USA

THE CASE OF THE 'CUBAN FIVE'

AMNESTY INTERNATIONAL

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CONTENTS

BACKGROUND AND HISTORY OF THE CASE

This report describes Amnesty International's concerns about the fairness of the trial of five men imprisoned in the USA since 1998 on charges related to their activities as intelligence agents for the Cuban government. The men, known as the Cuban Five, are Cuban nationals Fernando González (aka Ruben Campa), Gerardo Hernández and Ramón Labañino (aka Luis Medina), and US nationals Antonio Guerrero and René González. All are serving long prison sentences in US federal prisons.

The five are reported to have been among a group of intelligence agents known as the Wasp Network (La Red Avispa), headed by Cuba's Directorate of Intelligence, which infiltrated Cuban-American groups in Florida who support regime change in Cuba. They were arrested in September 1998 and charged with conspiring to act as unregistered agents of the Republic of Cuba, and related offences. At their trial, the US government alleged that, as well as monitoring anti-Castro groups, the Wasp network reported to Cuba about the operation of US military facilities, including the Key West Naval Air Station in Florida, where one of the five was employed as a labourer. Two of the five were alleged to have supervised attempts by other agents to penetrate the Miami facility of Southern Command, which oversees operations of US military forces in Latin America and the Caribbean.[1]

After a lengthy pre-trial detention, and a jury trial before the federal district court in Miami, Florida, lasting nearly seven months, the five were convicted in June 2001 on a combined total of 26 counts. These included acting and conspiring to act as unregistered agents of a foreign government; fraud and misuse of identity documents; and, in the case of three of the accused, conspiracy to gather and transmit national defence information. The men were sentenced in December 2001 to prison terms ranging from 15 years to life.

As well as being sentenced to life imprisonment for conspiracy to gather and transmit national defence information, Gerardo Hernández received a second life prison sentence for conspiracy to murder. This was based on his alleged role in the shooting down by Cuba of two planes operated by the US anti-Castro organization "Brothers to the Rescue" (BTTR), in 1996, in which four people died.

The defendants have not denied acting as unregistered agents for the Cuban

[1] US Court of Appeals for the Eleventh Circuit, D. C. Docket No. 98-00721-CR-JAP, 4 June 2008 (referred to hereafter as 11th Circuit Court of Appeals decision, 4 June 2008).

government. However, they have denied the most serious charges against them and contend that their role was to focus on Cuban exile groups responsible for hostile acts against Cuba, and visible signs of US military action towards Cuba, rather than to breach US national security.[2] No evidence was presented against them at trial to show that the accused had actually handled or transmitted a single classified document or piece of information, although the US government contended that this was their intention.

In August 2005, a three-judge panel of the US Court of Appeals for 11th Circuit unanimously overturned the convictions of the five on finding that pervasive community prejudice against the Castro government in the trial venire of Miami-Dade County merged with other factors to prejudice their right to a fair trial. The court ordered a new trial outside Miami. The decision was appealed by the US government and subsequently reversed in August 2006 by the full (*en banc*) Court of Appeal, by a 10-2 majority.[3]

In June 2008, a three-judge panel of the 11th Circuit Court of Appeals ruled on other grounds of appeal which had been pending in the case. It upheld the convictions in all five cases but vacated part of the sentences imposed on three of the defendants on finding that they had been wrongly enhanced under federal sentencing guidelines. The decision vacated the life sentences imposed on Ramón Labañino and Antonio Guerrero for conspiracy to gather and transmit national defence information, as no top secret information had in fact been gathered or transmitted. Ramón Labañino was subsequently resentenced to 30 years on that charge and Antonio Guerrero to 21 years and 10 months, both to be served concurrently with sentences on other counts. Fernando González had his sentence reduced from 19 years to 17 years and nine months, on the ground that the portion of his original sentence imposed for identity fraud had been set too high.

The court found that Gerardo Hernández's life sentence for conspiracy to gather and transmit national defence information had also been wrongly enhanced on the same grounds as in Labañino and Guerrero's cases. However, it declined to remand him for resentencing on the ground that, as he was already serving a life sentence for conspiracy to murder, any error in the recalculation of his sentence on the other charge was "irrelevant to the time he will serve in prison".[4] Gerardo Hernández is the only one of the five still serving life in prison. He is serving two terms of life imprisonment, plus 15 years, to be served concurrently.

The June 2008 decision to uphold the convictions was not unanimous. One of the three judges, Judge Kravitz, dissented from the decision to uphold the conspiracy to murder conviction in the case of Gerardo Hernández on the ground that, in her view,

[2] Exile groups monitored by the agents included Miami-based extremist organizations such as Alpha 66, suspected of planning and carrying out bombings and explosions against tourist targets in Cuba and organizing arms shipments to Cuba.

[3] One of the three judges in the earlier panel decision had since retired and had been replaced by another judge (see note 19, below).

[4] 11th Circuit Court of Appeal ruling, 4 June 2008, page 81.

the government had failed to prove beyond a reasonable doubt that he had entered into an agreement to shoot down the BTTR planes in international airspace and kill the occupants.

