

IMMIGRATION DETENTION IN GUANTÁNAMO BAY

(Not going anywhere anytime soon)

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Abstract

The detention facilities at the United States' Naval Station at Guantánamo Bay, 45 square miles (120 km) of land located at the south-eastern corner of the island of Cuba, gained global notoriety since the 'War on Terror' began in 2002. It is not so widely known, however, that since 1991 the base has been extensively used as an immigration detention facility for asylum seekers and refugees. This paper is concerned with the 'Migrant Operations Center' (MOC), which is the immigration detention facility operating at the base under a cloak of relative secrecy. It places the Guantánamo Base in its historical and geographic context. It shows that the very particular imperial geography of Guantánamo Bay anticipated its use as a detention facility for 'aliens'. This paper argues that it is problematic for the US to continue the decades old policy of interdicting and detaining refugees at Guantánamo, despite its alleged, though empirically unfounded, role as a deterrence mechanism for others considering a boat journey to US shores.

Keywords

Guantánamo Bay, Cuba, Immigration Detention, Migrant Operations Center

Introduction

The United States' Naval Station at Guantánamo Bay, 45 square miles (120 km) of land located at the south-eastern corner of the island of Cuba, received widespread coverage and gained global notoriety when the Bush Administration began detaining its first prisoners from the 'War on Terror' there in 2002 (Selsky, 2008). It is not so widely known, however, that since 1991 the base has been extensively used as an immigration detention facility for asylum seekers and refugees. Indeed, the "practice of holding aliens on this base for considerable periods without legal rights... was a significant factor in the choice of Guantánamo Bay to house post-September 11 prisoners" (Wilsher, 2011: 240).

This paper is concerned with the ‘Migrant Operations Center’ (MOC), which is the immigration detention facility at Guantánamo operating under a cloak of relative secrecy. Guantánamo Bay has been utilised by the US as a site for immigration detention and status determination since 1991. Though little is known about the conditions of the refugees’ detention at the MOC, the ostensible rationale for their detention is one of deterrence, "to discourage illegal and dangerous voyages by sea and to encourage future migrants to pursue safe and legal migration options" (Farber, 2010: 990).¹ Asylum seekers and refugees who are stopped en route to the United States are brought to the facility before they have their protection needs assessed. Asylum seekers whose claims for protection are not accepted are returned home but those found to be refugees remain detained in Guantánamo Bay indefinitely until they are resettled in a third country (that is, a country other than the United States).



Figure 1: Location of Guantánamo Bay (source: Wikipedia Maps)

To understand the United States’ establishment of a detention centre for asylum seekers and refugees in Cuban territory, it is important to appreciate the historical construction of Guantánamo as a part of an imperial geography (Gregory, 2006). This paper places Guantánamo in historical and geographic context, demonstrating that the Bay is, in Kaplan’s deft turn of phrase, “haunted by the ghosts of Empire” (2005: 832). It begins by tracing the history of the United States and Cuba through the Spanish-American war, the years of the Platt amendment and the Cuban revolution of 1959. It will show that Guantánamo Bay was acquired by the United States through three agreements with Cuba signed in 1903 and 1934. Despite calls by Cuba for the territory to be returned, the United States can occupy Guantánamo Bay in perpetuity if it so desires. This paper argues that a critical reading of this imperial history anticipates the use of Guantánamo Bay as an externalised detention facility, a particular space in which the US exercises jurisdiction and control over asylum seekers and refugees.

This paper will then evaluate the use of Guantánamo Bay for the detainment of asylum seekers and refugees, since the establishment of the ‘Migrant Processing Center’ in 1991, up until the present day. It will posit that the establishment of an immigration detention facility in the Guantánamo Bay Naval Base was a responsive action of

President George H.W Bush, later perpetuated by President Clinton during the *Balseros* crisis, to a perceived national security threat, namely the boatloads of people fleeing Haiti. This executive reaction came in the wake of a “revival in 1981 of systematic imprisonment of (aliens) entering the US without proper documents” (Simon, 1998: 578-579). The deployment of such an innovative technology of governance, the ‘externalisation of asylum’ (Hyndman and Mountz, 2008), was in line with a growing overlap between criminal justice and immigration policy at the time, what some scholars have dubbed ‘cimmigration’ (Stumpf, 2007). This paper argues that the immigration detention facility at Guantánamo operates as an exemplar of these trends.

