

U.S. SOCIALISM IN CUBA: IMPLICATIONS OF PROHIBITING THE PRIVATE SECTOR AT GUANTANAMO BAY

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In recent years the Cuban government has authorized a limited amount of private sector activity, mainly services performed on a small scale. Very considerable restrictions apply to the nature and scope of this activity, but there are no geographic restrictions on where it may occur. As an ironic consequence, the only part of Cuba where all private enterprise remains prohibited by law is the portion under U.S. control: Guantanamo Bay.

That is not to say there are no private sector businesses at Guantanamo Bay, because there are quite a few—the result of U.S. military activities being outsourced to commercial enterprises. Yet commercial enterprises are forbidden by the lease that allowed the United States to use the area. This paper examines how the current situation came about and its implications for activities at Guantanamo Bay.

THE LEASE AND ITS HISTORICAL CONTEXT

The lease dates from 1903 and permits the United States to use the site as a naval station and coaling

station. Its original terms have not been modified, although the interpretations of some have evolved over time. The United States still considers the lease fully valid and justifies its continued presence at Guantanamo Bay on this basis.² Cuba's current policy is to accept the existence of the arrangement, after arguing for many years after the 1959 revolution that the lease was void.³

The lease consists of two documents—an executive agreement between the U.S. and Cuban presidents in February 1903 that acted as a framework, and a treaty in July 1903 that contained more detailed terms.⁴ The executive agreement affirmed Cuba's legal sovereignty over Guantanamo Bay while transferring active authority there to the United States:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exer-

1. The author wishes to thank the discussant for this paper at the 2014 ASCE annual conference, Jorge L. Esquirol, Professor of Law at Florida International University, whose valuable comments were taken into account in revising the text for publication.

2. Memo from Leonard C. Meeker, Deputy Legal Adviser, Department of State to Dean Rusk, Secretary of State. February 2, 1962. National Security Archive, Cuban Missile Crisis Collection, Document CC00160. ProQuest LLC and The National Security Archive.

3. *White Book: Chapter IV: A Veritable "Moral and Legal Black Hole" in the Territory Illegally Occupied by the US Naval Base at Guantánamo*, Cuba Ministry of Foreign Affairs, <http://anterior.cubaminrex.cu/CDH/60cdh/Guantanamo/English/White%20Book.htm>, accessed Nov. 19, 2012.

4. An executive agreement has the same legal force as a treaty. Glen S. Krutz and Jeffrey S. Peake, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (Ann Arbor: University of Michigan Press, 2009), p. 41.

cise complete jurisdiction and control over and within said areas (...)⁵

The clause of the lease that outlawed private business at Guantanamo Bay was contained in the treaty:

The United States of America agrees that no person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise within said areas.⁶

When the lease was made, one could describe the U.S. military system as “an island of socialism in an ocean of capitalism.”⁷ It belonged entirely to the U.S. government and had a self-contained economic and social organization in which all activity was conducted directly by the government and the persons it employed. So it is curious that the lease for Guantanamo Bay contained a provision to ban activities that could not have existed in this environment, although the historical context provides a likely explanation.

At the time, the United States had been projecting its system of democratic capitalism abroad. After ousting Spain as an obstacle to that process in Cuba through the war of 1898, it sought a presence at Guantanamo Bay partly to ensure public order and protect U.S. commercial investments on the island once it granted Cuba independence. As the first sig-

nificant U.S. military installation abroad, Guantanamo Bay was a territorial creation without a precedent but with an underlying motive of assuring a climate in which U.S. businesses could prosper in Cuba.⁸

In accepting the Platt Amendment as a condition for independence, Cuba was obliged to make parts of its territory available to the United States.⁹ In negotiating these, it sought to limit number of locations and the activities the United States could conduct there.¹⁰ The ban on commercial activity may have alleviated Cuban concerns that Guantanamo Bay might become a site where military and business interests commingled to give U.S. enterprises a protected advantage on the island, while for the United States it was a concession made at no real cost because it pertained to activities that did not exist.

