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GUANTÁNAMO BAY AND THE EVOLUTION OF INTERNATIONAL LEASES AND SERVITUDES

*Michael J. Strauss**

INTRODUCTION

Territorial leases and servitudes are recognized in both international law and international relations as means by which states may exercise control over territories without having sovereignty over them.¹ They allow states to reallocate sovereign rights over specific areas without transferring title to the territories in question or altering state boundaries. As such, they act as legal and political mechanisms for addressing the interests of states when these interests evolve in ways that are incompatible with the boundaries that define their territory.

It is in this context that Guantánamo Bay exists as a distinct territorial space with a legal and political character. A closer look at the phenomena of state-to-state leases and servitudes is thus useful for understanding their contribution to questions of law that have arisen at Guantánamo Bay. The responses to these questions may in turn have a reciprocal impact on the law of international leases and servitudes more generally. Leases between states are typically embodied in treaties or other bilateral agreements, and are the legal instruments that create the servitudes by which states exercise sovereign competences on other states' territory.² Deriving from private law leases and servitudes, they form a peripheral theme in international law, sparsely studied relative to other aspects and widely regarded as marginal,³ although they tend to push

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¹ See MALCOLM N. SHAW, INTERNATIONAL LAW 366–67 (4th ed. 1997). International leases refer to agreements between states that permit a foreign entity to obtain “control of usually strategic points without the necessity of actually annexing the territory.” *Id.* at 366. International servitudes exist “where the territory of one state is under a particular restriction in the interests of the territory of another state.” *Id.* at 367. Both give rise to rights *in rem*. *Id.* at 366.

² Michael John Strauss, The Viability of Territorial Leases in Resolving International Sovereignty Disputes: A Comparative Study 120 (Apr. 2006) (unpublished Ph.D. dissertation, Centre d'Etudes Diplomatiques et Stratégiques, Paris) (on file with The New York City Law Review) (citing *Id.*).

³ *E.g.*, they occupy three of 939 pages in MALCOLM N. SHAW, INTERNATIONAL LAW

its margins outward by posing challenges to established legal concepts such as sovereignty and jurisdiction. As such, they provide an impetus for international law to evolve.

When states have objectives that require access to territory beyond their boundaries, leasing the area in question may be deemed the most desirable option when the risks and costs of securing that access by other means are weighed against it. Each party to a negotiated lease derives benefits—the lessee state obtains rights on additional territory, while the lessor state's benefits can range from being specific, direct, tangible and/or immediate (*i.e.*, monetary compensation) to being general, indirect, intangible and/or long-term (*i.e.*, a step toward improving political or economic relations).

Surveys of international leases and servitudes have shown them to be mostly *ad hoc* arrangements, tailored to address specific issues that arise among states in their interactions with one another.⁴ The goals are usually economic, military, administrative or diplomatic, and on occasion the aim has been to resolve conflicts about sovereignty over territory.

As each lease has unique features for the circumstances at hand, territorial leases can reflect a degree of pragmatism and even creativity for which international law and previous diplomatic experience may provide little guidance. The gaps they can reveal in established legal notions explain why such leases and the behaviour of states in relation to them are prone to be ongoing sources of new legal questions about sovereignty and jurisdiction. The lease of Guantánamo Bay by the United States from Cuba in 1903 raised such questions right from the start, as evidenced by the attention they received from international law scholars within its first decade of implementation.⁵

The Guantánamo Bay lease is particularly relevant to any general discussion about territorial leases and servitudes because of its influence on these broader notions themselves. It was concluded at a time when states were actively applying the concept of territorial leasing to a variety of new situations, and was the first major

366–68 (4th ed. 1997) and four of 1,520 pages in NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DRIT INTERNATIONAL PUBLIC* 484–87 (Librairie Générale de Droit et de Jurisprudence, 7th ed. 2002).

⁴ See HELEN DWIGHT REID, *INTERNATIONAL SERVITUDES IN LAW AND PRACTICE* (1932); F. A. VÁLI, *SERVITUDES OF INTERNATIONAL LAW: A STUDY OF RIGHTS IN FOREIGN TERRITORY* (Stevens & Sons Ltd., 2d ed. 1958).

⁵ See NAVAL WAR COLLEGE, *INTERNATIONAL LAW SITUATIONS 1907 9–22* (1908) [hereinafter *NAVAL WAR COLLEGE 1907*]; NAVAL WAR COLLEGE, *INTERNATIONAL LAW SITUATIONS 1912 93–113* (1912) [hereinafter *NAVAL WAR COLLEGE 1912*].

lease in which the U.S. secured an area for military-related activity within the territory of another state.⁶ This helped broaden the range of objectives for which states routinely engage in territorial leasing.⁷

The use of Guantánamo Bay since 2002 as a detention center for prisoners captured in U.S. anti-terrorism efforts abroad constitutes another precedent: it made Guantánamo Bay the first leased territory to be employed as a site for extra-jurisdictional activity—actions by a state that are not authorized under its legal system on its own territory, and that are also outside the jurisdiction of the state that was obliged by the lease to relinquish its legal authority in the territory where the actions occur.⁸

II. STATES, TERRITORY, AND TITLE

The innovative uses of Guantánamo Bay illustrate that states can perceive leased territories and their associated servitudes as “laboratories” for implementing new interpretations and applications of established law in support of political or other objectives. Leased territories are particularly exposed to this possibility because the basic concepts behind their existence—title to territory, effective control and sovereignty—have been subject to divergent theories, varying legal definitions and conflicting interpretations over time.

Differences in these notions can be traced back to the core relationship between states and territory. Of various theories that exist to explain this relationship, one currently enjoying considerable favour among international law scholars is the *juridical competence* theory,⁹ which views territory as the area in which a state can exercise its system of laws to the exclusion of other states.

⁶ Gary L. Maris, *International Law and Guantanamo*, 29 THE JOURNAL OF POLITICS 261, 263–64 (1967).

⁷ See VÁLI, *supra* note 4, at 208 (noting that “[p]rior to the Second World War maintenance of military bases in foreign territory in time of peace” as was the case with Guantánamo “was a rather exceptional phenomenon”).

⁸ Strauss, *supra* note 2, at 119; see also Harold Hongju Koh, Dean of Yale Law School, Statement before the Senate Judiciary Committee regarding the Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States (Jan. 7, 2005), available at http://judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3938 (testifying that in his legal opinion the use of Guantánamo Bay, as the center for indefinite detention and interrogation of foreign nationals, constitutes the use of an international servitude as an “extra-legal zone”).

⁹ CHARLES ROUSSEAU, COURS DE DROIT INTERNATIONAL PUBLIC 29–31 (Les Cours de Droit 1956) (Fr.). This has also been called the *jurisdictional theory*. See E.N. van Kleffens, *Sovereignty in International Law: Five Lectures*, in 82 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 1, 96 (1953).

But it is the *territoire-objet* theory, which considers territory as the property of a state and the object of its power and exercise of sovereignty,¹⁰ which provides a more direct basis for the notion of territorial leases and servitudes. This once-dominant theory was said to have lost most of its adherents by the middle of the twentieth century¹¹ and some international law scholars consider it to be no longer valid.¹² However, it remains quite alive: Brownlie, commenting on territorial title, writes “[i]n principle the concept of ownership, opposable to all other states and unitular, can and does exist in international law,”¹³ and Menon refers to territory as “territorial property of a State[.]”¹⁴

Title-to-territory is the conceptual instrument that has evolved in the context of international law to legitimize this property-like relationship between a state and the territory on which it is located, and to provide the state with legal competence on that territory. The term is used interchangeably to denote both the facts employed in conferring a right as well as the right itself.¹⁵ The International Court of Justice has broadened the scope of title-to-territory by considering it to be not only documentary evidence of a right, but also any other evidence that may establish the existence of a right or the source of a right.¹⁶

It is widely agreed that title-to-territory is a prerequisite to sovereignty. “The concept of title involves in essence a description of those legal and factual elements which by virtue of the norms of international law must be present before territorial sovereignty may be validly acquired or maintained,” according to Shaw.¹⁷ Likewise, Reuter has said that legal title “does not automatically grant sovereignty, but creates the rights and obligations that are condu-

¹⁰ NGUYEN QUOC DINH ET AL., *supra* note 3, at 413–14.

¹¹ van Kleffens, *supra* note 9, at 94–95 (“[T]he theory which proclaims territory to be the property of a state is open to serious objections which explain its present disfavour.”).

¹² NGUYEN QUOC DINH ET AL., *supra* note 3, at 414.

¹³ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 119 (6th ed. 2003).

¹⁴ P.K. MENON, *Title to Territory: Traditional Modes of Acquisition by States*, 72 *REVUE DE DROIT INTERNATIONAL* 1, 2 (1994) (Switz.).

¹⁵ ANA GEMMA LÓPEZ MARTÍN, *EL TERRITORIO ESTATAL EN DISCUSIÓN: LA PREUEBA DEL TÍTULO 8* (McGraw-Hill/Interamericana de España 1999).

¹⁶ Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), 1986 I.C.J. 554, 564 (Dec. 22); *see also* International Court of Justice, Case Summaries—Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), http://www.icj-cij.org/icjwww/icasas/iHVM/iHVM_isummaries/iHVM_isummary_19861222.htm; JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS* 25 (2003).

¹⁷ MALCOLM SHAW, *TITLE TO TERRITORY IN AFRICA* 16 (1986).

cive for territorial sovereignty to exist,”¹⁸ and Brownlie calls sovereignty “a consequence of title and by no means conterminous with it.”¹⁹

Traditional international law accepts that title can be obtained in various ways – all related to the circumstances by which a state whether existing or new – becomes associated with territory:

1. *Occupation* – the acquisition of territory that previously did not pertain to any state (*terra nullius*).²⁰

2. *Prescription* – the assumption and display of effective control over another state’s territory without consent.²¹

3. *Cession* – the peaceful acquisition of another state’s territory. This can result from victory in a conflict, agreements to sell or exchange territory,²² or the transfer of territory as a gift.²³

4. *Conquest* – the acquisition of territory by force. Once a primary method of acquiring title, this is no longer the case since the Charter of the United Nations outlawed the use of force.²⁴

5. *Accretion* – the acquisition of territory created by nature adjacent to a state,²⁵ such as a new volcanic island or silt deposits in a river delta.

