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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[1] This memorandum was drafted by Erick Acuña Pereda, Analía Banfi Vique, Sofía Galván Puente, and Imelda González Barreras, human rights specialists at the Inter-American Commission on Human Rights.

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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 paradigmatic 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 *Cristal Tovar*, 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.

[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 *infra* 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-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (IACEDPD), the first international human rights instrument specifically about persons with disabilities.[3] The Inter-American Commission on Human Rights (IACHR) has handled this issue through its various human rights protection and promotion mechanisms, in particular through its petition and case system, precautionary measures, general hearings and country reports. In addition, the Inter-American Court of Human Rights has handed down three judgments in cases relating to persons with disabilities.

1.1. Petition and case system

6. The first cases decided by the IACHR mainly concerned persons with mental disabilities who were deprived of their liberty. The first merits report adopted by the IACHR was in the case of Víctor Rosario Congo v. Ecuador.[4] In that case, the Commission found that the State violated the rights to life, humane treatment, and judicial protection of Víctor Congo, a person with a mental disability who died while being held in pretrial detention as a result of mistreatment by prisons security officers and the lack of medical and psychiatric treatment. In its decision, the Commission interpreted for the first time the guarantees established in Article 5 of the American Convention on Human Rights in light of the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.[5]

7. In recent years, the Inter-American Commission has decided the admissibility of various cases relating to persons with disabilities that are currently pending in the merits phase. In 2009 the Commission declared the case of the Miskito Divers v. Honduras, concerning the situation of the Miskitu indigenous community, admissible.[6] According to the petitioners, the Miskito divers are subjected to labor exploitation, which allegedly caused thousands of them to acquire severe and irreversible disabilities. In 2010, the IACHR found the case of Luis Eduardo Guachalá Chimbó v. Ecuador admissible, which concerns the alleged disappearance of a person with a mental disability after he was institutionalized in a public psychiatric hospital.[7] In 2012, the Commission admitted the case of Luis Fernando Guevara Díaz v. Costa Rica, which dealt with alleged employment discrimination based on the victim's intellectual disability.[8] Finally, in 2013 the IACHR admitted the case of the patients of the psychiatric service of the Santo Tomás Hospital in Panama, which alleged

[3] The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities was adopted on June 7, 1999, and entered into force on September 14, 2001. To date, this Convention has been ratified by 18 States.

[4] IACHR, Report No. 63/99, Case 11.427, Case of Víctor Rosario Congo, Ecuador, April 13, 1999.

[5] UN, Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, G.A. Res. 119, U.N. GAOR, 460 Session, Supp No. 49, Annex, U.N. Doc. A/46/49 (1991).

[6] IACHR, Report No. 121/09, Petition 1186-04, Admissibility, Opario Lemoth Morris, et al. (Miskito Divers), Honduras, November 12, 2009.

[7] IACHR, Report No. 141/10, Petition 247-07, Admissibility, Luis Eduardo Guachalá Chimbó, Ecuador, November 1, 2010.

[8] IACHR, Report No. 13/12, Petition 1064-05, Admissibility, Luis Fernando Guevara Díaz, Costa Rica, March 20, 2012.

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 governing the air travel of passengers with disabilities or special needs, which are included in the National Program for the Facilitation of Air Travel.

10. For its part, the Inter-American Court of Human Rights has ruled on the rights of persons with disabilities in three cases. The first judgment, handed down in the *Case of Ximenes Lopes v. Brazil* in 2006, is an exemplary decision on this issue.[11] The case addressed the inhumane and degrading conditions of the hospitalization of Mr. Ximenes Lopes, a person with a mental disability, in a private psychiatric institution, the inhumane treatment he experienced at the hands of the staff, his death while undergoing psychiatric treatment, and the impunity with which those acts were met. The Inter-American Court based its decision on the same United Nations Principles used by the Inter-American Commission in the case of Víctor Congo, among other international standards applicable to mental health treatment. The Court also referred to the IACEDPD as a source for interpretation in determining the obligations of the State in relation to the American Convention.

11. In 2012, the Court ruled in the *Case of Furlan and Family v. Argentina,* concerning the excessive delay in the adjudication of a civil action against the State, on which the medical treatment of a boy with physical and intellectual disabilities depended.[12] In the same year, the Court handed down a judgment in the *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica* on the general prohibition

[9] IACHR, Report No. 94/13, Petition 790-05, Admissibility, patients of the psychiatric service of the Santo Tomás Hospital, Panama, November 4, 2013.

[10] IACHR, Report No. 86/11, Petition 12.232, Friendly Settlement, María Soledad Cisternas Reyes, Chile, July 21, 2011.

[11] See: I/A Court H.R., Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149.

[12] I/A Court H.R., Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246.

against the practice of in vitro fertilization, in which it approached infertility as a disability.[13] In both judgments, the Inter-American Court examined the rights enshrined in the American Convention in light of the Convention on the Rights of Persons with Disabilities (CRPD).

1.2. Precautionary measures

12. Through its precautionary measures mechanism, the Inter-American Commission has protected persons with disabilities in serious and urgent situations. In 2003, the IACHR granted precautionary measures on behalf of the patients of the Neuropsychiatry Hospital of Paraguay.[14] The Commission asked the Paraguayan State to take measures to protect the lives and the physical, mental, and moral integrity of the 458 patients institutionalized there. In addition, in 2012, the IACHR issued precautionary measures on behalf of the patients of the Federico Mora Hospital in Guatemala.[15]

1.3. Other human rights protection and promotion mechanisms

13. On April 4, 2001, the Inter-American Commission adopted a recommendation on the promotion and protection of the rights of persons with mental disabilities urging the States to ratify the IACEDPD, take measures to disseminate the international standards on persons with mental disabilities, advocate and implement national mental health plans, and take specific initiatives for the defense of persons with mental disabilities, among other things.[16]

14. The Inter-American Commission has also used the system of general hearings to monitor the status of the rights of persons with disabilities in the Americas. Over the past five years, the IACHR has held six general public hearings on this issue: the right to education of persons with disabilities in the Americas;[17] the mistreatment of children with disabilities in state institutions in the Americas;[18] the institutional segregation and mistreatment of children and adults with disabilities in Mexico;[19] human rights of persons with mental and intellectual disabilities in Peru;[20] violations of the

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[13] I/A Court H.R., Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257.

[14] IACHR, 2003 Precautionary Measures, Paraguay, para. 60. Available at: http://www.cidh.org/annualrep/2003eng/chap.3e.htm. See also Galván, Sofía, "The Paraguayan Case: A Successful Experience in Community Integration and the Use of a Regional System," *Disability and Human Rights Blog*, August 2011. Available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fdisabilityandhumanrights.com%2F2011%2F08%2F17%2Fthe-paraguayan-case-a-successful-experience-in-community-integration-and-the-use-of-a-regional-system%2F&ei=lYocU8WuOeXw0QHD5oBI&usg=AFQjCNGmKG6XRJCdh-RRIpUkA13Pno9erg&sig2=uOUsaKfxPqmxEKGdzhNXJg&bvm=bv.62578216,d.dmQ.

[15] IACHR, PM 370/12 – 334 Patients of the Federico Mora Hospital, Guatemala, November 20, 2012. For more information, see: Disability Rights International, Precautionary Measures Petition, October 2012. Available at: http://www.disabilityrightsintl.org/media-gallery/our-reports-publications/.

[16] IACHR, 2001 Annual Report, Chapter VI, Recommendation of the Inter-American Commission on Human Rights regarding the promotion and protection of the rights of persons with mental disabilities, April 4, 2001.

[17] 137th period of sessions of the IACHR, November 6, 2009 (participants: CEJIL, UN Special Rapporteur on the Right to Education, Vernor Muñoz, Latin American Campaign for the Right to Education).

[18] 140th period of sessions of the IACHR, October 28, 2010 (participants: Disability Rights International).

[19] 144th period of sessions of the IACHR, March 23, 2012 (participants: representatives of the Mexican State and the Mexican Commission for the Defense and Promotion of Human Rights in the State of Mexico, Disability Rights International, Mexican Institute for Human Rights and Democracy, Colectivo Chuhcan, Documenta).

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 examining 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 Disabilities is considered by the United Nations to be a historic treaty because of the tremendous international support it has received in the short time since its adoption.[26] At the time of this writing, the CRPD has 158 signatures and 143 States Parties.[27] As its name indicates, this human rights treaty protects the rights of persons with disabilities, who—according to the World Health Organization and the World Bank—comprise 15% of the world's population, that is, around one billion people.[28] In spite of this high number (which makes persons with disabilities the largest minority in the world),[29] this population group faces the greatest physical and social obstacles in exercising their rights, such as the rights to health, employment, and education, and especially, in enjoying the right to make decisions about their own lives and to live in the community.

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[20] 149th period of sessions of the IACHR, November 1, 2013 (participants: representatives of the State of Peru and the Institute for Democracy and Human Rights of the Pontifical Catholic University of Peru).

[21] 150th period of sessions of the IACHR, March 24, 2014 (participants: representatives of the State of Colombia and the Program of Action for Equality and Social Inclusion, University of Los Andes School of Law, Association of Families of Persons with Down Syndrome).

[22] 150th period of sessions of the IACHR, March 25, 2014 (participants: Center for Legal Information - Cubalex).

[23] 150th period of sessions of the IACHR, March 25, 2014 (participants: CELS, EQUAL, Fundamental Colombia, PAIIS, Disability Rights International, and others).

[24] IACHR, Report on the Situation of Human Rights in Jamaica, Chapter VIII, August 10, 2012.

[25] This section is part of Chapter III "La Convención sobre los Derechos de las Personas con Discapacidad y su Cambio de Paradigma" of a booklet written by one of the authors of this Bench Memorandum. Galván, Sofía, *La Realización Progresiva del Derecho de las Personas con Discapacidad a Vivir en Forma Independiente y a Ser Incluidos en la Sociedad*, Comisión Nacional de Derechos Humanos, Mexico, 2014 (at press).

[26] Office of the United Nations High Commissioner for Human Rights, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, Geneva, 2007, p. iii; UN, With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May, Press Release HR/4941 L/T/4411 New York, 3 April 2008, http://www.un.org/News/Press/docs/2008/hr4941.doc.htm. July 21, 2013.

[27] UN, United Nations Treaty Collection, Convention on the Rights of Persons with Disabilities, official website, New York, 2014, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en.

