

SYMPOSIUM
PEOPLE AND TERRITORY



TERRITORIAL JURISDICTION
AS AN INTERNATIONALLY
RECOGNIZED RIGHT

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Territorial Jurisdiction as An Internationally Recognized Right*

Kok-Chor Tan

I

Two Aspects of Territorial Rights

Margaret Moore's *A Political Theory of Territory* offers a novel and systematic account of territorial rights.¹ A theory of territorial rights aims to explain and justify the conditions under which states enjoy rightful jurisdictional authority over a *particular* bounded geographical space. Territorial jurisdictional authority includes the legitimate authority of a state to make and enforce laws against individuals within its bounded space. Why should a state, or any entity for that matter, have this coercive power over persons within a geographical area? Why *that* particular state and not another? This right also includes the right of exclusion in at least two respects. In one, it grants the state the right to regulate the entry of outsiders into the state. In another respect, and more fundamentally, territorial rights also grant states an exclusive title over the particular territory they have jurisdictional authority over. That is, it gives states a claim-right over a tract of space and not a mere possession that other states are entitled to challenge. Rather, this territorial right of states is

* I thank Pierce Randall for helpful discussion of this topic.

¹ Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press 2015). References to this work will henceforth be noted in parenthesis in the text.

one that all other states and agents in the world are expected to respect and honor.² This last point raises the question as to what morally transforms a specific territorial possession on some natural part of the earth's surface into an internationally recognized territorial right.

The above questions identify two distinct aspects or questions of territorial rights. What we might call the *domestic question* is concerned with how a state can come to have jurisdictional authority over a specific space and over persons living within it. What we may call the *international question* is concerned with why outsiders must respect a state's territorial claim over a particular tract of space. These are of course related dimensions of territorial rights. But nonetheless there are distinct questions in that what counts as a satisfactory response to the domestic aspect may not work at all for the international question. For instance, suppose one endorses a social contract theory that explains the right of the state over its individual subjects by reference to the voluntary consent of individuals subject to power. This can very well solve the internal question—the state's authority comes about because individuals in that state grant it that authority. But this consent says nothing about why other states have to respect its territorial possession. We may have to invoke another social contract account, this time at the global level. This move might well succeed. But the point is that something more has to be said—the domestic justification alone does not suffice. Indeed, one might even say that if the domestic question is to be properly addressed, one has to presume some resolution of the international question. At any rate, these are two distinct

² Secessionist demands are demands against jurisdictional authority from within. But the form of the challenge is similar to that of outside annexation threats: both are challenges to a state's claim of exclusive jurisdictional right over a given bounded space.

problems that a complete theory of territorial rights must resolve coherently.

Moore certainly deals with these aspects of territorial rights in her work. But in distinguishing these two dimensions more vividly, we can gain a better grip on the overall strengths and weakness of the contending theories of territorial rights including Moore's. With Moore's work as a springboard, I will explore the challenges the international question poses for theories of territorial rights.

To clarify, the international question I will be focusing on is not that of immigration, but the state's exclusive title over a physical region. While immigration restrictions and exclusive territorial possession are related issues, the difference is significant. One could, for example, argue against open immigration by appealing to the right of the citizens of a country not to associate with persons they don't wish to. Whether or not this argument holds as a counter to open borders ultimately, it says nothing about exclusive territorial possession. Outsiders may have no wish to gain membership in an existing state jurisdiction, but want, rather, to claim a part of that state's territory for themselves in order to set up their own political association and authority therein. What gives any state the default moral standing to block such demands?

II

Justifying International Territorial Right

I begin with some general remarks on some common approaches to territorial rights to see how each can deal with the international question. The three main approaches of territorial rights may be labeled the voluntarist, culturalist, and functionalist

approaches.³ Voluntarists hold that the state has territorial jurisdictional authority because of the voluntary consent of those who are subject to it. This was the (contract) example I alluded to above. The culturalist approach says that states have jurisdictional authority because of a historically based cultural tie to a specific territory. The functionalist approach holds that a state has authority because the state realizes justice for its citizens. The creating of rightful conditions for the realization of justice is the state's basic function, and it's a function that it can serve only by maintaining the authority to make and enforce laws within its domain.

