



A Permissive Theory of Territorial Rights*

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Abstract

This paper explores the justification of states' territorial rights. It starts by introducing three questions that all current theories of territorial rights attempt to answer: how to justify the right to settle, the right to exclude, and the right to settle and exclude with reference to a particular territory. It proposes a "permissive" theory of territorial rights, arguing that the citizens of each state are entitled to the particular territory they collectively occupy, if and only if they are also politically committed to the establishment of a global political authority realizing just reciprocal relations. The paper is developed by introducing some key features of my permissive theory and by explaining how such an account addresses the questions of settlement, exclusion and particularity in ways that significantly improve on existing rival accounts (most prominently: acquisition theories, legitimacy-based theories and nationalist theories).

Territory is contested. It is both contested from the inside, when secessionist movements and autonomist groups threaten to disrupt the continuity of states' boundaries and from the outside, when foreigners attempt to enter a country or when other states and non-state actors raise claims to the territory's natural resources.¹ Territory is also immensely important. Human beings are both socially and spatially situated.² The state's ability to exercise territorial rights protects individuals from external threats, creates opportunities for political participation and shapes the geographical space in which citizens can lead their lives on the basis of reliable institutional expectations. But what exactly justifies states' territorial rights?

¹ For one analysis of territorial rights in relation to secession see Lea Brilmayer, "Secession and Self-Determination," *Yale Journal of International Law* 16, no. 1 (1991). and Allen Buchanan, *Secession: The Legitimacy of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder CO: Westview Press, 1991). For migration and territorial rights see Mathias Risse, "Common Ownership of the Earth as a Non-Parochial Standpoint: A Contingent Derivation of Human Rights," *European Journal of Philosophy* 17, no. 2 (2009). For resource use see Leif Wenar, "Property Rights and the Resource Curse," *Philosophy and Public Affairs* 36, no. 1 (2008).

² On the importance of territoriality for human life see Robert David Sack, *Human Territoriality : Its Theory and History* (Cambridge: Cambridge University Press, 1986).

One way of addressing the issue is by interrogating the past: a people's historical entitlements to the land they presently occupy, the attachments they have developed to each other, or the institutions they have jointly established. One arresting concern with that account is being able to find a single state whose citizens could claim a clean historical title; a single group of people whose presence in a specific territory does not involve arbitrary dynastic arrangements, acts of theft and usurpation of land, or war against particular groups of the population.

Another way of proceeding is by considering the present. But suppose we can create a perfectly just state by simply occupying others' land. If we limit our attention to the present performance of a state's institutions we may not be able to perceive what's morally problematic about the way they come about.

Existing theories of territorial rights seem caught between those two conflicting sides: either they deliver primarily past-oriented principles or they deliver primarily present-oriented ones. An alternative way of proceeding might be to elaborate a theory whose principles reflect sensitivity to the past whilst keeping in mind the necessity of ongoing obligations. This is what I propose to explore in this paper, and to do so by outlining what I shall call "a permissive theory of territorial rights".

This theory owes much to Kant's account of political obligation and his related analysis of cosmopolitanism. Both questions have been widely discussed in other contexts. However, an attempt to consider their application to issues of territorial rights is long overdue.³ This paper explores some features of the Kantian theory in order to reconstruct a so far largely missing alternative conception of territorial rights, to illustrate how it differs from other views (most prominently: acquisition theories,

³ One possible exception is Anna Stilz, "Why Do States Have Territorial Rights?," *International theory* 1, no. 2 (2009). However, as it becomes clear in what follows, Stilz's use of Kant is more in line with legitimacy-based accounts than with the permissive theory developed in this paper.

nationalist theories and legitimacy-based theories) and to emphasize its distinctive take on issues of state justification and territorial adjudication.⁴ In the end, even readers who might be only partially convinced by the permissive theory of territorial rights developed in this paper will hopefully agree that it represents a distinctive account worth articulating.

The paper proceeds as follows. Section I introduces permissive principles. Section II explains what I mean by “territorial rights” and introduces three questions that all current theories of territorial rights appear to face: justifying the right to settle, justifying the right to exclude and justifying the right to settle and to exclude with reference to a *particular* territory. Section III starts with some basic premises shared by all existent theories of territorial rights in order to introduce the key components of the permissive account. Sections IV, V, VI each consider in more detail the three issues introduced above and explain how a permissive theory of territorial rights might help us address the question of settlement, the question of exclusion and the question of particularity. Section VII examines some objections. Section VIII concludes.

