



EMBAJADA DE MÉXICO

PBA-03026

The Hague, 26 November 2003

Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
The Hague
The Netherlands

*Avena and Other Mexican Nationals
(Mexico v. United States of America)*

Dear Sir:

On Mexico's behalf, and in accordance with Article 56 of the Rules of Court, I write to request leave to submit a number of strictly selected additional documents to address certain arguments made by the United States in its Counter-Memorial.

* * *

On 5 February 2003, in its Order indicating provisional measures, the Court stated that it was "clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible" and that it was "therefore appropriate that the Court, with the co-operation of the Parties, ensure that a final judgment be reached with all possible expedition." *Avena and Other Mexican Nationals (Mexico v. United States of America), Request for the Indication of Provisional Measures, Order of 5 February 2003, para. 57.*

In view of the Court's Order, Mexico and the United States agreed to limit the written phase of the proceedings to one round of pleadings, consisting of a Memorial by Mexico and a Counter-Memorial by the United States. The Parties also agreed to file the written pleadings within a tight time-limit of originally four and later four and a half months.

On 20 June 2003, Mexico filed its Memorial. In accord with Practice Direction III, in which the Court "strongly urge[d] parties to append to their pleadings only strictly



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selected documents,”¹ Mexico deliberately limited the factual materials it submitted in order to ensure that, on the one hand, it supplied evidence sufficient to support its claims, but, on the other, did not unduly burden the resources of the Court.

Specifically, as Annex 7 to its Memorial, Mexico submitted a sworn statement by Ambassador Rodríguez Hernández, the Director General for Protection and Consular Affairs at Mexico’s Ministry of Foreign Relations, and hence the official responsible for supervision of Mexico’s consular protection program. In that statement, Ambassador Rodríguez set forth the essential facts with regard to each of the fifty-four cases. He based his declaration on the extensive documentation gathered by Mexican consular officials in the United States, as well as interviews conducted by Mexican consular officials and lawyers working for the Mexican capital assistance program.² Mexico also submitted six other declarations and a number of additional documents, which, although strictly limited and carefully selected, cover more than 1100 pages in three volumes of Annexes. On filing its Memorial, Mexico advised the Court that it was “prepared to submit to the Court any of the documents cited to in the Memorial and the expert and witness declarations contained in the Annexes to the Memorial, if so requested.”³

Had Mexico submitted a full documentary record for each of the fifty-four nationals, in order to anticipate any possible factual allegations by the United States, Mexico would have submitted dozens of volumes of annexes, consisting of many thousands of pages of documentation gathered and produced by Mexico’s forty-five consular offices in the United States, including voluminous excerpts from consular files, court transcripts, excerpts from legal briefs, and excerpts from habeas corpus proceedings. The magnitude of this submission would have placed an enormous burden on the Members of the Court, who would have studied the record, and on the staff and budget of the Court’s Registry, which would have had to provide the Court with translations.⁴

¹ The Court issued Practice Direction III in order to address “an excessive tendency towards the proliferation and protraction of annexes to written pleadings.”

² See also Mexico’s Memorial, Declaration of Ambassador Rodríguez Hernández, Annex 7, at para. 40.

³ Letter dated 20 June 2003 of the Agent of Mexico to the Registrar of the International Court of Justice.

⁴ The United States itself acknowledges the enormity of the full factual record of the 54 cases. Mexico’s claims arise from proceedings in courts in the United States, and thus, in order to conduct its investigation, the United States could call upon the full resources of the Department of Justice, the Attorneys General of the several states in which the prosecutions took place, and the offices of the local prosecutors. Yet the United States advises that it has “been unable to review the complete record in each case.” Declaration P.W. Mason, U.S. Counter-Memorial, Annex 2, A73 *et seq.* The United States explains: “The records in most of the 54 cases consist of thousands of pages of



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On November 3, 2003, the United States filed its Counter-Memorial. Notwithstanding Mexico's factual showing, the United States contended that Mexico had failed to submit sufficient evidence to meet its burden of proof that (1) the individuals who are the subject of the Application are Mexican nationals, and (2) in each of their cases the competent authorities of the United States failed to provide the consular notification required by Article 36 of the Vienna Convention on Consular Relations.⁵ The United States also made a series of affirmative factual allegations, most of them unsupported on their own terms.

