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THE STATUS OF GUANTÁNAMO BAY AND THE STATUS OF THE DETAINEES

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<sup>1</sup> Available electronically on [http://www.law.ubc.ca/events/2003/november/McK\\_Brown\\_Lecture.html](http://www.law.ubc.ca/events/2003/november/McK_Brown_Lecture.html); to be published in the Spring 2004 issue of the Law Review of the University of British Columbia. The lecture is also available on video from the Office of the Dean of the Law School of the University of British Columbia. ([Bobinski@law.ubc.ca](mailto:Bobinski@law.ubc.ca)). The lecture was repeated on 28 November 2003 at Simon Fraser University in Vancouver.

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#### I. Introduction

The Supreme Court of the United States<sup>2</sup> decided on 10 November 2003 to examine the appeal of certain detainees in Guantánamo Bay Naval Base, a test case for the fate of the 660 Taliban prisoners of war, Al-Qaida suspects and other persons<sup>3</sup> being detained by the United States since January 2002 at Guantánamo<sup>4</sup>.

At issue is the question whether US courts have jurisdiction to consider appeals made on behalf of inmates held at the camp. The appeals have been lodged by lawyers for 16 detainees, claiming that they are being held illegally. The Supreme Court must decide on the application of the United States Constitution and, in particular, the Bill of Rights, in the territory of Guantánamo Bay. Hitherto federal circuit courts have chosen the *de jure*

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<sup>2</sup> BBC News "The US Supreme Court has agreed to hear appeals by detainees from the Afghan war held at the Guantánamo Bay camp in Cuba", published 11 November 2003. According to Reuters, the Supreme Court will hear the appeal early in 2003 and issue a ruling by the end of June 2004. Philippe Gélie, *Le Figaro*, 12 November 2003 "Guantánamo Detainees get a Hearing". Washington Post, 12 November 2003, "Guantánamo cannot remain a human warehouse outside of the law indefinitely." Elaine Cassel, "A Glimmer of Hope? The Supremes and Guantánamo", *Counterpunch*, 12 November 2003.

<sup>3</sup> According to the International Committee of the Red Cross, the detainees come from more than 40 countries, speaking around 17 languages. There have been well over 700 detainees in Guantánamo, since the United States has been releasing small groups in the course of the last 12 months. BBC News, 17 July 2003, "Pakistanis freed from Guantánamo" by Zaffar Abbas, correspondent in Islamabad, reporting on the return of 11 Pakistani nationals, "This is the biggest group to be set free from among the 54 Pakistanis taken to the Camp Delta detention centre".

<sup>4</sup> BBC News, Rachel Clarke, Washington, 21 August 2003, "Justice denied at Guantánamo. A diverse group of ex-judges, diplomats and former military lawyers is urging the US supreme Court to intervene on behalf of hundreds of men being held without trial by the government." BBC News, Mark Doyle, 21 August 2003, "Lawyers call for 'fair' Guantánamo Trial. The heads of 10 leading institutions around the world have urged the United States to give fair trials to the alleged al-Qaeda and Taleban suspects held in Guantánamo Bay."

sovereignty test and not the jurisdiction and control test to determine the application of US constitutional protections in Guantánamo, holding that the detainees are in a legal black hole, enjoying no protection of the U.S. Constitution and Bill of Rights. This paper submits that the federal district and circuit courts have asserted a wrong and dangerous precedent that shows contempt for human rights and is inconsistent with the rule of law. Their reasoning is based on a restrictive interpretation of the application of the U.S. Constitution, excluding its protection except in territories where the United States exercises not only jurisdiction but also full sovereignty. This approach is not mandated by the Constitution but is the result of case-law that, in the light of the evolution of human rights law, is wholly anachronistic. It is within the competence of the Supreme Court to move with the times and to review and reverse obsolete jurisprudence. Moreover, the formal sovereignty approach appears ludicrous in fact, bearing in mind that it is, after all, the American flag, and not the Cuban flag, that flies over Guantánamo Bay, and Cuba has not been able to exercise any of the attributes of sovereignty over Guantánamo since 1903. The purpose of the restrictive interpretation of the scope of application of the Constitution does not appear to be concern for law or justice, but rather judicial deference to the executive.

The Supreme Court is now entertaining the appeal concerning the detention of two Britons<sup>5</sup>, Shafiq Rasul and Asif Iqbal, two Australians, David Hicks and Mamdouth Habib<sup>6</sup>, and twelve Kuwaiti nationals. Amnesty International has focused on the core of the issue in a sharp comment : “It is a basic principle of international law that any detainee has the right to test the lawfulness of his or her detention in a court of law ... by putting these detainees into a legal black hole, the United States administration is supporting a world where arbitrary unchallengeable detention becomes acceptable.”<sup>7</sup>

I will endeavor first to elucidate the status of Guantánamo Bay in international law, taking account of the terms of the 1903 lease agreement and all subsequent developments. In this context we will focus on the implications of the term “sovereignty” as used in the lease agreement and in United States case-law, and outline some of the legal consequences. Secondly, I shall review the legal situation of the detainees, and thirdly I will offer some possible options for a peaceful resolution of the manifold disputes associated with the Guantánamo lease and the grave human rights problems posed by the Guantánamo detention practices.

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<sup>5</sup> *The Observer*, “Terror camp Britons to be sent home”, Kamal Ahmed and Trady McVeigh, Sunday, 30 November 2003. “A deal to return British terrorist suspects held at Guantanamo Bay is to be sealed before Christmas, according to officials from America and the United Kingdom... Under the agreement, the nine British detainees will be sent back to Britain, either after pleading guilty to charges in America and being sent to serve their sentences in British prisons, or without being charged.”

<sup>6</sup> Unlike the U.K. and other governments that are attempting to protect the human rights of their citizens, “Australian authorities are in the process of betraying their two nationals held in Guantánamo as well as international law” in view of an agreement between Australia and the U.S. that any trials by military commission held in the US Naval Base in Cuba would be ‘fair’. Amnesty International News release 26 November 2003, AI Index: AMR 51/142/2003.

<sup>7</sup> Amnesty International: “Guantánamo detainees -The legal black hole deepens”. News release issued by the International Secretariat of Amnesty International: AMR 51/038/2003, of 12 March 2003, prisoner-rights@hrea.org.

As to the status of the detainees, I submit that there cannot be a “legal black hole” in international law, and that, at the very least, the International Covenant on Civil and Political Rights and the Third Geneva Red Cross Convention of 1949 apply to the detainees in Guantánamo<sup>8</sup>. Baruch Spinoza wrote in his *Ethics* “nature abhors a vacuum”. For the purposes of this paper, we should be guided by the related principle that law abhors a vacuum, particularly in the field of human rights.

Indeed, as the United Nations Human Rights Committee, the expert body entrusted with monitoring State compliance with the International Covenant on Civil and Political Rights, has declared on more than one occasion, the Covenant applies in all areas under the jurisdiction and control of a State party to the Covenant<sup>9</sup>. Since the United States exercises complete jurisdiction in Guantánamo, and since the United States is a party to the ICCPR, the detainees in Guantánamo are fully entitled to all the rights provided for in the Covenant, in particular the right to *habeas corpus*, to access to a lawyer, to due process of law, to recognition as a person before the law, to humane treatment during detention, and above all, the right not to be subjected to torture. This is so for many reasons, and there is no *prima facie* exception, since the United States did not introduce a relevant reservation when ratifying the Covenant, nor has the United States formally derogated from its obligations under the Covenant, as stipulated in article 4 of the Covenant.

In its 2003 report to the United Nations Commission on Human Rights, the United Nations Working Group on Arbitrary Detention concluded that the detention of persons in Guantánamo base constitutes arbitrary detention within the meaning of article 9 of the International Covenant on Civil and Political Rights<sup>10</sup>.

Serious concerns about the human rights situation of the detainees were also expressed by the late United Nations High Commissioner for Human Rights Sergio Vieira de Mello<sup>11</sup>, and by the former Chief Prosecutor of the International Tribunal for the Former Yugoslavia, Richard Goldstone, who said in an interview with the BBC on 5 October 2003 that the detainees were being treated in a manner that was “unlawful”, that the stress and duress techniques being used on detainees constituted “a form of torture”, noting further “I am using torture in its technical legal sense under the Torture Convention ... I don’t believe that the prolonged interrogation and detention without trial

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<sup>8</sup> On 13 March 2003 the United Nations High Commissioner for Human Rights, the late Sergio Vieira de Mello, criticized the judgement of 11 March 2003 of the Circuit Court of Appeals for the District of Columbia in the *Al Odah et al. case*, in which the court stated that the Guantánamo detainees do not benefit from the United States Constitution and Bill of Rights and cannot avail themselves of the United States courts. “Je n’accepte pas l’argument d’un trou noir juridique à Guantánamo ... si on contrôle un territoire, si on dispose d’une force militaire sur ce territoire, si on y a construit un center de détention et si on y détient 650 individus, on ne peut pas dire que la loi du pays qui contrôle ce territoire ne s’y applique pas.” Nations Unies Genève, 29e session de la Commission des droits de l’homme, [aidh.org](http://aidh.org).

<sup>9</sup> See Article 2 of the International Covenant on Civil and Political Rights, which stipulates that each State party must “ensure to all individuals ...subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind”.

<sup>10</sup> Report of the Working Group on Arbitrary Detention, UN doc. E/CN.4/2003/8, pp. 19-21; Written statement submitted by the International Federation for Human Rights to the Commission on Human Rights, UN Doc. E/CN.4/2003/NGO 247, p. 1-2

<sup>11</sup> In an interview just before the opening of the 59<sup>th</sup> session of the UN Commission of Human Rights in Geneva Sergio Vieira de Mello said “I do not accept that the Guantánamo prison is a legal hole” 16 March 2003. Vieira de Mello met with President Bush and urged him either to try the detainees or to release them [sda], *Bluewin International News*, 16 March 2003.

can be justified any more than torture can be justified. I think that in democracies there are certain measures that are simply ruled out and which aren't very effective incidentally. You know, one hasn't seen any great results coming out of Guantánamo Bay."<sup>12</sup> And Lord Johan Steyn, in the F.A. Mann Lectured delivered in London on Tuesday, 25 November 2003, stated "I regard this as a monstrous failure of justice".<sup>13</sup>

Meanwhile, the United States position remains, as White House spokesman Scott McClellan said on 10 October 2003, that the detainees are being treated consistently with international law. He added, "They are enemy combatants. We are at war on terrorism"<sup>14</sup>. It is argued that because they are suspected of being terrorists, they have no rights and cannot enjoy prisoner of war status<sup>15</sup>.

In this connection we should recall that when the 57<sup>th</sup> session of the UN General Assembly in 2002 adopted a resolution that emphasized the importance of combating terrorism, it also insisted on the necessity of respecting the rule of law and individual freedom.<sup>16</sup>

Serious instances of torture<sup>17</sup>, mental and physical, have been denounced by reliable sources<sup>18</sup>, so too the detention in Guantánamo of at least three minors<sup>19</sup>. The

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<sup>12</sup> Richard Goldstone to the BBC, aired in the program "Inside Guantánamo" 5 October 2003, pp. 6-7 of web transcript.

<sup>13</sup> Lord Steyn is a Lord of Appeal in Ordinary, one of 12 judges who sits on Britain's highest court. He went on to say: "The question is whether the quality of justice envisaged for the prisoners at Guantánamo Bay complies with minimum international standards for the conduct of fair trials. The answer can be given quite shortly: It is a resounding No. The term kangaroo court springs to mind... Trials of the type contemplated by the United States government would be a stain on United States justice. The only thing that could be worse is simply to leave the prisoners in their black hole indefinitely." International Herald Tribune "Guantánamo: a monstrous failure of justice", 27 November 2003.

<sup>14</sup> Dawn, the Internet Edition, 11 October 2003 "Detentions at Guantánamo unacceptable, says ICRC". John Gibbons, former chief judge of the federal appeals court in Philadelphia, said "The idea that American executive branch personnel, particularly military personnel, can detain people beyond the reach of habeas corpus is just repugnant to the rule of law" (Reuters).

<sup>15</sup> For a discussion of the issue of combatants and prisoners of war, see G. Aldrich, "Guerilla Combatants and Prisoner of War Status", *American University Law Review*, Vol. 31 (1981) pp. 855-859. See also A. de Zayas, "Combatants" in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. I, pp. 668-671, North Holland Publishers, Amsterdam, 1992.

<sup>16</sup> UN Resolution A/RES/57/219 of 16 December 2002, General Assembly Resolution on Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. At a ministerial meeting on terrorism on 20 January 2003, UN Secretary-General Kofi Annan stated: "Internationally, we are seeing an increasing use of what I call the 'T-word' – terrorism – to demonize political opponents, to throttle freedom of speech and the press, and to delegitimise legitimate political grievances. We are seeing too many cases where States living in tension with their neighbours make opportunistic use of the fight against terrorism to threaten or justify new military action on long-running disputes". Press Release SG/SM/8583 SC/7639. In an interview given by the then UN High Commissioner for Human Rights, the late Sergio Vieira de Mello, on 26 February 2003 in Islamabad, Vieira de Mello stressed the point that security and human rights are not competing but complementary values: "Combattre la terreur ne doit pas se faire au détriment de la protection des libertés fondamentales parce qu'elles sont aussi les piliers des sociétés démocratiques ... si nous sacrifions ces libertés et ... le droit d'accès à la défense, d'accès au dossier, d'être informé des charges retenues contre soi, d'accès à la famille ... nous risquerions d'offrir aux mouvements terroristes ce qu'ils recherchent, en minant progressivement les fondement des sociétés démocratiques." (Aidh.org). See also written statement submitted by the International Federation for Human Rights to the fifty-ninth session of the Commission on Human Rights, 17 March 2003, E/CN.4/2003/NGO/247.

<sup>17</sup> BBC "Inside Guantánamo", broadcast by *Panorama* on BBC One, on Sunday 5 October 2003, interviews of former Guantánamo detainees who have been released, pp. 1-21, testimonies of, among others, Sayed Abassin, Azmat Begg, Alif Khan: "they put cuffs and tape on my hands, taped my eyes and taped my ears. They gagged me. They put chains on my legs and chains around my belly. They injected me. I was unconscious. I do not know how they transported me. When I arrived in Cuba and they took me off the plane, they gave another injection and I came back to consciousness. .. they tied me up.... We go to a big prison and there were cages. They built it like a zoo. .. Each container housed 48 cages. Everyone was in a cage individually. Every cage had a tap, a toilet and water for washing. There was room to sit but not enough to pray...The light was very bright there as well. They were switched on all the time. Because of that our eyes were damaged and from constantly having to look through the netting. There were other blocks and we were not allowed to speak to the people on the other blocks. If we talked to them, they would draw the curtains and they would take our

International Committee of the Red Cross has concluded seven visits to the Naval Base and has had access to the internees since their transfer to Guantánamo. Its representatives have communicated their concerns to the detaining Power<sup>20</sup>. In an unprecedented move, the International Committee of the Red Cross went public<sup>21</sup> on 10 October 2003 to

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bedding and blankets and they wouldn't give them back for three days...They weren't letting us sleep, night or day. They were banging the walls with sticks, making lots of noise." See also, *New York Times*, 8 October 2003, "Lawyer Says Guantánamo Detainees tortured". See also the report by Georg Marsolo and Holger Stark in *Der Spiegel* of 14 April 2003, "Folter im Schwarzen Loch" (Torture in the black hole, pp. 56-58), in which instances of torture and ill-treatment are described.

<sup>18</sup> ABC Online, "Claims of torture in Guantánamo Bay", Wednesday 8 October 2003, Reporter: Ben Knight. Australian lawyer Richard Bourke, referring to reports leaked by US military personnel and from descriptions by some detainees that have been released, stated in an interview "One of the detainees had described being taken out and tied to a post and having rubber bullets fired at them. They were being made to kneel cruciform in the sun until they collapsed." The father of Australian terror suspect David Hicks, Mr. Terry Hicks confirmed having heard the same torture allegations, including "belting the bottom of their feet, there's quite a list of what I've gathered over the past 12 months". "Lawyer claims Hicks, Habib tortured", by Orietta Guerrera, *The Age*, 9 October 2003. It is, however, not easy to obtain evidence of torture. On 10 October 2003 Reporters without Borders condemned the action of US military authorities in making US reporters visiting the US naval base at Guantánamo Bay on 7 October 2003 to sign an undertaking that they would ask no questions about investigations under way there, on pain of being removed from the base. A significant incident followed when the BBC crew was so removed. After Australian lawyer Bourke denounced torture allegedly endured by two of his countrymen who were forced to stand until exhaustion holding their arms in a cross, President Bush is reported to have remarked "ridiculous". Erich Fottorino, "Guantánamo" in *Le Monde* of 4 November 2003. See also Andrew Buncombe, "Meanwhile 4,000 Miles Away in Guantánamo Bay 660 Prisoners have no idea when they will be freed", *The Independent*, 19 November 2003, "Few critics claim that prisoners at Camp Delta, as the incarceration unit is known, suffer from physical torture, through in the first six months of its operation interrogators used techniques known as 'stress and duress' to intimidate and soften up their subjects. Such techniques include sleep deprivation, exposing prisoners to hot or cold conditions and making them sit or stand in uncomfortable positions. But lawyers and activists say the prisoners ...face a form of psychological torture by being refused information about their future or access to legal advice. There are regular reports of suicide attempts among the prisoners."