II.

To understand what is at the heart of the permissive theory of territorial rights, it pays to start with an example which might help us familiarize with the idea of a permissive principle. Take the case of a very conscientious environmentalist NGO, whose members have made a joint decision to never travel by plane for environmental reasons. Suppose

⁴ The spirit of the enterprise is therefore not merely exegetical. Elsewhere I have offered some detailed textual discussions of Kant’s theory of political obligation, in particular as it relates to cosmopolitan right, see Author 1.

that at some point they are invited to explain their reasons to a meeting in which environmentally-relevant decisions regarding the reduction of travels by plane might be taken. Suppose further that at the time of the meeting the only way for them of reaching the location of the meeting is actually taking the plane. At this point, they adopt a permissive principle. Such principle authorizes them to suspend the prohibition of not taking the plane, for purposes of attending a meeting which will promote the reduction of plane travels. The permissive principle contingently suspends at T1 the principle to “not- Φ ”, if the action of Φ -ing contributes to establishing a state of affairs in which the principle of “not- Φ -ing” is promoted. It may be possible however, that if the meeting were to succeed in reducing plane travels, other ways of reaching certain locations will be possible in the future. Hence, at T2, the permissive principle would cease to apply.

A permissive principle is therefore both conditional and provisional. It is conditional because it authorizes an action otherwise incompatible with a certain principle, subject to its contributing to a state of affairs through which that principle is promoted. And it is provisional because the state of affairs that permissive principles justify is not peremptory: it is only there for as long as the end in the light of which the permission was initially introduced is not fully realized.

This explanation takes us closer to the Kantian definition of permissive laws.⁵ A permissive law, according to Kant, is “necessitation to an act such that one cannot be necessitated to do it” (8: 348; 321 fn). This apparently obscure definition is meant to

⁵ There is a discussion in the Kantian literature on whether the best translation for “Erlaubnisgesetz” is permissive “principle” or “law”. Kant’s use of the Latin “lex”, indicates that the term “law” might be appropriate. Here, however, I shall ignore that controversy and follow Mary Gregor in using both “principle” and “law” as they appear in the relevant translations. References in the text are to the volume and page numbers of the German Academy edition, followed by page numbers of the Cambridge edition of the works of Kant, in particular Immanuel Kant, *Practical Philosophy*, ed. M. Gregor (New York: Cambridge University Press, 1996).

introduce a third kind of norm (in addition to commands and prohibitions) required to exceptionally justify acts that we would ordinarily consider incompatible with principles of right. The Kantian idea that an action is incompatible with principles of right if it cannot coexist with everyone's freedom in accordance with universal law (6: 231; 387) has already been discussed at length by other authors.⁶ What bears emphasis here is the relationship of this definition to permissive principles, i.e. their employment to assess normatively relevant circumstances in which a course of action incompatible with the idea of equal freedom is pursued.⁷ Much of my analysis in this paper will focus on what these normatively relevant circumstances might be. However, it is important to insist that permissive principles justify states of affairs incompatible with the idea of "right" only provisionally and conditionally. That is, they justify actions incompatible with principles of right, subject to a commitment to bring about states of affairs which realize the idea of equal freedom, and for as long as principles of right are not in place. A similar way of putting the question implies that it might be possible that, at T1, an action is incompatible with principles of right but justified because it is the only way through which those principles could be realized. This does not mean that the same

⁶ See, most recently, Arthur Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy* (Cambridge MA: Harvard University Press, 2009).

⁷ A pioneering analysis of Kant's *Erlaubnisgesetz* showing its relevance for the entire *Doctrine of Right* can be found in Reinhold Brandt, "Das Erlaubnisgesetz, Oder: Vemunft Und Geschichte in Kant's Rechtslehre," in *Rechtsphilosophie Der Aufklaerung*, ed. Reinhold Brandt (1982). For an account of Kant's development of the concept, also in the context of other historical analyses of permissive principles, see Brian Tierney, "Permissive Natural Law and Property: Gratian to Kant," *Journal of the History of Ideas* 62, no. 3 (2001), ———, "Kant on Property: The Problem of Permissive Law," *Journal of the History of Ideas* 62, no. 2 (2001). For a careful discussion of the systematic role of permissive principles in Kant's *Doctrine of Right* see Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000). In this paper I follow authors, such as Brandt and Flikschuh, who take Kant's definitions of permissive laws that appear in the *Doctrine of Right* and in *Perpetual Peace* to be consistent. For an argument that they are not see Joachim Hruschka, "The Permissive Law of Practical Reason in Kant's Metaphysics of Morals," *Law and Philosophy* 23 (2004).

