



FACULTY OF LAW
University of Lund

Hanna Danwall

Guantanamo Bay, a legal “black hole”?

Master thesis
20 points

Supervisor:
Ulf Linderfalk

Public International Law

Spring 2004

Contents

SUMMARY	1
PREFACE	4
ABBREVIATIONS	5
1 INTRODUCTION	6
1.1 Presentation of the subject	6
1.2 Purpose	8
1.3 Methods, theories and materials	8
1.4 Delimitations	9
1.5 Criticism of sources	10
1.6 Outline	10
2 GUANTANAMO BAY	12
2.1 Introduction	12
2.2 Background to the United State's involment in Cuba	12
2.3 The Naval Base at Guantanamo Bay	13
2.4 The agreements concluded between Cuba and the United States concerning Guantanamo Bay	14
2.5 The United State's opinions and actions in regards to Guantanamo Bay	15
2.6 Cuba's opinions and actions in regards to Guantanamo Bay	16
2.7 Case law	17
2.8 Doctrine	18
3 SOVEREIGNTY	21
3.1 Introduction	21
3.2 Historical background to the concepts of sovereignty	21
3.3 Judicial definitions of sovereignty	22
3.3.1 Territorial sovereignty	23
3.3.2 The concept of Title to Territory	24
3.3.2.1 Case law - Island of Palmas arbitration case	24
3.3.3 Derogations from complete territorial sovereignty	26

3.3.4	Territorial jurisdiction – Evidence of change of sovereignty?	27
3.3.4.1	Definition of jurisdiction	27
3.3.4.2	Legislative, judicial and enforcement jurisdiction	28
3.4	Jurisdiction and its limitations according to the Guantanamo Bay agreements of 1903 and the treaty of 1934	29
3.5	Analysis of Guantanamo Bay and the concept of territorial sovereignty and territorial jurisdiction	30
4	INTERNATIONAL LEASE OF TERRITORY – IN THEORY AND DOCTRINE	34
4.1	Introduction	34
4.2	History of international leasing agreements	34
4.3	Definition of international lease of territory	35
4.3.1	General principles	35
4.4	Two categories of international territorial lease agreements according to international law	36
4.4.1	Specific characteristics for “real” territorial leases	37
4.4.1.1	Citizenship and nationality	37
4.4.1.2	Treaty making power	37
4.4.1.3	Responsibility	38
4.4.2	Political leases – the theory of disguised cession	38
4.4.2.1	Effect of disguised cession theory	38
4.4.3	Political leases - the theory of time-limited cession	39
4.4.4	Cession	39
4.4.4.1	Effects of cession	39
4.4.5	Contemporary definition of international territorial leases	40
4.5	Analysis of the lease of Guantanamo Bay	40
5	INTERNATIONAL LEASE OF TERRITORY IN STATE PRACTICE – GUANTANAMO BAY IN COMPARISON TO THE NEW TERRITORIES AND THE PANAMA CANAL ZONE	43
5.1	Introduction	43
5.2	The New Territories	43
5.2.1	Historical Background	43
5.2.2	Sovereignty and jurisdiction according to the lease, the Order in Council of 1898 and state practice	44
5.2.3	British and Chinese official opinions concerning sovereignty over the New Territories	45
5.2.4	Doctrinal views on sovereignty over the New Territories	46
5.3	The Panama Canal Zone	47
5.3.1	Historical Background	47
5.3.2	Sovereignty and jurisdiction according to the agreement of 1903 and state practice	47
5.3.3	Panama’s and the United State’s official opinions concerning sovereignty over the Panama Canal Zone	48
5.3.3.1	Case law	49
5.3.4	Doctrine	50

5.3.4.1	Titular sovereignty	51
5.4	An examination of the allocation of sovereignty in the cases of the New Territories and the Panama Canal Zone.	52
5.5	A comparison between the leases of Guantanamo Bay, the New Territories and the Panama Canal Zone	54
6	CONCLUSION	57
	SUPPLEMENTS	61
A		62
	Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903	62
B		64
	Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda; July 2, 1903	64
C		67
	Treaty Between the United States of America and Cuba; May 29, 1934	
D		70
	The Convention respecting an extension of the Hong Kong territory – June 9, 1898	
E		72
	The New Territories Order in Council	72
F		73
	Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty), November 18, 1903	
	BIBLIOGRAPHY	81
	TABLE OF TREATIES	85
	TABLE OF CASES	86

Summary

Guantanamo Bay has been in the centre of medias attention for a while, especially since the United States in the year 2002 began placing taliban and al-Qaida detainees there. Much of the attention has concerned the United State's lack of compliance with the Geneva Conventions and the protection that it affords prisoners of war. This thesis takes a look behind the scene, in order to try to establish why the United States places detainees in Guantanamo Bay, primarily focusing on how the United States initially came to "possess" Guantanamo Bay. The aim of this thesis is to examine whether Guantanamo Bay is sovereign territory of the United States or a mere piece of rental property with Fidel Castro as the current landlord?

The United States received control and power over Guantanamo Bay through a leasing arrangement concluded with Cuba in 1903. Art III of the Leasing Agreement of Guantanamo Bay states that:

..... the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas [Guantanamo Bay] 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.

This provision in the Leasing Agreement of Guantanamo Bay coupled with the extensive control that the United States in practice exercises over Guantanamo Bay and the fact that there is no time limit to the United States lease of Guantanamo Bay has led to different interpretations concerning the allocation of sovereignty. Some scholars claim that a transfer of sovereignty has occurred and some claim the opposite. One might ask why it is so important to identify the holder of sovereignty over Guantanamo Bay and if it would make a difference whether it is Cuba or the United States. A recent judgement in June 2004 in the case *Rasul Et Al. v. Bush*, the United States Supreme Court held that detainees placed in Guantanamo Bay have the right to access to American courts. The judgment does not clarify the status of Guantanamo Bay and if the detainees could have their claims tried in a Cuban court. The resolving of which state has sovereignty over Guantanamo Bay would provide answers to those questions and permanently stop the use of Guantanamo Bay as a legal "black hole".

The thesis is structured as a combined descriptive and analytical study, applying theories concerning sovereignty and international territorial leasing agreements to the lease of Guantanamo Bay. I have also conducted a comparative study of the New Territories, Panama Canal Zone and Guantanamo Bay with the purpose of examining the validity of theories

concerning sovereignty and international territorial leases and to identify common features concerning the issue of sovereignty over leased territory.

The test of title is often used as a method of determining which state possesses sovereignty over territory. In all probability, the United States does not possess a valid title to Guantanamo Bay, since it is not likely that they validly acquired a legal title, as lease is not an accepted mode of acquiring title to territory according to international law. If the lease in reality is a cession, in accordance with the theory of disguised cession, the United States would probably have the better title to Guantanamo Bay since they for more than a 100 years solely have exercised all the regular prerogatives of a government and thus fulfilling the second part of the test of title to territory better than Cuba.

The theories of disguised cession and time-limited cession are not accepted theories of international law, today one might even describe them as highly criticized. The situation of Guantanamo Bay being a time limited cession is not very likely, since there is no stipulated end time to the United States possession of Guantanamo Bay. The United States possession of Guantanamo Bay bears many similarities to a disguised cession, but it is difficult to clearly establish the real effects of the lease. A key question in regards to disguised cessions is whether Cuba has the right of disposition? If not, then in all probability the United States are sovereign over Guantanamo Bay.

The comparative study exposes that it is difficult to draw general conclusions concerning the legal effects of international territorial leases since all leases are distinct in wording and effect. The two leases of Guantanamo Bay and the Panama Canal Zone are more similar, which can be explained by the fact that they were concluded by the same state, this being the United States, at more or less the same time. The lease of the New Territories differs from the two other leases, both in wording and subsequent state practise. The uncertainties concerning sovereignty in the case of the New Territories stems from Great Britain's unilateral Order in Council by which they accorded the New Territories the same status as that of ceded Hong Kong and the subsequent occupation of the city of Kowloon.

In my opinion it is probable that the United States does not have a valid title to Guantanamo Bay since it seems unclear if they could be adjudged title in accordance with the test of title to territory. It is on the other hand likely that Cuba does not possess complete sovereignty over Guantanamo Bay, since according to the leasing agreements and the Treaty of 1934 Cuba made extensive derogations from complete sovereignty, with the United States as beneficiaries. An examination concerning the allocation of sovereignty over Guantanamo Bay reveals that it is likely that an extensive derogation from complete sovereignty has occurred, leaving neither Cuba nor the United States with full territorial sovereignty over Guantanamo Bay. The extent of governmental functions exercised by the United States, to the complete exclusion of Cuba, makes it very feasible that the United States has the

effective sovereignty, leaving Cuba with the titular sovereignty, at the most. It is in other words likely that Cuba has not been deprived of their ultimate right of disposal of Guantanamo Bay.

Preface

I would like to thank Jur. Dr. Ulf Linderfalk for inspiring me to write this thesis and for guiding me through the process of writing it.

I would also like to thank my wonderful family for always believing in me and supporting me, without you I would not be who I am and where I am today.

Abbreviations

AD	Annual Digest and Reports of Public International Law Cases (now International Law Reports)
AIDS	Acquired Immune Deficiency Syndrome
EU	European Union
HIV	Human Immunodeficiency Virus
ICJ	International Court of Justice
UN	United Nations
U.S.	The United States
WTO	World Trade Organisation

1 Introduction

1.1 Presentation of the subject

The United States exercises complete jurisdiction and control over the Guantanamo Bay and may continue to exercise such control permanently if it so chooses.¹

This statement was delivered by the Supreme Court of the United States in the *Rasul ET Al. v. Bush* judgment of June 2004, which gave detainees placed in Guantanamo Bay by the United States right to access to American courts.

The judgement concerned lawsuits under federal law, made by taliban and al-Qaeda detainees placed at Guantanamo Bay, challenging the legality of their detention. The detainees claimed to be held arbitrarily, meaning without being told why they were being detained, without being charged with any legal offence and without possibilities of contesting the detention. The District Court construed the suits as habeas petitions and dismissed them on the grounds that aliens outside the United States sovereign territory may not invoke habeas relief, in accordance with the precedence of the *Spelar v. U.S.* judgement.² The Court of Appeals confirmed the District Courts conclusion. The Supreme Court reversed the previous judgments and determined that the United State's courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated in Guantanamo Bay. The Supreme Court judgement does not further discuss possible implications of the far-reaching jurisdiction and control that the United States exercises over Guantanamo Bay in accordance with the terms of the lease.

It is likely to purport that the reason for the United States placing detainees in Guantanamo Bay was to effectively hinder the detainees from gaining access to United States judicial system. The United States policy on leased territory, as stated in the *Spelar* case, is that of it being foreign territory in relation to the United States. This policy was confirmed in regards to Guantanamo Bay by the *Cuban Bar Association* case³ in 1995, where the Eleventh Circuit held that the United States Bill of Rights did not apply to aliens placed in Guantanamo Bay. This judgment has been used as a precedent, allowing the government to treat Guantanamo Bay as an

¹Rasul ET AL. v. Bush, President of the United States. The Supreme Court of the United States, No 03-334, p 12. (2004)

²Spelar v. U.S., 338 U.S. 217 (1949), see Chapter 2.7 for more details concerning the case.

³ Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412 (11th Cir 1995).

“anomalous zone”, a geographical enclave in which fundamental legal norms do not apply.⁴

The circumstances behind the United States power and control over Guantanamo Bay are based on the Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations (Leasing Agreement of Guantanamo Bay) concluded on February 23 1903, the Lease to the United States by the Government of Cuba for Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo Bay and Bahia Honda concluded on July 2 1903 (Supplementary Agreement) and the Treaty Between the United States of America and Cuba concluded on May 29 1934 (Treaty of 1934).⁵ The key clause is found in the Leasing Agreement of Guantanamo Bay, stating that Cuba continues to possess the ultimate sovereignty over Guantanamo Bay and the United States has the right to exercise, ”complete jurisdiction and control over and within said area”.⁶

An historic oversight reveals that this is not the first time Guantanamo Bay has been used as a place to put people that the United States do not want on American soil. During 1991, 34,000 Haitian refugees were placed in Guantanamo Bay by the United States. The refugees had fled Haiti after a violent coup brought on by political and social upheaval in their country. Haitians that had credible fears of persecution in Haiti and therefore had the right to apply for visa in the United States were not allowed to leave Guantanamo Bay after they tested positive for HIV/Aids. The afflicted were, under a 1987 statute that bared HIV-positive immigrants, denied entry to the United States. From 1994 to 1996 Guantanamo Bay housed as many as 51,000 Cuban and Haitian migrants and asylum seekers. In 1999 President Clinton considered Guantanamo Bay as a destination for about 20,000 Kosovo refugees, but the plans were never carried out.⁷

After examining the legal reasoning in the judgments reiterated in the beginning and about the extensive powers and control the United States has been granted through the agreements concerning Guantanamo Bay, a feasible question is if Cuba still possesses any sovereign rights over Guantanamo Bay, or if the United States has acquired the sovereignty over Guantanamo Bay? Does the fact that the United States have complete jurisdiction over Guantanamo Bay give them sovereignty over Guantanamo Bay? What is the difference between the control that the United States exercises over Guantanamo Bay and possessing territorial sovereignty over Guantanamo Bay?

⁴ Neuman, Closing the Guantanamo Loophole. Loyola Law Review, 1, Spring 2004.

⁵ See Leasing Agreement of Guantanamo Bay, Supplement A, Supplementary Agreement, Supplement B and Treaty of 1934, Supplement C

⁶ See article III, Leasing Agreement of Guantanamo Bay, Supplement A

⁷ CNN Homepage, Guantanamo Bay in U.S.control for over 100 years.

<http://www.cnn.com/2002/US/01/09/guantanmo.history/> . Last visited 2004-10-16

1.2 Purpose

My purpose with this thesis is to analyse *whether Guantanamo Bay is sovereign territory of the United States or a mere piece of rental property with Fidel Castro as the current landlord?*

1.3 Methods, theories and materials

When writing this thesis, a combined descriptive and analytical judicial method has been used. I have also conducted a comparative study of the New Territories, the Panama Canal Zone and Guantanamo Bay.

To fulfil the purpose of this thesis I will examine if the jurisdiction and control that the United States has been granted and has exercised over Guantanamo Bay is equivalent to territorial sovereignty. I will also discuss and examine what status international territorial leases have according to international law.

Since the legal views on international territorial leases and the effects it has on sovereignty differ, I will conduct a small comparative study concerning leased territory, with the aim of identifying common traits concerning leases and the issue of territorial sovereignty upon entering an international territorial leasing agreement and subsequent state practice. The cases, which I will examine, are Great Britain's lease of the New Territories, which later formed a part of Hong Kong and the United State's lease of the Panama Canal Zone for the purpose of building a ship canal. The outcome of the comparative study will be compared with the lease of Guantanamo Bay.

Why did I choose the leases of the New Territories and the Panama Canal Zone to compare with the lease of Guantanamo Bay? When choosing international territorial lease agreements to compare with the lease of Guantanamo Bay I decided to use lease agreements that were more or less contemporary with the 1903 years lease of Guantanamo Bay and to exclude cases where there were no uncertainties concerning the allocation of sovereignty.

While gathering material for this thesis I found that there exists various theories concerning the establishment of sovereignty. My conclusions will reflect my subjective view based on the facts and material presented in this thesis and the use of legal theories concerning the allocation of sovereignty and the effects of international territorial leases, which I will apply to the case of Guantanamo Bay.

In order to complete this thesis I have used a wide range of materials, books, articles and the Internet. Different sources have been used in order to make this thesis as broad and valid as possible. Since it has been close to impossible to find first hand material, as for example official statements concerning the leases of the New Territories, the Panama Canal Zone and

Guantanamo Bay, I have had to resort and rely on secondary material. I have tried to use facts and statements, which I have been able to confirm in different sources, in order to raise the validity of this thesis

1.4 Delimitations

As always when writing, a writer has to make some delimitations in order not to encompass information that do not contribute to the aim of the text. In this section I will define and explain my delimitations.

Sovereignty is a very illusive term with analytical imprecision and disciplinary incompatibilities, as I have discovered during my research for this thesis. Over the centuries sovereignty has been attributed different meanings and it is no closer to a precise definition today. The concept of sovereignty is explained differently depending on whether the explanation is judicial, philosophical or political science based. In this thesis I will focus on judicial explanations to the concept of sovereignty. In regards to the concept of sovereignty I will primarily focus on territorial sovereignty, which is the dimension of sovereignty most of interest in this thesis, since I am not questioning whether Cuba or the United States are sovereign states possessing statehood, and therefore I will not discuss sovereignty used as a criteria for statehood.

In my outline on the legal concept of jurisdiction I will focus on domestic jurisdiction, which is closely linked with territory, leaving aside all other types of extraterritorial jurisdiction that states may be granted or claim. My reason for this is that according to the Leasing Agreement of Guantanamo Bay the United States was granted the power to “exercise complete jurisdiction and control over and within said areas”.⁸ Extraterritorial jurisdiction is not attached to territory, which makes it less interesting to examine in this thesis.

There has been some debate concerning the labelling of the Panama Canal Zone agreement. Some author’s claim that it is a lease and some that it is not.⁹ The reason for this confusion is that in the original draft for the Hay/Bunau-Varilla agreement the word lease was used. The day before the signing of the agreement, the word lease was substituted with the word grant. I choose to adhere to those scholars who view the treaty as a lease because of the similarities with the lease of Guantanamo Bay and the change of wording in the agreement and therefore I included it in my comparative study.

⁸ See article III, Leasing Agreement of Guantanamo Bay, Supplement A

⁹Rumpf, Territory, Lease. Bernardt, Encyclopedia of Public International Law, vol IV, 2000, p 844, Crawford, The Creation of States in International Law. 1979, p 434 and Maris, International law and Guantanamo. The Journal of Politics. Vol. 29, No. 2 (May 1967) p. 271

It has been purported in literature that international territorial leases often are unequal treaties. An unequal treaty is defined as when one contracting state is bound to do more than the other or is bound to recognize the other as his superior.¹⁰ The concept of unequal treaties is quite controversial in international law and has been rejected by some international jurists and governments and embraced by others.¹¹ It is, and has been alleged by some writers and some states (foremost China and Russia) that international territorial leases are often unequal and therefore should be void of legal effect. This is an interesting standpoint but one which I have chosen not to include in my thesis since that would make the scope of it too wide.

1.5 Criticism of sources

A possible weak spot one encounters when writing a thesis about an event that took place a long time ago, is the reliability of sources. Sources that describe events that occurred a long time ago must be used with great caution. The more time that passes between an event and its depiction, the greater is the risk that the depiction is affected by recollection, hindsight wisdom or pure reconstructions.¹² When it comes to the lease of Guantanamo Bay a substantial amount of time has lapsed between the depiction and the events which it is based on, which might affect the end product.

1.6 Outline

This thesis could have been organized in various ways. The outline used in this thesis was the one that best suited my way of approaching this subject. The organisation of this thesis is as follows. The next chapter is devoted to the Lease Agreement of Guantanamo Bay, the Supplementary Agreement, the Treaty of 1934 and the historic background leading up to the leasing of Guantanamo Bay. The purpose of the chapter is to outline the abovementioned agreements, as they will be underpinning the whole thesis. All the following chapters will be analysed using the contents of this chapter as a base. In chapter 3, the concept of sovereignty, primarily territorial sovereignty will be explained. The purpose of this chapter is to identify when a change of sovereignty occurs. Since jurisdiction is held to be a vital part of territorial sovereignty I will in this chapter also examine the allocation of territorial jurisdiction and the possible implications of the allocation of it to a foreign state present on the territory of a sovereign state. In chapter 4 the concept of international territorial leases is explained and different theories pertaining to it will be presented and examined. In chapter 5 I will conduct a comparative study concerning state practice in regards to international territorial leases, as manifested in the leases of the New Territories and the Panama Canal Zone. The outcome of the comparative

¹⁰ Chen, *State Succession Relating to Unequal Treaties*. 1974, p 28

¹¹ Chen, *State Succession Relating to Unequal Treaties*. 1974, p 3

¹² Esiasson, *Metodpraktikan*. 2003, p 309

study will be compared to the case of Guantanamo Bay, with the purpose of finding common features concerning the allocation of sovereignty. Chapter 6 is devoted to the conclusions of the whole inquiry and the presentation of my personal opinions.

