

Territorial Rights: Concept and Justification¹

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I

It is often said that states are by definition territorial entities: a state without a territory could not be a state.² But the normative relationship between a state and the territory it holds and/or claims is not clear, and what follows is an attempt to make it clearer through, first, an analysis of the concept of territorial rights itself – what are the rights that states claim towards their territories? – and second an enquiry into what could justify such rights.

But before starting that investigation we should pause to ask whether it is indeed correct to see territorial rights as belonging to states. It may be states that characteristically *exercise* such rights, but perhaps they exercise them derivatively on behalf of something or somebody else, as a lawyer exercises my rights when he sues someone on my behalf for breach of contract. A natural way to think about territory is to see it as involving a triangular relationship between first, a piece of land, second, a group of people who live on that land, and, third, the political institutions that govern those people in that place. Assume for purposes of argument that there is a justified claim to territorial rights: the question is whether the primary holders of territorial rights are the people as a collective body or the governing institutions. The answer is by no means clear. It depends on the justifying theory that one adopts. The important point at this stage is that even if one accepts a territorial definition of the

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² For a very interesting exploration of the history of this idea, see T. Baldwin, 'The Territorial State' in H. Gross and R. Harrison (eds.), *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press, 1992).

state (such as Weber's famous one³), this does not settle the question of whether states get their territorial rights directly, or indirectly as agents of the people they govern.

But let us for the moment think of territorial rights as rights belonging to states. The question is what exactly these rights amount to. Drawing on what I take to be the normal understanding of territorial rights, we can distinguish three main elements. The first is what is often called the right of jurisdiction, that is the right to make and enforce law throughout the territory in question. If a state has territorial rights, then anyone physically present in the relevant territory is subject to that state's legal system and may be punished if he or she violates one of its rules. The second is the right to control and use the resources that are available in the territory. If the territory contains extractable mineral resources, for example, those resources are at the state's disposal to make use of as it sees fit. The third is the right to control the movement of goods and people across the borders of the territory. Recall that at this stage I am simply trying to get clear about what territorial rights actually *mean*, not about their justification. So even if one thinks that states should allow free movement of goods and/or people across their borders, this is consistent with saying that a state that has territorial rights is entitled to control that movement if it so decides.

It might be questioned whether there really are three separate elements here. After all, if a state has the right of jurisdiction, then it has the right to legislate about the use to be made of resources within its territory, and so the second element seems to be contained in the first. Similarly the right of jurisdiction will include the right to make rules governing border-crossings. However even if in a formal sense one could squeeze the three elements into one bag, there are good reasons for not doing so. The right of jurisdiction is primarily a right exercised over persons. It is the right to make rules that require or prevent certain forms of behaviour on the part of persons residing in the territory. The right to the territory's resources, on the other hand, is a right exercised over physical things, and insofar as persons are involved, it is in the first

³ '.....a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory. Note that "territory" is one of the characteristics of the state.' (M. Weber, 'Politics as a Vocation' in H.H. Gerth and C. W. Mills (eds.), *From Max Weber* (London: Routledge and Kegan Paul, 1970), p. 78.)

place a right to prevent outsiders from taking or controlling the resources in question. Although it is not a property right, it is *akin* to a property right in that respect, whereas the right of jurisdiction certainly is not. Again the right to control borders differs from the latter right, especially when one considers its application to those outside the territory. This comes out most clearly when the exercise of the right involves repelling would-be invaders (as opposed say to regulating admissions by legal means). A state that defends its territory by fighting against an invading army is not claiming jurisdiction over the invaders, merely the right to exclude them physically from the territory.