6. *Adjudication* – the acquisition of territory through a judicial decision.²⁶

7. *Conversion of an inchoate title*. – the validation of a title that is incomplete, such as one claimed symbolically, through a display of control.²⁷

The determination of title-to-territory has become more complex over time, and today it also relies on additional factors such as the explicit or tacit recognition of a state’s claim to title, or the strength of a state’s ongoing involvement with the territory in question.²⁸ This involvement derives from effective control, which is essential for establishing title through occupation and prescription

¹⁸ PAUL REUTER, *DERECHO INTERNACIONAL PÚBLICO* 111 (José Puente Egido trans., 1962) (quotation translated by Author).

¹⁹ BROWNLIE, *supra* note 13, at 119.

²⁰ *Id.* at 168.

²¹ *Id.* at 145–46.

²² Menon, *supra* note 14, at 17–18.

²³ NAVAL WAR COLLEGE 1912, *supra* note 5, at 93.

²⁴ U.N. Charter, art. 2, para. 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”).

²⁵ BROWNLIE, *supra* note 13, at 144–45.

²⁶ *Id.* at 132.

²⁷ LÓPEZ MARTÍN, *supra* note 15, at 16.

²⁸ BROWNLIE, *supra* note 13, at 126–27.

and which can strengthen an inchoate title to the point where it is absolute. Effective control is sometimes considered to be a legal relationship similar to possession in private law, in which a state's activity (particularly administrative activity) reinforces what might otherwise be a tenuous connection between state and territory.²⁹

The importance of effective control in establishing title-to-territory has been widely recognized for some time,³⁰ and has influenced the intertemporal aspect of territorial titles. It was once generally accepted that the applicable law for determining a title's validity should be the international law in force when a state acquired territory, rather than any subsequent law.³¹ However, several legal decisions in the last century have considered a state's ongoing relationship with a territory to be the more important factor.³²

Despite its importance to determining territorial title, effective control is a concept in which no single standard of state behavior prevails. According to Schwarzenberger and Brown, "[the] degree of effectiveness required varies with circumstances, such as the size of the territory, the extent to which it is inhabited and, as in deserts or polar regions, climatic conditions."³³ Yet effective control is an important consideration in territorial leases because they rearrange between states the activities by which control is determined, and this brings sovereignty issues into the picture.

III. SOVEREIGNTY AND ITS LIMITS

The notion of sovereignty has also defied a uniform definition. Its essential components parallel those of a state itself—territory, population, and government—but as many as 12 distinct and overlapping meanings of sovereignty have been identified as the term applies to states.³⁴ Michael Fowler and Julie Bunck admit that

²⁹ *Id.* at 133–34; GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 97 (6th ed. 1976).

³⁰ *See, e.g.*, *Minquiers and Ecrehos (Fr. v. U.K)*, 1953–55 I.C.J. 47 (Nov. 17, 1953); WOLFGANG G. FRIEDMANN ET AL., CASES AND MATERIALS ON INTERNATIONAL LAW 442–49 (1969).

³¹ BROWNLIE, *supra* note 13, at 135–37.

³² *See, e.g.*, *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 155–56 (7th ed. 1997); FRIEDMANN ET AL., *supra* note 30, at 442–44. *See also* Legal Status of the South-Eastern Territory of Greenland (*Den. v. Nor.*), 1933 P.C.I.J. (ser. E) No. 9, at 120–21 (Aug. 2–3) *discussed in* FRIEDMANN ET AL., *supra* note 30, at 451; *Minquiers and Ecrehos*, 1953–55 I.C.J. at 63–69.

³³ SCHWARZENBERGER & BROWN, *supra* note 29, at 97.

³⁴ Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations* 3–5 (Univ. Fla. Coll. L., Working Paper, 2006),

the meaning “varies according to the issue that is being addressed or the question that is being asked.”³⁵ The term as used in this article will refer to the totality of a state’s exclusive authority on its territory plus extensions of that authority outside of it.³⁶

The sovereignty concept is mired in “chicken-or-egg” situations, with scholars disagreeing on whether it derives from a state’s power over territory³⁷ or vice versa.³⁸ Similarly, the broad acceptance that title-to-territory is a precondition for sovereignty has not prevented suggestions that the reverse is true. The judgment by arbitrator Max Huber in the *Island of Palmas (Miangas) Case*³⁹ mentions title-to-territory as being able to confer territorial sovereignty,⁴⁰ but later in the same ruling, he notes that title can be “founded on continuous and peaceful display of sovereignty.”⁴¹

While the vast majority of a state’s manifestations of sovereignty are internal—within its territorial boundaries—territorial leases and servitudes are among various phenomena that allow states to display sovereign competences externally.⁴² The geographical dimensions of a state’s sovereign reach thus exceed the dimensions of its territory.

Sovereignty was once envisioned as absolute authority, and as

available at <http://www.law.ufl.edu/faculty/publications/pdf/sov.pdf>. Sovereignty may refer to a symbol for “absolute, unlimited control or power; . . . political legitimacy; . . . political authority; . . . self-determined, national independence; . . . governance and constitutional order; . . . juridical personality of Sovereign Equality . . . ‘recognition’ . . . powers, immunities, or privileges; . . . jurisdictional competence to make and/or apply law; . . . [and] basic governance competences.” It can be a criterion of jurisprudential validation of all law and a formal unit of a legal system. *Id.*

³⁵ MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 6 (1995).

³⁶ Strauss, *supra* note 2, at 32 (noting that debate among international law scholars concerning the relationship between territorial boundaries and political authority requires “a broad but workable definition of sovereignty” to discuss issues of sovereignty as they relate to the U.S. lease of Guantánamo Bay).

³⁷ Jean Combacau, *Pas une puissance, une liberté: la souveraineté de l’Etat*, 67 POUVOIRS 47, 50 (1993) (Fr.); Albert Rigaudière, *L’invention de la souveraineté*, 67 POUVOIRS 5, 5 (1993) (Fr.).

³⁸ Rigaudière, *supra* note 37.

³⁹ *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

⁴⁰ *Id.* at 845.

⁴¹ *Id.* at 869.

⁴² Strauss, *supra* note 2, at 38–39; *see also* NGUYEN QUOC DINH ET AL., *supra* note 3, at 483–503 (positing that competencies related to external sovereignty fall into one of three general categories — “minor competences outside of state borders[,]” “authority over natural and legal persons[,]” and “competences relating to public services”) *cited in* Strauss, *supra* note 2, at 35–36 (noting that included within the third category is “a state’s authority to conduct administrative or military activities outside of its territory in support of the interests of the state”).

such it was considered indivisible, unable to be fragmented.⁴³ While it is not viewed as absolute today, many scholars still consider it indivisible in substance while allowing for the exercise of sovereignty to be divisible.⁴⁴ Another mainstream theory holds sovereignty itself is the sum of a potentially variable set of state competences, with states able to supplement or trim their “total” sovereignty by adding or divesting individual competences.⁴⁵

The divisibility of competences, whether through the exercise of sovereignty or by its nature, yields the notion that sovereignty can have limits—a view embraced by international law and one that provides the groundwork for states to establish territorial leases and servitudes. Carlos Fernández de Casadevante Romani notes that states accept having such limits as “the price they must pay for international cooperation.”⁴⁶ In fact, a state’s sovereignty is capable of withstanding a number of specific limits without deteriorating, and there are various ways this occurs:

1. *Implicit reconfirmation of a state’s core sovereign status* – states implicitly recognize the underlying sovereign status of other states with which they sign treaties, even when a treaty constrains elements of a state’s sovereignty.⁴⁷

2. *A limit on one aspect of sovereignty may be offset by a gain in another* – states may exercise reciprocal authority on each other’s territory or join an international process that creates limits on the sovereignty of all member states while giving each one a role in the mechanism that replaces it.⁴⁸

3. *A non-sovereign benefit may enhance a state’s sovereignty* – when the benefit of accepting a limit on sovereignty is not sovereign in nature (i.e., political, material or financial compensation), it can be seen in sovereign terms if it reinforces a state’s ability to effectively control its territory.⁴⁹

4. *A state retains its sovereign competence to withdraw from a restrictive arrangement* – this competence is displayed by renouncing a treaty or leaving an international organization.⁵⁰

⁴³ WIKTOR SUKIENNICKI, *ESSAI SUR LA SOUVERAINETÉ DES ETATS EN DROIT INTERNATIONAL MODERNE* 84 (A. Pedone, Ed. 1926); van Kleffens, *supra* note 9, at 85–87.

⁴⁴ van Kleffens, *supra* note 9, at 87.

⁴⁵ See FOWLER & BUNCK, *supra* note 35, at 64–70.

⁴⁶ CARLOS FERNÁNDEZ DE CASADEVANTE ROMANI, *DERECHO INTERNACIONAL PÚBLICO* 127 (2003) (quotation translated by author).

⁴⁷ See BROWNLIE, *supra* note 13, at 93.

⁴⁸ *Id.* at 289–90 (citing the United Nations as an example of an international mechanism that limits state sovereignty).

⁴⁹ Strauss, *supra* note 2, at 42.

