

10 • Private Property and Territorial Rights: A Kantian Alternative to Contemporary Debates

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I. Introduction: A Kantian Theory of Territorial Rights

Kantian theories of territorial rights share the view that territorial rights are required by justice.¹ However, they have often been based on isolated aspects of Kant's theory.² Taking into account systematic aspects of Kant's views on territory and their context within his larger legal theory, I will spell out some possible contributions of Kant's legal theory to contemporary debates on territorial rights. These are: (1) an alternative, flexible understanding of the bearers of territorial rights, depending on which perspective one adopts in reference to the different levels of the state of nature; (2) a critique of the view that political self-determination is incompatible with international juridical institutions, and an alternative understanding of the need for *consent* in international relations; (3) a critique of the view of states as 'justice providers'; and (4) an understanding of the relationship between territorial rights and property rights in a way that does not reduce the former to the latter.

Possession of land occupies a central position in Kant's legal theory. It is 'the ultimate condition that makes it possible to have external things' (*MS* 6:323, General Remark B). Private possession of objects cannot exist without first acquisition of land. Land is the substance on which movable objects inhere as attributes.³ Acquisition of land has normative priority over acquisition and possession of movable objects situated on that land because it provides the legal *title* from which all subsequent acquisition can be derived. Given the spatial character of Kant's theory of property, and indeed of his legal theory in general, *originally* acquiring the space within which movable objects are located entails acquiring these objects as well. It is only via subsequent contracts with the

original possessor of land that it is possible to acquire objects in a way that is derivative from that first acquisition, and to regulate the location of these objects independently of possessing the land on which they are located.⁴

Territorial rights are the privilege of public authority to exercise jurisdiction over a certain area, that is the right to make and enforce laws within a demarcated space.⁵ Although several territorial rights theorists correctly emphasise that there is a fundamental difference between territorial rights and property rights, I will argue that there is a connection between the need to justify individual acquisition of land and territorial rights in Kant's legal theory. Territorial rights *presuppose* acquisition and possession of land. However, I will argue that although territorial states are *necessary*, they are nevertheless not *sufficient* for justifying occupancy of land. Only a global rule of law can fully satisfy this requirement.⁶ Therefore, even if territorial states are *legitimate*, this is not enough to justify their occupancy of land. In this, the Kantian theory I develop here departs from legitimacy theories of territorial rights. Legitimacy theories provide a statist and moralised account of territorial rights: the bearers of territorial rights are states, but only if they are just and legitimate; being a just and legitimate state means successfully implementing justice over the territory.⁷

After reconstructing Kant's theory of territory, I argue that it is important to distinguish between two perspectives in Kant's theory of territorial rights: an internal or domestic perspective (the relation of states with regard to their subjects) and an external, international perspective (between states). My argument is that the distinctive feature of Kant's theory of territory is that the rationale of public authority is (primarily) not *protection* of individual acquisition, but the *condition* of the compatibility of acquisition with the equality and freedom of all. However, since the state of nature persists between states, the territorial claims of states in relation to each other must be regarded as *analogous* to individual possession of land. This shifts the normative task to enter a civil condition to the 'next level': states' possession of territory must be made compatible with the equal, external freedom of other states, which calls for the implementation of an *international* civil condition. I conclude that with gradual expansion of the rule of law at international level, hard territorial borders become less and less relevant, since closed borders and border

controls only make sense when there is a state of nature between ‘islands of civil condition’.

II. Territory and Distributive Justice

There are two stages in Kant’s justification of possession: first, the demonstration of why we can regard ourselves as legal possessors of external things (*Besitzlehre*); secondly, showing how occupation of land to the exclusion of others can be compatible with the equality and freedom of all persons, since acquisition is always unilateral, but must nevertheless impose an obligation on all others (*Erwerbslehre*). Until a civil condition encompassing all individuals and states on the globe has been established, all acquisition must remain *provisional*, meaning that the conditions for its *complete* normative justification have not yet been satisfied. ‘Provisional’ therefore means not ‘temporary’ or ‘transitional’ but in *expectation of (in Erwartung auf)*⁸ a state of affairs that lies in the future; ‘provisionality’ thus signals that the conditions under which acquisition can be fully justified have not yet been achieved, but that acquisition must nevertheless be regarded as binding *now*. Since a *complete* civil condition does not exist, Kant introduces a permissive law (*lex permissiva*) that confers upon individuals a *power* to bind others that they would otherwise not have.⁹ I will argue that territorial rights arise with the establishment of the civil condition over an area in which individuals had previously acquired parts of land and later ‘unified their wills’ under a common public authority. Although this sounds similar to Locke’s account of territorial rights, Kant conceives the relationship between private property and territorial rights in an unprecedented way. In the General Remark B in the Rights of States section of the *Doctrine of Right*, Kant asks: ‘Can the sovereign (*Beherrscher*) be regarded as the supreme proprietor (*Obereigentümer*) (of the land) or must he be regarded only as the one who has supreme command over the people by law?’ (*MS* 6:323). In other words: is the national territory the private property of the sovereign or does the sovereign have only political authority over the people? It is important to note that Kant uses the word *Obereigentümer* (highest proprietor) as opposed to *Besitzer* (possessor), which is used throughout the *Doctrine of*

