

IN THE INTER AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF

CASE NUMBER 12.579

VALENTINA ROSENDO CANTÚ et al

AND

THE UNITED STATES OF MEXICO

AMICUS BRIEF ON BEHALF OF THE HUMAN RIGHTS COMMITTEE OF THE BAR OF ENGLAND AND WALES AND THE SOLICITORS' INTERNATIONAL HUMAN RIGHTS GROUP

1. This short brief is respectfully addressed to the Court as a joint submission by the Human Rights Committee of the Bar of England and Wales and the Solicitors' International Human Rights Committee.
2. The first named *amicus*, the Bar Human Rights Committee ("BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.
3. The second named *amicus*, the Solicitors International Human Rights Group ("SIHRG") promotes awareness of international human rights within the legal profession and mobilises solicitors into effective action in support of those rights. The Group encourages human rights lawyers overseas and conducts related missions, research, campaigns and training. The SIHRG's organisation is designed to promote the application of solicitors' skills in realising the observance of international human rights standards.

4. In submitting this short brief, the authors respectfully adopt the legal framework as set out in the Commission's report to the Court, in the Commission's application dated 2nd August 2009 at paragraphs 60-174.
5. In the light of the comprehensive and very careful analysis of the relevant international and regional law and standards contained in the Commission's report, with which the authors of this brief are in substantial and respectful agreement, the authors of this brief seek to focus their submissions to the Court on a number of specific issues relating to the investigative obligations of the state with direct bearing on Ms Rosendo's case.
6. In particular, and in the light of the factual summary of Ms Rosendo's case, as set out in the Commission's application to the Court, the authors of this brief wish to highlight:
 - (a) The ethical standards and obligations owed by medical professionals;
 - (b) The significance of the investigative standards contained in the Istanbul Protocol.

Rape as torture

7. The absolute prohibition on physical and mental torture as part of the international *jus cogens* is beyond question and jurisprudence of the Inter-American Court establishes that rape committed by members of the security forces of a state against the civilian population constitutes, in any situation, a serious violation of the rights protected by Articles 5 and 11 of the American Convention.
8. Paragraphs 76 to 91 of the Commission report addresses the issue of rape as torture. The authors of this brief respectfully endorse the analysis of the law and jurisprudence contained therein.

The obligation to investigate with due diligence

9. The obligations of states in relation to the investigation of allegations of serious human rights abuses is contained within paragraphs 92 to 140 of the Commission report. The analysis of the law is respectfully adopted for the purposes of this brief.

Evidence in rape cases

10. In the case of the *González Pérez Sisters*, the IACHR duly stated that:

“Rape is an aberrant act, which, because of its very nature, requires evidence that is

different from other crimes. Subjecting the victim to another episode of humiliation or one that causes that person to relive the events involving the most private parts of the person's body in the form of review proceedings should be avoided. Consequently, the IACHR holds the view that the investigating authorities should analyze the circumstances surrounding the case and all available elements such as statements, circumstantial evidence, presumption, and other legal elements. In the absence of evidence, the medical examination must provide all the guarantees for fully respecting the dignity of the person and for considering that individual's mental and psychological condition.”¹

11. The UN Commission on Human Rights has defined principles to be taken into account by medical practitioners in investigating rape allegations. An investigation of an allegation focused on a physical and gynaecological examination does not comply with the minimum parameters necessary to investigate an allegation of rape and fails to pay any attention to the likely psychological issues that arise.²

The Istanbul Protocol

12. The authors of this brief note the importance of developing international forensic standards in relation to the investigation of allegations of human rights abuses. Central to the body of standards is what is commonly referred to as the ‘Istanbul Protocol’. The authors of this brief obviously appreciate that this Court has made a number of statements referring to its significance and importance in its jurisprudence.
13. The significance and importance of the detailed guidance in the Protocol, so far as the conduct of investigations is concerned, is also reflected in the case law of the European Court of Human Rights: see, inter alia, *Bati & ors v Turkey* 33097/96 (2008) ECHR 246 (3 June 2004); *Salmanoclu & Polattas v Turkey* 15828/03 [2009] ECHR 479 (17 March 2009).
14. The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Istanbul Protocol”) was submitted to the United Nations High Commissioner for Human Rights in 1999. The “Istanbul Principles” subsequently received the support of the United Nations through resolutions of the United Nations Commission on Human Rights and the General