<sup>19</sup> Monica Whitlock, BBC News, "Legal limbo of Guantánamo's prisoners", 16 May 2003, in which she reported "two weeks ago, US defence department officials announced that they had three children between the ages of 13 and 15 at Guantánamo ... Last month, the US Secretary of State Colin Powell, wrote a strongly worded letter to Donald Rumsfeld, deploring the imprisonment of children and old people, and saying that eight governments friendly to the US had complained about the holding of their citizens." On 29 April 2003 Irene Kahn, Secretary-General of Amnesty International, wrote to President Bush to express "deep concern at reports that several children are among the more than 600 detainees being held in the US Naval Base in Guantánamo Bay. We have written to your government on several occasions since the detainee transfers to the Naval Base began more than a year ago, and deeply regret that our concerns have gone unanswered and unremedied. While we continue to seek such remedies, under international law and standards, for the adult prisoners, we are now urgently requesting your assurances that the USA will abide by its international obligations in relation to these young detainees.... The reports indicate that a 'handful' of children, described as being between the ages of 13 and 15 years old, have been 'discovered' by the authorities in Guantánamo. It is reported that the children were transferred, possibly from the Air Base in Bagram, earlier this year. We further note that a 16-year old Canadian national, Omar Khadr, was transferred in late 2002 from Afghanistan to the Guantánamo Naval Base. We are concerned by reports indicating that it took six months for even the Canadian government to have access to him. Along with all the other detainees, he remains without access to legal counsel or his family... We are further concerned at reports indicating that the child detainees may be subjected to interrogation without access to any legal representatives. Article 40 of the Convention on the Rights of the Child states that 'every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'" See also UN Doc. E/CN.4/Sub.2/2003/NGO/23, 15 July 2003, Joint written statement submitted by Friends World Committee for Consultation (Quakers), and the World Organization Against Torture (OMCT), pp.3-4.

<sup>20</sup> See the website of the International Committee of the Red Cross, and the operational update of 25 August 2003 giving an overview of its work on behalf of the internees: "At the beginning and end of each visit to Guantánamo, the ICRC discusses its findings with the military authorities in the camp as well as with the appropriate authorities in Washington. A number of recommendations have been partly implemented, but the ICRC feels that significant changes need to be made. The ICRC's dialogue with the US on the conditions of internment and the treatment of internees remains frank and open. Nonetheless, serious divergences of opinion persist on a number of crucial issues."

<sup>21</sup> BBC News, "Red Cross blasts Guantánamo". On 10 October 2003 the BBC reported that the senior Red Cross official in Washington, Christophe Girod, "has broken with tradition by publicly attacking conditions at the US military base on Cuba". In an interview to the *New York Times* Girod stated that it was intolerable that the complex was used as "an investigation center, not a detention center... The open-endedness of the situation and its impact on the mental health of the population has become a major problem. ...One cannot keep these detainees in this pattern, this situation, indefinitely." Earlier in May 2003 the ICRC President Jakob Kellenberger had voiced objections over the prisoners' uncertain fate during meeting with National Security Advisor Condoleezza Rice and Secretary of State Colin Powell. Since then, prison camp commanders have confirmed 32 suicide attempts. Amanda Williamson of the ICRC's office in Washington publicly stated: "The main concern today after more than 18 months of captivity is that essentially the internees in Guantánamo have been placed beyond the law... they have no idea about their fate ... and they have no recourse... We have witnessed growing anxiety and a rather serious deterioration in the psychological health of the detainees, linked very much, we believe, to their ongoing uncertainty". In the BBC broadcast of 5 October 2003 Red Cross official Christophe Girod, who has personally visited Guantánamo, stated: "The point is that the US authorities have put the internees in Guantánamo beyond the law." See also "Red Cross Concerned Over Guantánamo Detainees", Associated Press, *The Guardian*, Friday 10 October 2003. "The ICRC, which is concluding a two-month visit to the camp, has been appealing in private to the Bush administration for due

denounce the continued detention of the prisoners of war and others being held in Guantánamo. Notwithstanding public protest from Amnesty International, Human Rights Watch, the International Federation for Human Rights and other non-governmental organizations, the official position of the United States Government remains that the detainees are “terrorists” and not prisoners of war, but that they are being treated in accordance with the law.<sup>22</sup>

## II. THE STATUS OF GUANTÁNAMO BAY IN PUBLIC INTERNATIONAL LAW<sup>23</sup>

Guantánamo Naval base is the oldest United States naval base outside the continental United States. It occupies 45 square miles, or 117.6 square kilometers, roughly the size of Manhattan island. It is situated in the southern coast of Cuba’s easternmost Oriente Province, just north of the Island of Jamaica. As United States Admiral La Rocque’s Center for Defense Information has observed, “It is clearly unnecessary militarily”<sup>24</sup>. Indeed, in the modern world, Guantánamo has little strategic importance, unless we overstate the facilitation of logistics for the 1983 United States invasion of Grenada<sup>25</sup> and the 1989 invasion of Panama<sup>26</sup>, both carried out for the purpose of obtaining regime change by force.

### A. *Terms of the Lease agreement of 16 February 1903*<sup>27</sup>

Pursuant to article I :

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process since shortly after the opening of the detention center in early 2002. The neutral, Swiss-run ICRC took the unusual step of going public with the request in May when its President, Jakob Kellenberger, met top Bush administration officials during a visit to Washington. The criticism has remained public. In a statement posted on its website in August, the ICRC conveyed its concern about the impact that the seemingly open-ended detention is having on internees.” See also Carol Rosenberg, Knight Ridder Newspapers, “International Red Cross protests conditions at Guantánamo prison”, and Australian Broadcasting Corporation Online, Saturday 11 October 2003 “It is unusual for the Red Cross to air such criticisms publicly, but says it has chosen to do so in this case because the US Government has not addressed its concerns.” ABC Online, 11 October 2003 “Guantánamo creating mental health problems”. See also Red Cross “Operational update” of 25 August 2003: “The ICRC visits around 660 people currently held at Guantánamo. The internees come from more than 40 countries speaking around 17 languages. Each visit lasts around six weeks and comprises a team of ICRC delegates, highly experienced in detention work, as well as medical personnel and interpreters. By August 2003, the ICRC had facilitated the exchange of more than 5,800 Red Cross messages between the internees and their families.”

<sup>22</sup> See United States Department of State website, *inter alia*, Fact sheet on the status of detainees in Guantánamo, dated 7 February 2002, “The United States is treating and will continue to treat all of the individuals detained at Guantánamo humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949”, but “neither the Taliban nor Al-Qaida detainees are entitled to POW status.” However, a statement by President Bush of 8 February 2002, had stipulated: “Bush says Geneva Convention Applies to Taliban, Not al-Quaida”. See Press Briefing of Senator Daniel Inouye (D-Hawaii) of 1 February 2002 following a visit of Camp X-Ray in Guantánamo. See also article by Professor Ruth Wedgwood in the *Financial Times* of London, 10 July 2003, “Justice Will be Done at Guantánamo”, also reproduced on the website of the U.S. State Department.

<sup>23</sup> For a general description see Roger Luis Ricardo, *Guantánamo. The Bay of Discord*, Ocean Press, Melbourne 1994.

<sup>24</sup> Quoted by Boone Schirmer in an article “U.S. Bases in Central America and the Opposition to them”, a paper presented at “Crossroads 1991”, an international conference on U.S. bases, Manila, Philippines, May 14, 1990, FFB Bulletin, Spring/Summer 1990.

<sup>25</sup> On 25 October 1983 the administration of President Ronald Reagan launched “Operation Urgent Fury”, an invasion of the island of Grenada. The initial assault consisted of some 1,200 troops. As the invasion force grew to more than 7,000 the defenders either surrendered or fled to the mountains. Thus the Marxist, pro-Cuban government was eliminated and a regime friendly to the United States was installed. America’s European allies expressed disapproval of the unilateral invasion of Grenada.

<sup>26</sup> Operation “Just Cause” 19-24 December 1989, conducted during the administration of President George Bush, Sr..

<sup>27</sup> Clive Parry, Consolidated Treaty Series, Volume 193, 1903, pp. 429-430.

“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:

1<sup>st</sup>. in Guantánamo ....” [description of the coordinates follows]

Pursuant to article II, the Republic of Cuba granted the right to use and occupy the waters adjacent to said areas of land and water, 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*”. (emphasis added)

Article III is of particular relevance to the issue of sovereignty. It reads

“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 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.” (emphasis added)

The treaty was signed by the first Cuban President Tomás Estrada Palma on 16 February 1903, and by the President of the United States Theodore Roosevelt on 23 February 1903.

The treaty was supplemented by a further agreement signed by the plenipotentiaries of Cuba and the United States on 2 July 1903 and on 2 October 1903, respectively.

Pursuant to article I, the United States agreed to pay to the Republic of Cuba the annual sum of two thousand dollars. – for 45 square miles of territory – and one of the best ports in Cuba.

Pursuant to article III, the United States “agrees that no person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise within said area.”

However, as we know from press reports, there are several commercial concessions operating in Guantánamo, including a Baskin Robbins, a McDonalds<sup>28</sup> and a ten-pin bowling alley.

The lease agreement was supplemented once again, by a new treaty, signed in Washington on 29 May 1934, when the United States agreed to increase the amount of the lease from \$2,000 to \$4,085 per annum<sup>29</sup>.

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<sup>28</sup> *Haitain Ctrs. Council v. Sale*, 823 F. Supp. 1028. This judgment was subsequently vacated as moot.

<sup>29</sup> The approximate equivalent of \$50,000 in the year 2002, cf. [http://eh.net/htmit/ppowerusd/dollar\\_question.php](http://eh.net/htmit/ppowerusd/dollar_question.php).



Article III of the 1934 agreement stipulates: “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 ... the stipulations of that agreement with regard to the naval station of Guantánamo shall continue in effect.”<sup>30</sup>

*B The United States position:*

The United States advances a positivist approach to the continued validity of the lease, insisting that it is open-ended in duration and that it can be terminated only by mutual agreement. The Guantánamo lease is neither void *ab initio* nor voidable today. Indeed, the law of treaties in 1903 did not forbid the use of force or the threat of force in the conclusion of treaties.

The consequence of this position is that for as long as the United States withholds its consent to termination, it effectively exercises not only complete control and jurisdiction over the area, but effectively all the trappings of sovereignty. Guantánamo is thus a quasi-dependent territory.<sup>31</sup>

*C. The Cuban position:*

In 1959 the Cuban Government informed the United States that it wanted to terminate the agreement. For this reason, the Cuban Government has not cashed the lease cheques since 1959<sup>32</sup>.

Cuba has ever since and consistently expressed the view that it deems the United States presence in Guantánamo as an illegal occupation<sup>33</sup>. In a statement to the General Assembly, dated 14 June 2002, Cuba demanded that the Government of the United States of America return the Cuban territory of Guantánamo Bay, noting that the territory had been “usurped illegally against the wishes of its people.”<sup>34</sup> On 14 January 2002, shortly after the United States started transferring Taliban detainees to Guantánamo, the Government of Cuba made a declaration recalling that:

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<sup>30</sup> Inter-American relations. Collection of Documents, compiled by Barry Sklar and Virginia Hagen, Washington, D.C., U.S. Government Printing Office, 1972.

<sup>31</sup> Alfred de Zayas, “United States: Dependent Territories”, in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, 2000, pp. 1204-1214, at 1213.

<sup>32</sup> Statement by the Government of Cuba to the National and International Public Opinion, *Granma Internacional*, 14 January 2002. Cuban President Fidel Castro, not long after the revolution, commented on Guantánamo: “The Naval base is a dagger plunged into the Cuban soil ... a base we are not going to take away by force, but a piece of land we will never give up.” J.L. Heibel, *Guantánamo Bay*, Chapter V, [www.nsgtmo.navy.mil/gazette/History](http://www.nsgtmo.navy.mil/gazette/History).

<sup>33</sup> In the Core document submitted by Cuba to the United Nations on 10 October 1997 in connection with the procedure of State party reporting under the human rights treaties, Cuba refers to the Guantánamo base as illegal occupation of its territory. UN Doc. HRI/CORE/1/Add.84, para. 22. In a speech at a press conference in Concepción, Chile, on 3 December 1971, Castro said “That base is there just to humiliate Cuba; just like a knife stuck in the heart of Cuba’s dignity and sovereignty ... But from a military standpoint, the base is completely useless.” Quoted in Herbert Matthews, *Revolution in Cuba*, Charles Scribners and Sons, New York, 1975, p. 163. In the “5 Puntos” advanced by Cuba on 28 October 1962 as a basis for negotiations with the United States, Point 5 stipulates the “withdrawal from the Guantánamo Naval Base (which the US has occupied and operated since the turn of the century), and return of the Cuban territory occupied by the United States.”

<sup>34</sup> UN Doc.A/57/312, *Right of peoples to self-determination, Report of the Secretary-General*, p. 3 (2002).

“The Platt Amendment, which granted the United States the right to intervene in Cuba, was imposed on the text of our 1901 Constitution as a prerequisite for the withdrawal of the American troops from Cuban territory<sup>35</sup>. In line with that clause, the aforementioned Agreement on Coaling and Naval Stations was signed on February 1903...In due course... the illegally occupied territory of Guantánamo should be returned to Cuba.”

Cuba, of course, has no possibility to expel the United States from Guantánamo<sup>36</sup>. It can only protest, and its protests have the function in international law of frustrating any eventual United States contention about putative Cuban acquiescence, and thus prevents the US from being able to claim sovereignty over the territory by virtue of occupation and prescription.

I submit that there is an international law obligation to negotiate<sup>37</sup>, and refer to article 2, paragraph 3, of the United Nations Charter, which requires the peaceful settlement of disputes. Thus, it would appear appropriate to test the question of the continued validity of the lease by means of binding arbitration, or to submit the issue to adjudication by the International Court of Justice, if indeed the dispute cannot be settled through bi-lateral negotiation.<sup>38</sup>

Any such tribunal would have to interpret the meaning of the term “sovereignty”, as it appears in article 3 of the agreement of 16 February 1903. Yet another term requiring interpretation, is the word “continued”, since the agreement provides for the “continued ultimate sovereignty” of Cuba. The question is thus whether sovereignty or continued sovereignty can be trumped by virtue of a lease agreement that does not state a specific date of termination. Should a date of termination be interpreted into the agreement?

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<sup>35</sup> “The Americans withdrew from the island in 1902, but not before they exacted, as a condition of their leaving, incorporation of a series of limitations on Cuban sovereignty, set forth in the famous Platt amendment, into the constitution of the new Cuban republic. .. The treaty also provided for the leasing of naval stations to the United States, by which means the United States acquired Guantánamo Bay for a naval base still under its control (despite Fidel Castro’s objections).” Rhoda P. Rabkin, *Cuban Politics. The Revolutionary Experiment. Politics in Latin America. A Hoover Institution Series*, Praeger, New York, 1991, p. 13. See also Louis A. Perez, *Cuba under the Platt Amendment 1902-1934*, University of Pittsburgh Press, Pittsburgh, 1986.

<sup>36</sup> In a speech delivered in Nicaragua on 11 January 1985 Fidel Castro said: “ What interest can we have in waging a war with our neighbours ? Even in our country we have a military base against the will of our people. It has been there throughout the twenty-six years of the revolution, and it is being occupied by force. We have the moral and legal right to demand its delivery to our people. We have made the claim in the moral and legal way. We do not intend to recover it with the use of arms. It is part of our territory being occupied by a U.S. military base. Never has anyone, a revolutionary cadre, a revolutionary leader, or a fellow citizen, had the idea of recovering that piece of our territory by the use of force. If some day it will be ours, it will not be by the use of force, but by the advance of the consciousness of justice in the world.” *Fidel Castro Speeches 1984-85. War and Crisis in the Americas*. Pathfinder Press, New York, 1985, pp. 99-100.

<sup>37</sup> Indeed, since the adoption of the United Nations Charter in 1945, of which both Cuba and the United States were original signatories, there is an obligation to negotiate in order to settle disputes peacefully, pursuant to article 2, paragraph, 3 of the Charter. See Carl August Fleischhauer, “Negotiation” in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. III, 1997, pp. 535-537.

<sup>38</sup> Over the years Castro has made the issue of Guantánamo a pre-condition to normalization of relations with the United States. Rabkin, op.cit., p. 156.

In the light of the reality of de-colonization in Africa and Asia, in the light of the return to their sovereigns of leased territories such as Macau and Hong Kong, in the light of the return of the Panama Canal<sup>39</sup> to Panamanian sovereignty, is it not an anachronism in international law that the “sovereign” in Guantánamo is unable to regain jurisdiction over its own territory, notwithstanding 45 years of consistent protests?

