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The Practice of Shared Responsibility in relation to Territorial Leases

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The Practice of Shared Responsibility in relation to Territorial Leases

Michael J. Strauss[*]

1. Introduction

The leasing of territory between two states, a common practice for military, economic and other purposes, alters the normal exercise of sovereignty in the leased zone, as the rights assigned to the lessee, or tenant, state allow it to display aspects of its sovereign authority in the area designated by the lease. What makes leases attractive is their value as alternatives to formal transfers of sovereignty when territorial cessions are deemed too definitive, politically unacceptable or otherwise too difficult to negotiate.[1] The territorial state, as the lessor, retains *de jure* sovereignty there, but suspends the active exercise of its authority to the extent agreed, while the lessee fills the void and becomes the *de facto* sovereign in those respects. Leases thus create deviations from the conventional legal association between each state and the territory where it is sovereign.

In general, a 'territorial lease' can be defined as a treaty or other bilateral instrument that establishes sovereign rights for one state on the territory of another. It creates a relationship that broadly emulates that of a lessor and lessee in private law. The rights transferred can be viewed as a servitude that effectively limits the lessor state's sovereign displays, and extends the sovereign competences of the lessee state on the territory involved. Leases are frequently *ad hoc* arrangements.[2] The provisions in the arrangements and the activities related to implementing them vary widely from one case to the next. There is no standard terminology for such arrangements, although terms relating to leasing ('lease', 'rent', etc.) are the most commonly used.

The practice of territorial leasing derives from private law concepts regarding property and contracts that were elevated into international law as a way to address situations in which

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[1] M. Strauss, *The Leasing of Guantanamo Bay* (Westport, Conn.: Praeger, 2009), p. 23.

[2] Some are part of systematic programmes, e.g. a network of military bases abroad.

more than one state desires rights on the same territory.[3] The adaptation is imperfect because the characteristics and interests of states differ from those of property owners and users, with political and strategic factors being important influences. While precision in a lease's text may be desirable from a legal perspective, ambiguity may be necessary from a diplomatic perspective in negotiating the arrangement. Consequently, the resemblance to private law leases is somewhat loose.

The legal features of territorial leases may have implications for questions of responsibility. More in particular, they may give rise to questions of shared responsibility. Given the fact that the lessee will display aspects of its sovereign authority in the area designated by the lease, while at the same time the territorial state, as the lessor, retains *de jure* sovereignty there, responsibility for an internationally wrongful act committed in such areas is not necessarily limited to the state that actively commits it.

The question of (shared) responsibility is relevant, since in recent years, some leased territories (notably Guantanamo Bay, see section 3) have become associated with allegations of human rights abuses and of violations of the sovereignty of third countries. It is therefore useful to consider how responsibility arising from sovereign behaviour may be shared by both states involved in a territorial lease. As the principle implies, a lease causes each party to have a legal relationship with the same territory, and thus to have simultaneous rights and obligations in relation to it that may differ, but that can nonetheless give rise to shared responsibility – defined as a responsibility that rests on both actors that contributed to a particular harm.[4]

The practice of territorial leasing has been rarely studied from the perspective of international law in general, and the law of responsibility in particular. There are no works dedicated to the allocation of state responsibility in leased areas. Most literature treats leased territories as anomalies relative to sovereignty and territorial control, giving them limited importance and rarely venturing beyond general descriptions.[5] Nonetheless, a few legal scholars have examined leases in detail. Works by two French jurists at the start of the twentieth century –

[3] H. Lauterpacht, *Private Law Sources and Analogies of International Law*, reprint (Hamden, Conn.: Archon Books, 1970), pp. 188-9.
[4] See chapter 1 of this volume, P.A. Nollkaemper and I. Plakokefalos, 'Introduction', p. 1, at p. ___.
[5] See e.g. E. van Bogaert, 'The Lease of Territory in International Law', in *Miscellanea W.J. Ganshof van der Meersch*, vol. 1 (Brussels: Bruylant, 1972), pp. 315-27.

Louis Gérard, who considered them 'disguised cessions',[6] and Jean Perrinjaquet, who viewed them as 'temporary cessions'[7] – remain largely although not fully valid. A later but unpublished dissertation by the American scholar Joseph Lazar has a worthy discussion of relevant legal relationships.[8] A briefer contribution on territorial leases in Verzijl's monumental treatise on international law also offers substantive insights into these arrangements.[9] However, none of these works discusses in any degree of detail the implications of leases for international responsibility.

This chapter discusses situations in which acts of a lessee state on a leased territory may entail international legal responsibility by the lessor as well. The chapter first will discuss some general aspects of territorial leases that are relevant to questions of shared responsibility (section 2). It then will focus specifically on the situation in Guantanamo Bay (section 3), before a shorter discussion of certain other territorial leases that may be viewed from the perspective of shared responsibility will follow (section 4). Section 5 concludes.

2. General features of territorial leases

A typical bilateral lease of a territory has three main components: first, the rights assigned by the lessor to the lessee; second, the compensation to be provided by the lessee to the lessor; and third, the duration of the arrangement. The rights assigned include jurisdictional rights that may range from narrow to comprehensive. These determine the nature and scope of each state's conduct vis-à-vis the territory, and establish the state's relative strength of association with it.

In practice, territorial leases vary from one another and vary in precision and clarity when allocating the rights that give rise to international legal responsibility, One aspect that is particularly relevant in relation to shared responsibility, and that will appear in some of the cases discussed below, is that the contents of lease agreements are not always public, making it difficult to determine who is responsible for what.