* * *

In order to address the suggestion of the United States that Mexico has not proven the requisite nationality or the alleged violation with respect to the individuals who are the subject of its Application, Mexico seeks leave, pursuant to Article 56 of the Rules of Court, to submit the documents enclosed with this letter as Annexes 67 to 71. In Mexico's view, the evidence included with its Memorial fully suffices to prove the facts on which this Court's Judgment should rest. However, unlike in the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of Germany)* and in *LaGrand (Germany v. United States of America)*, the United States has chosen not to concede the violations that, in many of the underlying cases, have already been conceded or determined in courts in the United States and, in the remainder, should not be subject to serious dispute. Given the United States' position here, Mexico seeks leave to submit the enclosed documents in order to eliminate any possible doubt about the basic facts of the case before this Court.

In order to comply with Practice Direction III, Mexico has again carefully limited its submission so as to minimize any burden on the Court. Given the short period of time between the filing of the Counter-Memorial by the United States on 3 November 2003, and the opening of the hearings on 15 December 2003, Mexico has also made its best efforts to produce these documents as expeditiously as possible, in order to allow the United States sufficient time to review them. In addition, on Wednesday, 26 November 2003, consistent with the courtesies that the Parties have extended one another, Mexico provided a copy of these documents directly to the United States so as to avoid any possible delay.

transcripts and, except in cases in which the first stage of appeal is still pending, hundreds of pages of legal briefs and memoranda." Indeed, though the United States has had Mexico's Application since early January, it advises the Court that even on the date of the filing of the Counter-Memorial, some ten months later, its investigation of the underlying cases was still "ongoing." U.S. Counter-Memorial, Chapter VII, ¶ 7.1.

⁵ U.S. Counter-Memorial, Chapter VII, pp. 147 *et seq.*



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Mexico seeks leave to submit three categories of documents.

1. *Nationality.* Mexico established the nationality of each of the fifty-four nationals in the Declaration of Ambassador Rodríguez. The General Division of Protection and Consular Affairs supervises the network of Mexican consulates and the consular services they provide. One of the primary functions of the consulates, in turn, is to confirm and document the nationality of Mexican nationals within their respective jurisdictions for a variety of purposes, such as the issuance of ID cards and passports, arrangements in case of death, and notification pursuant to Article 36 of the Vienna Convention. The Declaration of Ambassador Rodríguez therefore provides sufficient and conclusive evidence of the Mexican nationality of each of the fifty-four individuals.

a. *Mexico's affirmative proof.* The United States contends, however, that Mexico has failed to prove the Mexican nationality of the individuals named in the Application. U.S. Counter-Memorial, para. 7.7. Since the United States has contested the adequacy of the showing, Mexico seeks leave to submit (a) the birth certificates of, with one exception,⁶ each of the individuals named in its Application; (b) declarations, from each of the 41 Mexican nationals as to which there is no record of a judicial finding of an Article 36 violation from a United States court or a stipulation of such a violation, that they have not acquired U.S. nationality;⁷ and (c) certain additional documents establishing Mexican nationality. These documents are attached as Annexes 67, 70 and 68, respectively.

b. *U.S. defense of dual nationality.* The United States alleges that there is a "substantial possibility" that some Mexican nationals "were also United States citizens at the time of their arrests." U.S. Counter-Memorial, para. 7.8.⁸ The United States does not adduce a single document to support this allegation. Indeed, even though in the United States immigration and naturalization are the province of the federal government, the United States concedes that it cannot "confirm[]" its allegation. *Id.*

⁶ In the time available, Mexico was unable to obtain the birth certificate of Abelino Manriquez Jaquez (#14). For his nationality, which the United States does not appear to seriously contest (*see* U.S. Counter-Memorial, Annex 2, A 131), Mexico rests on the Rodríguez Declaration.

⁷ Because Mexican nationality would constitute a predicate to an Article 36 violation premised on failure to notify the Mexican consul, a finding or concession of a violation would also constitute a finding or concession of Mexican nationality.

⁸ *See also id.* n. 334 (suggesting that parent of specific national is "likely [a] United States citizen" and that there is "some possibility" that certain nationals acquired U.S. citizenship).



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While the United States' candor on the point should be applauded, its decision to raise the issue should not. It is well-established that a respondent alleging a specific fact in its defense carries the burden to prove that fact. *Temple of Preah Vihear, Merits,*

Judgment, I.C.J. Reports 1962, p.6, 16-16 ("burden of proof ... will of course lie on the party asserting or putting" forward claim on series of facts or contentions); *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p.47 ("each Party has to prove ... the facts upon which it relies"); *Mavrommatis Jerusalem Concessions, 1925, P.C.I.J., Series A, No. 5*, p.29 (respondent alleging that concessions were not valid had burden to prove invalidity). Hence, the United States bears the burden of proving that any specific individual named in the Application had U.S. nationality in addition to Mexican nationality. If it cannot do so, it should not make the allegation.

