imposition for her to accept the medical treatment.

110. Without prejudice to the above, the State could argue that the European Court has held that the right to humane treatment or privacy of a person with a mental disability is not violated if it cannot be sufficiently argued how, even without the person's consent, the authorities would have acted improperly in providing the treatment.[126]

4.2. Forced contraception

111. The Inter-American Commission has underscored the importance of women being able to make free and informed decisions about private aspects of their lives, such as their sexual and reproductive health.[127] Additionally, the Committee on Economic, Social and Cultural Rights

that the person understands the information provided;[132] and (ii) ensure that the consent provided is free and voluntary.[133]

113. The Committee on the Elimination of Discrimination against Women has stated that in order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services.[134] It also recommended that the States take the necessary measures to prevent any type of coercion in relation to women's fertility and reproduction.[135] It further recommended that the States "Require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice".[136]

114.

State has the obligation, in order to prevent any instances of sexual violence, to take less harmful measures that do not affect the sexual and reproductive health of female residents of "La Casita" like Cristal Tovar.

ii) State

119. The State could argue that in this case the situation involved a temporary and optional contraceptive treatment. As such, it could maintain that the international standards on forced sterilization should not be applied, because the case did not rise to that level.

120. The State could argue that Cristal Tovar never opposed the medical treatment that was provided, which included the contraceptive injection. Without prejudice to that argument, it could contend that Cristal Tovar's consent was not necessary in this case because of two main factors. First, it could argue that, due to Cristal Tovar's mental disability and her status as a person who had been declared incompetent, it was reasonable for the health authorities at "La Casita," and in particular Dr. Lira, to take the necessary protection measures. Secondly, it could argue that the authorities were facing an emergency situation and medical necessity because of the existence of sexual relations among the residents of "La Casita." In this regard, the State could argue that the decision was made to provide Cristal Tovar with contraception in the interest of safeguarding her humane treatment and public health.

5. Imposition of solitary confinement

5.1. United Nations

121. According to the Human Rights Committee, the prolonged solitary confinement of a detainee or prison inmate could constitute an act prohibited by Article 7 of the International Covenant on Civil and Political Rights[144] that is, torture or other cruel, inhuman or degrading treatment or punishment.

122. With respect to the imposition of this practice on persons with mental disabilities, the highest standard is the one referred to by the UN Special Rapporteur on torture and other forms of cruel, inhuman, degrading treatment or punishment ("Rapporteur on Torture"), who has called upon the States to apply an absolute ban on placing persons with mental and intellectual disabilities in solitary confinement, of its duration. Specifically, he stated as follows in his February 2013 report:

> It is essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty, including in psychiatric and social care institutions. The environment of patient powerlessness and abusive treatment of persons with disabilities in which restraint and seclusion is

144 General Comment No. 20, General Comment adopted by the Human Rights Committee, Article 7 – Prohibition of torture or other cruel, inhuman or degrading treatment or punishment, 44th session, U.N. Doc. HRI/GEN/1/Rev.7 at 173 (1992), para. 6.

used can lead to other non-consensual treatment, such as forced medication and electroshock procedures.[145]

123. On this issue, the Rapporteur on Torture has also stated that there can be no therapeutic justification for the solitary confinement of persons with mental disabilities in psychiatric institutions, and that both prolonged isolation and restraints can constitute torture and abuse.[146]

5.2. European Court of Human Rights

124. For its part, the European Court has held that the prohibition of contact with other persons deprived of liberty for safety, disciplinary, or protection reasons does not amount to a violation of the right to humane treatment.[147] According to the European Court, in order to determine whether the isolation is a violation of the right to the integrity of the person (contained in Article 3 of the European Charter of Fundamental Rights), account must be taken of specific conditions such as the severity of the measure, its duration, the objective pursued, and the effects on the person,[148] including physical and mental effects, and in some cases, the sex, age, and health status of the victim.[149] It has further established that complete sensory and social isolation can destroy the personality and constitutes a form of inhumane treatment that cannot be justified under the argument of security or any other reason.[150]

125. With regard to the use of this practice, the European Court has provided that isolation cannot be imposed indefinitely, and that it is essential for the person to have an independent judicial authority review the reasons for his or her situation in the event that it is prolonged.[151] It has additionally held that, in order to prevent the risk of arbitrariness, substantive reasons must be given to establish and prolong the isolation, and account must be taken of the circumstances and behavior of the person to be placed in solitary confinement.[152]

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[145] Report of the Special Rapporteur on Torture, A/HRC/22/53 (1 February 2013), para. 63. Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf. See also: , A/63/175 (28 July 2008), paras. 55-56.

