

I
Remember Elian?

***"It takes all the running you can do,
to keep in the same place"
(Through the looking glass)***

The case of Elian González, a six years old boy forcefully retained by his unknown great-uncles against the will of his father and in clear defiance of US law and decency was widely reported by all the media around the world. Miami, the place of the kidnapping, became a kind of secessionist city in North America when the Mayor, the chief of police, the politicians, every newspaper and local radio and TV broadcasters, together with religious and business institutions, joined the most notorious terrorist and violent groups in opposing the Courts and government orders to free the boy.

It was necessary that a Special Forces team sent from Washington DC launched a surreptitious and swift operation to occupy several houses, disarm the heavily armed individuals hidden there and in the neighborhood to save the child and restore law.

Everybody follow that story. Day in and day out.

But practically nobody knew that, at the very same time, in exactly the same place, Miami, five other young Cubans were arbitrary deprived from their freedom and subjected to a gross miscarriage of justice.

Gerardo Hernández, Ramón Labañino, Antonio Guerrero, Fernando González and René González were detained in the early hours of Saturday September 12th, 1998, and locked for the next 17 months in punishment cells, in solitary confinement. The main accusation against them-as recognized by the prosecutors and the judge from their indictment to the last day of the trial-was that they had peacefully, with no weapons, penetrated anticuban terrorist groups with a view of reporting to Cuba, about their criminal plans.

Was it conceivable to have a fair trial in Miami for any Cuban revolutionary facing such an accusation? Could that happen while the kidnapping of Elian was going on with its surrounding atmosphere of violence, hatred and fear?

According to the prosecution it was perfectly possible. In their words Miami was *"a very large, diverse, heterogeneous community"* capable of handling any sensitive issue even those involving the Cuban Revolution. They repeated that line when rejecting the more than ten motions presented by the defense lawyers requesting a change of venue before the start of the trial.

The same government that was obligated to deal with Miami as a sort of rebel city and to sent there secretly its forces to restore legality, lied

repeatedly on the venue issue denying the defendants a right so cherished by Americans, and refused to move the proceedings to the neighbouring city of Fort Lauderdale, half an hour away from Miami.

Ironically a few years later, in 2002, when the government was the object of a civilian complaint of an administrative nature, of far lesser significance-later resolved by an out of Court settlement-, and only indirectly related to the Elian case, they asked for a change of venue – to Fort Lauderdale-affirming that *“anything related to Cuba”* was impossible to get a fair trial in Miami. **(Ramírez vs. Ashcroft, 01-4835 Civ-Huck, June 25, 2002)**

Such a flagrant contradiction, a clear proof of prosecutorial misconduct, of real prevarication, was one of the main factors leading to the unanimous decision of the Court of Appeals panel, in 2005, to vacate the convictions of the Five and order a new trial. **(Court of Appeals for the Eleventh Circuit, No. 01-17176, 03-11087)**. That historical decision was later reversed by the majority of the entire Court under the pressure of Attorney General Alberto González in an action that went contrary to the normal US legal practice. Mr. González successful move, one manifestation of his peculiar legal philosophy, foreclosed the possibility of a just resolution of this case in manner that would have honour the United States.

The panel decision, an exceptionally sound and solid 93 pages document including irrefutable facts about the half century old terrorist war against Cuba, remains an outstanding moment in the best American tradition and will continue to be a text to be analyzed with respect by scholars and law school students.

But that’s another chapter in the long saga of the Cuban Five.

Elian is about to finish High School and continues to attract the attention of foreign media and visitors who keep going to Cardenas, the beautiful town where he lives. When travelling towards Elian’s home they will be surprised by billboards demanding freedom for five youngsters they never heard off before.

In Leonard Weinglass words: *“The trial was kept secret by the American media. It is inconceivable that the longest trial in the United States at the time it was taking place was only covered by the local Miami press, particularly where generals and an admiral as well as a White House advisor were all called to testify for the defense. Where was the American media for six months? Not only was this the longest trial, but it was the one case involving mayor issues of foreign policy and international terrorism. The question should be directed to the American media, with continues to refuse to cover a case with such gross violations of fundamental rights, and even violations of human rights of prisoner”*. (www.antiterroristas.cu September 12, 2003).

Elian was saved because Americans knew about his case and got involved and made justice prevail. The Five are still incarcerated –it will be 11 years next September- victims of a terrible injustice, because Americans are not permitted to know.

The Five are cruelly punished because they fought against terrorism. They are heroes. But forbidden heroes.

II Justice in Wonderland

"Sentence first-verdict afterwards"
Alice's adventures in Wonderland, Lewis Carroll

Having been defeated on the issue of venue the outcome of their trial was predetermined. It will go strictly in accordance with the Queen's prophecy.

The American media played a very important two-pronged role. Outside Miami it was and it continues to be how Weinglass so aptly described contrasting sharply with their role within Dade County, both offering an impressive show of discipline.

The local media not only intensively cover the case but intervened actively on it as if they were part of the prosecution. The Five were condemned by it even before they were first indicted.

Very early in the morning on Saturday September 12th 1998 each media outlet in Miami was talking, without breathing, about the capture of some "terrible" Cuban agents "*bent to destroy the United States*" (the phrase that prosecutors love so much and will repeat time and again during the entire process). "*Spies among us*" was the headline that morning. At the same time, by the way, the Miami FBI chief was meeting with Licoln Díaz-Balart and Ileana Ross Lehtinen, representatives of the Batista-terrorist gang in federal Congress.

An unprecedented propaganda campaign was launched against five individuals who could not defend themselves due to the fact that they were completely isolated from the outside world, day and night, for a year and a half, in what is accurately described in prison jargon as the "*hole*".

A kind of media circus has surrounded the Five since they were detained all the way until now. But only in Miami. Elsewhere in the United States they have only gotten silence. The rest of the country does not know much about this case and is kept aside, on the dark, as if everybody accepted that Miami -that "*very diverse, extremely heterogeneous community*" as described by his D.A- belongs to another planet.

That could have been a reasonable proposition if it were not for some rather embarrassing facts recently discovered. The media people involved in the Miami campaign - "*journalists*" and others- were paid by the US government, were in its payroll as employees of the radio and TV anticuban propaganda machine that has cost many hundreds of millions of US tax payer's dollars.

Without knowing it Americans were forced to be very generous, indeed. There is a long list of "*journalists*" from Miami who covered the entire trial of the Five and, at the same time, were receiving juicy federal checks (for those interested, all the names and what they got for their "*work*" is on www.freethefive.org).

The Court of Appeals decision on 2005 provides also a good summary of this propaganda campaign before and during the trial. That was one of the reasons leading the panel "*to vacate the convictions and order a new trial*". Miami was not a place to have even the appearance of justice. As the judges said "*the evidence submitted in support of the motions for change of venue was massive*". **(Court of Appeals for the Eleventh Circuit, No. 01-17176, 03-11087)**

Let's clarify something. Here we are not talking about journalists in the sense Americans outside Miami may be thinking of. We are referring to Miami "*journalists*", something quite different.

Their role was not to report the news but to create a climate guaranteeing conviction. They even called for public demonstrations outside the office of defense counsel and harass prospective jurors during the pretrial phase. The Court itself expressed concern about the "*tremendous amount of requests for the voir questions in advance of their been asked, apparently destined to inform their listeners, including members of the venire, of the questions prior to the time they are posed to them by the Court*".

We are talking about a bunch of individuals who harassed the jurors, following them, with cameras, through the streets, filming their car licenses and showing them on TV, tracking them inside the Court building, down to the jury room's door, during the entire seven months trial proceedings, all the way to the last day.

Judge Leonard more than once protested and begged the government to stop such a deplorable masquerade. She did that at the very beginning of the trial, on several occasions thereafter and until the very end. To no avail. **(Official transcripts of the trial, p. 22, 23, 111, 112, 625, 14644-14646).**

The government was not interested at all in having a fair trial. During the jury selection process it was very keen in excluding the majority of African

American prospective jurors. It also excluded the three individuals who didn't manifest strong anti Castro sentiments.

