

## DOES CUBA SHARE RESPONSIBILITY FOR HUMAN RIGHTS AT GUANTANAMO BAY?

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In 2002, the United States began using the Guantanamo Bay naval station as a detention center for prisoners captured in its fight against terrorism. Since then, there have been allegations of human rights violations at the site, notably that prisoners were being tortured during interrogations and that they have been detained for years without being charged with crimes or brought to trial.

The naval station is located on a piece of Cuban territory controlled by the United States since a bilateral lease agreement was made in 1903. Neither country has ever disputed Cuba's sovereignty there. As every state is normally obliged to ensure that human rights are protected on all parts of its territory,<sup>1</sup> the question arises: can Cuba be found to have some responsibility if the United States violates human rights at Guantanamo Bay?

Amid the many controversies surrounding the prison there, this particular question does not appear to have been explored previously. Indeed, it can seem absurd at first glance, given that Cuba has no jurisdiction at Guantanamo Bay under the lease.<sup>2</sup> Yet it warrants examination because it can have implications for nations around the world that allow their territory to be used by other countries through bilateral leases and similar arrangements.

The lease of Guantanamo Bay establishes legal relationships between the territory and two separate states, so the issue of state responsibility there is distinct from issues involving the rest of Cuba. It is duly noted that Cuba has long been accused of its own domestic human rights violations, but they will not be considered here because it is evident that Cuba would have sole responsibility for them.

Determining responsibility for ensuring human rights at Guantanamo Bay is not a straightforward process. Besides the nature and terms of the lease itself, relevant factors include existing notions of state responsibility for wrongful acts, the issue of whether Guantanamo Bay can be considered occupied territory, the hierarchy of norms in international law, the evolution of human rights law, and, of course, geopolitical realities.

### SOVEREIGNTY AND JURISDICTION ON LEASED TERRITORIES

It is common for nations to secure rights to engage in economic, military or other activities on the sovereign territory of other nations through bilateral agreements that are typically called leases and usually take the form of treaties. These agreements generally reaffirm the lessor state's *de jure* sovereignty over the area and often grant jurisdictional rights there to the lessee state. Sometimes the assignment of jurisdiction

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1. Some exceptions are discussed later in this paper.

2. Milanovic, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, Oxford University Press, 2011, p. 8.

is comprehensive or even complete, as it was at Guantanamo Bay.<sup>3</sup>

A transfer of complete jurisdictional authority can result in the state with sovereignty over the territory being blocked by the lease from intervening in the activities that the lessee state carries out there. At issue is whether the sovereign state has the right, or even a responsibility, to intervene if those activities violate international law.

To address this, we must look at the nature of sovereignty, which can be defined as the exclusive authority that a state exercises on its territory plus extensions of that authority outside its territory.<sup>4</sup> As part of this authority, a nation may voluntarily agree to restrict the display of its own sovereign rights; thus, one state may allow a second state to exercise rights associated with sovereignty on part of the first state's territory, as in a lease like that of Guantanamo Bay.

Nations may have governments that ignore or defy aspects of international law, but this does not jeopardize their sovereignty or their status as states; they are simply considered rogue or troublesome states when this occurs. Yet violations have never predominated. Most of the time, most states adhere to most norms of international law, which keeps the system viable and thriving. The costs of not complying—sanctions, loss of reputation, etc.—usually outweigh whatever benefits a nation may perceive.<sup>5</sup> We can therefore consider an obligation arising from international law to be a true responsibility.

### SOVEREIGNTY AND JURISDICTION AT GUANTANAMO BAY

The lease agreement covering Guantanamo Bay is spread over three documents—an executive agree-

ment that provided the framework and a treaty that detailed the terms, both dating from 1903, plus a treaty in 1934 that reaffirmed the indefinite duration of the lease and clarified how it may be terminated.<sup>6</sup>

The lease granted the United States “complete jurisdiction and control” over the territory in exchange for an annual rent, while stipulating that Cuba would retain “ultimate sovereignty” there.<sup>7</sup> This wording created sufficient confusion that both states took years to interpret the legal relationship that each had with the territory. Indeed, the legal issues involving prisoners at Guantanamo Bay and the question of state responsibility being discussed here show the process is still not complete. Nonetheless, both states have agreed from the start that Cuba has *de jure* sovereignty at Guantanamo Bay, even if it is barred by the lease from exercising it.