PRIVATE ENTERPRISE AT GUANTANAMO BAY

The U.S. armed forces used private-sector contractors only occasionally prior to the Vietnam War period. The subsequent shift toward widespread outsourcing marked a major change in U.S. military practice¹¹ and grew out of the belief that private entities would be more efficient than governmental ones.¹² It was spurred by the end of the military draft in 1973, which led to a sharp reduction in the number of personnel directly employed by the armed

5. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

6. Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahía Honda, *ratified on* Oct. 6, 1903, U.S.-Cuba, art. III, T.S. No. 426.

7. Paraphrased from Jorge F. Pérez-López, “Islands of Capitalism in an Ocean of Socialism: Joint Ventures in Cuba’s Development Strategy,” in Jorge F. Pérez-López, ed., *Cuba at a Crossroads: Politics and Economics after the Fourth Party Congress* (Gainesville: University Press of Florida, 1994), p. 190–219.

8. The objective was “to give Cuba clear enough independence to be recognized as a state with sovereignty over its territory while keeping enough residual influence in Cuba to prevent developments that could harm U.S. interests.” Michael J. Strauss, *The Leasing of Guantanamo Bay* (Westport, CT: Praeger, 2009), p. 47.

9. Article 7 of the Platt Amendment reads: “To enable the United States to maintain the independence of Cuba, and to protect the people thereof, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.” An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June 30, 1902 (Act of March 2, 1901), 31 Stat. 895, Ch. 803, Para. 7 (1901).

10. Emilio Roig de Leuchsenring, *Historia de la enmienda Platt: Una interpretación de la realidad cubana* (Havana: Cultural, 1935. Reprint, Havana: Editorial de Ciencias Sociales, Instituto Cubano del Libro, 1973), p. 166.

11. U.S. Department of Defense, *The Armed Forces Officer* (Washington, D.C.: National Defense University Press, 2007), p. 28–29.

12. Laura A. Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (New Haven: Yale University Press, 2011), p. 23–24.

forces,¹³ and it accelerated in the 1980s and 1990s as the privatization of state activities became an international trend.¹⁴ By 1996, the Department of Defense was engaged in a “systematic and vigorous effort” to improve its performance through “streamlining and, wherever possible, lowering costs through contracting out.”¹⁵

Through this process, employees of companies under contract to the Department of Defense came to perform many functions at military installations in place of the government’s own employees; today these range “from mundane jobs like cooking and cleaning to specialized ones like maintaining and repairing sophisticated weapons systems, translating and transcribing, and interrogating (...) prisoners.”¹⁶

The arrangements made by the United States to use other nations’ territory for its military installations abroad did not prohibit commercial activity—except at Guantanamo Bay. Derogations from the ban on private business were rare but did occur.

In 1907, for example, the U.S. government authorized the Central and South American Cable Company to install telegraph cables between New York and Guantanamo Bay and build a relay station on the leased territory.¹⁷ In 1908 a retail store owned by a U.S. citizen in a nearby Cuban town, E.P. Pawley and Company, was allowed to open a branch at Guantanamo Bay, a move that a subsequent commander of the base referred to as “probably contrary to the lease agreement which forbade private enterprise on the Reservation.”¹⁸ Authorization for the

branch store was revoked in 1910 following complaints by Cuban merchants that it violated the lease and unfairly competed with them.¹⁹ Also in the context of the ban on commercial business was the denial of permission for the opening of a commercial copper mine at Guantanamo Bay²⁰ and for the sale of insurance policies to military personnel stationed there.²¹

In 1921 the U.S. and Cuban governments agreed to a one-time suspension of the ban so the successor of the Central and South American Cable Company could improve the communications system at Guantanamo Bay. U.S. Secretary of State Bainbridge Colby made a formal request that said in part:

- Article 3 of the lease signed on July 2, 1903, granting the United States the use of certain areas at Guantanamo as a Naval Station, requires that the United States shall not permit any person, partnership or corporation to establish or maintain within the said areas a commercial, industrial or other enterprise.
- As it is important that my Government shall have facilities for rapid communication between its Naval Station at Guantanamo and points in the United States and elsewhere, I have the honor to state that my Government will be grateful if the Cuban Government will consent to such a modification of Article 3 of the lease of July 2, 1903, as will permit All America Cables, Incorporated, to lay, land, maintain, and operate the aforesaid cables at Guantanamo; to maintain and

13. The number of active-duty personnel fell from more than 3 million in 1970 to 1.4 million in 2002, according to the Department of Defense. Esther Pan, “Iraq: Military Outsourcing,” Council on Foreign Relations, May 20, 2004, <http://www.cfr.org/security-contractors/iraq-military-outsourcing/p7667>, accessed July 9, 2014.

