AMNESTY INTERNATIONAL

AMNESTY INTERNATIONAL'S PRESENTATION TO THE INTERNATIONAL COMMISSION OF INQUIRY INTO THE CASE OF THE CUBAN FIVE, 8 MARCH 2014

BY ANGELA WRIGHT

Amnesty International is a global movement of more than 3 million supporters, activists and volunteers in more than 150 countries who campaign to end grave abuses of human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards and treaties. We are independent of any government, political ideology, economic interest or religion – funded mainly by our membership and public donations.

One part of our remit has been to campaign for a fair retrial or other remedy where individuals in political cases are denied a fair trial. Amnesty is not a general criminal justice organization and we only become involved in a criminal case if it appears that there is a political element to the case, or someone is facing the death penalty. Often our concerns involve cases where there is a blatant flouting of fair trial norms through for example setting up summary courts, holding the accused incommunicado or restricting right to counsel.

Of course, cases are not always that straightforward. It can be particularly challenging when the trial in question broadly follows international norms of criminal procedure and the charges themselves are not overtly political or do not flout internationally protected rights such as freedom of peaceful assembly or association, or the right to freedom of expression. We would consider anyone imprisoned on the latter grounds to be prisoners of conscience, regardless of the procedures used in the trial.

In this case the defendants were charged with what were on their face serious offences, including conspiracy to gather and transmit national defence information. They were brought to trial in the ordinary US criminal justice system providing the usual fair trial norms such as right to counsel, trial before a jury and right of appeal. Thus it was necessary for us to scrutinize the case with great care and impartiality – looking at both sides and, in particular, seeing how the case developed on appeal, the appeal process itself being an integral part of the right to fair trial.

After this review and taking into account all the circumstances of this complex case, we concluded that there were serious concerns about the fairness of the convictions. These concerns are outlined in AI's report published in 2010, and remain unresolved to date.

Before our report was published, AI had already for some years campaigned about the treatment of the defendants in custody, including denial of visas for the Cuban wives of two of the defendants (Rene Gonzales and Gerardo Hernandez) to visit them in prison, and unnecessary delays in facilitating visits by relatives in some of the other cases: restrictions we found to be unnecessarily punitive and contrary to standards for the humane treatment of prisoners and states' obligation to protect family life. We also appealed against the men being placed in solitary confinement in prison in 2003 [check] and believe our appeals may have

contributed to their removal from isolation at that point. However, on this panel I will focus only on our concerns about the criminal proceedings.

A central underlying concern relates to the fairness of holding the trial in Miami, given the pervasive community hostility to the Cuban government in the area 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.

The right to trial by an independent, impartial and competent tribunal is guaranteed under Article 10 of the UDHR and Article 14 of the ICCPR, a key human rights treaty to which the US is a State Party. The UN Human Rights Committee (the treaty monitoring body) has emphasized that the requirements of competency, independence and impartiality of a tribunal – which includes all its components including the jury where there is one – is an absolute right that is not subject to any exception.

It is also a fundamental principle under international law that a trial must not only be fair but must be seen to be fair. This is a crucial element of public transparency and accountability, to ensure, among other things, that no influences are brought into play of which a defendant may be unaware and which may impede a proper defence.

The trial venue was the first issue that went to appeal as it underpinned the whole question of the fairness of the trial. It is significant that the 3-judge panel of the 11th Circuit federal court of appeals – a generally conservative circuit – were unanimous in ruling in August 2005 that the defendants were denied a fair trial, overturning the convictions and ordering a new trial outside of Miami.

The panel's decision was based on the combined impact of pervasive community prejudice, events and publicity before and during the trial, and improper statements by the prosecution which inflated the harm inflicted or threatened by the defendants. In one of the most extensive rulings in the case to date, the panel found the evidence submitted in support of the motion for a change of venue to be (quote) "massive". This included evidence of polls showing the decades of anti-Castro feeling in the Miami-Dade area which extended beyond the Cuban American community and which the judges found made ensuring an impartial jury from any jury pool in the area an "unreasonable probability". The panel further noted the impact of events such as the anti-Cuban demonstrations around the Elian Gonzalez case in the months leading to the trial as well as events during the trial itself, including ceremonies to commemorate the victims of the shooting down of the Brothers to the Rescue plane who had close ties to the area.

During the seven month trial, the jurors were not sequestered but went home every night. While they were instructed by the judge not to read or watch news about the case, as the 11th Circuit panel noted, it is hard to see how they would be completely insulated from the negative atmosphere surrounding the defendants and their ties to the Cuban government. The panel also considered prejudicial statements by the prosecution, which included inflammatory and unsupported statements such as that the defendants were "bent on destroying the United States". Although the trial judge sustained the defence's objections to these and other improper statements, there were no specific instructions in her summing up that they must exclude such statements from their deliberations. The panel agreed with defence submissions that this too may have led to undue pressure on jurors to convict.

However, the government appealed and in 2006 the panel's ruling was overturned by the full 12 member Court of Appeals, albeit by a 10-2 majority and with a strong dissenting opinion. The convictions were thus left in place, and no retrial was ordered.