Judge Birch concurred with the court's opinion on all matters before it, while admitting that the issue raised in the conspiracy to murder conviction "presents a very close case". He also took the opportunity to reiterate his opinion (set out in his dissent to the en banc appeal court's August 2006 decision on the trial venue) that "the motion for change of venue should have been granted", stating that the defendants "were subjected to such a degree of harm based upon demonstrated pervasive community prejudice that their convictions should have been reversed".[5]

In June 2009 the US Supreme Court denied a petition for leave to appeal against the convictions of the five without giving reasons.

In June 2010, lawyers for the five filed a further motion in the district (trial) court, seeking habeas corpus relief on the basis of new issues. These include a claim of ineffective assistance of counsel in the case of Gerardo Hernández, and new evidence of alleged government misconduct in the case. The latter claim is based on newly discovered evidence that journalists who had written prejudicial articles in Miami against Cuba at the time of the trial were paid employees of the US government as part of their work for anti-Castro media outlets, Radio Marti and TV Marti. A hearing on these issues had not yet taken place at the time of writing.

THE UNITED NATIONS (UN) WORKING GROUP ON ARBITRARY DETENTION

In May 2005, the UN Working Group on Arbitrary Detention adopted an opinion on the case in which it concluded that US government had failed to guarantee the Cuban five a fair trial under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), a treaty the USA has ratified. While noting that the case was still pending before the US appeal courts, The Working Group stated that its findings were made on the basis of the facts and circumstances described, the responses received from the US government and further comments by the complaint's source.[6]

The Working Group based its opinion on three factors, including the prejudicial impact of holding the trial in Miami. It also found that keeping the defendants in solitary confinement for part of their lengthy pre-trial detention, during which they allegedly had limited access to their attorneys and to evidence, and classifying all documents in the case as "secret", weakened the possibilities of an adequate defence and "undermined the equal balance between the prosecution and the defense". Taking into account the severe sentences imposed, the Working Group concluded that the factors cited above, "combined together, are of such gravity that

[5] 11th Circuit Court of Appeal decision, 4 June 2008, page 83.

[6] Opinion No. 19/2005 (United States of America) E/CN.4/2006/7/Add.1. In its opinion, the Working Group welcomed the cooperation of the US government and its timely responses to the complaint.

they confer the deprivation of liberty of these five persons an arbitrary character".[7] It called on the government to adopt the necessary steps to remedy the situation.

The US government responded to the opinion by letter dated 6 September 2005, expressing its disappointment that the Working Group had issued its opinion while the matter was under active judicial review and pending appeal in the United States at that time. In reporting on the response in its annual report, the Working Group noted that the doctrine of exhaustion of domestic remedy did not apply as a criterion for the admissibility of its communications to governments when investigating cases of alleged arbitrary deprivation of liberty.[8]

SUMMARY OF AMNESTY INTERNATIONAL'S CONCERNS

Amnesty International takes no position on whether the Cuban Five are guilty or innocent of the charges for which they have been convicted. However, having reviewed the case extensively over a number of years, the organization believes that there are serious doubts about the fairness and impartiality of their trial which have not been resolved on appeal.

Amnesty International's concerns are based on a combination of factors. A central, underlying concern relates to the fairness of holding the trial in Miami, given the pervasive community hostility toward the Cuban government in the area and media and other events which took place before and during the trial. There is evidence to suggest that these factors made it impossible to ensure a wholly impartial jury, despite the efforts of the trial judge in this regard.[9] The right to a trial by a competent, independent and impartial tribunal is guaranteed under Article 10 of the Universal Declaration of Human Rights (UDHR) and Article 14 of the ICCPR, and is fundamental to the right to a fair trial. In order for such a right to be guaranteed, every trial must not only be fair but be seen to be fair.[10] As described in more detail below, there is serious doubt that this principle was fulfilled in this case. Amnesty International is concerned that the Supreme Court declined to hear the appeal on this and several other key issues in the case, despite the fact that judicial opinion in the lower courts has been deeply divided.

Amnesty International also shares the concern of the Working Group against Arbitrary Detention that the conditions under which the defence attorneys were allowed access to their clients, and to evidence, during pre-trial investigations may have undermined the fundamental principle of "equality of arms" and the right of every defendant to have adequate facilities for the preparation of their defence.

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[7] E/CN.4/2006/7/Add.1, p.99.

[8] Annual report of the Working Group on Arbitary Detention, E/CN.4/2006/7, 12 December 2005 (http://www2.ohchr.org/english/issues/detention/annual.htm).

[9] The judge's efforts to empanel a neutral jury and to protect jurors from media intrusion and other measures are referred to below, under 2 (1).

[10] Human Rights Committee, General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N.Doc. CCPR/C/GC/32 (2007), III, paragraph 7.

Although these issues were not grounds of appeal, [11] it is one factor among others which raises concern about the overall fairness with which the defendants have been treated.

Amnesty International is further concerned about the strength of the evidence on which Gerardo Hernández was convicted of conspiracy to murder: an issue which was a ground of appeal to the US Supreme Court and which the court declined to review. Although Amnesty International is not in a position to second-guess the facts on which the jury reached its verdict, it believes that there are questions as to whether the government discharged its burden of proof that Hernández planned a shoot-down of BTTR planes in international airspace, and thus within US jurisdiction, which was a necessary element of the charge against him. One essential guarantee of a fair trial is that a person charged with a criminal offence must be presumed innocent until the charge has been proved beyond a reasonable doubt. The UN Human Rights Committee (the ICCPR treaty monitoring body) has noted that, "Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times."[12]

Given these concerns, and the lengthy sentences imposed, should further legal appeals on these issues be exhausted or carry little prospect of relief, Amnesty International calls on the US government to review the case and to take appropriate action to remedy any injustice.

