

CUBA AND STATE RESPONSIBILITY FOR HUMAN RIGHTS AT GUANTANAMO BAY

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I. INTRODUCTION

Allegations that the human rights of prisoners at Guantanamo Bay have been violated naturally raise questions about the behavior of the United States with respect to certain aspects of international law. These questions, in turn, generate other legal issues that have been virtually ignored and unexplored to date. We consider one such issue here: whether Cuba's relationship with Guantanamo Bay may cause Cuba to bear some responsibility under international law for wrongful acts that occur there.

The United States and Cuba agree that Guantanamo Bay is part of Cuba's sovereign territory; this fact places Guantanamo Bay within the geographic space where Cuba has international legal obligations. Yet the area has been controlled by the United States since a 1903 lease agreement suspended Cuba's active involvement there. It is important to assess whether Cuba is drawn back into a position of legal responsibility if human rights abuses occur at Guantanamo Bay because only then can we have a full sense of the consequences of such acts for both nations that create and maintain a leased territory where the normal exercise of state authority is altered. Many such territories exist around the world.

II. THE U.S. PRESENCE AND ACTIVITIES AT GUANTANAMO BAY

Following the U.S. victory in the Spanish-American War of 1898 and the subsequent granting of independence to Cuba in 1901, the United States negotiated to lease forty-five square miles of territory at Guantanamo Bay, on the southeast coast of Cuba, for use as an outpost of the U.S. Navy.¹ The lease was initially comprised of two legal instruments—an executive agreement between both countries' presidents in February 1903 that

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1. EMILIO ROIG DE LEUCHSENING, *HISTORIA DE LA ENMIENDA PLATT: UNA INTERPRETACIÓN DE LA REALIDAD CUBANA* 166-67 (3d ed. 1973).

provided a framework for the arrangement² and a treaty ratified by Congress in October of that year which provided the detailed terms.³ A subsequent treaty ratified by Congress in June 1934 reconfirmed the lease and also clarified the methods through which it could be terminated: by agreement between the two nations or by U.S. abandonment of the site.⁴ The lease also included a second, smaller territory on Cuba's northern coast, Bahia Honda,⁵ but it was never used by the United States and reverted back to Cuban control.⁶ The duration of the lease was not fixed in years; rather, it was contingent on how long the United States considered its presence to be necessary—"the time required for the purposes of coaling and naval stations."⁷

Although the lease restricted the United States to using Guantanamo Bay for only these purposes, it offered such wide latitude to act that this limitation was largely meaningless in a practical sense. It was up to the U.S. Navy, for example, to determine the range of activities that could occur at a "naval station," a term it created and used to designate a facility with fewer functions than a full naval base.⁸ In addition, friendly relations between the two governments for many decades led to informal deviations from the lease's terms, such as allowing the naval station to be gradually upgraded into a comprehensive naval base, a status it retained for half a century.⁹ Some of Cuba's acquiescence can be explained by the strategic and economic benefits it obtained as the scope of U.S. activities grew broader; the presence of American naval forces gave a degree of protection to a state that had limited military capabilities of its own, and the base powered the economy of the surrounding area of the island as the largest employer of Cuban nationals in the vicinity.

What was most important for the scope of U.S. activities at Guantanamo Bay, however, was the wording of the lease. It assigned to the United States "complete jurisdiction and control" over Guantanamo Bay,

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2. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, T.S. No. 418 [hereinafter Guantanamo Lease].
 3. Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda, *ratified on* Oct. 6, 1903, T.S. No. 426 [hereinafter Guantanamo Treaty].
 4. Treaty of Relations Between the United States of America and Cuba art. III, May 29, 1934, T.S. No. 866 [hereinafter Treaty of Relations].
 5. Guantanamo Lease, *supra* note 2, at art. I.
 6. The United States had abandoned Bahia Honda by 1916. See MICHAEL J. STRAUSS, *THE LEASING OF GUANTANAMO BAY* 54-56 (2009).
 7. Guantanamo Lease, *supra* note 2, at art. I.
 8. U.S. Dep't of the Navy, General Order No. 135, § 2, Dec. 6, 1911.
 9. The status of naval base existed from 1952 to 2003, when it reverted back to a naval station during a reorganization of U.S. Navy facilities. See STRAUSS, *supra* note 6, at 66-67. By this time, naval stations were accommodating activities by "tenant commands." *Id.* at 67. The prison was a tenant command operated by the Joint Task Force, which drew personnel from all U.S. armed forces. *Id.* at 71.

while Cuba retained “ultimate sovereignty.”¹⁰ This bifurcation of the concept of sovereignty into an operational element that can be assigned to another state and a de jure element that remains with the original sovereign is common in territorial leases, but as we shall see, the way it was employed at Guantanamo Bay became critical to events there and, consequently, to a host of legal issues—including the one examined in this Article.

