THE CREATION AND EVOLUTION OF THE LEGAL BLACK HOLE AT GUANTÁNAMO BAY

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The decision by the United States to use its naval station at Guantánamo Bay, Cuba, as a detention center for alleged terrorists was based largely on a feature of the site that has become known as the legal "black hole."[1] This refers to the fact that Guantánamo Bay is part of Cuba's sovereign territory but is not covered by the Cuban legal system, while it is controlled by the United States but is covered only partially by the U.S. legal system. The result is a gap where no jurisdiction is exercised by either state, and where no jurisdiction can be imposed by outside sources under the norms of international law.[2] Guantánamo Bay is thus an area where a certain range of activities may occur in the absence of any legal framework.

This jurisdictional vacuum warrants examination as a phenomenon of territory. It emerged from within the modern international system of states, and shows the system's capacity to produce and accommodate what is arguably a self-destructive element. Assessing the creation and evolution of the legal black hole can help us understand its nature and implications, not just for Cuba and the United States but also more broadly.

GUANTÁNAMO BAY AS A LEASED TERRITORY

Guantánamo Bay is a territory comprising 45 square miles on the south coast of Cuba. The United States leases it from Cuba through a bilateral arrangement made in 1903 that granted the United States two areas on the island for use as naval and coaling stations. (The second location, Bahía Honda, was never used and reverted back to Cuban control.) The lease itself was comprised of two separate accords—an executive agreement between the presidents of the United States and Cuba that created its framework,[3] and a treaty that elaborated its detailed terms.[4]

It was becoming common by 1903 for states to lease territory from each other as a way to address their evolving interests without formal cessions of territory. This reflected the view, widely held among legal theorists at the time, that territory was the property of a state,[5] and it relied on concepts that originated in

1. Michael J. Strauss, *The Leasing of Guantánamo Bay*, Westport, CT, Praeger, 2009, pp. 148–154, citing, *inter alia*, Daniel F. McCallum ("Why GTMO?" Research Paper, U.S. National War College, 2003) and John Yoo (*War by Other Means: An Insider's Account of the War on Terror*, New York, Atlantic Monthly Press, 2006). The term "black hole" appears to have originated with Lord (Johan) Steyn in "Guantánamo Bay: The Legal Black Hole," F. A. Mann Lecture, Lincoln's Inn, London, November 25, 2003.

2. Notably the norms pertaining to sovereign authority and non-intervention.

3. Agreement for the lease to the United States of lands in Cuba for coaling and naval stations, U.S. Treaty Ser. No. 418 (1903).

4. Lease of certain areas for naval or coaling stations, U.S. Treaty Ser. No. 426 (1903).

5. The *territoire-objet* theory of a state's relationship to territory.

private property law.[6] Territorial leases between states were pragmatic solutions to various issues, but they challenged traditional ideas of sovereignty by allowing more than one state to display elements of sovereignty in the same location.

Sovereignty can be broadly summarized as a state's exclusive authority within its territory, plus extensions of that authority outside of it. Territorial leases rely on the view that sovereignty, or the exercising of sovereignty, can be divided into specific rights that a state can assign to other states.[7] The leases are legal instruments that give one state the right to exercise aspects of its sovereignty on the territory of another state, and they typically have three main components: the rights that are transferred, the duration of the arrangement, and the compensation that the state obtaining the rights—the lessee—pays to the sovereign lessor.[8]

The rights that are transferred can be split into two types: those associated with the objective of the lease, and jurisdictional rights that facilitate its implementation.[9]

Rights associated with the lease's objective can be limited or comprehensive. A lease with an economic purpose, such as the exploitation of a natural resource, may restrict the lessee state to the right to engage in that activity, while a lease with a military objective may give the lessee state much broader rights.