BAN ON VISITS WITH WIVES OF TWO OF THE PRISONERS

For several years, Amnesty International has raised concern about the US government's denial of visas to allow the Cuban wives of Gerardo Hernández and René Gonzáles to visit them in prison. Adriana Pérez has not seen her husband, Gerardo Hernández, since his arrest in 1998. Olga Salanueva, the wife of René González, has not seen her husband since the eve of his trial in November 2000. The US government has denied the visits on foreign policy and national security grounds, including, reportedly, on the alleged ground that the women were associated with the Wasp Network. Neither of the women has been charged with any crime in the USA and Olga Salanueva, who was a lawful permanent resident in the USA at the time of her husband's arrest, continued to live legally in the USA for two and a half years during pre-trial proceedings against her husband. She alleges that he was offered a plea bargain in which she would have been allowed to remain in the USA if he pleaded guilty; he refused and she was deported in November 2000 and is now deemed permanently ineligible to enter the USA.

Both women have made repeated applications to the US government for temporary

[11] Only one ground of appeal related to access to evidence; this concerned a pre-trial *ex parte* hearing at which the prosecutor sought to withhold certain documents under the Classified Information Procedures Act. The appeal court held that the trial court had not erred in holding such a hearing under the Act noting that any information withheld must be replaced with redacted documents which the defence could examine and seek a further hearing to compel discovery if necessary. No classified information was presented as evidence by the prosecution at trial.

[12] Human Rights Committee, General Comment No.32 on Article 14 of the ICCPR, I, para.4.

visas to allow them to visit their husbands, with undertakings to abide by any security conditions deemed necessary. Their applications have been turned down, with the US authorities at times giving different grounds for the refusal of visas, citing various sections of immigration, national security and border protection legislation. No detailed reasons have been provided to either of the women for the continued denial of visas. At one point, in 2002, Adriana Pérez was actually granted a visa but was detained for 11 hours at Houston airport, after which her visa was revoked and she was refused entry to the USA.

Amnesty International has repeatedly expressed concern to the US government that the blanket, and apparently permanent, bar on the men receiving visits from their wives, without due consideration of any conditions that might make such visits possible, is unnecessarily punitive and contrary to standards for the humane treatment of prisoners and states' obligation to protect family life. This is of special concern given the long prison sentences imposed, including the double life sentence in the case of Gerardo Hernández. Amnesty International continues to urge the government to grant the wives temporary visas on humanitarian grounds, under conditions that would meet security concerns. Visas have been granted for other relatives in Cuba to visit the five prisoners occasionally, although there have reportedly been delays or difficulties at times. According to court documents, all of the five men have exemplary behavioural records in prison.

CONCERNS RAISED BY OTHER ORGANIZATIONS

The petition for a Writ of Certiorari (leave to appeal) to the US Supreme Court was supported by amicus curiae briefs submitted on behalf of numerous organizations and individuals, including 10 Nobel prize winners, the bar associations of various countries and other legal bodies, including the International Association of Democratic Lawyers, the Ibero-American Federation of Ombudsmen, the International Federation of Human Rights and the National Jury Project offices of California, Minnesota, New Jersey and New York. Most of the amicus briefs focused their concerns on the right of criminal defendants to an impartial jury and the prejudicial impact of the trial venue in this regard. Several of the briefs made specific mention of the operation of anti-Castro groups in Miami in the decade before the trial and the numerous hostile actions and attacks on individuals and organizations seen as pro-Cuban, and to pressures experienced by members of the jury at certain points during the proceedings (see panel decision, below).

FURTHER DISCUSSION OF FAIR TRIAL CONCERNS

TRIAL VENUE

Miami is home to the largest Cuban exile population in the USA and there is no doubt that the trial took place in a venire where there was substantial, even uniquely extensive, community hostility to the Cuban government, then led by Fidel Castro. There were also strong local connections to the Brothers to the Rescue

organization, the deaths of four of whose members formed a key part of the prosecution's case.[13] Both before, during and after the trial, the defendants sought to have the trial moved to Fort Lauderdale, less than 30 miles away, in motions which were denied by the district court.

MOTIONS FOR CHANGE OF VENUE

The first motion for a change of venue, filed before trial in January 2000, introduced evidence from a poll showing bias in the venire, not only among Hispanic respondents but also the wider community, against anyone allegedly associated with the Cuban government. The motion also introduced evidence of the wealth of pre-trial publicity about the case as well as numerous articles documenting decades of general anti-Castro sentiment in Miami. The latter described a history of violence and threats by anti-Castro groups based in Miami against businesses and others perceived to be pro-Cuban, which, it was argued, along with general community sentiment, could put pressure on jurors and make them nervous about entering a not-guilty verdict. It also cited the impact on the community of the Elián González case, which had led to massive anti-Cuba protests in the months leading to the trial.[14] The US government responded that the Miami community was diverse and heterogeneous, and immune from the influences that would preclude a fair trial.[15] The trial court dismissed the motions for change of venue, stating that it could explore any potential bias at *voir dire* [16]examination and carefully instruct jurors during the trial.

