UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-Civ-LENARD
Criminal Case No. 98-721-Cr-LENARD

GERARDO HERNANDEZ,	:
Movant,	:
	:
v.	:
	:
UNITED STATES,	:
Respondent.	:

DECLARATION OF PROFESSOR JOHN QUIGLEY

I, John Quigley, hereby declare under penalty of perjury as follows:

1. I am John Quigley, President's Club Professor in Law at the Moritz College of Law of the Ohio State University. I have been on the teaching faculty of this institution since 1969. I have published extensively in the field of international law and have served as an expert witness in a number of courts on issues of international law. I am a member of the bar of the United States Supreme Court and have filed there amicus curiae briefs on issues of international law, in particular on behalf of the European Union. Had I been consulted prior to trial in this case, I would have informed the defense, based upon well-established principles of international law, that the fact that the aircraft was civilian in nature was not dispositive in regard to the legality of the Cuban government's planning for measures to prevent aerial intrusions into the airspace above its territory or territorial sea.

2. Had I been consulted and/or called to testify, I would have said that, under international law, the relevant inquiry was whether the territorial state might reasonably perceive an imminent threat from the intrusion, rather than whether the aircraft was civil or military in character.

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3. I would, therefore, have advised the defense that a plan to defend Cuban airspace, even a plan that contemplated the possibility of shooting down incoming civilian aircraft, would, under appropriate circumstances, have been lawful under norms of international law that are binding on the United States as a matter of inter-governmental obligation, and binding on the courts of the United States through the incorporation of international law into the domestic law of the United States.

4. If I had been called to testify, I would have explained to the jury the relevant norms of international law as illustrated by comparable instances in which a state has defended its airspace by shooting down civilian aircraft. I would have explained that the relevant norm of international law relates not to the character (civilian vs. military) of the aircraft, but rather to the threat posed by the aircraft. I would have explained that instances in which a state has been criticized for interference with civilian aircraft have typically involved aircraft operated by a commercial airline company on a scheduled flight carrying passengers. Interceptions of such aircraft have been protested by other states with verbal formulations that focused on the civilian character of the aircraft, sometimes with a reference to Article 3 *bis* of the Convention on International Civil Aviation. However, the grounds for such protests have been that the aircraft, by virtue of being a commercial carrier on a scheduled flight, could not be regarded as having posed a threat.

5. I would also have used this principle to advise the defense that the legality of shooting down an aircraft turns on the threat, or lack of threat, posed by the aircraft.

6. I would have testified that in instances in which a state has shot down aircraft over its airspace, and where the interception was regarded as justified, the issue has been the perceived threat. For example,

- When the USSR shot down a US aircraft (U-2) that was surveilling the USSR photographically in 1960, the United States did not contest the legality of the shootdown. The basis for the legality was the perceived threat posed to the USSR by the photographing of military or other installations on the ground. It was not relevant whether the U-2 was operated by the military or by a civilian agency of government.

- Civilian aircraft transporting controlled substances have been shot down while in flight without the shootdown having been regarded as unlawful. Colombia and Peru

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have shot down aircraft, **civil in character and design**, believed to be carrying controlled substances. These two countries have carried out shootdowns based on information provided to them by the United States about particular flights in progress. These three states have regarded the shootdowns as lawful. There has, moreover, been no protest by third states. In international law, the absence of protest, at least where the absence continues over some period of time, is taken to mean the acquiescence of other states in the legality of the action in question. The absence of protest in the wake of the shootdowns of civilian aircraft allegedly carrying controlled substances means that such shootdowns are regarded as lawful under customary international law.

7. The practice of more recent years has drawn additional attention to the fact that the relevant norm relates to threat, rather than to the character of the aircraft. In 1998, the United States, by presidential order, reportedly authorized the shootdown of civilian aircraft that might be found to be carrying certain personnel of the Al Qaeda organization, even in international airspace. No such shootdowns were carried out, so far as is known, but the issuance of such an order indicated a view of the United States that the issue of the lawfulness *vel non* of shootdowns turns not on the character of the aircraft, but on the threat posed.

8. Thus, the issue that should have been addressed at trial was not the character of the aircraft, but the reasonableness of the perceived threat.

