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The legal right of the Cuban nation to self-defence against terrorism.

The following opinion considers the question, as to whether the activities of the Cuban Five, in Florida, USA, were justified under international law. They entered the USA under false pretenses, and, over a period of years, infiltrated and observed Cuban exile groups who were, from within the USA, actively subverting the sovereignty and territorial integrity of Cuba. They passed on this information to the Cuban government. After their arrest by the US authorities, and a blatantly unfair trial, they were convicted of conspiring to commit espionage, murder and violation of US immigration laws. They were sentenced to long jail terms.

The aim here is not to revisit the dubious conviction handed down by the Miami Dade court, or the questionable circumstances surrounding the whole trial process. The question to be considered here - which was ignored in the trial - is whether the illegal activities of the Cubans in the USA were in fact justifiable acts of self-defence, to protect the territorial integrity of Cuba and the lives of its citizens.

1. The Cuban Five were not acting as private individuals, infiltrating anti-Cuban groups operating from the south coast of the USA. They were sent by the Cuban government, with the clear and limited goal of gathering information on terrorism being planned and carried out against Cuba. They were "emissaries" of the Cuban government, directed and controlled by it, at all times. Because the Cuban government was responsible for the actions of the Five, what is at issue

here is, in fact, an international dispute between the USA and Cuba. This, as is the case in all international disputes, can only be judged and ruled upon within the parameters of International Law. Of particular relevance in this case is the question as to whether Cuba can claim the right of self-defence, under Article 51 UN-Charter, against acts of terror carried out from US territory.

The USA itself has justified military attacks on other countries on this basis, in particular when, after the attacks of the 11th of September 2001, George W. Bush declared the "War on Terror". The bombing of Tripoli in April 1986, in response to the attack on the Disco La Belle in Berlin, was a case in point. Though the legitimacy of the US action under Article 51 UN-Charter was criticized - the killing of a US soldier abroad can hardly be deemed an armed attack - the proportionality of the US response was not condemned by the United Nations. Similarly, there was only muted protest when the US launched missiles against Baghdad in 1993, in response to a failed assassination attempt on the then US president, George H.W. Bush. The only country which categorically condemned the attack, and justifiably so, was China. Other examples were the 1998 US attacks on a pharmaceutical factory in Sudan, and a purported terrorist training camp in Afghanistan. Both of these attacks were claimed as legitimate responses, in self-defence, to the attacks on US Embassies in Dar es Salaam and Nairobi - and were accepted as such. Doubts as to the legitimacy of the US action were muted, and limited to academic circles. So, too, it claimed the invasion of Afghanistan as a legitimate act of self-defence. The US was responding to the terrorist attacks of the 11th of September 2001. The rationale of legitimate self-defence was expounded in a speech given by President George W. Bush on the 21st of September 2001. He declared the "War on Terror" to be worldwide in scope, and unlimited in duration. Countries as far afield as Yemen, Somalia and Pakistan, though not in a state of war with the US, could be targeted for attack if terrorists were presumed to be operating from there. The fact that the policy of "targeted killing" was not limited to foreign suspects, but also included US citizens, caused an outcry in the US and internationally. The practice of targeted killing is widely seen as illegal under International Law. In addition it is doubtful that the self-defence provision of Article 51 UN-Charter, either in its terminology or intent, could be construed to extend the duration and global scope to over 13 years.

The USA has abused the right of self-defence to justify its worldwide military interventions; it is widely rejected and considered unacceptable. On the other hand, this is exactly the justification which the ICJ accepted in a case brought by Nicaragua against the USA in 1986¹. The case of the Cuban Five and their activities in the USA is exactly the same - the legitimate right of a sovereign government to self-defence against terrorism.

¹ICJ, Case concerning Military and Paramilitary Activities against Nicaragua, Judgment of 27th June 1986 (Merits), ICJ Rep. 1986, 14.

2. Firstly, it must be established whether the activities of the exile Cubans, based in Florida, would constitute an armed attack, as laid out in article 51 UN-Charter. To establish this, the following is a sample of some of the activities which, were observed and documented by the Cuban Five².