126. In particular, with regard to persons with mental disabilities, the European Court has indicated that the vulnerability arising from their condition warrants special protection, and that solitary confinement has a serious effect on their mental health.[153]

5.3. Inter-American Human Rights System

127. Regarding solitary confinement, the Inter-American Court has indicated in general terms that "prolonged isolation and compulsory incommunicado are, in themselves, cruel and inhuman treatment, which harm the physical and moral integrity of the individual and the right to respect for the inherent dignity of the human person."[154] In this respect, it has stated that both practices represent cruel and inhumane treatment,[155] and that as the party responsible for detention centers, the State must guarantee conditions that respect fundamental rights and a dignified existence.[156]

128. The Inter-American Court has also made reference to isolation rooms in the context of provisional measures, holding that they should not be used as disciplinary measures and that the conditions therein must conform to international standards.[157] For its part, the IACHR has already addressed this issue in the granting of two precautionary measures on behalf of persons with mental disabilities in institutions; and in this regard,

when placed in solitary confinement, they could argue that its use for residents of “La Casita” with mental disabilities could even constitute torture of responsibilities and take special actions to guarantee that inmates have the necessary conditions to

140. The European Court has also ruled on the scope of the right to nutrition of persons deprived of liberty. It has indicated that the State has the obligation to properly feed persons deprived of their liberty, which is part of its obligation to guarantee the health and general wellbeing of that population.[170] Regarding the quantity and quality of food, the European Court has established that "a slice of bread, an onion, and a piece of roasted fish or a meatball is not sufficient"[171] and therefore is denigrating treatment that violates Article 3 of the Convention.[172]

141. The European Court has additionally established that the States must guarantee adequate ventilation, access to natural light, and adequate sanitary facilities.[173] The interruption of electrical power or water service during certain periods, as well as the use of sanitary facilities, would thus give rise to a violation of the right to humane treatment.[174] With regard to clothing, the European Court has indicated that failing to provide clothing or sheets for a long period of time is also a violation of the right to humane treatment.[175]

6.1. Possible arguments of the parties

i) Representatives

142. The victims' representatives could argue that the quantity and quality de596 Tf tur5

Lira only, and not of Cristal Tovar. Accordingly, they could assert that Cristal Tovar's right of defense was violated, inasmuch as she did not have the opportunity to testify or present evidence to challenge the declaration of incompetency entered against her. They could note that the CRPD Committee has stated that "persons with disabilities must […] be granted legal capacity to testify on an equal basis with others."[182] They could argue that it was imperative at least for Cristal Tovar to testify in proceedings that were being held to determine her legal status.

ii) State

156. The State could argue that Cristal Tovar's right to access to justice was in fact guaranteed, given that when a person with a disability has been declared incompetent, it is necessary for his or her guardian to have the opportunity to request the revocation of that measure if he or she believes that it is no longer necessary or wishes to cease acting as the person's representative. The State could cite the CRPD Committee, which has held that the States must "ensur[e] that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference (on their own behalf or with legal representation)."[183] The State could interpret that statement to mean that "legal representative" refers to the guardian of the person with a disability who has been declared incompetent.

157. The State could also assert that, in order to prevent any arbitrariness on the part of the guardian, the laws of Exclutia allow the Public Ministry to also request the review and/or revocation of the declaration of incompetency.

158. The State could contend, without prejudice to the foregoing, that the judicial practice has been to allow for the legal representative of a person with a disability

ii) State

165. The State could argue that it questioned the filing deadline requirement during the admissibility phase before the Inter-American Commission, which would be sufficient. It could also contend that the Commission should have examined the six-month requirement in relation to each one of the domestic proceedings initiated by the petitioners—that is, with respect to the motion to vacate and the petition for a constitutional remedy

166. The State could also argue that, if the Commission had conducted that distinct analysis, it would have concluded that the arguments pertaining to the conditions at "La Casita" were inadmissible because they were not timely filed. In that regard, it could argue that that omission on the part of the IACHR result

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