The final part of this paper will evaluate the future of immigration detention at Guantánamo Bay. As the world’s largest resettlement country for refugees and the biggest donor to the United Nations High Commissioner for Refugees, the United States is a respected country in the international refugee protection regime. The United States’ immigration detention centre in Guantánamo Bay has been in operation for more than two decades, as part of a politicised effort to keep asylum seekers offshore. The detention of asylum seekers and refugees in Guantánamo Bay is an indelible and symbolic stain on the reputation of a country that has been an international leader in refugee protection. It represents what has become an entrenched shift “from legal frameworks of protection to more politicized and securitized practices of exclusion... (using) geography to suspend access to asylum” (Hyndman and Mountz, 2008: 269). This paper argues that it is problematic for the US to continue the decades’ old policy of interdicting and detaining refugees at Guantánamo, despite its alleged, though empirically unfounded, role as a deterrence mechanism for others considering a boat journey to US shores (Nash and Humphrey, 1988; Crock and Ghezelbash, 2010).

History of Guantánamo Bay and the United States – An Imperial Geography

The Spanish-American War

The history of how the United States came to occupy the territory of Guantánamo Bay is largely one of imperial conquest that can be traced back to the first days of the republic, when a relationship was formed with Cuba. In 1820, Thomas Jefferson, the third President of the United States told John C Calhoun, the then Secretary of War, that Cuba was "the most interesting addition which could ever be made to the [United States] system of States" and that the United States "ought, at the first possible opportunity, to take Cuba" (Schlesinger and Schlesinger, 2004: xxii). At that time, Cuba was a Spanish colony, but movements for the annexation of the country to the United States gained strength, in both Cuba and the United States, throughout the 1840s and the 1850s. The Cuban economy was also connected closely with that of the United States, which made annexation a more feasible and desirable prospect (Sweeney, 2007).

The United States made many unsuccessful attempts to purchase Cuba from Spain between 1848 and 1860. Despite these failed attempts, the United States, in the 19th Century spirit of ‘Manifest Destiny’, did not lose interest in the Spanish territory. When general resentment between the Cubans and their Spanish colonisers led to uprisings in Cuba in 1895, the expansionist United States was determined to use this revolt to its advantage. On 19 April 1898, the United States congress passed a joint resolution declaring "the people of the island of Cuba are and of right ought to be free and independent" and demanded the withdrawal of Spanish armed forces from Cuba

(Berdahl, 1920: 537). The joint resolution also contained an important amendment, proposed by Senator Henry M Teller of Colorado, who vehemently opposed annexation of Cuba (Deere, 1998), stating that the United States could not annex Cuba and must leave "control of the island to its people"².

The joint resolution was signed on 20 April 1898. On the same day, an ultimatum demanding Spanish withdrawal from Cuba was sent to Spain. Spain declared war on the United States on 24 April 1898. The United States responded with a declaration of war on 25 April 1898. After sixteen weeks of fighting, the Spanish surrendered in July of 1898. Spain relinquished control of Cuba without remunerative compensation and the Spanish-American War came to an end with the signing of the Treaty of Paris on 10 December 1898. Guantánamo Bay served as an important naval base and coaling station for the United States throughout the Spanish-American War (Heinl, 1962). Following the end of the war, Cuba, including the territory of Guantánamo Bay, came under the military occupation of the United States. In 1899 a survey was done by the United States for the formation of a continuing naval reservation in Guantánamo Bay (Murphy, 1953).

Platt Amendment and Cuban Independence

After the Spanish-American War, the United States did not attempt to annex Cuba and its territory at Guantánamo Bay outright. This was consistent with its promise under the Teller amendment. However, in 1901, Orville Platt, Chairman of the Senate Committee on Foreign Relations, proposed an amendment to an Army Appropriation Bill. The 'Platt Amendment,' as it became known, stipulated eight conditions that had to be met before the United States would grant Cuba its independence. The conditions, which undermined Cuban independence, included that the government of Cuba would lease to the States lands necessary for coaling and naval stations. Cuba had no choice but to adopt the Platt Amendment if it wished to be free of military rule. The amendment was approved by the United States congress on 2 March 1901 and became an appendix to the Constitution of Cuba on 20 May 1903 (Murphy, 1953).

In accordance with the Platt amendments and the Cuban Constitution, the first lease agreement for Guantánamo Bay was signed by Cuban President Estrada Palma on 16 February 1903 and by United States President Theodore Roosevelt on 23 February 1903. The Lease agreement entitled 'Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations: Lease to the United States of Lands in Cuba for Coaling and Naval Stations' leased to the United States the territory of Guantánamo Bay to be used as a naval and coal station. Article III of the Lease Agreement "recognizes the continuance of ultimate sovereignty of the Republic of Cuba over" the Guantánamo Bay Naval Base, and at the same time consents that the "United States shall exercise complete jurisdiction and control over" the territory³. A further agreement dated 2 July 1903, 'Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantánamo and Bahía Honda (Supplementary Agreement)' stipulated under Article I that the: "the United States of America agrees and covenants to pay to the Republic of Cuba the annual sum of two thousand dollars". The Lease Agreement and the Supplementary Agreement of 1903 formed the basis of United States occupation of Guantánamo Bay until 1934⁴.

