Tamar Meisels

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Second edition

By

Tamar Meisels

Tel Aviv University,
Tel Aviv, Israel

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Author
Tamar Meisels
Tel Aviv University,
Tel Aviv, Israel

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In loving memory of my father
Andrew Meisels
(1933–1997)
who taught me my commitment to *Eretz Yisrael*

Preface

In the time since *Territorial Rights* was first published, I have had the opportunity to think some of these issues through further, and to respond to some comments and objections that were posed to me along the way. Though the thesis of this book remains as it was, some of the arguments in this edition appear here in what is, I hope, a refined form. Previous versions of some chapters in this book have been published as independent articles. I begin by thanking the editors of the following journals for the changes they recommended, and for allowing me to reuse these materials here:

'A Land Without a People – An Evaluation of Nations' Efficiency-based Territorial Claims', *Political Studies,* 50/5 (December 2002), 959–973.

'Can Corrective Justice Ground Claims to Territory?', *The Journal of Political Philosophy,* 11/1 (March 2003), 65–88.

'Liberal Nationalism and Territorial Rights', *The Journal of Applied Philosophy,* 20/1 (2003), 31–43.

'The Ethical Significance of National Settlement', *The Canadian Journal of Philosophy,* 35/4 (December 2005), 501–520.

Many of my academic and personal debts remain as they were when I first published this book several years ago. The first and greatest of these is due without a doubt to David Miller who supervised my D. Phil work at Oxford, which formed the basis for this book. It is by no mean any exaggeration to say that this book could not have come about were it not for his particular guidance and support. His instructive comments on the various drafts of each and every one of my original chapters, as well as his endless patience and priceless advice, have helped me more than anything else in writing this book. His work On *Nationality,* and all that he taught me, have greatly influenced my writing on national territory, both here and elsewhere. For all this, and more, I am eternally indebted to him.

I also owe a distinct debt of gratitude to Yael Tamir who first introduced me (and everyone else) to the idea of Liberal Nationalism. She has been a good teacher and is a very good friend.

Special thanks are due to Cecile Fabre for her many useful comments on earlier drafts of most of my chapters, as well as to the other participants of the Nuffield Political Theory Workshop in 1998–2000. I was privileged to be part of this stimulating political theory group during my stay at Oxford, and my work has benefited greatly from the many helpful comments I received from its participants. In particular, I want to thank Karma Nabulsi, Sarit Ben-Simhon, Daniel McDermott and Micah Schwartzman for a variety of critical remarks on previous drafts of what are now Chapters 4 and 6–8.

I was exceptionally privileged to receive learned comments from Jeremy Waldron on an early version of my Seventh Chapter when I presented it at the Nuffield Workshop during his sabbatical in Oxford in 1999. His remarks at that time, and several years later at a conference on The Israeli Settlements, have been most helpful to me in forming the final version of Chapters 7. I am most fortunate to have benefited from some of his scholarly knowledge of the works of John Locke and from his critical thoughts on 'liberal nationalism'. My good fortune increased every time our paths met again.

One of the opportunities presented by the publication of a second edition is that of addressing new literature. In the first edition of this book, I noted Allen Buchanan's observation that systematic liberal thinking about the making and unmaking of boundaries is, at present, still in its infancy, or perhaps gestation.[1] By and large, this is still true. There are, however, some recent exceptions. Two valuable contributors to this slowly developing debate on boundary disputes are, as it happens, both former students of Buchanan's. Cara Nine's work: 'A Lockean Theory of Territory'; and: 'Superseding Historic Injustice and Territorial Rights', and her innovative discussion of groups who have lost their land to ecological disaster, are particularly noteworthy.[2] Her work, and our discussions, had a lot to do with prompting the revised edition of this book. No less important (though with less direct bearing on my own work here) is Avery Kolers' forthcoming book, *Land, Conflict, and Justice*.[3]

Above all, Chaim Gans' new book: *A Just Zionism* has been most influential in motivating me to update my work on *Territorial Rights*.[4] For all our disagreements, his work on *The Limits of Nationalism* and 'Historical Rights' inspired my writing on territory from the start.[5] My debt of thanks to him is a mixture of both personal and professional gratitude, for the endless support that he extended to me when I first began this project, and throughout the process of writing the original version of this book. He remains my very close friend. Our daughters, Abigail and Martha, also deserve my loving thanks.

Endnotes

1 Allen Buchanan, 'The Making and Unmaking of Boundaries: What Liberalism Has to Say' in Buchanan, Allen and Moore, Margaret (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge, UK: Cambridge University Press, 2003).

2 Cara Nine, 'A Lockean Theory of Territory', *Political Studies,* Vol. 56(1) (March 2008), 148–165; Cara Nine, 'Superseding Historic Injustice and Territorial Rights', *Critical review of International Social and Political Philosophy (CRISPP)*, 11/1 (March 2008), 79–87.
3 Avery Kolers, *Land, Conflict, and Justice – A Political Theory of Territory* (Cambridge: Cambridge University Press, 2009); See also: Avery Kolers, 'The Territorial State in Cosmopolitan Justice', *Social Theory and Practice,* 28/1 (January 2002), 29–50.
4 Chaim Gans, *A Just Zionism – On the Morality of the Jewish State* (New York: Oxford University Press, 2008).
5 Chaim Gans, "Historical Rights – The Evaluation of Nationalist Claims to Sovereignty", Political Theory, 29/1 (February 2001) 58–79. Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University press, 2003).

Contents

Chapter 1
Introduction

Liberal defences of nationalism have become prevalent, almost redundant, in modern political thought. The idea that there is, or can be, such a thing as 'liberal nationalism', has been pursued extensively (if not excessively) since the mid 1980s. Many arguments have been put forward concerning national cultures and their importance to individuals, cultural rights, the rights of disadvantaged indigenous minorities and those of immigrant groups, and so forth. Nationalism, however, involves land; Anthony Smith goes so far as to claim that it is primarily about land,[1] and he points to 'a curious neglect of the territorial aspects of the nation and nationalism. For what ever else it may be, nationalism always involves a struggle for land, or an assertion about rights to land; and the nation, almost by definition, requires a territorial base in which to take root and fulfill the needs of its members'.[2] Similarly, Hillel Steiner points out, 'it's fair to say that territorial claims, though not the *sole* objects of nationalist preoccupation, have probably excited more of its passion than any other type of issue'.[3]

This seems to reveal an unfortunate home truth for liberals, since it is precisely here that nationalism tends to get a bit 'sticky' from a liberal point of view. Thus, David Miller remarks that 'People of liberal disposition…will throw up their hands in despair when asked to resolve the practical problems that arise when…two nationalities make claim to the same territory, as for instance in the case of the Jews and the Palestinians in Israel'.[4] Scholars of nationalism, however, cannot afford to throw up their hands in despair, but need to seek out some general criteria for considering such problems.

This volume embraces that strain of liberal political thought which, in recent years, has come to the defence of nationalism, and applies it to the very concrete issue of national territorial rights. It concerns the moral evaluation of territorial claims put forward by states (particularly nation states), as well as by non-state groups, within the framework of what has come to be known as 'liberal nationalism'. While authors on liberal nationalism express views on contemporary territorial conflicts, we lack a systematic, well thought-out method of approaching such cases consistently. We are in need of some type of mechanism, some orderly general guidelines that will enable us to reflect upon our views on specific territorial conflicts, as well as to form opinions when we are confronted with new situations.

T. Meisels, *Territorial Rights,* Law and Philosophy Library, 72
DOI: 10.1007/978-1-4020-9261-9_1,

Some attention has of course already been focused on the issue of secession, and at various points throughout this book I refer to the central contributions on this topic.[5] The debate carried on in that literature, however, deals primarily with the justification of a right to secession and with determining the terms for legitimately exercising this right (who – that is, what groups – are entitled to secede, and under what conditions would they be justified in doing so). It does not, for the most part, focus on those problems relating to the precise demarcation of boundaries. Furthermore, to the extent that this literature addresses the issue of defining territorial borders at all, it naturally does so only with regard to severing an existing state. In contrast, the issue at hand here is a far wider one, which encompasses border disputes between existing states as well as the many other prevalent forms of territorial strife which do not involve secession.[6] In spite of existing literature on secession, then, the project of establishing a comprehensive set of morally relevant criteria for demarcating borders has not been addressed. How can the acquisition and holding of a particular piece of land by a particular political entity be morally justified? What criteria should liberal nationalists apply when trying to form an opinion in a case where the *X*s and the *Y*s are in dispute over a piece of territory *T*?

More important than enabling liberal-minded intellectuals to form and defend coherent opinions on contemporary international issues, is the task of injecting some analytical clarity, as well as a modicum of liberal morality, into an international arena rife with territorial conflict. Faced with many international disputes, we encounter a multiplicity of muddled arguments voiced by nations purporting to justify their alleged territorial rights. Such defences of acquiring and retaining territory are rarely neatly packaged, and often jumble together several distinct arguments. Quite often, such arguments are symmetrically matched by an equally confused package presented by another national group laying claim to the very same portion of land. Frequently, such controversies involve the use of popular slogans rather than any form of coherent debate of the type familiar in academic settings. Nowhere that I know of are negotiations over disputed territory carried out on the basis of an agreed set of values, let alone on the basis of liberal premises. More often than not, two sides to a territorial dispute will derive their respective arguments from within their own national culture and set of beliefs, and in accordance with their own irrefutable version of historical events, thus rendering their conflicting claims particularly difficult to mediate.

The liberal-nationalist response to these difficulties has so far taken one of two forms. The first is despair, of the kind described by David Miller in the passage cited above. The second is what can be referred to as ‘mediation through denial’: an attempt to form opinions on particular territorial disputes (and, in the case of world leaders, even an attempt to adjudicate them), while totally dismissing the particularistic, nationalist arguments raised by either side.[7] The first option is a luxury that liberal nationalism can no longer afford. Since land, territory and homelands are at the heart (or are at least form a significant part) of any reasonable account of nationalism, it follows that if there is anything at all to theories of liberal nationalism, they should be able to address issues concerning territorial distribution from

this perspective. The second avenue of evasion is even more problematic than the first. It bears grave consequences not for any particular academic theory, but rather for the actual ability to achieve the very goal that mediation, or arbitration, strives for. Given the tremendous force that nationalism has proven to be – for better or for worse – in the modern world, and the central role that territory has played in the history of nationalism, the outright dismissal of nationalist arguments is unlikely to help reduce international strife.[8] Quite the contrary. The lack of a clear understanding of the nature and possible *normative* (rather than merely psychological) force of these claims can only be detrimental to their adjudication.

This book adopts an approach which is diametrically opposed both to the denial of nationalist aspirations and to the despair of them. It confronts the central types of argument commonly employed by national groups in their attempts to justify various territorial entitlement claims, and analyses each of them from a liberal-national perspective. Each of these common types of national argument for territory is seriously considered, and in every case an attempt is made to state the strongest possible liberal case in its favour. The desired outcome is not only a clearer understanding of those arguments, but also an assessment of the normative weight they carry from the point of view of liberal morality.

It is perhaps important to state right here at the outset that the end product does not take the form of a neatly formulated recipe which will automatically prescribe the right answer to territorial questions. There are several reasons for this. For one thing, I am not convinced that in politics there is always only one morally correct answer. As will become apparent, many factors are relevant from a liberal perspective to the establishment of title to territory, and this multiplicity represents a plurality of values and principles. Such pluralism leaves room for balancing these principles and values against each other, as well as against possibly conflicting interests, in a variety of morally legitimate ways. Furthermore, various considerations should enter into a decision on the destiny of a territory, many of which cannot be dealt with on a theoretical level. Sometimes, for instance, there are considerations of security. Thus, different views on the destiny of a particular territory may then depend on different forecasts of future events, which are often unclear. The vagueness of the future may often account for a plurality of morally valid political opinions about the destiny of a territory.[9] Other considerations may at times include the extent to which territories can be subdivided; and still further considerations may be as mundane as ensuring sufficient water supplies, territorial continuity, safe passage, and so on. These types of factors will differ completely from case to case and cannot be settled at the level of abstract principles.

All of these considerations account for the fact that it is unfeasible to provide an equation, or formula, into which one can expect to place all the data on a given territorial issue and subsequently come up with a 'correct answer' to that issue. Instead, this volume provides liberal guidelines for the analysis of territorial questions. It is designed to supply a common ground for discussion (including disagreement) and for the mediation of claims within the framework of 'liberal-nationalism'. Naturally, it excludes conclusions which would be unacceptable from a liberal perspective, but it nevertheless leaves much room for a plurality of opinion.

1.1 Liberal Nationalism

In sketching a typology of nationalist ideologies, Chaim Gans points out that the term 'nationalism', just like 'liberalism', does not stand for one coherent doctrine. Instead, it represents an entire family of ideas or political movements, which exhibit all the wide variety of characteristics one would normally encounter in the members of any flesh-and-blood family.[10] If 'nationalism' and 'liberalism' respectively are indeed the surnames, so to speak, of two extended families of theoretical doctrines or political programmes, the recent union between these two highly contested concepts might be described as having bred an entire clan of political ideas conjoined under the name of 'liberal nationalism'. A great deal has been written in this field in the last two decades, and I shall not reiterate much of it here. It is now necessary to widen, rather than deepen, the scope of the liberal nationalist enterprise so that it may come to encompass the territorial element of nationalism which has so long been neglected by it.[11] Even for this limited purpose, however, I must begin with a few, very general, words concerning the most basic and widespread components of this doctrine.

For liberal nationalists, the term 'nation', in the relevant sense, is taken to denote a cultural, rather than racial, group sharing some joint social attributes (such as language, history, customs, lifestyle, etc, and – I would venture to add – territory), even though it is widely agreed that no specific common characteristic constitutes a necessary condition for nationhood, except perhaps the existence of national consciousness.[12]

In the broadest and most inclusive terms, liberal nationalism comprises two general strands of argument which often appear side by side. The first, weaker, version confronts the traditional liberal opposition to nationalism's many illiberal manifestations, primarily in the twentieth century, and its often violent and inhumane consequences. Against this, 'liberal nationalism' asserts that nationalism can, in principle, be compatible with basic liberal premises, most notably the primacy of individuals and their well-being, and the moral requirement of universalizability.[13] Both these liberal premises underlie all arguments throughout. They also serve as the basic liberal restraints on any nationalist claims raised here. Each type of argument for territorial entitlement examined in the following chapters is considered solely from the perspective of its contribution to the well-being of individuals and its potential service to what liberal nationalism takes to be some of their most basic interests. As for the second stipulation, it goes without saying that all conclusions concerning territory must apply equally to all national groups in like cases.

A second prototype of liberal nationalist arguments goes beyond this. It argues not only that nationalist ideas and programmes (such as self-determination and self-rule, minority, or polyethnic rights, the acknowledgement of special obligations towards fellow nationals, and so on) can be interpreted in a light that renders them compatible with liberalism; it argues further that a positive defence of nationalism can be constructed on the basis of liberal premises concerning individual freedom, well-being and self-respect. Liberal arguments purporting to base the normative

significance of nationalism on individualistic grounds assume initially that in our contemporary world nationalism is the primary form of cultural association, and therefore also the primary source of individuals' cultural identity. The type of arguments which usually follows these assumptions has recently been suitably dubbed 'a liberal version of cultural nationalism'.[14]

Proponents of such arguments proceed by asserting that individuals have an interest in culture because it is a prerequisite for their freedom. The ability to exercise this freedom and to shape one's life autonomously, they argue, is dependant on possessing certain 'cultural materials' such as language, modes of behaviour and a choice of lifestyles. Since exercising individual liberty is assumed to be contingent on the availability of these so called 'cultural materials' – materials that are at present supplied primarily by national cultures – it follows that individuals' interests in national culture are fundamentally important from any perspective which holds liberty dear, thus warranting liberal support for their institutional protection.[15]

However, it has been pointed out more than once that such arguments can provide a basis only for an individual's right to some culture or another, not for a right to a specific national culture.[16] Thus, this argument is either supplemented or supplanted by the claim that individuals ought to be granted a variety of political rights ensuring the respect and protection of their national culture because that culture is a component of their identity.[17] It is worthwhile spelling out this type of argument, if only in brief, for the assumptions which underlie it and the conclusions drawn from them are basic to 'liberal nationalism' for all its variety. Thus, they form a central part of the background assumptions to a liberal nationalist analysis of territorial rights.

The identity-based argument reasonably presupposes, first, that people's interests in components of their identity (components such as race, gender or sexual preferences) are fundamental human interests, that is, the type of interest warranting protection by moral and political rights. Certainly, from the view point of any theory which values individualism and cherishes individual identity, the interest not only in adhering to one's identity but also in gaining respect and protection for the components thereof must be viewed as a fundamental human interest. Second, this argument assumes, almost irrefutably, that culture forms an important source of individual identity. Finally, it makes an empirical observation to the effect that 'the culture of most people living today is a national (or quasi national) culture'.[18]

Culture, in the relevant sense, is commonly assumed to include elements such as language, customs, lifestyle, and the like. This study suggests that territory, that is, a specific terrain as well as the concept of a national homeland, form a principal aspect of national culture and consequently of individuals' cultural identity.[19] Thus, at various central junctures of the overall argument, it advances the liberal nationalist argument from identity one step further in an attempt to reveal its territorial implications.

Finally, one further group of liberal arguments for the endorsement of nationalism concerns the latter's contribution to the ability of states to successfully pursue liberal-democratic values and goals. According to this mode of liberal-national argument, it is desirable that state citizenries share a common national identity in

order to generate the kind of human emotions and incentives necessary to uphold and maintain ideals and policies such as a democratic system of government, social justice, and even the physical protection of the liberal-democratic state in the face of external military threats.[20] While this last type of argument has little, if any, direct bearing on the specific project engaged in here, it is nonetheless part and parcel of the liberal national framework as a whole, and as such is noteworthy. The scholars who employ such arguments in their liberal defence of the national phenomenon do not employ them exclusively. Side by side with this last type of argument, they refer to and rely on further arguments which are more relevant to the project at hand. We shall therefore have occasion to revisit the works associated primarily with this last type of liberal nationalist argument as well.

1.2 Territorial Property and State Sovereignty

So far, I have stressed my reliance on the doctrine of liberal nationalism as a primary source of reference, and indeed as a background assumption, for my deliberations on territorial rights. Since the territorial demands made by nations are essentially a type of ownership claim, it seems natural to turn next to the liberal literature on property rights as a further source of insight on the issue at hand. Appealing to this source in connection with territorial issues is, however, by no means an obviously legitimate step to take.

Throughout this book, I refer to, and rely heavily on, ideas derived from this liberal tradition, most notably the work of John Locke. To Locke himself, the move from the defence of private property to the justification of national sovereignty appeared straightforward enough. Locke notoriously described the state as a voluntary association among individual property owners on whose pre-existing real-estate holdings the territorial jurisdiction of the state they formed and its limits were based.[21] Aside from various inconsistencies within Locke's own comments on this matter (some of which are addressed in the course of this book), this Lockean link between private property rights and state sovereignty has itself been fiercely criticized. It has been pointed out more than once that national claims to territory differ significantly from the individual property rights defended by early liberal thinkers, and that therefore the Lockean shift from the justification of the one to the grounding of the other is invalid.[22] Lea Brilmayer, for instance, points out quite rightly that: 'Territorial sovereignty and property ownership are not necessarily the same thing. It is possible for sovereignty to be vested in one entity's hands, while property ownership is vested in another's. For example, New York's purchase of property in Connecticut does not make New York sovereign over that land. Connecticut, not New York, possesses the right to tax and regulate the property'.[23]

Admittedly, we all know that property rights and state sovereignty are not the same thing, nor do they always go hand in hand. Individual members of nation *A* may have property rights to land which is under the jurisdiction of nation *B*. Moreover, nations themselves may own property, such as the buildings in which embassies

and consulates are situated, which are nevertheless under the jurisdiction of a foreign state. As important as this distinction is, however, we would be wrong to make too much of it as an obstacle to drawing on ideas taken from the realm of property rights in order to assess claims to national sovereignty. While sovereignty and property are indeed two distinct concepts, they are nevertheless intimately related enough to warrant the suspicion that whatever argument favours the one may have serious implications for the justification of the other as well. Though admittedly different notions, they are hardly irrelevant to each other. Once we get past the theoretical distinction and all the scholarly examples that might go with it, we soon find that in reality the two are closely connected in more ways than one.

First, property and sovereignty are two forms, or two aspects, of ownership rights. Property in our connection refers to the ownership of land, while sovereignty includes inter alia the right to make the laws concerning real-estate (as well as other) property. That is, at least one very important aspect of sovereignty is the overall control of property within one's jurisdiction. As Paul Gilbert puts it, the right of sovereignty (or as he calls it 'a right to jurisdiction') 'includes the right to decide what rights do go with property and which do not'.[24] So sovereignty rights are 'powers' in the Hohfeldian sense. They involve, among other things, the right to specify and govern all property arrangements within a given territory.

Since sovereignty includes this right to govern property laws, individual property owners will naturally have a vested interest in the governing body legislating for and overseeing property arrangements in a way that coincides with their conception of property rights and their own view on the appropriate use of resources. Laws governing property rights will normally include answers to questions such as who is entitled to bear such rights; what they include and what is excluded from them; the legitimate ways of exercising such rights; the limits of government intervention in privately owned property (e.g. taxation policies); the legally binding procedures for property transactions, and so on and so forth. The answers to these questions are essentially culture-dependent. To use an extreme example, property laws in the United States differ significantly from the property arrangements that would have prevailed had native Americans remained in control of North America. The differences in cultural attitude towards property will often be less stark, but they are nevertheless significant and widespread. Laws governing property, most notably those concerning real-estate property, reflect certain values and cultural attitudes and are designed accordingly so as to uphold a certain way of life. I shall say more about territorial arrangements and decisions reflecting culture and lifestyle in the seventh chapter dealing with the issue of national settlement. For now, suffice it to say that, to the extent that sovereignty rights have this cultural feature (and I think they unarguably do), it is plausible to view sovereignty as closely connected to, perhaps even as an extension of, property rights.

A second, and related, link between property and sovereignty rights in the national context concerns the protection of property and securing its endurance and full enjoyment. Securing property rights within a given territory – that is, assuring that the prolonged holding of individual ownership over land within it will prevail – may very well entail granting sovereignty rights over that territory to the group

whose members own property within it. As things stand today, practically all of the earth's territory is divided into states, each representing the culture of one (or more) national group, and each presiding and exercising sovereignty rights over territory. Under such circumstances, securing both the continued existence of one's property rights and their full enjoyment in light of one's cultural attitudes and lifestyle is strongly linked to the issue of national sovereignty.

It might be said in response that the sovereign body entrusted to uphold individual property rights need not be a cultural-national one, but could instead be some form of culturally unaffiliated 'handy state' that would serve to secure the property rights of all its citizens. Though this might be true in principle, the prospect of any state being totally culturally neutral in its attitude towards property arrangements is implausible. More to the point, I will assume throughout that, at least for the foreseeable future, territorial questions should be asked, and can be usefully answered, only within the framework of the existing world order. This also explains why I do not concern myself with the justification of national sovereignty as such, but rather assume that most nations possess such rights over some territory, and focus on establishing the just criteria for determining which nations should have sovereignty over what territory. Within this framework of nation states, we have no realistic option other than vesting sovereignty in a body which represents some culture(s) or another. Futuristic 'handy states' are not at present a pragmatic alternative. Nor do we possess the practical option of denying sovereignty rights altogether. At most, sovereignty rights might be severed from property rights so that the latter right over a given piece of land is granted to the individual members of one cultural group (i.e. nation), while the sovereignty over the said territory remains in the hands of another group. This is the case, for example, when American or Australian courts grant property rights over segments of land to members of their indigenous populations, while the sovereignty over those places remains in the hands of the larger state.[25] But such cases serve only to further emphasize the fact that property owners are often put at a disadvantage when these rights are not accompanied by sovereignty for their own cultural group, and thus lend force to my argument that the two rights are strongly connected. This last claim is easily substantiated by pointing to the vast amount of time it took these indigenous peoples to have their property rights even partially recognized, and the problems they encounter in any attempt at reconstructing their way of life within an overall alien culture. The ultimate destiny of those property rights lies in the hands of those who are sovereign over it, and who consequently control the first-order rules governing property.

The upshot is that, while property and sovereignty are distinguishable, ultimately they are related. This relationship naturally does not remove the obstacles faced by the Lockean view of states as the repositories for individual property rights and of state sovereignty (its justification and extent) as no more than a derivative of the former rights. Indeed, for all the references to property argumentation and to Locke himself throughout this book, none of its arguments entails the straightforward and unequivocal application of Lockean property arguments – or any other theory of property for that matter – to the national case.

Liberal theories of property, however, can, and should, supply us with food for thought on the unexplored issues of territorial entitlement. This is, indeed, the limited fashion in which they are employed here. They serve as an additional intellectual resource for considering territorial questions from a liberal perspective. Some of the basic liberal intuitions on the issue of private property and the liberal perception of the individual interests involved in property entitlement help to gain some insight into the interests which individuals have in attaining territorial sovereignty over particular territories for their national-cultural group. The connections pointed to here between private property and territorial sovereignty indicate that these two forms of ownership rights are so intertwined that the arguments originally formulated to protect property rights can be drawn on to shed some light on cases of national disputes over territory. Thus, the distinction between property and sovereignty, though intellectually illuminating, does not raise an impenetrable barrier between arguments concerning private property and possible justifications for territorial sovereignty. It certainly does not render implausible the attempt to borrow from the former in search of answers to the latter.

1.3 Method and Content

This book contains chapters of differing lengths, most of which are dedicated to examining different prototypes of argument which may potentially justify territorial domination. As indicated in the opening section, I deliberately draw on those arguments which are frequently enlisted by contemporary national groups in defence of their territorial claims. Such arguments, while varied, are nonetheless finite in number. Some arguments purporting to justify territorial acquisition, most notably discovery, were once especially popular but have since vanished from the territorial debate. I do not confront any such archaic arguments which have become obsolete.[26]

One further argument which is not addressed here, though it still has some contemporary following, is based on military conquest. Quite obviously, from any liberal perspective, the mere fact that a national group has succeeded in conquering another state's territory cannot serve as grounds for a moral right to the territory in question. As Allen Buchanan points out, 'it is hard to see how a genuinely liberal theory could justify conquest as a legitimate mode of acquisition … liberal theories by their nature take the problem of justifying the use of force very seriously. And among the justifications for the use of force they countenance the expansion of state territory is not to be found'.[27]

The arguments included here are presented in the six chapters following the next. First, Chapter 2 makes a general point concerning the nature of territorial rights and takes a stand in favour of viewing these rights as collective ones. This chapter can be overlooked by those who already accept this approach, and by those who are prepared to accept it for the sake of argument. Next come the first two substantive chapters (Chapters 3 and 4) which examine various historical arguments for

territorial entitlement. The first of these, Chapter 3, titled '"Historical Rights", is dedicated to two related versions of historical entitlement arguments, namely, (1) the claim that the national group in question was the first to occupy the territory it lays claim to, and (2) the more sophisticated claim that the territory in question played an important role in the history of the said national group. Next, Chapter 4 deals with territorial claims phrased in the language of corrective justice. Chapter 5 is an essential addition to the second edition of this book. It continues the theme of Chapter 4, on corrective justice, and considers the suggestion that the historical claims discussed in the previous chapters have been superseded by circumstances.[28] It also links the various historical dimensions of territorial claims, discussed in the preceding chapters, to the more contemporary and forward-looking interests in territorial entitlement, discussed in the following chapters. Chapter 5 forms a necessary bridge between arguments supporting historical entitlement, particularly those invoked in demands for territorial restitution and restoration, and between those arguments favouring the interests of current inhabitants who are, for whatever historical reason, currently in control of the territories in question. The latter, the more contemporary interests of current inhabitants, are addressed in Chapters 6 and 7. Chapter 6 questions the relevance of efficiency arguments to the issue of territorial right. Chapter 7, a rather lengthy chapter, attempts to establish a case for the moral significance of territorial settlement. Finally, Chapter 8 concerns principles of distributive justice and examines the egalitarian perspective on the issue of territorial entitlement.

There is a kind of internal logic to the ordering of these chapters as they proceed, in a sense, from past to future. In Chapters 3 and 4, I set out with arguments to the effect that certain historical events are entitling factors. Chapter 5 confronts the suggestion that such arguments regarding the past ought to be largely excluded from the debate, or at least that they ought not to be the source of much contemporary concern. This is followed in Chapters 6 and 7 by two arguments for territorial entitlement – efficient land use and national settlement – which primarily concern the interests of current inhabitants, those who are using a disputed territorial resource at present. The arguments advanced in these two chapters are most relevant, and lend greatest force, to the claims of the present occupants of a given territory. The final argument, presented here, in Chapter 8, is forward-looking in that it examines a proposal for territorial distribution which is closely linked to aspirations for future global justice in the allocation of territory.

Two methodological points are in order here. The first is that, as indicated in the previous section, this book does not question the legitimacy of territorial sovereignty in general, but rather assumes that the world is divided into territorially defined states. On an ideal level it is quite possible that no justification of any kind whatsoever can be given to the acquisition and exclusive holding of land by any particular sub-group of mankind. The boundaries of the present project, however, preclude this level of inquiry. The 'ideal' level of normative thought is a form of philosophical inquiry which is often kindly referred to as utopian, but, less kindly, may be regarded as science-fictional. As Joseph Raz and Avishai Margalit put it: 'Moral inquiry is sometimes understood in a utopian manner, i.e. as an inquiry into

the principles that should prevail in an ideal world. It is doubtful whether this is a meaningful enterprise'.[29] Whether or not this is so, there is a further reason for abandoning the ideal level of inquiry. Since utopian enterprises concerning global territorial arrangements have, oddly enough, been taken up by philosophers far more often than normative evaluations of existing territorial arrangements and conflicts, concentrating on the latter is of far greater urgency.

The normative level of inquiry pursued here is non-ideal in the sense that it confines itself to the state of affairs and practices of the world community as it is in reality. It presupposes the existing international framework in which the world is divided into states, each occupying a given territory more or less exclusively. Thus, it does not aim to supply a general justification (or rejection) of state sovereignty as such.[30] A proper examination of the issue of state sovereignty could fill up entire volumes, but it is not the topic of this one.[31] The latter concerns the justification of specific territorial borders solely within an existing framework comprised of sovereign states, none of which are culturally, or nationally, neutral. This, however, does not amount to an endorsement of the status quo. It does not entail a conservative attitude which regards state boundaries as more or less sacred. On the contrary, the primary objective is to question the justification of those boundaries. Existing global arrangements are presupposed precisely in order to enable a concentrated critical evaluation thereof without getting bogged down in what are perhaps desirable, but nevertheless very far off, proposals. This still leaves many normative questions open. Within the existing general arrangement whereby the control over territory is in the hands of states, each representing some national culture, what territory should belong to whom?

A second, and final, methodological point is that in discussing territorial *rights* I rely on Joseph Raz's definition of a right[32] in general and (as I shall elaborate on in the subsequent chapter) on his understanding of collective rights in particular.[33] Thus, in the case of each argument for a territorial right, much attention is focused on attempting to isolate the individual interest underlying the alleged right and on considering whether the interest in question is significant enough to justify the correlative duties involved in granting the desired territorial right. In keeping with my previous methodological point, the correlative burdens to be considered here will not be those associated with the fact of territorial sovereignty as such, but merely those involved in the acquisition and holding of a *particular* territory.

Grounding any concrete territorial right will often involve more than a single interest, as well as a vast array of contingent considerations concerning the competing interests and potential duties of others. For obvious reasons concerning analytical clarity, each discussion in the various chapters singles out and concentrates on one distinct type of territorial argument, usually representing only one aspect of individuals' interests in territory. Additionally, an analysis of these claims and related interests in the abstract, naturally cannot account for the multiplicity of contingencies and practical considerations, conflicting interests, etc. which present themselves in immense variety in all real-world cases of territorial strife. Thus, there is a definite limit to how far each justification goes towards establishing a free-standing *right* to territory.

No argument, when taken on its own, is intended as an independent and full justification for a territorial right. The main work that is done in each of the chapters is to make sense of one type of nationalist argument for territory, from a liberal perspective. If we bear in mind the interest theory of rights, this amounts, initially, to identifying the various individual interests which are at stake and, subsequently, attempting a normative evaluation of their respective merits and relative force. Once this has been achieved, the total outcome should supply a clearer picture of the considerations that ought to be borne in mind in assessing territorial conflicts, along with a clear indication of their relative levels of importance. The concluding section addresses the manner in which these various interests and considerations are intended to work in conjunction with each other.

Endnotes

1 Anthony D. Smith, *National Identity* (Reno, Nevada: University of Nevada Press, 1991), 70.
2 Anthony D. Smith, 'States and Homelands: the Social and Geopolitical Implications of National Territory', *Millennium: Journal of International Studies*, 10/3, 187–202, 187.
3 Hillel Steiner, 'Territorial Justice', in Percy B. Lehning (ed.) *Theories of Secession* (London and New York: Routledge, 1998), 60–70, 64.
4 David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), Chapter 1, 1–2.
5 E.g.: Allen Buchanan, *Secession – The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Colorado and Oxford: Westview Press, 1991); Lea Brilmayer, 'Secession and Self-determination : A Territorial Interpretation', *Yale INT L.J.* 16 (1991), 177; Margaret Moore (ed.) *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998); David Miller, 'Secession and the Principle of Nationality', in *Rethinking Nationalism*, Jocelyn Couture, Kai Nielsen and Michel Seymour, eds. (Calgary, Alberta: University of Calgary Press, 1998), 261–282; and in Moore, *National Self-Determination and Secession,* 62–78, and in David Miller, *Citizenship and National Identity* (Oxford, Cambridge and Malden, MA: Polity Press, 2000), Chapter 7, 110–124; Joseph Raz, and Avishai Margalit, 'National Self-Determination', *The journal of Philosophy* 87 (1990), 439, and in: Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 125–145 (which, despite its title, basically presents a theory of secession); and Percy B. Lehning (ed.) *Theories of Secession* (London and New York: Routledge, 1998).
6 These include anything from the demands of aboriginal peoples in Western states, which are not necessarily secessionist in nature, to the conflicting demands of Serbians and Albanians to Kosovo. Even the Israeli-Palestinian dispute is not strictly (i.e. legally) speaking a matter of secession.
7 This, for instance, is the approach I attribute to Margaret Moore, in 'The Territorial Dimension of Self-Determination', in Margaret Moore (ed.) *National Self -Determination and Secession* (Oxford: Oxford University Press, 1998).
8 Cf.: Margaret Moore, *The Ethics of Nationalism* (Oxford and New-York: Oxford University Press, 2001), 195–196, where she goes some way towards modifying her previous view expressed in Moore, 'The Territorial Dimension of Self-Determination'.
9 For the idea that morally valid views are plural, and that two reasons for this may be: first, attributing different weight to various conflicting moral values, and, second the unpredictability of the future, see: Isaiah Berlin, *The Crooked Timber of Humanity – Chapters in the History of Ideas* (London: Henry Hardy ed., Fontana Press, 1990), Chapter 1, 'The Pursuit of the Ideal', 1–19, 12, 14, 17.

10 Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), 7. For the original description of liberalism as a family of ideas, see: Jeremy Waldron, 'Theoretical Foundations of Liberalism', *The Philosophical Quarterly,* 37/147 (April 1987), 127–150, 127.

11 As of the last few years, liberal nationalism's neglect of territorial issues is, admittedly, not altogether without exception. See: David Miller, *Citizenship and National Identity*,esp. Chapters 7 and 8. In particular, Miller's analysis of nationality in divided societies sheds light on some difficult territorial questions in a way that no other theoretical account of liberal nationalism had done before. See also: Moore, *The Ethics of Nationalism*. Part two of this book deals specifically with land, though in keeping with the author's previous work it concentrates almost exclusively on secession. An exception to this can be found in Chapter 7, which follows up her previous work in: Moore, 'The Territorial Dimension of Self-Determination'. More recently, see: Chaim Gans, *The Limits of Nationalism*. Chaim Gans, *A Just Zionism – On The Morality of the Jewish State* (New York: Oxford University Press, 2008). Specifically regarding Israel and the Palestinians, though with much further theoretical implications to other disputes. I refer to the works of all three authors extensively throughout this book. Notwithstanding such limited references to territory within liberal nationalism, alongside the more common attention focused on the very specific issue of secession, this doctrine still lacks any kind of complete and systematic study of territorial issues which, I maintain, ought rightly to be at the very center of any adequate theory of nationalism. Two important exceptions to the lack of systematic focus on territory within the literature have immerged since this book was first published in 2005, and were mentioned in the preface to this second edition: Cara Nine, 'A Lockean Theory of Territory', *Political Studies*, 56/1 (March 2008), 148–165; Cara Nine, 'Superseding Historical Justice and Territorial Rights', *Critical Review of International Social and Political Philosophy (CRISPP)*, 11/1 (March 2008), 79–87; And: Avery Kolers, 'The Territorial State in Cosmopolitan Justice', *Social Theory and Practice*, 28/1 (January 2002), 29–50; Avery Kolers, *Land, Conflict, and Justice – A Political Theory of Territory* (Cambridge: Cambridge University Press, 2009).

12 Chaim Gans, *The Limits Of Nationalism*; Chapter 1, esp. 28–29. Neil McCormick, 'Liberal Nationalism and Self-Determination', in D.M. Clarke and Ch. Jones (eds.) *The Rights of Nations – Nations and Nationalism in a Changing World* (Cork: Cork University Press, 1999), Chapter 3, 65–87, 76–77; Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), most notably in Chapters 2 and 3; David Miller, *Citizenship and National Identity*, Chapter 2.

13 For examples of this brand of 'liberal nationalist' arguments see e.g. McCormick, 'Liberal Nationalism and Self-Determination', and Tamir, *Liberal Nationalism*; though both contain other forms of arguments as well.

14 Chaim Gans, 'The Liberal Foundations of Cultural Nationalism', *Canadian Journal of Philosophy*, 30/3 (September 2000), 441–466, 441; Gans, *The Limits of Nationalism*, Chapter 2.

15 The most well-known author of this type of argument is probably Will Kymlicka, *Liberalism Community and Culture* (Oxford: Clarendon Press, 1989); *Multicultural Citizenship: A Liberal theory of Minority Rights* (Oxford: Clarendon Press, 1995).

16 Kymlicka in effect dedicates much of *Multicultural Citizenship* to answering this critique which applies to his earlier *Liberalism, Community and Culture.* Gans, 'The Liberal Foundations of Cultural Nationalism', 443, cites many critics of this liberty-based argument for nationalism. See also: Gans, *The Limits of Nationalism*, 40–43, esp. 41. He mentions Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture', *Social Research* 61 (1994), 491–510, 504; Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative', *University of Michigan Journal of Legal Reform* 25 (1992), 751–793; John Danley, 'Liberalism, Aboriginal Rights and Cultural Minorities', *Philosophy and Public Affairs* 20 (1991), 168–185, 172.

17 Gans, 'The Liberal Foundations of Cultural Nationalism', 445–448, and *The Limits of Nationalism*, Chapter 2, constructs an independent defense of 'liberal nationalism' based on this second argument concerning identity, side by side with his discussion and critique of the first.

Yael Tamir, *Liberal Nationalism,* on the other hand, uses both arguments almost interchangeably (see e.g. pp. 35–36), as do Raz and Margalit in their 'National Self-Determination'.

18 Gans, 'The Liberal Foundations of Cultural Nationalism', 446; *The Limits of Nationalism*, 40. Margaret Moore presents an identity-based argument for national rights in Moore, *The Ethics of Nationalism*, Chapters 2 and 3.

19 As Moore has recently pointed out: '…a normative theory of nationalism should consider the constitutive elements of people's identities, and this may include the role played by the group's conception of their homeland, and the bonds of attachment to territory that they feel'. Moore, *The Ethics of Nationalism*, 176. However, she does not attribute a sufficiently prominent place to territory amongst the various components of collective national culture and personal identity, and consequently fails to pursue this observation to the extent and depth that it deserves.

20 See (in the following order): John Stuart Mill, *Representative Government*, in Geraint Williams (ed.) *Utilitarianism, On Liberty, Considerations On Representative Government, Remarks On Bentham's Philosophy* (London and Vermont: Everyman, 1993), 188–428, Chapter 16; David Miller, *On Nationality* (Oxford: Clarendon press, 1995); Yael Tamir, 'Pro Patria Morti! – Death and the State', in Robert Mckim and Jeff McMahan (eds.), *The Morality of Nationalism* (Oxford and New-York: Oxford University Press, 1997), 227–241; Margaret Moore, *The Ethics of Nationalism*, Chapter 4: 'Instrumental Arguments (Or, Why States Need Nations)', 74–101.

21 John Locke, *Two Treatises of Government.* Peter Laslett (ed.), (Cambridge: Cambridge University Press, 1960) (1690), II, Chapter 5.

22 For a variety of recent criticisms of Locke on the grounds of overlooking the distinction between private property and national sovereignty and for the consequent flaw in his swift move from one to the other, see: Paul Gilbert. *The Philosophy of Nationalism* (Oxford: Westview Press, 1998), 102–104; Allen Buchanan, 'Boundaries: What Liberalism has to Say' in Allen Buchanan and Margaret Moore (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge, UK: Cambridge University Press, 2003), 231–261; Lea Brilmayer. 'Consent, Contract, and Territory', *Minnesota Law Review* 74/1 (1989), 1–35, 14–15. For a more general objection to the analogy between private property and state sovereignty, see: Moore, *The Ethics of Nationalism*, 166.

23 Brilmayer, 'Consent, Contract, and Territory', 15.

24 Gilbert, *The Philosophy of Nationalism,* 102–103.

25 Ross Poole, 'National Identity, Multiculturalism, and Aboriginal Rights: An Australian Perspective', in: Jocelyn Couture, Kai Nielsen and Michel Seymour (eds.) *Rethinking Nationalism* (Calgary, Alberta: University of Calgary Press, 1998), 407–438, 427, in reference to the case of *Mabo vs. Queensland*.

26 Thomas Baldwin mentions this outdated territorial claim in 'The Territorial State' Hyman Gross and Ross Harrison (eds.) *Jurisprudence – Cambridge Essays* (Oxford: Clarendon Press, 1992), Chapter 10, 207–230, 209. He also quotes Rousseau, in whose time this justification was still prevalent and who mockingly rejected it as a justification for territorial acquisition in the so-called 'new world'. See: Jean Jacque Rousseau, *The Social Contract and Discourses* (London and Vermont: Everyman, 1993), Book I, Chapter 9, 197.

27 Allan Buchanan, 'Boundaries: What Liberalism has to Say' in: *States, Nations, and Borders: The Ethics of Making Boundaries*, 231–261. Notwithstanding this, Buchanan suggests that some exception to this can possibly be made under highly constrained circumstances in the name of pre-emptive self-defence which might, in exceptional circumstances, justify the forcible taking of territory for the purpose of incorporation.

28 I am referring of course to Jeremy Waldron's "Supersession Thesis": Jeremy Waldron, 'Superseding Historic Injustice', *Ethics*, 103 (October 1992) 4–28, esp. pp. 20–28. Jeremy Waldron, 'Redressing Historic Injustice', *University of Toronto Law Journal*, 52/1(Winter 2002), 135–160. Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy', *New Zealand Journal of Public and International Law,* 1 (2003), 55–82. Jeremy Waldron, 'Settlement, Return and the Supersession Thesis' *Theoretical Inquiries in Law*, 5/2 (July 2004), 237–268.

29 Joseph Raz and Avishai Margalit, 'National Self-Determination', in Raz, *Ethics in the Public Domain*, 125–145, 125.

30 Cf: Thomas Baldwin, 'The Territorial State', in Hyman Gross and Ross Harrison (eds.) *Jurisprudence – Cambridge Essays*, 209: 'if some political societies have territories, then, given the finite area of land available, all had better have them', and this is assumed to be the case regardless of the fact that the initial premise remains to be justified.

31 For a taste of the vast literature which does deal directly with the question of justifying state sovereignty (for and against) and its extent, as well as with some of its other aspects, see: Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995); Joseph A. Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Hants (England) and Vermont: Edward Elgar Publishing, Ltd., 1992); Sohail H. Hashami (ed.) *State Sovereignty – Change and Persistence in International Relations* (Pennsylvania: The Pennsylvania State University Press, University Park, 1997); Marianne Heiberg (ed.) *Subduing Sovereignty – Sovereignty and the Right to Intervene* (London: Pinter Publishers, 1994); F.H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1996); John Hoffman, *Sovereignty* (Buckingham: Open University Press, 1998); Charles Jones, *Global Justice – Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999) Chapter 8, 203–226; Stephen P. Krasner *Sovereignty – Organized Hypocrisy* (Princeton: Princeton University Press, 1999); Gene M. Lyons and Michael Mastanduno (eds.) *'Beyond Westphalia?' – State Sovereignty and international intervention* (Baltimore and London: The John Hopkins University Press, 1995); Cynthia Weber, *Simulating Sovereignty – Intervention, the State and symbolic Exchange* (Cambridge: Cambridge University Press, 1995). Most interesting, especially for liberal-nationalist theory, is: Chaim Gans, *The Limits of Nationalism* (CUP 2003) mentioned above.

32 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 166; Joseph Raz, 'On the Nature of Rights' *Mind,* 93 (1984) 194–195. ' "X has a right" if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.

33 Raz, The Morality of Freedom, 207–209.

Chapter 2
Collective Rights

In order to proceed with the evaluation of territorial rights it is first necessary to address one further prefatory theoretical matter: the classification of such rights as either individual or collective. As will soon become apparent in Chapters 3 and 4, this issue is particularly relevant to those nationalist claims which rely on historical arguments of various kinds, and most notably to the issue of the possible transmission of territorial rights from one generation of nationals to the next.

Classifying these so-called national 'historical rights' to territory as collective or individual is naturally related to the wider question of classifying national rights in general, and national territorial rights (whatever their justification) in particular. This short chapter suggests that nations' territorial rights must be understood as collective rather than individual. This argument relies largely on Joseph Raz's theory of rights in general and collective rights in particular.[1] But it also involves more substantial reasoning about the way we normally view such rights, as well as about the way we ought to view them from a liberal nationalist perspective.

2.1 National Rights as Collective Rights

The most widely held background theory of collective rights, specifically national rights, in the Relevant literature to date, is undoubtedly Joseph Raz's account thereof. Raz's starting point on the issue of rights is his interest theory, according to which: '"X has a right" if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'[2] When addressing the issue of collective rights, Raz explains that: A collective right exists when the following three conditions are met: (1) It exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty; (2) The interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group; (3) The interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.[3]

T. Meisels, *Territorial Rights,* Law and Philosophy Library, 72
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Raz applies his three-tier definition to several cases of collective rights, most notably that of national self-determination. Keeping his third condition in mind, he explains that: 'Whereas a person does not have a right to the self-determination of the community to which he belongs, nations do have such rights'.[4] In view of what has been said so far, the reason for this is obvious: '…though many individuals have an interest in the self-determination of their community, the interest of any one of them is an inadequate ground for holding others to be duty-bound to satisfy that interest'.[5] And the same would go, presumably, for the kind of collective right which concern us here, namely, national territorial rights.

In his later work titled 'National Self-Determination', Raz remains faithful to this concept of collective rights. Throughout, he refers to national self-determination as a right belonging to groups rather than to their individual members, while at the same time emphasizing that the justification of the right is based in the interests of those individual members.[6]

Admittedly, Raz's account of collective rights has been the focus of some criticism, most recently by Peter Jones and Denise Reaume. Both maintain that Raz's understanding of group rights is somewhat too generous, and each attempts to reformulate the notion of 'collective' or 'group' rights so as to narrow its application to a specific sub-set thereof.[7]

Reaume's central dispute with Raz revolves around Raz's second condition for the establishment of a group right, that is, the requirement that the right in question be based on individual interests in a public good. Reaume argues that the term "group rights" ought to be reserved exclusively for those cases in which the grounding interest is not only in some public good but also in a specific sub-set of public good which she dubs 'participatory goods'.[8] These are goods which contain some aspects that can be enjoyed only publicly. Their public and participatory nature is part of what is good about them.[9] As she puts it: 'their value lies in the publicity of either or both production and consumption.'[10] These include, on Reaume's own account, cultural, linguistic and religious rights, all of which have at least some communal (joint) aspects which set them apart from public goods such as clean air, which can in principle be enjoyed separately and therefore should, according to Reaume, be the basis for individual rights rather than collective ones.[11]

It is safe to assume that national territorial rights would definitely fall under Reaume's sub-category of public goods. As for Jones' critique of Raz, it too, even if justified, does not hinder the reliance on Raz's conception in connection with territorial rights. Nevertheless, I will say a few words about it here. Briefly stated, Jones' objection to Raz's conception of collective rights is that, in keeping with its formulation, any large enough set of individuals who happen to share a significant interest at any point in time (e.g. city cyclists), while sharing nothing else in common other than this interest, can qualify as a 'group' for the purpose of attaining so called 'collective' rights.[12] In contrast, Jones maintains that "group rights" should be reserved only for those cases in which the grounding interest is of a social and interdependent kind, i.e., to cases in which there genuinely is a pre-existing group with more in common than merely an accidental common interest.[13] This narrower conception of group rights would still include cultural rights of various kinds, and

therefore also national rights. Jones' criticism, then, like Reaume's, does not prevent the use of collective terminology as regards national rights.

Aside from this, though, it is doubtful whether Jones' critique of Raz is sustainable in any case. As he himself admits (though only in a footnote), Raz's three components of a collective right (cited above) repeatedly emphasise that the interests involved in grounding a collective right must be 'the interests of individuals *as members of a group'*.[14] Thus the phrase 'as members of a group' is presumably intended as a prerequisite for collective entitlement.[15] Jones takes this phrase 'to refer to membership of the group identified by its shared interest in the relevant public good'.[16] And he goes on to state that he (Jones) 'cannot see how, given his general conception of rights, Raz could justifiably restrict collective rights to groups that are distinguished as groups by some feature that is independent of the interest that grounds their rights'.[17] But in fact, it is difficult to see how Raz can seriously be understood in any way other than as restricting the scope of collective rights to those groups with distinguishing features aside from their shared interest. This is primarily because we are faced with this repeated 'members of a group' clause, as in: 'The interests in question are the interests of individuals *as members of a group* in a public good and the right is a right to that public good because it serves their interest *as members of the group*',and in: 'The interest of no single *member of that group* in that public good is sufficient by itself to justify holding another person to be subject to a duty.'[18]

Furthermore, Jones' interpretation of Raz is questionable in light of the examples Raz chooses to illustrate the type of right he has in mind. Most specifically, Raz's elucidation of the concept of collective rights is followed immediately by the case of national self-determination, presumably indicating his intentions concerning the appropriate application of his theory.[19] Thus, although Jones may have, at most, succeeded in pointing to an unfortunate, theoretically ambiguous formulation of one of its requirements (possibly requiring Raz's tightening his definition of a 'group'); he has far from discredited the essence of Raz's thesis. Neither Jones' nor Reaume's critiques of Raz impedes the present classification of territorial rights as collective, in any way. The following section considers the alternative approach, classifying national rights as individual rights, and argues that while this view is most attractive from a liberal perspective, nonetheless, regrettably, it cannot be sustained.