During the *voir dire*, the defence used their peremptory challenges to remove all Cuban Americans from the jury and the final jury was empanelled without objection. However, motions for a mistrial and change of venue were renewed twice during the trial, based on community events and further publicity about the case after the trial opened (see 11th circuit panel decision, below). Although the motions were denied, the trial judge had to take action to protect the jurors from unwarranted media scrutiny on several occasions. During the *voir dire* and the main trial, jurors were filmed or approached by the media and some complained of feeling pressurized,

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[13] As noted in the petition for certiorari to the Supreme Court, memorials had been erected to the victims in Miami and streets renamed after them.

[14] Elián González was a 6-year-old Cuban boy who was the sole survivor of a group of rafters, among them his mother, who drowned while trying to reach the USA in November 1999. He was rescued and taken into the USA where relatives in Miami sought custody but he was eventually returned by the US government to Cuba in the custody of his Cuban father in June 2000. There were massive protests in Miami against his return.

[15] The issues presented in the motions for change of venue were summarized in detail in the 11th Circuit Court of Appeal ruling No. 01-17176, 9 August 2005 (panel decision) pages 11-22.

[16] The *voir dire* is the preliminary stage of a jury trial under the US legal system, where questions are put to prospective jurors by attorneys and the court to determine their suitability to sit on the jury. A juror may be dismissed "for cause" such as bias; in addition attorneys for both sides are allowed a set number of "peremptory" challenges that can be used to dismiss a juror for any or no reason.

causing the judge to modify their arrangements for leaving and entering the courthouse. During deliberations, jurors again complained about media intrusion, including being photographed walking to their cars and having their license plates filmed; further arrangements were made by the judge to protect their privacy by arranging private entrance to the court and transportation to their vehicles.

In August 2001, two months after their convictions, the defendants moved for a new trial and change of venue in the interests of justice, arguing that fears of presumed prejudice remained despite the district court's efforts to empanel a neutral jury. It was asserted that the jury's failure to ask a single question and its relatively speedy verdicts after only five days of deliberation following a lengthy, complex trial, also suggested that it was subject to pressure and prejudice. The district court again denied the motions, citing the measures it had taken to ensure a fair trial.[17]

In November 2002, the defendants filed a further motion for a new trial in the interests of justice, citing newly discovered evidence. The motion argued, among other things, that the government's position opposing a change of venue was contradicted by the position it had subsequently taken in *Ramirez v Ashcroft*. This was an action brought against the US government by a Hispanic employee of the US immigration service, alleging that he had been subjected to retaliation and intimidation by colleagues due to the government's removal of Elián González to Cuba. In court documents, the government stated that "it will be virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County."[18] It submitted that a move to the Fort Lauderdale division courthouse would be sufficient, noting that all the demonstrations which took place around the Elián González affair took place in Miami and that "as you move the case out of Miami Dade you have less likelihood there are going to be deep-seated ... prejudices in the case".[19]

The motion also presented evidence from Human Rights Watch reports of harassment and intimidation of Miami Cuban exiles expressing moderate political views about Cuba, and information from two further independent surveys supporting the earlier poll finding of entrenched community bias against Cuba.[20] One study's

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[17] These were the *voir dire*, measures to protect jurors from media intrusion, instructions to jurors not to read the news, and instructions during the summation. As the 11th Circuit en banc ruling noted, the district court further found that the jury's "prompt, inquiry-free verdict at most was speculative, circumstantial evidence of the venue's impact on the jury" (11th Circuit Court of Appeals decision, 9 August 2006, at page 36).

[18] 11th Circuit Court of Appeal decision, 9 August 2005, 68-71, citing motion for change of venue R15-1636.

[19] Ibid,at 71.

[20] The district court had faulted the original poll by Florida International University Professor Gary Patrick Moran, which had been submitted as an exhibit in the pre-trial motion for a change of venue, as lacking scientific rigour. The new supporting evidence included an affidavit by Professor Moran explaining his

author concluded that "the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero … even if the jury were composed entirely of non-Cubans, as it was in this case."[21]

The district court denied the motion, finding that the situation in *Ramirez* differed from the facts in the case of the Cuban five and was not new evidence; it declined to consider the exhibits in support of the original poll and other evidence of anti-Cuban bias in the venire because it found that this had not been filed on a timely basis.

APPEALS ON TRIAL VENUE ISSUE AND RELATED CONCERNS

The case was appealed to the 11th Circuit Court of Appeal, and in August 2005 a three-judge panel ruled unanimously that the defendants were denied a fair trial, based on the convergence of publicity before and during the trial, pervasive community prejudice and improper remarks by the prosecution in its closing arguments. The government appealed and, despite this being unusual in a case where a panel decision is unanimous, the full *en banc* appeals court decided to rehear the appeal.