permission is also required at T2, where other avenues might be available. Hence, permissive principles are principles of transition: they apply to past actions but not necessarily to future ones. However, they are not morally indifferent. An action that is morally indifferent does not require any special principle to be brought about.

I shall say more about permissive principles and about the circumstances in which they apply in the pages that follow. For now it is important to explain how this apparently abstract definition of permissive principles relates to the question of states' territorial rights. These territorial rights have been established during historical processes marked by political conflicts, population displacements or dynastic arrangements (eg. inheritance, exchange, transfer) which have led to an entirely arbitrary partition of boundaries. Citizens' control of specific territories reflects unilateral decisions that, as we shall shortly see, can only be provisionally and conditionally justified. Now, according to the theory developed here, states are only *permitted* to exercise territorial rights. Their citizens' acquisition and exclusive control of such territories is provisional *and* conditional upon their contribution to the full realization of the principle of right.

What exactly all this means will be clarified in greater detail shortly. But one point deserves to be mentioned at the outset. Even though throughout the paper I refer to states' obligation to create a political authority responsible for realizing the universal principle of right, I say very little about how that proposal should be empirically formulated. There are two reasons for this. The first is that the aim of the paper is more critical than constructive: it tries to illustrate what is wrong with the existing way of conceptualizing territorial rights and points to the need for answering that question from a new perspective. Hence, the permissive theory of territorial rights only explains why states have a reciprocal obligation to realize the principle of right, not where that

obligation exactly leads. Giving reasons for why a certain kind of obligation should be acknowledged is a different (and perhaps more modest) enterprise from specifying what form the institutions reflecting that obligation ought to take.

But there is also another reason for resisting the temptation to be more specific on what the universal realization of the principle of right concretely implies. Developing views on how a certain kind of political institution should look like is not just a matter of moral principle; it is also a question of contingent political judgment. To indulge ourselves in instructing citizens on what they should concretely do to reform specific political institutions, not only defies their democratic commonsense, it also threatens to issue the same kind of unilateral requirements that makes the permissive theory of territorial rights required in the first place. This, of course, does not imply that there are no moral constraints whatsoever on what kind of political authority realizing the principle of right the citizens of particular states can consistently establish, or that there is nothing we can say to facilitate their political task. We might have good reasons to insist for example that a similar global authority ought to make collective decisions with regard to some areas and not others, following some procedures (eg. democratic ones) and not others. We might also want to question the extent to which a similar political authority ought to have coercive capacity or whether states should be part of it only once they have reformed themselves in a certain direction (eg. republican one). However, providing a complete analysis of these requirements is separate from the attempt to show why the creation of a similar political authority is justified, and how that obligation lies at the heart of the permissive theory of territorial rights.⁸

III.

⁸ I have also discussed this issue in Author 1.

What is the territorial state? The term “territory” (in Latin, “territorium”) derives from the combination of the words *terra*, that is “land”, with “torium”, which means “belonging to”. The word therefore indicates the possession of a geographical unit by an agent, be it an individual, family, company or any other kind of artificial institution responsible for the use of the land (terra) and its subsequent transformation.⁹ The term “state”, on the other hand, derives from the Latin *status* and in its first, Medieval connotation, it was employed to denote both the “state” or “personal standing” of the rulers, and the “state” or “conditions” of the realm or commonwealth understood as an independent political unit.¹⁰ When the word progressively shifted meaning to the modern concept we are more familiar with, it indicated a form of institutional organization, distinct from the rulers and the ruled as well as responsible for the exercise of power in making and changing the laws of a specific unit.

