"Military bases on disputed islands are a threat to international peace and security". Discuss.

2,968 words

Military Bases on Disputed Islands: Alsatias in the Ocean Blue?

William Sanders 2024/055

I. Introduction

On 13 May 2026, Professor Michael Waibel, together with Sir Christopher Greenwood KC, delivered the fifth 3VB and NUS Arbitration Lecture. The Lecture's topic was 'Islands of Disagreement: Self-Determination in the Line of Fire'. Professor Waibel considered three issues, first, attacks on military bases on disputed islands, second, the role of consent and third, self-defence. The author of this essay attended the Lecture and came away from it with the overriding (and perhaps obvious) impression that the implications of military bases on disputed islands were overwhelmingly problematic from an international public law perspective.

Practitioners and academics in this field know that conflict arising out of the installation and maintenance of military facilities on these islands is nothing new. From recent flare ups over Greenland, to longstanding disputes over Cyprus, the Falkland Islands, the Chagos Islands and Guantánamo Bay, military presences on these disputed islands are seemingly never without consequence for international law. This essay will focus on three central questions concerning the establishment of these bases: (i) what qualities do these bases possess that make them attractive policy objectives for States; (ii) what are the implications for the international legal order; and (iii) are current international public law frameworks sufficient for dealing with the associated challenges? By reference to two case studies, Chagos and Guantánamo, and the two States responsible for establishing military bases on these islands, the UK and the US respectively, this essay will attempt to explore the myriad ways in which these military bases contravene established international legal principles through the lenses of first, extrajudicial status, second, sovereignty and consent and third, self-defence.

II. Extrajudicial status

Islands are, above all, of the utmost strategic value. An island military base provides a State with the ability to project its power upon distant localities or theatres of war in a fashion that would be otherwise impossible. Whether it be for refuelling, resupplying, surveillance or simply as a base of operations, an island with its natural defences and limited oversight from other State actors affords a

State with unparalleled strategic advantage. However, there exists deeper value beyond merely extending the reach of a State from its domestic confines.

First, it is worth setting out what an island is from an international public law perspective. It is "whatever its size or population, a formation" that "must be 'a naturally formed area of land'" and "it must always be above sea level."[1] The majority of military bases installed on disputed islands will be subject to a lease agreement, which are "examples of concessions of territory" often "for a period of years" or, as will be explored later, sometimes "even in perpetuity."[2] This complicates matters from a legal perspective as the precise terms of these leases will vary such that there is no bespoke body of law governing them: "each case depends on its particular facts and especially on the precise terms of the grant."[3]

Moreover, there is no specialism "of international law that relates exclusively to islands…as a general matter islands are simply one subject matter area to which various rules of international law may be applied."[4] Likewise, with regard to sovereignty issues "there is no difference between islands and continental land territory."[5] This is to be expected. Islands and the disputes that rage over them are each too specific in their historic, political and economic contexts for one overarching corpus of law to codify their management.

However, this essay suggests that this is the first, and even foremost, quality that makes these bases desirable for State actors. The complicated intersections between maritime law, sovereignty issues, general international public law and so on, provide a fertile ground for States to exploit ambiguities that they would otherwise be unable to. This is then exacerbated by a second quality in the geographic remoteness of islands and their peoples. Physical distance from oversight is complemented by a distance from the reach of ordinary legal processes and controls.

Take for instance, the implementation of laws on Guantánamo Bay that flagrantly oppose both the US's own domestic legal order and the totality of international legal conventions and customs. The lack of oversight in Guantánamo naturally produces a state of affairs that emboldens the State to "assert an extended extraterritorial jurisdiction in a manner" that may only be described as "almost totally unprincipled" and even "startling."[6] Christopher Staker writes here of US Military Order 66 FR 5783 of 13 November 2001 which, at Section 7 of the Order, renders detainees on base without the privilege to "seek any remedy or maintain any proceeding, directly or indirectly", before "any court of

