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# UNITED STATES OF AMERICA

## Oswaldo Torres, Mexican national denied consular rights, scheduled to die

*“The parties seem to forget the United States of America is a sovereign nation founded on the principle of the Rule of Law. The rights and protections afforded to persons charged with a crime in this country are unparalleled in the rest of the world.”* Oklahoma judge, 1 March 2004, setting execution date for Oswaldo Torres

Twenty-nine-year-old Mexican national Oswaldo Netzahualcóyotl Torres Aguilera is scheduled to be killed in Oklahoma’s lethal injection chamber on 18 May 2004. His execution date was set despite an International Court of Justice (ICJ) order that the execution not be carried out pending the ICJ’s judgment on a lawsuit brought by Mexico on behalf of its nationals arrested, denied their consular rights, and sentenced to death in the USA. The ICJ judgment was handed down on 31 March 2004. The Court found that the USA had violated its international obligations under the Vienna Convention on Consular Relations (VCCR) and that it must provide effective judicial review and reconsideration of the impact of the violations on the cases of the foreign nationals involved. The Court noted with “great concern” that an execution date had been set for Oswaldo Torres, whose appeals in the domestic courts have been exhausted.

Under Article 36 of the 1963 VCCR, local authorities must notify all detained foreign nationals “without delay” of their right to have their consulate informed of their detention.<sup>1</sup> The USA ratified the VCCR without reservation in 1969. Yet, among the three and a half thousand people on death row in the USA today are at least 120 foreign nationals from 31 different countries, most of whom are believed to have been denied their VCCR rights.<sup>2</sup> In its judgment, the ICJ found that the USA had violated the VCCR in 51 of the 52 cases of the Mexican nationals brought before it by Mexico.<sup>3</sup> The case of Oswaldo Torres was one of only

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<sup>1</sup> This right is also laid out in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 16.2), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 7) and other international instruments protecting the rights of detainees. Other instruments include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 6(3)); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (article. 16(5)); Convention on the Safety of United Nations and Associated Personnel (article 17); Organization of African Unity Convention on the Prevention and Combating of Terrorism, 1999 (article 7).

<sup>2</sup> For further information, see <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31>

<sup>3</sup> Mexico originally brought 54 cases, but subsequently withdrew two of them, one in Texas and one in Florida. The remaining cases were in California (28), Texas (15), Illinois (3), Arizona (1), Arkansas (1), Nevada (1), Ohio (1), Oklahoma (1), and Oregon (1). On 20 January 2003, Mexico informed the ICJ that three of the 54 nationals had had their death sentences commuted in the blanket commutation issued by Governor Ryan of Illinois. These three, although no longer on death row, remained on the lawsuit.

three in which the ICJ found that the USA had violated every one of its obligations under the various sections of Article 36.

At the time of his arrest, Oswaldo Torres was an 18-year-old Mexican national without a lawyer who had had minimal prior contact with the US criminal justice system.<sup>4</sup> He was registered with the immigration authorities as a resident alien, which would have become known to the police when they conducted a routine background check on him upon his arrest. Despite this, the authorities never informed him of his rights under Article 36 of the VCCR. Nor have the authorities ever advised Mexican consular officials of his detention. Mexico only learned of the case in 1996 when his family contacted the Mexican consulate for help. By then, Oswaldo Torres had already been convicted and sentenced to death.

This particular aspect of the death penalty – at least 20 foreign nationals, including five Mexicans, have been executed in the USA since 1988 – has been a running sore between the United States and other governments for some time. The last time the USA executed a Mexican national – Javier Suárez Medina, denied his VCCR rights and put to death in Texas in 2002 – President Vicente Fox cancelled a meeting with President George W. Bush in protest.<sup>5</sup> Mexico’s subsequent action in the International Court of Justice is the third such challenge brought against the USA in the ICJ on the Vienna Convention issue, following those of the governments of Paraguay and Germany.

The US Supreme Court’s refusal to take the appeal of Oswaldo Torres last year led to a dissent from two of its Justices. Justice Stevens wrote that by allowing state courts to disregard the USA’s treaty obligations, the Court was being “unfaithful” to Article VI of the Constitution which holds that all US laws, including all treaties entered into by the USA, “shall be the supreme Law of the Land”. Justice Breyer, noting the “international implications” of the issues raised, suggested that the Supreme Court should have deferred consideration of the Torres appeal until after the ICJ judgment.<sup>6</sup>

On 1 March 2004, the Oklahoma Court of Criminal Appeals determined that Oswaldo Torres had exhausted his state and federal appeals, and set his execution date for 18 May. Two of the judges dissented, noting that the defence, the prosecution and the Government of Mexico had all asked for a stay of execution pending the ICJ decision.

However, three judges voted to set the execution date. One of them, Judge Gary Lumpkin, wrote a special opinion: “Appellant and the State have urged this Court to put off setting an execution date pending a decision by the International Court of Justice...However, the ICJ has no jurisdiction over the decisions of this Court and the US Supreme Court. Any decision

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<sup>4</sup> This report spells the prisoner’s name as Oswaldo, as it appears on his birth certificate and in the ICJ documents. The US courts have used the name Osbaldo.

<sup>5</sup> According to the press release issued by President Fox’s office, the decision to cancel the meeting was “a sign of the unequivocal repudiation of the execution.” It stated that “it would be inappropriate in these lamentable circumstances to carry out this visit to Texas” and concluded that “Mexico trusts that the cancellation of this important presidential visit will contribute to strengthening the respect of all states for the norms of international law, and conventions that regulate the coexistence of nations.”

<sup>6</sup> *Torres v Mullin*, 540 U.S. \_\_\_ (2003), Justices Breyer and Stevens dissenting from denial of *certiorari*.

it may render would be advisory only. The parties seem to forget the United States of America is a sovereign nation founded on the principle of the Rule of Law. The rights and protections afforded to persons charged with a crime in this country are unparalleled in the rest of the world.”<sup>7</sup>

Such boasts are belied by the facts in a country which has a far from perfect human rights record, including in its use of the death penalty in an increasingly abolitionist world. Judge Lumpkin is also wrong in suggesting that the ICJ opinion in the Torres case is advisory only. As both the USA and Mexico are parties to the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes, the decision of the ICJ, the principal judicial organ of the United Nations, is binding on the two countries and not subject to appeal.

Concern over this case goes further than the consular rights issue. The prosecution has never alleged that Oswaldo Torres committed the two murders for which he now faces imminent execution, arguing instead that he “aided and abetted” the actual gunman. The evidence to support this theory was weak at the time of the trial and has become weaker since. As such, the execution would breach international safeguards relating to capital cases.

In the absence of a judicial remedy, the only chance for Oswaldo Torres to avoid lethal injection is executive clemency. On 7 May 2004, the Oklahoma Pardon and Parole Board will convene a hearing to review the case, and will then decide whether to recommend that Governor Brad Henry commute his death sentence. In any event, Governor Henry has the power to issue a reprieve.