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[6] L. Gérard, *Des cessions déguisées de territoires en droit international public* (Nancy: Imprimerie Nancienne, 1903).
[7] J. Perrinjaquet, *Des cessions temporaries de territoire: Etude de droit international* (Bordeaux: Imprimerie Commerciale et Industrielle, 1904).
[8] J. Lazar, 'The Status of the Leasehold in International Law', unpublished PhD thesis, University of Minnesota (1965).
[9] J.H.W. Verzijl, *International Law in Historical Perspective*, vol. III (Leiden: Brill, 1970), pp. 397-428.

An internationally wrongful act that occurs on leased territory inherently involves two different and possibly conflicting aspects of international law – that which governs the bilateral lease agreement, and that which establishes the wrongfulness of the act. While the former would normally involve treaty law, the latter can vary according to the type of act. Thus, a lessor state that grants jurisdictional rights on the leased territory to the lessee may comply with its treaty obligations by refraining from exercising its own jurisdiction there, but if the lessee commits a wrongful act, the lessor must decide which aspect of international law takes precedence in determining its own conduct vis-à-vis the situation.

Below, some general aspects of the obligations of the lessor state and of the applicable principles of responsibility are discussed (sections 2.1 and 2.2), followed by a brief consideration of the position of third states (section 2.3).

2.1 Continuing obligations of the lessor states

A key ground for the possibility of shared responsibility in situations of territorial leases is that the lessor state may continue to be bound by international obligations in relation to the leased territory.

Territorial leasing relies on the concept that sovereignty has assignable rights, either by its nature as a collection of individual sovereign rights or, for those who view sovereignty as an indivisible whole, through the divisibility of its exercise.[10] A lessor state, by not ceding title to the leased zone but rather retaining *de jure* sovereignty over it, signals its will to continue its legal relationship with that territory at the level of international law. As this relationship operates through rights and obligations, the lease does not extinguish them for the lessor. Meanwhile, international rights and obligations are simultaneously established for the lessee on the same territory, although the lessee's obligations under international law may be more limited in breadth, based on the scope of rights it is assigned on the leased territory. By directly carrying out state acts on the territory that the lessor has recused itself from performing, the lessee assumes the role of *de facto* sovereign relative to those acts. Consequently, the lessor remains in law the ultimate repository of exclusive authority over the territory and its responsibility for ensuring that international obligations pertaining to it are

[10] E.N. van Kleffens, 'Sovereignty in International Law' (1953) 82 RCADI 1, at 87.

assumed can transcend the lessee state's *de facto* assumption of these obligations through its displays of sovereign rights.

One particularly relevant question, in the light of the situations discussed in sections 3 and 4, is whether in situations of human rights violations in the leased territory, the obligations of the lessor state under human rights law prevail over its obligations vis-à-vis the lessee state. The hierarchy of international legal norms that has become more established in recent decades also has a role to play in the determination of state responsibility on leased territories. It is broadly accepted that key aspects of human rights law are so fundamental that they take precedence over obligations under other treaties.[11] Thus, a lessor state may be deemed to have an obligation to prevent human rights violations (in any case when they rise to the level of *jus cogens*) on all of its sovereign territory, regardless of whether it had concluded a lease agreement that assigned jurisdiction on part of its territory to another state.[12]

The emerging doctrine of 'responsibility to protect' also supports the notion that a lessor state is obliged to reassert its sovereign authority on a portion of its territory where another state is committing human rights abuses. The doctrine, emphasising the overriding importance of a state's obligation to prevent human rights abuses, mandates the involvement of other states, including intervention if necessary, to protect human rights when the sovereign state is unable or unwilling to do so.[13] While the responsibility to protect is still a controversial notion that is not universally embraced, the idea that a state may intervene on a leased part of its own sovereign territory to halt or prevent a human rights atrocity may be more readily accepted,

[11] See e.g. J. Pauwelyn, *Conflict of Norms in Public International Law: How the WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003); C.L. Rozakis, *The Concept of* jus cogens *in the Law of Treaties* (Amsterdam: North-Holland Publishing Co., 1976); and D. Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291.

[12] As expressed by the International Criminal Tribunal for the Former Yugoslavia: '[A] major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force'; *Prosecutor* v. *Anto Furundžija*, Judgement, ICTY Case No. IT-95-17/1-T, 10 December 1998, para. 153.

[13] See e.g. J. Hoffman and P.A. Nollkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, 2012); and United Nations, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate', press release, document GA/10850, 28 July 2009.

than the idea of the same state engaging in similar interventions on the sovereign territory of other states.[14]

However, the fact that the hierarchy of international legal norms is not firmly established makes this problematic. The cases discussed in this chapter all deal with responsibility for acts covered by human rights law, which has a clear place in the hierarchy relative to treaty law when viewed in a broad sense, but wrongful acts involving human rights can themselves vary in nature and degree.

It often occurs that a state leases territory to another state which is militarily or economically stronger.[15] In several of the situations discussed in sections 3 and 4 this was indeed the case. In this type of situation, a weaker lessor may deem that acting to halt the commission of a wrongful act by a stronger lessee entails sufficient risk to aspects of its security, that it takes either no action, or action that would be insufficient to absolve it of sharing responsibility.

Nonetheless, when the wrongful act involves human rights, the existence of the normative hierarchy that gives priority to human rights obligations can encourage a weaker lessor state to act more forcefully than it otherwise might, by providing a justification for other states to offer political support for the lessor's actions. Similarly, acceptance of the 'responsibility to protect' doctrine may embolden a weaker lessor in its conduct relative to its responsibilities in international law.

