

INTERNATIONAL LEASES AS A LEGAL INSTRUMENT OF CONFLICT RESOLUTION:

THE SHAB'A FARMS AS A PROTOTYPE FOR THE RESOLUTION OF TERRITORIAL CONFLICTS

Noemi Gal-Or[♦] and Michael J. Strauss[♣]

This paper looks at the Shab'a Farms – considered by the U.N. Secretary General as the linchpin excuse in the Hizb' Allah rhetoric justifying the de-stabilization of the Israel-Lebanon-Syria relationship. It contemplates the possibility of defusing a violent conflict by borrowing the lease – a legal instrument in domestic law of contract and real property and private international law – and turning it into a public international legal device.

I. THE SHAB'A FARMS

The area known as the Shab'a Farms, which since the 1967 Six Day War has been occupied by Israel, comprises six now abandoned farmlands which were never geographically or historically defined as an area/land in itself nor were they mapped cartographically.¹ This arid area in the southern slopes of Mount Hermon, south of the internationally recognized Syrian-Lebanese border and north-west of the Golan Heights, stretches south-west to north-east; the area is about 3 km. wide and 14 km. long, totaling about 40 square km. The only settlement near the area is the village of Ghajar, divided by the “blue line” marked by the United Nations (UN; UN Resolution 425) in May 2000² into a Syrian part occupied by Israel and a Lebanese part.³

[♦] Director, Institute for Transborder Studies, & Professor, Department of Political Science, Kwantlen University College, Surrey, B.C., Canada, noemi.gal-or@kwantlen.ca.

[♣] Lecturer in Geopolitics, Doctoral Program, Centre d'Etudes Diplomatiques et Stratégiques, Paris, France, m.strauss@wanadoo.fr.

¹ Haim Sarbaro, “The Legitimacy Issue of the the Lebanese Claim to the ‘Shebaa Farms’ in Relation to the International Border,” THE CENTRE FOR ISRAEL'S CARTOGRAPHY, Tel Aviv, 2006, *available at* www.ynet.co.il/articles [authors' translation from Hebrew]. The geographic and historical description is largely based on this most detailed available source.

² The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978), delivered to the Security Council*, U.N. Doc. S/2000/460 (May 22, 2000).

³ Gideon Levy, “Yatzpan Did Come, Life in a Syrian Village Where the Residents Are Israeli and Half its Area Is in Lebanon, Aja'ar without Border,” HA'ARETZ, Nov. 29, 2005, *available at* www.haaretz.co.il

The so-called Second Lebanon War of summer 2006 broke out as a result of the Hizb' Allah's incursion into Israeli territory under the claim that the Shab'a Farms belonged to Lebanon and therefore represented Lebanese territory occupied by Israel, to be liberated by the Hizb' Allah.

II. THE POLITICAL HISTORY OF THE SHAB'A FARMS

The political history of the Shab'a Farms dates back to the time previous to the First World War when Britain and France divided the area, later bringing Syria and Lebanon under French tutelage (Sykes-Pico Note, 1916). In 1920, France set an administrative borderline between Lebanon and Syria but did not clearly and physically delineate it. Until 1967, the Shab'a Farms area was generally considered Syrian territory. Following the 1967 Six Day War, Israel's conquest of the Golan Heights brought it under Israeli marshal law. In 1981, Israel unilaterally established Israel's jurisdiction over the Golan Heights, including the disputed area. Since October 2000, Hizb' Allah has carried out several attacks on the Israeli Defense Forces (IDF) in the Shab'a Farms. Shortly before (April 2000), Lebanon advised the UN of "its *new* position regarding the definition of its territory."⁴ By 2001, the Lebanese government effectively refused to recognize the blue line by preventing peacekeepers from deploying in key areas.

On July 12, 2006, the Second Lebanon War broke out. The UN Secretary General, in retrospect, noted in his September 2006 report that "[i]t is important to emphasize that the issue of the Shab'a Farms area continues to be put forward – in contradiction to the repeated resolutions of the Security Council – to justify the existence and activities of Hizbollah insofar as militant activity across the blue Line is concerned. [...] A permanent

[authors' translation from Hebrew]; see also Hagai Einav, "Aja'ar Representatives to Livni: 'We Have Been Already Seven Years under Internment,'" YNET NEWS, Mar. 4, 2007, available at www.ynet.co.il [authors' translation from Hebrew].

⁴ *Id.*; see also The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), delivered to the General Assembly, U.N. Doc. S/2007/392 (Jun. 28, 2007).

solution of this issue [status of the area], however, remains contingent upon the delineation of the border between the Syrian Arab Republic and Lebanon.”⁵

Since the adoption of Security Council resolution 1701 in August 2006, UN efforts in addressing the border demarcation in the disputed area have been increasingly intensifying. The major relevant points meriting attention are:

- The Secretary-General noted that the repeated *Syrian* statements over that year that the farmlands were Lebanese “constitute a *new* legal reality.”⁶
- The Secretary-General acknowledged the option suggested by Lebanon to temporarily place the farmlands under UN jurisdiction.⁷
- The work of the UN-appointed cartographer has been progressing thanks to the submission by Lebanon of *new* documents (found and collected in the region and from French archives) and previously unavailable. As a result, “[t]he Government of Lebanon contends that the 1920 intra-mandate line that defined the boundary between Lebanon and the Syrian Arab Republic in this region was drawn with scant knowledge of the geographical realities; the resulting status has been perpetuated ever since.”⁸
- While the UN cartographer has been working to ascertain the authenticity of the documents, the UN has called upon Syria to make relevant material available,⁹ and noted Israel’s cooperation.¹⁰ Furthermore, the Secretary-General encouraged

⁵ The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), delivered to the Security Council, U.N. Doc. S/2006/730 (Sept. 12, 2006).