Six of the seven recommendations for clemency made by the state Pardon and Parole Board in capital cases since 2001 have been rejected by Governor Henry or his predecessor. In its judgment of 31 March 2004, the International Court of Justice rejected the USA’s contention that executive clemency provides an adequate safety net to remedy violations of the Vienna Convention on Consular Relations.

Whether the execution of Oswaldo Torres is stopped or allowed to proceed will be an early indicator of whether the USA intends to take the ICJ ruling seriously or not. In the event that no meaningful judicial remedy is forthcoming, the Oklahoma clemency authorities must not repeat their habitual failure in capital cases. In the interest of the rule of law they should ensure that the execution is not carried out.

## **The death penalty – wrong every time**

In this case there were two murder victims and two defendants. That the crime was a serious one that has caused substantial suffering to those affected by it is beyond question. What must be questioned, however, is the way the state has decided to respond to this violence and suffering.

Amnesty International opposes the death penalty in all cases, regardless of the gravity of the crime, the guilt or innocence of the condemned, or the method used to kill the prisoner. In

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<sup>7</sup> *Torres v State*. Order setting execution date. 1 March 2004. Judge Lumpkin, special concurrence.

this case, the organization equally and unconditionally opposes each of the death sentences imposed on Oswaldo Torres and George Ochoa.<sup>8</sup> This is a punishment that should have no place in modern society. It consumes resources that could otherwise be used towards constructive strategies to combat violent crime and to offer assistance to its victims and their families. In addition, the capital justice system in the USA is marked by arbitrariness, discrimination and error. It prolongs the suffering of the murder victim's family, and extends that suffering to the loved ones of the condemned prisoner. The death penalty is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity. It should be abolished.

Today, 117 countries have abolished the death penalty in law or practice. In this context, a country's resort to judicial killing can only damage its image abroad. The more than 750 executions carried out in the USA since 1990 alone give the lie to frequent US claims to be the global human rights champion, and stand in stark contrast to President Bush's assertions that the United States will always stand firm for the "non-negotiable demands of human dignity". The United Nations Commission on Human Rights, for example, has repeatedly stressed its view that abolition of the death penalty "contributes to the enhancement of human dignity and to the progressive development of human rights".

## **The state's theory: Torres was not the gunman**

In the early hours of 12 July 1993, Maria Yanez and her husband Francisco Morales were shot dead in the bedroom of their Oklahoma City home. Their 14-year-old daughter was awoken by the sound of gunfire and rang the police. On their way to the house, police arrested George Ochoa and Oswaldo Torres a few streets away from the crime scene.

George Ochoa and Oswaldo Torres were tried jointly on charges of first degree burglary and first degree murder with malice aforethought.<sup>9</sup> On this latter charge, the prosecution had to prove beyond a reasonable doubt that each defendant deliberately intended to kill the victims. The case came to trial in October 1995, but the jury was unable to reach a verdict and the judge declared a mistrial. A retrial was held in February and March 1996.

In the case of Oswaldo Torres, the Oklahoma Court of Criminal Appeals noted that the prosecution "proceeded under the theory that Torres aided and abetted in the commission of the crimes and that Ochoa was most likely the triggerman", and that "the State's theory, which is supported by the evidence, shows that Torres was not the shooter."<sup>10</sup> In order to

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<sup>8</sup> George Ochoa remains on death row, but does not currently have an execution date. At the trial, the mitigation produced on his behalf included his young age at the time of the crime, his lack of criminal record, expert testimony about his mental illness, his mental illness history and his borderline mental retardation.

<sup>9</sup> "A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." Oklahoma Statute: 21 O.S.1991, § 701.7.

<sup>10</sup> *Torres v State*, 962 P.2d 3, Oklahoma Court of Criminal Appeals, 30 June 1998.

obtain a first degree murder conviction, the state therefore had to prove that Oswaldo Torres “personally intended the death of the victim and aided and abetted with full knowledge of the intent of the perpetrator.”<sup>11</sup>

The state produced some evidence which, although not watertight, tended to show that Oswaldo Torres was present at or near the crime. The evidence in support of the aiding and abetting theory was not strong, however, with no evidence presented that Oswaldo Torres committed, planned or helped to plan the murders, or knew that his co-defendant planned to kill.

The victims’ 14-year-old daughter testified that after she had called the police she had seen two men in her home, one in a black t-shirt and one in a white t-shirt, and that the former had something in his hand. The police officer who interviewed the teenager after the crime said that she had originally been unable to identify the men, but subsequently said that one of the men was George Ochoa, whom she knew, but that she did not know the other man. At the trial, she said that George Ochoa was the man in the black t-shirt and that the other man was wearing a white t-shirt. Questioned by the prosecutor, she said that she had not recognized either man at first, but had later come to recognize them as George Ochoa and Oswaldo Torres.<sup>12</sup> Her 11-year-old step-brother had also been awoken by the attack. He said that he had seen the man in the black t-shirt shoot his father. He could not identify the gunman, and did not see any other person with him.

A 20-year-old witness said that shortly before the shootings she had seen two men park a car several blocks from the scene of the crime. She identified George Ochoa, whom she knew, as the driver, and Oswaldo Torres as the passenger, although her identification of Torres was somewhat inconsistent and tentative. On cross-examination by the defence, she admitted that not only did she not get a good look at the person with George Ochoa, she could not be sure that this other person was Oswaldo Torres. She stated that the second man was “kind of heavy set”, but acknowledged in court that Oswaldo Torres was not of heavy build. When asked how she knew that Torres was the “other person”, she responded: “I didn’t get very close to look at him.” She agreed that George Ochoa was wearing a black shirt and that the other man was wearing a white t-shirt.

Another witness, a 15-year-old girl, was also present when the two men arrived in the car. She recognized the driver as “George”, but said that she did not know his family name. She testified that “George” was the man wearing the black t-shirt, but was unable to identify the man in the white t-shirt. This unidentified man, she said, had taken a gun from the boot of the car and put it in the waistband of his trousers. She admitted that in her police interview

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<sup>11</sup> *Johnson v. State*, 928 P.2d 309, Oklahoma Court of Criminal Appeals, 22 August 1996. Oklahoma law allows people to be convicted as principal actors in the crime, if they aided and abetted in that crime, even if they are not present. “All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.” Oklahoma Statute, title 21, § 172.

<sup>12</sup> “Q: And did you recognize these men when you saw them in your home? A: Not right off the bat. Q: Did there come a time when you did? A: Yes.”

immediately following the crime, she had not mentioned seeing a gun. The gun she described at trial was not the weapon used in the murders. Police had recovered a Tech-9 semiautomatic weapon behind the victims' home, which was established as the murder weapon. The gun that Oswaldo Torres allegedly carried was never recovered.