It is not helpful, then, to assimilate all territorial rights to rights of jurisdiction, nor for that matter to regard them all as a kind of property right. If one does that, one will misunderstand the nature of the rights in question. Moreover the different elements are separable insofar as one could defend a state's right of jurisdiction without defending either its right to the territory's resources or its right to control borders. Suppose, for example, that someone holds that the earth's resources belong collectively to humanity. It would then follow that a state could not claim rights to those resources that lie within its jurisdictional territory unless it did so by mutual agreement (or perhaps satisfied some egalitarian requirement that set limits to the quantity of resources a political community could rightfully hold). In that case a state might have full rights of jurisdiction but be required to pay a tax, say, for the use it made of the resources in its territory. Equally it is coherent to say that a state has rights of jurisdiction over everyone physically inside its territory, but no right to decide who should move in or out. One set of rights does not entail the other. Furthermore it may well turn out that different forms of justification are needed to support the three kinds of rights I have identified.

II

So let us now turn to the question how territorial rights might be justified. A good place to start might be the widely held view that a state that is able to impose order and administer justice in any region thereby gains the equivalent territorial right. This seems to be the default position, at least, in international law. It has the practical advantage that establishing who has territorial rights is relatively easy whenever there

is an effective state available to be identified. It is not so popular in the academic literature, but a version of it can be found in Sidgwick, who, starting with the announcement that ‘I shall take the happiness of the persons affected as the ultimate end and standard of right and wrong in determining the functions and constitution of government’⁴, argued in relation to territory that:

The main justification for the appropriation of land to the exclusive use, either of individuals or groups of human beings, is that its full advantages as an instrument of production cannot otherwise be utilised; the main justification for the appropriation of territory to governments is that the prevention of mutual mischief among the human beings using it cannot otherwise be adequately secured.⁵

In relation to competing territorial claims, Sidgwick’s view was that ‘the strict right of a State to exclude other States from land can only be maintained by its exercising a tolerably effective and continuous governmental control over the territory in question’.⁶ Putting these two propositions together, we reach the conclusion that ‘exercising a tolerably effective and continuous governmental control’ across a territory is a necessary and sufficient condition for a state’s having the right of jurisdiction over that territory.

The practical deficiencies of this position are easy to see. Sidgwick must condemn any attempt to challenge a state that exercises effective control, since ex hypothesi such a state meets the condition. Indeed this is the line he takes when discussing claims to secession, arguing that such claims have force only when the secessionists can demonstrate ‘some unjust sacrifice or grossly incompetent management of their interests, or some persistent and harsh opposition to their legitimate desires’,⁷ which I take to indicate the standard of performance that he is setting for the effective control

⁴ H. Sidgwick, *The Elements of Politics*, 2nd ed. (London. Macmillan, 1897), p. 38.

⁵ Sidgwick, *Elements of Politics*, p. 252.

⁶ Sidgwick, *Elements of Politics*, p. 254.

⁷ Sidgwick, *Elements of Politics*, p. 226.

condition to be met. On the other hand, if a state succeeds in imposing its authority by force on an existing political community, and subsequently meets the condition, then it gains territorial rights – an implication that Sidgwick also accepts when discussing colonisation. So we have the somewhat paradoxical view that a claim to territorial authority that would be rejected in advance has to be accepted once force is exercised and effective control established in the region in question.

A Sidgwickian might try to avoid this paradox by making the account of territorial rights more explicitly utilitarian: a state would have to justify its territorial claim by showing that its exercise of authority was more beneficial (measured in terms of the general happiness) than the equivalent exercise by rival claimants would be.⁸ The main problem here is going to be indeterminacy, particularly if the utilitarian calculation is going to include the preferences of the various groups whose position would be altered by a change in jurisdiction. Despite his utilitarianism, Sidgwick had to grapple somewhat with problems of national identity, because of his view that states function better when their subjects display the degree of cohesion that common nationality produces. But this must surely complicate the picture sketched above when secessionist claims have to be adjudicated, for if the secessionists form a national group, they can now claim that separation will produce a better-functioning political community even if they are not now being exposed to ‘unjust sacrifice or grossly incompetent management of their interests’. On the other hand, Sidgwick freely admits that the citizens of an established state are likely to have a strong psychological attachment to their territory, so ‘we must recognize as a powerful motive the dislike of the community from which secession is proposed to lose territory that has once belonged to it, and to which it has a claim recognized by foreigners’. Having laid out the arguments on either side, and also tried to factor in the disruptive effects of a change in territorial jurisdiction as against the longer term

