

PERSPECTIVES ON THE FUTURE OF GUANTANAMO BAY

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Guantanamo Bay has been a “sure thing” for more than a century—a fixture of Cuba’s geographic space where the U.S. intended to stay and carry out activities it deemed in the interest of national security. But now a convergence of developments raises uncertainty about the future of the lease by which the U.S. controls this piece of Cuban sovereign territory: the impending closure of the detention center for alleged terrorists, currently its main activity; the diminished military role of the Guantanamo Bay naval station in U.S. defense policy; the thawing of U.S.-Cuban relations; and the underlying context in which both nations are entering periods of potentially substantial change under new presidents.

This paper will explore scenarios for the future of the Guantanamo Bay lease from several perspectives—international law, bilateral relations, and the domestic interests of the U.S. and Cuba—in an effort to gauge, at this early stage, the relative likelihood for their occurrence.

THE GUANTANAMO BAY LEASE

Territorial leasing is a common practice among states, and it is one that often generates legal and political issues that derive from the paradox it creates for the international system of states: leases reinforce the system by confirming the existing distribution of territory among states—they allow rights typically associated with sovereignty to be redistributed without any

boundary changes as the states’ territorial needs evolve. But leases also challenge the system by creating locations where sovereign attributes are displayed by more than one state.¹

As there is no fixed definition for a territorial lease in international law, this paper will consider a lease to be a treaty or other agreement that establishes rights for one state on the territory of another in a way that generally emulates a lease in private law. These rights comprise a servitude that effectively limits the sovereignty of the lessor state and extends the sovereign competences of the lessee state.

Most territorial leases between states have three primary elements—a transfer of rights, compensation, and a durational aspect—although compensation and duration clauses are sometimes absent as these leases are political arrangements that do not share the same commercial motives as leases in private law.

Territorial leases gained favor among states by broadening their diplomatic options. They are alternatives to transfers of territorial title when these may seem too disproportionate or definitive, and they can provisionally resolve territorial issues for which permanent agreements prove too difficult. But leases can also lead to unintended consequences, such as sovereignty over a leased territory eventually passing from the lessor state to the lessee state; cases in which this occurred

1. For a general discussion of territorial leasing and leases between states, see Michael J. Strauss, “The Viability of Territorial Leases in Resolving International Sovereignty Disputes: A Comparative Study,” Ph.D. dissertation, Centre d’Etudes Diplomatiques et Stratégiques, Paris, 2006, and Michael J. Strauss, *The Leasing of Guantanamo Bay*, Westport, Connecticut, Praeger Security International, 2009, p. 20–39.

once led scholars to refer to leases as “disguised cessions.”²

The practice of territorial leasing saw a surge in popularity at the end of the 19th century, and it was in this context that the Guantanamo Bay lease was created between the United States and Cuba in 1903. Cuba agreed to the lease as a condition for securing independence from the United States, which had controlled Cuba since the Spanish-American War five years earlier.

The lease was actually the product of three separate bilateral accords:

1. An executive agreement in February 1903 that designated two sites in Cuba to be leased by the United States specifically for coaling and naval stations, with no other uses allowed (the second site, Bahia Honda, was never used and the United States later abandoned its rights there). This agreement gave the United States “complete jurisdiction and control” on the leased territories, while Cuba retained “ultimate sovereignty.”³
2. A treaty in July 1903 that elaborated more detailed terms for the lease, including the annual rent the U.S. would pay to Cuba.⁴

3. A treaty in 1934 that reconfirmed the lease and specified the means by which it could be terminated—either by the United States abandoning Guantanamo Bay, or by a mutual agreement between the states. This gave the United States a way to end the lease unilaterally, but did not offer Cuba the same option.⁵

- As a legal instrument, the lease was quite sloppy. It had ambiguities,⁶ there were differences between its English and Spanish versions,⁷ and the 1934 treaty reconfirmed obsolete elements that had been superseded in practice.⁸ In addition, the United States has generally interpreted the lease very loosely, overstepping its restrictions in various respects in which Cuba either acquiesced or at least did not legally challenge.⁹ The lease and its implementation have raised, and continue to raise, various questions for international law, U.S. law and Cuban law. While these all bear examination, it is the durational aspect of the lease that concerns us here, and specifically what might occur with Guantanamo Bay as a legal and political entity in light of the developments now occurring.