This witness has since recanted her testimony about observing a weapon and now asserts that she was coerced by the prosecution into claiming that she saw a gun. In a post-conviction affidavit in April 1997, she stated: "In fact I did not and do not now recognize that object to have been a gun of any kind. It was assuredly not a Tech-9, but I cannot in fact say that it was a gun at all." She said that she had testified that she saw a gun only because Assistant District Attorney Susan Caswell had told her that, in a prior interview with the prosecutor, the 15-year-old had stated that she had seen a gun and that she "would go to jail if I did not say this."<sup>13</sup>

Despite this affidavit, the Oklahoma Court of Criminal Appeals relied upon this witness's trial testimony in upholding Torres's conviction for first degree murder with malice aforethought: "The circumstantial evidence supports a finding of intent, *particularly given the evidence that Torres had a gun with him prior to the killings*" (emphasis added). The US Court of Appeals for the 10<sup>th</sup> Circuit Court has in turn upheld the Court of Criminal Appeals' decision despite acknowledging that the evidence against Oswaldo Torres is "susceptible to interpretation". If a juror heard that this crucial state's witness would no longer say that she had seen the second man in possession of a gun, could not that juror equally decide that the alleged object taken from the car boot had been, for example, a spanner or other tool useful for breaking into a house? However, the appeal courts have held that the witness's recantation has been procedurally barred as an appeal issue on the grounds that it was not raised as early as it could have been.

The officer who had arrested the two men testified that in the police station, "as I observed Oswaldo Torres sitting at the desk, he would look down, look up at the ceiling, he would shake his head from side to side, and approximately eight times he shake his head say shit, shit, shit, approximately eight times". As with the other evidence, this claim did not prove that Oswaldo Torres participated in the crime, nor would it be inconsistent with the behaviour of a suspect who may have been present at what he thought would just be a burglary and had been taken by surprise by an unexpected shooting.

The state's serologist testified that blood found on Oswaldo Torres' clothing was consistent with the blood of one of the victims, Francisco Morales, but was also consistent with Torres' own blood and that of his co-defendant. The chief crime scene investigator testified that the pattern of blood on Oswaldo Torres' clothing appeared to be a transfer stain consistent with someone putting a hand on the shirt, rather than blood emitted directly from a wound. The same witness noted that Oswaldo Torres had a number of cuts on his hands when apprehended.

The jury convicted both men on two counts of first degree murder with malice aforethought and one count of first degree burglary. During closing arguments, Oklahoma County District

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<sup>13</sup> *Torres v Mullin*, US Court of Appeals for the Tenth Circuit, 23 January 2003, footnote 7.

Attorney Bob Macy had argued to the jury: “All I’ve got to say is why do you think we’re asking you to convict? Do you think we are trying to prosecute somebody that’s innocent?” The Oklahoma Court of Criminal Appeals later said that the prosecutor’s “rhetorical question that he would not prosecute an innocent man impermissibly treaded on [both defendants’] presumption of innocence”.<sup>14</sup> The US Court of Appeals for the 10<sup>th</sup> Circuit agreed that the prosecutor’s remark was “improper”.<sup>15</sup> However, as has frequently occurred when appeal courts have berated Oklahoma County prosecutors for misconduct (see below), the error was ruled to be “harmless”.

In Oswaldo Torres’s case, the 10<sup>th</sup> Circuit court found that the prosecutor’s comment was harmless even though it agreed that the evidence to support his alleged role in aiding and abetting the crime “is susceptible to interpretation”. For example, the court suggested that “one could conclude that Mr Torres and Mr Ochoa jointly planned to burglarize the residence, but that, once they entered the house, Mr Ochoa acted impulsively by shooting the victims”. The 10<sup>th</sup> Circuit noted that “the record here contains no evidence that Mr. Torres expressed a desire to injure or kill the victims.” Indeed, one of the judges on the 10<sup>th</sup> Circuit panel of three who decided the appeal wrote in a separate opinion: “I do not believe that the evidence is sufficient to support Mr Torres’s murder convictions.” Judge Robert Henry, an Oklahoman, wrote:

“In my view, there are two key gaps in the prosecution’s case against Mr Torres for malice murder. First, there is no direct evidence of Mr Torres’s motive. Second, the prosecution did not present any direct evidence of Mr Torres’s role in the shooting. In light of the testimony of Mr. Morales’s son – that he saw a man in a dark shirt shooting his father – the prosecution’s theory was that Mr Ochoa was the shooter. The prosecution was unable to present testimony as to the conduct of another person inside the residence before or during the shooting.

Although the evidence cited by the majority does support the conclusion that Mr Torres broke into the residence and fled after Mr Ochoa shot the victims, those two key gaps in the prosecution’s case foreclose a rational juror’s finding beyond a reasonable doubt that Mr Torres intended to kill the victims. In this regard, I note that a number of courts have deemed evidence resembling that on which the majority here relies insufficient to establish an intent to kill.”

Under US law, federal courts must give great deference to state court decisions. Judge Henry noted this, and decided that in spite of the “deficiency of evidence” Oswaldo Torres faced “an extremely high hurdle” to be successful in his appeal, given the severe restrictions on the federal courts to grant relief. Judge Henry concluded that Torres had not cleared this hurdle. However, he decided that relief should be granted because the jury had been instructed in a way that “undermine[d] the fundamental fairness of the trial”. Judge Henry concluded that:

“In light of the fact that Mr Torres was tried jointly with Mr Ochoa, it was crucial for the jury to understand that it could not convict Mr Torres of malice murder unless he

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<sup>14</sup> *Torres v State*, 962 P.2d 3 (1998) and *Ochoa v State*, 963 P.2d 583 (1998).

<sup>15</sup> *Torres v Mullin*, US Court of Appeals for the Tenth Circuit, 23 January 2003.

personally intended the death of the victims... Because those instructions did not properly inform the jury that it was required to find that Mr Torres intended to kill the victims, I would reverse the district court's decision on that claim and direct the state to vacate the murder convictions and provide Mr. Torres with a new trial before a properly instructed jury."

However, the two other judges disagreed, and the conviction was upheld by the 10<sup>th</sup> Circuit. The US Supreme Court refused to intervene in the case.

There is no room for error in a capital case. Yet the risk of error, at either the conviction or sentencing stage, is always there – an inescapable flaw of the death penalty that alone requires its abolition. Amnesty International believes that under international standards, relief for Oswaldo Torres is warranted because of the doubts over the extent of his participation in the crime and the lack of evidence that he intended for anyone to be killed. The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty state that "in countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or other extremely grave consequences". In addition, the Safeguards state: "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts". As the 10<sup>th</sup> Circuit agreed, the evidence concerning Oswaldo Torres's role in the crime, and therefore his eligibility for the death penalty under Oklahoma law, is "susceptible to interpretation". In other words, there is room for an alternative explanation of the facts.

## **The sentencing phase – a jury inflamed?**

After the jury had voted to convict, the trial moved into its sentencing phase, the stage of a US capital trial when the state puts its case for execution and the defence presents mitigating evidence in favour of a sentence other than death. In this case, for each man, the prosecution argued two "aggravating circumstances" in support of the death penalty: (1) that it was probable that he would commit future criminal acts of violence that would constitute a continuing threat to society, and (2) that he knowingly created a great risk of death to more than one person.