There is a growing number of works discussing the merits and demerits of each of these approaches and Moore herself very helpfully engages in that discussion. I will not recount in detail Moore's considerations for the moment. Rather, I will point out that two of these approaches, in their basic form, elide the international aspect of territorial rights altogether. The third makes connection with this question, but its solution is only provisional and will require a more basic solution in the end.

First, the voluntarist approach, focusing as it does on the consent of subjects to their state, by passes the international aspect of the question completely. Why should the fact that there is an agreement or contract between two parties bind third

³ I draw in a very general way from some recent writings. In addition to Moore, see in particular A. John Simmons, "Territorial Rights: Justificatory Strategies," *Oxford Studies in Political Philosophy*, David Sobel et al (eds.) (Oxford: Oxford University Press, 2015). The categories above follow very closely Simmons. Also Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012); Avery Kolers, *Land, Conflict and Justice: a political theory of territory* (Cambridge: Cambridge University Press, 2009), and Anna Stilz, "Occupancy Right and the Wrong of Removal", *Philosophy And Public Affairs* 41/4 (2013): 324-356; and Lea Ypi, "A Permissive Theory of Territorial Rights", *The European Journal of Philosophy* 22/2 (2014): 288-312.

parties? Person A may have agreed to let B rule over her and exercise jurisdictional right over an agreed upon bounded area. But why should other parties be kept out geographically? What is to stop C from making the same deal with D within the same bounded space? Voluntarism, in as far as it is limited to justifying a political jurisdictional authority over those subject to it, says nothing about the obligation of parties outside this relationship to respect that authority's claim right to a territory.

The functionalist approach similarly does not connect with the international question. Even if it is true that the state has jurisdictional authority over individual subjects in light of the state's function to affect justice for them, why should this be of any concern to outsiders? Why can't another society, with its own state, make the same claim concerning the same piece of territory? The functionalist might respond here that this interference will undermine the original state's ability to deliver justice within its domain, and so, for this reason, outsiders have to honor its territorial possession. Yet, if this is the only consideration in favor of an internationally acknowledged territorial right, it is far from satisfactory. It does not explain why, say, the state of Australia, could not be reduced in size considerably, with portions of it parceled out to other peoples to form their own jurisdictional territories. It is not implausible, after all, to believe that an Australia that is half as big can just as effectively realize justice for Australians.⁴ One could presumably make the same argument for Canada and even the United States.⁵ That is, to simply say that a state has legitimate authority over its

⁴ There might be other reasons against doing this, for example, related to the rights of indigenous Australians to what might seem unclaimed land. But this move abandons the functionalist approach for a culturalist one. See below.

⁵ Why would the US government's ability to promote justice for Americans be affected significantly if, say, parts of Yellowstone National Park were given away to another people (at least before it was incorporated as a National Park)?

subjects within a given space because it delivers justice for them does not suffice to show why that state (and its people) is entitled to an internationally recognized exclusive right over its territory as demarcated. Why should outsiders be morally prevented from taking some of this space to create their own justice promoting associations where their doing so does not compromise any state's ability to secure justice for its members?

Functionalists can try to block off such objections by appealing to the rights or interests of individuals that stand to be violated if they cannot, through their respective states, enjoy exclusive territorial rights. It is, after all, the protection and realization of individual rights or interests that motivates the functional view of the state in the first place. I will return to some of these remarks below. The point for now is that in as far as functionalism is designed to explain and justify the relationship between the state and its subject within a bounded space, it does not address the obligation of outsiders to respect *that bounded space*. More must be said that goes beyond the functionalist position.