⁸ Others have discussed efficiency arguments for territorial rights that focus on the efficient use of land: see M. Moore, ‘The Territorial Dimension of Self-Determination’ in M. Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998); T. Meisels, *Territorial Rights* (Dordrecht: Springer, 2005), ch. 5; C. Nine, ‘A Lockean Theory of Territory’, *Political Studies*, 56 (2006), 148-65. My remarks here concern political efficiency, i.e. the effective functioning of a legal and political system.

gains from a more efficient assignment of territorial rights, Sidgwick throws in the towel, concluding merely that in standard cases territorial rights are justified.⁹

I have been exploring the problems with a utilitarian theory of rights of jurisdiction. It is also worth noting, however, that a utilitarian approach does not give us good reasons to link together the three components of territorial rights distinguished in section I above. It is not clear, in other words, why ‘the prevention of mutual mischief’ among the human beings who inhabit a territory should give the state either the right to exploit the resources that the territory contains, or the right to control immigration and emigration. Utilitarians can explain why *somebody* should exercise these rights – for example, the reasons why stable and secure ownership of resources is *prima facie* desirable – but not why that must be the same agency as the one that regulates the behaviour of persons. In that sense, they cannot explain and justify territorial rights as we would normally understand them.

III

As has often been observed, utilitarian arguments are forward-looking and consider the past only as a source of evidence about what might happen in the future. In the case we are considering, a state’s record in governing a territory matters only because it indicates what we can expect from allowing that state to continue to exercise jurisdiction in the future. But could we construct a state-centred theory of territorial rights that included a genuine backward-looking component? This suggestion is made by Cara Nine when she argues that ‘on a Lockean theory of desert claims to land, states can come to deserve territorial rights to land’.¹⁰ How plausible is it to attribute such desert claims to states?

⁹ Here is the towel being thrown into the ring: ‘I think it premature here to attempt a final solution of the problem presented by the conflict of sentiments and interests which I have indicated in the preceding section: my present aim is merely to justify a provisional acceptance of the assumption that a modern State is normally a determinate and stable group of human beings, whose government has a practically undisputed right of regulating the legal relations of human beings over a determinate portion of the earth’s surface’ (Sidgwick, *Elements of Politics*, pp. 229-30.)

There is some ambiguity in Nine's discussion about the relationship between state and people – i.e. between the state as a formal institution that exercises power and authority and the people who fall within its jurisdiction. She says, for example that 'the state can be seen as (at least in part) the manifestation of the coordinated efforts of individual members of the state. Much of the value of the lands occupied by the members of the state is due to the coordinated efforts of those members.'¹¹ This ambiguity is unfortunate if one wants to determine whether territorial rights belong primarily to states or to peoples. So let us consider the argument as applied to the state strictly understood. The claim is that the state has, through its past actions, contributed to the value of the land that it governs, by, for example, legislating to create 'stable systems of agriculture' and shaping the appearance of the landscape through zoning laws. Accepting this factual claim, it is difficult to make sense of the idea that a present-day state *deserves* the value created as a result of the actions taken by that same state in the past. Indeed it is hard to make sense of the idea of institutions having deserts at all, unless this can be cashed out in terms of the deserts of the existing members. Thus one might say that a football team that has played well all season deserves to be promoted to the division above, but this can be translated into a claim about the deserts of the members of the team. But to say that, for example, Oxford United today deserves something on the basis of what Oxford United did 50 years ago does not make sense, given the complete change of personnel between now and then. It is important here, as always, not to confuse desert and entitlement. Institutions can transmit entitlement across time under appropriate conditions. If the football league had a fixed membership (as the American football league does???) Oxford United might be entitled to a place in it by virtue of a decision made 50 years ago. So could we translate Nine's argument into a claim about historic entitlement? The argument would be that a state that has once established territorial rights – say by engaging in the value-creating activities that Nine describes – is then entitled to enjoy those rights in perpetuity, so long as it in some relevant sense remains the same state.

