

2007 Inter-American Human Rights Moot Court Competition
Hypothetical Case: Rosa Luna v. Republic of Azar

Rosa Luna v. Republic of Azar

I. Historical Context

1. The Republic of Azar—a country with a civil law tradition— adopted a democratic system of government in 1993. Since then, with the constitutional reform that gave international human rights treaties and agreements constitutional status, a process of institutional reform and greater openness to the international community was initiated. The State of Azar became a member of the Organization of American States and of the United Nations.

2. In 1995 Azar ratified the American Convention on Human Rights, or “Pact of San José”, and accepted the binding jurisdiction of the Inter-American Court of Human Rights. That same year, it ratified the Inter-American Convention to Prevent and Punish Torture and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In 1996, it also incorporated into its legal system the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará) and the Inter-American Convention on Forced Disappearance of Persons. In 1997, Azar ratified the Inter-American Convention against Corruption.

3. From the time Azar gained its independence in 1893, the northern region, which is the economic and industrial center of the country and has marked social and cultural differences from the rest of Azar, sought to obtain its autonomy and become independent. From that time forward, and for purposes of reaching this aim, the inhabitants of the north formed different organizations that are still active today within the State of Azar as well as internationally. The Luna family—a historical reference to the northern region of Azar—was continuously linked to the activities of the different organizations of the region. In 1950, Raúl Luna founded the group UNO—the Organized National Union. As of 2003, the organization adopted direct action as a method of intervention throughout Azar, resorting to sporadic armed actions to deal symbolic blows, raise funds for the organization or distribute money or goods to the people living in poor neighborhoods. The inhabitants of the region, including the Luna family, currently reject the activities of this group.

4. The latest estimates of the Intelligence Agency of the State of Azar suggest that, over the course of three years, the UNO Group participated in five assassinations of members of the security forces, two bank robberies, ten robberies against police and military warehouses and some thirty-five kidnappings. In addition, the State Security Agency has disclosed information linking this organization to the Catholic University of Azar. One of its confessed members, student Josué Guevara, was detained together with two others when they attempted to rob the supply warehouse at the Nueva Armenia military post in order to provide food to the area’s residents. During one of the interrogations he underwent, Josué implicated Rosa Luna—his professor at the Catholic University and the niece of Raúl Luna—as one of the individuals involved in UNO.

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II. The Facts of the Case

A. Detention of Rosa Luna

5. Rosa Luna was detained at her home on Friday, June 13, 2003 at 5:30 in the afternoon. The arresting officer had a warrant for her arrest. During the proceeding he informed her of the reasons for her arrest, and advised her of her rights. He informed her that she was accused of involvement in the crime of terrorism as a co-perpetrator. Specifically, she was accused of having provided financial support—in an amount equivalent to 200 American dollars—to the “Foundation for the Poor,” which illegally channeled part of its budget to UNO. She was also informed that she was accused of participating, as an accessory before the fact, in the crime of attempted robbery against the Nueva Armenia military supply warehouse.

6. Upon her arrest, Rosa Luna was taken to the Women’s Detention Center attached to the Azar Maximum Security Jail. From there she was able to make two telephone calls: one to her partner Juan Sol and another to her attorney María Chumbipa.

7. Over the weekend, Rosa Luna was held alone, in a cold, damp cell with a very dim light bulb and no access to a bathroom. She ate and slept in her cell and was not allowed to go out to the prison yard. Nor was she allowed to have contact with any person except for her jailers. Every time she needed to use the bathroom she had to ask the guards for permission. On the Saturday following the day of her arrest she asked repeatedly to be taken to the bathroom; a guard took her two hours after her initial request because the officer in charge of her hall was taking a nap.

8. On Saturday, June 14, her partner, Juan Sol, attempted to visit her. However, the detention center authorities barred his entry and informed him that his partner could not receive visitors until the end of the initial interrogation period, which usually lasted a week. That same day Rosa Luna had woken up with a vaginal hemorrhage and quickly realized that it was her menstrual period. She therefore requested to be provided with sanitary napkins, cotton or paper. Nevertheless, the guards informed her that they could not grant her request until Monday, when the storeroom would be opened and they would have access to such items. Rosa Luna thus had to spend the weekend without any type of dressing, with her clothes stained and with no way to wash herself.

9. Rosa Luna was taken to the infirmary on the morning of Monday the 16th. A doctor examined her and prepared a medical record of her health status at the time of her arrival at the detention center. On this occasion she was given two sanitary napkins and a change of clean clothes. At the same place, Rosa Luna met with psychologist Luciano Duche, who she knew because he was a professor at the Catholic University where she taught. Professor Duche informed her that the purpose of the interview was to establish her state of mind at the time of her arrest. The psychologist took down the relevant information to determine her general emotional state, as well as information necessary to establish her

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fears in light of her detention. Rosa Luna expressed her fear of violence, of mistreatment, of dirtiness and the illnesses she could contract during her time at the prison.