Shortly after the Cuban revolution in 1959 and the country’s move to align itself politically and militarily with the Soviet Union, the government of Cuba began calling for the United States to leave Guantanamo Bay.¹¹ Although the lease allowed for termination by mutual agreement or by a unilateral U.S. decision to leave,¹² its wording did not provide for Cuba to end the lease on its own. The United States has justified staying at Guantanamo Bay since 1959 by taking the position that the lease remained a valid agreement between the two states and that Cuba’s compliance was therefore obligatory under the international law principle of *pacta sunt servanda*—the obligation of states to adhere to agreements they enter into.¹³

Cuba, by contrast, elaborated no fewer than four different, and sometimes contradictory, legal arguments for invalidating the lease.¹⁴ More than a decade after the revolution, however, it had still not settled on which argument to pursue and never initiated legal action to oust the United States—even though a number of international law publicists considered that it might have successfully invoked the principle of *rebus sic stantibus*,¹⁵ which allows a state to withdraw from a treaty if fundamental circumstances underlying it have changed.¹⁶ In public statements criticizing the lease, Cuba has often referred to the lease as perpetual (some territorial lease agreements between states specify perpetual durations,¹⁷ although the Guantanamo Bay lease does not), and it has often characterized the U.S. presence there as an illegal occupation.¹⁸

10. Guantanamo Lease, *supra* note 2, at art. III.

11. *Aide of Castro Rules Out a Soviet Base in Cuba; Nunez Says Russians Require None for Their Missiles, Calls for U.S. Surrender of Guantanamo Site*, N.Y. TIMES, July 9, 1960, at 3.

12. Guantanamo Treaty, *supra* note 3, at art. III.

13. Joseph C. Sweeney, *Guantanamo and U.S. Law*, 30 FORDHAM INT’L L.J. 673, 720-21 (2007).

14. MINISTRY OF FOREIGN AFFAIRS OF CUBA, GUANTANAMO: BASE NAVAL YANKEE DE CRIMES ET PROVOCATIONS 24-37 (1970).

15. Sweeney, *supra* note 13, at 722-23.

16. John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139, 209 (1996).

17. Examples include the French lease of Quinto Real Norte in Spain (1856), the Bangladeshi lease of Tin Bigha in India (1982), and the U.S. lease of the Canal Zone in Panama (1903). The Canal Zone lease was made in perpetuity, but the treaty was replaced by a treaty in 1977 that set a termination date of 2000. Michael J. Strauss, *Perspectives on the Future of Guantanamo Bay*, in CUBA IN TRANSITION 220, 222 n.11, 226 (Ass’n for the Study of the Cuban Economy ed., 2009).

18. See generally FIDEL CASTRO ET AL., GUANTÁNAMO: WHY THE ILLEGAL US BASE SHOULD BE RETURNED TO CUBA (2011).

Cuba's opportunities to eject the United States from Guantanamo Bay arguably diminished with the collapse of the Soviet Union, which had used both its legal influence and its geopolitical power in support of that effort.¹⁹ During the Cold War, the Soviets referred to the lease as an example of an "unequal treaty"²⁰ and pressed for a doctrine in international law that would allow such treaties to be voided (this concept was ultimately not embraced by most Western nations). The Soviets also pressed for the United States to leave Guantanamo Bay as one of several conditions for removing its nuclear missiles from Cuba during the 1962 Missile Crisis,²¹ but this demand was eventually dropped during negotiations with the United States to end the crisis.

Cuba's current position with respect to the lease mingles international law, Cuban law, and realpolitik. It now accepts the lease as valid and asserts that control of Guantanamo Bay will eventually revert to Cuba because of the nature of the arrangement as defined by its domestic legal system, which prohibits perpetual leases. As stated by the Cuban Foreign Ministry in 2004:

The Cuban government's position as to the legal situation of the American Naval Base at Guantanamo is that, by being in the legal form of a lease, it does not grant a perpetual right but a temporary one over that part of our territory, by which, in due course, as a just right of our people, the illegally occupied territory of Guantanamo should be returned by peaceful means to Cuba.²²

This ambiguous stance (the lease is valid, but U.S. tenancy is illegal) also suggests that Cuba is not inclined to take specific action to recover control over Guantanamo Bay as it is destined to occur at some point anyway.