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[1] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford University Press, Oxford, 2019 247 - 248
[2] Ibid 196
[3] Ibid
[4] Sean D. Murphy, *International Law Relating to Islands*, The Hague Academy of International Law, Brill | Nijhoff, 2017 335
[5] Derek W. Bowett QC, *The Legal Regime of Islands in International Law*, Oceana Publications Inc, New York, 1979 45
[6] Malcolm D. Evans, Christopher Staker, 'Jurisdiction' in *International Law*, 6th ed., Oxford University Press, Oxford, 2024 326

the Untied States…any court of any foreign nation" or even "any international tribunal."[7] The total suspension of the ordinary course of legal proceedings is perhaps only possible because of Guantánamo's liminal position as simultaneously US-controlled and yet not US territory. This led to further unusual technicalities, such as the classification of detainees at Guantánamo as "enemy combatants" and not "prisoners of war with the protection of international law", a distinction facilitated by the physical and legal loopholes of the base's territorial status: "not physically in the United States, these persons have been denied fundamental constitutional protections…held them without bail, did not charge them with a crime, and denied them access to counsel."[8]

It is difficult indeed to imagine the US attempting such a scheme in Connecticut or North Dakota. It is likewise difficult to imagine that were such rules applied on home soil that it would be met with the same disinterest from the US's own citizenry and on the international stage. So, while there are good reasons for a lack of a singular unified approach for dealing with international island law, this is nevertheless a flaw that is a consistent refrain throughout the case studies of military bases on disputed islands the world over. The suspension of domestic legal processes, such as with Guantánamo, naturally incentivises States to ruthlessly exploit effectively whatever lacunas they wish. This essay would therefore contend that it is perhaps worth considering that as it relates specifically to the grant of military bases, the approach of international law ought to be reconsidered, so as to prevent States from using the protections they are afforded by ungoverned lease agreements.

III. Sovereignty and consent

The troubling effects of these military bases extend into the fundamental principles that govern international law. It is well-established that "sovereignty cannot today be acquired through military conquest", and yet, the aforementioned lease agreements between States to install military facilities once again rebut this presumption.[9] Paradoxically, these lease agreements, particularly where they are granted in perpetuity (as with Guantánamo) create a quasi-occupation of one State's sovereign land by another State's military. As Christopher Staker explains:

> In 2004 the US Supreme Court in *Rasul v Bush*[10]….to determine…jurisdiction to review the legality of the detention of prisoners in the Guantánamo Bay Naval Base…applied the terms of the Lease Agreement of 1903 under which Cuba conferred…complete jurisdiction and control over the Base while retaining ultimate sovereignty. The majority

[7] Ibid
[8] Wolfgang Benedek, Susan M. Akram & Kevin R. Johnson 'U.S. Measures Against Terrorism' in *Anti-Terrorist Measures and Human Rights*, Martinus Nijhoff Publishers, Leiden, 2004 146
[9] Murphy, *International Law*, 2017 119
[10] 542 US 466 (2004)

> inferred from the Agreement that the relevant statute should be construed to give US federal courts jurisdiction.[11]

However, in the face of a foreign military installation, how can it be said to be possible for Cuba's sovereignty to be exercisable? Short of invading the base, Cuba's sovereignty is impugned, in perpetuity, because of a 123-year-old lease. Chief amongst the inherent qualities of sovereignty and equality amongst States is "a jurisdiction, prima facie exclusive, over a territory and the permanent population living there" and moreover, "a duty of non-intervention in the area of exclusive jurisdiction of other states."[12] The base at Guantánamo does away with Cuba's exclusive jurisdiction and breaches the US's duty not to intervene in said jurisdiction; all to satisfy strategic and international policy. In other words, Cuba's very competence (used in the sense of Statehood) is interfered with.

It is correct that States have the power to consent to restrict their rights, but that this should be possible in perpetuity appears unjust. Cuba has claimed both the 1903 and 1934 leases for Guantánamo to be illegal since 1959, and yet, it is unable to action this assertion of its sovereignty without fear of military reprisal.[13] The same may be said for the Chagos Islands, initially procured through the consent of the Mauritian government, but it has since been suggested that the Mauritian government "had no meaningful choice" in the matter "given the threat that the Chagos Islands would be unilaterally excised from the colony of Mauritius if they resisted."[14] Whilst this may not void the 1965 Lancaster House Agreement itself (because the doctrine of coercion was not yet developed "in the contemporaneous customary international law") it certainly raises questions over the extent of the host State's sovereignty which is again limited if it is either not able to choose freely nor to repeal its choices when viewed in the context of inappropriate coercion.[15] The ICJ has suggested that the Agreement was not in fact based "on the free and genuine expression of the will of the people concerned", not least because Mauritius is "said to have ceded the territory to the United Kingdom" while "under the authority of the latter."[16]