2.2 Relevant principles of responsibility

Although lease agreements normally address the question of national jurisdiction in the leased zone, the issue of allocating responsibility in international law to one or the other, or both states, is rarely considered in the text of any lease.[16]

[14] M. Strauss, 'Cuba and State Responsibility for Human Rights at Guantanamo Bay' (2013) 37 *Southern Illinois University Law Journal* 533, at 548.
[15] This was a frequent occurrence in leases made at the end of the nineteenth century, and more recently with leases in which major powers obtain rights on territory for military bases in developing countries.
[16] An exception is the lease by the Soviet Union to Finland of part of the Saimaa Canal in 1962, which assigned sole responsibility to Finland for any damage to third countries arising from the use of the canal or work done to maintain or improve it, see Agreement concerning the Lease to the Republic of Finland of the Soviet Part of the Saimaa Canal and Maly Vysotsky Island, Moscow, 27 September 1962, in force 27 August 1963, 479 UNTS 122, Article 7.

An example may illustrate, however, how questions of (shared) responsibility may arise in relation to leases and how they can be dealt with. One purpose for which territory is sometimes leased from another state, is the launching of space objects from the territory of another state.[17] For such situations, the 1967 Outer Space Treaty[18] assigns responsibility jointly to the two states in the event that a space object causes damage in a third state.[19] This was reaffirmed in the 1972 Liability Convention.[20] The treaties that allocate liability for damage from space objects established that the acts of a lessee state, or circumstances that result from them, can generate responsibility for the lessor state as well, even if the lessor's only role is to grant rights on the territory. Arguably, the principle can, by the same logic, extend to other wrongful acts that occur on leased territory. However, it appears that it is exceedingly rare that such express provisions have been drawn up in relation to responsibility, leaving the matter to general international law.

In consequence, determinations of responsibility will have to rely largely on provisions in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[21] that address wrongful acts by the organs of one state on the territory of another state, and the circumstances in which the latter state either has responsibility, or is exonerated from responsibility.

The general rule of attribution applies to leased territories as it would on other territory. Under the ARSIWA, every state is responsible for its own internationally wrongful acts (Article 1 ARSIWA). A state also may be responsible for the wrongful acts of another state under some circumstances, for example, if it aids or assists the other state in the commission of the act (Article 16 ARSIWA), and if such assistance had the intent of 'facilitating the occurrence of the wrongful act'.[22] However, a facilitating state would not bear responsibility 'if it is

[17] E.g. the Baikonur cosmodrome and the associated city of Leninsk, Kazakhstan, which is leased by Russia.
[18] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, London, Moscow, and Washington D.C., 27 January 1967, in force 10 October 1967, 610 UNTS 205 (Outer Space Treaty). See on this also chapter 18 in this volume, P. Mendes de Leon and H. Van Traa, 'Space Law', ___, at ___.
[19] Article 7 Outer Space Treaty, ibid.
[20] Convention on International Liability for Damage Caused by Space Objects, London, Moscow, and Washington D.C., 29 March 1972, in force 1 September 1972, 961 UNTS 187 (Liability Convention), Article I.
[21] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II/(2) (ARSIWA).
[22] Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Article 16 ARSIWA, p. 66.

unaware of the circumstances in which the aid or assistance is intended to be used by the other state'.[23]

A key question for attribution (and perhaps also for the applicability of obligations), is the exercise of control. Ferenc Váli has written that 'international law may either make the territorial state responsible without any regard to the lack of actual control, or it may take into account the amount of control which is vested in each of the States concerned'. Calling the latter 'a breach … in the general rule of State responsibility', he noted that it may apply in an arrangement that permanently restricts the territorial state's sovereign authority, and cited Clyde Eagleton's argument that 'responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or, conversely, the actual amount of control left to the respondent State'.[24]

Additionally, the allocation of state responsibility with respect to a leased territory may depend on the conduct of the lessee or lessor state relative to the lease. Thus, a lease that grants the lessee state sufficient control to have *de facto* sovereignty over the leased area may be seen as absolving the lessor of legal responsibility for the lessee's acts on the territory, if the lease's text is the only filter through which this is viewed.[25] When state behaviour vis-à-vis the leased territory is taken into account, wrongful acts by the lessee may generate shared responsibility for the lessor.

2.3 The position of third parties

One other dimension in which one can speak of territorial leases in terms of a shared territory and shared responsibilities needs to be considered. This concerns the responses by third states. States that are not parties to a territorial lease also may have rights, obligations, and responsibilities under international law with respect to the leased zone. A lease may allow states other than the lessee or lessor to have investments or a physical presence in the territory, or engage in trade or financial transactions there. Likewise, when a third state is involved in a military conflict with either party to a territorial lease, its actions relating to the

[23] Ibid.
[24] F.A. Váli, *Servitudes of International Law*, 2nd edn (London: Stevens & Sons, 1958), pp. 317-9; the quotation is from C. Eagleton, *The Responsibility of States in International Law* (New York: Columbia University Press, 1928).
[25] M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011), p. 8.

leased territory may cause the third state to have rights, obligations, and responsibilities vis-à-vis the leased territory that span international humanitarian law, human rights law, the law of occupation and other aspects of international law. As George Grafton Wilson wrote about Guantanamo Bay:

> The use of the station would be an act in the ordinary course of war, and the station would be liable to attack or to other treatment to which enemy territory might be liable … The territory which is leased for a coaling or naval station gains no immunity from the consequences of war in which the lessee is engaged from the fact that the terms of the lease may specify that the sovereignty over the leased territory remains in the lessor.[26]

3. Alleged human rights violations at Guantanamo Bay

Guantanamo Bay, a territory covering 117 square kilometres of land and water, was leased by Cuba to the United States (US) in 1903 for an indefinite period in return for an annual rent. The lease was comprised of two instruments: an executive agreement between the US and Cuban presidents[27] and a treaty that elaborated additional terms.[28] The lease was later reconfirmed in a 1934 treaty that governed bilateral relations.[29] The conditions for shared responsibility arose from the division of sovereignty into a *de jure* aspect retained by Cuba, and a *de facto* aspect assigned to the United States:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.[30]

The lease restricted the United States to using Guantanamo Bay as a coaling or naval station, but this was not a true limitation, as it was the US Navy's prerogative to define the scope of activities at its naval stations. Since 2002, a primary activity at Guantanamo Bay has been the detention of prisoners captured by US armed forces in the fight against terrorism. In

[26] United States Naval War College, *International Law Situations and Notes – 1912* (Washington: U.S. Government Printing Office, 1912), p. 97.
[27] Agreement for the lease to the United States of lands in Cuba for coaling and naval stations, Treaty Series No. 418 (1903).
[28] Lease of certain areas for naval or coaling stations, Treaty Series No. 426 (1903).
[29] Treaty of Relations, 48 Stat 1682, Treaty Series No. 866 (1934).
[30] Agreement for the lease to the United States, n. 27, Article 3.

connection with this activity, the United States has been accused of violating human rights on the territory by subjecting prisoners to torture during interrogations, and by holding prisoners indefinitely without charging them with crimes or bringing them to trial.[31]

The torture allegations relate to interrogation techniques that the US government deemed to fall short of the legal threshold for torture, but that are viewed by a number of jurists[32] as being covered by the definition of torture in the 1984 Convention against Torture.[33] Moreover, indefinite detentions without charges are considered a violation of human rights under the International Covenant on Civil and Political Rights,[34] the United Nations General Assembly Resolution 43/173,[35] and the American Declaration of the Rights and Duties of Man.[36]

By having 'complete jurisdiction and control', the United States is the only state that actively exercises jurisdiction at Guantanamo Bay. Any aspects not exercised by the US do not revert to Cuba, as the lease precludes Cuba from displaying jurisdictional rights on the territory, a situation affirmed by the Cuban Supreme Court in a 1934 ruling.[37] Consequently, Cuba has not sought to exercise any jurisdiction in the leased area, although it has consistently affirmed that it retains legal sovereignty.

To date, litigation about US activities at Guantanamo Bay has implicated only the United States; no legal challenge has been brought against Cuba. While US responsibility for any wrongful acts at Guantanamo Bay would be evident, Cuban responsibility must be demonstrated. This entails a number of considerations.

A first consideration is that, as discussed in general terms in section 2.1, Cuba continues to exercise *de jure* sovereignty there, and in principle retains its (human rights) obligations. This

[31] See e.g. R.J. Wilson, 'United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole"' (2003) 10(3) *Human Rights Brief* 2; G. Thompson, 'Guantánamo and the Struggle for Due Process of Law' (2011) 63(4) *Rutgers Law Review* 1195.
[32] E.g. M. Ratner and E. Ray, *Guantanamo: What the World Should Know* (Junction, Vt.: Chelsea Green, 2004), pp. 30-5; J. Paust, 'The Second Bybee Memo: A Smoking Gun', *Jurist*, 22 April 2009, available at http://jurist.org/forum/2009/04/second-bybee-memo-smoking-gun.php.
[33] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85 (Convention against Torture).
[34] International Covenant on Civil and Political Rights New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171, Articles 9, 14.
[35] United Nations General Assembly Resolution 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (9 December 1988).
[36] American Declaration of the Rights and Duties of Man, Bogotá, April 1948, in force April 1948, Articles 18, 25, 26.
[37] *In re Guzman & Latamble* (1934), Cuba S Ct, Ann Dig of Pub Intl Law Cases 1933-34 (Int Law Rep 7) 112 (1934).

includes the obligation of a state to ensure human rights on all parts of its sovereign territory except where a *force majeure* exists (e.g. occupied territory).

A second consideration involves the terms of the lease, which (apart from separating Cuban sovereignty from US control) do not address matters relevant to responsibility, thereby causing a determination to rely on general rules of international law.

The third consideration is whether, after the United States began detaining prisoners there in 2002, Cuba was aware of the alleged wrongful acts at the time. It appears that Cuba knew of the alleged human rights violations at Guantanamo Bay while they were reported to be under way, and considered them credible:

> In that territory, hundreds of foreign prisoners are arbitrarily detained, subjected to indescribable humiliations, totally isolated, unable to communicate with their families, or have an adequate defence. 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.[38]

The fourth consideration is how Cuba has responded. It appears that Cuba has done little to respond strongly to these facts. Since its 1959 revolution, Cuba has repeatedly called for the US to leave Guantanamo Bay, arguing that the area became occupied territory when the United States refused[39] (although the nature of the US presence there is inconsistent with the legal criteria for occupied territory).[40] However, Cuba has taken no concrete steps to abrogate the lease[41] although it has protested the US presence through rhetorical denunciations and refusals to accept the rent.