The culturalists do better, in my view, on this score. A historical cultural connection to a given space or land is invoked to justify why it is *this* group, and not another, that has the right to establish a juridical authority in this *particular* region. The approach assumes, thus, that culture and history have moral significance, and hence a group's demonstrable cultural and historical relationship to a particular space, all things equal, can create obligations on others to respect its territorial claims. No doubt the cultural argument can be contested, but the form of argument is not an implausible one. Unlike the above two

approaches, the culturalist approach at least engages with the international question.⁶

However, as I will discuss below, the culturalist approach does not in the end succeed as a solution to the international question. A complete theory of territorial rights, one that can cover both the domestic and international questions, will have to take a different form from the standard approaches, so I will suggest.

III

States, Nations and Peoples

Let me locate Moore's own position in relation to the above considerations. Moore's main opponents are the "nationalists", on the one side, and the functionalists whom she labels "statists", on the other. She calls the functionalist approach a statist position because it defends territorial rights by reference to the *state's* moral purpose of realizing and preserving justice for its members. One of Moore's key objections to statism is that it cannot address "the attachment problem" (p. 97), that is, the question why the state has to realize justice in this particular locale and not somewhere else or under some other territorial configuration. After all, when states make territorial demands they are not just saying that they need somewhere, anywhere, to create the conditions of justice. Typically they are claiming jurisdictional authority and possession over a particular marked-out region or

⁶ Whereas the first two approaches are designed to account for the domestic question, are silent with respect to the international question, the culturalist approach engages the international question but seems weak as a solution to the domestic problem. For even if it is accepted that a state has an internationally recognized right to a tract of land in virtue of its historical cultural ties, this does not explain why individuals in the community have any obligation to obey that state's authority.

space that is of some historical and cultural importance to them. A state's claimed territory is not a mere platform from which it hopes to deliver justice for its members. Rather it something that is also intrinsically valued; it constitutes in most cases it what means for a state to affect justice for its members.

Thus, statism cannot explain why a "historic community", that was unjustly displaced and relocated in the distant past, but is now able to realize justice for its members where it is presently situated, can have a *pro tanto* right of repatriation (to its historic territory). Or, to recall an earlier example, it cannot explain why Australia should have an entitlement over the entirety of its vast political territory when it can just as well affect justice for Australians in a much smaller Australia. A statist might be prepared to bite the bullet and renounce that there is a *pro tanto* right of return in the above sense, or that Australia enjoys any default claim right over its territory. But this is not what most functionalists would want; at least not with regard to the Australia example. On this last point, most would hold that the present boundaries of states provide the morally acceptable baseline for understanding a state's territorial entitlements. The point is not that no existing boundaries can be challenged; of course they can, and in the real world they occasionally are. The point is that the status quo, where state territorial boundaries now lie, serves as the default from which departures have to be argued for and justified.

A statist might say that when a state's territorial jurisdiction is violated by outsiders, even when this does not significantly compromise the ability of that state to realize justice for its individual members, this offends against the rights of its individual members. The problem here, however, is to show there must necessarily be individual rights violation whenever a state's territorial claim is not honored. Suppose that some newly formed political association wishes to establish a new state and

jurisdictional authority on some untouched interior region of Australia. Whose individual rights are being violated when this tract of land is surrendered to this new state? It is no good to suggest that the rights of some individual Australians who might want later to stake out and claim this space are being violated, for this begs the question by presuming that individual Australians have a moral entitlement to this land. Why should they have this moral expectation in the first place?

A defensible theory of territory will thus have to say something about the significance of a political society's relationship to a land. Here the *nationalist* theory seems more promising since it introduces the notion of a historical connection to a land. But Moore rejects the ethno-national interpretation of culture that she finds in the main nationalist theories as too exclusionary. She opts instead to focus on the socio-political notion of culture. Instead of nations, Moore prefers the concept of "a people". A people consists of individuals who see themselves to constitute a distinct collective that is engaged in a common political project; who have the capacity to maintain political institutions through which they can exercise collective self-determination; and who have a shared political history (e.g., p. 50). A people is a collective with a distinctive political identity. This political identity of a people is what provides the missing link between claims of justice and an attachment to a particular piece of territory.