Jurisdictional rights have been allocated in various ways. There are leases in which complete jurisdiction remains with the lessor state—its entire legal system applies to the leased territory just as it applies to the rest of its sovereign territory.[10] Leases also exist in which jurisdiction is transferred completely to the lessee state, which is the case at Guantánamo Bay. Still other leases divide jurisdiction between the lessee and the lessor, such as by the nationality of individuals involved in incidents[11] or by the location within the leased territory.[12]

JURISDICTION ON LEASED TERRITORIES

The allocation of jurisdiction between the two states involved in a territorial lease is normally addressed in the lease itself. In the absence of international guidelines, the clarity and comprehensiveness of this allocation varies from one lease to another. This part of a lease can be a source of problems because jurisdiction occurs at more than one level.

First, there is the international level, where the lessee state's desire for rights on the territory must be reconciled with the lessor state's interest in protecting its sovereignty there, a function of effective control. This bilateral allocation of jurisdictional rights is fundamental to the operation of the lease because it determines which state has the authority to adjudicate situations that occur on the territory. Territorial leases normally address jurisdiction only at this level because they are meant to govern relations between the states as they pertain to the leased territory.

The second level where jurisdictional questions can arise is within the states that are parties to the lease. Each state must determine how its internal legal system addresses jurisdiction on territory that is differ-

6. H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, Longmans Green, 1927 (reprint, Hamden, Conn., Archon Books, 1970), p. 181–190.

7. Strauss, *The Leasing of Guantánamo Bay*, *op. cit.*, p. 17.

8. Michael J. Strauss, "The Viability of Territorial Leases in Resolving International Sovereignty Disputes: A Comparative Study," Ph.D. dissertation, Centre d'Etudes Diplomatiques et Stratégiques, Paris, 2006, pp. 120–131.

9. Michael J. Strauss, "A Matrix for Resolving Sovereignty Disputes through Territorial Leasing," paper presented at The State of Sovereignty Conference, Durham University, United Kingdom, April 3, 2009.

10. *E.g.*, the lease of the Pays Quint Septentrional to France by Spain in 1856. Treaty of Limits, 1142 UNTS 318 (1979).

11. *E.g.*, the lease of Tin Bigha to Bangladesh by India in 1992. India-Bangladesh Relationship Documents (Terms of Lease in Perpetuity of Tin Bigha—Area, 1982; Letter of Foreign Secretary of India Implementing Tin Bigha Lease, 1992), http://www.hcidhaka.org/viewDocs.php, accessed July 6, 2010.

12. *E.g.*, the lease of Kowloon, Hong Kong, to the United Kingdom by China in 1898. Treaty of Peking, 186 Consol. Treaty Ser. 310 (1898).

ent in character from the sovereign territory where it exercises exclusive and comprehensive jurisdiction.

With respect to the application of its legal system, either the lessee or the lessor state may consider a leased territory as equivalent to its own sovereign territory, as foreign territory, or as something in between. Thus, a lessee state with jurisdictional rights at the bilateral level may, at the state level, determine that its legal relationship with the leased territory prevents it from exercising that jurisdiction in all respects. This is precisely what happened to create the jurisdictional gap at Guantánamo Bay.

There is also a third level of jurisdictional questions that can arise when a territory is leased for military purposes. A state that has the right to exercise legal jurisdiction on the territory may have a domestic legal system that is split into separate civilian and military sub-systems, each with its own regulations and procedures. The questions that arise at this level involve which system applies on the leased territory, and in what circumstances. This, too, has occurred at Guantánamo Bay.

At all of these levels, the jurisdictional issues derive from the status of the territory as an area where neither the lessee nor the lessor state exercises sovereignty in the same way it does on its core territory.[13] Because territorial leases are bilateral instruments that do not address jurisdictional questions occurring entirely within the national legal system of either state, municipal case law becomes the determinant. This can be a piecemeal approach that takes shape only as individual issues are raised, as indeed it was for Guantánamo Bay.

U.S. JURISDICTION AT GUANTÁNAMO BAY

At the bilateral level, Guantánamo Bay had a clear jurisdictional structure. The first of the two accords comprising the lease, the executive agreement, gave the United States "complete jurisdiction and control" over the territory, while Cuba would retain "ultimate sovereignty." This created a simple, unambiguous division of jurisdictional rights in which the United States had all of them and Cuba had none.