14. The trend was spurred by a British policy launched in 1979 to privatize state enterprises; see, e.g., Owen E. Hughes, *Public Management and Administration: An Introduction* (New York: St. Martin’s Press, 1994), p. 121.

15. U.S. Department of Defense, “Improving the Combat Edge through Outsourcing,” *Defense Issues* 11, No. 30, 1996.

16. Pan, “Iraq: Military Outsourcing,” *op. cit.*

17. M.E. Murphy, *The History of Guantanamo Bay*, Vol. 1, 1953, Ch. 9, Naval Station Guantanamo Bay, <http://permanent-access.gpo.gov/lps17563/gtmohistorymurphy.htm>, accessed July 16, 2014.

18. *Ibid.*, Ch. 4.

19. Gary L. Maris, “International Law and Guantanamo,” *Journal of Politics* 29 (1967), p 267.

20. Murphy, *The History of Guantanamo Bay*, *op. cit.*, Ch. 10.

21. Maris, “International Law and Guantanamo,” *op. cit.*, p. 267–68.

operate its cables now landed at Guantanamo which connect with New York City and Colon; to maintain and operate its relay station at Guantanamo, and to receive and transmit all messages forward[ed] over its lines. This request is not intended to cover any further modification of the Article in question than that which would enable All America Cables, Incorporated, to land and operate the cables just mentioned.

- My Government is of the opinion that if the Government of Cuba is disposed to approve the proposed modification of Article 3 of the lease of July 2, 1903, in the manner above indicated such modification can be regarded as consummated by the delivery to me of a note from the Cuban Government acquiescing in my Government's request.²²

The response from Cuban Secretary of State Pablo Desvernine was positive:

(I)t affords me pleasure to inform Your Excellency that the President of the Republic accepts the aforesaid proposal transmitted by Your Excellency on behalf of the Government of the United States (...)²³

The process by which this exception was created made it evident that both states had come to interpret the prohibition as firm unless derogations were agreed for specific cases. This became the norm that prevailed for many years, including a period after the outbreak of World War II when the urgent need to build up the base prompted the U.S. Navy to engage a contractor, Frederick Snare Corp., to carry out the work with as many as 9,000 employees.²⁴

THE OUTSOURCING OF MILITARY FUNCTIONS

But the ban on commercial activity could not hold back the wave of military outsourcing in the last part of the twentieth century. To have rules at Guantanamo Bay that were separate from those applied everywhere else would have entailed additional costs and reduced efficiency—the opposite of what the contracting was meant to achieve. Consequently, a broad range of activities at Guantanamo Bay came to be outsourced. For the first time, many commercial enterprises were present there simultaneously, and “today the vast majority of base workers ... work for private contractors.”²⁵

Due to this presence, an entire private sector economy now thrives at Guantanamo Bay in parallel with the government's own activities. Companies with contracts to perform work on the leased territory, and their employees, do business among themselves in addition to interacting with the U.S. military. This has become so commonplace that it extends to the most banal of situations; typical of those I witnessed when visiting Guantanamo Bay in 2008 was an employee of Lockheed Martin Corp. buying lunch at a franchised McDonald's restaurant on the base.²⁶

Contractors at Guantanamo Bay interact commercially with other contractors because services essential to their operations are often outsourced. The U.S. government even requires companies at Guantanamo Bay to do business with each other, as in this instruction to contractors that obliges them to use the services of an enterprise engaged to collect waste at the base:

22. U.S. Department of State, *Foreign Relations of the United States, 1921*, Vol. 1 (Washington, D.C.: Government Printing Office, 1936), p. 809–10.

23. *Ibid.*, p. 814–15.

24. Murphy, *The History of Guantanamo Bay*, *op. cit.*, Ch. 12.

25. Jana K. Lipman, *Guantánamo: A Working Class History between Empire and Revolution* (Oakland: University of California Press, 2009), p. 9.