By that time Elian González has been rescued but he was very much in the minds of the jurors. As one of them said during voir dire: *"I would be concerned about the reaction that might take place ... I don't want rioting and stuff like that to happen like what happened in the Elian case"*. Or in the words of another: *"I would be a nervous wreck if you wanted to know the truth ... I would have actual fear for my own safety if I didn't come back with a verdict that was in agreement with the Cuban community"*.

In that ambience of fear begun the longest trial at the moment in American history. And the one that the big media *"chose"* to ignore.

III The face of impunity

As they recognized during voir dire, the kidnapping of Elian González and its consequences for the community was very much in the minds of those chosen to be jurors at the trial of the Cuban Five a few months after the six year old boy was rescued by the federals.

Like everybody else they had followed the events related to Elian which saturated the news. The faces of the kidnapers, their promoters and supporters, as well as others involved in the scandal have become quite familiar to the jury members. The faces, and two features of the Elian drama with a unique character and a direct connection with the process of the Five Cubans.

First, the perplexing behavior of every Miami public official, from its Federal Congressmen, the Mayor and the City Commissioners to firemen and members of the police force, who openly refused to obey the law and did nothing to put an end to the most publicized case of child abuse ever to occur. And, secondly, but not less astonishingly, that nothing happened to a group of individuals that so clearly had violated the law with the abduction of a child and the violence and disturbances they spread over the town when he was saved by the federal government. Nobody was prosecuted, arrested, or fined. No local authority was dismissed, substituted or invited to resign. The Elian case demonstrated how anti-Castro impunity reign over Miami.

When the jurors sat first at the Court room to do their citizens duty they were probably surprised. There, live, were the *"Miami celebrities"* that they have been so accustomed to watch, day and night, on local TV. And they were together, sometimes smiling and embracing each other, as old pals. The kidnapers and the *"law enforcement"* guys hand and glove with the

prosecutors (those valiant people who never show up when a little boy was being molested in front of the media)

The jurors spent seven months in that room looking at, and being watched by the same people so acquainted to them who now were at the witness stand, at the public area or at the news corner, the same people they will find frequently at the parking lot, at the building entrance, at the corridors. Some now and then proudly showing the attire used at their last military incursion to Cuba.

The jurors heard them explaining in detail their criminal exploits and saying time and again that they were not talking about the past. It was an odd parade of individuals appearing in a Court of law and recognizing their violent actions against Cuba that were planned, prepared and launched from their own neighborhood.

There, making speeches, demanding the worst punishment, slandering and threatening the defense lawyers.

The judge did what she could to try to preserve calm and dignity. She certainly ordered the jury, many times, not to consider certain inappropriate remarks, but by so doing their prejudicial and fearsome effects could not be erased from juror's minds.

The consequences were obvious. The Court of Appeal panel's decision stated it in clear terms: "The evidence at trial disclosed the clandestine activities of not only the defendants, but also of the various Cuba exile groups and their military camps that continue to operate in the Miami area. The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable". **(Eleventh Circuit Court of Appeal, No. 01-17176, 03-11087)**

But there was more. After hearing and seeing the abundant evidence of terrorist acts that the defendants had tried to avert, the Government succeeded in defending the terrorists by having the Court inexplicably agreeing to take from the jury the right to exonerate the Five on the basis of necessity which was the foundation of their defense.

The heart of the matter, in this case, was the need for Cuba to protect its people from the criminal attempts of terrorists who enjoy total impunity on US territory. The law in the United States is clear: if one acts to prevent a greater harm, even if he/she violates the law in the process, he will be excused from any criminality because society recognizes the necessity – even the benefit- of taking such action.

The United States, the only world superpower, has interpreted such universal principle in a manner leading to war in faraway lands in the name of fighting terrorism. But at the same time it refused to recognize it to five

unarmed, peaceful, non-violent persons who, on behalf of a small country, without causing harm to anybody, tried to avoid the illegal actions of criminals that have found shelter and support in the US.

The US government, through the Miami prosecutors, went even farther, to the last mile, to help those terrorists. They did it very openly, in writing and with passionate speeches that curiously were not considered newsworthy.

That was happening in 2001. While the Southern Florida prosecutors and the local FBI were very busy harshly punishing the Cuban Five and protecting *"their"* terrorists, the criminals preparing the 9/11 attack had been training, unmolested, in Miami for quite some time. They should have had a good reason to prefer that location.

IV In Their Own Words

The disproportionate prison terms imposed on the Cuban Five – Gerardo Hernandez Nordelo (2 life terms plus 15 years), Ramón Labañino Salazar (1 life term plus 18 years), Antonio Guerrero Rodríguez (1 life term plus 10 years), Fernando González Llort (19 years) and Rene Gonzalez Sehwerert (15 years) – contrast sharply with those applied in recent years in the United States on other persons accused of truly practicing espionage, sometimes at an uncommon scale, and even on some tied to violent armed actions against the United States. None of them was condemned to life sentences; all of them received lesser sentences than the Cuban Five, some have already served their sentences and are free and others, convicted of espionage, have had their charges withdrawn by the Obama administration and were set free.

The excessive nature of the sentences of the Five is an indication of the vengeful political motivation of the whole trial, as are the conditions of their incarceration, including the very serious obstacles for family visits that go to the extreme of having always denied visas to Gerardo and Rene's wives.

But there is an even more revealing aspect demonstrating that the purpose of the US Government was to give shelter and protect anti-Cuban terrorists, to prevent their sinister plans from being discovered, thus becoming accomplice and cover-up for their future outrages. For the Bush administration that was as important, or more, than the extravagant years of incarceration. That was what the prosecutors said, vehemently and in rather graphic terms, when asking the Court for an additional punishment: "incapacitation".

What does that mean? In their own words, for the government it was essential to ensure that these five individuals, after serving their prison

terms, could never again do anything that may affect the activities of the terrorists who operate in Miami under the protection of the US Government. To guarantee that, the prosecutors requested, and the Court granted, specific provisions on each sentence, making certain that, after completing their entire period of incarceration, even one and more life terms, the defendants will be prevented from trying to do what they did prompting their imprisonment.

Gerardo, Ramón and Fernando were born in Cuba and as undesirable aliens, after terminating their prison terms will be immediately expelled from the US territory. That was specifically incorporated in each of their sentences including Gerardo's, who after spending in prison 15 years of his second life will immediately be deported (Transcript of sentencing hearing before the Honorable Joan A. Lenard, December 12, 2001, page 93).

René and Antonio posed a particular problem. Having been born in Chicago and Florida, respectively, they are both US citizens by birth and can not be forced to leave the country. That called for a more imaginative thinking and inspired rhetoric on the part of the prosecutors. And they showed plenty of both.

A more precise and candid explanation of "incapacitation" was required.

First came René, sentenced "only" to 15 years. The prosecutors expressed plainly their grave concern with the prospects of a still young man getting free and going back attempting to do again what he had done.

The Court, conceding to the government anxiety, added this peculiar requirement to René's sentence: "As a further special condition of supervised release the defendant is prohibited from associating with or visiting specific places where individuals or groups such as terrorists, members of organizations advocating violence, and organized crime figures are known to be or frequent." (Transcript of Sentencing Hearing before the Honorable Joan A. Lenard, December 14, 2001, pages 45-46).

And then it was the turn of Antonio Guerrero, who had already received a life plus 10 years in prison. The prosecutors had to employ all the resources of their eloquence. For the government "incapacitation" was of paramount importance. It could not take any chances and when Antonio faced the Court on December 27th, 2001 it was added to his sentence, word by word, the same "special condition" imposed previously to René.

All that happened in December 2001, just three months after the horror of 9/11. Since that fateful day George W. Bush became famous calling for an all out war against terrorists and anybody that gives them any kind of help. Just one quotation from his repetitive parlance: "Any government that supports, protects or harbours terrorists is complicit in the murder of the innocent and equally guilty of terrorist crimes."

We have to take George W. Bush at his own words.

P.S. In October 2011 René González will have completed his prison term if his defense does not succeed in getting him out before. In any case he will be on supervised release during the current administration. Will President Obama try to “incapacitate” him? Shall René still be prohibited from doing anything to disturb the terrorists where they are “known to be or frequent”?