2.2 National Rights as Individual Rights

Israeli philosopher Yael Tamir, who has written extensively on the issue of nationalism and national rights, holds to this opposing view, according to which the appropriate way of defending what are commonly referred to as collective rights is by interpreting them as rights granted to individual members of a collective.[20] In fact, Tamir is one of the theorists most identified with this view, which underlies much of her renowned work on nationalism. In Tamir's view, all so-called collective rights should be perceived as rights bestowed on *individuals* as members of a collective

rather than rights granted to the collective as a whole.[21] Addressing the type of political rights and policies that can be justified by liberal theory, Tamir describes liberalism, and accordingly her theory of liberal nationalism, as 'structured around the assumption of ethical individualism, stating that "the only way to justify any social practice is by reference to the interests of those people who are affected by it".[22]

There is no argument here as to the moral priority of the individual. This is a liberal given. All sides to this debate take individuals' interests as their starting point.[23] It is widely believed, however, that certain individual interests would best be served by granting rights to collectives. Quite obviously, territorial entitlement is a particular instance of what are usually referred to as collective rights. From a liberal point of view which attributes ultimate value to the individual, a theory whereby even national territorial rights are considered to be individual rights certainly has initial appeal. Nevertheless, the suggestion that we view national rights as individual rights cannot be substantiated. Tamir's specific individualistic approach to national rights is problematic primarily (though not exclusively) for technical methodological reasons. It is problematic because, she sets out with Raz's interest theory as her starting point but ultimately dissents from his theory of collective rights.[24] This move involves her in an inconsistency since a collective approach to national rights is a natural derivative of the interest theory. As this is not an obvious point, it is necessary to spell it out in some detail.

Tamir presents many interesting arguments in support of her view.[25] At one point, she suggests that collectives, such as cultural-national groups, may not be agents *capable* of bearing rights,[26] and she is not alone in questioning whether they can (and should) qualify as right-holders. Others, such as Michael Hartney, have also questioned the assumption that *moral* (as opposed to legal) rights can inhere in collectives as such.[27] Hartney's objection to collective rights claims is largely grounded in his belief that the use of this terminology is unnecessary and can lead only to confusion and moral mistakes. Like Tamir, he recognises the significance of various communities for the well-being of their individual members, as well as the importance of their protection for that very reason. However, he too argues that this can be achieved by granting individuals, rather than groups, certain moral rights, such as a right to the preservation and protection of their community.[28] Chandran Kukathas takes a similar view when he asks 'Are There Any Cultural Rights?' and answers in the negative.[29] Kukathas maintains that the interests which concern defenders of cultural rights can be sufficiently protected by traditional liberal individual rights, such as freedom of association (including of course the option of disassociation) and freedom of religion.[30] Later in this chapter, I will argue that the essence of national territorial rights in particular, cannot be captured by individualist terminology.

The more general conceptual objection to the very possibility of regarding various collective (non-human) entities as potential right bearers will not be addressed here. For one thing, Tamir's conceptual critique of collective rights may be misplaced as far as Raz's particular approach is concerned. Jones maintains that opposition to group rights based on the denial of moral standing to anyone other than individual adult persons does not apply to Raz's collective conception of group rights. Jones points out that when people ask whether a group *can* bear rights 'often that

question is asked of groups in the way it is asked of infants or fetuses or animals or species or the dead or future generations. Questions of who or what can have rights are usually raised against a background assumption that rights can be possessed, un-controversially, by "persons" – that is, adult human beings in full command of their faculties…' The issue, then, is whether entities other than persons can possess rights. With reference to Raz's conception of collective rights, Jones remarks: 'The collective conception does not require us to ascribe moral standing to a group separately from the moral standing we ascribe to its members severally'.[31] So the type of theoretical problem Tamir points at would, on this account, never arise at all. This, following Jones, is because the rights Raz speaks of are totally grounded in interests held severally by individual group members.[32]

Be that as it may, it is in any event widely accepted by many contemporary liberal thinkers that there is such a thing as collective, or group, rights, and that this terminology expresses a coherent concept.[33] In the territorial connection it is likely that the plausibility of the collectivist approach to group rights is grounded not so much in a direct justification for the alleged ability of collectives to bear rights, but rather in our inability to do without the concept of collective rights. A close examination of Tamir's thesis reveals that abandoning the terminology of collective rights is impossible so long as we wish to hold on to the interest theory of rights, or anything like it.[34]

2.3 Individual Territorial Rights

The problem immediately encountered by anyone trying to define territorial rights and, for that matter, many other national rights, as individual rights, while at the same time basing that definition on the interest theory, is: what exactly does it mean for a single individual to hold such a right? Does it mean, for example, that an individual Jew holds a right to collective goods such as the formation of a Jewish state? Or that an individual Native American has a right to hunting grounds? Take the example of aboriginal land rights. It is not clear how such rights could be granted to individuals. What would this mean? Could it mean that a single individual would have such a right even if demanding it alone? On Raz's account of rights, we would say that a single individual's interest in such lands or in hunting grounds could not justify placing the relevant burdens on the rest of North American society. Indeed, according to Raz himself, the individual does not hold such a right (though he may have an interest in such public goods), and so these problems never arise to begin with. Tamir, on the other hand, having forced herself into this very difficult position, finds herself with a need to explain.

In several publications, in which she attempts to answer Raz, Tamir tries briefly to show how her thesis ought to be implemented. After reviewing his argument (according to which a right that entails holding many people under far-reaching duties must be seen as a collective right, since no single individual's interest can justify these correlative duties), she argues in effect that Raz's premise does not entail

his conclusion. In other words, the fact that realizing such a right would impose unjustifiably far-reaching duties on many others should not prevent us from recognizing that individuals hold such rights.[35] This, according to Tamir, is because most rights can be realized at different points along a continuum. Thus, for instance:

> The practice of a national culture … can be realized at different points along a continuum, from the right of individuals to do whatever they can on their own, all the way to the establishment of national autonomy. It would then be enough to claim that the balance between costs and benefits should determine when, and to what extent, one should seek to realize this right, but this holds true of every right.[36]

Tamir's argument relies on a distinction 'between matters of principle and matters of policy', as she puts it. As a matter of principle, rights that are meant to protect the interests of individuals are individual rights; as a matter of policy, a decision to support individuals in exercising their rights which places considerable obligations on others, may be justified only if there is a certain threshold number of beneficiaries.[37] 'Hence, the size of the group deriving benefits from a particular policy may influence the prospects of its implementation: the larger the number of individuals who will benefit from the implementation of a right, the stronger the justification to burden others with the costs entailed by this implementation.'[38]

Tamir's suggestion is very interesting, and would in fact enable us to view "collective rights" as individual ones. However, it remains totally unclear how the application of her suggestion to what are usually conceived of as collective rights to public goods can be compatible with Raz's definition of a right. Tamir proposes in effect that we view a right not as an interest which necessarily justifies placing particular duties on others, but rather as a general category of interests, some of which justify correlative duties while others do not. In general, this category of interests is important enough for Tamir to consider them as giving rise to a right. But, in particular, the realization of some of these interests might place unreasonably demanding burdens on others, and therefore should not be realized. Plainly, Tamir does not deny the cost-benefit factor which characterizes the interest theory. However, she argues that these considerations should be set into motion only at the point of realizing the right in question rather than at the point of determining whether or not the right exists. But for Raz the cost-benefit factor is already built into the definition of a right.

This difference between Raz and Tamir is no small semantic matter. It seems that, according to Tamir, when we claim that *X* has a right to *Y*, *Y* should not be understood as an interest that necessarily justifies holding others to be under the relevant duties. *Y* should rather be understood as a general category of individual interests placed along a continuum that ranges all the way from interests whose realization would place few burdens, if any, on others and should therefore be realized, all the way to interests whose realization would indeed place far-reaching duties on others and therefore should not be realized unless they are shared by many individuals. So, while in practical terms it seems that Tamir has arrived at the same conclusion as Raz, actually the difference is significant. According to Raz, those points on Tamir's continuum at which the individual interest does not justify placing heavy burdens on others is, by definition, a point of 'no right', whereas Tamir's view leads to the

conclusion that these are points on the continuum at which an individual has a right, but that he should not be assisted in realizing it because its realization places unjustifiably heavy burdens on others.

Furthermore, contrary to Tamir's claim in the section cited above, the way she presents things is most definitely not what 'holds true of every right'[39] at least not according to the interest theory. In keeping with Raz's theory, when we say that *X* has an individual right but that he is unjustified in exercising it and that we therefore should not assist him in doing so, we are not saying that his interest does not justify placing the relevant burdens on others; if this were so, he would not have a right to begin with. What we are saying in such cases is that, although his interest is of such importance that it justifies placing far-reaching duties on others, we would not endorse his exercising this right because of its negative consequences to others. Tamir is, of course, correct in claiming that individual rights are not necessarily ultimate. But then, those cases (or points along Tamir's continuum) in which it is no longer justified to place the relevant burdens on others in order to realize the interest in question are, by definition, outside the boundaries of that right. They are points at which the individual no longer can be said to have that right. It is this that holds true for all individual rights, and not that they all exist along a continuum so that at some points we might say that *X* has a right even though it doesn't justify placing the correlative duties on others.

Note also that while we may condemn, and refrain from assisting, a right holder for trying to realize her right in a way harmful to others, the decision whether or not to exercise his right in this way is at her discretion. This is an additional reason why the difference between Tamir's view – whereby if the realization of a right places too heavy a burden on others it should not be realized – and Raz's view – whereby an interest which doesn't justify placing the relevant duties on others does not constitute a right – is of major importance. Moreover, when discussing national self-determination Raz specifically addresses the possibility of groups exercising their rights in ways which are irresponsible and morally wrong due to their lack of consideration for the interests of others, thus distinguishing such cases from those in which the burdens placed on others are such as to negate the very existence of the right.[40]

But the main problem remains the one pointed to earlier. Raz's definition of a right simply does not lend itself to the possibility of defining national rights, most definitely including territorial rights, in the way that Tamir suggests. Based on the interest theory, those points along Tamir's continuum at which the individual's interests do not justify the correlative obligations are points at which the individual in question has no right at all. Raz's interest theory is intended to be applied as a two-step definition. In the first stage, one must identify the interest in question and establish whether it is a significant interest, that is, whether it is the kind of interest that could, in principle, give rise to a right (as opposed to some frivolous interest such as, let us say, one's interest in becoming a millionaire). But, contrary to what is implied by Tamir's explanation, this is not in itself enough for an interest to establish a right. In the second stage, it is still incumbent on us to show that this interest constitutes a sufficient reason for imposing the relevant duties on others. In contrast,

on Tamir's account, 'as a matter of principle', all one has to show in order to make the claim that *X* has a right is that *X* has an interest worthy of protection. If this is so, then it is possible that some of these rights (such as an individual's right to national self- determination, or at least to certain forms of it, or an individual's 'right' to his nation's historic territories, etc.) will not justify placing the relevant burdens on others. This, however, is clearly inconsistent with the interest theory.

2.4 Collective Territorial Rights

So far, all I have attempted to show is that Tamir's classification of national rights as individual rights is incompatible with the interest theory. I have argued that, if we set out with the interest theory of rights, or anything resembling it, as our understanding of what it means to have a right, then we must necessarily arrive at the conclusion that national rights (including territorial rights) are collective.

However, the argument for the collective nature of territorial rights does not rely solely on the merits of the interest theory. It also involves other philosophical accounts of the nature of territorial rights (which, while individualistic, are very different from Tamir's), as well as more substantial reasoning concerning the way we normally view such rights, and the way they ought to be viewed from a liberal-nationalist perspective.[41]

One well-known individualistic (or at least seemingly individualistic) approach can, of course, be found in John Locke's *Second Treatise of Government*.[42] According to Locke, states' territorial rights are established through the consent of individual property holders to incorporate and settle together.[43] Locke also firmly believed in the inheritance of those territorial rights which, as indicated by the above, were generally perceived by him as individual property rights.

Much later in *The Second Treatise of Government* Locke argues that: 'the inhabitants of any country who are descended and derive a title to their estates from those who are subdued, and had a government forced upon them against their free consent, retain a right to the possessions of their ancestors'.[44] Paul Gilbert points out that 'Locke based his argument on the assumption that people inherit the property rights of their progenitors', and he proceeds to briefly criticize various aspects of this assumption in the territorial connection.[45] Two of Gilbert's critical points are noteworthy here. According to the first, 'this assumption would scarcely do in the case of Indians for whom the ownership of property is customarily collective rather than individual'.[46] In other words, not all groups making territorial claims hold property individually. Second, what is more closely related to the topic at hand, Gilbert draws our attention to the distinction I addressed in the introductory chapter between property rights on the one hand – which in most cases are held individually – and rights to territorial sovereignty on the other.[47] Locke infamously blurred the two, as he saw the latter as arising and deriving its justification from a voluntary association among individuals possessing the former right.

A closer examination of Locke's text, however, reveals that he is not totally faithful to this individualistic view, or at least that he is unwilling to commit himself to

some of the conclusions it might entail. Locke's theory appears to leave room for a form of collective entitlement to land which we more commonly associate with nations and states. After establishing the legitimacy of acquisition of land which lies 'in common' through labour, Locke restricts his argument so that it does not apply within the boundaries of already established states. In Locke's own words:

> land that is common in England or any other country ….no one can enclose or appropriate any part of without the consent of all his fellow commoners; because this is left common by compact; i.e. by the law of the land, which is not to be violated. And though it be common in respect of some men, it is not so to all mankind, but is *the joint property of this country or this parish*.[48]

Admittedly, despite the above, one might argue that, according to Locke, individually owned property is not joint in any sense, and that any state property is justified only on the basis of individuals' consent to conjoin their privately owned land with that of others. However, as Hillel Steiner points out with reference to Locke's theory of entitlement to land, viewing nations' territorial entitlements as merely the aggregate of its individual nationals' property holdings would yield the right to secession, even individually or by small groups, whereas 'Locke himself balked at embracing this conclusion'.[49] Steiner points this out with astonishment and condemnation of Locke's conclusions. According to Steiner, the endorsement of a right to secession 'is very clearly implied by his [Locke's] principles, yet Locke refuses to recognize this for reasons which remain mysterious'.[50]

Are these reasons really so mysterious? Locke is quite explicit on this issue. While Locke views individuals as free to leave the society in which they were born and or reside, he indeed clearly negates the possibility of individuals leaving a commonwealth and taking their territorial property with them. Though individuals are in possession of their privately owned land, still it is under the jurisdiction of the government of a particular commonwealth in a way that renders the enjoyment of that property contingent on membership in the society in question.[51]

In an article titled 'The Territorial State', Thomas Baldwin also comments critically on this aspect of Locke's theory of territorial entitlement. Baldwin draws our attention to this same point in Locke, according to which: 'although those who have rightly acquired (for example by inheritance) an estate within the territory of a political society can emigrate to join another political society, they cannot alienate the estate that they acquired and incorporate it within the territory of their new political society. The original act of incorporation of the estate is supposed to bind that patch of land indissolubly within the jurisdiction of the political society within which it is incorporated.'[52] Thus, Baldwin states that 'Locke's political societies should be taken to have territories'.[53] And, I would add in our connection, that they should be taken to hold these territories as a collective. Baldwin, however, adds that 'this is not a consequence of Locke's definition of a political society itself, but only of that definition in conjunction with Locke's other assumptions'; and he goes on to argue that 'these assumptions do not warrant the territorial implications Locke draws'[54] (i.e. those anti-secessionist implications discussed above). Locke's aforementioned thesis on the inseparability of land from the jurisdiction of the political society within which it is incorporated does not, according to Baldwin, 'follow from his natural law premises and his accounts of the origins of political society, since

this is supposed to protect antecedent property rights, and not to limit them in the way Locke actually proposes'.[55]

While Steiner and Baldwin's particular criticisms of Locke may have their points, there is no *necessary* inconsistency involved in adhering to such a dual theory of property rights. On the one hand, private acquisition is recognized as legitimate and, in fact, as forming the very basis for collective, national entitlement. On the other hand, once such a collective has been formed, individual rights to territory exist only within the framework of that collective jurisdictional body which, in turn, protects and upholds the former rights. These latter rights are roughly what we would refer to today as sovereignty rights. So Locke may not be a total individualist when it comes to territorial rights after all.[56]

Whether or not we accept a dual construction of territorial rights of the kind attributed here to Locke, we must admit that this is much more like our common, everyday conception of the possession of land than is the extreme individualistic approach that Steiner suggests. On the one hand, we perceive ourselves as having private real-estate entitlements within states. On the other hand, we claim collective national territorial rights, that is, sovereignty rights, for our states. Whether ultimately justified or not, the demands for territorial rights to be considered throughout this book are not individual real-estate claims: at least, they are not perceived as such by those who raise territorial demands. Thus, for example, in analysing an Australian court case in which aboriginal inhabitants were demanding compensation for lost lands, Ross Poole distinguishes between the recognition of property rights enjoyed by members of aboriginal communities over various portions of the Australian continent (rights recognized by the Australian court), and community rights to political and legal sovereignty over land (which has not been established by the courts).[57] While the former are individual rights, the latter – though in a sense including, and perhaps even based on, the former – can nonetheless still be described as collective, as more than the sum total of the former rights. I do not see that Locke's theory necessarily excludes such a possibility.

Steiner himself is perhaps a better representative of the purely individualistic approach than Locke is. According to Steiner, the first and most direct bearing of liberal principles on national territorial claims is that 'all legitimate group claims must be aggregations of – must be reducible without remainder to – the legitimate claims of individual persons'.[58] If all Steiner meant by this was to stress the priority which liberalism places on the well-being of individuals, then his approach could still be consistent with the thesis whereby national rights are collective, though based on the individual interests of those comprising the nation. Steiner insists, however, that liberalism necessarily yields a far more individualistic conclusion. The essence of his view on this matter is summed up in his statement that: 'nations' territories are aggregations of their members' real-estate holdings'.[59] (I shall return to this suggestion in Chapter 8). Thus, as opposed to Locke, Steiner holds that 'the decision of any of them (i.e. of any of the nation's members) to resign their membership and, as it were, to take their real-estate with them is a decision which must be respected'.[60]

From a nationalist point of view (as opposed to Steiner's purely individualist approach), the problem here is that viewing territorial rights as a mere aggregate of privately owned land which its owner can, so to speak, get up and walk off with misses the essence not only of what people empirically conceive of as national territory but also of the way in which it must be conceived of in order to be meaningful from the point of view of nationalism. And on the liberal-nationalist account, which is presupposed here throughout, nationalism is of value (if it is), because of its value to individuals. The perception of national territory as nothing but a conglomerate of real-estate holdings ascribes solely material value to national territory. It thus fails to capture the historical dimension and related cultural value which members of nations attribute to the lands they lay claim to. It is only by virtue of their group membership, of their membership in a collective, that they possess a special interest in any particular land in question.

I shall return to the distinction between private ownership of real-estate assets and nations' territorial entitlements in Chapter 4, when I discuss the endurance of national claims to lost lands as opposed to private property claims, which are more vulnerable to prescription.[61] For now, suffice it to say that describing them as just so many individual property rights does not reflect the value attributed to national territories by the individual members of nations. Furthermore, this is not in plain fact what groups are demanding when seeking territorial domination. Contemporary national groups staking territorial claims are not primarily concerned with private property. They are seeking to gain (retain or regain) some form of collective jurisdictional right over a particular territory.[62]

The present assertion concerning the collective nature of national territorial rights is, however, not merely descriptive. It is not purely a matter-of-fact argument about the way in which members of national groups conceive of their nations' territory and of the type of claims they in practice make with regard to it. It is a normative argument about the way in which we ought to view such territorial rights from the perspective of liberal nationalism. If nationalism is of value for liberals (and my underlying assumption throughout is that it is) due to its importance to individuals, and if the concept of a *joint* territory, a homeland, is inherent to nationalism,[63] then we ought to view territorial rights as collectively belonging to nations. Furthermore, there is nothing illiberal about describing such rights as collective, since they are based on the interests of individuals. In fact, only a collective conception of territorial rights can satisfy the individual interests in question. Describing territorial rights as a collection of property holdings does not address these individual interests at all.[64]

Endnotes

1 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 166, 207–209; and Joseph Raz, 'On the Nature of Rights', *Mind* 93 (1984), 194.
2 Raz, *The Morality of Freedom*, 166; and 'On the Nature of Rights', 195.
3 Raz, *The Morality of Freedom*, 208.
4 Ibid.
5 Ibid., 209.

6 Joseph Raz and Avishai Margalit, 'National Self-Determination', *The Journal of Philosophy* 87 (1990), 439–461 and in: Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 125–145.
7 Peter Jones, 'Group Rights and Group Oppression', *The Journal of Political Philosophy* 7/4 (1999), 353–377; and Denise G. Reaume, 'The Group Right to Linguistic Security: Whose Right? What Duties?' in: Judith Baker (ed.) *Group Rights* (Toronto: University of Toronto Press, 1994), 118–141.
8 Reaume, 120–121.
9 Ibid.
10 Ibid., 120.
11 It is doubtful whether Raz could accept this, since one of his main points is precisely that some rights are collective because their corresponding duties can be justified only when many such interests exist. The question of whether any particular right of the kind Reaume has in mind would, indeed, be justified as an individual one would depend then on the severity of the correlative duties involved.
12 Jones, 'Group Rights and Group Oppression', 356–359. Reaume, 'The Group Right to Linguistic Security', 122–123, hints at this point as well though she does not develop it or make it the main focus of her argument.
13 Jones, 359.
14 Raz, *The Morality of Freedom*, 208.
15 Jones, 'Group Rights and Group Oppression', 357, his footnote 7, with reference to Raz, *The Morality of Freedom*, 208.
16 Jones, 357, note 7.
17 Ibid.
18 Raz, *The Morality of Freedom*, 208, emphases added.
19 Ibid.
20 Yael Tamir, *Liberal Nationalism* (Princeton, New Jersey: Princeton University Press, 1993), Chapter 2, 42–48, where she asks whether the right to culture is a communal right and answers in the negative; and Yael Tamir, 'The Right to National Self-Determination', *Social Research* 58/3 (Fall 1991), 565–590, where she relies throughout on the same view.
21 Ibid.
22 Tamir, *Liberal Nationalism*, 83–84, with reference to Brian Barry, 'Self-Government Revisited', in: David Miller and Larry Seidentop, (eds.) *The Nature of Political Theory* (Oxford: Clarendon Press, 1983), 124.
23 Raz, *The Morality of Freedom*, 208; Raz and Margalit 'National Self-Determination', throughout the article.
24 In several places, Tamir states outright that she is relying on Raz's definition of a right. See: Tamir, 'The Right to National Self-Determination', in footnote 1; Tamir, *Liberal Nationalism*, 172. In other places it is implied that she is basing herself on the interest theory.
25 Tamir, 'The Right to National Self-Determination', 582–590; Tamir, *Liberal Nationalism*, 42–48, where she discusses the right to culture.
26 Tamir, *Liberal Nationalism*, 47.
27 Michael Hartney, 'Some Confusions Concerning Collective Rights', in: Will Kymlicka (ed.) *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995), 202–227. Note that Hartney's critique is also partially aimed at Raz's account of collective rights, but that he, unlike Tamir, also criticizes some further aspects of Raz's theory of rights in general: Hartney, 203, 207, 212.
28 Hartney, 'Some Confusions Concerning Collective Rights'.
29 Chandran Kukathas, 'Are There Any Cultural Rights' in: Kymlicka (ed.) *The Rights of Minority Cultures,* 228–252.
30 Kukathas, ibid., esp. in Sects. IV and V, 245–252.
31 Jones, 'Group Rights and Group Oppression', 361–362.
32 Jones, ibid. I must add here that I myself am not totally convinced by these remarks, since the rights Raz speaks of are nonetheless said to be possessed by the group as such (and not by

its members, as Jones seems to claim on p. 362). This may leave some room for conceptual questions of the kind raised by Tamir.

33 The list of contemporary writers who accept this view is virtually endless. A few of these authors and their publications are: L.W. Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon Press, 1987), 209–211; Will Kymlicka: *The Rights of Minority Cultures*, esp. 1–27; *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989) where he first argues against the traditional liberal opposition to collective rights for minority cultures; *Multicultural Citizenship*: *A Liberal theory of Minority Rights* (Oxford: Clarendon Press, 1995), esp. p. 33 where he explains his preference for the term 'Minority Rights' to denote the specific type of collective rights which concern him in much of his writing; Judith Baker (ed.) *Group Rights* (Toronto: University of Toronto Press, Toronto, 1994) and the many interesting articles within it. In particular see: Denise G. Reaume, 'The Group Right to Linguistic Security' and Leslie Green, 'Internal Minorities and Their Rights', in: Judith Baker (ed.) *Group Rights*, 101–117. For some more specific discussion of the concept of collective rights see: Marlies Galenkamp, *Individualism and Collectivism: the Concept of Collective Rights* (Rotterdam: Rotterdam Filosofiche Studies, 1993); Ronald Garet, 'Communality and Existence: The Rights of Groups', *Southern California Law Review* 56/5 (1983), 1001–1075. Ian MacDonald, "Group Rights", *Philosophical Papers* 28/2 (1989), 117–136; Michael McDonald (ed.), *Collective Rights*, special issue of the *Canadian Journal of Law and Jurisprudence* 4/2 (1991), 217–419; Douglas Sanders, "Collective Rights", *Human Rights Quarterly* 13 (1991), 368–386. Vernon Van Dyke views such rights as 'corporate rights' rather than 'collective. Vernon Van Dyke, 'Collective Rights and Moral Rights: Problems in Liberal-Democratic Thought', *Journal of Politics*, 44 (1982), 21–40; V. Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport: Greenwood Press 1985); and Vernon Van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory', reprinted in Will Kymlicka (ed.) *The Rights of Minority Cultures*, 31–56. For a recent discussion of group rights see: Brian Barry, *Culture and Equality* (Cambrdige: Polity Press, 2001), Chapter 4, 112–154.

34 I assume throughout my argument that we do want to do this. The list of prominent subscribers to the interest theory is another long one. I shall therefore restrict the list to a sampling of those authors whose work is discussed in this volume who explicitly state that they base themselves on Raz's definition of rights. These include: Chaim Gans, 'Historical Rights – The Evaluation of Nationalist Claims to Sovereignty', *Political Theory* 29/1 (February 2001), 58–79; Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), 104. *Leslie* Green, 'Internal Minorities and Their Rights', 102–103; Avishai Margalit in: Raz and Margalit, 'The Right to National Self-Determination' and in: Avishai Margalit 'Historical Rights', *Iyun* 35 (Hebrew), 252–258; Yael Tamir, 'The Right to National Self-Determination', in her footnote 1, and Tamir: *Liberal Nationalism*, 172; Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 84–87; Denise Reaume, 'The Group Right to Linguistic Security…', 119. Both David Lyons and Neil McCormick are associated with interest-based definitions of rights which precede Raz's. Some of these names are also listed by Peter Jones in his aforementioned 'Group Rights and Group Oppression', 356, footnote 2. Jones additionally names: Nathan Brett, Michael Freeman, Moshe Halbertal, all of whom adhere to Raz's interest conception of rights (though, as Jones points out, not always to everything he says about rights in general or group rights in particular).

35 Tamir, *Liberal Nationalism,* 45; 'The right to National Self-Determination', 588.

36 Ibid.

37 This is the paraphrased essence of her argument. It appears in a somewhat more specific form in her *Liberal Nationalism*, ibid., 45, in connection with the right to culture; and in 'The Right to National Self-Determination', ibid., specifically in reference to this latter right.

38 Tamir, *Liberal Nationalism*, ibid.;'The Right to National Self-Determination', ibid.

39 Tamir, *Liberal Nationalism*, 45.

40 Raz and Margalit, 'National Self-Determination', in: Joseph Raz, *Ethics in the Public Domain*, 139. (See also the longer version of this article: Joseph Raz and Avishai Margalit, 'National Self-Determination', *The Journal of Philosophy* 87 (1990), 439–461, 454–455.)

41 Example, the fact that we do not think individuals are entitled to take a part of their territory with them if they leave their nation-state.
42 John Locke, *Two Treatises of Government.* Peter Laslett (ed.), (Cambridge: Cambridge University Press. 1960), II, *The Second Treatise*, Chapter 5.
43 Locke, *Two Treatises of Government*,II, Sect. 39
44 Ibid., Sect. 192.
45 Paul Gilbert, *The Philosophy of Nationalism* (Oxford: Westview Press, 1998), 101.
46 Ibid. See also: Ross Poole, *Nation and Identity*, (London & New York: Routledge, 1999), 131, where he makes a similar point about the territorial holdings of the aboriginal peoples of Australia.
47 Gilbert, *The Philosophy of Nationalism*, 102–104.
48 Locke, *Two Treatises of Government,* II, Sect. 35, emphasis added. On the possibility of Locke viewing property in land as joint or collective, see also Locke, *Two Treatises of Government*, II, Chapter 8: 'Of the Beginning of Political Society', Sect. 120, 121; and John A. Simmons, 'Historical Rights and Fair Shares', *Law and Philosophy* 14 (1995), 149–184, 181–182.
49 Hillel, Steiner, 'Territorial Justice', in: Percy B. Lehning (ed.) *Theories of Secession*, (London and New York: Routledge, 1998), 60–70, 66.
50 Ibid.
51 Locke, *Two Treatises of Government*, II, Chapter 8, esp. Sect. 121.
52 Thomas Baldwin, 'The Territorial State', in: Hyman Gross and Ross Harrison (eds.) *Jurisprudence – Cambridge Essays,* (Oxford: Clarendon Press, 1992), Chapter 10, 207–230, 213.
53 Ibid.
54 Ibid.
55 Ibid.
56 This is not to say that Locke himself was perfectly consistent on this matter. What I have argued for is that his text can be construed in a way that enables a consistent reading and understanding of the issue at hand.
57 Ross Poole, 'National Identity, Multiculturalism, and Aboriginal Rights: An Australian Perspective', in: Jocelyn Couture, Kai Nielsen & Michel Seymour (eds.), *Rethinking Nationalism* (Calgary, Alberta, Canada: University of Calgary Press, 1998), 407–438, 427, in reference to the case of *Mabo vs. Queensland*. Later, 428, Poole remarks that, in view of the special, complex relationship between the aboriginal people of Australia and the land, it is hard in practice to draw such a distinction concerning their rights to it. See also: Ross Poole, *Nation and Identity*. But the theoretical distinction, which applies more clearly to other cases, still holds.
58 Steiner, 'Territorial Justice', 65.
59 Steiner, ibid., 68. A similar statement is made earlier, on p. 66, to the effect that: 'a nation's territory is legitimately composed of the real-estate of its members'.
60 Ibid., 66.
61 See: Jeremy Waldron, 'Superseding Historic Injustice', *Ethics* 103 (October 1992), 4–28, 19–20.
62 No doubt, grievances concerning 'stolen' property are sometimes involved in these territorial demands, as in the case of many aboriginal peoples' claims, but these are nonetheless not the essence of groups' territorial aspirations.
63 See for example, Anthony D. Smith, *National Identity* (Reno, Nevada: University of Nevada Press, 1991), where Smith remarks that: 'Nationalism is primarily about land'. See also *National Identity* 9, 11, 13–15, 40, 43, where territory (historic territory) is referred to by Smith as an essential feature of the definition of nationalism. See also: Margaret Moore, *The Ethics of Nationalism* (Oxford & New-York: Oxford University Press, 2001), 176.
64 I realize that Steiner would not be particularly bothered by this criticism. As I will argue when confronting his work directly in Chapter 8, he appears to ignore the nationalist aspect deliberately, since it does not figure in his theory of what state property rights amount to. He is committed to the view that these are nothing but aggregates of their members' real-estate holdings and is comfortable with the consequences thereof.

Chapter 3
'Historical Rights' to Land

One argument commonly made by groups or their representatives laying claim to a particular territory is that the group (usually a national one) possesses a 'historical right' to the piece of land in question. At the height of events in Kosovo in the late 1990s, for example, London *Times* Serbian expert, Tim Judah, appeared on British television explaining that the relationship between the Serbs and Kosovo is analogous to the Jewish connection to Jerusalem. As a Jew would say 'next year in Jerusalem', says Judah, one could attribute a similar sentiment to a Serb as regards Kosovo, i.e. 'next year in Kosovo'.[1] Indeed, the Serbs, though forming less than ten percent of the population of Kosovo, believe they are entitled to it by historical right, in just the same way as many Jews believe that Israel is entitled to Jerusalem.

Land is conceived of by nations as being all bound up with history. It is this belief which gives rise to the type of territorial claims invoked in these cases. Such nationalist assertions differ from related arguments that might also be characterized as historical. They are not primarily demands to rectify past wrongs based on principles of corrective justice. (The normative status of these latter demands will be examined in Chapter 4). Nor do they resemble theories of historical entitlement such as the one sketched by John Locke and, more recently, by Robert Nozick.[2] These related issues will be addressed separately. This chapter looks at the prevalent nationalist claim whereby a particular historical connection to a specific land establishes a nation's right to retain or even acquire, the said territory.

3.1 What are Historical Rights?

In an article concerning the issue of states and homelands, Anthony Smith explains that:

> ...to a nationalist, the national territory belongs to a nation by historic right, as a possession of his forefathers for many generations and a repository of sacred memories. Its rivers, mountains, lakes and valleys evoke mythical ancestors and legendary heroes, its ancient sites tell of glorious events and terrible battles. The homeland is the nation's cradle; its terrain is the unique crucible of its peculiar character. Now it is trodden by strangers; but shortly it

T. Meisels, *Territorial Rights,* Law and Philosophy Library, 72
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> will be populated by its own true children and blossom forth regenerated and universally acclaimed.[3]

In his book *National Identity*, Smith makes several further references to the concept of a historic territory as part of his definition of nationalism.[4] He lists this concept as one of the fundamental elements of the Western model of nationalism shared, to some extent, by every version of nationalism (as well as being one of the elements of the different concept of the state).[5] According to Smith, a historic territory is also one of the basic features of national identity. He points out that, for all the differences between French republicans and monarchists, both 'accepted the idea of France's "natural" and historic territory (including Alsace)'.[6] Although the French example is used by Smith to illustrate a different point – that all forms of nationalism contain elements of both his civic and ethnic models – it serves as a perfect example of historical right claims. Both France and Germany saw (and perhaps even still see) themselves as bearing historical rights to this particular territory, each nation having its own name for the place. Most recently Smith remarked in a similar vein on the fact that: 'Nationalists do not seek to acquire any territory. They want their "homeland", that is, a historic territory which their people can feel is theirs by virtue of a convincing claim of possession and efflorescence sometime in the past'.[7]

David Miller, though not referring to 'historical rights' as such, hints repeatedly at these special historical connections between nations and territories. Enumerating the essential elements of nationality, he tells us that describing a community as a nation involves its being a community extended in history and connected to a particular territory.[8] When discussing the division of the world's natural resources and the difficulty of evaluating their 'objective' worth, he asks rhetorically: 'Can the value of Jerusalem to the Israeli nation be estimated by the revenue that that piece of real estate is capable of producing?'[9] Later, Miller speaks of nations, as well as ethnic groups, as often having 'a sense of a family home, a territory with which the group often has a special relationship'.[10] Thomas Baldwin makes a related point in his essay on 'The Territorial State' when he warns against undervaluing 'historical attachments to particular territories'.[11]

In several distinguished publications, when dealing specifically with the issue of 'Historical Rights', Chaim Gans makes just this point concerning special relationships and historical attachments to particular territories. In clarifying the concept of so-called historical rights Gans distinguishes between 'First Occupancy Rights', i.e. territorial rights claimed by nations on the basis of their being the first occupants of the territories in which they are demanding sovereignty; and 'Rights to Formative Territories', i.e. rights anchored in the primacy of given territories in the history of the nation demanding sovereignty.[12] In the first instance, the nation claiming sovereignty wishes to rely on its being the first (at least among the nations which exist at present) to occupy the disputed territory. In the second instance, the entitlement claim rests not on the historical fact of first occupancy but rather on the primary role played by the territory in the history of the nation laying claim to it, 'the fact that the disputed territory is of primary importance in forming the historical identity of the group'.[13] And Gans explains that, under this

second conception, 'the primacy considered relevant is mainly value-based rather than chronological'.[14]

By making this distinction, Gans draws our attention to an important ambiguity in the concept of 'historical rights' which is hidden not only in its use by those making territorial claims (as he himself points out), but also in its use by scholars of nationalism. Thus, Yael Tamir adopts this distinction in some of her later work on liberal-nationalism, when she addresses the historical aspect of territorial demands. She points out that: 'The demand that the national home is to be established in a particular place is also influenced by the history of a nation. Hence the demand to establish the Jewish state in the land of Israel rests on the constitutive role of this territory in the history of the Jewish people'.[15]

Bearing these two alternative interpretations of 'historical right' claims in mind – as 'First Occupancy Rights' or as 'Rights to Formative Territories' – it is mainly, though not exclusively, this second conception of 'historical right' which will concern me here, in Section 4. I begin with a refutation of the claim that all historical arguments ought to be rejected out of hand and disqualified altogether by any liberal attempt at attaining neutral guidelines for adjudicating territorial disputes.

3.2 Preliminary Objections

In her work on liberal-nationalism, Margaret Moore argues that historical claims of any type cannot yield the kind of general neutral rules or principles liberals aim at in order to adjudicate conflicts: '…historic or religious or cultural arguments are problematic because based on a biased, internal understanding of the particular group's tradition or history or religion'.[16] '…it is impossible to develop an adequate principle or mechanism to adjudicate such rival claims to territory…it depends on where in history one starts and whose history one accepts'.[17] Furthermore, historical justifications for territory based on historical claims are subject to myth-making. She suggests that we dispense with such claims and try instead 'to find some standpoint which is accessible to all points of view, and to arrive at general views from this standpoint'.[18]

Moore raises two distinct obstacles to including historical factors in our evaluation of territorial disputes: first, such arguments are based on different *understandings of history*. The problem is one of proof: 'it depends on where in history one starts, and whose history one accepts'.[19] And to this she adds the disturbing possibility that interested parties will, so to speak, attempt to falsify the evidence by way of myth-making. Jeremy Waldron raises a similar objection (among others) to The Principle of First Occupancy, stating that 'it makes tremendous demands on our historical knowledge'.[20]

Moore's second claim is quite different. Here it is argued that: 'justificatory arguments for the territory in question are internal to a specific tradition or culture and cannot provide the basis for a neutral adjudication of the problem'.[21] In other words, the justificatory claims used are based on incompatible value systems.

The first of these critical arguments is concerned with the difficulties in attaining an objective matter of fact regarding distant historical events; the second doubts whether there is an objective historical truth. It points out that historical justifications for land are culture- or tradition- dependent and as such they are subjective, so that groups raising rival claims do not have a common ground on which to argue. Their respective arguments are coherent only within their cultural context, so that groups making conflicting historical claims are involved in a dialogue of the deaf.

Moore's first objection admittedly raises some initial concern about any attempt to include historical criteria in the resolution of territorial disputes, but it is inconclusive. The fact that reaching a correct answer to the relevant historical questions has its difficulties does not in and of itself necessarily disqualify historical criteria; for this, one would have to show that the difficulties involved in obtaining historical facts are insurmountable. If, for example, it were the case that first occupancy of a territory was the just criterion for determining which group should possess which territory, then we might be well advised to turn all our efforts (archaeological, historical, etc.) to discovering who was in fact the first occupant of each given territory. I do not think this is a just criterion, as I shall argue later. But the point here is that it is not merely the difficulty in uncovering the historical facts that necessarily disqualifies it. Waldron's version of this objection to first occupancy is more compelling and harder to contend with. It points not only to the demands of first occupancy claims on the resources of historical inquiry (though that too) but also to the moral dangers inherent in first occupancy principles that licence first comers, purely on the basis of their historical priority, to repudiate and marginalize the claims and needs of others.[22] I shall return to Waldron's refutation of first occupancy claims in the following section.

Moore's second objection to the inclusion of historical arguments in any set of guidelines for mediating disputes, is that historical justifications are only 'acceptable to people who accept that particular version of history, or religion, or ethical value', and that therefore they cannot serve as any part of an attempt to develop external neutral principles and mechanisms for arbitrating between groups and for the adjudication of conflicts.[23] Admittedly, the content of historical justifications is usually culture-dependent; it makes sense only internally, within the group's own set of beliefs or value system. This is often true of religious arguments. However, Moore fails to distinguish between the particular content of a historical argument for territory, which admittedly usually makes sense only within the specific culture from which it stems, and the existence of such an argument which in itself is a significant fact that may count for something in the world outside that culture.

The fact that, for example, according to Romanian nationalist ideology Transylvania belongs to the Romanians while, according to Hungarian nationalist ideology, it belongs to the Hungarians indeed cannot serve as a basis for adjudicating this territorial conflict. This, moreover, is the very source of the conflict. However, the reality in which both Hungarians and Romanians have historical ties to Transylvania on which they base these claims (whereas, for example, the British do not), and the nature of such ties and the claims they subsequently give rise to (and perhaps also their various intensities) might very well be relevant to the external adjudicating

of such conflicts. When we widen the scope to encompass the array of cases in which groups are involved in disputes over territories, each group advancing similar historical claims, we may find that some general features do suggest themselves as candidates for playing significant roles in the development of general neutral rules or principles of adjudication.

Finally, Moore raises a further objection to historical arguments. 'Appealing to historical links', Moore adds, is dangerous because such links 'can legitimize claims to vast areas and many different irredentist claims'.[24] This point has not gone unnoticed by other writers. It has been raised in connection both with first occupancy, as Moore does, and also with other similarly problematic justifications such as discovery.[25] Once again though, avoiding this danger does not require the abandonment of all historical claims. Considering historical rights as among our criteria for the legitimization of territorial rights does not entail that we accept first occupancy as legitimizing a group's acquisition of all the territories the group was the first to occupy. For one thing, first occupancy could be viewed as dependent on (and restrained by) considerations of distributive justice.[26] Thus, it need not imply that first occupants are entitled to the entire territory which they were the first to occupy. For another thing, as mentioned in the previous section, one need not view all historical arguments in terms of first-occupancy claims. Earlier I mentioned that they can be conceived of as 'rights to formative possessions'.[27] The internal logic of such a conception places its own restraints on the scope of territories whose acquisition could be legitimized by historical rights. For presumably there are reasonable limits to the extent of territory to which a nation can be said to have established genuinely formative ties.[28] Interpreting historical rights as rights to formative territories, also serves to overcome Moore's first, factual, objection. Recognizing the significance of nations' historic ties to territory does not require us to establish historically who was there first. It merely requires the recognition of contemporary attachments based on historical events, or even cultural myths.

In conclusion, Moore's arguments do not establish that historical claims cannot play a part in our normative thinking on territorial issues. From this, of course, it does not follow that they should play such a role. In what follows I evaluate historical right arguments and try to establish their place, if they indeed warrant any, in our moral thinking on territorial conflicts. The subsequent sections consider whether historical attachments have any moral significance outside the framework of the specific national or religious set of beliefs from which they are derived. I begin with the most simplistic and widespread understanding of historical entitlement arguments, as the claim that 'we were here first'.[29]

3.3 From Time Immemorial

Recent philosophical literature on nationalism, as well as recent history and current affairs, supply us with ample examples of first occupancy claims, such as the aforementioned Serbs' claim to Kosovo. Such arguments also arise within the

Hungarian-Romanian dispute over Transylvania, the Arab-Israeli conflict, and the various aboriginal demands in countries such as the United States, Australia and New Zealand. Many of these peoples are claiming that they were not only the first to occupy the territories in question but that they have inhabited them continuously 'from time immemorial' and continue to inhabit them today.[30] Usually those voicing such claims while inhabiting their original territories do not have control over them. Others, such as the Jews, claim to be the first (among contesting nations) to have inhabited the relevant territories, though their inhabitancy has not been continuous. Some of the territories they lay historical claim to are in their possession today; others are not and, in any case, their historical claims precede their modern-day occupation of any territory whatsoever.

Their Palestinian opponents, rather than challenging this rather questionable argument, have recently chosen to join in the game themselves. Thus, they attempt to claim that they are in fact the descendants of one or another of the Canaanite peoples who preceded the ancient Israelites in these places. In keeping with this line of argument, Palestinian archaeologists claim to have uncovered Canaanite houses in the territories now under Palestinian authority, allegedly dating back approximately to the year 3000 BC. 'This strengthens our historical right to the land', they claim.[31]

The Romanians laying claim to Transylvania on the basis of historical rights raise similar arguments. In opposition to Hungarian claims of first occupancy, Romanian enlists 'the Daco-Roman theory' according to which modern-day Romanians are the descendants of a mixture between the population of ancient Dacia – the indigenous and ancient inhabitants of Transylvania – and their Roman conquerors, all of whom inhabited the region long before the Hungarians settled there.[32]

Why should exclusive sovereignty rights to a territory be given to peoples who occupied it several centuries ago rather than to those whose ancestors arrived there after them, and at the total expense of the latter, as well as the rest of the world's inhabitants? As Gans points out, 'first occupancy has been discussed extensively in the legal and philosophical literature dealing with the right to private property. Within this literature, first occupancy has been a dead horse for a very long time'.[33] By now, this is largely true of first occupancy in the relevant literature on territorial rights as well.

We have just seen Margaret Moore's objections to historical arguments, understood primarily as first occupancy claims.[34] There are entirely conclusive refutations of the Principle of First Occupancy in Gans' *The Limits of Nationalism*, and in Jeremy Waldron's discussion of 'Indigeneity'.[35] These, as Waldron explains, concern the moral dangers inherent in The Principle of First Occupancy that licences first comers to exclude subsequent arrivals from vital resources, purely on the basis of historical priority[36]: 'it is well understood in the literature on property that First Occupancy cannot stand on its own to legitimate disproportionate possession of land by one people to the exclusion of others who have no place else to go, simply because the former people came on the scene first'.[37] Or as Gans puts it, the interests and expectations of first occupants cannot justify imposing the duties on others that we associate with sovereignty rights. 'The duties corresponding to this right involve

the risk of losing sources of livelihood as well as the conditions necessary for freedom. It seems unlikely that the expectations of absolute first occupants, and especially the expectations of those who are first only relative to other existing nations, could be important enough to justify endangering such urgent interests'.[38]

The philosophical tradition to which one would normally turn to justify ownership rights on the basis of first-occupancy, requires that the acquisition in question be just that – the very first act to have removed the object in question (in this case territory) from the common stock. Thus, for Locke the moral force of so-called 'first occupancy', or rather first labour, arguments for property is attached only to the first agent who, by mixing his labour with an item, or parcel of land, thereby removes it from 'the state of nature'.[39] As Waldron points out, according to Locke 'Only the first Person to take or labour on a resource gets to be its owner. Apart from exceptional cases in which a resource reverts back to the common state, this happens only once in the history of each resource'.[40]

Elsewhere, considering the claims of indigenous peoples, Waldron explains that the moral force that attaches to first occupancy is based on the fact that: 'The first occupant… did not have to disturb anyone else's right'.[41] This is particularly important in connection with territorial rights. First occupants of a given territory, as opposed to subsequent occupants, did not disrupt existing arrangements and an existing way of life in establishing their occupancy. 'The gist of First Occupancy is that special rights may attach to the *peaceful* occupation of unoccupied lands'.[42] It is not to be confused, as it often is, with mere prior occupancy, that doesn't carry this normative force.

In the case of territorial acquisition, both Gans and Waldron point out, few nations, if any at all, can claim absolute priority of this kind to the territory they are demanding.[43] As Alasdair Macintyre asserts:

> The property-owners of the modern world are not the legitimate heirs of Lockean individuals who performed quasi-Lockean … acts of original acquisition; they are the inheritors of those who, for example, stole, and used violence to steal the common lands of England from the common people, vast tracts of North America from the American Indian, much of Ireland from the Irish, and Prussia from the original non-German Prussians. This is the historical reality ideologically concealed behind any Lockean thesis.[44]

Though in many cases this process would have occurred in the very distant past, in most cases it negates the possibility of turning to traditional first-occupancy arguments (and the rationale on which they are based) in order to substantiate territorial claims.

Distinguishing between First Occupancy and Prior Occupancy that are often conflated in territorial claims, Waldron explains that the Principle of Prior Occupancy is actually a conservative principle, which aims to preserve the status quo, without delving into its historical origins. 'Irrespective of how an existing distribution came about….The Principle of Prior Occupancy gives it a prima facie right to be respected and left undisturbed'.[45] 'Prior occupancy refers to the human interest in stability, security, certainty and peace, and for the sake of those values it prohibits overturning existing arrangements irrespective of how they were arrived at'.[46] While prior occupancy ought to have discouraged various colonizers and conquerors from

disrupting existing social orders when they did so, and it can serve as a basis for their reproach, it can do nothing now to base claims to revert to prior arrangements, once new social orders have been established. On the contrary, Waldron continues, while it condemns the disruption of previously established social orders, it now serves equally well to appose claims to restore those historic arrangements, once new arrangements have long been put into place. It can do nothing to assist prior occupants whose possession was disrupted and replaced long ago.[47]

Gans makes similar observations in disqualifying first occupancy claims. Prior occupancy, despite its name, is in fact based on the interests in preserving current occupancy, whatever its origins, rather than on any original priority.[48] As for the latter:

> Most groups demanding territories in the name of historical rights were first occupants only relative to other groups that exist today. Their occupancy was usually acquired by means of crimes committed by them against the previous occupants of the territories in question and by bringing about the physical, or at least cultural and political destruction of the latter. Thus, it is not clear why this justifies sovereignty rights, or even rights to determine the location of sovereignty. [49]

In an article on 'Locke's Theory of Original Appropriation', Bishop comments on the fact that 'All land masses on earth have been occupied by indigenous people for many thousands of years'.[50] Similarly, he remarks later that 'humans have occupied all significant land areas of the planet earth for at least the last ten thousand years'.[51] Moreover, few nations can claim to have acquired the land in question from its first occupants through morally justifiable procedures of transfer. In most, if not all, cases of national claims of 'first occupancy' of territory, the territory in question was, in fact, originally acquired by means of aggression and violence from the original occupants or from others who had already misappropriated it from the original inhabitants.

It is often assumed that at least some of the aboriginal peoples of North America, Australia and New Zealand can claim absolute priority over the territories they lay claim to,[52] but even this is largely disputed on the basis of tribal rivalry, inter tribal conflict and expropriation. Even in these cases, there may not always be an existing singular group unit that can claim peaceful first occupancy in absolute terms. Kymlicka makes this point primarily about North America, and Waldron makes similar remarks regarding the Maori people of New Zealand.[53]

So aside from its normative philosophical refutations, first occupancy claims can rarely, if ever, be taken literally from a historical perspective in the territorial connection anyway. If we are disappointed by all this, it is because we often feel sympathy towards groups making territorial demands based on such claims.[54] But the fact that *these* claims fail them does not mean that their territorial demands fail. Nor does our sympathy for them necessarily stem from their alleged first occupancy.

In cases in which alleged 'first occupancy' rights would favour maintaining a present state of affairs, our intuitive support for the occupants raising such claims probably derives from considerations pertaining to their present occupancy rather than their original occupancy. Furthermore, and this will be discussed separately in

Chapter 7 on settlement, it concerns aspects of their continuous occupancy of the territory in question.

When restitution is sought by peoples continuously inhabiting territories which they seek to gain (or regain) control of, such as in cases of aboriginal peoples or others currently inhabiting a territory controlled by another cultural groups, our sympathy has more to do with rectifying past wrongs than with actual first occupancy. This concerns whatever we believe to be the responsibility of present occupants for the actions of their forefathers and for the consequent past and present plight of the peoples staking these historical claims. This is the topic of the following chapter.