The Guantanamo Bay lease is often called perpetual, but that is not the case.¹⁰ The practice of states has

2. For example, Louis Gerard, in *Des cessions déguisées de territoires en droit international public*, Nancy (France), Imprimerie Nancienne, 1903.

3. Agreement for the Lease to the United States of lands in Cuba for coaling and naval stations, Treaty Ser No 418 (1903), in Charles I. Bevans, ed., *Treaties and Other International Agreements of the United States of America, 1776–1949*, vol. 6, Washington, D.C., Government Printing Office, 1971, p. 1113–1115.

4. Lease of certain areas for naval or coaling stations, Treaty Ser No 426 (1903), in *ibid.*, p. 1120–1122.

5. Treaty of Relations, 48 Stat 1682, Treaty Ser No 866 (1934), in *ibid.*, p. 1161–1162.

6. E.g., the term “ultimate sovereignty” has been defined variously by U.S. courts as an underlying, definitive type of sovereignty or as a temporal, final type.

7. E.g., the annual rent was 2,000 dollars in the English text and 2,000 pesos in the Spanish text, at a time when the Spanish colonial peso used in Cuba was worth 60 U.S. cents. Cuba’s own peso was not created until later. For the Spanish text, see Convenio reglamentando el arrendamiento de las Estaciones Navales y Carboneras, hecho por el 23 de febrero, in República de Cuba, *Colección Legislativa: Secretaría de Estado y Justicia, Departamento de Estado, de 20 de mayo de 1902 a 30 de junio de 1905*, vol. 2. La Habana, Rambla y Bouza, 1906, p. 201–204.

8. E.g., coaling stations had been mostly replaced by oil supply depots, and the specified form of payment—U.S. gold dollars—had been abolished by the U.S. government a short time earlier. See Strauss, *The Leasing of Guantanamo Bay*, p. 64–65, 127–131.

9. E.g., the facility was expanded from a naval station to a naval operating station between 1941 and 1952, and to a full-fledged naval base between 1952 and 2003; each was defined by the U.S. Navy as encompassing a progressively broader range of activities. See Strauss, *The Leasing of Guantanamo Bay*, p. 65–67, 127–31.

10. For a general discussion on perpetual leases and misperceptions about the Guantanamo Bay lease in this regard, see Strauss, *The Leasing of Guantanamo Bay*, p. 104–109.

yielded various models for the duration of territorial leases, and a lease concluded in perpetuity reflects the intention of the states involved that the arrangement should never end.¹¹ The Guantanamo Bay lease, by contrast, has a clearly stated endpoint that would be triggered by a contingency. The 1903 executive agreement restricted the duration of the lease to “the time required for the purposes of coaling and naval stations.” This makes the lease’s duration indefinite (although it has the *potential* to become perpetual). Moreover, the 1934 treaty that reconfirmed the Guantanamo Bay lease specifically looks toward a possible termination by designating the means by which it can occur. More recently, the Helms-Burton Act of 1996¹² adds a new triggering event for its possible termination—the transformation of Cuba’s government into a democracy.

Neither the United States nor Cuba referred to the lease as perpetual prior to the 1959 Cuban revolution. After that point, as relations between the two states turned from friendly to hostile, Cuba wanted the United States to leave Guantanamo Bay and began saying the lease was perpetual in efforts to portray the arrangement as illegal and unfair. This was an unheralded masterstroke of Cold War propaganda: as the description of perpetuity entered Cuba’s political rhetoric, it spread internationally and eventually became taken as fact, including in the United States. News reports, law review articles, legal arguments before courts (including the U.S. Supreme Court), and even some U.S. government documents, such as a current Library of Congress fact sheet, all refer to the lease as perpetual. This has allowed the description to proliferate to this day almost everywhere. The exception is in Cuba

itself, which has reversed course and now asserts that the lease is *not* perpetual.

CUBA’S EVOLVING ARGUMENTS FOR ENDING THE LEASE

Following the 1959 revolution, when Cuba called for the termination of the Guantanamo Bay lease, it developed various arguments to support claims that the arrangement violated Cuban law or could be voided under international treaty law.¹³ Nonetheless, Cuba has never brought a case to an international tribunal and has never sought arbitration to recover control of Guantanamo Bay, so the arguments have never been tested in a legal setting. Their main use appears to have been in public campaigns, including by the Ministry of Foreign Relations in its efforts to sway international opinion against the U.S. presence on the territory. Interestingly, the arguments were not compatible with each other. This signals that Cuba did not intend to combine them into a single strong assertion.