There are other related legal questions that must be answered. For instance, is the continued occupation of Guantánamo Bay by the United States compatible with the United Nations Charter, in particular in the light of the principle of self-determination enunciated in the preamble and article 1 of the Charter, and in the light of article 2, paragraph 4, of the Charter which prohibits the use of force? Is it compatible with article 1 of the International Covenant on Civil and Political Rights, which stipulates the right to self-determination and the right to dispose of a peoples’ natural resources<sup>40</sup>? Is it compatible with the United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*? This famous Friendly Relations Resolution, adopted without a single dissenting vote, strongly reaffirms the principle of equal rights and self-determination of peoples and the principle of the sovereign equality of States.

#### D. History of the Lease Agreement

In order to understand the validity of the Guantánamo lease today, it is useful to review the history of the Cuban insurrection against Spain in 1895 and the American intervention in what became known as the Spanish-American war.<sup>41</sup>

In the last decades of the nineteenth century, the United States government repeatedly expressed the desire to annex Cuba<sup>42</sup>. It made several overtures to Spain, offering to buy the island, as it had bought the French Territories of Louisiana from Napoleon in 1803,

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<sup>39</sup> Whereas the Panama Canal was under United States “sovereignty” by virtue of the 1903 Treaty, the Suez Canal was a private company, with Britons and French holding most of the shares. The Suez Canal was built between 1859 and 1869 by the French Engineer Ferdinand de Lesseps, and was acquired largely by Great Britain in 1875. By the provisions of the Anglo-Egyptian Treaty of 1936, Great Britain enjoyed the right to maintain defense forces in the Suez Canal Zone. On 26 July 1956 Egyptian President Gamal Abdel Nasser nationalized the Suez Canal and triggered the Suez Canal crisis, which was resolved by the arrival of United Nations peace forces in Egypt. W. Scott Lucas, *Divided We Stand: Britain, the United States and the Suez Crisis*, 1995; Keith Kyle, *Suez*, 1991; William Louis and Roger Owe (eds.) *Suez 1956: The Crisis and its Consequences*, 1989.

<sup>40</sup> During the examination of the initial report of the United States to the Human Rights Committee, the former chairman of the Committee Julio Prado Vallejo, today a member of the Inter-American Commission on Human Rights, raised a question on the respect and implementation of the right of self-determination by the government of the United States, in particular with regard to the detention of Cuban and Haitian refugees in Guantánamo Bay, UN doc. CCPR/C/SR/1401, para. 39.

<sup>41</sup> For histories of Cuba see, *inter alia*, Hugh Thomas, *Cuba, The Pursuit of Freedom*, Picador, London, revised edition 2001; Jorge I. Domínguez, *Cuba: Order and Revolution* (Cambridge, Massachusetts, The Belknap Press of Harvard University Press, 1978); Emilio Roig de Leuchsenring, *Historia de la Enmienda Platt*, La Habana, 1935.

<sup>42</sup> Hugh Thomas, *op.cit.*, pp. 129 et seq. “In 1845 John L. O’Sullivan ... coined the phrase ‘manifest destiny’ to describe the expectation that the US ... would inevitably absorb their neighbours.... In early 1847 O’Sullivan went to Havana ... and when they returned they launched a campaign for the US to buy Cuba, as had been suggested by Nicolas Trist, the US Commissioner in Mexico.” p. 130. In 1857 President James Buchanan undertook the third attempt by a US president to buy Cuba from Spain. Hugh Thomas, p. 137.

Florida from Spain in 1819, and Alaska from the Tsar in 1867. Spain, however, refused to sell Cuba and rejected a final American offer in 1897.

On 24 December 1897, the United States Undersecretary of War J.C. Breckenridge, addressed a detailed memorandum to Lieutenant General Nelson A. Miles, Commander of the U.S. Army, outlining the United States policy on “the upcoming campaign in the Antilles”, particularly concerning the intended conquest and annexation of Cuba<sup>43</sup>. The United States government was thus actively looking for an excuse to take Cuba by force. The pretext had been provided by the Cuban insurrection of 1895, which was scoring considerable victories and should have ended with full Cuban independence. This, however, would have deprived the United States of influence in the newly independent island neighbour. Thus, on 24 January 1898, U.S. President William McKinley sent the battleship USS Maine to Havana, ostensibly “to protect American lives and property”. On 15 February 1898, the USS Maine blew up in Havana harbor under unexplained circumstances, whereupon the U.S. blamed Spain and declared war<sup>44</sup>. While modern historical scholarship has since established that the Maine did not sink because of a Spanish mine or any sabotage on the part of Spanish agents<sup>45</sup>, as the contemporary US press had loudly reported<sup>46</sup>, two competing theories are still proffered: that the explosion was brought about by the proximity of gunpowder and ammunition to the ship’s motors<sup>47</sup>, and that the U.S. sunk the Maine deliberately<sup>48</sup>. On 11 August 1898 Spain accepted the American peace terms. By virtue of the Treaty of Paris, the United States obtained control of four new territories: Cuba, Puerto Rico, the Philippines and Guam.

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<sup>43</sup> Emilio Roig de Leuchsenring, *Historia de la Enmienda Platt*, La Habana, 1935. Frank Fernandez, “Political Realism Reconsidered: U.S.-Cuba Relations” in LBJ Journal of Public Affairs, vol XIII, pp. 21-31 at 24. Full text of memorandum quoted in J.A. Sierra, History of Cuba, www.historyofcuba.com.

<sup>44</sup> On 25 April 1898 the US Congress formally declared war on Spain, landed large numbers of soldiers in Cuba and soundly defeated the Spanish Navy at Santiago. The Spanish land troops, considerably weakened by three years of war against the Cuban insurrectionists, finally surrendered to the Americans. The United States Secretary of State spoke of “a splendid little war”.

<sup>45</sup> It is conceded that “The Spanish officials at Havana showed every attention to the survivors of the disaster and great respect for those killed.” U.S. Navy, <http://www.chinfo.navy.mil/navpalib/ships/battleships/maine/maine.html> and <http://pages.prodigy.net/cierpke/maine.htm>. See also Frank Freidel, *The Splendid Little War*, Bramhall House, 1958.

<sup>46</sup> The “yellow journalism” practiced both by the Hearst and Pulitzer newspapers incited to war. On 17 February 1898 Hearst carried a headline in the Journal “The Warship *Maine* was split in two by an enemy’s secret infernal machine”. Beneath was a drawing of the ship anchored over mines and a diagram, showing wires leading to the adjacent Spanish fort, the Cabaña. The U.S. investigation concluded “the *Maine* was destroyed by the explosion of a submarine mine which caused the partial explosion of two or more of the forward magazines.” The Assistant Secretary of the US Navy, Theodore Roosevelt seems to have had no doubts: “The Maine was sunk by an act of dirty treachery”. Hugh Thomas, *Cuba*, *op.cit.* p. 211.

<sup>47</sup> Rafael E. Tarrago “The thwarting of Cuban autonomy” in *Orbis*, Fall 1998, volume 42, number 4, pp. 517 et seq.: “Finally, eighty years after the Americans blamed the expulsion of the USS Maine in Havana harbor on Spanish perfidy, a meticulous study by U.S. Admiral Hyman Rickover confirmed, as did the Spanish commission’s own report of 1898, that the coal bunkers of the battleship were dangerous close to the magazine, and that a spontaneous combustion had caused the explosion.” See Rickover’s 1974 study which explains how the explosion had started in some accumulated coal dust in one of the ship’s coal storage bunkers, and how the heat from this fire ignited the ammunition magazine and blew up the ship. See also the review of various theories on the explosion: “What Destroyed the USS Maine” by Edward P. McMorrow, <http://www.spanamwar.com/Mainemo1.htm>

<sup>48</sup> “How to start a war: The American use of war pretext incidents” in: <http://www.abctheorists.com/print.php?sid=49>. Cf. the pretext to enter the Vietnam war, the alleged attack on two American ships in the Gulf of Tonkin in 1964, and the pretext to bombard Baghdad in March 2003, the alleged threat posed by weapons of mass destruction. Both pretexts have since been proven to be false.

The American intervention in the Cuban-Spanish war frustrated the hopes of the Cuban revolutionaries for self-determination. Instead, an American administration under General John R. Brooke and later Major-General Leonard Wood was established, supported by a strong military presence, which lasted for four years. U.S. policy vacillated between outright annexation and that of ensuring political and economic control. Eventually, the second option was chosen, but Cuba was not released into its quasi-protectorate status until it had agreed to the addition of an appendix to its Constitution, granting the United States effective control over the political development of Cuba. In practice, the amendment also ensured that the Cuban administrations would be subservient to the interests of the United States. This imposed appendix to the Cuban Constitution was known as the “Platt Amendment”, which was not an amendment to the Cuban Constitution, but an amendment to the appropriations bill in the United States Congress authorizing the continued financing of the U.S. military occupation of Cuba.

The Platt Amendment<sup>49</sup> had been proposed in the United States Congress by Senator Orville H. Platt (Republican, Connecticut). On 25 February 1901 the text went to the Senate and was not greeted with unanimous approval. Senator Morgan said “This is... a legislative ultimatum to Cuba”.<sup>50</sup>

The text was then imposed on the Cuban Constitutional Assembly, which initially rejected it

“some of these stipulations are not acceptable, exactly because they impair the independence and sovereignty of Cuba. Our duty consists in making Cuba independent of every other nation, the great and noble American nation included, and if we bind ourselves to ask the governments of the US for their consent to our international dealings, if we admit that they shall receive and retain the right to intervene in our country to maintain or precipitate conditions and fulfill duties pertaining solely to Cuban governments and ... if we grant them the right to acquire and preserve titles to lands for naval stations and maintain these in determined places along our coast, it is clear that we would seem independent of the rest of the world although we were not in reality, but never would be in reference to the United States.”<sup>51</sup>

The United States made it clear that it would not terminate military occupation of Cuba unless Cuba agreed to incorporate the text of the Platt Amendment into its Constitution. After serious debate in the Cuban Constitutional Assembly and a vote that resulted in 16 votes in favour and 15 against, the text of the Platt Amendment was formally accepted, thus enabling Cuba to emerge as a pseudo-republic, actually, as a quasi-protectorate<sup>52</sup> on 20 May 1902.

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<sup>49</sup> Roig, *op.cit.*, pp. 57-67. See also Hugh Thomas, *Cuba: The Pursuit of Freedom*, Harper / Row, New York, 1971; Guillermo A. Belt, “Relaciones Internacionales de la República de Cuba”, in *Guaracabuya, Organó Oficial de la Sociedad Económica de Amigos del País*, [www.amigospais-guaracabuya.org](http://www.amigospais-guaracabuya.org).

<sup>50</sup> Hugh Thomas, *op.cit.*, p. 263-64.

<sup>51</sup> Hugh Thomas, *op.cit.* p. 264.

<sup>52</sup> Wilbert A. Chaffee and Cary Prevost, *Cuba. A different America*. Rowman & Littlefield Publishers, Totowa, New Jersey, 1989, p. 3. William O. Scroggs, of the United States Council on Foreign Relations called Cuba a “protectorate” in his speech of 21 March 1935 in Toronto, Canada. *The Empire Club of Canada Speeches 1934-35*, pp. 316-328.

Article III of the Platt Amendment stipulated :

“The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.”

And indeed, pursuant to this provision, the United States intervened militarily in Cuba in 1906, 1912, 1917 and 1920. It also intervened to prevent the election of candidates critical of the United States control of the Cuban economy.

Of particular relevance is Article VII of the Platt Amendment, which stipulated :

“To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States.”<sup>53</sup>

The Platt Amendment, as incorporated in the Treaty of Relations between Cuba and the United States of 22 May 1903, was abrogated by President Franklin Delano Roosevelt as part of his “Good Neighbor Policy” toward Latin America. This abrogation became the subject of a new Treaty Between the United States of America and Cuba, dated 29 May 1934.

E. Four possible scenarios or options exist in international law

i. Option one: the Treaty is valid: the positivist approach

Article 26 of the Vienna Convention on the Law of Treaties stipulates that every treaty in force is binding upon the parties to it and must be performed by them in good faith: *Pacta sunt servanda*. On its terms, the Guantánamo treaty is still valid, and Cuba has no choice but to respect its continued validity, since Cuba failed to secure its rights by clearly stipulating a date of termination. Thus, as long as the United States insists on its continuation, Cuba cannot rescind it. The official position of the United States is precisely that it has a perpetual lease, since pursuant to article 1 of the 1903 lease agreement and article 1 of the 1934 Treaty, the lease can be revised or terminated only by mutual agreement. This position is reflected in the judgments of United States district and circuit courts<sup>54</sup> that interpret the lease agreement as a valid perpetual lease, in which Cuba has ultimate sovereignty and the United States full jurisdiction. This approach was

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<sup>53</sup> The Platt Amendment was adopted by the Congress of the United States on 2 March 1901 and submitted to the Cuban Constitutional Convention for adoption, which followed on 12 June 1901. Clive Parry, the Consolidated Treaty Series, Volumen 192, 1902-1903, pp. 19-21.

<sup>54</sup> In the judgment of the United States District Court for the Central District of California in *Coalition of Clergy v. Bush* (189 F. Supp. 2<sup>nd</sup> 1036, 2002 U.S. Dist. Lexis 2748) dated 21 February 2002, the Court relied on the text of the treaty providing that the 1903 lease would continue in effect until the parties agree to modify or abrogate it.

possible in the early twentieth century. but it is not compatible with modern international law, particularly in the light of the law of de-colonization and the recent experience of the termination of other comparable leases

ii. Option two: A condominium ?

A second option, favoured by the *Cuba Project* at the Center for International Policy in Washington, D.C.<sup>55</sup>, postulates a middle ground by invoking the application of the old doctrine of the condominium. History delivers examples of various kinds of *condominia*<sup>56</sup>, among them Andorra (between France and Spain), the New Hebrides, now Vanuatu (Between France and Great Britain), the Gulf of Fonseca (between Nicaragua, Honduras and El Salvador)<sup>57</sup>, and Danzig (between Germany and Poland) after World War I. The concept of a condominium, however, refers to the joint exercise of sovereignty over a given territory. The situation in Guantánamo is *sui generis*, since sovereignty is expressly recognized to lie with Cuba, whereas complete jurisdiction is granted to the United States. Cuba has not been able to share with the United States the jurisdiction over Guantánamo Bay or even exercise any sovereignty over the territory since 1903. Thus, the concept of a U.S.-Cuban condominium fails to convince.

iii. Option three: the lease is void *ab initio*

According to this scenario, the lease agreement was void from the beginning, because it was imposed by force. This means that the lease is void, not only voidable Pursuant to article 52 of the Vienna Convention on the Law of Treaties<sup>58</sup>:

“A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

However, one must bear in mind that the Vienna Convention on the Law of Treaties was adopted in 1969, and that it did not enter into force until 1980; the Charter of the United Nations dates back to 1945. Bearing in mind that the Guantánamo lease agreement dates from 1903, it would appear *prima vista* that the principle of non-retroactivity enunciated

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<sup>55</sup> On the doctrine of shared sovereignty, see the paper by Robert L. Muse, Esq., in <http://ciponline.org/cuba/cubaproject.htm>. The Cuba Project, 5 March 2003, Center for International Policy Conference at Carnegie Endowment for International Peace, Washington, D.C.

<sup>56</sup> Peter Schneider, “Condominium”, in R. Bernhardt (ed.) *Encyclopaedia of Public International Law*, Vol. I, pp. 732-735 (1992).

<sup>57</sup> ICJ case concerning the Land, Island and Maritime Frontier Dispute over the Gulf of Fonseca (El Salvador/Honduras). Judgments of 13 September 1990, 11 September 1992, public hearings 12 September 2003. Judgment of 13 September 1990, in which the Court found that Nicaragua had shown an interest of a legal nature which may be affected by part of the Judgment of the Chamber on the merits, granting permission to intervene.

<sup>58</sup> Preempting a positivist objection that the Vienna Convention on the Law of Treaties only entered into force in 1980 and that the United States is not a party to it (although Cuba is), it should be noted that the Vienna Convention is generally recognized as being declarative of the pre-existing international law on treaties. Moreover, the International Court of Justice has relied on the text of the Vienna Convention in many cases, including its 1971 Advisory Opinion in the South West Africa/Namibia case, long before the Vienna Convention had formally entered into force, and this notwithstanding article 4 of the Convention which articulates the rule on non-retroactivity.

in article 4 of the Convention applies. Moreover, although most parts of the Vienna Convention, and in particular the prohibition of force in the adoption of treaties, are declarative of pre-existing customary international law, the question arises whether the prohibition of force or the prohibition of annexation had already coagulated as a norm of international law in 1903. The evidence from State practice shows that the international law prohibition on the use of force and the prohibition of coercion had not yet emerged in 1903, so that even the annexation of Cuba in 1903 would have been lawfully possible in the light of the unsettled state of turn-of-the-century international law<sup>59</sup>, the hey-day of imperialism and colonialism, of the Monroe Doctrine<sup>60</sup> and “manifest destiny”<sup>61</sup>. According to the inter-temporal law principle enunciated in the *Palmas Island Arbitration*<sup>62</sup>, it is the law in existence at the relevant time (1898 for the Treaty of Paris; 1903 for the Guantánamo lease) that governs the question of the validity of the treaty or the question of sovereignty at that point in time<sup>63</sup>.