⁵⁰ *Id.* (“Ecuador and Gabon left the Organization of Petroleum Exporting Coun-

5. *A state automatically regains a relinquished element of sovereignty upon termination of the limit* – this occurs when a treaty is renounced or expires, when a state leaves an international arrangement that entails limits on its sovereignty, or when such an arrangement is disbanded.⁵¹

While limits on a state's competences do not necessarily endanger its sovereignty, they do influence where that sovereignty resides, and this is seen most notably with territorial leases and servitudes. These phenomena force sovereignty to be viewed in terms of its limits, as the rights transferred by one state to another are sometimes so comprehensive that they raise questions about which state actually has effective control over the territory involved.⁵²

It is not unknown for a lessee state to try to obtain sovereignty over a territory where the shift of rights leaves the lessor state so sidelined that it risks losing title to the area. The 1903 treaty in which Panama authorized the U.S. to act as “if it were sovereign”⁵³ in the Canal Zone prompted divergent views within the American government about “[w]hether the grant in the treaty amounts to a complete cession of territory and dominion to the United States or is so limited that it leaves at least titular sovereignty in the Republic of Panama[.]”⁵⁴ The Guantánamo Bay lease raises the same questions⁵⁵ and, as we shall see shortly, the fact that the U.S. has not sought sovereignty over the territory is critical to the legal questions that currently occupy us.

Because territorial leases can provide an avenue for the potential transfer of title and sovereignty, their preservation becomes a

tries (OPEC) in 1992 and 1996 respectively, reportedly because they could not afford its annual membership dues.”).

⁵¹ *Id.* (League of Nations and the Southeast Asia Treaty Organization are examples of disbanded and expired international organizations).

⁵² See DIANNE E. RENNACK & MARK P. SULLIVAN, U.S.–CUBAN RELATIONS: AN ANALYTIC COMPENDIUM OF U.S. POLICIES, LAWS & REGULATIONS 301 (2005) (noting that many Cuban scholars argue that “the Guantanamo agreement, which has no end date, contradicts Cuba’s right of sovereignty[,]” and that “the continuation of the U.S. presence on the basis of this treaty is a façade, given the hostility in U.S.–Cuban relations since the early 1960s”), available at http://www.acus.org/docs/0503-U.S.-Cuban_Relations_Analytic_Compendium_Policies_Laws_Regulations.

⁵³ Convention regarding the Isthmian Canal, U.S.—Pan., Nov. 18, 1903 – Feb. 26, 1904, 10 Bevens 663, 664 (1972), available at <http://www.yale.edu/lawweb/avalon/diplomacy/panama/pan001.htm> [hereinafter the Hay-Bunau-Varilla Treaty].

⁵⁴ Luckenbach S.S. Co. v. United States, 280 U.S. 173, 177 (1930).

⁵⁵ Maris, *supra* note 6, at 262; Hanna Danwall, Guantánamo Bay, a Legal “Black Hole”? 26–27 (2004) (unpublished master’s thesis, University of Lund), [http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/D8D0324D94417D16C1256FA9005EF2BD/\\$File/exam.pdf?OpenElement](http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/D8D0324D94417D16C1256FA9005EF2BD/$File/exam.pdf?OpenElement) (last visited June 24, 2007).

critical factor for the lessor state once it determines that a lease is in its interest. Indeed, it has long been debated whether territorial leases, by their very nature, actually constitute cessions. Scholars taking this view a century ago referred to leases as territorial transfers in disguise⁵⁶ or as a step toward annexation.⁵⁷ The British territorial lease negotiator Lord Curzon noted that “the tendency of Leases is, from being temporary to become permanent, and, in fact, to constitute a rudimentary form of ulterior possession.”⁵⁸ Such thinking persisted into the second half of the 20th century⁵⁹ but waned amid resistance from legal scholars like Váli, who argued that “in every case the grantor State still retains certain rights in or over the territory thus transferred” and that its sovereignty is expressly preserved.⁶⁰

Lingering sensitivity from this issue still affects the terminology of territorial leasing. Many treaties creating leases use words such as “lease” and “rent,” and references to these terms while the lease is in force can reaffirm the lessor state’s sovereignty over the territory and the lessee state’s acquiescence to it.⁶¹ Yet some states avoid using such words because of the connotations they had—and may still have—with popular opinion. Hence the constitutions of a few states, including Venezuela and Paraguay, explicitly prohibit the leasing of their territory to other states.⁶² Israel’s lease of two small areas from Jordan as part of the Peace Treaty of 1994⁶³ is widely acknowledged as a lease, but both states felt obliged to deny it that name: Israel’s then-prime minister said it was “not a leasing

⁵⁶ Louis Gérard, *DES CESSIONS DÉGUISÉES DE TERRITOIRES EN DROIT INTERNATIONAL PUBLIC* [Doctoral Dissertation, Université de Nancy] ii–iv (Imprimerie Nancienne 1903).

⁵⁷ Jean Perrinjaquet, *DES CESSIONS TEMPORAIRES DE TERRITOIRES ÉTUDE DE DROIT INTERNATIONAL* [Doctoral Dissertation, Université de Bordeaux] 365 (Imprimerie Commerciale et Industrielle 1904).

⁵⁸ Lord Curzon of Kedleston, *Romanes Lecture on Frontiers at Oxford* (Nov. 2, 1907) (transcript available at <http://www.dur.ac.uk/resources/ibru/resources/links/curzon.pdf>).

⁵⁹ ROUSSEAU, *supra* note 9, at 114–15 (adding, however, that the return of some leased territories to the lessor states might justify modifying this view); *see* Danwall, *supra* note 55, at 35, which notes how these ideas are no longer accepted in international law.

⁶⁰ VÁLI, *supra* note 4, at 273–74.

⁶¹ Strauss, *supra* note 2, at 121 (noting by way of example that the Convention of Paris of 1898 allowed France to annex the rights to two pieces of territory along the Niger River and paid “rent” to Great Britain as part of the “lease”).

⁶² Constitución de la República Bolivariana de Venezuela art. 13; Constitución de la República del Paraguay art. 155.

⁶³ Treaty of Peace Between The State of Israel and The Hashemite Kingdom of Jordan, Isr.–Jordan, Oct. 26, 1994, 34 I.L.M. 43 (1995) [hereinafter Jordan-Israel Peace Treaty].

arrangement,”⁶⁴ and a Jordanian negotiator of the treaty said, “the deal was not that of a lease, it was a Jordanian permission.”⁶⁵

The practice of states has shown that some leased territories ultimately were ceded to the lessee state, while others were not.⁶⁶ The recent return of full control over several prominent leased territories to the lessor states (Hong Kong in 1997,⁶⁷ Macao in 1999⁶⁸ and the Canal Zone in 2000⁶⁹) may indicate a trend toward confirming the lessor’s sovereignty. Historically, however, it appears that a mix of factors affect whether this happens: the interests of the states; their relations with each other; and their specific intentions *vis-à-vis* the territory when the servitude is created, during its existence and upon its expiration. In the case of Guantánamo Bay, the U.S. has linked its potential return to Cuba to a specific interest—that of seeing a change in Cuba’s form of government toward a democracy.⁷⁰ Thus, while international law may be the vehicle by which territorial leases are created, international relations become the determinant of their fate.

IV. COMPONENTS OF TERRITORIAL LEASES

The details contained in a territorial lease can reciprocally affect the broader relations between the states involved; for example, the Guantánamo Bay lease has contributed to the poor relationship between the U.S. and Cuba since the Cuban Revolution of 1959.⁷¹ These details normally fall into three main areas: the competences to be transferred to the lessee state, the duration of the arrangement, and the compensation to be paid to the lessor.

⁶⁴ PM Rabin at Knesset Debate on the Approval of Israel–Jordan Peace Treaty (Oct. 25, 1994) (transcript available at <http://www.mfa.gov.il/MFA/Archive/Speeches/PM%20RABIN%20AT%20KNESSET%20DEBATE%20ON%20THE%20APPROVAL%20OF%20ISRA>).

⁶⁵ MUNTHER J. HADDADIN, *DIPLOMACY ON THE JORDAN: INTERNATIONAL CONFLICT AND NEGOTIATED RESOLUTION* 394 (2002).

⁶⁶ Elie van Bogaert, *The Lease of Territory in International Law*, in *MISCELLANEA—W.J. GANSHOF VAN DER MEERSCH* 315, 316 (Établissements Émile Bruylant 1972) (Fr.).

⁶⁷ Edward A. Gargan, *Time of Uncertainty Begins: Will Beijing Honor Vows?*, N.Y. TIMES, July 1, 1997 at A1.

⁶⁸ Mark Landler, *Colonialism Ending in Asia As China Reclaims Macao*, N.Y. TIMES, Dec. 19, 1999 at A1.

⁶⁹ *To Cheers, Panama Takes Over the Canal*, N.Y. TIMES, Jan. 1, 2000 at A16.

⁷⁰ See *infra* text accompanying note 141.

⁷¹ Ministerio de Relaciones Exteriores, Declaración del Gobierno de la República de Cuba a la opinión pública nacional e internacional (Jan. 11, 2002), <http://europa.cubaminrex.cu/CDH/60cdh/Guantanamo/Base%20naval%20de%20guantanamo.htm> (last visited July 29, 2007) [hereinafter Statement from the Ministry of Foreign Relations].

The elaboration of competences is the portion most directly linked to the objective of the lease and has the greatest scope for variation. The rights that are transferred may be narrow, such as the ability to exercise a single competence under detailed and limited conditions, or comprehensive, ranging up to the ability to exercise all administrative, legislative and juridical competences without restraint. This aspect of a territorial lease can pose problems if its drafters do not make it adaptable. Political, social, economic and other factors that exist when a lease is negotiated continue to evolve after it enters into force, and a divergence can emerge between the rights elaborated in the lease and the interests of the states involved. This is precisely what happened with the lease of Guantánamo Bay: its objectives, to provide the U.S. with a coaling station and naval base, grew technologically and politically outmoded.⁷²

The other two elements of a territorial lease, duration and compensation, shape the structural and administrative obligations to which the participating states agree to adhere. These elements act as further acknowledgements of sovereignty.