¹⁰ Nine, 'A Lockean Theory of Territory', p. 159. I am focussing here on just one of the three arguments that Nine uses to develop her theory of territorial rights.

¹¹ Nine, 'A Lockean Theory of Territory', pp. 159-60.

This argument seems to me coherent, but not persuasive. It has often been pointed out in relation to historical entitlement theories of rights to private property that focussing simply on the pedigree of an alleged right ignores all changes in the surrounding circumstances that might bear on the value of recognising it now (increased scarcity is the obvious example). These same considerations apply to territorial rights. But in addition, the arguments from stability that are used to defend historic property entitlements are less strong in the territorial case. Of course it is important that territorial rights should remain stable in the short term. But in the longer term, questions arise about political legitimacy that have no analogue in the property case. A state may lose legitimacy because of its poor performance in carrying out standard governing functions such as maintaining an adequate level of personal security, or simply because the criteria of legitimacy change over time (a theocratic state may lose legitimacy as the society it governs becomes more secular). It would then be strange to attribute territorial rights to the state simply because it had inherited rights from a time when it *was* regarded as legitimate. In contrast, we don't in the same way think that a property owner should lose inherited rights because he or she is doing a poor job of managing the property in question. The state is answerable to the people in the way that the property owner is not, and this counts against granting it rights on a purely historical basis.

IV

The findings of the last two sections suggest that it is a mistake to treat states as the primary holders of territorial rights. The backward-looking arguments don't seem powerful enough; the forward-looking arguments, which afford territorial rights to states so long as they meet minimal performance standards, aren't discriminating enough.¹² Instead, we should see these rights as belonging in the first place to peoples. A state's claim to exercise territorial rights can then be understood by treating it as the legitimate representative of the people in question. If we take this

¹² Perhaps one could create a stronger theory by combining the two approaches: a state that can claim territorial rights must a) currently meet Sidgwickian performance standards across the territory, and b) demonstrate historical entitlement by virtue of past value-creation etc. I shall not explore this possibility further here.

approach, however, we have then to decide whether people's rights are to be understood as individual or collective. In other words, are we to treat territorial rights as an aggregate of individual rights over land, together with individual powers to create a state that exercises rights of jurisdiction, or are we to treat them as a form of collective or group right belonging to the people as a whole?

I shall only touch very briefly on the first possibility. Theories in this category are usually Lockean in inspiration. They involve giving an account of how individuals can acquire property rights in land in a pre-political state of nature, and then create a political authority that has rights of jurisdiction over the territory defined by combining these pre-existing properties. The latter part of the story may involve a social contract, as in Locke, or an invisible hand process, as in Nozick.¹³ There are several problems with such theories, including the following two: is it possible to establish robust property rights in advance of a legal system that is able to define rights in such a way as to protect against harmful externalities? If political authority is created by the holders of property rights transferring their powers of jurisdiction to the state, why can't individual property owners rescind the transfer at any moment, with the implication that a state authorised in this way would not necessarily continue to have rights of jurisdiction over a continuous geographical area? There are possible responses to these questions (including biting the bullet and conceding that states cannot legitimately claim territorial rights in the usual sense), but I do not want to add to a discussion that has been well advanced by others.¹⁴

Instead I want to look more carefully at the collective version of people's rights to territory, which is the view I have been inclined to defend in previous work.¹⁵ A

¹³ I have discussed the relative merits of these two strategies in 'The Justification of Political Authority' in D. Schmidtz (ed.), *Robert Nozick* (Cambridge: Cambridge University Press, 2002).