V

“Spies” Without Espionage

The first indictment in September 1998 charged the Cuban Five of being unregistered Cuban agents and of other minor violations. The government also charged three of them--Gerardo, Ramón and Antonio--with “conspiracy to commit espionage” (Count Two of the indictment)

Prosecutors didn’t accuse any of them of actual espionage for a very simple reason: there was not such a thing and thus it could never be proven. The prosecutors went even farther. At their opening statement they warned the jury not to expect them to present any secrets or anything of that sort. The only thing the prosecution needed was to “convince” the jurors that the defendants were really bad people capable of conceiving an attempt to endanger the national security of the United States sometime in a hypothetical future. And, they argued, the defendants had to get the most severe punishment possible because they were the really bad guys disrupting the peace and tranquility in Miami. Remember Elian?

In order to achieve that goal the prosecutors, notwithstanding what their own indictment said, made the most inflammatory kinds of statements at trial, accusing the Five of no less than trying “*to destroy the United States*” and reminding the scared jurors that if they failed to condemn them they will “*betray the community*”.

The media did the rest of the job. They have always portrayed the Cuban Five as “spies” or as people accused of being “spies”. The media went into overdrive in performing their task. They keep repeating the same tune even after the *en banc* Court of Appeals unanimously determined in September 2008 that there was no evidence that the accused had “*gathered or transmitted top secret information*” or that they had damaged the national security of the United States and thus it decided that the sentences for Charge 2 (conspiracy to commit espionage) were erroneous, it vacated them and remanded Ramon and Antonio for resentencing (**Eleventh Circuit Appeals Court, No. 01-17176, D.C Docket No. 98-00721-CR-JAL, pages 70-81**). Nevertheless, even though it acknowledged that the same procedure should be applied to Gerardo, in an astounding act of

judicial discrimination, the court refused to do so adducing that a life sentence was already weighing against him.

As a matter of fact, it was very easy to realize that in this case no secret or military information was involved and that the national security of the US was never affected. That was what the Pentagon said, in clear, plain language before the trial started. That was the testimony, under oath, by Admiral (R) Eugene Carroll (**official transcripts pages 8196-8301**), Army General (R) Edward Breed Atkeson (**Idem pages 11049-11199**), General and former Commander of Southern Command Charles Elliot Wilhelm (**Idem pages 11491-11547**), Air Force Lieutenant General (R) James R. Clapper (**Idem pages 13089-13235**).

Their testimonies were not secret, but were made voluntarily in open court. Probably such a parade of distinguished and decorated military chiefs sustaining the innocence of some young Cuban revolutionaries has not happen before a US Court of law. This didn't make the news out of Miami, but the official transcripts of the trial are there for anybody to read.

Since the Cuban Five were condemned there have been other cases whose results sharply contrast with theirs. Let's very briefly consider a few of them.

Khaled Abdel-Latif Dumeisi, accused of being an unregistered agent of the Saddam Hussein Government, was sentenced in April 2004, in the middle of the US war with Iraq, to **3 years and 10 months** in prison.

Leandro Aragoncillo was found guilty in July 2007 of transmitting secret national defense information of the United States (around 800 classified documents) obtained from his office in the White House, where he worked as military assistant to Vice Presidents Al Gore and Dick Cheney. Mister Aragoncillo was sentenced to **10 years in prison** while his co-conspirator Michael Ray Aquino got **6 years and 4 months**.

Gregg W. Bergersen, a Defense Department analyst was found guilty in July 2008 of providing national defense information to unauthorized persons in exchange for money and gifts and was sentenced to **4 years and 9 months** in prison.

Lawrence Anthony Franklyn, a US Air Force Reserves colonel, working in the Defense Department was found guilty of giving classified and national defense information, including military secrets, to representatives of a foreign government and was sentenced to **12 years and 7 months**. But he never entered a federal prison. He was free while appealing and last May the Justice Department dropped the charges that sustained his case.

It goes without saying that none of the cases referred to above were tried in Southern Florida or involved any attempts to frustrate criminal plans.

The Cuban Five got, together, **4 life terms plus 77 years**. They didn't work at the White House, or the Pentagon, or the State Department. They never had or sought access to any secret information. But they did something unforgivable. They fought anti-Cuban terrorism and they did it in Miami.

VI **Indictment À La Carte**

More than seven months after the Cuban Five were arrested and indicted a new charge was presented by the US Government. Again, the charge was one of "conspiracy", but this time to commit murder in the first degree and was brought specifically against one of the Five, Gerardo Hernández Nordelo.

The new indictment came after a public campaign in Miami actively promoted by "journalists" on the US Government payroll, including reports about meetings in public places attended by well-known Cuban exile leaders, US prosecutors and FBI officials, in which the accusation against Gerardo was openly discussed. It became a clear demand by the most violent groups in town and was a central focus of the local media.

The Government acquiesced to the demand and introduced the Second Superseding indictment whose essential new feature was adding this "crime" to Gerardo's list of charges.

This was a political concession to anti-Cuban terrorists, who were seeking revenge for the downing by Cuba's Air Force, in February 24, 1996 of two airplanes (Model O2 used by the US Air Force first in Vietnam and later in El Salvador wars, as was concretely the case with these two planes) piloted by members of a violent anti-Cuban group, an event that had taken place two years before the Cuban Five were detained, when those airplanes were within Cuban airspace.

The timing was very suspicious, indeed. According to information provided by the Government at trial, the FBI had found the real nature of Gerardo's revolutionary mission in Miami and was monitoring him and controlling his communications with Havana at least a couple of years before the downing of the planes. If that incident was a result of a "conspiracy," in which Gerardo was a key participant, why wasn't he arrested in 1996? Why was this issue not even mentioned in September 1998 when he was first detained and indicted?

The planes belonged to a group led by José Basulto, a veteran CIA agent involved in many paramilitary actions since 1959, included the Bay of Pigs invasion and a number of assassination attempts on Fidel Castro. In the 20

months preceding the incident, this group had penetrated Cuban airspace 25 times, each one denounced by the Cuban government.

After so many diplomatic démarches the US Government wanted to appear responsive. It initiated an investigation about those flights, asked for Cuba's help in providing details of previous provocations, acknowledged their receipt and thanked for them. On February 24, 1996 such administrative proceedings had not been completed, but later Mr. Basulto was deprived by the Federal Aviation Administration (FAA) of his pilot license and he doesn't fly anymore (at least legally).

The provocateurs had blatantly announced that they will continue making illegal flights into Cuba's airspace and even proclaimed that the island, which was at the time suffering its worst crisis ever – worse in economic terms, that the Big Depression, according to a UN report – was not able to respond to their illegal incursions. In January, Mr. Basulto brought with him an NBC TV crew from Miami who filmed and broadcasted how they overflowed downtown Havana throwing out propaganda and other materials. Cuba made it public that such provocations will not be tolerated anymore, made the proper notifications to all that may be concerned, including the US Government, the State Department and the FAA, which in turn warned Basulto and his group that they should refrain from such flights.

The alleged "conspiracy" was in itself a monumental stupidity, incomprehensible to any rational mind. It supposed that the Cuban government had decided provoke an all-out war with the United States, a military confrontation that obviously would have resulted in a terrible blow not only for the Cuban government, but for the entire nation and its people. In any crime motivation is always a key factor, a decisive cue. What could have been Cuba's motivation to provoke such an event precisely at that moment, the most risky for the survival of our country without allies or friends in a world and a hemisphere under the full control of the United States in 1996?

Cuba did exactly the opposite. It denounced one by one, each provocation to the FAA and to the International Civil Aviation Organization (ICAO, the UN family institution dealing with these matters) and sent dozens of diplomatic notes to the State Department. But Cuba went farther. It did his best to reach out to the highest level of the US Administration, the White House, trying to prevent more incidents.

The New Yorker issue of January 1998 dedicated to Cuba on the occasion of the Pope's visit included a serious article in which a fairly objective account of those efforts by Cuba can be found. (Carl Naguin, Annals of Diplomacy Backfire, The New Yorker, January 26, 1998, <http://www.newyorker.com/archive/1998>)

Yes, there was a conspiracy to provoke the tragedy of February 24, 1996. But it was the entire and exclusive work of the same Miami groups that have launched a half-century terrorist campaign against Cuba, the same gang that will afterwards kidnap Elian Gonzalez, a six-year-old boy. Events from which they always came out with impunity.