Nonetheless, with regard to my above categories, Moore's position, like the nationalist theory, can be described as a culturalist theory. The political identity of a people—centered around its common political projects and commitments, public institutions and practices, and a shared history and its relationship

to a land—can be called its *political culture*.⁷ In this regard, the dispute between Moore and the nationalist is an internal one, that is, a disagreement over what the morally relevant cultural feature ought to be. To situate Moore's position with reference to my framework, we can say that Moore rejects the functionalist approach altogether on the one side, but accepts the culturalist approach although she offers a specific interpretation of the culturalist approach in contrast to nationalist interpretations. She rejects, to repeat, the significance of an ethno-national culture, preferring instead the ethnically neutral notion of a political culture. The advantage of Moore's theory then, unlike the statist, is that it at least says something about the international aspect of territorial rights. The question, however, is whether the culturalist approach can fully succeed.

IV

Territorial Right as an International Right

Let us consider what could make a territorial possession or claim an internationally recognized right. To be sure, a territory is not identical to private property (a matter Moore rightly reminds us several times in her book). Rather, territorial jurisdiction is something that is more basic in that it establishes the parameters and terms for private property rights. That is, it establishes the state and its legal boundaries within which the terms of private ownership can be legally specified and enforced. Still, a territorial right is not a mere possession from which others (e.g., other states) are to be kept out by force only. It is a claim-right, a claim

⁷ This is not a terminological quibble. Substantively, what the culturalist approach seeks to do is to connect a society with a particular territory by reference to *how* that society identifies with it. National culture is one way this identification is made. So is what Moore calls "political identity".

that others, all things equal, have an obligation to respect. In this regard, it is not inappropriate to treat territorial right as a form of property claim, that is, as an exclusive but rightful claim over some particular space. Accordingly, it will help to see if the traditional theories of property rights can shed some light on this.

Let's consider in turn, a Lockean *natural rights* argument, the argument from *history and culture* (the culturalist approach, including Moore's), and a broadly *Kantian* argument, that we may call the international conventionalism argument.

The Lockean argument can proceed in different ways. But one way the argument cannot work is by treating territorial right as the sum of the property claims of its individual members. A state territory encompasses more than what its individuals own. It has public lands and other unclaimed spaces within its territorial jurisdiction. A Lockean theory of acquisition that remains individualistic cannot account for these. It will merely result in a state with a territory blotched with tracts of free unclaimed spaces that are up for grabs internationally.

A more plausible move is to give the Lockean argument a "collectivist" twist. That is, one could argue that it is the state as a whole that is doing the initial acquisition, and hence the state as the acquiring agent can come to own more than just the sum of individual ownership. But this collective turn risks making a mess of Locke's theory of acquisition. It will allow, for example, a small band of individuals to constitute themselves as a state, and then lay claim, through their state, to a geographical space of immense size, say the size of Australia, beyond what they as individuals altogether can possibly add their labor to and make valuable. This stands in violation of Locke's own account, unless we want to say implausibly that Locke would agree that merely fencing in a large piece of land qualifies as mixing one's labor with, and giving value to, everything within the fenced area.