Right to designate someone who has acquisition in the state of nature:

Since the land is the ultimate condition that alone makes it possible to have external things as one's own, and the first right that can be acquired is to possession and use of such things, all such rights must be derived from the sovereign as *lord of the land*, or better, as the supreme proprietor of it (*dominus territorii*)...This supreme proprietorship is, however, only an **idea of the civil union** that serves to represent in accordance with concepts of right the necessary union of the private property of everyone within the people under a general public possessor, so that determination of the particular property of each is in accordance with the necessary formal principle of *division* (*Einteilung*) (division of land), instead of with principles of *aggregation* (which proceeds empirically from the parts to the whole).¹⁰

In eighteenth-century Europe, landlords had jurisdictional rights over the areas they possessed. Kant reinterprets this scenario from the perspective of *Vernunftrecht* (Right as derived from reason). Jurisdictional rights follow from the rational idea of the civil union, not from private possession of land. The sovereign (a public person) can no longer hold land as her private property. Only private persons can be property owners. This is because, in case of a dispute, the sovereign would need a higher instance to appeal to, and would therefore no longer be the sovereign, the highest instance with the public authority to settle territorial disputes. A sovereign who possessed private property would be by definition a private person. In contrast, the role of a public person is to settle disputes about private rights.

Possession of land by the sovereign would also be a threat to the freedom of subjects. A sovereign who regarded herself as the proprietor of all land would be reducing subjects to mere serfs (*glebae adscripti*), deprived of the freedom to be possessors of land and dependent on the landowner for their subsistence. Kant therefore stresses that possession of land should be the privilege of individuals, who can then agree to hold the land in common or to make it a public good, if they wish,¹¹ and that the territory belongs to the people taken *distributively, not collectively*. This claim is not an explanation of how territories evolved historically, but of how we should conceive the relation between subjects and political authority with regard to the national territory, given the fundamental

rational requirement to respect the equal external freedom of all within that territory.

The idea of 'symbolic' supreme proprietorship by the sovereign plays a crucial function for individual private property: it makes distributive justice possible by unifying the private possessions of individuals under a public 'proprietor'.¹² As Kant puts it, the supreme proprietor makes 'a formal division of the land' (*Boden*) possible via the idea of unification of possessors' wills, in contrast to a mere empirical aggregation of the individual possession of each (from the parts to a whole). The property of individuals is thus not *aggregated* but *unified* into a system through a formal principle. Supreme proprietorship of land by the sovereign is thus a *rational idea*: the idea of bringing individual private property under the idea of civil union. This means that we no longer have private persons deciding over the possessions of other individuals, but a plurality of individuals being regulated by public authority. State rights of jurisdiction over territory follow from this unifying idea.

Lea Brilmayer and Allen Buchanan objected that property rights cannot be used to ground the metajurisdictional authority of states. This is because property rights can only be established and determined if a state already has meta-jurisdictional rights over the area. Jurisdictional authority *creates* property rights and is thus chronologically prior to them.¹³ If we have in mind statutory ownership rights (that is, a complex 'bundle of rights', whose precise incidents may differ in different societies), then Brilmayer and Buchanan are certainly correct. However, Kant's point is that *acquisition* gives rise to the normative problem that requires public authority and the rule of law. He is not defending a fully-fledged conception of ownership as a natural right,¹⁴ but is spelling out the rational conditions for the compatibility of acquisition of land and resources (which we originally had in common with everyone else on the planet) with the equal claim of everyone else to them. The dependence of property rights on meta-jurisdictional rights of a territorial state is thus no objection against Kant. No-one has ever had to wait for governments to start making use of external objects or occupy land, although they do have to wait for statutory ownership rights.