[28] World Health Organization, World Report on Disability, Geneva, 2011, http://www.who.int/disabilities/world_report/2011/accessible_en.pdf. July 21, 2013.

[29] UN, Some Facts about Persons with Disabilities, official website, New York, 2013, http://www.un.org/disabilities/convention/pdfs/factsheet.pdf. July 21, 2013.

17. Mexico advocated for this Convention by presenting a resolution before the United Nations General Assembly in 2001 to request the creation of an *ad hoc* 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. After five years of negotiation, which involved human rights experts, governments from all over the world, and, especially, persons with disabilities and their representative organizations—the CRPD was adopted on December 13, 2006, and entered into force on May 3, 2008, after having been ratified by the twentieth country. This Convention thus became the first human rights treaty of this century.[30]

18. It bears mentioning that the Optional Protocol to the CRPD was also approved at the time of its adoption.[31] The Optional Protocol allows nationals of the States Parties to the Convention to submit individual or group communications to its supervisory body—that is, the Committee on the Rights of Persons with Disabilities (hereinafter the "CRPD Committee")—to allege violations of their rights and to request the respective redress, provided that domestic remedies have been exhausted.[32]

2.2. The CRPD and its paradigm shift toward the social model

19. According to Article 1.1 of the CRPD, its purpose is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities." In fact, the CRPD does not recognize new rights, different from those that can already be found in other human rights instruments; rather, it clarifies the obligations to respect and ensure the enjoyment of rights by persons with disabilities.[33]

20. Although this Convention does not define "disability," it does establish that it is "an evolving concept,"[34] and that "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."[35] In addition, Article 1.2 of the CRPD specifies that persons with disabilities "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[36]

21. By indicating that disability is an evolving concept, the Convention "does not impose a rigid view of 'disability,' but rather assumes a dynamic approach that allows for adaptations over time and

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[30] Gerard Quinn, "Disability and Human Rights: a New Field in the United Nations," International Protection of Human Rights: a Textbook, Turku, Finland, 2009.

[31] Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008 (entry into force), https://treaties.un.org/doc/source/RecentTexts/IV_15a_english.pdf.

[32] Articles 1 & 2 of the Protocol to the CRPD.

[33] OHCHR, Office of the United Nations High Commissioner for Human Rights, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, Geneva, 2007.

p. 20; Charles O'Mahony, "Legal Capacity and Detention: Implications of the UN Disability Convention for the Inspection Standards of Human Rights Monitoring Bodies in The International Journal of Human Rights," The International Journal for Human Rights, Galway, vol. 16, No. 6, August 2012, p. 885.

[34] Preamble, para. (e), of the CRPD.

[35] Preamble, para. (e), of the CRPD.

[36] Article 1 of the CRPD.

within different socio-economic settings."[37] The reference to those who are considered to be persons with disabilities, and how the disability arises, clearly demonstrates that this status is not something that arises exclusively from the "limitations," "disorders," or "illnesses" of the individual, but rather that it is the result of the interaction between the individual's impairment and an inaccessible environment that puts up barriers to the his or her full integration into society. On this point, the Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, indicated that disability only arises when the environment fails to adapt to the needs of the person.[38]

22. By establishing that disability is a consequence of an interaction between the impairment of the individual and the environment, and that it does not arise solely from the individual, the CRPD reflects a clear paradigm shift in the way persons with disabilities are viewed. Accordingly, they cease to be viewed as "objects" of charity, medical treatment, and social protection, and become individuals who possess the same rights as all others and are able to assert those rights for themselves, to make life decisions, and to participate actively as members of the society to which they belong.[39] The States are now obligated to remove the existing societal barriers in order to ensure the enjoyment of all rights for persons with disabilities.

C. LEGAL ANALYSIS

1. Right to legal capacity of persons with disabilities

1.1. Content of Article 12 of the CRPD

23. Persons with disabilities—especially those with mental and intellectual disabilities—are usually considered legally incapable of making their own decisions, and therefore, they are faced with the substitution of their will. In this respect, the CRPD Committee stated in its draft General Comment on this issue that, "Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment."[40]

24. In recent years, and based on the obligations that arise from the CRPD, significant progress has made with respect to the scope of the right to legal capacity of persons with disabilities and the way in which this right is understood, and it has necessitated a transformation in its regulation. For this reason, and taking account of the fact that—like the right of persons to live in the community—

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[37] OHCHR, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, p. 13.

[38] Commissioner for Human Rights of the Council of Europe Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 2012, pp. 9-10.

[39] Camilla Parkeficr, Forgotten Europeans - Forgotten Rights, The Human Rights of Persons Placed in Institutions, [s. l. i.], European Regional Office of the United Nations High Commissioner for Human Rights, 2010, p. 6. For more information on this issue, see Comisión Nacional de Derechos Humanos (CNDH), *Convención sobre los Derechos de las Personas con Discapacidades y su Mecanismo de Vigilancia, Mexico*, April 2012, http://www.cndh.org.mx/sites/all/fuentes/documentos/cartillas/3%20cartilla%20Convenci%C3%B3n%20derechos%20personas%20discapacidad.pdf. November 13, 2013; Consejo Nacional para Prevenir la Discriminación (CONAPRED) & Consejo Nacional para el Desarrollo y la Inclusión de las Personas con Discapacidad (CONADIS), *Encuesta Nacional sobre Discriminación en México*, Mexico, 2012, p. 16, http://www.conapred.org.mx/userfiles/files/Enadis-PCD-Accss.pdf. November 13, 2013.

[40] Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12: Equal recognition before the law, 11th session, 30 March–11 April 2014, para. 7.

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 is clearly contrary to those on which systems of guardianship are based, given that, rather than establishing the support that persons with disabilities need to make their own decisions, those systems substitute their will. Indeed, the CRPD Committee has spoken out against systems that, instead of supporting decision-making by persons with disabilities, restrict it through systems such as guardianship. In this respect, it has asked the States examined in its country reports to make the pertinent legislative changes to bring their laws into line with Article 12 of the CRPD.[43] For example, in its report on Paraguay, the CRPD Committee called upon the State to abolish the provisions of the Civil Code that regulate the process of having a person judicially declared incompetent by reason of disability and to adopt an independent review mechanism that fully reestablishes the rights of persons who have been judicially declared incompetent.[44] For its part, the United Nations Office of the High Commissioner for Human Rights ("OHCHR") has also addressed this issue, by stating as follows:

> Whether the existence of a disability is a direct or indirect ground for a declaration of legal incapacity, legislation of this kind conflicts with the recognition of legal capacity

[41] Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12: Equal recognition before the law, 11th session, 30 March–11 April 2014, para. 11.

[42] Gerard Quinn, Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD (Paper presented at Conference on Disability and Legal Capacity under the CRPD, Harvard Law School, Boston, 2010). Available at: <<www.inclusionireland.ie/documents/HarvardLegalCapacitygqdraft2.doc>>. Cited in Galván, Sofía & Federico Portillo, *Guía de Estudio de la Materia "Personas Mayores,"* Maestría en Derechos Humanos y Democracia, FLACSO Mexico, 2014 at press).

[43] See UN Committee on the Rights of Persons with Disabilities (CRPD), CRPD/C/TUN/CO/1 Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia (2011), para. 23; CRPD, CRPD/C/ESP/CO/1 Concluding observations of the Committee on the Rights of Persons with Disabilities: Spain (2011), para. 32; CRPD, CRPD/C/PER/CO/1 Concluding observations of the Committee on the Rights of Persons with Disabilities: Peru (2011), para. 25; CRPD, CRPD/C/HUN/CO/1 Concluding observations of the Committee on the Rights of Persons with Disabilities: Hungary (2011), para. 26; CRPD, CRPD/C/CHN/CO/1 Concluding observations of the Committee on the Rights of Persons with Disabilities: China (2012), para. 22. Cited in: Galván, Sofía & Federico Portillo, Guía de Estudio de la Materia "Personas Mayores," Maestría en Derechos Humanos y Democracia, FLACSO Mexico, 2014 (at press).

[44] Committee on the Rights of Persons with Disabilities, Concluding observations: Paraguay (2013), CRPD/C/PRY/CO/1, para. 30.

> of persons with disabilities enshrined in article 12, paragraph 2. Besides abolishing norms that violate the duty of
> States to respect the human right to legal capacity of persons with disabilities, it is equally important that measures that protect and fulfill this right are also adopted, in accordance with article 12, paragraphs 3, 4 and 5.[45]

27. According to what the CRPD Committee has established, the support model in the decision-making processes of persons with disabilities must respect the autonomy, will, and preferences of the person, in this case underscoring respect for their right to free and informed consent prior to undergoing any medical treatment.[46] With regard to the way in which models for supporting persons with disabilities in the exercise of their legal capacity can be put into practice, the CRPD Committee indicates the following in its draft observation on this right:

> Persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility—for example a measure requiring private and public actors such as banks and financial institutions to provide understandable information—in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions. (Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences).[47]

28. In addition, according to Article 12 of the CRPD, the States have the obligation to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.[48]

1.2. Inter-American Human Rights System

29. Article 1.2 of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities states that "If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination." The Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities addressed this provision in its General Observation

[45] Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, 10th session, U.N. Doc.A/HRC/10/48, 26 January 2009, para. 45. Available at <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/a.hrc.10.48_sp.pdf>>

[46] CRPD, CRPD/C/PRY/CO/1, Concluding observations of the Committee on the Rights of Persons with Disabilities: Paraguay (2013), para. 30.

[47] Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12: Equal recognition before the law, 11th session, 30 March–11 April 2014, para. 15. Available at: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx

[48] Convention on the Rights of Persons with Disabilities, Article 12.