¹⁴ Including, Meisels, *Territorial Rights*, chs. 2 and 6; Nine, 'A Lockean Theory of Territory'; Baldwin, 'The Territorial State'; A. J. Simmons, 'On the Territorial Rights of States', *Philosophical Issues*, 11 (2001), 300-26; H. Steiner, 'Territorial Justice' in S. Caney, D. George and P. Jones (eds.), *National Rights, International Obligations* (Boulder, CO: Westview, 1996); H. Steiner, 'May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction: A Response to Nine', *Political Studies*, 56, 949-56.

successful theory of this kind must achieve three things. First, it must explain what makes a group of people into the kind of collective that is capable of having territorial rights. Second, it must explain the ethical relevance of what the group has done to the holding of territory – in other words, given that the group has done X, Y and Z, why should this be thought to give it any kind of territorial claim? Third, it must show why territorial rights, in the full sense explained in section I above, are justified on this basis, rather than some lesser entitlement such as, for instance, rights of continued occupancy. This is quite a demanding schedule.

The first question arises because we are trying to establish collective rights proper rather than an aggregate of individual rights. Moreover we are trying to establish collective rights that endure across generations. So we need to find a transhistorical agent that can be the bearer of such rights, without relying on the state to perform this role (since we are treating state claims to territory as derivative). This can only be a group that is held together by mutual recognition, common identity and shared practices. Nations are going to be the most relevant groups if we are thinking about the territorial rights of modern states, but the same idea applies, for example, to aboriginal groups and to long-established churches. Take the latter case. Someone who belongs to, or joins, such a church is part of a transhistorical community defined by shared beliefs and practices, and whose members recognize one another as members. This body holds certain collective rights, including the right to worship in the churches that traditionally belong to it. Of course this is normally given formal legal protection, but even if that were not the case, we would think it wrong if a church were to be deprived of its places of worship unless there was some compelling reason to do so. These buildings have a special significance for members of the church which cannot be explained except by reference to the transhistorical community to which they belong. In this case it is a property right that is being established, but I am using the example to illustrate what must be true of a group if it is to be awarded collective rights that endure over time.

¹⁵ D. Miller, 'Secession and the Principle of Nationality' in *Citizenship and National Identity* (Cambridge: Polity, 2000); D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 8.

Even if churches are collective agents of the appropriate kind, some might challenge the analogy with nations, on the grounds that the latter are too amorphous to count as such: there is, for example, no precise way of determining who counts as a member of the French nation and who does not (what about a newly arrived immigrant or a Breton nationalist?). It would take me too far afield to deal with this question properly here,¹⁶ so let me pass quickly to the second issue, namely what groups must do to establish territorial rights of any sort. It seems clear to me that simply taking possession of territory (e.g. by conquest) is not sufficient, venerable though this idea undoubtedly is. The land must be transformed (in a positive way) and this requires long occupation. Typically the transformation is both material and symbolic. That is, the land has its value enhanced, by cultivation, for example, or by the creation of buildings, roads, waterways and so forth. At the same time, significant events in the history of the group occur on the territory, so a field becomes the place where a battle was fought or a building the place where a historic document was signed. The claim is then that to deny the group territorial rights would be to deprive it of something of great value to its members – in normal cases both material value and symbolic value. This value is embodied in the territory: it cannot be detached and carried somewhere else. So only the continued holding of the territory can guarantee that the group can enjoy the value it has created.