But the most basic problem with extending Locke's theory to territorial rights is that it accentuates a fundamental problem commonly associated with Locke's account of property right. The problem is that of reasonable disagreements with respect to the terms of just acquisition. This is distinct from the problem of rights enforcement that Locke is well aware of and which, of course motivated, under his social contract theory, the formation of the state. The problem here is not just that of enforcement of a right that is clearly established, but the difficulty of even establishing that there is a right. For one, Locke's theory of just acquisition, along with its limiting conditions, albeit plausible, is reasonably contestable. And even if the theory itself is accepted, its application in the real world will be fraught with issues of competing interpretations and disputes over applicability. Has a particular state, even if we grant it the status of a Lockean acquiring agent, satisfy the Lockean conditions in its initial acquisition of leaving behind enough and as good for others? Was the land it appropriated really unclaimed and left in nature? If Locke's theory of acquisition is all we have to go on by way of defending territorial rights, the United States and Canada, to name just two countries, will not have any definitive territorial rights.

The problem of contestability is what ultimately unravels the argument from culture and history as well. To recall, the culturalist approach offers an account of "attachment" by reference to history and culture. The problem with this approach is not that cultural claims and historical arguments carry no moral weight—in fact, I would claim that it would be implausible to deny that they did. The problem is that of contestability and genuinely irresolvable competing cultural claims over particular territory. Again, examples are easy to come up with: who has the stronger historical claim to North America? The present jurisdictional authorities, or the various indigenous peoples,

whom the European forerunners of the present juridical authorities displaced? Appeals to history and culture cannot fully justify state jurisdiction in most cases, and rarely can they settle on going international disputes, such as the quarrel between China and other South East Asian countries over the island chains of the Paracels and Spratlys in the South China Sea. Here, one country's account of history is another's fabrication. Moore's reference to political identity does not avoid the problem of contestation any more than nationalist approaches. Whose interpretation of political identity? And what if there are competing claims of political identifications over the same land?

Indeed, the problem of reasonable disagreement about ownership in the state of nature is what prompts Kant's own approach to property rights, and this seems more promising as a basis for territorial rights. A Kantian inspired approach to territorial rights seems more promising then. Given the problem of disagreement over competing ownership claims in the absence of background public rules, Kant says that a claim of possession can at most be a provisional right whilst we remain in a pre-institutional or lawless state. An item that I have acquired in nature and am holding it in my hand physically might be universally consented as rightfully mine. (This is already assuming away potential disagreement over what counts as proper acquisition). But what happens if I were to leave it unattended for a moment? Or if I strayed some physical distance from the object? For Kant, unless there are some publicly known rules specifying who can come to own what, under which conditions, property rights can remain only provisional, subject to reasonable competing interpretation and dissent. So, the solution is the formation of a state that makes and enforces property laws that are knowable and accessible to all. In a sense, a certain established and accepted convention is that which makes a mere possession into rightful ownership.

The basic idea that there has to be a certain background system of rules or convention before possession can become a right-based claim that others must respect provides an answer to the international question. What grounds the right of a state to its current territory is the fact of an international legal convention that all states as a matter of general practice endorse. Even if we invoke some Lockean theory of acquisition to explain the territorial right of states (perhaps this argument can go some way but not all the way for the reasons noted above), at best any possession over territory remains provisional, contestable, and not based on right that other must respect. What grounds territorial rights, what turns any provisional right a state might come to have over its land into a definitive international right, is the fact of an international legal convention that sanctions this right.⁸

In sum, the reason why states are normally entitled to their established territories, at the end of the day, is not because they have some natural (Lockean) right of possession over their space, or that they have some independently verifiable and indisputable cultural historical attachment (ala Moore) to that space. It is rather simply an accepted fact of international relations and practice as given by the norms and conventions of international law. Following Michael Walzer, from a different context, we might well call the “legalist paradigm” theory of territorial rights.⁹ But for a more ecumenical label let me for now refer to it as the “conventionalism argument”.

The presumption of an international normative order has implications for how we should think about global justice. For one, it suggests that there is a background global structure that

⁸ For a well-developed account of a Kantian approach to international territorial rights, as I see it, see Ypi, op cit 3.

⁹ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 61.

can be subject to the regulative requirements of justice. The difference between the domestic order and the international order, a difference that appears profound to some critics of global egalitarian justice, is reduced to a difference in degree rather than in kind. There is a basic structure in the global domain as in the domestic domain, and hence principles of justice *for institutions* are just as applicable in the global context.