In a 10-2 majority decision given in August 2006, the *en banc* court reversed the panel's decision, affirming the district court's denial of the defendants' motions for a change of venue and for a new trial.[22] The *en banc* majority held that the trial court's efforts to empanel a neutral jury through an extensive voir dire and to protect jurors from media intrusion, as well as its instructions to the jury (including on the presumption of innocence), sufficiently addressed all claims of presumed prejudice.

However, the *en banc* court applied a narrower standard of review than the panel, largely disregarding events outside the courtroom and assessing for evidentiary value only publicity relating directly to the case against the five. It disregarded entirely the evidence of general anti-Castro sentiment in the Miami area, finding that the test of prejudice in this case was more thoroughly evaluated through the voir dire, and deferring to the trial judge's judgment in assessing juror credibility and impartiality. The panel, in contrast, took into account the "totality of the circumstances" surrounding the case, including events both inside and outside the court-room. While acknowledging the trial judge's efforts to ensure an impartial jury

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research as well as two further independent studies and surveys.

[21] 11th Circuit Court of Appeal decision, 9 August 2005, p. 74, citing study by Dr Lisandro Pérez, Florida International University Professor of Sociology and Director of the Cuban Research Institute.

[22] US Court of Appeals 11th Circuit decision 9 August 2006, Case No. 01-17176. Judge Oakes, who had been one of the three judges sitting on the panel, had since retired and been replaced as an 11th Circuit appeal judge by Judge Pryor, a conservative whose appointment by President Bush had been controversial. Like the panel's August 2005 ruling, the en banc decision ruled only on the motion for a new trial in a changed venue; it remanded the remaining issues which had been raised on appeal to the 11th Circuit panel for consideration.

in the case, it found that empanelling such a jury in Miami was an "unreasonable probability".

Amnesty International has reviewed the appeal court judgements and briefs of both parties. The organization believes that the wider issues considered by the 11th Circuit panel raise disturbing questions about the fairness of holding the trial in Miami which, in Amnesty International's view, are not dispelled by the *en banc* ruling.

The panel took into account evidence of pre-trial publicity and general anti-Castro feeling among the wider community within the venire. It found the evidence submitted in support of the motions for change of venue on this ground to be "massive".[23] It also noted that the *voir dire* showed the extent of potential bias among the venire-persons. Many of the potential jurors had personal contact with the BTTR victims and two had attended funerals of the victims; some were excused through clear bias and many because they expressed fear for their safety or standing in the community if they acquitted. Others said they held negative beliefs about Castro and the Cuban regime, but could set these aside; as the petition for certiorari to the US Supreme Court subsequently noted, three of the latter ended up on the jury, with one the foreman.

The panel decision also considered media events before and during the trial, including the impact of the publicity surrounding the Elián González case in the months preceding the trial; a press conference on the first day of the voir dire by BTTR victims' families on the steps of the court-house; and "commemorative flights" and public ceremonies which took place during the trial itself, on 24 February 2001, to mark the fifth anniversary of the downing of the BTTR planes, along with media reporting of these events. Although the trial judge repeatedly admonished the jurors – who went home every night – not to read or watch the news or discuss the case, they were not completely insulated from events.[24] As noted above, some jurors complained about pressure as television cameras were focused on them at key stages during the proceedings, including at the start of deliberations.

The appeals panel then widened its consideration to look at whether the combined effect of the publicity with the prosecution's closing arguments "operating together deprived the [defendants] of a fair trial". The panel noted the many improper and misleading statements by the prosecution throughout the trial, and in particular during closing arguments, which could have influenced the jury and led them to fear that acquitting the defendants would harm the US and/or support Cuba. These included statements that the defendants were "bent on destroying the United

[23] 11th Circuit Court of Appeals panel decision, 9 August 2005, p 13.

[24] In one instance a Miami Herald article about the case was found in the jury room – the judge did not find this sufficient reason to stop the trial, ruling that the issue was not whether the jurors were exposed to publicity but whether they had formed an opinion on the basis of it.

States"; that the Cuban government had a "huge stake" in the outcome; unsubstantiated references to the defendants sponsoring book bombs; misquoting the defence counsel as stating that the downing of the BTTR plane was the "final solution"; and emphasizing that the defendants were arguing their case at the expense of the American taxpayer. Although the judge sustained most of the defence objections during the prosecution's closing arguments – a factor the *en banc* court took into account in ruling that the defendants had failed to prove prejudicial effect – she did not issue specific instructions but reminded the jury only in general terms in her summing up that the statements by the attorneys were not evidence to be considered. The defence claimed that this was insufficient to undo any damage.[25]

The panel agreed and concluded that a new trial was mandated by the "perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the improper prosecutorial references".[26]

Amnesty International believes that the circumstances outlined above raise serious doubts whether the international standard requiring that a trial should not only be fair, but be seen to be fair, was met. Article 14(1) of the International Covenant on Civil and Political Rights, which the USA has ratified, states that, in the determination of any criminal charge against an individual "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee has stressed that this is "an absolute right that is not subject to any exception".[27] The Committee has noted that the requirement of impartiality has two aspects, that judges must not be influenced by bias or improperly promote the interests of one side over another and, secondly, "the tribunal must also appear to a reasonable observer to be impartial".[28]

Amnesty International notes that the request by the defendants for a change of venue was a modest one: to move the trial to a location (Fort Lauderdale) only 24 miles away. The organization is not aware of any obstacles that would have prevented moving the trial, adding to concern that more could have been done to

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[25] The prosecution's closing arguments came after the defence, and there was no chance for rebuttal at this stage. A senior counsel representing the prisoners on appeal told Amnesty International that the judge had sustained 28 of 31 objections by the defence but without any specific instructions to the jury to disregard each statement; he said the prosecution was given "unprecedented wide latitude", citing another case where a similar statement about the American taxpayer was made and the judge stopped the proceedings and specifically instructed the jury to disregard the statement (conversation with attorney Leonard Weinglass, November 2007).