Several models have evolved for establishing the duration of a territorial lease:

1. *Fixed term* – this entails an expiration date on which the territory reverts to the lessor state.⁷³ Prolonging the lease would require a new agreement.⁷⁴ An example was the 99-year lease of Hong Kong's New Territories by Great Britain from China, which ended in 1997.⁷⁵

⁷² California State Military Museum, Historic California Posts, Stations and Airfields: Naval Net Depot, Tiburon, <http://www.militarymuseum.org/Tiburon.html> (last visited July 30, 2007) (noting that by the early 1930s “[o]il had replaced coal as a fuel for Navy ships” forcing the closure or modification of many naval coaling stations).

⁷³ Strauss, *supra* note 2, at 125 (noting that a fixed term can be either explicit or implicit). See generally RESTATEMENT (SECOND) OF PROP. : LANDLORD AND TENANT § 1.4 (1977) (“A landlord-tenant relationship may be created to endure for any fixed or computable period of time.”); *Id.* § 1.4, cmt. a (1977) (“A lease is for a fixed period of time when it specifies its beginning date and its termination date as calendar dates. A lease is for a computable period of time when it specifies a formula for determining the beginning and termination dates.”); Strauss, *supra* note 2, at 125 (citing ROUSSEAU, *supra* note 9, at 480) (noting that fixed term leases between sovereign states are generally for terms of 25, 50, or 99 years).

⁷⁴ Strauss, *supra* note 2, at 125 (noting that a lease can be “prolonged by a new agreement, [if] both states had treaty-making competence”). See generally RESTATEMENT (SECOND) OF PROP. : LANDLORD AND TENANT § 1.4 cmt. e (1977) (“A tenancy for a fixed or computable period of time expires without notice at the end of the period.”).

⁷⁵ Lease of the New Territories, China-Gr. Brit., June 9, 1898, <http://>

2. *Fixed term with automatic renewal* – the term may be fixed but with an automatic renewal clause that can prolong it unless action is initiated to halt the renewal.⁷⁶ This was the nature of the lease arrangements in the Israeli-Jordanian Peace Treaty of 1994.⁷⁷

3. *Term contingent on events* – the timing of the expiration may depend on events. This was seen in reciprocal leases in 1894 between Great Britain and Belgium that involved territory in the Congo Free State, then under Belgian control.⁷⁸ The lease for part of the territory was to expire at the end of the reign of Belgium's King Leopold II (it did, in 1909), and for another part of the territory it was to last as long as the Congo remained Belgian.⁷⁹

4. *Indefinite term with provision for termination* – the term may be left indeterminate, with the lease defining circumstances by which it can be ended.⁸⁰ The Guantánamo Bay lease is this type, with two possible means of “termination” – the abandonment by the U.S. of the naval base, or an agreement between the U.S. and Cuba to end the lease.⁸¹

5. *Perpetuity* – this reflects the intention of permanence, an example being the perpetual lease granting France sovereign rights in Quinto Real Norte (Pays Quint Septentrional), a small territory in Spain.⁸² A term of perpetuity is not necessarily borne out in actual practice, as was shown with the U.S. lease of the Canal

www.yearbook.gov.hk/2004/en/21_04.htm (last visited Aug. 12, 2007) [hereinafter Hong Kong Lease].

⁷⁶ Strauss, *supra* note 2, at 125 (“[The lease] may stipulate a fixed term, but with an automatic renewal clause that can make its term indefinite in actual practice”). See generally RESTATEMENT (SECOND) OF PROP. : LANDLORD AND TENANT § 1.5 cmt. d (1977) (“The parties may expressly state that the lease shall continue from period to period or their agreement may be apparent from the circumstances.”).

⁷⁷ Jordan-Israel Peace Treaty, *supra* note 63, at Annex 1(b)(6).

⁷⁸ BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, PUBL'N NO. 106, SUDAN-DEMOCRATIC REPUBLIC OF THE CONGO (ZAIRE) BOUNDARY 2 (1978), available at <http://www.law.fsu.edu/library/collection/limitsinseas/IBS106.pdf>.

⁷⁹ *Id.* at 3.

⁸⁰ Strauss, *supra* note 2, at 126. See generally RESTATEMENT (SECOND) OF PROP. : LANDLORD AND TENANT § 1.7 cmt. a (1977) (“A tenancy is ‘terminable’ on the occurrence of an event if the event automatically terminates the tenancy, or if the event gives a party the option to terminate the tenancy by notice to the other party.”).

⁸¹ Treaty Between the United States of America and Cuba, U.S.—Cuba, May 29–June 9, 1934, 6 Bevens 1161, 1162 (1971), available at <http://www.yale.edu/law-web/avalon/diplomacy/cuba/cuba001.htm> [hereinafter Treaty Between the United States and Cuba—May 1934].

⁸² The Treaty of the Limits signed in 1856 ratified in Bayonne in 1857 with an additional convention agreed upon in 1858. Strauss, *supra* note 2, at 175; J.R. Remacha, *Review of La Frontera Hispano-Francesa y las Relaciones de vecindad (especial referencia al sector fronterizo del País Vasco)* by Carlos Fernández de Casadevante Romani (1985), 81 AMER. J. OF INT'L LAW 967, 967–68 (1987).

Zone from Panama; it was leased in perpetuity in 1903, but was returned to Panama in 2000.⁸³

A territorial lease may be legally terminated regardless of its intended duration under certain conditions. These include the doctrine of unequal treaties, if the lease is between a dominant state and a weak state;⁸⁴ the emergence of a peremptory norm of international law that is incompatible with a territorial lease;⁸⁵ the implied right of denunciation when a lease established by treaty has no provision for termination or withdrawal;⁸⁶ the principle of *clausula rebus sic stantibus*, which holds that a lease can be terminated if there is a fundamental change of circumstances;⁸⁷ and a material breach of a lease's provisions.⁸⁸ The ending of a territorial lease during its term may also be brought about if the participating states revise or replace the treaty that creates it,⁸⁹ by the transfer of title to the leased territory from the lessor state to the lessee state in accordance with the means of establishing title, or by the disappearance of one of the contracting states.⁹⁰

The nature of compensation paid by the lessee state to the lessor state can take various forms. It may be related to the objective of the lease, or to the issue of sovereignty over the territory concerned. The payment is not necessarily monetary – it may be in the form of goods or services, or a concession such as favorable terms in a separate transaction:

1. *Periodic payment based on economic value* – a periodic payment, typically annual, may be stipulated on the basis of the economic value of the leased territory or of the rights obtained by the lessee state.⁹¹ This was initially the case with the Guantánamo Bay

⁸³ Hay-Bunau-Varilla Treaty, *supra* note 53.

⁸⁴ Alfred de Zayas, *The Status of Guantánamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 300, 301–04 (2004).

⁸⁵ *Id.* at 300, 304–05.

⁸⁶ *Id.* at 300, 305–06.

⁸⁷ *Id.* at 300, 307.

⁸⁸ *Id.* at 300, 307–08.

⁸⁹ See Panama Canal Treaty, U.S.–Pan., Sept. 7, 1977, 16 I.L.M. 1022 [hereinafter Carter–Torrijos Treaty]. The U.S. lease of the Canal Zone from Panama by way of the Hay-Bunau-Varilla Treaty was terminated, and replaced with the Carter–Torrijos Treaty. *Id.*

⁹⁰ LEON YANG (YANG LIEOU-FONG), *Les Territoires á bail en Chine: Etude d'Histoire diplomatique et de Droit international* [Doctoral Dissertation, Université de Paris] 155–56 (Les Presses Universitaires de France 1929).

⁹¹ Strauss, *supra* note 2, at 129. In the example of the pasturage servitude created by the Treaty of Limits in 1856, two factors were used to decide on “the annual payment that France would make to Spain for grazing rights—the revenues of French farmers that could be attributed to using the pastures in Spain, and the rent in a previous lease agreement concluded between the valleys involved”). *Id.* See generally

lease.⁹²

2. *Periodic token payment to acknowledge sovereignty* – a periodic token payment may be required as affirmation by the lessee state of the lessor’s sovereignty over the territory.⁹³ The payment becomes a recurring display of recognition of the lessor’s claim to title, as was explicitly stated when Great Britain leased Kashmir to Maharajah Gulab Singh in the 1846 Treaty of Amritsar.⁹⁴

3. *Payment stipulated but waived* – a lease that includes compensation to acknowledge the lessor state’s sovereignty may waive the requirement for actual payment.⁹⁵ In this case, the lessee displays its recognition of the lessor state’s title-to-territory only once, by the act of agreeing to the payment.⁹⁶ India thus leased the tiny area of Tin Bigha to Bangladesh for an annual amount that equalled less than \$0.05, and waived its right to make Bangladesh pay it.⁹⁷

4. *Single payment* – a lease may involve a one-time payment rather than periodic payments. This was apparently the case when the U.S. leased the Chagos Islands from Great Britain for 50 years in 1966 to install a military base on the island of Diego Garcia.⁹⁸ The compensation terms were kept secret, but it was reported in the press that the U.S. gave the U.K. a discount on the Polaris nu-

RESTATEMENT (SECOND) OF PROP.: TENANT’S OBLIGATION TO PAY RENT § 12.1, cmt. a (1977) (“The rent reserved in the lease may be a specified dollar amount or may be an amount to be calculated on the basis of subsequent events.”); *Id.* § 12.1, cmt. c (“The terms of the lease may specify that the rent reserved is payable weekly, monthly, quarterly or for any other period of time, and may specify that it is payable in advance or at the end or at some time during the period the rent specified is to cover.”).

⁹² Agreement between the United States of Cuba for the Lease of Certain Areas for Naval or Coaling Stations, U.S.–Cuba, July 2–Oct. 2, 1903, 6 Bevans 1120, 1120 (1971), available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba003.htm> [hereinafter Coaling and Naval Stations Lease Agreement—July 1903].

