

2014 INTER-AMERICAN MOOT COURT COMPETITION

Case of Cristal Tovar v. Democratic Republic of Exclutia

I. The Democratic Republic of Exclutia

1. The Republic of Exclutia (the State, the Republic of Exclutia, or Exclutia), is an independent state located in the Americas. It has a population of 20 million, and covers a surface area of 850,000 km². More than half the population resides in the capital city of Inclutiarán. A mountain range runs through Exclutia, dividing it into two main geographic regions. The northern region is semi-tropical, and comprises 30% of the country; the south is predominated by valleys and has two drainage basins that provide water to a temperate grassland. The main resources are forestry and ranching, and within the last few years, a nascent paper industry and digital business industry have made it an enclave and a regional center of development.

2. According to the Economic Commission for Latin America and the Caribbean (ECLAC), in 2012 the Gross Domestic Product per capita was US\$ 15,000, the fifth highest in Latin America. Additionally, in recent years the Exclutian economy has seen a notable level of growth, mainly due to the opening of new markets for its beef and timber exports. Nevertheless, in spite of this progress, the Republic of Exclutia continues to be one of the most unequal countries in the region, with a Gini index of 0.55. Ten percent of the population holds 80% of the wealth.

3. Most of the population of Exclutia self-identifies as having mixed racial ancestry, the main ethnic minorities being the Nikich indigenous people (10%) and people of African descent (7%). According to the 2010 Population and Housing Census, the poverty rate is 30% and the extreme poverty rate is 10%, which is a slight decrease from the previous decade. The census also counted a total of 2,735,080 individuals with disabilities, which is more than 13% of the population.

4. The Republic of Exclutia is a unitary State with presidential rule. It is politically organized into twelve departments. Each department has a legislative body and a governor with executive duties, both popularly elected. Throughout history there have been two coalitions of political parties that have alternated power, and in 2000 a third, minority political force emerged, called the Independent Party. The Republic of Exclutia has been characterized as a country with a great democratic tradition, in which civilian governments have succeeded one another nearly without interruption, with the exception of two military coups in 1933 and 1971. After the return to democracy in 1979, all of the governments have been democratically elected.

5. For purposes of closing the gap between rich and poor and achieving a better distribution of the wealth generated over the past decade, the administration that governed the country from 2008 to 2013 implemented a number of social policies in various spheres. It undertook a program to eradicate extreme poverty, centered on a policy of nutritional and food security. That program also created several incentives to decrease absenteeism among schoolchildren in the poorest sectors. In addition, it has

Case of Cristal Tovar v. Democratic Republic of Exclutia

begun to implement some policies focusing on historically excluded sectors, such as homeless children, elderly adults, and persons with disabilities.

6. The Republic of Exclutia has a continental civil law tradition. It is a founding Member State of the Organization of American States (OAS), having ratified the OAS Charter on April 30, 1948. On December 10, 1989, the Republic of Exclutia ratified the American Convention on Human Rights and accepted the contentious jurisdiction of the Inter-American Court of Human Rights (Inter-American Court or Court). Additionally, Exclutia has been a State Party to the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities since October 27, 2004. On August 30, 2008, it ratified the Convention on the Rights of Persons with Disabilities. The Republic of Exclutia is recognized in the region for the progressive legislative reforms it has enacted over the past thirteen years. In 2008, an amendment to the Constitution conferred constitutional status on the human rights treaties to which the Republic is a party.

II. Background of Cristal Tovar

7. Cristal Tovar is a 33-year-old blind woman who, in 2006, lived alone with her mother, Mrs. Sandrina Castro, in a small apartment in South Inclutiarán. Both of them had lived in that apartment since Cristal's father left them when Cristal's diagnosis of permanent blindness was confirmed at age 15.

8. The only income that Cristal and her mother received was from Mrs. Castro's job at a cleaning company where she had worked since Cristal's father left the home. When she became permanently blind, Cristal stopped attending high school because the school did not accommodate her condition. In addition, given their poverty, she was unable to access education appropriate to her disability.

9. Mrs. Castro died in April 2006 as the result of a chronic illness. After her mother's death, Cristal earned some money through the sale of her few belongings, and some neighbors helped her for a couple of months by taking food to her. Cristal started to face various difficulties in her search for employment. Due to the fact that she could not get around independently, Cristal depended on her neighbor Anesí to help her look for work, read the newspaper ads to her, and take her from one place to another via public transportation. Once employers noticed Cristal's disability, they immediately showed disinterest in hiring her. On several occasions, they even said that it would be very difficult for her to understand the work dynamics and that her image could drive potential customers away.