VII It Happened in Miami

The Court of the Southern District of Florida is not an international tribunal, neither is it a UN body having jurisdiction on matters affecting relations between countries. It has a very specific duty, which is to determine if a particular defendant is guilty or not of a concrete charge. In instructing the jury in the case of Gerardo Hernandez, the Court recalled the language of the Government's indictment:

"Count 3 charges that defendant Gerardo Hernandez conspired with other persons to perpetrate murder, that is, the unlawful killing of human beings with malice aforethought and premeditated intent in the special maritime and territorial jurisdiction of the United States." (Transcript of Trial before the Honorable Joan A. Lenard, June 4, 2001, pages 14587 – 14588)

Judge Lenard pointed out that Gerardo:

"Can be found guilty of that offence only if all of the following facts are proved beyond a reasonable doubt.

First. That the victims named in the indictment are dead.

Second. That the defendant caused the death of the victims with malice aforethought.

Third. That the defendant did so with premeditated intent.

Fourth. That the killing occurred within the special maritime or territorial jurisdiction of the United States." (Idem pages 14598 – 14599).

She elaborated further:

"To kill with malice aforethought means to kill another person deliberately and intentionally ... Killing with premeditated intent is required in addition to proof of malice aforethought in order to establish the offence of first degree murder. Premeditation is typically associated with killing in cold blood and requires a period of time in which the accused deliberates or thinks the matter over before acting.

It must be long enough for the killer after the intent to kill, to be fully conscious of the intent. You are instructed that the location of the alleged murder, as described in the indictment, if you find beyond a reasonable doubt that such offence occurred there, would be within the special maritime or territorial jurisdiction of the United States." (Idem pages 14599 – 14600).

Such a crime had never occurred. During seven months of trial the prosecutors failed to provide any piece of evidence implicating Gerardo in the tragic event of February 24, 1996, nor could they demonstrate, "beyond a reasonable doubt", the exact location of the incident--something that ICAO experts had already failed to determine.

It should be noted, however, that Cuban radars showed clearly the shoot-down taking place well inside our territory, that the only remnants were found very close to Havana waterfront and that the US coast guard, having failed to find anything in the international area, asked on February 25th officially through the State Department for Cuba's permission to search within our territorial waters. The local media – the same government-paid "journalists" that had fabricated the accusation in Count 3 – became nervous and even announced an imminent defeat.

A few days earlier, as soon as the judge made it known to the parties her instructions to the jury, the prosecutors took what they described as "the unprecedented step of petitioning" – to the Court of Appeals – "for a writ of prohibition" because "in light of the evidence presented in this trial, this [the instructions to the jury] presents an insurmountable hurdle for the United States in this case, and will likely, result in the failure of the prosecution on this count." (Emergency Petition for Writ of Prohibition, May 30, 2001, pages 4 and 21).

After recognizing again that the instruction "imposes an insurmountable barrier to this prosecution" the government asked the Court of Appeals to urgently decide:

"That the district court be ordered to instruct the jury that it is not necessary for the jury to find that defendant Hernández or his co-conspirators in Count Three of the indictment agreed that the murders would occur in the special maritime and territorial jurisdiction of the United States."

"That the district court be prohibited from giving the pattern jury instruction on first degree murder and from instructing the jury that it must find that defendant Hernandez conspired to commit premeditated murder." (Idem, page 39)

The Court of Appeals denied the emergency petition and accordingly the district judge maintained her instructions as quoted above.

Some on the defense team were jubilantly celebrating a victory that was anticipated even by the prosecutors.

But it took the jurors a few minutes, without asking any questions, to find Gerardo guilty of conspiracy to commit murder in the first degree in the special maritime and territorial jurisdiction of the United States, a "crime" that he did not commit and which the prosecutors had desperately tried to withdraw.

That happened in Miami. In Miami, it is normal to kidnap with impunity a six-year-old boy, so why should it be difficult to condemn a young man for a "crime" that didn't occur?

VIII **Pryor's Judgement**

When the historic unanimous decision was reversed at the urging of George W. Bush's Attorney General ([Remember Elian?](#), CounterPunch, August 11, 2009), the same 3-judge panel was to hear the remaining issues other than venue, which had been the one upon which they had expressed their landmark opinion. However, in the meantime, one jurist, the oldest and most liberal, had retired and somebody else was designated to substitute for him. The one chosen for that role was a Bush recess appointee, William H. Pryor, whose nomination, described as "one of the most contentious in recent history", had provoked uproar in the Senate, which confirmed him over the opposition of 45 Senators. (For a detailed investigation into Pryor's legal career see Jeffrey St. Clair's [Pryor Unrestraint](#), CounterPunch, June 14, 2003.)

Senator Kerry, claimed that the new judge "has been a constant advocate for scaling back constitutionally guaranteed rights" with his "consistent pursuit of extreme and incorrect legal views ... as a result our Federal judiciary will have less ability to protect the constitutional rights we hold so dear" (Congressional record, Senate June 14, 2005).

Pryor was criticized by some major newspapers, and was described as a "right wing zealot not fit to judge". In summing up his pedigree Jeffrey St. Clair writes: "he goes much, much farther than even many of the most extreme ideologues in his party" ("Pryor Unrestraint", CounterPunch, June 14, 2003).

Mr. Pryor wrote the opinion for the Court rejecting the other issues presented by the defense in language that at times was closer to a slanderous anti-Cuban vulgar diatribe than to the balanced, sober style of the judiciary (even some well-known terrorists, rightly described as such by

the previous panel, were now transmuted into patriotic freedom fighters). Interestingly the accusation of "spying" was so clumsily fabricated and the Miami trial included other wrongs so obvious that even Pryor had to agree with the other two judges in vacating the sentences of three of the defendants. ([Spies Without Espionage](#), CounterPunch August 28-30, 2009).

This time the panel was divided on a very crucial point: Count 3, conspiracy to commit murder. One of the judges, J. Birch, while concurring with Pryor's opinion recognized that "this issue presents a very close case" and reiterated "that the motion for change of venue should have been granted" adding that "the defendants were subjected to such a degree of harm based upon demonstrated pervasive community prejudice that their convictions should have been reversed" (US Court of Appeals for the Eleventh Circuit N. 01-17176, DC Docket No. 98- 00721 CR-JAL, Page 83).

Judge Phyllis Kravitch, in an impressive 15-page dissent, demonstrated the terrible injustice committed by her colleagues against Gerardo Hernández.

She pointed out:

"A country cannot lawfully shoot down aircraft in international airspace, in contrast to a country shooting down foreign aircraft within its own territory when the pilots of those aircrafts are repeatedly warned to respect territorial boundaries, have dropped objects over the territory, and when the objective of the flights is to destabilize the country's political system. Thus, the question of whether the Government provided sufficient evidence to support Hernández's conviction turns on whether it presented sufficient evidence to prove that he entered into an agreement to shoot down the planes in international, as opposed to Cuban airspace" (Idem Pages 94-95) and in this regard "*the Government cannot point to any evidence*" (Idem Page 98).

But beyond the issue of the location of the incident "the Government failed to provide sufficient evidence that Hernández entered into an agreement to shoot down the planes at all. None of the intercepted communications the Government provided at trial show an agreement to shoot down the planes. At best, the evidence shows an agreement to 'confront' BTTR planes. But a 'confrontation' does not necessarily means a shoot down."

To prove her point she referred to testimonies and videotapes presented at trial: "This evidence demonstrates the obvious: there are many ways a country could "confront" foreign aircraft. But the Government presented no evidence that when Hernandez agreed to help "confront" BTTR that he agreed confrontation would be a shoot down. To conclude that the evidence does show this goes beyond mere inferences to the realm of speculation ... Because so much evidence points towards a "confrontation" other than a shoot down, I cannot say that a reasonable jury – given all the evidence –

could conclude beyond a reasonable doubt that Hernandez agreed to a shoot down." (Idem Pages 96-97)

It was so obvious that the Government itself had recognized the point in an "unprecedented" emergency petition to that very Court of Appeals: to demonstrate Gerardo's invented guilt on such a fabricated crime constituted an "insurmountable obstacle" for the prosecution.