Since all obligation must be self-imposed (*omni obligatio est contracta*),¹⁵ only the united will of all has the authority to impose

an obligation on everyone else. An obligation that deserves the name and is not simply a burden imposed on me from another's will must be able to *bind* me. Bindingness or obligatory force, however, can only emerge from omnilaterality: that is from *the will of all*.¹⁶ In contrast, borders are always contingent. They emerge at specific times and places due to empirical, arbitrary factors such as geographical features and historical facts. They are a result of feeble bilateral agreements between certain parties (for instance, neighbouring groups). There is nothing inherently binding in these agreements to third parties, who were not involved in these bilateral agreements in the first place. However, there is a sense in which borders must be regarded as a necessary by-product of individual acquisition. Kant seems to follow Locke in accepting a 'proviso' for individual acquisition of land. Although it is very difficult to find a standard for determining the extent of an individual's acquisition in the state of nature, one should not assume that a single individual could, by a single unilateral act of her own, become the possessor of the whole earth. This is why Kant, invoking Hugo Grotius, mentions the reach of the cannons as a way to determine the extent of the waters of a given state ('as if the land were saying, if you cannot defend me, you cannot command me!').¹⁷ All acquisition is therefore *limited*. If individual acquisition is limited, something must be left for others; but how much? Kant implicitly seems to accept a natural limitation on individual appropriation in the state of nature as an indicator of the *extent* of one's acquisition. If a single person is not entitled to appropriate the whole planet, and something must be left to others, it follows that individual acquisition is always limited and thus inseparably connected to the idea of *borders*. Borders are thus the necessary by-product of the individual division of land that tacitly recognises the equal entitlement of others to appropriate.¹⁸

While a state can be seen as a mere 'symbolic' supreme proprietor of land in relation to its citizens from an *internal* perspective, Kant conceives the relation of states to their territory with regard to *other states* in the international arena much more strongly. At interstate level, states appear as 'moral persons' (MS 6:344), analogous to individuals possessing land. Is Kant rejecting his former claim that only individuals can privately own land (MS 6:324 II. 2–4)? Is he affirming that territorial rights are property rights of states to their territory?¹⁹

III. States as Moral Persons in the International Arena

The right of *states* in relation to one another (which in German is called, not quite correctly, the *right of nations*, but should instead be called the **right of states** (*ius publicum civitatum*) is what we have to consider under the title the right of nations. Here a state, as a **moral person**, is considered as living in relation to another state in the condition of natural freedom and therefore in a condition of constant war...In this problem the only difference between the state of nature of individual human beings and of families (in relation to one another) and that of nations is that in the right of nations we have to take into consideration not only the relation of one state toward another as a whole, but also the relation of individual persons of one state toward the individuals of another, as well as toward another state as a whole. But this difference from the rights of individuals in a state of nature makes it necessary to consider only such features as can be readily inferred from the concept of a state of nature.²⁰

In this passage, Kant seems to be adopting a strictly statist view of international relations. However, we must note that *ius publicum civitatum* simply stands for a condition of public right. Central is the idea of a plurality of individuals able to appear in the international arena as a single ‘moral person’ due to their internal ‘unification’ under common public laws. The idea of a state proper is either secondary or to be understood in a broader sense, as a civil condition of some sort. Because nations have an internal civil condition, they must be regarded as moral persons in the international domain. For the sake of convenience, I will simply talk about ‘states’ as international actors.

The idea of states as moral persons is based on an analogy between states and individuals. Kant was not the first one to regard states as moral persons. This terminology was introduced by Pufendorf, who viewed states as having two moral faculties: an intellect and a will. Because these are distinct faculties, states should have separate institutions corresponding to each moral faculty. Pufendorf’s view provided a foundation for a constitutionalist view of the state. Emer de Vattel also adopted the idea of states as moral persons, but following a different intellectual tradition: Christian Wolff’s moral perfectionism. States are moral persons that have a duty of self-interest with regard to themselves. Since

they live in society with other states, they also have certain duties with regard to them. However, international duties must be subordinated to what states owe themselves internally; the state must not neglect its duties to its own people, which must come first. In this way, Vattel extended Pufendorf's idea of states as moral persons to international relations.²¹

Kant reinterpreted the view of states as moral persons once more, and offered arguments against the primacy of domestic politics. While states are constituted by their internal civil condition and have duties towards their subjects, regulation in the international domain is seen as a *condition* for peace at internal level, not as at odds with it.²² Kant treats the territorial rights of a state with regard to other states as a higher level 'replication' of individual possession of land. Whether a single person, a group or a whole nation lays claim to a specific area, the question remains essentially the same: what makes this specific acquisition of land *permissible*, and how can it generate an obligation on others to respect it?²³