This account of global justice can be described as cosmopolitan. But it is important not to misinterpret the implication of cosmopolitanism. Some worry that cosmopolitanism means that territories, sovereignty and ownership of natural resources have no significance and that thus a world governed by cosmopolitan principles would be a world without political borders, a fantasy world at best. But this is a false inference. Kant does not think that domestic state coercion has to be eliminated just because it restricts personal autonomy. Rather, for Kant, even though autonomy is a bedrock value, state coercion is nonetheless a moral necessity. The task is not to remove state coercion and bounded political authority but to try to resolve the paradox that the necessity of state coercion presents. The solution is to make it such that the coercive institutions are those institutions that nonetheless people can agree to. Likewise, cosmopolitanism does not mean the end of state sovereignty, ownership of resources and territorial rights. After all, as Kant notes, there must be some recognition of state territorial rights if rightful conditions within states are to be realized at all. The challenge then is not to get rid of states and territorial rights but to examine how an international system that grounds and authorizes these rights can be consistent with individual autonomy. That is, how and on what basis should the international order be structured in order for this paradox of coercion to be resolved? In short, borders and territorial claims can remain in place: the question is under what international

background conditions? So, contra Moore, it is not true that cosmopolitanism fails to take state, borders and territory seriously (p. 179). What cosmopolitanism does is to specify *the background conditions* for taking states, borders and territories seriously. One possible response, though this is not the place to argue for it here, is that states can enjoy territorial rights (and they must out of moral necessity) on the condition that the international order that grants this right takes global distributive justice seriously.

In short, of the three possible arguments for an international territorial right discussed above, namely the natural right argument (Lockean), the argument from history and culture (the culturalist), the conventionalist argument (e.g., Kantian), the last seems most compelling to me. Functionalists are typically Kantian conventionalists.¹⁰ That is, they hold that the state is a necessary means by which justice is secured for individuals precisely because the various individual rights, including property rights, remain underspecified and indeterminate in a stateless condition. But to be truer to their Kantian pedigree, the functionalists should also (following Kant himself) extend this reasoning to the international domain, and explain international territorial rights in the same form, as rights that must be constituted by an international public system of rules.

V

Conclusion

I agree with Moore that any attempt to defend territorial rights solely by reference to some abstract notion of justice (i.e., a view of justice that is not attached to some particular territorial claim) is a deficient theory of territory. Attachment to a specific land has

¹⁰ See Stilz, op cit 3.

to take into account actual practices and contingencies, including historical facts. In this sense, her theory of territorial rights as rights of peoples does better. But to the extent that any claims of possession in the absence of background rules or conventions can remain at most provisional and reasonably contestable (if Kant is right that is), Moore's account does not go far enough. A people's (historical) relationship to and identification with a land is subject to disputes, and hard to assess against similar competing claims. A complete account of territorial rights must appeal ultimately to some shared international public system of rules. Contemporary international relations operate under the shared presumption of states' territorial rights. What is remarkable about territorial rights of states in the real world is not their non-arbitrariness, but that they are accorded moral standing in spite of their arbitrariness. (As suggested above, there are moral reasons to accord standing to boundaries, arbitrary and even historically unjust in many cases they might be.) The violation of acknowledged background international standards is what ultimately explains the wrongness of international violations of existing territorial rights. What was wrong with Saddam Hussain's invasion of Kuwait in 1990, or with Russia's incursion into Ukraine in the Crimea, is not that these acts violated the natural rights of states to territory *à la* Locke, or that they violated some indisputable historical and cultural entitlements (though they might well do that too). Ultimately these are wrongful incursions because they violated the accepted norms and rules of international conduct. The world order is fundamentally institutional all the way up, from the domestic to the global domains, and this way of understanding territorial rights has implications for our understanding of global justice.

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