Great hostility towards the Platt amendment on the part of Cubans and political instability in Cuba finally led the United States to abandon much of the amendment through the

Treaty between the United States of America and Cuba dated 29 May 1934⁵. Despite this development, the complete control and jurisdiction of the United States over the territory of Guantánamo Bay endured, with Article III of the 1934 Treaty stipulating that the lease would continue unless Guantánamo Bay is abandoned by the United States or both parties agree to the modification of the present limits of the lease agreement. That is, under the 1934 Treaty, the lease for Guantánamo Bay became indefinite, such that the United States and not Cuba could act unilaterally to end the agreement. It is because of the perpetuity of the lease agreement that Rear Admiral Murphy contended in 1962 that the naval station in Guantánamo Bay is: “for all practical purposes... American territory. Under the foregoing agreements, the United States has... exercised the essential elements of sovereignty over this territory, without actually owning it” (Murphy, 1953: 7). A number of Retired Military Officers agree with Murphy and add that to their “knowledge, Guantánamo is the only military base located in another country that the United States is legally entitled to keep in perpetuity”⁶.

The Cuban Revolution and Guantánamo Bay

The United States retained close ties with Cuba until a revolution resulted in the ousting of the Cuban President and US ally, General Fulgencio Batista, who was forced to flee Cuba on New Year’s Day, 1959 (Sweeney, 2007). Following the revolution in Cuba, Fidel Castro was sworn in as Premier of Cuba on 16 February 1959. Fidel Castro became the president of Cuba on 2 December 1976. As President, Fidel Castro began a programme of nationalisation of Cuban industry, including the sugar, cattle and tobacco plantations, many of which were owned by United States investors. This antagonised the US government and led to a deterioration of the relationship between the two countries. This declining relationship called into question the fate of Guantánamo Bay as a United States military base.

Soon after coming to power, Fidel Castro demanded the return of Guantánamo Bay to the Cuban people and has since refused to cash all but the very first rent cheque for the lease of Guantánamo Bay in protest against the United States occupation (Boadle, 2007). Fidel Castro has maintained that the first cheque was mistakenly cashed during the confusion of the first days of the revolution (Goitia, 2008). In 1960, the United States became highly fearful of a Cuban invasion of Guantánamo Bay and forced seizure of the American Naval Base by the Castro regime (Herter, 1960⁷). Declassified documents reveal that Defence Secretary Thomas Gates advised the Chief of Staff to “hold on to Guantánamo Bay against any harassment, including ground attacks”⁸. On 26 September 1960, Fidel Castro fuelled these fears in a speech to the United Nations General Assembly in which he condemned the presence of the base at Guantánamo Bay but refuted any plans to attack the United States Territory for fear of giving the United States an excuse to attack Cuba. Fidel Castro’s condemnation of the US presence at Guantánamo was unequivocal. He stated:

There is a base on our island territory directed against Cuba and the Revolutionary Government of Cuba, in the hands of those who declare themselves enemies of our country, enemies of our revolution, and enemies of our people. In the entire history of the world's present-day bases, the most tragic case is that of Cuba; a base imposed upon us by force, well within our territory, which is a good many miles away from the coast of the United States, an instrument used against Cuba and the Cuban people

imposed by the use of force, and a constant threat and a cause for concern for our people. (Castro, 1960)

On 19 February 2008, Fidel Castro formally resigned as Cuba's President. His brother Raúl Castro succeeded him. The change in Presidency in Cuba has not led to any significant changes in the operation of the country as Raúl Castro was a prominent figure during his brother's rule and was considered by some to be the "chief operating officer" (Dominguez, 2008). In an interview published in *The Nation* magazine, Raúl Castro confessed that the United States and Cuba have, since 1994, had a secret agreement for regular contact. Representatives from the United States and Cuba have met more than 157 times to discuss the operation of Guantánamo Bay and partake in joint emergency-response exercises (Penn, 2008).