26. The Lockheed Martin employee was an intelligence analyst assigned to Guantanamo Bay. McDonald's franchises at U.S. naval bases are concessions of the Navy Exchange, a U.S. state-run entity, “but are owned and operated by local businesses as franchises of the McDonald's Corporation.” “Rights and Benefits: ID Cards, Commissaries and Exchanges,” *All Hands*, September 1988, p. 44. The McDonald's franchise at Guantanamo Bay has existed since 1986 (Stacey Byington, “Guantanamo Bay's McDonald's celebrates 20th birthday,” *Guantanamo Bay Gazette*, April 21, 2006, p. 4).

These services are provided by the Base Maintenance Service Contractor, Kvaerner Process Services, Inc. For the current rates, call 011-53-90-4271.

Refuse containers will be furnished and serviced by the Government at living quarters. Refuse collection service is mandatory. Contractors are required to meet base regulations concerning collection and disposal of refuse.²⁷

In recent years, the only reported case in which U.S. authorities actually stopped businesses from operating at Guantanamo Bay involved a decision in 2013 to end commercial aircraft flights between Fort Lauderdale, Florida, and Guantanamo Bay. This was done for reasons unrelated to the treaty's ban on commercial activity; rather, the flights were found to violate a previously unenforced federal regulation on the use of U.S. Navy aviation facilities by civilian aircraft.²⁸

THE LEGAL STATUS OF BUSINESSES AT GUANTANAMO BAY

The severing of diplomatic relations between the United States and Cuba in 1961 closed off the avenue for bilateral agreements on derogations from the ban on commercial business. Nonetheless, the United States continued to enforce it for years after the Cuban revolution on grounds that if the lease remained valid, its clauses were therefore also valid. According to a 1962 memorandum from the U.S. Department of State's deputy legal adviser, Leonard Meeker, to Secretary of State Dean Rusk:

A declaration by Cuba that it denounced, repudiated, or abrogated the Guantanamo Base arrangements would be legally ineffective. Those arrangements are to continue, *according to their terms*, until agreed otherwise between the United States and Cuba.²⁹

The later shift toward outsourcing activities at Guantanamo Bay signaled one of several possibilities: the

United States may have changed its interpretation of the clause prohibiting private enterprise; it may have altered the legal status of its contractors to remove them from the scope of prohibited businesses; or it simply may have disregarded the ban. As we shall see, the evidence points to the third circumstance.

The clause that outlaws private enterprise can be interpreted both linguistically and operationally. For the definition of what constitutes a "commercial" enterprise, one can look to U.S. court rulings that cite the authoritative legal encyclopedia *Corpus Juris Secundum*:

The word "commercial" is defined as meaning mercantile; occupied with commerce; relating to or dealing with commerce; of the nature of commerce; of or pertaining to commerce; pertaining or relating to commerce or trade; derived by commerce or trade; engaged in trade; having financial profit as the primary aim.

The term "commercial" in its broad sense comprehends all business and industrial enterprises, and in a comprehensive sense it includes occupations and recognized forms of business enterprise which do not necessarily involve trading in merchandise as well as buying, selling, and exchange in the general sales or traffic of markets, although, when limited to the purchase and sale or exchange of goods and commodities, it is said to be used in a narrow and restricted sense. Thus it has been said that in its narrow sense it includes only those enterprises which are engaged in the buying and selling of goods.³⁰

Turning to how the ban is interpreted operationally, several possible variants exist. Are contractors considered private-sector businesses with the U.S. government as a client? Or are they an integral part of the government and considered part of the public sector—at least with respect to the work they are contracted to perform and, in the case of Guantanamo, the location where the work is done? Do they

27. U.S. Department of Defense, "Unified Facilities Guide Specifications: Procurement and Contracting Requirements, Supplementary Conditions for Guantanamo Bay Projects," Document UFGS 00 73 01, 2008 (revised 2014), p. 11-12.

28. Regulation 32 CFR 766 (Use of Department of the Navy Aviation Facilities by Civil Aircraft). See Carol Rosenberg, "Navy ruling ends commercial flights to Guantánamo from South Florida," *Miami Herald*, March 17, 2013.