Sometimes, most problematically, we find groups demanding restoration of a past state of affairs with regard to a territory which its members do not, at least for the most part, inhabit; or cases where a group's loss of its historic land is not the result of an injustice perpetrated by the lands current inhabitants. Sometimes the claim to first occupancy, as in the case of the Jews, is positively ancient. Here, any sympathy we might have for demands to a specific land will admittedly involve a form of historical tie. However, as I shall argue in the following section, it is a form which has little, if anything, to do with the mere fact of first occupancy.[55]

3.4 The Nation's Cradle

I return to the distinction between 'historical rights' as first-occupancy rights and 'historical rights' as rights to formative possessions.[56] Recall that, under the latter conception, the entitlement claim rests not on the historical fact of first occupancy but rather on the primary role played by the territory in the history of the nation laying claim to it. Thus, 'The second conception of historical rights shifts the emphasis from a people's primacy in a given territory to the primacy of this territory for a given people'.[57] No doubt, something along the lines of this conception, though never explicitly stated, underlies Smith's description of 'the homeland' as 'the nation's cradle'.[58]

The second and more interesting part of Gans' analysis of historical entitlement deals with his alternative interpretation of 'historical rights' as rights to formative territories.[59] 'If the events thought to have formed the historical identity of a national group took place in specific territories, it seems likely that these territories will be perceived by the members of that group as bearing deep and significant ties to their national identity'.[60]

This appears to be a most accurate description of the type of association which often exists between members of national groups and specific historic terrains. Similarly, Smith observes that:

> …the terrain in question is felt over time to provide the unique and indispensable setting for the events that shaped the community. The wanderings, battles and exploits in which "our people" and their leaders participated took place in a particular landscape and the features of that landscape are part of those experiences and the collective memories to which they give rise.[61]

According to Gans, the natural analogy of these ties between peoples and what he refers to as their 'formative territories' is the ties between individuals and their parents.

> Many languages have a term for the concept of "fatherland". This concept represents an abstraction of territories common in many cultures, and is consistent with the above analogy. If we appeal to this analogy, then the claim that national groups possess some important interests in their formative territories is in need of no elaborate proof. Providing evidence for the existence of such an interest is much like attempting to prove that the tie between children and their parents forms a source of special interests. The existence of such interests would seem to be clear and self-evident, requiring no proof.[62]

As to the nature of such ties, he adds, in keeping with the analogy of parental ties, that: 'The interest at the basis of the formative tie between territories to which historical rights are demanded and the people demanding these rights is the interest of those who love in being close to their loved ones, in not being separated from them; the interest they have in not spending their lives in a state of pining and longing'.[63]

The analogy between national ties to territory and familial affection need not be taken as a sound philosophical parallel (nor is it necessarily intended as one), but it clearly succeeds in capturing a very significant strand of national sentiment towards territory. This is what Paul Gilbert refers to in *The Philosophy of Nationalism* as 'love of country' and where, like Gans, he states that 'this sentiment is thought of as a natural affection, attaching to the land that has given us birth, just as it does to our parents'.[64]

In what I take to be the central part of his thesis, Gans elaborates and clarifies this interest in formative territories, elucidating the nature, significance and normative force of the historical argument. He says:

> For peoples and nationally conscious individuals, the interests in not being severed from their formative territories touches on emotions which are inextricably intertwined with their conception of their identities… This [the interest in formative territories] is an interest tied to some of the deepest layers of identity, both in origin (the perception of selfhood) and in the consequences following from its frustration (feelings of alienation and longing).[65]

This passage lends the conception of historical rights as rights to formative territories its invaluable illuminative force. It points not only towards the significance of historic territories to the nations that claim them, but far more importantly from a liberal perspective, it points to what is important for individual nationals in their historical territories. It is precisely this type of connection between national historical territories and personal identity that is implied by Anthony Smith when he lists historic territory as one of the basic features of national identity.[66]

3.5 Historical Ties and National Interests

What of historical rights to land, then? Despite the intensity of the interest in formative territories, this interest cannot, in and of itself, serve as grounds for the right to regain territorial sovereignty over land in which others are currently exercising their

right to national self-determination. The high costs to those currently exercising sovereignty rights over the territory in question rule out the possibility of recognizing historical ties as grounds for re-instituting a previous state of affairs. Gans' ultimate conclusion on this matter rests on his particular distinction, between the right to sovereignty itself and the lesser right of location. This distinction in turn relies on an original background theory of national self-determination which he develops elsewhere and which excludes the possibility of exclusive sovereignty rights to land on any grounds.[67] His theory of national self-determination and its precise details far exceed the scope of the discussion here. Sufficed to say that the sacrifices entailed by the restitution of a past state of affairs seem especially unjustifiable in cases in which they would involve disrupting present sovereignty and the dismantling of established places of settlement – which are the product of the current inhabitants' endeavour – and the relocation of the local population.[68]

All this, however, does not yield the conclusion that historical interests are of no consequence.[69] All the above indicates that these are significant and intense individual interests held by members of nations (i.e. aspects of their well-being), which can be comprehended, and should be respected, within liberalism. There are reasons to consider these interests, whose nature is captured in the passages cited above, in our normative evaluation of territorial disputes. There are strong reasons to include them in any liberal account of territorial rights which takes nationalism seriously.

On Gans' account territorial rights must be allocated first and foremost in relation to a nation's size and needs, which determine the legitimate scope of their entitlement.[70] However, he suggests, assuming that all nations have a right to national self-determination which must be realized somewhere; the formative links that a given people might have to a particular territory could serve as grounds for locating that right, once the scope of their entitlement has been determined on the basis of material need.[71] Here he argues that unlike questions of the size and scope of territories rightfully due to each nation, which can be answered on the basis of distributive justice, there are no such independent criteria available for determining the location of national self-determination.[72] The significance of historical links supply good reasons for resorting to these ties for the limited purpose of determining a nation's location, rather than merely resorting to chance.[73]

Gans holds that while formative ties cannot justify exclusive sovereignty rights, they might justify lesser territorial rights, specifically this right to locate the realization of a nation's self-determination in a particular place.[74] This suggestion relies on a further distinction, introduced earlier in his work, between two kinds of territorial rights. The first is the right sought in reality by nations propounding 'historical rights' claims, and discussed in this volume – the right to territorial sovereignty itself. The other is this more limited right to the location of national self-determination in a specific territory, where self-determination is justified on grounds other than historical ones, and the size and scope of territory necessary for its realization is determined by considerations of distributive justice.[75] In the latter cases, 'historical rights' may still play the role of determining where – on which piece of the world's territory – this right to self-determination should be realized.[76] Formative territories can ground this lesser territorial right – it may entitle a nation to select its

historic territory as the site for realizing the right to self-determination.[77] In his later work Gans goes beyond this:

> Perhaps there is more to it than that. Given the centrality of historical territories in the formation of national identities, there seems to be an inherent link between these territories and the right to national self-determination. Unlike the case of first occupancy, the territories in question are not only *suitable* for determining the location of this right. They are territories that are *essential* for determining this location.[78]

These rights of location do not entail that a nation's territorial holding extend to all of their historic territory, or that they be the exclusive sovereigns of these territories. Their territorial rights based on formative ties are not necessarily exclusive, and imply that their possessors may have to share their historical territories with others who bear no historical ties to these territories, as well as with those who have a similar right to their own.[79]

I shall not confront all these conclusions directly. They are hinged on a background theory of national self-determination which questions sovereignty rights as we know them altogether, and on further distinctions that flow from that theory. They raise worthy doubts as to whether any one nation is entitled to sovereignty over land at all, and whether national self-determination need necessarily take the form of state sovereignty, as well as other concerns regarding the exclusive nature of territorial rights as we know them. I am however concerned at present with nations' demand for sovereignty over their historic territory within an existing international framework. The limited aim of the current project is to discern the relevant criteria for arbitrating territorial disputes and establishing territorial rights. Within this framework, no single interest need stand on its own as a single justification for territorial entitlement. Territorial rights, I suggest, are usually based on a conglomerate of interests. In the case of first occupancy, we found that even absolute priority can hardly qualify as a consideration to be accounted for at all. Like discovery and conquest, it has long been regarded as a morally dubious principle, apart from which, as a matter of purely historical fact regarding territory, it can be relied on by virtually no one at all. The case for 'formative territories' is much stronger.

Gans' insightful formulation of the individual interests involved in retaining, and at times even regaining, ones nations' historic territory, is invaluable. It suggests explicitly that the fact that certain territories constitute formative territories for a given nation is normatively significant.[80] Whatever conclusions we draw from this regarding particular political solutions, the formulation of historical rights as rights to formative territories identifies a significant individual interest that ought to be considered when evaluating territorial conflicts. The ties that individual members of cultural groups have with their formative territories, as Gans describes them, should, at the very least, constitute a significant consideration in allocating territorial rights.

Conceivably, historical ties, their nature and varying intensities, may also play other, secondary roles in understanding and evaluating claims to various territorial rights. Since often more than one group claims constitutive historical ties to the same territory, assessing the intensities of various ties to it and their precise natures may be helpful in forming an opinion as to the destiny of that territory.

For one thing, it seems relevant to ask whether the group's formative connection to the territory in question is, in the main, a religious or a national one. Where the territory plays a constitutive role in the history of a religious group, the group's historical interest can still be relevant to the grounding of territorial rights, but not of sovereignty rights. As David Miller points out, '…religious identities often have sacred sites, or places of origin, but it is not an essential part of that identity that you should permanently occupy that place; if you are a good Muslim, you should make a pilgrimage to Mecca at least once, but you need not set up house there. A nation, in contrast, must have a homeland'.[81] And this homeland is its historic territory.[82]

Miller's distinction between ethnic and religious groups, on the one hand, and national groups on the other highlights a difficulty in Margaret Moore's conclusions on the issue of national historical claims. According to Moore: 'historical ties are insufficient to generate rights to control the territory. Historic monuments and national ties can at best legitimize a prima-facie case in favour of rights of *access* but not to control over the territory…'.[83] While it is true that, at least when on their own, historical ties may be insufficient to generate sovereignty rights, the rights that Moore is willing to concede to nations point to her misunderstanding of their needs. It is not that rights of access are not enough, it is that they are not the kind of territorial right that addresses distinctly national interests at all. They are relevant primarily for ethnic or religious groups. Thus, Jews value the right of access to the Holy Land, as do many Christians. But once the Jewish people attained full national consciousness, these rights became entirely insufficient. From a Jewish nationalist perspective, they were no longer to the point at all.

It may indeed be necessary sometimes for nations to forfeit their historical interests for a variety of reasons. At times this is necessary in order to achieve justice among competing nations. Sometimes it is desirable in order to achieve peace. I have suggested only that formative ties may form an important component in attaining territorial rights, but that territorial sovereignty must be grounded in additional interests. However, from the perspective of specifically national interests in territory: pilgrimage or visitation rights, maintaining outposts in the territory, even attaining various forms of privileged status, is really no good at all. It is not merely that such rights do not grant nations all that they are demanding (this, for example, is the case where territorial compromise is achieved). They do not grant them the *kind* of right they are demanding. The difference between pilgrimage rights and sovereignty rights is not a difference in degree, it is a difference in substance. If it is the case that members of a nation will benefit from such visitation rights, it is not by virtue of their membership in their national group but rather by virtue of their membership in a religious group. Thus the Arabs benefit from such rights to Jerusalem, but they benefit from them as Christians or as Muslims. These rights do nothing to address the claims of those Arabs who conceive of themselves as bearing a Palestinian identity and national consciousness and make territorial claims in that capacity.

The nature of the formative connection – whether it is constitutive in the formation of a religious group identity or a national one – can help evaluate the appropriate response to territorial aspirations. It helps, for example, to explain why offering pilgrimage rights may be unhelpful in resolving national territorial disputes, while

sovereignty rights would be totally inappropriate for the satisfaction of religious historical interests (e.g. we do not think the Vatican need have sovereignty over Bethlehem, and we do not think the Crusaders had a justified national claim to occupy the Holy Land).

A further auxiliary role can be played by historical interests (when they are construed as rights to formative territories) in thinking about territorial disputes, if we consider their relative strengths. As Gans points out, and as we know from contemporary politics, 'specific territories do sometimes play a formative role in the historical identity of more than one national group'.[84] In many cases of territorial dispute we will find both parties claiming this type of connection. Here we might consider comparing the intensities of the various historical ties. Other things being equal, a far stronger tie might tip the balance in favour of one nation or another. The relative strengths of various connections are admittedly difficult to measure, but there is at least a minimal level beneath which we would not consider a historical connection to be significant. And even beyond the minimal level, not all comparisons are necessarily indeterminate. Admittedly, in many cases such comparisons will not be very helpful.

Finally, while historical ties in and of themselves are insufficient to generate rights to sovereignty over territory, they may be able to eliminate certain candidates as potential sovereigns. When several groups compete over a given terrain, a lack of historical connection may work against some of the candidates. While two or more groups may bear historical connections to the same land, some groups will have no such connection. This may count against the latter's case for sovereignty and in favour of one of the former group that is historically tied to the territory in question, though the lack of a historical connection need not necessarily rule out a candidate for potential sovereignty. Still, such considerations (among many others), for example, should have entirely ruled out the proposal suggested early in the last century of granting the Jews sovereignty over Uganda.

Above all, historical ties, as described above, while admittedly insufficient as a singular basis for territorial rights, supply a very good reason, subject to other considerations, for granting territorial entitlement over a territory to the nation whose members bear a sincere formative connection to it.

3.6 Concluding Remarks

We have been considering the popular nationalist claim whereby a particular historical connection to a specific land establishes a nation's right to retain or even acquire the said territory. I set out by denying the charge that such particularistic cultural claims ought to be disregarded altogether in favour of supposedly more neutral standards, and proceeded to evaluate the normative force of historical claims to land. In doing so, my argument relied fundamentally on Chaim Gans' invaluable distinction between two alternative understandings of 'Historic Rights': their conception as 'First Occupancy' claims, as opposed to their conception as 'Rights to

Formative Territories', and on his elucidation of the latter. After joining the general dismissal of the former as morally void, as well as largely inapplicable, the chapter continued by taking a closer look at the more sophisticated argument whereby the primary role played by the territory in the history of a nation justifies their claim to it. In this latter sense, historical claims represent significant and intense individual interests held by members of nations, which can be comprehended, and ought to be respected, from the perspective of liberal theories which we now call 'liberal-nationalism', and with which I set out in this book.

Despite their significance, however, I admitted that the interest in formative territories cannot form an independent basis for a right to regain territorial sovereignty over land in which others are currently exercising their right to national self-determination. The corresponding duties to such a potential right of restoration appear particularly grave and unjustifiable in cases in which their realisation would require the dismantling of established places of settlement, particularly existing states, or parts thereof. Historical ties cannot single-handedly outweigh such burdensome correlative duties.

On the other hand, I suggested that, historical ties – by virtue of their importance to the well-being of individuals – can serve as a partial basis for territorial rights, when they are joined by other supporting interests. In such cases, these ties would not be left to do the entire justificatory work on their own, but would rather join forces with other normatively significant considerations.

The ideas advanced in this chapter also point to a variety of secondary roles that can be attributed to historical interests in understanding and evaluating claims to particular territorial sites. It was suggested that assessing the relative intensity of various ties might at times serve to tip the balance between two competing claims. It is also necessary to establish whether a group's formative connection to any given territory is, primarily, a religious or a national one. In the latter case, pilgrimage rights might be in order, at times even sufficient. In other instances, where the tie is primarily a national one, such remedies may be totally insufficient and even inappropriate.

Finally, while historical ties in and of themselves are insufficient to generate rights to sovereignty over territory, they may be able to eliminate certain candidates as potential sovereigns. While two or more groups may bear historical connections to the same land, some groups will have no such connection. Needless to say, groups may be entitled to territorial resources regardless of history. But in the case of a particular dispute over a particular place (as apposed to the demand for allocation of land in some place or another), historical ties may count towards strengthening one groups' claim as against another.

To sum up: I have argued on the one hand against those who would dismiss historical arguments out of hand, and on the other against the claim that they can serve as the sole basis for territorial rights. I concluded that 'historical rights' are not rights properly so-called in that they do not by themselves constitute sufficient reason for holding others to be under the relevant duties. Nonetheless, national historical ties do have their place, even a central place, in our normative thinking on territorial rights within a framework of liberal nationalism. They form an initial

layer of considerations that ought to be taken into account in any liberal-nationalist evaluation of boundary disputes. The following chapters proceed to examine other territorial interests, which can join forces with historical ties in forming a more solid basis for sovereignty rights.

Endnotes

1 The fact that 'claims are still made today that Kosovo is the 'Jerusalem' of the Serbs' is pointed out by Noel Malcolm as well. Malcolm, however, also stresses that 'this has always been something of an exaggeration'. See Noel Malcolm, *Kosovo – A Short History* (London: Macmillan, 1998), Introduction, p. xxxi.

2 John Locke, *Two Treatises of Government.* Peter Laslett (ed.) (Cambridge: Cambridge University Press. 1960) (1690), II, Chapter 5; Robert Nozick. *Anarchy, State, and Utopia* (USA: Basic Books, Harper Collins Publishers, 1974).

3 Anthony D. Smith, 'States and Homelands: the Social and Geopolitical Implications of National Territory', *Millennium, Journal of International Studies* 10/3, 187–202, 193; and: Anthony D. Smith, *National Identity* (Reno, Nevada: University of Nevada Press, 1991), 9.

4 Smith, *National Identity*, 9, 11, 13–15, 40, 43. Other references to historic territories are made by Smith on, 70, 117, 124, 127.

5 Smith, *National Identity*, 9–15.

6 Smith, *National Identity,* 14.

7 Anthony D. Smith, *Myths and Memories of the Nation* (Oxford: Oxford University Press, 1999), Chapter 8, 219; see also Chapter 5, 149–157.

8 David Miller, On *Nationality* (Oxford: Clarendon Press, 1995), 22–27.

9 Miller, On *Nationality*, 106.

10 Miller, On *Nationality,* 121.

11 Thomas Baldwin, 'The Territorial State', in: Hyman Gross and Ross Harrison (eds.) *Jurisprudence – Cambridge Essays* (Oxford: Clarendon Press, 1992), Chapter 10, 207–230, 227.

12 Chaim Gans, 'Historical Rights – The Evaluation of Nationalist claims to Sovereignty', *Political Theory,* 29/1 (February 2001), 58–79, 59–60; Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), Chapter 4, 97–123, esp. for the distinction: 97–104. See also, with reference specifically to the Zionist movement: Chaim Gans, *A Just Zionism – On the Morality of the Jewish State* (New York: Oxford University Press, 2008), Chapter 2, p. 26.

13 Gans, 'Historical Rights' 60; Gans, *The Limits of Nationalism*, 100.

14 Gans, 'Historical Rights' 60; Gans, *The Limits of Nationalism*, 101.

15 Yael Tamir, 'Theoretical Difficulties in the Study of Nationalism', in Jocelyn Couture, Kai Nielsen and Michel Seymour (eds.) *Rethinking Nationalism* (Calgary Alberta: University of Calgary Press, 1998), 65–92, 73; Gans, *A Just Zionism*, Chapter 2, esp. p. 33, shows that this argument about constitutive ties, rather than first occupancy claims, was prominent among early Zionists.

16 Margaret Moore, 'The Territorial Dimension of Self-Determination', in Margaret Moore (ed.) *National Self -Determination and Secession* (Oxford: Oxford University Press, 1998), 134–157, 137. These arguments are repeated in: Margaret Moore, *The Ethics Of Nationalism* (Oxford and New York: Oxford University Press, 2001), 189–190, 196. Though the author appears to moderate her wholesale dismissal of historical claims in this later work, she essentially restates her previous argument, re-emphasizing the problems she attributes to historical justifications. She recognizes the merits of historical arguments only when they are conjoined with present occupancy, and for reasons pertaining to that occupancy rather than anything else. For practical reasons, she admits that achieving peace settlements may

entail taking groups' subjective feelings, i.e. their own historical narrative, into account, but she still attributes little, if any, normative weight to the fact that they bear such historical ties ('feelings') to the lands they lay claim to. In so far as she has any normative concern for nations' historical ties to land, they are, by her own admission, only normative in the sense that recognizing their existence may be instrumental to achieving the moral goals of peace and stability.

17 Moore, 'The Territorial Dimension of Self-Determination', 145, *The Ethics of Nationalism*, 190.
18 Moore, 'The Territorial Dimension of Self-Determination', 137.
19 Ibid, 145; Moore, *The Ethics of Nationalism*, 190.
20 Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy', *New Zealand Journal of Public and International Law*, 1 (2003), 55–82, 56, and also: 75–76, 80.
21 Moore, 'The Territorial Dimension of Self-Determination', 141.
22 Waldron, 'Indigeneity?', 80.
23 Moore, 'The Territorial Dimension of Self-Determination', 154.
24 Moore, 'The Territorial Dimension of Self-Determination', 145, *The Ethics of Nationalism*, 190.
25 Gans, 'Historical Rights', 63; Gans, *The Limits of Nationalism*, 106. Baldwin, 'The Territorial State', 209. Both refer to Rousseau on this matter: Jean Jacques Rousseau, *The Social Contract and Discourses* (London and Vermont: Everyman, 1993), Book 1, Chapter 9.As for First Occupancy, I have already mentioned to the dangers that Waldron points to as inherent to this questionable principle, Waldron: 'Indigeneity', 80.
26 Gans suggests a similar, though unique, solution to this problem. His solution is connected to a further distinction he draws between the right to sovereignty itself and the lesser right to locate sovereignty. This distinction already presumes that the scope of the territory which the group is entitled to on the basis of its right to self- determination has already been determined by criteria stemming from principles of distributive justice. Gans, 'Historical Rights', 61–62. Gans, *The Limits of Nationalism*, 104–109, esp. 107–109. I shall not go into this distinction here, though I do return to it, briefly, in the following section.
27 Gans, 'Historical Rights', 59–60 and 66–76; Gans, *The Limits of Nationalism*, 100–101, 109–123.
28 Gans, *The Limits of Nationalism*, 111.
29 Cf: Jeremy Waldron: 'Superseding Historic Injustice', *Ethics* 103 (October 1992), 4–28, 28.
30 For a scholarly discussion of these examples, see: Gans, *The Limits of Nationalism,* 97–101.
31 See: Gans, *The Limits of Nationalism*, 100. *Ha'aretz* (Israeli daily newspaper), August 4th. 1998.
32 J.F. Cadzow, A. Ludanyi, and L.J. Elteto (eds.) *Transylvania – The Roots of Ethnic Conflict* (Kent: The Kent State University Press, 1983), 232–233.
33 Gans, *The Limits of Nationalism*, 104.
34 Margaret Moore, 'The Territorial Dimension of Self-Determination', 134–157. These arguments are repeated in: Moore, *The Ethics Of Nationalism*, 189–190, 196.
35 Gans, *The Limits of Nationalism*, 104–109; Waldron, 'Indigeneity?', 55–82.
36 Waldron, 'Indigeneity?', 80.
37 Waldron, 'Indigeneity', 79.
38 Gans, *The Limits of Nationalism*, 106–107; See also: Gans, 'Historical Rights', 62–63.
39 Locke, *The Second Treatise of Government*, Chapter 5, e.g. Section 38. See also Gans' helpful reference to Locke, in: *The Limits of Nationalism*, 106–107.
40 Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 176.
41 Waldron, 'Indigeneity', 69.
42 Waldron, 'Indigeneity', 77–78.
43 Gans, *The Limits of Nationalism*, 117. Waldron, 'Indigeneity', 75–76.
44 Alasdair Macintyre, *After Virtue – A Study on Moral Theory* (London: Duckworth, 1981), 234.
45 Waldron, 'Indigeneity', 71.

46 Waldron, 'Indigeneity', 71. Cf: Gans, 'Historical Rights', 64–66, *The Limits of Nationalism*. 108–109.
47 Waldron, 'Indigeneity', 72.
48 Waldron, 'Indigeneity', 71. Gans, 'Historical Rights', 66, *The Limits of Nationalism*, 109.
49 Gans, *The Limits of Nationalism*, 117.
50 John Douglas Bishop, 'Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory', *Canadian Journal of Philosophy*, 27/3 (September 1997), 311–337, 314.
51 Bishop, 336.
52 Ross Poole, 'National Identity, Multiculturalism, and Aboriginal Rights: An Australian Perspective', in *Rethinking Nationalism*, Jocelyn Couture, Kai Nielsen and Michel Seymour (eds.) (Calgary, Alberta, Canada: University of Calgary Press, 1998), 428, 430; Ross Poole, *Nation and Identity* (London and New York: Routledge, 1999), 129, 131.
53 Will Kymlicka, *Multicultural Citizenship: A Liberal theory of Minority Rights* (Oxford: Clarendon Press 1995), 220. Waldron, 'Indigeneity', 76–77. Gans, *The Limits of Nationalism*, 105.
54 Cf: Waldron, 'Superseding Historic Injustice', 28: '"First come, first served". "We were here first". These simplicities have always been unpleasant ways of denying present aspirations or resisting current claims of need. They become no more pleasant, and in the end no more persuasive, by being associated with respect for aboriginal peoples or revulsion from the violence and expropriation that have disfigured our history'.
55 Here I am directly following Chaim Gans' conception of historical rights as 'rights to formative possessions'; Gans, 'Historical Rights', 66–76; *Gans, The Limits of Nationalism*, 109–123; Gans, *A Just Zionism*, Chapter 2, esp. 26, 32–34.
56 Gans, 'Historical Rights', 59–61, 66–76; *The Limits of Nationalism*, 97–104; *A Just Zionism*, 26.
57 Gans, 'Historical Rights', 60; *The Limits of Nationalism*, 101.
58 Smith, 'States and Homelands: the Social and Geopolitical Implications of National Territory', 193; *National Identity*, 9.
59 Gans, 'Historical Rights', 66–76; *The Limits of Nationalism*, 109–123.
60 Gans, 'Historical Rights', 66; *The Limits of Nationalism*, 110.
61 Smith, *Myths and Memories of the Nation*, 150.
62 Gans, 'Historical Rights', 66–67. See also: Gans, *The Limits of Nationalism*, 110.
63 Gans, 'Historical Rights', 67; Gans, *The Limits of Nationalism*, 110.
64 Paul Gilbert, *The Philosophy of Nationalism* (Oxford: Westview Press, 1998), 99.
65 Gans, 'Historical Rights', 72. *The Limits of Nationalism*, Chapter 4, 116. It is important to point out here again that this description is presented as part of Gans' discussion of the possibility that historical ties may be capable of grounding a territorial right which falls short of the sovereignty rights I am considering here. He himself believes that the normative implications of these ties are at most sufficient to ground this lesser right, which he dubs 'the right to determine the site of sovereignty.' I have already referred to this unique distinction in Section 3.
66 Smith, *National Identity*, 14.
67 Chaim Gans, "National Self-Determination: A Sub-and Inter-Statist Conception", *The Canadian Journal of Law and Jurisprudence*, 13/2 (July 2000), 185–205; Gans, *The Limits of Nationalism*, Chapter 3, 67–96.
68 I am not necessarily committing myself here to the position that nothing can ever justify relocation, though I lean towards that view. I am only claiming that historical connections in and of themselves cannot justify this.
69 Gans, *The Limits of Nationalism*, 115, 115–123.
70 *The Limits of Nationalism*, 109–115, 115–123.
71 Gans, 'Historical Rights', 70–76; Gans, *The Limits of Nationalism*, 115.
72 Gans, 'Historical Rights', 65; Gans, *The Limits of Nationalism*, 108.
73 A very imaginative example of the alternative to resorting to historical ties for determining the location of self-determination can be found in Michael Chabon's novel, *The Yiddish*

Policemen's Union (New York: Harper, 2007). In this detective novel, Chabon's story is set against a background of an imaginary alternative history in which the Jews were settled in 1941 in Sitka Alaska.

74 Gans, 'Historical Rights', 63–66; Gans, *The Limits of Nationalism*, 107–109.

75 Gans, 'Historical Rights', 61–62; Gans, *The Limits of Nationalism*, 103–104.

76 Gans, 'Historical Rights', 61–62; Gans, *The Limits of Nationalism*, 103–104. On the debate within Zionism regarding the location of Jewish national self-determination, see: Gans, *A Just Zionism*, 27–29.

77 Gans, 'Historical Rights', 70–76. Gans, *The Limits of Nationalism*, 115–123.

78 Gans, *The Limits of Nationalism*, 116.

79 Gans, *The Limits of Nationalism*, 115–123.

80 Gans, *The Limits of Nationalism*, 115, 115–123.

81 Miller, *On Nationality,* 24; *Citizenship and National Identity* (Cambridge: Polity Press, 2000), 29.

82 See: Smith, *National Identity*, 14, as well as much of what emerges from my discussion of historical arguments.

83 Moore, 'The Territorial Dimension of Self-Determination', 145.

84 Gans, 'Historical Rights', 70.

Chapter 4
Corrective Justice

Historical entitlement arguments appear in a variety of forms. A second version of such arguments invokes the concept of corrective justice: the claim to a particular piece of land is based on prior possession and subsequent wrongful dispossession. Typically, group representatives will argue that they were the legitimate owners of the land in question which was unjustly acquired from them, and are therefore entitled to reclaim it from its present possessors.

Such claims, seeking to restore a past state of affairs, may appear in one of two contexts: where the present occupants of the disputed territory acquired it (one way or another) directly from the group raising historical right claims; or where the group staking claims against present occupants originally lost its land to a third party. The territorial demands advanced by aboriginal peoples in Australia, New Zealand and North America serve as examples of the first context. Zionism is an example of the second context, but it is far from unique: many parts of the world whose borders were drawn by foreign powers – colonial or otherwise – fall into this category, in which people were separated from their historic territories (or parts thereof) by parties other than the present occupants.

A second distinction, which does not necessarily run parallel to the first, concerns the time span separating the alleged dispossession from the present claim. Some historical claims to land involve events that occurred within the relatively recent, well-documented past, while others date back to ancient history.[1]

Finally, whereas many claims for territorial rectification involve groups that have been entirely dispossessed of all (or virtually all) of their territory (for example, the ancient Jews, the aboriginal peoples of North America, Australia and New Zealand), some such claims may also be advanced regarding only a limited portion of a group's territory, as with the Syrian claim to the Golan Heights, for example.

All arguments of this type have at least one thing in common: they rely on a conception of justice in which what happened in the past is deemed morally relevant to the present. Many modern theorists and politicians, particularly in the West, stress a forward-looking conception of justice;[2] many national groups, on the other hand, advance a historic conception of justice which demands at least the partial restitution of a state of affairs which existed in the past.

T. Meisels, *Territorial Rights,* Law and Philosophy Library, 72
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It might be argued that claims to corrective justice need not be viewed in purely historical terms. After all, those seeking restitution of past losses are hoping to make use of the asset in question here and now, so that the distinction between these two outlooks need not be so stark. We might perhaps view demands for corrective justice not so much as historical claims but rather as claims for a contemporary improvement to a group's situation. In some cases, a group's claim for corrective justice might seem practically indistinguishable from the claim to a fair share of resources based on considerations of distributive justice. Demands for corrective justice are, however, based on a historical grievance. Regarding territory in particular, in the absence of the historical perspective it would not be clear why the group in question is demanding sovereignty, or other territorial rights, over a particular place, rather than simply demanding any similar-sized territory which would serve its present needs equally well. The issue of corrective justice, then, does, at least to some extent, involve choosing between competing conceptions of justice.

Demands for rectification in the context of territorial conflicts raise various issues and questions. Initially, I identify the argument under discussion by distinguishing it from closely related arguments, and articulate some of its preliminary assumptions. Subsequently, I address and comment on some of the literature on this subject. Finally, I examine the merits of the argument from corrective justice and consider its practical implications.

4.1 Initial Assumptions

The first preliminary assumption of territorial claims based on the idea of corrective justice is some theory of legitimate acquisition, though we need not specify it here. In order even to begin discussing corrective justice, we need to assume some background theory about the legitimate sovereignty over territory which can be violated.

Furthermore, in order to consider the normative force of corrective justice claims to land, it is necessary to accept at face value that a particular piece of land originally 'belonged' to a given group which is now making these claims, and that it was wrongfully taken away from it. Here it might be contended that any argument in favour of corrective justice based on such premises would be logically flawed by having begged the question. But such an objection would be misplaced. Starting out with these assumptions does not beg any significant questions regarding corrective justice. The main question posed by corrective justice claims is: what does justice require of us under these assumed circumstances? This is the important question here and it is not answered by our presuppositions.

Moreover, we could not deal properly and in isolation with the question of corrective justice were it not for the assumptions of legitimate sovereignty over territory and illegitimate expropriation thereof. Otherwise, we would soon find ourselves caught up in questions such as whether the group advancing corrective

justice claims was the rightful possessor of the land to begin with. Such questions are definitely worthy of consideration, as stated from the outset and pursued throughout. But they have little to do with the validity of corrective justice claims in principle. Raising doubts as to the legitimacy of the prior possession, or the illegitimacy of dispossession, is no argument against the *principle* of corrective justice as such.

This last point perhaps needs further explication. The preliminary assumption of prior ownership is plainly intended as just that, that is, as a working assumption. I am most definitely not arguing that questions concerning the legitimacy of prior ownership are irrelevant to our overall conclusions about territorial entitlement. (Indeed, this book in its entirety is dedicated to questions concerning legitimate ownership of territory.) Nevertheless, if one wishes to examine a specific type of claim with any hope of clarity, one cannot throw other issues into the mix at this point. Thus, I suggest we set aside the latter question for the moment in order to fruitfully consider the merits of corrective justice claims in the abstract.[3] Setting out without the assumptions I suggested would only hinder any attempt to evaluate principles of rectification when standing on their own.

Finally, it is of cardinal importance to distinguish claims based on corrective justice from the first occupancy claims discussed in the previous chapter, since it may appear at first glance that the discussion of claims based on the principle of corrective justice is merely a repetition of the debate over first occupancy rights. Indeed, a similar set of facts (or alleged facts) is presented in each of these cases. However, these arguments are not equivalent, since they advance distinct justificatory considerations.

While the set of events on which a first occupancy claim to a given territory relies largely overlaps with the set of events grounding a claim for corrective justice, each of the arguments clearly highlights a different aspect of the facts involved. While the former emphasizes prior possession as the factual element said to justify reclaiming of the land in question, the latter emphasizes the wrongful dispossession of the said territory, that is, the evil done to the group in question rather than the fact of their being the first possessors. The latter type of claim is by far more essential, for instance, in the case of various aboriginal groups, such as the Native Americans in the U.S. or the Maori in New-Zealand. While such groups rely on claims of prior occupancy – certainly they contest the doctrine of *terra nullius* which was used to justify the occupation of their lands – their main argument is that they were dispossessed of their occupancy by force and other immoral measures.

4.2 The Question of Reparations

From the fact that this kind of historical demand for land is based on some grievance concerning the circumstances of a group's dispossession, many writers on the present subject have inferred that what is under discussion is a question of compensation or reparation.[4] Thus, attempting to evaluate the extent of compensation

that might be owed, they focus on the possibility of reconstructing the situation that would have prevailed were it not for the wrongful expropriation.[5] This approach often leads to the (at least partial) dismissal of such claims because it is impossible to reconstruct the alternative scenario in which many intervening factors, changes in circumstances, certain human choices, as well as births, deaths, etc., might have been different or not have occurred at all.[6] 'It is popular, for instance, in criticisms of historical theories of property rights, to cite instances of massive historical injustices – such as the theft of tribal lands and resources from aboriginal peoples – and then to note that all of these complications are present… As a result, of course, a very common response to historical theories is simply to reject altogether the idea of historical entitlement'.[7]

One possible reply to this anti-historical argument is to point out, as John Simmons does, that: 'While the truth-conditions…for various kinds of counterfactuals is obviously a controversial issue, it is clear that we do regularly make counterfactual judgments with a high degree of confidence and take them to be centrally relevant to determinations of praise and blame and moral or legal liability'.[8] Simmons suggests, first, that, in doing so, we are, and indeed ought to be, guided by what would be *most likely* to have happened rather than what would *certainly* have happened. That is: 'For the purposes of assigning blame and liability we assume a normal, unsurprising course of background events'.[9] A second, related, suggestion is that the assumptions we make about the possible choices and background conditions that would have prevailed in the absence of the wrongdoing should be conservative. In a common private case in which, for instance, my bicycle is stolen, Simmons observes quite rightly that: 'We are not bothered by the fact that, during my bicycle's absence, I might otherwise have been shot by a deranged hater of bicyclists or might have been discovered by a talent scout for the Olympic cycling team. We do not hold the thief liable for dashing my Olympic hopes or reward him for saving my life'.[10] Thus, while admitting that the difficulties of assigning counterfactual judgements are indeed real and substantial, Simmons argues that they are by no means insuperable, nor do they, as it has become popular to claim, cast a pall over the project of rectifying past wrongs.[11] The admitted vagueness of alternative scenarios does not yield the strong scepticism about contrary-to-fact judgements or the rejection of historical entitlement claims. 'Persons often have a (legal and/or moral) right to what they would have enjoyed in the absence of a prior wrong, according to our best conservative estimate of what that would have been'.[12]

However plausible this response may be to attempts at dismissing historical claims on the basis of complications concerning counterfactuals, I argue more strongly that the entire underlying approach to territorial rectification which involves counterfactual reasoning is misguided. Not only is the technique of hypothetical reconstruction flawed, but the whole approach which views historical claims to land as an issue of compensation (necessitating a problematic assessment of the damage to be compensated for, as against the alternative scenario in which the injustice did not occur) is misconceived.

Groups making historical claims may indeed, among other things, be seeking compensation for the consequences of their wrongful dispossession. Such

compensation may be sought by Native Americans and by various other aboriginal peoples, just as it may be sought by American blacks where (at least usually) no historical claims for land are involved. But such claims must be distinguished from territorial claims. Groups seeking to regain territory that was once theirs and was wrongfully taken from them are not, strictly speaking, demanding compensation or reparation (though they may be demanding that as well). They are demanding *restitution*. They are simply seeking to right past wrongs by means of returning to them what they believe to be rightfully theirs.

Admittedly, the precise nature of the territorial control in question may have changed since the time of expropriation. The form and limits of modern-day sovereignty are no doubt distinguishable from the form of political control over territory exercised by the ancient Greeks or early Israelites. Native Americans can scarcely be said to have exercised *sovereignty* rights over North America at all. Thus, one might object here that the language of restitution is deceptive. When demanding modern-day sovereignty rights, so it might be argued, many groups are in fact demanding something they never had to begin with.

Demanding the restoration of sovereignty rights may indeed, at least in certain cases, strike us as somewhat anachronistic. Nevertheless, such observations do not invalidate the claims in question or their characterization as claims for restitution. Though the form and precise content of territorial control may admittedly have varied in the course of history, its basic essence remains the same. Roughly this amounts to the (more or less) exclusive control over a given territory and to its cultural domination, including the authority to command property rights within it. This is the form of territorial right which those groups advancing corrective justice-type arguments claim to have possessed in the past, and this is what they are aspiring to regain in the present. Today these rights are referred to as 'sovereignty rights', while in earlier times such notions were less developed. In the American and Australian continents prior to the arrival of Western settlers, a wide variety of aboriginal peoples (each with its own particular language, customs and heritage) enjoyed such rights over various parts of these continents respectively, basically by default. That is, many aboriginal nations enjoyed such quasi-sovereignty rights in the sense that they occupied and dominated various portions of these vast territories exclusively, with no one else (aside from each other) around to contest their control. Whether or not this type of territorial domination can or cannot be referred to, strictly speaking, as sovereignty rights, the point remains that what these groups did possess, and what they are seeking to regain at present, is in essence the same.[13] It is the collective cultural and political domination over a given territory, or whatever constitutes that form of command at any given time.[14]

Thus, for example, Zionist territorial demands concerned the claim for reinstituting a past state of affairs in which the Jews were in control of the land of Israel. They were not seeking compensation for Jewish losses throughout two thousand years of exile from that land. While it is true that the plight of the Jews, most recently the Holocaust, may have hastened the formation of the state of Israel, this is a point about a particular historical turn of events rather than the moral basis for Zionist territorial aspirations, which preceded Nazism by approximately half a century. That

the slaughter of European Jews during World War II served as a catalyst for the foundation of the contemporary state of Israel reflects world sympathy at that time. The international community may have felt that the Jews were worthy of compensation, or of protection, but this alone could not have justified (or even explained) the Jewish demand for a particular piece of land in a specific place. Furthermore, compensation could not play a part in justifying Zionist demands, since those who were responsible for the Jews' wrongful treatment at various times throughout history were not the ones who were to ultimately carry the burdens of their resettlement in the Middle East. On the other hand, compensation, or reparation, was received, both individually and collectively, from Germany. This, however, had nothing to do with territorial demands.

Other cases, such as those of aboriginal peoples, may be less clear. This is because the parties called on to make territorial concessions are also the parties responsible (at least collectively) for that territories' original expropriation. Thus it may seem that the demand is for compensation. Indeed, as I said, compensation as well as restitution may be sought in such cases. But the point is that claims for reparations must be distinguished from the territorial claim itself and dealt with separately. Territorial claims do not involve a virtually impossible reconstruction of the state of affairs that would have prevailed were it not for the original wrongful acts. In so far as they are justified, they would merely involve returning an object (in this case a piece of land) to its rightful owner.

Dealing with the issue of aboriginal claims to land, Jeremy Waldron supplies an example which may help to clarify this point, though he uses it to illustrate a different argument. Considering (and rejecting) the suggestion that we regard historical cases such as the expropriation of aboriginal lands as ongoing injustices, rather than merely injustices that took place in the past, Waldron gives the example of a car theft. According to Waldron, taking a stolen car away from the thief and returning it to the rightful owner is not a way of compensating for an injustice that took place in the past; 'it is a way of remitting an injustice that is ongoing into the present'.[15] But the example of the car theft illustrates a further point which Waldron does not make. There is no question of compensation involved in returning the stolen car. The victim may demand to be compensated (for example, for loss of time, emotional distress, etc.) in addition to demanding his car back. But these are separate claims. And the same goes for demands to return expropriated lands. It is a matter of the reinstitution of a past state of affairs in which the object in question was in the possession of someone other than the present holder.

This point has further implications, particularly for cases like those of aboriginal peoples. If we conclude that justice does not require restitution, then our sympathy for their plight – past and present – or our reproach for the people responsible for it cannot alter this. These sympathies and feelings of blame should influence our stand on questions of compensation, but not on the question of restoring, or partially restoring, a past state of affairs.

The confusion I have pointed to here between compensation and restitution may stem from a certain ambiguity in the concept of compensation itself.[16] In fact, two kinds of compensation, as well as the straightforward demand for restoration, are

often involved in claims for corrective justice. In the first instance, compensation may be demanded where restitution is for some reason impossible. That is, compensation may be demanded in lieu of restitution. This would be the case, for instance, if you were to steal my car and wreck it in a car crash. Here my demand for compensation, say for the monetary value of the car, would replace the normal demand for its return. This can also be the case where territorial claims are involved, when the land in question has been used in a way that nullifies, or at least places serious obstacles in the way of, the possibility of reinstituting a previous state of affairs with regard to it. Thus, for example, it might be argued that lands which once belonged to aboriginal peoples of North America or Australia and are now the sites of settled and well- established large Western metropolises, and have been otherwise irreversibly altered (e.g. by commercial development), cannot now reasonably be returned to their previous state and prior possessor. Aboriginal demands for compensation in such cases are sought as a second-best solution, since the possibility of full restoration is not open to them. In such instances, the notion of compensation involved is very closely related to the concept of restoration discussed earlier.

However, there is a second meaning of compensation which, as I have already said, is often also involved in demands for corrective justice, though it does not pertain directly to territorial claims. Compensation may be demanded for the deprivation which accompanied the loss of the object in question rather than for the object itself. In the case of land, compensation of this kind may be sought for the loss of use of the territory and its resources over the years. Here compensation is not sought in lieu of restitution but rather in addition to it, or in addition to the first form of compensation substituting for restitution.

It is this second form of compensation that might involve the kind of counterfactual reasoning mentioned above. It may be relevant to assessing the dimensions of the damage for which a group is entitled to be compensated. And here all the difficulties with this counterfactual approach which have been pointed out by various writers do, indeed, obtain. However, as I have argued, this is not relevant to the territorial claim which is primarily a claim for restitution. Compensation, at least in its second suggested form, is an additional claim which may also be worthy of consideration in some cases, but it is separate from the demand for the return of wrongfully acquired territory which concerns me here.

This second distinction, between the two forms of compensation, pinpoints the exact flaw in the argument that enlists the difficulties in counterfactual reasoning as ammunition against territorial concessions to injured groups. It shows precisely where some of the literature on territorial demands, particularly on aboriginal rights, has gone astray. Advancing such arguments entails pointing to difficulties concerning the second kind of compensation – which is not directly relevant to the territorial claims – in order to disqualify claims for restitution which, if related to compensation at all, are related to compensation of the first kind only. Failure to distinguish between these various forms of compensation, as well as between them and restitution, results in a convenient argument against aboriginal land claims. But oscillating back and forth in this manner between these different notions is an invalid move, and it renders void the argument based on it.

Finally, I have argued here that territorial claims based on corrective justice are primarily claims for restitution. It is, however, worth pointing out that theoretically a territorial claim could be based on compensation even in the second understanding I suggested, that is, not only when compensation is understood as a substitute for restitution, but rather when it stands on its own. A territorial claim could conceivably be grounded on a group's entitlement to compensation for prolonged suffering and deprivation caused by the absence of sovereignty over land. Furthermore, compensation of this kind need not be sought merely from the group responsible for the harm (though that presumably would be the first call), but also from others who do benefit from the advantages which the claimant group has been deprived of. This is especially so if the group that caused the harm does not exist any more (as when the injustice occurred in the very distant past) or when it is not in its power to rectify the injustice on its own.

However, such a demand for land would have at least one serious limitation which might explain why the possibility of basing a land claim on entitlement to compensation has so far remained mainly in the realm of theory.[17] Such an entitlement to compensation for past losses due to the absence of land could not justify, or even account for, a demand for any particular piece of land. It could justify only the allotment of some sufficient piece of territory that would compensate the group for its losses. An attempt to tie such a claim to any particular piece of land would have to rely either on considerations of efficiency, for example, allotting the group that land on which a large number of their members happen to be concentrated anyway, or else it would have to be supplemented by additional arguments such as the type of historical connection to land discussed in the previous chapter.

The present understanding of compensatory land claims (that is, as demands for compensation as such rather than as demands for restitution or for compensation in lieu thereof) carries with it a further difficulty for our present purpose of isolating and analysing arguments based solely on corrective justice. Not only do such claims lose their connection with any particular piece of land, they also quickly lose their connection with any particular injustice. In fact, they need not be connected to claims of dispossession of the type that concern us here at all. Such claims could legitimately be made by landless groups whether or not they had been unjustly dispossessed in the past. The background theory for such demands would presumably be one of distributive justice rather than corrective justice. The assumption would then be that all groups of a particular kind are entitled to a certain amount of territory and to the benefits stemming from it.[18] This being the case, with some groups having been dispossessed and others never having acquired land to begin with and therefore having been denied the benefits involved, all such groups are entitled to compensation. Furthermore, they are entitled to these benefits as against everyone in the world, especially if those who were originally responsible for their harm are not able to compensate them or if their misfortune is not due to dispossession to begin with. Will Kymlicka makes such an argument for land rights which he dubs 'the equality argument'.[19] However, as Kymlicka himself explains, such an argument 'situates land claims within a theory of distributive justice, rather than compensatory justice',[20] and it is the latter conception of justice which concerns me here.

4.3 The Collective Nature of Territorial Entitlement

A further point on which the views advanced in this chapter differ significantly from some of the relevant literature on corrective-justice claims to land follows directly from my arguments in Chapter 2. I argued there in favour of adopting a collective approach to territorial rights in general, an approach which would naturally encompass the type of historical entitlement presently under consideration. Some writers have assumed that the historical entitlement issue is problematic because it raises difficulties concerning inheritance. Such objections presuppose that the potential rights under discussion are individual rights whose validity today depends on the possibility of bequeathing such entitlements.[21] In accordance with the view I defended in Chapter 2, I argue here that rights to territorial restitution, in so far as they exist, are collective group rights, so that no question of inheritance arises at all. Such a right would belong to a group as an enduring entity, continuously over time, without involving inheritance from one person to another or from one generation to the next.[22]

The move from my previous and more general claim concerning the collective nature of territorial rights to its particular application in the case of historical rights requires one final link. Assuming one accepts my earlier claim that national territorial rights – such as the right to national-self determination as described by Raz – are indeed collective rights as argued in Chapter 2, it still remains to be shown that alleged territorial rights based on arguments for corrective justice (whether ultimately justified or not) can be classified in that same category even initially. The central problem arises from the necessary historical dimension of this alleged right. From the perspective of liberal political theory, the justification for collective rights, such as the right to national self-determination, is grounded in the significant interests of the individual members comprising the relevant national group. The liberal right of self-determination is thus a contemporary right based on the interests of contemporary individuals. In contrast, the type of entitlement claim considered throughout this chapter is not purely a contemporary right. An underlying assumption of territorial demands phrased in the language of corrective justice is that the collective territorial rights in question have endured throughout the generations. It is an argument for a group right which persists throughout time regardless of the identity of its individual members. How then, can one purport to defend it on liberal grounds, that is, as based on the interests of presently existing individuals?

In order to dismiss the inheritance-based objections to historical entitlement arguments, it is vital to establish that the duality I ascribe to these alleged rights is coherent. On the one hand, a territorial right based on claims for corrective justice would necessarily be a collective right. On the other hand, in order to maintain their liberal credentials these rights would have to be based on the interests of the individual members of the group in question. But (and here is the tricky part) these alleged territorial rights based on past incidents of injustice are claimed to endure beyond the lifetime of individual mortals. How is this possible?

I do not think this problem is insurmountable. The key to its resolution lies in the fact that, while the right in question would indeed belong to a group (and as such could continue to exist over time for as long as the group's cultural identity remained intact), its justification *at every point in time* would be totally dependent on the existence of intense individual interests held by group members (whoever they might be) in reclaiming the expropriated territory. While no individual right to territory is inherited, a cultural connection to the territory, as well as a story about the group's dispossession, is passed down from generation to generation. Where this cultural transmission has been successful, and/or where the group's objective situation is such that its members continue to suffer deprivation as a result of the injustice inflicted upon them in the past, contemporary individuals will have an interest in reclaiming these lost lands. So, while such a right to restitution would belong to a group, its viability would be constantly dependent on the existence of contemporary individuals' interests.

To put all this another way, if various aboriginal peoples can be said to have land rights by virtue of past possession and dispossession, these rights have to be conceived of as collective rights. However, such rights would have to be grounded in the interests of contemporary group members. To the extent that such a right exists today, this is also contingent on its having existed yesterday on the basis of yesterday's members' interests, and a hundred years ago on the basis of the interests of members at that time. It might also exist tomorrow, and possibly a hundred years from now, so long as there continue to be individuals who bear the same cultural affiliation by virtue of which they possess similar interests. Thus, the right may exist for as long as the cultural group can reasonably be described as the one which originally lost its territory, and it persists without the need for any form of bequest. It is, however, always conditional on the interests of its individual group members. Correspondingly, there is no reason to assume that this right is inalienable. If at any point the claim for restitution is abandoned – that is, if any given generation of individuals judged that it lacked an interest in recovering the misappropriated territory – then the right to it would necessarily perish. The liberal premises of the argument entail that the right cannot persist in the absence of grounding individual interests.