When asked how he felt about Guantánamo Bay today Raúl Castro said:

I'll tell you the truth... the base is our hostage. As a President, I say the United States should go. As a military man, I say let them stay. (Penn, 2008)

Raúl Castro demonstrated a clear commitment to reclaiming Guantánamo, however, when he was asked how he felt about President Obama's election promise to meet with Cuban leaders. He stated:

We must meet and begin to solve our problems, and at the end of the meeting, we could give the president a gift... we could send him home with the American flag that waves over Guantánamo Bay. (Markey, 2008)

Despite this, the United States has shown no willingness to leave Guantánamo Bay. Under international law Cuba retains "ultimate sovereignty" over the leased area of Guantánamo Bay whereas the United States can exercise "complete jurisdiction and control" over the occupied land (USA-Cuba, 1903⁹). This lease is unlikely to be repudiated.

Upon critical appraisal, the historical construction of Guantánamo Bay is an integral part of an imperial geography. It is the very particular spatial and political history of the base that "provides the legal and political groundwork for the current violent penal regime" (Kaplan 2005: 833), as well as the often overlooked immigration detention facility that is in operation there. Guantánamo Bay represents a constituted space whose particularity is very much a part of its functioning (Reid-Henry, 2007). Despite an overwhelming tendency in academic discourses to characterise Guantánamo Bay under Giorgio Agamben's umbrella notion of 'spaces of exception,' such rhetoric obscures the actual construction and constitution of this particular territory (Agamben, 2005 and Reid-Henry, 2007). Far from being a 'black hole' (Fletcher, 2004), a 'nonplace' beyond the law, the detention of refugees in Guantánamo Bay is actually dependent upon the law. This detention would not be possible without the international agreements between the United States and Cuba and executive orders that have the full force of municipal law.

Immigration Detention in Guantánamo Bay – Externalising Asylum

The creation of an extraterritorial detention centre can be traced back as far as 1981 when the US President at the time, Ronald Reagan, began a Migrant Interdiction

Program, which continues to this day¹⁰. Under the programme United States Coast Guard vessels were to stop and board Haitian or un-flagged vessels outside the territorial boundaries of the United States. Haitians were to be interviewed or 'screened' for their protection needs on board Coast Guard vessels or cutters. If the Haitians were found to have a 'credible fear' of persecution or torture they were to be taken to the United States where they could lodge an asylum claim.

Between 1981 and 1990 the United States brought many asylum seekers who were stopped en route to the United States and found to have a credible fear of persecution to the United States mainland for a full assessment of their refugee status. At that time the majority of such individuals were Haitian. However, in December of 1990, after the democratic election of a Catholic Priest, Jean-Bertrand Aristide, to the office of President in Haiti, the United States' treatment of Haitian asylum seekers and refugees changed, given that Haiti was at that time deemed to have become safe. No individuals interdicted by the United States were brought to the United States, rather they were all returned to Haiti.

The United States Migrant Interdiction Program took yet another direction when Aristide was overthrown in a coup by the Haitian military in September of 1991. According to Amnesty International, the Haitian military attacked and killed 1,500 of Aristide's supporters immediately after the coup (Amnesty International Haiti, 1992). The removal of Aristide was condemned by the United States and as a response to the military coup the US adopted mandatory sanctions against Haiti, while the Organization of American States (OAS) instituted voluntary sanctions aimed at restoring Constitutional government in the troubled country. The OAS and the United Nations declared the rule of the junta leader, Raoul Cédras to be illegal under international law¹¹.

Following the coup, the United States found itself in a political bind. It had publicly denounced the coup that had removed Aristide and had placed sanctions on Haiti but the Bush Administration was hesitant to give asylum to the large number of Haitians who were fleeing the country by boat to the US (Legomsky, 2006). The administration of George H W Bush feared that bringing Haitians interdicted at sea to the United States might lead to a mass exodus of people from Haiti (Briggs, 1993). Bush also desired, in a presidential election period, to avoid a replay of the Cuban Marielito boat crisis that had plagued the Carter presidency (Koh, 1994). The Mariel boatlift in Florida in 1980, which saw some 125,000 refugees fleeing Cuba, triggered a shift in US thinking about refugees. Throughout the 1980s refugees were "increasingly problematized" and "stigmatized as criminals and deviants" (Simon, 1998: 582). It was this shift that precipitated the promulgation of a policy of imprisonment of undocumented migrants, influenced by the notion of 'humane deterrence'. According to Simon, "refugees in the 1980s were increasingly seen in a new framework of threat... a dangerous class whose unconstrained needs and desires threatened to overwhelm the nation" (Simon, 1998: 583-584). He adds that, "among the disfavoured groups, none has been more harshly dealt with than Haitians" (ibid). Such was the political atmosphere in the US as the Haitians made for the country's shores in 1991.