At the level of the U.S. domestic legal system, it did not take long for the United States to determine that its jurisdiction at Guantánamo Bay (and Bahía Honda) was not as comprehensive as jurisdiction on U.S. sovereign territory. The respected international lawyer George Grafton Wilson, who taught at the U.S. Naval War College, said in 1907 that "the United States … has only a qualified jurisdiction over these regions and not sovereignty ... and the conditions of exercise of jurisdiction in these leased areas are accordingly unlike the conditions within the areas over which the United States exercises sovereignty."[14]

It was already recognized by then that U.S. jurisdiction in territories that were not U.S. states but were under U.S. control was a matter that had never been treated consistently either by legislation, which would sometimes cover these territories and sometimes exclude them, or by judicial rulings on whether the Constitution automatically extended to them.

In 1901, two years before the Guantánamo Bay lease was made, the U.S. Supreme Court acknowledged its own inconsistency on this question. In its ruling in the case of *Downes v Bidwell*,[15] it said: "The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States."

More than six decades after the Guantánamo Bay lease was negotiated and implemented, this situation had not changed. Political scholar Gary L. Maris wrote in 1967 that "it is sometimes difficult to deter-

13. Strauss, *The Leasing of Guantánamo Bay*, *op. cit.*, pp. 78–80.

14. U.S. Naval War College, *International Law Situations with Solutions and Notes—1907*, Washington, D.C., Government Printing Office, 1908, p. 18.

15. 182 U.S. 244 (1901).

mine just which United States laws apply to Guantánamo" based on court rulings and legal opinions up to that point. He correctly predicted that "the failure of Congress to refer explicitly to leased areas such as Guantánamo will probably continue to result in a case-by-case approach by United States authorities when questions arise as to which legislation is to apply to Guantánamo."

Maris notes that while the 1901 ruling in *Downes v Bidwell* established that a territory where the United States had jurisdiction could be considered incorporated into the United States, a 1932 determination by the U.S. secretary of state held that the right to U.S. citizenship through birth in the United States, contained in the Fourteenth Amendment to the Constitution, did not apply to Guantánamo Bay because it "has never been incorporated into or become a part of the 'United States.'"[16]

Opposite interpretations like these have occurred throughout Guantánamo Bay's history as a leased territory. Both sides of jurisdictional questions have been readily supportable by legal precedents, and decisions about jurisdiction at Guantánamo Bay have remained inconsistent to this day.

The recent issues about U.S. jurisdiction at Guantánamo Bay can be traced back to 1991, when political violence in Haiti prompted many thousands of Haitians to flee the country by boat. Many who sought to reach the United States were intercepted by the U.S. Navy and brought to Guantánamo Bay as the nearest place with any U.S. jurisdiction. Their claims for refugee status and asylum in the United States were processed under a program that involved repatriating to Haiti those whose claims were unsuccessful.

With so many Haitians taking part in this exodus, the U.S. government decided that it could expedite the processing of those brought to Guantánamo Bay because the Immigration and Nationality Act of 1952[17] did not include the site in its definition of U.S. territory. The United States was thus able to circumvent the procedures and protections that its legal system had established for asylum seekers who reached its sovereign territory. Its right to do this was affirmed by two judicial rulings, *Haitian Refugee Center, Inc. v Baker* (1992)[18] and *Cuban American Bar Association v Christopher* (1995).[19]

A series of court decisions since then has refined U.S. jurisdiction at Guantánamo Bay, notably as it pertained to the constitutional rights of non-U.S. nationals being held on the island as asylum seekers or, since 2002, as prisoners in the fight against terrorism. This sequence of cases ultimately led to the landmark Supreme Court ruling in 2008, in the case of *Boumediene v Bush*,[20] that the U.S. Constitution does apply on the territory. But this may have only narrowed the jurisdictional gap—it did not necessarily eliminate it.