Despite the analogy between individual acquisition and the territorial rights of states, there are significant asymmetries between the two. While we can coerce individuals to leave the state of nature and enter a civil condition, Kant argues that it is not permissible to coerce states to enter an international civil condition with other states, due to the state's internal constitution (*Verfassung*)²⁴ and the original contract, that is the idea of the act whereby a multitude of persons can be regarded as uniting into a civil condition.²⁵ Nevertheless, in the international state of nature, states are to be regarded as the 'proprietors' of their territory.²⁶ Kant makes a similar argument for non-state peoples. The alleged good ends of European colonialists, bringing 'civilisation' to the 'lawless savages', do not entitle them to dispossess native peoples of their territory. The reason is that their first acquisition of land must be respected; any arrangements regarding their territory would require a contract.²⁷ Since it is permissible to coerce individuals (who may also be possessors of land) to enter the civil condition but not non-state peoples due to their first acquisition, one must conclude that Kant regards non-state peoples as having an original contract, even if it is not a developed rule of law with a public constitution. It is important to remember that the ideal state, the *res publica noumenon*, is an *ideal*, nowhere to be found in the physical world. The fact that many concrete political associations are still 'works in

progress' compared to the ideal republic does not disqualify them as legitimate for Kant. As he recognises in a passage of *Toward Perpetual Peace*, 'peoples, or the states representing them, can be owners of the land they inhabit. This land too is a "belonging (*patrimonium / Habe*)"',²⁸

If states are not proprietors of land, and only individuals are, why does Kant treat groups and states as proprietors of land *in regard to each other*? To answer this question, one must distinguish between two dimensions in Kant's theory of territorial rights: an internal or domestic perspective (the relation between the state and its subjects) and an external, international perspective (between states and nations). The main difference between the two is that in the first, the state of nature has been *comparatively* overcome (over a certain area), whereas an international state of nature persists. While with regard to its own subjects, a given state must be considered the 'symbolic' supreme proprietor of land, invested with jurisdictional rights but no private property, in relation to other states in the international state of nature, that same state must be regarded similarly to a private individual (a moral person), having a title to the national territory akin to individual private property. Why is this necessary? My view is that the existence of a state of nature between states is normatively significant; it is the reason why territorial rights are necessary *at the international level*. Territorial rights are not intrinsically required, but are necessary given the lack of an international juridical framework regulating the relations between civil conditions.

In Kant's theory, territorial rights play two functions: first, they enable a comparatively *omnilateral* standard for determining acquisition compared to the state of nature. Since private persons do not have the authority to decide for others and enforce their own judgements about justice, this must be done by an institution that has a public character. But this public institution is only 'comparatively' omnilateral because, strictly speaking, a civil condition will only be achieved if the whole globe is brought under lawful external relations. The borders of a state are constituted not only by its internal civil union but also by the lawless state of nature external to its territory: the limits of its jurisdiction coincide with the state's territory. This civil condition will remain relative and incomplete until the state of nature has been overcome at a global level. Although Kant at times expresses scepticism about its

feasibility, it is nevertheless the case that the requirement to leave the state of nature at international level strictly follows from his theory of acquisition.²⁹

Territorial states can be regarded as necessary ‘transitional’ steps towards a condition of global distributive justice, towards which we have a duty to strive. It is only through the relative unification of specific parts of the globe that it is possible to expand legal relations. Since original acquisition is individual and naturally entails borders, any emerging civil society will necessarily be a fragment among other emerging or isolated fragments on the globe. The expansion of the rule of the law at an international level thus presupposes states as preliminary steps. However, the original contract at internal level will impose constraints on the international expansion of the rule of law. States are not allowed to treat each other as individuals in the lawless state of nature.

IV. Territorial Rights and Political Autonomy

The uncontested value of *self-determination* or *political autonomy* is an assumption shared by different contemporary theories of territorial rights.³⁰ A common argument for territorial rights is that territorial rights promote or are required for self-determination. According to Cara Nine, ‘a general right to territory is a claim to be self-determining over some territory, even if the particular territory is not yet identified.’³¹ Similarly, Jeremy Waldron states that ‘the territorial version of the self-determination principle holds that the people of each territory have a right to work out their own constitutional, political, and legal arrangements without interference from the outside.’³² While nationalist theories tend to defend the right to self-determination on cultural identity grounds, Kantian and Lockean theories usually defend a political conception of autonomy.³³ However, all these theories agree that there is an important connection between self-determination (as a right or value) and the justification of territorial rights.