2 Guantanamo Bay

2.1 Introduction

In 1903, the newly independent Republic of Cuba leased Guantanamo Bay to the United States. On the site, in accordance with the provisions of the lease the United States later built a naval station.¹³ The lease was negotiated to implement the Platt amendment¹⁴. The terms of the lease are contained in three documents - two agreements and a treaty. The first agreement, which is the lease, was concluded in 1903. Later the same year a Supplementary Agreement, providing details concerning the naval station, was concluded between the United States and Cuba. These agreements were later confirmed in the Treaty of 1934 between the United States and Cuba.

In this chapter I will examine the terms of the lease of Guantanamo Bay and present the background for the United States involvement in Cuba. This chapter will be used as the basis for the following chapters, as I will conclude all of the following chapters with analysing the lease of Guantanamo Bay in the light of that particular chapter.

2.2 Background to the United State's involment in Cuba

Cuba liberated itself from its Spanish coloniser through a bloody uprising in the year 1898. In the uprising's final hour the United States intervened military, with the aim to end the Spanish colonisation of Cuba and temporarily claim sovereignty over Cuba themselves. The United State's official explanation for intervening, was that of a neutral states attempt to stop the war between Spain and Cuba. Before the decision to intervene was taken, there were extensive discussions in the United States Congress concerning the possibility of using a neutral intervention as a mean by which to establish a United States claim of sovereignty over Cuba.¹⁵ Finally the Congress reached a compromise and stated that the United States:

.... hereby disclaims any disposition of intention to exercise sovereignty, jurisdiction, or control over said island except for pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.¹⁶

¹³ See article I, Lease Agreement of Guantanamo Bay, Supplement A

¹⁴ See Chapter 2.2 for more details

¹⁵ Pérez, Cuba under the Platt Amendment, 1902-1934. 1986, p 30

¹⁶ Pérez, Cuba under the Platt Amendment, 1902-1934. 1986, p 30

The United States intervention transformed in to a war of conquest when they began claiming victory for themselves in the war. The United States unilaterally negotiated the peace terms, where they claimed responsibility for ending the Spanish colonial government and the right to supervise Cuban national government. The United States military occupation of Cuba began on January 1 1899 and continued until May 20 1902, when Cuba finally became a sovereign state. During those years of United States supervision, the Cuban Congress enacted two agreements that together became known as the Platt amendment. In the year 1902, the Platt amendment was inserted as an appendix to the Cuban Constitution. According to the Platt amendment, Cuba agreed that the United States retained the right to intervene to preserve Cuba's independence and stability and for these purposes had the right to acquire and hold the title to land and maintain naval stations, at certain specified points. On May 22 1903 a Permanent Treaty of Relations was signed by Cuba and the United States using the exact text of the 8 clauses contained in the Platt Amendment.¹⁷ The Treaty of 1934¹⁸, abrogated the Platt amendment and the United States and Cuba agreed to continue the two agreements of 1903, which leased Guantanamo Bay to the United States.

2.3 The Naval Base at Guantanamo Bay

The Naval Base situated in Guantanamo Bay is the United State's oldest overseas naval base and the only one situated in a communist country. The base is located on the southeast corner of Cuba and is located about 400 miles from Miami, Florida. The Guantanamo Bay divides the base in to two distinct areas, the airfield on one side and the main base on the other side. The primary mission of Guantanamo Bay is to serve as a strategic logic base for the Navy's Atlantic fleet and to support counter drug operations in the Caribbean. Also a migrant operation was added in the beginning of the 90:s to Guantanamo Bay's mission. The latest addition to the mission is the temporary holding of al-Qaida, taliban and other detainees that come under the United States control during the war on terrorism.¹⁹

¹⁷ Pérez, Cuba between reform and revolution. 1988, p 186

¹⁸ See article I, Treaty of 1934, Supplement C

¹⁹ Murphy, The History of Guantanamo Bay. 1953;

http://www.nsgtmo.navy.mil/gazette/History_98-64/Brief%20History.htm. Last visited 2004-10-16 and [Globalsecurity.org](http://www.globalsecurity.org/military/facility/guantanamo-bay_x-ray.htm), "Guantanamo Bay – Camp X-Ray";

http://www.globalsecurity.org/military/facility/guantanamo-bay_x-ray.htm. Last visited 2004-10-16

2.4 The agreements concluded between Cuba and the United States concerning Guantanamo Bay

As mentioned in the introduction, the provisions of the lease of Guantanamo Bay are contained in the two agreements of 1903 and the Treaty of 1934. The first agreement of 1903 is the lease.

On February 23 1903, the United States and Cuba concluded the Leasing Agreement of Guantanamo Bay and Bahia Honda, which the United States had been promised in the Platt amendment. The aim of the lease, according to article VII in the Platt amendment, was:

To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defence, the Cuban Government will sell or lease to the United States the lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States.²⁰

In article I of the Leasing Agreement of Guantanamo Bay, the areas to be leased are defined as being Guantanamo Bay and Bahia Honda.²¹ The United States never realized the naval base of Bahia Honda. Article II regulates the question of water rights, giving vessels engaged in Cuban trade free passage through waters included in the lease.²² The question of sovereignty over Guantanamo Bay is regulated in article III, stating that:

.... 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...²³

A Supplementary Agreement, containing detailed provisions concerning the construction of naval bases and coaling stations in Guantanamo Bay and Bahia Honda²⁴ was concluded on July 2 1903. The Supplementary Agreement states in article I, that the United States shall pay the annual sum of two thousand dollars in gold coins to Cuba. Furthermore the same article states that payment for private lands and properties in the leased area shall be accepted by Cuba as advance payment on account of rental.²⁵ This

²⁰ As quoted in the Lease Agreement of Guantanamo Bay, Supplement A

²¹ See article I, Lease Agreement of Guantanamo Bay, Supplement A

²² See Lease Agreement of Guantanamo Bay, Supplement A

²³ See article III, Lease Agreement of Guantanamo Bay, Supplement A

²⁴ As mentioned above the naval base of Bahia Honda was never realized

²⁵ See article I, Supplementary Agreement, Supplement B

clause was inserted for the purpose of acquiring land and property from property owners in order that Cuba could lease the area to the United States with no private encumbrances. The United States agrees in article III that no person, partnership, or corporation is permitted to establish or maintain a commercial, industrial or other enterprise within Guantanamo Bay.²⁶ Article IV contains stipulations concerning the extradition upon demand of fugitives from Cuban or American justice to the demanding state.²⁷ Article V provides custom regulations concerning materials of all kinds, merchandise, stores and munitions of war.²⁸ According to article VI the United States agrees, except in case of war, to place no obstacle in the way of vessels entering or departing from Guantanamo Bay en route to or from Cuban ports. Such vessels, within the limits of Cuban territory, shall be subject exclusively to Cuban laws and authorities.²⁹

On May 29 1934 Cuba and the United States concluded a treaty, which confirmed that the lease and supplementary agreement of 1903 should continue in effect.³⁰ There is no mentioning in the treaty of Bahia Honda, with the effect of completely excluding it as a possible base. The Platt amendment, which gave the United States the right to intervene in Cuba, was abrogated according to article I.³¹ The treaty provides in article III provisions concerning how the termination of the lease shall take place. It states that as long as the United States does not abandon the naval station of Guantanamo Bay or the two Governments do not agree to a modification of its limits, the station shall continue to exist.³² Article IV contains provisions concerning acts that may be taken if a situation of an outbreak of contagious diseases occur, giving the contracting states right to take actions for its own safety without being considered unfriendly.³³

2.5 The United State's opinions and actions in regards to Guantanamo Bay

According to the United States the lease of Guantanamo Bay is valid. The lease is not to be equated with the United States having sovereignty over Guantanamo Bay since there is a distinction between a leasing arrangement and having powers equal to sovereignty.³⁴

²⁶ See article III, Supplementary Agreement, Supplement B

²⁷ See article IV, Supplementary Agreement, Supplement B

²⁸ See article V, Supplementary Agreement, Supplement B

²⁹ See article VI, Supplementary Agreement, Supplement B

³⁰ See article II, Treaty of 1934, Supplement C

³¹ See article I, Treaty of 1934, Supplement C

³² See article III, Treaty of 1934, Supplement C

³³ See article IV, Treaty of 1934, Supplement C

³⁴United States Congress Senate Committee on armed services Defence, Maintenance and Operation of the Panama Canal, Including Administration and Government of the Canal Zone. Hearings before the Committee on Armed Services United States Senate. January 24, 31, February 1 1978. p 92

On May 1, 1941 the United States issued the Executive Order 8749, which made Guantanamo Bay a “closed port”. The executive order established Guantanamo Bay as a “Naval Defensive Sea Area” and a “Naval Air Space Reservation” where no vessel or other craft, other than public vessels of the United States and vessels engaged in Cuban trade may be navigated in to the area or aircraft, except other than public aircrafts of the United States may be flown into the reservation, unless they are authorized”.³⁵ Vessels and aircrafts in distress are exempted from the regulations.³⁶

The United States restrictive attitude towards Cuba in regard to Guantanamo Bay has been evidenced in various ways. In 1959 Cuba was declared off-limits to base personnel in Guantanamo Bay by the American Navy. A cactus barrier and the installation of antipersonnel mines in Cuban territory immediately outside the base are other measures taken by the United States in order to ensure the limits of the base.³⁷

In Guantanamo Bay there is no Status of Forces Agreement defining the allocation of civil and criminal jurisdiction over military and other personnel at the base unlike all other naval bases that the United States has abroad.³⁸

2.6 Cuba’s opinions and actions in regards to Guantanamo Bay

Cuba claims that the United States holds Guantanamo Bay illegally and while doing so they represent a permanent threat to Cuba’s sovereignty. Cuba also claims that the lease lacks legal existence and judicial validity.³⁹

Even if the lease should be considered to be valid, Cuba would have the right to cancel the lease since it is not a ”real” lease⁴⁰, as a “real” lease is temporal to its nature, which the lease of Guantanamo Bay clearly is not. According to Cuba it is obvious that the United States never intends to terminate the lease and this lack of intention gives Cuba the right to immediately cancel the lease.⁴¹

Another factor that Cuba claims give them the right to cancel the lease is the fact that the United States is violating the purpose stated in the Treaty of 1934. The purpose, as stated in the treaty is “to fortify the relations of

³⁵U.S. National Archives & Records Administration, The Executive Order 8749; http://www.archives.gov/federal_register/executive_orders/1941.html. Last visited 2004-10-16

³⁶Murphy, The History of Guantanamo Bay. 1953; http://www.nsgtmo.navy.mil/gazette/History_98-64/hischnp3.html. Last visited 2004-10-16,

³⁷ Neuman, Closing the Guantanamo Loophole. Loyola Law Review, Spring 2004

³⁸ Neuman, Closing the Guantanamo Loophole. Loyola Law Review, Spring 2004

³⁹ The Republic of Cuba, Ministry of Foreign Relations Information Center. Guantanamoo, Yankee Naval Base of Crime and Provocations. 1970, p 9

⁴⁰ See Chapter 4.4 for definitions of ”real” leases

⁴¹ Ministerio de Relaciones Exteriores, Historia de una usurpacion. La base naval de Estados Unidos en la bahía de Guantánamo. 1979, p 55-58

friendship between the two countries”.⁴² According to international law the lessee must follow the contract and use the leased territory according to the purpose stated in the contract, since the consent to the agreement is based on that purpose. Not to do so would be a violation to the in international law accepted *Clausula rebus sic stantibus*. *Clausula rebus sic stantibus* refers to the silent or explicit reservation in an agreement, by which the continued validity of the agreements presupposes that the circumstances, which prevailed at the conclusion of the agreement, do not considerably change. The foundation for the contract was to strengthen the friendship between the two peoples. That foundation has according to Cuba disappeared as the naval base has become an instrument of aggression and consequently does not represent friendship. As a result, the purpose of the base has been substantially altered and according to the *Clausula rebus sic stantibus* the agreement is not valid anymore.⁴³

On July 26 1962, Fidel Castro made a policy statement concerning Guantanamo Bay where he declared that:

Cuba has not wavered nor will it ever waver in its determination to recover the land for its people, exercising its sovereignty according to international legal resources at the proper time. Caimanera⁴⁴ is Cuban. As Cuban as the mothers who have wept over the crimes committed there.⁴⁵

In 1961 Cuba stopped cashing in the annual fee that they, according to article I of the Supplementary Agreement of 1903⁴⁶, receives from the United States. This was done on the ground that the United States should not retain possession of Guantanamo Bay.⁴⁷ In 1964 Cuba ceased to supply water to the naval base in Guantanamo Bay, forcing the United States to install water purification plants.⁴⁸

2.7 Case law

The Cuban Supreme Court held in the case *In re Guzman and Latamble* of 1933 that the United States naval base in Cuba is foreign territory vis á vis a Cuban court. The case concerned a non-payment of duties on hogs, which

⁴² See Treaty of 1934, Supplement C

⁴³ Author unknown, The U.S. Naval Base at Guantanamo – Imperialist Outpost in the Heart of Cuba. 1963?, p 18

⁴⁴ Caimanera is the Cuban name for Guantanamo

⁴⁵ Author unknown, The U.S. Naval Base at Guantanamo, 1963?, p 36

⁴⁶ See article 1, Supplementary Agreement, Supplement B

⁴⁷ Maris, International law and Guantanamo. The Journal of Politics. Vol. 29, No. 2 (May 1967) p. 262, Murphy, The History of Guantanamo Bay. 1953.

http://www.nsgtmo.navy.mil/gazette/History_64-82/CHAPTER%20V.htm. Last visited 2004-10-16

⁴⁸ Neuman, Closing the Guantanamo Loophole. Loyola Law Review, Spring 2004

defendants brought from Guantanamo Bay into a neighbouring place in Cuba.⁴⁹

In the case *Spelar v. the United States* in 1949, the Supreme Court of the United States held that leased bases⁵⁰ were foreign territory in relation to the United States, since a transfer of sovereignty did not occur and was never intended to occur.⁵¹ In 1994 the United States Court of Appeal had in the case *Cuban American Bar Association v. Christopher* to determine whether Cuban and Haitian migrants temporarily detained at the Guantanamo Bay Naval Base could assert rights under various United States statutes and the United States Constitution.⁵² This was the first case examining the status of Guantanamo Bay. The Court of Appeal rejected the District Courts conclusion that Guantanamo Bay was territory of the United States and held that control and jurisdiction is not to be equated with sovereignty. The Court of Appeals then went on to reject the argument that United State's military bases abroad, which are situated on leased territory and remain under the sovereignty of foreign nations, are functionally equivalent to being within the United States.⁵³

2.8 Doctrine

Doctrine is not coherent on the topic of whether Cuba or the United States has sovereignty over Guantanamo Bay. All relevant agreements, treaties, state practice and other circumstances in connection with the lease of Guantanamo Bay are, depending on the scholar, interpreted differently.

It has been purported in international law literature that the territorial sovereignty over Guantanamo Bay belongs to the United States. The allocation of territorial sovereignty to the United States has been based on circumstances prior to Cuba's independence, claiming that the United States never surrendered its right of occupancy over Guantanamo Bay. This right of occupancy is based on the peace agreement of December 10 1898 between Spain and the United States, where Spain surrendered sovereignty over Cuba to the United States. According to customary and conventional international law, the United States was in rightful occupancy of Guantanamo Bay until the creation of the state Cuba in 1902. Guantanamo Bay still belongs to the United States, as they never surrendered their right of occupancy in relation to Guantanamo Bay and the agreements of 1903 and the treaty of 1934 confirmed this pre-existing occupational right.⁵⁴

⁴⁹ As quoted in Lazar, International Legal Status of Guantanamo Bay. The American Journal of International Law, Vol 62, no 3, (July 1968), p 738

⁵⁰ Referring to leased bases in general, not Guantanamo Bay solely

⁵¹ *Spelar v. U.S.*, 338 U.S. 217 (1949)

⁵² *Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995)

⁵³ Murphy, Ability of Detainees in Cuba to Obtain Federal Habeas Corpus Review. The American Journal of International Law. Vol. 96, No. 2, (April 2002), p 482

⁵⁴ Lazar, International Legal Status of Guantanamo Bay. The American Journal of International Law, Vol 62, no 3, (July 1968). p 740

It has also been claimed that Cuba granted away sovereignty over Guantanamo Bay to the United States in the Leasing Agreement of Guantanamo Bay. In a statement delivered to the Cuban Congress by the Cuban President, T. Estrada Palma concerning the Leasing Agreement of Guantanamo Bay, further support for this theory is established:

The constant energy of that Government [the United States] to secure the first two stations can only be compared with the efforts made by the Cuban not to cede more than the two stations previously mentioned.⁵⁵

Those in doctrine that oppose the conclusion that Cuba granted away sovereignty over Guantanamo Bay, see article III in the Lease Agreement of Guantanamo Bay, where the United States expressly recognises Cuba's continued "ultimate sovereignty", as an obvious confirmation of Cuba's continuance as sovereigns over Guantanamo Bay. The limits placed upon the United States' use of the base, restricting the use of the base solely for the purposes of coaling and a naval station, is claimed to support this theory.⁵⁶ The Supplementary Agreement also limits the persons, partnerships, or corporations that are permitted to establish or maintain a commercial, industrial or other enterprise within Guantanamo Bay.⁵⁷ The later restriction has by the United States been interpreted as meaning that only non-profit organisations and those related to military and defensive purposes are allowed on the base.⁵⁸ These restrictions and the fact that the United States seems to observe them should be viewed as evidence that Cuban sovereignty is real and effective and also acknowledged by the United States.⁵⁹

Much emphasis has been put on the similarities of the effects of the lease of Guantanamo Bay and the effects of the theory of cessions in disguise. This likeness is contravened by Maris, as he views article III of the Treaty of 1934, which states that the lease of Guantanamo Bay is to continue in effect until modification or abrogation by the contracting parties, leaves unanswered the question what happens should one of the contracting parties cease to exist by virtue of a loss of sovereignty or independence. This fact is very important since it distinguishes the lease of Guantanamo Bay from that of the Panama Canal Zone, where it has been purported that the rights required by the United States from Panama would persist even if the independence or sovereignty over Panama should change. The special relationship between Cuba and the United States, as stated in the preamble

⁵⁵ As quoted in Lazar. "Cession in Lease" of the Guantanamo Bay Naval Station and Cubas "Ultimate Sovereignty". *The American Journal of International Law*. Vol. 63, No. 1 (Jan. 1969), p 117

⁵⁶ See Lease Agreement of Guantanamo Bay, Supplement A and Supplementary Agreement, Supplement B

⁵⁷ See article III, Supplementary Agreement, Supplement B

⁵⁸ It does seem as if the United States does not adhere rigorously to the purpose anymore since i.e. McDonalds has been allowed to establish on the base.

⁵⁹ Maris, Guantanamo: No rights of occupancy. *The American Journal of International Law*. Vol. 63, No. 1 (Jan 1969), p p 114-115

to the Treaty of 1934, that the purpose for the agreement is the friendship of the two states and for mutual defensive needs seems to imply that the United States rights over Guantanamo Bay are dependant on a specific relationship between the two states and as a consequence not so strong as those rights the United States received in the case of the Panama Canal Zone.⁶⁰

Another presented theory concerning sovereignty over Guantanamo Bay claims that the United States for approximately fifty years has exercised the essential elements of sovereignty over the territory, without actually owning it. Unless the United States abandons the area or agrees to a modification of the terms of occupancy, they can continue in the present status as long as they like.⁶¹

⁶⁰ Maris, International law and Guantanamo. The Journal of Politics. Vol. 29, No. 2 (May 1967) p. 265

⁶¹ Murphy, The History of Guantanamo Bay. 1953;
http://www.nsgtmo.navy.mil/gazette/History_98-64/hischp3.htm. Last visited 2004-10-16

3 Sovereignty

3.1 Introduction

One of the key elements in this thesis is the identification of sovereignty and under which circumstances a transfer of sovereignty can occur. The identification of sovereignty is not unproblematic since there is no general definition of the concept. One of the reasons for the lack of a coherent definition is that legal, philosophical and political science scholars all attribute different meanings to sovereignty. Even within each discipline the definitions given by scholars are not coherent.