⁶ The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), ¶ 46, delivered to the Security Council, U.N. Doc. S/2007/147 (Mar. 14, 2007). Note that this is a more definitive statement than the one made in 2000, when a similar but significantly milder pronouncement was made by the UN regarding the then Lebanese claims to the Shab’a Farms, qualifying them as “its [Lebanon’s] new position.” See The Secretary General, *supra* note 2, at ¶ 15.

⁷ The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), delivered to the Security Council, U.N. Doc. S/2007/147 (Mar. 14, 2007).

⁸ *Id.* at ¶ 48-49.

⁹ *Id.* at ¶ 50; The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), ¶ 62, delivered to the General Assembly, U.N. Doc. S/2007/392 (Jun. 28, 2007).

¹⁰ The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), ¶ 50, delivered to the General Assembly, U.N. Doc. S/2007/392 (Jun. 28, 2007).

Syria to reconsider its position that a resolution of the status of the disputed farmlands depended on a peace treaty with Israel.¹¹

- The Secretary-General “reiterate[s] the urgent call upon the Syrian Arab Republic and Lebanon to take the necessary steps to delineate their common border, in fulfillment of resolutions 1559 (2004), 1680 (2006) and 1710 (2006)”, and noted that “[i]t should be recognized that joint Lebanese-Syrian boundary committees demonstrated good collaboration and agreement on boundary procedures during the 1960s. It is suggested that with the assistance of the United Nations a joint boundary committee could be re-established.”¹²
- The UN registered that inadvertent crossings represented a particular concern in the Shab’a Farms area, where there is no Israeli technical fence in place to assist in marking the blue line and the distance from the land controlled by Israel.¹³
- The territorial definition of the area would benefit from a trilateral Syrian-Lebanese-Israeli diplomatic process.¹⁴

The Shab’a Farms, however, represent an issue of significance far beyond the immediate local context.¹⁵ Apparently, the more Arab states conclude peace agreements with Israel, consequently eliminating grounds for conflict, the greater the salience of these arid farmlands, a colonial relic resurrected for twenty-first century purposes. It has been made the center pillar of strategizing Syrian and Iranian political interests in the region, tied in to water rights – and scarcity thereof – in the area, the Israeli-Palestinian conflict, Lebanese effective sovereignty, and Israel’s security at large, and the UN stature, to name the most prominently related themes.

¹¹ *Id.* at ¶ 49.

¹² The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), ¶ 66, delivered to the Security Council, U.N. Doc. S/2007/147 (Mar. 14, 2007); The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), ¶ 61, delivered to the General Assembly, U.N. Doc. S/2007/392 (Jun. 28, 2007).

¹³ The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701* (2006), ¶ 14-15, delivered to the General Assembly, U.N. Doc. S/2007/392 (Jun. 28, 2007).

¹⁴ *Id.* at ¶ 62.

¹⁵ Consideration of the broader regional context is important in order to weigh the potential viability of the various legal solutions to the immediate dispute, including the larger Arab-Israeli conflict of which the Shab’a Farms represent an integral part.

Unlike Lebanon, Syria, the Hizb' Allah and Iran, while Israeli interests in Lebanon, and particularly southern Lebanon, have played an ongoing role since 1978, Israel does not have any claim to the Shab'a Farms. It maintains that it is Syrian territory captured in the 1967 Six Day War, in which Lebanon was not a warring party. In addition, Israel is reluctant to unilaterally withdraw from the Shab'a Farms for fear of signals this would send to its enemies, encouraging adverse conclusions as to its determinacy in the Israel-Palestinian conflict specifically, and the Arab-Israeli conflict at large. Consequently, Israel has continued to maintain that its withdrawal from the area is contingent on a Syrian-Lebanese territorial transfer agreement.¹⁶

Finally, the UN has been torn between its own conflicting interests. Particularly, given Security Council Resolution 425, any change in position would appear to undermine the organisation's credibility, in particular, the legality of its UNIFIL, UNDOF operations in the region since 1974.¹⁷ A change in tenor has, however, been recently noticeable, for the Secretary-General now refers to the panoply of actors reviewed here and the role they play in enabling a permanent ceasefire and long-term solution as envisioned in the resolution. It notes Hizb' Allah's destabilizing impact in the area as well as Syria's involvement and responsibility and Iran's role regarding the post-Second Lebanon War UN Security Council Resolution 1701.¹⁸

III. THE LEGAL ISSUES CONCERNING THE SHAB'A FARMS

The history of the Shab'a Farms raises several legal issues which put at odds customary with conventional legally based interpretations. The major pertinent issue consists of the international border delineation and, consequently, sovereign jurisdiction in the disputed area. Other legal issues, such as the conflict of law regarding private real estate and taxation, the Israeli foreign occupation of the disputed farmlands, and even a

¹⁶ Recent developments (September 2007) in Israel's foreign policy, which doubtlessly reflect its stand also regarding the Shab'a Farms, consist of the government's declaration of Gaza as a hostile area and the alleged air force attack on installations in northern Syria.