The United States has not indicated any intention to abandon Guantanamo Bay, although the Helms-Burton Act of 1996 requires the United States to be prepared to negotiate either returning control of the area or staying there on revised terms if Cuba adopts a democratic form of government.²³

19. Sweeney, *supra* note 13, at 701-03.

20. Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 966 (1967).

21. Adlai E. Stevenson, Cable to Dean Rusk (Nov. 2, 1962), ProQuest LLC/National Security Archive, Cuban Missile Crisis Revisited Collection, Document CU01003.

22. *White Book: Chapter IV: A Veritable "Moral and Legal Black Hole" in the Territory Illegally Occupied by the US Naval Base at Guantánamo*, MINISTRY OF FOREIGN AFFAIRS OF CUBA, <http://anterior.cubaminrex.cu/CDH/60cdh/Guantanamo/English/White%20Book.htm> (last visited November 19, 2012).

23. 22 U.S.C. § 6061(12) (2012).

III. THE PRISON AND ALLEGATIONS OF HUMAN RIGHTS ABUSES

Since 2002, one of the primary functions of Guantanamo Bay has been the prison established to hold suspects captured by the United States in the international fight against terrorism following the September 11, 2001, terrorist attacks. The process of deciding to use Guantanamo Bay as the site for these detentions was directly linked to its location on territory fully controlled by the United States, but not under U.S. sovereignty, and where U.S. constitutional protections and legislation had been inconsistently applied as the result of a century of piecemeal legislative acts and conflicting court rulings.²⁴

With the creation of the prison, new U.S. legislation was passed and physical facilities were established for the purpose of trying the prisoners in military tribunals.²⁵ At its peak, the prison's population was more than 700,²⁶ a number that had been whittled down to 166 by June 2013,²⁷ mainly through negotiated releases to other nations, although several prisoners died from natural causes or suicide.²⁸ Most of the remaining prisoners have neither been charged with crimes nor faced trials.

This Article will not focus on the legal status of the prisoners, the propriety of using the U.S. military (as opposed to civilian) justice system with respect to them, or the extensive legal proceedings that have taken place regarding these matters, as they are amply covered in many published works. Rather, it focuses on the allegations that the prisoners' human rights were violated by the United States and specifically on whether the status of Guantanamo Bay as a leased territory causes legal responsibility to reside partially in Cuba if the allegations are validated through a legal process.

There are two aspects of international human rights law that the United States is accused of violating at Guantanamo Bay: first, that prisoners were subjected to torture during interrogations by U.S. authorities, and second, that prisoners have been detained indefinitely without being charged with crimes or brought to trial.²⁹

24. Gary L. Maris, *International Law and Guantanamo*, 29 J. POL. 267, 270 (1967).

25. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *invalidated by* Boumediene v. Bush, 553 U.S. 723 (2008).

26. David Bowker & David Kaye, *Guantánamo by the Numbers*, N.Y. TIMES (Nov. 10, 2007), http://www.nytimes.com/2007/11/10/opinion/10kayeintro.html?_r=0.

27. Carol Rosenberg, *Guantánamo Prison Getting Guard Reinforcements*, MIAMI HERALD (June 5, 2013), <http://www.miamiherald.com/2013/06/05/3434821/guantanamo-prison-getting-reinforcements.html>.

28. James Risen & Tim Golden, *3 Prisoners Commit Suicide at Guantánamo*, N.Y. TIMES (June 11, 2006), http://www.nytimes.com/2006/06/11/us/11gitmo.html?pagewanted=all&_r=0.

29. See, e.g., *Pillay Deeply Disturbed by US Failure to Close Guantanamo Prison*, U.N. HUMAN RIGHTS (Jan. 23, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11772&LangID=E>.

With respect to the torture allegations, they refer to what the United States called “enhanced interrogation techniques,” including waterboarding (simulated drowning), that were determined by the U.S. Department of Justice to be short of the international legal threshold for torture.³⁰ However, these techniques have been widely deemed by others to comply with the definition of torture elaborated in the primary international agreement that makes torture an internationally wrongful act, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³¹ Article 1 of the Convention defines torture as follows:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³²

The Convention entered into force in 1987, and the United States signed it a year later with the following declaration: “The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary.”³³ Among the reservations it made when it ratified the Convention in 1994 were several that pertained to its definition of torture:

(1)(a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened

30. See Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1, available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all>.

31. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

32. *Id.* at art. 1.

33. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, United States of America, Apr. 18, 1988, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf>.

administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.³⁴

As of June 2013, neither the U.S. government nor specific individuals have been formally charged in any legal venue with carrying out torture against prisoners at Guantanamo Bay. As military tribunals begin to hear cases against some of the prisoners, the question of the admissibility of evidence obtained through torture has been raised by defendants' attorneys, creating a possible route toward a legal determination of whether torture occurred.³⁵

In Spain, which applies the concept of universal jurisdiction for international crimes and has a legal system that entails investigations led by magistrates, two criminal cases are pending against the U.S. government and certain officials with respect to alleged torture during interrogations at Guantanamo Bay. In one case, the judge initially handling the investigation

34. *Id.*

35. This question has been raised in the case against Khalid Sheikh Mohammed and his co-defendants. See David Glovin, *Sept. 11 Defense Seeks Torture Evidence at Cuba Hearing*, BLOOMBERG (Jan. 28, 2013, 10:59 AM CT), <http://www.bloomberg.com/news/2013-01-28/sept-11-defense-seeks-torture-evidence-at-cuba-hearing.html>.

described the alleged crime being investigated as “an authorized and systematic plan of torture and ill-treatment on persons deprived of their freedom without any charge and without the basic rights of any detainee, set out and required by applicable international conventions” at Guantanamo Bay.³⁶ The case grew from a separate Spanish criminal case against four ex-detainees at Guantanamo who were acquitted based on a finding that they had been tortured and subjected to other abuse at Guantanamo Bay.³⁷ The other case currently pending in Spain involves accusations that six former officials in the U.S. government aided and abetted the torturing of prisoners at Guantanamo Bay in violation of the Geneva Conventions and the Convention against Torture.³⁸

Regarding the allegations that prisoners have been held in situations of indefinite detention at Guantanamo Bay without charges being brought against them or trials being held, there are no universal international conventions that prohibit the practice. However, this practice is widely considered a violation of human rights and is addressed as such in various instruments, notably a United Nations (U.N.) General Assembly Resolution adopted in 1988, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.³⁹ In addition, various regional human rights instruments, such as the European Convention on Human Rights,⁴⁰ the American Convention on Human Rights,⁴¹ and the African Charter on Human and Peoples’ Rights,⁴² have all been interpreted as prohibiting the indefinite detention of prisoners.⁴³

The United States acknowledges that such behavior on the part of a state on Cuban sovereign territory is abusive when the state engaging in that behavior is Cuba. The U.S. State Department’s annual report for 2011 on Cuban human rights practices notes that authorities in Cuba are obliged by domestic law to inform detainees after an initial detention period of 168 hours of the basis for their arrest and criminal investigation and to allow access to legal representation.⁴⁴ The report states that authorities “often

36. *The Spanish Investigation into U.S. Torture*, CTR. FOR CONST. RIGHTS, <http://ccrjustice.org/spain-us-torture-case> (last visited Nov. 19, 2012).

37. *Id.*

38. *Id.*

39. G.A. Res. 43/173 (IX), U.N. GAOR, 43rd Sess., Supp. No. 26, U.N. Doc. A/43/26 (Dec. 9, 1988).

40. Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

41. American Convention on Human Rights art. 7, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

42. African Charter on Human and Peoples’ Rights art. 6, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

43. Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L REV. RED CROSS 15, 22 (2005).

44. U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: CUBA 7 (2011), available at <http://www.state.gov/documents/organization/186717.pdf>.

disregarded” such procedures and cited information from “a noted dissident” that “64 percent of pretrial detainees where [the dissident] was being held had spent weeks and sometimes months without having seen an attorney or being informed of the charges against them.”⁴⁵

IV. ADDRESSING THE QUESTION OF CUBAN RESPONSIBILITY

Turning to whether Cuba can be found to share responsibility if the United States is determined to have violated human rights at Guantanamo Bay, it must be noted at the outset that every state is normally obliged to ensure that human rights are protected on all parts of its sovereign territory. There are nonetheless certain situations that give rise to exceptions, so it must be determined whether those exceptions apply to Cuba in the case of Guantanamo Bay.

It should also be noted that the lease establishes legal relationships between the territory of Guantanamo Bay and two separate states, so the issue of state responsibility there is distinct from issues involving the rest of Cuba. Cuba has long been accused of its own domestic human rights violations,⁴⁶ but they are not being considered here because it is evident that Cuba would have sole responsibility for them.