The first argument was that the lease had been void from the start because of its fundamental nature. It referred to the lease as perpetual, and because of this the Cuban government of 1903 exceeded its constitutional authority in ceding part of Cuba’s sovereign territory forever. Cuba supported this argument by also claiming that the lease was obtained through coercion, and that the stated reasons for the lease—to protect Cuban independence and to strengthen friendly relations—no longer existed.¹⁴

Cuba’s second argument was that the lease’s terms were governed by Cuban domestic law because of the “ultimate sovereignty” that Cuba retained at Guantanamo Bay. Relying again on the claim of perpetuity, it asserted that the lease was invalid because domestic

11. Examples of leases with perpetual terms are those for the Quinto Real Norte between Spain and France; see Treaty of Bayonne, 1856, in M. de Clercq, *Recueil des traités de la France*, vol. 7, Paris, A. Durand et Pedone-Lauriel, (1880); and for the Canal Zone between Panama and the United States; see Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans [Hay-Bunau-Varilla Treaty], 33 Stat 2234, Treaty Ser No 431, (1903). The latter lease was terminated through a subsequent treaty, illustrating that the intended term of perpetuity is not always borne out in practice.

12. Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), Pub L 110–114, 110 Stat 785 (1996), codified at 22 USC.

13. See Strauss, *The Leasing of Guantanamo Bay*, p. 170–176.

14. Cuba Ministerio de Relaciones Exteriores, *Guantánamo: Base Naval Yanqui de Crímenes y Provocaciones*, La Habana, Instituto del Libro, 1970, p. 24–31.

law considered a lease to be temporary so the owner of the leased entity may eventually recover it. Cuba also argued that because the U.S. violated the usage restrictions contained in the lease, domestic law permitted Cuba to take legal action to recover the territory.¹⁵

The third argument relied on the international legal principle of *rebus sic stantibus*, which allows for a treaty to be abrogated if the fundamental circumstances for it have changed. The change in this case was the dramatic transformation of U.S.-Cuban relations after the Cuban revolution.¹⁶

Cuba's fourth argument was that the 1934 treaty reaffirming the Guantanamo Bay lease was invalidated by the Cuban constitution of 1940, which stated that Cuba will not be party to treaties or other agreements that limit or undermine its territorial sovereignty.¹⁷

While the first and second arguments contended that the lease was invalid from the start, the third and fourth arguments relied on the lease being valid, with its legality being brought into question only later by subsequent events.

The fact that Cuba's government published these arguments in 1970 showed that 11 years after the revolution, it had not developed a coherent legal strategy for recovering control of Guantanamo Bay. More recently, it has openly affirmed that getting back this control is not a priority. Its policy is stated in a 2004 report:

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.¹⁸

This confirms that Cuba has discarded the first two legal arguments above—it is no longer arguing that the lease is perpetual and therefore not valid; rather, it now argues that the lease is valid and therefore not perpetual. The current policy also shows that Cuba has dropped the fourth legal argument—that constitutions since 1940 have voided the lease.

This leaves the argument of *rebus sic stantibus*. Since 1959, a number of international law experts have concluded that it might be a convincing one if Cuba were to invoke the principle, even if the United States were to counter it with another principle of international law, *pacta sunt servanda*, which states that nations are obliged to honor the agreements they enter into.

Why has Cuba not gone this route? For one thing, international jurists have set the bar extremely high for changes in circumstances that are fundamental enough to justify renouncing a treaty, lest the principle be overused, and revolutions have not been considered sufficient to meet that standard.¹⁹ Another may be that Cuba is being pragmatic in confronting the geopolitical reality of the situation—the United States is military and economically a far stronger country. Even when Cuba was allied with the Soviet Union, arguably its best chance to have major support on this issue, it failed to make the Soviets eager to help it recover control of Guantanamo Bay (the Soviets did make modest efforts toward that end during negotiations with the United States to end the 1962 missile crisis, but dropped them to focus on other demands it considered more important to its interests).²⁰

Another reason why Cuba has not brought a *rebus sic stantibus* case may be that 50 years after its revolution, it still has not settled on a path for seeking to win back control of Guantanamo Bay. Its current stance is self-

15. *Ibid.*, p. 31–32.