15th May 1991. José Basulto, a veteran CIA operative, former Bay of Pigs mercenary, and founder of the self-styled "Brothers to the Rescue" group. He procured, with support from Congresswomen Ileana Ross, three military versions of the Cessna plane.

8th May 1992. The Cuban government files a complaint to the United Nations about the organized terrorism being carried out against it. At Cuba's request, a document, dated the 23rd of June 1989, was circulated as an official council document. The document lays out in detail the terrorist activities of Orlando Bosch. Among these activities was the 1976 bombing of a Cuban passenger plane in mid-flight, with the deaths of all passengers and crew. Because of his proven participation in past and ongoing terrorist activities, he was banned from entering the United States.

7th October 1992. Varadero Meliá Hotel is attacked from the sea by four terrorists based in Miami. Though they were later arrested, and questioned by the FBI, they were all subsequently released without charge.

January 1993. The US Coast Guard stops a vessel; it was armed with heavy machine guns and other weapons and heading for Cuba. The five terrorists on board were arrested and later released without charge.

7th January 1993. At a press conference in Miami, Tony Bryant, the leader of the terrorist group "Commandos L", announced plans for further attacks on hotels in Cuba. Specifically, he warned foreign tourists to "stay away from Cuba", because "from now on we are at war with Cuba".

October 1993. The group "Brothers to the Rescue" warned of further violence against Cuba and threatened the life of President Castro. It also confirmed its readiness to accept "the risks that come with doing this". Andrés Nazario Sargén, head of the terrorist group Alpha 66, admits in the US that his organization had recently carried out five operations against Cuba.

7th November 1993. Humberto Pérez, spokesman for Alpha 66, announced at a press conference in Miami that tourists visiting Cuba would be targeted - "we consider anyone staying in a Cuban hotel to be an enemy".

11th March 1994. The "Guitard Cayo Coco Hotel" is the scene of a terrorist attack. This hotel had been attacked on the 6th of October of the same year and yet again on the 20th of May 1995. CBS News in Miami broadcast an interview

² The Perfect Storm The Case of the Cuban Five, La Habana, Cuba, 2005, Page 58

with an individual who claimed that he and Andrés Nazario Sargén were responsible for the attacks.

November 1994. During the 5th Ibero-American Summit in Colombia, Luis Posada Carriles and five accomplices smuggled weapons into the country, with the intention of assassinating President Fidel Castro.

12th July 1995. Three armed terrorists were arrested in the United States while planning to infiltrate into Cuba. Though their weapons and explosives were confiscated, they were released without charge.

16th December 1995. Two armed terrorists were arrested, trying to infiltrate into Cuba and released without charge.

13th January 1996. Several planes piloted by the "Brothers to the Rescue" group violate Cuban airspace over Havana. José Basulto admitted, "They say I was flying over Cuban airspace, something I have never denied".

23rd January 1996. US Coastguard intercepted a vessel near Marathon Key with five armed terrorists on board. It was heading towards Cuba with the intention of carrying out a terrorist attack; though questioned by the FBI, they were released the same day without charge.

24th February 1996. "Brothers to the Rescue" launched an incursion into Cuban airspace. In the 20 month period, prior to this incident, there had been at least 25 other violations of Cuban Airspace. On this occasion 2 of the 3 light planes were shot down.

12th April 1997. The "Meliá Cohiba" hotel in Havana is bombed.

30th April 1997. In the same hotel a bomb is discovered and defused, before it could detonate.

12th July 1997. The "Capri" and "Nacional" hotels are bombed.

4th August 1997. The "Meliá Cohiba" hotel is again bombed.

11th August 1997. A statement by the Cuban American National Foundation (CANF) is published in the US media openly endorsing the ongoing campaign of terrorist bombings against civilian and tourist targets in Cuba. The Chairman of CANF, referring to the bombing outrages, publicly stated, "We do not think of these as terrorist actions", and went on to say that, he considered any violent action against Cuba to be legitimate.

4th September 1997. The "Tritón" hotel is bombed.

4th September 1997. The "Chateau Miramar" is bombed.