It is important to note that the “complete jurisdiction and control” obtained by the United States at Guantanamo Bay exists only at the level of international relations. The United States has the right to exercise 100% of whatever jurisdiction exists there. At the level of the U.S. domestic legal system, however, the jurisdiction that applies on U.S. sovereign territory is more complete than the jurisdiction that applies at places like Guantanamo Bay, where the United States has control but not sovereignty.<sup>8</sup>

Any aspects of jurisdiction that are not exercised at Guantanamo Bay by the United States do not automatically revert to Cuba, since the lease agreement precludes Cuba from displaying any jurisdictional rights on the territory. This was affirmed by the Cuban Supreme Court in a 1934 ruling that said Guantanamo Bay must be considered foreign territory for

3. Strauss, Michael J., *The Viability of Territorial Leases in Resolving International Sovereignty Disputes*, Paris: L'Harmattan, 2010, p. 97–107; Strauss, Michael J., “A Matrix for Resolving Sovereignty Disputes through Territorial Leasing,” paper presented at the States of Sovereignty conference, Durham University, Durham, U.K., 2009.

4. Strauss, Michael J., *The Leasing of Guantanamo Bay*, Westport, CT: Praeger, 2009, p. 12.

5. Guzman, Andrew T., “A Compliance Based Theory of International Law,” *California Law Review*, 90 (2002), p. 1860–1863.

6. “Agreement for the lease to the United States of lands in Cuba for coaling and naval stations,” Treaty Ser No 418 (1903); “Lease of certain areas for naval or coaling stations,” Treaty Ser No 426 (1903); “Treaty of Relations,” 48 Stat 1682, Treaty Ser No 866 (1934).

7. “Agreement for the lease,” *ibid.*, Art. III.

8. This is the so-called “legal black hole.” It was partially closed by the U.S. Supreme Court ruling in *Boumediene v Bush*, 128 S Ct 2229 (2008).

legal purposes.<sup>9</sup> In compliance with this decision, Cuba has not sought to exercise any jurisdiction there.

### RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Current notions of allocating responsibility for violations of international law are set forth in the text and interpretations of the UN International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001). These have effectively become the standards in use today. At the most basic level, the draft articles say that every state is responsible for its own internationally wrongful acts (Art. 1). A state may also be responsible for the wrongful acts of another state under some circumstances, for example, if it aids or assists the other state in the commission of the wrongful act (Art. 16), and if that assistance had the intent of "facilitating the occurrence of the wrongful act."<sup>10</sup>

A facilitating state does not bear any responsibility, however, if "if it is unaware of the circumstances in which the aid or assistance is intended to be used by the other state."<sup>11</sup> It also bears no responsibility if there is a situation of *force majeure* (Art. 23), as when a state violates human rights on territory that it has occupied militarily; *force majeure* requires the "loss of control over a portion of the State's territory" as the result of human intervention such as a military operation, with "no real possibility of escaping" the effects of the force or coercion applied.<sup>12</sup>

By allowing the United States to use Guantanamo Bay in 1903 and to have complete jurisdiction and control, Cuba clearly facilitated the occurrence of all U.S. activities there by providing the location where they could take place. Until 2002, however, it had no reason to believe that any of those activities might be wrongful acts under international law.

At issue, then, is whether Cuba was still willingly facilitating the occurrence of U.S. activities at Guantanamo Bay since the United States began holding prisoners there in 2002, and, if so, whether it was aware that some of those activities were allegedly wrongful under international law. An affirmative answer in both cases would seem to allocate some responsibility for those acts to Cuba.

### ASSESSING CUBA'S POTENTIAL RESPONSIBILITY

Whether Cuba was still willingly facilitating U.S. activities at Guantanamo Bay depends on whether it has voluntarily permitted the continued U.S. presence there or was forced to accept it. Since the 1959 revolution, Cuba has repeatedly stated that it has wanted the United States to leave Guantanamo Bay. As the weaker of the two countries militarily (and with its stronger ally, the Soviet Union, unwilling to force the issue during the Cold War), Cuba has protested the U.S. presence mainly through political rhetoric and refusals to cash the annual U.S. rent checks.<sup>13</sup>

It could thus be argued that Guantanamo Bay became occupied territory once the United States refused to leave, and that Cuba has had no responsibility for U.S. actions there because it was forced to accept the U.S. presence, which is, after all, a military one. Additionally, it could be argued that Cuba was required by its own obligation under international law to honor its treaty agreements, and was legally forced to allow the United States to stay at Guantanamo Bay, even if it no longer wished to do so. Moreover, by honoring the terms of the lease, Cuba was unable to exercise any jurisdiction over U.S. activities at Guantanamo Bay, and it was prevented from evicting the United States because the 1934

9. *In re Guzman & Latamble* (1934), Cuba S Ct, Ann Dig of Pub Intl Law Cases 1933-34.

10. United Nations, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, New York: United Nations, 2008, p. 66.

11. *Ibid.*, p. 66.

12. *Ibid.*, p. 76.