Kant’s idea of states as ‘moral persons’ in the international domain, which precludes external coercion and interference in internal affairs as well as the acquisition or annexation of another state, seems to indicate that he also endorsed self-determination as a political ‘end in itself’. I have argued elsewhere that regarding

self-determination as an unconditional value would be incompatible with Kant's *exeundum* at international level (the duty to leave the state of nature in the relations between states) and the idea of a *complete* civil condition (a condition of distributive justice encompassing all states and nations of the globe).³⁴ One could argue that Kant might have considered nations and nation states as the *transitional locus* of political self-determination. The final locus would be a world republic or a world federation of republics.³⁵ The problem with this view is that it suggests that overcoming the state of nature internationally requires giving up internal sovereignty. My view is that the international *exeundum* does not entail the dissolution of internal social contracts, but the additional higher level regulation of the relations between states by international law. This does not commit us to a strongly centralised idea of world government as being the sole political authority; just as individuals do not 'disappear' as persons when they enter the civil condition with each other under a state, states need not be dissolved as moral persons because they agreed to leave the international state of nature. I imagine here an international federalist model in which states are subordinated to international institutions with coercive powers, but retain internal sovereignty and the regulation of their own regional affairs.³⁶ The idea of an international rule of law would require that states' internal laws be *coordinated* and made *compatible* with international laws. This ideal has been, to a limited extent, realised within the European Union. However, such a vision requires political will, since states as moral persons must voluntarily *agree* to bind themselves by international laws and sanctions.

Kant understands political autonomy along the lines of moral autonomy, that is as self-determination in accordance with laws of reason, and not as lawless independence. The rule of law can be regarded as self-imposed not because it arises from the actual will of a certain group,³⁷ which would be a voluntaristic conception of self-legislation. The rule of law can be seen as self-imposed because it is commanded by reason *and* has been consented to. Freedom is never possible in a state of lawlessness. Therefore, true political autonomy is necessarily global, not vicarious. Just as reason is universal, the rule of law must be global in scope. Therefore, Kant holds a different conception of political autonomy to contemporary theories of territorial rights. Political autonomy excludes domination by other states but does not entail that states should

not be bound by external laws. We should therefore not confuse state interference in the affairs of another state with constraints imposed by international laws aiming to overcome the juridical vacuum at inter-state level. The primary goal of Kant's theory of territorial rights is not the protection of internal sovereignty per se, but the rational requirement to make private property compatible with the axioms of pure Right (*Recht*). This requirement can only be satisfied by the implementation of a global rule of law. Territorial rights play an important role in this development, but for other reasons than usually assumed.

Private property must be compatible with the freedom of all, and be able to impose an obligation on everyone to respect the acquisitions of the *beati possidentes*. Private property thus requires the united will of all, meaning the will of everyone on the face of the planet, including future generations. Elsewhere, I have argued that Kant's theory of acquisition requires the introduction of a genuine *contractualist* element in his legal theory.³⁸ Because it involves external objects and contingent, unilateral acts of appropriation, the *rational necessity* to respect an empirically contingent distribution can only arise via the *actual* consent of all possible possessors of external things. Other forms of private law that do not involve external objects, but merely the wills of the contracting parties, do not require omnilateral consent for their bindingness, since it already expresses the wills of the contracting parties, and does not involve all others. Possession of external objects, in contrast, requires the actual consent of everyone for their bindingness, including future generations.

Social contract philosophers have found different ways to circumvent or make superfluous the need for the actual consent of everyone. Kant offers his own solution to the problem of consent in classic social contract theory. This solution consists of the implementation of the rule of law as a *surrogate* to actual consent. A common constitution that is public in character and thus omnilaterally binding can be regarded as unifying the wills of all individuals and also of polities at international level. The civil condition is thus a surrogate for the actual consent required for the compatibility of private property with the freedom of all.

Kant argues that a civil condition, that is a condition with a publicly binding constitution, is equivalent to bringing about the united will of all. But private property is actually a *global*

institution; I must be able to impose an obligation on everyone on the globe to respect my acquisition. Consequently, the united will of all ‘citizens of the world’ required for the permissibility of private property will be the implementation of the civil condition at global level. But we must start somewhere. Our initial isolation in fragmented parts of the globe, lack of coordination and other contingent empirical factors will give rise to isolated *islands*, where civil conditions *in progress* will emerge.

Territorial rights are not only permitted but indeed *required* because they make it possible to ‘quantify’ the extent of acquisition within a certain, limited area.³⁹ Determining the extent of acquisition is always in relation to a certain determinate whole, of which this acquisition is a part. This means that if one can bring at least a determinate area of the surface of the earth under a lawful condition, this will be the first step towards the implementation of the rule of law and a relative condition of distributive justice. Territorial rights enable the fragmented emergence of ‘islands of distributive justice’ at international level. The borders of a polity are the limits of its moral personality.