The United States initially responded by keeping Haitians fleeing Haiti on its Coast Guard cutters. In the eight-month period following the coup, however, 38,000 Haitians were intercepted fleeing their country by the United States (Helton, 1993). Reluctant to allow Haitians into the United States but unable to keep them on Coast Guard ships because of overcrowding, the United States responded to the high number of Haitians asylum

seekers by authorising a policy of status determination and detention in Guantánamo Bay. The US built a series of tent cities and shelters guarded by United States troops and surrounded by barbed wire on its Naval Base. The Haitians were given no due process rights of any kind (Koh, 1994). By 1992, 12,500 asylum seekers were held there whilst their claims were screened (Wilsher, 2011).

Guantánamo Bay was used exclusively for the detention of Haitian refugees between 1991 and 1994. However, on 5 August 1994, thousands of Cubans attempted to set sail for the United States on rafts and boats in response to rumours that the Cuban authorities were permitting the departure of Cuban citizens from the country. The rumour was in fact incorrect and those attempting to leave were met with Cuban officials who were tasked with stopping the exodus. The rafters (popularly known as *Balseeros*) and the police became involved in altercations that led to the death of two policemen and left another seriously injured. A riot in the commercial district of Havana followed. On 6 August 1994, Castro made an announcement that he was not opposed to letting those who wanted to leave Cuba emigrate. On 12 August 1994, Castro ordered the Cuban Coast Guard not to apprehend anyone leaving Cuba unless they attempted to flee on board a stolen boat (Human Rights Watch, 1994). In response to the influx of Cuban nationals in 1994, the governor of Florida, Governor Lawton Chiles, declared a state of emergency and openly urged the then President Clinton to take immediate action (Wachs, 1996).

Despite his earlier criticism of the Bush Administration's treatment of Haitian asylum seekers and refugees during the Haitian Refugee crisis (when he was a Governor and Presidential candidate), on 19 August 1994, President Clinton announced that Cubans would be taken to the Guantánamo Bay Naval Base to join the 15,000 Haitians already there at that time (Sartori, 2001). It should be noted that Cubans have enjoyed preferential treatment under US immigration law since the passing of the Cuban Refugee Adjustment Act (CAA)¹² in 1966. Under the CAA, which continues to operate today, any Cuban national who has been living in the United States, under any circumstance and for any reason, can apply to become a permanent United States resident after one year. Permanent residency is a path to United States citizenship. The CAA is only applicable to Cuban nationals. Cubans have been privileged under United States immigration law because their claim to protection in the United States has traditionally been seen to be a statement against the perceived shortcomings of the Cuban regime. However, by 1994, the fall of the Soviet Union as a superpower and the end of the Cold War had made Cuban refugees less potent as a statement against communism. Thus the Clinton administration was prepared to fundamentally change Cuban refugee policy. The United States now has a wet foot/dry foot policy. Under the policy, any Cuban who attempts to come to the United States by sea will now be interdicted extraterritorially and returned to Cuba. As with Haitian nationals, if an interdicted Cuban exhibits a credible fear of persecution they will be taken to Guantánamo Bay for further status determination. However, any Cubans who make it onto United States soil retain their privileged status under the CAA and after one year can request an adjustment of their status to that of permanent resident.

On 15 November 2002, President George W Bush issued Executive Order 13276. The order, (as amended by Executive Order 13286), authorises the Secretary of Homeland Security to maintain custody and conduct screening of any undocumented non-citizens intercepted in the Caribbean region in Guantánamo Bay or any other appropriate location. Thus, United States municipal law provides an unreviewable discretion to the

Secretary of Homeland Security for the detention and status determination of asylum seekers and refugees in Guantánamo Bay.

The establishment of the immigration detention facility at Guantánamo Bay Naval Base was part of a shifting political framework for understanding the migration of asylum seekers and refugees to US shores. In light of the growing criminalisation of asylum seekers and refugees in the American consciousness and the proliferation of government policies mandating greater use of imprisonment, the use of detention against immigrants in the United States may be seen as a logical outcome (Simon, 2010). The decision to 'externalise Asylum' by creating a detention facility at Guantánamo Bay, however, represented a significant policy innovation and a respatialisation of governance with respect to asylum seekers and refugees. The use of Guantánamo Bay for immigration detention in the early 1990s marks a turning point in the way the "space of Guantánamo Bay was deployed within American imaginations and materialisations of power" (Reid-Henry, 2007). The base at Guantánamo became a geographical pivot on which a new strategy of immigration governance, the 'externalization of asylum' became very quickly naturalised and continues to be pursued in the name of security and deterrence.