13. Strauss, *The Leasing of Guantanamo Bay, op. cit.*, p. 182-183.

treaty only allowed only the United States and not Cuba to terminate the lease unilaterally.<sup>14</sup>

The opposite view—that Cuba continued to willingly permit the U.S. presence—is supported by the fact that Cuba took no steps to abrogate the lease after the 1959 revolution, not even one that a number of international jurists considered logical—invoking the principle of *rebus sic stantibus*, which allows a country to withdraw from a treaty when a fundamental condition underlying it has changed.<sup>15</sup> It could also be argued that Cuba’s rhetorical denunciations of the lease and its refusal to cash the rent checks are weak forms of protest compared to other options at Cuba’s disposal to try to regain control over the territory, such as initiating diplomatic efforts or legal action. Thus, there is room to challenge whether Cuba really wanted the United States to leave it.<sup>16</sup>

An assertion that Guantanamo Bay is occupied territory could be countered by the argument that the United States remains there under terms of a bilateral agreement that has not been terminated, and that the nature of the U.S. presence, while military, is inconsistent with the criteria set by international law for identifying when territory is occupied in a legal sense—for example, the occupier is required to maintain the sovereign state’s legal system and other institutions, but this is not the case at Guantanamo Bay.

Other evidence of a willingness to facilitate U.S. activities there in recent years was a Cuban offer in 1999 to provide medical and other services to people fleeing the Kosovo conflict and brought by the United States to Guantanamo Bay (the U.S. project was

aborted so the offer was not acted upon);<sup>17</sup> and Cuba’s offer to facilitate U.S. efforts to transport prisoners to the detention center in Guantanamo Bay in 2002. The willingness expressed in the latter case was evident: “We shall not set any obstacles to the development of the operation,” the government said as detainees began arriving. “Having been apprised of the operation and aware of the fact that it demands a considerable movement of personnel and means of air transportation, the Cuban authorities will keep in contact with the personnel at the American naval base to adopt such measures as may be deemed convenient to avoid the risk of accidents that might put in jeopardy the lives of the personnel thus transported.”<sup>18</sup>

Cuba thus acknowledged knowing in advance that the United States would use Guantanamo Bay to hold prisoners, and stated its readiness to take measures that would smooth the way. But did it know about the alleged violations of human rights once they started to occur? Documents from the Ministry of Foreign Relations show that the government not only knew about the allegations, it also considered them credible.

One document prepared by Cuban authorities in connection with a meeting of the UN Human Rights Council in 2004 states: “In that territory [Guantanamo Bay], hundreds of foreign prisoners are arbitrarily detained, subjected to indescribable humiliations, totally isolated, unable to communicate with their families, or have an adequate defense. The charges against most of them remain unknown. Some of the very few who have been freed have recounted the horrors of the concentration camp, where despicable

14. “Treaty of Relations,” *op. cit.*, Art. III.

15. Strauss, *The Leasing of Guantanamo Bay*, *op. cit.*, p.170–176.

16. Among reasons suggested to explain why Cuba may tolerate the United States remaining at Guantanamo Bay: giving Cuba a greater voice in the United Nations, reinforcing domestic political support for the government, keeping Cuban defense costs down, and Guantanamo’s potential to resume being a regional economic engine.

17. “Cuba offers help in assisting Kosovar refugees at Guantanamo base, CNN, 8 April 1999.

18. Ministerio de Relaciones Exteriores, “Statement by the Government of Cuba to the National and International Public Opinion,” 11 January 2002, <http://www.cubaminrex.cu/english/Guantanamo/Articulos/Prision/02-01-11-Government-Cuba.html>, last accessed 21 July 2012.

forms of torture and cruel, degrading and inhuman treatment are practiced.”<sup>19</sup>

So, depending on the arguments one uses, a case may be established that Cuba willingly facilitated the entire range of U.S. activities at Guantanamo Bay during the period when the alleged U.S. violations of human rights were occurring, that it was aware of those allegations at the time and that it considered them credible. In allowing its territory to be used by the United States for wrongful acts, it met the threshold for having responsibility for those acts under the ILC draft articles.

In accepting this premise, the question would then turn to whether Cuba risks facing consequences under international law for tolerating allegedly wrongful acts. Presumably, this would depend on what Cuba actually did, relative to what it could have done, to stop the U.S. actions at Guantanamo Bay once the allegations of human rights violations came to light. In other words, were statements denouncing the acts in the UN Human Rights Council and elsewhere sufficient?

### HIERARCHY OF NORMS IN INTERNATIONAL LAW

When a nation believes wrongful acts are occurring on its sovereign territory at the hands of another state, its range of possible responses includes diplomatic, military and/or legal actions to achieve a halt to the acts in question. These responses may be unilateral or they may involve other nations. Whether and how the sovereign state intervenes in such a situation will likely depend on the geopolitical realities it faces, such as its strength relative to the alleged

wrongdoer state or its perception of the political or other consequences of acting.