In Oswaldo Torres's case, in support of the first aggravating factor, the prosecution relied upon the circumstances of the murders, the defendant's alleged membership in a local gang (the Southside Locos) and a burglary allegedly committed by a group of individuals when Oswaldo Torres was 13 or 14 years old. That case did not go to court – the boy and his father cooperated with the police and the stolen items were recovered.

The jury agreed that the state had proved both aggravating factors in Torres's case (and in Ochoa's). On appeal, the Oklahoma Court of Criminal Appeals described the gang evidence as "of very marginal value as to the question of whether Torres himself poses a continuing threat to society". Given this questionable evidence, the fact that the unadjudicated juvenile burglary was non-violent, as well as the evidence that it had not been Oswaldo Torres who had

shot Maria Yanez and Francisco Morales, the appeals court ruled that there was insufficient evidence to sustain the continuing threat aggravator.

The Court of Criminal Appeals therefore reweighed the remaining aggravator against the mitigating evidence that had been presented at trial. It wrote that at the trial: “In mitigation, Torres offered his youth at the time of the crime, his lack of a criminal record, his lack of a violent criminal history, his personal history and artistic ability, the love of his family and their support of him, and his degree of participation in the murders was less than that of co-defendant Ochoa. Torres’ family also pleaded for mercy. While Torres’ evidence had compelling aspects, we find, on balance that the aggravating evidence of the murder of two people outweighs the mitigating evidence. Accordingly, we sustain Torres’ death sentence.”

Amnesty International believes that the clemency authorities should question the reliability of the appeal court’s decision. The fear that a defendant will be a future threat to society has been shown to be one of the most “aggravating” factors in the minds of capital jurors.<sup>16</sup> In this case, the prosecution has been shown not to have had the evidence to sustain the continuing threat aggravator, and yet managed to persuade the jury of its existence. It did so by using evidence that had the power to instil fear in the minds of jurors – evidence of gang membership. The prosecutor exaggerated this evidence, arguing that the motive for the killings was to gain higher status in the gang, a claim which the Oklahoma Court of Criminal Appeals said was not supported by the evidence. In addition, it has been alleged since the trial that one of the trial witnesses was coerced by the prosecution to testify that she had seen Torres with a gun, a claim she has since retracted, but which may have fed into the juror’s fears of the future danger posed by this defendant.

The proceedings were also marred by the prosecutor’s improper arguments for execution. The prosecutor, District Attorney Bob Macy, argued that the only route to justice was for the jury to pass a death sentence. He also asked the jury “if this isn’t a death penalty case, what is?” The Oklahoma Court of Criminal Appeals said that it was “disturbed that the prosecutor risked reversal on appeal by employing such improper tactics”. The prosecutor had also resorted to a barely concealed appeal to vengeance. He argued that if the jury returned a life sentence, the defendants would be given food and shelter, while the “victims lie cold in their graves”. He had used this argument in previous cases, and would use it in future cases.<sup>17</sup>

In one of these cases on appeal in early 2000, Judge Chapel of the Court of Criminal Appeals said that he had had enough of such conduct by the Oklahoma County District Attorney: “I cannot overlook the prosecutor’s attempts to inflame the jury... As the majority notes, this same prosecutor was previously admonished not to argue that the victim was dead while the defendant slept on clean sheets and ate daily meals... The majority admits the prosecutor apparently chose to ignore this Court’s explicit warning not to repeat the mistake, but once

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<sup>16</sup> For example, *Aggravation and mitigation in capital cases: what do jurors think?* 98 Columbia Law Review (1998).

<sup>17</sup> For a list of examples, see pages 56-57 of *USA: Old habits die hard: The death penalty in Oklahoma*, AI Index: AMR 51/055/2001, April 2001, <http://web.amnesty.org/library/Index/ENGAMR510552001>

again fails to attach any consequence to the prosecutor's decision. I believe we should no longer let this error pass." However, Judge Chapel was in the minority.

The case of Oswaldo Torres gives the clemency authorities an opportunity to add their voices to Judge Chapel's and by commuting the death sentence show that there will be consequences to prosecutorial misconduct, as well as to the state's violations of a foreign national's consular rights.

## **Not just a legal nicety – Consular rights denied**

At the time of his arrest, Oswaldo Torres was an 18-year-old Mexican national without a lawyer who had had minimal prior contact with the US criminal justice system. He was registered with the US Immigration and Naturalization Service as a resident alien, which presumably would have become known to the arresting authorities when they conducted a routine background check on him upon his arrest. Despite this, the authorities never informed him of his rights under Article 36 of the Vienna Convention on Consular Relations. Nor have the authorities ever advised Mexican consular officials of his detention. Mexico only learned of the case in March 1996 when his family contacted the Mexican consulate for help. Oswaldo Torres had already been convicted and sentenced to death.

A primary task of all consuls is to render assistance to their citizens abroad and to see that they receive fair, equal and humane treatment while in custody. Consular access and assistance are indispensable whenever foreign nationals face prosecution and incarceration under local legal systems, especially when a death sentence may result. Timely consular intervention ensures that foreign detainees understand their legal rights and have the means to mount a proper defence.

Article 36 of the VCCR requires the local authorities to "without delay" inform detained, arrested or imprisoned foreign nationals of their right to have their consulate notified of their detention. At the request of the detainee, the authorities must then notify the consulate of the arrest without delay and permit consular access to the detained national. Consuls have the right to visit and communicate with their nationals in all cases and may arrange for the detainee's legal representation or provide other legal and humanitarian services.

Consular rights are not just a legal nicety. Available information indicates that for a foreign national facing capital charges in the USA, access to consular assistance can mean the difference between life and death. This is certainly true in the case of Mexico: no other country in the Americas provides such prompt, comprehensive and effective consular assistance to its nationals facing the death penalty. In its recent submission to the International Court of Justice, the Government of Mexico noted:

Mexican consular officers may also, among other functions, provide interpreters; secure legal counsel for defendants unable to afford representation; communicate with family members, friends, and others who may be able to offer assistance or information vital to a national's defense; supply records, documents, and other evidence for the national's defense; identify and transport family members and other witnesses to the United States, enabling them to offer frequently crucial testimony;

attend arraignments, trials, and other legal proceedings; and collect and present mitigating evidence at the sentencing phase of criminal trials—a consular function that literally can make the difference between life and death for Mexican nationals prosecuted for capital crimes.<sup>18</sup>

Between September of 2000 and June of 2003, consular officers and attorneys from Mexico's legal assistance program successfully intervened in 45 cases of Mexican nationals facing capital charges in the United States. In 38 of those cases, prosecutors agreed to waive the death penalty prior to trial.<sup>19</sup> In Osvaldo Torres's case, timely intervention by consular officials could have led to the death penalty not being sought in the first place, given the tenuous nature of the evidence that ultimately secured his first degree murder conviction.<sup>20</sup> If this was unsuccessful, consular assistance could have boosted the resources and means for Osvaldo Torres's court-appointed lawyer to mount a more vigorous defence, including facilitating background investigation for the presentation of mitigating evidence at the sentencing phase.