It remains a somewhat open question whether, under such circumstances, the right in question would perish irrevocably. That is, if such a right is relinquished by a generation of group members – members who cease to foster these interests but nonetheless continue to maintain the other aspects of the group's culture – can it at some later point be 'revived' by a subsequent generation of members who do perceive of themselves as bearing these interests? Joseph Raz believes that it cannot. In reference to the right of self-determination he asks: 'Do historical ties make a difference?' and answers: 'Not to the right if voluntarily abandoned'.[23] His reasons for this conclusion are similar to those which will ultimately lead me to question whether a fully-fledged right to a territory (rather than merely an interest in it) can be established on the basis of correcting past wrongs. He points to considerations of prescription, and argues that they are, among other things, 'meant to prevent the revival of abandoned claims, and to protect those who are not personally to blame from having their life unsettled by claims of ancient wrongs, on the grounds that their case now is as good as that of the wronged people or their descendants'.[24]

This last point concerning the protection of present inhabitants and their competing interests is crucial to the final question of establishing a territorial right. Nevertheless, I shall not address it here. The present analysis is dedicated solely to the evaluation of the moral relevance of corrective justice claims to the issue of territorial entitlement. It should by now already be apparent that the general thrust of my overall argument is that establishing a group's right to any given territory will always be the outcome of more than a single type of interest, and will often need to contend with (and ultimately overcome) a similar parcel of interests held by members of a competing group. The interests of current inhabitants will be discussed extensively in Chapter 7. They will, in fact, ultimately carry the greatest weight of the argument in this book. For now, however, these competing interests will be put aside. The question here is whether the initial step towards establishing a territorial right on the basis of corrective justice can be taken, that is, whether a relevant and sufficiently substantial interest can be shown to exist.

The remainder of Raz's short comments on the issue at hand generally strengthens the arguments advanced in this chapter regarding the moral relevance of demands for straightforward territorial restitution. It is also consistent with my assertion in this section that the potential right under consideration would be a collective right based on the interests of contemporary individuals. After asserting that historical ties should be disregarded where the right to self-determination was voluntarily abandoned, the authors continue to speculate on the issue of correcting past injustices as follows: 'Suppose that the group was unjustly removed from the country. *In that case, the general principle of restitution applies, and the group has a right* to self-determination and control over the territory it was expelled from, subject to the general principle of prescription'. [25]After clarifying what they take to be the rationale in applying the general principle of prescription to such cases, as cited above, they go on to say that: 'Prescription, therefore, may lose the expelled group the right *even though its members continue to suffer the effects of the past wrong. Their interest is a consideration to be born in mind* in decisions concerning immigration policies, and the like, but because of prescription they lost the right to self-determination'.[26]

Similarly, I have argued that territorial demands based on principles of corrective justice should be understood as claims for territorial restitution rather than as compensatory claims. In this section I argued further (following my general assertions in Chapter 2) that such a potential territorial right grounded on principles of corrective justice would be a collective (or group) right, based on the interests of contemporary individuals.

4.4 Territorial Restitution – For and Against

Now that the way has been cleared, we are at last free to discuss the substantial question. Does justice require the return of lands wrongfully taken away from their previous possessors many years ago?

I have already mentioned Jeremy Waldron's contention whereby the injustice inflicted upon aboriginal peoples has been superseded by circumstances.[27] I will discuss this argument at length in the following chapter. Kymlicka holds to a similar view. Voicing sentiments similar to Waldron's, Kymlicka claims that:

> … the idea of compensating for historical wrongs, taken to its logical conclusion, implies that all the land that was wrongly taken from indigenous peoples in the Americas or Australia or New Zealand should be returned to them. This would create massive unfairness given that the European settlers and later immigrants have now produced hundreds of millions of descendants, and this land is the only home they know. Changing circumstances often make it impossible and undesirable to compensate for certain historical wrongs.[28]

And he quotes Waldron on this point as arguing that 'certain historical wrongs are "superseded".[29]

I take a different approach from that of Waldron and Kymlicka, though ultimately it leads to similar practical conclusions vis-à-vis the possibility of full restitution. Rather than arguing that the injustice has been 'superseded', I believe we should consider past injustices of the relevant kind as yielding strong, legitimate, claims to land. If, after all, we arrive at the conclusion that certain historical wrongs should not be reversed, this will be because other powerful and conflicting claims prevail rather than because we have necessarily concluded that the original claim no longer stands.[30]

In arguing against the passage from Kymlicka cited above, Ross Poole takes a similar position. Claiming that Kymlicka's argument is confused, Poole states that:

> If the "logical conclusion" of "compensating for historical wrongs" would be further "massive unfairness", then no doubt this should be taken into account in resolving what now ought to be done. But this does not imply that we should ignore or downplay the "historical wrong". Rather, we should assess what it is, and what might count as addressing it, and then consider the cost of doing so. It might well be that the costs in terms of further consequential injustice would severely limit the extent to which compensation is possible. But this should not inhibit the initial inquiry. Indeed the comparison requires that it proceed.[31]

This difference in approach has both theoretical and practical significance. It gives more weight and respect to land claims based on historical grievances and, by so doing, it may yield different conclusions at least regarding compensation in places where full restitution is outweighed by other considerations.

In what follows, then, I shall be pursuing such a two-tier approach. The remainder of the present chapter is dedicated to evaluating the rationale for returning land which was wrongfully appropriated in the past, i.e. with establishing the basis for a historical right of this kind. In short, it is aimed at establishing the legitimacy, as well as the nature and force, of misappropriated groups' interest in the recovery of their land. The following chapter continues this line of argument. Once again however, we must keep in mind that the conclusions that emerge out of the limited discussion here, and in Chapter 5, must ultimately be incorporated into the wider discussion on land rights addressed throughout this book. As I have already explained, claims for corrective justice cannot remain neatly packaged on their own. In reality they are always contingent on our wider view of what establishes entitlement to land, as well as on a narrower view of what is politically feasible in any given particular situation.

Chapters 6 and 7 will offer arguments that on the whole oppose a right to restitution, that is, arguments that work against claims for reinstating territorial arrangements which have long passed from the scene. These countervailing arguments will return us to the interests of present possessors, which were already mentioned as opposing first-occupancy rights.

4.5 The Case for Corrective Justice

On the face of it, making a case for territorial restitution appears to be a morally straightforward issue. As Aristotle says when discussing the issue of rectificatory justice as regards both voluntary and involuntary transactions, justice of this sort 'consists in having an equal amount before and after the transaction'.[32] It is also part of our everyday moral thinking that where property has been misappropriated, it should, when possible, be returned to its rightful owner or, failing that, the rightful owner should at least be compensated for her loss. The aforementioned example of a stolen car is a case in point. Furthermore, in such instances not only would we say that the said property 'ought to' be returned to its rightful owner, we would say that the previous owner (assuming, as we are here, the legitimacy of the prior ownership) has a *right* to restitution where that is possible, or at least to compensation where restitution is not a viable option. Such a right rests on the existence of initial title (which I have assumed throughout this chapter) and correspondingly on the interest of the injured party in regaining her property, an interest which is thought to be justified and is believed to outweigh the thief's (unjustified) interest in that same object.[33] Why then should we assume differently in the case of misappropriated groups' land claims?

There appears to be no obvious difference between the nature of the interest involved in the everyday case of theft, where we are usually convinced that restitution is the appropriate remedy, and in cases of expropriated groups' territorial claims. But, while the nature of these interests is indeed similar, there is at least one obvious difference, pertaining to the length of time separating the expropriation from the demand for restitution. In the common case of theft, this time span is usually relatively short. Where it is not short, considerations favouring prescription often influence legislation (as well as our moral intuitions) in these private cases as well. Usually there are statutes of limitation restricting the punishment of such crimes. Note that the passage of time in these private cases gives rise to two distinct kinds of policies. One prevents the possibility of punishment for a property crime committed in the distant past; the other impedes the possibility of recovery of long-lost possessions. In the case of historical land claims, the time span separating the crime from the contemporary claim is often quite extensive, and reasoning similar to that which yields the above-mentioned policies in private cases may apply here as well.

The time factor in cases of historical territorial claims has two implications. It may, and usually does, have bearing on the opposing interests, that is, on the interests

of those who are now to carry the burden of the proposed restitution – individuals who are themselves (unlike in the example of the car thief) not directly guilty of the original sin of misappropriation, and who have, increasingly over time, developed legitimate interests of their own in the land in question. These will be considered in Chapter 7 which is devoted to the interests of current occupants in the continued possession of lands they have settled. But there is a second, in fact previous, implication of the temporal factor: prior to considering the interests opposing a right to restitution in the case of expropriated lands, we must establish that the interest underlying the right in question still stands, whether in full or in part.

Two arguments need to be answered in this connection. According to the first, at least in cases in which restitution is sought for lands lost in the far distant past, it is questionable, due to the passage of time, whether the group presently demanding restitution is in fact the same group as that which was dispossessed all those many years ago. If it is not, so the argument implies, there is no basis for a right to restitution. A second argument does not deny that the identity of the group has survived, but it questions the endurance of its interest in the lost territory.

As for the first argument, when can a collective be said to have endured through time? We know that the relevant collectives, that is, national collectives, change in the course of time. I am assuming a cultural approach towards national collectives rather than a racial one. Presumably, a group claiming a historical entitlement to land might, at some point, be so different culturally from the group originally dispossessed of the territory in question that it will no longer be considered to be the original group at all or be able to claim its rights, whatever the historical or biological connection to that original collective may be. Alternatively, we might view the group's continuity as totally subjective, solely as a question about the way a group perceives itself. This latter approach seems particularly problematic when we consider the high stakes involved.

Although such questions arise naturally in this connection, as they did in connection with first occupancy, I think they are of far less concern here. In the previous chapter I referred to the doubts raised by Kymlicka, Gans and Waldron as to whether various aboriginal peoples, claiming to have been the original occupants of North America and New-Zealand, ever occupied these territories as a unified group which continues to exist today, rather than as individual warring tribes that forcefully acquired territory from each other at various points prior to European colonization.[34] In connection with corrective justice claims based on the interests of contemporary individuals, I think this accusation is weaker than it is in opposition to first occupancy claims taken literally. In most cases, there is at least no doubt that the peoples in questions were harmed by conquest and colonization, whether they were the first, or merely prior, occupants. Even if that harm was inflicted on their ancestors as members of distinct sub-groups of that culture it still seems plausible to view their descendants, contemporary group members, as the cultural heirs of that injustice.

Other cases may be viewed as borderline. Yael Tamir raises doubts concerning cultural continuity with regard to the Jewish people when she refers to modern-day Israeli culture as 'newly invented' and involving 're-creation': Do modern-day

Israelis constitute the same cultural collective as the Israelites who first inhabited the territories in question and were subsequently expelled from it (at least according to the Zionist narrative)?[35] Here, I think, the claim to cultural continuity – tying the injustice to the present – is not far-fetched (though obviously in this case there is no possibility of demanding restitution from the group responsible for the historic injustice). In other cases it is completely implausible to raise corrective justice claims based on any cultural continuity with the dispossessed group. The aforementioned Palestinian claim to decent from the ancient Canaanite peoples is a case in point.[36] Again, national territorial rights are collective rights rather than individual rights passed down by inheritance.[37] It is therefore incumbent on a group claiming restitution of a previous territorial arrangement to show that it is indeed, and has been continuously, the same cultural group as the one that was dispossessed of the relevant territories all those many years ago. On the other hand, Palestinian claims to corrective justice from modern day Israel, based on the events of 1948 and 1967, are entirely coherent.

While acknowledging the relevance of such questions regarding cultural continuity in some instances, we need not attempt to answer them by reaching conclusions in borderline cases. Most cases in which corrective justice plays a central role – cases involving aboriginal peoples staking claims against modern states – are, if not clear-cut, at least not borderline cases, and much can be said that would apply at the very least to the overwhelming majority of groups claiming this type of historical entitlement. The fact that their ancestors were organized in separate rival tribes may be relevant to disqualifying first occupancy claims, but it cannot serve to deny that injustices were inflicted upon their cultural progenitors.

The second argument concerning the effect of the time element is more difficult to contend with. Here it is argued that the group's claim has 'weakened' or 'faded' with time.[38] Recall that, while I have assumed that any right to national territory is a group right, the interests on which it is based must, under a liberal theory, be those of its individual members. And the latter, due to well-known natural facts concerning human mortality, have not endured over time. Thus, in order to establish a right to territory based on the idea of corrective justice, it must be shown that presently living individuals have a special and significant interest in the return of territory which belonged to, and was wrongfully taken away from, the group with which they are affiliated.

One might assume that the mere fact that a group is seeking the recovery of a certain territory testifies to the interest of its members in it. But this is far from sufficient in order to ground a territorial right. Many groups, especially national groups, have (or at least often believe to have) an interest in the accumulation of (any) territory, just as most individuals believe they have an interest in the accumulation of wealth. Such interests, however, are not sufficiently substantial to ground a right to these desired assets.

A stronger variation of the above would suggest that the group has a legitimate interest in the restoration of a situation in which it was in possession of land (along with all the benefits that accompany the possession thereof) to which it was entitled, and which was unjustly taken away from it. Since the occurrence of this wrongful

dispossession, members of this group have been in a state of continuous deprivation of these benefits, and justice now requires that this situation be corrected and their lands be returned. Such a formulation returns us to Waldron's analogy with cases of stolen private property where our moral intuitions as to what ought to be done are considerably clearer. 'We simply give the property back to the person or group from whom it was taken and thus put an end to what would otherwise be its continued expropriation'.[39]

Unfortunately though, according to Waldron, this analogy exposes a weakness in aboriginal land claims – their susceptibility to prescription. Waldron's main argument concerns what he calls the supersession of injustice. I will discuss this argument separately in the following chapter. The other reasons Waldron mentions in favour of viewing certain property rights as subject to prescription do not apply, at least not with equal force, to nations' territorial claims. The first set of reasons concerns inheritance, the transfer of claims from one generation to the next, and the problems with making counterfactual assumptions as to what a property holder would have done with his possessions had he not been dispossessed. These problems, by Waldron's own admission, do not apply so much to groups, assuming we accept their entitlement as being collective and enduring beyond the lifetime of their individual members.[40]

The second set of reasons favouring statutes of limitation in cases of theft is procedural, or pragmatic. 'It is hard to establish what happened if we are inquiring into events that occurred decades or generations ago'.[41] As Hume observed:: 'It often happens, that the title of first possession becomes obscured through time; and that 'tis impossible to determine many controversies, which may arise concerning it. In that case long possession or prescription takes place, and gives the person a sufficient property in anything he enjoys'.[42] This is undoubtedly sometimes true, but, again, it is presumably less so in well-documented historical cases than in the private ones that Hume had in mind. It has been argued that such difficulties do obtain in the national connection with considerable force as regards ancient wrongs.[43] But this is surely not true to any great degree of the aboriginal grievances Waldron is discussing, and may not always be true as regards all ancient wrongs either.

The third kind of reasoning enlisted in support of the argument that entitlements may 'fade' with time rests on an adaptation of the Lockean justification for the acquisition and legitimate holding of property. According to this quasi-Lockean theory of property rights, Locke's notion of 'mixing one's labour' is replaced by the idea that a historical entitlement exists where an object or piece of land has come to form a pivotal place in the life of its possessor, so that it is a necessary condition for the exercise of his autonomy.[44] Such a justification for historical entitlement is, according to Waldron, particularly vulnerable to prescription, since if 'something was taken from me decades ago, the claim that it now forms the centre of my life and that it is still indispensable to the exercise of my autonomy is much less credible'.[45] But, by Waldron's own admission, this argument 'may not apply so clearly to cases where the dispossessed subject is a tribe or community, rather than an individual, and where the holding of which it has been dispossessed is particularly important for its sense of identity as a community'.[46] In such cases, where the terri-

tory in question often bears religious or cultural significance, 'the claim that the lost land forms the centre of a present way of life … may be as credible a hundred years on as it was at the time of the dispossession'.[47] And, one might add, if this is true a century or two after the dispossession, it might in some cases be true after several millennia as well.

This last point links this version of historical entitlement arguments with the liberal-nationalist notion of historical territories as significant constituents of the individual identities of group members. While in the previous chapter on historical rights this notion played the primary role, here it is employed only in a subsidiary capacity. Its limited role in the present argument is to support the claim that the interest in restitution need not have 'faded' or 'weakened' in the course of time. Unlike in cases of misappropriation of assets which are solely of material value then, the claim to regain control over historic territories may not be (as) vulnerable to prescription. Furthermore, and this returns us to a previous point in this chapter, it is a claim that cannot be satisfied through compensation but only through restitution.

The paradigm example of such a case is probably that of the Jewish people and their tie to the land of Israel. Throughout their two thousand-year exile from their land, their culture, and consequently the individual members' lives, never ceased to revolve around the territory they saw as their homeland. For two millennia, their way of life centred around this lost land, as exhibited in almost every prayer, holiday, and custom. Note that though the aspiration to return to their land never perished, it was the land itself, rather than any attempt to regain it, that remained the centre of their lives for generations.

It might of course be argued here that the Jewish example, rather than serving as a paradigm case accompanied by other less paradigmatic examples, is in fact a unique case, unable to serve as an illustration for any general phenomenon. In the normal course of events, which is what concerns us here, when a people loses possession of land, its members remould their collective identity, or lose it, so that a different land (and often a different culture) becomes the new centre of the individual members' lives. When possession is disrupted, so the argument goes, the lost territory no longer plays the central role it once played in the lives of the individual group members, and they therefore cannot reclaim it many generations later on the pretence that it does. To draw on the analogy with private property, it might be argued here that my car may have played a central role in my life before it was stolen. I may have driven it everywhere I went, planned my day according to the availability of parking, etc. Thus its theft is a serious loss to me when it occurs and for a time thereafter. If it can be recovered shortly after the theft, it should be returned to me and the culprit should be punished. But if many years go by and my car is not found, I can meanwhile be expected to have readjusted my life in a way that no longer enables me to claim that the stolen car still plays a pivotal role in my life. I may have purchased a new car, or I might perhaps buy a bike and get fit. In any event I can no longer claim that the lost car is still so central to my life plan. The same, so it might be argued, goes for long-lost territories, and the Jewish example, on this account, is merely the exception that proves the rule.

Admittedly the Jewish example may be *sui generis.* However, a more common territorial case serves to illustrate the same point, that is, that a territory may continue to form the centre of a present way of life long after possession of it has been lost. In many cases, while a group loses control over a territory its members continue to reside within it or near it. They are unable to rebuild their lives around a different territorial asset since they have nowhere else to go, and thus the lost asset, with which they are still in physical contact, continues to play a pivotal role in their lives. This is the case of group members who live in refugee camps and of the various aboriginal peoples living on reservations, or in other areas in North America, Australia and New Zealand.

Individual members of dispossessed groups will often have a morally significant interest in the restitution of their lost lands. Even if their material claim to the land in question can be said to have weakened over time, they still have other weighty interests which may serve to ground a right to restitution. Furthermore, the identity argument drawn from theories of liberal nationalism ties the territorial claim to a specific place and a specific injustice. It explains why groups seeking restitution on the basis of corrective justice demand particular pieces of land in particular places rather than simply any equivalent territory which would compensate them for their ongoing material depravation. It points to an interest that was, among other things, harmed by the original misappropriation, but unlike other interests (for example, material interests) may well be every bit as strong in the present as it was in the past. Moreover, it is an interest which can be satisfied only by means of literally undoing the injustice (rather than by way of either monetary or other compensation): that is, by returning the specific land to the dispossessed group.[48] Thus, the liberal-nationalist understanding of historic territories as components of individual group members' personal identity, discussed in Chapter 3, joins forces with the principle of corrective justice in order to lend a basis to the potential right in question.

4.6 Concluding Remarks

The purpose of this chapter was to further the understanding of territorial claims phrased in the language of corrective justice, and to evaluate their force. The first few sections analysed this sort of claim in an attempt to refine our understanding of precisely what they amount to. To this end, I pointed at a few sources of potential confusion, and drew several distinctions between the demand for territorial restitution and other, related claims. The second half of the chapter was dedicated to establishing the moral validity of territorial claims based on principles of corrective justice. I argued that members of dispossessed groups carry substantial interests in the restitution of their lost lands, interests that may well endure for prolonged periods. I took a strong stand against the view that these claims are necessarily weakened by the passage of time.

What this all adds up to is a favourable understanding of territorial claims advanced by groups on the basis of their historical misfortune. This sympathetic

account and the arguments that accompanied it, distinguishes my view from some of the recent literature on aboriginal land claims. I implied that such claims have more to them than is usually appreciated and that they carry more normative weight than is commonly conceded. My argument, however, does not amount to a call for territorial restitution of all long-lost lands. At most it offers a prima facie case for partial restitution which must ultimately be balanced against other weighty interests, such as those held by the relevant territories' present inhabitants. The following chapter discusses the possibility that the injustice involved in the misappropriation of aboriginal lands has in some way been superseded by circumstances. In the chapters after that, especially in Chapter 7, I proceed to examine arguments favouring the claims of present occupants, particularly those of settlers. Such arguments oppose claims to restitution, even if such claims are, as I have argued, well-founded.

Endnotes

1 See, George Sher, *Approximate Justice – Studies in Non-Ideal Theory* (Maryland: Rowman and Littlefield Publishers,1997), Chapter 1, 'Ancient Wrongs and Modern Rights'.

2 See, most notably: Jeremy Waldron, 'Superseding Historic Injustice', *Ethics* 103 (October 1992), 4–28, esp. 26–27, where he speaks of a prospective theory, or conception, of justice. I discuss Waldron's Supersession Thesis in the following Chapter. For one further academic example of this approach, see: Lea Brilmayer, 'Groups, History, and International Law', *Cornell International Law Journal* 25 (1992), 555–563, 562–563, where she speaks of the necessity that international solutions to groups' historical disputes look to the future rather than the past.

3 As far as I can see, the only alleged justification for acquisition and holding which would pose an obstacle to these assumptions, and to my attempt at evaluating the merits of corrective justice-type claims in this kind of isolation, would be a theory according to which the mere fact of forceful conquest legitimizes territorial appropriation. If one was to accept such a theory, one could not then ask whether a group who had been dispossessed by force had any valid claim. The negative answer to this question would, in such a case, be found in the theory of acquisition itself. On this account, if the territory in question has been successfully conquered, then no one but the conqueror has any legitimate claim to it. I, however, remain totally unbothered by this observation. The idea that conquest in and of itself can serve to justify territorial rights was dismissed out of hand, on liberal grounds, right at the outset of this book.

4 George Sher, *Approximate Justice*, Chapter 1, Jeremy Waldron, 'Superseding Historic Injustice', 7–14; Will Kymlicka, *Multicultural Citizenship: A Liberal theory of Minority Rights* (Oxford: Clarendon Press, 1995), 220.

5 Sher, *Approximate Justice,* 18–19; 21–23, 25; Waldron, 'Superseding Historic Injustice', 7–14.

6 Sher, *Approximate Justice*, e.g. p. 18; Waldron, 'Superseding Historic Injustice', 12. Kymlicka, *Multicultural Citizenship,* 220, also describes historical claims in terms of trying to 'turn back the historical clock' and attempting to 'restore groups to the situation they would have been in the absence of any historical injustice'. This is precisely the understanding of historical arguments which I am arguing against.

7 A. John Simmons, 'Historical Rights and Fair Shares', *Law and Philosophy* 14 (1995), 149–184, 154–156, who points out that such problems concerning counterfactuals are a popular ground for rejecting historical entitlement arguments.

8 Simmons, ibid, 157.

9 Ibid.

10 Ibid.
11 Ibid, 159.
12 Ibid.
13 When contemplating the rights of expropriated groups within their account of 'National Self-Determination', Joseph Raz and Avishai Margalit use the general terminology of 'control' to denote both prior territorial rights and the content of contemporary demands for restitution without any such distinction between the two on the basis of the evolution of political concepts. See: Joseph Raz and Avishai Margalit, 'National Self-Determination', in: Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 125–145, 143; Similarly, Anthony Smith uses the language of restoration to describe the Jewish claim to Palestine. See: Anthony D. Smith, *Myths and Memories of the Nation* (Oxford: Oxford University Press, 1999) Chapter 8.
14 One could of course go further than this and argue that the full restoration of any given past situation is philosophically incoherent. On this account, one can never actually reinstitute a past state of affairs since no two points in time are identical. This would go for the restitution of a stolen car in precisely the same way as it works in the territorial connection. I am willing to concede that on this philosophical level any so-called restoration is merely an attempted approximation of restitution. I doubt however that this theoretical observation bears significantly on the issue at hand.
15 Waldron, 'Superseding Historic Injustice', 14. Note that in using this example, Waldron relies on the type of analogy between cases of theft of private property and those involving the loss of territorial sovereignty. In the introduction to this book, I argued for the legitimacy of drawing on private property-based arguments in connection with territorial claims. I, therefore, allow myself to pursue this example throughout this chapter without further defence.
16 Simmons clearly recognizes that there are significant differences in the languages of 'reparations', 'rectification', 'compensation', 'restitution' etc., and cites several distinctions between them, each different in its own way from the one presented here. He, however, does not pursue any such distinction, and explicitly admits to using all the above more or less synonymously, loosely 'referring in all cases to that which is due the victim of a wrong in consequence of the wrong'. Simmons, 'Historical Rights and Fair Shares', 149–150, his footnote 2.
17 The proposal of a Jewish state in Uganda can be understood to have been based on such an understanding of the need for compensation. It was, however, rejected and, as far as I know, no group has based a territorial demand solely on compensation in this sense with no regard for the location of its desired territory. An exception to this, that is, a demand for territorial restitution with no particular land in mind, could possibly be made on behalf of groups who have lost their land due to natural disasters, ecological catastrophes, rather than as a result of human injustice. See Cara Nine's innovative work on this issue: Cara Nine, 'A Lockean Theory of Territory', *Political Studies*, 56/1 (March 2008), 148–165, Section III.5.
18 The best argument of this distributive type is Chaim Gans' theory of National Self-Determination, referred to in the previous chapter. See: Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University press, 2003), Chapters 3–4; Chaim Gans, *A Just Zionism – On the Morality of the Jewish State* (New York: Oxford University Press, 2008), esp. Chapter 2. See also: Gans, Chaim "National Self-Determination", *The Canadian Journal of Law and Jurisprudence*, 13/2 (July 2000).
19 Kymlicka, *Multicultural Citizenship*, 108–120.
20 Kymlicka, *Multicultural Citizenship,* 120.
21 David Lyons, 'The New Indian Claims and Original Rights to Land', *Social Theory and Practice*, 4/3 (Fall, 1977) 249, 257–259, 268–269; Lyons argues in favour of the collective approach with regard to Native Americans' rights, but adopts an individualistic approach involving inheritance in connection with their American opponents. As for the former, he is not totally faithful to this collective approach. Earlier (257–259), he dedicates an entire section to the question of inheritance, though he does admit that it bears little connection to the Native American issue. As I pointed out in Chapter 2, Yael Tamir is on record as claiming that all national and other so-called collective rights are actually individual rights. Yael

Tamir, *Liberal Nationalism* (Princeton NJ: Princeton University Press, 1993)45, 73. Sher's *Approximate Justice,* 23–25, though not addressing the issue of individual versus collective rights explicitly, clearly supposes an individualistic approach (See his mention of historical transmission of entitlements and of bequeathing wealth in *Approximate Justice,* 24–25). Simmons, 'Historical Rights and Fair Shares', 177–180, briefly raises and argues against the type of objections to the rectification of long-lost lands based on difficulties concerning the inheritance of the entitlement in question.

22 As I said, this is also Lyons' view as regards Native Americans. Lyons, 'The New Indian Claims', 257, 268–269.

23 Raz and Margalit, 'National Self-Determination', 143. Note that for Raz and Margalit, the right to self-determination is a territorial right.

24 Raz and Margalit, 'National Self-Determination', 143.

25 Ibid.,

26 Ibid.

27 Waldron, 'Superseding Historic Injustice'.

28 Kymlicka, *Multicultural Citizenship*, 220.

29 Kymlicka, *Multicultural Citizenship*, 220.

30 For the view I oppose here, see: Waldron, 'Superseding Historic Injustice', 15, where he speaks of claims "fading" and "weakening" over time; and: Sher, *Approximate Justice,* 23–24.

31 Ross Poole, 'National Identity, Multiculturalism, and Aboriginal Rights: An Australian Perspective', in Jocelyn Couture, Kai Nielsen and Michel Seymour (eds.) *Rethinking Nationalism* (Calgary, Alberta, Canada: University of Calgary Press, 1998), 407–438, 430; Ross Poole, *Nation and Identity* (London and New York: Routledge, 1999), 132.

32 Aristotle, *The Nicomachean Ethics* (Oxford and New York: Oxford World's Classics, Oxford University Press, Davis Ross, Translator*,* 1998) book 5, Chapter 4, 114–117, 117.

33 To this one might add (for the sake of precision) the general interest in the protection of our rights, as well as considerations of public order.

34 Will Kymlicka, *Multicultural Citizenship: A Liberal theory of Minority Rights* (Oxford: Clarendon Press 1995), 220. Waldron, 'Indigeneity', 76–77; Gans, *The Limits of Nationalism*, 105.

35 Yael Tamir, *Liberal Nationalism* (Princeton, New Jersey: Princeton University Press, 1993), 52.

36 Similarly, the Romanian claim to be the rightful owners of Transylvania by virtue of alleged biological decent from the population of ancient Dacia – the indigenous and ancient inhabitants of Transylvania – mixed with their Roman conquerors, is not very helpful either, though here the cultural connection may be somewhat closer than that of the Palestinians to the Canaanites. However, in order to establish historic entitlement based on corrective justice, it is simply insufficient to point to a biological link with a previous group possessing this land. It must be shown that the present claimants constitute the same *cultural collective* as the group which was historically dispossessed. For this Romanian claim to priority over Hungarians in Transylvania, see: J.F. Cadzow, A. Ludanyi, and L.J. Elteto (eds.) *Transylvania – The Roots of Ethnic Conflict* (Kent: The Kent State University Press, 1983), 232–233. For the Palestinian claim, see: Gans, *The Limits of Nationalism*, 100. *Ha'aretz* (Israeli daily newspaper), August 4th. 1998.

37 Within the framework of liberal nationalism, these collective rights are granted to groups by virtue of their being distinct cultural entities – what Joseph Raz and Avishai Margalit refer to as 'encompassing groups'.Joseph Raz and Avishai Margalit, 'National Self-Determination', *Journal of Philosophy* 87 (1990) 439–461; and in: Joseph Raz, *Ethics in the Public Domain*, 125–145.

38 Again: Waldron 'Superseding', 15, uses terms such as 'fading' and 'weakening' to describe his view on some aboriginal land claims.

39 Waldron, 'Superseding', 15.

40 Waldron, 'superseding', 15.

41 Ibid.

42 David Hume, *A Treatise of Human Nature*, Oxford Philosophical texts (The Complete edition for students) D.F. Norton and M.J. Norton, eds. (Oxford: Oxford University Press, 2000) Book 3, Part 2, Section 3, 326. See also: Paul Gilbert, *The Philosophy of Nationalism* (Oxford: Westview Press, 1998), 102, who sites Hume in the territorial connection.
43 George Sher, *Approximate Justice*, Chapter 1: 'Ancient Wrongs and Modern Rights'.
44 Waldron, 'Superseding', 18.
45 Ibid, 19.
46 Waldron, 'Superseding', 19. John Simmons, 'Historical Rights and Fair Shares', 170–171, totally denies Waldron's view whereby moral rights to rectification of past injustices simply fade away with the passage of time. Simmons goes further than I do as he appears to imply that the mere passage of time, considered strictly in and of itself, can never have any effect on the substance of our moral (as opposed to legal) rights to the recovery of stolen property, whether it was held privately or collectively prior to the theft.
47 Waldron, 'Superseding',19.
48 This is not to deny that monetary compensation may be appropriate where groups have been wronged. I am, however, dealing only with national territorial claims and as to these, I argue, financial compensation is never the most appropriate remedy, and that often it is totally inappropriate.

Chapter 5
The Supersession Thesis

Jeremy Waldron's final and most influential argument against the restitution of aboriginal land claims is based on what he refers to as the supersession of the injustice that was perpetrated by white colonists.[1] I have referred to aspects of this argument at various points throughout the last two chapters on historical and corrective justice, and will continue to do so in the following two chapters, on efficiency and settlement respectively. But the Supersession Thesis deserves separate consideration here. Whereas the arguments discussed in the previous chapter concentrated on the strength of the interests of the claiming parties, the present argument concerns the impact of restitution on the interests of others who would carry the burden of exclusion from the territory in question. Moreover, the previous chapters considered territorial interests which rely, one way or another, on past events. The following chapters consider interests stemming from the current use of the territory in question, and on attaining a just solution which takes the present situation into account, whatever its history. The present discussion has something to say about the contrast between these two competing perspectives on justice.

5.1 The Argument from Supersession

According to Waldron's argument, just as justice in acquisition of land, and the legitimacy of its subsequent holding, are susceptible to re-evaluation in light of changing circumstances, so is our attitude towards injustice in the acquisition and holding of resources, such as land. In other words, just as a legitimate acquisition and entitlement may become unjust and illegitimate if certain circumstances change (e.g. resources become scarce, population increases, etc.), so may an illegitimate acquisition be legitimised retrospectively in light of such changes in circumstance.[2]

> The burden of justifying an exclusive entitlement depends (in part) on the impact of others' interests of being excluded from the resources in question and that impact is likely to vary as circumstances change. Similarly, an acquisition which is legitimate in one set of circumstances may not be legitimate in another set of circumstances.[3]

T. Meisels, *Territorial Rights,* Law and Philosophy Library, 72
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Waldron continues to infer from the above that:

> an initially legitimate acquisition may become illegitimate or have its legitimacy restricted (as the basis of an ongoing entitlement) at a later time on account of a change in circumstances. By exactly similar reasoning it seems possible that an act that counted as an injustice when it was committed in circumstances C1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C1 to C2. When this happens, I shall say the injustice has been *superseded*.[4]

Justice, and our views on what is just or unjust in a particular situation, is dependant on external circumstances.[5] The justice of any particular entitlement is dependant on its underlying interest outweighing the interests of those who are to bear the costs of respecting it. With regard to the acquisition and holding of property, a distribution of entitlements that is just under conditions of plenty may not be just if circumstances change to conditions of scarcity. Waldron suggests that the same logic works in the other direction as well: a system of entitlements that is unjust under conditions of plenty (e.g. grabbing resources previously acquired by others) may later, under conditions of scarcity, become precisely what justice prescribes.

In the case of aboriginal land rights in North America, Australia and New Zealand:

> The argument is that claims about justice and injustice must be responsive to changes in circumstances. Suppose there had been no injustice: still, a change in circumstances (such as a great increase in world population) might justify our forcing the aboriginal inhabitants of some territory to share their land with others. If this is so, then the same change in circumstances in the real world can justify our saying that the others' occupation of some of their lands, which was previously wrongful, may become morally permissible. There is no moral hazard in this supersession because the aboriginal inhabitants would have had to share their lands, whether the original injustice had taken place or not.[6]

Waldron does qualify these strong statements somewhat by admitting that such supersession of injustice, due to changes in circumstances, may not pertain to all cases of misappropriated aboriginal lands, but it is still quite clear that he believes it may well obtain in many such cases.[7]

The basic logic of Waldron's supersession argument, regarding the inevitable implications of a change in circumstances to the justice of present day arrangements, seems undeniable. On the whole, the Supersession Thesis is irresistibly convincing. The following two chapters of this book, Chapters 6 and 7, attempt to explain why, aside from purely self-interested and pragmatic reasons, there is in fact a near world-wide consensus regarding the grave injustice that would be involved in an actual reversion of European settlement throughout North America, Australia, New Zealand, and, to some extent also in Israel. But the Supersession Thesis probably offers the best explanation of, and justification for, this widespread presumption against massive reversion. Still, as in the case of all great works, there remains something to be said about some of the intricacies – the specific details and workings – of Waldron's Supersession Thesis.

5.2 Some Early Objections

When I first addressed this argument in the previous edition of this book as well as elsewhere,[8] I suggested that the turn of phrase 'Superseding Historic Injustice', may itself be problematic. I no longer think this point is of much interest in and of itself. Waldron's use of the term 'supersession' with regard to past injustices has become so well known in the literature on land rights and corrective justice, and so entirely identified with his particular argument against reversion, that questioning this phrase now may admittedly appear odd, perhaps even in bad taste at this point. However, such terminology may be taken to imply that circumstances have in some way transposed or replaced the injustice in question, and as such may be objectionable to those who are particularly influenced by, or sensitive to, the injustices that took place in the past.

The argument for the 'supersession' of past injustices is that changing circumstances justify the continued possession of territories which were unjustly acquired and unjustly held under the circumstances which obtained at the time of their acquisition. Possibly, what was once an unjust situation (the European settlers' control of lands in American, Australia and New Zealand) is now precisely what justice requires: 'it seems possible that an act that counted as an injustice when it was committed in circumstances C1 may be transformed, *so far as its ongoing effect is concerned*, into a just situation if circumstances change in the meantime from C1 to C2'.[9] The historic injustice itself – the brutal and fraudulent acquisition of such lands in the past – has not been put right by Waldron's assumption that the aboriginal peoples in question would have meanwhile (that is, in the intervening period between the injustice and the present claims) had to surrender some of those territories to European settlers anyway. I shall return to this point in Section 3 of this chapter. I will argue there that if any injustice has been superseded, it is only the possible injustice involved in the present holding of the territories in question, not the historic injustice itself. [10]

So far all I have questioned is the particular verbal formulation of the argument as 'Superseding Historic Injustice', and I have been pretty hesitant at that. But some of the ins and outs of the argument raise several further questions as well. For one thing, the Supersession Thesis rests on the assumption that the criterion for land acquisition is a fair (as in roughly equal) distribution, based on considerations of need, size of population, and so on. While we need not necessarily reject such a criterion, it is certainly one that cannot be supposed as agreed on without further argumentative support. Waldron's assumption that, even if there had been no injustice inflicted upon aboriginal peoples in the past, 'a change in circumstances (such as a great increase in world population) might justify our forcing the aboriginal inhabitants of some territory to share their land with others',[11] is itself in need of justification in the form of an entire detailed background theory of entitlement to land which is lacking in his argument here. Since what he is arguing for is the destiny of

specific territories, he cannot simply assume a certain criterion, which he believes is appropriate for determining that destiny. Choosing the relevant criteria for determining entitlement to land is a major component of the final outcome. Presupposing certain such criteria in an argument for a particular outcome in a particular case, is, then, to a large extent, begging the question.

Material resources are not usually distributed in our world on the basis of need, and not everyone agrees that they should be. Even if physical need is taken as the primary criterion for the allocation of resources, it is not clear that this would have eventually required particular aboriginal peoples to forfeit their territorial holdings in favour of European settlers. It may only have required some native peoples to supply the settlers and their descendants with enough resources to ensure their survival. I return to this point at great length in the following section.

Let us ignore the previous point and assume now that we all accept, as I'm sure many do, the kind of background theory that underlies the argument from supersession. That is, assume we all agree with Waldron that territory should be distributed on a roughly egalitarian basis taking into account the size of populations, availability and need of natural resources, etc. We will, however, still recognise that this is as yet a totally unrealised ideal. Perhaps Australia, which is still largely under populated, should surrender significant portions of its territory to China, for example. Except that it is unlikely to do so.[12] In view of reality, then, Waldron's contention whereby 'a change in circumstances ... might justify *our* [?] Forcing the aboriginal inhabitants of some territory to share their land with others'[13] is somewhat troubling. It suggests that we (whoever 'we' are) might be justified in forcing peoples who form the weakest link in the international chain to live up to some idealised, albeit theoretically desirable, world order that none of the more established, powerful, nations is likely to succumb to in the foreseeable future.[14] Admittedly, in the 17th and 18th centuries, aboriginal peoples were prosperous with regard to their per-capita land holdings, in relation to Europeans. But the implications of supersession in the present affect groups who are now territorially impoverished.

Waldron's proposal raises objections along the lines that 'charity begins at home'. When attempting to implement costly just policies we ought to start by taxing the rich and prosperous before we collect from the poor and needy. Suggesting, in effect, that we target the landless aboriginal survivors of grave injustice as the pioneers of a new world order instituting justice in the distribution of territory may simply add insult to injury.

5.3 Superseding Historic Injustice and the Lockean Proviso

For all the above, the greatest challenge to the Supersession Thesis may ultimately lie elsewhere entirely. Throughout the remainder of this chapter, I am going to explore the possibility that the conclusions of the Supersession Thesis depend to some extent on the specific formulation of the so called 'Lockean Proviso' that underlies it. I am

going to suggest that the Supersession Thesis is most convincing on the traditional understanding that Locke's 'enough and as good left for others' clause was intended as a strong constraint on initial acquisition, an understanding which Waldron refutes.

The logic of the Supersession Thesis relies to some degree on a type of 'Lockean Proviso'.[15] Explaining the first step in the Supersession Thesis – that an act of acquisition, A, may be just in circumstances of plenty, C1, but that the same act A may be unjust if circumstances change to conditions of scarcity in C2[16] – Waldron enlists Locke in support of his argument that justice regarding resource acquisition is sensitive to changing circumstances.[17] 'One does not need the exact formulation of a "Lockean Proviso" to see this. It is simply that there are real and felt moral concerns in the one case that have to be addressed that are not present in the other'.[18] This effect of changing circumstances is recognized by Nozick as well.[19]

> Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean Proviso and limits his property rights.[20]

Waldron assures us again that 'we need not worry about the exact details of this proviso or of the various Lockean and Nozickian formulations of it'.[21]

Waldron's own take on the waterhole example is so well known that it hardly requires retelling.[22] In a situation of plenty, it may be just for various groups – the P's and the Q's – to appropriate waterholes and use them exclusively. But if all the waterholes except P's were to dry up, then P's exclusion of the Q's from their waterhole would no longer be just. The Supersession Thesis suggests that the reverse is possible as well. An unjust incursion and acquisition may become a just situation at a later date, as the result of a change in circumstances:

> Suppose as before that in circumstances of plenty various groups on the savanna are legitimately in possession of their respective water holes. One day, motivated purely by greed, members of group Q descend on the water hole possessed by group P and insist on sharing that with them ... That is an injustice. But then circumstances change, and all the water holes of the territory dry up except the one that originally belonged to P. The members of group Q are already sharing that water hole on the basis of their earlier incursion. But now that circumstances have changed, they are entitled to share that water hole; it no longer counts as an injustice. It is in fact part of what justice now requires. The initial injustice by Q against P has been superseded by circumstances.[23]

The basic logic of Waldron's supersession argument, regarding the inevitable implications of a change in circumstances to the justice of present day arrangements, seems undeniable. The analogy with cases of European territorial conquest and colonisation follows.

> …there have been huge changes since North America and Australia were settled by white colonists. The population has increased manifold, and *most of the descendants of the colonists, unlike their ancestors, have nowhere else to go*. We cannot be sure that these changes in circumstances supersede the injustice of their continued possession of aboriginal lands, but it would not be surprising if they did. The facts that have changed are exactly the sort of facts one would expect to make a difference to the justice of a set of entitlements over resources.[24]

5.3.1 Superseding Historic Injustice and Territorial Rights

In a most insightful article titled 'Superseding Historic Injustice and Territorial Rights', Cara Nine argues that Waldron's supersession argument applied to the historic injustice of territorial conquest and colonization, is unsuccessful.[25] Nine refers to Waldron's conclusion in the above:

> Because the descendants of colonists have nowhere else to go, the descendants of the original inhabitants are obliged to share their territory with the descendants of the colonists. This argument, according to Waldron, strongly suggests that the descendants of colonists are not obligated to return territorial sovereignty to the land's original inhabitants.[26]

Nine believes that Waldron's conclusion to this effect is unfounded because it does not take into consideration the difference between the right to reside in a territory and take advantage of its resources, and the right to territorial sovereignty. The former, is merely the right to use the means of subsistence offered by a plentiful territory in order to ensure ones endangered survival. In contrast, the right to territorial sovereignty, the right to share the territory, is the right to establish a determinate jurisdiction within a region along with the right to determine the laws governing property arrangement within that jurisdiction.[27] Nine argues that, as it stands, Waldron's argument can only support the modest claim that the descendants of colonists have the right to reside in the territory, along with access to resources, but not the right to territorial sovereignty. She suggests that, on Waldron's own terms, we ought to conclude that if the descendants of colonists indeed have nowhere else to go, they should retain access to land and other resources, but that they remain obliged to return territorial sovereignty to the original inhabitants of the land, and they are required to do so even under conditions of scarcity.[28]

Nine explains her critique by using Nozick and Waldron's waterhole examples. She points out that what follows from Nozick's example, is only that the owner of the remaining waterhole in a desert must allow others to share his hole by guaranteeing them an affordable price for his water.[29] In Waldron's example, the Q's have a right to use the P's waterhole once their own has dried up, in order to quench their thirst. To this extent, Nine admits, the P's are obliged to share their waterhole with the Q's once circumstances have changed. But under no circumstances are the P's required to share management of the waterhole with the Q's, just because the latter's waterhole has dried up. They are certainly not entitled to replace the Q's as managers of the hole.[30]

Recall that Waldron argues that even if 'there had been no injustice: still, a change in circumstances (such as a great increase in world population) might justify our forcing the aboriginal inhabitants of some territory to share their land with others'.[31] And that 'If this is so, then the same change in circumstances in the real world can justify our saying that the others' occupation of some of their lands, which was previously wrongful, may become morally permissible'.[32] On Nine's account, changes in circumstances might have justified forcing aboriginal peoples to share their territorial resources with the inhabitants of an increasingly over populated Europe in order to guarantee their physical survival. But a change in world population would never have justified the European *occupation* of aboriginal lands.[33]

Again, Nine attributes her differences with Waldron to the distinction between immigration and sovereignty. In another analogy with private property, not dissimilar to the waterhole examples, Nine points out that in circumstances of existential need, a car owner may have a duty to drive the victim of a motor accident to the hospital. But the victim of the car accident does not thereby acquire any further rights to control the car owner's property. He may have a right to be driven to the hospital, but that does not entitle him to joint ownership over the car.[34] She concludes her objection by arguing that, as it stands, the Supersession Thesis actually recommends that sovereignty over colonized lands, such as in North America, Australia and New Zealand, ought to be returned to their aboriginal inhabitants, with the proviso that the descendants of colonists, if they indeed have 'nowhere else to go', remain in the territory and reside in it under native control.[35] I think this is where Nine's analogy with property rights and her adjacent critique of supersession break down, though I also think that the concerns she raises are extremely important.

5.3.2 The Lockean Proviso

I doubt the sovereignty-residence distinction has much significance to the cases at hand. Once having acknowledged that a change in world circumstances would at some point legitimize European settlement on sparsely populated continents, and acknowledging that the descendants of colonists now have 'nowhere else to go', there is little significance to the sovereignty-residency distinction. European settlers and their descendants, if they are legitimate inhabitants by virtue of need, will naturally be entitled to democratic rights. Nine acknowledges this as well when she speaks of immigrants acquiring the right to vote.[36] A shared say in the management of the territories in question swiftly follows their democratic rights. Taking circumstances – particularly relative size of populations – into account, sheer numbers will quickly entitle the descendants of colonists to a larger say over the running of the territory, its political culture and property arrangements. Nine might argue that native groups ought to be granted special representation rights, or the right to decide particular issues on their own. But Nine's conclusion that actual sovereignty over these territories ought to revert to their original inhabitants could only be implemented if one were willing to deny the descendants of colonists the right to vote on ethno-nationalist grounds, which of course we would not.

Another reason for denying the significance of any sovereignty-residency distinction is the overall cosmopolitan framework of the Supersession Thesis. In 'Redressing Historic Injustice', Waldron sets out with the Kantian Proximity Principle, stating that 'people have a natural duty to enter into political society with those with whom they find themselves in a condition of unavoidable coexistence'.[37] Though, as I understand it, this is not a derivative of the Supersession Thesis, but rather some sort of background assumption to it. This is 'the spirit of the Supersession Thesis'.[38]

Still, there is something very significant in Nine's objection. Recall Waldron's argument:

> Suppose there had been no injustice: still, a change in circumstances (such as a great increase in world population) might justify our forcing the aboriginal inhabitants of some territory to share their land with others. If this is so, then the same change in circumstances in the real world can justify our saying that the others' occupation of some of their lands, which was previously wrongful, may become morally permissible. There is no moral hazard in this supersession because the aboriginal inhabitants would have had to share their lands, whether the original injustice had taken place or not.[39]

If a change in circumstances (an increase in world population) only entitled Europeans to use oversees resources, rather than to appropriate them, as Nozick's example suggests, then the injustice involved in territorial acquisition of Aboriginal lands never became just, and therefore was never superseded, at least not in this way. This however, has little to do with the distinction between sovereignty rights versus the right to immigrate, because the right to immigrate will necessarily entail the right to vote, and thereby share sovereignty.

Instead, Nine's objection actually derives from her reliance on Nozick's theory of property rights.[40] As she says: 'I have grounded this objection on Nozickian property right theory'.[41] On Nozick's weak interpretation of the 'Lockean Proviso', appropriators need only leave 'as much and as good in common ' so that the situation of others is not worsened by the appropriation, but only in the sense that there remain resources for them to use, though not necessarily to acquire.[42] In Nozick's example, all the Proviso requires of the owner of the sole waterhole is to supply others with a drink at a reasonable price. Hence Nine's analogous conclusion that aboriginal peoples would never have been obliged to supply Europeans with anything more than the right to use some resources in order to alleviate their pressing needs. Nozick's weak proviso doesn't require an appropriator to leave an equal opportunity for others to actually appropriate, no matter what their needs are.

On the traditional understanding of the 'Locekan Proviso', Locke required initial appropriators to leave sufficient supplies in common for further labourers to acquire. This would require appropriators to leave an equal opportunity for others. Nozick's critique of such a strong Lockean proviso and its detrimental implications for Lockean property rights, casting a historical shadow on a theory of original appropriation, are well known.[43] It is Nozick's substitute – a far weaker proviso – that yields Nine's territorial conclusions. But on a traditional, non-Nozickian, account of 'enough and as good', European settlers actually would have eventually had the right to acquire territory in foreign continents when their territorial resources began running out. Aboriginal peoples' original appropriation would have been limited in just the way that Waldron describes. They could not have legitimately acquired, and indefinitely held, vast amounts of territory, merely by virtue of their priority, without permanently leaving 'enough and as good' for subsequent arrivals to acquire.

Nine asserts that 'the details of the proviso don't need to be settled before we can use it to make a point about just holdings in land'.[44] This she legitimately picks up from Waldron's 'Superseding Historic Injustice',[45] and it holds for the limited point about the sensitivity of justice to circumstances. But in the end, a lot may actually depend on the type of 'Lockean Proviso' that permeates the Supersession Thesis.