¹⁷ See Sarbaro, *supra* note 1.

¹⁸ *Id.*

relatively new legal issue regarding collective human rights of indigenous people,¹⁹ are subsumed within the chief issue. A detailed dissection of the issues and ascertainment of their legal validity is critical to finding a legal way to defuse the dispute.

A customary legal approach would have to rely on the jurisdictional practice of the parties to the conflict, which include:

- The Lebanese-Syrian borderline in the area has never been officially determined by either of the two contiguous states, only generally described by the French authorities prior to their independence.
- Up until 2000, the Lebanese government had not made sovereign claims to the area nor did it submit any official complaint against Israel.²⁰
- Up to late 1999, the Lebanese governments did never *de facto* challenge the situation of Syrian *de facto* jurisdiction (sovereignty).
- All the relevant villages were included in Syrian citizenship censuses carried out since Syrian independence in 1946, the first-ever statistics of this kind collected in the disputed area.²¹ Residents of the village of Ghajar were granted Syrian citizenship upon its independence, and about half of them moved to Syria following the war in 1967.
- The Syrian government set up military bases in the area.²² There has been no Lebanese military presence in the area.
- Until 1967, there was no physical fence marking the borderline between the two countries.

¹⁹ Although not yet invoked, the religiously and ethnically mixed population of the area may arise as an issue within the context of expanding international human rights law and particularly concerning the collective rights of Alawites, other Shia, Sunni, and even Christians, to mention a few. In fact, this added complexity may work in favor of a leasehold solution attached to the clarification of sovereignty.

²⁰ See Sarbaro, *supra* note 1. See also Asher Kaufman, "Size Does Not Matter, The Shebaa Farms of History and Contemporary Politics," THE MIT JOURNAL OF MIDDLE EAST STUDIES, Vol. 6, 163-76 (2006), available at http://web.mit.edu/cis/www/mitejmes/MITEJMES_Vol_6_Summer.pdf. Kaufman mentions the resurfacing of the Shab'a Farms as a "popular" theme in South Lebanon intensified as a result of Hizb' Allah's activity in the region since 1982. *Id.* at 165-66.

²¹ See Sarbaro, *supra* note 1.

²² Cilina Nasser, "The Key to Shebaa," ALJAZEERA.NET, 25 Apr. 2005, available at <http://english.aljazeera.net/archive/2005/04/200849161650764672.html>. This refers to the Israeli-Syrian water dispute but also to the increase of Syrian control in the area during the pan-Arab revolt against the Lebanese Maronite President Chamoun shortly following the signing of the Syrian-Egyptian UAR.

- Israel has expressed its territorial claims to the area by the promulgation of the Golan Heights Law in 1981. All the residents were defined as Israeli citizens, including the residents of the northern part of the village of Ghajar, divided since 2000.
- Until 2000, all maps drawn of the area - Syrian and Lebanese, official and other - indicated the farmlands as Syrian territory, although doubts were expressed in French reports preceding Syria's independence as to the borderline, referring to anomalies and the possible existence of a Lebanese enclave within Syrian territory.²³ This ambiguity remained politically marginal until at least 2002.
- The official one-thousand Lebanese Lira note portrays a map of Lebanon which excludes the Shab'a Farms.²⁴
- All foreign official maps, government or otherwise (i.e. not Lebanese or Syrian) exclude the farmlands area from Lebanon.²⁵ The Arab League has not taken a different position.
- There are land deeds dating back to both Lebanon's pre- and post-independence periods, which are stamped by Lebanese authorities,²⁶ and documents registering payment of taxes to various national, local, regional, and municipal authorities. There are most likely also private real estate ownership deeds certified by Syrian, even Ottoman, authorities. It must be noted that private ownership of real estate prior to Lebanese independence cannot be taken as indicating Lebanese sovereignty over the area. Also, ownership of real estate by Lebanese or Syrian nationals does not serve as proof of sovereign jurisdiction over land, which can be owned by foreign nationals.

The few legal conventional facts pertaining to the Shab'a Farms border demarcation are:

²³ See Kaufman, *supra* note 20, at 173.

²⁴ See Sarbaro, *supra* note 1.

²⁵ *Id.*

²⁶ See Sarbaro, *supra* note 1. Sarbaro mentions legal conventional instruments facilitating transborder mobility and usage rights of residents from both sides of the border between the French and British ruled areas, e.g., the *Bon Voisinage* agreement signed in 1926 prior to the mandatory regime. See also Nasser, *supra* note 22; Gary C. Gambill, "Syria and the Shebaa Farms Dispute," MIDDLE EAST INTELLIGENCE BULLETIN, May 2001, available at http://www.meib.org/articles/0105_11.htm.

- The Israeli-Lebanese border set in the armistice agreement of 1949 in correspondence with the British mandatory border.²⁷
- Upon their acceptance as members of the UN, both Lebanon (established 1943) and Syria (established 1946) did not deposit any border agreements with the organisation as required of new members, for no such agreement existed.²⁸
- Since 1974, the practice of the UN as reflected in various resolutions including those establishing UNIFIL and UNDOF, adopted the *de facto* borderline as per custom between Syria and Lebanon.
- Pursuant to Security Council resolution 425 and according to the respective UN determination of the blue line, the village of Ghajar was divided in its centre in two parts, the southern belonging to Syria and the northern to Lebanon.
- All Syrian maps, including the one attached to the 1974 Israel-Syria signed Disengagement Agreement,²⁹ located the Shab'a Farms within the Occupied Golan Heights.