¹ *Ana, Beatriz and Celia Gonzalez Perez (Mexico)*, IACommHR, Report no. 53/01, Case 11.565, § 75

² UN Human Rights Commission, *Torture and other cruel, inhuman or degrading treatment or punishment, Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. E/CN.4/RES/2000/43, available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4740

Assembly. It is the first set of guidelines to have been produced for the investigation of torture. The Protocol contains full practical instructions for assessing persons who claim to have been the victims of torture and for reporting the investigation's findings to the relevant authorities.

15. The authors of this brief simply seek to draw respectful attention to the extremely detailed guidance contained in the Istanbul Protocol as it relates to the general obligations of medical professionals; and the guidance that the Protocol contains in relation to the conduct of relevant examinations, and the preparation of reports.
16. Both the Commission and the Court have acknowledged the guiding principles of the Istanbul Protocol to collect evidence in cases of torture. In the case of *Bayarri v. Argentina*, the Court, citing the Istanbul Protocol, affirmed that judicial authorities have a duty to ensure *"the authenticity of any evidence that can prove acts of torture"*. It went on to hold that *"The State must guarantee the independence of the medical and health care personnel responsible for examining and providing assistance to those [...] so that they can freely carry out the necessary medical evaluations, respecting the norms established for the practice of their profession."*³
17. In the case of *Gutiérrez-Soler*, a case involving the arbitrary detention and torture of the victim by a private individual and police officers, a pertinent issue was the inadequacy of the forensic medical examinations conducted during his period of custody.
18. The Court commissioned medical expert opined that the report was insufficient, since no photographs were taken and no anal examination was carried out. Medical examination was limited to external physical description of anatomical areas. The wounds, which would have been significant for the courts' assessment during judicial proceedings, were not explained in detail in one of the reports.
19. The expert also pointed out the importance of implementing the standards of the Istanbul Protocol in cases of torture in order to avoid insufficient examination and impunity. As a consequence, the Court ordered Colombia to disseminate and implement the standards of the Istanbul Protocol as a mean to effectively protect the right to humane treatment in Colombia.⁴

³ Case of *Bayarri v Argentina*, Inter-Am. Ct.H.R, Judgment of 30 October 2008, § 92

⁴ Case of *Gutiérrez-Soler v. Colombia*, Inter-Am. Ct.H.R, Judgment of 12 September 12, 2005, §§109-110

20. In the *Vargas-Areco* case concerning the torture and extrajudicial killing of the victim, the Court considered that the State had the obligation to exhume and perform an autopsy on the body of the victim to establish, with the maximum degree of certainty, if he was subject to acts of torture, according to article 12 of the Istanbul Protocol.
21. In the same case, it was acknowledged that the obligation of the State became effective at the time the State learnt of the alleged acts of torture.⁵
22. In the *Campo Algodonero* (“Cotton Field”) case, recently decided against Mexico, the Court spelt out the need to follow the guidelines prescribed in the Istanbul Protocol regarding the performance of autopsies⁶.
23. In the “*Street Children*” case, the Court confirmed that the efficacy of an investigation can be established by the use of international documents and rules that cover the various aspects of the investigation of abuses against human rights (i.e. the UN Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions, contained in the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions (Minnesota Protocol)).
24. The importance of the above instruments mentioned has been determined by the Court for the following reasons:

*“That as regards to the effective investigation and documentation of torture and cruel, inhuman and degrading treatment, the Court has held that the principles of independence, impartiality, competence, diligence and promptness should apply to any legal system and govern the investigation of any alleged acts of torture”.*⁷

25. The Court has found also that:

“... at the time of hearing report or indications of acts of torture, competent authorities will be entitled to access any information deemed necessary for the actual performance of the investigation, and will indeed be obliged to exercise that

⁵ Case of *Vargas-Areco*, Inter-Am. Ct.H.R, §§ 89 ss. Moreover, said procedures should take into consideration the international rules for documenting and interpreting forensic evidence elements regarding the commission of acts of torture and, particularly, those defined in the Istanbul Protocol.