The ruling was founded partly on the U.S. intent to govern Guantánamo Bay indefinitely. But a 1996 U.S. law requires the United States to abandon this intent if Cuba installs a democratic government. The Helms-Burton Act[21] obliges the United States to be prepared to negotiate returning control of Guantánamo Bay to Cuba in such a circumstance. This would begin a period during which the United States controls Guantánamo Bay *without* the intention of governing it indefinitely, altering an underlying condition for the decision that the U.S. constitution applies there. The continued application of the Constitution at Guantánamo Bay would again be open to question, and could hinge on the relative importance of this point as a condition for the *Boumediene v Bush* ruling.

16. Gary L. Maris, "International Law and Guantánamo," *Journal of Politics* 29 (1967), pp. 270–272.
17. Pub. L. No. 82–414, 66 Stat. 163 (1952), codified at 8 U.S.C.
18. 953 F2d. 1498 (11th Cir. 1992).
19. 43 F3d 1412 (11th Cir. 1995).
20. 553 U.S. 723 (2008).
21. The Cuban Liberty and Democratic Solidarity (Libertad) Act, Pub. L. 104–114, 110 Stat. 785 (1996), codified at 22 U.S.C.

CUBAN JURISDICTION AT GUANTÁNAMO BAY

In contrast to the ongoing questions in the United States about the scope of its jurisdiction at Guantánamo Bay, Cuba has consistently viewed its own jurisdiction to be nil, in line with the terms of the lease. As a consequence, it has not sought to exercise legal jurisdiction on the territory. This has even been the case throughout the period since the 1959 revolution, during which Cuba has sometimes asserted that the lease was not valid (that assertion has now been dropped).

A Cuban Supreme Court decision in 1934 affirmed that Cuba had no authority to exercise its municipal legal system at Guantánamo Bay. The ruling, in the case of *In re Guzman & Latamble*, involved the question of whether Cuban import duties must be paid on goods transported across the boundary from the leased territory into the territory where Cuba exercised full sovereign rights.

According to a summary of the case, "the defendants had been found guilty of importing three hogs from the United States naval station at Caimanera, on Guantánamo Bay, into a neighboring place in Cuba, without payment of customs duties. The defendants claimed that the hogs had already been in Cuba when they were at the naval station, and therefore that they had not brought them in without payment of duties. Upon appeal by the defendants, (the Supreme Court held) that the conviction must be affirmed, for 'the territory of that Naval Station is for all legal effects regarded as foreign.'"[22]

This decision also put an end to the occasional argument that U.S. jurisdiction at Guantánamo Bay was complete only within the scope of its authorized activities there, which the lease had limited to naval and coaling stations. The United States had always interpreted its "complete jurisdiction and control" at Guantánamo Bay in a very broad sense, and the ruling ensured that Cuba's government had no authority to challenge this.

THE LEGAL "BLACK HOLE"

The legal "black hole" at Guantánamo Bay is the product of these two separate national processes in which the legal systems of the United States and Cuba defined their respective jurisdictional roles *vis-à-vis* the territory. It came about because the state with full jurisdictional rights through sovereignty—Cuba—transferred them in their entirety to another state—the United States—that determined it was incapable of exercising them all.

The lease blocked this situation from being corrected. Its terms did not, for example, give Cuba the right to exercise any aspect of jurisdiction that the United States did not display, or to reassume control over the territory without agreement from the United States.[23] And because sovereignty over Guantánamo Bay has never been in dispute,[24] the sovereign authority of both states has kept all outside parties from intervening to fill the jurisdiction gap.

There is no indication that the negotiators of the lease considered the potential consequences of the jurisdictional aspect of their arrangement. The U.S. Supreme Court ruling in *Downes v Bidwell* just two years earlier could have alerted the negotiators to the possibility of problems if this aspect was not considered carefully, but this warning went undetected or unheeded.