By agreeing to the lease and suspending its displays of sovereignty at Guantanamo Bay in favour of the United States in 1903, Cuba clearly facilitated all US activities there from that point onward. Additionally, Cuba aided US efforts to transport prisoners to the detention centre in 2002, stating publicly that 'we shall not set any obstacles to the development of the operation … The Cuban authorities will keep in contact with the personnel at the American

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[38] Cuba Ministry of Foreign Relations, 'Ayuda Memoria sobre el Proyecto de Resolución titulado 'La cuestion de las detenciones arbitrarias en el área de la base naval de los Estados Unidos en Guantánamo,' presentado por Cuba al 60 Período de Sesiones de la CDH en Ginebra, see http://anterior.cubaminrex.cu/CDH/60cdh/Guantanamo/Ayuda%20memoria%20.htm.
[39] Strauss, *The Leasing of Guantanamo Bay*, n. 1, pp. 182-3.
[40] Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 1 Bevans 631, Articles 42-56.
[41] Strauss, *The Leasing of Guantanamo Bay*, n. 1, pp. 170-6.

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'.[42]

Overall, if Cuba is deemed to act insufficiently toward ending internationally wrongful acts it believes are occurring on its territory, it may be seen to acquiesce in those violations.[43] This in itself would not make Cuba responsible in law.

It is possible, however, to construct the situation in terms of shared responsibility. One ground is that the hierarchy of international legal norms arguably puts Cuba's obligation to protect human rights above its obligation under the lease, that led it to refrain from asserting jurisdiction at Guantanamo Bay.[44] Another approach is to argue that Cuba's facilitation in combination with its knowledge met the International Law Commission (ILC)'s threshold (Articles 16 ARSIWA) for sharing responsibility for the alleged wrongful US acts.[45]

At the same time, geopolitical factors may be relevant in assessing the adequacy of Cuba's response, given US hostility to Cuba's system of government and the numerous efforts the United States has made with the objective of bringing about a change. As noted above, it often occurs that a lessee state is militarily or economically stronger than the lessor,[46] as is the case with the US and Cuba, and a weak lessor may deem that acting to halt wrongful acts by a powerful lessee entails sufficient risk of retaliation that it takes either no action, or limited action, in order to protect its vital interests.[47] Whether or not this matters in terms of law (as a potential defence against responsibility depends on a further assessment of the facts), in any case it places the response by Cuba in perspective.

Cases involving the allegations in the factual scenarios involving Guantanamo Bay are currently pending before national courts in the United States.[48] In Spain, two criminal cases are pending against the US – one pertaining to the state and the other to six US government

[42] Cuba Ministry of Foreign Relations, 'Statement by the Government of Cuba to the National and International Public Opinion', 11 January 2002, available at http://anterior.cubaminrex.cu/CDH/60cdh/Guantanamo/English/Official%20Statements%20and%20Editorials.htm#2.
[43] Strauss, 'Cuba and State Responsibility', n. 14, pp. 545-49.
[44] See section 2.1.
[45] See section 2.2.
[46] This was a frequent occurrence in leases made at the end of the nineteenth century, and more recently with leases in which major powers obtain rights on territory for military bases in developing countries.
[47] Such conduct is addressed by rational-choice theorists in discussing non-compliance with international law; see C.K. Lamont, *International Criminal Justice and the Politics of Compliance* (Farnham, UK: Ashgate, 2010), pp. 15-16.
[48] Several cases involving prisoners detained at Guantanamo Bay are pending before military tribunals there.

officials – with respect to alleged torture during interrogations at Guantanamo Bay.[49] The case against the six US officials was temporarily stayed by Spain in 2011, and transferred to the US legal system; an appeal of this decision is pending.[50]

4. Other situations involving wrongful acts on leased territories

In addition to the situation in Guantanamo Bay, three other situations where territorial leases could give rise to shared responsibility can be identified: the use of Diego Garcia in 'extraordinary renditions' (section 4.1); the use of armed drones at Camp Lemonnier and Chabelley Airfield (section 4.2); and the Australia-Papua New Guinea arrangement for asylum seekers (section 4.3). None of these arrangements (to the extent its text is public) addresses the issue of international responsibility for situations that may arise on the territory.

4.1 The use of Diego Garcia in 'extraordinary renditions'

Diego Garcia is an island at the southern end of the Chagos archipelago in the central Indian Ocean. The archipelago, initially administered by the British colony of Mauritius, was placed within the newly created British Indian Ocean Territory (BIOT) in 1965. In 1966, the United Kingdom (UK) leased Diego Garcia to the United States for a military base through an exchange of diplomatic notes.[51] A second exchange of notes in 1976 allowed the US to considerably expand its operations at the base,[52] which today covers much of the island.[53]

Parts of the lease agreement were secret, although various terms have gradually come to light through legal actions and parliamentary investigations regarding the forced relocation of Diego Garcia's inhabitants to clear the island for military use, and through other documents

[49] Center for Constitutional Rights, 'The Spanish Investigation into U.S. Torture,' available at http://ccrjustice.org/spain-us-torture-case.
[50] Ibid.
[51] Exchange of Notes Constituting an Agreement Concerning the Availability for Defense Purposes of the British Indian Ocean Territory, London, 30 December 1966, in force 30 December 1966, 603 UNTS 273.
[52] Exchange of Notes Constituting an Agreement Supplementing the Abovementioned Agreement, Concerning a United States Naval Support Facility on Diego Garcia, British Indian Ocean Territory and Replacing the Supplementary Agreement of 24 October 1972, London, 25 February 1976, in force 25 February 1976, 1018 UNTS 372.
[53] United States Navy, 'Welcome to Diego Garcia', available at http://www.public.navy.mil/fcc-c10f/nctsfedetdg/Documents/WELCOME_ABOARD_JAN%202011_.pdf.

and statements. It is not clear how much still remains undisclosed, but details continue to be revealed.

