THE INTERNATIONAL LEASE AS A LEGAL INSTRUMENT OF CONFLICT RESOLUTION: THE SHAB'A FARMS AS A PROTOTYPE FOR THE RESOLUTION OF TERRITORIAL CONFLICTS

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The Shab'a Farms have been considered the linchpin in the Hizb' Allah rhetoric to destabilize the Israel-Lebanon-Syria relationship. We contemplate here the possibility of defusing the conflict over the territory by using a lease as a public international legal device.

I. THE SHAB'A FARMS

The Shab'a Farms area comprises six now-abandoned farmlands, on forty square kilometres where Syria, Lebanon and Israel converge.[1] Until 1967, it was considered Syrian. Israel seized it during the 1967 Six-Day War and still occupies it as captured Syrian territory. In April 2007, Lebanon advised the United Nations (UN) that it considered the Shab'a Farms to be Lebanese.[2] The so-called Second Lebanon War in 2006 resulted from the Hizb' Allah's

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1. HAIM SARBARO, THE CENTRE FOR ISRAEL'S CARTOGRAPHY, THE LEGITIMACY ISSUE OF THE LEBANESE CLAIM TO THE 'SHEBAA FARMS,' IN RELATION TO THE INTERNATIONAL BORDER (2006), www.mapi.gov.il/files/Shab'aa.pdf (last visited Mar. 22, 2008) [author's translation from Hebrew]. The geographic and historical description is largely based on the most detailed available source. *See* The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701 (2006)*, ¶ 50, *delivered to the Security Council*, U.N. Doc. S/2007/392 (June 28, 2007) [hereinafter *UN Shab'a*].

2. UN Shab'a, *supra* note 1, at ¶ 48–49; *See* Gideon Levy, *Yatzpan Did Come. Life in a Syrian Village of Which the Residents are Israeli and Half its Area is in Lebanon. Aja'ar Without Border*, HAARETZ, Nov. 29, 2005, http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=651440 (last visited Mar. 22, 2008) [author's translation from Hebrew]; *See also* Hagai Einav, *Aja'ar Representatives to Livni: 'We Have Been Already Seven Years Under Internment,'* YNET NEWS, Apr. 3, 2007, http://www.ynet.co.il/articles/0,7340,L-3372246,00.html (last visited Mar. 22, 2008) [author's translation from Hebrew].

incursion into Israeli territory under the claim that the Shab'a Farms was Lebanese territory occupied by Israel, to be liberated by the Hizb' Allah. The UN Secretary General noted after the war that

> [T]he 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 solution of this issue [regarding status of the area], however, remains contingent upon the delineation of the border between the Syrian Arab Republic and Lebanon.[3]

The major pertinent legal issue consists of defining the border and sovereign jurisdiction in the disputed area. UN efforts in addressing this have intensified since the 2006 war. Meanwhile, the Secretary-General has referred to repeated Syrian statements that the farmlands were Lebanese as "a new legal reality,"[4] although the UN still considers the territory Syrian. He has also acknowledged an option suggested by Lebanon to temporarily place the farmlands under UN jurisdiction.[5]

The dispute thus takes the following shape: Israel claims that Syria has title, while Lebanon and Syria claim that Lebanon has title. The UN supports the Israeli claim. And the only state claiming title for itself, Lebanon, has never exercised effective control over the Shab'a Farms, and has suggested assigning it to the party backing the competing claim—the UN.

The difficulty in settling this dispute by traditional diplomacy argues in favor of applying other means. One that may hold promise is territorial leasing, which allows a state to exercise control over an area where it does not have sovereignty, by allocating sovereign rights to more than one state or party.

Leasing injects two elements into resolving sovereignty disputes that are not traditionally present: first, a lease between states has the aura and connotations of a private law contract, creating broader options for dealing with a

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3. The Secretary-General, Report of the Secretary-General on the Implementation of Security Council Resolution 1701 (2006), ¶ 44, *delivered to the Security Council*, U.N. Doc. S/2006/730 (Sept. 12, 2006).

4. The Secretary-General, Report of the Secretary-General on the Implementation of Security Council Resolution 1701 (2006), ¶ 46, *delivered to the Security Council*, S/2007/147 (Mar. 14, 2007) (emphasis added). 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 Frams, qualifying them as "[Lebanon's] new position . . . ." The Secretary-General, Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978), ¶ 15, *delivered to the Security Council*, S/2000/460 (May 22, 2000).