[26] 11th Circuit Court of Appeal decision, 9 August 2005 (panel ruling), p. 118.

[27] Human Rights Committee, General Comment No. 32, Article 14, U.N.Doc. CCPR/C/GC/32 (2007), III, paragraph 5..

[28] Ibid, III, paragraph 7. The tribunal refers to both the judge and the jury where there is one.

ensure a fair trial by an impartial jury.[29] As the US government noted in its petition for a change of venue in *Ramirez v Ashcroft* (cited above), there was a significantly greater level of community prejudice surrounding the Elián González case, and the Castro government, in Miami than in Fort Lauderdale. This distinction would seem to be equally relevant in the case of the Cuban Five, given the nature of the charges against the defendants, with their direct links with the Castro government, and the Miami connection of the BTTR victims.

In reversing the panel's decision, the *en banc* court of appeals addressed the prosecution's prejudicial statements only briefly, holding that they were of minor significance and were in any event neutralized by the judge's instructions to disregard them. However, Amnesty International believes that this remains an issue of concern, given the general nature of the judge's instructions in this regard and the potential effect on the jury of the other factors cited above. The potential for a jury to be swayed by inflammatory or prejudicial statements in a case involving alleged breaches of national security is arguably greater where, as in this case, no evidence was presented of any top secret information being collected or transmitted.

The petition for certiorari to the US Supreme Court asked the court to reconsider what it called the "exceptionally high barriers to change of venue" erected by the 11th Circuit *en banc* court of appeals in its August 2006 ruling. It noted that, while the 11th Circuit majority had applied a test requiring the defendants to demonstrate that a fair trial was "impossible", four other circuits had applied the more lenient test of "reasonable likelihood" that the defendant could not receive a fair trial. The petition also drew attention to the dissenting opinion of Judge Birch to the *en banc* ruling, which stated that "This case presents a timely opportunity for the Supreme Court to clarify the right of an accused to an impartial jury in the high-tech age … and to clarify circuit law to conform with Supreme Court precedent". [30]

Amnesty International is concerned that the US Supreme Court chose not to consider this issue, in view of the fundamental importance of the fair trial principle involved.

EQUALITY OF ARMS

As noted above, the UN Working Group on Arbitrary Detention found that the limitations placed on access of the defendants to their lawyers and to evidence during their pre-trial detention "undermined the equal balance between the

[29] Amnesty International notes the court decision in the Oklahoma bombing case to move the trial of Timothy McVey 1,200 miles away to Denver, Colorado.

[30] Judge Birch, supported by judge Kravitz, entered a 50-page dissent to the 2006 *en banc* ruling, in which he reiterated the concerns of the panel about the evidence of pervasive community prejudice which was omitted from the *en banc* opinion and which he held were "essential to an understanding of the intense community pressures in this case", particularly a case involving admitted agents of Castro's Cuban government. (US Court of Appeals for the 11th Circuit, No. 01-17176, 9 August 2006, p. 70.)

prosecution and the defence" and thus the fundamental fair trial principle of "equality of arms".

Following their arrest in September 1998 the defendants were denied access to their attorneys for the first two days in police custody. They were refused bail and spent 26 months in pre-trial detention, isolated from other pre-trial inmates in the Security Housing Unit (SHU) of the Federal Detention Centre in Miami. They spent the first five months in total solitary confinement in the SHU, after which four of them were held two to a single cell for 12 months. One of the defendants (Ramón Labañino) spent 17 months of his pre-trial detention in solitary confinement. The circumstances of their pre-trial detention meant that they had limited opportunity to consult with each other at least in the initial stages of detention and access to their attorneys was also restricted.

During pre-trial investigation, the prosecution seized as potential evidence thousands of documents from the defendants' homes, including personal papers, and it stamped every document, regardless of its content, as "top secret". The government invoked the provisions of the Classified Information Procedures Act (CIPA), which allowed it to restrict access of the defence to the documents.[31] All the documents were stored in a basement in the court-house and defence lawyers had to make appointments to see them, were not allowed to remove them and could take notes only.

A senior defence counsel in the case told Amnesty International that, although the government ultimately declassified all the materials they requested, and no classified information was introduced as evidence at trial, "no-one was confident they had everything they needed" and they had "trouble getting to see their clients and documents" during their pre-trial detention, which he believed impaired their ability to construct a defence. Article 14(3) of the ICCPR states that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing". These minimum guarantees for a fair trial apply at every stage of the proceedings.