The lease arrangement made the entire Chagos archipelago available to both the United States and the United Kingdom for military purposes.[54] It has a 50-year duration with an automatic 20-year extension if neither side renounces it toward the end of the initial period.[55] Although the agreement specified that the US would have its rights there without charge,[56] the US did provide compensation to the UK in the form of a financial concession for the British purchase of US submarines.[57] In contrast to the situation at Guantanamo Bay, the United Kingdom retained jurisdiction on Diego Garcia through the BIOT legal system, which applies to all of the island, including the US base, although the United States also has jurisdiction over persons subject to US military law. Issues of concurrent jurisdiction are subject to rules that determine which laws take precedence, and each party has exclusive jurisdiction in situations that the other's laws do not address.[58]

The sharing of responsibility for internationally wrongful acts at the Diego Garcia base was integral to a legal suit filed against the British government and several individual government officials in December 2011.[59] The case seeks to establish that the United Kingdom bears legal responsibility for human rights violations, some of which were carried out by the United States on the leased territory with British knowledge and approval. Arguably, the circumstance described is covered by Article 16 of the ILC's ARSIWA (aiding or assisting the commission of a wrongful act by another state).

The claim for damages was brought by Abdel Hakim Belhaj,[60] a Libyan national who led an insurgency movement against the government of Moammar Gaddafi in the 1990s. He later went into exile, before being returned to Libya through an 'extraordinary rendition' carried out by the United States. As described by attorneys representing him, Belhaj was in China in 2004 with his wife, having entered the country from Malaysia. Concerned that they were under surveillance, they attempted to travel to the United Kingdom to seek political asylum, but were detained by Chinese authorities and deported back to Malaysia. The Malaysian

[54] Agreement Concerning the Availability for Defense Purposes, n. 51, Article 2.
[55] Ibid., Article 11.
[56] Ibid., Article 4.
[57] J. Lunn, 'The Chagos Islanders', UK House of Commons Standard Note SN04463, 20 April 2012, p. 4.
[58] Agreement Concerning the Availability for Defense Purposes, n. 51, Annex II, Article 1.
[59] *Abdul-Hakim Belhaj and another* v. *Rt Hon Jack Straw MP and others*, Judgment, [2013] EWHC 4111 (QB), 20 December 2013 (*Belhaj*).
[60] Spelled 'Belhadj' in some documents.

authorities allowed them to proceed to the UK via Thailand, but on arrival in Thailand they were detained by local officials, and transferred to US authorities who then transported them to Libya in the rendition. Once in Libya, Belhaj and his wife were imprisoned and he was tortured.[61] Following Gaddafi's ouster in 2011, Belhaj emerged as a leading figure in Libya's military and political life, first as the commander of the Tripoli Military Council, a security force, and then as the founder of the Watan political party.[62] Documents found at the former offices of Gaddafi's security services confirmed the US rendition flight was to make a refuelling stop at Diego Garcia, and a former Libyan security official said this had occurred with the permission of British authorities.[63] As a British newspaper pointed out:

> Any evidence that the rendition plane landed on Diego Garcia would be enormously damaging for the British government. Although the remote coral atoll in the Indian Ocean is operated as a US military outpost, it is a British Overseas Territory, and the UK is legally responsible for events there.[64]

After the discovery of the documents, Belhaj's attorneys announced in April 2012 that they would extend the suit to include the BIOT Commissioner, with the allegation that BIOT's administrative commission was complicit in the rendition, and in the unlawful imprisonment of Belhaj by the US, while the rendition flight was on the ground at Diego Garcia.[65] Among the reasons they cited were the commission's permission for the aircraft to land and refuel; 'facilitating and/or in fact making possible' the rendition to Libya; and its failure to act to ensure that Belhaj was not 'unlawfully detained, tortured or subjected to inhuman or degrading treatment'.[66]

The extension of the claim for damages to include the BIOT Commissioner ultimately did not occur for reasons that have not been made public, although the suit continues against the British government and the officials originally named. In December 2013, a British Court dismissed Belhaj's complaint on grounds that proceeding would require examining the wrongfulness of US acts, and that 'such an inquiry would be damaging to the national interest'; yet it called his suit 'a potentially well-founded claim that the UK authorities were

[61] Leigh Day & Co., 'Libyan rebel leaders sues British Government for illegal rendition to Libya', press release, 19 December 2011.
[62] A. Blomfield, '"Rendition" Libyan commander Abdel Hakim Belhadj to form his own party', *Telegraph*, 15 May 2012.
[63] Leigh Day & Co., 'Belhadj lawyers announce fresh legal action in rendition case', press release, 9 April 2012.
[64] I. Cobain, 'Special report: Rendition ordeal that raises new questions about secret trials', *Guardian*, 8 April 2012.
[65] 'Belhadj lawyers announce fresh legal action', n. 63.
[66] Letter of Claim from Leigh Day & Co. to Her Majesty's Commissioner for the British Indian Ocean Territory, 5 April 2012.

directly implicated in the extra-ordinary rendition'.[67] In February 2014 the Court authorised an appeal of its ruling.[68]

The *Belhaj* case revealed that when a question of shared responsibility for a wrongful act on leased territory is pursued in the context of the national legal system of one party to the lease, that state may be obliged to assess the international legality of the other party's acts in order to proceed toward a judgment. Making that assessment can have implications for a vital interest – the state's relations with the other state – and may cause this to become a decisive factor in the case.