10. After the medical sessions, Rosa Luna was able to see her attorney, María Chumbipa, for just 15 minutes since the authorities had to continue with some medical examinations. Taking the opportunity of María Chumbipa's visit, Juan Sol also tried to visit his partner. However, the penitentiary authorities reiterated that the prisoner could only receive visitors after the initial investigation period was over.

11. On the afternoon of June 16, Ms. Luna was taken to a dimly lit room where she was met by three uniformed men and one plainclothes individual. Those persons involved in the interrogation sought to obtain information on Rosa Luna's participation in the activities of the UNO Group —among them the attempted robbery against the military warehouse— and any information on the group. The interrogation was carried out according to procedures established by a ministerial order. They also had the advice of a psychiatrist, Dr. Líbero Carnelutti, who worked with the officers of the security forces, directing each one of the stages of the questioning and recording Rosa Luna's reaction to the techniques used. The interrogation, conducted mainly by Sergeant Jorge Fortunato, went on for 12 hours and included questions about her everyday life, the lives of her family, friends and closest colleagues, her tastes in film and literature, her ideological convictions, her opinion on the people's right to rebel, the compatibility or incompatibility of international humanitarian law with the necessities of war and social change, among other topics. During this time Rosa Luna was given water and tea with sugar, and only was allowed to use the restroom on two occasions. Rosa Luna was taken to her cell at midnight. She asked for food, access to a shower and sanitary napkins. The guard told her that it was not possible to meet her needs because the kitchen and storeroom were closed and because there was no nighttime guard staff assigned to supervise the showers.

12. Between Tuesday the 17th and Friday the 20th of June, Rosa Luna was interrogated for 14 hours a day in a sequence that involved questioning from Sergeant Fortunato and Colonels Lino Lona and José Jundia. The interrogations were about her political ideas and those of several of her colleagues.

13. On Friday, June 20, Ms. Luna was able to see her attorney a second time. The meeting was again only for 15 minutes because that morning the meeting room had to be shared with 10 other prisoners. That same day, the attorney appeared before the Court on Duty and requested the release of her client. The Judge denied this request on the basis that the Code of Criminal Procedure of the Republic of Azar prohibited the release of perpetrators or participants in crimes of terrorism in view of the possibility of collusion with other alleged members of the criminal organization.

14. As of that Wednesday the 20th, the personnel at the detention center changed the method of interrogation used. Given the lack of cooperation evidenced by Ms. Luna's responses, Sergeant Jorge Fortunato forced her to stand with her arms raised for periods of 40 minutes. This occurred on five occasions over the course of that day, during the 4

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hours that the interrogation lasted. During that week, Rosa Luna had only one meal a day, which was breakfast, consisting of tea, bread and two eggs. She had no sanitary napkins and could not bathe.

15. Only on Saturday, June 21, was Rosa Luna able to bathe, and guard staff gave her a package of 24 sanitary napkins. She ate breakfast for the first time in the cafeteria, and was also allowed to go out into the detention center's yard, see sunlight and interact with other detainees. Rosa Luna felt that her eyes were bothering her because of the lack of light in her cell and in the interrogation room. The interrogations continued on Saturday afternoon. This time they took her to a large, well-lit room. There they alternated between shouting obscenities at her and playing recordings of people screaming in pain. Her interrogators asked her questions about the activities of her colleagues, about members of the Foundation for the Poor and about other people she did not know, telling her that the same fate awaited her if she did not cooperate.

16. On Sunday, June 22, Sergeant Fortunato went back to his original interrogation method in a dimly lit room where he asked her detailed questions about her personal life.

17. In spite of having gone to the Detention Center almost daily since the time of his partner's arrest, it was not until Monday, June 23, 2003 that Juan Sol was authorized to visit her for half an hour in a common room together with other family members and individuals who appeared to be guards. She looked emaciated and frightened to him. That same day, Rosa Luna's attorney, María Chumbipa, was able to have a private, two-hour meeting with her. The attorney had unrestricted access to her client from that date forward, which enabled her to do her job adequately.

18. The interrogations stopped on June 23, but Rosa Luna remained in custody pending trial for her alleged involvement with the UNO Group. On June 26, 2003 Rosa Luna was summoned for the first time to appear before the judge presiding over the case. Finally, on July 28, 2003, Ms. Rosa Luna was acquitted and released.

