

THE STATUS OF GUANTANAMO BAY AND THE LEGAL SITUATION OF THE DETAINEES
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Cuba maintains that the U.S. is illegally occupying the territory.
The U.S. takes the positivist approach that the 1903 lease agreement is of indefinite duration and can only be terminated by mutual agreement.

STATUS OF THE 1903 LEASE AGREEMENT ON GUANTANAMO BAY. OPTIONS:

1. the 1903 treaty is void as a treaty imposed by force
2. the 1903 treaty is voidable today, because it is
 - a) an unequal treaty
 - b) it violates peremptory norms of international law, including self-determination and the sovereign equality of States
 - c) any interpretation, in good faith, of the treaty and its history would result in the conclusion that it was not the intention of one of the parties, Cuba, to grant perpetual use of Guantanamo to the United States. This would have been tantamount to a cession agreement. Cuba successfully fought the U.S. insistence to "purchase" the area and insisted on a lease, but at the time, Cuba was not a sovereign State. After four years of military occupation, US withdrawal from Cuba was linked to the acceptance by the Cuban constitutional assembly of the so-called "Platt Amendment", providing for naval bases and allowing the U.S. to intervene militarily in the country, an intervention right that was exercised on four separate occasions
 - d) the treaty can also be terminated on account of material breach of the agreement, which stipulated that it could be used "for naval and coaling stations only, and for no other purpose." The detention of 31,000 Haitian refugees in the 1990's and now 680 prisoners of war is clearly incompatible with the lease agreement.

THE STATUS OF THE DETAINEES IN GUANTANAMO

THERE IS NO "LEGAL BLACK HOLE" - Nature abhors a vacuum (Spinoza)

THREE LEGAL REGIMES APPLY:

1. THE INTERNATIONAL HUMAN RIGHTS LAW REGIME OBLIGES THE UNITED STATES TO EXTEND THE PROTECTION OF HUMAN RIGHTS TREATIES, INCLUDING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE CONVENTION AGAINST TORTURE TO ALL PERSONS UNDER ITS JURISDICTION, WITHOUT DISCRIMINATION. AMONG THE RIGHTS PROTECTED ARE THE RIGHT NOT TO BE SUBJECTED TO ARBITRARY DETENTION, THE RIGHT TO COUNSEL, THE RIGHT TO DUE PROCESS OF LAW, THE RIGHT NOT TO BE SUBJECTED TO TORTURE OR TO INHUMAN TREATMENT OR PUNISHMENT.
2. THE REGIME OF INTERNATIONAL HUMANITARIAN LAW, INCLUDING THE THIRD GENEVA RED CROSS CONVENTION OF 1949, WHICH THE UNITED STATES HAS RATIFIED, AND WHICH HAS BECOME CUSTOMARY INTERNATIONAL LAW.
PURSUANT TO ARTICLE VI OF THE US CONSTITUTION, INTERNATIONAL TREATIES ARE THE SUPREME LAW OF THE LAND. THUS, THE FEDERAL GOVERNMENT IS UNDER AN OBLIGATION TO APPLY ARTICLE 5 OF THE THIRD GENEVA CONVENTION IN ORDER TO DETERMINE THE STATUS OF THE DETAINEES BY A "COMPETENT TRIBUNAL". UNTIL SUCH A DETERMINATION HAS BEEN MADE, THE DETAINEES ARE TO BE TREATED AS PRISONERS OF WAR AND ENJOY ALL THE BENEFITS OF THE CONVENTION.
3. THE DOMESTIC US LEGAL REGIME, WHICH PROVIDES FOR CIVIL RIGHTS TO ALL PERSONS WITHIN THE TERRITORY OF A STATE.
THE ANTE-DELUVIAN POSITION THAT THE CONSTITUTION AND BILL OF RIGHTS APPLY ONLY IN TERRITORIES WHICH ARE FORMALLY UNDER THE 'SOVEREIGNTY' OF THE UNITED STATES IS NOT TENABLE. MODERN INTERNATIONAL LAW, WHICH ACCORDING TO THE PAQUETE HABANA PRECEDENT MUST BE TAKEN INTO ACCOUNT BY THE JUDICIARY OF THE UNITED STATES, REQUIRES THE USE OF THE "EFFECTIVE CONTROL" OR "JURISDICTION" TEST. THUS, EVERYWHERE THAT U.S. AUTHORITIES EXERCISE CONTROL, THE GUARANTEES OF THE BILL OF RIGHTS ARE APPLICABLE.
THE UNITED STATES SUPREME COURT HAS GRANTED CERT. ON 10 November AND WILL HEAR THE CASE OF THE GUANTANAMO DETAINEES. LET US HOPE THAT IT OVERTURNS AN ANACHRONISTIC CASE LAW (Johnson v. Eisentrager, 1950) THAT IS INCOMPATIBLE WITH THE OBLIGATIONS OF THE UNITED STATES UNDER CURRENT INTERNATIONAL LAW.

PART III – OPTIONS OF PEACEFUL SETTLEMENT

Pursuant to article 2, para. 3, of the UN Charter there is an obligation to negotiate. The matter should be submitted to international arbitration, and the Secretary-General of the UN or of the OAS could assume this function.

The matter could be submitted to the ICJ for an advisory opinion

States whose citizens are detained in Guantanamo can use their right of diplomatic protection and invoke article 41 of the Covenant on Civil and Political Rights, which creates a settlement mechanism

IN CONCLUSION: THE NORMS ARE CLEAR. THERE IS NO LEGAL LIMBO.
NATIONAL AND INTERNATIONAL LAW ARE BEING VIOLATED WITH IMPUNITY.
THE ABSENCE OF ENFORCEMENT OF LAW DOES NOT MEAN THAT THERE IS NO LAW.
IT MEANS THAT THE ENFORCEMENT MECHANISMS ARE NOT WORKING.

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