Current Operations of the Immigration Detention Centre in Guantánamo Bay

Since its establishment, the detention facility for asylum seekers and refugees at Guantánamo Bay has become more sophisticated. Asylum seekers and refugees on the base are now detained in dormitory style, renovated, marine barracks and are escorted by security staff at all times (Rosenburg, 2012). At the time of writing, the GEO Group, previously known as the Wackenhut Corrections Corporation¹³, a company that operates private prisons in the United States and abroad, provides "Management and Operations (as well as) unarmed custody officers" at the Migrant Processing Centre for the United States government (GEO Group, 2011). These include "all staff, supplies and equipment to manage and operate" the centre (ibid). GEO was awarded the contract for running the Migrant Operations Center in 2003. This contract was renewed in 2006 with four, one-year renewal option periods.

The Department of Homeland Security (DHS) has a permanent Asylum Officer from the Refugee Corps, a division of the United States Citizenship and Immigration Services (USCIS), stationed at Guantánamo Bay to conduct status determinations¹⁴. Asylum seekers detained at Guantánamo Bay are subject to a face-to-face interview with the Asylum Officer from the Refugee Corps to determine if they are refugees. Asylum seekers who are found not to have a well-founded fear of persecution are returned to their home country. Asylum seekers have no access to legal representation and no right of review of their status determination. Individuals who are confirmed to have a well-founded fear of persecution through the refugee status determination process in Guantánamo Bay are not referred to as 'refugees' by the United States but are instead labelled as 'protect migrants'. This label is deliberately misleading and obfuscates the United States' particular obligations to these individuals as set out in the Protocol Relating to the Status of Refugees¹⁵ (Refugee Protocol), which the US ratified in 1968. Under the Refugee Protocol, the United States must abide by Articles 2 to 34 inclusive of the Convention Relating to the Status of Refugees (Refugee Convention). The refusal to acknowledge the protected status of refugees in Guantánamo Bay does not in any way diminish the United States' responsibility to those refugees under international refugee law, including the prohibition on their *refoulement* (ie rejection) to persecution¹⁷.

The Migrant Operations Center in Guantánamo Bay has a capacity of 130 individuals with an additional capacity of approximately 400 individuals in the event of surge. According to the GEO website (nd) “this dynamic population may consist of single adult males and females, unaccompanied male and female juveniles, and family groups of various nationalities”. According to information given to Frohock, in 2011 “the ICE (US Immigration and Customs Enforcement) stands ready to “ramp up the camp” to handle up to 10,000 people in case of another mass migration.” (2012: 81).

The International Organization for Migration (IOM) provides services for refugees detained at Guantánamo. IOM currently provides: “community liaison assistance, translation and interpreting, education and recreation programmes, employment facilitation, and coordinating medical services”.¹⁸ The employment facilitation provided by IOM involves finding jobs on the Naval Base for some of the refugees held there. IOM typically employs spouses of naval officers serving in Guantánamo Bay. The work of the IOM at Guantánamo is an illustrative example of this transnational organisation’s embroilment in a “colonialism of compassion” (Hyndman, 2000). IOM’s activities at Guantánamo may be seen as “ethically and politically questionable work along the edges of sovereign territory and jurisdiction... engaged not only in border enforcement but also in transport and detention practices that contained rather than facilitated human mobility” (Ashutosh and Mountz, 2010: 22). Refugees working on the base are escorted by security (Rosenberg, 2012).

Refugees remain in Guantánamo Bay until a third country can be found for their resettlement. No refugees at Guantánamo Bay are resettled in the United States. As at February 2012, the immigration detention centre in Guantánamo Bay held 33 Cubans aged 18-53 years. Twenty-one have been found to be refugees and await resettlement whilst twelve are awaiting refugee status determination or repatriation (Rosenberg, 2012). The United States claims that its interdiction of sea vessels and the detention of asylum seekers and refugees in Guantánamo Bay discourages unsafe journeys by sea. However, “there is no empirical evidence that detention deters irregular migration” (Crépeau, 2012: 4). Furthermore, deterrence is not an appropriate justification under international law for detention because it “is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile” (Helton, 1989: 137). As UNHCR explains:

Detention of asylum seekers which is applied... for example, as part of a policy to deter future asylum seekers... is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. (online)

The use of detention for the purposes of deterrence is therefore impermissible and renders detention arbitrary in contravention of Article 9 of the International Covenant on Civil and Political Rights²⁰. These issues call into question the legal and ethical legitimacy of the immigration detention facility at Guantánamo Bay.