A core feature of this examination is the fact that throughout the existence of the lease, neither the United States nor Cuba has ever disputed Cuba’s sovereignty at Guantanamo Bay. The United States has exclusively exercised jurisdiction and control there for more than a century and may even meet the legal threshold for acquiring title to the territory through prescription (adverse possession) if it were to claim it. But the United States has not sought title or sovereignty there, instead continually reaffirming Cuba’s sovereignty through acts it carries out under terms of the lease that exist for this purpose, such as making an annual rental payment (although Cuba has declined to accept it since 1960 as a form of protest)⁴⁷ and by referring to the site as “Guantanamo Bay, Cuba” in many official contexts.⁴⁸

At first glance, the issue of potential Cuban responsibility would appear to be a non-starter. The international law publicist Marko Milanovic, for example, notes:

45. *Id.*

46. See Juan O. Tamayo, *UN Panel Blasts Cuba on Human Rights Abuses*, MIAMI HERALD (June 2, 2012), <http://www.miamiherald.com/2012/06/02/v-fullstory/2828219/un-panel-blasts-cuba-on-human.html>.

47. STRAUSS, *supra* note 6, at 182-183.

48. See, e.g., *Travel to Guantanamo Bay, Cuba*, U.S. CUSTOMS AND BORDER PROTECTION, https://help.cbp.gov/app/answers/detail/a_id/1027/~/~travel-to-guantanamo-bay,-cuba (last updated Aug. 3, 2011, 10:00 AM).

[A] state may have title over territory, but not have jurisdiction, i.e. *de facto* control, over it. Thus, it is Cuba, not the United States, that has title over Guantanamo Bay, yet it would to my mind be absurd to say that it is Cuba, rather than the United States, which has the obligation to ensure the human rights of persons detained there.⁴⁹

He rightly infers that the nature of the lease as a bilateral instrument and that the specific terms of the arrangement—the separation of jurisdiction and control from *de jure* sovereignty—point to this obvious conclusion. Yet an examination of how the lease has been implemented and the behavior of both states toward the territory, including decisions within their national legal systems that have shaped such behavior, are also important. When these factors are considered in conjunction with the lease itself, they may steer us toward a different conclusion. State behavior, after all, constitutes a set of facts that are routinely considered relevant by international tribunals in adjudicating situations that have their origins in legal instruments and their interpretation.⁵⁰ In the case of Guantanamo Bay, the result can have implications for the behavior of nations throughout the world that put parts of their territory at the disposal of other states through bilateral leases and similar arrangements.

Determining responsibility for ensuring human rights at Guantanamo Bay is far from a straightforward process. Besides the nature and terms of the lease and the behavior of the states involved, other relevant factors include existing notions of state responsibility for wrongful acts, the issue of whether Guantanamo Bay can be considered occupied territory, the hierarchy of norms in international law, the evolution of human rights law, and, of course, geopolitical realities.

V. SOVEREIGNTY AND JURISDICTION ON LEASED TERRITORIES

It is common for nations to secure rights to engage in economic, military, or other activities on the sovereign territory of other nations through bilateral agreements that are typically called leases and usually take the form of treaties. These agreements generally reaffirm the lessor state's *de jure* sovereignty over the area and often grant jurisdictional rights there to the lessee state. Sometimes the assignment of jurisdiction is comprehensive or even complete, as it was at Guantanamo Bay.⁵¹

49. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 8 (2011).

50. Ian Sinclair, *Estoppel and Acquiescence*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 104, 116-20 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

51. MICHAEL J. STRAUSS, THE VIABILITY OF TERRITORIAL LEASES IN RESOLVING INTERNATIONAL SOVEREIGNTY DISPUTES 97-107 (2010); Michael J. Strauss, A Matrix for Resolving Sovereignty Disputes Through Territorial Leasing 4 (Apr. 3, 2009).

A transfer of complete jurisdictional authority can result in the state with sovereignty over the territory being blocked by the lease from intervening in the activities that the lessee state carries out there.⁵² At issue is whether the sovereign state has the right, or even a responsibility, to intervene if those activities violate international law.

To address this, we must look at the nature of sovereignty, which can be defined as the exclusive authority that a state exercises on its territory plus extensions of that authority outside its territory.⁵³ As part of this authority, a nation may voluntarily agree to restrict the display of its own sovereign rights; thus, one state may allow a second state to exercise rights associated with sovereignty on part of the first state's territory, as in a lease like that of Guantanamo Bay.

Nations may have governments that ignore or defy aspects of international law, but this does not jeopardize their sovereignty or their status as states; they are simply considered rogue or troublesome states while this occurs. Yet violations have never predominated. Most of the time, most states adhere to most norms of international law, which keeps the system viable and thriving. The costs of not complying—sanctions, loss of reputation, etc.—usually outweigh whatever benefits a nation may perceive.⁵⁴ We can therefore consider an obligation arising from international law to be a true responsibility.

The lease of Guantanamo Bay granted the United States “complete jurisdiction and control” while stipulating that Cuba would retain “ultimate sovereignty.”⁵⁵ This wording created sufficient confusion such that both states took years to interpret the legal relationship that each had with the territory. Indeed, the legal issues involving prisoners at Guantanamo Bay and the question of state responsibility being discussed here show the process is still not complete.