#### iv. Option four: the treaty is voidable

A fourth scenario is that while the lease was valid *ab initio*, it is now voidable. In this connection the doctrine of “unequal treaties” becomes particularly relevant. While not challenging the validity of the treaty from the start or the legality of actions taken pursuant to the treaty, it allows for its termination today. Article 64 of the Vienna Convention stipulates that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void. Self-determination is such a peremptory norm, as amply illustrated in the de-colonization process<sup>64</sup>. Moreover, article 56 of the Vienna Convention on the Law of Treaties

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<sup>59</sup> As to coercion of a State, the International Law Commission’s Commentary on the draft Vienna Convention on the Law of Treaties states: “The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties should no longer be recognized as legally valid....” *Yearbook of the International Law Commission*, 1966, II, p. 246. See also D.J. Harris, *Cases and Materials on International Law*, Third Edition, 1983, pp. 614-15.

<sup>60</sup> For a discussion of the international law implications of the Monroe doctrine, see Peter Malanczuk, “Monroe Doctrine” in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. III, 1997, pp. 460-464

<sup>61</sup> Oppenheim-Lauterpacht, *International Law*, eighth edition 1963, Vol. I. See the sections on State territory, in particular the section on “subjugation” (pp. 566-575) and “prescription” (pp. 575-578). “Conquest is the taking possession of enemy territory through military force in time of war. Conquest alone does not ipso facto make the conquering State the sovereign of the conquered territory ... conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory ... But it must be specifically mentioned that, if a belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.” (p. 566-67).

<sup>62</sup> *Island of Palmas Arbitration*, RIAA, Vol. 2 (1949) 829-890. P.C. Jessup, “The Palmas Island Arbitration”, *American Journal of International Law*, Vol. 22 (1928) pp. 735-752.

<sup>63</sup> Palmas Island (or Miangas) is a small inhabited island situated approximately 50 miles south-east from Cape San Augustin, Mindanao (Philippines). By the Paris Peace Treaty of 10 December 1898 (*Martens NRG2*, Vol. 32, p. 74) which ended the Spanish-American war, Spain ceded the Philippines and the Island of Palmas to the United States. By virtue of the same treaty, Spain abandoned sovereignty over Cuba and allowed the United States to establish its administration there.

<sup>64</sup> Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, Clarendon Press, Oxford, 1994. In the *East Timor (Portugal v. Australia)* case, ICJ Report, 1995, 90, at 102, para. 29, the International Court of Justice elaborated on the concept of *erga omnes* duties, expanding these to encompass the right of self-determination. See “*erga*



provides for denunciation or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. Such denunciation right is deemed to be implied in this kind of treaty, as it is implicit in treaties of alliance, which may and do often lapse upon a change of government. Finally, there is also Article 62, the famous *clausula rebus sic stantibus*, that allows for termination on the ground of fundamental change of circumstances.

Even if the Guantánamo lease was not void *ab initio*, it would appear that it must be deemed to be void today, because treaties that are imposed by coercion are voidable (articles 51-52 of the Vienna Convention on the Law of Treaties). Needless to say, this must be considered on a case by case basis, to determine what kind of coercion was applied, and whether the coercion was so severe as to vitiate the entire treaty. The historical record shows that the conditions under which the Platt Amendment was imposed on the Cuban Constitutional Assembly, in particular its character as a precondition to limited Cuban independence, and the way in which the United States Government occupied and then demanded Guantánamo Bay from Cuba, left no other choice to Cuba other than yielding to pressure.

In this context it is worth recalling that the Vienna Conference on the Law of Treaties of 1969 adopted a “Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties” by virtue of which the Conference:

“Solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any state in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.”

This declaration is relevant in determining the validity of the treaty today.

In the light of the above, five possible grounds for invalidating the lease agreement of 1903 will be reviewed:

a) the doctrine of unequal treaties, b) the emergence of a peremptory norm of international law which is incompatible with the lease agreement, c) good faith interpretation of the lease, the time factor and the concept of sovereignty, d) the doctrine of fundamental change of circumstances, and e) termination by virtue of material breach of the terms of the lease.

a) Doctrine of unequal treaties<sup>65</sup>

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*omnes obligations*” in Christian Tomuschat, *Recueil des Cours de l’Académie de Droit International de la Haye*, Vol. 281 (1999) pp. 82 et seq.

<sup>65</sup> F. Nozari, *Unequal Treaties in International Law*, Stockholm, 1971

Werner Morvay “Unequal Treaties”, in Rudolf Bernhardt (ed.) *Encyclopaedia of Public International Law*, Vol. IV, 2000, pp. 1008-1011; D.J. Harris, *Cases and Materials on International Law*, Sweet and Maxwell, London, 1983, pp. 564, 615-16; P. Sinha, “Perspective of the Newly independent states on the binding quality of International Law”, 14 *International and Comparative Law Quarterly*, pp. 121-13. O.J. Lissitzyn, “International Law in a Divided World”, in 542 *International Conciliation* 37, 57 (1983). Conference des juristes Afro-Asiatiques, Damas, 7-10 novembre 1957, édité par l’ordre des Avocats de Damas (1957) p. 198.

The process of de-colonization in the United Nations gave impetus to the doctrine of the invalidity of unequal treaties. This doctrine has been confirmed by the renegotiation of the Panama Canal in 1977 and its return to Panamanian sovereignty in January 2000. Based on the same doctrine, the United Kingdom returned Hong Kong to China in 1997 and Portugal returned Macau to China in 1999. Let us revisit these treaties, which originally were declared to be “in perpetuity” by the United States, the United Kingdom and Portugal, respectively.

### *The Panama Canal*

The history of the Panama Canal Treaty is revealing<sup>66</sup>. In October 1903 Panama did not exist as a sovereign State, but was part of Colombia. In the light of the failure of the United States to persuade Colombia to grant to the United States the territory in the isthmus of Panama in order to build a canal, the United States chose to encourage a revolt in Panama, and to negotiate with the rebels. In November 1903, with U.S. warships standing by, a revolution broke out in Panama City. With U.S. encouragement and financing, the rebels declared their independence from Colombia, while the U.S. fleet prevented Colombian troops from arriving. Independence was declared on 4 November 1903, and American diplomatic recognition followed two days later. Mr. Bunau-Varilla was named by the new republic to handle the negotiation of a canal treaty in Washington. The resulting Hay-Bunau Varilla Treaty secured American rights to construct and maintain the canal in Panama. Work began on the canal in 1904 and was completed in 1914. The treaty granted not only jurisdiction and control, but full *sovereignty* over the Panama Canal territory to the United States<sup>67</sup>. A long dispute subsequently ensued because of Panama’s general dissatisfaction with the terms of the 1903 Treaty and the circumstances in which it was concluded, Panama arguing that the treaty had been imposed on it against its interests, and that it was incompatible with new principles of international law. Already in 1960 Panama’s Ambassador to the United States argued in the United Nations General Assembly that “in the light of legal principles a lease for an indefinite period of time is inadmissible”<sup>68</sup>. In 1973, Panama brought its case before the Security Council and insisted on “effective sovereignty and complete jurisdiction over its entire territory as basic points of a new treaty for the Panama Canal”<sup>69</sup>. The Delegate of Peru argued that the “treaty is completely out of the spirit of the age and the principles of international law ... it should be abrogated and a new treaty should emerge as soon as possible whereby Panama’s effective sovereignty and total jurisdiction over all its

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<sup>66</sup> Ph. Bunau-Varilla, Panama: *The Creation, Destruction and Resurrection*, London, 1913. R.R. Baxter and R.D. Caroll, *The Panama Canal: background papers and proceedings*, Association of the Bar of New York, Oceana Publishers, New York, 1965.

<sup>67</sup> Hay-Bunau Varilla Treaty of 18 November 1903, 33 Stat. 2234 (1903-5), UKTS No. 431. By virtue of Article 11, the Panama Canal Treaty of 1903 granted 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 the Panama Canal. Article 111 granted “all the rights power and authority ... which the United States would possess and exercise as if it were the sovereign... to the entire exclusion of the exercise by the Republic of Panama of any such rights, power or authority”.

<sup>68</sup> 17 UN GAOR (1962), Plenary meetings, 113.

<sup>69</sup> Official Records of the Security Council (1973) vol. 28, 1684<sup>th</sup> meeting, at p. 4. Panama referred to “the principles of international law concerning friendly relations and co-operation among States, and particularly those pertaining to respect for the territorial integrity and political independence of States, non-intervention, equality or rights and self-determination of peoples, the sovereign equality of States, the elimination of all forms of foreign domination, the right of peoples and nations to permanent sovereignty over their natural resources, and international co-operation in the economic and social development of all nations” Ibid, 1704<sup>th</sup> meeting at 6-7. The Cuban delegate argued that the treaty’s provisions were no longer valid “in the light of international law and the Charter of the United Nations” 1696<sup>th</sup> Meeting, at 21. See Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, Clarendon Press, Oxford 1994, pp. 74-78.

territory will be vindicated”<sup>70</sup>. Similarly, the Canadian Ambassador stated “reviewing developments since the first Convention 70 years ago, it is clear that, as the poet said, the old order changeth, yielding place to new”.<sup>71</sup> In 1977 United States President Jimmy Carter signed the new Panama Canal Treaty, which provided for the return of the Canal to Panama in the year 2000.

### *Hong Kong*

By virtue of the Treaty of Nanking of 1842, which ended the first Opium War, China ceded *in perpetuity* Hong Kong to Great Britain. In 1860 China was forced to cede Kowloon and Stonecutters Island. The adjacent territories were leased in 1898 for 99 years. When the time came to renegotiate an extension of the 99-year lease, China demanded and succeeded in obtaining the return of all territories administered by the United Kingdom, and on 1 July 1997 Hong Kong became a Special Administrative Region of the People’s Republic of China.

### *Macau*

In 1517 the Chinese viceroy of Canton ceded the peninsula of Macau and the islands of Taipa and Coloane to the Portuguese against payment of an annuity. After 1849 the Portuguese expelled all Chinese customs officials from Macau and ceased to pay the annuity. By virtue of the Sino-Portuguese Protocol of 1 December 1887, China recognized the permanent occupation of Macau by Portugal, which was henceforth administered as a Portuguese colony. The Peoples’ Republic of China, however, did not recognize the 1887 Sino-Portuguese treaty, which it rejected as an “unequal treaty”. In March 1987 Sino-Portuguese negotiations took place, resulting in an agreement whereby China resumed the exercise of sovereignty over Macau with effect from 20 December 1999.<sup>72</sup>

In his 1947 course at the Hague Academy, Serge Krylov, Judge at the International Court of Justice, expressed the view that unequal treaties and those establishing capitulatory regimes<sup>73</sup> “by which an imperialist power imposes its will upon a weaker state” are invalid.<sup>74</sup> The same view is expressed by Professor F. I. Kozhevnikov in his textbook on International Law, in which is stated “The principle that international treaties must be observed does not extend to treaties which are imposed by force, and which are unequal

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<sup>70</sup> 1701<sup>st</sup> meeting, at 5.

<sup>71</sup> 1700<sup>th</sup> meeting, at 18.

<sup>72</sup> Walter Rudolf, “Macau” in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. III, 1997, pp. 275-278.

<sup>73</sup> Special agreements with the Ottoman empire, going back to certain privileges granted by Sultan Suleyman I to France in 1535. The particular rights established under the Capitulatory treaties varied from case to case, but usually they provided that nationals of the Capitulatory Powers residing in Turkey were subject to the jurisdiction of their own consuls and to the application of their national laws to the exclusion of the Turkish laws and tribunals. In cases where the Turkish courts retained jurisdiction, the foreign Powers had the right to intervene in the administration of justice; foreigners were exempted from taxes other than customs duties. In September 1914 Turkey declared that Capitulations were to be considered abrogated as of 1 October 1914. Several arguments were advanced for unilateral abrogation, but the Powers concerned stated that the Capitulations could not be terminated without their consent. Fraiborz Nozari, *Unequal Treaties in International Law*, Institute of International Law of the University of Stockholm, Stockholm 1971, pp. 142 et seq. Nancy Kontou, *The Termination and Revision of Treaties in the Light of New International Law*, Clarendon Press, Oxford, 1994, pp. 78 et seq.

<sup>74</sup> Serge Krylov, “Les Notions Principales du Droit des Gens”, 70 *Recueil des Cours de l’Académie de Droit International de la Haye*, vol. 70, pp. 407 et seq. (1947-1), at p. 434.

in character... Equal treaties are treaties concluded on the basis of the equality of the parties... unequal treaties are not legally binding... Treaties must be based upon the sovereign equality of the contracting parties.”<sup>75</sup>

Applying this principle to Guantánamo Bay, an objective observer will consider that Cuba was anything but a sovereign State in 1902, when it emerged from four years of United States military occupation, handicapped by the imposition of the Platt Amendment, which granted to the United States the right to interfere in its internal affairs. As a consequence, the unequal treaty is voidable in terms of modern international law.

b) Emergence of new peremptory norms that conflict with the terms of the lease agreement

After the Second World War and in the light of the process of de-colonization, the principle of self-determination has emerged as *jus cogens*<sup>76</sup>. Article 64 of the Vienna Convention on the Law of Treaties provides that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

Article 71 stipulates that as a consequence of the invalidity of a treaty which conflicts with a peremptory norm of general international law, the termination of the treaty “releases the parties from any obligation further to perform the treaty”.

Thus, treaties in violation of the principle of self-determination, many of which were imposed upon weak nations by strong nations in the age of imperialism and colonialism, may be deemed invalid if *jus cogens* can be shown to be violated.<sup>77</sup> The return of the Panama Canal to Panamanian sovereignty is illustrative of this rule. During the relevant discussions in the General Assembly and in the Security Council, the principles enunciated in the Friendly Relations Resolution of 1970 were reaffirmed and relied upon as constituting customary international law. It was thus argued that the old Bunau-Varilla-Hay Treaty had become obsolete by virtue of the emergence of a new international legal order, consisting of a whole body of norms and principles, mostly originating in the UN Charter, which have become customary law, some of which are deemed to be *jus cogens*, including the prohibition of the threat or the use of force stipulated in article 2, paragraph 4, of the Charter.

c) Interpretation of the Lease Agreement, implied right of denunciation, the time element, the concept of sovereignty

The majority of modern treaties contain provisions for termination or withdrawal. Sometimes it is provided that the treaty shall come to an end automatically after a certain

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<sup>75</sup> F. Kozhnevnikov (ed.) *International Law*, 1961, p. 248.

<sup>76</sup> For a discussion of the debates on *jus cogens* at the Vienna Conference, see Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1973. See also Shabtai Rosenne, *The Law of Treaties, A guide to the Legislative History of the Vienna Convention*, A.W. Sijthoff, Leyden, 1970.

<sup>77</sup> Daniel O’Connell, *International Law*, Second edition, 1970, Vol. 1, p. 245.

time, or when a particular event occurs: other treaties merely give each party an option to withdraw, usually after giving a certain period of notice.<sup>78</sup> A conference of parties to a long-running treaty every twenty or fifty years would seem to foment friendly relations among States and provide for the opportunity of negotiating and agreeing on reasonable revisions or termination.

Moreover, in the light of the fact that in international practice the longest-running leases are for 99 years, it would appear that after 101 years, the Guantánamo lease is overdue for termination. Even the Hay-Bunay-Varilla Treaty of 18 November 1903, which was not a mere lease, but actually granted sovereignty “in perpetuity,”<sup>79</sup> over the Panama Canal zone, was subject to revision in 1977, and by virtue of a new Panama Canal Treaty, the United States returned the Canal to Panamanian sovereignty.

Finally, any good faith interpretation of the lease would have to focus on the language recognizing Cuban sovereignty over the territory. Article 31 of the Vienna Convention on the Law of Treaties stipulates that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” If “sovereignty” means anything, it means that the sovereign must retain some attributes of sovereignty, even if he temporarily gives up jurisdiction over a given territory. Thus, a sovereign should be able to regain the exercise of jurisdiction over the territory in question, otherwise he is not a true sovereign. The language of the Guantánamo lease does not indicate that Cuba ever intended or contemplated a cession or territory. Had cession or purchase been intended by the parties, they could have so provided in the text of the treaty. In this context it should be recalled that the United States initially wanted to purchase the territory, as envisaged in article VII of the Platt Amendment, but that the Cuban negotiators succeeded in limiting the treaty to a “lease”<sup>80</sup>. Moreover, it is worth noting that the treaty speaks of “continued ultimate sovereignty”. This necessarily implies that it was envisaged by both parties that sooner or later the territory would revert to Cuba. Thus, in brief, a lease agreement is not the equivalent of a cession or a sale. A lease, being a lesser right than sovereignty, cannot be perpetual unless the sovereign agrees by a recognizable and unmistakable act.

d) *clausula rebus sic stantibus*

The fundamental change of circumstances, otherwise known as the *clausula rebus sic stantibus*<sup>81</sup>, can also be invoked to test the validity of treaties dating back from colonial times. Newly independent nations have resorted to this argument in order to terminate their inherited burdens, sometimes with reference to article 62 of the Vienna Convention

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<sup>78</sup> Michael Akehurst, “Treaties, Termination”, in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, 2000, pp. 987-990.

<sup>79</sup> Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty), November 18, 1903, article 1. See also Matthias Hartwig, “Panama Canal” in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 4, pp. 878-885.