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 "seriously contradicts the provisions of Articles 2 and 12 of the United Nations Convention, and the Committee therefore construes that the aforementioned criterion must be reinterpreted in light of the latter document currently in force."[49]

30. In this General Observation, the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities also referred to the importance of Article 12, stating that "the entry into force of the [CRPD] implies a change of paradigm away from substitution of a person's will […] to the new paradigm based on decision-making with [the] support and safeguards set forth in Article 12 of the Article 12 of the [CRPD]."[50]

31. Based on the above, among other issues, the Committee resolved: (i) To request the OAS Secretary General to order a revision, by the appropriate legal bodies, of Article I.2(b) i*n fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, with a view to aligning it with Article 12 of the CRPD; and (ii) To urge the States to adopt measures, in keeping with Article 12 of the United Nations Convention, to guarantee recognition of universal legal capacity, including that of all persons with disabilities, regardless of the type or extent of disability, and, consequently, to initiate without delay a process for replacing the practice of declaring legal incompetence, guardianship, or any other form of representation that impairs the legal capacity of persons with disabilities, with a practice based on decision-making with support.[51]

1.3. Possible arguments of the parties

i) Representatives

32. The main argument that could be used by the representatives is that, according to the standards that provide the greatest protection, the will of persons with disabilities to make decisions about their own lives cannot be substituted through systems such as guardianship. In this respect, the fact that Cristal Tovar was subjected to this system—whatever the procedure for its imposition may have been—is a *per se* violation of her right to legal capacity. They could argue that the Inter-American Court must examine that right in light of the content of Article 3 of the American Convention, which refers to the right to the recognition as a person before the law. In this case, and in all others, in order for Cristal to be able to fully exercise her right to legal capacity, support

[49] General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2(b) *in fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. CEDDIS/doc.12 (I-E/11), Rev.1, OEA/ Ser.L/XXIV.3.1, April 28, 2011.

[50] General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2(b) *in fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. CEDDIS/doc.12 (I-E/11), Rev.1, OEA/ Ser.L/XXIV.3.1, April 28, 2011.

[51] General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2(b) *in fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. CEDDIS/doc.12 (I-E/11), Rev.1, OEA/ Ser.L/XXIV.3.1, April 28, 2011.

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 non-binding.

38. Additionally, the State of Exclutia could demonstrate its intent to improve the system *per se* through the proposed amendment of the Civil Code, which contains more safeguards for the effective use of the system of guardianship. In this regard, and according to the facts of the case, the State could assert the following: (a) the proceeding for the declaration of incompetency will apply only to persons who cannot express their will by any means or with the support of other persons; (b) the system of guardianship is not permanent and is subject to review, and (c) the guardian is required to file a monthly report on the person under his or her charge.

[52] A critique of the systems that seek to improve the system of declaring persons incompetent can he found in: Cárdenas Emmanuel & Sofía Galván, *La Suprema Corte y el caso Ricardo Adair: una mala decisión*, on the blog of Nexos magazine, October 2013. Available at: http://eljuegodelacorte.nexos.com.mx/?p=3297

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 has held that Article 7.1 of the American Convention is not limited to detentions that involve the investigation and punishment of criminal offenses, but rather that it extends to other spheres in which the State might administer its authority,[57] such as the detention of individuals for reasons pertaining to their physical or mental health.[58]

42. The Commission similarly maintained in its *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* that deprivation of liberty is also understood to encompass "any form of institutionalization" that includes "persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities."[59]

43. Additionally, as discussed below, the Human Rights Committee, the CRPD Committee, and the European Court have addressed the right to personal liberty of persons with disabilities who have been institutionalized.

44. Thus, the initial point that the parties should establish is that the institutionalization of persons with disabilities must be examined in light of the right to personal liberty. Once that has

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[53] I/A Court H.R., Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 223; Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs. Judgment of November 27, 2003. Series C No. 103, para. 66; Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 129; Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, paras. 82-83.

[54] I/A Court H.R., Case of Acosta Calderón v. Ecuador. Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, para. 57; Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 98.

[55] I/A Court H.R., Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 70.

[56] I/A Court H.R., Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 143.

[57] IACHR, Report on Terrorism and Human Rights. Doc. OEA/Ser.L/V/ll.116, October 22, 2002, para. 121.

[58] IACHR, Report No. 51/01, Case No. 9903, Rafael Ferrer-Mazorra et al., United States, April 4, 2001, para. 210.

[59] IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Resolution 1/08. March 13, 2008, general provision.

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 "La Casita" was a legitimate restriction of her right to personal liberty.

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

45. The Inter-American Commission has held that the institutionalization of persons with disabilities takes place when they enter an institution "which that person is not permitted to leave at will." [60] The European Court has also indicated that the notion of the deprivation of liberty of a person with a disability is comprised not only by an objective element relating to confinement in a specific and restricted place for a period of time;[61] there is also an additional, subjective element referring to the consent of the person with disabilities to be institutionalized.[62]

46. In the case law of the Inter-American Court, pursuant to Article 7.2 of the American Convention, no one can be deprived of personal liberty except for reasons, cases or circumstances expressly defined by law (substantive aspect), and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (procedural aspect).[63]

47. With regard to the arbitrariness referred to in Article 7.3 of the Convention, the Court has established that no person can be subjected to detention or imprisonment for reasons and by methods that—even if classified as lawful—can be deemed incompatible with respect for the individual's fundamental rights by virtue of being, *inter alia*, unreasonable, unpredictable, or disproportionate.[64] Accordingly, the Court has ruled that "the arrest may become arbitrary if in its course facts attributable to the State, considered incompatible with [respect for] the detained person's human rights, occur."[65]

48. Article 14 of the Convention on the Rights of Persons with Disabilities also refers expressly to the obligations of the States in relation to the right to personal liberty of persons with disabilities; it establishes the duty of the States to ensure that persons with disabilities are not unlawfully or arbitrarily deprived of their liberty.

49. Furthermore, that provision underscored that "the existence of a disability shall in no case justify a deprivation of liberty." In that regard, it is not possible to justify the institutionalization of persons with disabilities without their consent based solely on the condition of their disability;

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[60] IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Resolution 1/08. March 13, 2008, general provision.

[61] ECHR, Storck v. Germany. Judgment of 13 July 2006, para. 74.

[62] ECHR, Storck v. Germany. Judgment of 13 July 2006, para. 74.

[63] I/A Court H.R., Case of Gangaram Panday v. Suriname. Judgment of January 21, 1994. Series C No. 16, para. 47.

[64] I/A Court H.R., Case of García Asto and Ramírez Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137, para. 105; Case of Acosta Calderón v. Ecuador. Judgment of June 24, 2005. Series C No. 129, para. 57; Case of Tibi v. Ecuador. Judgment of September 7, 2004. Series C No. 114, para. 98; Case of the Gómez Paquiyauri Brothers v. Peru. Judgment of July 8, 2004. Series C No. 110; Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 146.

[65] I/A Court H.R., Case of López Álvarez v. Honduras. Judgment of February 1, 2006. Series C No. 141, para. 66.

"rather, it must be founded on a neutral basis, such as, for example, actions that threaten the safety of others."[66]

50. On this point, the CRPD Committee maintained in its draft General Comment on Article 12 that the content of that right must be analyzed in the following manner:

> The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.[67]

2.1.1. Possible arguments of the parties

i) Representatives

51. The representatives could argue that Cristal Tovar's institutionalization in "La Casita" on August 3, 2006 was against her will. For the purpose of arguing that position, they could also contend that the facts of the case do not provide any evidence that Cristal Tovar had expressly or even implicitly expressed her desire to be admitted to that institution. On the contrary, they could cite the fact that Cristal Tovar had previously stated that "she did not want to go to a shelter."

52. The representatives could maintain that Cristal Tovar's detention was unlawful insofar as the facts of the case provide no evidence of any legal provision that allows for the institutionalization of persons with disabilities without their consent.

53. They could also argue that the institutionalization was arbitrary inasmuch as it would *per se* infringe upon the right to personal liberty and legal capacity, according to what has been established by the CRPD Committee (see *supra* para. 50).

54. The representatives could additionally argue that in recent case law the European Court has declared the violation of the right to personal liberty in the case of a person with a disability who never consented to the measure of institutionalization and was held at the center indefinitely.[68]

ii) State

55. The State could argue that it was not a detention insofar as Cristal Tovar gave her implied consent. In support of this argument, it could assert that when Cristal Tovar was taken by the police officers to "La Casita" she neither resisted nor expressed her disagreement with that situation.

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[66] Eric Rosenthal, Sofía Galván & Erin Jehn, *Abandonados y Desaparecidos, la Segregación y Abuso de Personas con Discapacidad en México, Disability Rights International*, Mexico, 2010, p. 48.

[67] Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12: Equal recognition before the law, 11th session, 30 March–11 April 2014, para. 36.

[68] ECHR, Stanev v. Bulgaria. Judgment of 17 January 2012, paras. 122-129.

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 personas 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 *supra* 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 attorney, as appropriate—to inform that person that he is in the custody of the State.[74]

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[69] Article 5.1.e of the ECHR: "(…)o

one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law (…) the lawful detention of (…) persons of unsound mind (…)."

[70] ECHR, Luberti v. Italia. Judgment of 23 February 1984, para. 29.

[71] ECHR, Stanev v. Bulgaria. Judgment of 17 January 2012, para. 157.

[72] I/A Court H.R., Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 108; Case of the Gómez Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 91; Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 71; Case of Juan Humberto Sánchez, Judgment of June 7, 2003. Series C No. 99, para. 81.

[73] I/A Court H.R., Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 109; Case of the Gómez Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 92; Case of Maritza Urrutia, Judgment of November 27, 2003. Series C No. 103, para. 72; Case of Juan Humberto Sánchez, Judgment of June 7, 2003. Series C No. 99, para. 82. Similarly, see: Case of Bulacio, Judgment of September 18, 2003. Series C No. 100, para. 128.

[74] I/A Court H.R., Case of the Gómez Paquiyauri Brothers, Judgment of July 8, 2004. Series C No. 110, para. 93; Case of Bulacio, Judgment of September 18, 2003. Series C No. 100, para. 130.

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 provisions do not establish specific deadlines for the person to appear without delay before a judge following his or her detention; rather, the time periods must be determined on a case-by-case basis. On this point, the European Court of Human Rights has held that although the word "immediately" must be interpreted in accordance with the special characteristics of each case, no situation, no matter how serious, gives the authorities the power to unduly prolong the period of detention.[79]

65. Article 7(5) of the Convention also establishes that the detainee has the right to be tried within a reasonable period of time or released without prejudice to the continuation of the proceedings. On this point, the Inter-American Court has noted that pretrial detention "cannot be for longer than a reasonable time and cannot endure for longer than the grounds invoked to justify it. Failure to comply with these requirements is tantamount to a sentence without a conviction, which is contrary to universally recognized general principles of law."[80]

66. Article 7(6) of the Convention is related to Article 25 of the same instrument, and makes reference to the need for an effective means of judicial oversight. In other words, this paragraph establishes the right of *habeas corpus*, the purpose of which is to judicially confirm the lawfulness of the deprivation of liberty. With regard to this remedy, the Court has held that it is not enough for it to formally exist; rather, it must be effective.