⁹³ Strauss, *supra* note 2, at 129.

⁹⁴ Treaty of Amritsar, Gr. Brit.–Maharaja Gulab Singh, Mar. 16, 1846, available at <http://www.kashmir-information.com/LegalDocs/TreatyofAmritsar.html>.

⁹⁵ Strauss, *supra* note 2, at 130. See generally RESTATEMENT (SECOND) OF PROP.: TENANT’S OBLIGATION TO PAY RENT § 12.1, cmt. c (1977) (“The landlord may waive his right to the prompt payment of rent by acting in such a manner that the tenant is led to believe that a later date of payment than that specified in the lease is acceptable.”).

⁹⁶ Strauss, *supra* note 2, at 130.

⁹⁷ Terms of Lease in Perpetuity of Tin Bigha–Area, India–Bangl., Oct. 7, 1982, <http://www.hcidhaka.org/indbangla/index.html> (follow “Click to view the Documents” hyperlink; then follow “Terms of Lease in perpetuity of Tin Bigha–Area” hyperlink) (last visited Aug. 11, 2007).

⁹⁸ Availability of Certain Indian Ocean Islands for Defense Purposes [Agreement], U.S.–U.K., Dec. 30, 1966, 18.1 U.S.T. 28.

clear weapons system as its payment.⁹⁹

5. *Payment not required* – a lessee state may not be required to make any payment to the lessor state.¹⁰⁰ Great Britain's lease of Hong Kong's New Territories from China in 1898 was this type.¹⁰¹

Apart from any financial benefit that accrues to a lessor state, the importance of the compensation aspect of a territorial lease is that it may affect the treaty's duration: if the specified payment is such that a lessee state's failure to pay is considered a material breach, international law permits the lessor state to void the lease and end the servitude.¹⁰²

In this regard, it should be noted that the nature of the payment can change over time. Cases have occurred—and the Guantánamo Bay lease is an example—when a payment originally linked to a servitude's economic value has become a token payment by remaining at the amount initially fixed, while economic circumstances and currency rates evolved.¹⁰³

A state's behaviour regarding payment may also be relevant in voiding a lease. Besides the obvious circumstance of a lessee state declining to pay, a lessor state may act in ways that influence the lease's future. Guantánamo Bay once again illustrates this – Cuba has declined for decades to cash the U.S. rent checks it receives, in order not to undermine its arguments for ending the treaty.¹⁰⁴

V. THE GUANTÁNAMO BAY LEASE

Let us now examine the Guantánamo Bay lease and servitude more closely as they relate to the context described above. Historically, the lease grew out of the U.S. victory in the Spanish–American War of 1898, when Spain relinquished its claim to

⁹⁹ Marjorie Miller, *Britain Illegally Expelled Chagos Islanders for U.S. Base*, L.A. TIMES, Nov. 4, 2000, at A9.

¹⁰⁰ Strauss, *supra* note 2, at 131.

¹⁰¹ Hong Kong Lease, *supra* note 75.

¹⁰² Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹⁰³ See Kathleen T. Rhem, *Guantánamo Bay Base Has Storied Past*, Armed Forces Press Service (Aug. 25, 2004), http://www.news.navy.mil/search/print.asp?story_id=14902&VIRIN=&imagetype=0&page=1 (last visited on June 23, 2007) (noting that the original lease price of \$2,000 was “renegotiated” only once in 1934 to \$4,085 per year).

¹⁰⁴ *Id.* (noting that the U.S. military reports that every July the State Department sends President Castro a check, but to date he has “only cashed one—in 1959, the year he took power”). See also JOHN POMFRET, THE HISTORY OF GUANTANAMO BAY, VOL. II, available at <http://www.nsgtmo.navy.mil/history/gtmohistoryvol2ch1.htm> (noting that Cuba accepted payment up until 1958, but stating that President Castro cashed two checks).

sovereignty and title to Cuba in a peace treaty that made the U.S. the occupying power on the island pending the establishment of an independent Cuban government.¹⁰⁵

Five main steps toward developing the lease and servitude can be identified, the first being the so-called Platt Amendment, an act passed by Congress in March 1901,¹⁰⁶ and attached to Cuba's new constitution as a condition for the end of American occupation. Article VII of this act stated:

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense [sic], 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.¹⁰⁷

This led to the conclusion of a leasing agreement in February 1903 that covered two areas, Guantánamo Bay and Bahia Honda:¹⁰⁸

Article I. The Republic of Cuba hereby leases to the United States, for the time required for the purposes of coaling and naval stations, the following described areas of land and water situated in the Island of Cuba:

[The article then details the geographical coordinates that define the perimeters of Guantánamo Bay and Bahia Honda.]

Article II. The grant of the foregoing Article shall include the right to use and occupy the waters adjacent to said areas of land and water, and to improve and deepen the entrances thereto and the anchorages therein, and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.

Vessels engaged in the Cuban trade shall have free passage through the waters included within this grant.

Article III. While on 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

¹⁰⁵ Statement from the Ministry of Foreign Relations, *supra* note 71.

¹⁰⁶ Treaty Establishing Relations with Cuba, U.S.–Cuba, May 22, 1903–July 2, 1904, 6 Bevens 1116, 1116 (1971) (abrogated June 9, 1934, by Treaty of May 29, 1934) [hereinafter Treaty Establishing Relations with Cuba].

¹⁰⁷ *Id.* at 1117.

¹⁰⁸ Agreement between the United States of Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.–Cuba, Feb. 16–23, 1903, 6 Bevens 1113 (1971), available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm> [hereinafter Coaling and Naval Stations Lease Agreement—Feb. 1903].

the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.¹⁰⁹

This was followed in July 1903 by a supplemental agreement that made the terms of the lease more specific:¹¹⁰

Article I. The United States of America agrees and covenants to pay to the Republic of Cuba the annual sum of two thousand dollars, in gold coin of the United States, as long as the former shall occupy and use said areas of land by virtue of said Agreement.

All private lands and other real property within said areas shall be acquired forthwith by the Republic of Cuba.

The United States of America agrees to furnish to the Republic of Cuba the sums necessary for the purchase of said private lands and properties and such sums shall be accepted by the Republic of Cuba as advance payment on account of rental due by virtue of said Agreement.

Article II. The said areas shall be surveyed and their boundaries distinctly marked by permanent fences or inclosures [sic].

The expenses of construction and maintenance of such fences or inclosures shall be borne by the United States.

Article III. 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.

Article IV. Fugitives from justice charged with crimes or misdemeanors amenable to Cuban Law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities.

On the other hand the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities.

Article V. Materials of all kinds, merchandise, stores and munitions of war imported into said areas for exclusive use and consumption therein, shall not be subject to payment of cus-

¹⁰⁹ *Id.* at 1113-14.

¹¹⁰ Coaling and Naval Stations Lease Agreement—July 1903, *supra* note 92, at 1120.

toms duties nor any other fees or charges and the vessels which may carry same shall not be subject to payment of port, tonnage, anchorage or other fees, except in case said vessels shall be discharged without the limits of said areas; and said vessels shall not be discharged without the limits of said areas otherwise than through a regular port of entry of the Republic of Cuba when both cargo and vessel shall be subject to all Cuban Customs laws and regulations and payment of corresponding duties and fees.

It is further agreed that such materials, merchandise, stores and munitions of war shall not be transported from said areas into Cuban territory.

Article VI. Except as provided in the preceding Article vessels entering into or departing from the Bays of Guantanamo and Bahia Honda within the limits of Cuban territory shall be subject exclusively to Cuban laws and authorities and orders emanating from the latter in all that respects port police, Customs or Health, and authorities of the United States shall place no obstacle in the way of entrance and departure of said vessels except in case of a state of war.¹¹¹

By 1912, the U.S. Navy no longer needed the Bahia Honda site but wanted to expand the Guantánamo Bay naval station.¹¹² This led to the fourth step in developing the territorial entity of Guantánamo Bay – a treaty that year by which the U.S. would give up its lease of Bahia Honda in exchange for applying the Guantánamo Bay lease to a larger area.¹¹³ Neither the U.S. nor Cuba ratified the treaty, and it never formally entered into force, but parts of it were

¹¹¹ *Id.* at 1120–22.

¹¹² President Taft included these issues in his 1912 State of the Union address, and stated that:

There has been under discussion with the Government of Cuba for some time the question of the release by this Government of its leasehold rights at Bahia Honda, on the northern coast of Cuba, and the enlargement, in exchange therefor [sic], of the naval station which has been established at Guantanamo Bay, on the south. As the result of the negotiations thus carried on an agreement has been reached between the two Governments providing for the suitable enlargement of the Guantanamo Bay station upon terms which are entirely fair and equitable to all parties concerned.

William Howard Taft, State of the Union Message (Dec. 3, 1912) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29553>) (last visited Aug. 11, 2007).