In this chapter I will outline the concept of sovereignty, focusing on territorial sovereignty. I will also present different theories concerning under which circumstances a transfer of sovereign rights and complete sovereignty can occur. In the end of this chapter I will apply the different theories concerning identification of transfer and derogations of territorial sovereignty to the case of Guantanamo Bay. Jurisdiction is described as a vital part of sovereignty, which makes it significant to examine the allocation of jurisdiction in the context of Guantanamo Bay and therefore I will do an assessment of the jurisdictional rights granted to the United States with the aim of establishing if those rights are equal to the United States having territorial sovereignty.

3.2 Historical background to the concepts of sovereignty

The notion of sovereignty has undergone changes over the centuries. One of the first to develop a theory about sovereignty was Bodin in the 16th century. According to his theory of sovereignty, in a state there could only be one final source and not more than one from which the laws proceeded and the essential manifestation of sovereignty was the power to make the laws. Also the sovereign could not be bound by the laws he made.⁶² Before Bodin, the word *souverain* had been used in France from the end of the middle ages, as defining an authority, political or other, with no other authority above itself.⁶³

After the Peace of Westphalia⁶⁴ in 1648, the Westphalian phase of sovereignty emerged. During this time sovereignty refers to the international order of sovereign states that were gradually being established. Sovereignty was seen as indivisible and containing the centralisation of all power in the

⁶² Brierly, *The Law of the Nations*, sixth edition. 1963, p p 8-9

⁶³ Oppenheim, *International law*, vol I. Peace. 1928, p p 137-139, also Walker, *Sovereignty in Transition*. 2003, p 231, Reisman, *Jurisdiction in International Law*. 1999, p 11

⁶⁴ Which ended the Thirty Years War

hands of the sovereign, whether a monarch or the people itself in a republic. That international order was supported by two complementary frameworks of law; Constitutional law – the law governing the internal order of sovereign states; and international law – the law governing the relations between sovereign states. A main characteristic of the Westphalian phase is that no claims to authority other than by or on behalf of a state were seriously countenanced.⁶⁵

The concept of sovereignty evolved and became more divisible during the 18th century. The debate concerning the divisibility of sovereignty continued and grew stronger during the 19th century.⁶⁶ Today, the scholarly debate focuses on if we have polities that rival with states, in terms of legal and political authority, as for example the EU, WTO and UN.⁶⁷

In conclusion, the discussion concerning the concept of sovereignty has over the centuries gradually evolved from originally primarily referring to the superiority of one authority within the boundaries of a state to now also attributing it to other political entities and international organisations.

3.3 Judicial definitions of sovereignty

As mentioned in the introduction to this chapter, a common judicial definition of sovereignty does not exist. An excursion through judicial literature discloses a multitude of different definitions. The Oxford Dictionary of Law defines sovereignty as "supreme authority in a state" and as the "ultimate authority to impose law" and "the power to alter any pre-existing law".⁶⁸ Sovereignty has in literature also been defined as "the nature of the rights over territory", meaning the fullest rights over territory.⁶⁹ Other scholars depict it as the "totality of powers which states may, under international law, have".⁷⁰ It has also been described as the "normal complement of state rights, the typical case of legal competence".⁷¹ Sovereignty has been interpreted as referring to a "ultimate authority" which is subject to no exterior or secular superior, but with the constraint that the "quality of sovereignty has never implied total and unlimited power".⁷² It has also been portrayed as "the highest legal order, power or authority" in relation to territory.⁷³

As seen above, the mentioning of powers or rights is a common characterization in the different definitions of sovereignty. Which are these powers or rights allegedly inherent in sovereignty? This is a complicated

⁶⁵ Walker, *Sovereignty in Transition*. 2003, p 9

⁶⁶ Oppenheim, *International law, vol I. Peace*. 1928, p p 138-142

⁶⁷ Walker, *Sovereignty in Transition*. 2003, p 10

⁶⁸ Oxford Dictionary of Law. 2000, p 469

⁶⁹ Brierly, *The Law of Nations*, sixth edition. 1963, p 162

⁷⁰ Crawford, *The Creation of States in International Law*. 1979, p 27

⁷¹ Brownlie, *Principles of Public International Law*, sixth edition. 2003, p 106

⁷² Gelber, *Sovereignty through Interdependence*. 1997, p 78

⁷³ Vali, *Servitudes in International Law*. 1958, p 7

question to answer since sovereignty neither corresponds to some state of affairs in an independently verifiable material world, nor, relatedly, is it commensurable with other concrete articulations of the abstract concept of “power” or “rights”. One way of picturing sovereignty is attached with certain substantive practises which are often coupled with the notion of power and rights, meaning the capacity of national authorities to regulate the flow of capital, goods, persons, services, pollutants, diseases, ideas etc across national boundaries.⁷⁴

3.3.1 Territorial sovereignty

A common feature in the above-cited definitions of sovereignty is that it is often coupled with control or power over territory. This intrinsic relationship between sovereignty and territory is a feature, which many scholars utilize when trying to explain the concept of sovereignty. A view fully supported by many scholars is that a state cannot exist without territory and a state is per definition a sovereign subject under international law.⁷⁵ Others depict the relationship between sovereignty and territory as the fullness of territorial rights is equal with territorial sovereignty and a state that enjoys territorial sovereignty can never be regarded as foreign in relation to that territory.⁷⁶ Territorial rights have been defined as rights of *imperium* (governance) and of *dominium* (ownership).⁷⁷

According to Shaw, territorial sovereignty has a positive and a negative aspect. The positive aspect concerns the exclusivity of the competence of the state regarding its own territory. The negative aspect refers to the obligation to protect the rights of other states.⁷⁸

Traditional international law provides five modes of acquisition of territorial sovereignty; occupation, prescription, accretion, cession and conquest. These are divided into original and derivative modes. An original acquisition is obtained through occupation or accretion and involves no transfer of sovereignty from a previous sovereign. The remaining modes are derivative and involve a transfer of sovereignty from a previous sovereign.⁷⁹

Territorial sovereignty extends principally over land territory, the territorial sea appurtenant to the land, and the seabed and subsoil of the territorial sea. The concept of territory includes islands, islets, rocks and reefs.⁸⁰

⁷⁴ Walker, *Sovereignty in Transition*. 2003, p 8

⁷⁵ Crawford, *The Creation of States in International Law*. 1979, p 36 and Verzijl, *International Law in Historical Perspective*. 1970, p 5

⁷⁶ Váli, *Servitudes of International Law*. 1958, p 50

⁷⁷ Green, *International Law – Law of Peace*. 1973, p 193

⁷⁸ Shaw, *International Law*, fifth edition. 2003, p 412

⁷⁹ Sharma, *Territorial acquisition, disputes and international law*. 1997, p 35

⁸⁰ Brownlie, *Principles of Public International Law*, fifth edition. 1998, p 105

3.3.2 The concept of Title to Territory

The concept of territorial sovereignty is closely connected with the notion of title to territory. Some scholars claim that the essence of territorial sovereignty is contained in the notion of title.⁸¹ The competence a state enjoys as sovereign over territory, is a consequence of the title the state holds over that territory. It is important to note that the competence is a consequence of the title and by no means conterminous with it. Thus, it is significant to observe that the power of disposition, which is an important aspect of state competence, may be limited by treaty and as long as that limitation of power of disposition is not total, the title is unaffected.⁸² The concept of “title to territory” concerns both the factual and the legal conditions under which territory is deemed to belong to one particular state or another.⁸³

Title to territory is often used as a way of identifying the validity of states concurring claims to territorial sovereignty. Deciding who has the better title, of the claimants to a certain territory, is according to international law most often a relative decision. A court deciding who has the title to a territory will consider all the relevant arguments and thereafter award the land to the state which relatively speaking puts forward the better legal case, as they for example did in the Island of Palmas⁸⁴ Arbitration case recapitulated below.⁸⁵

3.3.2.1 Case law - Island of Palmas arbitration case

The arbitral award of the Island of Palmas dispute has proven to be very significant on the subject of territorial sovereignty. The dispute was between the United States and Holland, concerning who had sovereignty over the Island of Palmas. The United States claimed to have inherited Spain’s claim to title by discovery. Holland claimed to have possessed and exercised rights of sovereignty over the island as far back as 1677, or even 1648. The rights of sovereignty were granted to a company from Holland and later to the state Holland, through treaties concluded by the company and by Holland with the native princes and these treaties established the suzerainty of Holland over the territory.

In the award, judge Huber discussed, amongst other things, the whole nature of territorial sovereignty. Huber noted that:

Sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State.

⁸¹ Shaw, *International Law*, fifth edition. 2003, p 412 and Brownlie, *Principles of Public International Law*, sixth edition. 2003, p 119

⁸² Brownlie, *Principles of Public International Law*, fifth edition. 1998, p p 120-121

⁸³ Shaw, *International Law*, fifth edition. 2003, p 412

⁸⁴ The Island of Palmas arbitration case, 4 IRL

⁸⁵ Shaw, *International Law*, fifth edition. 2003, p p 412-413

Sovereignty, which in relation to territory may be called territorial sovereignty, in the relation between States, signifies independence. Independence in relation to territory is the right to exercise therein, to the exclusion of any other State, the functions of a State.⁸⁶

He also stated that:

Subject to the reservation (more apparent than real) of composite States and of collective sovereignty, territorial sovereignty belongs always to one State, or in exceptional circumstances to several States, to the exclusion of all others.⁸⁷

The concept of title to territory was used as a way of solving the sovereignty question in this dispute. Judge Huber noted that:

If the dispute is based on the fact that one State has actually displayed sovereignty, it is not sufficient to establish the title by which territorial sovereignty was validly acquired at a certain date; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which must be considered as critical for the decision of the dispute. This demonstration consists in the actual display of normal State activities. An element, which is essential for the constitution of sovereignty must not be lacking in the maintenance of sovereignty. So true is this that practice, as well as doctrine recognises that the continuous and peaceful display of territorial sovereignty, in relation to other States, constitutes a good title.⁸⁸

Judge Huber dismissed the United States claim derived from the Spanish discovery as not effective to found a title. The Netherlands was declared to possess sovereignty on the basis of the actual continued and peaceful display of state functions, evidenced by various administrative acts performed over the centuries. In the judgment it was also emphasised that the manifestation of territorial sovereignty may assume different forms, according to conditions of time and place.⁸⁹ The less habitable, the farther distant from civilisation it is, the less intensive has the establishment of actual state supervision be.⁹⁰

⁸⁶ The Island of Palmas arbitration case, 4 IRL, p 104

⁸⁷ The Island of Palmas arbitration case, 4 IRL, p 104

⁸⁸ The Island of Palmas arbitration case. 4 IRL. 1965, p p 104-105

⁸⁹ Shaw, International Law, fourth edition. 1997, p 348

⁹⁰ Verzijl, International Law in Historical Perspective. 1970, p 349

3.3.3 Derogations from complete territorial sovereignty

According to international law, state practice and doctrine, territorial sovereignty shall not be equated with territory that only one state can have power over. The overall competence that a sovereign state possesses towards territory does not necessarily mean the complete competence over the territory in question has to be with that state. The sovereign state may *distribute* its sovereign competences to other states. Distributed sovereignty is described as when a state exercises “all the regular prerogatives of a government in such a manner that the island [or territory in general] must in fact, be regarded as having been governed by [another State]”.⁹¹ The state, which has the ultimate capacity of disposing of the territory, may be said to possess *titular, residual* or *nominal* sovereignty.⁹² The state, which exercises plenary power over the territory but lack the capacity of ultimate disposal may be said to possess *effective* sovereignty. According to O’Connell, residual and effective power, together make up the totality of sovereignty.⁹³

Another situation of derogation from complete territorial sovereignty is when two or more states exercises *divided* functions, which can give rise to different degrees of divided sovereignty, depending upon to what level the states must act jointly or may act separately within defined spheres of competence.⁹⁴

A form of divided sovereignty is *condominium*, resembling co-ownership in municipal law. Two states or more, on a basis of equality, jointly exercises condominium.⁹⁵ This is a form of dividing sovereignty, which is recognised by international law; for example, Great Britain and Egypt had condominium over Sudan, between 1898 and 1956.⁹⁶ In a judgment in 1917 concerning the dispute between El Salvador and Nicaragua, the International Court of Justice noted that states having condominium, may not perform any act disposing of a thing in common possession without all the involved states acting jointly or without the consent of all the involved states. The absence of that joint will is equivalent to the omission of an empowering formality.⁹⁷

Doctrine is not coherent on the possibilities of dividing sovereignty. Some scholars claim that it is not possible to divide sovereignty. That need not mean that the sovereign state has to possess total power in the sense of directly co-ordinating everything. Tasks may be distributed but the

⁹¹ O’Connell, International Law, vol I. 1965, p 354

⁹² The expression accorded to the phenomenon differs depending on the scholar

⁹³ O’Connell, International Law, vol I. 1965, p 352

⁹⁴ Crawford, The Creation of States in International Law. 1979, p 271

⁹⁵ Malanczuk, Akehurst’s Modern Introduction to International Law, seventh edition. 1997, p 158

⁹⁶ Brownlie, Principles of Public International Law, fifth edition. 1998, p 114

⁹⁷ Lauterpacht, Private Law Sources and Analogies of International Law. 1927, p 289, Shaw, International Law, fourth edition. 1997, p 165

sovereign state must retain the highest authority, meaning that ultimately sovereign powers can only be distributed vertically not horizontally.⁹⁸

According to Brownlie, a state has the right to make derogation from possessing complete sovereignty without any transfer of territorial sovereignty occurring, which he illustrates with this example:

State A may have considerable forces stationed within the frontiers of state B. State A may also have exclusive use of a certain area of state B, and exclusive jurisdiction over its own forces. If, however, these rights exist with the consent of the host state then state A has no sovereignty over any part of state B. In such a case there has been a derogation from the sovereignty of state B, but state A does not gain sovereignty as a consequence. It would be otherwise if state A had been able to claim that exclusive use of an area of state B was hers as sovereign, as of right by customary law and independently of the consent of any state.⁹⁹

3.3.4 Territorial jurisdiction – Evidence of change of sovereignty?

According to the Lease Agreement of Guantanamo Bay, article III¹⁰⁰, the United States was granted “complete jurisdiction” within and over Guantanamo Bay. Jurisdiction has in doctrine been described as a vital and central feature of state sovereignty.¹⁰¹ This correlation between sovereignty and jurisdiction makes it interesting to examine the allocation of jurisdiction over Guantanamo Bay.

3.3.4.1 Definition of jurisdiction

Jurisdiction is a complex concept, which in international law literature has been defined differently. It has been described as meaning power and in relation to states, the exercise of authority.¹⁰² Jurisdiction has also been depicted as particular rights or accumulations of rights quantitatively less than the norm.¹⁰³ Another description of jurisdiction refers to it as reflecting the basic principals of state sovereignty, equality of states and non-interference in domestic affairs and thus containing the power of a state to affect people, property and circumstances.¹⁰⁴ Other explanations of

⁹⁸ Walker, *Sovereignty in Transition*. 2003, p171-172

⁹⁹ Brownlie, *Principles of Public International Law*, fifth edition. 1998, p 106

¹⁰⁰ See article III, Lease Agreement of Guantanamo Bay, Supplement A

¹⁰¹ Shaw, *International Law*, fourth edition. 1997, p 452

¹⁰² Green, *International Law – Law of Peace*. 1973, p 181

¹⁰³ Brownlie, *Principles of Public International Law*, sixth edition. 2003, p 106

¹⁰⁴ Reisman, *Jurisdiction in International Law*. 1999, p 140

jurisdiction focuses on its function as an exercise of authority, which may alter, create or terminate legal relationships.¹⁰⁵

Jurisdiction is defined as being an important component of sovereignty as a sovereign state is described as having a) jurisdiction, prima facie exclusive, over a territory and the permanent population living there; b) a duty of non-intervention in the area of exclusive jurisdiction of other states, also called the principle of domestic jurisdiction.¹⁰⁶

In general it could be concluded that sovereign states have exclusive jurisdiction within and over its own territory and to all persons present upon it, irrespective of nationality.¹⁰⁷ It is important to note that only because a state is exercising jurisdiction over territory, it does not mean that the state has the right of possession to territory, since it is possible to exercise authority over an object without owning it or having the right to dispose of it. In other words, jurisdiction may be exercised without having a title to territory.¹⁰⁸

According to international law there are different modes of acquiring jurisdiction. These are through lease, cession (purchase or conquest), avulsion or accretion, gift, prescription, discovery and occupation.¹⁰⁹

3.3.4.2 Legislative, judicial and enforcement jurisdiction

There are three different types of jurisdiction; legislative, judicial and enforcement jurisdiction.¹¹⁰ Legislative refers to the power of the constitutionally recognised state organs, to make binding laws and rules within its territory.¹¹¹ Anyone present within the territory is subject to the laws of the territory unless he or she is granted immunity.¹¹² In many areas the state has legislative exclusivity, as for example court procedures and other procedural techniques. A states legislative supremacy within its own territory can be challenged if an adopted law is contrary to international law.¹¹³

Judicial jurisdiction concerns the powers of the courts of a state, to establish procedures for identifying breaches of the laws and to hear cases concerning the persons, property or events in question.¹¹⁴

¹⁰⁵ Shaw, *International Law*, fifth edition. 2003, p 572

¹⁰⁶ Brownlie, *Principles of Public International Law*, fifth edition. 1998, p 289

¹⁰⁷ Brierly, *The Law of Nations*. 1963, p 222, Shaw, *International Law*, fifth edition. 2003, p 574 and Green, *International Law – Law of Peace*. 1973, p 192

¹⁰⁸ Swift, *International Law – Current and Classic*. 1967, p 120

¹⁰⁹ Swift, *International Law – Current and Classic*. 1967, p 120

¹¹⁰ Brownlie, *Principles of Public International Law*, sixth edition. 2003, p 297

¹¹¹ Shaw, *International Law*, fourth edition. 1997, p 456

¹¹² Green, *International Law – Law of Peace*. 1973, p 192

¹¹³ Shaw, *International Law*, fourth edition. 1997, p 456

¹¹⁴ Malanczuk, *Akerhurst's Modern Introduction to International Law*, seventh edition. 1997, p 109 and Oxman, *Jurisdiction of States*. Bernhardt, *Encyclopedia of Public International Law*, vol III. 2000, p 55

Enforcement jurisdiction refers to the executive's power of physical interference, as for example the arrest of persons, seizure of property because of breach of the law or alleged breaches.¹¹⁵

3.4 Jurisdiction and its limitations according to the Guantanamo Bay agreements of 1903 and the treaty of 1934

The question of jurisdiction and its limitations in relation to Guantanamo Bay was dealt with in several articles in the agreements of 1903.

Article III in the Lease Agreement of Guantanamo Bay is the essential provision concerning jurisdiction, which states that 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.¹¹⁶

In the Supplementary Agreement, article IV states that:

Fugitives from justice charged with crimes or misdemeanours amenable to Cuban Law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities.¹¹⁷

The provision is reciprocal in its effects as Cuba also agreed that:

..... fugitives from justice charged with crimes or misdemeanours amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities.¹¹⁸

The article places an obligation on the enforcement jurisdiction of the United States in relation to Guantanamo Bay, as it binds them to deliver, upon demand from Cuban authorities, fugitives from Cuban law.

The Treaty of 1934¹¹⁹ did not in any way alter the standing of jurisdiction over Guantanamo Bay.