⁶ Case of *González et al. (“Cotton Field”) v. Mexico*, IACHR, Judgment of November 16, 2009, §310

⁷ Case of *Bueno Alves v. Argentina*, IACHR, §108; and Case of *Bayarri v. Argentina*, Inter-Am. Ct.H.R, § 92.

power. To that effect, the necessary technical and budgetary resources should be available, including the power to bound the officers allegedly involved in the crime investigated to appear and give their testimony.

That the investigators of acts of torture and mistreatment must gather all possible material evidence. The aim is at successfully preserving evidence so that it can be used in a potential criminal proceeding. To that effect, it is necessary for the investigators to have access to the places where acts of torture were allegedly committed.

That any places subject to investigation as alleged crime scenes must be closed so that no potential evidence is lost and only investigators and their staff will be allowed access thereto. All evidence will be gathered, handled, packed and identified in a proper manner, and must be kept at a place to safeguard it from contamination, touching or loss.”⁸

The conduct of effective investigations and the conduct of medical professionals

26. The authors of this brief note what is set out in the Commission’s summary of the facts at paras 35-37 of their report to the Court, concerning the failure of medical professionals initially seen by Ms Rosendo to attend her in the immediate aftermath of the assault on her. In the first instance, this was on the basis, in a claim that was not disputed by the Government of Mexico, that the doctor concerned was ‘afraid of the army’⁹, leading Ms Rosendo, following an arduous journey, to seek attention at the Central Hospital in Aylutla where, again, she was not seen by a doctor on the basis that ‘she had no appointment’.
27. In this context, the authors draw attention to the important responsibilities owed by medical professionals who are initially consulted following an alleged incident of physical or sexual abuse by agents within the state or its security forces, and in the importance of strict adherence to standards of ethical conduct.¹⁰ In this context, the European Court of Human Rights reiterated in *Salmanoclu & Polattas v Turkey* 15828/03 [2009] ECHR 479 (17 March 2009)¹¹ noted:

‘The Court has already reaffirmed the European Committee for the Prevention of Torture’s (“CPT”) standards on the medical examination of persons in police

⁸ Order of the Inter-American Court of Human Rights of January 27, 2009 Case of the “Street Children” (*Villagrán Morales et al.*) v. *Guatemala (Monitoring Compliance with Judgment)*, Inter-Am. Ct.H.R, §§ 26-29

⁹ See the Commission’s report at para 35;

¹⁰ See, inter alia, Paras 48-73 of the Istanbul Protocol for a summary of relevant ethical standards;

¹¹ Judgment at paragraph 80;

custody and the guidelines set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Istanbul Protocol", (submitted to the United Nations High Commissioner for Human Rights, 9 August 1999). **The Court has held that all health professionals owe a fundamental duty to of care for to the people they are asked to examine or treat....'** (emphasis added)

Standards of investigation

28. The principles applicable to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment are to be found in Annex 1 of the Manual, the relevant parts of which read as follows:

"The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment (hereafter referred to as torture or other ill-treatment) include the following: clarification of the facts and establishment and acknowledgment of individual and State responsibility for victims and their families, identification of measures needed to prevent recurrence and facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

States shall ensure that complaints and reports of torture or ill-treatment shall be promptly and effectively investigated. Even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission, investigations by impartial medical or other experts. ...

The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. ... Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.

Alleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation and shall be entitled to present other evidence.

A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, this report shall be made public. It shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation, and, as appropriate, indicate steps to be taken in response.

Medical experts involved in the investigation of torture or ill-treatment should behave at all times in conformity with the highest ethical standards and in particular shall obtain informed consent before any examination is undertaken. The examination must follow established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.

The medical expert should promptly prepare an accurate written report. This report should include at least the following:

(a) The name of the subject and the name and affiliation of those present at the examination; the exact time and date, location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic, house); and the circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner, threatening statements to the examiner) and any other relevant factors;

(b) A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;

(c) A record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;

(d) An interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and further examination should be given;

(e) The report should clearly identify those carrying out the examination and should be signed.”