9. If I had been called as an expert witness at trial, I would have testified about the kinds of threats that can justify a shootdown. These threats need not necessarily be of harm that would be realized immediately, or even at all. To take spying, as in the U-2 case, the legality of the shootdown was not contested even though the potential harm to the USSR was a matter of speculation. The photographs that the USSR presumed were being taken might, or might not, have yielded information actually harmful to the USSR. It might have been that no harm would result at all to Soviet security from the photographs that might have been taken. It was rather the possibility of harm that gave rise to a reasonable perception of threat.

10. The threat from aerial transport of prohibited drugs is similarly one that might, or might not, result in actual harm. As regards the interceptions by Peru and Colombia, the United States evidently perceived a threat from the possibility that drugs would be transshipped eventually to the United States. Peru and Colombia may have perceived a threat

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from the conduct of drug operations in their territory. Particular flights may have posed no threat at all. The information that served as the basis for a particular shootdown may have been inaccurate. In one highly publicized case, this did occur in the drug interception program.

11. In neither the U-2 case nor the drug flights was the threat to the country intercepting and shooting down the aircraft one that would be immediately realized. The concern of the state was over a possible eventual or cumulative harm. The perception need not be of a threat of a harm that would befall the state immediately.

12. Beyond flight intrusions involving spying or drug transport, flight intrusions aimed at political destabilization have been identified as posing a threat that may justify a shootdown.[1] Such activity has, at a minimum, been regarded in customary international law as a violation of sovereignty.

13. If I had been called to testify, I would have recounted instances in which acts involving intrusion into airspace, where the acts were aimed at political destabilization, were regarded as violative of sovereignty. The USSR filed a diplomatic protest in 1955 and again in 1956 against the United States, alleging that the United States had sent balloons over Soviet territory containing propaganda leaflets, where the leaflets were dispersed to the ground. The USSR considered this action to be an unlawful intrusion into its airspace. The United States replied to the protest by saying that the balloons were sent not by it, but by private organizations over whom the United States had no control. The United States thus did not dispute that such balloons had been sent, or that Soviet airspace was thereby violated. The United States, by denying its own responsibility, conceded the point that an intrusion into a state's airspace for the purpose of distributing propaganda leaflets was a violation of that state's sovereignty.

14. I would have testified that the only comparable situation that has been addressed explicitly by treaty in international law involves the activity of ships. As regards the territorial sea, foreign ships may enter without prior consent for purposes of so-called

1 See Eric Edward Geiser, "The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime," *Journal of International Legal Studies* (volume 4, Summer 1998), p. 187: Geiser was a Commander of the U.S. Navy and Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff.

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innocent passage. However, they are prohibited from propaganda activity. If they engage in propaganda, their passage is not considered "innocent," hence a violation of the rights of the coastal state. According to the United Nations Convention on the Law of the Sea, the "passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in . . . any act of propaganda aimed at affecting the defense or security of the coastal State."2

15. I would have explained that the United States has not yet ratified the UN Convention on the Law of the Sea, but that its official position is that the Convention's provisions relating to the territorial sea reflect customary law, which is binding on all states.3 According to the Supreme Court of the United States, in a case involving facts relating to maritime matters in relation to Cuba, customary international law is to be applied by the courts of the United States when relevant to issues before them.4

16. I would have explained that there is no comparable treaty regarding the use of airspace above the territorial sea, because there is no concept of innocent passage for foreign aircraft in the territorial sea. Foreign aircraft enjoy what is called a right of "transit passage" in the airspace above international straits.5 But they enjoy no right of passage or transit in the airspace above the territorial sea. Use of that airspace is handled on the same basis as the use of airspace above a state's land mass, namely, that consent -- either on an ad hoc basis, or on the basis of permission granted in advance for particular uses – is required.

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2 United Nations Convention on the Law of the Sea, December 10, 1982, U.N. Treaty Series, vol. 1833, p. 3, at Article 19(2)(d).

3 *United States Oceans Policy: Statement by the President*, March 10, 1983, Weekly Compilation of Presidential Documents, vol. 19, no. 10 (March 14, 1983), p. 383 (President Reagan stating that the US recognizes as customary law the provisions of the Convention relating to navigation, overflight, and rights in coastal waters). See also William H. Taft IV, Legal Advisor, U.S. Department of State, Written Statement Before the Senate Armed Services Committee on April 8, 2004, Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention.