16. *Ibid.*, p. 32–37.

17. *Ibid.*, p. 39–41.

18. Cuba Ministerio de Relaciones Exteriores, “Cuba y su defensa de todos los Derechos Humanos para todos,” report distributed in the UN Economic and Social Council Commission on Human Rights, April 6, 2004 (UN document E/CN.4/2004/G/46).

19. The Cuban revolution plus the dramatic change in bilateral relations were separate, if related, events, and the jurists who believe *rebus sic stantibus* could be invoked invariably note their combined impact.

20. See Strauss, *The Leasing of Guantanamo Bay*, p. 121–124, 175.

contradictory insofar as it asserts that the lease is valid but the U.S. tenancy is illegal.

Finally, there is the issue of time: even if there had been a fundamental change in circumstances that could meet the threshold of allowing the lease to be abrogated, it occurred so long ago that the altered circumstances have now existed in their current form for half a century, becoming the new *status quo*. The change has been completely absorbed into the life of both states with the lease staying intact. As time elapsed, any argument that the lease should end on the basis of this change progressively weakened. Today, Cuba may in fact be left with no substantial legal argument for recovering control of Guantanamo Bay.

Because Cuba has never made any of its arguments in a legal setting, the United States has not had to counter them, and the fate of Guantanamo Bay has never been subject to any sort of adjudication about its future. Nonetheless, the U.S. took the position in the early 1960s that the agreements that established the lease are entirely legal and valid, that the principle of *pacta sunt servanda* prevails.²¹

ENDING THE LEASE THROUGH INTERNATIONAL LAW

Besides the *rebus sic stantibus* principle, international jurists have suggested other means by which international law might be employed in an effort to end the lease, although each has obstacles.²² One is the doctrine of unequal treaties, which holds that a treaty is void if it is the product of coercion by a stronger state against a weaker state. Indeed, there is no doubt that the United States, which held Cuba for several years after defeating Spain in the Spanish-American War, imposed the condition of retaining control over a piece of Cuban territory as part of the price for giving Cuba its independence. This demand was included in the so-called Platt Amendment to a U.S. military appropriations bill that became law in 1901.

But the doctrine of unequal treaties is not universally accepted by jurists. The closest that treaty law comes to addressing the issue is Article 52 of the Vienna Convention on the Law of Treaties, which allows for the voiding of treaties concluded under the threat or use of force in violation of the UN Charter. Proponents of the doctrine have argued that pressure of the sort imposed on Cuba constitutes such force, but opponents cite the UN Charter itself, whose preamble equates force with armed force, and note that the concept of unequal treaties had not yet emerged when the Guantanamo Bay lease was created.

Another option is for Cuba to claim a material breach of the provisions of the lease. Over the years, the United States went beyond loose interpretations and overstepped various restrictions set forth in the text of the lease, such as those limiting the range of U.S. activities on the territory. While some of these actions were substantial and others were small and expanded progressively, there is little evidence of Cuban displeasure with them when they occurred, and most were not subject to Cuban diplomatic protests or legal challenges. This would make any attempt to end the lease by claiming a material breach problematic.

Thirdly, Article 56 of the Vienna Convention gives a state the right to denounce or withdraw from a treaty that has no provision for withdrawal, if the intent to admit that possibility is evident or if such a provision is implied. The 1934 treaty that reconfirmed the Guantanamo Bay lease allowed it to end through mutual agreement or by a U.S. withdrawal, but there is no express or implied provision that allows Cuba to unilaterally withdraw. It became impossible to know later whether this was intended or an oversight, as the treaty was concluded extremely rapidly and the trail of records was unusually thin.

In addition to these options, international law may allow for the lease to be ended through a transfer of territorial title to the United States by prescription. The United States has not displayed any desire for this to

21. U.S. Department of State, "Guantanamo Base," memo from Leonard C. Meeker, Deputy Legal Adviser, to Dean Rusk, Secretary of State, February 2, 1962 (ProQuest LLC/National Security Archive, Cuban Missile Crisis Collection, Document CC00160).