Elsewhere, when questioning 'indigeneity', and the restitution of land to aboriginal peoples on the basis of their first occupancy claims, Waldron returns to his point about justice being susceptible to changing circumstances. He argues that while The Principle of First Occupancy 'accords moral privilege to an occupancy, in virtue of that occupant's not having dispossessed anyone else'[46] (in other words, it derives its moral force, such as it is, from the fact that the first occupant acquired the territory peacefully, without disrupting any pre-existing holding), still:

> …in relation to territory and resources, violently dispossessing another person or another people is not the be-all and end-all of injustice, and it is not the only basis on which we might raise a moral question-mark over an entitlement. Refusing to share resources with others is also a form of injustice; refusing to modify a holding based on First Occupancy in response to demographic changes in circumstances is an injustice. *Taking more than you need, or occupying so much that subsequent arrivals have nothing to occupy, is an injustice*.[47]

Again, as indicated by the last sentence, the Lockean Proviso is not far behind, as Waldron tells us regarding the above: 'We know that Locke felt it necessary to qualify his version of the Principle of First Occupancy with the condition that there be 'enough and as good left for others' after the occupation'.[48]

Do we know this? I'm not sure. But it seems important for the Supersession Thesis that we know this about the 'Lockean proviso': that Locke intended his 'enough and as good' clause, or something very close to it, as a restriction on acquisition in circumstances of scarcity. Why else would it appear in every possible version of the argument for supersession? Waldron continues: 'No one now that I know of in the theory of property is willing to argue for a First Occupancy principle that is not qualified in this way, and very few are willing to deny that *this* proviso may also call one's holding into question at a later time, when circumstances change'.[49] This clearly echoes Waldron's previous argument in 'Superseding Historic Injustice' which he refers to in a footnote.[50]

If this is so, if: 'occupying so much that subsequent arrivals have nothing to *occupy*, is an injustice'[51] and if it is *this* proviso that has a continuous effect,[52] then Nine's critique is unfounded. On a strong understanding of the 'Lockean Proviso', aboriginal peoples had an obligation to leave 'as much and as good' for subsequent arrivals to appropriate, and not merely to use. Territorial holdings have a continuous effect, and so, on this understanding of the 'Lockean proviso' the initial inhabitants of generous lands had an obligation to continuously leave 'as much and as good' for subsequent labourers to appropriate. This would certainly have been true at the time when resources in Europe became scarce as a result of an increase in population. This, I think, is the logic of the Supersession Thesis at its best.

5.3.3 Enough and as Good Left for Others

What happens to the Supersession Thesis if we reject this strong formulation of the Lockean Proviso? We have already seen Cara Nine's use of Nozick's weaker

proviso in this connection. I guess she does this because she believes that: 'Waldron particularly relies on Robert Nozick's construal of the Lockean Proviso'.[53] I doubt this is true. Waldron certainly mentions Nozick,[54] but there is no indication that he relies specifically on his weak interpretation of the 'Lockean Proviso'.[55] I have in fact suggested that the Supersession Thesis may work best in conjunction with a stronger understanding of this so-called 'Lockean Proviso', requiring appropriators to leave enough and as good for others to acquire. If understanding the supersession argument is now an interpretive endeavour, then why not choose the interpretation that will render the thesis most coherent?

Fortunately for Nine's argument, Waldron himself suggests a very convincing interpretation of Locke's 'enough and as good' clause, that may be more in keeping with some of Nine's intuitions. In several pieces of his eminent work on Locke, Waldron denies that Locke ever intended 'enough and as good' as a restriction on appropriation at all.[56] Waldron supplies entirely persuasive arguments challenging the traditional opinion of Locke's interpreters whereby the 'enough and as good' clause was intended as a restriction on acquisition. In contrast, Waldron argues 'that the traditional opinion is strained and artificial… Locke did *not* intend the clause to be taken as a restriction or a necessary condition on appropriation'.[57]

Waldron argues first textually, that the language of the 'enough and as good' clause, especially when compared with that of Locke's spoilage proviso, is not the language of restriction and constraint. Referring to Chapter 5 of Locke's *Second Treatise* Section 27: 'For this labor being the unquestionable Property of the Laborer, no Man but he can have a right to what that is once joined to, *at least where* there is enough and as good left in common for others',[58] Waldron argues most persuasively that reading 'at least where' as a sufficient condition is far more plausible than interpreting it as 'only if'.[59] Also, Waldron points out, Locke never explicitly introduces such a restriction, as he did when he clearly intended to limit acquisition, as in the case of the spoilage proviso. Nor does Locke state anywhere that an appropriation that did not leave 'as much and as good' would be void. Nor, again, as in the case of the provisos Locke did explicitly introduce, does he ever mention such a supposed 'enough and as good' proviso, when he discusses the implications of the introduction of money.[60]

Interestingly, Waldron quotes from the very same section of the *Second Treatise*, Section 33 (as well as Section 34) that he later sites repeatedly in the various versions of his Supersession Thesis, when arguing there for the sensitivity of Lockean property rights to changing circumstances and for Locke's supposed restriction on initial acquisition.[61] Only here, Waldron states:

> In neither of these passages is Locke saying that the appropriations in question would have been *void* if there had *not* been enough and as good left in common for others. Rather he is saying that, *as things stood*, when land began to be appropriated, there was plenty of opportunity for the anti appropriattionists to join the land rush, and that if they did not seize the opportunity when it came along they could hardly complain about the subsequent prosperity of those who did.[62]

In short, according to Waldron, there is no basis in Locke's writing on property for interpreting 'enough and as good' as a restriction on acquisition. Quite the reverse,

Waldron argues. Waldron proceeds to show that attributing such a proviso to Locke would artificially introduce an (additional) inconsistency into Locke's theory. Construing 'enough and as good' as a limitation on appropriation would be entirely inconsistent with what Locke claimed to be the fundamental law of nature.[63] It would prohibit the acquisition of limited, but existing, necessary resources in a situation of scarcity, with the absurd result (entirely inconsistent with Locke's view of the law of nature) that all God's creatures would perish, rather than some survive.[64]

However, Locke does not leave his theory of appropriation entirely unrestricted (or at least, Waldron does not leave Locke's theory unrestricted). Waldron imports a restriction on property holdings from Locke's First Treatise. (Section 42), explaining that Lockean property rights are limited by the fundamental needs of others, but in a different, stronger and more continuous, way than would be implied by any 'enough and as good' condition.[65] Waldron suggests that Locke's principle of charity, deriving from Locke's view that the basic principle of natural law is to ensure the survival of as many human beings as possible, places a continuous restraint on property holdings. The desperately needy have a continuous right to the surplus resources of others, and property holders are continuously limited in their entitlements by the obligation of charity to the extent that this is necessary for the survival of their fellow human beings.[66]

I have now said enough to suggest that the Supersession Thesis is open to different readings dependant on various interpretations of 'enough and as good' and that this ambiguity, rather than any residence/sovereignty distinction, is at the heart of Nine's important objection. If we understand the way in which entitlements are sensitive to circumstances in terms of charity, we may read the Supersession Thesis very much in the way that Nine suggests. On such a reading, a change in circumstances, such as an increase in world population, would have indeed activated a continuous restriction on entitlements. At some point it may have become just for Europeans to utilize surplus resources available in abundance on other continents, but only enough to ensure their physical survival.

It is certainly possible for humans to use land to satisfy their needs and thus ensure their survival without acquiring exclusive property rights,[67] not to mention sovereignty rights. A change in circumstances may have resulted in the supersession of the previously unjust situation in which Europeans were already using the resources of aboriginal peoples, motivated purely by greed. But it remains unclear whether, at any point, the actual appropriation of aboriginal land would have been justified. Consequently, *that* historic injustice – the injustice involved in the appropriation of territory, as apposed to resource use – may never have been superseded by circumstances at all.

5.3.4 The Lockean Proviso and National Self-Determination

Cara Nine's objection whereby the injustice of appropriating aboriginal lands, rather than merely residing on them and using their resources, has not been superseded

concludes that: 'What seems to be required is the return of limited territorial sovereignty to the original inhabitants. The right is 'limited' because the descendants of colonists retain the right to reside in the territory'.[68]

Nine offers a response to her own conclusion: 'To save Waldron's argument, we must apply the Lockean proviso to protect the survival of self-determining groups'.[69] Territorial sovereignty, she argues, is instrumentally integral to self-determination and therefore the survival of the colonists' distinct national group is at stake when considering reversion, whether or not their individual members have anywhere else to go. If descendants of colonists lose sovereignty, their group would cease to exist.[70] The outcome of applying the Lockean proviso to endangered groups is then that: 'a group whose right to self-determination is threatened has a right to territorial sovereignty, regardless of its historical claims to territory'.[71]

Nine's view that endangered groups are entitled to stake non-historical territorial claims in order to protect their collective identity, is a significant point. It forms the foundation for her groundbreaking work on groups that have lost their historic lands to ecological disaster, and now require a new portion of territory in order to sustain their collective self-determination, though they have no further historical ties to any other territory.[72] It is also to this end, I believe, that she suggests amending the Lockean proviso in the way that she does. In point of fact, descendants of colonists in North America, Australia and New Zealand have a historic claim to those territories, having resided in them for so long. But Nine is rightly concerned about landless groups in our over-appropriated world who have no such claims. She raises these worries in some of her further work on 'A Lockean Theory of Territory', applied to territorial rights. Groups may catastrophically lose their own territory, and subsequently have no further historical claim to any other particular part of the globe, though they may sorely require sovereignty over some territorial resource in order to protect their collective cultural identity. [73]

The very best source that Nine could enlist in the defence of such groups would be Chaim Gans' invaluable work on nationalism and national rights, most recently and notably: *The Limits of Nationalism* and *A Just Zionism*.[74] There, as elsewhere, Gans offers a detailed account of the liberal foundations of the right to national self-determination, totally independent of specific historic territories.[75] Subsequently Gans proposes to determine the scope of territorial entitlement on an egalitarian basis, taking into account size of population and their needs. This is followed by his uniquely meticulous analysis of so called 'Historical Rights', discussed here in Chapter 3, and by the suggestion that, other things being equal (regarding the interests of others), a group's particular historical tie to a specific territory can supply guidance regarding the location of its independent and pre-existing right to national self-determination. But Gans certainly lays the strongest foundations for any argument purporting to locate self-determination on the basis of collective need, regardless of historical claims. This would undoubtedly suffice in order to formulate Nine's argument in favour of allocating territory to landless groups whose individual members are unthreatened, but whose self-determining cultural community requires location or relocation.[76] Formulating such an argument on the basis of a Lockean proviso, however, is more problematic.

First, even if there were such a thing as a 'Lockean Proviso', it could not be applied straightforwardly to argue for leaving 'enough and as good' to ensure the survival of particular groups, as apposed to their individual members. With all due respect to the literature on liberal-nationalism and group rights about the importance of groups to their individual members, one cannot possibly attribute this concern for the survival of cultural groups to John Locke.[77] Nine's argument that the Lockean proviso might be extended to cover the survival of cultural groups is an interesting one, but the application of Locke's theory of property to national self-determination and the survival of particular minority cultures is somewhat remote from what Locke had in mind, and in any event not a straightforward move.[78]

Secondly, we are discussing Waldron's supersession thesis, and must therefore consider Waldron's interpretation of the 'Lockean Proviso', or rather his substitute for this proviso. Locke's principle of charity is inapplicable to the pressing needs of groups as such. As Waldron explains it, Locke's argument about charity stems from his view that the basic principle of the law of nature is the preservation of as many people as possible.[79] Locke's concern, Waldron tells us, is for the survival of mankind, or as much of mankind as possible, that is the survival of individuals created by God as each others' equals. God's plan for the survival of the human beings that He created is also at the basis of Locke's theory of property entitlements acquired through labour.[80] All this, on Waldron's account, has to do with the special equal status that Locke accords to individual human beings, created by God who planned for their survival.[81] Groups clearly do not have this special status.

Later on in this book I draw on certain elements of Locke's theory of property in my own territorial arguments. While I loosely borrow some Lockean ideas and attitudes in the following two chapters, I am adamant there, as here, that for a variety of reasons one cannot stake national claims to territory straightforwardly on Lockean grounds.[82]

To recap: Nine raises a very important point about the Supersession Thesis. She questions whether any change in circumstances ever actually entitled white colonists to appropriate, rather than merely use, territory in America, Australia, or New Zealand. Her objection therefore raises doubts as to whether the injustice of acquiring territory in these lands could ever have been superseded. But the reasons for this critique may have nothing to do with distinguishing between residency and sovereignty. Rather, it follows from an ambiguity regarding the 'Lockean Proviso', and the precise nature of the limitations on acquisition that Waldron attributes to Locke.

I also disagree with Nine about the initial outcome of her analysis. At least for the most part, the supersession argument retains its force against reversion. Even leaving aside (which we clearly cannot) democratic rights – the right of the current majority of these lands to self rule – it remains unclear to me what it would mean, in practical terms, to return 'limited' sovereignty to descendants of original inhabitants while the descendants of colonists retain the right to reside in the territory. Would it mean that the residents of NYC, for example, would be allowed to stay, but would now go fishing and hunting?

Finally, the argument that Nine offers as a response to the objection she herself raises, is far less straightforward and uncomplicated in terms of the Lockean foundations of the Supersession Thesis, than her argument implies.

5.4 Why Does any of this Matter?

We are supposed to be discussing the arbitration of territorial disputes and the criteria that ought to be applied to a peaceful attempt at that. Who cares what Locke intended over 300 years ago by stipulating that appropriation by labour is legitimate so long as 'enough and as good' remains in common for others? It remains the case that the Supersession Thesis supplies a most powerful argument against the literal restoration of a past state of affairs in western states like the US, and that is what matters.

Perhaps I have just been nitpicking. It is clear that whatever ones reading of Locke's supposed proviso, the undeniable susceptibility of justice to massive changes in circumstances would still supply a conclusive argument against returning sovereignty to aboriginal peoples. In fact, for all that has been said in support of historical arguments in the last two chapters, the following two have much to say in the way of strengthening the overall stance against restoration, and in favour of retaining the results of European-style settlement projects. This is where I part company with Nine. The Supersession Thesis is successful in arguing against wholesale reversion to the historic state of affairs that predates colonial settlement. It still supplies the most authoritative argument to this effect, and this is what is so important about it.

No one, however, to my knowledge, is seriously proposing to return Manhattan to the Native Americans or New Zealand to the Maori. Of course, there is great value to understanding *why* we should not do this, and that is also the topic of my next two chapters. But again, as Waldron himself acknowledges: 'one seldom hears an argument for complete reversion to the status quo that confronted the earliest European colonizers'.[83] Insofar as the Supersession Thesis is purely an argument against dismantling the US or Australia, it remains in tact and supplies the most persuasive argument to date. But there is more to the Supersession Thesis than that.

The Supersession Thesis is designed to deny more than reversion. It is presented as a refutation of the more moderate claims put forward by 'indigenous' peoples who assume the background supposition that their pre-existing entitlements prevail into the present, however impractical it may be to reclaim them.[84] As indicated at the very end of the previous chapter, in the end I shall also deny that aboriginal peoples are entitled to these territories. There are very significant interests on the other side of the balance as well. The following chapters suggest that the settlers and their descendants have weightier claims. But the argument about 'Superseding Historic Injustice' suggests more than that. It is pitted against what Waldron refers to dismissively as 'the grievance industry'.[85] It suggests that there is no ongoing historic injustice imbedded in our present day holdings, though no doubt Waldron

believes that western states have much redistributive work to do so far as the present is concerned. Nonetheless, the Supersession Thesis suggests that the particularly *historic* injustices involved in the appropriation of aboriginal lands – as opposed to purely contemporary imbalance in resource distribution – have not persisted into the present. Intervening circumstances would have (as in the second waterhole example) warranted such appropriation at some point anyway. It is precisely this claim about the absence of a lingering historic injustice that I have attempted to refute by pointing to the implications of 'enough and as good'. If external circumstances of dire need on the part of Europeans, say around 1800, only required native peoples to treat them charitably rather than requiring them to relinquish any ownership right over land, then supersession could not have been activated at any such point in the way that the thesis suggests that it was. If this is so, there remains a much stronger case for aboriginal grievances than the Supersession Thesis implies. I stand by the conclusion of the previous chapters that, in principle, some claims to territorial restitution based on historical events are well-founded, even if, when all is said and done, justice often requires them to be put aside in favour of the weightier claims of settlers.

And this does matter a great deal. On the one hand, the Supersession Thesis still establishes that, at least for the most part, the results of historic injustices involved in territorial conquest and colonisation should not be overturned, and it supplies strong moral arguments for that stand. It is indeed not an argument that 'might makes right'. It forces us to consider that something about the process of European settlement might have actually been called for by considerations of justice, and it hints at the moral significance of these settlement projects, whatever the injustices that accompanied them. But a Supersession Thesis minus a strong Lockean proviso cannot avoid the enduring historic injustice that is attached to western settler societies, and that persists into the present. A weaker supersession argument would have to be less sceptical about historical grievances and might have a harder time denying the need to redress them, more than symbolically. In the absence of a strong Lockean proviso that would have justified forcing aboriginal peoples to relinquish much of their lands in favour of Europeans anyway, the Supersession Thesis cannot wash away the guilt that attaches to the legacy of settlement.

If settlers were never justified in acquiring territory, then the argument about supersession in the cases of America, Australia and New-Zealand, relies more heavily on the changes that were effected unjustly on the ground, rather than on the changes in external circumstances. If changes in world population and resultant scarcity in Europe merely warranted a charitable attitude towards the settlers, rather than succumbing to their conquest, then supersession could not have kicked in at that point. If so, then the relevant changes that activated the Supersession Thesis were primarily, if not entirely, those unjustly brought about by the settlers themselves. On the other hand if, for some reason other than immediate need, western settlement projects were not entirely a bad thing, despite the grave and enduring injustices they incurred, it is important to know why that is. Either way, the legacy of settlement as presented in the supersession argument without the justification of a strong Lockean proviso, may conceivably also retain a graver moral hazard, in its own terms, than the thesis might like to admit.[86]

In his original 'Superseding Historic Injustice', Waldron states that 'There is no moral hazard in this supersession because the aboriginal inhabitants would have had to share their lands, whether the original injustice had taken place or not'.[87] However, if, in the absence of a Lockean proviso, the Supersession Thesis cannot show that colonists of America, Australia and New Zealand were ever entitled to actually appropriate land, at any point, then there may be a stronger case for the moral hazard objection. The refutation of the moral hazard objection seems to rely on the idea (illustrated in the waterhole story) that the acquisition and holding of territory by European settlers would have at some point been justifiable, apparently on the basis of the proviso that they be left 'enough and as good' to acquire. If there was no such point for colonization, as the denial of a strong proviso would suggest, this may render the justification of present day holdings somewhat more morally hazardous.

Waldron's later discussions of supersession concedes that *some* of the changes that brought the supersession thesis into play in America, Australia and New Zealand, were in fact those affected by the settlers themselves.[88] But in the absence of a strong Lockean proviso, it now appears that *the only* changes that activated supersession and eventually justified the actual acquisition and holding of land, as opposed to its utilization, were those implemented by the process of settlement. If the supersession thesis cannot show that *any* of the changes that activated supersession were exogenous to the actions of the settlers themselves, this may prove more problematic, so far as moral hazards and the legacy of settlement are concerned.

One final caveat: I have argued over the past three chapters that historical claims can endure with great force over time. It remains an open question, to be settled in each particular case, whether the groups in question ever had full original title to the entire scope of territory they now lay claim to. From the claim I am making that, *in principle*, some claims to territorial restitution based on historical events are well-founded, it doesn't follow that all such claims are necessarily justified, or that any particular claim has in fact remained in tact. From the claim that a non-existent proviso cannot excuse misappropriation it does not necessarily follow that all acts of territorial acquisition by settlers were unjust.

We might not need the intervention of any Lockean Proviso in order to question the extent of title originally acquired by aboriginal peoples. The stronger version of the Supersession Thesis suggests that the just holdings of original peoples were limited by the requirement to leave 'enough and as good' for further arrivals to appropriate. But on Waldron's persuasive interpretation of Locke there is no basis for such a restriction. One could of course impose such a restriction retroactively, regardless of Locke, but then why phrase it in those terms?

We might need to consider, independently of any Lockean proviso, whether all the lands inhabited by aboriginal peoples were actually theirs to begin with. And perhaps we ought to do this thinking directly, on the basis of whatever general criteria ought to apply to territorial rights universally. Obviously, Locke was wrong when he assumed that the inhabitants of America had no title to the territory at all. Clearly, as Waldron puts it: 'Indigenous peoples were not just hanging around in New Zealand, Australia and North America, waiting to be colonised'.[89] But whatever it is that legitimizes exclusive title to territory – whatever principle of just

acquisition we choose – did this apply to aboriginal peoples with regard to entire continents? Did they in fact perform whatever it is we regard as legitimate acquisitive acts over the entire territories they lay claim to? If entitlement is taken to be based on non-historical considerations, such as need, we would have to ask more directly whether aboriginal peoples could have appropriated so much more than they needed and could conceivably have used. Or were they simply sovereigns by default, because no one else had turned up yet? And does that make a difference?

I argued in my second objection at the outset that the Supersession Thesis does not supply us with a worked out theory of territorial entitlement, though it implies a roughly egalitarian principle of allocation, or one based on need. It is not clear that an egalitarian based criterion for the allocation of land world-wide, rather than any historical criteria, would require a Lockean proviso at all. And if we include historical guidelines, here too, the introduction of a Lockean Proviso on its traditional interpretation would have serious implications for contemporary holdings as well.

Once again, the task of the present project is to supply a set of criteria that should be applied to all groups. I am only half way through in suggesting a set of considerations that ought to be taken into account when considering anyone's territorial holding. It is only on the basis of such a theory that one can go forth to asses the plausibility of the claim that a small group of scattered inhabitants could have had exclusive dominion over 'a large and fruitful territory',[90] once other people came round. The set of criteria I am offering here throughout applies to indigenous peoples, at any given time, just as it applies to everyone else.

5.5 Concluding Remarks

I have questioned the Supersession Thesis in several ways. First, regardless of its practical prescriptions concerning territorial resolutions in the present, its verbal formulation already suggests that past injustices themselves (rather than merely their current implications) have in some way been retrospectively corrected by changing circumstances. Second, the argument appears to rely on a specific background theory which necessarily underlies and prescribes its conclusions. Third, given the lack of an ideal institutional setup that would enforce the dictates of distributive justice on all parties, the Supersession Thesis may be overly demanding so far as territorial concessions are concerned, with regard to aboriginal peoples. I questioned whether it is legitimate at present to demand concessions on the part of the weak and needy that have not been obtained, and are not likely to be obtained, from the strong and powerful.

Above all, I explored the ambiguity surrounding the use of a so-called 'Lockean Proviso' as the basis for the Supersession Thesis, and the implications that various interpretations of 'enough and as good' might have for the supersession argument. To this end, I considered Cara Nine's critique of 'Superseding Historic Injustice', at great length. Though I disagree with some of her reasoning, the discussion throughout Section 3 suggests that Nine's objection is invaluably illuminating. It raises seri-

ous doubts as to whether, on the assumptions of the Supersession Thesis itself, any change in circumstances ever would have entitled white colonists to appropriate, rather than merely utilize, territory in America, Australia, or New Zealand. Thus, it casts doubts as to whether any of the injustices involved in *acquiring* aboriginal territory in these lands were indeed superseded by circumstances of need, in the way that 'Superseding Historic Injustice' claims that they were. Perhaps they were merely diluted by the passage of time and superseded only by the usual processes which accompany holding on to a territory, rightly or wrongly, for a considerable number of years.[91]

If this is so, then historic injustice continuously remains in the background for the liberal citizens of modern western states to contend with. Their territorial holdings are, at least in part, still somewhat tainted with the original injustice of its acquisition, assuming (which I am not) that it all was in fact unjust. Certainly, some of it was. This remains an unavoidable aspect of the culture, history and legacy of all western-style settlement projects. The idea that the European settlement projects may have been justifiable, at least at some point, regardless of the grave injustices they incurred in the process thereof, is also an enduring problematic aspect of the legacy of settlement. Citizens of settlement societies have not only inherited those territories as material resources (if we have) but also the culture and political philosophies that gave rise to the injustices in question; and we continue to rely on some of the same values in our aversion to turning the clock back. This may render us particularly responsible for the historic injustices committed in the process of acquiring these territories. This sets these injustices apart from other historical injustices – such as slavery or the Holocaust – to which we attribute no positive aspects and which we would wholeheartedly overturn, if we could. We repudiate the injustices and reject the ideologies on which they were founded. In the case of western settlement we lament the injustice itself, but continue to live largely by its legacy and initiating philosophies.

The historical interests pointed to in the previous chapters remain an ongoing part of the story that requires redress, not only with regard to purely prospective considerations of distributive justice within multi-cultural societies, but also with hindsight, with reference to the significance of specifically historic events to the current interests of contemporary individuals. This forms part of Gans' point in his discussion of historical rights, discussed in Chapter 3.[92] Nations and peoples are historical entities, and their histories and cultures have continuous significance for the individual identities of their members. This is part of the complicated territorial puzzle presented here, part of what liberal justice requires us to consider when arbitrating territorial disputes among nations. The account in this volume is a multifarious one that takes various sorts of interests into account. My point here is that nothing has washed away those retrospective interests when it comes to dispossessed groups, and that there is an important difference between their demands and those of other disadvantaged groups within a multicultural society.

In the following chapters it remains to be seen what else can be said about this territorial story, particularly on the other side of the equation. I have said that this is a complex account of territory which takes a multiplicity of interest into

consideration. Sometimes these interests will conflict with each other, as when one side to a dispute has largely historical interests while the other brings forth weighty considerations of a more contemporary nature. At times, both historical interests and those associated with contemporary land use and settlement come together to strengthen each other, favouring the occupancy of one particular nation. In either scenario, a set of interests, either contesting each other or reinforcing one another, come into play.

We have been talking a lot about the territorial demands of minority groups and their histories. This is the context in which we are most accustomed to considering culture and cultural rights, especially when it comes to territorial claims. Not everyone has patience for these arguments. The Supersession Thesis states a preference for contemporary considerations of distributive justice applied to material resources. But the settlers and their descendants, whether consciously or otherwise, also brought with them a distinct culture: a culture of land use and settlement, alongside the political philosophies that accompanied them.

Endnotes

1 Jeremy Waldron, "Superseding Historic Injustice", *Ethics*, 103 (October 1992) 4–28, esp. 20–28; See also: Jeremy Waldron, "Redressing Historic Injustice", *University of Toronto Law Journal*, 52/1 (Winter 2002), 135–160. Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy', *New Zealand Journal of Public and International Law*, 1 (2003), 55–82; Jeremy Waldron, 'Settlement, Return and the Supersession Thesis' *Theoretical Inquiries in Law*, Vol. 5/2 (July 2004), 237–268.

2 Waldron, 'Superseding Historic Injustice', *Ethics*, 24.

3 Waldron, 'Superseding Historic Injustice', 24.

4 Waldron, 'Superseding Historic Injustice', 24.

5 Waldron, 'Superseding Historic Injustice', 20.

6 Waldron, 'Superseding Historic Injustice', 25.

7 Waldron, 'Superseding Historic Injustice', 25.

8 Tamar Meisels, 'Can Corrective Justice Ground Claims to Territory', *The Journal of Political Philosophy*, 11/1 (March 2003) 65–88.

9 Waldron, 'Superseding Historic Injustice', 24.

10 There is no doubt that Waldron acknowledges the grave injustice inflicted on aboriginal peoples. He speaks, in 'Superseding Historic Injustice', of the injustice of expropriation, of stolen lands and ruined lives (e.g. p.4, 26), of perennial maltreatment, and of 'revulsion from the violence and expropriation that have disfigured our history' (p. 28).

11 Waldron, 'Superseding Historic Injustice', 26.

12 Here's another example of this problem: When addressing the issue of the Israeli Settlements and the Israeli-Palestinian conflict, Waldron refers to Kant's Proximity Principle whereby: 'people who are thrown, in Kant's phrase, unavoidably side-by-side, have no choice but to share the resources that surround them justly among themselves as though they were a new community, even if the presence of some of them in that situation is a result of injustice'. (Waldron, 'Settlement', 246). The problem here is not with the principle of justice, but rather with its application to one small party in a non-ideal situation. Millions of Palestinians live in refugee camps in Lebanon and Syria. As Waldron himself acknowledges, those nations, as well as the Palestinian leadership itself, have deliberately made it difficult for Palestinians to build new lives for themselves in their current places of residence. This severely complicates

the issue of the Palestinian right of return – as it presumably greatly enhances the number of Palestinians who would return to what is now Israel, if they were permitted to do so, in relation to the prospects of return if those Palestinians had been absorbed, or if they were now permitted to be absorbed, in their countries of residence. Syria and Lebanon and the rest of the Arab world's deliberate refusal to share with those who have been thrown side-by-side with them, shapes the entire situation, most definitely including the prospect of peace. See: Waldron, 'Settlement', 261, 262. This is just one further illustration of my doubts about the application of ideal principles to non-ideal situations, in which only one small party is required to comply. It appears problematic to demand of Israel that it live up to this Kantian ideal, when Syria and Lebanon are unlikely to comply with 'the spirit of the Supersession Thesis'. The non-compliance on the part of the majority of nations, particularly stronger nations, may have an effect on the demands that justice places on the minority and/or the weaker party. The point is not merely that it would not be fair to apply the requirements of justice selectively, particularly to weaker parties. The point is also that the demands of justice may be different in ideal and non-ideal settings.

13 Waldron, 'Superseding Historic Injustice', 25, emphasis added.

14 Cf.: Chaim Gans, *A Just Zionism – On the Morality of the Jewish State* (New York: Oxford University Press, 2008), 39. When attempting to apply a different type of egalitarian principle to the issue of territorial justice – a principle whereby nations would be entitled to locate their right to self-determination within territories to which they are historically connected – Gans makes a similar point about the problems of implementing one just principle to an isolated case within a non-ideal world.

15 Waldron, 'Superseding Historic Injustice', 21.

16 Waldron, 'Superseding Historic Injustice', 20.

17 Waldron, 'Superseding Historic Injustice', 21; Waldron, 'Redressing Historic Injustice', 153.

18 Waldron, 'Superseding', 21; Waldron, 'Redressing', 153. My emphasis.

19 Waldron, 'Superseding' 21; See also 'Redressing Historic Injustice', 153–154, note 37.

20 Robert Nozick, *Anarchy State and Utopia*, New York: Basic Books (1974), 180.

21 Waldron, 'Superseding Historic Injustice', 21.

22 Waldron, 'Superseding Historic Injustice', 24; See also 'Redressing Historic Injustice', 151–152.

23 Waldron, 'Superseding Historic Injustice', 24–25; See also, 'Redressing Historic Injustice', 152.

24 Waldron, 'Superseding Historic Injustice', 26; See also 'Redressing Historic Injustice', 156. My emphasis.

25 Cara Nine, 'Superseding Historic Injustice and Territorial Rights', *Critical review of International Social and Political Philosophy (CRISPP)*, 11/1 (March 2008) 79–87.

26 Nine, 'Superseding Historic Injustice and Territorial Rights', 80.

27 Nine, 'Superseding Historic Injustice and Territorial Rights', 82.

28 Nine, 'Superseding Historic Injustice and Territorial Rights', 83–84.

29 Nine, 'Superseding Historic Injustice and Territorial Rights', 81, with Reference to Nozick, *Anarchy, State and Utopia*, 180.

30 Nine, 'Superseding Historic Injustice and Territorial Rights', 83.

31 Waldron, 'Superseding', 25.

32 Waldron, 'Superseding', 25.

33 Nine, 'Superseding Historic Injustice and Territorial Rights', 83–84.

34 Nine, 'Superseding Historic Injustice and Territorial Rights', 82–83.

35 Nine, 'Superseding Historic Injustice and Territorial Rights', 84.

36 Nine, 'Superseding Historic Injustice and Territorial Rights', 82.

37 Jeremy Waldron, 'Redressing Historic Injustice'. 137–138; See also: Waldron, 'Settlement, Return and the Supersession Thesis', 245–246.

38 Waldron, 'Settlement', 246.

39 Waldron, 'Superseding', 25; Waldron, 'Redressing', 156.
40 Nine, 'Superseding Historic Injustice and Territorial Rights', 84.
41 Nine, 'Superseding Historic Injustice and Territorial Rights', 84.
42 Nozick, *Anarchy State and Utopia*, 175–176; See also: Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 213–214; 280–283.
43 Nozick, 176; Waldron, *The Right to Private Property*, 213–216, esp. 214.
44 Nine, 80.
45 Waldron, 'Superseding', 21; 'Redressing', 153.
46 Waldron, 'Indigeneity? First Peoples and Last Occupancy', 78.
47 Waldron, 'Indigeneity?', 78. My emphasis.
48 Waldron, 'Indigeneity?', 78.
49 Waldron, 'Indigeneity?', 78–79. My emphasis.
50 Waldron, 'Indigeneity?', 79.
51 Waldron, 'Indigeneity?', 78.
52 Waldron, 'Indigeneity?', 78–79. My Emphasis.
53 Nine, 81.
54 Waldron, 'Superseding Historic Injustice', 21; See also 'Redressing Historic Injustice', 153–154, note 37.
55 In fact, I doubt very much that Waldron is relying on Nozick's weak version of 'enough and as good'. See Waldron, *The Right to Private Property*, 215–216.
56 Jeremy Waldron, 'Enough and as Good Left for Other', *The Philosophical Quarterly* 29/117 (October 1979), 319–328.
57 Waldron, 'Enough and as Good', 320.
58 John Locke, *Two Treatises of Government.* Peter Laslett (ed.) (Cambridge: Cambridge University Press. 1960) (1690), II, Section 27. My Emphasis.
59 Waldron, 'Enough and as Good', 320–321.
60 Waldron, 'Enough and as Good', 323–324.
61 Waldron, 'Enough and as Good', 322. Cf.: Waldron, 'Superseding', 21; Waldron, 'Redressing', 153.
62 Waldron, 'Enough and as Good', 322; Cf.: Waldron, 'Superseding', 21; Waldron, 'Redressing', 153.
63 Waldron, 'Enough and as Good', 325–326.
64 Waldron, 'Enough and as Good', 325–326.
65 Waldron, *The Right to Private Property*, 209–218; Waldron, 'Enough and as Good', 326–328; Jeremy Waldron, *God, Locke, and Equality – Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002), 177–187.
66 Waldron, 'Enough and as Good', 326–328; Waldron, *God, Locke, and Equality*, 177–187.
67 Waldron, *The Right to Private Property*, 168–170, 217.
68 Nine, 84.
69 Nine, 85.
70 Nine, 84–85.
71 Nine, 85–86.
72 See: Cara Nine, 'A Lockean Theory of Territory', *Political Studies*, 56/1 March 2008, 148–165.
73 Nine, 'A Lockean Theory of Territory'.
74 Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University press, 2003), Chapters 3–4; Chaim Gans, *A Just Zionism*, esp. Chapter 2.
75 See also: Gans, Chaim "National Self-Determination: A Sub-and Inter-Statist Conception", *The Canadian Journal of Law and Jurisprudence*, 13/2 (July 2000), 185–205.
76 A further source that Nine could rely on is 'the equality argument' in: Will Kymlicka, *Multicultural Citizenship: A Liberal theory of Minority Rights* (Oxford: Clarendon Press, 1995), 108–120.

77 It is more than a bit remote to attribute a concern for the survival of cultural groups or respect for culture to Locke's theory of property, and to its details. See, for example: Waldron, *God, Locke, and Equality*, 169. It also doesn't seem very plausible to attach this concern for the survival of groups or for national self-determination, as apposed to the survival of individuals, to Waldron or to his supersession thesis. See, as just one citation for this point: Waldron, 'Settlement, Return and the Supersession Thesis', 258–259, esp. the latter. In general, this would be totally not in keeping with the spirit of the Supersession Thesis.

78 One could argue all sorts of things regarding supersession and self-determination. Here's another indirect move that might be attempted if one wishes to argue for supersession on the basis of the right to cultural self-determination: European settlers were not only in need of material resources, but also of cultural ones. The lands they acquired were necessary not only for the physical survival of many individuals as the population of Europe expanded. They were also necessary in order for new ideas and new ways of life to take root and flourish in a new world. It is hard to say how the recognition of a need for cultural, rather than merely material, territorial resources within a theory of supersession would play out in the particular cases under consideration. One might argue that the settlers were in need of a 'public sphere' in which their culture could flourish, and that when this need matured it activated the supersession thesis. (I borrow the phrase 'public sphere' from Yael Tamir's discussion of national self-determination in: Yael Tamir, *Liberal Nationalism* (Princeton, New Jersey: Princeton University press, 1993), Chapter 3). The point is that such arguments are a bit removed from 'the sprit of The Supersession Thesis', not to mention the Lockean Proviso. This is not to say that they cannot be attempted, just that proceeding with them requires a great deal more caution, and acknowledgment of quite how far they take us in a totally different direction from that which was intended.

79 Waldron, 'Enough and as Good', 326; Waldron, *God, Locke, and Equality*, 184.

80 Waldron, 'Enough and as Good', 326; Waldron, *God, Locke, and Equality*, 184.

81 Waldron, *God, Locke, and Equality*, 151–187.

82 See this volume, esp. Chapter 7, Section 4.1.

83 Waldron, 'Indigeneity', 67.

84 Waldron, Indigeneity', 67.

85 Waldron, 'Settlement', 239.

86 For the denial of the objection that the supersession thesis generates a moral hazard, see: Waldron: 'Superseding Historic Injustice', p. 25; Waldron, 'Settlement', 248–252. I am not at all sure that the supersession thesis *does* generate a moral hazard. All I'm suggesting is that, in its own terms, there is a stronger case for the moral hazard objection if the supersession thesis cannot show that colonists of America, Australia and New Zealand were ever entitled to appropriate land.

87 Waldron: 'Superseding Historic Injustice', 25.

88 In: 'Settlement, Return and the Supersession Thesis', 248–252, Waldron presents a more detailed and convincing answer to the moral hazard objection. A few pages earlier, he admits that "the change of circumstances referred to in the Supersession Thesis may include changes that are the immediate casual product of the very injustice originally complained of". ('Settlement', 243). But now, having lost the proviso and its effects, it looks as though the Supersession Thesis, applied to the US, Australia and New Zealand, includes nothing but changes that are the immediate effect of the injustice. This makes it more than a little bit different from the two waterhole examples. Indeed in 'Settlement', 242–243, Waldron supplies a further example in which supersession is entirely the product of the injustice. Again, I am not arguing that there is a moral hazard, or that we should deny the requirements of justice even if it involves one. I am merely pointing out that this objection may gain greater force if the thesis cannot show that *any* of the changes that justified the actual acquisition and holding of land, as opposed to its utilization, were exogenous to the actions of the settlers themselves.

89 Waldron, 'Indigeneity', 66.

90 Now I'm borrowing this phrase from Waldron, 'Supersession', 26, who borrows it from Locke, *Two Treatises*, II, Section 41.

91 In keeping with Waldron's: 'Settlement, Return and the Supersession Thesis', 237, 249–250, I am not implying that supersession is associated with the passage of time per se, but am referring to the usually changes in circumstances that ordinarily accompany the passage of time.

92 Gans, *The Limits of Nationalism*, Chapter 4; *A Just Zionism*, Chapter 2, and: Chaim Gans, 'Historical Rights – The Evaluation of Nationalist Claims to Sovereignty', *Political Theory*, 29/1 (February 2001) 58–79.

Chapter 6
Efficiency

Attempting to establish liberal guidelines for territorial entitlement, Margaret Moore briefly considers, and abruptly dismisses, any possibility of establishing territorial rights on the basis of efficiency arguments. She naturally associates the view that the efficient use of land has something to do with its rightful ownership, with the Western settlers of North America and, more recently, with the Jewish settlers of Israel – left and right, past and present. Alluding to the old Zionist slogan proclaiming the historical land of Israel prior to its Jewish resettlement as 'A land without a people for a people without a land', she states:

> In the first part of the twentieth century, when early Zionists began to settle in Israel, the efficient use of the land argument was used to justify rights to land. Although some early Zionists claimed that there were few people or no people in Palestine, the evidence is that this wasn't meant literally…but rather that there were no people using the land.[1]

As testimony to the continued prevalence of this idea, Moore reproachfully quotes former Israeli Prime Minister Shimon Peres' description of the early period of Zionism: 'The land to which they came, while indeed the Holy Land, was desolate and uninviting; a land that had been laid waste, thirsty for water, filled with swamps and malaria, lacking in natural resources'.[2] She views this statement as lending credence to the erroneous belief that those people who lived on the land prior to Zionist settlement were not attached to it: 'they had 'laid waste' the land, neglected it, and so it seems, they had no rights to it'.[3]

Moore is, of course, correct in assuming that the Zionist conception of early twentieth-century Palestine as vacant cannot (and was probably never meant to) be taken altogether literally, at least not as a claim that there were no prior inhabitants whatsoever of mandatory Palestine. At most, it stakes a lesser claim concerning the density of the population, that is, the fact that the territory in question was, according to all accounts, at that time very sparsely populated. More likely, if intended as an empirical statement at all, it denies that 'a people', that is a free-standing full-fledged nation, inhabited Palestine as such prior to its renewed Jewish settlement.

Quite plausibly, then, Moore opts for a non-literal interpretation of such propositions. She argues, by no means unconvincingly, for what one might call a 'Lockean interpretation',whereby the efficient use of land is considered a

T. Meisels, *Territorial Rights,* Law and Philosophy Library, 72
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prerequisite for its rightful acquisition and holding. This 'philosophy', which European settlers carried with them throughout the 'new world', holds that efficiency is measured by European standards and consequently those territories whose local inhabitants fail, as it were, to live up to these standards are judged to be a wilderness free for the taking. On the basis of this world view, Locke referred to the America of his time as a wasteland, while clearly being well aware of its native population.[4] It is this theoretical approach, and the illiberal measures taken in its name by the forebears of what are today Western democratic states, which ultimately leads Moore to reject any consideration of efficiency in her pursuit of neutral liberal guidelines for the mediation of conflicting territorial demands. The following focuses exclusively on this culturally sensitive standard for territorial entitlement, and takes issue with this wholehearted dismissal of such claims.

6.1 The Efficiency Argument

Should we exclude arguments concerning the utilization of land from any set of liberal guidelines for evaluating competing territorial claims? Waldron's 'Superseding Historic Injustice' suggests that perhaps we should not. In his concluding remarks, Waldron comments with reference to North America that:

> Apart from anything else, the changes that have taken place over the past two hundred years mean that the cost of respecting primeval entitlements are much greater now than they were in 1800. Two hundred years ago, a small aboriginal group could have exclusive domination of a "large and fruitful Territory" without much prejudice to the needs and interests of many other human beings. Today, such exclusive rights would mean many people going hungry who might otherwise be fed and many people living in poverty who might otherwise have an opportunity to make a decent life.[5]

This paragraph, along with its reference to Locke, hints at the somewhat controversial Lockean argument which ties dominion over territory to the efficacy of its use.[6] Ross Poole clearly applies such a utilitarian consideration to the aboriginal land case. He says of the aboriginal peoples of Australia: 'Where between 300,000 and 350,000 indigenous people were able to subsist before white settlement, neither dependent on nor contributing to the rest of the world, modern agriculture and industry now enable the Australian continent to support and contribute to the support of countless millions more'.[7] Poole qualifies this observation by adding that 'these considerations do not justify, excuse, or even rationalize the brutality, oppression, exploitation, and misery which were the direct and indirect consequences of white settlement in Australia'.[8] However, Poole does characterize these considerations as moral ones, and adds that 'one does not have to be utilitarian to think that the interests and needs of the many must figure in any argument as to the rights of the few'.[9] In a similar vein, John Simmons points out with regard to North America that Locke 'was certainly right about the inefficiency of aboriginal land use, at least in this one

sense – there is not enough land in the world to support us all at the population density levels characteristic of original Native American Tribal life'.[10]

The theoretical roots of the argument tying entitlement to land to the efficiency of its exploitation are, as Moore observes, to be found in Locke's *Second Treatise*. In Moore's words:

> Locke argued that the right to private property was based on the person's right to his body; that the person can appropriate things in the external world through labour and these became his goods as long as he leaves as much and as good for others…Locke justifies a certain form of (private) property-holding, for he goes on to argue that enclosure is more efficient than holding the land in common, and that, while it might seem to be taking land away from others (because others can't use it), it is possible to produce more efficiently on private property, and so, effectively, 'leave as much and as good for others'.[11]

For Locke, one may recall: 'As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common'.[12] The criterion for legitimate acquisition of land is the same as that for the justified acquisition of fruits of the land: he who appropriates land by his labour not only does not lessen the common stock but rather increases it. For, according to Locke, the provisions serving to support human life produced by enclosed and cultivated land far exceed those which are yielded by a land of an equal richness lying waste in common.[13] In keeping with Locke, then, the appropriator may more correctly be described as contributing to mankind's welfare rather than subtracting from its joint property. At the very least, even if he keeps all his produce to himself, Waldron explains, 'he nevertheless reduces the pressure on other common resources because he feeds himself now from a much smaller piece of land than that which he roamed over before. So others who continue to use common land have per capita more land to roam over than they had before his enclosure'.[14] Locke's argument for private property here is in fact primarily about the importance of cultivation.[15] 'God gave the world to men in common; but since he gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated'.[16]

As for aboriginal peoples of lands such as North America, we know what Locke thought of their relationship with the land, for he says so explicitly. Illustrating the points made above, Locke poses the rhetorical question, 'whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage, or husbandry, a thousand acres yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land do in Devonshire, where they are well cultivated'.[17] This example demonstrates the way Locke viewed territories such as America of his time, which were quite populous: a fact not unknown to Locke, who often speaks explicitly of the American Indian.[18] Still he speaks of these territories in America as '…waste, left to nature',[19] describing them as land in common, not as yet to be considered appropriated by anyone. It is only when man incorporates, settles and builds cities that distinct bounds of territories are set and limits between people and their neighbours are defined.[20] On the other hand, land

'that has no improvement or pasturage, tillage, or planting, is called, as indeed it is, "waste".[21]

The upshot of Locke's reflection here is clearly that the criterion for legitimate acquisition of land is its enclosure and development, at least where as much and as good is left for acquisition by others.[22] Without getting into the problems, mentioned in the previous chapter, which have been attributed to this last proviso, we can establish that, for Locke, land which has not been acquired in the way he describes is still common 'wasteland' as Locke himself puts it or, in other words, for all practical purposes, empty.

None of the modern-day theorists dealing with aboriginal land claims goes so far as to argue that legitimate acquisition should be determined by the efficient exploitation of the territorial resource. Still, it is sometimes implied, as demonstrated in the above passages from Waldron, Poole and Simmons, that such considerations should figure in our reasoning on territorial entitlement. In some of his later work on supersession, Waldron describes various changes in circumstances which have, in his view, activated 'the supersession thesis' in the case of New Zealand. Among other things, he points out, 'the resources with which justice has to concern itself have also changed'.[23]

> European technology and farming, mining and fishing methods have transformed out of all recognition the amount and the productivity of land and other resources available for use. Agriculture now supplements horticulture; mountainous hill country has become farmable; new species have been introduced; modern road, rail and other infrastructure developed; cities have been built (and most New Zealanders – Maori and Pakeha – live in cities); and the technology of a fully developed commercial society has replaced the Neolithic technology that characterized the thousand years or so of Maori occupation. In these circumstances, it boggles belief to say that what justice requires in this territory now is anything like what justice required at the very beginning of European contact.[24]

Bearing this last statement in mind, Waldron is clearly not suggesting that the capacity of European settlers to implement such changes entitled them to the territory to begin with. He enlists these facts in order to argue his main point, that the requirements of justice are demonstrably and unquestionably susceptible to circumstances. However, he does claim that such changes have a direct effect on the legitimacy of contemporary European-type settlement and entitlements in New Zealand. More importantly, Waldron's description of the relevant changes in circumstances – the greatly enhanced resources brought about by European settlement – more than implies that this was not altogether a negative process at all.

Contrary to Moore, I suggest that the benefits of efficient land use is a reasonable consideration in evaluating territorial issues. While, for a variety of reasons, we would reject Locke's theory as the comprehensive account of the justification for territorial acquisition and entitlement, along with his total denial of aboriginal land rights, we might still hold that it reflects a basic moral intuition that should be incorporated into our ethical reasoning about land rights. While Locke's principle of efficiency cannot be the whole story on establishing legitimate land titles, it remains an important part of that story.

6.2 Overcoming Some Basic Objections

Moore's fierce criticism of the view that Locke's principle of efficiency should be incorporated into our moral reasoning about territorial entitlement begins by formulating Locke's, basic idea as stating that 'land should be allocated to those who use it most efficiently'. From there she goes on to raise two problems with this idea which she regards as basic.[25]

Moore's first problem with the Lockean idea in question is what she calls its 'lack of generalizability'.[26] This deficiency stems from the fact that 'what counts as efficient use depends on the values of the people and their vision of desirable land use. It is impossible to assess one culture's "efficiency" against another if they value different things, if one culture values low density and open spaces, for example, while another values a more intensive, transformative pattern of land use'.[27]

Admittedly, Moore points at a deficiency in *Locke's* thesis that does seem quite unacceptable to many contemporary liberal thinkers. Locke did premise the right to territory on a very particular conception of land use to the exclusion of all others. It has been noted by others as well, in connection with aboriginal land rights, that the territorial entitlements of groups ought not to be judged solely on the basis of *our* cultural tradition regarding the use of land.[28] However, recognizing a certain cultural bias in Locke's theory, and rejecting it, does not amount to the refutation of the entire idea that efficiency might form part of the basis for a right to territory. This would be true only if our choices were so limited that we could either adopt Locke's theory on land acquisition and title lock, stock and barrel, or do away with it altogether. Moore seems to view these as our only alternatives and consequently opts for the latter.

For those who might not be so eager to discard Locke's theory entirely, there is another option. We can retain the general framework of Locke's train of thought while expanding the content of his efficiency criterion so that it is able to incorporate other forms of land use as well.[29] This would still leave the basic distinction between the utilization of land – which would form one of the criteria for establishing legitimate title to it – and no use, or virtually no use, of land, which would bring entitlement into question.

It might be argued here that even such a wider criterion would remain culturally biased. Both the emphasis on utility and the criteria which would presumably be necessary in order to determine what counts as utilization of land and what would be considered virtually no use would draw on our cultural values. Thus, the problem Moore points at would still exist, though perhaps to a lesser degree.

The answer to this objection pertains to Moore's original objection as well. While we would be wrong to subject groups to our particular conception of efficient land use, we need not adopt a totally subjectivist approach with regard to the value of various forms of territorial utilization. There is a gross exaggeration involved in arguing that it 'is impossible to assess one culture's "efficiency" against another if they value different things'.[30] There are certain things connected to the exploitation of land that members of all cultures can be assumed to value. To borrow a phrase

from Rawls' discussion of primary goods, there are things 'that every rational man is presumed to want'.[31] In the case of land and its exploitation, we can safely assume that certain things must be of value to any rational person, regardless of whatever else he or his culture values. These 'are things which it is supposed a rational man wants whatever else he wants…it is assumed that there are various things which he would prefer more of rather than less'.[32] In connection with land, these can be assumed to be goods such as food, water, natural resources, shelter and various other means of subsistence.[33] Cultures, and the individuals adhering to them, cannot be indifferent to these goods or to their attainment, which is dependent on the sufficiently efficient use of land.[34]

The second difficulty which Moore raises in connection with the aforementioned 'basic idea' that she attributes to Locke is that 'the consequences of implementing the rule would be disastrous'.[35] Later she explains that if such a principle of efficiency 'was adopted as a general principle or rule, it would not provide a secure basis for control over territory, but would lead to an unstable and counter-productive situation where borders are constantly being re-drawn'. This is because:

> [i]f applied generally, this rule would seem to dictate that land rights should be conferred according to who is most effective in exploiting the resources. Because this would change over time, the rights to particular pieces of land would also shift. Changing technology, changing land-use patterns and demographic shifts would lead to a situation in which one area of land, previously best exploited by one group, now might be used more efficiently by another group; thus one group would lose their rights to the land and another would gain rights. Because efficiency (or expected efficiency) is the foundation for rights, it would follow that the actual amount allotted to different groups would constantly change.[36]

Moore's concern here for radical instability is, if not totally unfounded, at least extremely exaggerated. Her worry stems from an invalid move implicit in her original formulation of the so-called 'basic idea', and now explicitly articulated in this second objection. She assumes that if we allow use, or efficiency, to form part of the foundation for territorial entitlement, this would entail that land be allotted, and re-allotted, according to who was expected to use it most efficiently. This conclusion is in keeping with what Moore understands to be the underlying idea here, that is, that 'land should be allocated to those who use it *most* efficiently'.[37] But it is not undeniably in keeping with Locke's theory, nor is it necessarily entailed by any theory which takes efficient land use to be part of the justification for a right to it.