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[75] ECHR, Z.H. v. Hungary. Judgment of 8 November 2012, para. 41.

[76] ECHR, Z.H. v. Hungary. Judgment of 8 November 2012, para. 41.

[77] I/A Court H.R., Case of Acosta Calderón, Judgment of June 24, 2005. Series C No. 129, para. 77; Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 115.

[78] UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Principles 16-17. In the case of Víctor Rosario Congo, the Inter-American Commission found that the Mental Health Principles are authoritative for compliance with the requirements of the American Convention with respect to psychiatric commitment. Inter-American Commission on Human Rights. *Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, April 13, 1999. Cited in, Eric Rosenthal, Sofía Galván & Erin Jehn, *Abandonados y Desaparecidos, la Segregación y Abuso de Personas con Discapacidad en México*, Disability Rights International, Mexico, 2010.

[79] ECHR, Case of Brogan et al. v. United Kingdom. Judgment of 29 November 1988, paras. 58-62.

[80] I/A Court H.R., Case of the "Juvenile Reeducation Institute" v. Paraguay. Judgment of September 2, 2004. Series C No. 112, para. 229; Case of Suárez Rosero, Judgment of November 12, 1997. Series C No. 35, para. 77.

67. The remedy of *habeas corpus* 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 police authorities failed to inform Cristal Tovar of the reasons for which she was detained and admitted to "La Casita."

69. The representatives could also maintain that Cristal Tovar was at no time brought before a judicial authority for a determination of the legality of her detention. They could add that the judicial review process initiated in view of the request for a declaration of incompetency against her cannot be considered a "judicial review" of her institutionalization. Therefore, they could claim that the institutionalization and the declaration of incompetency are two distinct aspects, insofar as the VI Court did not examine the legality or arbitrariness of the measure of institutionalization.

70. The representatives could also note that during her institutionalization in "La Casita," Cristal Tovar was not able to challenge the legality of her detention. They could argue that, according to the European Court, institutionalized persons with disabilities must have the opportunity to challenge the legality of their detention.[82]

71. Accordingly, they could indicate that even though the facts of the case do not show that Cristal Tovar filed a writ of *habeas corpus*, it is safe to assume that it would be denied because of her declaration of incompetency. Therefore, they could maintain that the court would have declared any appeal filed by Cristal Tovar inadmissible because as a "legally incapacitated person" she would have lacked standing.

72. They could further contend that there is no evidence of any judicial authority having performed periodic reviews of the status of Cristal Tovar's institutionalization.

ii) State

73. The State could argue that the guarantees set forth in paragraphs 4 through 6 of Article 7 of the American Convention should not be applied to cases of involuntary institutionalization insofar as the purpose of the detention was not to exercise the punitive power of the State, but rather to protect the alleged victim. Without prejudice to the above, the State could argue that once Cristal Tovar arrived at "La Casita" she became aware of her situation after speaking with the social worker and the attending physician at that facility.

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[81] I/A Court H.R., Case of Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70, para. 192.

[82] ECHR, Z.H. v. Hungary. Judgment of 8 November 2012, para. 41.

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 *habeas corpus* on her behalf.

76. The State could also note that Article 41.7 of the Civil Code of Exclutia allows the judicial authority to determine the frequency with which the declaration of incompetency can be reviewed.

3. The right of persons with disabilities to live independently and to be included in the community

3.1. Importance and scope of the right of persons with disabilities to live in the community

77. The right of persons with disabilities to live in the community has not been examined within the framework of the inter-American system. That right, established in Article 19 of the CRPD, is one of the most innovative and relevant principles provided for in that instrument. That article provides for "the equal right of all persons with disabilities to live in the community,"[83] and its main objective is their full inclusion and participation in society.

78. The relevant doctrine has made reference to the fact that that right is a fundamental platform for the purpose of the CRPD, consisting in the enjoyment of all human rights and fundamental freedoms by all persons with disabilities.[84] For its part, the CRPD Committee has underscored in its observations on the country reports that the right to live in the community must be guaranteed to persons with disabilities through support services.[85]

79. The World Health Organization has maintained that there is ample scientific evidence to demonstrate that persons with disabilities develop and benefit from being part of the community.[86]

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[83] Article 19 of the CRPD.

[84] Commissioner for Human Rights of the Council of Europe Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 2012. pp. 4 & 10. On this point, Gerard Quinn and Suzanne Doyle indicate that "Even if the Convention did not contain an express right to live independently and be included in the community, such a right can be fairly inferred from the rich filigree of other provisions." Quinn, Gerard & Suzanne Doyle, *Getting a Life – Living Independently and Being Included in the Community: A Legal Study of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities*, Geneva, European Regional Office of the United Nations High Commissioner for Human Rights, 2012. p. 24.

[85] CRPD Committee, *Concluding observations on the initial report of China*, CRPD/C/CHN/CO/1, 8th session, (17-28 September 2012), para. 32.

[86] See: Commissioner for Human Rights of the Council of Europe Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 2012. World Health Report 2001, Mental Health: New Understanding, New Hope. Geneva, 2001, http://www.who.int/whr/2001/en/whr01_en.pdf. 21 July 2013.

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-based services and support systems, many people with mental disabilities, once relegated to living in closed institutions, have demonstrated that they can live full and meaningful lives in the community. People once thought incapable of making decisions for themselves have shattered stereotypes by showing that they are capable of living independently if provided with appropriate legal protections and supportive services. Moreover, many people once thought permanently or inherently limited by a diagnosis of major mental illness have demonstrated that full recovery is possible. [87]

3.2. The right of persons with disabilities to live in the community in view of the principle of nondiscrimination

80. Article 1.1 of the American Convention establishes the obligation of the States to respect and guarantee the rights therein without discrimination for reasons of "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." The Inter-American Court has held that the prohibition against discrimination for reasons of disability is also included within this provision.[88]

81. The protection of persons with disabilities against discrimination was explicitly established in 1999 with the adoption of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities. Its preamble underscores that:

> Persons with disabilities have the same human rights and fundamental freedoms as other persons; and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person.

82. For its part, the CRPD stipulates that "discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."[89] Nondiscrimination and the full and effective participation and inclusion in society of persons with disabilities are enumerated as governing principles in Article 3 of that treaty. Additionally, Article 4.1 of the CRPD includes nondiscrimination against persons with disabilities as one of the obligations of the States.

83. Based on the above, the right to live in a community has been developed by different international bodies as part of the State obligation not to discriminate against persons with

[87] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Economic and Social Council, Commission on Human Rights, 61st session, U.N. Doc. E/CN.4/2005/51, 14 February 2005, (by Mr. Paul Hunt), para. 15. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/108/93/PDF/G0510893.pdf?OpenElement.

[88] I/A Court H.R., Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257.

[89] Preamble, paragraph (h). Specifically, Article 2 of the CRPD states that "'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

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 States should take steps to ensure a full package of community-based mental health care and support services conducive to health, dignity, and inclusion of persons with disabilities.[91]

3.3. Possible arguments of the parties

i) Representatives

84. First, the representatives could argue that the State violated Article 1.1 of the American Convention to the detriment of Cristal Tovar by not allowing persons with disabilities to have the right to live in the community. Accordingly, they could argue that the institutionalization of persons with disabilities without their consent and the absence of services in the community constitute a discriminatory policy against them.

85. The representatives could assert that it is irrelevant whether the conditions at the institution are adequate or inadequate because institutionalization *per se* violates human rights. They could argue that the United Nations Special Rapporteur on the right to health has himself stated that "in any part of the world, because the segregated environments are outside the scope of public scrutiny, the commitment of persons with disabilities to institutions is a grave and serious violation of their human rights."[92] They could also argue that there are immediate obligations that the States must undertake for this to happen,[93] such as banning the construction of new institutions[94] and the refurbishment of existing ones.[95]

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[90] Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc. E/C.12/1994/13 (1994), para. 16. Available at: http://www1.umn.edu/humanrts/gencomm/epcomm5e.htm.

[91] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Economic and Social Council, Commission on Human Rights, 61st session, U.N. Doc. E/CN.4/2005/51, 14 February 2005, (by Mr. Paul Hunt), para. 43.

[92] See: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Economic and Social Council, Commission on Human Rights, 61st session, U.N. Doc. E/CN.4/2005/51, 14 February 2005, (by Mr. Paul Hunt), http://www2.ohchr.org/english/bodies/chr/sessions/61/lisdocs.htm. 21 June 2013; Camilla Parkeficr, *Forgotten Europeans - Forgotten Rights, The Human Rights of Persons Placed in Institutions*, [s. l. i.], European Regional Office of the United Nations High Commissioner for Human Rights, 2010, p. 6; International Disability Alliance, *Inclusion and Living in the Community (Article 19 of the CRPD)*, CRPD/CSP/2010/CRP.3, report presented at the third session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, New York, 2010, p. 25. Galván, Sofía, *La Realización Progresiva del Derecho de las Personas con Discapacidad a Vivir en Forma Independiente y a Ser Incluidos en la Sociedad*, Comisión Nacional de Derechos Humanos, Mexico, 2014 (at press).

[93] The CRPD Committee even recommends that urgent measures be taken to progressively eliminate the institutionalization of persons with disabilities; CRPD Committee, *Concluding observations on the initial report of China*, CRPD/C/CHN/CO/1, 8th session, (17-28 September 2012), para. 32.

[94] Quinn, Gerard y Suzanne Doyle, *Getting a Life – Living Independently and Being Included in the Community: A Legal Study of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities*, Geneva, European Regional Office of the United Nations High Commissioner for Human Rights, 2012, p. 30. In addition, regarding the concept of what is understood to be an institution, see Chapter IV, "La Institucionalización como Contraposición al Derecho de las Personas con Discapacidad

86. They could assert that institutionalization has serious consequences for persons with disabilities, such as: (i) the creation of barriers to integration into the community, because "it leads to the loss of abilities that allow them to live their lives in the community, and isolates them from the support needed to return to it"; and (ii) the development of behavioral and mental changes.[96] On this point, they could stress that "La Casita" had only two people who were providing physical and psychological therapy and skills training for daily life. This shows the lack of enablement or rehabilitation services for the residents of "La Casita," which, in turn, segregates them from society. They could add that the segregation of persons with disabilities at "La Casita," including Cristal Tovar, is also reflected in the fact that some of the residents have been living at that institution for more than 20 years.