Whilst it is important that treaties are not set aside simply whenever a signatory changes its mind or experiences a change in government, it is important to reiterate that "the preamble of the 1969 Vienna Convention on the Law of Treaties recognises the fundamental importance of the

[11] Evans, Staker, 'Jurisdiction' in *International Law*, 2024 416
[12] Crawford, *Brownlie's*, 2019 431
[13] Ibid 196 - 197
[14] Stephen Allen, *The Chagos Islanders and International Law*, Hart Publishing, Oxford, 2014 128
[15] Ibid 128
[16] *Legal Consequences of the Seperation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* ICJ Reports 2019 [172]

principles of freedom of consent, good faith…essential to both forms [treaties and private law contracts] of agreements…"[17] Stephen Allen goes as far as to suggest that:

> the very nature of the relationship between an administering State and a non-self-governing territory creates conditions which are inherently favourable to the administering State when agreements are being concluded between them. Accordingly, the causal relationship between the coercion used and the consent procured should be readily presumed in such cases.[18]

These basic principles buttress the conception of treaties, which is essential to the viability of international legal order, and these examples exhibit the way in which these military bases subvert these core precepts.

IV. The self-defence pretext and indigenous peoples

The historical reasons for these military bases inform many of the injustices felt in their use today. Initially, the UK and US conceived of "a 'strategic island policy' in the aftermath of the Second World War…premised on the identification of geographically remote islands that were strategically signific ant…When such territories were inhabited…would endeavour to ensure the prompt removal of their inhabitants" as is the case with the forced removals in both the outer Chagos Islands and Bikini Atoll.[19]

Pre-emptive self-defence is itself a controversial topic and beyond the scope of this essay. Suffice it to say that "all states agree that self-defence must be necessary and proportionate" but some "states and commentators have argued that the 'war on terror' justifies a very wide interpretation of necessity and proportionality going beyond a response to an actual armed attack."[20] The justification for maintaining these island bases is increasingly made by reference to the need to sustain the prolonged and globally-spanning 'war on terror'. Whereas the island bases' initial conception was strategic value in the prelude to the Cold War, now the UK, and US in particular, deem these bases as vital lynchpins for combatting terrorism. So much so that the ability for the US to use the "naval facility" in Guantánamo "to house detainees" is directly linked to "the so-called 'war on terror'" and

[17] Allen, *The Chagos*, 2014, 104
[18] Ibid 128
[19] Ibid 78
[20] Christine Gray, *International Law and the Use of Force*, 4th ed., Oxford University Press, Oxford, 2018 157 - 159

this is only made possible by exercising effective unquestioned sovereignty (see analysis above) without the extension of domestic constitutional rights.[21]

As such, thanks to the development of modern terrorism as a borderless threat, the international legal principles governing self-defence may be stretched to their absolute limit in justifying the need for bases. It is true, that there are of course, benefits in holding onto these bases. First, some might argue that they are effective and uncontroversial in the majority of instances. There are plenty of foreign bases, both on islands and on continental land that function without creating disputes. They can contribute to local economies and lease agreements can be of mutual benefit to both States involved. Second, of course, the projection of power is necessary in some circumstances and to the benefit of large populations of people, as with, for example, Taiwan benefitting from the presence of US bases in the Philippine Sea.

However, principally, "the struggle against terrorism does not excuse the use of means which violate the rule of law", if for no other reason than that the threat is so pervasive that it can never truly be vanquished.[22] This means that, as with perpetual lease agreements, States may always have a ready excuse to facilitate the acquisition and upkeep of these island bases, for in order to engage in the war on terror the practical benefits of the bases remain ever-relevant. The consequence of this is that the aforementioned removal of indigenous peoples is prolonged indefinitely. An example of this is readily evidenced in the plight of Chagossians who were in the first instance removed under the covert agreement of the UK and US governments to make way for the US base at Diego Garcia[23], who are now told that they may not return for fear that resettlement "would increase the risk of terrorist infiltration and attack."[24]