But territorial rights also protect these fragile emerging political and juridical developments, and the people they represent. This may lead one to conclude that self-determination is the main value at stake. Borders protect the political association within them from arbitrary interference. But the main reason for the protection of the ‘internal social contract’ of polities against external coercion is the requirement that *actual consent* to the expansion of the rule of law to the relation between states be possible. While individuals in a state of nature do not have to consent to the rule of law and can be coerced into a civil condition,⁴⁰ *actual consent* plays a crucial role in international law.

While Kant stresses that coercing other states would be impermissible due to their internal constitution, he nevertheless regards the expansion of the civil condition at international level as a *duty* states and peoples ought to strive towards. Ideally, this would require a world state; but also, a voluntary federation of states would require giving up sovereignty in external relations to a certain extent, although not necessarily relinquishing internal sovereignty. Kant’s argument is not that there should be no world state but that there should be *at least* a free federation of states, as a *minimal* requirement for avoiding war.⁴¹ Kant’s discussion of

the right of nations takes into account two different perspectives: the perspective of reason and the perspective of the non-ideal, 'real world'. The latter must take into account historical and empirical factors such as the level of internal political development of states and the willingness of political actors to realise what reason requires.⁴² It is important to emphasise that Kant's arguments against the implementation of a world state are not of a *legal* character, ruling out the world republic as incompatible with Right. His concerns are instead of a prudential nature. Although the world republic is required for overcoming the international state of nature, it is nevertheless not a realistic way to actually implement the international rule of law, given the condition of international relations during his time. States were unwilling to give up external sovereignty, that is the lawless freedom to act as they see fit with regard to each other in the international domain. Kant takes this fact into account in his discussion of the right of nations, and simply assumes that states are externally independent of each other in international relations (and will want to remain like this).

Since Kant assumes the existence of sovereign, externally independent states at the international level, the implementation of the rule of law in the relation between states will require the consent of these states to any international arrangements and constraints. This calls for a voluntary federation of free states as the only permissible way to expand the rule of law to the international domain compatible with state's moral personality. Therefore, although the creation of an international condition of distributive justice is duty, it will nevertheless require the actual agreement of the members of the international community. Territorial rights are thus necessary from an international perspective because they enable and protect the possibility of consent to international law. Territorial rights are thus a function of states' external sovereignty with regard to each other, necessary if states must be able to consent to the international rule of law.

V. Conclusion: Kant's Legal Theory and the Territorial Rights Debate

In this chapter, I have reconstructed Kant's theory of territorial rights, taking into account systematic aspects of Kant's legal

theory. I will now sketch some possible contributions of Kant's legal theory to contemporary debates.

As Cara Nine explains, 'any articulation of the concept of territorial rights must include an account of *who* and of *what*. *Who* is qualified to hold territorial rights? *What* is a territorial right?'⁴³ Kant's legal theory can provide an alternative answer to the question concerning the *bearers of territorial rights*. I argued that this question can be answered from different perspectives: from an internal or from an external perspective.

Holders of territorial rights can be states and groups but not individuals (considered distributively), since the bearers of territorial rights must be able to impose an obligation on everyone else to respect the laws imposed over the territory (internally) and territorial borders (externally). This requires a social contract and public authority. Different perspectives arise in relation to the different levels of state of nature.

If we adopt an internal perspective (intra-borders), what counts are the 'borders' of individual acquisition. The state functions as a 'symbolic' meta-owner of land, but has no real private ownership of the territory. The jurisdictional authority of the state arises from the *unification* of individual acquisition of land under a common, public authority. This 'synthesis' of the manifold of individual acquisition under public authority (to echo the terminology of the first *Critique*) is what gives rise to the authority to determine the extent of acquisition; lacking such an omnilateral representative institution, we have individuals in a state of nature with regard to each other. In contrast, because there is no civil condition between states, states' relationship to their territory must be regarded analogously to landowners. Although their territory should be respected internationally, occupancy of territory is only normatively complete through the implementation of international law. Kant thus transfers the duty to leave the state of nature to the international level, where there is also the need to establish public authority to decide territorial conflicts.

Kant's legal theory offers an alternative to the view that territorial rights are primarily about protecting internal self-determination. National or collective self-determination is often taken for granted in contemporary debates. I have argued that a strong conception of self-determination would be incompatible with the requirement in Kant's legal theory to expand the rule of law beyond national

borders. Interestingly, Kant *defends* the internal contract of nations against external interference, but the reason for this is not some non-instrumental, absolute value given to political self-determination. The state's occupation of territory imposes on them a duty to make their occupation of space compatible with the equal freedom of other 'moral persons'. The primary concerns in Kant's legal theory are thus external freedom and the rule of law. These have a global scope and go beyond territorial states.