4.2 The use of armed drones at Camp Lemonnier and Chabelley Airfield

Camp Lemonnier is a military base in Djibouti that was initially used by the French Foreign Legion and later became a domestic base for the African country's own forces. The Djibouti government granted the United States the right to use the base starting in 2002, and it became a site from where anti-terrorism and anti-piracy operations were undertaken in the Horn of Africa region. These operations involved primarily US forces in cooperation with military personnel who are stationed there from other nations, including Japan and a number of African countries. The US leased the base from Djibouti in 2007 for five years with options to renew, and through this arrangement the site was expanded from 36 hectares to 202 hectares.[69] In 2014 the lease was renewed for another 10-year period.[70] Under terms of the lease, the US pays Djibouti an annual rent.[71] The leases were made within the framework of a bilateral agreement signed in 2003 that authorised the United States 'access to and use of Camp Lemonnier and other such facilities and areas in the Republic of Djibouti as may be mutually agreed'.[72]

It has been reported that US forces regularly launched unmanned armed drone aircraft from Camp Lemonnier into the airspace of other states, mainly Yemen and Somalia, on missions

[67] *Belhaj*, n. 59, para. 151.
[68] Leigh Day & Co., 'Belhaj legal case granted permission to appeal', press release, 3 February 2014.
[69] United States Navy, 'CNIC/Camp Lemonnier, Djibouti: History', available at http://www.cnic.navy.mil/regions/cnreurafswa/installations/camp_lemonnier_djibouti/about/history.html.
[70] E. Schmitt, 'US Signs New Lease to Keep Strategic Military Installation in the Horn of Africa', *New York Times*, 6 May 2014.
[71] C. Whitlock, 'Remote US Base at Core of Secret Operations', *Washington Post*, 25 October 2012.
[72] Agreement between the Government of the United States of America and the Government of the Republic of Djibouti on Access To and Use Of Facilities in the Republic of Djibouti, Djibouti, 19 February 2003, Article 2, available at http://www.state.gov/documents/organization/97620.pdf.

that ranged from surveillance to the targeted killing of alleged terrorists. The base is adjacent to the Ambouli International Airport in Djibouti City, and Djiboutian air traffic controllers there handled the base's aircraft, including the drones, in addition to flights using the airport,[73] giving Djibouti an active role in the drone operations. In 2013, after several drone crashes prompted safety concerns, the US moved its drone operations to Chabelley Airfield, a more isolated facility that Djibouti allowed the US to use for this purpose.[74]

Whether the use of drones for the targeted killings is a violation of international law has been the subject of debate.[75] It highlights a complex legal situation that arises when a leased territory is used by the lessee to carry out acts that may be wrongful, on the territory of a third state.[76] International humanitarian law may overlap with human rights law with respect to the wrongfulness of certain acts, and may complicate the allocation of responsibility if, for example, the lessor and lessee differ on whether a given act is wrongful in a given circumstance, and their behaviour relative to the act – and also toward each other as it pertains to the act, and additionally regarding the leased territory – is dictated by their respective positions on the act's legality.

While the US would be responsible if its drones launched from Djibouti's territory are used for wrongful acts, Djibouti also may bear responsibility based on these considerations in connection with others. These other consideratoins include legally relevant facts, e.g. its sovereignty over Camp Lemonnier and Chabelley Airfield, and the bilateral agreements that facilitated their use by the US. They also include Djibouti's knowledge of the drone activity, as well as elements of its conduct relative to the wrongful acts – first, its direct participation in it through air traffic controllers at Ambouli International Airport;[77] second, the extent to

[73] Ibid.
[74] C. Whitlock and G. Miller, 'US Moves Drone Fleet from Camp Lemonnier to Ease Djibouti's Safety Concerns', *Washington Post*, 25 September 2013.
[75] United Nations General Assembly, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', UN Doc. A/68/382 (13 September 2013); United Nations General Assembly, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc. A/68/389 (18 September 2013), reissued 18 October 2013; M. Sterio, 'The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law' (2012) 45 *Case Western Reserve Journal of International Law* 197.
[76] See e.g. V.P. Nanda, 'International Law Implications of the United States' "War on Terror"' (2008-2009) 37 *Denver Journal of International Law & Policy* 513, at 532-3.
[77] Controllers at Chabelley Airfield are presumably US personnel, as was the case with past US military exercises there. The site was previously dormant except for such exercises. See M.C. Lawrence, 'US Marines Set Up Austere Landing Zone', 17 November 2011, available at http://www.22ndmeu.marines.mil/News/ArticleView/tabid/196/Article/510392/us-marines-set-up-austere-landing-zone.aspx.

which it is aware (or believes) that the drones are being used for wrongful acts; and third, any actions it may take in response.

Details of the drone operations are not publicly revealed, so it is not known if other states with forces stationed at Camp Lemonnier participated in them directly or indirectly, or had knowledge about the missions for which the drones were used. These factors could extend the sharing of responsibility for any wrongful acts to additional states.