¹¹³ U.S. Dep't of State, Papers Relating to the Foreign Relations of the United States with the Annual Message of the President Transmitted to Congress December 3, 1912, <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=goto&id=FRUS.FRUS1912&isize=M&submit=Go+to+page&page=295> (containing the text of the Proposed agreement between the United States and Cuba for the enlargement of the Guantánamo Naval Station).

nonetheless implemented – the U.S. gave up Bahia Honda, and credible sources in both states reported that some expansion of the 45-square-mile Guantanamo Bay site did occur.¹¹⁴

The last step occurred in May 1934 when the status of the lease and servitude at Guantánamo Bay was reaffirmed without changes in a U.S.–Cuban treaty whose relevant provision read:¹¹⁵

Article III. Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations signed by the President of the Republic of Cuba on February 16, 1903, and by the President of the United States of America on the 23d day of the same month and year, the stipulations of that agreement with regard to the naval station of Guantánamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations signed between the two Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantánamo. So long as the United States of America shall not abandon the said naval station of Guantánamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.¹¹⁶

VI. DISCUSSION OF THE LEASE

A. *Competences and Rights*

Given the choice of selling or leasing the territory to the U.S., Cuba successfully negotiated to make the arrangement for a lease in order to minimize the extent of U.S. presence that it had agreed

¹¹⁴ In 1929 the Council on Foreign Relations noted that, while the treaty was never ratified, “the United States gave up its rights at Bahia Honda for increased advantages in the bay of Guantanamo, and now has virtually complete control over a tract of land at Caimanera.” COUNCIL ON FOREIGN RELATIONS, SURVEY OF AMERICAN FOREIGN RELATIONS 1929, at 24 (Thomas P. Howland ed., Yale University Press 1929). In 1934, Manuel Marquez Sterling, who served briefly as Cuba’s President and held positions as a foreign minister and an ambassador to the U.S., referred to the treaty as “not having been ratified but having been executed” with Guantánamo Bay “having use of the annexed territory,” M. MARQUEZ STERLING, PROCESO HISTORICO DE LA ENMIENDA PLATT 432 (1941). Additionally, a year later, the government historian in Havana, international lawyer Emilio Roig de Leuchsenring, wrote that the area of the Guantánamo Bay base had increased since 1912 and its actual boundaries were no longer known. EMILIO ROIG DE LEUCHSENRING, HISTORIA DE LA ENMIENDA PLATT 291–92 (Instituto Cubano del Libro 1973) (1935).

¹¹⁵ Treaty Establishing Relations with Cuba, *supra* note 108, at 1162.

¹¹⁶ *Id.*

to accept on the island.¹¹⁷ As Cuba's then-president, Tomás Estrada Palma noted,

of two formulas of grant, "sale" or "lease" . . . the one that would least wound Cuban sentiment was accepted. Of such stations we granted the least number possible, and the conditions inserted in the convention regulating the lease of the same are so many more limitations of that grant, all favourable to the Republic of Cuba.¹¹⁸

Had Cuba sold Guantánamo Bay to the U.S. instead, title to the territory would have been transferred and the existence of unambiguous U.S. sovereignty would have made jurisdiction clearer. Today's legal questions can be traced directly to the fact that the territory was leased – the arrangement allowed sovereign rights to be separated from sovereignty, and that meant that Guantánamo Bay remained physically outside the area over which U.S. sovereignty exists. The forced issue of jurisdiction to be addressed in the lease,¹¹⁹ and the way it was done introduced uncertainty into how the concept should be applied.

The lease gave the U.S. "complete jurisdiction and control" in Guantánamo Bay, but this was clear only in a relative sense, as it gave U.S. total jurisdiction by reducing Cuba's to nothing.¹²⁰ It was not clear whether "complete" equated U.S. jurisdiction in Guantánamo Bay with the entirety of jurisdiction that a state would have on its own sovereign territory. George Grafton Wilson, editor of *International Law Situations* at the Naval War College, commented that while the lease was still new "the United States . . . has only a qualified jurisdiction over these regions [Guantánamo Bay and Bahía Honda] and not sovereignty . . . and the conditions of exercise of jurisdiction in these leased areas are accordingly unlike the conditions within the areas over which the United States exercises sovereignty."¹²¹ Six decades later, Gary L. Maris of Stetson University commented that restrictive provisions of the lease meant that

¹¹⁷ NAVAL WAR COLLEGE 1912, *supra* note 5, at 101–04 (citing 31 Stat. 895 (1901)).

¹¹⁸ *Id.* at 104 (citing U.S. Foreign Relations 1903, at 365).

¹¹⁹ See NAVAL WAR COLLEGE 1907, *supra* note 5, at 10. ("The jurisdiction based on sovereignty is in general exclusive, though exceptions are sanctioned by international law and international practice. The jurisdiction based upon lease is naturally dependent upon the conditions of the lease. The leases vary.")

¹²⁰ Joseph Lazar, *International Legal Status of Guantánamo Bay*, 62 AM J. INT'L L. 730, 739 (1968) ("[T]he United States has 'complete jurisdiction and control' so that she has the power, viewed from the level of the international legal system, to expropriate the ownership rights of the Republic of Cuba to the leased realty").

¹²¹ NAVAL WAR COLLEGE 1907, *supra* note 5, at 18.

jurisdiction at Guantánamo “is not a *carte blanche*.”¹²² A more expansive view, recently expressed by Professor Kal Raustiala of University of California at Los Angeles (UCLA) Law School, is that “complete” suggests “a special sort of control and jurisdiction, a view consistent with the . . . interpretation that the United States is a temporary sovereign for the duration of the lease.”¹²³

Intertwined with the legal uncertainties about jurisdiction was the issue of how the U.S. could use the territory it leased—as a coaling station or naval base.¹²⁴ Coal, commonly used as fuel for naval vessels in 1903, had been superseded by oil by the time the lease was reaffirmed in 1934.¹²⁵ The U.S. Navy had already been shutting down coaling stations elsewhere, and in fact the one at Guantánamo Bay was closed by 1938.¹²⁶

Thus, even before the U.S. and Cuba acted to reaffirm the lease of Guantánamo Bay, advances in technology had rendered one of the two goals of the lease obsolete. The terms of the lease did not anticipate this development or address any alternative to coal technology, so any substitution of more modern fuels at the supply station could have risked a dispute. No dispute arose when the concept of a naval base, the other permitted activity, evolved to include fuelling stations in a broader sense.¹²⁷

But just what constitutes a naval base? What range of activities may legitimately occur at one, and must these be in direct or indirect support of a state’s naval operations in a strict sense for them to comply with a servitude that allows one state to have a base on another state’s territory? The administrative and legal history of Guantánamo Bay shows that these questions have never been definitively answered. Indeed, the concept of a naval base was already undergoing transition when the lease was signed in 1903. During

¹²² Maris, *supra* note 6, at 266.

¹²³ Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2541 (2005).

¹²⁴ Coaling and Naval Stations Lease Agreement—Feb. 1903, *supra* note 108, at 1113.

¹²⁵ M.E. Murphy, *The History of Guantánamo Bay 1494–1964*, Vol. 1, Ch. 11 (originally published Jan. 5, 1953), available at [http://www.cnmc.navy.mil/guantanamo/AboutGTMO/gtmohist\]general/gtmohistmurphy/gtmohistmurphyvoll/gtmohistmurphyvollch11/index.htm](http://www.cnmc.navy.mil/guantanamo/AboutGTMO/gtmohist]general/gtmohistmurphy/gtmohistmurphyvoll/gtmohistmurphyvollch11/index.htm).

¹²⁶ *Id.*

¹²⁷ See Randy B. Frye, *Naval Station Guantánamo Bay Fuel Summit Held*, FUEL LINE (Defense Energy Support Ctr., Fort Belvoir, Va.), Spring/Summer 2004, at 26, <http://www.desc.dla.mil/DCM/Files/FLVol204.pdf> (last visited Aug. 27, 2007) (“[M]uch of the facilities and infrastructure that make up the Defense Fuel Supply Point (DFSP) date back to the early 1900s. . . . The base was established in 1903 as a coaling station and to this day abides by the original treaty as a support point for the refueling ships.”).

that time, powerful states were just starting to engage in the practice of establishing foreign naval bases. Foreign bases, by virtue of being outside a state's sovereign territory, and often at a distance from it, had different operational requirements and activities than those bases within the state.¹²⁸

The Guantánamo Bay lease did not specify restrictions other than those that prohibited commercial or industrial activity.¹²⁹ This was at a time when governments saw their roles as providing essential services that today are partially or completely performed by the private sector in many states.¹³⁰ The lease did not foresee this evolution, and over time interpretations of the lease's restrictions on activity at the base became looser and allowed for it. This trend arguably set the stage for a more expansive definition of legitimate naval base activities, and these broader activities in turn required support of their own.

During the base's history, permits have been issued for mercantile activity, the grazing of cattle,¹³¹ entertainment facilities, schools, transportation,¹³² and dairy production plants.¹³³ Such activities would flourish or wane according to the latest interpretations of the restrictions, as the primary uses of the base evolved in their own right. During the Cold War, the base was employed for controlling Caribbean sea lanes, deterring the Soviet Union's presence in the region and supporting potential military operations.¹³⁴ In 1994-1995, it housed Cuban and Haitian refugees fleeing their countries, and since 2002 it has been a detention center for alleged Taliban and Al Qaeda militants.¹³⁵

Use as a detention center is a principal activity, not a peripheral one. With regard to Guantánamo Bay's current use, the U.S. government has said that "[t]he positioning of a prison for enemy

¹²⁸ *Id.* at 26 ("With the population of this remote location [Guantánamo] totally reliant on fuel for the production of power and water, and in support of essential mission operations, a reliable and modern infrastructure becomes paramount.").

¹²⁹ Treaty Between the United States and Cuba—May 1934, *supra* note 81.

¹³⁰ See generally, International Labor Organization (ILO), *The Impact of Decentralization and Privatization on Municipal Services* (2001), available at <http://www.ilo.org/public/english/dialogue/sector/techmeet/jmms01/jmmsr.pdf>.

¹³¹ Maris, *supra* note 6, at 266–67 (noting that permits for the grazing of cattle were later rescinded by the Department of Navy).

¹³² Gerald L. Neuman, *Anomalous Zones*, 48 STAN L. REV. 1197, 1198 (1996).

¹³³ POMFRET, *supra* note 104 (noting that Guantánamo Bay produced its own dairy between 1914 and 1941, and operation of its current milk plant began 1967).

¹³⁴ MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA: ISSUES FOR THE 109TH CONGRESS 38 (Aug. 31, 2006), available at <http://nationalaglawcenter.org/assets/crs/RL32730.pdf>.