Such would have been the case with "a reasonable jury" in any other venue. But not in Miami, where the intimidated jurors were surrounded at the courtroom by a bunch of individuals who proclaimed their terrorist exploits and were able to kidnap Elian Gonzalez, always with total impunity, and joined the Government in demanding the worst punishment for Gerardo. That could have been understood by any reasonable jurist. But not by a "right wing zealot not fit to judge."

Somebody at the White House was happy. His appointee served him well. Gerardo got his two life sentences confirmed with the reluctant and paradoxical vote of a judge, Birtch, who insisted that all of the Five "convictions should have been reversed" and a dignified lady who maintained her dissenting voice: "the Government presented no evidence" to sustain its accusation.

After Pryor's shame judgement, the Five appealed to the *en banc* Court. This time they were not contesting an unanimous and well founded decision – as the Government did in 2005 – but one clearly unfair and prejudicial that had sharply divided the panel on Count Three, with Kravitch rejecting it with impeccable consistency and Birtch – after recognizing her arguments, but ignoring the presumption of innocence and his own "reasonable doubts" – strangely decided to join Pryor's pro-Government stance and neocon logic.

But this time the Court of Appeals confirmed the disputable conclusions of the panel. The Atlanta judges even forgot that it was to them that the same Government had made an "emergency petition" admitting that it had failed to prove Gerardo's guilt.

IX **The Unheard Call**

Having exhausted their appeal efforts, the Cuban Five petitioned the Supreme Court to review their case. They were not asking too much. It was a case deserving the attention of the Justices for a number of reasons, some of a really exceptional nature.

All along the legal process – one of the most prolonged at the time in American history – a number of constitutional rights were violated, as well rulings which contradicted with the holdings in other Circuits - which are considered to be the main business of the Justices - on important issues such as venue, racial discrimination in jury selection, sentencing, and defendants and defense lawyers' rights.

It was a case, furthermore, having a direct connection with terrorist groups and their activities within the US territory – at a time when terrorism was supposed to be the biggest issue – and with clear implications in terms of international relations; a case in which generals and top military chiefs and even a president's special advisor had appeared on the witness stand. It had the distinction of being unique in several respects.

The original Court of Appeals panel's unanimous determination, after having examined all aspects of the case for several years, to set aside all the convictions and order a new trial, was in itself unique, as was the 93-page document explaining the ruling. Very exceptional was the US government decision, taken at the highest level, to demand the en banc Court to reverse the decision and very rare getting the Court agreeing to such an uncommon petition.

On the other hand, it is not a regular thing for an appellate judge to ask the Supreme Court to review a case, much less to do so twice as did Judge Birch, who repeated that demand while strangely joining Judge Pryor in his shameful judgement.

It was unique also in terms of concern and interest all over the world.

In 2005, prior to the determination of the Appeal's Court panel, a very important and also unique decision was unanimously adopted by the UN Working Group on Arbitrary Detention. This is a completely independent entity, not an intergovernmental body, with five judges – one for each Continent – not representing any UN member state and conducting themselves exclusively in a personal capacity. The UN group studied the situation of the Five at the request of their wives and mothers. The group spent several years researching the case in its entirety and interacting with the US in official correspondence. The Cuban government was never consulted, as it should not be, because Cuba was not a party to that process.

It was a history-making decision. The UN group concluded that the deprivation of liberty for the Five was arbitrary and in contravention of the relevant UN Human Rights Conventions and called on the government of the United States to take steps to remedy the situation.

The Group stated that: "the trial did not take place in a climate of objectivity and impartiality which is required" and "the Government [of the

United States] has not denied that the climate of bias and prejudice against the accused in Miami persisted and helped to present the accused as guilty from the beginning. It was not contested by the Government that one year later it admitted that Miami was an unsuitable place for a trial where it proved almost impossible to select an impartial jury in a case linked with Cuba."

"The Government had not contested the fact that defense lawyers had very limited access to evidence because of the classification of the case by the Government as one of national security" which "undermined the equal balance between the prosecution and the defense and negatively affected the ability [of the defense] to present counter evidence."

The UN experts noted that the accused "were kept in solitary confinement for 17 months," and as a consequence "communication with their attorneys and access to evidence and thus, possibilities to an adequate defense were weakened."

In conclusion they determined that these "three elements, combined together, are of such gravity that they confer the deprivation of liberty of these five persons an arbitrary character." **(Report of the UN Working Group on Arbitrary Detention E/CN.4/2006/7/Add.1 at p. 60, Opinion No. 19/2005 - United States of America)**

This was the first and only time in the history of the United States and in the history of the United Nations that a UN body had found a trial process in the US to be unfair and contrary to universally established standards of human rights and international law.

But that finding of five independent judges, none of them, by the way, a leftist or a radical, was not easily available in the American media and most Americans probably have never heard of it.

Many Americans do not know about the Cuban Five because they have not been permitted to know.

Not only was the long trial of the Five maintained in the dark, Americans have not even been allowed to know that this case has been very much in the minds of many millions around the globe. The big corporate media that didn't report their legal battle threw a similar curtain of silence around the wide, ever growing, movement of solidarity that the Cuban Five have received practically everywhere from Ireland to Tasmania, from Canada to Namibia. Churches, parliaments, human rights organizations, labor unions, writers, lawyers and peoples from all walks of life have expressed their concern and interest in all languages, English included.

But the Supreme Court did not bother to listen.

X **An Insult To Humanity**

On March 6, 2009 twelve separate amicus briefs were presented in support of the Cuban Five's petition for certiorari before the Supreme Court, the largest number of amicus filings ever to have urged Supreme Court to review a criminal conviction.

Eight briefs were submitted by institutions or persons based on the United States: National Association of Criminal Defense Lawyers; Florida Association of Criminal Defense Lawyers, Miami Chapter; National Jury Project; National Lawyers Guild and National Conference of Black Lawyers; William C. Velazquez Institute and Mexican American Political Association; Civil Rights Clinic at Howard University School of Law; Center for International Policy and Council on Hemispheric Affairs; and one amicus brief submitted by Professors Nelson P. Valdés, Guillermo Grenier, Félix Masud-Piloto, José A. Cobas, Lourdes Arguelles, Rubén G. Rumbaut and Louis Pérez, distinguished Cuban-American Scholars, authors of some of the most important books about the Cuban emigration to the US.

The support from around the world was really impressive. It included:

An amicus presented by ten Nobel Laureates: José Ramos-Horta (President of the Republic of East Timor), Wole Soyinka, Adolfo Pérez Esquivel, Nadine Gordimer, Rigoberta Menchú, José Saramago, Zhores Alferov, Darío Fo, Günter Grass and Máiread Corrigan Maguire.

Another brief was submitted by a record number of legislators from every corner of the world, including the entire Senate of Mexico and the National Assembly of Panama, both having discussed and unanimously decided to join. Also by Mary Robinson, former President of Ireland and United Nations High Commissioner for Human Rights; dozens of members of the European Parliament from every political group, including three current vice-presidents and two former Presidents and hundreds of lawmakers from Brazil, Belgium, Chile, Germany, Ireland, Japan, Mexico, Scotland and the United Kingdom.

This document added similar appeals by other Nobel Laureates, Archbishop Desmond Tutu and Harold Pinter, and by the Latin-American Council of Churches, the permanent Conference of Latin-American and Caribbean political parties, the Latin-American Parliament as well as other regional legislative bodies and specific resolutions of support approved by national parliaments from Namibia, Mali, Russia, Mexico, Brazil, Bolivia, Venezuela, Peru, Ireland, Switzerland and Belgium, among many others.

Two separate amicus came from a wide spectrum of lawyers' organizations and personalities: One was submitted by the Ibero-American Federation of Ombudsman, the Order of Attorneys of Brazil (membership 700 thousands), the Belgium bar associations, the Berlin and other German bars, the International Federation for Human Rights and a number of religious, legal, human rights organizations, law professors, and lawyers from Argentina, Chile, Colombia, Ecuador, Germany, Japan, Mexico, Panama, Portugal, Spain and the United Kingdom. Among the personalities signing it were Federico Mayor Zaragoza, former Director-General of UNESCO, and Judge Juan Guzmán Tapia of Chile.