Although the "black hole" was recognized early in the lease's implementation as the United States began to develop its piecemeal jurisdiction at Guantánamo Bay, there is no indication that it was perceived as either a useful or detrimental characteristic, and nothing was done to eliminate or change it. The jurisdictional gap stayed benign for nearly a century, and in the absence of any significant consequences it hardly raised any eyebrows. Only in recent years was

22. H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases, Years 1933–1934* (*International Law Reports*, Vol. 7), London, Butterworth, 1940 (reprint, Cambridge, Grotius Publications, 1989), p. 112–113.

23. Treaty of Relations, U.S. Treaty Ser. No. 866 (1934).

24. The United States regularly displays recognition of Cuban sovereignty at Guantánamo Bay, *e.g.*, by issuing checks for the annual rent.

it recognized as a feature of the territory's legal status that could be exploited for policy purposes. Because the Supreme Court's ruling in *Boumediene v Bush* may not have completely eliminated the jurisdictional gap, there may be future attempts to determine when and how it can be used.

It is important to note that while the jurisdictional gap at Guantánamo Bay arose at the domestic level, it is not restricted to internal U.S. legal matters—it also affects the application of international law. The only entity capable of administering international law at Guantánamo Bay is the state that has jurisdictional rights there. As a result, Guantánamo Bay became a location where the application of international legal norms requires the determination by the U.S. legal system that the United States has the jurisdiction necessary to apply them. Questions that arise about U.S. law can lead to such determinations, but so can questions of international law for which there is no guidance from municipal jurisdictional decisions. Any residual "black hole" that may exist at Guantánamo Bay after the *Boumediene v Bush* ruling can leave the territory without international law coverage in whatever ways the United States determines that its own jurisdiction does not apply.[25]

CAN THE JURISDICTION GAP BE REPLICATED?

The Guantánamo Bay lease makes an important contribution to understanding the nature of the international system of states by exposing how its constituent states can create a geographic space where aspects of jurisdiction are entirely missing.

Breaking down the jurisdictional gap into its structural features reveals how it was formed: It required two sovereign states as the legal actors, a bilateral agreement in which one state granted jurisdictional rights on part of its territory to the other, and a legal system in the state receiving the rights that created a distinction between the breadth of jurisdiction on its sovereign territory and the jurisdiction it applied extraterritorially.

As for the procedure, the gap at Guantánamo Bay resulted from standard diplomatic practices that states had been using in their relations with each other at the time, and still do—executive agreements and treaties. Moreover, the lease itself was not an unusual form of state-to-state arrangement, either in 1903 or today.[26]

This combination of factors can occur elsewhere, either inadvertently or intentionally. Historically, a number of bilateral leases have transferred considerable jurisdiction from the sovereign lessor state to the lessee, and it has not been uncommon for national legal systems to have different jurisdictional regimes for various categories of territory under their control.[27]

What made Guantánamo Bay unique, then, is that it was the first place where all of the relevant factors came together, where their collective result was recognized as creating a jurisdictional gap, and where the state in control of the territory used the gap to pursue its policies.

Guantánamo Bay can be seen as a territorial equivalent of Frankenstein's monster: a place that eluded the legal control of the United States and Cuba. Two states with full and exclusive jurisdiction over their own sovereign territories used routine diplomacy to establish a zone that became completely exempt from the jurisdiction of one state and partly exempt from the jurisdiction of the other.

The gap at Guantánamo Bay showed a certain randomness in its development. The fact that some parts of the U.S. legal system have applied there and others have not, and that Cuba's has not applied there at all, is the result of a specific mix of legislation and court rulings in both countries. This suggests that a differ-

25. Strauss, *The Leasing of Guantánamo Bay*, *op. cit.*, p. 195.

26. Recent examples include agreements in 2010 to renew Russia's lease of a naval port at Sevastopol, Ukraine, and Finland's lease of the Saimaa Canal from Russia.

27. *E.g.*, British jurisdiction in its former American colonies was less comprehensive than in Great Britain itself. See B. H. McPherson, "How Equity Reached the Colonies," *Queensland University of Technology Law and Justice Journal* 5 (2005), 108–117.

ent mix of laws and judgments would have caused a greater or lesser degree of U.S. jurisdiction to exist at Guantánamo Bay, and might have even allowed for some kind of jurisdictional role for Cuba.