¹³⁵ *Id.*

combatants from the war on terrorism has focused attention on, and led to the revitalization of, a base that had been in a period of decline.”¹³⁶ This territory has particular value as a detention center because of U.S. sovereignty and its extra-jurisdictional nature, derived from its leased status and established to the satisfaction of the U.S. government in rulings by the Eleventh Circuit Court during the Haitian refugee influx.¹³⁷ “The one thing we all agreed on was that any detention facility should be located outside the United States[,]” wrote John Yoo, a former deputy assistant U.S. attorney general who was instrumental in creating the detention policy.¹³⁸

B. *Duration and Compensation*

Maris has argued that the return of Guantánamo Bay to Cuban control was envisioned by Cuba when it sought to lease the area rather than sell the area: “[T]he legal term ‘lease’ was not a disguise for the actual cession of Guantánamo to the United States but a relinquishing of jurisdiction over the area with the legal possibility of eventual recovery if the parties so desired or if conditions of the lease were not met.”¹³⁹

After the Cuban Revolution of 1959 led to hostile relations between the U.S. and Cuba, duration arose as a prominent issue. Cuba wished to terminate the arrangement, but there was no provision allowing it to do so unilaterally, as there was for the U.S.¹⁴⁰ Meanwhile, the antagonism between the states reinforced the military and political interests of the U.S. in retaining the base.¹⁴¹ These interests fostered the misperception that the lease had a perpetual term—to the point that both states began referring to it as such. Statements by the U.S. government today note that “Guantánamo Bay is the oldest U.S. base overseas, operating since 1903 when the U.S. government obtained a perpetual lease,”¹⁴² and that

¹³⁶ Rhem, *supra* note 103.

¹³⁷ Neuman, *supra* note 132, at 1200 (citing *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513 n.8 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992)). See also *Cuban Am. Bar Ass’n. Inc. v. Christopher*, 43 F.3d 1412, 1424–25 (11th Cir.), *cert. denied*, 516 U.S. 913 (1995); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 142–43 (Atlantic Monthly Press 2006) (discussing a particular case where the absence of federal rights for Haitian refugees suggested that Guantánamo Bay was outside U.S. habeas jurisdiction).

¹³⁸ *Id.* at 142.

¹³⁹ Maris, *supra* note 6, at 263.

¹⁴⁰ Treaty Between the United States and Cuba—May 1934, *supra* note 81, at 1162.

¹⁴¹ Murphy, *supra* note 125, Vol. 1, Ch. 12.

¹⁴² U.S. Library of Congress, *Places in the News—Cuba* (on file with The New York

“the base was leased in 1903 for \$2,000 per year on a perpetual basis.”¹⁴³

In making its own contradictory statements on the duration of the lease, Cuba’s government has both denied and confirmed the validity of the treaty. Cuba has argued that the treaty is void because its government did not have the legal competence to cede part of the territory by means of a “lease in perpetuity.”¹⁴⁴ But Cuba has also made a separate argument that relies on the treaty being valid and that Guantánamo Bay should revert to Cuban control because “being based on a lease, it is a temporary—not perpetual—occupation of part of our territory, and that . . . in due course it must be peacefully returned to Cuba.”¹⁴⁵

Termination of the lease has been envisioned by the U.S. in the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996,¹⁴⁶ which made it government policy “[t]o be prepared to enter into negotiations with a democratically elected government in Cuba either to return the United States Naval Base at Guantánamo to Cuba or to renegotiate the present agreement under mutually agreeable terms.”¹⁴⁷

International law scholars have suggested several other legal scenarios by which the lease might be ended—a finding that Cuba was coerced into accepting the Platt Amendment as a condition for independence, or that the current activities at Guantánamo Bay constitute a material breach of the treaty that limits its uses to a coaling station or naval base, or that *rebus sic stantibus* is justified in view of the fundamental change of political circumstances that followed the 1959 Cuban Revolution.¹⁴⁸ Another argument questions whether the lease is compatible with the principle of self-determi-

City Law Review); *see also* Rhem, *supra* note 103 (“At 101 years old, Naval Base Guantánamo Bay is America’s oldest active overseas military base.”).

¹⁴³ Rhem, *supra* note 103.

¹⁴⁴ DIRECTION DE L’INFORMATION, MINISTÈRE DES AFFAIRES ÉTRANGÈRES, REPUBLIQUE DE CUBA, GUANTANAMO: BASE NAVALE YANKEE DE CRIMES ET PROVOCATIONS 25 (Instituto del Libro 1970), translated in GUANTÁNAMO–YANKEE NAVAL BASE OF CRIMES AND PROVOCATIONS 29 (U.S. DEPT. OF DEF. 1977), available at <http://stinet.dtic.mil/oai/oai?&verb=getRecord&metadataPrefix=html&identifier=ADA373599> (follow “<http://handle.dtic.mil/100.2/ADA373599>” hyperlink).

¹⁴⁵ Ministerio de Relaciones Exteriores de Cuba, Guantánamo, U.S. Black Hole, available at <http://america.cubaminrex.cu/CDH/60cdh/Guantanamo/English/White%20Book>.

¹⁴⁶ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 § 201, 22 U.S.C. §§ 6021–6091 (1996).

¹⁴⁷ *Id.* § 6061(12) (2001).

¹⁴⁸ Margalida Capellà i Roig, *El estatuto jurídico de Guantánamo (Cuba)*, 54 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 773, 778–79 (2002) (Spain).

nation embodied in the Charter of the United Nations.¹⁴⁹

Opponents of these arguments point out, for example, that there is no evidence of coercion when the lease was reaffirmed in 1934,¹⁵⁰ and that the initial U.S. right to occupy Guantánamo did not derive from treaties or agreements with what later became the state of Cuba. Thus, “[n]o need . . . exists to consider or to accommodate the policies of *rebus sic stantibus* with *pacta sunt servanda* insofar as the United States’ rights of occupation in Guantanamo are concerned.”¹⁵¹

The Cuban government has not initiated proceedings in any legal forum to recover control over Guantánamo Bay, despite the chance that Cuba could benefit from a tribunal or arbitration procedure (there may be political risks, but the legal risk is nil because an unfavorable judgment would simply reaffirm the status quo). In fact, Cuba has intentionally adopted a policy of *not* making the return of Guantánamo Bay a high priority¹⁵² because circumstances have never existed to produce an accurate legal and diplomatic discourse—a pragmatic stance in view of the relative political and military strengths of the two states, which Ninth Circuit Court Judge Graber noted in her dissent in *Gherebi v. Bush*,¹⁵³ and perhaps also in view of the inconsistent legal arguments that Cuba has put forth about the lease’s validity.

However, the International Court of Justice decision in *Minquiers and Ecrehos*, which awarded disputed territory to the United Kingdom over France on grounds that the British had exercised jurisdiction and administrative activity,¹⁵⁴ shows that Cuba could risk losing title to Guantánamo Bay by being entirely passive with respect to asserting its claim for control over it. As a result, Cuba

¹⁴⁹ de Zayas, *supra* note 84, at 304–05 citing 23 May 1969, 1155 U.N.T.S. 331 [*Vienna Convention*].

¹⁵⁰ Maris, *supra* note 6, at 276–78. A communication from the Cuban Secretary of State to the American Ambassador stated the 1903 lease provisions retained in the Treaty of 1934:

[re-affirmation of the lease] did so “by virtue of the free and sovereign will of the people of Cuba.” The lack of records on the negotiation of this treaty which makes it impossible to refute the accuracy of the preceding statement [and] has the effect of vindicating the United States against any charge of duress which may previously have been valid.

Id. at 278.

¹⁵¹ Lazar, *supra* note 120, at 740.

¹⁵² Statement from the Ministry of Foreign Relations, *supra* note 71.

¹⁵³ *Gherebi v. Bush*, 352 F.3d 1278, 1309–13 (9th Cir. 2003) (Graber, J., dissenting), *vacated*, 542 U.S. 952 (2004).

¹⁵⁴ *Minquiers and Ecrehos*, 1953–55 I.C.J. at 72.

pursues modest but visible acts of resistance.¹⁵⁵ As Alfred de Zayas notes:

Cuba, of course, has no possibility to expel the United States from Guantánamo; it can only protest, and its protests have the function in international law of frustrating any eventual United States contention about putative Cuban acquiescence, thus preventing the U.S. from being able to claim sovereignty over the territory by virtue of occupation and prescription.¹⁵⁶

Cuba uses two vehicles for this resistance – public rhetoric in its conduct of international relations, and the compensatory aspect of the lease. Events show that its rhetorical denunciations of the U.S. occupation of Guantánamo Bay can be inconsistent with its actions regarding the territory. Thus, while Cuba has cited the current use of the base as a detention center as justifying an end to the lease,¹⁵⁷ it acquiesced to this use when contacted by U.S. authorities in advance and stated as the operation was starting:

We will not create obstacles to the development of the operation. Having been advised of it and conscious that it requires a large movement of personnel and means of aerial transport, the Cuban authorities will maintain contact with the personnel of the base in the adoption of measures that impede the risk of accidents.¹⁵⁸

In regard to the compensation stipulated by the lease, the U.S. has continued to make annual rent payments for Guantánamo Bay, but these have been transformed from reflecting the true value of the territory¹⁵⁹ into token payments because the lease had no provision for adjusting the rental amount. With the phasing out of gold coins and changes in the value of gold in dollar terms, the \$2,000 payable in gold coins eventually became \$4,085 payable by

¹⁵⁵ de Zayas, *supra* note 84, at 290–91 (noting that since 1959 Cuba has expressed the view that the American presence in Guantánamo Bay constitutes an illegal occupation).

¹⁵⁶ *Id.* at 291 (citing Fidel Castro, *Fidel Castro Speeches: 1984–1985* (Pathfinder Press 1985) at 99–100) (quoting Fidel Castro as stating in a January 11, 1985 speech delivered in Nicaragua) (“What interest can we have in waging a war with our neighbors. . . . We do not intend to recover it with the use of arms. . . . If some day it will be ours, it will not be by the use of force, but by the advance of the consciousness of justice in the world.”).