The Future of Immigration Detention in Guantánamo Bay

On 16 November 2008, United States President Barack Obama confirmed that his administration would close the detention centre affiliated with the ‘War on Terror’ in

Guantánamo Bay. The intention to close the detention centre was signed into law by President Obama on 22 January 2009 under Executive Order 13492; however the military detention centre continues to operate at the time of writing²². Despite an expressed intention that Guantánamo Bay will cease being used in the ‘War on Terror’, President Obama has made no indication that he will close the Migrant Operations Center. The detention of asylum seekers and refugees in Guantánamo Bay continues unchanged under his administration. In fact, there has been long term planning for the site. In 2011 the United States began again the process of soliciting for the provision of custody, security and facilities management services at the Migrant Operations Center,²³ proving a continued dependence on extraterritorial immigration detention.

The Obama administration’s commitment to Guantánamo Bay as a site for immigration detention was further confirmed when, following a devastating earthquake in Haiti in January of 2010, the Obama administration began preparing Guantánamo Bay to cope with a mass exodus from Haiti and tents and toilets were erected on the Naval Base. State Department Spokesman P.J Crowley is reported to have told reporters that Guantánamo Bay was going to be “an enormously valuable asset” for the United States in its dealings with the Haitian earthquake (Levine, 2010: online).

Contrary to predictions, and thanks to a number of ‘preventative protection’ policy and programme responses put in place by the US and partnering organisations, such as the UN and the IOM, there was no mass exodus from Haiti following the earthquake and Guantánamo Bay was not used as a detention facility for individuals fleeing the aftermath of the tragedy. However, the willingness of the Obama administration to use Guantánamo Bay’s Migrant Operations Center in case of an emergency highlights the continuing reliance in Guantánamo Bay as a means of dealing with irregular movements of people within the Caribbean region. It should be noted that even if President Obama loses power in the 2012 presidential elections, the continued use of the Migrant Operations Center is unlikely to be affected. Republican Presidential candidate, Mitt Romney, has not objected to the use of the Migrant Operations Center in Guantánamo Bay. It is clear that, in the name of politics and security, the externalisation of asylum policy of successive US administration, one that uses Guantánamo Bay as a place to exclude unwanted asylum seekers and refugees from US land, is not a policy that is going anywhere, anytime soon.

Conclusion

Guantánamo Bay is not the only site of offshore detention for asylum seekers and refugees globally (Mountz, 2011). Offshore detention of asylum seekers and refugees occurs for example in the island of Lampedusa in Italy and Christmas Island in Australia. However, the model of detention adopted in Guantánamo Bay is different under international law to the model adopted in Lampedusa and Christmas Island, because in Guantánamo Bay ultimate sovereignty rests with Cuba whilst the United States enjoys the exercise of jurisdiction and control. In Lampedusa and Christmas Island, Italy and Australia retain both ultimate sovereignty, jurisdiction and control over their own territory. The model of detention adopted for asylum seekers and refugees in Guantánamo Bay is also different to that of third country detention and processing adopted by Australia (between the years 2001 and 2007 and resumed from August 2012) in Nauru and Manus Island in Papua New Guinea. Unlike the United States, Australia does not enjoy complete jurisdiction and control, under international law, over territories in which its detention centres operate extraterritorially. As such “the mechanism by which (Guantánamo)

achieves its goals under present circumstances is singular” (Butler, 2004: 92) although all three models above are motivated by the desire to “deter, detain, and deflect migrants from mainland territory” (Mountz, 2011: 118).

The detention of Cuban and Haitian asylum seekers and refugees in Guantánamo Bay cannot be divorced from Guantánamo Bay’s history and geography. Forced to lease the territory of Guantánamo Bay to the United States when under occupation, and powerless to unilaterally end the lease agreement today, Cuba is saddled with a detention centre on its territory over which it cannot exercise control or jurisdiction. The United States made effective use of Guantánamo Bay as a valuable strategic site in enemy territory during the Cold War and continues to use the site in its new international and borderless wars, the ‘War on Terror’ and what Fekete (2005) calls the undeclared war on refugees. Whilst President Obama’s call for the end of a detention centre on Guantánamo is a welcome development that may lead to greater respect for the rights of detainees in the ‘War on Terror’, it does not affect the United States occupation of Guantánamo Bay and the detention of asylum seekers and refugees on the Naval Base. Asylum Seekers and refugees will continue to be detained on the Base “in perpetuity,” so long as the United States’ perpetuates the status quo; namely, its ongoing presence in Cuba, its ongoing commitment to the Migrant Operations Center in Guantánamo Bay and the sustained inability of the United States courts to compel the United States to admit asylum seekers and refugees into United States territory. The ‘War on Terror’ prison is not the only detention facility on the base that is steeped in a problematic historical, legal, and political context.