The ILO Convention No. 169, and in particular its Article 16(3) enshrines the right for indigenous peoples to return to their traditional lands as soon as the grounds for relocation cease to exist. By maintaining an endless 'war on terror' the States that hold these bases may forever rebuff indigenous peoples seeking to return to their lands. This essay does not have the ambit to cover this matter in full, however, it should be pointed out that such removals are themselves, arguably contrary to a raft of other international law principles and customs. In the case of the Chagos Islands "the UK government has taken extraordinary steps to avoid the prospect of the resettlement of the outer Chagos Islands…which indicate that it is not confident of the lawfulness of its actions"[25], which is perhaps no surprise given that at the time of the expulsions "the UK government knew that the Chagos Islands supported a permanent population…but it decided not to disclose this

[21] Crawford, *Brownlie's*, 2019 197
[22] Benedek, *Anti-Terrorist,* 2004 202
[23] Allen, *The Chagos*, 2014, 2
[24] Ibid 18
[25] Ibid 284

information…for fear that the BIOT would be…subject to the obligations contained in Chapter XI of the UN Charter."[26]

V. Conclusion

At the conclusion of the 3VB and NUS Arbitration Lecture, Professor Waibel referred to the possibility of the introduction of a plausibility test to resolve sovereignty disputes on islands. This essay suggests that such a test may similarly be appropriate in disputes over military bases on these islands. Application of a test of plausibility would flush out the rationales for holding these bases and would represent a step in the direction of providing courts with the means to hold States to account. In international law, the use of force in law enforcement activities is permitted only where it is "unavoidable, reasonable and necessary" and it "must be avoided as far as possible."[27] It is submitted that these requirements could serve as the formulation of a test of plausibility of the need for military bases on disputed islands. Given that these bases ostensibly facilitate the use of force, these principles ought to likewise underpin their operation.

Insofar as these bases relate to peace and security, these are notions that can only ever be guaranteed through the consistent respect for and implementation of the rule of law. These bases undeniably have strategic value for States and therefore have the ability to be used for 'good'. However, they represent a pursuit of power and policy that necessarily strains against international legal efforts. Taken at their best, it is submitted that even uneasy existence within conceptions of international law (to say nothing of the numerous flagrant breaches and violations) is unsatisfactory. The creation and preservation of these bases invariably contribute to the subtle erosion of the foundations of international law. Turning a blind eye to injustices against individuals and peoples, even when set against admirable objectives such as 'the war on terror', undermines the rule of law. In so doing, the otherwise virtuous rationales referred to by States as pretexts for these military bases are also compromised. Ironically, the divisions between the "irreducible dualities" that dominate, for instance, US policy that justifies these bases are imperilled by their very existence.[28]

The position was perhaps best summarised by Alex P. Schmid when writing of the work of the Terrorism Prevention Branch of UNODC:

> Where the Rule of Law is firmly in place, it ensures the responsiveness of government to the people as it enables enhanced critical civil participation. The more citizens are

[26] Ibid 6
[27] See for example, *Arbitration Regarding the Delimitation of the Maritime Boundary between Guyana and Suriname (Guyana v Suriname)* 2007 [405], [445]
[28] Howard M. Hensel, *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, Ashgate Publishing Ltd, Aldershot, 2005 210

> stakeholders in the political process the less likely it is that some of them form a terrorist organization. In this sense…the Rule of Law has a preventive effect on the rise of terrorism…[29]

Therefore, even if these military bases assist in the struggle against terrorism, in a more fundamental sense where they have been procured or protected through improper means and where they are used by States to conceal otherwise unacceptable practices, they fuel the very problem they were intended to combat. In some sense, the mechanisms of dispute resolution available in cases of disputed islands, "negotiation, mediation, conciliation, arbitration or judicial settlement", are impaired by the reality that the military bases stationed on these islands inherently stoke conflict and are, for whatever reason, overwhelmingly unlikely to be relinquished by those States that view them as a policy priority.[30] The existence of these bases is the manifestation of well-intentioned policy and legislation gone awry, and wherever the value and meaning of international law is weakened, so too is international peace and security.

[29] Benedek, Alex P. Schmid in *Anti-Terrorist*, 2004 57
[30] Murphy, *International Law*, 2017 338