5. UN Shab'a, *supra* note 1, at ¶ 49.

territorial issue.[6] 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."[7] This transforms the conflict from one about sovereignty to one about *specific components of sovereignty*—competences and rights—and opens alternative paths to settling it.[8] The cooperation required after creating a lease can then foster confidence-building.

II. THE NATURE OF TERRITORIAL LEASES

Most territorial leases have economic, military, administrative or diplomatic objectives,[9] and states have shown great flexibility with their terms governing duration and compensation. Only rarely have leases been used to resolve territorial conflicts—between France and Spain (1856), Bangladesh and India (1974/1992), Israel and Jordan (1994), and Ecuador and Peru (1998)—and these had never been examined as a phenomenon until recently.[10]

A comparative study of the first three leases[11] showed they all resolved the specific territorial problem they were created to address. They produced stable situations of sovereignty, precise and respected boundaries, and an end to violence where it occurred. All three leases generated new problems, but these were either resolved or less acute than the initial ones and stemmed from factors external to the agreements' form as a lease.

If territorial leases can succeed in this application, why are they so infrequent? It appears the precedents, known only poorly and individually, have gone undetected, as evidenced by attestations of the originality of using a lease each time one was employed to resolve a territorial conflict. Creativity has been necessary to arrive at this option.

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6. HELEN DWIGHT REID, INTERNATIONAL SERVITUDES IN LAW AND PRACTICE 9, 58 (1932).

7. Michael John Strauss, The Viability of Territorial Leases in Resolving Sovereignty Disputes: A Comparative Study 359 (Apr. 2006) (unpublished Ph.D. dissertation, Academie De Paris) (on file with Centre d'Etudes Diplomatiques et Stratégiques, Paris).

8. *Id.*

9. *See generally* F.A. VÁLI, SERVITUDES OF INTERNATIONAL LAW: A STUDY OF RIGHTS IN FOREIGN TERRITORY (2nd ed. 1958).

10. The France-Spain lease involved the Pays Quint Septentrional/Quinto Real Norte; the Bangladesh-India lease involved Tin Bigha; the Israel-Jordan lease involved Naharayim/Baqura and Zofar/Al Ghamr; and the Ecuador-Peru lease involved Tiwintza. 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.

11. Strauss, *supra* note 7, at 359.

III. THE POTENTIAL OF LEASING THE SHAB'A FARMS

Besides Lebanon's suggestion to place the Shab'a Farms under UN jurisdiction pending a permanent delineation of the boundary, Kaufman designs two other scenarios—a "procedure of negotiation" to first settle the dispute, after which, Israel (as occupier) would facilitate the demarcation of the border; and an agreement on a "mechanism of resolution" among the three parties, perhaps through international arbitration.[12] Yet agreement on the means would still require the border's demarcation to be addressed. Without an agreement between Syria and Lebanon to facilitate this, Lebanon would need to prove its historic rights over the Shab'a Farms by demonstrating that it exercised sovereignty there until 1967, against existing evidence.[13]

Our proposal suggests embarking on a different route, tied to a recognized need for all sides to maintain their dignity.[14]

The conflicts that were resolved through territorial leases involve small areas with few if any inhabitants, limited natural resources and limited economic activity. These conditions are present in the Shab'a Farms, where the reduced intensity of the dispute since the 2006 cease-fire may create an opening for a lease to be discussed. Among the potential scenarios:

1) Confirmation of Syria's title to the Shab'a Farms, with Syria leasing the territory to Lebanon;
2) Confirmation of Lebanon's title to the Shab'a Farms, with Lebanon leasing the territory to Syria through an agreement that formally recognizes Lebanese sovereignty over it;
3) Confirmation of Syria's title to the Shab'a Farms, with Syria leasing the territory to Israel and transforming the occupation into a more benign presence; and
4) Confirmation of either Syria's title or Lebanon's title to the Shab'a Farms, with the sovereign state granting a lease to a non-state actor—the UN, or even Hizb' Allah, which cannot be ruled out in view of its relations with the other actors.

Instead of attempting an immediate settlement on final borderlines, we suggest an international lease agreement as an interim solution with long-term potential.[15]

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12. Asher Kaufman, *Size Does Not Matter: The Shebaa Farms in History and Contemporary Politics*, 6 THE MIT ELECTRONIC J. OF MIDDLE E. STUD. 163, 171–72 (2006) http://web.mit.edu/cis/www/mitejmes/ (last visited Mar. 22, 2008).

13. *Id.* at 172.

14. Michael Molloy, *Tiptoeing Through the Mideast Minefield of Myths*, THE GLOBE AND MAIL (Toronto, Can.), Aug. 31, 2007, at A15.

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