Amnesty International shares the concern of the UN Working Group that the circumstances described above undermined the principle of "equality of arms" and may have impacted upon the defendants' ability to prepare their defence. Although not a ground of appeal before the US Supreme Court, these circumstances add to concern that the defendants' right to a fair trial was not fully respected.

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[31] Under CIPA, "classified information" means any information or material that has been determined by the US government to require protection against unauthorized disclosure for reasons of national security. CIPA allows the US government to seek a court order to protect against the disclosure of classified information to any defendant in a US criminal case on national security grounds.

CONSPIRACY TO MURDER CONVICTION IN THE CASE OF GERARDO HERNÁNDEZ

Gerardo Hernández, was sentenced to two life prison terms, one for conspiracy to transmit national defence information and the second for conspiracy to murder. The conspiracy to murder charge arose from his alleged role in the shooting down by Cuba of two planes flown by members of the Brothers to the Rescue (BTTR) organization in February 1996. He was the only one of the five to be charged with this offence and was tried on this count along with the other charges against him.

BTTR was one of the Miami based anti-Castro organizations monitored and infiltrated by members of the Wasp network. It was initially set up to rescue "rafters" fleeing Cuba who faced difficulties in the high seas, and to transport them to the USA. Between 1994 and February 1996, BTTR planes also made repeated incursions into Cuban airspace where they dropped leaflets with messages quoting from the Universal Declaration of Human Rights (UDHR) and calling on Cubans to "fight for" their rights. According to the US prosecution in the case against the Cuban five, after a leafleting incursion over Havana in January 1996, the Cuban government set up a special mission to confront the BTTR. On 24 February 1996, three BTTR planes flew toward Cuba and two of the planes were shot down by Cuban fighter planes, killing the pilot and passenger in each plane.

Gerardo Hernández was accused of being involved in the alleged plan to confront the BTTR planes and to murder the victims of the 24th February shoot-down. He was charged with conspiracy to commit first-degree murder within the special maritime or territorial jurisdiction of the USA.[32] The sufficiency of the evidence to support his conviction on this charge was one of the issues raised in the petition for certiorari to the US Supreme Court.

The evidence presented by the prosecution against Hernández at his trial consisted of an intercepted message from the Cuban intelligence directorate to Hernández's call signal in Miami a few days before the shoot-down that "under no circumstances" should agents fly with BTTR planes from 24-27th February "in order to avoid any incident of provocation that they may carry out and our response to it"; a message from Hernández after the incident expressing satisfaction that the operation "to which we contributed a grain of salt" ended successfully; and an order from the Cuban Directorate of Intelligence granting Hernández recognition for his results on the job "during the provocations carried out by the government of the United States this past 24th February of 1996". [33]

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[32] He was charged under 18 U.S.C. Sections 1111 and 1117. Section 111 provides that anyone who within the special maritime or territorial jurisdiction of the US is guilty of murder in the first degree shall be punished by death or life imprisonment; Section 1117 provides a penalty of "imprisonment for any term of years or for life" for a conspiracy to violate Section 1111.

[33] The significance of the intercepted messages was disputed by the defence at trial, including the message "recognizing" Gerardo's role in the operation, which the defence suggested could have referred to a different operation occurring at the time.

Although Cuba always maintained that it shot down the planes during an illegal incursion into its territory, US radar indicated that the shoot-down occurred a few miles outside Cuba in international airspace, which would put it within US jurisdiction.[34] However, the defence argued at trial and on appeal that the evidence supported an assumption by Hernández that any confrontation planned by the Cuban authorities, even had he been party to it, would take place in Cuban airspace, which would not have been an offence under US federal law. They pointed, among other things, to the fact that the BTTR had frequently flown unauthorized planes over Cuban territory in the two years prior to the shoot-down, and to an intercepted message from Cuba introduced by the prosecution, which had specifically instructed Hernández to report any planned violations of Cuban airspace.

In June 2008, by a majority of two to one, the 11th Circuit appeals panel rejected Hernández's argument that his conviction should be reversed because the government had failed to prove that he intended to commit murder within the jurisdiction of the USA, failed to prove that he knew the object of the conspiracy, and failed to prove that he had acted with malice aforethought. In his majority opinion, Judge Pryor wrote that, while the statute required proof of pre-meditated attempt to commit murder, no separate test of *mens rea* (intent) was required with regard to jurisdiction, a position which was strongly disputed as a matter of law by dissenting Judge Kravitz. [35]

In his ruling, Judge Pryor held that, even assuming that specific proof of intent was required for both the shoot-down and where it occurred, there was "ample evidence" of this from the messages cited above.[36] However, Judge Birch, in concurring with Judge Pryor's majority opinion, wrote that it "presents a very close case". Judge Kravitch entered a strong dissent, stating her view that "the Government failed to provide sufficient evidence that Hernández entered into an agreement to shoot down the planes at all", noting the nonspecific nature of the messages the prosecution had entered as key evidence. She also agreed with the petitioners that any evidence that was presented pointed to a plan for the shoot-down to occur in Cuban rather than international airspace, referring to the repeated BTTR incursions into Cuban airspace, messages encouraging Cubans (including the pilots of Cuban fighter planes) to bring an end to the Castro regime, repeated verbal

[34] As the trial judge instructed the jury in her summing up, the special maritime jurisdiction of the USA includes an aircraft belonging in whole or in part to the USA or any US citizen while such aircraft is in flight over the high seas. The high seas include all waters beyond the territorial seas (12 nautical miles off the coastlines) between the United States and Cuba.