Although the positions of Syria and Lebanon with regard to sovereignty over the Shab'a Farms have now practically been reversed by 180° at the unilateral political declaratory level, no revisions of sovereignty were undertaken formally, nor did either of the parties delineate borderlines or enter into any corresponding bilateral or otherwise relevant agreement.

IV. THE LEGAL CHARACTERIZATION OF LEASEHOLD

i. Leases as Concepts of International Law

The multitude of claims involving the Shab'a Farms makes the dispute complex: Israel claims that Syria has title, Syria claims that Lebanon has title, and Lebanon

²⁷ See Kaufman, *supra* note 20.

²⁸ *Id.* at 164.

²⁹ Israel Ministry of Foreign Affairs, *29 Agreement on Disengagement of Forces between Israel and Syria*, May 31, 1974, available at <http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/29+Agreement+on+Disengagement+of+Forces+between+Is.htm>.

supports the Syrian claim. A fourth actor, the United Nations, supports the Israeli claim. Yet the only state claiming title for itself, Lebanon, has not exercised effective control over the Shab'a Farms either before or after the claim, and in fact has suggested that control be assumed by the party that has backed the competing claim – the UN.³⁰

The discourse about resolving the dispute indicates that it has been framed largely as a conventional one, but its complexity argues in favor of viewing it as an unconventional conflict that may warrant unusual means to settle it. One method that would appear to hold promise is territorial leasing – a mechanism normally associated with economic, military and certain other objectives but that states have used on rare occasions to successfully resolve disputes over sovereignty.

International law recognizes territorial leasing as a means by which states can exercise control over territory without having sovereignty over it. It allows for sovereign rights over a specific territory to be allocated to more than one state, and acts as a legal and political method for addressing the interests of states when these interests evolve in ways that are incompatible with their existing territorial boundaries.

Territorial leasing and the related concept of servitudes between states derive from private law concepts involving property ownership and the rights associated with it.³¹ These phenomena have remained poorly defined in public international law, but in general one can define a territorial lease as an agreement that creates sovereign rights for one state on the territory of another, when the form of the agreement emulates a lease in private law. These rights can be said to comprise a servitude that effectively limits the sovereignty of the lessor state and extends the sovereign competences of the lessee state.

Sovereignty has also resisted a universally agreed definition, but can generally be described as the totality of a state's exclusive authority on its territory, plus extensions of that authority outside of it. Two parallel concepts are prevalent today, one viewing

³⁰ *infra* p. 16, section VI.

³¹ H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 181-90 (Hamden, Conn., Archon Books, 1970) (1927).

sovereignty as indivisible in substance but allowing for the exercise of sovereignty to be divisible,³² and the other holding sovereignty to be the sum of a potentially variable set of state competences.³³ Both accept that specific, identifiable rights exist within the context of sovereignty, giving rise to the notions that sovereignty can have limits as individual competences are present or absent, and that sovereignty has both internal and external aspects, with the latter including rights on the territory of other states. Together, these form the basis for territorial leases and servitudes.³⁴

It is generally accepted that sovereignty derives from title to territory, the conceptual legal instrument that legitimizes the relationship between a state and the territory associated with it. Title can be acquired by various means; traditionally these have included occupation, prescription, cession, conquest, accretion, adjudication and the conversion of an inchoate title.³⁵ *Effective control* is the essential element in establishing, validating or confirming title,³⁶ and territorial leases are relevant to this factor because several international tribunals in the last century have established that a state's ongoing relationship with its territory, not just its initial relationship, is vital to determining title.³⁷

Leases and servitudes can influence where sovereignty ultimately resides; when rights that are transferred through a lease are comprehensive, they can raise questions about which state actually has effective control over the territory involved, and it is not

³² WIKTOR SUKIENICKI, *LA SOUVERAINETE DES ETATS EN DROIT INTERNATIONAL MODERNE* 85, (Paris, A. Pedone, 1927).

³³ MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* 64-70, (University Park, Pa., The Pennsylvania University Press, 1995).

³⁴ NGUYEN Q. DINH, et. al., *DROIT INTERNATIONAL PUBLIC*, 474-79, 483-503 (7th ed., Paris : Librairie Generale de Droit et Jurisprudence 2002).

³⁵ P.K. Menon, "Title to Territory : Traditional Modes of Acquisition by States," 62 *REVUE DE DROIT INTERNATIONAL* 1 (1994); *see also* ANA GEMMA LOPEZ MARTIN, *EL TERRITORIO ESTATAL EN DISCUSSION: LA PRUEBA DEL TITULO* 1-24 (Madrid: McGraw-Hill Interamericana de España 1999).

³⁶ GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 97 (6th ed. 1976).

³⁷ The Permanent Court of Arbitration's 1928 decision in the *Island of Palmas (Miangas)* case between the Netherlands and U.S.; *see* PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 155-56 (7th revised ed., London, Routledge, 1997). Also, the Permanent Court of International Justice's 1933 ruling in the *Eastern Greenland* between Norway and Denmark. Further, the International Court of Justice's 1953 decision in the *Minquiers and Ecrehos* case between the United Kingdom and France; *see* International Court of Justice, "Case Summaries—Minquiers and Ecrehos Case," *available at* <http://www.u-paris2.fr/cij/icjwww/idecisions/isummaries/ifuksummary531117.htm>.

unknown for a lessee state to seek title to the leased territory when the lessor state becomes little more than a passive bystander. The practice of states has shown that while some leased territories ultimately were ceded to the lessee state, others were not,³⁸ and it appears that a mix of factors affects whether this happens: the interests of the states involved, their relations with each other and their specific intentions *vis-à-vis* the territory when the lease is created, during its existence and upon its expiration.