Kant's legal theory also offers an alternative understanding of the view that territorial rights are about the enforcement of justice within a given territory. Although the enforcement of justice is a primary task of states, the state in Kant's legal theory is not a Nozickean service provider or security agency. From the perspective of reason, political representation primarily functions as a *surrogate* for the actual consent of individuals to respect acquisition and exclusive possession. Following the requirement that all obligation must be self-imposed (*omnis obligatio est contracta*), the idea of a 'union of all wills' under the civil condition is what gives rise to the obligation to respect the acquisition of individuals and states, and the public authority to adjudicate in matters of right. In this way, there is no list of minimal requirements that states must be able to enforce, such as the protection of human rights,⁴⁴ in order to be entitled to their territory, as suggested by Stilz. Who would have the authority to decide who has territorial rights and who does not? Who would enforce this verdict? The focus of Kant's legal theory is instead the possibility of improvement and progress through gradual reforms and international agreements.

Finally, Kant offers a reinterpretation of the relationship between *individual property and territorial rights*, without reducing the one to the other. Several territorial rights theorists are unanimous in their rejection of an identification between or reduction of territorial rights to property rights. Territorial rights are *not* property rights. In this chapter I have attempted to show that the relationship between both concepts in Kant's legal theory is complex and that they are deeply connected. Acquisition imposes a problem that the rule of law alone can solve: obligation must be self-imposed and omnilateral, and yet acts of acquisition are unilateral and contingent. Territory is a *relative* civil condition and territorial rights signalise that the state of nature still persists at inter-state level. Kant's theory of acquisition is thus the foundation of the

international *exeundum* and of territorial rights, but not in the way one may have expected.

Notes

- 1 Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015), p. 93.
- 2 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); Anna Stilz, 'Why Do States Have Territorial Rights?', *International Theory*, 1/2 (2009), 185–213; Jeremy Waldron, 'Two Conceptions of Self-Determination', in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 397–413. Lea Ypi, 'A Permissive Theory of Territorial Rights', *European Journal of Philosophy*, 22/2 (2014), 288–312. In contrast to other Kantian theories, Ypi offers an approach that takes into account the provisional character of territorial rights and the role of permissive laws in Kant's legal theory.
- 3 MS 6:261. Kant's works are cited according to the volume and page numbers of the Academy edition of Kant's works (Akademie Ausgabe, 1900ff). Unless stated otherwise, all translations are taken from Mary J. Gregor, *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1996). Abbreviations are as follows: IAG: *Idea for a Universal History with a Cosmopolitan Intent / Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*; MS: *The Metaphysics of Morals / Die Metaphysik der Sitten*; ZeF: *Toward Perpetual Peace / Zum ewigen Frieden*.
- 4 I discuss the relationship between possession of land and possession of objects in my article 'Common Possession of the Earth and Cosmopolitan Right', *Kant-Studien*, 107/1 (2016), 160–78.
- 5 Allen Buchanan, 'The Making and Unmaking of Boundaries: What Liberalism has to Say', in Margaret Moore and Allen Buchanan (eds), *States, Nations and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003), p. 233.
- 6 As Cara Nine puts it, property rights give the holder control over the use of and benefits from an object. In contrast, territorial rights give the right holder the power to establish justice within a certain geographical area: Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press 2012), pp. 12–13. My point in this chapter is not to refute the claim that territorial rights are not private property, but to show that there can be important normative connections

between the two concepts beyond the fact that territorial rights can protect and enable ownership.