¹⁵⁷ *Id.* at 307–08.

¹⁵⁸ Statement from the Ministry of Foreign Relations, *supra* note 71 (quotation translated by author).

¹⁵⁹ Interview by Vivien Sequera with Raúl Castro Ruz, Cuban Defense Minister, at the Loma Malones Observation Point, Guantánamo (Jan. 19, 2002), *available at* <http://www.cubapolidata.com/cafr/news/2002-1.html#3> (last visited Aug. 11, 2007). “[I]n Cuba during the U.S. occupation, there were places where you could buy a hectare of land for 10 U.S. cents[,]” Castro said. *Id.*

check,¹⁶⁰ but it still represents the 1903 value of the territory itself.

Cuba has refused to cash the checks after 1959 “in rejection of what it justly considers to be an illegal usurpation of a portion of its territory.”¹⁶¹ Whether this legally constitutes rejection of the funds is another issue, as Cuba continues to accept the checks that are convertible into the funds.

“The U.S. does annually pay the \$4,085 in the form of a U.S. Treasury check. This check is transmitted to the Cuban government by the U.S. Interests Section in Havana on or before July,” according to a U.S. government official familiar with Cuba and Guantánamo Bay.¹⁶² The check is not refused upon receipt or subsequently returned to the U.S., according to the official. “It’s not rejected, but I’ve never seen any evidence that the Cubans . . . have cashed the checks,” he said.¹⁶³

The U.S. considers that under commercial law, it complies with its obligation as payor by providing the check to Cuba’s government, according to the official.¹⁶⁴ The U.S. has not sought to make payment by alternate means such as electronic funds transfer due to “the absence of normal banking relations between the U.S. and Cuba,” he said.¹⁶⁵

U.S. Treasury checks have no validity after a year,¹⁶⁶ resulting in the U.S. having access to leased territory at Guantánamo Bay at no cost. This occurs without any substantive financial consequence to Cuba because the annual payment has become a token amount

¹⁶⁰ Strauss, *supra* note 2, at 131 (citing *Gitmo Detainees Get New Deal* (CBS television broadcast Dec. 6, 2002)) (noting that the \$2,000 annual payment by the U.S. to Cuba has been unchanged since the 1903 “treaty’s stipulation that the payment be made ‘in gold coin’ makes the effective value today roughly \$4,000”).

¹⁶¹ Embassy of Cuba in the United Kingdom, *Facts About the U.S. Naval Base at Guantánamo*, [http://www.cubaldn.com/englishFiles/follow “FACTS ABOUT THE U S NAVAL BASE IN GUANTANAMO.pdf”](http://www.cubaldn.com/englishFiles/follow%20FACTS%20ABOUT%20THE%20U%20S%20NAVAL%20BASE%20IN%20GUANTANAMO.pdf) hyperlink) (last visited Aug. 11, 2007).

¹⁶² Telephone interview with the official, who spoke “on background” (information is given on condition that the source is not identified); he agreed to be described as above. (Dec. 20, 2006).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ U.S. DEP’T OF STATE, 4 FAH-3 H-340, FINANCIAL MANAGEMENT PROCEDURES HANDBOOK 5–6 (1995), *available at* <http://foia.state.gov/masterdocs/04fah03/04fah030340.pdf> (last visited Aug. 12, 2007).

All checks drawn on the Treasurer of the United States must be negotiated within 12 months after the date of issue. Unnegotiated USG [US Government] Checks are canceled 14 months after issue by Treasury. Valid claims against checks canceled by Treasury may be re-submitted for certification and issuance of a check(s).

Id. at 6.

that Cuba calculates as 37.4 cents per hectare.¹⁶⁷

VII. ANALYSIS AND IMPLICATIONS

The situation at present appears to offer the U.S. a remarkably smooth path toward obtaining title to Guantánamo Bay through prescription. It has displayed effective control and jurisdiction over an extended period, as required by *Minquiers and Ecrehos*.¹⁶⁸ Cuba has consistently behaved passively toward the territory as evidenced by its policy of not prioritising Guantánamo's recovery through legal means and thereby not bringing the case to an international tribunal or arbitration; and by acquiescing to specific U.S. activities on the territory that are counter to its arguments that they violate the treaty's restrictions.¹⁶⁹ Moreover, Cuba's own municipal law considers Guantánamo Bay to be foreign territory as the result of a 1934 decision by its Supreme Court.¹⁷⁰ Finally, the transformation of the rent amount to a token level that Cuba does not convert into cash renders the compensation aspect of the lease, once material, inconsequential.

The significance of the last point is that a halt in rent payments by the U.S. would not be a serious enough breach of the treaty to render it void and cause control over Guantánamo Bay to revert to Cuba. Indeed, Laly-Chevalier suggests it may not even be a violation. "One does not find in general international law any precise definition of the violation of a treaty," she writes,¹⁷¹ adding that a true violation is serious enough to affect the very substance of the treaty and that non-compliance with minor elements "do not generally qualify as violations."¹⁷²

Thus, while Cuba may have retained sovereignty over Guantánamo Bay through the lease, it may no longer be in a position to control whether it can *keep* that sovereignty. This raises a question about whether "ultimate sovereignty" remains true sovereignty once its continued existence becomes dependent on another sov-

¹⁶⁷ Interview with Raúl Castro Cruz, *supra* note 159.

¹⁶⁸ *Minquiers and Ecrehos*, 1953–55 I.C.J. at 67.

¹⁶⁹ Embassy of Cuba in the United Kingdom, *supra* note 161.

¹⁷⁰ Lazar, *supra* note 120, at 738 (citing *In re Guzman & Latamble*, Annual Digest & Reports of Pub. Int'l Law Cases, 1933–34, Case No. 43, 112 (Cuba Sup. Ct. 1994)). Here, the court declared that "the territory of that naval station is for all legal effects regarded as foreign." *Id.* This was in February 1934, before the treaty in May reaffirmed the lease. Capellà i Roig, *supra* note 148, at 781.

¹⁷¹ CAROLINE LALY-CHEVALIER, *LA VIOLATION DU TRAITE 126* (Editions Bruylant/Editions de l'Université de Bruxelles 2005) (quotation translated by Author).

¹⁷² *Id.* at 138.

foreign state. A policy change by the U.S. government may be all that is necessary for Guantánamo Bay's title to shift to the U.S.

By continuing to pay the rent, however, the U.S. annually displays its acceptance of the lease and its affirmation of Cuban sovereignty over the territory—a situation that has value for the U.S. in two respects. From the standpoint of international relations, it permits the U.S. to seek changes in Cuba's form of government by offering the incentive of terminating or changing the lease. From a legal perspective, maintaining Guantánamo Bay as a leased area with neither U.S. sovereignty nor Cuban jurisdiction preserves the territory's character as an extra-jurisdictional entity.

Neuman refers to such an entity as an “anomalous zone” where “certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended.”¹⁷³ He notes that such geographical exceptions to fundamental policies can be dangerous for the policies' basic values.¹⁷⁴ “In a sense, any exception to a rule tests the firmness of the rule. Exceptions may multiply, and even if they do not, the rule is only as strong as the barriers to bringing oneself within the exception.”¹⁷⁵ Additionally, he asserts “within an anomalous zone, disrespect for one fundamental value may breed disrespect for others.”¹⁷⁶

Exceptions to a rule may spread vertically, within a state, but they can also spread horizontally, among states. The use of Guantánamo Bay as a detention center has been referenced by foreign governments to justify deviations from their established legal procedures in regard to the handling of suspected terrorists or other persons deemed to be security threats.¹⁷⁷

It is common for states to replicate the behavior of other states when faced with similar situations, producing what political scientists call an international regime – defined by Krasner as a set of “principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of interna-

¹⁷³ Neuman, *supra* note 132, at 1201.

¹⁷⁴ *Id.* at 1233.

¹⁷⁵ *Id.* at 1234.

¹⁷⁶ *Id.*

¹⁷⁷ Harold Hongju Koh, Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, John Galway Foster Lecture: The United States and Human Rights after September 11th, Remarks Before the University College, London (Oct. 21, 2003) (transcript available at http://www.blackstonechambers.com/pdf-Files/Blackstone_JGF%20Lecture.pdf) (last visited Aug. 12, 2007). Remarks were given prior to his appointment as Dean of Yale Law School.

tional relations.”¹⁷⁸ Regimes provide the models of state behaviour that act as a source of customary international law,¹⁷⁹ and Stein writes that common interests and aversions among states are among the factors that allow regimes to develop.¹⁸⁰

The legal decisions surrounding the use of Guantánamo Bay as a detention center highlight the territory’s extra-jurisdictional aspect and create the conditions for a new regime to emerge around this point. Historically, states have gravitated toward using leased territories for similar types of activities, and legal decisions that support the definition of one leased territory as an extra-jurisdictional zone may give other leased territories intrinsic value as such.

This raises the possibility that leased territories, simply by virtue of being leased, may be employed for practices not conducted on other types of territories where sovereignty and jurisdiction are more firmly established. These practices may be entirely in harmony with established municipal and international law, but they also may not be, and the *habeas corpus* issue and others that have arisen at Guantánamo Bay have brought this into focus.

No comprehensive world inventory exists of leased territories and their associated servitudes, but there are probably hundreds, if not thousands, when minor sites such as diplomatic missions are included. The influence of the legal developments involving Guantánamo Bay on the future of these territories, and on international law in general, seems far from over.

¹⁷⁸ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1983).

¹⁷⁹ SHAW, *INTERNATIONAL LAW*, *supra* note 1, at 58. (“[C]ustomary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do.”).

¹⁸⁰ Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *INTERNATIONAL REGIMES*, *supra* note 178, at 115, 127.