While it is impossible to know for certain the extent to which the jurors were actually prejudiced against the defendants, there remain in Amnesty's view grave doubts about the impartiality of the tribunal before which the defendants were tried and convicted. In rejecting the appeal, the majority decision of the 11th Circuit Court applied a narrower standard of review than the panel, largely disregarding events that took place outside the court-room.

We believe that the broader approach taken by the panel was the right one, given all the circumstances surrounding this highly charged case and the absolute obligation on governments to do everything to ensure that a trial is both fair and seen to be fair.

In considering the options open to the government to ensure a fair trial, it is relevant that an alternative venue was readily available, and that the trial could have been moved to Fort Lauderdale just 24 miles away – as counsel for the defendants requested. This is exactly what the US Government itself sought in another case, in which it sought a change of venue in an action brought against it in connection with the Elian Gonzales case. In this case (Ramirez v Ashcroft, 2005) the government said it would be "virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County". It submitted that a move to Fort L would be sufficient on the ground that "as you move the case out of Miami-D you have less likelihood there are going to be deep seated … prejudices in the case".

Since then, of course, new evidence has emerged that casts even more doubt about the fairness of the trial, with information suggesting that the US systematically paid journalists hostile to Cuba to cover the trial and provide prejudicial articles in the local media asserting the guilt of the accused. While this is the subject of new appeals no remedy has yet been granted, despite it being well over a decade since the convictions.

Amnesty is not the only human rights organization to raise concern about this case. In May 2005, the UN Working Group on Arbitrary Detention adopted an opinion on the case in which it concluded that the USG had failed to guarantee the Cuban Five a fair trial under Article 14 of the ICCPR. It cited two concerns: the impartiality of the trial venue and the principle of "equality of arms", another fundamental fair trial requirement. This means that the same procedural and other rights must be afforded to both the defence and prosecution in equal measure. The Working Group cited the circumstances under which the defendants were held in isolation during much of their pre-trial detention and the alleged difficulties their attorneys had in accessing information, much of which was initially classified.

AI shares the concern of the Working Group that their conditions of pre-trial detention undermined the principle of equality of arms and the right of every defendant to have adequate facilities for the preparation of their defence. Although the government ultimately declassified the materials the defence requested and no classified information was introduced as evidence at trial, the late Leonard Weinglass, a highly respected defence attorney, told me that "no-one was confident they had everything they needed". The new evidence that has emerged since the trial – of journalists being paid to plant prejudicial stories against the accused during the trial – also raises concern about equality of arms in that the government, unknown to the defendants, were stacking the case in the media – and also as we have seen very possibly in the court-room itself – in the prosecution's favour.

I will just briefly say a few words about the case of Gerardo Hernández, the only one of the accused to be serving life in prison. He was convicted of two life terms, one for conspiracy to transmit national defence information and the second for conspiracy to murder. The latter was based on his alleged role in the 1996 shooting down by Cuba of two planes flown by members of the Brothers to the Rescue organization on a mission to drop anti-government leaflets over Cuba, charges he strenuously denies.

In assessing the fairness of judicial proceedings, Amnesty International does not purport to be a trier of fact or to substitute its own verdict of guilt or innocence for that of a properly constituted court. However, as we note in our report, there was no direct evidence against Hernández of planning or knowing about an intended shoot-down of the aircraft (whether in international or Cuban airspace) and the evidence introduced by the prosecution at trial consisted of nothing more than a few intercepted messages that were ambiguous at best. We believe there are serious questions as to whether the government discharged its burden of proof in this case or, given other prejudicial factors, whether Hernández was afforded the full right of presumption of innocence, another fundamental pre-requisite for a fair trial.

We are also concerned that Gerardo Hernández remains sentenced to two life terms, despite an appeals court acknowledging that the life sentence imposed for conspiracy to transmit national defence information was over-inflated, as no top secret information had in fact been gathered or transmitted. On this ground an appeals court vacated the life sentences imposed on his co-defendants Ramón Labañino and Antonio Guerrero (reducing those sentences to long prison terms instead). The appeals court declined to reduce GH life sentence on the ground that this would make no difference as he was already serving another life sentence. That he should be serving two life sentences when one is acknowledged by the courts to have been wrongly imposed, is a manifest injustice.

This case has been marked throughout by divided opinions of successive appeals courts – not only on the trial venue but on the shoot-down charges as well. We believe it is significant that senior members of the US judiciary have in almost every appeal to date expressed serious doubt about the fairness of the case. This makes it even more disturbing that the US Supreme Court declined to review the case in 2009, without giving an opinion.

When Amnesty International sent its report to the USG, it urged it to review the case and address the concerns raised, noting as well the lengthy sentences being served by the accused. We framed our request in broad terms as there were a number of options open to the government through the clemency process, as well as pending legal appeals.

Meanwhile, another three and a half years have passed and the current appeals may still take some time to work their way through the courts with no guarantee that justice will be served. Two of the five have now been released after serving their full sentence. Others remain in prison, possibly for life in GH case.

We are aware of the urgency of this case after so many years without a remedy, and will continue to appeal for justice to be expedited through all appropriate means. We look forward to continuing discussions with those involved as to how this can be done.