¹¹⁵ Malanczuk, Akerhurst's Modern Introduction to International Law, seventh edition. 1997, p 109

¹¹⁶ See article III, Lease Agreement of Guantanamo Bay, Supplement A

¹¹⁷ See article IV, Supplementary Agreement, Supplement B

¹¹⁸ See article IV, Supplementary Agreement, Supplement B

¹¹⁹ See Treaty of 1934, Supplement C

3.5 Analysis of Guantanamo Bay and the concept of territorial sovereignty and territorial jurisdiction

As stated in the beginning of this chapter, sovereignty is a wide concept with many meanings. Sovereignty could be described as the overall framework encompassing many different dimensions. The dimension, which is of interest in connection with Guantanamo Bay, is that of territorial sovereignty. An assessment of international law literature reveals that there are mainly three possibilities concerning the allocation of territorial sovereignty in the context of Guantanamo Bay. Either the United States has complete territorial sovereignty over Guantanamo Bay or Cuba still possess the complete territorial sovereignty. The third possibility is that there has been some form of derogation of sovereignty, leading to that neither Cuba nor the United States possesses complete sovereignty.

I will begin by examining the possibility concerning if a complete transfer of territorial sovereignty to the United States has occurred or if no transfer at all has occurred, leaving Cuba with complete territorial sovereignty over the area. Territorial sovereignty has been defined as the fullness of territorial rights. When applied to the case of Guantanamo Bay neither Cuba nor the United States could be adjudged to possess complete territorial rights over the area. According to the wording of the Leasing Agreement of Guantanamo Bay, Cuba secured the United State's recognition of Cuba's ultimate sovereignty, while granting the rest of the rights over Guantanamo Bay to the United States.¹²⁰ It is feasible to interpret this stipulation of recognition of ultimate sovereignty as an articulated reservation of Cuba's ultimate right of disposition of Guantanamo Bay, granting the effective sovereignty to the United States.

The United State's powers over Guantanamo Bay is not unrestricted, for example article III of the Supplementary Agreement of July 2 1903 limits the categories of persons, partnerships or corporations that may establish or maintain commercial, industrial or other enterprises within the area.¹²¹ Today it is questionable if the United States is respecting this restriction, as McDonalds, Pizza Hut, Subway and Kentucky Fried Chicken has been allowed to establish within the premises.¹²² Furthermore, in article IV the United States and Cuba promise to upon demand exchange fugitives from law, which more precisely restricts the jurisdictional powers granted to the United States.¹²³ Article V prohibits the United States from transporting materials, merchandise, stores and ammunition of war from Guantanamo

¹²⁰ See article III, Lease Agreement of Guantanamo Bay, Supplement A

¹²¹ See article III, Supplementary Agreement, Supplement B

¹²² Neuman, Closing the Guantanamo Loophole. Loyola Law Review, Spring 2004

¹²³ See article IV, Supplementary Agreement, Supplement B

Bay to Cuba.¹²⁴ It is unsure if the United States sees themselves as bound by these restrictions, however no evidence of direct violations has surfaced, besides the establishment of McDonalds and other fast food chains, which is a clear violation of article III of the Supplementary Agreement.

Another way of establishing whether Cuba or the United States have territorial sovereignty over Guantanamo Bay is to examine which of the states has title to Guantanamo Bay. This is determined by examining the legal and factual conditions. This process is a two-tier: a state has to have acquired legal sovereignty and exercised factual sovereignty, in order to be deemed to have title to territory. In the case of concurring claims of title to territory, the Island of Palmas arbitration case illustrates the process of determining which state has the better title to territory. Applying the test to the case of Guantanamo Bay reveals that there is an important difference between Guantanamo Bay and the Island of Palmas case; as there are no concurring claims concerning territorial sovereignty over Guantanamo Bay, since the United States does not claim sovereignty.

Fictionally applying a test of title to the case of Guantanamo Bay would most likely lead to the conclusion that Cuba has the better case since their claim to sovereignty is validly acquired and the wording of article III of the Leasing Agreement of Guantanamo Bay could be seen as a reservation of the right of disposition, the implication being that Cuba still possesses a sovereign right. The United States claim to title would be weaker since they would have considerable problems in proving that they legally acquired a claim to sovereignty, as leasing is not an accepted way to obtain territorial sovereignty according to international law. If the lease instead is to be considered to be a cession¹²⁵, the United States could maybe be said to have acquired a valid claim to title. The next step would then have to be to examine if the criteria of factual display of state activities is fulfilled, which would strengthen the United States case since they have in fact controlled Guantanamo Bay alone for over a hundred years, to the complete exclusion of Cuba. It is unlikely if Cuba has ever exercised any normal state activities over Guantanamo Bay. In conclusion, when applying the test of title to territory to the case of Guantanamo Bay, it seems as if Cuba has the better claim to title, since it is highly dubious if the United States has validly acquired a legal title to territory, but if that should be the case, then the United States would probably be adjudged to have the better claim to title.

A third possibility concerning the allocation of territorial sovereignty over Guantanamo Bay is that of derogations from complete sovereignty, which can be made in various forms and extents, as demonstrated in this chapter. One form of derogation is when a state has distributed away most of its sovereignty, leaving them with only the ultimate capacity of disposing of the territory. What the grantor is left with has been referred to as titular, residual or nominal sovereignty. Is the case of Guantanamo Bay a derogation from Cuba or the United States possessing complete territorial

¹²⁴ See article V, Supplementary Agreement, Supplement B

¹²⁵ See Chapter 4.4.2 concerning disguised cessions.

sovereignty? A possible interpretation of article III of the Lease Agreement of Guantanamo Bay¹²⁶, where the United States recognizes the continuance of Cuba's ultimate sovereignty over Guantanamo Bay, as Cuba keeping the ultimate right of disposition. This would leave Cuba with titular, residual or nominal sovereignty and the United States would possess the effective sovereignty over the area. This scenario of derogated sovereignty between Cuba and the United States is very likely since the United States was granted and has exercised all the regular prerogatives of a government, the result being that the United States in reality exclusively governs Guantanamo Bay.

Another form of derogation is that of divided sovereignty or otherwise referred to as condominium. An examination of the agreements of 1903, the Treaty of 1934 and of the parties conduct concerning Guantanamo Bay does not indicate that the territorial sovereignty is dual or divided between the parties, since the United States is completely controlling Guantanamo Bay, without any Cuban interference. The scenario of condominium seems therefore not likely in regards to Guantanamo Bay.

As stated in the beginning, jurisdiction is generally viewed as an effect or part of sovereignty even if it is important to note that the granting of jurisdiction to another state does not have to mean that the grantee receives the title to territory. The task of trying to establish how far reaching the "complete jurisdiction"¹²⁷ that the United States was granted over Guantanamo Bay is, can be viewed as a way to measure how much sovereignty the United States received or if there were any limitations to the sovereign rights over Guantanamo Bay that Cuba granted to the United States. According to the wording in article III of the Lease Agreement of Guantanamo Bay, there were no limits to the jurisdiction that the United States was granted.¹²⁸ In article IV in the Supplementary Agreement, there is a reciprocal commitment, which obliges the United States and Cuba to use its enforcement jurisdiction and to, upon demand, deliver fugitives to justice, charged with crimes or misdemeanours under the other states law.¹²⁹ This should be viewed as a restriction of the complete jurisdictional powers that the United States was granted in the Leasing Agreement of Guantanamo Bay.

An important question is to what extent the United States has in practice exercised their right to complete jurisdiction or if they view their jurisdictional rights as restricted. Since the United States gained control over Guantanamo Bay it seems as if they have been the sole exerciser of all jurisdictional rights over the area. The United States has always claimed jurisdiction over crimes committed on the base even if Cuban nationals were involved.¹³⁰ As the verdict in the case *Rasul ET AL. v. Bush*¹³¹ reveals, the

¹²⁶ See article III, Lease Agreement of Guantanamo Bay, Supplement A

¹²⁷ See article III, Lease Agreement of Guantanamo Bay, Supplement A

¹²⁸ See article III, Lease Agreement of Guantanamo Bay, Supplement A

¹²⁹ See article IV, Supplementary Agreement, Supplement B

¹³⁰ Maris, International law and Guantanamo. The Journal of Politics. Vol. 29, No. 2 (May 1967) p 273

United States gave non-American citizens the right to address to American courts, if they are on territory where the United States exercises plenary and exclusive jurisdiction, which was found to be the case in Guantanamo Bay. The judgment even recognizes that the United States can exercise these rights permanently if they so choose.

In conclusion, since Cuba, according to article III, granted all of its jurisdictional rights to the United States and the limitation in article IV of the Supplementary Agreement is not so extensive and does not seem to ever have been utilized, the effect would be that the United States exercises far reaching rights of territorial sovereignty, namely that of complete jurisdiction. Possessing complete jurisdictional rights are not equal to having title territory, but a necessary part of it.

¹³¹ Supreme Court Decision of the United States, Rasul ET AL. v. Bush, President of the United States. No 03-334, p p 1-2

4 International lease of territory – in theory and doctrine

4.1 Introduction

He offer'd me also 60 Pieces of Eight more for my Boy Xury, which I was loath to take, not that I was not willing to let the Captain have him, but I was very loath to sell the poor Boy's Liberty, who had assisted me so faithfully in procuring my own. However when I let him know my Reason, he own'd it to be just, and offer'd me this Medium, that he would give the Boy an Obligation to set him free in ten Years, if he turn'd Christian; upon this and Xury saying he was willing to go to him, I let the Captain have him.¹³²

I decided to use this quote from Robinson Crusoe as an introduction to the concept of international territorial lease to illustrate that lease agreements have very much in common with the private law concept of lease. The debate amongst scholars on the topic of international territorial leases has been very vivid as the views concerning its effects are not coherent. A purported view by some scholars is that international territorial lease is just a disguise, used to hide what in reality is a cession. According to others, an international territorial lease is just a lease and nothing more.

My objective with this chapter is to explain the concept of international territorial lease agreements, which is not an easy task since each lease differs from the other. I will also explain the legal concept of international territorial leases and the theories of disguised cession and time-limited cession. In the end of this chapter I will apply the legal concept of international territorial leases and the theories of disguised cession and time-limited cession to the lease of Guantanamo Bay, with the purpose of establishing the nature of the lease of Guantanamo Bay; is it a “real” lease or is it in reality a cession. To enhance the understanding of these theories I will also explain the concept of cession and its effects.

4.2 History of international leasing agreements

It was very popular during the end of 19:th century and the beginning of the 20:th century for states to lease territory from other states.¹³³

¹³²Robinson Crusoe, as quoted by Sim, *The discourse of Sovereignty, Hobbes to Fielding-The State of nature and the nature of the State*. 2003, p 141

¹³³Rumpf, *Territory, Lease*. Bernhardt, *Encyclopedia of Public International Law*, vol. IV. 2000, p 844

The mode of leasing territory has according to history mostly been used for five different reasons. These are:

1. to provide access to the big rivers or lakes of Africa;
2. to acquire suitable ports and additional establishments on the coast of China;
3. to assure the possibility of constructing a railway, a road or a canal across the territory of another state which was to remain under its sovereignty;
4. to secure free zones in foreign seaports with the object of remedying an unfavourable situation caused to a state by being cut off from the high seas;
5. to provide army, naval or air bases on foreign territory.¹³⁴

A common feature for most international territorial leases is that they have mostly been advantageous and favourable for one party, primarily the leasing party. The use of leases are of decreasing importance today and the only type of international territorial lease agreement that has not fallen completely out of use are leases with the aim to provide a state with an army, naval or air base on foreign territory.¹³⁵

4.3 Definition of international lease of territory

4.3.1 General principles

The legal concept of lease is derived from private law, where it is defined as a contract by which an owner of land or a building (the lessor) agrees to the use of such property by another (the lessee) for a certain time, for a fixed payment (the rent), usually in money.¹³⁶ With some small modifications this definition is also valid in international law. Lease of territory has in international law been described as an agreement by which a subject of international law agrees to allow another subject of international law, as a rule sovereign states, to have the use of a part of the lessor's territory through the exercise of some or all sovereign rights, including the lessee's own administration, and the usufruct of the territory for a certain payment.¹³⁷ Shaw describes lease as a legal right exercisable over the territory of other states, which fall short of absolute sovereignty.¹³⁸ According to Verzijl, lease agreements include a more or less extensive

¹³⁴ Verzijl, *International law in historical perspective*, vol. III. 1970, p 398

¹³⁵ O'Connell, *International Law*, vol. II. 1965, p 362

¹³⁶ Rumpf, *Territory, Lease*. Bernhardt, *Encyclopedia of Public International Law*, vol. IV. 2000, p 842

¹³⁷ Rumpf, *Territory, Lease*. Bernhardt, *Encyclopedia of Public International Law*, vol. IV. 2000, p 842

¹³⁸ Shaw, *International Law*, fifth edition. 2003 p 459

number of sovereign rights for the benefit of the lessee state, or even a formal transfer of the exercise of all sovereign rights to the lessee.¹³⁹

According to state practice, territorial leases usually includes that the lessor resigns the use of his sovereign rights in the territory, in full or in part, to the lessee who then has the right to install his own regime. What that regime might be composed of depends on to what extent the lessor has resigned his sovereignty. The regime includes at least governmental administration and at the most total administration and jurisdiction. The lessee has to pay a rent, which generally, but not necessarily is paid in a single fixed amount or as a recurring fee. Finally, no right arising from the contract may be transferable, by a party to the agreement, to a third party without the consent of the other party or parties to the agreement.¹⁴⁰

When a state is accorded the most total administration and jurisdiction i.e. the exercise of sovereignty according to a lease agreement, the sovereignty of the lessor state is reduced to *nudum jus* without any trace of effective application. One of the main characteristics of that type of lease, is that the *nudum jus* sovereignty of the lessor is to be given full content in the future, meaning that the lessor has a claim to full possession of the territory at the end of the time stipulated in the agreement.

In some cases, the lease does not contain stipulations concerning expiration dates. Then there are three possibilities to be considered according to the circumstances of the agreement; firstly the lessor may have a claim to the return of full possession at any time; secondly, the lessor may have a claim to negotiations on that subject, or thirdly, the lessor may have a claim to the return of full possession when the purpose of the contract is fulfilled. The later two possibilities may apply in the case of perpetual leases.¹⁴¹

4.4 Two categories of international territorial lease agreements according to international law

According to international law scholars, international territorial leases can be divided into two different categories.¹⁴²

The first category is leasing for a certain period of time during which the lessor state retains the sovereignty over the leased area and the legal relations between him and the lessee remains the same as in private law.

¹³⁹ Verzijl, *International Law in Historical Perspective*, vol. III. 1970, p 397

¹⁴⁰ Rumpf, *Territory, Lease*. Bernhardt, *Encyclopedia of Public International Law*, vol. IV. 2000, p 843

¹⁴¹ Rumpf, *Territory, Lease*. Bernhardt, *Encyclopedia of Public International Law*, vol. IV. 2000, p 843

¹⁴² O'Connell, *International Law*, vol II. 1965, p 360

Usually this type of leasing, described as “real” leases, do not furnish any difficulties in connection with sovereignty.¹⁴³

The second category of leases is often depicted as political leases, intending to affect the ownership of the territory. This second category is problematic since the provisions concerning sovereignty in this type of leases are often vague or non-existing, making it hard to establish which state retains sovereignty over the territory. There are two theories concerning political leases, the disguised cession- and the time-limited cession theory. Scholars claiming that leases have political character have been criticised for lack of legal reasoning.¹⁴⁴

4.4.1 Specific characteristics for “real” territorial leases

According to scholars the extent to which a lessee can obtain control over the territory through a lease agreement can vary. In a typical ”real” lease, the control is limited to a fixed period of time. Another characteristic of “real” leases is that the territory, explicitly or implied, is not transferable to a third power without the consent of the lessor state. Lease-agreements of this nature are judicially different from cessions, in wording and in effect.¹⁴⁵

4.4.1.1 Citizenship and nationality

If the leased territory has inhabitants these do not lose their original citizenship or nationality. If the lessee were to accord them civil rights and other rights, which used to be privileges of nationals or citizens of the lessee state, the inhabitants theoretically remain totally under the sovereignty of the lessor.¹⁴⁶

4.4.1.2 Treaty making power

If the lease does not contain rules concerning who has the right to enter into treaties with third parties on issues relating to the leased territory or its inhabitants, the circumstances e.g. tacit will, implied powers e.t.c. decides which of the parties to the lease has competence to conclude international treaties. The result will depend on the extent of sovereign rights that the party concerned is allowed to exercise according to the lease agreement.¹⁴⁷

¹⁴³ Lauterpacht, *Private Law Sources and Analogies of International Law*. 1927, p p 183-184

¹⁴⁴ Lauterpacht, *Private Law Sources and Analogies of International Law*. 1927, p p 184-186

¹⁴⁵ Lauterpacht, *Private Law Sources and Analogies of International Law*. 1927, p 186

¹⁴⁶ Rumpf, *Territory, Lease*. Bernhardt, *Encyclopedia of Public International Law*, vol. IV. 2000, p 843

¹⁴⁷ Rumpf, *Territory, Lease*. Bernhardt, *Encyclopedia of Public International Law*, vol. IV. 2000, p 843

4.4.1.3 Responsibility

When there is a problem of concurring claims to sovereignty over a leased territory, this will lead to difficulties allocating the responsibility for actions, wrongful according to international law, taken or derived from the leased territory. If there are no stipulations concerning responsibility, the lessee is responsible for all actions taken by its own organs on the leased territory. The lessor might be accorded participation in that responsibility if the organs of the lessee act in the name of the lessor or if the lessor does not make use of any legal or factual possibilities to intervene.¹⁴⁸

4.4.2 Political leases – the theory of disguised cession

A disguised cession has the effect of changing the holder of title over the territory. The use of the mode leasing were in those cases only intended as a veil to disguise the real purpose, which was to permanently acquire territory. Formal limitations were of no binding force since it had never been the lessee's intention to regard them as binding.¹⁴⁹ This type of political leases have been described as:

.... no more than a diplomatic device for rendering a permanent loss of territory more palatable to the disposed state by avoiding any mentioning of annexation and holding out the hope of eventual recovery.¹⁵⁰

During the beginning of the 20th century it was common for scholars to disregard legal formalities concerning the leases and instead base their conclusions upon what they saw to be the intention of the lessee states and the political reality. They regarded the leases as mere veils designed to hide the real intention of the lessee, which was to acquire the title to the territory and to hide the vulnerability of the lessor state.¹⁵¹

4.4.2.1 Effect of disguised cession theory

The practical consequences of a treaty concluded in accordance with the disguised cession theory are the same as those of a cession,¹⁵² in other words the treaty is regarded as executed; the legal obligation to restore the territory to the lessor is not enforceable, in case of war the validity of the treaty continues; the lessee is entitled to dispose of the leased territory and his sovereignty over the territory is supreme.¹⁵³

¹⁴⁸ Rumpf, Territory, Lease. Bernhardt, Encyclopedia of Public International Law, vol. IV. 2000, p 844

¹⁴⁹ Norem, Kiaochow Leased Territory. 1936, p p 56-57,

¹⁵⁰ Brierly, The law of nations. 1963, p p 189-190

¹⁵¹ Norem, Kiaochow; Leased Territory. 1936, p 56 and Lauterpacht, Private Law Sources and Analogies of International Law. 1927, p185

¹⁵² See Chapter 4.4.4.1.