End Notes

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- ¹ According to Farber (2010), this information was previously available on the website of U.S. Immigration and Customs Enforcement (“ICE”). In 2009, ICE deleted the web page describing the Guantánamo Bay Migrant Operations Center (“MOC”), despite its continued use of the MOC to confine refugees. An archived copy of the web page is available online at:
web.archive.org/web/20070711063736/http://www.ice.gov/pi/news/factsheets/072304gitmo.htm - accessed September 2012
- ² Also see Teller Amendment, archived online at:
www.vw.vccs.edu/vwhansd/HIS122/Teller_Amend.html - accessed September 2012
- ³ *Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations; Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, February 16th-23rd, 1903, US-Cuba, T.S. n418.
- ⁴ The United States did not go on to lease the territory of Bahia Honda under the 1902 Supplementary Agreement.
- ⁵ ‘Treaty between the United States of America and Cuba’, May 29th, 1934, US-Cuba, T.S. n866.
- ⁶ See Brief Amicus Curiae Of Retired Military Officers in Support of Petitioners nos, in the Supreme Court of the United States *Shafiq Rasul, et al. Petitioners v. George W. Bush, et al; Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners, v. United States, et al:* 14.

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- ⁷ See for example Letter from Christen A Herter, Department Of State to Thomas S. Gates, Secretary of Defense. 'Contingency Planning for Cuban attack on Guantánamo Naval Base' Secret. Issue Date: October 14th, 1960. Date Declassified: July 14th, 1981. Unsanitized.
- ⁸ 'Defense Secretary Gates discusses with Secretary Herter plans to hold onto the United States. Base at Guantánamo'. Miscellaneous. Department of Defense. Secret. Issue Date: October 4th, 1960. Date Declassified: July 21st, 1988. Unsanitized.
- ⁹ Article III, *Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations; Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, February 16th-23rd, 1903, US-Cuba, T.S. No. 418.
- ¹⁰ Proclamation No. 4865, 46 Fed. Reg. 48, 107, (1981). This was followed by Executive Order No.12324, 46 Fed. Reg. 48, 109, 48, 210 (1981).
- ¹¹ Organization of American States Resolution MRE/RES. 1/91 OEA/SER. F/V.1, 3 October, 1991; Organization of American States Resolution MRE/RES. 2/91 OEA/SER. F/V.1, October 8th 1991; UN GA Res. A/46/L.8/Rev/1 'The situation of Democracy and Human Rights in Haiti', October 11th 1991.
- ¹² Pub.L. No. 89-732, 80 Stat. 1161, as amended 8 USC § 1255 note (Supp.1992).
- ¹³ The corporation's name was changed in 2003 as a result of a merger with Group 4 Falck.
- ¹⁴ Interview with Chief, Refugee and Asylum Law Division, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security (Fairfax, Virginia, USA, 24 October 2008). Comments confirmed by Interview with Deputy Assistant Secretary of State, Bureau of Population, Refugees, and Migration (Fairfax, Virginia, USA, October 24th 2008).
- ¹⁵ Opened for access on January 31st 1967, 606 UNTS 267 (entered into force 4 October 1967). The Refugee Protocol removed the temporal and geographic restrictions in the original definition of 'refugee' under the refugee convention.
- ¹⁶ *Convention Relating to the Status of Refugees*, opened for signature July 28th 1951, 189 UNTS 150 (entered into force April 22nd 1954).
- ¹⁷ See Article 33 *Convention Relating to the Status of Refugees*, opened for signature July 28th 1951, 189 UNTS 150 (entered into force April 22nd 1954).
- ¹⁸ Email from Regional Coordinator IOM, Media and External Relations to author, October 27th 2008.
- ¹⁹ Interview with Regional Coordinator IOM, Media and External Relations (Fairfax, Virginia, USA, October 24th 2008).
- ²⁰ *International Covenant on Civil and Political Rights*, opened for signature, December 19th 1966, 999 UNTS 171 (entered into force March 23rd 1976).
- ²¹ Comments reprinted by Reuters, 'FACTBOX: Obama interview on CBS' "60 Minutes" – archived online at:

www.reuters.com/article/vcCandidateFeed2/idUSTRE4AG46020081117 – accessed September 2012

- ²² Executive Order 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Federal Register 4897.
- ²³ Prospective vendors were required to attend a mandatory site visit on August 24th 2011. See Goodwin (2011).

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