In its judgment on 31 March 2004, the International Court of Justice took the view that the term “without delay” in Article 36(1)(b) of the Vienna Convention on Consular Relations does not necessarily mean “immediately” upon arrest. However, the ICJ ruled that “there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national”. This clarifies that the authorities cannot delay providing advice due to uncertainty over a detainee's citizenship status. The ICJ gave strong support to incorporating advice about consular rights into the so-called *Miranda* warnings that must be provided to all detainees in the USA prior to interrogation.<sup>21</sup> The ICJ noted that “were each individual to be told upon arrest that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1(b) would be greatly enhanced.” Amnesty International would support such a measure.

International bodies have repeatedly emphasised the importance of consular rights. The United Nations Commission on Human Rights has called on all governments “to observe the

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<sup>18</sup> *Application Instituting Proceedings*, 9 January 2003, ICJ General List No.128, para. 23.

<sup>19</sup> In four cases, defendants were sentenced to life imprisonment after jury trials. And in three cases, the defendants' sentences were commuted to life in prison. See ICJ, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Memorial of Mexico (20 June 2003), para. 38, footnote 13.

<sup>20</sup> From 1 December 1994 to 15 August 2000, Mexican consular officials provided assistance to 261 Mexican nationals involved in death penalty cases in the USA. Of those cases, 119 avoided capital prosecution, 19 were acquitted and two death sentences were commuted. Mexican Ministry of External Relations, Annual Report, 2000.

<sup>21</sup> Under the 1966 US Supreme Court decision, *Miranda v Arizona*, “[t]he person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.”

safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under article 36 of the 1963 Vienna Convention on Consular Relations”.<sup>22</sup>

In 1999, the Inter-American Court of Human Rights issued an advisory opinion at the request of Mexico. It ruled that “[t]he expression “without delay” in Article 36(1)(b) of the Vienna Convention on Consular Relations means that the State must comply with its duty to inform the detainee of the rights that article confers upon him, at the time of his arrest or at least before he makes his first statement before the authorities.” The Inter-American Court ruled that a country’s failure to observe this right “is prejudicial to due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life “arbitrarily”, as stipulated in the relevant provisions of the human rights treaties (e.g. American Convention on Human Rights, Article 4; International Covenant on Civil and Political Rights, Article 6)”.<sup>23</sup>

Taking note of the decision of the Inter-American Court, the United Nations General Assembly overwhelmingly endorsed a resolution reiterating the need for all States to protect fully the universally recognized human rights of migrants, “particularly with regard to assistance and protection, including those under the Vienna Convention on Consular Relations, regarding the right to receive consular assistance from the country of origin”. Only one country – the USA – voted against including the reference to the Inter-America Court’s opinion in the resolution.

Yet the US Government knows the importance of consular rights for its own citizens arrested abroad. The Department of State considers that the right to consular notification and access is so fundamental that it is a principle of customary international law and applies in all cases even if the detainee’s home country is not a state party to the VCCR.<sup>24</sup>

## **A serial VCCR violator brought to the ICJ**

The lawsuit brought by Mexico against the USA in the International Court of Justice is not the first such case to be brought against the United States in the ICJ.

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<sup>22</sup> *The question of the death penalty*, Commission on Human Rights resolution 2003/67.

<sup>23</sup> Inter-American Court of Human Rights, Advisory Opinion OC-16 (1 October 1999), “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law”, paragraphs 141(3) and 137.

<sup>24</sup> The US Department of State has stressed that consular notification is “in our view a universally accepted, basic obligation” under customary international law. According to the Department, the provisions of Article 36 “are binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause in Article VI of the United States Constitution”. US Department of State, Consular Notification and Access, January 1998; Part Five. The Supremacy Clause states that a treaty ratified by the USA “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”.

In 1998, Paraguayan national Ángel Francisco Breard was executed after the US Supreme Court ruled that Virginia authorities were under no legal obligation to obey a “provisional measures” order issued by the ICJ to halt the execution. Several months later, Paraguay withdrew its case against the USA after receiving a formal apology. It is doubtful that the USA or its citizens would view a posthumous apology as an adequate response to the execution of an US national abroad under the same circumstances. Indeed, an apology is not a sufficient remedy under international law, as the ICJ has now declared.

The year after Ángel Breard was killed, Germany sued the USA in the ICJ after two its nationals were executed in Arizona. Walter LaGrand, the second of the German brothers to be put to death, had been killed on 3 March 1999 in open defiance of an order by the ICJ requiring a stay of execution. German authorities had been unaware of the plight of the LaGrand brothers until 10 years after their arrest, when the two men learned of their consular rights from other prisoners and contacted their consulate. By that time it was too late in the appeals process to raise the treaty violation as grounds for challenging the death sentences, under the domestic legal doctrine of “procedural default” (see below). Clemency did not serve as a fail-safe. The Arizona governor allowed the execution to proceed, overriding the unprecedented recommendation of the state Board of Executive Clemency that she grant a reprieve to Walter LaGrand.

Unlike Paraguay, Germany did not drop its ICJ lawsuit after the executions of its nationals and the subsequent US apology. On 27 June 2001, the ICJ issued its judgment in the LaGrand case.<sup>25</sup> By 14 votes to one, the Court found that the USA had “breached its obligations to Germany and to the LaGrand brothers under the Vienna Convention on Consular Relations”, by failing to promptly inform Karl and Walter LaGrand following their arrest of their right to communicate with their consulate. The Court noted: “It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.”

The Court held that in such cases “it would be incumbent upon the USA to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.” The ICJ also declared that, by not allowing judicial consideration of the consular rights violation in the latter stages of their appeals, the USA had failed to give “full effect” to the rights of the LaGrand brothers, in further violation of its treaty obligations. The Court determined that “the procedural default rule had the effect of preventing Germany, in a timely fashion, from assisting the LaGrands as provided for by the Convention”.

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<sup>25</sup> International Court of Justice, *LaGrand Case (Germany v. United States)*, Judgment of 27 June 2001, General List N° 104. available at: <http://www.lawschool.cornell.edu/library/cijwww/icjwww/idocket/igus/igusframe.htm>

The ICJ declined to dictate specific remedies to the USA for past violations of the treaty in criminal cases, finding that the United States must allow review and reconsideration of those cases “by means of its own choosing”. However, the ruling clearly establishes three key points which provide authoritative guidance. The right to consular notification is a personal right conferred on individuals. Domestic procedural barriers may not be invoked to prevent judicial review and potential remedies for serious violations of these rights. Finally, the USA must provide the means by which such cases can be reviewed and reconsidered. An apology is not enough.

In a separate declaration attached to the Court’s judgment, ICJ President Gilbert Guillaume noted that “in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation” to the cases of non-German foreign nationals, in terms of the obligation to provide review and reconsideration of their sentences in such cases. In other words, while the judgment addressed submissions made by Germany regarding the cases of German nationals not informed of their consular rights, the declaration by the ICJ President clarifies that the principles in the ruling apply to all nationalities.