87. Another defense that Exclutia might assert in relation to compliance with this right is its progressive nature. On this point, the petitioners could take account of the following:[97]

> Although the realization of the right to live in the community is progressive, the States have the obligation to demonstrate that they really are taking measures to the greatest extent possible with the resources available to them to make this right effective.[98] Moreover, each year, their actions should be measured as better than the previous year. Otherwise, the State can be internationally responsible for failing to protect this right.[99] Indeed, in examining the compliance of States with the right to live in the community, the CRPD Committee has already admonished them for making no significant progress on a mental health policy that includes measures to deinstitutionalize persons with disabilities who are currently housed in psychiatric hospitals.[100] There are also immediate obligations that the States must undertake for its realization.[101] First of all, the States should ban the construction of new institutions[102] and the refurbishment of existing ones.[103] [Without] the adoption of

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de Vivir en la Comunidad," in Galván, Sofía, *La Realización Progresiva del Derecho de las Personas con Discapacidad a Vivir en Forma Independiente y a Ser Incluidos en la Sociedad*, Comisión Nacional de Derechos Humanos, Mexico, 2014 (at press).

[95] Rosenthal, Eric, Sofía Galván & Erin Jehn, *Abandonados y Desaparecidos, la Segregación y Abuso de Personas con Discapacidad en México*, Disability Rights International, Mexico, 2010, p. 83.

[96] Galván, Sofía, *La Realización Progresiva del Derecho de las Personas con Discapacidad a Vivir en Forma Independiente y a Ser Incluidos en la Sociedad*, Comisión Nacional de Derechos Humanos, Mexico, 2014 (at press).

[97] Galván, Sofía, *La realización Progresiva del Derecho de las Personas con Discapacidad a vivir en forma independiente y a ser incluidos en la sociedad*, Comisión Nacional de Derechos Humanos, Mexico, 2014 (at press).

[98] Commissioner for Human Rights of the Council of Europe Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 2012. p. 21.

[99] Commissioner for Human Rights of the Council of Europe Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 2012. p. 21.

[100] CRPD Committee, *Concluding observations on the initial report of Paraguay,* CRPD/C/PRY/CO/1, 9th session, (15-19 April 2013), para. 47.

[101] The CRPD Committee even recommends that urgent measures be taken to progressively eliminate the institutionalization of persons with disabilities; CRPD Committee, *Concluding observations on the initial report of China*, CRPD/C/CHN/CO/1, 8th session, (17-28 September 2012), para. 32.

[102] Quinn, Gerard & Suzanne Doyle, *Getting a Life – Living Independently and Being Included in the Community: A Legal Study of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities*, Geneva, European Regional Office of the United Nations High Commissioner for Human Rights, 2012. p. 30. In addition, regarding the concept of what is understood to be an institution, see Chapter VI.

[103] Rosenthal, Eric, Sofía Galván & Erin Jehn, *Abandonados y Desaparecidos, la Segregación y Abuso de Personas con Discapacidad en México*, Disability Rights International, Mexico, 2010, p. 83.

> 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]

88. Give the State's possible argument relating to the cost involved in establishing services in the community, the petitioners could argue that:

> Studies have shown that the States save resources once institutions have been gradually eliminated and replaced with community-based services. On this point, there is no evidence that community service models are more costly than institutions; in fact, when community systems that support independent life have been properly established, they have better outcomes than institutions.[105]

ii) State

89. The State could argue that there has been no discriminatory act or practice against Cristal Tovar because the right of persons with disabilities to live independently and be integrated in the community is a progressive right with an economic, social, and cultural content.[106] In this respect, it could contend that the State cannot be required to immediately ensure community living for institutionalized persons with disabilities, given that the process of deinstitutionalization involves political and social reform that requires the allocation of financial resources and the coordination of different entities.

90. The State could argue that as long as the process of replacing institutions with community services lasts, it is necessary for the States to take all necessary measures to ensure: (i) that persons in institutions live in decent conditions;[107] and (ii) that persons with disabilities housed in institutions do not face any risks that endanger their lives or humane treatment.[108]

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[104] Quinn, Gerard y Suzanne Doyle, *Getting a Life – Living Independently and Being Included in the Community: A Legal Study of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities*, Geneva, European Regional Office of the United Nations High Commissioner for Human Rights, 2012. p. 30.

[105] In support of the lower cost of establishing community services for persons with disabilities, see the following sources: James W. Conroy, "The Costs of Supporting People with Developmental Disabilities in Institutional Versus Community Settings" (revised June 2004), Center for Outcome Analysis, US. See also: Jones, P., Conroy, J., Feinstein, C., & Lemanowicz, J. (1984). "A Matched Comparison Study of Cost Effectiveness: Institutionalized and Deinstitutionalized People," Journal of the Association for Persons with Severe Handicaps, 9, 304-313; and Stancliffe, R.J. & Lakin, C. (2004) "Costs and outcomes of community services for persons with intellectual and developmental disabilities," Policy Research Brief 14(1), Minneapolis, University of Minnesota, Research and Training Center on Community Living. Cited in: Galván, Sofía, *La realización Progresiva del Derecho de las Personas con Discapacidad a vivir en forma independiente y a ser incluidos en la sociedad*, Comisión Nacional de Derechos Humanos, Mexico, 2014 (at press).

[106] Commissioner for Human Rights of the Council of Europe Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 2012. p. 21.

[107] Rosenthal, Eric, Sofía Galván & Erin Jehn, *Abandonados y Desaparecidos, la Segregación y Abuso de Personas con Discapacidad en México*, Disability Rights International, Mexico, 2010, p. 83.

[108] Commissioner for Human Rights of the Council of Europe Thomas Hammarberg, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 2012. p. 5; Parliamentary Assembly of the Council of Europe, *Access to rights for people with disabilities and their full and active participation in society*, Resolution 1642, Strasbourg, 2009, http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1642.htm. 21 July 2013. para. 8.

91. The State could argue, without prejudice to the above, that it allocated $200,000 in its budget to remodel the infrastructure of "La Casita" and improve its conditions. The State could cite all of the actions taken on behalf of the facility's residents, which benefitted Cristal Tovar (see Clarification Question 30).

4. Free and informed consent of persons with disabilities

4.1. Forced medication

92. The American Convention does not expressly establish a person's right to provide informed consent to the use of medications. Therefore, it is necessary to take account of the standards established in other international human rights systems.

93. Within the sphere of the universal system, Article 7 of the International Covenant on Civil and Political Rights, which protects the right to humane treatment, establishes that "no one shall be subjected without his free consent to medical or scientific experimentation." The Human Rights Committee has held that that prohibition encompasses not only experiments but also medical treatments that are conducted without the free consent of the interested person.[109] In addition, the Committee on Economic, Social and Cultural Rights has specified that the right to humane treatment includes the prohibition against administering medical treatment without informed consent, because that protection is closely tied to the right to health.[110]

94. The European Court has ruled in various cases on the content of informed consent as it relates to medical treatment. That analysis has included not only the right to humane treatment but also the right to privacy.[111] The European Court has held that the concept of "privacy" is a broad term not susceptible to an exhaustive definition, and therefore covers, *inter alia*, a person's physical and psychological welfare.[112] As such, the European Court has stated that medical treatment administered against the patient's wishes would interfere with his or her right under Article 8 of the European Convention.[113]

95. In the inter-American system, the right to privacy is enshrined in Article 11 of the American Convention.[114] The Inter-American Court has established that the protection of privacy involves the acknowledgement that there is a personal sphere that must be exempt from and immune to abusive or arbitrary assaults by third parties or government authorities.[115] The IACHR has in various cases addressed the relationship between the right to privacy and the autonomy of the person to make decisions about different aspects of his or her life.

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[109] Human Rights Committee. General Comment No. 20. Article 7 - (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment). 1992, para. 7.

[110] Committee on Economic, Social and Cultural Rights. General Comment No. 14. The right to the highest attainable standard health (Article 12). 2000, para. 8.

[111] See: ECHR, Csoma v. Romania. Judgment of 15 January 2013.

[112] ECHR, G.B. and R.B. v. Moldova. Judgment of 18 December 2012, para. 29.

[113] ECHR, G.B. and R.B. v. Moldova. Judgment of 18 December 2012, para. 29.

[114] I/A Court H.R., Case of the Massacres of El Mozote and neighboring locations v. El Salvador. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252, para. 166.

[115] I/A Court H.R., Case of J. v. Peru. Preliminary Objection, Merits and Reparations. Judgment of November 27, 2013. Series C No. 275, para. 128.

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. Once this point has been established, it is necessary to identify the essential requirements needed to respect and guarantee this right.

97. Informed consent cannot be considered a simple legal requirement or administrative procedure. According to the international case law, the elements of informed consent are: (i) voluntariness, which necessarily means that it must be free from any coercion or undue influence; (ii) understanding, as the manner and context in which information is provided is essential; and (iii) level of information.

98. In cases that have examined the concept of informed consent, the European Court has cited the provisions of the European Convention on Human Rights and Biomedicine.[116] The European Court has held that, based on that instrument, the States have the obligation to provide every patient with objective and comprehensive information on the treatment to be administered, as well as its purpose, nature, consequences, and risks, in order for him or her to be able to provide informed consent.[117] The person must also receive information on any existing alternatives to the proposed treatment, the effects of not receiving treatment.[118]

99. The European Court added that, based on that treaty, information provided to the patient must be provided using terminology that the person can understand. In the event that there are language barriers, some type of interpretation must be provided.[119]

100. The European Court has held that even when the refusal to accept a particular treatment has fatal consequences, the imposition of medical treatment without the consent of a "mentally competent adult" could interfere with the person's right to physical integrity.[120]

101. Additionally, the Committee on the Elimination of Discrimination against Women has determined that it is a violation of the right to provide informed consent when a patient is not informed of the nature, risks, and consequences of a medical treatment in a way that he or she can understand.[121]

102. The States have the obligation to pass laws to ensure that public centers take the necessary measures to protect the lives of their patients.[122] Therefore, the Court has emphasized that the States have the obligation to take the necessary regulatory measures to ensure that medical personnel inform patients of the consequences of the medical treatment to be administered, in a manner that allows the person to provide informed consent.[123]

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[116] See: ECHR, V.C. v. Slovakia. Judgment of 8 November 2011.