10. After Mrs. Castro's death, Cristal was unable to pay the rent on her apartment. Under the civil law of the State of Exclutia, after a tenant fails to pay rent for three months, the landlord has the right to give 30 days' notice of eviction, and then initiate proceedings to recover the back rent plus interest. On Friday, June 12, 2006, the landlord appeared at Cristal's house to serve the notice of eviction as provided by law. Cristal tried to get in touch with a distant aunt and uncle to see if she could stay with them, but she was unable to locate them.

11. Anesí, who was born in a northern city called Pastrana, told her that the government in that city had assisted living homes, service dogs, and offices that helped people find

Case of Cristal Tovar v. Democratic Republic of Exclutia

work. Anesí advised Cristal to go to the National Council of Persons with Disabilities of Exclutia (CONADISE) to see whether there was any kind of support or alternatives that the government might offer for individuals with disabilities so they can lead independent lives in their community. The CONADISE worker with whom she met informed her that, although new public policies for persons with disabilities were being developed in Inclutiarán, the only support alternative currently available for people in her situation was to go to a shelter with services appropriate to her needs.

12. A few days later, having little money and convinced that she would not be able to pay the rent and her debts, Cristal moved out of her small apartment. Because Cristal did not want to go to a shelter, she went to a public square where she started begging for money during the day and sleeping on a bench near a fountain. After living for a few days on the street, on August 3, 2006, a police officer who was working for the latest initiative of the capital city's government, "Sheltering our Poor," put her in a patrol car and took her to a shelter called "La Casita."

III. "La Casita"

13. The shelter that Cristal was taken to, "La Casita," housed people with physical, mental, intellectual, and/or sensory disabilities. The shelter also had all kinds of homeless people, who resided in a separately managed adjacent area. "La Casita" was a closed institution, whose only admission requirement was that the individuals not have any type of support to live in the community.

14. This shelter housed a total of 400 people (including 50 children with disabilities), most of whom had relatives who could take them in if they had the support to do so. Additionally, "La Casita" had 7 areas and one emergency room with three beds and medical supplies for minor emergencies. The shelter's population was divided as follows:

- Area "A": Women with physical and sensory disabilities
- Area "B": Women with mental and intellectual disabilities
- Area "C": Men with physical and sensory disabilities
- Area "D": Men with mental and intellectual disabilities
- Area "E": Elderly adults
- Area "F": Children with disabilities
- Area "G": Homeless population

15. Each area had four dormitories. The beds were lined up one after another, and the mattresses were old and dirty. There was no place to store personal belongings. The few people who had any belongings carried them with them for fear that they would be stolen. A book, a religious image, or a simple coin was the greatest treasure for these people. In each area there was a common space with a long table and chairs scattered around the room, in which the individuals with disabilities would eat and watch television. There were also large park areas at "La Casita" that were poorly lit at night, where people freely walked around.

16. "La Casita" was an institution with 1950s facilities. From 6:00 a.m. to 10:00 a.m., there was no running water, so the residents and personnel had to take care of their personal hygiene and cleaning needs according to the times at which this service was available. Some of the bathrooms did not work, and basic cleaning items (soap,

Case of Cristal Tovar v. Democratic Republic of Exclutia

shampoo, feminine hygiene products, and toothbrushes) were scarce. As far as the food, breakfast consisted of a cup of tea and a slice of bread. A bowl of soup or beans and rice and a piece of fruit were generally provided for lunch and dinner. A portion of chicken or beef would occasionally be served. In addition, there were two people who provided daily physical therapy, psychological services, or entertainment.

17. There were also two isolation rooms in areas “B” and “D” that were used for safety reasons. These were cement rooms, measuring 2 x 2 meters, with dim lighting, a mattress on the floor, and a bucket in which to go to the bathroom. While individuals were in isolation, they were not allowed out under any circumstances.

IV. Cristal’s arrival at “La Casita”

18. When the police took Cristal to the shelter, she was received by a social worker, who was in charge of filling out the respective admission application. She asked Cristal her name, whether she had a place to live, and whether she had any relatives. With respect to the third question, Cristal said that she had distant relatives, and she provided her aunt and uncle’s phone number. The social worker immediately got in touch with Mr. Iparraguirre and his wife, who confirmed that they were Cristal’s aunt and uncle. They indicated that they had not had any contact with her or her mother in a very long time, and that they lacked the necessary financial resources to care for her because they were retired. This information was taken down in a written document.