Territorial leasing injects two elements into the process of resolving sovereignty questions that are not present in conventional diplomatic practice: first, a lease between states has the aura of a private law contract, and the resulting connotations give states broader options for dealing with a territorial issue than might be possible otherwise.³⁹ Each state can claim a legal association with the territory in question, and through this association each state can claim some form of control over the territory while also addressing its own interests. Second, the competences gained by one state on another's territory through a lease may satisfy objectives that otherwise could only be achieved by obtaining sovereignty over the territory itself. A lease can thus change the very nature of a territorial conflict from one about sovereignty into one about *specific components of sovereignty* – competences and rights – and thus territorial leasing can offer an alternative path toward settling it.

ii. The Nature of Territorial Leases

Surveys of international leases and servitudes have shown them to be mostly *ad hoc* arrangements, tailored to address specific issues that arise among states in their interactions with one another.⁴⁰ Yet leases between states normally share three main elements that reflect the private law origins of the concept – the competences allowed, the duration of the arrangement and the compensation to be paid for having the rights.

³⁸ Elie van Bogaert, "The Lease of Territory in International Law," *Miscellanea – W.J. Ganshof van der Meersch*, Vol. 1, Brussels, Etablissements Emile Bruylant, 1972, 315-16.

³⁹ HELEN DWIGHT REID, *INTERNATIONAL SERVITUDES IN LAW AND PRACTICE* 57-58 (The University of Chicago Press 1932).

⁴⁰ *Id.*; see also F. A. VÁLI, *SERVITUDES OF INTERNATIONAL LAW: A STUDY OF RIGHTS IN FOREIGN TERRITORY* (2d ed. 1958).

The first element is the one that is most directly linked to the objective of the lease and has the greatest scope for variation, as the rights embodied in the servitude it creates may be extremely broad or quite narrow. It is thus the most critical factor in determining how much control the lessee state may obtain over the territory.

The duration of a territorial lease reflects how the states perceive the territorial issue it addresses – as something temporary or permanent, or too difficult to resolve by more definitive means. This aspect of a lease can be shaped to the situation at hand, and can allow leases to be applied as a provisional measure when a more lasting solution proves elusive. It can also serve to reaffirm where sovereignty lies by anticipating the eventual return of the territory to the lessor state or by acknowledging the lessor's sovereignty on an ongoing basis. Several models have evolved for establishing the duration of a territorial lease:⁴¹

1. Fixed term – This entails an expiration date on which the territory reverts to the lessor state. Prolonging the lease would require a new agreement. An example was the 99-year lease of Hong Kong's New Territories by Great Britain from China, which ended in 1997.
2. Fixed term with automatic renewal – The term may be fixed but with an automatic renewal clause that can prolong it unless action is initiated to halt the renewal. This was the nature of the lease arrangements in the Israeli-Jordanian Peace Treaty of 1994.
3. Term contingent on events – The timing of the expiration may depend on events. This was seen in reciprocal leases in 1894 between Great Britain and Belgium that involved territory in the Congo Free State, then under Belgian control.⁴²

⁴¹ Michael J. Strauss, *The Viability of Territorial Leases in Resolving International Sovereignty Disputes: A Comparative Study*, doctoral thesis, Centre d'Etudes Diplomatiques et Stratégiques, Paris, 2006, p. 125-26.

⁴² CHARLES ROUSSEAU, COURS DE DROIT INTERNATIONAL PUBLIC 114, 121-22 (Paris, Les Cours de Droit 1956); see also U.S. Department of State, Bureau of Intelligence and Research, "International Boundary Study No. 106 – Sudan-Democratic Republic of the Congo (Zaire) Boundary," (1978), available at <http://www.law.fsu.edu/library/collection/LimitsinSeas/IBS106.pdf>.

4. Indefinite term with provision for termination – The term may be left indeterminate, with the lease defining circumstances by which it can be ended. The Guantanamo Bay lease is this type – it can be ended by the U.S. abandoning the naval base, or by an agreement between the U.S. and Cuba to end the lease.

5. Perpetuity – This reflects the intention of permanence, an example being the perpetual lease granting France sovereign rights in the Pays Quint Septentrional (Quinto Real Norte), a small territory in Spain. A term of perpetuity is not necessarily borne out in actual practice, as was shown with the U.S. lease of the Canal Zone from Panama; it was leased in perpetuity in 1903 but was returned to Panama in 2000.