A hierarchy of norms in international law that has emerged in recent decades can facilitate the intervention of a weaker state against a stronger one by endowing its action with heightened legitimacy in cases when the hierarchy gives precedence to the violated law over another aspect of international law that may otherwise keep the sovereign state from acting.

Although this hierarchy is informal and relative standings within it are nebulous or undefined in many circumstances, international law scholars broadly accept that key aspects of human rights law are considered so fundamental as to take precedence over most or all other aspects of international law, such as treaty law that obliges states to honor their international commitments.<sup>20</sup> Seen in this context, a state can be said to have a responsibility under international law to protect human rights on all of its sovereign territory, including an area where it has relinquished jurisdictional rights to another state through a lease agreement.

As an aside, the recent emergence of the doctrine of the “responsibility to protect” as an aspect of human rights law—the obligation for a nation to intervene militarily in another nation to halt or prevent human rights atrocities—may provide further legal “cover” for a state to reassert jurisdiction on a portion of its territory where it has given up jurisdictional rights to another state. At present, the responsibility to protect is a controversial notion; it runs counter to the longstanding principle of non-intervention in the internal affairs of states, and it is not universally accepted.<sup>21</sup>

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19. Ministerio de Relaciones Exteriores, “Ayuda Memoria sobre el Proyecto de Resolución titulado ‘La cuestión de las detenciones arbitrarias en el área de la base naval de los Estados Unidos en Guantánamo,’ presentado por Cuba al 60 Período de Sesiones de la CDH en Ginebra,” <http://www.cubaminrex.cu/CDH/60cdh/Guantanamo/Ayuda%20memoria%20.htm>, last accessed 21 July 2012.

20. See, e.g., Pauwelyn, Joost, *Conflict of Norms in Public International Law: How the WTO Law Relates to Other Rules of International Law*, Cambridge: Cambridge University Press, 2003; Rozakis, Christos L., *The Concept of jus cogens in the Law of Treaties*, Amsterdam: North-Holland Publishing Co., 1976; Shelton, Dinah, “Normative Hierarchy in International Law,” *American Journal of International Law*, 100 (2006), p. 291–323.

21. See, e.g., Hoffman, Julia, and Nollkaemper, André, eds., *Responsibility to Protect: From Principle to Practice*, Amsterdam: Pallas, 2012; United Nations, “Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate,” press release, document GA/10850, 28 July 2009.

The existence of the hierarchy has important implications. When the sovereign state does not take sufficient action toward ending violations it believes are occurring, it might be seen to acquiesce in those violations, exposing it to legal consequences. Likewise, if the sovereign state is unaware that the lessee state is engaging in significant or ongoing abuses of human rights on the leased territory, or if it tries but fails to ensure that the lessee state respects human rights law there, it may risk having its effective control of the leased area brought into question. This could jeopardize its title and sovereignty over the territory, as international law considers effective control to be a prerequisite for sovereignty.

The stakes are therefore quite high when part of a state's sovereign territory becomes the site of human rights abuses by another state. The situation forces the state with the sovereignty to face new legal and/or geopolitical risks as the result of the degree to which it is aware of the events, and also as the result of the course of action, if any, that it pursues.

### CONCLUSION

The fact that arguments can be developed within international law that both affirm and deny Cuban responsibility for alleged human rights violations by the United States at Guantanamo Bay shows that the potential does exist for Cuba to share responsibility if such violations are confirmed in a legal setting, and to face possible consequences based on the nature and extent of the actions it takes in response to the alleged violations.

This has ramifications for other states that lease territory between them, most notably for military bases

or “black sites” that fall under the jurisdiction of the lessee state and where the lessee's actions include violations of human rights. A finding that Cuba shared responsibility for U.S. human rights violations at Guantanamo Bay would, for example, would indicate that the United Kingdom shares responsibility for any U.S. human rights violations that occur on Diego Garcia, the Indian Ocean island where the United States has a military base that it used in the “extraordinary rendition” of prisoners to Guantanamo Bay. (This example is timely, as the initial 50-year lease of Diego Garcia to the United States will expire in 2016; negotiations to prolong it may thus offer the opportunity to add safeguards against human rights violations.)

Territorial leasing can be advantageous for the viability of states and the international system. The practice allows nations to adapt to evolving economic, security, social and political situations without resorting to boundary changes. At times leasing has been used successfully as a means of bringing peace to areas where sovereignty had been disputed.<sup>22</sup> A determination that Cuba shares responsibility for ensuring human rights at Guantanamo Bay would signal that a state which allows another state use its territory retains some responsibility under international law for what happens there, even if it gives up jurisdictional rights and no longer actively displays aspects of sovereignty. By recognizing this as an inadvertent consequence of territorial arrangements like leases, nations may consider ways to reinforce human rights protections in locations of this nature.

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22. Strauss, *The Viability of Territorial Leases*, *op. cit.*