19. Rosa Luna currently suffers from severe back problems caused by the tension generated during the interrogations and by her constant state of alertness that intensifies in the presence of authority figures. Her nature has changed profoundly. She has become a very pessimistic and fatalistic person, and it is very difficult for her to concentrate and to read. Her imprisonment also affected her emotional and spousal relationship. She feels incapable of having a full and free emotional and sexual relationship with her husband. Rosa Luna says that she can no longer trust anyone, that she cannot relax, that she feels very guilty about the things she said during the interrogations and that "she is no longer clean."

20. Following her release, and with the will to regain control of her life and her destiny, Rosa Luna decided—with the support of her attorney and her partner—to bring legal action against the persons responsible for her torture and humiliation during the time of her detention.

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B. The criminal case involving the crime of torture

21. The Criminal Code of Azar defines torture under Title II “Crimes against liberty,” Chapter I “Crimes against individual liberty.” Article 100 of the Criminal Code establishes: “Any public official who tortures a person deprived of his or her liberty shall be punished by a term of imprisonment of two months to six years.” In addition, under Title I “Crimes against the person,” Chapter II “Crimes of bodily harm,” the Criminal Code anticipates crimes of bodily harm as follows: Article 72 states that “[a]ny person who causes harm to another’s body or health that is not anticipated in another provision of this Code shall be sentenced to term of imprisonment of one month to one year;” Article 73 establishes that: “[a] term of imprisonment of one month to five years shall be imposed if the bodily harm results in the permanent debilitation of the victim’s health, a sense, an organ or a limb, or results in a permanent difficulty in speech, or if the victim’s life was placed in danger, or if the victim was incapacitated from work for more than one month” and Article 74 states: “[a] term of imprisonment of two months to six years shall be imposed if the bodily harm results in a physical or mental illness that is certainly or probably incurable, permanent incapacitation from work, the loss of a sense, of an organ, of a limb, of the use of an organ or limb, of speech or of the ability to procreate.”

22. On May 25, 2004, Ms. Rosa Luna filed a criminal complaint with the Office of the Public Prosecutor of Azar alleging that she had been subjected to torture by virtue of the actions of police Sergeant Jorge Fortunato, Colonels José Jundia and Lino Lona, the psychologist Luciano Duche, the psychiatrist Líbero Carnellutti, the Minister of the Interior, the Minister of Defense, the Minister of Justice and the honorary advisor of said Ministry, Professor Gabriel Guerra of the Private University of Azar. She argued that she had been subjected to inhumane conditions of detention because of the lack of food and light and because of the restrictions on bathroom use. In addition, she complained of having been subjected to humiliation because of the lack of appropriate attention to her situation as a woman and for having been subjected to obscene shouts. She alleged that all of these actions caused her extreme pain and resulted in irreversible psychological and physical harm. Finally, in the alternative, in the case that the Office of the Public Prosecutor is of the opinion that the facts are not consistent with the definition of torture, she requested that it consider prosecuting the accused individuals for crimes of bodily harm.

23. The Office of the Public Prosecutor opened a criminal case to investigate the facts alleged in the complaint. It was determined during the initial investigation period that the interrogations were conducted in accordance with the guidelines of a confidential memorandum that was drafted at the request of the Ministry of the Interior by Professor Guerra, an expert in international criminal law and international human rights law, as well as a consultant to the Red Cross of Azar. The directives in question had been later approved by the Minister of the Interior, the Minister of Defense and the Minister of Justice. According to the investigation, the memorandum contained guidelines for conducting interrogations in cases where national security was at stake. Its reasoning established that its purpose was to adapt interrogations to the international obligations of the State and to its obligations arising from international criminal law. In the “Acceptable

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Techniques” section, the memorandum contained the following directives “[...] 3) Detainees may be interrogated for up to 20 continuous hours per day; 4) Detainees may be interrogated sitting down, standing with raised arms or lying down; 5) Detainees may be interrogated in the facilities available in the detention center where they are being held, or they may be taken to other facilities of the security forces; [...] 15) Detainees may be held in individual or group cells; 16) The cells may have artificial lighting during the entire day, and the light bulbs may be between 25 and 200 watts; and 17) Detainees may have a blanket and a Bible in their cell.” In addition, in the section titled “Control over interrogations,” the memorandum provided the guideline: “1) Interrogations must include psychological or psychiatric and medical advising to ensure the effective taking of statements and the well-being of the person being interrogated; 2) The information in the detainee’s clinical medical and psychological file shall be taken into account during interrogations, as shall other information on his or her activities on record with the State Security Service, with any state security forces or in the possession of the Office of the Public Prosecutor [...].”