It is nonetheless clear that the “complete jurisdiction and control” obtained by the United States at Guantanamo Bay exists only at the level of international relations because this is the level at which the lease agreement operates. It gives the United States the right to exercise 100% of whatever jurisdiction exists there. At the level of the U.S. domestic legal system, however, the jurisdiction that applies on U.S. sovereign territory is more

52. See Strauss, *supra* note 51, at 3 (explaining how rights established under a lease can limit those of the lessor state and extend those of the lessee).

53. STRAUSS, *supra* note 6, at 12.

54. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1860-63 (2002).

55. Guantanamo Lease, *supra* note 2, at art. III.

complete than the jurisdiction that applies at places like Guantanamo Bay, where the United States has control, but not sovereignty.⁵⁶

Any aspects of jurisdiction that are not exercised at Guantanamo Bay by the United States do not automatically revert to Cuba because the lease agreement precludes Cuba from displaying any jurisdictional rights on the territory.⁵⁷ This was affirmed by Cuba's Supreme Court of Justice⁵⁸ in a 1934 ruling that said Guantanamo Bay must be considered foreign territory for legal purposes.⁵⁹ In compliance with this decision, Cuba has not sought to exercise any jurisdiction there.

VI. RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Current notions of allocating responsibility for violations of international law are set forth in the text and interpretations of the U.N. International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁶⁰ These have effectively become the standards in use today. At the most basic level, the draft articles say that every state is responsible for its own internationally wrongful acts.⁶¹ A state may also be responsible for the wrongful acts of another state if, for example, it aids or assists the other state in the commission of the wrongful act and that assistance had the intent of "facilitating the commission of that act."⁶²

A facilitating state does not bear any responsibility, however, if it "is unaware of the circumstances in which its aid or assistance is intended to be used by the other State."⁶³ It also bears no responsibility if there is a situation of *force majeure*, as when a state violates human rights on territory that it has occupied militarily;⁶⁴ *force majeure* requires the "loss of control over a portion of the State's territory" as the result of human

56. This gap is the so-called "legal black hole." Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 1 (2004). It was partially closed by the U.S. Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008).

57. Guantanamo Lease, *supra* note 2, at art. III.

58. Replaced by the People's Supreme Court when Cuba reorganized its legal system in 1973. *See generally* Ley No. 1250, Ley de Organización del Sistema Judicial, Gaceta Oficial [GO], 23 de Junio de 1973 (Cuba).

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

60. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 43-365, U.N. Doc. A/56/49 (Vol. I); GAOR, 56th Sess., Supp. No. 10 (2001).

61. *Id.* at 43.

62. *Id.* at 155-56.

63. *Id.* at 156.

64. *Id.* at 183-84.

intervention, such as a military operation, with “no real possibility of escaping” the effects of the force or coercion applied.⁶⁵

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

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

Whether Cuba was still willingly facilitating U.S. activities at Guantanamo Bay depends on whether it has voluntarily permitted the continued U.S. presence there or was forced to accept it. Since the 1959 revolution, Cuba has repeatedly stated that it has wanted the United States to leave Guantanamo Bay.⁶⁶ As the weaker of the two countries militarily (and with its stronger ally, the Soviet Union, unwilling to force the issue during the Cold War), Cuba has protested the U.S. presence mainly through political rhetoric and refusals to cash the annual U.S. rent checks.⁶⁷

It could thus be argued that Guantanamo Bay became occupied territory once the United States refused to leave and that Cuba has had no responsibility for U.S. actions there because it was forced to accept the U.S. presence, which is, after all, a military one. Additionally, it could be argued that Cuba was required by its own obligation under international law to honor its treaty agreements and was legally forced to allow the United States to stay at Guantanamo Bay, even if it no longer wished to do so. Moreover, by honoring the terms of the lease, Cuba was unable to exercise any jurisdiction over U.S. activities at Guantanamo Bay, and it was prevented from evicting the United States because the 1934 treaty allowed only the United States to terminate the lease unilaterally.⁶⁸

The opposite view—that Cuba continued to willingly permit the U.S. presence—is supported by the fact that Cuba took no steps to abrogate the lease after the 1959 revolution, even while a number of international jurists considered it possible for Cuba to have done so legally by invoking the *rebus sic stantibus* principle.⁶⁹ It could also be argued that Cuba’s

65. *Id.* at 184.

66. *See, e.g.,* Sweeney, *supra* note 13, at 707-08 (discussing Fidel Castro’s animosity toward the United States).