¹⁵³ Lauterpacht, Private Law Sources and Analogies of International Law. 1927, p 190

4.4.3 Political leases - the theory of time-limited cession

The second theory concerning political leases is that of time-limited cession, which is when the ceding state only cedes the territory for a determined time but during that time the lessee is sovereign over the leased territory. The difference between time limited cession and disguised cession is the fact that scholars saw binding force in the ultimate reversionary right in the time-limited lease, this causing the transfer of sovereignty not to be definitive. In all other aspects the effects were the same as of a cession.¹⁵⁴

4.4.4 Cession

Cession of state territory occurs when the owner state intentionally transfers sovereignty over territory to another state. It is a bilateral transaction between states. The purpose of a cession is to transfer the sovereignty over the territory from the ceding state to the acquiring state. The parties must have the intention to transfer sovereignty.¹⁵⁵ The requirement of consent is of relatively recent origin, in the seventeenth and eighteenth century, this intention was assumed. Later, as an effect of the French revolution it became custom to, through a deliberate and formal action, substitute the sovereignty, usually in the form of a treaty of cession or domestic legislation, which manifested the intention of change of sovereignty.¹⁵⁶ Compensation is sometimes stipulated in the treaty.¹⁵⁷

Cession of territory usually occurs either at the end of war, which implies that it is involuntarily, or voluntarily, in the form of gift, purchase or exchange. Cession at the end of war is sometimes declaratory of what in reality is a fact meaning that the defeated state “consents” to the change of sovereignty even though it is already a legal fact. Involuntary cession is usually declarative to its character while in a voluntary cession the word “cede” is normally used.¹⁵⁸

4.4.4.1 Effects of cession

The effects of cession of territory is described as a permanent order of things, not affected by the outbreak of war between the parties to the cession. The ceding state hands over all its powers to exercise governmental authority within the territory. The acquiring state receives full territorial and jurisdictional rights but never more rights than its predecessor possessed.¹⁵⁹

¹⁵⁴ Norem, *Kiaochow Leased Territory*. 1936, p p 62-63

¹⁵⁵ Shaw, *International Law*, fifth edition. 2003, p 420-421

¹⁵⁶ Norman, *The right of conquest*. 1996, p p 120-122

¹⁵⁷ Oppenheim, , *International Law*, vol. I. Peace. 1928, p p 440-442

¹⁵⁸ O’Connell, *International Law*, vol. I. p 503

¹⁵⁹ Shaw, *International Law*, fifth edition. 2003, p 420-421 and Norem, *Kiaochow leased territory*. 1936, p 62

The acquiring state receives full title¹⁶⁰ to the territory and has the right to transfer his rights to a third state.¹⁶¹

On rare occasions cession has been known to be temporary. For example the cession of Halland by Denmark to Sweden in 1645 was only for thirty years, but it became final through the treaty of Roskilde concluded in 1658. Another example is the Island of Tigre in the Gulf of Fonseca, which was ceded by Honduras to the United States for a period of eighteen months.¹⁶²

4.4.5 Contemporary definition of international territorial leases

Today legal scholars define international territorial leases as legal rights exercisable by states over the territory of other states, which fall short of absolute sovereignty. These rights are attached to the territory and as such they may be enforced even though the ownership of the particular territory subject to the rights has passed to another sovereign, or in other words they are rights *in rem*.¹⁶³

4.5 Analysis of the lease of Guantanamo Bay

As reiterated in this chapter, there are two categories of international territorial leases; “real” leases and political leases. When comparing the lease¹⁶⁴ of Guantanamo Bay with these two categories, it seems to belong to the second, more problematic category of political leases, as there is no fixed time limit and the sovereignty provision in article III¹⁶⁵ of the Lease Agreement of Guantanamo Bay is not clear and unambiguous. Article III states that the United States recognizes the ultimate sovereignty of Cuba, and during the period of the United States occupation, they exercise complete jurisdiction and control over and within said areas. Nowhere in the lease is there a definition of what powers Cuba kept when they preserved the ultimate sovereignty for themselves but a likely interpretation is that it could mean that Cuba kept the ultimate right of disposition.

Does the lease of Guantanamo Bay display any of the characteristic effects of being a cession in disguise? This is hard to ascertain since there actually has not occurred an instance where the limits of the United State’s rights over Guantanamo Bay has been tested. How would the United States react if there were to be an outright outbreak of war between themselves and Cuba? Would it in any way effect the lease of Guantanamo Bay? It is clear that the United States is ignoring Cuba’s demand for them to leave Guantanamo

¹⁶⁰ See Chapter 3.3.2

¹⁶¹ Brownlie, Principles of Public International Law, fifth edition. 1998, p 131

¹⁶² Verzijl, International Law in Historical Perspective. 1970, p 394

¹⁶³ Shaw, International Law, fourth edition. 1997, p 366

¹⁶⁴ When referring to the lease of Guantanamo Bay in this chapter, the Leasing Agreement of Guantanamo Bay, Supplementary Agreement and the Treaty of 1934 are implied

¹⁶⁵ See article III, Lease Agreement of Guantanamo Bay, Supplement A

Bay. The lease agreements of Guantanamo Bay do not give Cuba the right to demand the eviction of the United States from Guantanamo Bay. An effect of a cession, which might be missing for the United States in this case, is whether they received the right of disposition of Guantanamo Bay or not. If the lease is to be viewed as a cession, Cuba would not have the right to demand the United States to leave Guantanamo Bay and the United States would not be obliged to obey. For the lease of Guantanamo Bay to be a disguised cession, all of the effects common to that type of transaction should be present, which might not be the case here.

The theory of time-limited cession seems to be very ill fitting to the case of Guantanamo Bay since there is no mentioning of time limitation in the leasing agreements of Guantanamo Bay. The only reference to the termination of the lease is made in the Treaty of 1934¹⁶⁶, which contains provisions regarding the procedure for ending the lease, but no mentioning of an end-time. The United States does not seem to be intending to leave Guantanamo Bay, as it has strong geopolitical value to them. Secretary of State, Rusk, has further evidenced the United States lack of intent to, in a near future, obey Cuba's demand for their departure when stating that:

We shall certainly not discuss the future of Guantanamo with a regime which does not speak for the Cuban people, which has been unanimously condemned by the governments of this hemisphere, and which demonstrates both in words and actions its hostilities to its neighbours.¹⁶⁷

In the case of *Rasul ET AL. v. Bush*, the Supreme Court of the United States further emphasised the possibility for the United States to control Guantanamo Bay permanently by stating in the judgment:

The United States exercises complete jurisdiction and control over the Guantanamo Bay and may continue to exercise such control permanently if it so chooses.¹⁶⁸

It is clear that, according to international law, territorial leases are today not a valid way to obtain title to territory and it is very questionable if it ever has been. Scholars in the beginning of the 20th century saw international leasing agreements as a veil to hide what they saw as in reality being cession of territory. Instead of publicly calling it cession, it was named lease. The purpose for this fraud was to not upset the lessor. The effects of the lease were the same as of a cession, the title to territory changed owner. It is difficult to establish if a cession in disguise has occurred in this case.

¹⁶⁶ See article III, Treaty of 1934, Supplement C

¹⁶⁷ Secretary of State Rusk as quoted in Maris, *International law and Guantanamo*. The Journal of Politics. Vol. 29, No. 2 (May 1967) p. 285

¹⁶⁸ *Rasul ET AL. v. Bush*, President of the United States. The Supreme Court of the United States, No 03-334, p 12. (2004)

The United States original purpose might very well have been to obtain Guantanamo Bay through a disguised cession but over time the United State's and Cuba's official opinions does not seem to support the conclusion that Guantanamo Bay was ceded in disguise to the United States. A more interesting question is what sovereign powers Cuba in reality have over Guantanamo Bay. If the answer to that question is none, then the United States should be viewed as sovereigns over Guantanamo Bay.

5 International lease of territory in state practice – Guantanamo Bay in comparison to the New Territories and the Panama Canal Zone

5.1 Introduction

After having examined the legal concept of international territorial leases and theories and doctrinal comments pertaining to the concept, we now turn our attention to state practice concerning leased territory, in order to examine the validity of the theories concerning sovereignty and international territorial leases explained in the two previous chapters. This chapter seeks to examine the lease and subsequent agreements of the New Territories in China and the Panama Canal Zone. The examination will focus on the identification of the lease category¹⁶⁹, the allocation of sovereignty and jurisdiction¹⁷⁰ according to the agreements concluded, subsequent state practice and doctrine. In the end of this chapter I will compare the cases of the New Territories and the Panama Canal Zone with Guantanamo Bay, with the purpose of identifying similarities concerning the allocation of sovereignty over leased territory.

5.2 The New Territories

5.2.1 Historical Background

On June 9 1898 the Convention Respecting an Extension of the Hong Kong Territory¹⁷¹ (Lease Agreement of New Territories) was signed between China and Great Britain. According to the agreement Great Britain leased part of San On county of Kwangtung for ninety-nine years. The area, later known as the New Territories was by Her Majesty's The New Territories Order in Council of October 20 1898¹⁷² (Order in Council) absorbed into the colony of Hong Kong. The lease of the New Territories expired on June 30 1997, whereupon Hong Kong and the New Territories were returned to China.¹⁷³

¹⁶⁹ See Chapter 4.4

¹⁷⁰ See Chapter 3

¹⁷¹ See Lease Agreement of New Territories, Supplement D

¹⁷² See Order in Council, Supplement E

¹⁷³ See article 1 – 2, Joint Declaration of the Government of the United Kingdom and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong: <http://www.info.gov.hk/trans/jd/jd2.htm>. Last viewed 2004-11-21

Great Britain's reason for seeking to enlarge the colony of Hong Kong was, as stated in the preamble of the Lease Agreement of New Territories:

.... it has for many years past been recognized that an extension of Hong Kong territory is necessary for the proper defence and protection of the Colony.¹⁷⁴

Another reason for enlarging the Hong Kong territories, not stated in the preamble, is the fact that many prominent members of the Hong Kong community had bought territory in the area latter leased. Getting control over custom in the surrounding waters was also a reason for wanting to enlarge the area under British control.¹⁷⁵

5.2.2 Sovereignty and jurisdiction according to the lease, the Order in Council of 1898 and state practice

It can at best be said that according to the wording of the Lease Agreement of the New Territories, Great Britain received the right to administrate the New Territories. In the agreement China reserved some privileges, for example "within the city of Kowloon the Chinese officials now stationed there shall continue to exercise jurisdiction, except so far as may be inconsistent with the military requirements for the defence of Hong Kong",¹⁷⁶ and "the existing landing-place near Kowloon City shall be reserved for the convenience of Chinese men-of-war, merchant and passenger vessels".¹⁷⁷ In other words, according to the provisions of the agreement, British jurisdiction within the leased territory was not as plenary as that over ceded Hong Kong. There was no mentioning in the lease of the allocation of sovereignty.

Later the same year Great Britain issued the Order in Council¹⁷⁸ where they extended the sovereignty and jurisdiction over the New Territories to the same degree as that of Hong Kong. In the order Great Britain stated that the New Territories was:

..... hereby declared to be part and parcel of Her Majesty's Colony of Hong Kong inlike manner and for all intents and purposes as if they had originally formed part of the said Colony.¹⁷⁹

The order did not include the city of Kowloon, where the Chinese officials, in accordance with the Lease Agreement of the New Territories¹⁸⁰, were

¹⁷⁴ See Lease Agreement of New Territories, Supplement D,

¹⁷⁵ Wesley-Smith, *Unequal Treaty 1898-1997*. 1983, p 17

¹⁷⁶ See Lease Agreement of the New Territories, Supplement D

¹⁷⁷ See Lease Agreement of the New Territories, Supplement D

¹⁷⁸ See Order in Council, Supplement E

¹⁷⁹ See article I, Order in Council, Supplement E

¹⁸⁰ See Lease Agreement of the New Territories, Supplement D

allowed to continue to exercise jurisdiction.¹⁸¹ Later in 1898, Great Britain unilaterally abrogated the lease as they occupied Kowloon and seized jurisdiction thereof. This had the effect of assimilating Kowloon with the rest of the New Territories and Hong Kong.¹⁸²

The jurisdiction exercised over Hong Kong was based on British law. An effect of the assimilation achieved through the Order in Council, was that Great Britain was able to draft its own land law for the New Territories, declaring the land there “to be the property of the Crown during the term specified in the Convention of the 9th day of June 1898”. This arrangement allowed the British, when issuing sub-leases to owners and purchasers of land in the New Territories, to issue these sub-leases in the name of the Crown, rather than of the Chinese Emperor, who remained the sovereign as far as China was concerned. All territory that was sold in the New Territories was effectuated in the form of sub-leases. No sold sub-lease lasted longer than the head lease of the New Territories.¹⁸³

Along side with the land Great Britain acquired 100.000 Chinese villagers. The lease was silent on the topic of if the villagers were to remain Chinese subjects or become British subjects. When a resident in the New Territories in 1899 asked the Hong Kong government to certify him as a British subject, the Colonial Office’s legal advisers reported that the villagers of the New Territories were indeed British subjects, as would anyone else born in the New Territories during the period of the lease.¹⁸⁴

In practise the New Territories, due to their rural nature and dispersed population were administered through a separate system based on district administrative officers who liaised with the central government of Hong Kong and exercised a wide range of functions, with the assistance of traditional authority. It was not until early 1980:s that the New Territories became fully integrated with Hong Kong.¹⁸⁵

5.2.3 British and Chinese official opinions concerning sovereignty over the New Territories

The Order of Council of 1898 and the occupation of the city of Kowloon the same year were definite statements from Great Britain concerning their view on the status of the New Territories. In the order, Great Britain accorded the same status to the New Territories as that of ceded Hong Kong, where Britain exercised full sovereignty. Even the fact that the cession of the New Territories was only to last for ninety-nine years did not change Great

¹⁸¹ See article IV, Order in Council, Supplement E

¹⁸² Ghai, Hong Kong’s New Constitutional Order - The Resumption of Chinese Sovereignty and the Basic Law. 1997, p 7

¹⁸³ Cottrell, The End of Hong Kong. 1993, p p 22-23

¹⁸⁴ Cottrell, The End of Hong Kong. 1993, p p 14-15

¹⁸⁵ Ghai, Hong Kong’s New Constitutional Order - The Resumption of Chinese Sovereignty and the Basic Law. 1997, p p 13-14

Britain conclusion that they had full sovereignty over the area in question during those years.¹⁸⁶

China did not adhere to the British view that Great Britain had sovereignty over the New Territories. According to China, sovereignty remained with them during the lease period and Chinese residents were to remain Chinese subjects.¹⁸⁷ The closer the end of the ninety-nine year lease came, the stronger China voiced its opinion that sovereignty over the New Territories and Hong Kong belonged to them and had always done so. In the beginning of the 80:s, China and Great Britain held talks concerning the future of the Hong Kong colony, which included the New Territories, where it became blatantly clear that China in no way could contemplate a prolonging of the colony.¹⁸⁸

The two countries different views on who had sovereignty over the colony of Hong Kong is manifested in the Joint Declaration¹⁸⁹ that they issued, deciding the future of the colony. According to the Joint Declaration China declared in article 1 that they “decided to resume the exercise of sovereignty over Hong Kong”. Great Britain declared in article 2 that “it will restore Hong Kong to the People’s Republic of China with affect from 1 July 1997”.¹⁹⁰

5.2.4 Doctrinal views on sovereignty over the New Territories

Most scholars of today generally agree that some kind of transfer of sovereignty took place for the period of the lease.¹⁹¹ The doctrinal comments varies concerning to which extent a transfer of sovereignty occurred. According to some a complete cession did not take place, which is indicated by Great Britain’s recognition of the lease only lasting for ninety-nine years.¹⁹² Some claim that the New Territories through the Order in Council acquired the legal status of a time-limited cession.¹⁹³

¹⁸⁶ Wesley-Smith, *Unequal Treaty 1898-1997*. 1980, p 165, Ghai, *Hong Kong’s New Constitutional Order*. 1997, p 8

¹⁸⁷ Wesley-Smith, *Unequal Treaty, 1898-1997*. 1980, p166

¹⁸⁸ Cottrell. *The End of Hong Kong – The Secret Diplomacy of Imperial Retreat*. 1993, p 19

¹⁸⁹ The treaty in which Great Britain consented to withdraw its government from Hong Kong so China could resume its exercise of sovereignty over Hong Kong.

¹⁹⁰ See article 1 – 2, Joint Declaration of the Government of the United Kingdom and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong; <http://www.info.gov.hk/trans/jd/jd2.htm>. Last viewed 2004-11-21

¹⁹¹ Malanczuk, *Akehurst’s Modern Introduction to International Law*, seventh edition. 1997, p 158 and Starke, *Introduction to International Law*, tenth edition. 1989, p p 321-323

¹⁹² Wesley-Smith, *Unequal Treaty, 1898-1997*. 1980, p 178

¹⁹³ Cottrell, *The End of Hong Kong – The Secret Diplomacy of Imperial Retreat*. 1993, p 14

5.3 The Panama Canal Zone

5.3.1 Historical Background

Panama became independent from Colombia, through American intervention on November 3 1903. The United States decided to support Panamas uprising after failing to conclude an agreement with Colombia concerning the building of a canal through Panama. Panama granted the United States the Panama Canal Zone in the Hay/Bunau-Varilla agreement on November 18 1903. The United States motive for wanting the Panama Canal Zone was that of constructing an interoceanic canal across the Isthmus of Panama.¹⁹⁴

Philippe Bunau-Varilla, the last chief engineer on the failed French Panama canal project, drafted the lease. The lease was hastily drafted due to the fact that a Panamanian delegation, with superior orders to those of Buanu-Varilla, was on its way to Washington for the purpose of negotiating a canal agreement with the United States.¹⁹⁵

In 1977, Panama and the United States signed the Panama Canal Treaty, returning the Panama Canal Zone to Panama. According to the treaty the canal was to be under joint United States and Panamanian control until 1999, when Panama was to gain full control.¹⁹⁶

5.3.2 Sovereignty and jurisdiction according to the agreement of 1903 and state practice

Article II in the Hay/Bunau-Varilla agreement states that:

The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal.¹⁹⁷

Furthermore, article III in the agreement states that:

The Republic of Panama grants to the United States all the rights, power and authority within the zone [...] which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise

¹⁹⁴ Bray, The common law zone in Panama. 1977, p p 33-38

¹⁹⁵See Graham, The "Interests of Civilization"? 1983, p 20 and Hay/Bunau-Varilla Agreement, Supplement F

¹⁹⁶See article II, The Panama Canal Treaty of 1977;

<http://www.state.gov/p/wha/rlnks/11936.htm>. Last visited 2004-11-09

¹⁹⁷ See article II, Hay/Bunau-Varilla Agreement, Supplement F

by the Republic of Panama of any such sovereign rights, power, or authority.¹⁹⁸

In return for the rights that the United States were granted, they had to pay or compensate Panama with the sum of ten million dollars in gold coins and an annual payment of two hundred and fifty thousand dollars in gold coins, according to article XIV.¹⁹⁹ The agreement was silent on the subject of jurisdiction.²⁰⁰

The United States manifested in various ways that they had sovereign rights over Panama Canal Zone; for example the Governor over the Canal Zone was an American general, the United States had its own courts and police force in the area and the headquarter for all American military and intelligence activities in Latin America was situated in the Canal Zone.²⁰¹ Furthermore, the United States changed the Panama Canal Zone from a Civil Law- to a Common Law jurisdiction zone. The Common Law Code of 1907, which superseded Panamanian Code in the Panama Canal Zone, was based on the Californian Common Law Code.²⁰²

The United States also conducted activities in the area, which fell outside the purpose of the lease, being “for the construction, maintenance, operation, sanitation and protection of said canal”.²⁰³ For example the School of the Americas, which was a school set up by the United States for the indoctrination and acculturation of Latin American military officers, did not fall under the purpose of the grant.²⁰⁴

In 1936 Panama and the United States altered the geographical limits of the Panama Canal Zone, and undertook to co-operate to ensure the benefits of the Canal to all nations. Also, the United States accorded to Panama certain commercial privileges in the Zone, and exemption from duties and taxes on goods entering the Zone from Panama. In 1955 the United States abandoned the transportation monopoly it had enjoyed in the Zone, and increased the annuity payments to Panama.²⁰⁵

5.3.3 Panama’s and the United State’s official opinions concerning sovereignty over the Panama Canal Zone

It was Panamas official opinion that they had not granted sovereignty over the Panama Canal Zone to the United States.²⁰⁶

¹⁹⁸ See article III, Hay/Bunau-Varilla Agreement, Supplement F

¹⁹⁹ See article XIV, Hay/Bunau-Varilla Agreement, Supplements F

²⁰⁰ Bray, *The Common Law Zone in Panama – A Case Study in Reception*. 1997, p 41, and Hay/Bunau-Varilla Agreement, Supplement F