22. For a discussion of these, see Alfred de Zayas, "The Status of Guantanamo Bay and the Status of the Detainees," Douglas McK. Brown Lecture, University of British Columbia, November 19, 2003.

occur, and indeed in recent years it has considered the fact of Cuba's sovereignty over Guantanamo Bay to be an asset that can be exploited, as seen by the decision to locate a detention center there for prisoners captured in its fight against terrorism.

Nonetheless, the U.S. display of full control and jurisdiction on the territory for more than a century, and the absence of any active display of sovereign rights there by Cuba, create a surprisingly smooth path for this to occur if U.S. intentions should change in the future, and if, in such a circumstance, Cuba's protests against the U.S. presence at Guantanamo Bay are deemed insufficient to preserve Cuban sovereignty.

SCENARIOS FOR THE FUTURE

It appears that we can rule out a Cuban attempt to regain control of Guantanamo Bay through legal means. Its best opportunities were in the past, and the passage of time has caused its strongest potential argument in international law, *rebus sic stantibus*, to lose what strength it once had. Cuba nonetheless expects to recover this control one day, so let us examine this and other scenarios for Guantanamo Bay's future.²³

U.S. Abandonment of Guantanamo Bay

One way is for the United States to decide it no longer needs the territory, and to abandon it. Yet while the strategic necessity of Guantanamo Bay for earlier naval priorities (e.g., as a fuel supply station, a site for protecting Panama Canal shipping lanes, etc.) has diminished in recent decades, the evolving definition and functions of a naval station have breathed new life into its desirability and allow for its strategic value to be sustained with operations geared toward current issues, such as confronting seaborne drug smuggling.²⁴ U.S. naval stations may entail a limited range of naval activities, but today they may house "tenant" military operations that are not strictly naval in nature, such as the detention center for alleged terrorists, or that are not even military in character, such as a possible housing facility for victims of natural disasters in the region.

The fact that a wide range of activities may now occur at a site designated "naval station" reduces the likelihood that the U.S. may abandon Guantanamo Bay by deciding it is no longer required for a facility with that classification. The broader use of the territory also reduces the chances that the United States might decide to leave Guantanamo Bay for budgetary reasons: pressures to contain military costs undoubtedly will continue, but naval operations alone may no longer be decisive in evaluating these costs against the benefits of having rights there.

Another route by which the U.S. may return control of Guantanamo Bay to Cuba is through the Helms-Burton Act, which makes it U.S. policy to be prepared to enter talks with Cuba to revise or end the lease if Cuba installs a democratically elected government. This naturally requires two separate actions within Cuba—the transformation of its government and a decision by a democratically elected Cuban leadership to enter talks with the United States about the territory's future. There is nothing from the initial years of Raúl Castro's presidency to indicate that it might encourage this transformation, either with or without the continuing presence of Fidel Castro as an influence, so it is logical to assume that any move in this direction might only become more likely if Raúl Castro's successor is amenable.

A geopolitical event or trend that substantially alters the bilateral relationship between the United States and Cuba may also create the potential for the United States to relinquish control of Guantanamo Bay. This change could be either a significant improvement in relations or a fresh deterioration, either of which would create an opportunity for the U.S. to assess its future at Guantanamo Bay in light of a new bilateral context. While nothing of this nature seems imminent, geopolitical events sometimes develop rapidly so this prospect cannot be ignored. For now, the thaw in U.S.-Cuban relations that began earlier this year is at an early stage and it remains unknown how, or how quickly, it will proceed.

23. For a more comprehensive discussion of these scenarios, see Strauss, *The Leasing of Guantanamo Bay*, p. 178–185.

24. The author wishes to acknowledge comments by the paper's discussant at the ASCE 2009 annual conference, Manuel Supervielle, which were incorporated here.