The term “territorial state” is therefore linked to a collective’s exercise of political power over a geographical area through an artificial political agent such as the state.¹¹ States’ territorial rights can be understood with reference to a threefold

⁹ P. J. Taylor, *Political Geography: World-Economy, Nation-State, and Locality* (London: Longman, 1985), 95-140. The issue is, however, contested. Some argue that if the term really derived from “terra”, the Latin derivation should read “terratorium”, not “territorium”. An alternative explanation claims that the word might in fact derive from “terrere”, that is to frighten, to terrorize, which in turn implies that “territory” is “a place from which people are frightened off, or warned”. Interestingly enough, here the etymology of territory would come closer to the etymology of “terrorism”. For more on this issue see David Delaney, *Territory: A Short Introduction* (Oxford: Blackwell, 2005), 14. and Thomas Baldwin, “The Territorial State,” in *Jurisprudence: Cambridge Essays*, ed. Hyman Gross and Ross Harrison (Oxford: Oxford University Press, 1992), 209-10.

¹⁰ Quentin Skinner, “The State,” in *Political Innovation and Conceptual Change*, ed. T. Ball; J. Farr; R. I. Hanson (Cambridge: Cambridge University Press, 1989).

¹¹ For some authors the relationship of the geographical territory to the state is somewhat similar to the relationship of a property-owner with the territory that is in his property (see for example John A. Simmons, “On the Territorial Rights of States,” *Philosophical Issues*, no. 11 (2001).; Hillel Steiner,

relationship between a bounded geographical area (the territory of the state), the people controlling the land (i. e. citizens in their capacity as both the rulers and ruled) and the institutions through which their control of the land is exercised.¹² In order to understand why states have territorial rights theorists therefore attempt to answer three questions. Firstly, what justifies citizens' entitlement to occupy a bounded area of geographical space? Call this the question of settlement. Secondly, what justifies their right to permanently control the territory? Call this the question of exclusion. And thirdly, what explains their ability to settle in and exclude others from a *specific* piece of territory? Call this the question of particularity.

Different theories of territory have different ways of addressing these concerns. In what follows I shall not examine in detail these theories but only refer to them as a

"Territorial Justice," in *National Rights, International Obligations*, ed. Simon Caney, D. George, and Peter Jones (Boulder CO: Westview Press, 1996). Others insist that while property rights relate to the ability of agents to control (use, exchange, transfer etc.) the resources in their power, states' territorial rights include also rights to jurisdiction (i.e. rights to create and enforce legal rules within that specific territory) and meta-jurisdictional authority (i.e. capacity to modify the boundaries of jurisdictions). For discussions see Lea Brilmayer, "Consent, Contract and Territory," *Minnesota Law Review* 74, no. 1 (1989), Allen Buchanan, "Boundaries: What Liberalism Has to Say," in *States, Nations, and Borders: The Ethics of Making Boundaries*, ed. Allen Buchanan and Margret Moore (Cambridge: Cambridge University Press, 2003), 232-61, Cara Nine, "A Lockean Theory of Territory," *Political Studies* 56, no. 1 (2008), Stilz, "Why Do States Have Territorial Rights?." It is worth noticing how all these authors agree that, to some extent, the claims of public authorities to jurisdiction over the territory share some problems with the claims of individual property-owners, in particular as regards exclusive use of resources and control of outsiders. Although Kant also refers to the sovereign as a "supreme proprietor (dominus territorii)" (6: 324; 466), he clarifies that the sovereign has no land of its own and that the idea of supreme proprietorship is equivalent to that of a civil union that assigns to each what is his, consistently with principles of right. It is therefore possible to illustrate some of the problems with existing theories of territorial rights without placing too much emphasis on the analogy between the state and an individual property owner and by simply focusing on the conditions under which a collective political body can exercise jurisdiction over a specific geographical area, compatibly with principles of equal freedom.

¹² For a similar characterization see also Simmons, "On the Territorial Rights of States." and David Miller, "Territorial Rights: Concept and Justification," (unpublished manuscript 2009).

point of comparison with my own account, especially when it comes to answering the three questions raised above. The starting premises are intended to be ecumenical and appeal to normative assumptions that all existent theories of territorial rights should find uncontroversial. These premises are then further developed in ways that allow us to perceive the distinctive appeal of the permissive theory of territorial rights.

IV.