A territorial lease may be legally terminated regardless of its intended duration under certain conditions. These include the emergence of a peremptory norm of international law that is incompatible with a territorial lease; the implied right of denunciation when a lease established by treaty has no provision for termination or withdrawal; the principle of *rebus sic stantibus*, which holds that a lease can be terminated if there is a fundamental change of circumstances; and a material breach of a lease's provisions.⁴³ The ending of a territorial lease during its term may also be brought about if the participating states revise or replace the treaty that creates it,⁴⁴ by a transfer of title to the leased territory or by the disappearance of one of the contracting states.⁴⁵

The nature of compensation paid by the lessee state to the lessor state can vary. It may be related to the perceived value of the territory, the objective of the lease or the affirmation of sovereignty. The payment is not necessarily monetary – it may be in the form of goods or services, or a concession such as favorable terms in a separate transaction. In leases between states, unlike in private law leases, the compensation is sometimes unspecified and implied, such as gains that a lessor state may reap from

⁴³ Alfred de Zayas, The Douglas McK. Brown Lecture, University of British Columbia (Nov. 19, 2003), available at <http://www.law.ubc.ca/files/pdf/events/2003/november/GUANTANA.pdf>.

⁴⁴ This is how the U.S. lease of the Canal Zone from Panama was terminated.

⁴⁵ Leon Yang (Yang Lieou-Fong), *Les Territoires à bail en Chine*, doctoral dissertation, Université de Paris, Paris, Les Presses Universitaires de France, 1929, at 155-56.

improved political or economic relations resulting from the arrangement. Among types of compensation seen in the practice of states are the following:⁴⁶

1. Periodic payment based on the territory's economic value.
2. Periodic token payment, to acknowledge the lessor's sovereignty.
3. Payment stipulated by the lease but waived by the lessor state; this normally involves token payments.
4. One-time payment for the entire lease period.
5. Payment not required.

Apart from any financial benefit that accrues to a lessor state, the importance of this aspect of a territorial lease is that it may affect the treaty's duration: if the compensation is significant and a lessee state's failure to pay is considered a material breach, the lessor may void the lease and end the servitude under the provisions of the Vienna Convention on the Law of Treaties.⁴⁷

The scope of objectives for territorial leases is limited only by the range of activities that states engage in. Nearly all leases and their resulting servitudes can be categorized as economic, military, administrative or diplomatic,⁴⁸ although an individual lease may fit into more than one category. Of all the territorial leases that states have concluded with each other, there are only four known cases in which the objective was to resolve a dispute about sovereignty over territory: one between France and Spain (Pays Quint Septentrional/Quinto Real Norte, 1856); one between India and Bangladesh (Tin Bigha, 1974 and 1992); one between Israel and Jordan (Naharayim/Baqura and Zofar/Al Ghamr, 1994); and one between Ecuador and Peru (Tiwintza, 1998).⁴⁹ A comparative study of the first three cases⁵⁰ showed they all resolved the specific issue of territorial

⁴⁶ Strauss, *supra* note 41, at 129-31.

⁴⁷ Vienna Convention on the Law of Treaties, art. 60, May 23, 1969, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980.

⁴⁸ See REID, *supra* note 39; F.A. VÁLI, *supra* note 40.

⁴⁹ The last two were not called leases by the states involved, but have the characteristics of leases and are tacitly regarded as such both within and outside of the states.

⁵⁰ Strauss, *supra* note 41.

sovereignty that they were created to address, while the fourth has shown signs of the same result.

V. THE ROLE OF LEASEHOLD IN INTERNATIONAL LAW

The leases concluded by France and Spain, Bangladesh and India, and Israel and Jordan all resulted in stable situations of sovereignty and territorial control in the frontier locations where these questions had been disputed. They established clearer and more precise boundaries that were respected by the states and also by local populations in proximity to the territories involved, and they brought to an end the periodic violence that had occurred in some of these areas.

All three of the leases generated new problems, but these were either resolved or considerably less acute than the initial problems of territorial sovereignty that were being addressed. Moreover, the problems that arose were associated with the individual circumstances of each lease, such as the economic impact of a specific clause or a third party's reaction to the arrangement, rather than being inherent in the lease itself as a legal instrument.

Examples of leases created for the purpose of resolving sovereignty disputes are sufficiently rare that positive results cannot be assumed likely to occur under all conditions, but comparisons of the cases assessed in the study provide a body of information that allows us to deduce general circumstances in which leases may be viable options for settling such disputes. These involve:

1. The characteristics of the territory being disputed – its size, its location, the presence or absence of inhabitants, and the presence or absence of resources that can be exploited for economic gain.
2. The characteristics of the leases – their specific terms, the mechanisms and resources necessary for their administration, their link to other state commitments (such as being

part of a broader treaty), and the use of terminology that is legally or politically acceptable.

3. The characteristics of the disputes – most notably, their intensity.

Yet the question must be asked: If territorial leases can succeed in resolving even some territorial conflicts, why are they used so rarely? The reason is that territorial leasing is simply not put forth as an option in most cases, and on the few occasions when it has been proposed, it has rarely moved beyond the initial idea. Precedents were undetected, as evidenced by attestations of the originality of using the leasing concept each time it was employed in resolving a territorial dispute. Even today, territorial leases are considered a marginal aspect of international law, and what little literature exists about them completely ignores those that have had the objective of resolving conflicts over sovereignty. The fact that each new lease has been a reinvention of the notion rather than an application of a known practice indicates that a degree of creativity has been necessary for negotiators of solutions to territorial disputes to arrive at this option – and, as with any human endeavor, creativity only occurs sporadically as an exception to the established order.

VI. THE POTENTIAL OF LEASEHOLD AS A MEANS TO DIFFUSE THE ISRAELI-LEBANESE & SYRIAN CONFLICT

The resolution of the Shab'a Farms dispute, and a corresponding Israeli withdrawal,⁵¹ have been widely considered as a necessary (although not sufficient) condition for defusing the larger conflict (including the volatile domestic Lebanese situation) and the neutralization of the Hizb' Allah.