- 7 Moore, *A Political Theory of Territory*, p. 89.
- 8 MS 6:265.
- 9 MS 6:247.
- 10 MS 6:323–4; my emphasis.
- 11 MS 6:251.
- 12 Distributive justice in Kant's theory (*iustitia distributivae*) does not mean the socially just redistribution or allocation of resources, but the authority to settle disputes and determine the extent of possessions if required.
- 13 Lea Brilmayer, 'Consent, Contract and Territory', *Minnesota Law Review*, 74/1 (1989), 1–35, and Buchanan, 'The Making and Unmaking of Boundaries', pp. 231–61. See also the discussion in Nine, *Global Justice and Territory*, pp. 11–13.
- 14 Cf. Kenneth Westphal, 'Do Kant's Principles Justify Property or Usufruct?', *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, 5 (1997), 141–94.
- 15 Immanuel Kant, *Vorarbeiten Metaphysik der Sitten. Erster Teil, Metaphysische Anfangsgründe der Rechtslehre* (preparatory notes to *The Metaphysics of Morals: First Part, Metaphysical Foundations of the Doctrine of Right*), 28:219.
- 16 I developed this idea in my 'Private Property and the Possibility of Consent: Immanuel Kant and Social Contract Theory', in Larry Krasnoff, Nuria Sanchez Madrid and Paula Satne (eds), *Kant's Doctrine of Right in the Twenty-first Century* (Cardiff: University of Wales Press, 2018), pp. 29–45.
- 17 MS 6:343–4; my emphasis.
- 18 This idea is suggested by Joachim Hruschka, *Kant und der Rechtsstaat und andere Essays zu Kants Rechtslehre und Ethik* (Freiburg and Munich: Karl Alber Verlag, 2015), p. 87.
- 19 I take Kant to be saying that only individuals can acquire land *originally* (for the first time), and not that only individuals can possess land, as opposed to groups and states. Kant's point seems to be that all first acquisition must be individual, and that other property arrangements must be seen as derived from that original acquisition. This point becomes clear in his criticism of a primeval communism of land, which must be understood as adventitious (*gestiftet*), that is as *derived* (MS 6:251, 258, 262).
- 20 MS 6:343–4; my emphasis.
- 21 Ben Holland, 'The Moral Person of the State; Emer de Vattel and the Foundations of International Legal Order', *History of European Ideas*, 37 (2011), 438–45.

- 22 IAG 8:24.
- 23 See Hruschka, *Kant und der Rechtsstaat*, pp. 73–4.
- 24 Does Kant mean that only constitutional states are moral persons, or does he regard any form of political association as deserving such a status?
- 25 MS 6:315.
- 26 See B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), p. 123.
- 27 MS 6:264–6.
- 28 ZeF 8:344, ll.17–18.
- 29 ZeF 8:367. It is important to stress that Kant's sceptical argument is about the implementation of a *universal monarchy*. He does not consider other possible international institutional arrangements.
- 30 Waldron, 'Two Conceptions of Self-Determination'; Stilz, 'Why Do States Have Territorial Rights?'; Anna Stilz, 'The Value of Self-Determination', in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy: Volume 2* (Oxford: Oxford University Press, 2016), pp. 98–127.
- 31 Nine, *Global Justice and Territory*, p. 3.
- 32 Waldron, 'Two Conceptions of Self-Determination', p. 407.
- 33 For a criticism of Neo-Kantian attempts to argue for territorial rights on the basis of self-determination, see David Miller, 'Neo-Kantian Theories of Self-Determination: A Critique', *Review of International Studies*, 42/5 (2016), 858–75.
- 34 Alice Pinheiro Walla, 'Global Government or Global Governance? Realism and Idealism in Kant's Legal Theory', *Journal of Global Ethics*, 13/3 (2018), 312–25.
- 35 I owe Ruhi Demiray this and other insightful suggestions and objections to the views developed here.
- 36 I thank Arthur Ripstein and Cara Nine for pressing me to be clearer on this point.
- 37 See Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge: Cambridge University Press, 2012), p. 112, for the view that consent plays a stronger role in Kant's late theory than in his earlier works.
- 38 Pinheiro Walla, 'Private Property and the Possibility of Consent: Immanuel Kant and Social Contract Theory'.
- 39 MS 6:266: 'The indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve. Still, there must be some original acquisition or other of what is external, since not all acquisition can be derived. So this problem cannot

be abandoned as insoluble and intrinsically impossible. But even if it is solved through the original contract, such acquisition will always remain only provisional unless this contract extends to the entire human race.’ My emphasis.

⁴⁰ MS 6:312.

⁴¹ Georg Geismann, ‘Kants Weg zum Frieden. Spätlesung von Seels “Neulesung” des Definitivartikels zum Völkerrecht’, in Hariolf Oberer (ed.), *Kant. Analysen – Probleme – Kritik: Bd. III* (Würzburg: Königshausen Neumann, 1997), pp. 333–62.

⁴² Georg Cavallar, *Die Europäische Union – von der Utopie zur Friedens- und Wertegemeinschaft* (Münster: LIT Verlag, 2006). See also Pinheiro Walla, ‘Global Government or Global Governance?’.

⁴³ Nine, *Territory and Global Justice*, p. 6.

⁴⁴ This is not to say that human rights should not be protected and that states should not provide security and public services. The point is, rather, that these cannot be criteria for the legitimacy of territorial rights. Stilz’s approach derives the legitimacy of territorial rights from the legitimacy of states. The consequence would be that only well-functioning, minimally just liberal states would be entitled to their territory, a conclusion Kant would certainly not accept.