[117] Article 5 of the European Convention on Human Rights and Biomedicine.

[118] WHO, Declaration on Patients' Rights, para. 2.2.

[119] Article 5 of the European Convention on Human Rights and Biomedicine; WHO, Declaration on Patients' Rights, art. 2.4.

[120] ECHR, V.C. v. Slovakia. Judgment of 8 November 2011, para. 105; Pretty v. United Kingdom. Judgment of 29 April 2002, paras. 63-65.

[121] For more information, see: Committee on the Elimination of Discrimination against Women. Communication No. 4/2004. A.S. v. Hungary. 29 August 2006, para. 11(2).

[122] ECHR, Csoma v. Romania. Judgment of 15 January 2013, para. 41.

[123] ECHR, Csoma v. Romania. Judgment of 15 January 2013, para. 42.

103. The European Court has also used the Guidelines Regarding Informed Consent put out by the International Federation of Gynecology and Obstetrics (FIGO). That instrument stresses that even if providing adequate information to the person is difficult or time-consuming, this cannot be a justification for the failure to meet this requirement.[124] It further states that informed consent is a process of communication and interaction that is not satisfied a mere signature. The European Court has additionally used the Universal Declaration on Bioethics and Human Rights.[125]

4.1.1. Possible arguments of the parties

i) Representatives

104. The representatives could argue that in this case the requirements were not met in order for Cristal Tovar to provide informed consent. They could assert that the alleged victim did not have an understanding of the medication to be used. They could argue that, on the contrary, the information was presented in a hasty and disorganized fashion, without allowing sufficient time for Cristal Tovar to think about it; therefore, her ability to make an informed decision was adversely affected.

105. The representatives could also note that the information should have been presented in accessible language consistent with Cristal Tovar's situation of disability, avoiding any technical terminology. They could maintain that, according to the facts of the case, she was only given a verbal explanation of the treatment to be administered and no other type of communication tool was used.

106. They could also argue that there was no adequate presentation of the procedure for the medical treatment, its purposes, the risks and benefits that could be expected, or of any alternative procedures. The representatives could assert that Cristal Tovar was at no time offered the opportunity to request the modification or interruption of medical treatment.

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[124] FIGO, Recommendations on ethical issues in obstetrics and gynecology by the FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health, Guidelines Regarding Informed Consent, para. 3 (2000) [hereinafter FIGO, Guidelines Regarding Informed Consent].

[125] Article 5 of the Declaration states that: "The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected. For persons who are not capable of exercising autonomy, special measures are to be taken to protect their rights and interests."

In addition, Article 6 provides that:

1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.

2. Scientific research should only be carried out with the prior, free, express and informed consent of the person concerned. The information should be adequate, provided in a comprehensible form and should include modalities for withdrawal of consent. Consent may be withdrawn by the person concerned at any time and for any reason without any disadvantage or prejudice. Exceptions to this principle should be made only in accordance with ethical and legal standards adopted by States, consistent with the principles and provisions set out in this Declaration, in particular in Article 27, and international human rights law.

3. In appropriate cases of research carried out on a group of persons or a community, additional agreement of the legal representatives of the group or community concerned may be sought. In no case should a collective community agreement or the consent of a community leader or other authority substitute for an individual's informed consent.

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 has held that the right to health entails the right of every person to control his or her health and body, including sexual and reproductive freedom.[128] In this respect, the States have the obligation to abstain from measures that allow for the misrepresentation of information on reproductive matters by public servants for purposes of dissuasion[129] or even the practice of sterilization without the woman's consent.[130]

112. In the interest of preventing such practices, the IACHR has emphasized the need for women to be able to give their free and informed consent in any situation relating to their sexual and reproductive health. As noted in the previous section (see *supra* paras. 92-103), the elements that make up the process of informed consent in such cases are as follows: (i) inform the person of the nature of the procedure, treatment options, and reasonable alternatives, including the possible benefits and risks of the proposed procedures;[131] (ii) take account of the person's needs and ensure

[126] See: ECHR, Gennadiy Naumenko v. Ukraine. Judgment of 10 February 2004.

[127] See: IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, November 22, 2011, p. 15.

[128] Committee on Economic, Social and Cultural Rights. General Comment No. 14. The right to the highest attainable standard health (Article 12). 2000, para. 8.

[129] IACHR, Report No. 21/07, Petition 161/02, Friendly Settlement, Paulina del Carmen Ramírez Jacinto, (Mexico), March 9, 2007.

[130] IACHR, Report No. 71/03, Petition 12.191, Friendly Settlement, María Mamérita Mestanza Chávez (Peru), October 3, 2003.

[131] Access to information on reproductive matters requires that women have sufficient information to make decisions about their health. In order to meet this objective, the information provided must be timely, complete,

that the person understands the information provided;[132] and (iii) 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] Moreover, it emphasized that:

> Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives.[137]
>
> (...)
>
> Acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives.[138]

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accessible, reliable, and proactive. It must also be understandable, using language that is accessible, and must be current. IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, November 22, 2011, p. 15.

[132] The former United Nations the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted the duty of the States to guarantee the provision of health information and services to vulnerable groups in the context of the mandatory fight against discrimination. In this respect, the CEDAW Committee has held that health services are acceptable if the prior fully informed consent of the woman is granted, her dignity is respected, her confidentiality is guaranteed, and her needs and perspectives are taken into account (United Nations, Committee on the Elimination of Discrimination against Women. General Recommendation No. 24, para. 22). IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, November 22, 2011, pp. 18-19.

[133] Involuntariness in medical procedures can be a violation of the rights to humane treatment, life, and the equal protection of the law under the American Convention, as well as a form of violence and discrimination against women under the provisions of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"). According to the terms of the Convention of Belém do Pará, the lack of information concerning the practice of sterilization performed without the woman's consent, as well as the physical and psychological consequences of that procedure, are examples of forms of violence against women. Situations in which women victims of sexual violence are not informed of the services available in view of such acts can also constitute forms of violence. IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, November 22, 2011, pp. 21-22.

[134] CEDAW Committee. General Recommendation, No. 21, Equality in marriage and family relations. 13th session, 1994), para. 22. Available at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21

[135] CEDAW Committee. General Recommendation, No. 19, Violence against women. 11th session, 1992, para. 24(m). Available at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.

[136] CEDAW Committee. General Recommendation, No. 24, Women and health (Article 12 of the Convention on the Elimination of Discrimination against Women), para. 31. Available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24.

[137] CEDAW Committee. General Recommendation, No. 24, Women and health (Article 12 of the Convention on the Elimination of Discrimination against Women), para. 31. Available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24.

114. For its part, Committee on Economic, Social and Cultural Rights has underscored the importance of access to information in the area of reproductive health and the obligation of the State to disclose it in a timely, complete, accessible, reliable manner, and to do so on its own initiative. As such, it has noted that States have an obligation to refrain from censoring, withholding, or intentionally misrepresenting information related to methods of contraception.[139]

115. Additionally, the European Court has indicated that the right to privacy includes aspects of an individual's physical, psychological, and social identity, such as personal autonomy and development, the right to establish and develop relationships with other people, and the right to decide whether or not to have a child.[140] In this respect, it has underscored the individual's right of effective access to information concerning his or her reproductive health status.[141]

116. The IACHR has also acknowledged that there are exceptional circumstances under which the consent of the person would not be required in situations that concern his or her sexual and reproductive life. In this respect, the Commission has cited instances in which (i) a person must be treated medically in order to preserve his or her life or health, but neither the person not a close relative can provide consent; and (ii) there are legal mandates tied to mental health and public health issues.[142]

4.2.1. Possible arguments of the parties

i) Representatives

117. The representatives could argue that Cristal Tovar never gave her consent to be injected with contraceptives. They could assert that the State did not give the alleged victim any kind of information on the use of contraceptives; instead, she was just told in general terms that it was medicine for her "medical treatment." The representatives could say that, according to the IACHR's interpretation based on Article 7 of the Convention of Belém do Pará, the fact that the women were not guaranteed a free and voluntary consent process for an intervention like the use of contraceptives could be considered a case of violence against women.[143]

118. In addition, the representatives could maintain that there was no exception that would justify the failure to obtain Cristal Tovar's informed consent. They could maintain that there is no evidence of an emergency situation that warranted the alleged victim's injection with contraceptives. They could emphasize that the existence of sexual relations among residents of "La Casita" cannot be considered grounds for the application of the aforementioned exception. They could argue that the

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[138] CEDAW Committee. General Recommendation, No. 24, Women and health (Article 12 of the Convention on the Elimination of Discrimination against Women), para. 31. Available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24.

[139] IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, November 22, 2011, p. 29.

[140] V.C. v. Slovakia, para. 138; see Evans v. the United Kingdom [GC], no. 6339/05, § 71, ECHR 2007-I, and E.B. v. France [GC], no. 43546/02, § 43, 22 January 2008).

[141] K.H. and Others v. Slovakia, para. 44.

[142] IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, November 22, 2011, p. 24.

[143] IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, November 22, 2011, p. 22.

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 exceptional 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 contraceptives 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, *regardless* 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 *per se* 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: *Torture and other forms of cruel, inhuman, degrading treatment or punishment*, A/63/175 (28 July 2008), paras. 55-56. Available at http://www.ohchr.org/EN/Issues/Disability/Pages/UNStudiesAndReports.aspx. This position was also maintained by the Special Rapporteur on Torture at a Thematic Hearing on Human Rights and Solitary Confinement in the Americas, Presentation before the Inter-American Commission on Human Rights (12 March 2013). Available in Spanish at: http://www.ohchr.org/Documents/Issues/Torture/IAC12March2013.pdf

[146] 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: Report of the Special Rapporteur on torture and other forms of cruel, inhuman, degrading treatment or punishment, *Torture and other forms of cruel, inhuman, degrading treatment or punishment*, A/63/175, (28 July 2008), paras. 55-56.

[147] ECHR, Ramirez Sanchez v. France. Judgment of 4 July 2006, para. 123; Ilascu and others v. Moldova and Russia. Judgment of 8 July 2004, para. 432.

[148] ECHR, X. v. Turkey. Judgment of 9 October 2012, para. 40; Rohde v. Denmark, Judgment of 21 July 2005, para. 93.