The other amicus was presented by the International Association of Democratic Lawyers, the American Association of Jurists, the Indian Association of Lawyers, Droit Solidarité, the Haldane Society and other legal organizations from Italy, Japan, the Philippines, Portugal and Belgium.

A number of American lawyers volunteered in drafting those papers (as required by law), consulting and coordinating with the many individuals involved and presenting the briefs on time and with due respect to the technical and other parameters that the Court has established. Every individual or institution submitting an amicus brief had to identify himself/herself with specific data, to sign it personally and pay a filing fee. Pursuant to Rule 37.6 of the Court "no counsel for a party has authored this brief, in whole or in part. No person or entity other than amici curiae, or its counsel have made any monetary contribution to the preparation or submission of this brief." It was a hell of a work for which many people deserve being recognized. All the amicus briefs, along with a complete list of the amici can be found on SCOTUS blog (www.scotusblog.com) and on www.antiterroristas.cu.

We shall never know what the Justices or their clerks thought, if anything, about those documents. Nobody knows if they even glanced over them. The amici didn't get an answer or a single comment--not even a clerk's receipt note.

Nobody knows either how the Justices pronounced themselves regarding the petition for certiorari. We only learned that on June 14th the petition of the Cuban Five was thrown out with the other petitions the Court had decided not to hear.

A famous Mexican poet once defined US imperial attitude with the melding of two words: arrogance and ignorance. It appears that the Court, supremely, epitomizes both.

XI Mission Impossible?

When the Supreme Court decided not to hear the Cuban Five petition, the Justices acted exactly as requested by President Obama's Solicitor General, showing that on this issue, there has been no change, certainly not a change we can believe in.

The Supreme Court last June 14 simply joined the other two branches of Government in demonstrating their hostility towards the Cuban people. During the 1990s this official animus, had among its main features their connivance with a terrorist campaign that has cost lives, caused human suffering and material damages, which the US instead of preventing – as was its obligation – tolerated or promoted.

Immediately after the break up of the Soviet Union, Cuba entered an extremely severe economic crisis, worst for us than the Big Depression of 1929. It was precisely the time chosen by the US to strengthen its economic blockade as reflected in the Torricelli Amendment (1992) and the Helms-Burton Act (1996). The trio – Torricelli, Helms and Burton –replying to those objecting the illegal extraterritorial legislations assured their colleagues that it was the last year of the Government led by Fidel Castro.

Others made easy money in those days publishing cheap texts, announcing with specific datelines the inevitable end of the Cuban Revolution. It became an uncontested dogma for many scholars, politicians and journalists and a source of encouragement for those who have actively sought revenge for decades.

Some, unsatisfied with what they perceived as Washington's insufficient aggressiveness, tried to make a final assault on the abandoned, isolated island.

Paradoxically in September 1994 and May 1995, Cuba and the US succeeded in negotiating new migration accords in an exercise of quiet private diplomacy that involved the commitment to move towards the lifting of the embargo and a promise to curb terrorist actions against Cuba.

It was then that Mr. Basulto and his cohorts ramped up their airborne incursions. Basulto was very open in explaining his intentions. The alleged "humanitarian" nature of their previous flights – to help undocumented Cubans to enter the US – had disappeared with the new US policy, since May 2, 1995 to send them back to the Island. From that day on, as recognized by Basulto, the flights would continue and be multiplied with a subversive purpose. Almost daily he was on the media announcing the next provocation and proclaiming that Cuba was so weakened by the economic crisis that it could not protect its borders or even impede him to overfly

downtown Havana as he did on more than one occasion. The US authorities knew what he and his group were doing, as it was known by anybody having a TV set because the provocations were filmed and reported live by the Miami local stations of national TV networks.

In 1995 and early 1996 we made our utmost to persuade Washington to prevent those completely illicit air provocations. We were just asking the US Administration to respect international law and abide by its own domestic laws and regulations.

A rather intense wave of official communications took place between the authorities of both countries through which the US side explicitly recognized the illegal character of the flights and initiated, with Cuban cooperation, administrative proceedings against the transgressors. Or so they reiterated in diplomatic notes.

Apart from the open channel we warned time and again, at the highest level, both US civilian and military authorities.

Fidel Castro was personally involved in those efforts. He spent many hours with more than one US important visitor, some with clear White House endorsement. And we succeeded in getting a very specific commitment by President Clinton that those provocations will never happen again. (Indictment *À la Carte*, Counterpunch, September 3, 2009; *Annals of Diplomacy*, Backfire, The New Yorker, January 26, 1998).

Something rather strange happened on the road from Washington to Miami. It appears that President Clinton gave specific instructions to fulfill his commitment. But in that peculiar town (Remember Elian?) the US Commander in Chief's orders are not always obeyed. As soon as the Miami mafia learned of the President's instructions, the provocateurs organized their last violation. That was the real conspiracy, the only one, leading to the tragic events of February 24, 1996.

President Clinton astonishingly reacted as if he never knew anything and rushed to sign the Helms-Burton Act in a deplorable ceremony at the White House, joyfully surrounded by some of the true culprits, the very individuals who defied him. It was a presidential election year and Clinton won easily in Miami.

That experience would have been more than enough to anybody in terms of believing in the possibility of serious talks and engagement with such frivolous partners, some kind of mission impossible.

But we tried it again. We didn't have a choice.

XII Cherry Blossoms

Attracting foreign tourism was at that time – mid and late nineties – one of the few possibilities to earn much needed hard currency. Knowing that, Washington reinforced its sanctions and threats against foreign companies investing in Cuba or having any transaction with the island. Coincidentally the so-called Cuban American National Foundation (CANF) and other anti-Cuba terrorist groups openly declared such visitors “enemies” and justified violent attacks against them.

As tourists were arriving to the island in larger numbers a series of bombs exploded and others were found at our hotels and beach resorts in 1997 and 1998.

From April to September 1997 such attacks had the city of Havana as its main target. As a result, four people were wounded on July 12 when bombs exploded at the Nacional and Capri Hotels. On September 4 explosions occurred almost simultaneously in the Copacabana, Chateau and Triton Hotels and at a Havana restaurant. In the Copacabana, Fabio di Celmo, a 32-year-old Italian tourist was killed.

On August 11, 1997 in the middle of that terrorist campaign CANF made public a statement describing it as *“incidents of internal rebellion which have been taking place in Cuba over the last few weeks”* and stating that *“the Cuban American National Foundation supports these without hesitation or reservations.”*

These acts were not “internal” much less a “rebellion”. Some Central-American mercenaries arrested in Havana had admitted that they were acting under instructions of Luis Posada Carriles, a fugitive criminal who had escaped from trial for masterminding in 1976 the first midair destruction of a civil airplane ever. Posada now enjoys total impunity in Miami. On July 12, 1998 in a front-page interview with the *New York Times*, Posada Carriles admitted full responsibility for the new terrorist attacks, recognized that he was financed by CANF and cynically referred to Fabio di Celmo as a person *“at the wrong place at the wrong time”* whose death didn’t disturb him. Posada said he was able to *“sleep like a baby”*. He repeated similar words in front of a TV camera on a programme broadcasted through the United States.

Between March and April 1998, Cuba was approached several times by the State Department and their representatives in Havana to share with us some sensitive information they had gotten, the gravest of all related to possible attacks on civilian airplanes flying to the island. We spent hours jointly examining intelligence that the Americans considered so credible that the Federal Aviation Administration (FAA) issued a special warning to air companies.

In view of those positive exchanges Fidel took a very important initiative. Gabriel García Márquez, a well recognized friend of Cuba and of the leader of its Revolution, was travelling soon to attend a conference at Princeton and expected to meet President Clinton, a reader and admirer, like many millions, of the Nobel Laureate in Literature.