²⁰¹ Asrat, *Jurisdiction in USA v. Noriega*. 2000, p 78-79

²⁰² Bray, *The Common Law Zone in Panama – A Study in Reception*. 1977, p 96

²⁰³ See article II, Hay/Bunau-Varilla Agreement, Supplement F

²⁰⁴ Asrat, *Jurisdiction in USA v. Noriega*. 2000, p 78-79

²⁰⁵ O’Connell, *International Law*, vol I. 1965, p 356

²⁰⁶ Bray, *The Common Law Zone in Panama – A Case Study in Reception*. 1977, p p 41-42

Secretary of War William H. Taft stated in a report concerning the Panama Canal on December 19, 1904 to President Roosevelt, what was to be the United States standard view on the question of sovereignty over Panama Canal Zone during the early years of the lease period:

The truth is that while we have all the attributes of sovereignty necessary in the construction, maintenance, and protection of the Canal, the very form in which these attributes are conferred in the treaty (of 1903) seems to preserve the titular sovereignty over the Canal Zone in the Republic of Panama, and as we have conceded to us complete judicial and police power and control of two ports at the end of the Canal, I can see no reason for creating a resentment on the part of the people of the Isthmus by quarrelling over that which is dear to them, but which to us is of no real moment whatever.²⁰⁷

The United States never gave an official positive definition to what powers a state with titular sovereignty possesses.²⁰⁸

During the hearings on Panama Canal Treaties in 1977, Attorney General Griffin B. Bell testified that:

We have the closest thing you can get to sovereignty. We are not the titular sovereign, but we have all the powers of the sovereign, so I think we have to assume that we have something near or akin to sovereignty”.²⁰⁹

In 1946 the United States included the Panama Canal Zone in a list regarding American-owned non-self-governing territories sent to the UN, which greatly annoyed Panama.²¹⁰

5.3.3.1 Case law

The Supreme Court of the Panama Canal Zone held in the case *Canal Zone v. Coulson* of 1907 that the Constitution of the United States did not apply in the Zone, since the Panama Canal Zone was not territory of the United States.²¹¹

The Supreme Court of the United States held in the case *Luckenbach Steamships Co v. U.S.* in 1930 that ports in the Panama Canal Zone were foreign ports for revenue statute purposes.²¹²

²⁰⁷ LaFeber, *The Panama Canal*. 1989, p 35

²⁰⁸ Stoll, *Canalgate*. 1989 p p 419-420

²⁰⁹ Stoll, *Canalgate*. 1989, p 352

²¹⁰ James, *Sovereign Statehood*. 1986, p 33

²¹¹ O'Connell, *International Law*, vol. I. 1965, p 357

²¹² O'Connell, *International Law*, vol. I. 1965, p 357

Less consistent in its ruling concerning the Panama Canal Zone has the Supreme Court of Panama been. The court stated in the case *Lowe v. Lee* that marriage entered between two Panamanians in the Canal Zone had taken place abroad.²¹³ In the case *RE Cia. De Transportes de Gelabert* the Supreme Court of Panama declared that the airspace above the Canal Zone belonged to the Republic of Panama.²¹⁴ The Supreme Court held in the case *Re Burriel* that the United States-Panama extradition treaty did not apply to the Panama Canal Zone, as it was not foreign territory.²¹⁵

5.3.4 Doctrine

The as “if it were the sovereign” provision in article III²¹⁶ of the agreement has been interpreted very differently by legal scholars. Some have interpreted it to mean that Panama surrendered her sovereignty when signing the agreement and was only left with titular sovereignty.²¹⁷ Other scholars claim that the rights Panama granted away when signing the agreement did not at all affect Panamanian sovereignty over the area.²¹⁸

Another author describes the rights granted to the United States in the agreement as equivalent to:

.... a great international right of way across Panama territory, of which the United States is the administrator and protector with power sufficient to carry out the great design of the parties.²¹⁹

The same author also said that in respect to police and judicial rights, the grant seemed to be without effective limitations and it seems as if the United States has “by a slim margin, the better case, if the controversy of sovereignty were to be viewed as strictly a contractual matter”.²²⁰ The author continues to examine the lease and claimed that the power to set up an exclusive and independent legal system may be implicit in “if it were the sovereign” language in article III.²²¹ The parties did not beforehand intend this power, which is shown by the parties’ statements and actions.²²²

Another suggested possibility is that when drafting the Hay/Bunau-Varilla agreement, Bunau-Varilla invented a “sovereignty that was not a

²¹³ O’Connell, *International Law*, vol. I. 1965, p 357

²¹⁴ Váli, *Servitudes in International Law*. 1958, p p 261-262,

²¹⁵ O’Connell, *International Law*, vol. I. 1965, p 357

²¹⁶ See article III, Hay/Bunau-Varilla Agreement, Supplement F

²¹⁷ See discussion about titular sovereignty in paragraph 3.2.3 and paragraph 6.3.4.1 and Kelly/Summ, *The Good Neighbors – America, Panama and the 1977 Canal Treaties*. 1988, p 9

²¹⁸ Bray, *The Common Law Zone in Panama – A case study in Reception*. 1977, p 40-41

²¹⁹ Bray, *The Common Law Zone in Panama – A Case Study in Reception*. 1977, p 42

²²⁰ Bray, *The Common Law Zone in Panama – A Case Study in Reception*. 1977, p 43

²²¹ See article III, Hay/Bunau-Varilla Agreement, Supplement F

²²² Bray, *The Common Law Zone in Panama – A Case Study in Reception*. 1977, p p 42-43

sovereignty and a cession that was not a cession”, meaning that interpretation by precedent or analogy is not possible since it is *sui generis*.²²³

The grant to the United States “in perpetuity the use, occupation and control”²²⁴ of the Panama Canal Zone has been interpreted by Brownlie as meaning that Panama kept residual sovereignty. According to Brownlie, this means that Panama delegated all of its rights of jurisdiction to the United States and it might even be seen as if Panama renounced the right of disposition, as a licence can be terminated but a grant in perpetuity by definition cannot. The grantees right rests on an agreement and would be defeated by a disposition of the residual sovereignty to a third state in regard to which the grant was *res inter alios acta*.²²⁵

The conclusion by some scholars that the United States was granted sovereignty over the Panama Canal Zone has been criticized. According to other scholars the facts that an American citizen could only remain in the Canal Zone as long as he or she was employed there and that a person born in the Panama Canal Zone of Panamanian parents was not an American citizen, has been pointed out as valid evidence of missing attributes of sovereignty. Other arguments brought forward against the United States possessing sovereignty over the Panama Canal Zone are: A) the very language of the agreement, “if it were the sovereign” must mean that they were actually not sovereign. B) the powers and authority which the United States exercised in the Canal Zone was dependent upon the use of the territory. If it ceased to be used in accordance with the agreement, jurisdiction would automatically revert to Panama. This would not be the case if the United States had been the sovereigns. C) also, if the United States had been the sovereigns they could have ceded the territory to another state, which they could not in this case.²²⁶

5.3.4.1 Titular sovereignty

The key clauses concerning sovereignty in the Hay/Bunau-Varilla agreement is to be found in article II, stating that “The republic of Panama grants to the United States in perpetuity the use, occupation and control ”of the Panama Canal Zone, and in article III stating that the United States would possess and exercise these rights, powers and authority, as “if it were the sovereign” of the territory.²²⁷ These clauses have been interpreted in different ways, to some as granting full sovereignty to the United States and to others as reserving the sovereignty to Panama.²²⁸ These reiterated provisions have been described as amounting to the most complete transfer of jurisdiction over a territory without, in technical international law sense,

²²³ Bray, *The Common Law Zone in Panama – A Case Study in Reception*. 1977, p 43

²²⁴ See article II, Hay/Bunau-Varilla Agreement, Supplement F

²²⁵ Brownlie, *Principles of Public International Law*, sixth edition. 2003, p p 111-112

²²⁶ Bray, *The Common Law Zone in Panama - A Study in Reception*. 1977, p 130

²²⁷ See Hay/Bunau-Varilla Agreement, Supplement F

²²⁸ Stoll, *Canalgate*. 1989, p 356-380

being a cession.²²⁹ It was Hay²³⁰ who coined the term titular sovereignty, as a summary of the rights that Panama retained over the territory. The significance of the term “titular sovereignty” was according to Hay meaningless, since in reality the United States had all the attributes of sovereignty but he thought it unnecessary to take away something that obviously meant a lot to the Panamanians.²³¹

5.4 An examination of the allocation of sovereignty in the cases of the New Territories and the Panama Canal Zone.

The leases of the New Territories and the Panama Canal Zone manifest many of the difficulties inherent in political leases, as for example the lack of time limits and unclear or non-existent provisions concerning sovereignty. An examination of the Lease Agreement of the New Territories, leaving aside the Order in Council and state practice reveals that the lease of the New Territories displays similarities to what in literature has been described as “real” leases²³². This conclusion is based on the fact that the powers granted to Great Britain over the New Territories seems only to amount to a right to administrate, since China reserved sovereign rights for themselves, as for example jurisdiction within the walls of the city of Kowloon.²³³ The detailed provisions concerning the distribution of jurisdiction between the parties can be interpreted as meaning that a transfer of territorial sovereignty was never intended according to the lease, which is supported by the fact that there is no mentioning of sovereignty in the lease. If it had been the intention that a transfer of territorial sovereignty should occur, the restriction concerning jurisdiction would not have been included, since all rights of jurisdiction is transferred with the transfer of territorial sovereignty. The lease of the New Territories should more likely be seen as if China derogated from possessing complete territorial sovereignty, giving Great Britain some sovereign rights but not complete territorial sovereignty.

The fact that there are uncertainties concerning territorial sovereignty over the New Territories origins from Great Britain’s assimilation of the New Territories with the ceded Hong Kong through the unilateral Order in Council²³⁴ and subsequent state practice and not as an effect of the Lease Agreement of the New Territories. Many scholars purport that the assimilation of the New Territories with Hong Kong had the effect of

²²⁹ Váli, *Servitudes in International Law*. 1958, p 254

²³⁰ John Hay was Secretary of State in the United States during the period of negotiations concerning the Panama Canal Zone and one of the drafters of the Hay/Bunau-Varilla agreement

²³¹ Summ/Kelly, *The Good Neighbours: America, Panama and the 1977 Canal Treaties*. 1988, p 9

²³² See Chapter 4.4.1 for definition of “real” lease

²³³ See Lease Agreement of the New Territories, Supplement D

²³⁴ See Order in Council, Supplement E

changing the lease into a time-limited cession.²³⁵ Great Britain official statements and actions seem to support the conclusion that they had sovereignty over the New Territories during the time of the lease.

What contradicts the conclusion that the New Territories was a time limited cession is the fact that Great Britain at times did not treat the New Territories the same as ceded Hong Kong, as for example Great Britain had different administration systems in the New Territories and Hong Kong.

It does not seem very likely that the lease of New Territories was in reality a cession in disguise since the only provision Great Britain did not abrogate was the time limit, which is illustrated by the handing back of the New Territories and the issuing of sub-leases not exceeding the time limit.

The lease of the Panama Canal Zone is more problematic as Panama granted extensive powers over the Panama Canal Zone to the United States. A comparison between the leases of the New Territories and the Panama Canal Zone reveals that the designs of the agreements differ significantly. The lease of the Panama Canal Zone is much more detailed than the lease of the New Territories and it also contains regulations concerning sovereignty, though vague. Another difference is that the United States was granted the Panama Canal Zone in perpetuity, while the lease of the New Territories was limited to ninety-nine years and also the United States had to pay a fee for the Panama Canal Zone, which Great Britain did not have to pay in regards to the New Territories.

The lease of Panama Canal Zone displays some similarities with the theory of disguised cession as there was no time limit and the provisions concerning sovereignty were vague, making it hard to establish which state retained sovereignty. The grant of the Panama Canal Zone to the United States in perpetuity could very well be seen as evidence that the lease in reality was a cession.

The theory of time-limited cessions does not seem applicable to the lease of the Panama Canal Zone since the territory was granted to the United States in perpetuity.

In article II of the Hay/Bunau-Varilla agreement the United States received “in perpetuity the use, occupation and control of a zone of land and land under water for the construction [...] and protection” of the Panama Canal Zone²³⁶, which can be interpreted as the United States receiving extensive sovereign rights, and leaving Panama with titular sovereignty²³⁷. The content of this alleged titular sovereignty that Panama was left with can be interpreted differently. Hay’s interpretation of the content of titular sovereignty seems to be hollow, in reality functioning as a veil to hide a cession in order to spare the lessor state. The implication of Hay’s definition

²³⁵ See Chapter 5.2.3 – 5.2.4

²³⁶ See article II, Hay/Bunau-Varilla Agreement, Supplement F

²³⁷ See Chapter 3.3.3 and 5.3.4.1

of titular sovereignty is that Panama had no right of disposition of the Panama Canal Zone, in fact meaning that the United States had permanently acquired the Panama Canal Zone. According to the definition in international law of titular sovereignty, Panama would still have the right of disposition.²³⁸ The United State's statements and actions in the Panama Canal Zone indicates that they saw themselves as having extensive powers over the area, maybe mounting to complete sovereignty thus leaving Panama with the hollow version of titular sovereignty.

The grant of sovereignty in article III, stating that the United States had the Zone as "if it were the sovereign" can be interpreted as Panama making a derogation from possessing complete territorial sovereignty while still retaining the ultimate right of disposition, which would be in coherence with the meaning of titular sovereignty in international law. The grant of jurisdiction to the United States, which has been described as a part or effect of sovereignty,²³⁹ is reasonable to interpret in article III of the Hay/Bunau-Varilla agreement, where they were granted "all the rights and powers [...] would possess and exercise if it were the sovereign".²⁴⁰

A logical conclusion would be that if Panama wanted to grant complete territorial sovereignty to the United States they would have left out the word "if" sovereign in the lease. What confuses this reasoning is the fact that these sovereign rights were granted to the United States in perpetuity, to the entire exclusion of the exercise by Panama of any such sovereign rights, powers or authority. What was then left of Panamas territorial sovereignty? Is it possible to limit Panamas right to dispose of the territory in perpetuity? If so, that makes it even more dubious if Panama in any way could be viewed as being sovereigns over the Panama Canal Zone. Answers to these highly political questions are difficult to find, both in international law and doctrine. It seems as if the United States wanted to put a lid on what was a very explosive situation by not discussing the effects of the arrangement on Panamas sovereignty over said territory.

5.5 A comparison between the leases of Guantanamo Bay, the New Territories and the Panama Canal Zone

I have to begin with a disclaimer concerning the difficulties to draw general conclusions regarding the legal effects of international territorial leases since all leases are distinct in wording and purpose. A comparison of the three leases included in this thesis illustrates how leases can vary in content, form and effect. The lease of Guantanamo Bay bears more similarities with the lease of the Panama Canal Zone than with the lease of the New Territories since the leases of Guantanamo Bay and the Panama Canal Zone

²³⁸ See Chapter 3.3.3

²³⁹ See Chapter 3 for definitions of the concepts of sovereignty and jurisdiction

²⁴⁰ See article III, Hay/Bunau-Varilla Agreement, Supplement F

contain vague provisions concerning the allocation of sovereignty and no time limits. The lease of the New Territories is time limited and contains no provision concerning sovereignty. What makes the lease of the New Territories interesting as an object of study here is mainly the effect that Great Britain's unilateral Order of Council and subsequent state practice had over the territory in question.

An aspect that reveals the similarities of the leases of Guantanamo Bay and the Panama Canal Zone are the circumstances under which the leases were concluded. Both Cuba and Panama had been under the control of a colonial state and was liberated through the United States intervention, which left them in a vulnerable position in relation to their liberator. In what way and to what extent those circumstances formed the lease agreements and what the real intentions behind the leases were is today hard to find definite answers to, especially considering the laps of time and the development of international law, but these special circumstances could very well be an indication that the leases was/is in reality a disguised cession, using the term lease as a way to spare the lessor state. At the time of the conclusion of the leases there might not have been an absolute demand for there being the outspoken intention of the states that a cession should occur, which makes it difficult to rule out a cession just because it is not likely that the lessor state intended to permanently transfer the territory in question to the lessee state or because the lessee state has not officially claimed sovereignty over the territory.

In regards to the granting of sovereign rights, the lease of the Panama Canal Zone seems to grant slightly more far-reaching sovereign rights to the United States than the lease Guantanamo Bay, since the United States was granted the Zone in perpetuity. In relation to the lease of the New Territories, the leases of the Panama Canal Zone and Guantanamo Bay grant much more extensive sovereign rights to the lessee. In the lease of the New Territories sovereignty is not even mentioned and in the case of Guantanamo Bay, Cuba explicitly retains the ultimate sovereignty in contrast to the case of Panama Canal Zone, which the United States possessed as if they were the sovereigns. The United States seems to have taken more liberties in the Panama Canal Zone, in regards to what functions they saw themselves allowed to exercise without overstepping the limits of the purpose of the lease, then they do in Guantanamo Bay. The United States seems to have interpreted the purpose of the lease of Guantanamo Bay more restrictive than they did in the case of the Panama Canal Zone. The lease of the New Territories was abrogated through Great Britain's unilateral Order in Council and subsequent actions, disregarding restrictions in the lease. The only restriction Great Britain seems to have regarded as valid was that of the time limit, as they returned the New Territories at the end of the stipulated time. The United States has not through its actions abrogated the leases of the Panama Canal Zone or Guantanamo Bay.

One aspect, which could be seen as indicating that the United States does not and did not have sovereignty over Guantanamo Bay and the Panama

Canal Zone is the fact that the United States is paying and had to pay for the leased territories.²⁴¹ If the United States has/had territorial sovereignty over the areas in question, they should not pay any fee to the lessor state.

The Panama Canal Zone provides us with an important lesson. During the lease period none thought that the United States would ever leave the Panama Canal Zone, just as today Cuba thinks that the United States will never leave Guantanamo Bay. In the end it turned out that Panama had more power over the Panama Canal Zone than they thought, which might also be the case of Cuba's powers over Guantanamo Bay. Only time will tell what powers Cuba possesses over Guantanamo Bay.

²⁴¹ See article I, Supplementary Agreement, Supplement B and article XIV, Hay/Bunau-Varilla Agreement, Supplement F

6 Conclusion

The leasing of Guantanamo Bay has in this thesis been examined from various approaches and it is now time to sum up my conclusions and present my opinion concerning the allocation of sovereignty over Guantanamo Bay.

It is important to pin point that there does not exist a real and public conflict between Cuba and the United States concerning the territorial sovereignty over Guantanamo Bay, since both states concur that Cuba have and always have had sovereignty over Guantanamo Bay. The conflict between Cuba and the United States rather concerns the validity of leasing arrangements and the United States refusal to obey the Cuban governments request for them to leave Guantanamo Bay.

The conflict concerning which state has territorial sovereignty over Guantanamo Bay is mostly vivid amongst scholars. No explicit transfer of complete territorial sovereignty can be deduced from the wording of the Lease Agreement of Guantanamo Bay, the Supplementary Agreement or the Treaty of 1934. The United States did not receive territorial sovereignty outright in any of the leasing agreements or the Treaty of 1934 and they have not publicly claimed it afterwards. Cuba has not through subsequent statements and actions provided any indication that they meant to cede Guantanamo Bay to the United States, since they have continuously opposed the presence of the United States in Guantanamo Bay. Unfortunately there still exist questions concerning which state in reality has territorial sovereignty, since what states say and what they do are different things. It is not possible to ignore the fact that the far reaching powers that the United States exercises over Guantanamo Bay seems equal to them possessing territorial sovereignty.

As presented in this thesis there are various ways to approach the subject of territorial leases and territorial sovereignty. According to international law, one can either access the nature of the lease or the effects of the lease. The approach, which seems to be more valid according to international law, is to examine the effects of the lease. The practice of the parties towards the territory in question is highly decisive when deciding the effects of a lease, as has been illustrated in the lease of the New Territories. In the case of the lease of the New Territories, Great Britain unilaterally changed the effects of the lease through the issuing of the Order in Council²⁴² and also in part abrogating the lease through their actions, leaving only the time-limit provision in tact. In the case of Guantanamo Bay, the United States has not had to go to such great lengths as Great Britain did in the New Territories, since they were granted more extensive rights over Guantanamo Bay then Great Britain was granted in regards to the New Territories. The United States has in Guantanamo Bay effectively, from the beginning of the lease period, exercised all the rights normally belonging to the sovereign. In fact

²⁴² See Order in Council, Supplement E

it seems as if Cuba has no effective sovereign powers over Guantanamo Bay at all.