Locke's theory of entitlement with regard to land is, indeed, based on its efficient use. However, nowhere does he indicate that, once a territorial acquisition has taken place, others can claim the land in question on the basis of more efficient use. On the contrary, Locke's theory places great importance on first occupancy, as he understood it, that is, *first* labour, as part of the justification for land acquisition. Legitimate territorial holdings are acquired initially by staking claims to land which is not already claimed by others.[38] Investing one's labour in the land one is the first to occupy is a *further*, and necessary, condition for gaining title to it.

In a recent article on 'Locke's Theory of Original Appropriation', John Bishop makes this very point explicitly. When discussing Locke's references to the efficient use of land, Bishop notes that: 'Locke nowhere argues that efficiency overrides

private property once ownership is established; his theory is obviously not a utilitarian theory in which land must always be reassigned to the most efficient use. Thus efficiency is only relevant at the time of original appropriation'.[39] Later Bishop explains at greater length that:

> Locke's theory was not a utilitarian theory in which property rights are always assigned and re-assigned to the most productive use; utilitarianism was neither the basis of original appropriation nor of the continuing private ownership of land… this obviously is not consistent with Locke's theory of property, which is a rights, not a utilitarian, theory. For Locke, the issue of productivity only arises at the time of original appropriation, and even then the issue is not which use is the most productive, but rather who is the first to improve a piece of land.[40]

Admittedly, Locke's failure to acknowledge the potentially destabilizing principle which Moore points to, whereby land would be constantly reallocated on the basis of optimal efficiency, could simply be attributed to an inconsistency in his theory. Locke does make remarks which leave his thesis open to the interpretation that his criterion for land acquisition is *optimal* use, and consequently to the sort of objection from instability which Moore raises. Thus, for example, he states right at the outset of his discussion on property that: 'God, who has given the world to men in common, has also given them reason to make use of it to the *best* advantage of life and convenience'.[41]

However, contrary to Moore's concern, the principle of instability she points at is not necessarily dictated by any rule which regards the exploitation of land as a prerequisite for its legitimate acquisition. At most she has succeeded in pointing out a deficiency in Locke's particular theory of efficiency which depends on a specific reading of his argument. But, in general, taking utilization to be a partial basis for land rights does not entail that the criterion for such acquisition and subsequent holding need necessarily be the *most* efficient use. The latter does not necessarily follow from the former. From the fact that use is a condition of entitlement, it does not necessarily follow logically that continued entitlement is contingent on optimal use. Consider, for instance, the institution of marriage. It is widely accepted in many legal systems, as well as in various religious codes, that a marriage is not valid until it has been consummated. It does not, however, follow from this that the ongoing validity of marriage depends on the frequency (or quality) of intimacy. It certainly does not follow that if, at some later point, one is intimate with someone other than one's legal spouse more frequently than with that spouse, the former thereby acquires marital status while the latter loses it. This is at least partly because consummation is only an additional (though necessary) condition for the validity of a marriage.

In general terms, regarding A as a necessary condition for B does not in any way entail the conclusion that if A is not maximized to it highest degree, then B does not obtain. Nor does it entail, as my example illustrates, that A is a sufficient condition for B. Likewise, as I have already stated, according to Locke the utilization of land is an essential, but not a sufficient, condition for entitlement to it. His principle does not necessarily dictate a rule whereby land should be continuously reallocated on the basis of optimal use.

This reading of the utilization requirement, as opposed to Moore's, stands to gain even greater plausibility when one considers not only Locke's theory of property but Hume's as well.[42] For Hume, stability itself is regarded as the most beneficial feature of a system of property, and the concern for it is at the very heart of his utilitarian account of property rights.[43] On this account, the principles of utility and stability, far from being at odds with one another as Moore presents them, are in fact closely linked in an inseparable manner.[44] Stability is taken to be the primary component of what makes a system of property useful for individuals. If one keeps Hume's utilitarian comments on stability in mind, it then seems plausible to maintain that utility is a significant factor in allocating property rights (or territorial rights, as the case may be), but that for the very same reason (i.e. the maximization of utility), once those rights have been acquired, it is equally useful to protect their stability from then on. If stability is understood to actually form a part of what utility or efficiency are all about, then this view, which I attributed to Locke, is totally coherent.

Whatever inconsistency may be involved in some of Locke's comments on the matter, then, his basic idea seems to entail only that one make some reasonable (rather than optimal) use of the land in question in order to gain title to it. And I have already suggested that such a Lockean principle can be expanded in a way that will enable it to encompass various cultures' interpretations of what counts as making good use of land. There is certainly good reason not to confine ourselves to a particular, narrow conception of appropriate land use if it is unjustifiably culturally biased.

Now, I can foresee an objection which, while admitting to the logical possibility of what I am suggesting here, might argue that in my attempt to avoid the undesirable destabilizing consequences entailed by adopting *optimal* use as a criterion for territorial entitlement, as well as the unacceptable cultural bias involved in adopting any particular conception of appropriate and efficient land use, I will have, in reality, weakened the efficiency criterion to an extent which renders it practically void. In other words, in order to avoid the moral and practical hazards which Moore points to as natural consequences of adopting a Lockean criterion of efficiency, we would have to modify the efficiency criterion to an extreme degree. If we weaken this principle too far, so the argument goes, then almost any group will turn out to have a claim based on it. So, while the objectionable consequences Moore points to may not be necessary logical derivatives of any efficiency criterion whatsoever, they are after all natural consequences of adopting any significantly strong principle of efficiency.

Such an objection is not unfounded. I am indeed suggesting the incorporation of a relatively weak principle of efficiency within some wider set of criteria for the legitimate acquisition and holding of territory. In fact, I would not even refer to it as an efficiency principle, but rather as a principle of utilization. And, admittedly, most groups permanently inhabiting a territory will be able to enlist the fact that they are making good use of it as a point in their favour.[45] But this does not render this criterion void of all content. It still leaves us, as I have already suggested, with the basic distinction between utilization of land in various forms – which I argue should have something to do with establishing title to it – and virtually no use of land (perhaps

even totally inefficient use) which might bring entitlement into question. I have also suggested that some common idea of what amounts to good use can be derived from the basic needs of all human beings, regardless of their cultural affiliation. So while we might reject Locke's narrow, and perhaps culturally biased, approach towards the proper exploitation of land, we need not, after all, adopt a totally subjectivist approach to the issue of appropriate utilization of land, as Moore seems to suggest.

6.3 The Value of Efficiency

There is much to be said in favour of retaining this basic idea that entitlement to land is tied in some way or another to its usage. One reason for doing so which has already been mentioned is that the efficient use of land results in produce which is of value to everyone. Thus, it supplies us with a universal criterion that crosses all cultural borders.

Another compelling reason for retaining this basic Lockean intuition is that it is compatible with some other widespread beliefs about which we are more confident. Our normal everyday tendency is to associate use with interest (and lack of use with lack of interest). When an individual neglects to use a resource which is at his disposal, we would normally conclude, quite confidently, that he lacks any significant interest in it. Admittedly, if the said resource is the property of that individual, his apparent lack of interest in it would not automatically justify his dispossession. It does, however, cast doubt on the strength of the owner's interest in that property. If his continued possession of the unused item placed heavy burdens on others – burdens arising from their obligation to refrain from using his resource – then it might put his entitlement into question.

Assume now that the resource in question is scarce, and that its ownership is in dispute. Others who lack it would, if they were granted possession of it, use it for their livelihood. Surely, in such a case, the current possessor's failure to make use of the resource would figure into our considerations as to its rightful ownership. I, therefore, doubt that such considerations should be excluded in the case of territorial entitlement.

It might be argued here that the case of land is necessarily different because land is of value for simple residence if nothing else, so that, even if it hardly utilized, those who reside on it still have a vital interest in not being removed from it. Granted, an interest in residence, that is an interest in territorial space, may well exist even where neglect indicates no further interest. However, this is not necessarily an interest in any specific land. It may simply be an interest in some territorial sphere on which a group can reside freely, though usually it is also an interest in residing in the place where one is already situated. This is certainly an interest worthy of respect, but, in view of the severe scarcity of land and the frequent disputes over it, this limited interest will often have to contest with the needs and interests of others, which might be more substantial, as well as more closely connected to a particular place. Others who are competing for this territorial space, while certainly

un-entitled to remove those whom they regard as inefficient inhabitants (as settlers so often have) might put the land to some good use.

As in the case of private ownership, I am not arguing that lack of use automatically amounts to a lack of title or that cultivation on its own automatically gives rise to rights over territory. However, I am arguing most definitely that use be regarded as a relevant consideration in the attribution of land rights, and against the view that any such semi-Lockean considerations be excluded from the discussion. Such exclusion ignores our common intuitions which associate use with interest and neglect with lack thereof. Furthermore, it ignores the unarguable fact that the produce of well-utilized land is of universal value.

Finally, I might be criticized for implying that the utilization of land by a particular group is in some way ultimately beneficial to all. I have argued that the use of land results in produce which is of value to everyone, and that the produce of well-utilized land is of universal value. In fact, as should have been clear, all that was intended by such comments was a response to Moore's first objection to Locke's principle of efficiency, her objection from 'lack of generalizability', according to which it is impossible to assess one culture's 'efficiency' against another's because different cultures value different things.[46] Here I argued that certain things, certain products of land use, can be assumed to be of value to all, cross-culturally, thus enabling us to make some assessments of relative efficiency. All that I have been arguing for is the existence of some common denominator, which Moore denies, for the assessment of efficiency.

As for the stronger claim that might be attributed to me – that the efficient use of land is of benefit to all – I doubt whether this is entirely necessary for my argument here. I will nevertheless attempt to defend at least one possible version of this stronger claim. I will suggest that the use of land, as opposed to its neglect, is morally valuable. Defending this stronger claim entails showing that the utilization of any given territory by an individual or by one set of people (e.g. those occupying it) is in some sense universally desirable above and beyond the direct benefit to the individual or individuals occupying the said territory.

In the *Second Treatise of Government*, Locke attempts to formulate an argument of this sort. According to Locke:

> he who appropriates land to himself by his labor does not lessen but increase the common stock of mankind; for the provisions serving to the support of human life produced by one acre of enclosed and cultivated land are – to speak much within compass – ten times more than those which are yielded by an acre of land of an equal richness lying in common. And therefore he that encloses land and has a greater plenty of the conveniences of life from ten acres than he could have from a hundred left to nature; may truly be said to give ninety acres to mankind.[47]

Beyond these statements, however, Locke remains somewhat vague as to how in practice any personal appropriation and cultivation of land actually benefits anyone other than the appropriator himself. It is quite clear that the latter now enjoys 'a greater plenty of the conveniences of life'.[48] It is far less obvious that he has in fact, by his act of enclosure, increased the stock of all mankind, or of anyone, for that matter, other than himself.

I noted earlier that Waldron understands this passage from Locke as expressing the view that:

> When a man encloses and cultivates ten acres of hitherto common land, the rest of mankind is benefited, according to Locke, by the greater reduced pressure on the remaining common land. To produce the same goods that he is producing by cultivation, a hunter and gatherer would need to roam over a hundred acres of common land. So by withdrawing from the common into his ten acre patch the encloser leaves the remaining ninety acres that much freer for everyone else.[49]

According to Waldron: 'It is *not*, however, Locke's argument that mankind benefits from the *product* of the ten cultivated acres: the only person who benefits from that is the cultivator'.[50] In some of his later writing, however, Waldron does attribute a stronger argument about the universal value of efficient land use to Locke with regard to America, though he acknowledges that Locke's argument to this effect may not be a good one. Still, Waldron tells us, Locke insisted that native peoples were not entitled 'to simply tie up in unproductive occupancy productive resources whose industrious cultivation could improve both their own prospects and those of a much greater population'.[51]

In the modern international context, with regard to nations' utilization of land, another seemingly possible way of defending the claim that utilization is generally beneficial is by pointing to the interrelations between various parts of the globe. One land's prosperity, it might be argued, eventually 'trickles down' to the populations of less affluent places by way of export, international aid, and so on. According to this argument, the efficient use of land would eventually and indirectly benefit all mankind, for example by making goods more readily available world-wide.

Such assumptions, however, are somewhat questionable, as well as unnecessary to show the general desirability of making good use of land. They are questionable because one can easily envisage instances of territorial exploitation (by way of cultivation or otherwise) which benefit no one, directly or indirectly, other than the occupants of the utilized territory themselves. They are unnecessary because the general moral desirability of territorial utilization need not depend on its benefiting all mankind. From a utilitarian point of view, the mere fact that some sentient beings are enjoying greater pleasure than they would be were it not for the utilization of the land in question (without lessening the enjoyment of others as a result) suffices to render the use in question morally desirable. Whatever version of utilitarianism one might adhere to, this conclusion is difficult to deny. The use of land to the benefit of individuals (the forms of what counts as beneficial use admittedly varying from one culture to another) raises both the aggregate utility and the average utility of all mankind.

Perhaps one need not be a utilitarian in order to accept my basic contention whereby some form of utilization of land is morally preferable to its neglect. We might ask ourselves what would be the appropriate Kantian attitude towards the issue at hand. Kant's categorical imperative requires the moral agent to act only upon such maxims of action as can be willed as universal laws applying to every moral agent.[52] One of the corollaries of this categorical imperative, its second composition as 'The Formula of the Law of Nature', stipulates that one ought to 'Act

as if the maxim of your action were to become through your will a universal law of nature'[53]. So we might ask ourselves in our connection whether the neglect, or totally inefficient use, of land could be willed by those neglecting it, or using it totally inefficiently, as a universal law, or a universal law of nature. In light of those fruits of the land which I suggested to be basic human needs (i.e. food, shelter, etc.), I strongly suspect the answer to this question must be in the negative.

Kant's subsequent illustration of these first two formulations of his categorical imperative consists of four examples intended to demonstrate the appropriate implementation of his imperative.[54] The third of these four examples might possibly shed some further light on the question in hand. In this example, Kant condemningly describes a man who chooses to dedicate his life solely to the pursuit of pleasure and enjoyment, thus neglecting the development of his natural aptitudes.[55] Kant asks whether such a tendency towards idleness and neglect could be compatible with what is called duty. Pointing to the South Sea islanders as an example of such a life of idleness – and thus admitting that such a system of nature could indeed subsist under such a universal law – Kant nevertheless concludes that a man living such a life 'cannot possibly *will* that this should become a universal law of nature'.[56]

A similar conclusion might be appropriate as regards individuals who neglect a piece of land which is at their disposal. While such individuals or a group might very well be able to exist under such a system, reason does not allow them to will this way of life as a universal law. For if everyone were to treat land in this manner, the very basic resources which every person requires for her very subsistence, or at least for any minimal degree of comfort, would be denied to all.

6.4 Concluding Remarks

I have argued, following Locke, that we consider utilization to be a relevant factor in determining the destiny of disputed territory. I maintained that this reflects certain basic, widely held, moral intuitions, which can be further backed up by argument. At the same time, I suggested that we might interpret 'use' or 'utilization' in a broader way than Locke did, so as to incorporate in it various cultural understandings of the appropriate handling of land. On the other hand, I argued against the view advanced by Moore according to which the concept of efficient land use must be regarded as totally relativistic. I also rejected the interpretation of any utilization test as necessarily requiring maximum efficiency. Finally, I argued that the utilization of land, as opposed to its neglect, is of moral value.

The outcome of these brief comments on efficiency is relatively straightforward. They indicate that there are good reasons for viewing the way in which a given land has been put to use as a relevant component of any overall account of territorial entitlement. In those cases in which the occupancy of land is conjoined with its utilization, this use of the land serves to strengthen the occupant nation's claim to it. Correspondingly (though less obviously) it follows that the neglect of

a land by its inhabitants may put their title to it into question, though it does not automatically negate any territorial claim. In the first case, the modified efficiency argument advanced in this chapter lends further moral support to existing territorial claims. It explicates a small, but nonetheless important, part of the reason for our common intuition whereby current inhabitant of a territory are the most likely candidates to be morally entitled to it. But it also serves to restrict these intuitions, so as to exclude negligent occupants. Thus, in the second instance (that of neglect, or non-use) the principle of utility suggests a weakening of the moral case for entitlement.

In most real-world cases the role of guidelines based on utility would usually be limited to strengthening territorial claims which are already legitimized by other criteria, as in: we are well settled here, and have been from time immemorial, thus having established cultural ties to the land, *and* we make good use of our land to everyone's benefit. This last point is non-negligible, though it is admittedly a supplementary one. However, since I am suggesting throughout that any adequate overall approach to the evaluation of territorial entitlement will ultimately be multi-criterial, auxiliary arguments will have a significant role to play within it.

One important prototype of territorial cases to which an efficiency criterion would be most relevant was clearly suggested at the beginning of this chapter. Following Waldron, Poole and Simmons, I indicated that considerations of efficiency and utility apply quite directly to territorial conflicts involving 'settler societies', most notably to struggles for land in America, Australia and New Zealand. As both Waldron and Poole imply, efficiency considerations strengthen the claims of the present occupants of those continents, that is, the innocent descendants of the European settlers.[57] Though unlike Locke, they clearly do not suggest that such considerations justify the original expropriation of land. I also referred to the implicit efficiency argument embedded in Zionist rhetoric. Notwithstanding the definite support that considerations of utility lend to the territorial claims of latter generations of Western-style settlers, it is possible that, when such arguments are interpreted generously enough to avoid cultural bias, they might end up supporting some of the demands of aboriginal groups as well.[58]

Furthermore, claims of superior efficiency do not operate in a vacuum, nor have I argued that they occupy a paramount place within a variety of normative considerations favouring one group's claim to territorial sovereignty over another's. In any concrete territorial case, arguments from utility will ultimately have to contend with other interests in territorial domination such as those stemming from a historical connection to a given territory or those related to de facto occupancy, or physical need. Admittedly, no magical formulas or instant recipes for solving the complex problems of territorial allocation are supplied here. 'How much history equals how much efficiency' or 'what degree of utility is necessary in order to meet counterclaims' must remain somewhat open questions throughout, with no definitive theoretical answers. Notwithstanding these limitations, I attempted to highlight the normative significance of this efficiency consideration which, I argued, should not be underestimated.

Endnotes

1 Margaret Moore, 'The Territorial Dimension of Self-Determination', in Margaret Moore (ed), *National Self -Determination and Secession.* (Oxford: Oxford University Press, 1998), 134–157, 148.
2 Moore, 'The Territorial Dimension of Self-Determination', in Margaret Moore (ed), *National Self -Determination and Secession.* (Oxford: Oxford University Press, 1998), 134–157, 148.
3 Moore, 'The Territorial Dimension of Self-Determination', in Margaret Moore (ed), *National Self -Determination and Secession.* (Oxford: Oxford University Press, 1998), 134–157, 148.
4 John Locke, *Two Treatises of Government*,Peter Laslett (ed.) (Cambridge: Cambridge University Press. 1960) (1690), II, Chapter 5, Sect. 32. See also: Jeremy Waldron, *God, Locke, and Equality – Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002), 168–170, Locke not only acknowledged the presence of Native Americans, he also did not deny their equal status as human beings.
5 Jeremy Waldron, 'Superseding Historic Injustice', *Ethics* 103 (October 1992), 4–28, 26. Jeremy Waldron, 'Redressing Historic Injustice', *University of Toronto Law Journal*, 52/1(Winter 2002) 135–160, 156–157.
6 For one of Waldron's discussions of this Lockean argument with regard to America, see again: *God, Locke, and Equality*, 168–170.
7 Ross Poole, 'National Identity, Multiculturalism, and Aboriginal Rights: An Australian Perspective', in *Rethinking Nationalism*, Jocelyn Couture, Kai Nielsen and Michel Seymour, eds.(Calgary, Alberta, Canada : University of Calgary Press, 1998), 407–438, 431; Ross Poole, *Nation and Identity* (London and New York: Routledge 1999), 133–134.
8 Poole, 'National Identity Multiculturalism, and Aboriginal Rights', 431; Poole, *Nation and Identity*,134.
9 Pool, 'National Identity Multiculturalism, and Aboriginal Rights', 431; Poole, *Nation and Identity*,134.
10 John Simmons, 'Historical Rights and Fair Shares', *Law and Philosophy* 14 (1995), 149–184, 183.
11 Moore, 'The Territorial Dimension of Self-Determination', 148.
12 Locke, *Two Treatises of Government*, II, Chapter 5, Sect. 32.
13 Locke, *Two Treatises*, II, Sects. 36, 43.
14 Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 170.
15 Waldron, *The Right to Private Property*, 170.
16 Locke, *Two Treatises*, II, Sect. 34.
17 Locke, *Two Treatises*, II, Sect. 37; See also: Sects. 43–44, 49.
18 Locke, *Two Treatises*, II, Sects. 26, 30, 43. See also: *Waldron, God, Locke, and Equality*, 168–170.
19 Locke, *Two Treatises*, II, Sect. 37.
20 Locke, *Two Treatises*, II, Sect. 38.
21 Locke, *Two Treatises*, II, Sect. 42.
22 Locke, *Two Treatises*, II, Sect. 27.
23 Jeremy Waldron, 'Settlement, Return and the Supersession Thesis', *Theoretical Inquiries in Law*, 5/2 (July 2004) 237–268, 243.
24 Waldron, 'Settlement', *Theoretical Inquiries in Law*, 5/2 (July 2004) 243–244.
25 Margaret Moore, 'The Territorial Dimension of Self-Determination', 149; Margaret Moore, *The Ethics of Nationalism* (Oxford and NY: Oxford University Press, 2001), 183.
26 Moore, *The Ethics of Nationalism*, 149.
27 Moore, *The Ethics of Nationalism*, 149.
28 Poole, 'National Identity, Multiculturalism, and Aboriginal Rights', 427, 428–429, 431; Poole, *Nation and Identity*, 130–131, 135; James Tully, 'Rediscovering America: The Two Treatises and Aboriginal Rights', in James Tully, *An Approach to political philosophy: Locke*

in Contexts (Cambridge: Cambridge University Press, 1993), 137–176; and in: G.A.J. Rogers (ed.), *Locke's Philosophy: Content and Context* (Oxford: Clarendon Press, 1994), 165–196; John Douglas Bishop, 'Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory', *Canadian Journal of Philosophy*, 27/3 (Sept. 1997), 311–337; John Simmons, 'Historical Rights and Fair Shares', 183.

29 This would answer objections like Moore's and David Lyons', who similarly rejects Locke's implicit assumption whereby cultivation is the only proper way of using land. David Lyons, 'The New Indian Claims and Original Rights to Land', *Social Theory and Practice* 4/3 (fall 1977), 249–272, 249. The proposal to retain Locke's basic theory minus his culturally biased assumptions is at the heart of J.D. Bishop, 'Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory', e.g. 312, 335–337. Both Bishop and Tully suggest that, without the unjustified Eurocentric presumptions, Locke's theory would in fact work in favor of Aboriginal land claims. Tully, *An Approach to political philosophy: Locke in Contexts* (1993), 137–176, 175–176. See also Simmons, 'Historical Rights and Fair Shares', 183.

30 Moore, 'The Territorial Dimension of Self-Determination', 149; Moore, *The Ethics of Nationalism*, 183.

31 John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 20th printing, 1994, copyright 1971), 62. For Rawls, the primary social goods are chiefly 'rights and liberties, powers and opportunities, income and wealth', to which he later adds self-respect. All I am borrowing from him is the basic idea that there are certain fundamental goods that every rational person can be assumed to value, whatever else he values. Admittedly Rawls himself has been widely criticized for this argument; nevertheless, I take it to be a convincing claim.

32 Rawls, *A Theory of Justice*, 92.

33 This, in fact, seems to me to be a far less culturally biased assumption than assuming that every rational man necessarily values income and wealth, which Rawls regards as a primary good for every rational individual, regardless of whatever his rational plans of life are in detail. Rawls, *A Theory of Justice*, 62, 92.

34 It is true that cultures can vary in the degree of value which they attach to these material fundamental goods, which is precisely why I suggested we expand the Lockean view of use so that it may encompass various forms of land use. But still, there is, contrary to what Moore argues, a lowest common denominator which enables comparison. Inefficient use of land is, at the very least, an expensive taste.

35 'The Territorial Dimension of Self-Determination', 149; Moore, *The Ethics of Nationalism*, 183.

36 Moore, 'The Territorial Dimension of Self-Determination', 149; Moore, *The Ethics of Nationalism*, 183.

37 Moore, 'The Territorial Dimension of Self-Determination', 149; Moore, *The Ethics of Nationalism*, 183. Emphasis added.

38 Locke, *Two Treatises*, II, Chapter 5, Sect. 27, Locke explains his theory of original acquisition and emphasizes that once the original appropriator's labor has been mixed with the object in question 'no man but he can have a right to what that (the labor) is once joined to'; Sect 32, Locke speaks of the legitimate annexation through labor of land 'which another had no title to'; Sect 45, where he speaks of the acquisition of land which previously lay in common; Sect. 46, where he speaks in terms of acquiring land by removing it from the state of nature. There are ample examples of this throughout the chapter. Nowhere does Locke suggest that land that has already been removed from the common, or the state of nature, and is being used (at least in the sense in which he understood the use of land), should be reallocated to someone else if it could be shown that they would use it more efficiently. On this same point see also: Hillel Steiner, 'Territorial Justice', in: Percy B. Lehning (ed.) *Theories of Secession* (London and New York: Routledge, 1998), 60–70, 65.

39 Bishop, 'Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory', 311–337, 316. In stating that for Locke, enclosure is a necessary, though not a

sufficient, condition for appropriation, I am drawing on Jeremy Waldron's interpretation of Locke's enclosure requirement, in: Waldron, *The Right to Private Property*, 174.

40 Bishop, 'Locke's Theory of Original Appropriation', 327.

41 Locke, *Two Treatises of Government*, II, Sect. 27. Emphasis added.

42 David Hume, *A Treatise of Human Nature*, Mossner, Ernest, G. (ed.) (London: Penguin Classics, 1985), Book III, Part II, Sects. II and III, 536–555.

43 Hume, *A Treatise of Human Nature*, Mossner, Ernest, G. (ed.) (London: Penguin Classics, 1985), Book III, Part II, Sects. II and III, 536–555.

44 This link between utility and stability has been taken up by some modern-day writers on property rights, for example Lawrence C. Becker, *Property Rights* (Boston, London, Melbourne and Henley: Routledge and Kegan Paul, 1977), 101–102. And: Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), 79–80.

45 This last point does not work against recognizing utilization as a morally entitling factor. We accept the fact of inhabitance of a territory as relevant to the question of entitlement to it, even though this factor also applies to most groups demanding territory.

46 Moore, 'The Territorial Dimension of Self-Determination', 149; Moore, *The Ethics of Nationalism*, 183.

47 Locke, *Two Treatises,* II, Sect. 37.

48 Locke, *Two Treatises,* II, Sect. 37.

49 Jeremy Waldron, 'Enough And As Good Left For Others', *The Philosophical Quarterly*, 29 (1979), 319–328, 323.

50 Waldron, 'Enough and as Good Left for Others', 323.

51 Waldron, *God, Locke, and Equality*, 169.

52 Immanuel Kant, *Groundwork of the Metaphysic of Morals*, translated and analyzed by H.J. Paton (New York: Torchbooks/The Academy Library, Harper and Row, Publishers, 1964), Chapter 2, 88.

53 Kant, *Groundwork of the Metaphysic of Morals*, Chapter 2, 89.

54 Kant, *Groundwork of the Metaphysic of Morals*, Chapter 2, 89–91.

55 Kant, *Groundwork of the Metaphysic of Morals*, Chapter 2, 90.

56 Kant, *Groundwork of the Metaphysic of Morals*, Chapter 2. 90.

57 Waldron, 'Superseding Historic Injustice', 26; Poole, 'National Identity, Multiculturalism, and Aboriginal Rights', 431; Poole, *Nation and Identity*, 133–134.

58 See: Tully, *An Approach to political philosophy: Locke in Contexts* (1993), 137–176, 175–176; Bishop, 'Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory', 312, 335–337.

Chapter 7
Settlement

As an Israeli writing at the turn of the twenty-first century, I have become accustomed to hearing the word 'settlement' used by liberals almost invariably as a derogatory term. The Jewish settlements to the west of the Jordan river, now populated by close to a quarter of a million Jews, are often said to be a central obstacle to peace in the Middle East, as well as being immoral in and of themselves. Consistent liberals realize that this attitude poses a problem for the endorsement of the Zionist effort altogether, since settlement has been a central tenet of this doctrine from the start and the main practical tool for achieving its goals within contested territories. It was also the primary apparatus for achieving Western control over North America, Australia and New Zealand, wholly at the expense of the aboriginal inhabitants of those places. This too is the source of a great deal of contemporary liberal breast-beating.

My primary purpose in this chapter is neither to support nor to refute these liberal views. It is principally to remove the issue of settlement from any narrow and controversial context and examine its possible significance to the project of justly determining the allotment of territory, as well as to touch on its moral value as a form of human endeavour. This Chapter asks what, from a liberal point of view, is the effect of settlement on entitlement to territory?

More specifically, I will be asking whether settlement on a particular piece of land establishes a claim to it, and what the moral force of such a claim might be. As we have seen, contemporary territorial conflicts present a multiplicity of arguments commonly raised by national groups in defence of their respective claims. These typically include historical arguments of the various kinds discussed in Chapter 3, often accompanied by compensatory demands phrased the language of corrective justice that were addressed in Chapter 4. From an egalitarian perspective, the allotment of territory also raises issues of distributive justice. This is the topic of the following chapter. It certainly raises questions concerning subsistence rights and basic needs, some of which were addressed in the previous chapter.

Determining the destiny of any particular territory ultimately involves demographic considerations concerning the national affiliation of its present inhabitants and their right to self-determination. I begin by differentiating between the question of settlement and the issue of national self-determination, which, in many of its

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formulations, also concerns the rights of a territory's inhabitants to govern the land on which they are situated. I will argue that the liberal doctrine of self-determination does not supply us with sufficient answers to territorial questions. Later, after clarifying the concept of settlement, I will be asking what (if anything) about settlement warrants its defence from a liberal point of view. I will argue that the fact that individual members of a nation are settled on a particular piece of land constitutes a primary factor, which should be taken into account in evaluating their nation's claim to control over that territory. Finally I will say a few words about the complicated issue of settlement in disputed territories.

7.1 Settlement and Self-Determination

It might be argued that establishing the significance of settlement for territorial entitlement is redundant, since the questions it purports to answer have already received more than sufficient attention in the voluminous literature on national self-determination. Liberalism, so this argument might go, has already had its say on this matter, to the effect that the inhabitants of any given territory are entitled to control over it.

Settlement in its minimal sense of residence, or presence, in a territory does indeed link the territorial issue to the liberal principle of self-determination. However, contrary to what might be assumed, the principle of self-determination does not take us very far towards resolving the kind of territorial disputes we are familiar with in contemporary politics. A brief look at the relation between territorial claims based on the right to self-determination and the right to secession, on the one hand, and justifications of territorial entitlement which concern settlement, on the other, reveals that the former leaves many territorial questions open.

It is difficult to achieve a canonical definition of the principle of national self-determination. On some accounts, national self-determination is practically synonymous with the idea of self-rule. There are many variations on this theme. According to David Miller, the Principle of National Self-Determination is 'the principle that where a body of people form a national community, they should be allowed to control their own affairs through institutions of self-government'; he realizes, however, that this principle in and of itself does not justify any particular territorial solution in all cases of rival national claims over land.[1]

Sometimes the right to national self-determination is more closely linked to the right to secession, and as such, appears to be more helpful with regard to territorial solutions. Joseph Raz and Avishai Margalit understand self-determination as equivalent to the right to secede and form a separate state, that is, as the right of the majority in a given territory to determine the destiny of that territory. For them, the core content of national self-determination is 'a right to determine whether a certain territory shall become, or remain, a separate state (and possibly also whether it should enjoy autonomy within a larger state)'[2]

But in fact, associating self-determination with the right of secession does not get us much further towards resolving territorial disputes. For one thing, it does not address cases in which the territory in question is nationally mixed to a significant degree. For another thing, it implies that a territorially concentrated encompassing group has the right to secede and form an independent state regardless of whether or not other members of that group have already established a self-determining state (or several states) elsewhere. Most importantly, in granting the majority of 'a certain territory' or 'a territory' the right to secede, Raz and Margalit's interpretation of self-determination is totally indeterminate. In contested cases, the question of whether or nor the disputed territory is in fact a separate unit, a 'given territory', with its own relevant majority and minority, is often itself the crucial issue.

The problem of determining the relevant jurisdictional unit for holding a plebiscite on the question of secession has not gone unnoticed by writers on self-determination.[3] Raz and Margalit themselves seem to recognize this problem with their theory when they discuss the question of the relevant majority involved in their proposed decision-making procedure and pose the question 'what is the relevant democratic unit?'[4] They admit that the answer to this question cannot be achieved on the basis of majoritarian principles and must instead rely on other background principles. But they do not supply conclusive answers to the questions this raises. What are the appropriate criteria for demarcating territorial boundaries? This is the central question which underlies this book in its entirety and this chapter in particular, and it cannot be answered by referring to principles such as self-rule and self-determination.

Note that the question that is left open by Raz and Margalit is not primarily a practical one which can be discarded as such by political theorists. It concerns not only the possibility that states will unjustifiably engage in gerrymandering in order to prevent groups within their states from seceding. The principled territorial issue that the Raz –Margalit thesis leaves unresolved is that of specifying the legitimate criteria for resolving questions of demarcation. What are the appropriate liberal guidelines for determining which territory should belong to which jurisdictional unit?

Avner De-Shalit, to take a further example, aligns with Raz and Margalit in understanding national self-determination in terms of territorial separation and the formation of a new state. Consequently, his argument retains many of the territorial indeterminacies exhibited by the Raz-Margalit thesis.[5] He argues that, as a rule, the appropriate way of meeting demands to national self-determination, at least in cases of antagonistic ethnic groups, is to redraw the territorial boundaries in the disputed region so that those claiming self-determination can establish their own independent state.[6] But, again, how are we to redraw these boundaries?

Another variation on the theme of self-determination appears in Thomas Baldwin's article dedicated specifically to the territorial aspect of states. Baldwin's 'The Territorial State' recommends 'a principle of self-determination to the effect that political communities which seek autonomy should, as far as practicable, be allocated a territory within which they can become autonomous states'.[7] But despite the promising title with its territorial focus, Baldwin's account of self-determination,

which requires that 'political communities, which seek autonomy, should, as far as practicable, be allocated a territory within which they can become autonomous states',[8] surprisingly does not even acknowledge the most basic questions concerning which territory should be allocated to whom.

David Copp supplies us with yet another account of self-determination which does not advance us any further towards solving territorial problems, though at least he admits to this outright. Copp's interpretation of the principle is not only unhelpful territorially, but also, as he puts it, societal rather than national. It amounts to the right to hold on to, or form, an independent state.[9]

Other versions of this principle are primarily cultural. They focus on individuals' interests in adhering to their culture and preserving it within a designated public sphere. Yael Tamir argues that the right to national self-determination 'stakes a cultural rather than a political claim, namely, it is the right to preserve the existence of a nation as a distinct cultural entity'.[10] In contrast with the definitions listed above, Tamir helpfully distinguishes her understanding of the right to self-determination from the right to self-rule, which is the right of individuals to govern their lives and to participate in a free and domestic political process.[11] She adds that the realization of this cultural right to self-determination, need not in all cases take the form of an independent state.[12] This cultural version of national self-determination, by its very nature, does not even purport to resolve any territorial issues.

Chaim Gans' understanding of national self-determination is also concerned with individuals' interests in living within their identity culture and preserving it for generations. He argues that, in general, this right ought to be granted to each nation at a sub-state level, preferably, as noted in Chapter 3, within some adequate portion of their historic territories[13] The size of each territorial allotment is subject to considerations of need and distributive justice.

Some of these theories in their totality are most helpful in advancing us towards resolving territorial questions from a liberal-nationalist perspective. I have relied on the last two, particularly the latter, in connection with historical rights to land. Some, like Gans, proceed from their thesis on self-determination to offer useful guidelines for the resolution of territorial issues. David Miller's wider idea of nationality supplies additional guidance for determining the allocation of territory, and I will return to some of Miller's thoughts on this matter at various points throughout this chapter. The limited point here is that the liberal principle of national self-determination, in and of itself, cannot resolve these issues conclusively, no matter how it is defined.

There are countless definitions and accompanying theories of national self-determination. Whether we define self-determination with reference to the right to culture or along more political lines, as grounding a good claim for each national community to be politically self-determining, this principle, along with the idea of self-rule, still leaves many territorial questions open. For one thing, territories are often in dispute among nations which already enjoy self-determination through their own independent states. In such cases, the dispute often concerns the possible inclusion of the territory in question within the boundaries of one existing nation state or another. France and Germany's long dispute over the region of Alsace-Lorrain is a case in point, as is the historical Hungarian-Romanian dispute over Transylvania.

Israel's peace negotiations with Egypt in the late 1970's regarding the Sinai Peninsula, and Israel's territorial dispute with Syria over the Golan Heights, serve as further examples. In neither case is independent statehood an issue at all. In other cases, holding referendums in response to secessionist demands requires pre-determining the precise boundaries of the relevant territorial unit in which to hold such a vote, and that, as already mentioned, often poses both practical and principled difficulties. Furthermore, the Principle of Self-Determination is not helpful in resolving territorial conflict in cases in which it is agreed that a nation should be granted an independent state, but where the exact borders of this would-be new state remain disputed.

None of this is intended as a critique of any of the aforementioned theories of national self-determination. This principle, regardless of the various forms it takes, is essentially a principle about political authority rather a principle for determining precise territorial boundaries. Of course it has something to say about territorial issues, but it also leaves many questions on the territorial front unanswered. Earlier I suggested that the existence of national settlements in a given territory might form a central piece of the territorial puzzle I am engaged in solving here. In the following I suggest that considering the issue of settlement might advance us further towards establishing a set of criteria for assessing national disputes over land from a liberal perspective, than the principle of national self-determination does.

7.2 The Concept of Settlement

In the narrowest sense, the term 'settlement' can be understood to denote nothing more than human residence in a territory. In this sense then, the settlement of a land simply means 'being there'. I refer to this narrow meaning of settlement as 'encampment'.

Now, merely being there is nothing to be sneered at. Basic laws of physics require that we all have to be somewhere (that is, to take up some physical space).[14] The fact that some of us happen to be here, while others are there, and others still are somewhere else, can be morally significant. For example, the fact that your body is physically occupying a certain space poses not only a practical barrier but also a moral one to my occupying that space. The fact that we are over here where there is plenty of food and water, while others are over there where there is nothing, may place certain moral duties on us. More to the point, the fact of a people's mere presence in a territory forms the basis for many of the claims advanced by modern liberal theorists in the name of 'self-determination', 'self rule' or 'self-government'.

However, as we saw in the previous section, these principles run into serious problems when relied on to determine territorial questions. This is, among other reasons, because, unlike individuals, a nation does not form one single physical entity. Some members of a nation can be situated in one place while others are located elsewhere; at times some of those members will already enjoy self-determination in one of those places, and sometimes they will not; and, of course, members

of various nations can inhabit the same territory simultaneously. The problematic territorial questions stemming from these situations, and the fact that they cannot be redressed solely by appealing to the principle of national self-determination, gives cause to search for a more meaningful understanding of settlement, one that is more sensitive to territorial issues.

There is a further virtue to adopting a more meaningful interpretation of 'settlement'. Mere presence in a territory, while certainly not morally irrelevant, does not capture the full significance of the interest nations have in the possession of territories settled by their members. The fact that individual English nationals happen to inhabit the European island currently called Britain does not capture the strong interest the British have in holding on to this island.

The interest involved in territorial sovereignty over places of national settlement can be better captured by adopting a wider and more active understanding of the term 'settlement', which includes a certain interaction with the territory in question. This understanding, although obviously including the first meaning, also involves a fruitful relationship with the land, which consists primarily of building on it and shaping its landscape. This is also the more common understanding of the term 'settlement', as denoting the existence of an established (though sometimes relatively new) town, village, colony, or city. In short, 'settlement' is taken here as referring not only to the presence of individuals on a piece of land but also to the existence of a permanent physical infrastructure. Such settlements are sometimes constructed in a conscious and premeditated manner, through a collective national endeavour. More often than not, however, they simply evolve over time as individuals, or members of this or that cultural group, settle in a given place and slowly develop the land and build on it in light of their immediate needs. This, at least according to some accounts (most notably, John Locke's) may yield individual property rights, but does not on its own automatically generate a joint place of settlement, such as a city or town, let alone any claims of collective ownership over a territory.[15] Still, as history has shown, even where settlement does not start out as a group effort, individuals ultimately join together and, somewhere down the line, make a collective, group investment in setting up permanent foundations for their communal habitation. This is the meaning of 'settlement' that I will be addressing here.

Moreover, territorial settlement thus defined, may be encountered at various stages. At its inception, or gestation, settlement refers to the process of establishing a new territorial community. Settlement as an ongoing action may conjure up images of pioneer colonisation and, most problematically, often involves a state-directed policy of settling its co-nationals or co-ethnics on a particular territory precisely in order to gain control over it.[16] Once this problematic process has been carried out to its near completion, however, the resulting 'settlement' refers to an existing state of affairs rather than to a debatable project. At this second stage I argue, settlement gains not only practical but also considerable moral, force. Consequently, I will suggest that when considering conflicting territorial claims, serious weight ought to be given to the interests of settler nations in retaining the lands they have successfully settled.

In the following two sections, I argue that national settlement (understood both meaningfully and retrospectively) includes two distinct elements which lend it moral significance and contribute to entitlement. The first section concerns the Lockean idea of mixing one's labour with the land. I will argue that this Lockean idea is far more compelling when applied to the building of a city than to the picking of an acorn from a tree. The idea that the effort results in the acquisition of title (or at least a good claim) to that territory is, I believe, more easily defensible in the former than in the latter case. This is because the resource being claimed at present is now quite different from the one originally provided by nature. Those who laboured on it are laying claim to something that has been transformed by their endeavour and which, in a sense, did not even exist prior to their labours. In the second of these two sections, I discuss a further element of settlement in its stronger form, which I call the 'expressive' element. This feature concerns the way in which national cultures manifest themselves in the territories settled by their members. The theoretical framework for this second argument is the idea of 'liberal nationalism' with which I set out, and which places strong significance on individuals' interests in their national culture as a constitutive component of their personal identity. Here I shall explore the possibility that the expression of a national culture in a territory, its landscape, architecture, and so on, is relevant to the question of entitlement to it.

Each of the two arguments are intended to bring out some morally worthy interests held by members of settler nations with regard to lands settled by their conationals or forebearors. Such interests are often overlooked particularly where the original act of settlement is tainted with morally damning deeds. I will argue that some normatively valuable interests exist regardless of the injustice by means of which they may have been acquired. However, while I suggest that settlers' interests should be accounted for, they need not necessarily outweigh all competing claims. Moreover, the arguments presented in the next two sections apply to existing places of settlement and leave room for less sympathetic normative judgements regarding settlement projects at earlier stages of development. I shall have something to say about 'settlement' at each of these respective time frames, throughout.

7.3 The Ethics of Settlement

7.3.1 The Lockean Element

Locke's theory of the legitimate appropriation of natural resources assumes initially that, though God gave the world to all men in common, an individual's body and consequently his work, pains and labour properly belong to him.[17] From this he (controversially) infers his 'labour theory of acquisition' whereby:

> Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature has placed it in; it has by this labour something annexed to it that excludes the common right of other men.[18]

In keeping with this logic, 'He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself'.[19] The entitling act is specified by Locke as being that of the first gathering or picking, the rationale for this being that in so doing, the gatherer of the fruit or acorns 'added something to them more than nature … had done'.[20]

As regards land, Locke tells us that as much 'as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common'.[21] 'He that … subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him'.[22]

Although it is presented as an integral account, Locke's theory of acquisition does in fact include several distinct components, only one of which, I shall suggest, is applicable to the issue of national settlement. The first of these components concerns primacy, that is, the stipulation whereby the appropriator needs to be the very first to have enclosed the property in question from the common. In the political context, it is clear that this feature of the Lockean argument can rarely be applied in connection with national claims to territory. This was discussed in Chapter 3 in connection with first occupancy claims. Few nations can claim to be the absolute first to have removed the land in question, as it were, from the state of nature. Furthermore, the normative force of The Principle of First Occupancy with regards to property rights in general, and the moral significance of this requirement in the national-territorial connection in particular, are, to say the least, extremely questionable.[23]

The second, and central, component of the Lockean theory concerns the notion of an appropriator mixing his self-owned labour with the item in question, thus (according to Locke) legitimately appropriating it as his property. This labour theory has attracted much criticism and is indeed problematic, at least when adopted wholeheartedly and not provisionally.[24] Additionally, as already mentioned, when applied to land it also involves interpreting 'labour' as the efficient use thereof, or, more precisely (and more problematically), it involves a specific culture-dependant understanding of the efficient utilization of land. I have already discussed this aspect of the Lockean theory of appropriation at length in the previous chapter, arguing that this accusation of cultural bias can be overcome to some extent.

Finally, there is at least one further strand in Locke's theory of entitlement. Part of the rationale behind his labour theory appears to be that in labouring on an object the individual improves it in a way that ultimately renders it completely different, and immeasurably more valuable than it was before. Thus, he who toils over a previously un-appropriated item does not merely 'mix' his own work with it, but rather, improves it in a way and to an extent which change it unrecognizably from the object which originally lay in the state of nature. Thus, in effect, the labourer is laying claim to something that did not exist prior to his effort.

This component of Locke's argument, while never distinguished explicitly by Locke from the totality of his entitlement theory, does in fact constitute a distinct aspect of it. It is in part what Jeremy Waldron refers to as Locke's 'Labour Theory of Value',[25] but it also includes certain elements of so-called 'creators' rights'.[26] This 'Labour Theory of Value' serves to strengthen Locke's overall argument whereby

appropriation by labour is a legitimate way of obtaining exclusive property rights in the appropriated item. If the usefulness of appropriated resources derives mainly from the labour invested in them, says Waldron, 'then anyone complaining about an exclusion by an appropriator can be accused of desiring almost nothing but "the benefit of another's pains"'.[27] As for 'creators' rights, it is difficult to deny the existence of a creative element in Locke's text. To begin with, Locke attributes very little value indeed to un-laboured-on items as they appear in the state of nature.[28] Items owe the overwhelming part of their value in usefulness to human industry rather than to nature.[29]

As for the land itself, Locke specifically speaks of the appropriation of any parcel thereof by improving it:[30]

> for it is labour indeed which puts the difference of value on everything; and let anyone consider what the difference is between an acre of land planted with tobacco or sugar, sown with wheat or barley, and an acre of land lying in common without any husbandry upon it, and he will find that the improvement of labour makes a far greater part of the value.[31]

Later Locke states outright that: 'It is labour, then, which puts the greatest part of the value upon land, without which it would scarcely be worth anything'[32]

Locke himself seems to acknowledge that this form of justification for property entitlement is considerably stronger in the case of land than it is in the case of gathering the fruits thereof.[33] After all, as Waldron points out, many of the provisions left by nature need only be gathered as they are in order to provide significant utility for man. In such cases it may be harder to see how the gatherer has, by simply removing these things from the common stock, altered them to any considerable degree.[34] 'Paradoxically, then, there seems more room for complaint about the exclusive appropriation of acorns than about the exclusive appropriation of land, on the Lockean Labour Theory'.[35]

In the case of empty land it is plain to see why Locke argues that, were it not for labour, 'it would scarcely be worth anything', whereas once it has been laboured on it is worth many times more.[36] 'There is, as Locke notes, a striking difference between the usefulness of a piece of cultivated land and the usefulness, as it stands, of a piece of waste ground'.[37] In fact, it is worth so much more, and is indeed so different in kind as a result of the industry invested in it in order to render it valuable, that it ought now, according to Locke, to be seen as the sole property of the labourer. Furthermore, the labourer is entitled to the object in question precisely because he, by his efforts, has in fact made it, out of virtually nothing, into what it now is. Thus, the logic behind granting entitlement over land to its first cultivator is in part that the improvement, or change, brought about by his labour is a far greater component of the value of the land than the original soil supplied by nature.[38]

Apart from the philosophically problematic notions assumed here, such as self-ownership and dominion over one's labour, Locke introduces a justification for entitlement over land and its fruits which appears plausible and readily applicable to national claims.[39] For according to Locke entitlement through labour is justified because the object laboured upon has, at least metaphorically speaking, 'been brought into being' largely by the labourer himself. As Nozick suggests, 'Perhaps the idea … is that labouring on something improves it and makes it more valuable; and

anyone is entitled to own a thing whose value he has created'.[40] Thus the labourer is not in effect demanding acknowledgement of an appropriation so much as he is seeking recognition of his right to something he has, in the main, brought into being. Or, as Waldron puts this: '…if natural resources and land are "almost useless materials as in themselves" in their natural state, then it does not seem so unjust that an appropriator should acquire exclusive title to the whole of the object he has taken. For there is only a negligible difference between the worth of his labour and the value of the object he now controls'.[41]

Far from being straightforward, however, the application of this theory to the case of national settlement quickly encounters several obstacles. Locke speaks only of land acquired directly out of the state of nature, but nations sometimes 'mix their labour' with lands previously settled by members of other national groups rather than merely with previously un-appropriated territory. It is an unarguable fact that national settlement efforts are sometimes carried out in territories which cannot be regarded as having previously lain 'in common' by any reasonable account. Such acts of settlement would be unjustifiable by Locke's own thesis.

As for the settlement project which Locke himself supported, he was notoriously culturally biased, as he considered all land which had not been cultivated and 'improved' in a way consistent with the use of land in England of his time to be 'waste' land, free for the taking.[42] Earlier I discussed Locke's controversial assumptions regarding the valuable usage of land. Briefly restated, it was apparent to him that the lands in un-colonized America were virtually without value, as they were not enclosed and cultivated in the way he saw fit. Consequently, those who were to be responsible for the lands' enclosure and improvement, and therefore also for the overwhelming increase in its value, would be, by virtue thereof, entitled to it. Locke totally overlooked the fact that 'improvement' is often a point of cultural contention: while Locke valued cultivation and industry, other cultures value harmony with nature, virgin land and open spaces. One man's improvement of land may be another's destruction thereof. I argued with regard to efficiency arguments, that there is more to the Lockean claim here than first meets the eye. Nevertheless, it admittedly renders the Lockean account of justified acquisition acceptable only to those who are prepared to accept at least some of his assumptions concerning the appropriate use of land.