Other international guidance

29. The IACHR 2007 Report concerning the Access to Justice for Women Victims of Violence in the Americas highlights that International human rights instruments provide that physical evidence must be gathered by specialists trained in the type of violence being investigated, and preferably should be the same sex as the victim. The victim’s culture and the context in which the assault occurred must be taken into consideration. If necessary, an interpreter should be made available and must not be a government official.¹²

30. It continues:

“International instruments also feature a set of principles to steer the proceedings of the administration of justice system when dealing with women victims of violence. The Rules of Procedure and Evidence of the International Criminal Court provide that gender-sensitive measures are to be taken to enable victims of sexual violence to participate and testify at all stages of the proceedings; victims of sexual violence are also to have complete access to information on the proceedings. A number of international instruments on protection against torture and other cruel, inhuman and degrading treatment underscore the importance of preserving the mental and physical well-being of the victims during the criminal proceedings, which includes the investigative phase. The Commission has or can invoke this principle in cases involving violence against women, to avoid a re-victimization of the women victims. In general, measures should be adopted for the duration of the criminal process to

¹² *Access to Justice for Women Victims of Violence in the Americas*, IACommHR, § 52, citing the Istanbul Protocol

protect the safety, privacy and dignity of women victims. Also, victims should be advised of their rights and of how to exercise them throughout the criminal case, during all its phases.

As for the type of evidence admissible in cases of sexual assault, the International Criminal Court's Rules of Procedure and Evidence make provision for the importance of not inferring a victim's consent in rape cases, as the atmosphere of coercion that the assailant can create and a variety of factors can be reasons why a victim may be unable to physically resist her assailant. The Rules also stipulate that evidence of a victim's prior sexual conduct is inadmissible.¹³

31. The same report addresses the need to verify evidence other than physical evidence in cases of sexual violence against women.

"The IACHR has verified that evidence other than physical evidence and testimonies needs to be weighed to prove cases of violence against women, particularly those related to sexual violence. The Rules of Procedure and Evidence of the International Criminal Court address several factors that can inhibit a victim from physically resisting a sexual aggression, even when the act has not been consented, and how these factors must be considered within the context of a judicial process. According to the rules, these factors may include: "force, threat of force, coercion or taking advantage of a coercive environment" which might have undermined the victim's ability to give "voluntary and genuine" consent."¹⁴

32. The Commission concludes: *Therefore, medical- legal reports that confine to physical observations, such as determining whether the victim's hymen was still intact, are only part of a group of evidence that must be evaluated to clarify the facts in a sexual violence crime.¹⁵*

Investigations of the full circumstances

33. The authors of this brief further respectfully note, and in relation to the summary of the relevant facts set out in the Commission's report, that the state's obligation to conduct an *effective* investigation of misconduct by state agents or members of the security forces must not be exclusively centered on medical evidence obtained in relation to alleged victims. As part of the clarification of the facts, in order to establish if and where

¹³ *Access to Justice for Women Victims of Violence in the Americas*, IACommHR, §§ 54/55

¹⁴ *Access to Justice for Women Victims of Violence in the Americas*, IACommHR, § 138

¹⁵ *Access to Justice for Women Victims of Violence in the Americas*, IACommHR, § 138

individual and State responsibility lay, it was important for all of the surrounding circumstances, such as the movements of the army within the vicinity at the time of the incident, to be investigated timeously by the state.

34. From the overview presented above, the authors of this brief would simply respectfully seek to underscore the importance, in relation to the obligation to conduct an effective investigation, that international standards, most particularly the Istanbul Protocol, provide important and detailed guidance that should be central to any proper and adequate investigation. These standards further emphasise the high ethical requirements that are incumbent upon medical professionals. They further highlight the need, as extensively canvassed in great detail in the Court's jurisprudence, for thorough and comprehensive investigation of all of the surrounding circumstances of a serious allegation of human rights abuse, particularly, as in the case before the Court, where the allegation is one of sexual violence against a vulnerable individual.

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Respectfully submitted,



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