## **Adding insult to injury: Procedural default**

In its case brought to the International Court of Justice, Mexico argued that the USA must not be allowed to resort to the doctrine of procedural default to deny the prisoners a remedy in the courts. As discussed below in more detail, the ICJ judgment emphatically supported Mexico’s interpretation.

When reviewing state prisoners’ *habeas corpus* appeals, US federal courts may generally not consider issues seeking the reversal of a sentence or conviction if those issues were not first introduced in state court proceedings. The failure to introduce a claim in earlier proceedings will usually result in “procedural default”, whereby the merits of the issue will not be addressed at all by the appellate courts.

In the case of both Ángel Breard and the LaGrand brothers, the previous cases brought to the ICJ by Paraguay and Germany respectively, the US courts had rejected the VCCR claims as procedurally defaulted. In Osvaldo Torres’s case, the same happened. In his 1999 appeal in federal district court, the claim that the authorities had violated his consular rights was first raised. The district court rejected the claim, saying that it had been procedurally defaulted. The court also found – without any analysis – that Osvaldo Torres had failed to show that he had been prejudiced by having been denied his consular rights. The US Court of Appeals for the 10<sup>th</sup> Circuit upheld the district court’s decision and the US Supreme Court declined to take the case.

This is clearly unfair. The state was under a treaty obligation to inform Osvaldo Torres of his right to contact his consulate. It failed to do so, and yet now relies upon procedural default to stop the issue being examined by the courts. Osvaldo Torres cannot be victimized for his failure to protest the state’s failure, since it was the state which deprived him of knowledge of his consular rights and how to invoke them. The fact that his counsel failed to raise the issue at trial or during state-level appeals cannot be used against the prisoner either. If the lawyer

knew of this treaty obligation and failed to raise it, it would be a contravention of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which require that capital defendants receive “adequate legal assistance at all stages of the proceedings”. If counsel was not aware of the VCCR issue, then the USA’s adherence to the UN Basic Principles on the Role of Lawyers is called into question. Principle 8 holds that “Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of *human rights and fundamental freedoms recognized by national and international law*.” (emphasis added).

In any event, what is clear is that the USA violated its obligations under the VCCR. International law states that a country cannot use its domestic laws as an excuse not to meet its international obligations. Article 27 of the Vienna Convention on the Law of Treaties states: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” The USA has signed this treaty, thereby under article 18, agreeing not to do anything to undermine its provisions pending a decision on whether to ratify it.

This principle is provided in US law. The Restatement (Third) of the Foreign Relations Law of the United States confirms that “[a] state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation”.<sup>26</sup>

## **Remedy ordered: the ICJ’s judgment in *Mexico v USA***

The Government of Mexico initiated proceedings against the USA in the ICJ on 9 January 2003. In the previous decade, Mexico had seen five of its nationals executed in US death chambers.<sup>27</sup> All five had been denied their VCCR rights. Each time, executive clemency was shown to be incapable of remedying the violation, even when the Mexican President himself made a personal appeal.

Mexico’s lawsuit alleged violations of the Vienna Convention on Consular Relations with respect to more than 50 Mexican nationals then on death row in the USA.<sup>28</sup> On 5 February 2003, the ICJ unanimously issued “provisional measures” ordering the USA to “take all measures necessary” to ensure that the three Mexican nationals considered at the most immediate risk of execution “are not executed pending final judgment in these proceedings”. Oswaldo Torres was one of the three prisoners named by the ICJ.<sup>29</sup>

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<sup>26</sup> Restatement of the Law (Third), The Foreign Relations Law of the United States (1987), vol. 1 p. 64, § 115, Comment b.

<sup>27</sup> Ramon Montoya (Texas, 1993); Irineo Tristan Montoya (Texas, 1997); Mario Murphy (Virginia, 1997); Miguel Angel Flores (Texas, 2000); Javier Suárez Medina (Texas, 2002).

<sup>28</sup> Mexico alleged that of the 52 cases of Mexican nationals it eventually brought before the ICJ, in 50 the detaining authorities had made no attempt at any time to comply with Article 36 of the Vienna Convention Consular Relations, and that in the two other cases, the required notification was not made “without delay”.

<sup>29</sup> The other two were César Roberto Fierro Reyna and Roberto Moreno Ramos, both on death row in Texas. Neither have been given an execution date since the ICJ issued its order.

Mexico and USA have been parties to the VCCR since 1965 and 1969 respectively. In addition, both have ratified the Optional Protocol to the treaty, which concerns the Compulsory Settlement of Disputes. Article 1 of the Optional Protocol states that: “Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”

On 31 March 2004, the International Court of Justice handed down its judgment in *Mexico v USA*. In the case of 51 of the 52 Mexican nationals on whose behalf Mexico brought its lawsuit, including Oswaldo Torres, the Court found that the USA had violated its obligations to notify the detainee of his right to contact his consulate, as provided under Article 36.1(b) of the VCCR. In 49 cases, including Oswaldo Torres, the ICJ found that the USA had violated its obligation to notify the Mexican consular post of the detention, and to enable consular officers to have communication with and visit their detained nationals, as required under Article 36.1 (a), (b) and (c). In addition, the Court found that in 34 cases, again including Oswaldo Torres, the USA had denied Mexico the ability to arrange for legal representation of their nationals, as required under Article 36.1(c).<sup>30</sup> On all these violations, the ICJ found against the USA by an almost unanimous vote, 14 to one.

Under Article 36(2) of the VCCR, national laws must “enable full effect to be given to the purposes for which the rights accorded under this Article are intended”. The ICJ noted that, in the LaGrand case brought by Germany in 2000, the Court had concluded that the procedural default rule had prevented the LaGrands’ appeal lawyers from being able effectively to raise the VCCR violations in challenging their clients’ convictions and sentences. In its judgment on 31 March 2004, the ICJ noted that this concern “seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation”. In particular it noted that in the case of three of these Mexican men – César Fierro, Roberto Moreno and Oswaldo Torres – domestic judicial appeals had been exhausted and therefore the USA was in breach of its obligations under Article 36(2) of the VCCR for these

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<sup>30</sup> Article 36.1 (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

three as procedural default had denied each of them the opportunity to obtain relief in the appeal courts. The ICJ's finding of this violation was also by 14 votes to one.

The ICJ then moved on to discuss remedies for the violations. It stated that "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration" of the cases *in the US courts*, to determine any prejudicial impact of the VCCR violation on the defendant. The Court emphasised that this judicial review and reconsideration must be meaningful and effective, and must relate to both sentence and conviction – clearly of relevance in Oswaldo Torres's case, where the state's evidence to support a first-degree murder conviction is flimsy. The Court held that procedural default is not a legitimate obstacle to judicial review and reconsideration: "The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution."

Moreover, the International Court of Justice held that review by the executive clemency authorities is not enough: "[T]he clemency process, as currently practised in the United States criminal justice system... [is] not sufficient in itself to serve as an appropriate means of review and reconsideration as envisaged by the Court..." (see further below on Oklahoma clemency).

The ICJ emphasised that while the case under consideration involved Mexican nationals, its judgment applied to all foreign nationals: "To avoid any ambiguity, it should be made clear that... the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States."