29. Meeker memo, *op. cit.* (emphasis added).

30. 15A C.J.S. 1, cited in, *e.g.*, *United States ex rel. Burnette v. Valandra*, 300 F. Supp. 312 (D.S.D. 1969)

have some sort of hybrid legal status with a simultaneous private and public character?³¹ Or are they something else entirely? A query to the Department of Defense had yielded no response by the time this paper was submitted.³²

These are questions with wide-ranging consequences when addressed in a general sense, as the use of contractors by all branches of the U.S. government occurs on a vast scale and involves many millions of individual employees. Yet such questions have never been resolved, and the division between the public and private sectors in the context of government outsourcing remains legally nebulous.³³ The lease for Guantanamo Bay forces the issue by making it a unique location with respect to business activity: only there does the U.S. government allow private companies to operate in a zone where their presence is forbidden.

An early attempt to neutralize the prohibition was made by the solicitor of the Department of the Navy in 1915, who drafted a legal opinion that said businesses doing work for the government were tantamount to being parts of the government itself:

Where a private cable company had established a Station on the government reservation at Guantanamo under license from the Government and was operating not only for the profit of the Company, but also for the convenience and benefit of the Government, its position was analogous to that of an instrumentality of the Government.³⁴

This position did not prevail, as evidenced by the subsequent practice of making occasional agreements with Cuba to allow exceptions to the ban: if commercial enterprises were exempt from the prohibition as *de facto* elements of the U.S. military structure, the agreed derogations would have been unnecessary.

Even if one were to accept the argument, it goes no further than tolerating the presence of private sector

enterprises at Guantanamo Bay. Yet tolerating businesses that interact with U.S. military forces is quite different from permitting multiple contractors to interact commercially among themselves. Mandating them to do business with each other takes the matter to still another level; in requiring the prohibited activity to be carried out, the United States arguably overstepped any reasonable interpretation of the ban.

Or did it? If the United States were to transform the legal status of its contractors at Guantanamo Bay so that the ban does not apply to them, their presence and interaction there would be in full compliance with the lease. This could occur, for example, by nationalizing the contractors or the portions of these enterprises that are present at Guantanamo Bay for the duration of the contracts, or by otherwise formally bringing their activities and employees at Guantanamo Bay into the public sector. Yet there is no evidence that this has occurred or that it has even been contemplated.

The United States is a party to the World Trade Organization's Revised Agreement on Government Procurement, which defines "commercial" goods and services as being "of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, nongovernmental buyers for non-governmental purposes."³⁵ While this might be used as a basis for asserting that procurement causes business entities and their employees at Guantanamo Bay to be absorbed into the public sector as opposed to staying "commercial," the U.S. government has never made that argument. Indeed, it historically has sought to maintain a public/private distinction there.³⁶

The nature of the relationship between the government and its contractors at Guantanamo Bay is identical to that at other U.S. military facilities: between a

31. In a non-legal sense, this is how it appeared; see Lipman, *Guantánamo: A Working Class History*, *op. cit.*, p. 54.

32. Department of Defense, Office of Public Communication, Question Reference No. 140916-000007.

33. Paul R. Verkuil, *Outsourcing Sovereignty* (New York: Cambridge University Press, 2007), p. 78-101.

34. Murphy, *The History of Guantanamo Bay*, *op. cit.*, Ch. 9.

35. Revised Agreement on Government Procurement, art. 1 (a) (2012).

36. Lipman, *Guantánamo: A Working Class History*, *op. cit.*, p. 38, 54.

procurer in the public sector and suppliers in the private sector.³⁷ It is highlighted by the difference in legal status between employees of the government and employees of the contractors. According to a report by a U.S. government panel that examined its procurement policy:

Most of the statutory and regulatory provisions that apply to federal employees do not apply to contractor employees, even where contractor employees are co-located and work side-by-side with federal employees and are performing similar functions.³⁸

The government publishes special conditions for contractors at Guantanamo Bay that take into account circumstances that are specific to the location, so it is clear that the peculiarities of the site are not ignored; yet these conditions do not refer to the lease's prohibition on private enterprise nor do they allude to any transformation of the contractors' legal status.³⁹

One may thus conclude that the United States is simply disregarding the prohibition on commercial enterprises at Guantanamo Bay by permitting them to be present there. Two factors could have encouraged this to occur: the prospects for cost and efficiency gains from the outsourcing, and the absence of diplomatic relations with Cuba, which left the Cuban government without a direct channel to oppose the U.S. actions.