Work in this direction has begun through UN mediation but the hurdle remains set very high. Any resolution would require some degree of confidence-building measures,

⁵¹ Nicholas Blanford, "Hizbullah and the IDF: Accepting New Realities Along the Blue Line," THE MIT ELECTRONIC JOURNAL OF MIDDLE EAST STUDIES, Vol. 6, 74 (2006); Kaufman, *supra* note 20, at 171.

and this applies also to our proposal concerning a leasehold agreement between Lebanon and Syria. So far, the UN Secretary-General reported that liaison and coordination arrangements generally concerning the blue line have been progressing between the UN, Lebanon, and Israel. Both states accepted the terms, which entered into force, and they were followed with written notifications of acceptance from their respective armed forces. “The arrangements stipulate that both the Lebanese Armed Forces and the Israel Defense Forces must ensure that an officer at the rank of General, or his deputy, can be contacted at all times by the UNIFIL Force Commander so that the incident can be quickly resolved before it escalates,”⁵² and in June 2007, UNIFIL was in the process of setting up a hotline to enable swift tripartite communication. In this framework, both state parties have also been discussing temporary security arrangements regarding northern Ghajar, which have not been concluded due to duration concerns.⁵³ Syria, the third party, so crucial to the resolution of the bilateral Shab’a Farms border demarcation, has remained non-collaborative. The Secretary-General underlined the importance of “further discussions on the area, including on its territorial definition, with the Governments of Israel, Lebanon and the Syrian Arab Republic [which] will strengthen a diplomatic process aimed at resolving this key issue [Shab’a Farms] in accordance with the relevant provisions of resolution 1701 (2006).”⁵⁴

In its seven-point plan, Lebanon has suggested placing the Shab’a Farms under United Nations jurisdiction pending a permanent delineation of the boundary.⁵⁵ This would resemble the current situation in Afghanistan, and would not be very different from the precedent played by UNIFIL and UNIDOF; alternatively, it may amount to a revival of some sort of UN trusteeship.

⁵² U.N. Doc. S/2007/392 (Jun. 28, 2007), *supra* note 10, at ¶18; *see also* U.N. Doc. S/2007/147 (Mar. 14, 2007), *supra* note 6, at ¶17 (“The [UNIFIL] Force Commander holds regular tripartite meetings with senior representatives of both parties. As witnessed following the incident of 7 February, the mechanism has become instrumental in addressing critical security matters and is now key element in the mission’s efforts to foster stability in southern Lebanon”).

⁵³ U.N. Doc. S/2007/392, *supra* note 10, at ¶19.

⁵⁴ *Id.* at ¶62.

⁵⁵ *Id.* at ¶49.

Kaufman designs two optional, and perhaps “minimalist”, scenarios for a resolution, which he classifies as regarding “smaller” challenges.⁵⁶ Given his estimation that neither Israel nor Syria are amenable to a resolution 1701-based package-deal settlement (which involves also the Hizb’ Allah),⁵⁷ he conceives a “procedure of negotiation” which will have, in the first place, to settle the Shab’a Farms dispute between Lebanon and Syria. Israel’s role picks up after such agreement for, as an occupant, it would be called upon to facilitate the physical demarcation of the border. Syria so far has been disinclined to engage in such negotiations. The other alternative entertains an agreement over a “mechanism of resolution” among the three parties, whether direct or facilitated by an outside party, perhaps through international arbitration. However, should the parties agree to a tribunal, there still remains the substantive issue of the border’s demarcation (and Syria continues to procrastinate).

Since there is no treaty or other consensual agreement between Syria and Lebanon that could facilitate the determination of the border, there is a need to resort to other means. In 2000, the UN used maps which unquestionably put the Shab’a Farms within the Syrian Golan Heights. Assuming that the UN is interested today in changing the status quo and since the use of maps would leave the status quo intact, there is a need to resort to other avenues, one of which is custom. In other words, Lebanon will need to prove its historic rights over this area by means of demonstrating that despite the fact that the maps indicate that the region is in Syria, it was Lebanon that exercised its sovereignty in the area until 1967. But as most evidence shows, Lebanon did not implement its authority in the Shab’a Farms and in fact (with minor exceptions) it was indifferent to Syria’s effective control of the region. Lebanon’s claims, that the land deeds of the Lebanese owners of the Shab’a Farms are good enough proof that the area has been under its sovereignty, are extremely weak. International law (and common sense) does not support private property as a proof of sovereignty.⁵⁸

⁵⁶ Kaufman, *supra* note 20, at 172.

⁵⁷ *Id.* at 170-71.

⁵⁸ *Id.* at 172-73.

Kaufman then lays out a way to reconstruct the French maps' determinative historic evidence to demarcate the borderline, and offers a revised demarcation of the current *de facto* delineations.⁵⁹

Our proposal suggests embarking on a completely different route. "In the Middle East, perception is often more powerful than objective reality, and the task of today's Israeli and Palestinian leaders of finding ways to interpret the myths in a way that maintains both sides' dignity and opens the way for practical solutions is formidable."⁶⁰ This applies also to the relations between Lebanon, Syria, and Israel, and to our suggestion regarding a leasehold solution. Since 1982, the Hizb' Allah has been extremely successful in creating and developing a new perception regarding southern Lebanon; and since 2000, specifically concerning the Shab'a Farms.⁶¹ This tactic could be reversed and employed to assist Syria in returning to a leadership position in the Arab world as well as bolstering its status *vis-à-vis* Iran and restoring control over the Hizb' Allah – and all this without losing face. It may prove the carrot to attract Syria to join the negotiation table.