[149] ECHR, Ilascu and others v. Moldova and Russia. Judgment of 8 July 2004, para. 427; Kalashnikov v. Russia. Judgment of 15 July 2002, para. 95; Labita v. Italy. Judgment of 6 April 2000, para. 120.

[150] ECHR, Ramirez Sanchez v. France. Judgment of 4 July 2006, para. 123; Ilascu and others v. Moldova and Russia. Judgment of 8 July 2004, p 432.

[151] ECHR, Ramirez Sanchez v. France. Judgment of 4 July 2006, para. 145.

[152] ECHR, Ramirez Sanchez v. France. Judgment of 4 July 2006, para. 139.

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 their 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, it has asked that the States to impose solitary confinement in accordance with the relevant standards. However, more recently, in a press release issued in 2013 regarding the excessive use of solitary confinement in the United States, the Commission expressed that there should be an absolute ban on the solitary confinement of persons with mental disabilities.[158]

5.4. Possible arguments of the parties

i) Representatives

129. The main argument that the petitioners could use in their favor is that, according to the statements of the Special Rapporteur on Torture, there is an absolute ban on using this type of practice for persons with mental disabilities.

130. Also, considering the conditions in the isolation rooms (see paragraph 17 of the facts of the case) as well as the risks, in addition to the imminent physical and mental pain that a person faces

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[153] ECHR, Renolde v. France. Judgment of 16 October 2008, para. 109.

[154] I/A Court H.R., Case of Lori Berenson Mejía v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2004. Series C No. 119, para. 103.

[155] I/A Court H.R., Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 191, para. 58; Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 323; Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 171.

[156] I/A Court H.R., Case of Lori Berenson Mejía v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2004. Series C No. 119, para. 102.

[157] I/A Court H.R., Matter of "Matter of the Socio-Educational Internment Facility." Provisional Measures with respect to Brazil. Order of April 26, 2012. Whereas clause 22; "Matter of Monagas Judicial Confinement Center (La Pica)." Provisional Measures with respect to Venezuela. Order of February 9, 2009. Whereas clause 19 & Paragraph 2 of the Operative Part of the Order.

[158] IACHR, IACHR Expresses Concern over Excessive Use of Solitary Confinement in the United States, Press Release, July 18, 2013. Available at http://www.oas.org/en/iachr/media_center/PReleases/2013/051.asp.

when placed in solitary confinement, they could argue that its use for residents of "La Casita" with mental disabilities could even constitute torture.

ii) State

131. For its part, the main argument that the State could raise is that the Inter-American Court—in spite of the fact that it has not ruled on the application of this practice to persons with disabilities—has ruled that isolation is permissible, provided that it is consistent with the relevant international standards. This is clearly supported by the practices of the IACHR in relation to the granting of precautionary measures on behalf of persons with mental disabilities, as it has asked both Paraguay and Guatemala to apply solitary confinement in accordance with the relevant international standards.

132. Taking account, for example, of the fact the European Court has declared the violation of the right to the integrity of the person in cases of prolonged isolation lasting months or years,[159] the State could argue that when this practice is used at "La Casita" it generally lasts between 4 and 5 hours. It could further argue that the exceptional nature of its use is evidenced by the fact that Cristal, during the time she stayed at the shelter, only witnessed the confinement of residents in the isolation rooms on three occasions.

133. From a practical point of view, the State could argue—as stated in the facts of the case—that isolation is used as a "safety" measure to protect residents who are experiencing a psychiatric crisis, as well as to protect others.

6. Conditions at the "La Casita" institution

134. With respect to the conditions in which the residents of "La Casita" are living, it is appropriate to apply the general standards regarding conditions of detention, interpreted in light of the rights of persons with disabilities—that is, bearing in mind at all times that the State must grant them special protection according to their needs.

135. Article 1.1 of the American Convention establishes that the States Parties must guarantee the free and full exercise of the protected rights of "all persons subject to their jurisdiction." The persons residing at "La Casita" are under the direct jurisdiction the State by virtue of the fact that it is a public entity. The State therefore has the responsibility to guarantee the physical, mental, and moral integrity of the facility's residents.[160]

136. The Inter-American Court has stated that, in accordance with Articles 5.1 and 5.2 of the Convention, every person deprived of liberty has the right to live in detention conditions that are compatible with his or her personal dignity.[161] Therefore, in view of the special relationship of subjection between persons deprived of liberty and the State, the State must assume a specific series

[159] See: ECHR, , Ilascu and others v. Moldova and Russia. Judgment of 8 July 2004; Ramirez Sanchez v. France. Judgment of 4 July 2006.

[160] See, *mutatis mutandis*, IACHR, Report No. 63/99, Case of Víctor Rosario Congo, Ecuador, April 13, 1999, para. 47.

[161] I/A Court H.R., Case of Pacheco Teruel et al v. Honduras. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 241, para. 63; Case of Neira Alegría et al. v. Peru, Merits. Judgment of January 19, 1995. Series C No. 20, para. 60.

of responsibilities and take special actions to guarantee that inmates have the necessary conditions to lead a decent life, and to contribute to the exercise of those rights that, under no circumstances, can be restricted or whose restriction does not necessarily arise from the deprivation of liberty.[162] In addition, the Court has held that the food provided to penitentiary centers must be of good quality and provide sufficient nutritional value.[163]

137. According to the case law of the Inter-American Court on the rights of persons with disabilities, the general obligation to guarantee the right to physical integrity gives rise to special duties of protection and prevention that translate into duties of care and regulation. The first is related to the special position of guarantor assumed by the State with respect to persons under their custody or care, to whom the State has the positive obligation of providing the necessary conditions to lead a decent life. The duty of the States to regulate and oversee institutions that provide health services to persons with mental disabilities applies, *inter alia*, to both public and private services.[164] In addition, according to the Inter-American Court, the place and physical conditions in which persons with mental disabilities receive treatment must be consistent with respect for the dignity of the person.[165]

138. With respect to the nutrition of the residents of "La Casita," Principle XI.1 of the IACHR's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas can be taken as a guide. According to this principle, "Persons deprived of liberty shall have the right to food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition." In relation to hygiene and clothing, those principles refer to the right of access to clean and sufficient sanitary installations that ensure their privacy and dignity, access to basic personal hygiene products, and access to water for personal cleanliness (see Principle XII.2). That document further establishes that clothing shall not be degrading or humiliating (see Principle XII.3).

139. The European Court has also ruled specifically on the conditions of detention of persons with disabilities. It has stated that the authorities must take special care to guarantee that the conditions of detention satisfy the special needs arising from the disability.[166] According to the European Court, inadequate detention conditions for persons with disabilities can exacerbate feelings of stress, anxiety, and fear.[167] It has also noted that it is important for the facilities of an institution where there are persons with disabilities to be adapted to their needs.[168] In that respect, it has indicated that the authorities cannot be indifferent to the accessibility needs of persons with disabilities.[169]

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[162] I/A Court H.R., Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 153; Case of Pacheco Teruel et al v. Honduras. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 241, para. 64.

[163] I/A Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 209; Case of Pacheco Teruel et al v. Honduras. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 241, para. 67.d).

[164] I/A Court H.R., Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, paras. 137-141.

[165] I/A Court H.R Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, para. 131.

[166] ECHR, Z.H. v. Hungary. Judgment of 8 November 2012, para. 29.

[167] ECHR, Musial v. Poland. Judgment of 25 March 1999, para. 96.

[168] ECHR, Price v. United Kingdom. Judgment of 10 July 2001, para. 27.

[169] ECHR, Arutyunyan v. Russia. Judgment of 10 January 2012, para. 79.

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 of the food does not provide adequate and sufficient nutrition according to the international standards applicable to persons in the custody of the State. That, plus the lack of running water for four hours a day, the shortage of basic hygiene items, and the poor condition of the mattresses and of some bathrooms, could be an infringement of the physical, mental, and moral integrity of the residents of "La Casita," in violation of Article 5.1 of the American Convention.

143. In addition, the absence of private spaces and the old, ill-fitting clothing could also be considered by the representatives to be a violation of Exclutia's international responsibility to guarantee the right to humane treatment and to oversee the conditions at the shelter.

144. They could also contend that the mandatory haircuts upon admission to the shelter constitutes an arbitrary interference in the residents' privacy, and infringes the right to have their honor respected and their dignity honored, in violation of Article 11.1 and 11.2 of the Convention.

ii) State

145. The State could argue that the living conditions of the residents of "La Casita" are compatible with personal dignity, that it has been implementing public policies oriented toward persons with disabilities since 2008, and that it provides persons with disabilities who lack the support to live in the community the opportunity to live at a shelter with services appropriate to their needs.

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[170] ECHR, Moisejves v. Latvia. Judgment of 15 June 2006, para. 78.
[171] ECHR, Moisejves v. Latvia. Judgment of 15 June 2006, para. 79.
[172] ECHR, Moisejves v. Latvia. Judgment of 15 June 2006, para. 80.
[173] ECHR, Babushkin v. Russia. Judgment of 18 October 2007, para. 44.
[174] ECHR, Modarca v. Moldova. Judgment of 10 May 2007, paras. 65-69.
[175] ECHR, Modarca v. Moldova. Judgment of 10 May 2007, paras. 65-69.

146. It could also argue in its favor that the homeless population is segregated from the population of persons with disabilities, and that women and men with disabilities reside in separate areas. They could also assert that the persons with disabilities are separated by type of disability in order to provide services consistent with their needs. In addition, children are segregated from adults, as are elderly adults.

147. The State could also maintain that the conditions at "La Casita" respect the dignity of the residents, given that the common spaces with televisions in each area and the green spaces provide opportunities for leisure and recreation. This is in addition to the physical and psychological therapy and skills training for daily life that is provided by two specialists.

148. The deprivation of water for four hours a day would not be such a significant restriction to the residents' water consumption or personal cleanliness that it would infringe upon their right to humane treatment, according to the State. Finally, with respect to the mandatory haircuts, the State could argue that it is a hygiene measure that benefits the residents, and therefore does not affect their rights to humane treatment and privacy.

7. Access to justice of persons with disabilities

149. According to the Court, the right to judicial guarantees means that every person who has suffered a violation of his or her human rights "the right […] to obtain clarification of the events that violated human rights and the [establishment of the] corresponding responsibilities from the competent organs of the State through the investigation and prosecution."[176] With respect to the right to judicial protection, the Court has established that:

> (...) [Article 25 in relation to Article 1(1) of the American Convention] obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, *inter alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered. (…) Article 25 "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society (...).[177]

150. It is important to stress that the Court has held that in order for the State to comply with the provisions of the above-cited Article 25.1 of the Convention, it is not enough for the remedies to merely exist; rather, they must be effective.[178] In other words, the person must be given the real opportunity to file a simple and rapid appeal that makes it possible, if appropriate, to attain the requested judicial protection.