(It also is conceivable that disregarding the prohibition began inadvertently if relevant decision-makers were unaware of it. The text of the lease was not always available to persons with responsibility for its implementation,⁴⁰ and because the clause was anom-

alous and ran counter to accommodating capitalist values its existence would not have been readily assumed. Nonetheless, U.S. conduct regarding the ban has not changed since the prohibition received more visibility since 2002 through the controversy over the prison at Guantanamo Bay for persons detained in the fight against terrorism; indeed, the detention center's installation and operation led to a notable increase in the use of private contractors.)

ESTABLISHING A BREACH OF THE LEASE

Although the 1903 executive agreement with Cuba gave the United States "complete jurisdiction and control" at Guantanamo Bay—a breadth of authority that sometimes has been deemed to be *de facto* sovereignty (most recently by the U.S. Supreme Court in *Boumediene v. Bush*)⁴¹—it has never considered this as sufficient justification to discount Cuba's *de jure* sovereignty or to ignore the limits that the lease placed on U.S. activities there.

In this regard, the United States continues to abide by other restrictive clauses, even if it has interpreted them very broadly. Thus, while the lease constrains the United States to using the site as a naval or coaling station, it is up to the Department of the Navy to determine the range of activities that may occur at its naval stations, and at present these include the accommodation of "tenant commands" that engage in non-naval military activities. This explains the presence of such entities as the Joint Task Force that operates the prison for alleged terrorists.⁴²

Similarly, a "coaling station" has been interpreted expansively as a fuel supply facility for ships in which

37. See, e.g., U.S. Department of the Navy Solicitation No. N6883614R0020, "Full Food Services at Naval Air Station, Guantanamo Bay, Cuba," amended through July 2, 2014, <https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=ed7be7e7774cd09d540794d5160302f0&cview=0>, accessed July 10, 2014.

38. Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January 2007, p. 418, <http://www.acquisition.gov/comp/aap/documents/Chapter6.pdf>, accessed July 11, 2014.

39. Navy Solicitation No. N6883614R0020, *op. cit.*

40. "The contents of these documents are not well-known. At times they have been misunderstood locally and also in Havana and Washington. It is no small wonder that such has been the case. It was reported officially in 1936 that the Naval Station did not even possess a copy of the original lease agreement" (Murphy, *The History of Guantanamo Bay*, *op. cit.*, Ch. 3). Similarly, a senior officer advised me in 2008 that it did not have a copy. The situation was subsequently rectified.

41. *Boumediene v. Bush*, 553 U.S. 723 (2008).

42. Strauss, *The Leasing of Guantanamo Bay*, *op. cit.*, p. 71.

the specific fuel is irrelevant. A report in a Defense Department publication in 2004 noted that “the base was established in 1903 as a coaling station and to this day abides by the original treaty as a support point for refueling ships.”⁴³

The United States also continues to abide by its other obligations in the lease, such as maintaining the fence that separates Guantanamo Bay from the rest of Cuba and paying an annual rent for the use of the leased territory (or at least making an effort to pay via the Swiss government as an intermediary, as Cuba declines to cash the checks).

Compliance with these conditions and restrictions shows the United States still considers itself legally obliged to adhere to even minor clauses in the lease. Its conduct regarding the ban on private enterprise thus appears to be isolated to that provision.

Verifying that the United States is violating this aspect of the lease depends on what constitutes a treaty violation, because it is possible for all or part of a bilateral treaty to be altered with legal effect but without going through the formal process of revising its text and having it approved through ratification or other procedures.

This can occur in several ways. First, by making a subsequent bilateral agreement that has the legal force of a treaty in its own right. This allows the parties to adjust part of a treaty while keeping the rest of it intact, and it can be done through an exchange of diplomatic notes such as those that created the 1921 derogation from the ban on private business at Guantanamo Bay. However, no such agreement exists to encompass the current practice of outsourcing activities at the site or to authorize the presence of individual contractors.