<sup>80</sup> The first Cuban President, Tomas Estrada Palma, succeeded in reducing the American demands for four naval bases, to two, Guantánamo and Bahia Honda (which was given up in 1912). Most importantly, he refused to cede the territory and only agreed to rent it. Hugh Thomas, *op.cit.*, p. 299.

<sup>81</sup> Georg Schwarzenberger, “Clausula rebus sic stantibus” in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. I, 1992, pp. 611-617.

on the Law of Treaties. The doctrine is invoked by them not only on the basis of justice but also because a treaty fails to accord with the present conditions of the world<sup>82</sup>. Thus, in connection with the rationale developed in sections a- c above, it could be argued that the lease of a military base in a foreign country is conditioned on the friendly relations between those States, and that as alliance treaties are deemed to terminate when a new sovereign government is fundamentally opposed to the alliance, similarly the presence of a hostile nation on the sovereign territory of Cuba is contrary to modern conceptions of sovereignty and of the sovereign equality of States. Indeed, it is an anomaly that the country that has imposed an embargo on Cuba for more than 40 years insists that it has a right to remain on its sovereign territory<sup>83</sup>.

e) Termination by virtue of material breach

Pursuant to article 60 of the Vienna Convention on the Law of Treaties, a treaty is voidable by virtue of material breach of its provisions.

Bearing in mind that according to the terms of articles 1 and 2 of the lease agreement of 16 February 1903 the use of the Guantánamo Bay territory was limited to coaling and naval purposes only, “and for no other purpose”, it would follow that the repeated use of the territory as an internment camp (for 36,000 Haitian refugees in the years 1991 to 1994, and 21,000 Cuban refugees in the 1990’s), or as a detention and interrogation center and prisoner of war camp where trials and even executions are envisaged is wholly incompatible with the object and purpose of the treaty and entails a material breach of the agreement justifying unilateral termination by Cuba in accordance with Article 60 of the Vienna Convention on the law of Treaties.

Another serious concern is that, according to reliable sources, gross violations of international human rights norms and international humanitarian law are occurring in the territory. If indeed torture is being practiced, as a number of released detainees have stated and as Richard Brourke, the Australian lawyer of several detainees maintains<sup>84</sup>, such gross violations of human rights would entail an even graver breach of the lease agreement justifying its immediate termination.<sup>85</sup>

As to the presence of a number of concessions and commercial enterprises in Guantánamo, including a McDonalds and a ten-pin bowling alley, it is certain that this

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<sup>82</sup> Georges M. Abi-Saab, “The Newly Independent States and the Rules of International Law: An Outline” (1962), *Recueil des Cours de l’Académie de Droit International de la Haye*, vol. 88, pp. 417, 432. Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, second edition, pp. 192-196. See also Hill, *The Doctrine of Rebus Sic Stantibus in International Law*, 1934; Lissizyn, “Treaties and changed circumstances” 61 *American Journal of International Law*, 1967, pp. 895-922; Haraszti, “Treaties and the fundamental change of circumstances” 146 *Recueil des Cours*, 1975, pp. 7-91.

<sup>83</sup> See General Assembly resolution of 4 November 2003 condemning the embargo on Cuba (adopted by a vote of 179 to 3)

<sup>84</sup> *New York Times*, Wednesday 8 October 2003, “Lawyer Says Guantánamo Detainees Tortured”.

<sup>85</sup> On 27 February 2001 a noted Cuban international law expert, Dr. Olga Miranda, stated in Cuba that “to maintain the base is an act of aggression on the sovereignty and dignity of our people. Moreover, the base has been used for committing aggressions and violating agreements although it was intended to be used for supplies and not for training, attacking or establishing refugee camps for Haitians. They are using the base in quite a different way than what was agreed.” Cubanet, 27 February 2001 “Cuba will not give up claim to territory occupied by US base”.

constitutes a breach of the terms of article III of the supplemental agreement of 2 July 1903. However, since such a breach does not affect the object and purpose of the lease agreement and can be easily corrected by bilateral negotiation, it does not entail a material breach justifying termination of the lease.

#### F. Conclusion

In conclusion: On the basis of the five rationales developed in the fourth option, there can be no doubt that in international law the lease agreement is voidable *ex nunc*. A reasonable period for the termination of the lease, however, should be allowed.

### III LEGAL STATUS OF THE DETAINEES

Having outlined the options concerning the current and future status of Guantánamo Bay, let us now focus our attention on the status of the Guantánamo detainees.

We recall that on 7 October 2001 the United States launched a military attack on Afghanistan, as a result of which several hundred “fighters” were detained by the United States military in Afghanistan, and numerous suspected terrorists and suspected Al Quaida members were arrested in other parts of the world. On 10 January 2002 the United States began the transportation of alleged members of the Taliban and Al Quaida to the United States Naval Base at Guantánamo.

As we have seen, pursuant to the Guantánamo lease agreement, although Cuba has ultimate sovereignty, the United States exercises exclusive jurisdiction. Thus Cuban law does not apply in the territory.

But there cannot be a “legal black hole”. *Nature abhors a vacuum*, as the noted Dutch philosopher Baruch Spinoza (1632-1677) stipulated in his *Ethics*<sup>86</sup>. In fact, there are several legal regimes that apply simultaneously:

1. the regime of international human rights law, which applies both in times of peace and in times of war. Of particular relevance to the Guantánamo detainees are those human rights treaties that bind the United States, including the International Covenant on Civil and Political Rights<sup>87</sup>, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Racial Discrimination.

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<sup>86</sup> Benedict Spinoza 1677, *Ethics*, part 1, proposition 15.

<sup>87</sup> Adopted by the General Assembly on 16 December 1966, entered into force 23 March 1976, entered into force for the United States 8 September 1992. As of November 2003 there were 151 States parties. The Covenant is not subject to denunciation. The independent expert from the United States sitting in the Human Rights Committee is Professor Ruth Wedgwood.

2. the regime of international humanitarian law, which applies in times of armed conflict<sup>88</sup>, whether or not war be officially declared, in particular the regime established by the Third Geneva Red Cross Convention of 12 August 1949, Article 5 of which provides that persons detained during armed conflict are entitled to the full protection of the Convention unless and until a competent court decides otherwise<sup>89</sup>. Article 46 limits the detaining Power's right to transfer the prisoners of war to far away locations and, in case of transfer, requires humane treatment, taking account of climatic conditions; Article 99 regulates penal proceedings; Article 118 provides that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities<sup>90</sup>, and
3. United States law, both military and civilian, in particular, the United States Constitution, which, in my view and in that of many legal experts in the United States<sup>91</sup>, applies not only in the 50 States but also in all territories where the United States exercises jurisdiction and control.

*1. The international human rights regime: International Covenant on Civil and Political Rights .*

International human rights law protects all human beings on this planet. It applies both in time of peace as in time of war.

In particular, the International Covenant on Civil and Political Rights<sup>92</sup> applies to the detainees in Guantánamo, since the United States ratified it without any relevant reservation excluding Guantánamo from its application.

Article 2, paragraph 1, of the Covenant stipulates: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and

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<sup>88</sup> In its general comment No. 29, the Committee affirms the continued application of the Covenant in times of war and stipulates: "During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation." HRI/GEN/1/Rev.6, page. 186, para. 3. The United States, however, has not notified any derogation to the Secretary General of the United Nations.

<sup>89</sup> See Louis Joinet, *Report of the Working Group on Arbitrary Detention*, UN Commission on Human Rights Doc. E/CN.4/2003/8.

<sup>90</sup> Pursuant to Executive Order No. 13268 of 2 July 2002, the hostilities in Afghanistan are deemed to be terminated. The "national emergency...with respect to the Taliban" was over. Available at <http://www.ustreas.gov/offices/eotffc/ofac/legal/eo/13268.pdf>. But under article 119, paragraph 5 of the Third Geneva Convention, the United States does have the right to detain prisoners against whom criminal proceedings are pending or those who are completing their punishments given under such proceedings.

<sup>91</sup> See the dissenting opinion of Justice Black in *Johnson v. Eisentrager* (339 U.S. 763, 70 S.Ct. 936, 94 L. Ed. 1255) (1950), discussed below.

<sup>92</sup> In its *Advisory Opinion* (General List No. 95) *Legality of the Use or Threat of Nuclear Weapons* (8 July 1996), the International Court of Justice observed "that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant" para. 25.



subject to its jurisdiction<sup>93</sup> the rights recognized in the present Covenant, without distinction of any kind”<sup>94</sup>. Pursuant to this article, the crucial test is whether the individuals are “subject to the jurisdiction” of the United States. Since the Guantánamo detainees are being held by the United States, it is clear that there is *in personam* jurisdiction.<sup>95</sup>

In its case-law the Committee has been unequivocal that article 2(1) “does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State.”<sup>96</sup>

Guantánamo Naval Base, as we have seen, is under United States control, but under Cuban sovereignty. The detention of 660 persons in this territory raises many issues under the Covenant, including under :

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<sup>93</sup> The Human Rights Committee, acting under the Optional Protocol, has considered numerous cases of persons “under the jurisdiction” of a State party, even if the persons are not or have never been within the territory of that State party and the jurisdiction is not *in personam* but *in rem*. See The Committee’s “Views” in case No. 196/1985, *Ibrahima Gueye et al. v France*, in which the Committee found a violation of article 26 by France, because the Senegalese former soldiers of the French Army but residing in Senegal did not receive the same pension as the retired French Army members living in France. *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Vol. 3, United Nations Doc. CCPR/C/OP/3 (2002).

<sup>94</sup> See also the concluding observations of the Human Rights Committee following the examination of the initial report of Israel, in which the Committee applies the test of effective control and holds that the CCPR protections extend to the territories occupied by Israel, Un Doc. CCPR/C/79/Add. 93, para 10; in its concluding observations after the examination of Israel’s second report, the Committee “reiterates the view... that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of international law. The State party should reconsider its position and include in its third periodic report all relevant information regarding the application of the Covenant in the Occupied Territories resulting from its activities therein.” UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11. In a number of contentious cases under the Optional Protocol the Committee has similarly stated that the Covenant applies wherever the State party exercises effective control. Moreover, according to General Comment No. 15 “The Position of Aliens under the Covenant”, 27<sup>th</sup> session 1986, “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”

<sup>95</sup> The European Commission of Human Rights (subsequently merged into the European Court pursuant to Protocol 11) takes a similar approach to the application of the European Convention on Human Rights. Thus, in *Cyprus v. Turkey* (1975) the European Commission found that because Cypriot nationals were under the “actual authority and responsibility” of Turkey, the protections of the European Convention applied, in spite of the fact that the alleged human rights violations occurred in Cyprus and not in Turkey.

<sup>96</sup> Views in caseNo. 52/1979, , Views adopted on 29 July 1981, para. 12.3. *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Vol. 1, pp. 88-92 at 91. The Committee went on to admonish: “According to article 5 (1) of the Covenant: ‘Nothing in the present Covenant may be interpreted as implying for any State, group or person nay right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.’ In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”

*Article 7* of the Covenant, which stipulates: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

*Article 9, paragraph 4*, of the Covenant provides that: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>97</sup>

The Committee’s General Comment No. 8/16 on article 9 confirms that “the right to control by a court of the legality of the detention applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.... Another matter is the total length of detention pending trial ...pre-trial detention should be an exception and as short as possible.”<sup>98</sup>

The case-law of the Human Rights Committee confirms that article 9 extends the right to challenge one’s detention also before a military court.<sup>99</sup> And we read in its General Comment 29: “The Committee is satisfied that States parties generally understand that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency.”<sup>100</sup>

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<sup>97</sup> The European Court of Human rights found in the *Ocalan v. Turkey* case (March 2003) that the European Convention on Human Rights had been violated because of the lack of a remedy for the applicant to have the lawfulness of his detention decided and the failure to bring the applicant before a judge within at least seven days of arrest. By way of contrast, the Guantánamo Bay detainees have been held for 22 months without access to a court to determine the lawfulness of their detention. See also *Human Rights Features, Asia Pacific Human Rights Network*, “Guantánamo Bay. Shining a ray of light into legal black hoe” 7-13 April 2003.

<sup>98</sup> Human Rights Committee, General Comment No. 8, adopted at the sixteenth session in 1982, HRI/GEN/1/Rev. 6 of 12 May 2003.

<sup>99</sup> Views in case No. 265/1987, *Atti Vuolanne v. Finland*, Views adopted 7 April 1989, para. 9.6: “The Committee further notes that whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law. In this particular case, it matters not whether the court be civilian or military.” Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. III, pp. 159-164, Un Doc. CCPR/C/OP/3.

<sup>100</sup> HRI/GEN/1/Rev.6, pp. 186-193. Human Rights Committee, General Comment No. 29, adopted at the seventy-second session in 2001. Footnote 9: “See the Committee’s concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: “... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency ... . The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention.” See also the recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant: “The Committee is satisfied that States parties generally understand that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to

Article 10 stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

*Article 14* of the Covenant sets forth the guarantees of a fair hearing, including trial by an independent tribunal, the presumption of innocence, the right to counsel and the right to appeal<sup>101</sup>.

In its General Comment No. 13, on the right to a fair hearing, the Committee observes that “the provisions of Article 14 apply to all courts and tribunals”, including military tribunals. With regard to the presumption of innocence “the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.” In this connection, the statements of the U.S. government to the effect that the detainees in Guantánamo are “bad people”<sup>102</sup> are incompatible with Article 14 of the Covenant. Moreover, the indefinite detention without trial poses a serious problem. Paragraph 3 c “relates not only to the time by which it should commence, but also the time by which it should end and judgment be rendered; all stages must take place ‘without undue delay’. To make this right effective, a procedure must be available in order to ensure that the trial will proceed ‘without delay’, both in first instance and on appeal.”<sup>103</sup>

In this connection, it is useful to recall the Committee’s General Comment No. 29 on “States of Emergency” (derogation under Article 4 of the Covenant), which particularly emphasizes the importance of procedural and judicial guarantees:

“Safeguards related to derogation, as embodied in Article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for

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the Covenant as a whole.” Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40), vol. I, annex XI, para. 2.

<sup>101</sup> A. de Zayas, “The United Nations and the Guarantees of a fair trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” in David Weissbrodt and Ruediger Wolfrum (eds.), *The Right to a Fair Trial*, Springer, Berlin, New York, Paris, 1998, pp. 669-696.

<sup>102</sup> Associated Press, 18 July 2003, “Bush says Guantánamo detainees ‘bad people’”. At a joint news conference with British Prime Minister Tony Blair, President Bush said that “terrorist suspects held at the US naval base in Cuba are ‘bad people’ who aided and abetted the Taliban in Afghanistan.”

<sup>103</sup> Human Rights Committee, General Comment No. 14, adopted at the twenty-first session in 1984, UN Doc. HRI/GEN/1/Rev. 6., pp. 135-139, paras. 4, 7, 10. See also Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights*, Oxford, 2000, pp. 277-339.

derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.”<sup>104</sup>

Article 16 of the Covenant stipulates: “Everyone shall have the right to recognition everywhere as a person before the law.”

Article 26 of the Covenant stipulates: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

By virtue of the United States ratification of the Covenant, these rights are available to all persons under the jurisdiction of the United States, irrespective of whether they are on United States sovereign territory. The only test is that of effective control.

A consequence of unlawful arrest or detention is that the person “shall have an enforceable right to compensation.” This is specifically provided for in article 9, paragraph 5, of the Covenant. And, indeed, an ex-Guantánamo inmate has filed a suit against the United States. Mohammed Sagheer, a Pakistani citizen who was released in November 2002 after 10 months in captivity, is suing for \$ 10.4 million, alleging unlawful arrest and detention, and because of the “mental and physical torture he endured at Camp X-ray in Guantánamo Bay”<sup>105</sup>. He is a cleric who was on a preaching mission in northern Afghanistan when he was arrested by Afghan warlord General Rashid Dostum and handed over to the United States authorities. On being handed to the American authorities, he says he was deprived of food, forbidden to pray and made to shave off his beard. He further alleges that he witnessed scores of people dying, including 50 who suffocated to death as they were transported across Afghanistan. In January 2002 he was transported to Guantánamo, where he was “treated like an animal”<sup>106</sup> and kept for many months in a prison cell which he described as a cage meant for animals. He alleges that he underwent long periods of solitary confinement during his captivity and that he was served alcohol-laced drinks – contrary to his religion of Islam.<sup>107</sup> Mr. Sagheer filed his suit in an Islamabad court on 3 November 2003<sup>108</sup>. A preliminary hearing is to be held during the third week of December 2003.<sup>109</sup>

In this connection it should be noted that the release of some of the detainees does not wipe the slate clean with respect to their rights and claims. Admittedly, the prolonged violation of article 9 of the Covenant terminates upon the release of the detainees, but the

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<sup>104</sup> Human Rights Committee, General Comment No. 29, adopted at the 1950<sup>th</sup> meeting, on 24 July 2001, “Derogations during a state of emergency”, UN. Doc. HRI/GEN/1/Rev. 6, page 190, para. 16.