The study of international leasing indicated that conflicts which are amenable to resolution through territorial leases involve areas that are small, both in absolute terms and relative to the size of the states involved; with few if any inhabitants; with limited natural resources (known or suspected); and with limited economic activity. Leases may also succeed for territories with other characteristics, but these mentioned here are the conditions that the territories examined had in common. The same conditions are present for certain territories on all continents where issues of sovereignty remain unresolved between states, among them the Shab'a Farms.

Conflicts that are low-intensity may also have the greatest potential to be settled through leases, as this was also a feature in the cases studied. The timing of conflict-resolution

⁵⁹ *Id.*

⁶⁰ Michael Molloy, "Tiptoeing through the Mideast Minefield of Myths," THE GLOBE AND MAIL, Aug. 31, 2007, at A13.

⁶¹ See, e.g., Kaufman, *supra* note 20. This Hizb' Allah tactic is not much different from the historical approach of the Arab states reflected in the perpetuation of the Palestinian refugee problem.

efforts relative to events in a dispute is therefore critical; while this would be the case for any type of settlement attempt, it is possible that resolving a conflict through leasing may be viable at an earlier moment of calm rather than resolving it through a more traditional and definitive determination of sovereignty and rights.

The cooperation required for administering a lease would provide a forum for confidence-building among the states involved in the Shab'a Farms dispute. In the event that a lease is agreed as a provisional measure because a lasting solution cannot be negotiated, the process of administering it can be a catalyst for relations, moving the states toward the point where a more permanent solution might be achievable.

By moving the dispute away from the realm of all-or-nothing sovereignty and into the realm of a division of sovereign attributes, a lease could also ease some of the pressure to determine the exact location of the Syrian-Lebanese boundary.

Taking stock of all of these factors suggests that a territorial lease may be a workable option for resolving the conflict over the Shab'a Farms, particularly since the cease-fire after the Second Lebanon War in 2006 has kept the intensity of the conflict at a reduced level. The cross-currents of claims suggests a variety of possible scenarios, for example:

1. Confirmation of Syria's title to the Shab'a Farms could lead to Syria leasing the territory to Lebanon (assuming that Syria does not formally cede it to Lebanon). A sufficient display of sovereign rights there by Lebanon could become a basis for Israel to withdraw, using UN Security Council Resolution 425 as justification.
2. Confirmation of Lebanon's title to the Shab'a Farms could lead to Lebanon leasing the territory to Syria through an agreement that formally recognizes Lebanese sovereignty over it; in this case, the rights granted in the lease to Syria may be sufficiently limited for Lebanon to display a high degree of effective control. This could also support an Israeli withdrawal.

3. Confirmation of Syria's title to the Shab'a Farms could lead to Syria leasing the territory to Israel. This confirmation could allow Israel to justify its continued occupation of the territory on the basis of having captured it in 1967, but a lease would provide opportunities to transform the occupation into a more benign presence. One possible outcome of this might be Israel saving face domestically with a continued presence in the Shab'a Farms, and Syria saving face domestically by neutralising a perceived threat on its territory. Such a lease could be fertile ground for confidence-building that might raise the possibility of an eventual Israeli withdrawal.

4. Confirmation of either Syria's or Lebanon's title to the Shab'a Farms could lead to the state with sovereignty over the territory granting a lease to a non-state actor such as the United Nations, which could assume broad-ranging jurisdiction in a trusteeship-type arrangement. In considering non-state actors as potential lessees, however, even Hizb'Allah cannot be ruled out in view of its relations with the other actors; in such a case, the terms of the lease could become the mechanism for neutralizing it as a threat to Israel and enhancing its legitimacy, with the lessor acting as guarantor by virtue of its confirmed sovereignty over the area.

Instead of attempting, at this stage, where confidence building measures are far from being robust, to settle on final borderlines, we suggest considering regulating the jurisdictional status of the Shab'a Farms by way of an international lease agreement between Lebanon and Syria.⁶² To be sure, both Kaufman's revision and arbitration proposal,⁶³ and some elements from the Lebanese seven-point plan, may indeed be incorporated within such a lease agreement. It may be modeled so as to satisfy Israeli

⁶² See Sarbaro, *supra* note 1. The Eretz Israel Electricity Company entertained ownership and usage rights east of Naharayim, and so did the Eretz Israel Dead Sea Company in Transjordan, without recognizing any Israeli sovereignty in these Jordanian territories.

⁶³ Although Kaufman's tribunal proposal seems impractical at the moment, an alternative is to invite an advisory opinion from the International Court of Justice which may invoke public opinion pressure not unlike the advisory opinion in matter of the "Wall." International Court of Justice, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (2003), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=mwp&case=131&k=5a>. The ICJ may thus be asked for its opinion with regard to a lease agreement, as described. *Id.*

security concerns, e.g. by establishing a tripartite military force facilitated by the UN as a measure of “interlocked” mutual security. The lease agreement would settle matters of private real estate including compensation and/or restitution of property belonging to persons displaced in 1967.