An approach to establishing the allocation of sovereignty or sovereign rights in leased territory is to examine the lease in the light of the theories concerning sovereignty. Theories concerning sovereignty seem to have more support amongst international law scholars than theories concerning political leases. A key question when trying to establish who has sovereignty is if the United States possesses complete territorial sovereign rights to the complete exclusion of Cuba possessing any such rights? It is clear that the United States possesses and exercises sovereign rights, as for example complete territorial jurisdiction, while there is no evidence of Cuba actually having any such rights of sovereignty. Article III in the Lease Agreement of Guantanamo Bay ²⁴³ states that Cuba keeps the ultimate sovereignty, which could be interpreted as meaning that Cuba kept the ultimate right of disposition. A feasible conclusion is that the United States has been granted all the rights of sovereignty except the right of disposition. These rights of sovereignty that the United States has exercised are very far reaching, making it hard to draw a line between possessing complete sovereignty and possessing sovereign rights.

The test of title to territory is a frequently used method to settle uncertainties concerning territorial sovereignty in regards to concurring claims. The test would have to be used hypothetically as only Cuba claims to have title to Guantanamo Bay, hence the lack of conflict. An examination of the allocation of title to territory reveals that Cuba most likely would have the stronger case, since their claim to title to territory has been validly acquired. The United States has the stronger case when examining which state has actually exercised governmental functions but it would be difficult to adjudge their claim to legal sovereignty as validly acquired, since according to international law, leasing is not a valid way to obtain title to territory. If the United States was to be considered to have the better claim to title to Guantanamo Bay, it could be seen as proof that the lease of Guantanamo Bay in reality is a cession in disguise²⁴⁴.

As seen in chapters 4 and 5, it is not uncomplicated to assess the real nature or intention behind a lease; is it a “real” lease or a political lease? There seems to be unity amongst scholars that a “real” lease should be time-limited and have clear and unproblematic provisions concerning sovereignty, reserving the ultimate sovereignty for the lessor state. The lease of Guantanamo Bay is neither time-limited nor contains clear and unproblematic provisions concerning sovereignty, hence making it more similar to the category of political leases. It is hard to establish whether the lease of Guantanamo Bay is a disguised cession as it is problematic to determine the intention of the parties at the time of the conclusion of the lease of Guantanamo Bay and also to assess changes of intentions since then. Was it the United States aim to permanently acquire Guantanamo

²⁴³ See article III, Lease Agreement of Guantanamo Bay, Supplement A

²⁴⁴ See Chapter 4.4.2 and 4.4.3

Bay? Was it Cuba's intention to permanently cede Guantanamo Bay to the United States? If the answer is yes to these questions, then the lease of Guantanamo Bay clearly falls within the category of disguised cessions. The intention of the lessee and lessor can change over time and the requirement of intention of cession of both parties should maybe not be interpreted as strict, as the requirement that the parties should have the intention of a cession, has not always been so strict as it is today. At the time of conclusion of the lease of Guantanamo Bay it might have been the intention of the parties to permanently change sovereignty over Guantanamo Bay, but the passing of time coupled with changes in international and politics in regards to the acquirement of territory, might have had the effect of also changing the intentions of the United States and Cuba. Obviously this is just speculations as no substantial evidence of the United State's intentions at the time of the lease has been found. Today the United States claim that they do not have or claim sovereignty over Guantanamo Bay.

From the comparative study of the leases of the New Territories, Panama Canal Zone and the Guantanamo Bay I draw the conclusion that it seems to be easier to find some coherence in leasing agreements where the lessee state is the same and which is concluded at more or less the same time, which the leases of Guantanamo Bay and the Panama Canal Zone illustrates. The lease of the New Territories differs as to the uncertainties concerning sovereignty was brought on by Great Britain's subsequent actions and not by the lease. The case of Guantanamo Bay displays more similarities, in regard to the design of the lease and the problems allocating sovereignty, with the case of the Panama Canal Zone. In the Panama Canal Zone, the lessor reserved what has been referred to as titular sovereignty, which has been interpreted as a disguised cession or as a derogation from complete sovereignty, leaving Panama only with the right of disposition. There has been much discussion about what titular sovereignty in the context of the Panama Canal Zone in reality meant and it is highly dubious whether in reality Panama had any sovereign rights left over the Panama Canal Zone. The lease of Guantanamo Bay reveals resemblance with the lease of the Panama Canal Zone, as it also, at the least, seems to be a derogation from complete sovereignty, leaving Cuba with titular sovereignty. A comparison of the leases and following state practise gives the impression that the derogation in the case of Panama Canal Zone was slightly more extensive than in the case of Guantanamo Bay.

In conclusion it is probable that the United States does not have a valid title to Guantanamo Bay since it seems unclear if they could be adjudged title in accordance with the test of title to territory. It is on the other hand likely that Cuba does not possess complete sovereignty over Guantanamo Bay, since they in the leasing agreements and the Treaty of 1934 concerning Guantanamo Bay made extensive derogations from complete territorial sovereignty, with the United States as beneficiaries. An examination concerning the allocation of sovereignty over Guantanamo Bay reveals that it is likely that some degree of derogation from complete sovereignty has occurred, leaving neither Cuba nor the United States with full territorial

sovereignty over Guantanamo Bay. The extent of governmental functions exercised by the United States, to the complete exclusion of Cuba, makes it very feasible that the United States has the effective sovereignty, leaving Cuba with the titular sovereignty, at the most. My more subjective view regarding the allocation of territorial sovereignty and the fact that Cuba in practice does not seem to have any sovereign rights left over Guantanamo Bay, thus leaving Cuba at the United State's mercy in regards of an eventual return of Guantanamo Bay, could be interpreted as complete territorial sovereignty belonging to the United States.

My hope is that the Supreme Court Decision in the case *Rasul ET AL. v. Bush, President of the United States* will put an end to the use of Guantanamo Bay as a legal "black hole", independent of if the United States sees themselves as possessing sovereignty over Guantanamo Bay or not. A clarification of the present situation is the preferable solution, where the United States either recognizes the implications of their far-reaching power or recognizes Cuba's right to exercise sovereignty over Guantanamo Bay. A prolonging of the present situation and the effects of it, is contrary to international law and human rights.

Supplements

A

Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903

**Signed by the President of Cuba, February 16, 1903; Signed by the
President of the United States, February 23, 1903**

AGREEMENT

Between the United States of America and the Republic of Cuba for the lease (subject to terms to be agreed upon by the two Governments) to the United States of lands in Cuba for coaling and naval stations.

The United States of America and the Republic of Cuba, being desirous to execute fully the provisions of Article VII of the Act of Congress approved March second, 1901, and of Article VII of the Appendix to the Constitution of the Republic of Cuba promulgated on the 20th of May, 1902, which provide:

"ARTICLE VII. To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defence, the Cuban Government will sell or lease to the United States the lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States."

have reached an agreement to that end, as follows:

ARTICLE I

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

1st. In Guantanamo (see Hydrographic Office Chart 1857). From a point on the south coast, 4.37 nautical miles to the eastward of Windward Point Light House, a line running north (true) a distance of 4.25 nautical miles; From the northern extremity of this line, a line running west (true), a distance of 5.87 nautical miles; From the western extremity of this last line, a line running southwest (true) 3.31 nautical miles; From the southwestern extremity of this last line, a line running south (true) to the seacoast.

This lease shall be subject to all the conditions named in article II in this agreement

2nd. In Northwestern Cuba (see Hydrographic Office Chart 2036).
In Bahia Honda (see Hydrographic Office Chart 520b).

All that land included in the peninsula containing Cerro del Morrillo and Punta del Carenero situated to the westward of a line running south (true) from the north coast at a distance of thirteen hundred yards east (true) from the crest of Cerro del Morrillo, and all the adjacent waters touching upon the coast line of the above described peninsula and including the estuary south of Punta del Carenero with the control of the headwaters as necessary for sanitary and other purposes.

And in addition all that piece of land and its adjacent waters on the western side of the entrance to Bahia Honda including between the shore line and a line running north and south (true) to low water marks through a point which is west (true) distant one nautical mile from Pta. del Cayman.

ARTICLE II

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

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

ARTICLE III

While on 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 with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

Done in duplicate at Habana, and signed by the President of the [SEAL] Republic of Cuba this sixteenth day of February, 1903.

T. ESTRADA PALMA

Signed by the President of the United States the twenty-third of February, 1903.

[SEAL] THEODORE ROOSEVELT

B

Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda; July 2, 1903

Signed at Habana, July 2, 1903;

Approved by the President, October 2, 1903;

Ratified by the President of Cuba, August 17, 1903;

Ratifications exchanged at Washington, October 6, 1903

The United States of America and the Republic of Cuba, being desirous to conclude the conditions of the lease of areas of land and water for the establishment of naval or coaling stations in Guantanamo and Bahia Honda the Republic of Cuba made to the United States by the Agreement of February 16/23, 1903, in fulfillment of the provisions of Article Seven of the Constitutional Appendix of the Republic of Cuba, have appointed their Plenipotentiaries to that end.-

The President of the United States of America, Herbert G. Squiers, Envoy Extraordinary and Minister Plenipotentiary in Havana.

And the President of the Republic of Cuba, Jose M. Garcia Montes, Secretary of Finance, and acting Secretary of State and Justice, who, after communicating to each other their respective full powers, found to be in due form, have agreed upon the following Articles;

ARTICLE I

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

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

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

ARTICLE II

The said areas shall be surveyed and their boundaries distinctly marked by permanent fences or inclosures.

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

ARTICLE III

The United States of America agrees that no person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise within said areas.

ARTICLE IV

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

ARTICLE V

Materials of all kinds, merchandise, stores and munitions of war imported into said areas for exclusive use and consumption therein, shall not be subject to payment of customs duties nor any other fees or charges and the vessels which may carry same shall not be subject to payment of port, tonnage, anchorage or other fees, except in case said vessels shall be discharged without the limits of said areas; and said vessels shall not be discharged without the limits of said areas otherwise than through a regular port of entry of the Republic of Cuba when both cargo and vessel shall be subject to all Cuban Customs laws and regulations and payment of corresponding duties and fees.

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

ARTICLE VI

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

ARTICLE VII

This lease shall be ratified and the ratifications shall be exchanged in the City of Washington within seven months from this date.

In witness whereof, We, the respective Plenipotentiaries, have signed this lease and hereunto affixed our Seals.

Done at Havana, in duplicate in English and Spanish this second day of July nineteen hundred and three.

JOSE M. GARCIA MONTES [SEAL]

H. G. SQUIERS [SEAL]

I, Theodore Roosevelt, President of the United States of America, having seen and considered the foregoing lease, do hereby approve the same, by virtue of the authority conferred by the seventh of the provisions defining the relations which are to exist between the United States and Cuba,

contained in the Act of Congress approved March 2, 1901, entitled "An Act making appropriation for the support of the Army for the fiscal year ending June 30,1902."

Washington, October 2, 1903.

THEODORE ROOSEVELT.

C

Treaty Between the United States of America and Cuba; May 29, 1934

Signed at Washington, May 29, 1934;

Ratification advised by the Senate of the United States, May 31, 1934
(legislative day of May 28, 1934);

Ratified by the President of the United States. June 5, 1934;

Ratified by Cuba, June 4, 1934;

Ratifications exchanged at Washington, June 9, 1934;

Proclaimed by the President of the United States, June 9, 1934

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA A PROCLAMATION

Whereas a Treaty of Relations between the United States of America and the Republic of Cuba was concluded and signed by their respective Plenipotentiaries at Washington on the twenty-ninth day of May, one thousand nine hundred and thirty-four, the original of which Treaty, being in the English and Spanish languages, is word for word as follows:

The United States of America and the Republic of Cuba, being animated by the desire to fortify the relations of friendship between the two countries and to modify, with this purpose, the relations established between them by the Treaty of Relations signed at Habana, May 22, 1903, have appointed, with this intention, as their Plenipotentiaries:

The President of the United States of America; Mr. Cordell Hull, Secretary of State of the United States of America, and Mr. Sumner Welles, Assistant Secretary of State of the United States of America; and

The Provisional President of the Republic of Cuba, Senor Dr. Manuel Marquez Sterling, Ambassador Extraordinary and Plenipotentiary of the Republic of Cuba to the United States of America;

Who, after having communicated to each other their full powers which were found to be in good and due form, have agreed upon the following articles:

ARTICLE I

The treaty of Relations which was concluded between the two contracting parties on May 22, 1903, shall cease to be in force, and is abrogated, from the date on which the present Treaty goes into effect.

ARTICLE II

All the acts effected in Cuba by the United States of America during its military occupation of the island, up to May 20, 1902, the date on which the Republic of Cuba was established, have been ratified and held as valid; and all the rights legally acquired by virtue of those acts shall be maintained and protected.

ARTICLE III

Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States

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

ARTICLE IV

If at any time in the future a situation should arise that appears to point to an outbreak of contagious disease in the territory of either of the contracting parties, either of the two Governments shall for its own protection, and without its act being considered unfriendly, exercise freely and at its discretion the right to suspend communications between those of its ports that it may designate and all or part of the territory of the other party, and for the period that it may consider to be advisable.

ARTICLE V

The present Treaty shall be ratified by the contracting parties in accordance with their respective constitutional methods; and shall So into effect on the date of the exchange of their ratifications, which shall take place in the city of Washington as soon as possible.

In faith whereof, the respective Plenipotentiaries have signed the present Treaty and have affixed their seals hereto.

Done in duplicate, in the English and Spanish languages, at Washington on the Twenty-ninth day of May, one thousand nine hundred and thirty-four.

CORDELL

HULL

SUMNER

WELLES

M. MARQUEZ STERLING

And whereas, the said Treaty has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the city of Washington on the ninth day of June, one thousand nine hundred and thirty-four;

Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this ninth day of June, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the United States of America the one hundred and fifty-eighth.

FRANKLIN D. ROOSEVELT By the President:
CORDELL HULL
Secretary of State

D

The Convention respecting an extension of the Hong Kong territory – June 9, 1898.

WHEREAS it has for many years past been recognized that an extension of Hong Kong territory is necessary for the proper defence and protection of the Colony.

Territory leased.- It has now been agreed between the Governments of Great Britain and China that the limits of British territory shall be enlarged under lease to the extent indicated generally on the annexed map. The exact boundaries shall be hereafter fixed when proper surveys have been made by officials appointed by the two governments. The term of this lease shall be ninety-nine years.

Jurisdiction in leased territory.- It is the same time agreed that within the city of Kowloon the Chinese officials now stationed there shall continue to exercise jurisdiction except so far as may be inconsistent with the military requirements for the defence of Hong Kong. Within the remainder of the newly-leased territory Great Britain shall have sole jurisdiction. Chinese officials and people shall be allowed as heretofore to use the road from Kowloon to Hsinan.

Rights of Chinese ships.- It is further agreed that the existing landing-place near Kowloon city shall be reserved for the convenience of Chinese men-of-war, merchant and passenger vessels, which may come and go and lie there at their pleasure: and for the convenience of movement of the officials and people within the city.

Railway.- When hereafter China constructs a railway to the boundary of the Kowloon territory under British control, arrangements shall be discussed.

Expropriation of natives.- It is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension, and that if land is required for public offices, fortifications, or the like official purposes, it shall be bought at a fair price.

Extradition.- If cases of extradition of criminals occur, they shall be dealt with in accordance with the existing Treaties between Great Britain and China and the Hong Kong Regulations.

Chinese war ships.- The area leased to Great Britain as shown on the annexed map, includes the waters of Mirs Bay and Deep Bay, but it is agreed that Chinese vessels of war, whether neutral or otherwise, shall retain the right to use those waters.

This convention shall come into force on the first day of July, eighteen hundred and ninety-eight, being the thirteenth day of the fifth moon of the twenty-fourth year of Kuang Hsu. It shall be ratified by the Sovereigns of the two countries, and the ratifications shall be exchanged in London as soon as possible.

In witness whereof the Undersigned, duly authorized thereto by their respective Governments, have signed the present Agreement.

Done at Peking in quadruplicate (four copies in English and four in Chinese) the ninth day of June, in the year of our Lord eighteen hundred and ninety-eight, being the twenty-first day of the fourth moon of the twenty-fourth year of Kuang Hsu.

Claude M. MacDonald
(Seal of the Chinese

Plenipotentiary)

E

The New Territories Order in Council

At the court of Balmoral, the 20th day of October 1898.

Present,
The Queen's Most Excellent Majesty in Council

WHEREAS by a Convention dated the 9th day of June, 1898, between Her Majesty and His Imperial Majesty the Emperor of China, it is provided that the limits of British territory in the regions adjacent to the Colony of Hong Kong shall be enlarged under lease to Her Majesty in the manner described in the said Convention:

AND WHEREAS it is expedient to make provision for the government of the territories acquired by Her Majesty under the said Convention, during the continuance of the said lease:

1. The territories within the limits and for the term described in the said Convention shall be and the same are hereby declared to be part and parcel of Her Majesty's Colony of Hong Kong in like manner and for all intents and purposes as if they had originally formed part of the said Colony.
2. It shall be competent for the Governor of Hong Kong, by and with the advice and consent of the Legislative Council of the said Colony, to make laws for the peace, order and good government of the said territories as part of the Colony.
3. From a date to be fixed by proclamation of the Government of Hong Kong, all Laws and Ordinances which shall at such date be in force in the Colony of Hong Kong shall take effect in the said territories, and shall remain in force therein until the same shall have been altered or repealed by Her Majesty or by the Governor of Hong Kong, by and with advice or (sic) consent of the Legislative Council.
4. Notwithstanding anything herein contained, the Chinese officials now stationed within the City of Kowloon shall continue to exercise jurisdiction therein in so far as may be inconsistent with the military requirements for the defence of Hong Kong.

And the Right Honourable Joseph Chamberlain, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

Note: Clause 4 was revoked by the Walled City order in council of 27 December 1899.

F

Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty), November 18, 1903

Concluded November 18, 1903; ratification advised by the Senate February 23, 1904; ratified by President February 25, 1904; ratifications exchanged February 26, 1904; proclaimed February 26, 1904. (U.S. Stats., vol. 33.)

The United States of America and the Republic of Panama being desirous to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific oceans, and the Congress of the United States of America having passed an act approved June 28, 1902, in furtherance of that object, by which the President of the United States is authorized to acquire within a reasonable time the control of the necessary territory of the Republic of Colombia, and the sovereignty of such territory being actually vested in the Republic of Panama, the high contracting parties have resolved for that purpose to conclude a convention and have accordingly appointed as their plenipotentiaries,-

The President of the United States of America, John Hay, Secretary of State, and

The Government of the Republic of Panama, Philippe Bunau-Varilla, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, thereunto specially empowered by said government, who after communicating with each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

ARTICLE I

The United States guarantees and will maintain the independence of the Republic of Panama.

ARTICLE II

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific ocean to a distance of three marine miles from mean low water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above

described, shall not be included within this grant. The Republic of Panama further grants to the United States in perpetuity the use, occupation and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said enterprise. The Republic of Panama further grants in like manner to the United States in perpetuity all islands within the limits of the zone above described and in addition thereto the group of small islands in the Bay of Panama, named, Perico, Naos. Culebra and Flamenco.

ARTICLE III

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

ARTICLE IV

As rights subsidiary to the above grants the Republic of Panama grants in perpetuity to the United States the right to use the rivers, streams, lakes and other bodies of water within its limits for navigation, the supply of water or water-power or other purposes, so far as the use of said rivers, streams, lakes and bodies of water and the waters thereof may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal.

ARTICLE V

The Republic of Panama grants to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

ARTICLE VI

The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any Article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case. the rights of the United States shall be superior. All damages caused to the owners of private lands or private property of any kind by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employees, or by reason of the construction, maintenance, operation, sanitation and protection of the said Canal or of the works of sanitation and

protection herein provided for, shall be appraised and settled by a joint Commission appointed by the Governments of the United States and the Republic of Panama, whose decisions as to such damages shall be final and whose awards as to such damages shall be paid solely by the United States. No part of the work on said Canal or the Panama railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages. The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention.