That point carries special force here, because it is the United States – not Mexico – that possesses the necessary information to establish whether an individual has United States citizenship. As the United States acknowledges,⁹ the INS keeps extensive record files ("A files") for all naturalized citizens.¹⁰ The United States should therefore be able to provide documents demonstrating U.S. citizenship if, in fact, any of the Mexican nationals had acquired it.¹¹ It has not, and it therefore should not be permitted to contest Mexico's showing.

Again, however, in order to eliminate any conceivable doubt, Mexico seeks leave to submit the declaration of Karen F. Ellingson, Esq. Ms. Ellingson is an attorney specializing in immigration law and serves as an Adjunct Professor at the Immigration Clinic of the University of Minnesota School of Law. In her declaration, Ms. Ellingson concludes that, based on the lack of any apparent documentation regarding U.S. nationality, the highly rigorous requirements for acquiring U.S. nationality, and the known facts regarding the nationals' parentage and date of entry into the United States, it

⁹ See U.S. Counter-Memorial, Declaration of D. Gentile, Annex 19. See also *id.*, Declaration of E.A. Betancourt, Annex 18, para. 7.

¹⁰ The United States suggests that Mexican nationals may have acquired U.S. citizenship either because one of their parents may have been a U.S. citizen or because they moved as minors to the United States. It does not deny, however, that in either case the Mexican national would have received U.S. nationality by means of a formal process of naturalization.

¹¹ The only case in which the United States has provided proof of U.S. nationality is that of Mr. Enrique Zambrano (#28). Having considered that proof, Mexico is satisfied that Mr. Zambrano possesses U.S. nationality, and consequently, by a letter dated this date to the Registry, has advised the Court that it amends its submissions to withdraw its request for relief in his case.



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is highly unlikely that any of the Mexican nationals subject of the Application have acquired United States citizenship. She also observes that, where, as here, a claim of U.S. citizenship for a person born abroad is at issue, documentation of naturalization would be normally available from United States immigration records and under the exclusive control of the United States. Ms. Ellingson's declaration is attached as Annex 69.

2. *Article 36 violations.* Mexico established the Article 36 violations by the evidence submitted with its Memorial. *First*, in ten cases, U.S. courts have found that the United States violated Article 36(1)(b). Mexico included extracts from the relevant decisions as Annexes to its Memorial.¹²

Second, in an eleventh case, the United States entered into a stipulation acknowledging that it violated Article 36(1)(b). Mexico submitted the stipulation as an Annex to its Memorial.¹³

Finally, Ambassador Rodríguez testified in his declaration as to the violation of Article 36(1)(b) in the case of, with one exception, each of the fifty-four Mexican nationals.¹⁴ He based this testimony on interviews with the fifty-four Mexican nationals,

¹² Juárez Suárez (#10), Mexico's Memorial, Annex 36, at A706; see also A62, para. 54; Eduardo Vargas (#26), Annex 35, at A699; see also A81, para. 139; Hernández Llanas (#34), Annex 50 at A1037; see also at A94, para. 200; Sánchez Ramírez (#23), Annex 64, at A1325; see also at A77, para. 121; Ignacio Gómez (#33), Annex 61, at A1297; see also at A93, para. 195; Félix Rocha Díaz (#42), Annex 41, at A764; see also at A110, para. 271; Ramiro Ibarra (#35), Annex 62, at A1306; see also A96, para. 210; Humberto Leal García (#36), Annexes 51-52, at A1072 and A1156; see also at A98, para. 218; Virgilio Maldonado (#37), Annex 53, at A1183; see also at A98, para. 226; and José Trinidad Loza (#52), Annex 44, at A868; see also at A131, para. 348. There is also a judicial finding with regard to Mr. Aguilar Saucedo (#56), which we address below.

¹³ Mr. Villa Ramírez (#20), Mexico's Memorial, Annex 65, at A1329; see also at A74, para. 106. There is also a stipulation with regard to Mr. Miranda Guerrero (#55), which we address below.

¹⁴ In the case of Mr. Hernández Alberto, Ambassador Rodríguez testified that Mexico was "still investigating the circumstances of [his] case" and had not been able to verify the account of the law enforcement official that he had timely informed Mr. Hernández of his right to contact the consul. Mexico's Memorial, Declaration of Ambassador Rodríguez Hernández, Annex 7, at para. 326. In a letter to the Registry dated this date, Mexico informs the Court that, having completed its investigation and concluded that there was no failure to notify prior to interrogation, it now amends its submissions to withdraw its request for relief in the case of Mr. Hernández Alberto.