67. STRAUSS, *supra* note 6, at 182-83.

68. Treaty of Relations, *supra* note 4, at art. III.

69. STRAUSS, *supra* note 6, at 170-76.

rhetorical denunciations of the lease and its refusal to cash the rent checks are weak forms of protest compared to other options at Cuba's disposal to try to regain control over the territory, such as initiating diplomatic efforts or legal action. Thus, there is room to challenge whether Cuba really wanted the United States to leave.⁷⁰

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

Other evidence of a willingness to facilitate U.S. activities at Guantanamo Bay in recent years is a Cuban offer in 1999 to provide medical and other services to people fleeing the Kosovo conflict and brought to Guantanamo Bay by the United States (the U.S. project was aborted, so the offer was not acted upon)⁷¹ and Cuba's offer to facilitate U.S. efforts to transport prisoners to the detention center in Guantanamo Bay in 2002.⁷² The willingness expressed in the latter case was evident:

We shall not set any obstacles to the development of the operation. Having been apprised of the operation and aware of the fact that it demands a considerable movement of personnel and means of air transportation, the Cuban authorities will keep in contact with the personnel at the American naval base to adopt such measures as may be deemed convenient to avoid the risk of accidents that might put in jeopardy the lives of the personnel thus transported.⁷³

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

70. Reasons suggested to explain why Cuba may tolerate the United States remaining at Guantanamo Bay include: giving Cuba a greater voice in the United Nations, reinforcing domestic political support for the government, keeping Cuban defense costs down, and Guantanamo's potential to resume being a regional economic engine. *See id.* at 185.

71. *Cuba Offers Help in Assisting Kosovo Refugees at Guantanamo Base*, CNN (Apr. 8, 1999, 11:37 PM EDT), <http://www.cnn.com/WORLD/americas/9904/08/cuba.refugees/index.html>.

72. Press Release, Ministry of Foreign Affairs of Cuba, Statement by the Government of Cuba to the National and International Public Opinion (Jan. 11, 2002), *available at* <http://www.cuba.cu/gobierno/documentos/2002/ing/d110102i.html>.

73. *Id.*

Cuban authorities in connection with a meeting of the U.N. Human Rights Council in 2004 states:

In [Guantanamo Bay], hundreds of foreign prisoners are arbitrarily detained, subjected to indescribable humiliations, totally isolated, unable to communicate with their families, or have an adequate defense. The charges against most of them remain unknown. Some of the very few who have been freed have recounted the horrors of the concentration camp, where despicable forms of torture and cruel, degrading and inhuman treatment are practiced.⁷⁴

So, depending on the arguments one uses, a case may be established that the territory where these acts were occurring was under Cuban sovereignty, but not, in a legal sense, under U.S. military occupation, that Cuba willingly facilitated the entire range of U.S. activities at Guantanamo Bay during the period when the alleged U.S. violations of human rights were occurring, that it was aware of those allegations at the time, and that it considered them credible. In allowing its territory to be used by the United States for wrongful acts, it would have met the threshold for having responsibility for those acts under the ILC draft articles.

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

VII. THE HIERARCHY OF NORMS IN INTERNATIONAL LAW

When a nation believes wrongful acts are occurring on its sovereign territory at the hands of another state, its range of possible responses includes diplomatic, military, and/or legal actions to achieve a halt to the acts in question. These responses may be unilateral or they may involve other nations. Whether and how the sovereign state intervenes in such a situation will likely depend on the geopolitical realities it faces, such as its strength relative to the alleged wrongdoer state or its perception of the political or other consequences of acting. A hierarchy of norms in international law that has emerged in recent decades can facilitate the intervention of a weaker state against a stronger one by endowing its action

74. MINISTRY OF FOREIGN AFFAIRS OF CUBA, LA CUESTION DE LAS DETENCIONES ARBITRARIAS EN EL AREA DE LA BASE NAVAL DE LOS ESTADOS UNIDOS EN GUANTANAMO (2004), *available at* <http://anterior.cubaminrex.cu/CDH/60cdh/Guantanamo/Ayuda%20memoria%20.htm>.

with heightened legitimacy in cases when the hierarchy gives precedence to the violated law over another aspect of international law that may otherwise keep the sovereign state from acting.⁷⁵

Although this hierarchy is informal and relative standings within it are nebulous or undefined in many circumstances, international law scholars broadly accept that key aspects of human rights law are considered so fundamental as to take precedence over most or all other aspects of international law, such as treaty law that obliges states to honor their international commitments.⁷⁶ Seen in this context, a state can be said to have a responsibility under international law to protect human rights on all of its sovereign territory, including an area where it has relinquished jurisdictional rights to another state through a lease agreement.