The increasing use of drones in military operations is creating parallels to this scenario elsewhere. In February 2013, the US announced a similar lease agreement with Niger to create a base in that state for using drones in a region that includes the territories of other African states.[78] Furthermore, US drones based in Saudi Arabia reportedly have been used for actions that include targeted killings in Yemen,[79] and US drones based in Afghanistan have been used for similar actions in Pakistan. In the latter case, civilian casualties from drone strikes aroused Pakistan's ire at what its ambassador to the US called 'a clear violation of our sovereignty and a violation of international law',[80] a view later backed by the United Nations Special Rapporteur on Counter-Terrorism and Human Rights.[81]

Neither party to the Camp Lemonnier lease has faced claims against it for the drone flights, although in July 2013 the human rights organisation *Reprieve* filed a claim with the UK government against a British company, alleging that it violated the OECD Guidelines for Multinational Enterprises, by providing telecommunications infrastructure essential to the use of drones from the base for targeted killings in third countries.[82] If the complaint succeeds in establishing the acts as wrongful, and that a party other than the one committing them shares responsibility by facilitating their commission on a leased territory, the matter would expose Djibouti to being in a similar situation of sharing responsibility through its facilitating acts.

[78] E. Schmitt and S. Sayare, 'New Drone Base in Niger Builds U.S. Presence in Africa', *New York Times*, 22 February 2013.
[79] R.F. Worth, M. Mazzetti and S. Shane, 'Drone Strikes' Risk to Get Rare Moment in the Public Eye', *New York Times*, 5 February 2013.
[80] K. DeYoung, 'Pakistani ambassador to U.S. calls CIA drone strikes a "clear violation"', *Washington Post*, 5 February 2013.
[81] United Nations Office of the High Commissioner for Human Rights, 'Statement by the Special Rapporteur following meetings in Pakistan', 14 March 2013, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E.
[82] Reprieve, 'Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises in respect of BT plc', 15 July 2013.

4.3 The Australia-Papua New Guinea arrangement for asylum seekers

In July 2013, Australia and Papua New Guinea signed an agreement under which Australia would transfer asylum seekers arriving by boat in its territorial waters to a processing centre in Papua New Guinea. Their asylum claims would be processed by Papua New Guinea authorities; the claimants granted refugee status would be resettled in Papua New Guinea or a third state, while those not deemed refugees would be detained in Papua New Guinea, returned to their home state, or sent to another state where they have residency rights.

The processing centre would be 'managed and administered by Papua New Guinea under Papua New Guinea law, with support from Australia'.[83] This support includes paying 'the full cost of implementing the Arrangement in Papua New Guinea'[84] as well developing the necessary infrastructure and facilities. The arrangement has a minimum duration of one year and is intended to last beyond that, as it stipulates there will be annual reviews.[85] Australia's budget plans assume the agreement will be in place for at least four years.[86]

Details of the legal status of the zone where the processing centre is located, as well as a number of other details about the arrangement itself, have not been made public. The zone may be deemed a leased territory as defined in this chapter, if Papua New Guinea has assigned rights to Australia for processing the asylum seekers' claims (as the responsible state in view of their arrival in Australian territory), and if Australia has reassigned them to Papua New Guinea, so that the latter performs the processing on Australia's behalf and at Australia's expense. Papua New Guinea would thus have a dual and convoluted legal relationship, as both the lessor and as the state assigned to exercise its own sovereign rights on its territory at a level divorced from sovereignty; this would be roughly analogous to a common private law situation in which property is sold and then leased back to its previous owner.

The arrangement has generated multiple concerns about violations of international human rights law and refugee law. The United Nations High Commissioner for Refugees for example

[83] Australian Government Department of Foreign Affairs and Trade, 'Regional Resettlement Arrangement Between Australia and Papua New Guinea' (2013), see http://dfat.gov.au/geo/papua-new-guinea/pages/regional-resettlement-arrangement-between-australia-and-papua-new-guinea.aspx.
[84] Ibid.
[85] Ibid.
[86] G. Jones, 'Cash grab for detention centres as PNG asylum seeker deal cost more than $1 million', *News Limited Network*, 3 August 2013.

has reported 'significant shortcomings in the legal framework for receiving and processing asylum-seekers from Australia'.[87]

Questions that arise are whether the zone housing the centre is considered Australian or Papua New Guinean territory for purposes of *non refoulement* obligations; second, whether any *non refoulement* obligation created for Papua New Guinea is relative to the asylum seekers' country of origin; and third, whether Papua New Guinea and Australia share responsibility for any wrongful *refoulement* of asylum seekers diverted to Papua New Guinea from Australian territory. Additionally, the operation of the processing site itself, and thus the acts that occur there, depend on the involvement of both states, creating the prospect for shared responsibility if either state engages in a wrongful act at the site.

5. Conclusion

A lease of territory between states creates a zone in which sovereign authority is not displayed solely by the state with *de jure* sovereignty there, generating the potential for international legal responsibility to be shared by both parties. The lessee state assumes responsibility for acts it carries out on the territory, while the lessor's retention of *de jure* sovereignty preserves its association with the territory at a level that entails international rights and obligations. Thus, even when a lease assigns comprehensive jurisdictional rights to the lessee state, the lessor may not be absolved of responsibility when the lessee commits a wrongful act.

Whether responsibility is shared in a given situation can depend on multiple factors, including the details of the lease agreement (although these rarely address the matter of international responsibility), the nature of the wrongful act relative to the lease as a legal instrument in the hierarchy of international law, and the conduct of both states vis-à-vis the leased territory and to each other's acts there. Determinations may have to rely primarily on international tribunals as early cases brought within national legal systems have revealed potential obstacles at that level.

[87] United Nations High Commissioner for Refugees, 'UNHCR: Australia-Papua New Guinea asylum agreement presents protection challenges' press release, 26 July 2013.