One might raise the question why nations (or for that matter other groups) should benefit in this way from the actions of their predecessors. Isn't it just a matter of good luck, a critic might argue, that our ancestors acted so as to create value in the place where we now claim territorial rights? I agree that it would be wrong to claim that we can *deserve* territory on this basis. On the other hand we may be legitimately entitled to it through our membership in a transhistorical community that collectively has performed the relevant acts, just as the present-day church member is legitimately entitled to worship in his denomination's traditional church. It is also worth keeping in mind here that responsibilities accompany these rights, including the responsibility to make redress to those harmed by past events in the nation's history.¹⁷ Perhaps

¹⁶ I have tried to defend the idea of nations as real communities in *On Nationality* (Oxford: Clarendon Press, 1995), ch. 2, and the idea of nations as collective agents in *National Responsibility and Global Justice*, ch. 5.

there is also a responsibility to preserve the created value that justifies the territorial claim.

Finally, there is the question of the extent of the territorial rights that flow from the value-creating activities I have outlined. It might be thought that all I have shown is that groups that have occupied territory for a lengthy period of time have a claim to continue in occupation, so that they benefit from the enhanced value of the land, and have access to sites of symbolic significance, but not to territorial rights proper.

It is not difficult, however, to justify rights of jurisdiction on the basis of what has been said. For if the group does not have representatives to exercise such rights on its behalf, then its continued enjoyment of the value it has created will always be insecure. Rights of private property alone will not do the job because a) such rights are always susceptible to being redrawn by whoever holds rights of jurisdiction and b) much of the embodied value that the group has created is likely to be located in public space – in public architecture, landscapes of historic significance, and so forth. The group needs to maintain overall control over the territory in order to secure that value over time, and for that it needs rights of jurisdiction such as those normally exercised by a state.

If we now turn to consider the right to the territory's *resources*, it may not be so clear how occupying and transforming land gives a group a right to the land itself, including the minerals and so forth that were present in it all along, rather than merely to the increased value that the group has created. So although the group may be able to claim that it must stay on the land to enjoy that value, why shouldn't it be taxed on the basis of the natural value of the land it occupies, the proceeds being paid into a fund for global redistribution? Such a proposal may be sound in principle. However, as I have argued elsewhere,¹⁸ in practice there is no way of determining what that natural value actually is, once one thinks carefully about the several ways in which property values are determined by human activity. So although it would be wrong to say that the story we tell to explain why the Norwegians have territorial rights in the

¹⁷ On this, see *National Responsibility and Global Justice*, ch. 6.

¹⁸ In *National Responsibility and Global Justice*, ch. 3.

land of Norway will also justify their having the right to the oil they extract from that territory, there is no *rival* story to tell about whom that oil should belong to. For pragmatic reasons it is almost certainly going to be better for rights to natural resources to remain with the group that has rights over the territory in which the resources are located.¹⁹

Finally there is the contested question of the right to control borders. I do not think that one should try to defend this by treating territorial rights as akin to property rights – that is, argue that just as a property-owner has the right to decide who or what enters or leaves his property, so a territorial group has an equivalent right over the area it occupies. There are special reasons that apply in the property case, including the owner's privacy and the particular projects he or she may want to pursue inside the property, that have no analogue in the territorial case (one can perhaps think of hypothetical examples such as a people who hold their land sacred in a way that implies that the presence of any unbeliever would defile it). So the argument for border control – particularly the right to prevent people from coming in – has to be an indirect one, along something like the following lines. First, a people that has established territorial rights, including rights of jurisdiction, has a good reason to prevent a rival group encroaching upon, and setting up its own jurisdiction within, the territory in question. We could call this the anti-colonisation claim. But if that claim holds, then incomers have to be admitted on condition that they should become part of the political community that currently exercises rights of jurisdiction. And then questions of self-determination come into play: changing the composition of a political community will normally alter its character, and political communities have the right to determine the character of their own future selves by resisting changes that they regard as detrimental. This certainly does not entail closing borders, full stop, but it does mean that the *right* to regulate border crossings is a natural and justifiable corollary of the other territorial rights that peoples can claim.

¹⁹ This is not intended as an argument against the justice of global redistribution per se, merely a claim that using natural resource holdings as the tax bases for such schemes is misguided. The Norwegians may well have a duty to contribute to global redistribution simply by virtue of their relative wealth.