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their defense counsel, and U.S. authorities conducted by Mexican consular officers and lawyers working under his supervision. There is considerable additional evidence of the violations in these cases, including the pattern of United States' noncompliance with its Article 36 obligations, particularly during the years in which most of the capital proceedings at issue here took place.

The United States contends, however, that Mexico has failed to prove the violations it alleges. Since the United States has contested the sufficiency of the showing, Mexico seeks leave to submit a declaration demonstrating the violation from

each of the 41 individuals subject of the Application as to which the record does not include a judicial finding or stipulation of the violation.¹⁵ The declarations are attached as Annex 70.

3. *Messrs. Miranda Guerrero and Aguilar Saucedo.*

By letter dated 14 October 2003, Mexico informed the Court that it amended its submissions to include two additional Mexican nationals, Messrs. Miranda Guerrero and Aguilar Saucedo, who, since the date of Mexico's Memorial, had been sentenced to death as a result of criminal proceedings in which the United States failed to comply with its obligations under Article 36 of the Vienna Convention. By letter dated 2 November 2003, the United States objected that "Mexico has submitted no evidence concerning these cases, and in the available time the United States has been unable to investigate the facts alleged."

There is no basis for the United States' objection. In the case of Mr. Miranda Guerrero (#55), U.S. authorities entered into a stipulation acknowledging the violation of Article 36(1)(b). In the case of Mr. Aguilar Saucedo (#56), a U.S. court found that Article 36(1)(b) had been violated.

The documents constituting the stipulation and the finding are not only in the possession of the United States, but are publicly available.¹⁶ Given the United States'

¹⁵ In addition, Mexico submits a declaration by Mr. Virgilio Maldonado (#37), although there is a judicial finding as to the violation of Article 36(1)(b) of the Vienna Convention.



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objection, however, Mexico seeks leave to submit them at this time. They are enclosed as Annex 71.

* * *

Article 56 of the Rules of Court permits a party to submit further documents after the closure of the written proceedings if the other party so consents, or absent such consent, if the Court considers the documents necessary. While Practice Direction IX states that documents will be admitted after the close of the written submissions only in "exceptional circumstances," the Direction also confirms that the Court will admit documents at this stage if the production "appears justified to the Court." In the circumstances here, the production of the documents Mexico seeks leave to submit is fully justified.

First, where, as here, the proceeding is limited to one round of pleadings, an applicant will be denied its right fully to present its case unless it has the opportunity to submit additional documents in response to new factual allegations by the respondent or an allegation that the factual showing made is insufficient. In a proceeding consisting of two rounds of written pleadings, the applicant is entitled under Article 50 of the Rules to submit additional evidence to rebut allegations raised in the respondent's counter-memorial. Where, however, proceedings consist of only one round of written pleadings, the applicant would be deprived of this right unless the Court permitted it to submit selected documents pursuant to Article 56.

No applicant can anticipate the precise arguments that a respondent will make. The Court has indicated that "a single round of written pleadings is to be considered as the norm in cases begun by means of an application."¹⁷ If the Court wishes future applicants to agree to a single round, it should not discourage future applicants from doing so by denying Mexico leave here to submit a limited set of additional documents. Considerations of fairness dictate that result in any event.

¹⁶ The judicial finding of a violation of Article 36(1)(b) with regard to Mr. Aguilar Saucedo (#56) is available at <<http://www.courtminutes.Maricopa.gov/docs/Criminal/022003/m0903660.pdf>>. The stipulation with regard to Mr. Miranda Guerrero (#55) is a publicly available court document.

¹⁷ *I.C.J. Press Release 2002/12*.



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Second, the Court has repeatedly requested that parties submit only a strictly limited set of documents with their pleadings, and it has emphasized the importance of that request to the Court's ability to do its work with the resources available to it.¹⁸ In submitting its Memorial, Mexico took that request seriously. Now that the United States has tried to turn that approach to Mexico's disadvantage by challenging the adequacy of Mexico's showing, Mexico should be granted leave to submit additional documents on matters that should not be subject to fair dispute.