ARTICLE VII

The Republic of Panama grants to the United States within the limits of the cities of Panama and Colon and their adjacent harbours and within the territory adjacent thereto the right to acquire by purchase or by the exercise of the right of eminent domain, any lands, buildings, water rights or other properties necessary and convenient for the construction, maintenance, operation and protection of the Canal and of any works of sanitation, such as the collection and disposition of sewage and the distribution of water in the said cities of Panama and Colon, which in the discretion of the United States may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal and railroad. All such works of sanitation, collection and disposition of sewage and distribution of water in the cities of Panama and Colon shall be made at the expense of the United States, and the Government of the United States, its agents or nominees shall be authorized to impose and collect water rates and sewerage rates which shall be sufficient to provide for the payment of interest and the amortization of the principal of the cost of said works within a period of fifty years and upon the expiration of said term of fifty years the system of sewers and water works shall revert to and become the properties of the cities of Panama and Colon respectively, and the use of the water shall be free to the inhabitants of Panama and Colon, except to the extent that water rates may be necessary for the operation and maintenance of said system of sewers and water.

The Republic of Panama agrees that the cities of Panama and Colon shall comply in perpetuity with the sanitary ordinances whether of a preventive or curative character prescribed by the United States and in case the Government of Panama is unable or fails in its duty to enforce this compliance by the cities of Panama and Colon with the sanitary ordinances of the United States the Republic of Panama grants to the United States the right and authority to enforce the same.

The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon and the territories and harbours adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.

ARTICLE VIII

The Republic of Panama grants to the United States all rights which it now has or hereafter may acquire to be property of the New Panama Canal Company and the Panama Railroad Company as a result of the transfer of sovereignty from the Republic of Colombia to the Republic of Panama over the Isthmus of Panama and authorizes the New Panama Canal Company to sell and transfer to the United States its rights, privileges, properties and concessions as well as the Panama Railroad and all the shares or part of the shares of that company; lot the public lands situated outside of the zone described in article II of this treaty now included in the concessions to both said enterprises and not required in the construction or operation of the Canal shall revert to the Republic of Panama except any property now owned by or in the possession of said companies within Panama or Colon or the ports or terminals thereof.

ARTICLE IX

The United States agrees that the ports at either entrance of the Canal and the waters thereof, and the Republic of Panama agrees that the towns of Panama and Colon shall be free for all time so that there shall not be imposed or collected custom house tolls, tonnage, anchorage, lighthouse, wharf, pilot, or quarantine dues or any other charges or taxes of any kind upon any vessel using or passing through the Canal or belonging to or employed by the United States, directly or indirectly, in connection with the construction, maintenance, operation, sanitation and protection of the main Canal, or auxiliary works, or upon the cargo, officers, crew, or passengers of any such vessels, except such tolls and charges as may be imposed by the United States for the use of the Canal and other works, and except tolls and charges imposed by the Republic of Panama upon merchandise destined to be introduced for the consumption of the rest of the Republic of Panama, and upon vessels touching at the ports of Colon and Panama and which do not cross the Canal.

The Government of the Republic of Panama shall have the right to establish in such ports and in the towns of Panama and Colon such houses and guards as it may deem necessary to collect duties on importations destined to other portions of Panama and to prevent contraband trade. The United States shall have the right to make use of the towns and harbors of Panama and Colon as places of anchorage, and for making repairs, for loading, unloading, depositing, or transshipping cargoes either in transit or destined for the service of the Canal and for other works pertaining to the Canal.

ARTICLE X

The Republic of Panama agrees that there shall not be imposed any taxes, national, municipal, departmental, or of any other class, upon the Canal, the railways and auxiliary works, tugs and other vessels employed in the service of the Canal, store houses, work shops, offices, quarters for laborers, factories of all kinds, warehouses, wharves, machinery and other works, property, and effects appertaining to the Canal or railroad and auxiliary works, or their officers or employees, situated within the cities of Panama and Colon, and that there shall not be imposed contributions or charges of a

personal character of any kind upon officers, employees, laborers, and other individuals in the service of the Canal and railroad and auxiliary works.

ARTICLE XI

The United States agrees that the official dispatches of the Government of the Republic of Panama shall be transmitted over any telegraph and telephone lines established for canal purposes and used for public and private business at rates not higher than those required from officials in the service of the United States.

ARTICLE XII

The Government of the Republic of Panama shall permit the immigration and free access to the lands and workshops of the Canal and its auxiliary works of all employees and workmen of Whatever nationality under contract to work upon or seeking employment upon or in any wise connected with the said Canal and its auxiliary works, with their respective families, and all such persons shall be free and exempt from the military service of the Republic of Panama.

ARTICLE XIII

The United States may import at any time into the said zone and auxiliary lands, free of custom duties, imposts, taxes, or other charges, and without any restrictions, any and all vessels, dredges, engines, cars, machinery, tools, explosives, materials, supplies, and other articles necessary and convenient in the construction, maintenance, operation, sanitation and protection of the Canal and auxiliary works, and all provisions, medicines, clothing, supplies and other things necessary and convenient for the officers, employees, workmen and laborers in the service and employ of the United States and for their families. If any such articles are disposed of for use outside of the zone and auxiliary lands granted to the United States and within the territory of the Republic, they shall be subject to the same import or other duties as like articles imported under the laws of the Republic of Panama.

ARTICLE XIV

As the price or compensation for the rights, powers and privileges granted in this convention by the Republic of Panama to the United States, the Government of the United States agrees to pay to the Republic of Panama the sum of ten million dollars (\$10,000,000) in gold coin of the United States on the exchange of the ratification of this convention and also an annual payment during the life of this convention of two hundred and fifty thousand dollars (\$250,000) in like gold coin, beginning nine years after the date aforesaid.

The provisions of this Article shall be in addition to all other benefits assured to the Republic of Panama under this convention.

But no delay or difference opinion under this Article or any other provisions of this treaty shall affect or interrupt the full operation and effect of this convention in all other respects.

ARTICLE XV

The joint commission referred to in Article VI shall be established as follows:

The President of the United States shall nominate two persons and the President of the Republic of Panama shall nominate two persons and they shall proceed to a decision; but in case of disagreement of the Commission (by reason of their being equally divided in conclusion) an umpire shall be appointed by tire two Governments who shall render the decision. In the event of the death, absence, or incapacity of a Commissioner or Umpire, or of his omitting, declining or ceasing to act, his place shall be filled by the appointment of another person in the manner above indicated. All decisions by a majority of the Commission or by the Umpire shall be final.

ARTICLE XVI

The two Governments shall make adequate provision by future agreement for the pursuit, capture, imprisonment, detention and delivery within said zone and auxiliary lands to the authorities of the Republic of Panama of persons charged with the commitment of crimes, felonies or misdemeanors without said zone and for the pursuit, capture, imprisonment, detention and delivery without said zone to the authorities of the United States of persons charged with the commitment of crimes, felonies and misdemeanors within said zone and auxiliary lands.

ARTICLE XVII

The Republic of Panama grants to the United States the use of all the ports of the Republic open to commerce as places of refuge for any vessels employed in the Canal enterprise, and for all vessels passing or bound to pass through the Canal which may be in distress and be driven to seek refuge in said ports. Such vessels shall be exempt from anchorage and tonnage dues on the part of the Republic of Panama.

ARTICLE XVIII

The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18,1901.

ARTICLE XIX

The Government of the Republic of Panama shall have the right to transport over the Canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind. The exemption is to be extended to the auxiliary railway for the transportation of persons in the service of the Republic of Panama, or of the police force charged with the preservation of public order outside of said zone, as well as to their baggage, munitions of war and supplies.

ARTICLE XX

If by virtue of any existing treaty in relation to the territory of the Isthmus of Panama, whereof the obligations shall descend or be assumed by the Republic of Panama, there may be any privilege or concession in favor the Government or the citizens and subjects of a third power relative to an interoceanic means of communication which in any of its terms may be incompatible with the terms of the present convention, the Republic of Panama agrees to cancel or modify such treaty in due form, for which purpose it shall give to the said third power the requisite notification within the term of four months from the date of the present convention, and in case the existing treaty contains no clause permitting its modification or annulment, the Republic of Panama agrees to procure its modification or annulment in such form that there shall not exist any conflict with the stipulations of the present convention.

ARTICLE XXI

The rights and privileges granted by the Republic of Panama to the United States in the preceding Articles are understood to be free of all anterior debts, liens, trusts, or liabilities, or concessions or privileges to other Governments, corporations, syndicates or individuals, and consequently, if there should arise any claims on account of the present concessions and privileges or otherwise, the claimants shall resort to the Government of the Republic of Panama and not to the United States for any indemnity or compromise which may be required.

ARTICLE XXII

The Republic of Panama renounces and grants to the United States the participation to which it might be entitled in the future earnings of the Canal under Article XV of the concessionary contract with Lucien N. B. Wyse now owned by the New Panama Canal Company and any and all other rights or claims of a pecuniary nature arising under or relating to said concession, or arising under or relating to the concessions to the Panama Railroad Company or any extension or modification thereof; and it likewise renounces, confirms and grants to the United States, now and hereafter, all the rights and property reserved in the said concessions which otherwise would belong to Panama at or before the expiration of the terms of ninety-nine years of the concessions granted to or held by the above mentioned party and companies, and all right, title and interest which it now has or many hereafter have, in and to the lands, canal, works, property and rights held by the said companies under said concessions or otherwise, and acquired or to be acquired by the United States from or through the New Panama Canal Company, including any property and rights which might or may in the future either by lapse of time, forfeiture or otherwise, revert to the Republic of Panama, under any contracts or concessions, with said Wyse, the Universal Panama Canal Company, the Panama Railroad Company and the New Panama Canal Company.

The aforesaid rights and property shall be and are free and released from any present or reversionary interest in or claims of Panama and the title of the United States thereto upon consummation of the contemplated purchase by the United States from the New Panama Canal (company, shall be

absolute, so far as concerns the Republic of Panama, excepting always the rights of the Republic specifically secured under this treaty.

ARTICLE XXIII

If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.

ARTICLE XXIV

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

If the Republic of Panama shall hereafter enter as a constituent into any other Government or into any union or confederation of states, so as to merge her sovereignty or independence in such Government, union or confederation, the rights of the United States under this convention shall not be in any respect lessened or impaired.

ARTICLE XXV

For the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality, the Government of the Republic of Panama will sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the Republic at certain points to be agreed upon with the President of the United States.

ARTICLE XXVI

This convention when signed by the Plenipotentiaries of the Contracting Parties shall be ratified by the respective Governments and the ratifications shall be exchanged at Washington at the earliest date possible. In faith whereof the respective Plenipotentiaries have signed the present convention in duplicate and have hereunto affixed their respective seals. Done at the City of Washington the 18th day of November in the year of our Lord nineteen hundred and three.

JOHN HAY [SEAL]

P. BUNAU VARILLA [SEAL]

Bibliography

Akehurst, Michael. *Akehurst's modern introduction to international law*. 7. rev. ed. / [edited by] Peter Malanczuk. London : Routledge, 1997

Asrat, Beletchew. *Jurisdiction in USA v. Noriega : with special reference to the Honecker case*. Iustus: Stockholm, 2000

Author unknown. *The U.S. Naval Base at Guantanamo – Imperialist Outpost in the Heart of Cuba*. Havana, [1963?]

Bray, Wayne D. *The Common Law Zone in Panama – A Case in Reception*, Port City Press: Baltimore, 1977

Brierly, James Leslie. *The law of nations: an introduction to the international law of peace*. 6. ed. Clarendon: Oxford, 1963

Brownlie, Ian. *Principles of public international law*. 5. ed. University Press: Oxford, 1998

Brownlie, Ian. *Principles of public international law*. 6. ed. University Press: Oxford, 2003

Chen, Lung-Fong. *State succession relating to unequal treaties*. Archon Books: Hamden, 1974

CNN Homepage. *Guantanamo Bay in U.S. control over 100 years*. January 10, 2002

<http://www.cnn.com/2002/US/01/09/guantanmo.history/>

Cottrell, Robert. *The end of Hong Kong : the secret diplomacy of imperial retreat*. Murray: London, 1993

Crawford, James. *The Creation of States in International Law*. Clarendon Press: Oxford, 1979

Esiasson, P., Gilljam M., Oscarsson, H., Wängerud, L. *Metodpraktikan: Konsten att studera samhälle, individ och marknad*. 2 uppl. Norstedts Juridik: Stockholm, 2003

Gelber, Harry Gregor. *Sovereignty through interdependence*. Kluwer Law International: London, 1997

Ghai, Yash, *Hong Kong's New Constitutional Order – The Resumption of Chinese Sovereignty and the Basic Law*, Hong Kong University Press: Hong Kong, 1997

Globalsecurity.org, "Guantanamo Bay – Camp X-Ray". June 17, 2004
http://www.globalsecurity.org/military/facility/guantanamo-bay_x-ray.htm.

Graham, Terence. *The "interests of civilization"? : reaction in the United States against the "seizure" of the Panama canal zone, 1903-1904.* Esselte studium: Solna, 1983

Green, N.A., Maryan. *International law: law of peace.* Macdonald & Evans: London, 1973

James, Alan. *Sovereign statehood: the basis of international society.* Allen & Unwin: London, 1986

Kelly, Tom and Summ, Harvey, G. *The Good neighbors : America, Panama, and the 1977 canal treaties.* Ohio University Center for International Studies, Latin American Studies Program: Athens, Ohio, 1988

LaFeber, Walter. *The Panama Canal: the crisis in historical perspective.* Oxford University Press: New York, N.Y., 1989

Lauterpacht , Hersch. *Private law sources and analogies of international law : with special reference to international arbitration.* London, 1927

Lazar, Joseph. "International Legal Status of Guantanamo Bay". *The American of International Law*, Vol. 62, no 3. (Jul., 1968)

Lazar, Joseph. "Cession in Lease" of the Guantanamo Bay Naval Station and Cubas "Ultimate Sovereignty". *The American Journal of International Law*. Vol. 63, No. 1 (Jan., 1969)

Maris, Gary L. "International law and Guantanamo". *The Journal of Politics*. Vol. 29, No. 2 (May 1967)

Maris, Gary L. "Guantanamo: No rights of occupancy". *The American Journal of International Law*. Vol. 63, No. 1 (Jan 1969)

Ministerio de Relaciones Exteriores, *Historia de una usurpacion. La base naval de Estados Unidos en la bahía de Guantánamo.* La Habana : Ministerio de relaciones exteriores, 1979

Murphy, Marion E. *The History of Guantanamo Bay.* 1953
<http://www.nsgtmo.navy.mil/history.htm>

Murphy, S. D. *Ability of Detainees in Cuba to Obtain Federal Habeas Corpus Review.* *The American Journal of International Law*. Vol. 96, No. 2, (April 2002)

Neuman, Gerarld L., *Closing the Guantanamo Loophole.* *Loyola Law Review*, 1, Spring 2004.

- Norem, Ralph, A.** *Kiaochow leased territory*. University of California Press: Berkeley, Cal, 1936
- Norman, Sharon.** *The right of conquest*. Clarendon Press: Oxford, 1996
- O'Connell, Daniel, Patrick.** *International law. Vol. 1*. London, 1965
- Oppenheim, Lassa.** *International law: a treatise. Vol. 1, Peace*. Longman: London, 1928
- Oxford Dictionary of Law.** Clarendon Press: Oxford, 2000
- Oxman, Bernhard H.** *Jurisdiction of States*. Bernhardt, Encyclopdia of Public International Law, vol III. North-Holland: Amsterdam, 2000
- Pérez, Louis A.** *Cuba under the Platt Amendment, 1902-1934*. University of Pittsburg Press: Pittsburg. 1986
- Pérez, Louis A.** *Cuba between reform and revolution*. Oxford U.P: New York, 1988
- Reisman, W. Michael.** *Jurisdiction in international law*. Aldershot: Ashgate, c1999
- Republic of Cuba, Ministry of Foreign Relations Information Center.** *Guantanamo, Yankee Naval Base of Crime and Provocations*. Instituto del Libro: La Habana, 1970
- Rumpf, Christian,** *Territory, Lease*, Bernardt, Encyclopedia of Public International Law, vol IV. North-Holland: Amsterdam, 2000
- Sharma, Surya P.** *Territorial acquisition, disputes, and international law*. The Hague: London, 1997
- Shaw, Malcom, Nathan.** *International law*. 4. ed. Cambridge University Press: Cambridge, 1997
- Shaw, Malcom, Nathan.** *International law*. 5. ed. Cambridge University Press: Cambridge, 2003
- Sim, Stuart.** *The discourse of sovereignty - Hobbes to Fielding: the state of nature and the nature of the state*. Aldershot: Ashgate, 2003
- Stoll, Samuel, J.** *Canalgate: a Panama Canal brief for the people*. Livingston, N.J., c1988
- Swift, Richard, N.** *International law – Current and Classic*. John Wiley: New York, 1967

United States. Congress. Senate. Committee on armed services *Defence, Maintenance and Operation of the Panama Canal, Including Administration and Government of the Canal Zone. Hearings before the Committee on Armed Services United States Senate. January 24, 31, February 1 1978.* Washington, 1978

U.S. National Archives & Records Administration, *The executive Order 8749.* http://www.archives.gov/federal_register/executive_orders/1941.html

Váli, Ferenc A. *Servitudes of international law: a study of rights in foreign territory.* 2. edition. London, 1958

Verzijl, Jan Henrik Willem. *International law in historical perspective. Part. 3, State territory.* Sijthoff: Leyden, 1970

Walker, Neil. *Sovereignty in transition.* Oxford: Portland, 2003

Wesley-Smith, Peter. *Unequal treaty 1898-1997: China, Great Britain and Hong Kong's New Territories.* Oxford University Press: Hong Kong and Oxford , 1983

Table of Treaties

The Convention respecting an extension of the Hong Kong territory – June 9, 1898, Wesley-Smith, Unequal Treaty 1898-1997. China, Great Britain and Hong Kong's New Territories, 1983

The New Territories Order in Council, Wesley-Smith, Unequal Treaty 1898-1997. China, Great Britain and Hong Kong's New Territories, 1983

Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23 1903;
<http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm>

Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda; July 2, 1903,
<http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba003.htm>

Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty), November 18, 1903;
<http://www.yale.edu/lawweb/avalon/diplomacy/panama/pan001.htm>

Treaty Between the United States of America and Cuba; May 29, 1934,
<http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba001.htm>

Joint Declaration of the Government of the United Kingdom and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong,
<http://www.info.gov.hk/trans/jd/jd2.htm>

Table of Cases

Canal Zone v. Coulson. The Supreme Court of the Panama Canal Zone, (1907), O'Connell, Daniel, Patrick. International law. Vol. 1. London, 1965

Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412 (11th Cir 1995).

In re Guzman and Latamble, Annual. Digest, 1933-34, case no 43, O'Connell, Daniel, Patrick. International law. Vol. 1. London, 1965

Island of Palmas Arbitration Case, Annual Digest, 4, (1981)

Lowe v. Lee, The Supreme Court of Panama, O'Connell, Daniel, Patrick. International law. Vol. 1. London, 1965

Luckenbach Steamships Co v. U.S., The Supreme Court of the United States, (1930), O'Connell, Daniel, Patrick. International law. Vol. 1. London, 1965

Rasul ET AL. v. Bush, President of the United States.
The Supreme Court of the United States, No 03-334, p 12, (2004)

RE Burriel, The Supreme Court of Panama, Annual. Digest, 1931-32, case n. 53, O'Connell, Daniel, Patrick. International law. Vol. 1. London, 1965

RE Cia. De Transportes de Gelabert, The Supreme Court of Panama, Annual Digest, 1938-40, case n 45, Váli, Ferenc A. Servitudes of international law: a study of rights in foreign territory. 2. edition. London, 1958

Spelar v. U.S., 338 The Supreme Court of the United States. 217 (1949)