As an aside, the recent emergence of the doctrine of the “responsibility to protect” as an aspect of human rights law—the obligation for a nation to intervene, up to and including militarily, in another nation to halt or prevent human rights atrocities⁷⁷—may provide further legal “cover” for a state to reassert jurisdiction on a portion of its territory where it has given up jurisdictional rights to another state. At present, the responsibility to protect is a controversial notion; it runs counter to the long-standing principle of non-intervention in the internal affairs of states, and it is not universally accepted.⁷⁸

The existence of the hierarchy has important implications. When the sovereign state does not take sufficient action toward ending violations it believes are occurring, it might be seen to acquiesce in those violations, exposing it to legal consequences. Likewise, if the sovereign state is unaware that the lessee state is engaging in significant or ongoing abuses of human rights on the leased territory or tries to ensure that the lessee state respects human rights law there and fails, it may risk having its effective control of the leased area brought into question. This situation could jeopardize its title and sovereignty over the territory, as international law considers effective control to be a prerequisite for sovereignty.⁷⁹

75. See, e.g., Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, ETHICS & INT’L AFF., Winter 2004/2005, at 1, 22-23.

76. See, e.g., JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 21, 94-126 (2003); CHRISTOS L. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES 47 (1976); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 294 (2006).

77. Julia Hoffman & André Nollkaemper, *Introduction*, in RESPONSIBILITY TO PROTECT 13, 13-15 (Julia Hoffman & André Nollkaemper eds., 2012).

78. Saira Mohamed, *Taking Stock of the Responsibility To Protect*, 48 STAN. J. INT’L L. 319, 321-30 (2012); Press Release, General Assembly, Delegates Weigh Legal Merits of Responsibility To Protect Concept as General Assembly Concludes Debate, U.N. Press Release GA/10850 (July 28, 2009).

79. Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous People*, 42 TEX. INT’L L. REV. 155, 174 (2006).

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

VIII. CONCLUSION

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

This possibility has ramifications for states that lease territory to other states, most notably for military bases or "black sites" that fall under the jurisdiction of the lessee state and where the lessee's actions include violations of human rights. A finding that Cuba shared responsibility for U.S. human rights violations at Guantanamo Bay would, for example, indicate that the United Kingdom may share responsibility for any U.S. human rights violations that occur on Diego Garcia, the Indian Ocean island where the United States has a military base that it used in the "extraordinary rendition" of prisoners to Guantanamo Bay and Morocco⁸⁰ and allegedly to Libya as well.⁸¹

Territorial leasing can be advantageous for the viability of states and the international system. The practice allows nations to adapt to evolving economic, security, social, and political situations without resorting to boundary changes. At times leasing has been used successfully as a means of bringing peace to areas where sovereignty had been disputed.⁸² A determination that Cuba shares responsibility for ensuring human rights at

80. Mark Tran, *Miliband Admits US Rendition Flights Stopped on UK Soil*, *GUARDIAN* (Feb. 21, 2008, 11:57 EST), <http://www.guardian.co.uk/world/2008/feb/21/ciarendition.usa>. This example is timely, as the initial fifty-year lease of Diego Garcia to the United States will expire in 2016. *Agreement Concerning the Availability of Certain Indian Ocean Islands for the Defense Purposes of Both Governments*, Dec. 30, 1966, 18 U.S.T. 28, T.I.A.S. 6196, 603 U.N.T.S. 273. The lease will automatically renew for twenty years if neither party objects, and negotiations on the matter may thus offer the opportunity to add safeguards against human rights violations. *Id.* at art. 11.

81. *Belhaj & Anor v. Straw & Ors*, No. HQ12X02603, [filed June 28, 2012] EWHC (QB) (Eng.). The claimant accuses U.K. authorities of unlawful acts in connection with a U.S. "extraordinary rendition" flight in 2004 that was allowed to refuel at Diego Garcia while transporting him from Thailand to Libya, where he alleges he was tortured. *See* Richard Norton-Taylor, *Libyan Rebel Leader Sues Britain over Rendition Ordeal*, *THE GUARDIAN* (Dec. 19, 2011, 1:03 EST), <http://www.guardian.co.uk/world/2011/dec/19/libyan-rebel-abdel-hakim-belhadj>.

82. *See generally* STRAUSS, *supra* note 51.

Guantanamo Bay would signal that a state that allows another state to use its territory retains some responsibility under international law for what happens there, even if it gives up jurisdictional rights and no longer actively displays aspects of sovereignty. By recognizing this result as an inadvertent consequence of territorial arrangements like leases, nations may consider ways to reinforce human rights protections in locations of this nature.