In asking why states have territorial rights at all, it pays to start with a thought experiment. Imagine the universe as initially unaffected by territorial claims. Its resources are fully available for use to all human beings and anyone's claim to freely be in a particular piece of territory is as good as that of anyone else. The rationale for the thought experiment is fairly clear. The transition to a stage in which agents enjoy exclusive control rights over certain areas and against certain people follows a stage in which everyone in the universe is free to be in these areas. If we want to explain how *X* becomes a function of *Z* we need to imagine a counterfactual situation in which *X* is *not* a function of *Z* and then try to understand the change. For this reason, to say that something is available for "use" is significantly different from saying that it is "owned" in common.¹³ In the first case the assumption is needed only as a heuristic device, to understand how it is that something that everyone could initially use becomes something that some agents exclusively control.¹⁴ But what justifies the transition from a stage in which agents can freely inhabit and use any area of the earth to one in which they settle and exclude others according to specific jurisdictional boundaries?

¹³ For an argument that links territorial rights to common "ownership" see Risse, "Common Ownership of the Earth as a Non-Parochial Standpoint: A Contingent Derivation of Human Rights."

¹⁴ I have discussed this issue in greater detail in Author 2.

Most theorists of territorial rights would endorse (or at least not reject) the starting premises of this thought experiment. They would also agree on the relevance of the question that follows from them. However, their understanding of the conditions under which particular agents can claim territorial rights over particular pieces of the earth is strikingly different. So, for example, acquisition theorists consider territorial rights a derivative of agents' (be them individuals or collectives) property rights in the land.¹⁵ Nationalists emphasize the material and symbolic value of the land for its inhabitants and the kind of cultural and political attachment they develop to it.¹⁶ Legitimacy-based theories insist on the institutional opportunities that states make available to their own citizens, i.e. the establishment of a rightful political order, respect for basic rights, creating opportunities for political participation, and so on.¹⁷ The permissive theory of territorial rights outlined below shares some features with all of these theories. However, it differs with respect to two crucial dimensions.

The first has to do with the unit of justification. In all current theories of territorial rights justification is mainly constructed with reference to the claims of agents within the state (or the nation): property owners in the case of the acquisition account; members of particular ethnic groups or nationalities in the case of nationalist accounts; citizens in the case of legitimacy-based accounts. In asking why states have territorial rights, the relationship between the state and these agents takes normative priority. Alternatively, in the permissive theory of territorial rights, the unit of

¹⁵ For developments of the individualist version see Steiner, "Territorial Justice.", Simmons, "On the Territorial Rights of States.", for collectivist interpretations see Nine, "A Lockean Theory of Territory.", Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005).

¹⁶ Miller, "Territorial Rights: Concept and Justification.", Meisels, *Territorial Rights*, Margaret Moore, "The Territorial Dimension of Self-Determination," in *National Self-Determination and Secession*, ed. Margaret Moore (Oxford: Oxford University Press, 1998).

¹⁷ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), Stilz, "Why Do States Have Territorial Rights?." see also Jeremy Waldron, "Special Ties and Natural Duties," *Philosophy and Public Affairs* 22, no. 1 (1993).

justification is universal both across space (it extends to the citizens of other states and to stateless people) and across time (it extends to future generations). I shall return to this in the following pages.

The second difference has to do with the nature of justification. In all the theories mentioned above the justification of territorial rights is conclusive: once the conditions under which states are entitled to particular territories have been established, their claims to such territories are secure and binding. By contrast, in the permissive theory outlined here, states' claims to particular pieces of territory are justified only conditionally and provisionally. States can exercise territorial rights if and only if their citizens are also politically committed to the establishment of a global authority realizing an all-inclusive principle of right. This is where the permissive account of territorial rights follows Kant's justification of political obligation and his analysis of cosmopolitanism. Much more needs to be said in order to understand firstly, why these collective obligations are required and, secondly, how exactly they are supposed to work. As already mentioned, this paper engages mostly with the former question. To get a clearer grasp of the problem, we need to start by closely examining how the Kantian theory might help us understand the right to settle, the right to exclude and the rights to settle and exclude with regard to a particular territory.

V.

Let us start with the right to settle. Settlement, according to the Oxford English dictionary, is the "placing of persons or things in a fixed or permanent position".¹⁸ The

¹⁸See

http://dictionary.oed.com/cgi/entry/50221032?query_type=word&queryword=settlement&first=1&max_to_show=10&single=1&sort_type=alpha

definition already directs us to the idea that part of understanding why states have territorial rights requires explaining why their citizens have a right to settle, i.e. permanently stay in the territory defined by the boundaries of the state. This in turn requires analyzing, firstly, how their citizens have a right to permanently stay in a certain area of geographical space and, secondly, how they relate to each other in doing so.