<sup>105</sup> Prisoners were initially kept in steel-mesh cages in the first camp, called Camp X-ray. Early in 2003 more permanent structures were built, known as Camp Delta. Wendy Patten of Human Rights Watch says that the detainees are now living in a facility which has plumbing and ventilation. BBC News, “Legal limbo of Guantánamo’s prisoners”, 16 May 2003.

<sup>106</sup> BBC News, 4 November 2003, [http://news.bbc.co.uk/go/pr/ft/-/2/hi/south\\_asia/3241265.stm](http://news.bbc.co.uk/go/pr/ft/-/2/hi/south_asia/3241265.stm)

<sup>107</sup> BBC News, 10 July 2003

<sup>108</sup> The case is being heard in Pakistan because Pakistan’s interior ministry is one of the defendants.

<sup>109</sup> BBC News, “Former Guantánamo Inmate Sues United States”, by Zaffar Abbas, 5 November 2003.

prior violation of the rights under articles 7, 9, 10, 12, 14, 16, 17, 18, 26 of the Covenant still require a remedy.

The detainees also are entitled to the protection of the Convention Against Torture, which prohibits not only torture but also inhuman or degrading treatment or punishment. While the United States is a party to both the ICCPR and the Convention Against Torture, it appears that their provisions are not “self-executing”. This means that the victims cannot directly invoke the Conventions in United States courts, but it does not mean that the detainees are not entitled to their rights. They are.- It means that the United States must adopt appropriate legislative, judicial and executive measures so as to execute the obligations it assumed by virtue of ratification on the said Conventions.

## *2. International Humanitarian Law; Third Geneva Red Cross Convention of 1949*

Prisoner of War status is governed by the Third Geneva Convention of 1949, which has been ratified by both the United States and Afghanistan<sup>110</sup>. Article 4 of this Convention stipulates:

“Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: ...[follows a very comprehensive list including militias, volunteer corps, organized resistance movements, persons who accompany the armed forces without actually being members thereof, members of crews of the merchant marine and civil aircraft, etc.]

Article 5, paragraph 2, of the Convention, stipulates:

“The present Convention shall apply to the persons referred to in article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent court.”

Bearing in mind that the status of the Guantánamo detainees has not been determined by any competent court in the United States, it is clear that they have a right to enjoy the protection of the Third Geneva Convention.

On 16 January 2002 the Office of the United Nations High Commissioner for Human Rights<sup>111</sup> informed the United States that the Office was concerned about the fate of the detainees and that it considered that

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<sup>110</sup> Jiri Toman, “The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions”, in Yoram Dinstein (ed.), *Israel Yearbook on Human Rights* vol. 32, pp. 271-304 (2003). Compare G.H. Aldrich, “The Taliban, Al Qaeda, and the Determination of Illegal Combatants” 96 *American Journal of International Law* pp 891-98 (2002); Ruth Wedgwood, “Al Qaeda, Terrorism and Military Commissions”, 96 *American Journal of International Law*, pp. 328-37 (2002).

“All persons detained in this context are entitled to the protection of international human rights laws and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention. Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention.”<sup>112</sup>

Similarly, Kenneth Roth, Executive Director of Human Rights Watch, stated on 28 January 2002: “The United States government cannot choose to wage war in Afghanistan with guns, bombs and soldiers and then assert that the laws of war do not apply. To say that the Geneva Conventions do not apply to a war on terrorism is particularly dangerous, as it is all too easy to imagine this ‘exception’ coming back to haunt U.S. forces in future conflicts.”<sup>113</sup>

Of particular concern was the alleged inhumane treatment of the detainees. Authors have referred to Article 17 of the Third Geneva Convention, which stipulates:

“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”<sup>114</sup>

The position of the United States, however, has been consistently negative. As Secretary of Defence Donald Rumsfeld maintains: “As I understand it, technically unlawful combatants do not have any rights under the Geneva Conventions.”<sup>115</sup> Accordingly, the detainees have been denied the right to access to a lawyer<sup>116</sup>, to challenge the legality of their detention<sup>117</sup>, and to due process.

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<sup>111</sup> For a description of the High Commissioner’s mandate, see A. de Zayas “Human Rights, United Nations High Commissioner for” in H. Volger (ed.), *A Concise Encyclopedia of the United Nations*, Kluwer Law International, The Hague, 2002, pp. 217-223.

<sup>112</sup> Statement of the High Commissioner for Human Rights on the Detention of Taliban and Al Qaida Prisoners at Guantánamo Bay. Homepage of the UN High Commissioner for Human Rights, [www.unhchr.ch](http://www.unhchr.ch), also in [www.unog.ch/news/documents/newsen/hr02004e.htm](http://www.unog.ch/news/documents/newsen/hr02004e.htm), also [www.pcpafg.org/organizations/Human\\_rights/hrweb/Class2](http://www.pcpafg.org/organizations/Human_rights/hrweb/Class2)

<sup>113</sup> Human Rights Watch website, Human Rights News, 28 January 2002.

<sup>114</sup> G.H. Aldrich, “The Taliban, Al Qaeda and the Determination of Illegal Combatants”, 96 *American Journal of International Law*, pp. 891-98 at 896 (2002).

<sup>115</sup> BBC News, “Legal Limbo of Guantánamo’s prisoners”, published 16 May 2003.

<sup>116</sup> Christine Huskey, an American lawyer representing 28 Kuwaiti inmates, told the BBC she had had “absolutely” no access to them, “I represent a ghost”, BBC News, 10 October 2003, “Red Cross blats Guantánamo.”

<sup>117</sup> This is particularly worrisome, bearing in mind that Section 9(2) of Article I of the U.S. Constitution specifically stipulates: “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” The writ of *habeas corpus* has been

As early as 7 February 2002, the White House press secretary Ari Fleischer stated:

“the national security team has always said that these detainees should not be treated as prisoners of war, because they don’t conform to the requirements of Article 4 of the Geneva Convention... for example, the detainees in Guantánamo did not wear uniforms. They’re not visibly identifiable. They don’t belong to a military hierarchy. All of those are prerequisites under Article 4 of the Geneva Convention, which will be required in order to determine somebody is a POW.”<sup>118</sup>

On 8 February 2002, Richard Boucher, spokesman of the US Department of State, in responding to the question of a journalist invoking Article 5 of the Geneva Convention, elaborated further:

“... the Geneva Convention says that if there is any doubt, then a competent tribunal should be convened to review these things.. We don’t think there is any doubt, in this situation. The While House, in their announcement yesterday, I think, made quite clear why there is no doubt about Taliban people involved. All of these people have been screened several times before they were taken, and after they were taken to Guantánamo, and we don’t think there is any doubt in these cases... I think ... if there is any factual or reasonable basis for doubt, then of course we would be willing to review this. But at this point, we’re not aware of anything in all these interviews that raises any doubt about these people... There was nothing in that examination of the facts of the situation that raises any doubts that would lead us to believe that they might qualify, and therefore we believe firmly that they don’t. Now, should something come up that would change that, I’m sure we would review it.”<sup>119</sup>

In nearly two years since transfer of the Taliban to Guantánamo, the U.S. position has not changed.. In a statement by the Press Office of the White House on 7 May 2003, Mr. Ari Fleischer noted:

“Under Article 4 of the Geneva Convention, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Queda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and

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suspended only twice in American history, by Lincoln during the American Civil War, and in Hawaii during the Second World War.

<sup>118</sup> Press Briefing 7 February 2002. <http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html#4>.

<sup>119</sup> U.S. Department of State, Daily Press Briefing, R. Boucher, Spokesman, Feb. 8, 2002. See Jiri Toman, *op.cit.*, p. 303-304.

customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.”<sup>120</sup>

Similarly, at a joint press conference with Prime Minister Tony Blair on 18 July 2003, President George W. Bush stated : “these were illegal combatants. They were picked up off the battlefield aiding and abetting the Taliban.”<sup>121</sup>

The above statements, of course, beg the question. Precisely what must be determined by a competent tribunal is whether the four conditions identified by the United States as required under Article 4(a)(1) of the Third Geneva Convention are indeed required, and, if so, whether these conditions are satisfied<sup>122</sup>. I share the view of Professor Jiri Toman<sup>123</sup>, a distinguished expert on international humanitarian law, that Taliban soldiers captured in Afghanistan are “prisoners of war” for purposes of article 4 of the Third Geneva Convention. In my view, the four pre-conditions identified by United States authorities are not required under Article 4(a)(1). The fact that Taliban armed forces were not comparable to the armed forces of the United States, does not exclude them from being “armed forces” for purposes of the Geneva Convention. It is not international law that determines what kind of forces constitutes a regular army. This is a matter for the municipal law of each belligerent party to an armed conflict<sup>124</sup>, and there are several States whose armies consist of militia and volunteer corps exclusively, no standing army being established. Thus members of the Taliban forces should be treated as members of the armed forces of the then *de facto* government of Afghanistan, the Taliban government. The fact that the Taliban government was not recognized by the United States is irrelevant. Article 4(a)(3) expressly includes within the definition of prisoners of war, “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.” The arguments that Taliban fighters allegedly did not respect the four conditions in paragraph 2 of Article 4, are also irrelevant.<sup>125</sup> Nor is the nationality of the combatants decisive, whether Afghan, Pakistani, Saudi Arabian or even American.

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<sup>120</sup> Statement by the Press Secretary on the Geneva Convention 7 May 2003, White House website: [whitehouse.gov/news/releases](http://whitehouse.gov/news/releases). See also Ruth Wedgwood, “Al Qaeda, Terrorism and Military Commissions” 96 *American Journal of International Law*, pp. 328-37 at 325 (2002).

<sup>121</sup> Associated Press, “Bush says Guantánamo detainees ‘bad people’”, 18 July 2003.

<sup>122</sup> An issue arises whether the additional requirements under Article 43 of the 1977 First Protocol Additional to the Geneva Conventions are relevant here. However, neither the United States nor Afghanistan are parties to the 1977 Protocols.

<sup>123</sup> Jiri Toman, “The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions”, in Y. Dinstein (ed.), *Israel Yearbook on Human Rights*, vol. 32, pp. 271-304, at p. 304. Dietrich Schindler, Jiri Toman, *The Laws of Armed Conflicts*, third edition, Martinus Nijhoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, 1988.

<sup>124</sup> L. Oppenheim, 2 *International Law, A Treatise (Disputes, War and Neutrality)* 255 (7<sup>th</sup> edition by H. Lauterpacht, 1952). C. Rousseau, *Le Droit des Conflits Armés* 69 (1983): “C’est à l’Etat intéressé qu’il revient exclusivement de déterminer la composition et les modalités de recrutement (volontariat ou conscription) de ses forces armées.” Jiri Toman, *op.cit.* p. 284.

<sup>125</sup> The ICRC Commentary of the 1949 Geneva Conventions considers these conditions implicit in any general reference to the armed forces. Jean Pictet (ed.), *ICRC Commentary, III Geneva Convention* pp. 51-51. See also Alan Rosas, *The Legal Status of Prisoners of War*, p. 328, 1976.



Recognizing that there is a dispute about the status of the Guantánamo detainees, article 5 of the Third Geneva Red Cross Convention requires that the decision be taken by a “competent tribunal”, not by the military authorities or by the executive of any country. If ever submitted to such a “competent tribunal”, the likely finding would be that whereas the Taliban fighters captured in Afghanistan enjoy the status of prisoners of war, the Al Qaeda detainees do not. Moreover, there is a third category of Guantánamo detainees who were not captured as soldiers during the armed conflict in Afghanistan, but who were civilians detained in Afghanistan or elsewhere in the world, in Pakistan or even in the territory of the former Yugoslavia. While the Third Geneva Convention does not apply to them, they may enjoy some protection derived from the Fourth Geneva Convention of 1949 relative to the Protection of Civilians in Time of War. In this context we should recall the relevant jurisprudence of the Human Rights Chamber for Bosnia and Herzegovina<sup>126</sup>.

Of particular interest is the case of the six terror suspects of Arab origin handed over on 18 January 2002 by the Government of Bosnia and Herzegovina to the United States and subsequently transferred to Guantánamo<sup>127</sup>. They had been detained by the Bosnia and Herzegovina authorities, but released by the Supreme Court of the Muslim-Croat Federation because of lack of any evidence to justify their detention. But under United States pressure Bosnia and Herzegovina handed them over to US troops serving with NATO-led peacekeepers. The 14-member Human Rights Chamber for Sarajevo, established under the Dayton Peace Accord that ended Bosnia’s 1992-95 war, took the case and in two judgments of October 2002<sup>128</sup> and April 2003<sup>129</sup> held that the Government of Bosnia and Herzegovina had violated several provisions of the European Convention on Human Rights concerning illegal detention and expulsion. Among others, the Chamber ruled that the authorities had breached the obligation under the European Convention to seek assurances before handing over of the suspects to the United States that the death penalty would not be carried out upon them. The Chamber also ruled that Bosnia and Herzegovina had “to take all possible steps to prevent a death sentence from being pronounced or executed” on the six detainees, and to provide them with a

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<sup>126</sup> Leif Berg and Ekkehard Strauss, *The Human Rights Chamber for Bosnia and Herzegovina*, Sarajevo, 2000.

<sup>127</sup> The 2003 *World Report* of Human Rights Watch comments: “After seven years of laudable efforts on the part of the U.S. to foster peace and the rule of law in Bosnia, some of its actions in Bosnia during 2002 seriously undermined the rule of law. In January, the U.S. put intense pressure on Bosnia to hand over six Algerians sought for alleged links to terrorism. Bosnia revoked the citizenship of five of the six suspects and turned over all six, although a day earlier the Supreme Court of the federation had ordered the release of the detained suspects due to lack of evidence, and the Bosnian Human Rights Chamber had made an interim order halting their removal from Bosnian jurisdiction.” Pp. 323-24.

<sup>128</sup> Concerning four Algerians handed over to the United States: Hadz Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lahmar, Cases Nos. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691. Sarajevo, AFP, April 5, 2003. See Amnesty International Press Release of 11 October 2002: “Bosnia-Herzegovina: Human rights chamber’s decision in the Algerians’ case must be implemented... The organization reiterates its call to the US authorities to immediately release the Algerian men, unless they are charged with a recognizable criminal offence and tried in proceedings which respect their right to a fair trial and do not impose the death penalty.”

<sup>129</sup> Concerning two Algerians handed over to the United States: Mustafa Ait Idr and Belkasem Bensayah.

lawyer<sup>130</sup>. A senior official of the United Nations Office of the High Commissioner for Human Rights stated on 22 January 2002 that the human rights of the six Algerian men had been violated because of their handing them over to the United States without due process of law<sup>131</sup>. Although this category of detainees cannot claim the protection of the Third Geneva Convention, they are entitled to the protection of the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture. Moreover, an argument can be made, that they may derive some rights from the Fourth Geneva Red Cross Convention<sup>132</sup>.

In conclusion, it is worth recalling the language of the famous “Martens clause”<sup>133</sup>, which appears in the preamble to the Hague Regulations on Land Warfare, appended to the Hague Convention No. IV of 1907:

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”<sup>134</sup>

### 3. *United States legal order*

In its initial report to the United Nations Human Rights Committee, the United States stated that “the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system.”<sup>135</sup>

In the case of the Guantánamo detainees, however, this is not the case.

The official United States position is that the detainees are “unlawful combatants” and not entitled to sue in United States courts<sup>136</sup>, nor entitled to prisoner of war status<sup>137</sup>.

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<sup>130</sup> It is speculated that because of the October 2002 judgment, which was followed by a second judgment in April 2003, both of which were perceived in Washington as anti-United States, the Human Rights Chamber is being closed in December 2003, after seven years of distinguished service.

<sup>131</sup> Madeleine Rees, head of the Sarajevo office of the UN High Commissioner for Human Rights. Radio Free Europe, Sarajevo, 22 January 2002. Amnesty International quotes Rees as describing the case as one of “extrajudicial removal from sovereign territory”. Amnesty International press release of 25 June 2003, “USA/Malawi: Another unlawful transfer to US custody?” reacting to a report that five men, said to be Turkish nationals, were arrested in Malawi and turned over to US custody and spirited away to Guantanamo. AI Index: AMR 51/092/2003, 25 June 2003.

<sup>132</sup> See A. de Zayas, “Civilian Population, Protection” in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. I, pp. 606-611 (1992).

<sup>133</sup> Helmut Strebler, “Martens Clause” in Rudolf Bernhardt (ed.) *Encyclopaedia of Public International Law*, Vol. III, 1997, pp. 326-27.

<sup>134</sup> Preamble to the 1899 and 1907 Hague Conventions on the Law of War on Land, reprinted in Schindler/Toman, *op.cit.* p. 63.

<sup>135</sup> CCPR/C/81/Add.4, August 1994, examined in March 1995.

<sup>136</sup> However, in the *Vermilya-Brown Co. v. Connell* decision of the United States Supreme Court (335 U.S.377, decided 6 December 1948), the court held that the Longshoremen’s and Harbor Workers’

On 13 November 2001 President Bush issued a Military Order entitled “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism”<sup>138</sup> which governs their situation under United States law<sup>139</sup>. This order provides for trial by military commissions, which allow reduced procedural guarantees to the accused, significantly less than if they were tried in a regular federal court in the United States. Moreover, article 7(b)(2) of the Military Order provides that “the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States....”