19. Cristal was subsequently taken to the attending physician, who performed a general medical exam. She was then taken to a psychiatrist who asked her various questions about her childhood and her family. Cristal recounted the events related to her abandonment by her father, the absence of opportunities to go to school and find a job, and the death of her mother. She also expressed the sadness and powerlessness she had felt after her mother’s death, and she said that she suffered from insomnia. In view of the information provided by Cristal, the psychiatrist found that her responses reflected a mood disorder. He therefore diagnosed her with major depression, which is considered a mental disability.

20. The social worker submitted the admission form and the medical exam to the director of “La Casita,” Dr. Lira, who approved Cristal’s admission to the shelter. Due to Cristal’s diagnosis of mental disability, she was taken to area “B” of the shelter.

V. Proceeding for the declaration of incompetency of Cristal Tovar

21. The Civil Code of the State of Exclutia was enacted on July 27, 1997 through Act No. 1160. Section IV of the Code enumerates different grounds for regulating the legal capacity of individuals, including persons with disabilities. Article 41 of the Civil Code establishes:

Article 41. Proceeding for the declaration of incompetency of persons with disabilities

1. The regulation of the legal capacity of persons with disabilities is governed by the proceeding for the declaration of incompetency.
2. The declaration of incompetency is an ex parte proceeding that can be initiated at the request of the interested party or *sua sponte* by the

Case of Cristal Tovar v. Democratic Republic of Exclutia

Public Ministry or a civil judge. In the case of persons with disabilities in residential institutions who do not have relatives to care for them, the directors may request a declaration of incompetency as provided herein.

3. The request for a declaration of incompetency must include a medical report, a statement of the facts supporting the need for a declaration of incompetency, and the specification of the relationship or affiliation between the petitioner and the person subject to the proceeding for a declaration of incompetency.
4. Upon verification of the admissibility requirements, the judge shall hold a hearing that must be attended by the Public Ministry and the person requesting the declaration of incompetency.
5. In the event that the judge declares the incompetency of a person with disabilities, based on the documentation submitted with the request for the declaration and on the expert testimony deemed appropriate, the judge shall establish the extent and limits of the guardianship according to the type of disability. A guardian shall be appointed in the same judgment to represent the person declared incompetent.
6. All judgments of incompetency must be recorded at the Office of Vital Records.
7. The judge shall determine the review periods for the declaration of incompetency in each case.
8. The Public Ministry or the guardian may request the review and/or revocation of the declaration of incompetency.

22. On August 25, 2006, Dr. Lira filed a request for the declaration of the incompetency of Cristal Tovar before the VI Civil Court of the city of Inclutiarán. On August 28, 2006, the judge requested that a psychiatrist perform an expert medical examination of Cristal. This expert evidence led to the same conclusion as the initial medical report of August 3. On September 15, 2006, the judge held a hearing attended by Dr. Lira and a representative from the Public Ministry. At the hearing, the judge asked the petitioner whether Cristal had any close relatives. Dr. Lira stated that Cristal had no contact with any relatives, or with any close friends.

23. Upon examining the documentation submitted with the request for a declaration of incompetency, hearing Dr. Lira's testimony, and considering the information presented by the expert witness, on September 29, 2006, the judge declared Cristal to be incompetent pursuant to Article 41 of the Civil Code, and appointed Dr. Lira as her representative.

VI. Situation of Cristal Tovar at "La Casita" shelter

24. Upon her arrival at "La Casita," Cristal was taken to a room where she was given a haircut. The staff told her that this was done to all of the residents for purposes of hygiene. During the initial days, some of the residents in her area approached Cristal to meet her. They told her that they wore old, ill-fitting clothes, and that some of them did not have shoes. Some of them also told her that they had been living at "La Casita" for 20 years. Cristal witnessed at least three occasions on which residents of the shelter were locked in the isolation rooms. The hospital staff indicated that the individuals in crisis

Case of Cristal Tovar v. Democratic Republic of Exclutia

were sent into isolation to protect their own safety as well as that of the staff and other residents. The people who were locked in those rooms would usually stay there for 4 or 5 hours.

25. After Cristal was given a medical exam, she was told that, due to her diagnosis of major depression, she had to take anti-depressants for at least six months. Cristal asked the doctor whether the medication would improve her mood, to which the doctor replied in the affirmative. She began receiving such treatment at that point.

26. Because the personnel at “La Casita” were aware of sexual activity among the residents in the common park areas, the decision was made to inject all female residents of pavilions “A” and “B” with contraceptives, and they were told it was part of their treatment. The injections were given every three or four months.

