

**PUBLIC**

**AI Index: AMR 51/060/2004**

**UA 136/04**

**Death penalty / Legal concern**

**2 April 2004**

**USA (Oklahoma)**

**Oswaldo Netzahualcóyotl Torres Aguilera (m), Mexican national, aged 29**

---

Mexican national Oswaldo Torres is scheduled to be executed in Oklahoma on 18 May 2004 for a double murder committed in 1993. He was sentenced to death in 1996.

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 VCCR, the authorities must notify all detained foreign nationals "without delay" of their right to have their consulate informed of their detention. The ICJ found that the USA had violated this provision in 51 of the 52 cases of Mexican nationals brought before it by Mexico. The Torres case was one of only three in which the ICJ found that the USA had violated all of its various obligations under Article 36, including Mexico's right to be able to assist with his legal representation.

At the time of his arrest, Oswaldo Torres was an 18-year-old without a lawyer who had had minimal contact with the US criminal justice system. 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 the VCCR. 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. Timely assistance from the Mexican consulate could have prevented the imposition of the death penalty, either by persuading the prosecutor not to seek a death sentence or by assisting the defence at the trial.

The crime in question was the murder of Maria Yanez and her husband Francisco Morales, who were shot dead in their Oklahoma City home in July 1993. Their 14-year-old daughter was woken by gunfire and rang the police. On their way to the house, police arrested George Ochoa and Oswaldo Torres not far from the crime scene. The two men were tried jointly on charges of first degree burglary and first degree murder with malice aforethought. On this latter charge, the prosecution had to prove beyond a reasonable doubt that each defendant intended to kill the victims. According to the Oklahoma Court of Criminal Appeals, "the State's theory, which is supported by the evidence, shows that Torres was not the shooter." In order to 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." 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. George Ochoa remains on death row, without an execution date.

One of the state's witnesses, a 15-year-old girl, testified that the man she saw with George Ochoa before the crime had carried a gun. The pistol she described at trial, never found, was not the weapon used in the murders. This witness has since recanted her testimony and said that she was coerced by the prosecution into saying that she saw a gun. Despite her affidavit, the Oklahoma Court of Criminal Appeals relied upon

her 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 10<sup>th</sup> Circuit Court of Appeals has in turn upheld the conviction and death sentence, despite acknowledging that the evidence against Torres is "susceptible to interpretation". One of the three judges wrote: "I do not believe that the evidence is sufficient to support Mr Torres's murder convictions."

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". Furthermore, "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 said, the evidence concerning 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.

Oswaldo Torres is due to have a clemency hearing before the Oklahoma Pardon and Parole Board on 7 May 2004. In its judgment of 31 March, the ICJ found that the clemency process in the USA was not a satisfactory forum for the effective review and reconsideration of the impact of VCCR violations on an individual's case. The ICJ ruled that the examination of the cases must be conducted in the courts. It remains to be seen if the USA complies. In the meantime, the clemency hearing is still scheduled.

For more detail see: *USA: Oswaldo Torres, Mexican national denied consular rights, scheduled to die*, AI Index: AMR 51/057/2004, 2 April 2004, <http://web.amnesty.org/library/Index/ENGAMR510572004>.

**RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words:**

- expressing sympathy for the family and friends of Maria Yanez and Francisco Morales, explaining that you are not seeking to condone the manner of their deaths or to deny the suffering caused;
- noting the decision of the International Court of Justice, binding on the USA and all jurisdictions within it, that Oswaldo Torres must receive effective judicial review of the treaty violations in his case;
- noting the state's position that Oswaldo Torres did not actually kill anyone, and noting that a key prosecution witness has withdrawn her testimony indicating that Torres was armed, thereby further weakening the evidence supporting his first degree murder conviction;
- calling on the Pardon and Parole Board to recommend that the governor grant clemency;
- calling on the Attorney General to ensure that Oklahoma fully complies with the ICJ judgment, and to do all in his power and influence to ensure that Oswaldo Torres is not executed.

**APPEALS TO:**

Oklahoma Pardon and Parole Board, 4040 N. Lincoln Blvd., Suite 219, Oklahoma City, OK 73105, USA

**Fax:** + 1 405 427 6648

**Salutation:** Dear Board members

The Honorable Drew Edmonson, Attorney General, 112 State Capitol Bldg., Oklahoma City, OK 73105, USA

**Fax:** +1 405 521 6246

**Salutation:** Dear Attorney General

**COPIES TO:**

The Honorable Colin Powell, Secretary of State, Department of State, 2201 C Street, NW, Washington DC 20520, USA

**Fax:** + 1 202 261 8577

Governor Brad Henry, 212 State Capitol, 2300 N. Lincoln Blvd, Oklahoma City. OK 73105, USA

**Fax:** + 1 405 521 3353

and to diplomatic representatives of the USA and Mexico accredited to your country.

**PLEASE SEND APPEALS IMMEDIATELY**, to arrive by 7 May, after which an update will be issued.