4th September 1997. The "Copacabana" hotel is bombed and the young Italian tourist Fabio Di Celmo is killed.

4th September 1997. The "La Bodeguita del Medio" restaurant is bombed.

27th October 1997. The US Coast Guard stops a vessel on the high seas, west of Puerto Rico; a large cache of military grade weapons and equipment was on board. The 4 crew members were identified as active members of anti-Cuban terrorist groups operating out of the US. Among the weapons confiscated were two 50 caliber high velocity rifles with tripods and night vision sights. The vessel was registered under the name of a Florida company, the chairman of which was a member of CANF's board of directors. Also, one of the 50 caliber rifles was registered under the name of the CANF president. During questioning by the US authorities, one of the crew confessed the vessel was en route to Venezuela, where the Ibero-American Summit, on Margarita Island, was due to begin on the 7th of November. They planned to assassinate the Cuban President Fidel Castro when he arrived. Despite the clear evidence that they were in possession of illegal military grade weapons, and that they intended to assassinate a foreign head of state, they were all acquitted by a Federal Court in December 1999.

16th November 1997. The Miami Herald publishes the results of a 2 month investigation into Miami-based, Cuban exile groups. The paper uncovered that Luis Posada Carilles was the mastermind behind the bombing campaign in Cuba, the same terrorist who was responsible for the destruction of a civilian Cuban plane in 1976, causing the death of all passengers and crew.

12th/13th July 1998. "The New York Times" publishes an interview with Luis Posada Carilles about his terrorist activities. He openly admitted to having organized the bombing campaign against tourist hotels and restaurants in Cuba. He further confirmed that these terrorist attacks were financed by CANF, and that the chairman Jorge Mas Canosa had personally overseen the logistics and transfer of funds for the attacks.

2nd August 1998. The "CBS News" television program "Opposing Points of View" broadcasts an interview with Luis Posada Carriles in which he openly stated his intention to continue his terrorist attacks, both within Cuba and internationally.

September 1998. The Cuban Five, Fernando González, Gerardo Hernández, Ramón Labañino, Antonio Guerrero and René González are arrested and imprisoned.

The anti-Cuban terrorist activities continue unabated.

26 April 2001. A vessel is stopped by the Cuban Coast Guard, off the coast of Via Clara, in Cuban waters. The vessel was transporting weapons and communication equipment. The 3 crew members were based in Miami and directly linked to the anti-Cuban terrorist groups "Commandos F4" and "Alpha 66".

29th March 2002. At a public meeting in Tampa, Florida, the leader of "Commandos F4", Rodolfo Frómeta, openly admitted that he was organizing the training of terrorists to attack Cuban targets.

January 2003. The "Wall Street Journal" publishes a report on the creation of a Cuban-Venezuelan "Civic Military Alliance", with the objective of overthrowing both Fidel Castro and Hugo Chavez, President of Venezuela. Rodolfo Frómeta the leader of "Commandos F4" stated "We are preparing for the war", he further went on to say that 50 men, 30 of them Cubans, were at that time being trained at a secret location in the Florida Everglades.

Up to 1999, terrorist attacks in Cuba had resulted in the deaths of up to 3500 civilians, and serious injury to a further 2100.

3. There is no doubt that the terrorist attacks constitute an armed attack on the sovereignty and territorial integrity of the Cuban State. That does not imply, however, that terrorist attacks carried out by individuals, or groups, constitute attacks as stipulated in Article 51 UN-Charter. Such attacks allow the State attacked to resort to measures in self-defence which in turn infringe on the sovereignty of the State from which the attacks were launched. Article 51 UN-Charter was instituted to allow States the right of self-defence against acts of violence committed by other States. This concept of self-defence does not, however, cover acts of violence committed by free individuals against States.

The International Court, in its Ruling on the Nicaragua Case³, stated that the USA was not responsible for the infringements of International Human Rights Law committed by its proxy paramilitary "Contras", because the crimes were not "directed or enforced" by the US. A very close link must be demonstrated between the actors and the State which sponsors them, to prove culpability under Article 51 UN-Charter. A case in point, would be the "targeted killing" with drones as practiced by the CIA in Pakistan, Somalia and Yemen - though it is a private organization, this warfare is clearly carried out by the US.