On April 18, Fidel personally drafted a message to Clinton and gave it to the Colombian writer who arrived to the US Capital on May 1st. García Márquez waited for several days *"in my impersonal room at the Washington hotel where I spent up to 10 hours a day writing. However, even if I refused to admit it, the true reason for my confinement was the custody of the message lying in the safety box ... I devoted myself to its custody while I continued to write, to eat my meals and to receive my visits in the hotel room."*

Unable to receive Gabo personally, President Clinton arranged for some of his closest associates to meet him at the White House on May 6. According to Gabo's report Fidel's message was taken very seriously.

One after the other, they read it with keen interest. Richard Clarke, a senior official at National Security Council, said *"that they would take immediate steps for a joint US-Cuba plan on terrorism."* James Dobbins, also a senior at NSC, *"concluded that they would communicate with their embassy (sic) in Cuba to implement the project."* Mack McLarty *"expressed his appreciation for the great importance of the message, worthy of the full attention of his Government, of which they would urgently take care."*

In closing the White House meeting McLarty said, *"Your mission was in fact of utmost importance, and you have discharged it very well."*

Both Fidel's message and García Márquez's entire and fascinating description of his mission were published, unedited, by Fidel Castro in a special public address on May 20, 2005 (["A Different Behaviour", www.antiterroristas.cu](http://www.antiterroristas.cu)).

Having concluded such a delicate task, Gabo was happy, almost completely happy:

"My only frustration on the way back to the hotel was not having discovered and enjoyed till then the miracle of the cherries in blossom during that superb spring season.

I barely had time to pack my bags and catch the flight at five that afternoon. The plane that had brought me from Mexico fourteen days earlier had had to return to base with a broken turbine and we waited for four hours at the airport till there was another available flight. The one I took back to Mexico, after the meeting at the White House, was delayed in

Washington for an hour and a half while they repaired the radar with the passengers on board.

Before landing in Mexico, five hours later, the plane had to hover over the city for almost two hours due to an out of service runway. Ever since I began flying fifty two years ago, I never had gone through anything like this. But then, it couldn't be any other way, for a peaceful adventure that will forever hold a privileged place in my memories."

XIII

History Repeats Itself

Just a couple of days after the Clinton White House encounter with García Márquez, US diplomats in Havana approached Cuban authorities. We had a number of discussions specially focused on what the US had found about terrorist plots against civilian aircrafts and the warning that the FAA felt obliged to issue. In the course of those exchanges the US asked formally for a high level FBI delegation to come to Havana with a view toward receiving from their counterparts our intelligence concerning the ongoing terrorist campaign. In preparation for that visit an Assistant Secretary of State, John Hamilton, communicated that *"this time they would like to emphasize the seriousness of the United States offer to investigate any evidence that [Cuba] might have."*

The meetings were held in Havana on June 16-17, 1998. The US team was given copious information, both documentary and testimonies. The material handed over included the investigations related to 31 terrorist acts, having taken place between 1990 and 1998, including detailed information on the financing of the most dangerous actions carried out by Luis Posada Carriles's network. The information included lists and photographs of weapons, explosives and other material seized in each case. Additionally, 51 pages with evidence concerning how the money was routed to various groups for terrorist acts on the island. The FBI also received tapes recording 14 phone conversations in which Posada Carriles referred to violent attacks against Cuba. Specific data was provided on how to locate the notorious murderer, such as his home addresses, places he frequented, and his car number plates in El Salvador, Honduras, Costa Rica, the Dominican Republic, Guatemala and Panama.

The FBI took the files of 40 Cuban-born terrorists, most living in Miami, and the clues to find each individual. The US delegation brought back with them three 2-gramme samples of explosive substances from the bombs deactivated before they could have exploded in the Melia Cohiba Hotel on April 30, 1997 and in a tourist van on October 19, 1997, as well as the explosive device confiscated from two Guatemalans on March 4, 1998.

The FBI was also given 5 video and 8 audio cassettes and their transcripts with statements by the Central Americans who had been arrested for placing bombs in hotels. There they talked about their links to Cuban gangs and in particular to Posada Carriles.

The US side acknowledged the value of the information and made a commitment to reply as soon as possible.

We never got a word back. Nobody knows for sure what the FBI did with the evidence and the thorough information they received in Havana. They certainly did not use it to arrest any of the criminals or to open any investigations.

Wasn't the State Department any more worried with the information it had gathered on its own concerning terrorist attacks against commercial airlines? What happened with their preoccupation with the lives and security of passengers, including American passengers?

Is that the way to *"take immediate steps"* on a problem *"worthy of the full attention of his Government, of which they would urgently take care"* as solemnly promised at the White House? Or *"to emphasize the seriousness of the United States"*?

It may be assumed that the FBI shared the information they got with their pals in Miami.

If facts have any meaning this must have been the case. On September 12, 1998, almost three months after the visit to Havana, we learnt through the media about the detention of Gerardo, Ramón, Antonio, Fernando and René and that Mr. Pesquera, the FBI chief in Miami, was, on that Saturday morning, visiting with Ileana Ros Lehtinen and Lincoln Díaz-Balart – the Batista-Miami Congresspersons – to inform them of the incarceration of the five Cubans.

History repeated itself. In 1996 President Clinton gave instructions to stop Brothers to the Rescue air provocations, but when his orders reached Miami, the local mob conspired to do exactly the opposite. In 1998 the very same President appeared to be willing to put an end to terrorist attacks against Cuba – and also against Americans – but when his intentions were learnt in Miami, the FBI there blew them out.

Mr. Pesquera has recognized in a press interview that his main difficulty was in getting Washington's authorization to apprehend the Five. It should have been very hard, indeed. Was not Washington supposed to be on the other side of the fence in the fight against terrorism?

But Mr. Pesquera and his cronies, won. They proved being able to ignore law and decency, and to ridicule again the US Commander in Chief. Remember Elian?

XIV **Which Side Are You On?**

FBI officials received a huge amount of concrete, detailed information about anti-Cuban terrorist groups, including their exact locations, with addresses and phone numbers, photographs and tape recordings describing sinister plans in their own voices and many other data. At no time did they protest or express concern regarding Cuba's ability or methods used to obtain such precise evidence.

They just thanked us and asked for some time, arguing that they got more evidence, far much more, than what they could have expected.

When Gabriel García Márquez met President Clinton's closest advisors at the White House on May 6, 1998, nobody asked how Cuba had unveiled those terrible plots. One of the American gentlemen just said, "We have common enemies."

It was exactly the same on every other occasion when we met in Havana, Washington or elsewhere to discuss with American officials the information we had on terrorist attempts. They never complained in any manner, directly or indirectly--not even in a whisper.

US officials never objected to our investigative efforts for some very obvious reasons. The history of violence and terror against Cuba is quite long – has lasted so far half a century – and is very well documented in an extensive bibliography partially registered in the US Congressional Record and also available in declassified, or not yet so, official papers with which our American counterparts, we should assume, are well familiar.

With such a background Cuba has the right (even the inexcusable obligation) to protect itself and its people and to discover what may be in the making among those who try to cause material damage and human suffering. This is the universally recognized principle of self defense.

The Americans were very well aware of that. As they surely remembered, when we learned about an assassination attempt against President Reagan we promptly shared the information with them, the Great Communicator's antipathy towards Cuba notwithstanding. Washington did not complain then, but expressed thankfulness.

They also knew that Cuba is just a small island in the Caribbean, with a population a little above 11 million people. Cuba does not have satellites getting data from outer space, neither has it any of the extremely sophisticated devices that are in common use by the American and other Big Powers intelligence services.

Cuba only has human intelligence. Something that is admitted now as indispensable in the United States, something that would have saved many American lives if it had been aptly used by the US before the terrible events that shook America in 2001.

And ours is not paid human intelligence. We have never spent money, as others do by many billions, to buy information or contract with expensive agents around the world. We depend on the generous heroic sacrifice of youngsters like Gerardo, Ramón, Antonio, Fernando and René.

Long before the heinous attacks of 9/11, Gerardo Hernandez Nordelo said these simple truths to an American Court that regrettably was unwilling to listen:

"Cuba has the right to defend itself from the terrorist acts that are prepared in Florida with total impunity, despite the fact that they have been consistently denounced by the Cuban authorities. This is the same right that the United States has to try to neutralize the plans of terrorist Osama Bin Laden's organization, which has caused so much damage to this country and threatens to continue doing so. I am certain that the sons and daughters of this country who are carrying out this mission are considered patriots, and their objective is not that of threatening the national security of any of the countries where these people are being sheltered."