Finally, one cannot rule out the emergence of political pressures that might prompt the United States to want to give up its rights at Guantanamo Bay. Indeed, the U.S. lease of the Canal Zone in Panama was terminated in 2000 because of political pressures that built up over a period of years in Panama itself, and these eventually caused strains in U.S.-Panamanian relations that were alleviated by the negotiation of a new treaty that ended the lease.²⁵

Activities at Guantanamo Bay that result in public controversies within the United States or internationally might be a source of such political pressures. To date, however, the controversies surrounding the detention or treatment of alleged terrorists at Guantanamo Bay have not been sufficient to push the United States toward considering abandonment of the territory. Nonetheless, as the U.S. government finds it difficult to convince other states to take in the prisoners held at Guantanamo Bay in advance of the detention center's closure, the terms of the lease suggest this dilemma could be addressed by abandoning the naval station, which would cause the prisoners remaining there, and jurisdiction over them, to pass instantly to Cuba—a sort of Mariel boatlift in reverse. It is highly unlikely that such an option would be chosen, as it could trigger a new set of human rights issues and might lead to a worsening of U.S.-Cuban relations at a time that both nations are working toward improving them.

Overall, then, it appears improbable that the United States will be motivated to return control of Guantanamo Bay to Cuba in the near term.

Revision or Reinterpretation of the Lease's Terms

Another scenario for Guantanamo Bay's future involves the continuation of the lease but with a revision or reinterpretation of its terms. The potential for this is foreseen by both the 1934 treaty and the Helms-Burton Act, and there are many ways it can occur. Among other possibilities, the rights of the United States at Guantanamo Bay may be tightened or loos-

ened, a fixed expiration date for the lease may be introduced, or the nature and/or amount of the annual rent payment might be revised.

At present, however, changing the terms of the lease through bilateral negotiations does not seem to be an attractive option for either country. The U.S. currently has full jurisdiction and control over Guantanamo Bay, so any change would likely diminish its rights there. Cuba's desire to see the United States leave the territory makes it unlikely to welcome revisions that would prolong the U.S. presence there, unless the U.S. were to make clear at the start of negotiations that the revisions are an interim step toward returning control of the territory to Cuba.

The United States may do as it has done before, and unilaterally alter how it interprets the lease or implements its compensation aspect. One option might be to raise the annual rent payments to reflect current territorial and/or currency values, although this may have little impact if the United States continues to pay with checks and Cuba declines to cash them in protest of the U.S. presence at Guantanamo Bay. The United States might, however, revert to paying in gold dollars, as the lease had originally stipulated. This practice was abandoned in the 1930s with the abolition of U.S. gold coins and of the "gold clause" in domestic and international agreements, although the U.S. Mint has been producing gold dollars again since 1986. Gestures of this type may occur in an effort to foster a further thaw in bilateral relations.

U.S. Acquisition of Territorial Title

The United States has exercised effective control and displayed sovereign rights at Guantanamo Bay for more than a century, as the lease gave the United States "complete jurisdiction and control" on the territory. While Cuba retained a nebulous and largely empty "ultimate sovereignty" and has said since 1959 that it wants control of Guantanamo Bay back, it has not put a high priority on recovering control, has never pressed for its return through an international legal

25. "In January 1962, Panamanian dissatisfaction with this relationship boiled over into riots. A three-month suspension of diplomatic relations followed. The growing bilateral tension in the 1960s gave weight to the views of those who believed that a new Canal Treaty was needed to replace the 1903 treaty and to establish a new relationship with Panama." U.S. Department of State, "Transfer of the Panama Canal," available from the U.S. Embassy in Mexico.

proceeding, and has a long history of tolerating U.S. activities on the territory that fall outside of the lease's usage restrictions. Moreover, Cuba's own domestic legal system considers Guantanamo Bay to be foreign territory as the result of a 1934 Cuban Supreme Court ruling to that effect.²⁶

This combination of factors goes a long way toward satisfying the legal conditions by which the United States might, if it desired, acquire title to the territory through prescription, a recognized means of obtaining title without the consent of the state that loses it. There are, however, two factors that are preventing this from occurring. First, the United States has shown no sign of wanting sovereignty at Guantanamo Bay and continues to actively recognize Cuban sovereignty over it; indeed, in recent years the United States has viewed the absence of its own sovereignty at Guantanamo Bay as a favorable situation. Second, Cuba pursues modest but visible acts of resistance to the U.S. presence on the territory, notably through public rhetoric in its conduct of international relations and by not cashing the annual U.S. rent checks.

While a transfer of sovereignty to the United States is improbable under these circumstances, it cannot be discarded completely as a scenario. First, this is because the current situation reflects the policies of both states, and policies may change over time in response to evolving circumstances. Second, historical precedents show that states with comprehensive authority over the territories they lease sometimes develop a desire for sovereignty over them, resulting in the lessee state obtaining title to these territories.