27. On September 1, 2007, Cristal went to the doctor’s office and told the attending physician that over the last few weeks she had been suffering from urinary retention and constipation, and also complained of short-term memory loss and increased anxiety. The doctor told her that in order to continue her treatment she had to take other psychiatric medications.

28. In the early morning hours of December 26, 2007, Cristal woke up screaming. The nurses went to her room, and when they asked her what had happened, she told them that she had hallucinations. The nurses confirmed that Cristal had a fever, muscle spasms, and strong Parkinson’s-like tremors. Accordingly, they placed a phone call to the attending physician, who ordered them to take her to a hospital immediately.

29. Cristal was taken to the “Raúl Cano National Hospital,” where she was stabilized. The following day, Cristal woke up and told the attending physician about her situation at “La Casita.” The doctor was of the opinion that, given the state of her health, she should remain in the hospital for observation for at least a week. He asked Ángela, a hospital nurse, to contact the director of the shelter in order to request Cristal’s medical history.

30. During the week that she was hospitalized, Cristal developed a very trusting relationship with Ángela, who had been working at the hospital for several years and had a great vocation for service. Cristal told Ángela about her arrival at the shelter, and about the fact that she was unable to make decisions in the institution, and she provided her with details about her life there. Cristal also told Ángela that she never should have been declared incompetent, and that what she most wanted was to leave the shelter and be integrated into the community.

31. In view of the information she received from Cristal, Ángela called her sister, Mirtha Sicha, an attorney who worked with an organization that advocates for the human rights of individuals with disabilities called “Disability is not Inability” (ODNEI). After hearing about Cristal’s case, Mirtha went to the hospital. With her sister’s help, Mirtha was able to speak with Cristal, who told her everything that had happened to her since her mother’s death. Mirtha offered to help Cristal deal with the situation she was facing.

VII. Domestic proceedings

Case of Cristal Tovar v. Democratic Republic of Exclutia

32. On February 21, 2008, the ODNEI filed a motion to vacate challenging the declaration of incompetency entered in the case of Cristal Tovar. In a decision dated September 18, 2008, the trial court judge ruled the motion inadmissible for lack of standing. The judge held that Exclutia's Code of Civil Procedure establishes that only the Public Ministry or the incompetent person's guardian may request the review and/or revocation of the declaration of incompetency.

33. The ODNEI appealed that decision on October 1, 2008. The Court of Appeals of Inclutiarán decided to subpoena Dr. Lira to appear at the hearing. Dr. Lira stated before the court that Cristal was receiving adequate care at "La Casita" and that there was no better place for her to receive medical treatment, which was provided on the instructions of the institution's doctors. After hearing her testimony on April 18, 2009 the court denied the motion for appeal on the grounds that there had been no abuse on the part of Cristal's guardian. Notice of the decision was provided to the parties the following day. The court also indicated that the appropriate remedy for challenging the declaration of incompetency would be an unconstitutionality action before the Constitutional Court of Exclutia.

34. At the same time, the ODNEI also filed a petition for a constitutional remedy on November 2, 2008, alleging that the conditions at "La Casita" violated the rights of the individuals with disabilities living in that shelter, including Cristal Tovar. On December 2, 2008, the Second Constitutional Chamber granted the petition for a constitutional remedy, finding that the infrastructure and the lack of food and basic items, among other things, constituted a violation of the fundamental rights of the individuals residing at "La Casita." In addition, the Court ordered the State to take the necessary measures to improve the conditions at "La Casita." Six months later, the State announced that it had allocated \$200,000 in its budget to remodel the shelter's infrastructure and improve conditions there.

VIII. Proceedings before the Inter-American Human Rights System

35. On September 1, 2009, the ODNEI filed a petition before the Inter-American Commission on Human Rights (Inter-American Commission, Commission, or IACHR), alleging the international responsibility of the State of Exclutia for the violation of the rights set forth in Articles 3, 5, 7, 8, 11, 24 and 25 of the American Convention, all in conjunction with Articles 1.1 and 2 of the American Convention, to the detriment of Cristal Tovar. Together with the petition, they requested precautionary measures on behalf of the residents of "La Casita." One month later, the IACHR granted the precautionary measures. On December 22, 2009, the Commission began processing the petition and forwarded the pertinent parts of the complaint to the State of Exclutia. In its written observations of March 29, 2010, the State asserted that the petition was inadmissible according to Article 46.1(b) of the American Convention. It also rejected in their entirety the allegations of the violation of the human rights recognized in the American Convention.