President Vicente Fox of Mexico hailed the ICJ's judgment as "a victory for international law and for human rights".<sup>31</sup> A senior legal advisor at the Mexican Foreign Ministry said that his government "trusts that the United States will do the right thing and the necessary thing to fulfil this decision".<sup>32</sup>

There is no room for further excuses or delays. It is time for the United States to comply with international law. The case of Oswaldo Torres is clearly the most urgent on which it has to act.

## ***Old habits die hard: the death penalty in Oklahoma***

Stopping executions in Oklahoma is an uphill task. Seventy-two people have been killed in its lethal injection chamber since the state resumed executions in 1990. It has carried out more than 50 executions since January 2000 alone. Oklahoma ranks 28<sup>th</sup> in population out of the 50 US states and third in the number of executions carried out since 1977. It now has the highest

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<sup>31</sup> *Triunfo del Derecho Internacional, decisión de la Corte Internacional de La Haya: Presidente Fox*. (unofficial translation). <http://www.presidencia.gob.mx/?P=2&Orden=Leer&Tipo=PP&Art=7867>

<sup>32</sup> *World Court Rules US Should Review 51 Death Sentences*. New York Times, 31 March 2004.

execution rate per capita of population of the USA's 38 death penalty states, higher even than its more notorious southern neighbour, Texas.

As Amnesty International found in a 100-page report in April 2001, the State of Oklahoma is willing to contravene international law and standards in its pursuit of judicial killing.<sup>33</sup> For example, Oklahoma accounts for two of the 16 executions of child offenders, people who were under 18 years old at the time of the crime, known in the world since 1999. Moreover, Oklahoma's prosecutors have frequently contravened the UN Guidelines on the Role of Prosecutors, which state that: "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." Oklahoma prosecutors have repeatedly been reprimanded by the appeal courts for misconduct in capital cases. Prosecutors in Oklahoma County, where Oswaldo Torres and almost 40 per cent of the people executed in Oklahoma (28 of 72) were prosecuted, have come in for particular criticism, albeit with impunity.

In his special opinion written when setting Oswaldo Torres's execution date, Judge Gary Lumpkin wrote: "Just as [Torres] has been afforded his rights, the victims of his crime and the citizens of the State of Oklahoma are now afforded the right to have a sentenced duly imposed carried out."<sup>34</sup> In its 2001 report on the death penalty in Oklahoma, Amnesty International acknowledged that the families of murder victims deserve compassion, respect, information and access to justice. However, the organization was also concerned that a culture of "victims' rights" appeared in some instances to be turning the capital justice system into a forum for state-sanctioned vengeance.

One of the prosecutors in Oswaldo Torres' case, Susan Caswell, was elected to the judiciary in 1998 on a platform of victims' rights. In her campaign literature to become a "conservative" trial-level judge, she wrote: "Too often crime victims are not treated fairly in the courtroom...I believe it's time to redress the balance".<sup>35</sup> As already noted, one of the state's witnesses in the Torres case has signed an affidavit retracting part of her trial testimony, claiming that prosecutor Caswell pressurized her into testifying in a way that supported the state's theory against Oswaldo Torres.

There are serious questions of fairness surrounding the other end of Oklahoma's capital justice system, namely the clemency process to which Oswaldo Torres now turns for relief. Between 1966 and March 2001, the Oklahoma Board of Pardons and Paroles made only one recommendation for clemency in a capital case. In that case, the state governor accepted the recommendation and on 9 April 2001 commuted Phillip Smith's death sentence to life imprisonment without the possibility of parole because of serious doubts over the prisoner's guilt. Since the Phillip Smith case, the Board of Pardons and Paroles appears to have begun rightly to broaden (beyond narrow questions of innocence) its view of what issues can be a

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<sup>33</sup> USA: *Old habits die hard: The death penalty in Oklahoma*, AI Index: AMR 51/055/2001, April 2001, <http://web.amnesty.org/library/Index/ENGAMR510552001>

<sup>34</sup> *Torres v State*. Order setting execution date. 1 March 2004. Judge Lumpkin, special concurrence.

<sup>35</sup> Page 77, *Old habits die hard, op.cit.*

cause for commutation of a death sentence and has recommended clemency in six cases.<sup>36</sup> However, the current and previous Governor, pressed by the Attorney General's Office, has rejected all six recommendations – including in the cases of Ernest Carter and Vietnamese national Hung Thanh Le in which the Board had voted unanimously (4-0) for clemency. This pattern of gubernatorial rejection raises the legitimate question as to whether the Oklahoma clemency process is truly meaningful, as required under the International Covenant on Civil and Political Rights, which the USA ratified in 1992.<sup>37</sup>

Yet, challenging the case brought against it by Mexico in 2003, the USA argued in the International Court of Justice that clemency is enough for the “review and reconsideration” of VCCR claims that have not been reached by the courts. In oral arguments on 16 December 2003, the USA said: “Even in a case where judicial remedies have been exhausted without review and reconsideration of a Vienna Convention claim, or where review and reconsideration were given but the court did not order a remedy, the clemency process is still available to review and reconsider convictions and sentences in light of any violations of Article 36...Clemency therefore is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process.”

The case of Gerardo Valdez is another that suggests that executive clemency is not the failsafe it is supposed to be. In its oral arguments in the ICJ in December 2003, the USA noted the case of Gerardo Valdez, a Mexican national who had been facing imminent execution in 2001. The US delegate noted that the Oklahoma Court of Criminal Appeals had vacated Valdez's death sentence and ordered a new sentencing because “Valdez's trial counsel was ineffective in failing to uncover significant mitigating evidence that was subsequently discovered through the intervention and assistance of the Mexican consulate”. What the US delegate failed to add was that prior to this last-minute judicial intervention, the Oklahoma Governor had rejected a clemency recommendation from the state Pardons and Paroles Board, as well as a personal appeal for clemency from President Vicente Fox of Mexico. It was only then that the Court of Criminal Appeals stepped in, and subsequently ordered a new sentencing. In November 2003, Gerardo Valdez received a life sentence. If a court granted relief on an issue that had been raised in clemency proceedings, it is clear that executive clemency is not a failsafe that ensures justice and fairness.

In Oklahoma, the clemency process has failed, for example, to stop the internationally illegal executions of two child offenders.<sup>38</sup> It has failed to stop the execution of a seriously mentally

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<sup>36</sup> Ernest Carter, executed December 2002; Bobby Joe Fields, executed February 2003; Jackie Willingham, executed July 2003; David Brown, executed March 2004. Hung Thanh Le, executed March 2004. The execution of Gerardo Valdez, a Mexican national, was stopped by the courts in 2001 after the governor rejected clemency, and Valdez eventually received a life sentence.

<sup>37</sup> Article 6.4 of the Covenant states: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.” Obviously, this must provide a genuine opportunity to the prisoner. Some death row inmates in Oklahoma have declined to put themselves through what they perceived to be a sham process.