Second, a treaty also may be revised without changes to its text if the parties agree to a common interpreta-

tion of aspects that are no longer aligned with the political or operational realities that existed at the time the treaty was made.⁴⁴ Here again, no agreement has been made with respect to interpreting the clause that forbids commercial enterprises at Guantanamo Bay.

Third, a treaty may be legally altered through the acquiescence by one party to the other’s conduct over time, when this conduct deviates from what the treaty stipulates.⁴⁵ But it is unlikely that Cuba has acquiesced or otherwise tacitly agreed to the presence of private enterprises at Guantanamo Bay since 1959 and particularly since the broad expansion of outsourcing. It has given no positive indication of such acquiescence, and has continually stated its desire for the United States to abandon Guantanamo Bay, an act that would trigger the termination of the lease and the return of the site to Cuban control.⁴⁶

Finally, the Vienna Convention on the Law of Treaties stipulates that a party to a bilateral treaty may suspend or terminate its compliance with a specific provision only if the treaty allows it or if both parties agree,⁴⁷ and neither is the case with the Guantanamo Bay lease.

Thus, from the reasons elaborated here, it is possible to conclude that the United States is violating Article III of the treaty that comprised the second part of the lease agreement.

IMPLICATIONS OF BREACHING THE LEASE

The Vienna Convention allows one party to a treaty to suspend or terminate the entire treaty if the other commits a “material breach,” but permitting commercial enterprises at Guantanamo Bay does not meet the threshold it establishes for this because a violation of this type is not an obstacle to the treaty’s core purpose—allowing the United States to use the

43. Randy B. Frye, “Naval Station Guantanamo Bay Fuel Summit Held,” *Fuel Line 2* (2004), p. 26.

44. Athina Chanaki, *L’adaptation des traités dans les temps* (Brussels: Bruylant, 2013), p. 305.

45. *Ibid.*, p. 376–88.

46. Treaty of Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

47. Vienna Convention on the Law of Treaties, May 23, 1969, art. 44, 1155 U.N.T.S. 331.

territory.⁴⁸ The breach must therefore be considered a non-material one.

While the Convention does not address the consequences of non-material breaches,⁴⁹ the International Law Commission has done so, stating that “in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity.”⁵⁰ The principle of international law at the heart of this rule was elaborated by the Permanent Court of International Justice in the *Factory at Chorzów* case:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.⁵¹

Among the derivative principles elaborated by the ILC, the state responsible for an internationally wrongful act—such as violating a treaty provision—has a continued duty to comply with the obligation it has breached;⁵² and if the breach is continuing the state is obliged to cease it and offer any necessary assurances and guarantees that it will not be repeated.⁵³

To date, there has been no legal challenge to the presence of commercial enterprises at Guantanamo Bay. Cuba is an unlikely source of one because it is not an injured party, given that the situation developed within the context of a pre-existing absence of economic relations. Nonetheless, the possibility of a

challenge by others cannot be ruled out, particularly as the public controversy over the detention center for alleged terrorists and accusations of human rights violations there generate opportunities for this to occur. The functioning of the prison, like other military activities at Guantanamo Bay, is largely dependent on private sector contractors.⁵⁴ Thus, the legality of their participation could become an issue either in its own right or in connection with human rights claims. A judgment affirming that the use of contractors violates U.S. obligations under the lease could force the practice to be halted and disrupt numerous operations at the naval station, including the prison.

Any complaint that the United States has breached the lease would almost certainly have to occur within the domestic U.S. legal system. At the level of international law, neither the United States nor Cuba accepts compulsory jurisdiction by the International Court of Justice. Besides, an international legal effort by Cuba to ensure full U.S. compliance with the lease could be seen as legitimizing an arrangement that Cuba only grudgingly accepts, and might appear contradictory to its desire for the United States to abandon Guantanamo Bay.

It is equally unlikely that the U.S. outsourcing would be challenged within Cuba’s domestic legal system as Cuba had granted “complete jurisdiction and control” at Guantanamo Bay to the United States; consequently, Cuba has not sought to exercise any jurisdiction in the leased territory since the lease was

48. *Ibid.*, art. 60: “A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”

49. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009), p. 748.

50. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Commentary to Art. 42, in *Yearbook of the International Law Commission*, 2001, Vol. II, Part 2 (New York: United Nations, 2007), p. 117.

51. *Factory at Chorzów* case (Germ. v. Pol.), 1928 P.C.I.J. (Ser. A) No. 17, p. 47.

52. *Ibid.*, art. 29.

53. *Ibid.*, art. 30. A further principle, that the state in breach is obliged to make reparations for any injury caused (*ibid.*, art. 31), would not apply here; Cuba has been shielded from injury by the political, economic and social isolation of Guantanamo Bay from the rest of Cuba that has prevailed since the 1960s, before the U.S. outsourcing trend began.

54. Martha Minow, “Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy,” *Boston College Law Review* 46, 5 (2005), p. 1000.

made. Indeed, a 1934 ruling by the Cuban Supreme Court mandated that Cuba must consider Guantanamo Bay as foreign territory⁵⁵ and thus its own legal system does not apply there.

Within the U.S. legal system, the “supremacy clause” in the U.S. Constitution makes treaties part of U.S. law.⁵⁶ Although there has been much judicial inconsistency about the domestic enforcement of treaties that require implementing legislation, that is not the case with so-called “self-executing” treaties. As the Supreme Court stated in *Foster v. Nielson*, a treaty “is (...) to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision.”⁵⁷

The court’s 2008 ruling in *Medellin v. Texas* limited what constitutes a self-executing treaty but reaffirmed the principle that such a treaty automatically becomes federal law upon ratification,⁵⁸ which allows parties claiming injury from non-enforcement to sue for compliance. As the self-executing nature of the Guantanamo Bay lease was established long ago—the application of U.S. jurisdiction and control did not require legislation—this remains an option for those who may claim injury from the presence of private-sector companies there—for example, prisoners claiming harm from the acts of businesses involved in the detention center’s operation.⁵⁹

Deeming the lease to be U.S. law on this basis also exposes the government and its contractors at Guantanamo Bay to allegations of establishing and operating illegal businesses, for example through charges related to racketeering. The employees and clients of

these companies might themselves face legal risks associated with participating in illegal activities.

Apart from the impact on the functioning of the naval station, establishing that part of the lease is being breached would undermine U.S. foreign policy in various respects. At the bilateral level, it would give Cuba a stronger political argument for opposing the continued U.S. presence at Guantanamo Bay. As for U.S. international relations more generally, such a finding could counteract the very reason that the United States wanted to be at Guantanamo Bay in the first place: facilitating the climate for U.S. enterprises to operate abroad:

For (...) the businesses whose trillions of dollars in investments are protected by a variety of international treaties, the ability to enforce treaty-based rights abroad is essential. But other countries are less likely to observe their treaty obligations if the United States fails to live up to its side of the bargain.⁶⁰

In a broader sense, a court ruling on the whether the United States is violating the ban on commercial enterprises at Guantanamo Bay can aid in further refining the concept of treaty violations in international law. At the national level, it might bring more clarity to the legal relationship between the public and private sectors, and to the legal nature of companies or activities carried out by them in this heretofore nebulous environment. The resulting impact on the rights and obligations of states and companies can influence their future interactions in a world where business is increasingly globalized and governing is increasingly privatized.

55. *In re Guzman & Latamble*, Cuba S. Ct., 7 Ann. Dig. (I.L.R.) 112 (1934).

56. U.S. Constitution, art. VI, cl. 2.

57. *Foster v. Nielson*, 27 U.S. 253, 314 (1829); see also Carlos Manuel Vázquez, “Judicial Enforcement of Treaties: Self-Execution and Related Doctrines,” *American Society of International Law Proceedings* 100 (2006), p. 440.

58. *Medellin v. Texas*, 552 U.S. 491 (2008).

59. Griff Witte and Renae Merle, “Contractors Are Cited in Abuses at Guantanamo,” *Washington Post*, January 4, 2007.

60. Oona A. Hathaway, Sabrina McElroy and Sara A. Solow, “International Law at Home: Enforcing Treaties in U.S. Courts,” *Yale Journal of International Law* 37 (2012), p. 55.