In 2002 the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumarashwamy, expressed concern about the impact of the Military Order on the rule of law and due process in general.<sup>140</sup>

As to the application of United States laws in Guantánamo Bay, an interesting 1966 precedent 1965 appears relevant. The Pellicier murder case concerned a Cuban resident of the base, who on 13 February 1965 chased an unarmed Jamaican named Scott several hundred yards across the athletic fields and whacked him to death. Since Pellicier was a Cuban national who had committed a crime on a military base, normal jurisdiction should have fallen to the host country. He could not be tried in Cuba, since at that time there was no exchange between the base and Cuba. The Navy Judge Advocate General and the United States Attorney General reasoned that the base is within the “special maritime territorial jurisdiction of the United States”. Pellicier was flown to Miami and indicted

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Compensation Act which covered death or disability from an injury occurring upon the navigable waters of the United States extended to a lease in Bermuda, as it extended to naval bases “in any US territory or possession outside the continental United States, including Alaska, Guantánamo, and the Philippine Islands.”

<sup>137</sup> In the argument filed to the United States Supreme Court by Don Guter, former US Navy judge advocate general, Mr. Guter and the other American judges and military officials signing the brief stated: “The lives of American military forces may well be endangered by the United States failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.” BBC News, 10 October 2003, “Red Cross blasts Guantánamo”.

<sup>138</sup> 66 F.R. 57, pp. 833-36 (16 November 2001)

<sup>139</sup> Section 1 (e) of the Military Order states that “to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained.” Sec. 4 stipulates: “(a) Any individual subject to this order shall, when tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

© Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for ... (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission... have probative value to a reasonable person... (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present...” white house website: [whitehouse.gov/news/releases](http://whitehouse.gov/news/releases).

<sup>140</sup> UN Doc. E/CN.4/2003/65, para. 37. See also Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-fifth session, 15 July 2003, E/CN.4/Sub.2/2003/NGO/23, Joint Statement submitted by Friends World Committee for Consultation (Quakers) and World Organisation Against Torture.

for murder. However, before the trial began, he was found insane and not competent to stand trial. A precedent was set<sup>141</sup>.

As to the application of the United States Constitution and the Bill of Rights to the detainees in Guantánamo<sup>142</sup>, the case concerning the Haitian refugees who were detained in Guantánamo Naval Base from 1991 to 1994 is of particular relevance. In *Haitian Ctrs. Council v. Sale*<sup>143</sup>, the United States District Court for the Eastern District of New York entertained the case of persons detained in Guantánamo, and applied the test of United States control and jurisdiction over Guantánamo, holding that the US Constitution and Bill of Rights necessarily apply there. The Court held that “denying plaintiff Haitian Service Organizations immediate access to Guantánamo to communicate and associate with their detained screened in plaintiff clients violates the First Amendment” and ordering that “Defendants are permanently enjoined from denying plaintiff Haitian Service Organizations immediate access at Guantánamo”. Prior to that decision District Judge Sterling Johnson had issued a preliminary injunction dated 6 April 1992 concerning the denial of due process rights under the Fifth Amendment of the United States Constitution, and an interim order on 26 March 1993.

Nine years later, concerning the current situation of the Taliban detainees in Guantánamo, the United States Court of Appeal for the District of Columbia held in March 2003 in the case of *Al Odah et al. v. United States*<sup>144</sup> that the United States Courts do not have jurisdiction to issue writs of *habeas corpus* for alien nations detained outside the “sovereign territory” of the United States. Commenting on this decision, the United Nations Special Rapporteur on the Independence of Lawyers and Judges, Dato Param Kumaraswamy said in a press release: “ By such conduct, the Government of the United States, in this case, will be seen as systematically evading application of domestic and

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<sup>141</sup> J.L Heibel, Guantánamo Bay, Chapter V, [www.nsgtmo.navy.mil/gazette/History\\_64-82](http://www.nsgtmo.navy.mil/gazette/History_64-82).

<sup>142</sup> In this connection it is worth quoting from the dissent of Circuit Court Judge Diana Gribbon Motz in the Case of Hamdi v. Rumsfeld (No. 02-7338 4<sup>th</sup> Cir. 9 July 2003). Hamdi was an American citizen arrested in Afghanistan, taken to Guantánamo and subsequently transferred to the United States for eventual trial. He challenged his detention on a writ of *habeas corpus* motion, which was denied:

“To justify forfeiture of a citizen’s constitutional rights, the Executive must establish enemy combatant status with more than hearsay. In holding the contrary, the panel allows appropriate deference to the Executive’s authority in matters of war to eradicate the Judiciary’s own Constitutional role: protection of the individual freedoms guaranteed all citizens. With respect, I believe the panel has seriously erred, and I dissent from the court’s refusal to rehear this case en banc. The panel’s decision marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive’s designation of that citizen as an enemy combatant, without testing the accuracy of the designation. Neither the Constitution nor controlling precedent sanction this holding.” This, in my opinion, is what the Supreme Court should have said. In this connection, see also the criticism of the Lawyers’ Committee for Human Rights in its Newsletter, *The Rights Reporter*, Spring 2003, page 1.

<sup>143</sup> 823 F. Supp. 1028, 1993 U.S. District Court for the Eastern District of New York, decision of 8 June 1993.

<sup>144</sup> United States Court of Appeals for the District of Columbia Circuit, No. 02-5251, Consolidated with No. 02-5284 and No. 02-5288, decided 11 March 2003. See commentary by Professor Norman K. Swazo, “Rules of Law in the U.S. Global War on Terrorism?” *The Ethical Spectacle*, April 2003, [www.spectacle.org](http://www.spectacle.org).

international law so as to deny these suspects their legal rights. Detention without trial offends the first principle of the rule of law.”<sup>145</sup>

Similarly, the United States District Court for the Central District of California rejected the precedent of the *Haitian Centers Council v. Sales* case in a case concerning the Guantánamo detainees, *Coalition of Clergy v. Bush*<sup>146</sup>, and held that no United States court could exercise jurisdiction over Guantánamo base, since the Constitution and Bill of Rights applied only in territories that were under the full sovereignty of the United States<sup>147</sup>. In so doing, the Court relied on obsolete, not to say anachronistic case-law such as the US Supreme Court judgment in *Johnson v. Eisentraeger*<sup>148</sup>, a 1950 decision that denied the benefit of the writ of *habeas corpus* to aliens convicted by United States military courts.<sup>149</sup>

Well, the world has evolved some over the past 50 years.

According to modern international law, in particular according to article 26 of the International Covenant on Civil and Political Rights, it is not acceptable to make distinctions between citizens and aliens, except in very few areas such as the right to vote and to stand for election. I refer to the general comment of the Human Rights Committee on “the position of Aliens under the Covenant”<sup>150</sup>, which provides that aliens have the same basic human rights as citizens, especially with regard to due process of law. In the examination of State party reports and in its jurisprudence, the Committee has made it

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<sup>145</sup> *United Nations Press Release*, “US Court Decision on Guantánamo Detainees has Serious Implications for Rule of Law, Says UN Rights Expert”, 12 March 2003. Cumaraswamy added: He further added: “The war on terrorism cannot possible be won be denial of legal rights, including fundamental principles of due process of those merely suspected of terrorism.”

<sup>146</sup> 189 F. Supp. 2d 1036, decision of 21 February 2002.

<sup>147</sup> Such a formalistic interpretation flies in the face of the reality that for one hundred years the United States has behaved in Guantánamo as if it were the sovereign. Moreover, it is interesting to recall Article IV of the 1903 Guantánamo lease agreement, which gives the United States the right to demand from Cuba any fugitive that breaks American laws on the territory leased to the United States. While this provision is aimed at extradition, underlying it is the claim that the United States has full jurisdiction over the territories. See also *United States v. Rogers*, 388 F. Supp 298 (E.D. VA 1975 at 301, where the court found that the “complete jurisdiction and control” under the United States’s lease meant that the United States Criminal law applied in Guantánamo.

<sup>148</sup> 339 U.S. 763, 70 S.Ct. 936, 94 L. Ed. 1255 (1950)

<sup>149</sup> The *habeas* petitioners were twenty-one German nationals who claimed to have been working in China for “civilian agencies” of the German government before Germany surrendered on May 8, 1945. They were taken into custody by the United States Army and convicted by a United States Military Commission of violating laws of war by engaging in continued military activity in China after Germany’s surrender, but before Japan surrendered. The petitioners filed a writ of *habeas corpus* claiming that their right under the Fifth Amendment to due process, other unspecified rights under the Constitution and laws of the United States and provisions of the Geneva Convention governing prisoners of war all had been violated. While the Court of Appeals recognized the right of the petitioners, the Supreme court held: “The privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign and the circumstances of their offense (and) capture ... were all beyond the territorial jurisdiction of any court of the United States” (777-78, n. 12). This obsolete holding can and should be overturned in the same manner as the Supreme Court has overturned many other obsolete judgments, including the judgment of 12 May 1896 in *Plessey v. Ferguson* (163 U.S. 537 (1896)), upholding the principles of racial segregation..

<sup>150</sup> General Comment of the Human Rights Committee No. 15, “The position of aliens under the Covenant”, adopted during the Committee’s twenty-seventh session in 1986.

clear that aliens are entitled to the same due process rights as everyone else and that discrimination entails a violation of the Covenant.

I firmly believe that U.S. judges ought to know and give due weight to international law, and in particular, human rights law in their judgments. In this context, it should be remembered that conventional and customary international law are relevant in the domestic legal context in view of Article VI of the U.S. Constitution, which stipulates that all treaties made under the authority of the United States shall be the supreme law of the land. Among the principles of international law that judges must not ignore are treaties, including the International Covenant on Civil and Political Rights<sup>151</sup>, the United Nations Charter, and the Third and Fourth Geneva Conventions of 1949.<sup>152</sup>

In this connection, I should like to recall the celebrated decision of the United States Supreme Court, in the 1900 *Paquete Habana* case<sup>153</sup>, where the Court held that judges had to take due account of relevant international law in their judgments<sup>154</sup>. In his famous opinion, Justice Gray articulated the rationale of the majority of the Supreme Court:

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<sup>151</sup> Even if the United States upon ratifying the ICCPR submitted a “declaration” to the effect that the Covenant is not “self-executing”, this does not imply that the United States is free of the obligations to implement the provisions of the Covenant. It may mean that individuals cannot directly invoke the articles of the ICCPR before American Courts. But the United States still has the treaty obligation to implement those provisions, which would obviate the necessity for individuals to complain about violations.

<sup>152</sup> In an article entitled “Rules of Law in the U.S. Global War on Terrorism?” Professor Norman K. Swazo concluded “If (a) neither the United States government nor the US military (i.e. the Executive Branch) conforms to the requirements of international law expressed in treaty such as the Geneva Convention, and (b) the US judiciary refuses to recognize its jurisdiction in the case of the detainees on Guantánamo Bay, then it falls to Congress – as trustee of the law of nations in the United States – to take the requisite legal action to assure Executive branch compliance with its obligations under international law. The US military unlawfully denies to the detainees on Guantánamo their ‘full civil capacity’. Cumaraswamy speaks appositely in his reminder to the United States that ‘Detention without trial offends the first principle of the rule of law’. The UN Office of the High Commissioner for Human Rights, as Cumaraswamy knows, rightly holds that ‘Democracy and human rights are interdependent and inseparable,’ even as ‘The effective application of the rule of law and the fair administration of justice are vital to the good functioning of democracy.’ The decision in *Al Odah v. United States* rendered by the United States Court of Appeals for the District of Columbia ominously undermines the fair administration of justice, diminishing as it does due regard for civil liberties of persons. If the United States is to retain its authority at the bar of the community of nations as a democracy subject to the rule of law, this decision must not stand. As Alexander Hamilton said, ‘The sacred rights of mankind ... can never be erased or obscured by mortal power’; and so it is with the rights of those persons unlawfully detained by the United States Government at Guantánamo Bay Naval Base.” [www.spectacle.org](http://www.spectacle.org).

<sup>153</sup> 175 U.S. Reports 677.

<sup>154</sup> Professor Ruth Wedgwood is quoted as saying that the government should follow customary international law, but that doing that is up to the administration itself. “The courts are not in the business of telling the president how to follow customary international law.” Thomas Wilmer, A Washington lawyer working on behalf of 12 Kuwaiti detainees agrees that the government can “incarcerate foreign nationals who pose a danger to the nation ... but there must be some legal process for distinguishing those who are dangerous from those who have been swept up without basis. Court review does not threaten our national security. It does not exalt liberty over security. It simply ensures that a balance will be drawn.” *Bloomberg News*, 16 November 2003, reported in *the Manila Times*, “US military wants no court over its shoulder” by Ann Woolner.

“International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”

This obligation extends not just to treaty-based rights, but also to customary international law.<sup>155</sup>

Thus, we can conclude that under present international law, detainees are not in a “legal black hole” but are entitled to the protection of various human rights and humanitarian law provisions, “a kind of umbrella law, which gives every human being a guarantee of decent treatment both before the establishment of his culpability by an impartial tribunal, as well as later when his or her culpability is or is not established. The rules concerning the humane treatment of detainees are well known.”<sup>156</sup>

Often enough in the past, the United States Supreme Court has reversed its own jurisprudence, when it realizes that the times have evolved and that the United States Constitution, like living law, deserves dynamic interpretation that expands, not restricts, human rights. The crippled interpretation of the Constitution in *Johnson v. Eisentrager* is not mandated by the Constitution. Indeed, nothing in the Constitution stipulates that it shall apply exclusively in the States or that it shall not apply in United States military bases, or in occupied territories, even when the United States exercises full jurisdiction and control. The *Johnson* interpretation was unduly restrictive and could easily be reversed.

Let us hope that the current composition of the Supreme Court will associate itself with the arguments of the three dissenting judges in *Johnson v. Eisentrager*, Justices Black, Burton and Douglas, who insisted that the Constitutional guarantees and, in particular, the writ of *habeas corpus* applied to all areas where the United States exercised jurisdiction. In their dissenting opinion they argued:

“Does a prisoner’s right to test legality of a sentence then depend on where the Government chooses to imprison him? Certainly the *Quirin*<sup>157</sup> and *Yamashita*<sup>158</sup> opinions lend no support to that conclusion, for in upholding jurisdiction they place no reliance whatever on territorial location. The Court is fashioning wholly indefensible doctrine if it permits the executive branch by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations. If the opinion thus means, and it apparently does, that

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<sup>155</sup> Justice Grey went on : “For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.” Id. at p. 700. See also William R. Spiegelberger “Can a Claim Under Customary International Law Succeed in the United States?” *Bloomberg News*, September 17, 2003.

<sup>156</sup> Jiri Toman, “The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions”, in Y. Dinstein (ed.), *Israel Yearbook on Human Rights*, vol. 32, pp. 271-304 at 279. Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, London, 1987.

<sup>157</sup> *Ex parte Quirin*, 317 U.S. 1.

<sup>158</sup> *Yamashita v. United States*, 327 U.S. 1.

these petitions are deprived of the privilege of *habeas corpus* solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle.... Though the scope of *habeas corpus* review of military tribunal sentences is narrow, I think it should not be denied to these petitions and others like them... Only our own courts can inquire into the legality of their imprisonment. Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy.”

”Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. *Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.”<sup>159</sup>

#### IV. PEACEFUL SOLUTIONS

There are a number of peaceful ways to settle the disputes over the status of Guantánamo Bay and over the status of the detainees there, namely arbitration<sup>160</sup> and/or submission of the issues to adjudication by the International Court of Justice. I will review seven possible measures of peaceful settlement.

##### A. *Advisory opinion by the International Court of Justice*

The General Assembly could adopt a Resolution to the effect that the continued occupation of Guantánamo Naval base by the United States is incompatible with existing international law. The General Assembly could then seek an advisory opinion under article 96 of the UN Charter to the effect that the Guantánamo 1903 Treaty was an unequal treaty and invalid today by virtue of the emergence of a peremptory norm of general international law (*jus cogens*) in the form of the right to self-determination, and the application of the *clausula rebus sic stantibus*. Or it could determine that the treaty is terminated on the ground of a material breach of its provisions. There is an obvious precedent that should be cited in this context.

By virtue of Resolution 2145 (XXI) of 27 October 1966, the United Nations General Assembly declared that South Africa had failed to fulfill its obligations as mandatory over South West Africa/Namibia and decided that the mandate was therefore terminated, that South Africa had no other right to administer the territory, and assumed direct responsibility for the territory until its independence.

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<sup>159</sup> *Johnson v. Eisentrager*, 339 U.S. 763, Judgement by the Supreme Court of the United States, argued 17 April 1950, decided 5 June 1950. Dissenting opinion by Justice Black.

<sup>160</sup> Hans-Juergen Schlochauer, “Arbitration” in R. Bernhardt (ed.): *Encyclopaedia of Public International Law*, Vol. 1, pp. 215-230.



Since South Africa refused to comply with Resolution 2145, the Security Council, by Resolutions 264 and 269 (1969), called upon South Africa to withdraw its administration from Namibia immediately. By Resolution 276 (1970), the Security Council declared (para.2) “that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid” and (para.5) called upon “all States...to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution”.