<sup>38</sup> Sean Sellers, executed in Oklahoma in 1999, remains the only person to be put to death in the USA for a crime committed at the age of 16 since executions resumed in 1977. See: *USA: Killing hope: the*

ill man, whose possible insanity may have rendered his execution unconstitutional.<sup>39</sup> It has failed to stop the execution of an African American man whose jury selection may have been tainted by racial discrimination.<sup>40</sup> It failed to stop the execution of a man whose trial was tainted by alleged racist juror coercion.<sup>41</sup> It failed to stop the execution of a man whose legal representation at trial was inadequate, and whose trial lawyer, according to a federal appeals court, had apparently developed no strategy to defend him against the death penalty.<sup>42</sup> It failed to stop the execution of a man whose crime may have been an act of self-defence.<sup>43</sup> It failed to stop the execution of a gay man whose trial was tainted by prosecutorial homophobia.<sup>44</sup> It failed to stop the execution of a man who was not even present when his co-defendant, who received a life sentence, committed the murders.<sup>45</sup>

As noted above, in its judgment of 31 March 2004 the International Court of Justice ruled that the executive clemency process in the USA is not enough to ensure effective and meaningful review and reconsideration of any prejudicial impact of VCCR violations on the defendant's sentence and conviction. At the time of writing, Osvaldo Torres has a clemency hearing pending on 7 May 2004. In the absence of US compliance with the ICJ-required judicial review, clemency will be Osvaldo Torres's final chance to avoid execution. The Oklahoma authorities should ensure that the execution does not proceed. The US Government must do all it can to persuade them to this end.

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*imminent execution of Sean Sellers*, AI Index: AMR 51/108/1998, December 1998

<http://web.amnesty.org/library/Index/ENGAMR511081998>. All the other child offenders put to death since then, including Scott Hain in Oklahoma in 2003, were 17 at the time of the crime.

<sup>39</sup> Tuan Ahn Nguyen, a former Vietnamese refugee, was executed on Human Rights Day 1998, despite evidence that he had gone insane on death row. Page 25, *Old habits die hard*, *op.cit.*

<sup>40</sup> Malcolm Johnson, executed in January 2000 was tried by all-white jury. The 10<sup>th</sup> Circuit Court of Appeals pointed to the "troubling evidence" that the prosecutor had used discriminatory tactics to exclude blacks from the jury. Page 40, *Old habits die hard*, *op.cit.*

<sup>41</sup> Walanzo Robinson, executed in 2003, <http://web.amnesty.org/library/Index/ENGAMR510232003>

<sup>42</sup> Cornel Cooks, executed in 1999. Page 45, *Old habits die hard*, *op.cit.*

<sup>43</sup> David Brown, executed in 2004. The Board of Pardons and Paroles recommended clemency in this case, but this was rejected by the governor. As well as the doubts about the first-degree murder conviction, the only African American juror on Brown's jury later came forward to say that he had only voted for death as a result of the pressure he felt in a racially charged atmosphere. See <http://web.amnesty.org/library/Index/ENGAMR511052002>

<sup>44</sup> Wesley Jay Neill, executed in 2002. See <http://web.amnesty.org/library/index/ENGAMR511752002>

<sup>45</sup> Steven Hatch was executed in 1996 for two murders committed by his severely mentally ill co-defendant Glen Ake in 1979. Hatch had already left the house when Ake shot the couple. They were sentenced to death at separate trials. Glen Ake's conviction and sentence were overturned by the US Supreme Court because, despite the fact that his sanity was a significant factor at the trial, the defence was denied access to expert psychiatric assistance. At his retrial, Ake was sentenced to life in prison. At Hatch's clemency hearing, his appeal lawyer asked if his execution would serve justice "or vengeance because we can't reach the one who pulled the trigger?" Attorney General Edmondson displayed a disturbing attitude towards the execution of the mentally ill when he countered that the injustice was not that Hatch would be executed, but that Ake would not. Page 16, *Old habits die hard*, *op.cit.*

## Human rights and the rule of law

*“President Bush regards the defence and advancement of human rights as America’s special calling, and he has made the promotion of human rights an integral and active part of his foreign policy agenda.”* Secretary of State Colin Powell, 25 February 2004<sup>46</sup>

Senior US officials display a fluency in the language of human rights, but their words are rarely critical of their own country’s record and all too often ring hollow in the face of violations of international standards. The cases of foreign nationals awaiting execution in the USA, despite violations of their consular rights, are a long-standing concern. It is now more than six years since Amnesty International issued its first report on this aspect of the death penalty.<sup>47</sup> Since then, 14 foreign nationals have been executed in the USA as the diplomatic tension on this issue has increased.

On 15 March 2004, Deputy Secretary of State Richard Armitage said that “in order to protect and promote the interests of the American people, the United States absolutely must engage with the world”. In its statement of apology to the Paraguayan government six years earlier, following the 1998 execution of a Paraguayan man denied his VCCR rights, the US State Department had noted that consular notification “is no less important to Paraguayan and other foreign nationals in the United States than to US nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard.”<sup>48</sup> Yet double standards are precisely what have continued.

In October 2003, US Supreme Court Justice Sandra Day O’Connor said that “no institution of government can afford any longer to ignore the rest of the world.” She continued: “I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in foreign courts. Doing so may not only enrich our own country’s decisions; it will create that all-important good impression. When US courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced”.<sup>49</sup> The failure of the US Supreme Court to take Oswaldo Torres’s case flies in the face of such sentiment.

In his speech at the United Nations General Assembly on 23 September 2003, President George W. Bush said: “As an original signer of the UN Charter, the United States of America is committed to the United Nations. And we show that commitment by working to fulfil the UN’s stated purposes, and give meaning to its ideals.” In a pre-war speech in the same forum a year earlier, he said that the conduct of Iraq “is a threat to the authority of the United

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<sup>46</sup> Remarks on The Country Reports on Human Rights Practices for 2003, Secretary Colin L. Powell, Washington, DC, 25 February 2004.

<sup>47</sup> USA: *Violations of the rights of foreign nationals under sentence of death*, AI Index: AMR 51/001/1998, January 1998. <http://web.amnesty.org/library/Index/ENGAMR510011998>

<sup>48</sup> US Department of State Press Statement, November 4, 1998.

<sup>49</sup> Remarks at Southern Center for International Studies, Atlanta, Georgia, 28 October 2003.

Nations... Iraq has answered a decade of UN demands with a decade of defiance... Are Security Council resolutions to be honoured and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?"

Oswaldo Torres was set an execution date in defiance of an order from the International Court of Justice, the principal judicial organ of the United Nations. The Court has expressed "grave concern" at this development, in a judgment which makes it clear that the USA must allow Oswaldo Torres review and reconsideration of the multiple violations of the Vienna Convention on Consular Relations which occurred in his case. Amnesty International believes that it is reasonable to conclude that these VCCR violations prejudiced his defence, given the tenuous nature of the evidence presented by the state in support of his first-degree murder conviction.

The execution of Oswaldo Torres would undermine international respect for the rule of law and contravene the USA's stated commitment to human rights. It must be stopped.