24. Once the investigation was concluded, and in view of the evidence produced, the Office of the Public Prosecutor charged Sergeant Fortunato, Colonels Lona and Jundia, the Minister of the Interior, the Minister of Defense and the Minister of Justice for their participation in the crime of torture as principals and accessories. However, the Office of the Public Prosecutor did not consider it possible to link Professor Guerra criminally. On one hand, he was not a public official and therefore was not a perpetrator of the crime of torture; on the other hand, given that he was not a member of the State structure, the drafting of a memorandum requested by a ministerial authority did not make him an accomplice or an abettor to the crime of torture. With respect to Professor Duche and Dr. Carnelutti, the Office of the Public Prosecutor believed that in their capacity as psychologist and psychiatrist, respectively, their contributions had not been determinative to the commission of the crime of torture.

25. On June 2, 2006, the trial court judge, Judge Gelman, ruled on the case and sentenced Sergeant Fortunato to 4 years in prison, having found him guilty of the crime of torture. The judge considered that subjecting Ms. Luna to positions that caused her to experience pain, together with the physical and psychological consequences, were consistent with the crime defined and proscribed in Article 100 of the Criminal Code of Azar. In parallel, the judge ruled that the inhuman conditions of detention to which Ms. Luna had been exposed did not fit the criminal definition of torture because Ms. Luna’s experience was the result of a series of unfortunate facts, and not of an act attributable to Sergeant Fortunato. With respect to the humiliation that Ms. Luna suffered during her detention, Judge Gelman found that it had not caused pain of the intensity required to fall within the category of torture.

26. The judge ruled to dismiss the charges against Colonels Jundia and Lona, the Minister of the Interior, the Minister of Defense and the Minister of Justice because the conviction of these individuals for the crime of torture would violate the principle of legality, a long-held constitutional principle respected in international human rights treaties. According to the judge’s interpretation, the crime of torture is an offense whose commission requires

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the direct involvement of the perpetrator. Based on these arguments, the judge acquitted the public officials, although she called attention to the lack of a specific criminal definition that would enable the State to comply fully with its international obligations.

27. Both Sergeant Fortunato's defense attorney and the Office of the Public Prosecutor filed appeals against the decision. While the defendant's attorney objected to the sentence imposed, the Office of the Public Prosecutor questioned the separation of Colonels Jundia and Lona, the Minister of the Interior, the Minister of Defense and the Minister of Justice from the case. The Court of Criminal Appeals on one hand affirmed the sentence imposed against Fortunato and the acquittal of the State ministers; on the other hand, it sentenced Colonels Jundia and Lona—Fortunato's immediate superiors—to 4 years and 1 month in prison, having found them guilty based on their direct involvement in the supervision of the acts categorized as torture.

28. The decision of the Court of Criminal Appeals was final as of September 18, 2006.

III. Proceedings before the Inter-American human rights system

29. On December 5, 2006, Ms. Rosa Luna filed her petition before the Inter-American Commission on Human Rights in which she complained that the State of Azar violated the rights of personal integrity (Article 5 of the American Convention on Human Rights), personal liberty (Article 7.3 of the American Convention), judicial guarantees and protection (Articles 8 and 25 of the American Convention on Human Rights) and the obligation to respect rights and the duty to adopt provisions of domestic law (Articles 1 and 2 of the American Convention on Human Rights). She further alleged the violation of Articles 2.c, 3 and 6 of the Inter-American Convention to Prevent and Punish Torture, Articles 2, 3 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Pará" and Article I of the Inter-American Convention against Corruption.

30. The State of Azar did not raise any preliminary exceptions in the case, nor did it dispute the facts. However, the State strongly questioned the interpretation of the scope of the American Convention on Human Rights asserted by the victim in her initial petition because the acts did not constitute violations of personal integrity, personal liberty, judicial protection or the general obligation to guarantee rights.

31. The Inter-American Commission declared the case admissible with respect to all of the rights violations alleged. Upon issuing the report provided for in Article 50 of the American Convention, the Commission limited itself to establishing that the State of Azar had violated Articles 5, 7, 8, 25, 1.1 and 2 of the American Convention on Human Rights; Articles 3 and 6 of the Inter-American Convention to Prevent and Punish Torture and 2, 3 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Pará". The Commission did not make any considerations with respect to the violation of Article I of the Inter-American Convention against Corruption. The State refused to comply with the recommendations of the Inter-American Commission, alleging the existence of

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insurmountable legal obstacles that would require it to violate the rights of the acquitted individuals in order to comply with the Commission's decision.

32. Upon completion of the proceedings outlined in the American Convention and in the Regulations of the Inter-American Commission on Human Rights, the case was submitted to the jurisdiction of the Inter-American Court.