Such a strict interpretation of what would constitute "violent acts carried out by individual groups" would never have allowed, in case of the 11th of September 2001 attacks, the USA to claim the right of self-defence under Article 51 UN-Charter. Though Al Qaeda was operating from Afghanistan, no case was made that the Taliban was involved, much less that it "directed or enforced" the actors. The UN Security Council therefore had to expand the scope of Article 51 UN-Charter to cover Non-State Entities such as Al Qaeda and its attacks. The expanded remit of Article 51 UN-Charter now allowed for legitimate acts of self-defence which would, in turn, infringe the sovereignty of Member States (Article 2 Nr. 7 UN-Charter), from which Non-State Entities had operated. All extensions of the right to self-defence are in direct conflict with the absolute prohibition of violence as laid out in Article 2 Nr. 4 UN-Charter. There is a clear danger that States will cloak illegal military attacks with the right to self-defence. A chilling example of how this looks is the declaration of the "War on Terror" by the USA and NATO. Now practically any State on whose territory Non-State Entities could

³ ICJ, Case concerning Military and Paramilitary Activities against Nicaragua, Judgment 27th June 1986 (Merits), ICJ Rep. 1986, 14, 54

be hiding is in danger of military attack. Such States can no longer claim protection under the UN-Charter - now, their only protection is a credible military deterrence of their own.

4. The UN-Security Council Resolution 1368(2001) opened the way to extending the remit of Article 51 UN-Charter, without however, clearly stipulating the new limits. Because the situation after the attacks in September 2001 was so confused, the Security Council did not want to give the USA a new mandate. This created a gap, which was thrown wide open with the adoption of Resolution 1373(2001) "Enduring Freedom". This Resolution, and its ever more difficult consequences, has over the years proved highly contentious. Nevertheless, at the time, the vote in the UN Security Council was broadly supported. Now the remit of Article 51 UN-Charter covered terrorist acts committed by Non-State Entities⁴, and with that banished any doubts as to the limits of self-defence. Irrespective of this, some authors still require demonstrable evidence, connecting the Non-State Entities to the State harboring them⁵. Others consider the existence of an "external link" sufficient proof the attack was not perpetrated by the targeted State⁶. With this they adopt the reasoning of NATO, which invoked the Treaty Clause under Article 5 of the NATO Statute, to support the USA, as the attack originated outside of the USA⁷.

If the territorial integrity of the State from which the terrorists operated is to be violated by a military intervention, then a "certain control" must be demonstrated by the " Guest" State over the "resident terrorists". In the Nicaragua Ruling, the International Court stipulates that this control must also be "effective". The Appeals Chamber of the Yugoslavia Tribunal (ICTY), however, ruled that "overall control" was sufficient⁸. In the case of the anti-Cuban terrorists based in Florida, this differentiation is not decisive. The terrorist activities were public, they made no attempt to hide, or keep secret what they were engaged in. On the contrary, they actively sought publicity and, even had their operational planning published in the "New York Times". One must assume, the US Administration was not only fully informed, but also exercising significant control. Clearly the US Administration tolerated and supported them. If proof were lacking, then the fact that Military Grade Cessna Aircraft were supplied to persons openly plotting

⁴ Compare for example Stahn, Carsten, Terrorist Acts an "Armed Attack": The right to Self-Defense, Article 51 (1/2) UN Charter, and International Terrorism, in: The Fletcher forum of World Affairs, Vol. 27:2 Summer/Fall 2003, page 35,37

⁵ Compare Randelzhofer, Albrecht, "On Article 51", in : Simma, Bruno (ed.), Charter of the United Nations, 2002, p. 802

⁶ See also Stahn, Carsten, note 2, p. 33, 34

⁷ Compare NATO, Press release No. 124, "Statement of the North Atlantic Council", 12th September 2001

⁸ Compare ICTY, Appeals Chamber, Prosecutor vs. Tadic, Judgment of July 1999, par. 137

terrorist attacks against Cuba must suffice. The USA cannot claim ignorance of the terrorist activities it supported, which, in turn, elicited military measures in self-defence.