International law recognizes protests as a legitimate means for a lessor state to retain title, but it is an open question whether Cuba's protests are sufficient to meet the standard the law sets, as a protest that is too weak loses its legal value over time and may be taken as constructive abandonment of the territory through the tacit acquiescence of the actions of the other

state.²⁷ In the case of Guantanamo Bay, Cuba's rhetorical denunciations of the U.S. presence at Guantanamo Bay are sometimes inconsistent with its actions regarding the territory. Thus, while Cuba has cited the current use of the base as a detention center as justifying its call to end the lease, it acquiesced to this use when contacted by U.S. authorities in advance: "We will not set any obstacles to the development of the operation. Having been apprised of the operation and aware of the fact that it requires 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," it said as the operation was starting.²⁸

The absence of Cuban legal actions to recover control of the territory may also work against an effort to retain title to Guantanamo Bay if the U.S. should desire it one day, as it would signal that Cuba has not used all the legal means at its disposal.

Continuation of the Lease in its Present Form

The last scenario is that the lease of Guantanamo Bay may remain in its current form indefinitely. As the United States is the only country that can act unilaterally to terminate the arrangement, there is nothing to force it to adopt a new policy as long as it continues to want the territory for a naval facility and the conditions of the Helms-Burton Act are not met.

Several factors may contribute to a U.S. desire to keep things as they are. It may see opportunities for it to have a future strategic role; it may consider the lease to have ongoing value as a potential bargaining chip by which to seek changes in Cuba; or it may wish to keep the site from being developed by Cuba to commemorate the U.S. presence in ways that run counter to U.S. interests. The United States also may want the option to make further use of the distinction that exists be-

26. *In re Guzman & Latamble*, Cuba S Ct, Ann Dig of Pub Intl Law Cases 1933-1934 (Intl Law Rep 7).

27. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, Grotius Publications, 1986, p. 158-159.

28. Cuba. Ministerio de Relaciones Exteriores, "Statement by the Government of Cuba to the National and International Public Opinion," January 11, 2002.

tween the jurisdiction of its legal system on U.S. sovereign territory and jurisdiction at Guantanamo Bay.

Cuba, too, may find it convenient to retain the status quo despite its public denunciations of it. The fact that Cuba has not put a priority on recovering control of Guantanamo Bay through legal or other means may reflect a pragmatic reading of the power relationship between the two states, but it also may be that Cuba is able to use the situation to portray itself as an underdog standing up to a hostile superpower on its own territory; this may have value in maintaining the government's standing among the Cuban population and in giving it a greater voice in the international sphere.

Additionally, Guantanamo Bay serves as a location for direct contact between the governments of the United States and Cuba, with informal talks being held there regularly in the absence of formal diplomatic relations. The territorial arrangement thus serves as an alternative to a complete absence of ties.²⁹

Even a future Cuban government that meets the U.S. vision of democracy may want to retain the existing arrangement, as the base could revert to its pre-1959 role as an engine for the regional economy as an outpost of a wealthier country. Guantanamo Bay once provided substantial employment and bolstered commercial activity in the surrounding area, and it would be in a position to do so again.

CONCLUSION

The impending closure of the detention center at Guantanamo Bay, which U.S. President Obama has ordered by early 2010, will remove the main activity on the territory and contribute to the uncertainty about the future of the lease by which the United States controls it. Combined with the thaw in bilateral relations and the consolidation of the new leaderships in both the U.S. and Cuban governments, the range of potential scenarios is particularly wide.

Despite this evolving context, a return of the territory to Cuban control does not appear likely in the near term, nor is there any evidence that the United States might seek to obtain title to the territory despite having what appears to be a relatively smooth path toward that end under international law pertaining to territorial prescription. If we discard these scenarios as improbable, we are left with those that involve a continuation of the lease, with revisions or reinterpretations or even in its current form.

The lease has survived Cuba's development as an independent state, its revolution and its alliance with the Soviet Union. It has survived the evolution of U.S. activities that now bear little relation to the original purposes of the arrangement, and it has survived half a century of hostile relations between the two states. It now appears poised to keep surviving for the foreseeable future.

29. Strauss, *The Leasing of Guantanamo Bay*, p. 168.