[35] Judge Kravitz noted that in order for there to be a conspiracy under Section 1117 of the statute (see note 30, above), there must be an unlawful objective and that a two pronged approach was thus required, with separate proof of intent to conspire to shoot-down the planes, and proof of an agreement for this to occur in international, as opposed to Cuban, airspace (page 96, note 3 of the 11th Circuit panel ruling, 4 June 2008, Kravitz dissent).

[36] 11th Circuit Court of Appeals ruling, 4 June 2008, at page 62.

warnings by Cuba to the US government and Federal Aviation Authority (FAA) not to allow unauthorized planes to fly into its airspace, and the absence of any prior threats or attacks by Cuban fighter planes on BTTR planes during approximately 2000 earlier flights in international airspace.

The 11th Circuit majority held that a reasonable jury could infer the necessary intent to commit an unlawful act under the statute from Hernández's statement that the operation had ended successfully, as well as the commendation from Cuba post the event. The petition for certiorari to the US Supreme Court disputes that these two isolated statements satisfied the necessary burden of proof, noting that Cuba had maintained throughout that the shoot-down had occurred over its own airspace, and stating that "…to the extent that any relevant inference can be drawn from the evidence … it is that the planes were intended to be shot down in Cuban territory, not US jurisdiction". It submitted that the jury's inference was not reasonable in the face of all the evidence and that, in dismissing the appeal, the 11th Circuit majority had failed to heed the US Supreme Court's admonition that courts must "scrutinize the record … with special care in a conspiracy case".[37]

The petition for certiorari also noted that the district court had agreed with the petitioners that the charge of conspiracy to commit murder (which applies only to an "unlawful killing"), required the government to prove beyond a reasonable doubt that the conspirators planned to shoot down the planes in US jurisdiction. The government had submitted that such a requirement presented an "insurmountable hurdle" which would "likely result in the failure of the prosecution on this count".[38] Despite the fact that the prosecution was unable to present any direct evidence of such an agreement, the jury nonetheless convicted on this and all other counts. The petition for certiorari suggested that the verdict was further indication of the "fear and hostility that inevitably influenced the jury's deliberations".

On the basis of the evidence presented, Amnesty International believes there are serious questions as to whether the government discharged its burden of proof

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[37] Petition for Writ of Certiorari to the US Supreme Court, page 34 (filed January 2009) (Hereafter referred to as Petition for Certiorari).

[38] Petition for Certiorari, page 4. Amnesty International understands that, in the instruction conference, the trial judge indicated that, on the charge of an "unlawful killing", she would require the government to prove Hernández's specific intent for the shoot-down to occur in international airspace. The government's statement that this would present an "insurmountable hurdle" was contained in its appeal to bar the trial judge from including such an instruction to the jury (Emergency Petition for Writ of Prohibition, (11th Circ. May 25, 2001). The government's appeal on this issue was rejected. In the event, the trial judge failed to include an unambiguous instruction to the jury on the specific intent required as to jurisdiction. (Her actual instructions were that the jury had to find beyond reasonable doubt: that defendant caused the death of the victims with "malice aforethought"; that he did so with "premeditated intent"; and that the killing occurred within the special maritime or territorial jurisdiction of the United States. A senior counsel for the petitioners has told Amnesty International that this was an error by the trial court which should have been challenged at the time.)

beyond a reasonable doubt that Hernández planned for a shoot-down to occur, or for such a confrontation to take place in international, as opposed to Cuban, airspace which, in the latter case, would not have been a crime as charged under US law. [39] This raises a concern as to whether the presumption of innocence – an essential component of the right to a fair trial – was preserved in this case. The jury's unanimous conviction on the charge, despite the lack of conclusive evidence, raises further questions about the prejudicial impact of the trial venue and other pressures cited above.

CONCLUSION

Amnesty International recognizes that the case brought against the five Cuban men is a complex case in which the defendants were charged with serious crimes. They were afforded independent counsel and were tried before a jury in a US criminal court following rules of criminal procedure which do not on their face violate international fair trial norms, and with full rights of appeal. However, the organization believes that the concerns outlined above combine to raise serious doubts about the fairness of the proceedings leading to their conviction, in particular the prejudicial impact of publicity about the case on a jury in Miami. Amnesty International hopes that these concerns can still be given due consideration by the appropriate appeal channels. Should the legal appeals process not provide a timely remedy, and given the long prison terms imposed and length of time the prisoners have already served, Amnesty International is supporting calls for a review of the case by the US executive authorities through the clemency process or other appropriate means.

[39] In raising questions about the sufficiency of the evidence as to Hernández's alleged role in the shoot-down, Amnesty International is not pronouncing on the legality or otherwise of the actions taken by the Cuban military in shooting down the planes, whether in Cuban or international airspace, which the Inter-American Commission on Human Rights concluded was a disproportionate use of force and a violation of the right to life. An investigation by the Independent Civil Aviation Organization (ICAO) also found that Cuba had violated international law in shooting down unarmed civilian aircraft without warning, a finding the Cuban government has disputed.

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