5. It is, however, a prerequisite that the nature of the terrorist activity is both serious and ongoing. The terrorist activity may not consist merely of minor outbreaks of limited intensity, which could be more an irritation to a State, than a concrete threat to its stability. Additionally, these activities must indicate that further attacks are in the offing before measures of self-defence, as stipulated in Article 51 UN-Charter, can legitimately be triggered. In the long history of anti-Cuban activities, directed from the US, numerous acts of the most grievous nature have been documented. For example, one could point to the many attempts to assassinate the Cuban President Fidel Castro. Also, the bombing of tourist hotels and restaurants, specifically designed to engender a climate of fear and damage the Cuban economy. There can be no doubt that in such a situation Cuba would be entirely justified in taking measures of self-defence to protect both its population, and its sovereignty.

When a State is compelled to adopt measures of self-defence, it is in turn obliged to ensure that such action is balanced and proportionate. The response to the violence already suffered, or expected to occur, must be commensurate to the terrorist acts. Essentially, States must avoid the temptation to punish and take revenge for injury suffered. Basically, a State is defending itself from a danger which is both concrete and ongoing. It is legitimate when a State initiates measures to prevent future attacks. It is obliged to defend both its citizens, and its territorial integrity. The State which is the victim of terrorism must demonstrate that it has attempted, through diplomatic channels, to persuade the other State to desist. If, after repeated requests, the State refuses to desist, then, the ultima ratio is the legitimate resort to military self-defence.

It is common knowledge that the US "War on Terror" has rarely been proportional when responding to perceived threats. Whether the Cruise Missile attack on Baghdad in 1993 after the failed assassination attempt on President George H.W. Bush, or the reckless destruction of a Sudanese pharmaceutical factory in 1998. But it is the policy of "targeted killing", using drone aircraft, in Pakistan, Somalia and Yemen which has caused most outrage. The large, and mounting number of innocent civilians, killed and wounded, ignores all proportionality. Clearly the constraints of Article 51 UN-Charter are being massively violated.

6. The defensive measures adopted by the Cuban government were different. The US administration was warned repeatedly, through both public and private channels, in New York, Washington and Havana that the ongoing anti-Cuban terrorism could and would not be tolerated any longer. Cuba repeatedly requested that the US administration use its influence to reign in the exile Cuban groups operating from its territory. Only after the US clearly demonstrated it had no intention of curbing the terrorist activities did Cuba react. Cuba sent its men to

the USA with a limited mandate - to infiltrate the anti Cuban groups and gather information. They were not authorized to, and certainly did not, gather any information which could have compromised America's legitimate national security interests. This was confirmed at the trial by respected individuals, such as General James R. Clapper Jr, and Rear Admiral Eugene Carroll⁹. The documents and other material sent back to Havana by the Cuban Five, were largely from the public domain, and were directly related to the activities of the exile Cuban groups operating out of the Florida region.

Compared to the terrorist activities, and "Regime Change" plans of the exile Cubans, the self-defence measures implemented by the Cuban government were entirely proportional. Even if considered as espionage, under US law, the seriousness, extent and ongoing nature of the terrorist activities would suffice to warrant a legitimate response under Article 51 UN-Charter. The 1996 shooting down of the two "Brothers to the Rescue" aircraft, operated by the notorious terrorist José Basulto, was a direct and legitimate response to repeated violations of Cuban airspace. Both the US administration, and the groups, were directly and repeatedly warned that if the terrorist activities were not halted, the Cuban government would adopt the military option. It is in strict conformity with International Law and norms when a sovereign State resorts to military measures, to defend its airspace from egregious and repeated violations.

In conclusion, it must be noted that, though the Cuban Five broke American law, they did so purely to defend their country. The gross violations of International Law, committed by anti-Cuban terrorists, had to be countered. The action was strictly proportional, and compatible with the remit of Article 51 UN-Charter. The activities of the Cuban Five were justified, and a fair trial would have resulted in their release or, at the very least, far more lenient sentences.

⁹ Compare "The perfect Storm", p. 98