36. On October 21, 2011, the Commission issued Admissibility Report No. 55/11, in which it declared the alleged violations of the American Convention admissible. The parties submitted their additional observations on the merits of the case, and a public hearing was held on October 25, 2012. On March 11, 2013, the Inter-American Commission approved Merits Report No. 12/13, in which it concluded that the State of

Case of Cristal Tovar v. Democratic Republic of Exclutia

Exclutia violated the rights alleged by the petitioners. In addition, the Commission made several recommendations with respect to the situations that violated the rights of Cristal Tovar, as well as measures of non-repetition. The State and the petitioners were given notice of the report on March 14, 2013.

37. On June 13, 2013 the State asked the IACHR for a two-month extension to comply with its recommendations and waived its opportunity to file preliminary objections within the time period set forth in Article 51 of the American Convention. In its brief, the State maintained that the Congress had drafted a bill to amend Article 41 of the Civil Code, establishing the following:

Article 41. Proceeding for the declaration of incompetency of persons with disabilities

1. The regulation of the legal capacity of persons with disabilities is governed by the proceeding for the declaration of incompetency. This proceeding applies to individuals who cannot express their will by any means or with the assistance of another person, and is governed by the principles of suitability, necessity, and proportionality.
2. The declaration of incompetency is an ex parte proceeding that can be initiated at the request of the interested party or *sua sponte* by the Public Ministry or a civil judge.
3. The proceeding for the declaration of incompetency shall be conducted by means of a public hearing, in which the relatives of the disabled person and any interested party may take part.
4. For the declaration of incompetency, the judge shall consider the opinions of the parties to the hearing and expert witnesses.
5. Guardianship is not permanent. Its duration shall be determined according to the particularities of each case.
6. Any person may file a request for the review of a guardian's discharge of his or her duties or request a hearing for the revocation of the guardianship.
7. The guardian shall submit a quarterly report to the judge on all of the decisions that have been made on behalf of the disabled person.

38. On June 14, 2013, the Commission granted the State's request for an extension. On August 10, 2013, the State requested a second, three-month extension. In view of the fact that the State of Exclutia had not followed the recommendations made in the Merits Report, the Commission decided not to grant the State's request for another extension and brought the case before the Inter-American Court on August 14, 2013. In its letter of submission of the case to the Court, the Commission indicated that the bill is incompatible with the international standards on the human rights of persons with disabilities and that the State failed to report on the other recommendations made in the Merits Report.

39. In its answer to the submission of the case, the State filed a preliminary objection alleging that the petition before the IACHR was filed more than six months after the notice of the decision adjudicating the petition for a constitutional remedy, which had been decided in Cristal's favor. The State indicated that according to Article 46.1(b) of the American Convention, the IACHR should have declared the petition inadmissible on

Case of Cristal Tovar v. Democratic Republic of Exclutia

the grounds that it was not timely filed, and therefore the Court should not rule on the merits. For its part, the Commission maintained that the petition was filed within the six-month period calculated from the April 18, 2009 decision of the Court of Appeals. It added that the State, during the admissibility period before the IACHR, failed to submit arguments on the inadmissibility of the petition and limited itself to referring generally in its first written answer to the applicability of Article 46.1(b) of the American Convention.

40. On April 6, 2014, Cristal's representatives met with her at "La Casita" to explain the dynamics of the public hearing that would be held before the Inter-American Court. During this time, two women who lived at the shelter approached Cristal and told her that one of her friends, also a resident of "La Casita," had died of a heart attack. Cristal began crying and screaming, and one of the shelter's guards approached her to calm her down. One of the guards tried to take her by the hand, and Cristal pushed him. As a result, shelter personnel restrained her and took her to one of the isolation rooms, where she stayed for four hours.

41. On April 18, 2014, Cristal's representatives asked the Inter-American Court to grant provisional measures on her behalf, given the ongoing practice of involuntary isolation at "La Casita." The IACHR submitted a statement in support of the representatives' request. For its part, the State asserted that the Court should deny the request because what happened to Cristal was an aberration, was done to protect the safety of the other people at the shelter, and only lasted for four hours. The State further maintained that, according to the IACHR's new Rules of Procedure, if the Court denied the request for provisional measures, the Commission would have to lift the precautionary measures benefitting the residents of "La Casita."

42. The Office of the President of the Inter-American Court issued an order convening a public hearing in the *Case of Cristal Tovar v. Exclutia* for the third week of May, 2014. It also ordered the parties to make their arguments on the request for provisional measures that was filed on April 18, 2014 at the same hearing.