4 *Paquete Habana*, 175 U.S. 677 (1900).

5 United Nations Convention on the Law of the Sea, Article 38.

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17. I would have testified further that preventing unconsented physical intrusions by persons who seek to destabilize a government is regarded as the prerogative of a state.

18. I would have advised the defense that if the evidence, including all the facts and circumstances, were to show that Cuba had a reasonable basis for perceiving that anticipated flights were aimed at political destabilization, a plan to protect against such a threat would have been legitimate. I would have provided guidance to the defense for presenting a defense based upon the legitimacy of such a plan.

19. I would have identified the following elements as relevant to such a defense:

- Knowledge of the prior activity of the pilots in question or their associates would be relevant in planning for the prevention of future intrusions. If the evidence were to show that in prior incursions, these pilots or their associates were warned that they were violating Cuban airspace, and if these pilots or their associates responded by indicating their intent to ignore such warnings, this information would be relevant to an assessment that force might be required in the event of future intrusions. If, further, the evidence were to show that in response to prior warnings, these pilots or their associates replied to those giving the warnings by advising them to take action to overthrow the government of Cuba, this information too would be relevant as to the future intent of these pilots or their associates, and thus the reasonableness of any plan to use force to prevent future intrusions.

- If the evidence were to show repeated prior intrusions by these pilots or their associates, that fact would be relevant in determining the means required to prevent future intrusions. In particular, if the evidence were to show that after prior intrusions, a representative of the pilots stated publicly that the Government of Cuba was too weak to stop them, that fact would be relevant in assessing the means required to prevent future intrusions.

- If the evidence were to show that the aircraft failed to follow a flight plan that had been filed with US authorities and had been communicated to Cuban authorities, that deviation be relevant to planning that occurred on the day of the shootdown as Cuba assessed the intent of the pilots. If the evidence showed that the filed plan would have taken the aircraft away from the Cuban coast and out into international waters

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whereas the aircraft instead were following a route that would take them over the capital city of Cuba, which is located on Cuba's northern shore, that circumstance would be relevant in assessing the intent.

- Any knowledge possessed by Cuba of past deviations by these pilots or their associates would also be relevant. If Cuban radar had shown on previous occasions that they deviated from flight plans and that they flew over Cuban territorial waters without consent, such a circumstance would be relevant in assessing the pilots' intent and whether preventive force might be required.

- If the evidence showed that the day in question was a national holiday with major public events planned in Havana, including a meeting of oppositional groups, and that the aircraft were flying on a course that would take them over Havana, and that during previous intrusions these pilots had dropped items in Havana calculated to stir the population to engage in anti-government activity, these circumstances would be relevant for the Cuban authorities in assessing the pilots' intent as they planned possible preventive measures.

- If the evidence showed that the pilots were warned by the Cuban authorities, while the pilots were in the air flying in the direction of Cuba on that particular day, against intruding into Cuban airspace, and if the evidence showed that they ignored such warnings, such circumstances would be relevant for the Cuban authorities in assessing the intent as they planned possible preventive measures.

- If the evidence showed that, at the time of being intercepted, one of the three aircraft had entered Cuban airspace, flying on a southerly course, and that the other two were flying southward on a course farther south than had been indicated in their flight plans, these circumstances would be relevant for the Cuban authorities in assessing the pilots' intent as they planned possible preventive measures.

20. I would have advised the defense that each of these circumstances would be relevant to the assessment by Cuba of the intent of the pilots to engage in destabilization-oriented activity. They would also be relevant to Cuba in assessing the means that would be required to keep the pilots from carrying out their intent. These circumstances could each be considered individually by Cuba, but they could also be considered in their totality. I would

have advised the defense that were the facts to appear as indicated in paragraph 19, a plan by Cuba to use preventive force, even involving a shootdown, would not have been inconsistent with the rules that are accepted in the international community for the defense of airspace.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 8th day of September, 2010 in accordance with form of oath set forth in 28 U.S.C. § 1746.

John Quigley

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