151. In relation to the right to access to justice of persons with disabilities, Article 13 of the Convention on the Rights of Persons with Disabilities provides as follows:

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[176] I/A Court H.R., Case of Barrios Altos v. Peru. Merits. Judgment March 14, 2001. Series C No. 75, para. 48.

[177] I/A Court H.R., Case of Loayza Tamayo. Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, para. 169; Case of Fairén Garbi and Solís Corrales. Preliminary Objections. Judgment of 26 June 1987. Series C No. 2, para. 90.

[178] I/A Court H.R., Case of Maritza Urrutia. Judgment of November 27, 2003. Series C No. 103, para. 117; Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 121.

> 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
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> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

152. On this point, the CRPD Committee has held that "recognition of the right to legal capacity is essential for access to justice."[179] Likewise in the *Case of Furlan and Family v. Argentina* the Inter-American Court stressed the importance of access to justice for persons with disabilities on an equal basis with others. In this regard, it found that the States must take the pertinent measures to prioritize the processing and adjudication of proceedings relating to persons with disabilities so as to ensure their prompt decision and execution.[180]

153. Finally, international human rights law provides that persons with disabilities are entitled to guarantees such as the right to be heard by an independent and impartial authority, the right to receive counsel in order to object to their confinement, and the right to present evidence, such as the opinion of an independent mental health professional.[181]

7.1. Possible arguments of the parties

i) Representatives

154. The representatives could argue that the State failed to provide an adequate and effective remedy with the proper due process guarantees for challenging the declaration of Cristal Tovar's incompetency. They could argue that the mere fact that the laws of Exclutia prevent the person declared incompetent from challenging the determination of his or her legal incapacity violates Articles 8 and 25 of the American Convention. They could provide an example of this by noting that the trial court did not allow Cristal Tovar—through her legal representative, the ODNEI—to challenge the declaration of incompetency entered against her. In this respect, they could contend that the declaration of Cristal Tovar's incapacity prevented her from having access to justice on an equal basis with others.

155. The representatives could further maintain that, in spite of the fact that the Court of Appeals of Inclutiarán heard the merits of the request filed by the ODNEI, it requested the testimony of Dr.

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[179] Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12: Equal recognition before the law, 11th session, 30 March–11 April 2014, para. 34.

[180] I/A Court H.R., Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 196.

[181] UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Principles 16-17. In the case of Víctor Rosario Congo, the Inter-American Commission found that the Mental Health Principles are authoritative for complying with the requirements of the American Convention with respect to psychiatric commitment. Inter-American Commission on Human Rights. *Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, April 13, 1999. Cited in Eric Rosenthal, Sofía Galván & Erin Jehn, *Abandonados y Desaparecidos, la Segregación y Abuso de Personas con Discapacidad en México*, Disability Rights International, Mexico, 2010.

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 declared legally incompetent and not necessarily his or her guardian to have standing to challenge the declaration of incompetency. It could indicate that that took place in this case, as the Court of Appeals of Inclutiarán admitted the motion for appeal filed by the ODNEI. The State could even maintain that the court ruled on the merits of the case and found that it was not proper to revoke the declaration of incompetency after receiving all of the information provided by Dr. Lira, who was not only Cristal Tovar's guardian but also the director of "La Casita."

159. Finally, the State could argue that the petition for a constitutional remedy filed by the ODNEI was an adequate and effective remedy for purposes of improving the infrastructure and conditions at "La Casita."

D. PRELIMINARY OBJECTION

160. The State of Exclutia filed a preliminary objection before the Inter-American Court alleging that the petition before the IACHR was not timely filed; that is, it was filed more than six months after the notice of the decision on the petition for a constitutional remedy, and therefore it does not

[182] Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12: Equal recognition before the law, 11th session, 30 March–11 April 2014, para. 35.

[183] Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12: Equal recognition before the law, 11th session, 30 March–11 April 2014, para. 34.

meet the requirement set forth in Article 46.1(b) of the American Convention. The State is therefore requesting that the Court review the legality of Admissibility Report No. 55/11.

1. Deadline for filing the petition before the IACHR

161. With regard to the filing deadline for the petition, the Inter-American Commission has acknowledged that "the principles underlying the inter-American system of human rights certainly include legal certainty, which is the basis for the six-month rule and a reasonable time frame when applying exceptions to the exhaustion of domestic remedies."[184] Additionally, it has stated before the Inter-American Court that the admissibility stage is the stage at which the Commission decides on this requirement, in light of the information provided by the parties.[185]

162. With respect to its authority to review the legality of the proceedings of the IACHR, the Inter-American Court has held that the Commission has autonomy and independence in the processing of individual petitions, as provided in Articles 44-51 of the Convention. Nevertheless, the Court has established that in matters before it, "it has the authority to carry out a control of the legality of the Commission's actions," which "does not necessarily mean reviewing the proceedings that have been conducted before the Commission, unless one of the parties proves that a serious error has occurred that allegedly violates their right of defense."[186]

2. Possible arguments of the parties

i) Representatives

163. The representatives could cite the autonomy and independence of the Commission and indicate that the procedural stage at which the State must make the specific arguments concerning the requirements set forth in Article 46 of the Convention is the admissibility stage. They could assert that the State, at that stage, only indicated in general terms that the petition was not timely filed, and did not make the specific argument until the case was before the Court. They could also underscore the fact that the Commission makes its admissibility decision based on the information provided by the parties. Furthermore, they could argue that the State has the burden of proving how a specific act of the IACHR infringes upon its right of defense—which it did not do in this case.

164. The representatives could also argue that, if the Court were to examine the actions of the IACHR—which could happen only in the case of a serious violation of the State's right of defense—it would have to rule that the Commission correctly found that the filing deadline should be calculated from the motion to vacate and not from the petition for a constitutional remedy. This is because the object of the petition filed by the ODNEI is tied to Cristal's lack of access to justice, which arose from the denial of the appeal filed in the adjudication of the motion to vacate. The petition for a constitutional remedy, however, was meant to protect the rights of all of the residents of "La Casita" adversely affected by the conditions there.

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[184] IACHR, Report No. 100/06, Inadmissibility, Petition 943-04, Gaybor Tapia and Colón Eloy Muñoz, Ecuador, October 21, 2006, para. 20.

[185] I/A Court H.R., Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257, para. 30.

[186] I/A Court H.R., Case of Mémoli v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 22, 2013. Series C No. 265, para. 25.

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 resulted in a serious violation of the State's right of defense, which opens the door for the Court to examine the legality of that omission.

E. PROVISIONAL MEASURES

167. At the hearing before the Inter-American Court, the parties will present their arguments on the request for provisional measures made by the representatives in relation to the practice of involuntary isolation at "La Casita." At that time, two aspects of the request for provisional measures will be examined.

168. First, it will determine whether the conditions of "extreme seriousness," "urgency," or "irreparable harm" are present. The possible arguments of the parties (see *supra* paras. 134-141) discussed in this memorandum could be applied to this point, with the exception that they must focus on the three aforementioned conditions. It bears noting in particular that the Court cannot consider the merits of any argument that is not exclusively related to extreme seriousness, urgency, and risk of irreparable harm.

169. In addition, it will examine the State's argument that, in the event that the Court denies the request for provisional measures, the Commission would have to lift the precautionary measures issued on behalf of the residents of "La Casita." In the framework of that discussion, arguments could arise in connection with the most recent amendments to the IACHR's Rules of Procedure, which entered into force on August 1, 2013.

170. That reform made several changes to Article 25 of the Rules of Procedure, which regulates the mechanism of precautionary measures. For the first time, the effects of provisional measures on the Commission's precautionary measures are regulated. The new text of paragraph 13 of that article establishes:

> 13. In the case of a decision of the Inter-American Court dismissing an application for provisional measures, the Commission shall not consider a new request for precautionary measures unless there are new facts that justify it. In any case, the Commission may consider the use of other mechanisms to monitor the situation.

171. In other words, in cases in which the Court does not grant a provisional measure, the precautionary measure of the IACHR must be lifted. To date there has been no situation in which this situation has occurred. However, it could happen in the future.

1. Possible arguments of the parties

i) Representatives

172. The representatives could argue that the purposes of the precautionary measure granted by the IACHR and of the request for provisional measures before the Court are not the same. The precautionary measures are broader, since they cover all persons residing at "La Casita," while the request for provisional measures applies only to those persons liable to be subjected to involuntary isolation (residents of areas "B" and "D"). They could also assert that the precautionary measures refer to the general conditions at "La Casita," while the request for provisional measures deals exclusively with the practice of involuntary isolation.

173. In addition, the representatives could argue that the standards applied by the Commission and the Court to assess requests for precautionary and provisional measures, respectively, are different.[187] In that regard, they could indicate that the IACHR applies the standard of seriousness and urgency for the granting of precautionary measures (Article 25.2 of the Rules of Procedure), while the Court applies a higher standard of "extreme" seriousness and urgency (Article 63.2 of the Convention). They could therefore invoke the independence of the IACHR from the Court in the exercise of its jurisdiction, as well as the aforementioned difference in the standards, in order to argue that this new provision of the Rules of Procedure should be interpreted in a broad and *pro persona* sense.

174. Finally, the representatives could argue that the issue of the possible lifting of the precautionary measure must be decided by the Inter-American Commission itself, at the appropriate time, on the basis of its rules.

ii) State

175. The State could argue that the new Rules of Procedure of the IACHR are clear in the sense that the Commission must lift the precautionary measures if the Court dismisses the request for [provisional] measures. It can point out that the Commission cannot revisit a matter when the Court has already decided that it does not meet the criteria for the granting of protection measures.

176. The State could additionally argue that precautionary measures can only be granted subsequent to the denial of a request for provisional measures through the presentation of new facts. It could indicate that no new facts have arisen subsequent to the filing of the request for provisional measures that would justify the adoption of protection measures.

[187] IACHR, "Reply of the Inter-American Commission on Human Rights to the Permanent Council of the OAS regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the Inter-American Human Rights System." CP/INF./12corr., October 23, 2012, para. 98.