In the light of the lack of cooperation from South Africa, and in order to give more weight to its resolutions, the Security Council, by Resolution 284 (1970), requested the International Court of Justice for an advisory opinion on the question: “What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970) ?”.

The ICJ found that the mandate was a treaty, that South Africa had violated the terms of the treaty, that the treaty was terminated, that South Africa’s continued presence in Namibia was illegal, and that all States, including non-member States of the United Nations had to act accordingly, since the termination of the mandate was deemed to be “opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law.”

By virtue of the international pressure on South Africa and the economic sanctions imposed, South Africa finally allowed Namibia to attain its independence on 21 March 1990. As is obvious from the above, the process of de-colonization of Namibia was long, but in the end Namibia achieved its independence.

Admittedly, the factual and legal situation in the South Africa/Namibia controversy is not identical to the United States/Cuba dispute over Guantánamo. However, the South Africa/Namibia precedent does provide certain parameters to facilitate the resolution of the Guantánamo crisis.

Now, in view of the United States veto power, it is unthinkable that the Security Council would ever ask the International Court of Justice for an advisory opinion concerning the validity of the leave over Guantánamo. But, pursuant to article 96 of the United Nations Charter, the General Assembly has the authority to ask for an advisory opinion, and it should be relatively easy to obtain the necessary votes there.

#### *B. Procedure under the Third Geneva Red Cross Convention of 1949*

A not insignificant consideration is what Cuba may do in the light of serious violations of international human rights law and humanitarian law in Guantánamo Naval Base, which are occurring under the “ultimate sovereignty” of Cuba.

Both Cuba and the United States are parties to the Third Geneva Red Cross Convention of 1949, which stipulates in article 132 that in case of an alleged violation, an enquiry shall be instituted in the manner to be decided between the interested parties. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Either the United Nations Secretary-General or the Secretary-General of the Organization of American States could be an appropriate umpire. Hitherto this procedure has never been invoked.

*C. Procedure under the Vienna Convention on the Law of Treaties,  
Submission to the Secretary-General of the United Nations under article  
66*

The Vienna Convention on the Law of Treaties provides for a procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. Article 65 stipulates that “A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.”

Article 66 provides for a procedure for judicial settlement, arbitration and conciliation<sup>161</sup>.

“If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

- (a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 65 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;
- (b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.”

The Annex to the Vienna Convention on the Law of Treaties provides that “A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations.”

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<sup>161</sup> Although the United States has not ratified the Vienna Convention on the Law of Treaties, it did sign it on 24 April 1970. Cuba ratified it on 9 September 1998.

*D. Submission of a case to the United Nations Human Rights Committee under article 41 of the Covenant on Civil and Political Rights*

While the individual complaints procedure of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights is not available because the United States has hitherto not ratified the Optional Protocol, the inter-State procedure appears promising.

As of November 2003 forty-nine States, including the United States, have recognized the competence of the United Nations Human Rights Committee to receive inter-State complaints. Although no inter-State complaints have yet been received by the Committee, the Guantánamo dispute may provide an appropriate subject matter. Any of the 49 States parties has the right to invoke the procedure under article 41, but their standing would be strengthened if they were representing the rights of their citizens currently being detained in Guantánamo. At present there are nationals of 42 States in Guantánamo, including nationals of Australia, Canada, Sweden and the United Kingdom<sup>162</sup>, all of whom have given the declaration under article 41 of the Covenant, and therefore have formal standing.

One possible case could be predicated on violations of Articles 7, 9, 14, and 17 of the Covenant, which prohibit torture, arbitrary arrest and detention, require due process of law, presumption of innocence, expeditious legal proceedings, and respect of privacy and family life.

*E. Invoking the procedures of the United Nations Committee Against Torture*

Here too the individual complaints procedure cannot be invoked, because the United States has not yet given the requisite declaration under Article 22 of the Convention Against Torture. There are, however, two other procedures that the Committee on its own initiative and other States parties to CAT may undertake.

Article 20 of the Convention against Torture stipulates that “If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State party, the Committee shall invite that State party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.... The Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently... If an inquiry is made ... such an inquiry may include a visit to its territory.”

Of course, the United States may argue that article 20 has no relevance, because Guantánamo is not “in the territory of” the United States. This argument would persuade

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<sup>162</sup> A total of nine Britons are being held in Guantánamo. Two Britons are of the first list of six persons to face military tribunals at Guantánamo, Moazzam Begg, aged 30, from Sparkbrook in Birmingham, and Feroz Abbasi, 23 from Croydon. Mr. Begg was arrested by the CIA in Pakistan in February 2002, while Mr. Abbasi was said to have been captured in Kunduz, Afghanistan, in late 2001. Early in November 2003, Frederic Borch, the designated prosecutor, announced the hearings for six detainees at the beginning of 2004.

the Committee against Torture as little as it would persuade the Human Rights Committee, since both Committees use the test of exercise of jurisdiction over persons subjected to torture or ill-treatment, and not any test of formal exercise of sovereignty over the territory concerned. Both Committees interpret their respective treaties in an autonomous manner, i.e. the term “in the territory of” must be interpreted for purposes of the treaty, and not for purposes of the domestic law of the State party concerned. Thus, the Committee against Torture would hold that for purposes of the Convention against Torture, Guantánamo is “in the territory” of the United States, because the United States exercises full jurisdiction there.

Upon signature and ratification of the Convention Against Torture, the United States did not give any declaration excluding the applicability of the Article 20. Thus, this procedure is available, and a visit *in loco* is, in principle, possible.

Pursuant to this “Article 20 procedure” the Committee against Torture has conducted fact-finding missions to a number of States parties to the Convention, including Egypt, Peru, Sri Lanka and Turkey.

Article 21 of the Convention stipulates that

“A State party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee.”

The article proceeds to lay down a procedure, including the offer of its good offices to the States concerned.

With regard to the inter-State complaints procedure, the United States submitted the following declaration :

“The United States declares, pursuant to article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.”

Thus, it is open to many States parties to the Convention, which have also given the declaration under article 21, to invoke the inter-State procedure. Many States parties that have given the declaration have citizens currently detained in Guantánamo, including Australia, Canada, France, Sweden and the United Kingdom.

Hitherto the inter-State complaints procedure under the Convention against Torture has never been used. Maybe Guantánamo provides an appropriate opportunity to test it.

*F. The Inter-American Commission on Human Rights*

On 25 February 2002 the Center for Constitutional Rights, the Center for Justice and International Law, Judith Chomsky, Columbia University's Human Rights Clinic and Professor Richard Wilson of the Washington College of Law submitted a petition to the Inter-American Commission on Human Rights, on behalf of persons detained in Guantánamo Naval base, alleging in particular violations of article I, the right to life, liberty and security of person, article XVII, the right to recognition of juridical personality and of civil rights, Article XVIII, the right to a fair trial, article XXV, the right to protection from arbitrary arrest or detention, and especially Article XXVI, the right to due process of law. These are articles of the American Declaration of the Rights and Duties of Man, which the Inter-American Commission invokes when the State party concerned is not yet a party to the American Convention on Human Rights, as is the case with the United States of America.

Pursuant to article 25(1) of the IACHR's rules of procedure, the petitioners requested the Commission to ask the United States, *inter alia*: (i) to adopt measures necessary to protect their right to personal integrity and fair trial; (ii) to treat each detainee as a prisoner of war until any doubt as to status is determined by a competent tribunal; (iii) to provide the detainees written notice of the charges, access to legal counsel with confidential communications and access to judicial review.

On 12 March 2002 the Commission granted, in part, the request for precautionary measures and asked the United States "to take urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal." The Commission also noted that it had ruled that member States of the Organization of American States like the United States were subject to an international legal obligation to comply with such a request for precautionary measures.<sup>163</sup>

In its 11 April 2002 response to the IACHR's request, the United States argued that there was no basis in fact or law for the Commission's request because: (a) international humanitarian law, not international human rights law, applied; (b) the IACHR had no jurisdiction to apply international humanitarian law; (c) the detainees, as a matter of public record, were unlawful combatants, not prisoners of war; and (d) the detainees were treated humanely. Therefore, the U.S. asked the Commission to rescind its request for precautionary measures.

On 28 May 2002 the Commission, acting on further observations by the petitioners, asked the United States to comment on the contention that some of the detainees were not captured on any battlefield, that some were suffering from mental disorders, that the legal

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<sup>163</sup> *Detainees at Guantánamo Bay* case, IACHR Request for Precautionary Measures (IACHR March 12, 2002). Reported in the Human Rights Law Journal, Vol. 23, No. 1-4, pp. 15-16.

status of the detainees was unclear and that the uncertainty of their status was “placing them increasingly at risk of irreparable harm”.

On 23 July 2002 the Commission refused to rescind its 12 March 2002 request and instead urged the United States to furnish information as to how the United States was complying with the earlier request. In addition, the Commission stated that “it has the competence and responsibility to monitor the human rights situation of the detainees and in so doing to look to and apply definitional standards and relevant rules of international humanitarian law in interpreting and applying the provisions of the Inter-American human rights instruments in time of armed conflict.”<sup>164</sup>

On 16 October 2002 a closed hearing was held on the further request of the petitioners for precautionary measures in the light of the degrading situation in Guantánamo and the high number of attempted suicides. The Commission has deferred consideration of the merits awaiting further information on the exhaustion of domestic remedies in the United States.

#### *G. Council of Europe; European Union; Diplomatic protection of citizens*

As indicated above, the Guantánamo detainees represent 42 nationalities. Their countries of nationality can intervene on their behalf through diplomatic notes and/or protests addressed to the Secretary of State of the United States, Colin Powell. Among the detainees, there are 26 Europeans, citizens of France, Spain, Sweden, and the United Kingdom. Since the United Kingdom actively supported the United States in the war on Iraq, it has been easier for Prime Minister Tony Blair to intercede on behalf of the nine Britons, two of whom, Moazzam Begg and Feroz Abbasi, are among the six detainees identified by President Bush for trial before a military tribunal.<sup>165</sup>

On 26 September 2003 Azmat Begg, the father of Moazzam Begg, made an appeal before a special meeting of Members of the European Parliament in Brussels, asking the Parliament to intercede before the United States either to release his son “from this place where he’s being treated like an animal”, or to allow him to face trial in Great Britain.<sup>166</sup>

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<sup>164</sup> IACHR Request to U.S., Detainees in Guantánamo Bay, Cuba 23 July 2002. On 26 September 2002 the Commission granted a second request for precautionary measures, this time concerning the Post September 11 Detainees, and asked the United States “to protect the fundamental rights of the petitioners, including their right to personal liberty and security, their right to humane treatment, and their right to resort to the courts for the protection of their legal rights, by allowing independent courts to determine whether the detainees have been lawfully detained and whether they are in need of protection.” In support of this decision, the Commission stated that the United States had failed to clarify or contradict petitioners’ information indicating that (i) there was no basis under domestic or international law for their continued detention; (ii) there was no information regarding their conditions of detention although former detainees have claimed that they have been subjected to harsh conditions and verbal and physical abuse; and (iii) the detainees were being held without any effective means of challenging the legality or conditions of detention before the domestic courts.

<sup>165</sup> In a visit to Washington, D.C., in July 2003, Prime Minister Tony Blair interceded on their behalf. Blair said he had “strong reservations” about a military tribunal. Since Britain is opposed to the death penalty, the Blair Government would raise the strongest possible objections if there were any chance of capital punishment being applied in the Britons’ cases. *Associated Press*, 18 July 2003, “Bush says Guantánamo detainees ‘bad people’”.

<sup>166</sup> Emma Jane Kirby, BBC Brussels, “Members of the European Parliament have been meeting families of Guantánamo Bay detainees from the EU to discuss the situation in the camp”. UK MEP Baroness Ludford

On 22 October 2003 European Parliament leaders urged the European Union Presidency to raise the case of the 26 Europeans being held as terror suspects in Guantánamo. As the leader of the Parliament's biggest grouping, the European People's Party said, "even the worst criminals must have the right to a fair trial."<sup>167</sup> Meanwhile the lawyers for the four French detainees have asked France to refer their cases to the International Court of Justice.<sup>168</sup>

## V. CONCLUSION

It is clear that the United States imposed the treaty on Cuba at a time when Cuba only had very limited sovereignty. International law has evolved to the point that colonial or quasi-colonial agreements are deemed "unequal treaties" and thus no longer valid, as was the case with regard to the capitulation regimes<sup>169</sup>, as was the case with the Panama Canal.

There is an obligation in international law to negotiate in good faith. If the Cuban Government were to submit a concrete offer to negotiate, and the United States were to refuse this offer, the matter could be submitted for the good offices of the United Nations Secretary General, or could be taken up by the General Assembly with a resolution requesting an advisory opinion by the International Court of Justice.

And even if the United States disregards the judgments and advisory opinions of the International Court of Justice, as it did in the 1984 case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and as it has disregarded the decisions of the Inter-American Commission on Human Rights concerning the Guantánamo detainees and in other cases, a certain momentum is gained. In the case of the Panama Canal, it was the Latin-American region that took the matter to the Security Council and eventually prevailed upon the United States to negotiate in good faith.

The United States is not alone in the world. And the United States policies concerning Guantánamo are not unusual in the light of America's unilateralism, in the light of America's efforts to undermine the United Nations, to pull the rug under the newly established International Criminal Court. A different United States administration will understand that multilateralism is inescapable, and that consistent disregard of international law and international agreements has a price. The worldwide condemnation of the American policies in Guantánamo should make some politicians in Washington reflect about long-term consequences to American interests. As Richard Goldstone said

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asked EU States to refuse to sign any new resolution on Iraq until the United States puts an end to the "intolerable suffering" of the Guantánamo prisoners. BBC News, 30 October 2003.

<sup>167</sup> BBC News, 22 October 2003, "Europe urges Guantánamo action."

<sup>168</sup> Philippe Gélie, *Le Figaro*, 12 November 2003, "Guantánamo Detainees Get a Hearing".

<sup>169</sup> Kontou, *op. cit.*, pp. 78-85.

in his BBC interview of 5 October 2003: “A future American President will have to apologize for Guantánamo”<sup>170</sup>.

I should like to conclude by repeating the old wisdom that law is not mathematics. If it were, we would not need judges.

In the case of Guantánamo, I submit that international law is reasonably clear:

Cuba remains the *de jure* sovereign. The United States is an unlawful occupant.

As long as the United States refuses to leave the territory, as South Africa had refused to leave Namibia, it engages in internationally wrongful behaviour. The question is therefore not one of norms but rather one of effective *enforcement* of those norms, a question of an incipient culture of impunity that should not be allowed to prevail. In particular there is a question of impunity with regard to grave breaches of the Third Geneva Convention of 1949.

Bearing in mind that human rights is a paramount concern of all State members of the United Nations, let us persevere in demanding that human rights be respected, also in the case of the Guantánamo detainees. I would welcome it, if the current United States Administration would understand that it is in its own interest and in the interest of the world community, that it abide by the rule of law, and this entails, as the International Committee of the Red Cross has said, either giving the detainees a fair hearing or releasing them. Now.

I would also welcome it, if the United States would understand that, as it returned Okinawa<sup>171</sup> in 1972 to Japan and the Panama Canal Zone to Panama in 1977, it should also consider returning Guantánamo to Cuba. This would be a valuable contribution to peace and to the rule of law in the hemisphere.

I should like to end with a quote from former President Jimmy Carter, the 2002 Nobel Peace Prize laureate, which aptly captures the tragedy of the situation. Speaking at the Carter Center in Atlanta on 15 September of this year President Carter said:

“[The Guantánamo detainees] have been held in prison without access to their families, or a lawyer, or without knowing the charges against them. We’ve got hundreds of people, some of them as young as 12, captured in Afghanistan, brought to Guantánamo Bay and kept in cages for what is going on two years. It’s difficult for international aid workers to spread the message of human rights to places like Cuba, Africa and the Middle East when the US government doesn’t practice fairness and equality ... I have never been as concerned for our nation as I am now about the threat to our civil liberties.”<sup>172</sup>

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<sup>170</sup> Transcript of BBC programme “Inside Guantánamo”, 5 October 2003.

<sup>171</sup> On 15 May 1972 by virtue of a treaty negotiated between President Richard Nixon and Japanese Prime Minister Sato, signed on 17 June 1971, on the reversion of the Ryukyu Islands.

<sup>172</sup> Associated Press, 15 September 2003.



On 11 November, at the “Human Rights Defenders of the Frontlines of Freedom” Conference at the Carter Center, former President Carter again deplored the indefinite detention of the terrorism suspects in Guantánamo and added, “I say this because this is a violation of the basic character of my country and it’s very disturbing to me.”<sup>173</sup>

It is disturbing to all humanity.

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<sup>173</sup> Associated Press, 11 November 2003; Doug Gross, “Carter: U.S. missteps boost dictators” in the Athens Banner-Herald on Wednesday 12 November 2003; “Carter slams human rights decline” in *The Australian*, 12 November 2003. At the conference in the Carter Center, also attended by the Acting United Nations High Commissioner for Human Rights, Bertrand Ramcharan, Professor Saad Ibrahim of the American University in Cairo said: “Every dictator in the world is using what the United States has done under the Patriot Act ... to justify their past violations of human rights and to declare a license to continue to violate human rights.”