An additional complication with applying the Lockean reasoning on legitimate appropriation to the national case stems from what has long been interpreted as one of Locke's own constraints on appropriation, discussed in Chapter 5 of this volume. According to this supposed constraint, the transfer of property from the common stock to private (or in our case national) ownership is legitimate only if 'enough and as good is left in common for others' to appropriate.[43] In 'Rediscovering America', Tully points out that, in reality, the English colonists of America, and presumably Locke himself, saw their settlement project as leaving 'as much and as good' for the natives of that continent. He quotes one of the prominent colonists as 'enunciating a principle similar to Locke's proviso' when he wrote that: '…if we leave them [Native Americans] land sufficient for their use, we may lawfully take the rest, there being more than enough for them and us'.[44]

Though much has been made of this so-called 'Lockean proviso', Locke seems to have been relatively unbothered by it. This might be because Locke assumed that the legitimate appropriation of land (that is, the original labouring on a parcel of virgin common land) always improved it to an extreme degree. Thus, in Locke's view any appropriator actually contributed to the common welfare of mankind rather than subtracting from it, whether or not he had left sufficient surplus land for further acts of enclosure and appropriation[45] This point was discussed briefly in the previous chapter. If one assumes that an appropriated resource was virtually worthless to begin with and, moreover, that an appropriator will have always left the human race better off as a result of his appropriation, why then surely no man's rights will have been violated by such an act. In any event, as explained in Chapter 5 of this volume, Waldron suggests convincingly that Locke never intended the stipulation whereby appropriation is legitimate 'at least where there is enough and as good left in common for others' as a constraint on acquisition in circumstances of scarcity.[46]

Nevertheless, as a result of such problems it is difficult to argue straightforwardly that the laborious act of national settlement justifies the acquisition of territory on Lockean grounds. This is not to deny that there may be cases in which an act of national settlement can be justified along these lines. This is so where settlement is carried out on land which was previously empty and unutilised, and where it can be reasonably argued that its settlement constituted a significant improvement. This, for example, may well have been the case of settlement efforts which took place in the far distant past, 'in the beginning' in Locke's terms, when land was considerably more plentiful. If one accepts this, there may also be more recent cases which could be defended along these lines. I will, however, not argue for any such particular case here. On the whole, the obstacles to doing so pointed out above would render such a defence at best both problematic and controversial.

Instead, my project is more limited. It does not enlist Locke in order to argue in favour of implementing national settlement projects, nor does it promote a primarily labour-based theory of territorial acquisition, as Locke himself may have favoured. Rather, it draws on certain elements of his thesis in arguing for the relevance of *existing* national settlements to the issue of justly demarcating boarders and determining entitlement to land, specifically in those cases in which it is disputed amongst two competing groups.

The crucial feature of the Lockean argument for this purpose is the embedded suggestion whereby labouring warrants entitlement because the labourers' industry establishes something virtually novel that came into existence by virtue of their industry. Certainly, according to Locke, such labourers are responsible for the overwhelming proportion of its current worth. Perhaps this is what Locke had in mind when he commented, as regards an object removed from the state of nature by an individual's labour, that no man but he can have a right to it.[47]

Locke's problematic assumptions concerning relative value and his arguments regarding efficiency serve to strengthen this claim, but they are not essential to it. In the previous chapter I defended the adoption of at least a modified version of Locke's efficiency principle, and argued in favour of acknowledging the value of the produce of efficient land use. In the present connection it is not for the most part

necessary to get bogged down in questions of relative value. The relevant feature of the Lockean rationale concerns the fact that labouring over land can alter it to such a degree as to, in effect, create a new territorial entity which exists only thanks to that labour. At least its current form and the extent of its value are due solely to those who laboured on it. Whether, in various respects and from different cultural viewpoints, this new creation is better or worse than the resource that existed before is a lesser matter. For instance, whether or not Manhattan is an improvement on the island held by the Native Americans several centuries ago is an arguable point, but it is not of primary significance here. It is by all accounts something new and completely different whose value (whatever that may be) is due to the labouring of Western settlers. It is, in other words, the fruit of their labour in which they naturally have a vested interest.

As implied by the above example, the current reading of the Lockean argument is even more compelling when applied to the building of a city than to the cultivation of a parcel of land by an individual. A nation seeking recognition of title to a settlement set up by its members is in a strong sense claiming ownership rights to an object which its members in effect brought into being. At the very least, its nature and current value are of their making. Having 'mixed their labour' with a portion of the earth's surface, thereby forming it into something new which did not exist (in its current form) prior to their collective endeavour, they now possess a morally significant interest in the products of their labour. Properly speaking, then, far from claiming the right to appropriate territory, they are actually seeking recognition of their interest in something that, for the most part, they themselves established.

Admittedly, the initial liberty right to the original acquisition and subsequent settlement of a territory cannot be justified on these grounds. The original right to 'mix one's labour', as it were, with a territorial asset must be justified on exterior grounds (for example, the Lockean notion of vacant territory free for the taking; various historical arguments). The interests considered here concern the present inhabitants of territories which have already been settled in the past. These interests are significant to determining the destiny of existing settlements. The arbitration of territorial disputes requires us to look at a current time slice and evaluate the contemporary interests involved. One significant type of interest held by current settlers is highlighted, and better appreciated, in the Lockean terms described above than in any other. Locke's 'Labour Theory of Value', when taken on its own, alongside certain elements of 'creators rights', can serve *retrospectively* to legitimize national sovereignty over places settled in the past by members of their nation. Current inhabitants possess certain interests in retaining their territorial holdings (with varying degrees of moral force), which stem from the act of settlement itself, regardless of the extent to which their nation's original acquisition was normatively justifiable. Where the original acquisition of land can be justified (on the basis of historical, or other arguments such as self-determination, and/or where the land in question was in fact empty prior to settlement), the act of settlement strengthens the inhabitants interest in the currently settled land, and lends their territorial claim additional moral force which did not exist prior to settlement.

Some readers might object to the application of Locke's thesis to the national case on the grounds that nations differ significantly from individuals, to whom Locke was referring, as do the demands they make vis-à-vis land. This would contest the move from individual to national rights, as well the move from arguments favouring individual *property* rights to arguments supporting national sovereignty rights. I have addressed some of these difficulties along the way. First, my arguments here and throughout with much reference to Locke, nevertheless do not attempt a straightforward application of Locke's thesis on property to national entities and their claims to territorial sovereignty. Nowhere do I refer to Locke's account of property rights substituting 'nation' and 'sovereignty' for 'individual' and 'property', nor do I claim that Locke says anything directly to support my argument. The present argument attempts only to isolate certain features of Locke's reasoning which, I argue, shed light on the issue of national territorial claims.

As for the nature of these alleged rights themselves, I admitted outright that national claims to territory differ significantly from the individual property rights which Locke speaks of. I discussed the extent of my reliance on some of the literature on property rights in Chapter 1. Again, while sovereignty and property are admittedly two distinct concepts, they are nevertheless sufficiently related and mutually relevant in order to enlist the one as constructive food for thought as regards the justification of the other. The two issues are closely connected enough to suggest that arguments originally formulated to protect property rights, such as the Lockean arguments invoked here, can be drawn on in an attempt to shed some light on issues concerning territorial sovereignty. Both are forms, or different aspects, of ownership rights. I noted also that a vital aspect of sovereignty rights is the overall control of property within one's jurisdiction.

It is perhaps not at all surprising that Locke's theory of appropriation in particular, while presented solely as a theory of individual property rights, lends itself easily to the issue of national settlement. Historically speaking, Locke's support for the European settlement of North America is well documented, as is his personal vested interest in it.[48] James Tully goes so far as to suggest that Locke's entire theory of property, as presented in his *Second Treatise*, was purposefully designed to justify the European settlement of North America.[49] In reality Locke's arguments were, in fact, widely employed by the colonists in their continuing struggle to justify English settlement in native America.[50]

Be that as it may, it has been argued, by Tully and other critics of Locke, that any attempted justification of Western settlement on the lands of North American natives based on Locke's theory of original appropriation is unsuccessful and ultimately self-defeating.[51] This is not to say that any Western settlement in North America would have been unjustifiable in Lockean terms, but only that the wholesale theft of native lands cannot be said to have been justified. The same is true of other incidents of national settlement where this effort is not carried out on empty land. My argument here is, however, as I have said, considerably less ambitious than Locke's was, and consequently this observation does not pose any serious threat to it. Rather than arguing that Locke's thesis justifies a right of settlement in any particular case, I suggest only that *once* a territory has been settled, certain aspects of the Lockean

argument give rise to good moral reasons for granting continued possession of that territory to those who have already settled it.

Admittedly, settlement projects too often involve destroying previous arrangements that were of great value to others. In such cases, a new settlement cannot acquire automatic priority over its predecessor. Where construction of the new involves the destruction of the old, the latter carries with it a negative value judgement that must be accounted for in any overall evaluation of competing claims. Nevertheless it does not preclude the consideration of newly evolved interests on the part of settlers and these, I have suggested here, are better appreciated in Lockean terms than in any other.

7.3.2 The Expressive Element

Thus far, I have pointed to the change or alteration of territory that occurs in the process of national settlement. I have as yet said little concerning the nature of this change. I stated at the outset that this book embraces that strain of liberal political thought which, in recent years, has come to the defence of nationalism, and attempts to apply it to the very concrete issue of national territorial rights. It focuses on the significance that theories of 'liberal nationalism' place on individuals' national-cultural affiliation and on the important identity-related role attributed by those theories to national cultures.[52] When individual members of a nation settle a territory (i.e. when they form a colony, build a town or city), they not only change the terrain in question but, rather, they reform it and shape it in the light of their national culture.

National settlement involves shaping a territory so as to coincide with a particular way of life. Nations or individual nationals settling territories must, at some point, reach certain collective decisions concerning the form their settlement is to take. They must, for instance, choose between various modes of architecture and forms of agriculture, which will ultimately shape the territory's landscape; they must decide whether to build huts or high-rises, and what style to build in; they need to determine whether to enclose and cultivate, or to allow for open spaces, and whether to construct urban or rural settlements. Should they aspire to construct a few concentrated and densely populated potential cities, or to spread out within a given terrain into many sparsely inhabited small villages or towns? They have to decide whether to industrialize and, if so, to what extent and in what fields; and so on and so forth. In some cases these decisions will be made explicitly in a well thought-out manner by a central power, as when a government plans the construction of a city or encourages (through financial or other incentives) internal immigration to outposts which are as yet unsettled by their nationals. Other decisions will often be made ad hoc and haphazardly, sometimes on the spot by settlers themselves, or will simply develop gradually in a certain way. Still others will be influenced by circumstances and unfolding events. Settlement is not always the product of a preconceived and organized decision,

though such premeditated projects did characterize the settlement of much of the New World. Often places of settlement simply develop over time as a result of prolonged occupancy in a given territory, as was the case throughout Europe. But the point is that most of the decisions involved in settling a territory – whether taken in advance of settlement or in the process thereof – are culture-dependent, just as the decision whether to build churches or synagogues or mosques in the settlement is.

Furthermore, the mode in which these plans and decisions are ultimately carried out, the manner in which the settlement is constructed and managed in practice is also culturally influenced. As time goes by, the expression of the national culture in the territory will necessarily become more and more apparent. Beyond the bare essentials of life, places of permanent residence will usually acquire ornaments of cultural significance, which manifest themselves in the public sphere. This is easy to see when one considers well-established places of settlement such as old cities. Landmarks such as the Tower of London, the Arc de Triomphe and the Eiffel Tower in Paris, the Arch of Titus in Rome, Wenceslas Square in Prague, and Heroes' Square in Budapest are all cases in point. Such monuments are all entwined with the culture of the settled society, either with its collective history or with the personal achievements of certain prominent nationals, and subsequently with the cultural identity of its members.

Quite obviously, these last examples are paradigmatic cases of cultural manifestation in territory. In reality, the modes of architecture and artefacts that are exhibited in any given territory will often be varied, complex and multi-layered. Nations tend to copy styles and architectural fashions from each other, as when Louis the 14th designed Versailles to emulate his Austrian neighbours' Schonbrun Palace. I doubt, however, that this would deter us from claiming that Versailles, for all its art and history, reflects an aspect of *French*, rather than Austrian, culture and identity. The decision to adopt a certain style or foreign architectural concept is also a cultural choice (what to borrow, who from, to what extent, and so on). For the purposes of this argument, nations need not confine themselves to modes of building and construction of their own invention in order to live up to some artificial standard of authenticity. My argument does not require that the culture reflected in places of settlement be nationally 'pure'. It merely points to the fact that, on the whole, the landscape and architecture of the various settled territories in our world reflect the national cultures of their respective inhabitants.

Architectural styles, modes of living and the like are not culturally 'uncorrupted', so to speak, but neither are the national cultures themselves on which liberal nationalism has built so much over the last decade.[53] If we accept the distinctness and normative significance of national cultures as identity components (though admittedly not everyone does),[54] despite their complexities and vast 'impurities', then there is no reason to dispute my argument on the grounds that places of settlement do not always reflect a singular, homogeneous and 'uncorrupted' national culture. Certainly, both the development of culture (e.g. its language, customs, even religion) and modes of territorial formation will involve outside influences and a certain amount of borrowing and imitation, as well as

a substantial amount of temporal transformation. But none of this negates the existence of a core national culture of identity, which ultimately manifests itself in settled territories.

Cities and other forms of settlement display a variety of structures and monuments that date back to various historical periods, possibly owing their identity to different groups of inhabitants. This too is not unlike national cultures, which tend to be historical and multi-layered, and often include a large amount of 'leftovers' from previous cultures. But this in no way decreases their significance for their members, or makes their culture any less their own. And the same is true for the territorial manifestations of national cultures.

Finally, it might be pointed out that national culture is not always responsible for shaping a given territory so much as inhabitancy in a given territory is responsible for shaping the culture itself. In other words, the influence may run in exactly the opposite direction than the one I am suggesting. Frequently, it is not a pre-existing national culture that imprints itself on a piece of land, but rather the terrain that serves to shape an emerging national culture. In *The Philosophy of Nationalism*, Paul Gilbert rejects Herder's view according to which a nation's shared character is formed by its particular natural environment which, in turn, generates a reason for its members to occupy that territory – namely, that they are particularly well adapted to it: 'the Arab of the Desert belongs to it, as much as the noble horse and his patient indefatigable camel'[55]A less naturalistic account of the process whereby national culture emerges from a prolonged period of joint inhabitancy of a shared territory is offered by David Miller:

> …very often we find groups who are living side-by-side, who are largely descended from the same ancestors, who speak the same language, who share many of the same practices, and whose members think of themselves as having a common identity. Groups like that often acquire a shared national identity…[56]

Nothing here is intended to deny this common sequence of events, nor does this mode of development – joint inhabitancy preceding and contributing to the evolution of national culture – undermine the present argument in any way. The idea that territory is often a constitutive component rather than a by-product of national culture and identity formed the central part of the discussion in Chapter 3, concerning 'Historical Rights' to Territory. The two claims under discussion are not mutually exclusive and I, in fact, believe them both to be true. The territories which make up 'national homelands' can both condition who we are as members of cultural groups and, at the same time, be the products of this culture. Anthony Smith makes a similar point when, discussing what he refers to as 'ethnoscapes', he states that: 'What is at stake is the idea of an historic and poetic landscape, one imbued with the culture and history of a group, and vice versa, a group part of whose character is felt by themselves and outsiders to derive from the particular landscape they inhabit and commemorated as such in verse and song'.[57] Since culture and identity are not static but develop dynamically over time, there is no contradiction involved in viewing culture in some cases as both influencing and influenced by the inhabitancy and development of a certain terrain.[58]

National cultures are imprinted on the territories settled by their members. As Miller points out when referring to the establishment of national claims to authority over a territory:

> The people who inhabit a certain territory form a political community. Through custom and practice as well as by explicit political decision they create laws, establish individual or collective rights, engage in public works, ***shape the physical appearance of the territory.*** Over time this takes on symbolic significance as they bury their dead in certain places, establish shrines or secular monuments and so forth. This in turn justifies their claim to exercise continuing political authority over that territory. It trumps the purely historical claim of a rival group who argues that their ancestors once ruled the land in question.[59]

Why should this be so? Why should the unarguable fact that the process of settlement involves the imprint of national cultures on the territories settled by their members be considered relevant from a liberal viewpoint to the question of entitlement to it, even where a territory is claimed by another group which may have inhabited it previously? The answer to this question lies in the trilateral relationship between personal identity, national cultural identity, and national territory.

A central tenet of the doctrine of 'liberal nationalism', which is presupposed throughout, is that certain forms of collective cultural affiliations, specifically national cultures, form an essential component of individual identity. Since the welfare of individuals is at the heart of liberalism, and national cultures, it is argued, are important to individual identity, then nationalism, at least in certain benign and restricted forms, is of value to liberalism. This is, of course, a gross simplification of a wide variety of complex arguments residing under the collective roof of 'liberal nationalism' presented at the outset. Still, I think it captures the essence of a significant strand of this doctrine.

The next step in the territorial argument is predictable and practically inevitable. If national cultures form an essential component of their individual members' identities (or at least of the identities of very many contemporary nationals), and if these same national cultures manifest themselves in certain territories, then those territories are of unarguable significance to the personal identity of the individuals composing that nation. And if the well-being of individuals and the protection of their identities is what is at stake when nations lay claim to territory settled by their nationals, then there are good liberal reasons for granting the desired control over that territory to the nation comprising those individuals whose identity is so closely intertwined with it.

This argument need not disturb contemporary opponents of ongoing settlement projects too much. In fact, accepting it supplies them with good cause to resist unjust acts of appropriation and land transformation, even more fervently than they would otherwise.[60] If unjust settlement projects are allowed to succeed, they will ultimately acquire the type of moral respectability outlined in this section. Territories are not merely improved, or at least altered, by settlement, as was argued in the previous section: they are not only 'created', or recreated, by their settlers. They are, as it were, 'created in their image', that is, in the image of their national culture. As they take root, national settlements begin to form a new component of the cultural identity of the individual members of the settling nation ***wherever they may live***.

Since individuals and their identities are important from a liberal perspective, liberals will increasingly acquire good reason to favour the prolonged holding of national settlements by the nation state whose members established and inhabit them.

These reasons are admittedly non-conclusive, and in many concrete territorial cases they will have to contend with the identity-related historical interests of contesting nations. The present argument relies on the fact that certain brands of contemporary liberalism place considerable value on the protection of cultural components of individual identity. By this very logic, any wholly conclusive judgement regarding the destiny of a specific territory will also have to account for the identity related interests of prior inhabitants and their descendants. The likelihood of conflict does not weaken the present argument, which willingly acknowledges that resolving territorial disputes requires a delicate balance of multiple considerations. Success in these matters, however, requires a clear view of its respective components and a consideration of their varying strengths. The expressive element, while admittedly neither exclusive nor conclusive, addresses one such aspect, which is both politically urgent and philosophically unattended to.

Moreover, while the delicate interplay between various identity-related arguments may often be the source of conflict, their conjunction enables them to mutually reinforce each other. The expressive interest argument presented here not only supplies its own justification for territorial entitlement but also reinforces our sense of the importance of historical connections as a criterion in evaluating claims to territory. If a national group has a historical-cultural connection with a given territory, then it has a particularly strong interest in being on that territory now because that same territory is likely to be uniquely suited to the expression of its inherited culture. Furthermore, in many cases the act of settlement itself will serve to create a historical-cultural tie with the territory as it moulds the history and culture of the settling nation around that territory. This is the complicated fact of the matter, despite the recognition that even such dual interests may still have to compete with the historical claims of other nations (e.g. prior occupants) to the same territory.

7.4 Settlement in Disputed Territories

The upshot of the two arguments advanced above is that there are good *moral* reasons for granting political control over places of settlement to the nation whose members established them and whose culture is imprinted on them. How does this conclusion relate to contemporary ‘hard cases’ in which settlements are established in territories claimed by more than one nation? As already stated, unlike what Locke may have intended, the two arguments advanced here were not designed to address the original act of settlement directly, though I reserve the right to say a few words on this matter towards the end of this section. Rather, the arguments put forward in the last two sections advocate the incorporation of current facts about existing settlements into any liberal attempt at arbitrating territorial disputes.

I have in mind places such as the United States, Australia, and New Zealand and, with the progress of time, many parts of Israel as well in which settlement has already, rightly or wrongly, occurred in the past and is now a well established fact. *Once* this has happened, I claimed, both of the arguments advanced above give rise to reasons for favouring settlers' claims over those of others. Arguably, the value of labour and of cultural identity may acquire additional moral value when political, legal institutions have evolved in such ways that the settlers' descendants are able to recognise their fault and to offer some kind of compensation to the native national group.

Incorporating the phenomenon of national settlement into our criteria for the allocation of territory is not only morally justifiable, but also practically advantageous. In overcomes the indeterminacies raised by implementing the principle of national-self determination to territorial disputes, that is, the indeterminacies involved in marking the relevant borders of 'a given territory' for the purpose of determining its destiny, or holding a referendum with regard to it. Settlement creates manifest 'facts on the ground' which can serve to clearly mark the boundaries of a given area for these purposes. Of course, territorial arrangements are often disputed among two groups inhabiting a territory simultaneously. This was another situation which, I argued in Section 2, the principle of self-determination is hard pressed to resolve. Resolving the morally problematic issue of disputed territories whose populations are nationally mixed is helped along by adopting the settlement criterion as one of our moral considerations. The present argument about settlement favours the political control of the group (or groups) who – through laborious alteration – settled the territory in question and whose culture is imprinted on it. And again, it is considerably easier to determine the boundaries of a given settlement, a town, village or city, than it is to demarcate a 'given territory' for the purposes of granting territorial control on the basis of principles such as self-determination and self-rule. Furthermore, adopting a settlement-based argument as an additional guideline for the precise drawing and redrawing of boundaries boundaries, serves to highlight and strengthen these convincing liberal arguments about cultural self-determination and political self-rule with regard to territorial arrangements in non- homogeneous territories.

Time is, of course, of the essence, and it may often be difficult to determine how much time is enough to constitute a well-established settlement whose existence trumps the claims of others. Are one or two centuries sufficient, as in the case of North America? Is only a single century, more or less, enough, as in the Australian case? Can fifty or, say, seventy-five years suffice, or even twenty or thirty, as is the case with various places of settlement in Israel? Perhaps, in cases where the act of settlement itself is judged to be wrong, any claim based on such morally negative actions should be considered only when the present claimants do not belong to the generation of settlers who were responsible for the original wrongful acts.

More crucial, however, and more easily determinable than any temporal test, is the factor of change. This was Waldron's argument about his supersession thesis, emphasised in his discussion of settlement and supersession, and discussed here a couple of chapters ago. Supersession is not associated with the passage of time per

se, but rather with the usual changes in circumstances that ordinarily accompany the passage of time.[61] The argument here is considerably different, though it does converge with supersession on this point, as well as with many, though not all, of its practical territorial conclusions. My argument is different from the supersession thesis, first, because it is not primarily focused on the injustice of settlement projects, nor does it argue against the enduring effects of those injustices. Rather it is about the nature of settlement projects in general – whatever injustices were involved in that process – and their positive aspects, and the effect that these aspects of settlement have on the just drawing of boundaries. This last point concerns the second difference between this argument and supersession. The changes considered in this chapter are entirely those affected by the settlers and their project itself. They have nothing to do with external changes in circumstances, though such changes may indeed facilitate some settlers' claims as well. The argument here does not rely on the assumption that the settlers now 'have no where else to go'.[62] It argues that regardless of whether they have anywhere else to go or not, settlement supplies significant, though inconclusive, reasons (which also require taking all other considerations into account) against asking them to go.[63] Finally, my argument here, combined with the previous chapter, involves a controversial outright appreciation for those changes affected by settlers, which is never explicitly acknowledged by The Supersession Thesis. This appreciation, however, does not deny the injustices often involved in these settlement projects, nor does it suggest, as the supersession thesis does, that their negative aspects and harmful affects on others have not endured into the present. Chapters 3–5 argued that historical interests in restoration may not have faded with time, and that the injustices involved in settlement have not necessarily been altogether superseded. Despite this, it might not be right to turn the historical clock back to the situation that existed prior to European settlement, even if we could do so.

Settlement creates objective 'facts on the ground' and these facts are not merely physical, but also moral. Settlement reshapes the normative, alongside the tangible, landscape. While the time element may be difficult to pinpoint, the very nature of the arguments presented here supplies a more applicable, and a more justifiable, pair of criteria. First, we must ask whether the settling nation has improved, or at least altered, the territory significantly. Has it in effect 'created' something new that did not exist prior to its settlement effort? And second, has the nation claiming a given territory constructed a settlement that now reflects its members' culture of identity?

Where the answers to these questions are affirmative, both arguments point towards favouring the territorial claim. This is so largely regardless of the merits (or demerits) of the original act of settlement. As David Miller has argued:

> If one group occupies the territory previously held by another, then, *ceteris paribus*, the strength of its claim to exercise authority will increase over time. At a certain point – impossible to specify exactly – it will have a stronger title than the original inhabitants will. This might sound uncomfortably like a version of "might makes right", but I cannot see any reasonable alternative to the view that *it is the occupation and transformation of territory which gives a people its title to that territory*, from which it follows that the competing

> claims of the present and original inhabitants increase and diminish respectively with the passage of time.[64]

Similarly, I have emphasized throughout that the argument advanced here applies mainly to settlement as a *fait accompli* rather than to the justification of any settlement project. This last point might prove controversial as it suggests that the morally appropriate attitude towards settlement may, in some cases, be different when settlement is being contemplated or carried out from what it might be in retrospect, that is, once a territory has been successfully settled. It suggests that at times there may be reasons for acknowledging title to territory whose history is tainted with morally questionable deeds. This admittedly is a morally problematic view, as it may encourage national groups to commit morally unjustifiable acts of settlement in the hope that their acquisition of a territory will be retrospectively recognized as legitimate. This is, of course, the morally problematic reality of the matter as well. It is also an unavoidable moral hazard for liberalism.[65] From a purely national point of view, it renders settlement a primary national objective.

As for the appropriate attitude towards ongoing settlement efforts, though this was not the focus of the argument here, it does have some bearing on this issue. The Lockean element of my argument implies that, from a liberal perspective, settlement is justified only where it is carried out on as yet unsettled ground. It is unjustified when it involves the infiltration of pre-existing well-established places of settlement, such as cities or towns. If we take this restriction into account, however, the appeal to Locke in connection with settlement does imply that, in principle, such human endeavour is of moral value.

7.5 Concluding Remarks

I have argued that where members of a nation have succeeded in settling a parcel of land and in shaping it into a well-established, built-up, permanent place of residence which reflects their culture, there are strong moral reasons to grant that nation a right to that land. The issue of settlement supplies us with a perspective on territorial questions that has both liberal foundations (i.e. in Locke) and liberal-national appeal.

The two arguments advanced here attempted to identify some of the interests held by members of 'settler societies' that are worthy of our moral consideration. These were said to be the interest in harvesting 'the fruits of one's labour' (so to speak) and the interest in components of identity.

All that was said does not, however, necessarily establish that these interests always constitute sufficient reason for imposing on others the relevant duties involved in granting the settler nation sovereignty over the land it has settled. Thus, the argument falls short of claiming that nations always, and under all conditions, have an overriding right to all places settled by their nationals. The arguments offered above present the interests of settler nations in a new and favourable light, but they will not

necessarily trump all other interests in every case, nor do they negate the importance of conflicting considerations.

Beyond the various conflicting national interests in specific portions of territory that settlers will have to contend with, one must also always bear in mind the general question of necessity. In the following chapter, dedicated to the topic of distributive justice as regards territory, I will say something more specific on the issue of just territorial distribution and the appropriate role that principles thereof should play in the assessments of contemporary territorial disputes. In connection with settlement in particular, it is important to add that the type of close identity-related links established between nations and the territories settled by their members embodies its own internal limitation on the extent of territorial holdings that can be justified in this manner. Needless to say, by its very definition, this justification can extend only to those territories settled by members of a nation in the strict sense of 'settlement' outlined in section 2, and resulting in the intimate ties described in section 3. These requirements in themselves impose restrictions on the scope of the territory that can be acquired in this manner, and they work towards achieving and retaining an adequate proportion between settlers and territory.

Endnotes

1 David Miller, *Citizenship and National Identity* (Oxford: Polity Press, 2000), 125, 129, 140.
2 Joseph Raz and Avishai Margalit, 'National Self-Determination', in Joseph Raz, *Ethics in the Public Domain*, (Oxford: Clarendon Press, 1994), 125–145, 126–127, 139; See also 141–143, on the requirement that the said group form a majority within the territory.
3 Two Examples: Brian Barry, 'Self Government Revisited', in David Miller and Larry Seidentop (eds.) *The Nature of Political Theory* (Oxford: Clarendon Press, 1983),121–154, 127; and, Margaret Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998, Margaret Moore ed.) 2, 134–135.
4 Raz and Margalit, 140–141. David Miller criticizes the idea that majorities' consent to secession suffices to justify it, in: David Miller, *On Nationality* (Oxford: Clarendon press, 1995), 111–112, where he criticizes Beran's consent theory of secession and argues that it is both potentially chaotic – as it can legitimize an infinite number of secessions within secessions – and that it is often ineffective in solving the problems of minorities, as secession will often result in a new majority-minority relationship. The first point is reiterated in Miller's *Citizenship and National Identity*, 118, 139. There, Miller also makes a related point to the one I have been discussing here when he says that: 'majority voting as a way of implementing democratic principles applies only once the boundaries of the relevant constituency have been determined'(Miller, *Citizenship and National Identity,* 139).
5 Avner De-Shalit, 'National Self-Determination: Political, not Cultural', *Political Studies* XLIV (1996), 906–920, 916–917.
6 Avner De-Shalit, 'National Self-Determination: Political, not Cultural', 916–917.
7 Thomas Baldwin, 'The Territorial State', in: Hyman Gross and Ross Harrison (eds.) *Jurisprudence – Cambridge Essays* (Oxford: Clarendon Press, 1992), Chap. 10, 209–230, 228.
8 Thomas Baldwin, 'The Territorial State', Chap. 10, 209–230, 228.
9 David Copp, 'Democracy and Communal Self-Determination', in: *The Morality of Nationalism*, 277–300, 278–279.

10 Yael Tamir, *Liberal Nationalism* (Princeton, New-Jersey: Princeton University Press, 1993), Chap. 3, 57; Yael Tamir, 'The Right to National Self-Determination', *Social Research*, 58/3 (Fall 1991), 565–590, 566.
11 Yael Tamir, *Liberal Nationalism* (Princeton, New-Jersey: Princeton University Press, 1993), Chap. 3, 57; Yael Tamir, 'The Right to National Self-Determination', *Social Research*, 58/3 (Fall 1991), 565–590, 566.
12 *Liberal Nationalism*, 74–75; 'The Right to National Self-Determination', 587.
13 Chaim Gans, 'National Self-Determination: A Sub-and Inter-Statist Conception', *The Canadian Journal of Law and Jurisprudence*, 13/2 (July 2000), 185–205; Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), Chaps. 3 and 4.
14 Just for the fun of it, recall the reply given by the late British comedian Spike Milligan to the question posed by the other late British comedian Peter Sellers: 'what are you doing here?' Milligan replies: 'Everybody's got to be somewhere'. In: 'The Last Goon Show of All', BBC, broadcasted October 5, 1972.
15 For Locke, as is well known, the formation of the state comes later – when individuals consent to uniting their person, along with their possessions, to a commonwealth. John Locke. *Two Treatises of Government.* Peter Laslett (ed.) (Cambridge: Cambridge University Press. 1960) (1690), II, Chap. 8, Sect. 120.
16 This was true of North America as early on as the 17th century. See James Tully, 'Rediscovering America: The Two Treatises and Aboriginal Rights', in: James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 137–176, 143, where he discusses the colonization of Carolina. The proprietors (most notably John Locke and Lord Shaftsbury), who were granted sovereignty by the crown over most of the area that today constitutes North and South Carolina and most of Georgia, 'set up government and a system of property in order to recruit settlers.' The incentives given to settlers of the West of the continent by the independent American government in the 19th century are, of course, well known. See also: David M. Heer, 'Policy Legislation Effecting the Pacific Region: The United States and the USSR', *Comparative Social Research*, 7 (1984), 369–385, where the author compares the historical settlement policies of the U.S. and USSR and points out that one of the similarities was that each nation granted financial subsidies to its settlers. In Australia, British émigrés (or deportees) were granted land to settle on. As for Israel, many Jewish settlements were established in Judea and Samaria under the auspices of a succession of Israeli governments beginning in the mid-1970s. This is a well-known fact acknowledged by both Israelis and Palestinians, and often complained about by the latter. See, for example, Janet Lughod, 'Israeli Settlement in Occupied Arab Lands: Conquest to Colony' *Journal of Palestine Studies*, 11/2 (Winter 1982), 16–54, where the author complains of the extent to which Jewish movement into the West Bank has been guided by various official Israeli plans for settlement.
17 John Locke. *Two Treatises of Government*, II, Chap. 5, Sect. 25–27.
18 Locke. *Two Treatises of Government.* II, Sect. 27.
19 Locke. *Two Treatises of Government.* II, Sect 28.
20 Locke. *Two Treatises of Government.* II, Sect 28.
21 Locke. *Two Treatises of Government.* II, Sect. 32.
22 Locke. *Two Treatises of Government.* II, Sect. 32.
23 See Chap. 3, and the detailed arguments referred to there, most notably: Chaim Gans, *The Limits of Nationalism* (Cambeidge: Cambridge University Press, 2003), 104–109; Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy', *New Zealand Journal of Public and International Law* 1 (2003), 55–82. Jeremy Waldron, 'Superseding Historic Injustice', *Ethics* 103 (October 1992), 4–28, 28.
24 Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 184–191; 'Two Worries About Mixing One's Labour', *The Philosophical Quarterly*, 33 /130 (Jan. 1983), 37–44, 39–44.
25 Waldron, *The Right to Private Property*, 191.

26 Waldron, *The Right to Private Property*, 198–201, rejects the interpretation of Locke's Labour Theory as granting title to the labourer by virtue of his having created an object out of pre-existing materials rather than merely mixing his labour with existing ones. Waldron's critique of Tully's reading of Locke is basically a rejection of any possible analogy between God, as conceived of by Locke, and man, vis-à-vis creation. But see also: Waldron, 'Two Worries About Mixing One's Labour', 37, where Waldron discusses Locke's 'Labour theory of Value' as suggesting that 'in the case of many important resources, the labour that has been expended on them is the source of so much of the value they possess that the labourer is entitled to the resource in roughly the same way that a creator is entitled to his creation'.
27 Waldron, *The Right to Private Property,* 192.
28 Locke, *Two Treatises of Government,* II, Sect. 28, 37 42, 43.
29 Locke, *Two Treatises of Government*, II, Sect. 42. Later, Locke introduces a similar comparison with regard to land, Sect. 23.
30 Locke, *Two Treatises of Government*, II, Sect. 33.
31 Locke, *Two Treatises of Government.* II, Sect. 41.
32 Locke, *Two Treatises of Government.* II, Sect. 43.
33 Locke, *Two Treatises of Government.* II, Sect. 32–45.
34 Waldron, *The Right to Private Property,* 193: 'The Labour Theory of Value is perhaps most plausible in the case of land.'
35 Waldron, *The Right to Private Property,* 193.
36 Locke, *Two Treatises of Government*, II, Sect. 40, 43.
37 Waldron, *The Right to Private Property*, 193.
38 Locke, *Two Treatises of Government*, II, Sect. 41, 43.
39 Waldron, *The Right to Private Property*, 193; Waldron, 'Two Worries About Mixing One's Labour', 37–38, 44. Discussing Locke's 'Labour Theory of Value', Waldron points out that this theory 'can be expressed independently of the "mixing one's labour" doctrine', and therefore 'is not affected by the latter's incoherence, and can stand by itself'. Waldron, *The Right to Private Property*, 193; 'Two Worries About Mixing One's Labour', 37–38, 44.
40 Robert Nozick, *Anarchy, State, and Utopia* (USA: Basic Books, Harper Collins publishers, 1974)*,* 175.
41 Waldron, *The Right to Private Property,* 192.
42 Locke, *Two Treatises of Government*, II, Sect. 42. For a variety of critiques of Locke's cultural bias as regards the appropriate use of land see: James Tully, 'Rediscovering America', 137–176; John Douglas Bishop, 'Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory', *Canadian Journal of Philosophy*, 27/3 (September 1997), 311–337. Margaret Moore, 'The Territorial Dimension of Self-Determination', in Margaret Moore (ed.), *National Self – Determination and Secession* (Oxford: Oxford University Press, 1998) 134–157, 148–9; Margaret Moore, *The Ethics of Nationalism* 181–184.
43 Locke, *Two Treatises of Government*, II, Sect. 27.
44 Tully, 'Rediscovering America', 151 (in reference to The *Winthrop Papers*).
45 Locke, *Two Treatises of Government*, II, Sect. 37. Waldron, 'Enough and as Good Left for Others', 323.
46 Waldron, 'Enough and as Good Left for Others'; Waldron, *The Right to Private Property*, 209–218.
47 Locke, *Two Treatises of Government,* II, Sect. 27.
48 Tully, 'Rediscovering America', 140–141, 143–144, 147, 159; Bishop, 'Locke's Theory of Original Appropriation', 311, 329.
49 Tully, 'Rediscovering America', mainly on 139–166. Note that, in this historical connection, the property arguments advanced by Locke attached themselves to collectives as well as to individuals, as Locke notoriously defended not only individual colonists' property claims but also the alleged rights of the British crown over the colonies established by its nationals in North America (Tully, 165).
50 Tully, 'Rediscovering America', mainly on 166–171.

51 Tully, 'Rediscovering America', throughout, esp. on 175–176; Bishop, 'Locke's Theory of Original Appropriation', throughout, esp. on 312.
52 See Chap. 1 of this book.
53 To use just one example of a culture which I am particularly familiar with, the fact that some Jewish customs and holidays can be traced back to practices of various Canaanite peoples who predated the Jews in the Land of Israel does not defeat the claim that these same practices are now part of the Jewish culture. The fact that the Canaanites apparently already had a holiday in which they did not eat leavened bread and another in which they constructed and sat in huts does not defeat the claim that Passover and Succoth are aspects of Jewish culture. Similarly in the case of territory, the fact that there are remnants of Roman aqueducts, crusader castles, and the like, throughout Israel does not defeat the claim that its landscape now reflects, at least among others, the Israeli-Jewish culture.
54 E.g., Jeremy Waldron, whose useful comments on a previous version of this chapter sparked many of the points of clarification in this present section.
55 In: Paul Gilbert, *The Philosophy of Nationalism* (Colorado and Oxford: Westview Press, 1998), 94.
56 David Miller, 'Review of Gilbert, *The Philosophy of Nationalism'*, 16/2 *Journal of Applied Philosophy* (1999), 191–192.
57 Anthony D. Smith, Myths and Memories of the Nation (Oxford: Oxford University Press, 1999), Chap. 5, 150.
58 Such mutual influence is not uncommon in other identity-related spheres of life. When we produce something of value, our identity and its cultural components usually make their mark on it. For example, when one has a child, writes a book, paints a painting, or composes a piece of music, these products of labour are indelibly tainted with their originator's specific identity. But this is a two way street. The product of one's effort – whether a child, a book or a painting – will in turn affect and reshape the identity of its creator. The identity of latter is no longer only what she was before. She is now also the mother of a child or the author of this or that book, etc. Similarly, the relationship between territory and national culture is often similarly a two-way street. Thus, there is no contradiction in acknowledging that territory often influences the development of a national culture within it, while arguing that a settled territory acquires its particular form from its settlers' cultural identity and the choices and actions made within it.
59 Miller, *Citizenship and National Identity*,116–117. Emphases added.
60 Cf.: Jeremy Waldron, 'Settlement, Return and the Supersession Thesis, *Theoretical Inquiries in Law* 5/2 (July 2004) 237–268, 248–252.
61 Jeremy Waldron, 'Settlement, Return and the Supersession Thesis', 237–268, 237, 249–250,
62 Waldron, 'Superseding Historic Injustice', 26; Waldron, 'Settlement, Return and the Supersession Thesis', 256, 268. See also: Jeremy Waldron, "Redressing Historic Injustice", *University of Toronto Law Journal*, 52/1 (Winter 2002), 135–160, 156.
63 Cara Nine, 'Superseding Historical Justice and Territorial Rights', *Critical review of International Social and Political Philosophy (CRISPP)* 11/1 (March 2008) 79–87, 83–84 appears quite sceptical about Waldron's 'nowhere else to go' argument, as we saw in Chap. 5, and I think there is some justification for this. If we ignore national-cultural considerations, which the supersession thesis does, and consider that in the modern world transport is swift and easy, perhaps the relatively small population of New Zealand, for example, could in fact be relocated in some other Western English speaking state. There is no reason to assume that settlers necessarily have 'no where else to go'. The point here is that even regardless of need, there are good moral reasons for allowing settlers to remain where they are, though these are not always conclusive reasons.
64 Miller, *Citizenship and National Identity*, 196, Miller's note 14, emphasis added. As I understand it, Miller presents occupation and transformation as cumulative requirements, both necessary conditions for control.
65 Both Miller and Waldron discuss morally hazardous conclusions on related issues. Miller, *Citizenship and National Identity*, 196, where Miller acknowledges and resigns himself to a

certain degree of moral hazard. Waldron answers the charge of moral hazard with regard to his supersession thesis, in: Jeremy Waldron, 'Superseding Historical Injustice', *Ethics*, 103 (Oct. 1992), 4–28, 25; and: Waldron, 'Settlement', 248–252.

Chapter 8
Global Justice and Equal Distribution

It is often assumed, especially by egalitarian liberals, that questions concerning territorial rights ought to be settled solely on the basis of principles of equal distribution. Strict egalitarians understand international justice as requiring the equal distribution of the earth's natural resources among all the world's inhabitants.[1] Recently, it has been suggested that egalitarian distribution should apply not only to detachable natural resources (e.g. minerals, oil, coal, wild fruit), but also to the earth's surface itself, that is, to land.[2]

This final chapter questions the extent to which considerations of egalitarian distributive justice ought to be taken into account in resolving territorial conflicts. I will suggest that, at least as things stand at present, principles of equal distribution can supply only minimal guidance in this context. To this end, I argue for two separate propositions. The first, and primary, argument is most closely linked to the overall project of resolving territorial strife within the existing world order. I argue that principles of equal distribution are applicable in full only within multilateral relationships and, as far as territory is concerned, only with regard to decisions that involve the relationship between all nations of the world and the entire earth's surface. In contrast, territorial disputes are usually bilateral relationships concerning only a small portion of the globe. In such cases, I maintain that it is futile, at times also unjust, to apply principles of equal distribution that are not currently being applied worldwide to isolated individual cases. The outcome of such selective application, I shall argue, is likely to be no more, if not less, just, than no application at all.

Later in this chapter I will also have something to say about 'territorial justice' as it applies in the global context as well as in the narrow familiar bilateral situations in which two nations squabble over the same piece of land. Thus, my secondary argument is more global in scope. It is designed to question the egalitarian contention, advanced most explicitly by Hillel Steiner, that nations' territorial holdings can be appraised objectively in terms of real-estate value to the exclusion of any national considerations, and divided equally among the world's' inhabitants.[3] In the case of neither argument, however, do I completely reject the relevance of equality. I most certainly do not reject considerations of dire need. The first argument suggests that principles of equal distribution may (though they need not necessarily) be viewed

T. Meisels, *Territorial Rights,* Law and Philosophy Library, 72
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as an as yet unattained ideal, serving, so to speak, as a 'guiding light' in evaluating individual cases of territorial conflict. They cannot, however, at present be regarded as more than this. The second argument, points to the very high value that nationals place on their territorial homeland (or to specific segments thereof) and to the subsequent difficulties in placing a price tag on such territorial assets. However, it does not preclude the possibility of making some assessments of relative value with regard to territory.

8.1 Distributive Principles and Bilateral Relationships

What part, if any, should egalitarian principles play in the evaluation and arbitration of territorial conflicts within the existing world order? Are principles of egalitarian distribution applicable to cases of contemporary territorial disputes? As indicated above, I hold plainly that they cannot play any significant role in this project. This patently negative answer does not stem from, nor does it entail, the outright rejection of the compelling moral force that egalitarian principles hold for many political theorists. Instead, it concerns the necessary scope for their appropriate application.

In *An Essay on Rights*, Hillel Steiner distinguishes between two forms of mandatory redistribution. The first, are occasioned by instances of injustice in which the action of one party infringes upon the just title of another. In such cases, 'The particular perpetrator of any such encroachment owes redress to the specific person suffering that encroachment, the amount of that redress being equal to the magnitude of the encroachment suffered'.[4] This type of international demand in the territorial context was addressed in Chapter 4 on corrective justice. It is not strictly speaking an issue of justice in distribution, at least not initial distribution. It is a question of rectification for an act that upset a prior distribution.

As I pointed out in Chapter 4, final judgements involving infringements of rights must necessarily rest on a pre-existing theory of what those rights ought to be; a given act can be judged as constituting an encroachment on another's right only against the background of a particular theory of just entitlement. In this sense, corrective justice presupposes, and depends on, a theory of distributive justice. Nevertheless, they remain two distinct aspects of justice. And, as Steiner points out, one of the distinguishing marks of redress transfers of the corrective type is their bilateral nature. Justice in rectification involves only the specific culprit and the injured party or parties and revolves around the existence of a set commodity which was unjustly (so it is assumed) removed by the one from the possession of the other and whose return is therefore now warranted by the precepts of justice.[5]

Accordingly, Steiner refers to this first type of redress as bilateral, thus distinguishing it from the second, which he describes as 'multilateral'. Assuming, as he does, that justice requires that each person have a right to an equal share of all initially un-owned natural resources, Steiner considers that over-appropriators owe redress, equal to the amount of their over-appropriation, to those who appropriated less than an equal portion.[6] However, 'precisely which under-appropriators have

what claims may or may not be inferable'.[7] Moreover, 'unlike encroachments occasioning bilateral redress, no particular over-appropriator encroaches on the rights of a specific under-appropriator'.[8] Specifically in connection with the international dimension of demands for distributive justice (concerning issues such as international migration and secession, transfers of wealth between nations, etc.), Steiner remarks that 'each person's original right to an equal portion of initially un-owned things is correlative to a duty in *all* other persons. That is…the equality mandated by these rights is global in scope'.[9]

I will not elaborate here on Steiner's practical proposals for achieving international justice.[10] Instead I draw only on his distinction between bilateral and multilateral forms of redress. More specifically, I hold that we must distinguish sharply between the requirements of justice in multilateral contexts and what justice requires, or indeed is able to achieve, within bilateral relationships. In the territorial connection this means that we need to differentiate between our views on the overall just division of the earth's surface as a whole, and our practical moral reasoning regarding the adjudication of specific territorial disputes within a world order which falls far short of perfection. The difference between bilateral and multilateral forms of redress can be clarified in terms of the distinction between corrective and distributive justice, a distinction whose roots go back to Aristotle's ethics.[11] While, strictly speaking, all requirements phrased in the language of 'redress' are *ipso facto* demands of a corrective nature, multilateral redress implies a far more direct appeal to distributive justice. Principles of global distributive justice, I argue, apply only within multilateral contexts, whereas bilateral conflicts over territorial resources, which as I suggested in Chapter 4 might be partially governed by principles of corrective justice (or 'bilateral redress'), cannot justly be arbitrated on the basis of principles of equal distribution. Principles of equality, and the derivative belief in the justness of an egalitarian division of the world's territory, do not apply in the same way to multilateral and bilateral cases.

In the multilateral case, the subjects of territorial distribution are all the worlds' inhabitants and the subject matter is all the earth's territory. Here, it might be plausible to hold that, as far as possible, each individual ought to possess a precisely equal share of the earth's territorial resources; failing that, each individual is entitled to the monetary value thereof.[12] Should this future egalitarian world continue to be organized in the form of states, then, perhaps, each state ought to have possession of only that portion of the earth's territory, or the value thereof, which represents the aggregate of its inhabitants' fair and equal shares.[13]

But whatever the merits of this proposal and the principles which underlie it may be, it implies little of relevance to bilateral territorial situations. This is because, as Steiner himself points out, multilateral redress is necessarily global in scope.[14] But the multilateral redistribution of the entire world's territory is confined for the foreseeable future to the realm of theory alone. On the other hand, bilateral territorial conflicts in which two national groups claim possession over the same piece of territory are familiar to us within our existing imperfect world. In these latter cases, the subject matter for possible redistribution is severely limited, as are the number of parties involved. Even if we assume that justice requires each of the two parties

to have an equal share of territory, they cannot demand this equal share within a dual framework. Nor could such a demand, if granted, satisfy the requirements of egalitarian justice of the kind outlined above. In his *A Just Zionism*, Chaim Gans makes this point in connection with his own ideal principles of justice for the allocation of territory.

> …in order for justice to be achieved in these matters, there is a need for most nations in the world to co-ordinate their actions by adhering to a comprehensive system of principles that could help to settle these types of issues. One isolated action according to one principle only that is no part of a comprehensive and institutionalized system could well be compared to playing one single note without completing the performance of the symphony to which it belongs. However, in the case of justice, in contrast to the analogy of music, playing an isolated note is not merely jarring. Applying one isolated principle of justice to only one party may mean that this party alone might be forced to pay a price which ought to have been shared by all those subject to the aforementioned system of principles. …this isolated action may also confer advantages to parties who may not be the only ones entitled to those advantages.[15]

The equal share that states, nations, or their individual members, are entitled to relates to the portions of territory held by *all* others, and not specifically to the share held by their adversaries in any particular territorial dispute. No individual, or group of individuals, has such a right to equality as against any other particular group, whether or not they happen to be currently involved in any territorial dispute. Correspondingly, groups involved in territorial disputes may, depending on their relative size, owe the territorially unfortunate inhabitants of the world some portion of their land (or the financial equivalent thereof). But this obligation, where it exists, is necessarily global in scope. We cannot infer from its existence precisely which over-appropriator owes what to whom. No particular obligation towards specific adversaries in a dispute can be deduced from the wider obligation. This is because determining how much is owed and to whom, from the point of view of global equality, necessarily concerns the extent of territorial holdings, i.e. the relative size of *all* other groups', and not just of those who happen to be parties to a dispute.

In fact, disputes over territory often arise between groups that might both be 'under-appropriators', while other groups, totally uninvolved in their conflict, may well hold portions of territory which far exceed an equal share. In any event, whether or not one or both of the parties to any given conflict possess more or less territory than the average they would be entitled to under some egalitarian global regime, and whether or not either disputant possesses more per capita territory than the other, a just redistribution based on principles of global equality cannot be attained amongst the two parties alone. It can be achieved only within an overall international setting in which all territorial assets are put up for redistribution.

Perhaps, it might be argued, the fact that global territorial equality cannot be achieved within a bilateral situation does not yield the conclusion that principles of equality should not apply to these situations at all. While the requirement of equal distribution of resources on a global scale cannot be achieved in full within these bilateral contexts, we might nevertheless attempt to approximate it by applying principles of equality to disputes over territory and thus at least come closer to the just ideal. Such approximations, however, run the risk of yielding territorial

solutions that are less just than those we would reach without reference to principles of equality at all. Applying these principles to bilateral disputes might actually end up taking us further away from the ideal situation. It is, in general, a false belief that if achieving a goal in full is desirable, then striving towards its approximation will always be desirable as well, though obviously to a somewhat lesser degree. But going part way along a road leading to a desirable end is not always the second-best option. Sometimes it is no good at all, as when a pilot aiming to reach a land base ends up well on his way there in the middle of the ocean. Similarly, attempting an approximation of global equality by adjudicating individual cases of territorial dispute on the basis of the relative per capita share of territory held by each of the two sides to a given conflict, may lead to a similar negative result.