One can envision that, in the most extreme case, a jurisdictional gap might be great enough to cause the absence of most or all jurisdiction on a leased territory. However, this result would have little value for the state receiving that right because it would undermine other aspects of the lease for which the jurisdictional right was elaborated. A practical limit may therefore exist on how much jurisdiction actually can be removed from a territory.

We can conclude from this that a jurisdictional gap can be a "generic" phenomenon with details that are shaped by the political dynamics and legal systems of the nations directly involved. At Guantánamo Bay they were the United States and Cuba, but two other states with an identical lease on territory elsewhere undoubtedly would have a jurisdictional gap with different specifics.

JURISDICTIONAL GAPS AND TERRORISM

Guantánamo Bay exemplifies what Gerald L. Neuman calls an "anomalous zone," where "certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended."[28] He notes that the disrespect for a fundamental value that an anomalous zone reflects can spread beyond the zone itself, and Harold Hongju Koh illustrates this by citing Guantánamo Bay's use as a detention center. Koh notes that Guantánamo has influenced other states to deviate from their established legal procedures when dealing with suspected terrorists or other persons they deem to be security threats.[29]

This raises the question of whether terrorism can be a motive for states to find jurisdictional gaps desirable, as the United States did with Guantánamo Bay. Scholars in international relations recognize that states often copy the behavior of other states when they are faced with similar situations, creating what is known as an international regime, and a recognized regime can be a catalyst for other states to act accordingly.[30]

Regimes can thus become sources of customary international law. According to Malcolm N. Shaw, customary law is "founded on the performance of state activities and the convergence of practices, in other words, what states actually do."[31]

In recent years, terrorism has become a common concern of states, and many have supplemented their existing legal systems with special rules to deal with it. As Anil Kalhan et al. noted in a 2006 article about antiterrorism laws in India, "the impulse to enact special laws stems from real and perceived problems concerning the effectiveness of the regular criminal justice system itself, which create intense pressures to take particular offenses outside of that system."[32] This observation is equally valid in many other states.

Special laws pertaining to crimes of terrorism often generate their own set of questions and controversies vis-à-vis human rights; for example, by authorizing detention without charges for periods of time, detention incommunicado, or other procedures by which suspected terrorists may be afforded fewer legal rights or given harsher treatment than they would experience through the application of standard criminal law.

With the globalization of terrorism in recent decades, states regularly look to each other's behavior in addressing the problem, and the use of Guantánamo Bay as a detention center where jurisdiction is limited broadens the options. The U.S. Supreme Court may have narrowed the how the United States ap-

28. Gerald L. Neuman, "Anomalous Zones," *Stanford Law Review* 48 (1996), pp. 1233–1234.

29. Harold Hongju Koh, John Galway Foster Lecture, University College London, October 21, 2003.

30. Strauss, "The Viability of Territorial Leases," *op. cit.*, p. 357.

31. Malcolm N. Shaw, *International Law*, 5th ed., Cambridge, Cambridge University Press, 2003, p. 70.

32. Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller, and Jed S. Rakoff, "Colonial Continuities: Human Rights, Terrorism and Security Laws in India," *Columbia Journal of Asian Law*, 20 (2006), p. 98.

plies this option, but other states may not necessarily follow its lead.

States may also be induced to create jurisdictional gaps in order to have locations that are under their control but where their actions are less restricted than on their sovereign territory. They may use these locations to test the limits of their legal systems, or to intentionally subvert them, without disturbing the application of the systems anywhere else. What states do with these legal laboratories may be entirely aligned with national law and international law, or it may not be, as Guantánamo Bay has shown.

At the same time, criticism from other states of how the United States has used the jurisdictional gap at Guantánamo Bay may discourage the creation of similar territories with this objective. Guantánamo Bay may thus become a model for other states to copy, or to avoid.