Again, in formulating its submissions, no applicant can anticipate the precise arguments that a respondent will make. A decision denying an applicant the opportunity to submit additional documents to refute a challenge by the respondent to the documentary record would encourage future applicants liberally to append documentation to written pleadings in order to preempt any conceivable future evidentiary challenge. The Court recognized the potential for tension between its request that the parties limit their annexes and a party's interest in protecting against evidentiary challenges when, in its 1998 Note containing Recommendations to the Parties, it stated that, in order to ease the parties' task in strictly selecting documents during the written proceedings, it would "more readily accept the production of additional documents during the period beginning with the close of the written proceedings." Again, therefore, if the Court wishes future applicants, and particularly those with the benefit of only one round of briefing, to exercise discipline in putting together their annexes, the Court should grant Mexico leave in the circumstances here.

Third, Mexico has agreed to conduct this proceeding on a timetable whose brevity is unprecedented.¹⁹ To be sure, as the Court observed, that schedule was "in the interest

¹⁸ In addition to Practice Direction III, see the Note containing Recommendations to the Parties to New Cases, issued for the first time in 1998 (The Court "strongly urges parties to append to their pleadings only strictly selected documents"); *I.C.J. Press Release 98/14* ("With regard to the written proceedings in general, the Court has asked the Parties to see to it that the content of memorials is clear and that the annexes are more strictly selected"); Address by the President of the International Court of Justice to the General Assembly of the United Nations, 27 October 1998 (the Court "has asked parties to cases to attach only strictly needed annexes to their pleadings"); Address by the President of the International Court of Justice to the General Assembly of the United Nations, 30 October 2001 (the Court "has again informed [the parties] of its desire to see a decrease ... in the volume of annexes to pleadings ... However, old habits die hard"); Address by the President of the International Court of Justice to the General Assembly of the United Nations, 29 October 2002 (the Court asks parties "to be rigorously selective in the documents which they append to their pleadings").

¹⁹ For example, in *LaGrand (Germany v. United States of America)*, which arose from a single case involving only two individuals, the parties had six and a half months to prepare their written pleadings.



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of both Parties.”²⁰ But that mutual interest was driven by a single fundamental consideration: the shorter the proceedings, the shorter the period during which the bar of the Order indicating Provisional Measures would remain in effect. Given its interest in avoiding an irreparable prejudice, Mexico has fully cooperated with the Court’s objective of expedition.

Combined with the single round of pleadings, the expedited timetable necessarily had a greater impact on Mexico as applicant than the United States as respondent. While Mexico had only four and a half months to put together its submissions, the United States, with full access to the records in the underlying capital proceedings through state authorities, had twice as long.

Where parties agree to time-limits such as those here in order to expedite the proceedings, general considerations of fairness counsel in favor of permitting an applicant to submit additional documents pursuant to Article 56. Yet again, a decision denying Mexico leave here would discourage parties from agreeing to such time-limits in future proceedings before the Court.

Finally, the nature of this case, more than any other case, counsels in favor of granting leave. Where, as here, human lives are at stake, the Court should ensure that it bases its decision on a full and fair evidentiary record.

* * *

May I take this opportunity to provide you the assurance of my highest esteem.

Ambassador Santiago Oñate Laborde
Agent of Mexico

²⁰ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Order of 5 February 2003, para. 57.

Annex to Mexico's November 27, 2003 Letter

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I hereby certify that all documents submitted are truthful copies of their original, and that the English translation of documents whose original is in Spanish is accurate. –



Ambassador Santiago Oñate,
Agent of Mexico



EMBAJADA DE MEXICO
LA HAYA, PAISES BAJOS

The Hague, 26 November 2003



EMBAJADA DE MÉXICO

PBA-03070

The Hague, 2 December 2003

Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
The Hague
The Netherlands

*Avena and Other Mexican Nationals
(Mexico v. United States of America)*

Dear Sir:

On Mexico's behalf, I write to supplement Mexico's submission of additional documents under Article 56 of the Rules of Court of 28 November 2003 to include the birth certificate of Mr. Abelino Manriquez Jaquez (#14) in Annex 67.

By letter filed on 28 November 2003, Mexico submitted, *inter alia*, the birth certificates of 53 of the 54 Mexican nationals subject of the Application as Annex 67. As Mexico explained in that letter, in the short time available, it had been "unable to obtain the birth certificate of Abelino Manriquez Jaquez (#14)."

Mexico has now located Mr. Manriquez' birth certificate and therefore supplements its submission under Article 56 of the Rules of Court to include Mr. Manriquez' birth certificate in Annex 67.

May I take this opportunity to provide you the assurance of my highest esteem.

Ambassador Santiago Oñate Laborde
Agent of Mexico