In the territorial connection, the partial application of principles of equality can only mean favouring a transfer of territory from that party to the dispute who possesses more territory per capita to the party possessing less. In the worst-case scenario, a mandatory transfer of territory might be demanded of the relatively territorially richer party with the effect that, though the distribution between the two disputants is subsequently more equal, one or both of the parties end up with less than the minimum they require for their very survival as a distinct political entity. This might happen if one small state were forced to concede territory to an even smaller state or to a group with no territory at all. Equality between the two groups, when looked at in isolation from the rest of the world, might require this. But the overall result could turn out to be no more, or even less, just than the original situation.

One could, of course, take this eventuality into account, and stipulate that principles of equality should govern decisions concerning the possession of territory only when the dispute in question concerns portions of land which lie beyond the bare territorial minimum required by groups for their physical or political viability. In other words, equality should favour territorially poorer disputants, but only at the expense of what might be considered the surplus territory of others. This additional stipulation would overcome any objection concerning undesirable consequences of the kind described above, and still leave us with a proposal for attaining greater equality among groups. It might be argued that adopting an equality criterion for the adjudication of territorial conflicts, for example one which would always favour the territorial claims of groups which possess less per capita territory than their opponents, and applying it many times over would eventually result in greater world equality. The aggregate of cases in which bilateral territorial disputes were adjudicated on the basis of equality would, I assume, ultimately result in a better, though admittedly less than perfect, global territorial arrangement.

This may indeed be true, mathematically speaking. Nevertheless, as indicated above, the suggestion is extremely problematic from the point of view of justice. One relatively minor, and obvious, point to be borne in mind here is that many national groups, including some nation states which possess vast territorial holdings, may not be engaged in any particular bilateral territorial disputes at any given time. Any partial application of egalitarian principles to bilateral territorial conflicts would leave these territorially based groups totally unscathed by demands for territorial equality, whatever the ratio between their population and territorial holdings

may be. While a more equal distribution among those groups which are currently involved in conflicts might admittedly result in some slight mathematical improvement in the overall situation as regards equality, movement towards greater equality under such circumstances would necessarily be marginal. It is hard to imagine that the ideal could be advanced significantly by this very limited application of egalitarian principles.

In any event, the primary difficulty with any partial implementation of egalitarianism in the territorial case to anything less than a futuristic multilateral reconfiguration of the earth's surface remains the one pointed to earlier in this section. Leaving practical probabilities aside, and conceding that partial application might conceivably have some good effects from the point of view of equality, it would still be the case that these good consequences could be achieved only at the expense of an injustice. Even in a seemingly easy case in which a group possessing more than its fair share of territory is engaged in a territorial dispute with so called 'underappropriators', the former cannot be said to have an equality-based obligation to concede territory to the latter. Since, when considered in isolation from the rest of the world, no such duty can be inferred from the fact that one group possesses more than its equal share of territory, we have no basis on which to demand this. Any such demand, then, would be unfounded, and would therefore in effect constitute an infringement of rights. Obligations stemming from principles of global equality simply cannot be 'cashed out' in a bilateral setting. The very nature of these egalitarian redistributive principles, that is, their global reference, restricts their application to contexts of this scope. In fact, partial application of ideal principles might actually make matters worse.

When considering the justness of Jewish return to the Land of Israel, and the price that this return entailed for the local Arab-Palestinian population, Gans continues to caution against the partial application of those distributive principles which he himself regards as ideal. While global justice, on his account, requires respecting a universal right to national self-determination, located in each case with reference to historical ties, Gans refuses to deduce from this that the Jews had a right to relocate themselves on the basis of this just ideal.

> In this context, there is another related issue that also warrants consideration. If the burdens and advantages of distributive justice are not allocated among all the parties involved (in our case, the nations of the word), and if only one of them pays the price (perhaps rightfully so, but others should also have to pay the price), and if only one of them reaps the benefits (again, perhaps rightfully so, but others should also reap the benefits) then it is reasonable to expect that this might lead to instability and even bloodshed.[16]

For these reasons, principles concerning global equality cannot play any significant role in assessing bilateral territorial conflicts. On a mundane political level, we are accustomed to hearing and entertaining arguments concerning equality alongside other familiar attempts to justify territorial demands within the context of international conflicts. As these claims go, those formulated as pleas for greater equality are often more appealing and persuasive to liberals than arguments made with reference to history or religion. This appeal is, however, deceptive. Whatever one's

views on global justice are, they cannot be straightforwardly applied to contemporary cases of territorial conflict among two groups.

I have attempted throughout to gain insight into the criteria that should be applied to the evaluation of territorial disputes within the existing world order. Such projects relate only to what has been referred to as bilateral contexts in which a finite number of groups (usually two) claim possession of a single piece of land. I have explained here why principles of global equality cannot shed much light on these cases. For those who adhere to them, principles of equal distribution can, at most, be kept in mind as an as yet unattained ideal.

Having said all this, however, in the following section I shall nevertheless describe Steiner's vision of territorial justice in detail. It is a version of egalitarian proposals for global justice that deals directly with the distribution of land. In the section after next I will point to some internal difficulties within Steiner's egalitarian thesis regarding territory. Later I will argue that adherence to liberal-nationalism, while not precluding the guidance of egalitarian principles, does command a form of sensitivity towards national ties to land which excludes its straightforward reduction to real-estate property.

8.2 Territorial Redistribution on a Global Scale

In an article titled 'Territorial Justice', Steiner argues that 'Everyone, everywhere, has a right to an equal share of the value of all land'.[17] Accordingly, he suggests that, at every point in time, the current aggregate global value of land be assessed and divided by the number of people in the world. This computation, which would be based on an assessment of the real-estate value of all the world's territorial sites, would result in a monetary figure representing each of its inhabitants' equal share in the value of land. In order for those individuals who possess real-estate holdings worth more than their fair share to legitimize their possession, they would have to make a cash compensation to those who possess less than an equal share. In Steiner's words: 'landowners thereby owe, to each other person, an equal slice of the current site value of their property: that is, the gross value of that property *minus* the value of whatever labour-embodying improvements they and their predecessors may have made to it. Hence the validity of their title to that land vitally depends upon the payment of that debt'.[18]

As for national territories, which concern us here, Steiner contends that these are no more than 'aggregations of their members' real-estate holdings'.[19] Thus, according to Steiner, the validity of national territorial claims rests solely on the validity of their individual members' land titles. Since the latter depend on the debt-payments described above, nations' entitlement to territory is dependant on their land-owning members making these payments to the world's (territorially) less fortunate.[20] In keeping with his *Essay on Rights*, Steiner describes the total revenue yielded by such payments as a *global fund*,[21] and he concludes that: 'Each nation therefore has an equal *per capita* claim on this global fund'.[22]

Finally, Steiner enumerates several meritorious effects of adopting his proposal, such as its redistributive implications. Most interestingly, he also suggests that 'the operation of such a fund might be expected to foster greater willingness to compromise in international boundary disputes… by attaching a price-tag to any instance of territorial acquisition or retention'.[23]

Before addressing any issues of justice in distribution, the following section questions Steiner's initial identification of the distributable territorial asset as merely an aggregate of the world's real estate property. This preliminary point logically precedes, and naturally shapes, the discussion of his ultimate proposal. In Section 4 of this chapter, I suggest that the special ties that often exist between individuals and the territories comprising their national homelands pose serious obstacles in the way of placing a purely objective real-estate value on national territories.

8.3 The Appropriate Subject Matter for Territorial Redistribution

Steiner's practical proposal concerning the subject of redistribution reveals a considerable neglect of any cultural-national dimension of the territorial issue. In discussing this proposal I largely ignore the practical computational problem that might arise in any actual attempt at global territorial redistribution. Political theory cannot be reasonably expected to supply complete answers to all empirical problems which might arise in concrete situations.

Additionally, I will make little, if any, attempt to criticize the egalitarian approach as such, though I have my doubts as to whether this is indeed what global justice requires. David Miller argues that international justice requires attaining a certain minimum of resources for all rather than achieving unqualified world equality.[24] This would require favouring claims based on great need, but it would not entail massive and radical redistributive schemes. Nevertheless, at this point, I will concede, purely for the sake of argument, that global justice requires that natural resources be distributed equally among all the world's inhabitants, and concentrate only on the application of this principle to the specific resource of land.

Steiner's redistributive suggestion stipulates that each and every one of us is entitled to an equal slice of the earth's real-estate property only once the value of whatever labour-embodying improvements its current owners and their predecessors may have made to it has been subtracted from its worth.[25] He thus appears to have succeeded in avoiding a certain vein of criticism, one example of which can be found in Miller's aforementioned critique of 'global equality' theories. When considering radical proposals for the redistribution of natural resources, Miller points out that:

> …resources are not simply there for the taking: they need to be discovered, extracted, and made serviceable for human use, all at some cost. So the question how many resources does any society possess has no straightforward answer. (Do you have coal if it is prohibitively expensive to mine, or if you do not have the technology to extract it?) The resource base of

> each society will depend on its cultural features and on political decisions already taken, such as decisions about which productive skills to cultivate through the education system. The apparent simplicity of "global equality of resources" dissolves in the face of these problems.[26]

Though Steiner may appear to have shielded himself against criticism of this kind by subtracting improvements from the value of land, he has in fact remained quite unprotected from at least one strain of such critique. The impact of national culture on the development of what nature has endowed us with is immense. It is, at least in a large part, the national culture of the inhabitants of a place which determines political decisions regarding education, the allocation of finances (or lack thereof) to various projects, and sets the order of priorities. This obtains with as much, if not greater, force to the development of land as it does with respect to the extraction of natural resources. As things are organized in the world today, virtually all territorial property is under the jurisdiction of some national government or another. Thus, all real-estate value is influenced (for better or worse) by collective national decisions and subsequent actions that are, at least to a large extent, culture-dependant. This is an aspect of the 'real-estate' value of land that Steiner completely neglects.

As we know, different nations make different decisions on these matters and work to improve their territory in a variety of ways, all requiring an immense multi-generational investment of laborious efforts and resources, and all influencing the value of the real-estate holdings of their members. When considering the equitable distribution of the world's territorial resources, it would be patently unfair to ignore the fact that human effort is responsible for much of the real-estate value of the territorial assets on earth.[27] To paraphrase Nozick's famous comment on property rights: the value of real-estate property does not come into being like manna from heaven, but is rather, at least for the most part, the product of both individual and collective human endeavour.[28]

One might argue in the name of equality that individuals do not own their labour or its products in any coherent sense, and therefore that the current value of the earth ought rightly to be divided equally amongst all its inhabitants regardless of personal or collective responsibility for any specific enhancement of its real-estate value. Such an argument, however, even if it were justified, would be inconsistent with Steiner's proposal and overall world view.[29] As noted above, Steiner qualifies his proposal for global equality by stipulating that the net subject for equal division is confined to the value of land which remains after the portion of its worth which can be attributed to the property owner himself or his predecessors has been subtracted. In light of this qualification, it is not clear why national investment in real estate in the form described above should not also be subtracted from the land's current gross value before the distribution of the world's net property value is to be distributed equally amongst all its inhabitants.

Steiner never addresses this national-cultural aspect of labour-embodying improvements, except to say that the value of real estate varies significantly from place to place.[30] He explicitly acknowledges that (for example): '

> …the ownership of an acre in the Sahara Desert is of a different value, and consequently attracts a different payment liability, than the ownership of an acre in downtown Manhattan

> or the heart of Tokyo. Similar things can be said about real-estate in the Saudi oil fields, the Amazon rain forests, the Arctic tundra, the Iowa Corn Belt, the Bangladeshi coast and the city of London.[31]

However, Steiner supplies nothing in the way of an explanation for this difference in value. Obviously it is due in part to natural causes. Nature favoured some regions with various benefits, others with different advantages, and others still with few if any redeeming natural features at all. Why should some individuals suffer and others benefit from the inequality in richness of resources which is determined by the fortunes of Mother Nature? But the variety of natural advantages goes only a small part of the way towards explaining the difference in real-estate value.

In order to illustrate this last point, consider the example of the real-estate value of an acre in downtown Manhattan compared with the value of an acre of land in Manhattan Island some centuries ago, when it was inhabited by Native Americans, say in 1626. From a purely financial perspective, its current value far exceeds its former worth. From an ecological point of view, on the other hand, there has been a considerable decline in the condition of this territory since Western colonization. Neither of these changes has any natural, arbitrary, source. Both are largely due to the different cultural attitudes of the two relevant groups towards the appropriate treatment of land, and their subsequent actions. In view of this example, it is less clear that a contemporary New Yorker should have a payment liability which is presumably higher than these per acre payments would be in the absence of historic national improvements. Notice that the value of these collective improvements includes not only the existence of a skyscraper, for example, on any given acre of Manhattan, but also, crucially, the fact that the skyscraper is situated *in* Manhattan, which is a major source of its value. The overall value of the real-estate commodity is obviously determined to a large extent by the wider cultural project, which is also part of a larger national enterprise, namely The United States. Steiner claims that his proposal allows for the subtraction of labour-embodying improvements from the gross value of the real-estate. But his examples exhibit no allowance for national improvements of any kind.

One way out of this criticism would be to read Steiner's theory in a way that would take these national-cultural improvements into account, in addition to the individual labour-embodying improvements of which he speaks, and subtract both from the gross value of real estate prior to redistribution. Since Steiner explicitly recognizes individuals' and their predecessors' improvements as being excluded from the pool of assets to be appraised and distributed, why not allow for the same with regard to collective improvement of land?

In rescuing the 'global equality of land value' suggestion in this way, however, one places it in danger of incurring another serious obstacle – that of remaining with almost nothing substantial to redistribute. The gross value of land, once all human improvement – both individual and collective – has been subtracted from it, might not be worth very much at all. It is tempting to recall Locke's observation that: 'It is labour, then, which puts the greatest part of the value upon land, without which it would scarcely be worth anything'.[32] Moreover, egalitarians favour the redistribution of detachable natural resources anyway. Once this has already been conceded,

and all the aforementioned labour-embodying improvements have been subtracted from the gross value of land, it does not appear that all that much is left to warrant any great concern about redistribution. In this case, perhaps Locke was right when he commented about territorial properties in their natural state being 'almost useless materials as in themselves'.[33]

There still remains the value of mere availability of space and its natural quality (climate, fertility of land, etc.), regardless of the actual real-estate value which is, I have suggested, in large part the product of labour-embodying improvements of a national-cultural kind. Taking this national factor, which Steiner omits, into account and consequently concluding that the only appropriate subject for global territorial redistribution is the value of the bare territory itself as provided by nature (rather than its 'current site value') does not totally invalidate Steiner's argument. Space itself, along with its quality and quantity as endowed by nature, are significant assets to which an egalitarian proposal can still be applied. The earth's surface, and not only the reserves and supplies of various commodities lying above and beneath it, is indeed a significant human asset. It is quite obviously of some value by virtue of its existing scope, that is, its ability to provide space, which is so fundamentally necessary for sheer human existence.[34] Furthermore, it is naturally valuable in view of the numerous ways in which it can be put to use for the benefit of human subsistence. Many people lack the basic materials necessary for the preservation of human life, not to mention the pursuit of a meaningful existence, while others enjoy territorial resources in abundance.

Nevertheless, with regard to land itself, acknowledging the national-cultural impact on territory does change the appropriate subject matter for redistribution, and consequently alters the nature of the computation involved in Steiner's 'global equality of land value' argument. In view of the above, the subject matter Steiner singles out for redistribution appears too wide. After accounting for the national improvements of territory, only the bare land emerges, after all, as the proper subject for any global territorial redistribution. This being the case, an acre of land in downtown London or Tokyo should be considered of equal value to a comparably fertile acre of land anywhere else in the world.

A revised proposal for 'territorial justice' which would take the reservations raised here about national improvements into account, would at most require the monetary assessment of the bare earth's surface, rather than its current real-estate value, and the redistribution of this alone, or rather of its cash value, amongst all the earth's inhabitants. The next section elaborates further on the significance of cultural-national considerations within this discussion of territorial justice.

8.4 A Liberal-Nationalist Approach to the Value of Territory

In charting my course along 'liberal-nationalist' lines, I am knowingly steering the territorial issue out of the confines of Steiner's theoretical framework. Steiner's perception of national territory as a mere aggregate of privately owned land allows him

to propose that the entire earth's surface be appraised in terms of real-estate value and divided accordingly among its inhabitants.[35] But from a nationalist point of view (liberal or otherwise) this perception and subsequent suggestion fail to account for the forms of national attachment to land discussed at great length in two previous chapters, on the issues of historical ties to territory and the cultural implications of national settlement. As those arguments suggest, the value that individuals attribute to their national territories is not primarily financial. David Miller states this point rhetorically, when he asks: 'Can the value of the city of Jerusalem to the Israeli nation be estimated by the revenue that that piece of real estate is capable of producing?'[36]

From Miller's perspective *On Nationality*, indeed from any liberal perspective which attributes significance to individual interests in their national culture, regarding territorial rights as merely a conglomerate of individual property rights is objectionable. Describing national territorial rights as a conglomerate of individual property holdings does not capture, or even address, individuals' national interests in land. It places a price-tag on valuables which, unlike other natural resources such as coal, oil or water, bear significantly on individuals' identity, well-being and self-respect. They are of intrinsic value to individuals, a value which exceeds any monetary worth.[37]

The most central features of the relationship between individual nationals and the territories they value concern culture and history. Two earlier chapters here dealt with historical interests in territory and with national settlement respectively. The first concerned the constitutive role that a nation's territorial homeland plays in the formation of that nation as a historic entity and in shaping its specific historic identity. It relied on the suggestion that, as a consequence thereof, these 'formative territories' were likely to be perceived by the members of that nation as bearing deep and significant ties to their very essence.[38] The second of these chapters argued for the effect that nations and their cultures have on the development of the territories they settle – the imprint and manifestation of their members' identity and culture on the territories they inhabit – and for the identity-related implications thereof.

Both arguments indicate that at least part of the value attributed by members of national groups to their nation's territory is based on significant and intense individual interests that relate to their national culture as a constitutive component of their identity. I suggested that these interests can be comprehended, and should be respected, within liberalism, and that they ought at least to be accounted for within any attempt at territorial distribution.

Respect for individuals – their identity, their significant interests and their well-being – warrants at least some recognition of the unquantifiable value many individuals place on their national territory. Both the argument from history and the argument from settlement serve to substantiate this claim. The notion of a territorial homeland is central even to the most liberal and benign form of nationalism; it is virtually part of the very definition of nationalism.[39] As Michael Walzer notes, 'the link between people and land is a crucial feature of national identity'.[40] Attempting to quantify the entire value of such lands merely in terms of individual real-estate does not accord these interests any respect at all.

I am not suggesting that national considerations negate the possibility of justifying any form of territorial redistribution on an egalitarian basis. I do maintain, however, that arrangements concerning the land surface itself should also exhibit respect for those individual interests in territory which relate to their membership in national groups. More specifically, I argue that proposals which assign *purely* financial value to national territory fail to display such respect. Gans' account of historical rights, for example, considered in Chapter 3, exhibited precisely the type of sensitivity for cultural ties which Steiner's egalitarian proposal neglects. While maintaining that territorial rights ought to be allocated first and foremost in relation to a nation's size and needs which determine the legitimate scope of their entitlement, Gans also suggests that, whenever possible, the location of this allotment ought to be based on historical ties.[41] Steiner's proposal does not preclude such a solution. He does not propose to remove over-appropriators from their historic homelands, as long as they pay their global dues. His vision of territorial justice simply does not acknowledge anything beyond the material value of territory.

Crucially, the concerns raised in this section indicate that any hope that adopting a purely financially based programme aimed at a totally equal distribution of all the world's territory '…might be expected to foster greater willingness to compromise in international boundary disputes … by attaching a price-tag to any instance of territorial acquisition or retention'[42] is entirely unfounded. The special relationships existing between nations and the lands to which they bear historical ties, and/or on which they are settled, are incomprehensible in financial terms. Nations involved in boundary disputes do not, at least for the most part, conceive of their territorial interests in monetary terms. Placing artificial 'price tags' on land, and indirectly also on the national attachments to it will do nothing to improve international relations. On the contrary, blindness towards national sentiments vis-à-vis land and neglect of the interests involved, can only lead to insensitive and misguided actions and consequently to an escalation of international conflict rather than to its resolution.

For all these reasons global justice cannot be achieved purely through assessing the real-estate value of the earth's territorial sites and redistributing the outcome equally among all its inhabitants. While admittedly there are objective criteria for attempting such an appraisal (for example, size, natural fertility, climate conditions, etc.), we ought not to ignore the special, and unquantifiable, additional national value attached to land. Any allegedly objective, totally monetary, evaluation of territory can be achieved only by denying this extra value.

The practical outcome of all this is, after all, rather more limited than some nationalists might hope for. It suggests only that territorial redistribution should not be embarked upon in the same straightforward manner that might characterize an egalitarian redistribution of money or of more fluid forms of natural resources. It attempts to place some restrictions on the egalitarian project of land redistribution. Certainly, theories of liberal nationalism would not necessarily reject any form of egalitarian redistribution of territorial resources or the value thereof. My argument was confined to addressing a specific type of egalitarian proposal that totally disregards the national-cultural value of land. From a liberal perspective that takes nationalism seriously, it is incumbent upon those doing the redistributing to take

into account considerations other than formal resource equality when contemplating territorial justice. This does not imply that we ought to set aside all principles of equality in our aspiration towards a more just overall global arrangement of the earth's resources. I suggested only that liberal-nationalism might have a problem with certain ways of going about this.

At least one positive, rather than critical, attitude towards resource equality necessarily follows from the idea of liberal nationalism. This concerns the commitment to the universalizability of national rights, naturally including territorial ones. Any liberal theory of nationalism is necessarily committed to the view that, if, nations require the use of land in order to enable individuals to fully exercise their national-cultural interests, then all nations have a right to a territory in which their culture can flourish. Yael Tamir argues that each nation should enjoy a public sphere in which its members constitute a majority and within which the communal aspects of their culture can be fully realized; Gans argues for a universal right to national self-determination, and for the proportionate allocation of land to such projects. [43]

Admittedly, the type of equal treatment implicit in the consistent application of rules constitutes a kind of equality only in a very formal sense.[44] The universalizability requirement contains a very weak equality component, and some question whether it truly deserves the title of an equality proviso at all.[45] Nevertheless, in the present connection, the universality requirement, along with its link to the notion of equality (however loose), is a significant constraint. It sharply distinguishes any liberal-nationalist approach to territorial rights from the territorial claims to national homelands that are typically raised by nationalists, and advanced by chauvinist theories of nationalism.

Beyond this, I doubt that the idea of liberal nationalism as such, prescribes any specific approach towards equality. Liberal nationalism *can* (though it need not necessarily) accommodate various degrees of egalitarianism. It cannot accommodate the specific kind of strict egalitarian approach which attributes solely material value to national territory. But it need not ignore considerations of resource equality either.

As for the overall project of formulating a set of criteria for assessing territorial conflicts in non-ideal situations: the central guidelines suggested in Chapter 3 and 7, and referred to in this section, already contain a degree of egalitarian restraint. As pointed out in each of those chapters, both historical ties and national settlement inherently limit the extent of territory which nations can legitimately acquire. Both these guidelines, by their very nature, restrict the extent of legitimate territorial acquisition and holding. As for historical rights, there are, presumably, reasonable limits to the extent of territory to which a nation can be said to have established genuinely formative ties.[46] As far as settlement is concerned, the restriction on the scope of territorial acquisition and holding is even clearer and more closely connected to considerations of human need. The settlement argument can only be employed to legitimize the continuous holding of territory which is actually being utilized in the narrow sense of having been actively settled, as described in the previous chapter. It cannot be invoked in claims to vast territories which are well beyond the needs, and capabilities, of any given settlement project.

Notwithstanding these last observations, the main point regarding the equal distribution of land remains the one argued for in Section 2: egalitarian principles of equal distribution, even if desirable on an ideal level, cannot be justly applied to the bilateral settings which characterize contemporary international disputes over territory. Isolated applications of such principles to individual bilateral conflicts would indeed be, at the very least, like 'playing one single note without completing the performance of the symphony to which is belongs'.[47] At worst, it would be both unjust and dangerous. At most, such principles can serve as a regulative ideal of some kind, to be borne in mind as a general aspiration restricted for the time being to the realm of the future.

Furthermore, it remains an open question whether they should indeed be employed even in this limited capacity. Even on the ideal level, territorial justice and sensitivity to the needs of others need not necessarily be understood in strictly egalitarian terms. In Section 3, I referred to David Miller's suggestion that the global duties involved in allocating territory should be confined to attaining a certain minimum of territorial resources for all.[48] Arguing against 'radical proposals for redistribution' and with reference to national self-determination, Miller suggests that: 'resource transfers should be made so as to allow each national community to reach a threshold of viability, giving it an economic base from which national self-determination can meaningfully be exercised'.[49]

8.5 Concluding Remarks

Rousseau is sometimes quoted in connection with territorial justice as having ridiculed the European practice of annexing vast amounts of territory in the New World by virtue of alleged 'discovery', and by so doing excluding the rest of humanity, including the actual inhabitants of the place.[50] In another section in *The Social Contract*, dealing with the optimal size of states, Rousseau asserts that states should be 'neither too large for good government, nor too small for self-maintenance'.[51] Later he speaks of the need for achieving the appropriate relation between the extent of a state's territory and the number of its inhabitants. Roughly speaking, he maintains that 'the right relation is that the land should suffice for the maintenance of the inhabitants, and that there should be as many inhabitants as the land can maintain.'… 'No fixed relation can be stated between the extent of territory and the population that are adequate one to the other'. [52]

Rousseau identifies numerous variables which would necessarily impede any such project of fixing hard and fast rules on this matter.[53] He mentions the differences in fertility of the land in various areas of the globe and the difference in their produce; he speaks of the differences in climate, and even of the varying degrees of female fertility. Crucially, he refers to the 'different tempers' of various populations, or what in today's terms might be called cultural differences.[54] All these factors indicate the advantage of vagueness in the principles we apply to the project of fixing appropriate boundaries.

Rousseau was concerned with the appropriate relation between the size of a state's population and the extent of its territorial holdings not for reasons of international justice, but rather for the purpose of achieving a well-ordered body politic. Still, there is an important lesson to be learned from what he says here for our purposes. Territorial Justice (and not only the internal well running of states, though that too), warrants a concern for human need and an adequate relation between the scope of territory and size of population. Nonetheless, we are well advised by him to refrain from adopting rigid rules regarding the precise per capita share of land that each state is entitled to. A set of vague guidelines which are internally sensitive to maintaining a reasonable proportion between territorial scope and its inhabitants, may be the best we can aspire to so far as international territorial justice is concerned.

Endnotes

1 E.g.: Brian Barry, 'Humanity and Justice in a Global Perspective', *Nomos*, Vol. 24 (New York: J.R. Pennock and J.W. Chapman eds. 1982), 232, 235; Brian Barry, *Democracy, Power, and Justice* (Oxford: Clarendon Press, 1989; Charles Beitz, *Political Theory and International Relations* (Princeton, New Jersey: Princeton University Press, 1979), Chap. 3, Sect. 2; Hillel Steiner, *An Essay on Rights* (Oxford U.K. and Cambridge U.S.A: Blackwell, 1994), Chap. 8.

2 Hillel Steiner, 'Territorial Justice', in Percy B. Lehning (ed.) *Theories of Secession* (London and New York: Routledge, 1998), 60–70. More recently, see: Hillel, Steiner, 'Hard Borders, Compensation and Classic Liberalism', in: David Miller and Sohail Hashmi (eds.) *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 2001), 79–88, Sect. 4; See also, Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), 103–104, 109–115; 115–123, discussed here in Chap. 3. Gans' ideal is that territorial rights ought to be allocated first and foremost in relation to a nation's size and needs, which determine the legitimate scope of their entitlement.

3 Steiner, 'Territorial Justice'.

4 Steiner, *An Essay on Rights,* 267.

5 Steiner, *An Essay on Rights*, 267–268.

6 Steiner, *An Essay on Rights*, 267.

7 Steiner, *An Essay on Rights*, 267.

8 Steiner, *An Essay on Rights*, 268.

9 Steiner, *An Essay on Rights*, 270.

10 Briefly stated, Steiner goes on to suggest that a complex international mechanism be established for implementing these egalitarian principles; specifically, he proposes what he dubs a 'global fund' into which so called over-appropriators will deposit their redress payments in compensation for their respective over-appropriations for the benefit of the world's 'under-appropriators'. See also: Steiner, 'Hard Borders, Compensation and Classic Liberalism'', 79–88, Sect. 4, 85–87.

11 Aristotle, *The Nicomachean Ethics* (Oxford and New York: Oxford World's Classics, Oxford University Press, Davis Ross, Translator*,* 1998) book 5.

12 Steiner, 'Territorial Justice.'

13 Steiner, 'Territorial Justice'. I am by no means committing myself here to the view that this would in fact be the most just global arrangement. All I am arguing for is that, even on the assumption that global egalitarianism is the ideal, not much can be derived from this view to guide us in the resolution of bilateral conflicts within a non-ideal overall situation.

14 Steiner, *An Essay on Rights*, 268.

15 Chaim Gans, *A Just Zionism – On the Morality of the Jewish State* (New York: Oxford University Press, 2008), 39.
16 Gans, *A Just Zionism*, 39.
17 Steiner, 'Territorial Justice', 67.
18 Steiner, 'Territorial Justice', 67.
19 Steiner, 'Territorial Justice', 68.
20 Steiner, 'Territorial Justice', 68.
21 Steiner, 'Territorial Justice', 68; *An Essay on Rights*, Chap. 8; 'Hard Borders, Compensation and Classic Liberalism', 79–88, Sect. 4, 85–87.
22 Steiner, 'Territorial Justice', 68.
23 Steiner, 'Territorial Justice', 68. See also: Steiner, 'Hard Borders', 86–87.
24 David Miller, 'Justice and Global Equality', in Andrew Hurrell and Ngaire Woods (eds.) *Inequality, Globalization and World Politics* (Oxford: Oxford University Press, 1999), 187–210, 197.
25 Steiner, 'Territorial Justice', 68.
26 Miller, *On Nationality* (Oxford: Clarendon Press,1995), 106; See also: Miller, 'Justice and Global Equality', 193–196.
27 Cf.: Miller, 'Justice and Global Equality', 194.
28 See: Robert Nozick, *Anarchy, State, and Utopia* ((USA: Basic Books, Harper Collins publishers, 1974), 198, 219.
29 Steiner himself is in fact strongly committed to the idea of 'self-ownership'. Thus, he could not consistently endorse such a defence of his egalitarian proposal. See: Steiner, *An Essay On Rights*, 231–265, esp. on 231–237; 241–244; 265; Hillel Steiner, 'Choice and Circumstance', in Andrew Mason (ed.) *Ideals of Equality* (Blackwell, Oxford, 1998), 95–111, esp. on 98, 100.
30 Steiner, 'Territorial Justice', 67.
31 Steiner, 'Territorial Justice', 67. For similar points, see also: Steiner, 'Hard Borders', Sect. 4, 85–87.
32 John Locke, *Two Treatises of Government.* Peter Laslett (ed.) (Cambridge: Cambridge University Press. 1960) (1690), II, Chap. 5, Sect. 43.
33 Locke, *Two Treatises of Government.* Peter Laslett (ed.) (Cambridge: Cambridge University Press. 1960) (1690), II, Chap. 5, Sect. 43.
34 Cf.: Michael Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Oxford: Basil Blackwell, 1983), 43.
35 Steiner, 'Territorial Justice', 66, 68.
36 Miller, *On Nationality*, 106.
37 This is not to deny that in some cases nations and their respective members may also attribute additional, cultural, value to forms of natural resources other than land, for instance where a culture revolves around the use of a particular type of animal (e.g. hunting it, or sacrificing it), a particular water reservoir, etc.
38 Chaim Gans, 'Historical Rights The Evaluation of Nationalist Claims to Sovereignty', *Political Theory,* 29/1 (February 2001), 58–79; Gans, *The Limits of Nationalism*, Chap. 4, 109–123, esp. 110.
39 Anthony D. Smith, *National Identity* (Reno, Nevada: University of Nevada Press, 1991), 9, 11, 13–15, 40, 43.
40 Walzer, *Spheres of Justice,* 44.
41 Gans, *The Limits of Nationalism*, Chap. 4, esp. 115–123.
42 Steiner, 'Territorial Justice', 68; See also 'Hard Borders', 86–87.
43 Yael Tamir *Liberal Nationalism* (Princeton, New-Jersey: Princeton University Press, 1993) Chap. 3, 70–71. Gans, *The Limits of Nationalism*, Chaps. 3 and 4.
44 David Miller, 'Equality and Justice', in: Andrew Mason (ed.) *Ideals of Equality* (Oxford: Blackwell, 1998), 21–36, 21–23.
45 Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 218, 220–222, 228.

46 Cf.: Gans, *The Limits of Nationalism*, 111. Gans worries that formative ties may still justify over appropriation, but he states clearly that it is far less dangerous as a potential basis for sovereignty rights than criteria such as 'discovery' or 'first occupancy' are. In the end, he opposes national sovereignty rights in general.
47 Gans, *A Just Zionism*, 39.
48 Cf.: Miller, 'Justice and Global Equality', 198–204.
49 Miller, *On Nationality*, 106.
50 Rousseau, Jean Jacques, *The Social Contract*, book I, Chap. 9 (London and Vermont: Everyman, 1993 [1762]), 197; Thomas Baldwin, 'The Territorial State', in: Hyman Gross and Ross Harrison (eds.) *Jurisprudence – Cambridge Essays* (Oxford: Clarendon Press, 1992), Chap. 10, 207–230, 209 quotes Rousseau in this connection; as does Chaim Gans, 'Historical Rights The Evaluation of Nationalist Claims to Sovereignty', his footnote 11.
51 Rousseau, *The Social Contract*, book II, Chap. 9 (London and Vermont: Everyman, 1993 [1762]), 219.
52 Rousseau, *The Social Contract*, book II,, Chap. 10, 222.
53 Rousseau, *The Social Contract*, book II, Chap. 9, 222.
54 Rousseau, *The Social Contract*, book II, Chap. 9, 222.

Conclusions

Years of sympathetic interest in the liberal-nationalist enterprise led me to pursue the territorial issue as the final unexplored realm into which liberal nationalists have (at least for the most part) so far feared to tread. Due to the centrality of land to all nationalist movements, not least my own, I believed the territorial front to be an absolutely essential last stop for this theory if it was to be taken seriously as any kind of account of nationalism at all. As Anthony Smith restates in some of his more recent work on nationalism, 'Whatever else it may be, nationalism always involves an assertion of, or struggle for, control of land'.[1] This point struck me, as an Israeli national, as patently obvious, but it appeared to have been somewhat overlooked by much of the literature on 'liberal nationalism', including that strand of it which originated in my own country.[2] Liberal defences of nationalism had already become prevalent as of the mid 1980's, but curiously they largely continued to neglect the fact that nationalism is primarily about land. Consequently, placing this topic on the liberal-nationalist agenda was in itself a worthwhile task. I hope, however, to have contributed a bit more than this.

In the course of my work, I have searched the resources of liberal-nationalist theory in an attempt to answer the central moral questions concerning territorial entitlement, understood chiefly as states' rights to sovereignty over specific lands. Should liberals just throw up their hands in despair when confronting conflicting claims stemming from incommensurable national narratives and holy texts? Should they dismiss conflicting demands that appear to stem solely from conflicting cultures, religions and mythologies in favour of a supposedly neutral set of guidelines?

A variety of political arguments presented themselves as potential bases for territorial entitlement. Does history matter? Should ancient injustices interest us today? Should we care who reached the territory first and who were its prior inhabitants? Should principles of utility play a part in resolving territorial disputes? Was John Locke right to argue that the utilization of land counts in favour of its legitimate acquisition? And should western-style settlement work in favour or against a nation's territorial demands? When and how should principles of equal distribution come into play?

This book examined all these generic types of territorial claims customarily put forward by national groups as justifications for their territorial demands. Each of these arguments was scrutinized in light of the liberal concern for the well-being of individuals, and an attempt was made to assess the relative merits of every potential

justification from this point of view. I promised no magical formulas and no instant recipes for solving the complex problems of territorial allocation, and shall supply none here. I would, however, like to leave the reader with more than a handful of disjointed criteria for assessing territorial demands. In order to attain a comprehensive impression of the set of principles suggested here for evaluating international disputes over land, it is worth taking a final look at the popular justifications for territorial rights discussed throughout, and ordering these parameters in order of importance. Following this, I will say a few final words about their application (including its limitations) to any real world cases.

The idea that territorial boundaries should be drawn and redrawn primarily in accordance with existing human settlement was argued for in Chapter 7. I suggested there that taking existing national settlements into account as a central factor in demarcating territorial boundaries has both liberal foundations (i.e. in the work of John Locke) and liberal-national appeal. In support of the latter claim I pointed to the affinity between my settlement principle and the liberal doctrine of national self-determination, though I also suggested that the former has both practical and normative advantages as a principle of demarcation. This argument was defended in two stages, which were intended to bring out the full strength of its normative appeal.

The first part of the settlement argument relied loosely on the Lockean notion of mixing one's labour. I argued that Locke's theory of acquisition by labour includes one distinct feature which is both morally compelling and at the same time also applicable to the case of nations demanding sovereignty over territories settled by their members. Locke argued that objects which have been improved through labour should be granted to the industrious individuals who laboured on them because such items owe their value to the labour of those individuals. This argument, as Locke himself seems to have recognized, is of particular appeal in the case of territorial properties, and even more so in the case of national territories. I argued that, at the very least, territorial sites owe their particular identity, or specific form, to the nationals who settled them. At best, western-style settlements owe the majority of their value, in terms of human resources, to their settlers, as Locke himself believed. The fact that members of a nation worked the land, thus altering it significantly, supplies us with substantial moral reasons for favouring their claim to the territory over that of others.

The second part of this argument pointed out that when individual members of a cultural group settle a territory, they not only change the terrain in question but also reform it and shape it in the light of their national culture. Settled territories increasingly reflect the national culture of the individuals who established them, and that of their cultural descendants. Settlers share this culture with all their fellow nationals, wherever they live. In keeping with the liberal-nationalist assertion that national cultures form significant components of their individual members' identities, I argued that national settlements (imbued with this culture) constitute components of the settlers' cultural identity, and of those of their compatriots. Since individuals and their identities are important from a liberal perspective, I concluded that liberals have good reason to favour the prolonged holding of national settlements by the settling nation.

However, I also raised doubts (which underlie this book as a whole) as to the ability of any single consideration to supply a correct answer for all territorial ques-

tions. The interest in national settlements (or any other interest in territory, for that matter) does not work in a vacuum and will often have to contend with conflicting considerations and competing interests. In the case of western style settlement projects, as in North America, Australia and New Zealand, utility and efficiency serve as an auxiliary entitling factor. They support the claims of settlers whom, for all the grave injustices they committed, also enhanced the value of the lands they settled many times over, to the benefit of all mankind. This argument is admittedly controversial, and open to charges of cultural bias. The approach advanced in chapter 6, on Efficiency, was pitted against some recent arguments opposing the inclusion of any efficiency criterion whatsoever into our moral reasoning about territorial entitlement. Though I argued against this dismissive view, I admitted that any efficiency criterion that would avoid cultural bias would have to be a relatively mild one, accepting a wide variety of national-cultural interpretations of legitimate land use. Still, I suggested that some neutral, objective, guidelines for what might count minimally as good use, can be derived from universal human needs and desires. The role of guidelines based on utility (or 'efficiency' in the restricted sense I suggested) will usually be limited to strengthening territorial claims which are already legitimized by other criteria, such as current inhabitancy and settlement. Efficient land use is a non-negligible consideration, but it is nonetheless an auxiliary argument. In a multifarious approach to the evaluation of territorial entitlement, subsidiary arguments have their place as well. Within this wider framework, I argued that there are good reasons for regarding the way in which a given land has been put to use as a relevant component, though admittedly a supplementary one, within our account of territorial entitlement.

The injustices perpetrated by these settlement projects and their utilization of previously inhabited lands cannot, however, be ignored or downplayed. It is part and parcel of the legacy of western settlement which exists side by side with the justifications for it. Whatever can be said in favour of European settlement in other continents, on the basis of a growing need for territorial resources or whatever, it goes without saying that they ought not to have been carried out with the total lack of sensitivity for the rights of the indigenous population of those territories and at the expense of genocide, ethnic cleansing, and the massive misappropriation of native lands. Chapter 4 considered contemporary demands raised by the decedents of these native peoples to regain their control over some of these lands, or, failing that to significant compensation for their ancestors' loses. This analysis aimed to further the understanding of territorial claims phrased in the language of corrective justice and to evaluate their force. I argued that members of dispossessed groups do carry substantial interests in the restitution of their lost lands, and that these individual interests can be held by a succession of generations of group members. I took a stand against the view that these territorial claims are necessarily weakened by the passage of time, whether because the interests perish or because the right is unsustainable in the face of human mortality. I argued that corrective justice-type claims have more to them than is usually appreciated and that they carry more normative weight than is commonly conceded.

Chapter 5 continued this theme and questioned the thesis whereby historic injustices, such as those committed by European settlers in America, have been superseded by circumstances. While I questioned some of the details of The Supersession Thesis, nonetheless its basic logic regarding the effects of changing circumstances on considerations of justice and its practical conclusions against massive reversion, remain indisputable. My arguments in the chapters focused on historical considerations did not amount to a call for territorial restitution of all long-lost lands, only for further sympathy and consideration for the historical dimension of these claims and for their enduring presence. Ultimately, I suggested that, while the interests in regaining control over misappropriated territories are, at times, valid ones, they cannot, in and of themselves, hope to contend with the interests of present settlers. The latter's claims oppose and (at least usually) outweigh claims to restitution, even where these historical claims are well-founded.

Historical arguments, nonetheless, remain non-negligible considerations in evaluating boundary disputes, and in some cases they carry more weight than in others. What exactly are these original historical interests which I claimed can endure for generations, and throughout centuries and millennia of exile? The argument about corrective justice relied in part on the ideas advanced by a different variant of historical entitlement argument. Historical Rights to territory and the interests they represent were discussed at length in Chapter 3. This chapter focused on Chaim Gans' interpretation of 'historical right' claims as 'the right to formative territories'.[3] 'If the events thought to have formed the historical identity of a national group took place in specific territories, it seems likely that these territories will be perceived by the members of that group as bearing deep and significant ties to their national identity'.[4]

> For peoples and nationally conscious individuals, the interest in not being severed from their formative territories touches on emotions which are inextricably intertwined with their conception of their identities... This [the interest in formative territories] is an interest tied to some of the deepest layers of identity, both in origin (the perception of selfhood) and in the consequences following from its frustration (feelings of alienation and longing).[5]

Historical arguments, understood as claims to formative territories, along with my argument from settlement (primarily by virtue of its second, expressive justification), are most closely related to, and based on, liberal nationalist assumptions and underlying ideas. Furthermore, both contain internal restrictions as to the extent of the territorial holdings they can support. In both cases, the internal logic of the arguments place restraints on the scope of territories that can be legitimized on such bases. Aside from their distinctly liberal-nationalist foundations, this additional shared feature places the formative-tie consideration and the settlement criterion at a distinct advantage from the perspective of distributive justice.

Additionally, the interplay between these two central considerations enables them at times to mutually reinforce one another. The expressive interest argument for the settlement criterion not only supplies its own justification for territorial entitlement but also reinforces our sense of the importance of formative connections as a criterion in evaluating claims to territory. If a national group has a formative connection with a given territory, then it has a particularly strong interest in being on that territory now because, given that its culture was formed by interac-

tion with that territory, that same territory is likely to be uniquely suited to the expression of its inherited culture. Furthermore, in many cases, such as in the case of North America, Australia etc., the act of settlement itself will serve to create a formative tie with the territory as it moulds the history and culture of the settling nation around that territory. Such dual interests may, however, at times still have to compete with the formative ties of other nations (such as prior occupants) to the same territory.

Despite the possible interconnections, and the significance attributed to formative ties, the interests of current settlers (at least where their inhabitancy is not altogether recent) appears to exclude the possibility of transferring the territory on which they have settled to a competing national group which may also bear a formative connection to that territory. The interests of current and actual settlers take priority over the potential interests of members of another national group in expressing their culture on that territory, even where the latter's interests stem from a genuine formative connection with the land in question.

There admittedly remains room for reasonable disagreement on this last point concerning the relative ranking of the formative tie argument and the argument from settlement. For a variety of reasons, I took a stand in favour of attributing slightly more weight to the former. While Chapters 3–5 stressed the significance of historic ties, collective grievances and memories, the forward-looking considerations, discussed as of Chapter 5 and onward, ultimately prevail. Interestingly, as pointed out there, the academic objections to reversion, including my own, largely rely on philosophical traditions which also contributed to the original injustice. While we sincerely regret these injustices, we continue to adhere to the basic ideas and cultural assumptions on which they were founded. This, I suggested, is part of the reason for our continued responsibility for the specifically historical dimension of these injustices. We are not only the heirs of the property and sovereignty arrangements which were the outcome of the relevant injustices; we are also the cultural and philosophical descendants of its perpetrators. This, for better and for worse, is the complicated legacy of settlement.

My conclusions also relied to some extent on common intuition within western liberal societies. No one, to my knowledge seriously favours massive reversion, or the restoration of sovereignty to the original inhabitants of the large western settler societies that have emerged over the past several centuries. The arguments about settlement and efficiency contributed to explaining why this is so. Undoubtedly, Waldron's Supersession Thesis still supplies the best argument against the restoration of any state of affairs that existed prior to European colonization of America, Australia and New Zealand.

As against these arguments, the interest in formative ties, in and of itself, could not possibly justify dismantling well established existing states, such as the United States, Canada, Australia or New Zealand. The interest in formative possessions is significant and enduring, and in the case of native peoples still inhabiting their formative territories it might justify significant concessions to some of their demands. The historical interest in formative territories and homelands might also grant a territorial landless group exiled from its homeland, the right to return to its formative territory, at least where that territory has not yet been acquired and settled by any

other nation. But only an active settlement project, a positive utilization of unsettled land, where that is feasible, could conceivably complete and justify their claim to sovereignty over it.

I promised some further indication of the kind of guidance this book is designed to offer for the resolution of territorial disputes. Primarily, it is intended as a tool for attaining a better understanding of the conflicting demands involved in any territorial altercation. To this end, the initial step it prescribes is deciphering the allegedly entitling claims in terms of the various typical arguments discussed throughout. An extremely easy example of this would be one in which a nation has a good claim to a territory based on all the considerations mentioned throughout. That is, a case in which a nation bears strong historical ties to the territory on which it is situated, where the territory is settled predominantly by its nationals, who have improved it and developed it so that its culture now manifests itself in that land. Here the various factors operate in conjunction with each other. Even in such cases, these interests may be challenged by other, rival, interests when another nation lays claim to the particular territory in question on the basis of historical arguments. Furthermore, the interests of present inhabitants of territory throughout the world may always be open to contention on the basis of pure need.

In cases of conflicting claims, when the occupation of land is seriously disputed, it is helpful to untangle the various allegedly entitling factors. It is very important in evaluating and arbitrating disagreement between the parties to embark on this project with the highest regard and greatest sensitivity for the actual beliefs of each of the competing sides, difficult as this may seem. Disentangling nationalist slogans and laying out the various arguments on each side will immediately serve to further our internal understanding of the competing claims and assessing their merits. Without this initial step, we have no hope of understanding what it is these groups are arguing, and often fighting, about, and of achieving a long-term peaceful arrangement that will be agreeable to the warring parties, and not only to the external mediator.

Beyond these stages of identifying the different arguments and interests involved and appreciating their nature and force, many cases will require evaluating the sincerity of various claims as well as their truth content and the intensity with which each of the competing interests presents itself. This will involve certain factual questions which naturally cannot be answered in general terms or with the aid of philosophical tools. In a variety of different territorial cases, these will include questions such as: Who is settled where? What proportion of the population in the disputed territory belongs to each of the disputant nations? Does the populated occupation of this piece of land constitute a settlement in any morally relevant sense? Was the group which is claiming territorial restitution in fact dispossessed? Is the desired territory genuinely intertwined with the national identity of those laying claim to it? And, if so, how intense is their formative connection to it, as opposed say to that of their opponents who may well foster parallel claims?

Note that in the important case of settler societies, the collective identities of both the descendants of settlers and of the indigenous populations will have been

shaped by events that took place in those territories, so that both parties will bear significant formative ties to the lands in question. A proper understanding and appreciation of the importance of these ties to individual members of groups, as well as the recognition of their existence on both sides, bring to the surface a further complex aspect of the matter at hand, and one which will inevitably pull in opposing directions. Additional complications will be purely practical, regarding the possible divisibility of any given territory and the viability of any proposed solution.

None of this is an exact science, and consequently there may be a variety of reasonable political conclusions and proposed solutions for various real world cases. Depressing as this may sound, sometimes there may be no amicable solution at all. Nevertheless, the guidelines developed throughout enable us to recognize and understand conflicting nationalist claims in a way that is exterior to the sectarian cultures from which they are usually spouted, without dismissing them or displaying a self-defeating degree of insensitivity towards them.

Why should secular liberal-individualists care about any nationalist claims? I have argued that those liberals who subscribe to some version of 'liberal-nationalism', or at least accept the plausibility of its central tenets, should recognize the normative significance of some of these claims from within their own value system. Perhaps more importantly, for those who do not prescribe to any version of liberal nationalism, ignoring nationalist aspirations has not proved particularly helpful in attaining enduring peaceful arrangements. Ultimately, the warring groups themselves, rather than outside observers, must be able to live with whatever peaceful solution is prescribed. Thus, a central portion of the analyses here was dedicated to translating some common nationalist rhetoric concerning territorial entitlement into liberal philosophical arguments. Liberalism can make sense of a variety of nationalist territorial claims in its own terms, and doing so (as opposed to dismissing these nationalist claims out of hand) is both practically and morally desirable for the purpose of achieving a just and long-lasting resolution to international territorial conflicts.

Finally, any attempt at attaining real-world resolutions concerns the delicate balance between the many different considerations that come into play. I have suggested an appropriate ordering of the various considerations throughout and discussed their relative importance. It is not unreasonable, however, to assume that, even within the framework of liberal-nationalist commitments, different theorists may attribute different degrees of importance to these diverse considerations.

As I forewarnd at the outset, the final product of this inquiry is not a single justification for the right to territory. Rather, it is an aggregate of interests which, in various configurations, can work together to form potential grounds for entitlement to territory. The final outcome is a multifarious theory of the ethics of territorial boundaries that supplies a workable set of guidelines for evaluating territorial disputes from a liberal nationalist perspective, and offers a common ground for discussion, including disagreement, and for the mediation of claims.

Endnotes

1 Anthony D. Smith, *Myths and Memories of the Nation* (Oxford: Oxford University Press, 1999), 149.
2 I refer of course to Yael Tamir's *Liberal Nationalism* (Princeton New Jersey: Princeton University Press, 1993), which I have cited repeatedly throughout and which, along with its author, played an important part in inspiring this book.
3 Chaim Gans, 'Historical Rights–The Evaluation of Nationalist claims to Sovereignty', *Political Theory*, 29/1 (February 2001), 58–79
4 Chaim Gans, 'Historical Rights', The Evaluation of Nationalist claims to Sovereignty', *Political Theory*, 66; Chaim Gans, *The Limits of Nationalism*, (Cambridge: Cambridge University Press, 2003), Chapter 4, 100.
5 Gans, 'Historical Rights', 72; *The Limits of Nationalism,* Chapter 4, 116.

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