When Gerardo wrote those words many of the individuals, who would later use civilian aircrafts as lethal weapons against Americans, were finalizing their training right there in Miami. But the local FBI did nothing to frustrate their horrendous project. They didn't have time for that. Their time was devoted exclusively to protecting their own terrorists by persecuting and punishing Gerardo and his comrades.

The FBI, at least in Miami, was not fighting terrorism. Neither was it preventing criminal attacks against Americans or Cuba. It was on the other side of the fence.

XV

The Importance of Being a Liar (1)

Guava Pastries

Luis Posada Carriles is a real VIP enjoying unique courtesies and privileges not offered to other dignitaries and celebrities. But he is also a self-confessed and duly certified international terrorist.

- Posada began his long career with the early actions against the Cuban Revolution, including the Bay of Pigs fiasco and several years as the CIA man in Venezuelan political police where he became a leader of some conspicuous torturers;
- Posada was sought by Interpol, since he escaped from a Venezuelan prison in 1985 – Hugo Chávez was still an unknown young man – while on trial for masterminding the first destruction ever of a civilian airplane in midair and the murder in cold blood of 73 human beings;
- Posada emerged immediately in Central America as a key figure in the Iran-Contra scam, being mentioned several times during the US Senate investigation and in Oliver North's notebook;
- Posada published his autobiography – a Miami bestseller - and has appeared many times in the local and US media;
- Posada twice landed on the front page of The New York Times, in consecutive issues, describing his responsibility in the bombing campaign in Cuba in the 1990s;
- Posada was found guilty by a Panamanian tribunal of crimes associated with a plot to bomb the University in order to kill Fidel Castro and hundreds of students and professors; being illegally pardon by the President of Panama, on the eve of her last day in office and after receiving special emissaries sent in a hurry by George W. Bush;
- Posada again went into "hiding" somewhere in Central America, but maintained constant communication with his pals in the Cuban American National Foundation and other terrorist groups and collected money from frequent well publicized fundraisings.

Yes, it's been a long career of infamy, always on behalf of US goals and interests as proudly proclaimed by his Miami lawyer.

If we are to believe his words all through that period Posada has visited the US several times, although unnoticed. One day he decided to settle there for good. After all, his family has been residing in Miami for decades.

And then he went back home.

Posada Carriles entered Florida in March 2005, clandestinely, without a US visa, like millions of Latinos try to do unsuccessfully time and again. But he was not arrested, much less deported. The story of how he did it in the

Santrina boat with the help of his US based terrorist network was described in a Yucatan newspaper, "*Por Esto*", in a story widely disseminated through the continent. Everybody knew it except the Bush Administration, which insisted for two months that they knew nothing about his whereabouts--until, that is, Posada convened a press conference in May to announce his willingness to continue waging from Miami his total warfare against the Cuban Revolution.

Having no other option, the Bush Administration detained Posada and took him to the immigration facility in El Paso, where they had prepared for him VIP quarters, completely separated from the general population, with special food and amenities of every sort, even the possibilities to meet friends and journalists. Posada's only grumble: the US protocol failed to provide him Cuban guava pastries.

According to official papers submitted by the US Government to migratory Courts, Washington deployed strenuous diplomatic efforts trying to convince other countries to grant shelter and protection to Posada. American diplomats approached governments in Central and South America and even in Europe asking them to receive the notorious VIP. Without exception the answer always was: No thanks.

Ironically Washington has yet to answer the diplomatic note presented by Venezuela on June 15, 2005 for his detention and subsequent extradition to Caracas in accordance with the Extradition Treaty existing between both countries.

The Bush Administration, and so far his successor, choose to accuse him of being a liar and entered in a deliberately confused litigation with Mr. Posada for allegedly not being truthful with immigration officials about how he entered the country. As a result, an administrative Court sent Posada home to keep comfortable, arguing for his formal admission by authorities who have shown such unparalleled patience and understanding.

How many undocumented poor Latinos have had that opportunity? How many of them have, in the meantime, been freed and allowed to walk away unmolested and do whatever they want to?

Posada doesn't complain anymore. He is a free man in Miami eating plenty of guava pastries.

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Without any exception whatsoever?

Venezuela's formal request for the extradition of Posada Carriles is well founded. There is an Extradition Treaty between Venezuela and the United States, ratified by both countries in 1922, which has been implemented all along a Century. Venezuela followed the letter of the law, with its Supreme Court issuing an arrest warrant for the fugitive who had absconded from a Venezuelan prison in 1985. The Venezuelan government formally transmitted its extradition request to the United States government on June 15, 2005.

According to the Treaty, Washington should have immediately detained Posada and submitted his case to a federal Court for an extradition process in which the Secretary of State would have the final word. That's how Montesquieu idea of "separation of powers" allegedly works in America.

But nothing of the sort has happened in more than four years. The US government has instead chosen not to detain Posada Carriles or to submit the case to a federal court for extradition. The US could have also detained Posada under its own Patriot Act which gives the Attorney General the authority to detain a terrorist until his ultimate removal from the United States. The Patriot Act obviates the need to consult with the Courts in order to detain a terrorist. The Attorney General need only certify the person as a terrorist. **(See Section 1226 (A) of Title 8 of the United States Code)**. By deciding not to certify Posada as a terrorist and allow him to roam free, the United States is in clear violation of its own Patriot Act. And by ignoring the extradition Treaty with Venezuela and several international Conventions on terrorism, Washington grossly violates the US Constitution and specifically Article VI which establishes that such international treaties "shall be the supreme Law of the Land."

Bush decided that Posada's mendacity to a bureaucrat was a more serious offense than 73 counts of first-degree murder. And instead of abiding by the US constitutional and treaty obligations, Bush preferred to try and convince other governments to help him shelter and protect Posada. No other government, however, was prepared to do that.

The Administration has flatly ignored certain international conventions that are among the main pillars of the fight against international terrorism: the Montreal Convention for the Suppression of Illicit Acts against Civil Aviation and the Protection of Passengers and the International Convention against Terrorist Acts Committed with the Use of Bombs.

Both Conventions introduced a very specific provision to make it impossible for any suspect of such crimes to escape prosecution. They established one alternative to extradition: only one. If any State does not comply with an extradition request, it shall be obligated to immediately prosecute and put on trial the alleged criminal for the same crime as if it had been committed in its own territory. That has to be done, according to both Conventions, "without any exception whatsoever."

In September 2001, a few days after 9/11, the Bush Administration urged the UN Security Council to adopt mandatory and concrete measures that every country must take, under the threat of force in case of non compliance. Security Council resolution 1373, introduced by the US delegation and approved unanimously, made it an enforceable obligation for all member states to cooperate in prosecuting fugitive suspects, denying them shelter, condemning political excuses not to extradite and demanding the full application of all international agreements against terrorism, including the two Conventions referred to above.

To ensure implementation of Resolution 1373, a special permanent UN Security Council committee was established. It meets regularly in its New York headquarters. At every meeting, the United States is denounced for being in clear violation of Resolution 1373 with its hypocritical double standard on terrorism as reflected in its protection of Luis Posada Carriles and the incarceration of the Cuban Five.

The next round of the charade known as the Posada "trial" is scheduled for March 1, 2010. Posada is to be "tried" on perjury charges. By then it will be five years of US adamant efforts in protecting a terrorist and not allowing him to be tried for his real crimes. By then, five antiterrorist heroes will be in the middle of their 12th year of unjust, cruel punishment.

By not respecting its international treaty obligations, Washington is undermining the main legal instruments which were conceived to sustain the struggle against terrorism which is supposed to be of a highest priority for the United States. The damage to US credibility may not be clearly perceived by many Americans because the big corporate media do not allow them to ascertain it. They are not permitted to know how the hypocrisy and arrogance permeating US policy is universally rejected. To imagine the possibility of the US playing any leadership role in the world, not to mention the idea of being respected, is to indulge in irrational, unfounded daydreaming.