Let us start with the first. How should we understand the entitlement to permanently make use of a certain thing, in this case a particular area of geographical space and all of its resources? Answering this question requires us to lay down the conditions under which an agent is free to establish a certain special relation with that area, a relation that would allow him to claim the land and its resources *as his* on an ongoing basis. But this clearly requires going beyond our contingent, physical, mode of relationship to external things. For a coat to be considered *permanently* mine, I do not need to be wearing it at all times. For a piece of land to *permanently* belong to a farmer, he need not be catering for it at all times. But how can I be sure to have permanent access to a coat even if I am not presently wearing it? And how can the farmer be sure to have permanent access to a piece of land, even if he has left it provisionally unattended?¹⁹ Tackling the issue of what justifies settlement requires focusing on the conditions under which an external object is guaranteed to be available and promote my ends. This amounts to clarifying both how an agent A can establish a lasting relationship with external things (how he comes to *acquire* them in the first place) and how another agent B can refrain from claiming access to those things even if A is not

¹⁹ In the Kantian debate this distinction is related to that between physical and intelligible possession, and to the postulate of right that is developed from that distinction. I shall not explore it here, but see Katrin Flikschuh, "Kant's Indemonstrable Postulate of Right: A Response to Paul Guyer," *Kantian Review* 12 (2006).

physically present (how they can be permanently maintained). Explaining permanent access therefore consists of two elements: relationship of agents to external things (acquisition) and relationship of agents to other agents. Even if, as we shall shortly see, the former element turns out to be normatively secondary, it is important in order to explain agent's special relation to physical things from a subjective perspective.

So let us start with *acquisition*. The first acquisition of an external object, Kant says, can only be the acquisition of the land (6:261; 414). This is because land constitutes the physical space upon which all other movable objects are placed. As he argues following Aristotle, just as in a theoretical sense accidents cannot exist apart from substance, so in a practical sense no one can have what is movable on a piece of land permanently as his, unless one is assumed to be in rightful possession of the land (6: 262; 414).

One might find this claim slightly puzzling. Do I need to possess the street on which the car is parked in order to possess the car? Does understanding people's relationship to the land really need to precede our understanding of their relationship to other external things? To see this point, think about the situation of refugees. Refugees have been forced to leave their territory, and they have no guaranteed place where to stay. Their position on Earth is not secure. This renders them vulnerable to the decisions of others, and unable to set and pursue ends in a reliable manner. Consider, for example, how a first-generation Palestinian refugee who has been living for most of his life in a Syrian refugee camp summarizes the start of his experience of displacement following 1948:

We wandered around different villages; we stayed one week here and two weeks there until we were later deported to Bintjail village in the south of Lebanon. The Lebanese army picked Palestinians from the streets and transferred them to Anjar. We were among the people who were transferred to Bal'bek

and we lived there for one year. In 1950 we arrived to Syria by train. We hired a small house, but soon after our landlord kicked us out because we were too large a family to rent his property.²⁰

Or consider how another Palestinian child, a third-generation refugee, summarizes the deprivations suffered by life in a camp:

Football is my favourite game; we play in the street of our camp because we do not have a playground to practice. People in the neighbouring houses often shout at us and order us to play away from their houses. We are always scared of being hurt by passing cars.²¹

Failing to have one's place on Earth secured severely impairs individuals' ability to pursue their own ends. It deprives them of the possibility to form reliable life plans and to access opportunities necessary to promote them. Hence it seems important to address the issue of individuals' relationship to the land, before attempting to clarify their relationship to other external things.

Kant, as already anticipated, analyses this question by directing attention to initial acquisition. To understand the argument, recall our thought experiment in which the universe is freely available for use to anyone. Nature or chance brings individuals in contact with particular areas of geographical space. The spherical surface of the earth brings individuals in contact with each other. Freedom to set and pursue one's ends implies freedom to make use of the physical resources and space available. But how does an individual not just come to use land and resources as he finds them, but also use them in ways that are relevant to justify permanent access?

Kant lays out three necessary (but as we shall shortly see not sufficient) subjective conditions that ground initial acquisition. The first is that for an agent to

²⁰ See Dawn Chatty and Gillian Lewando Hundt, eds., *Children of Palestine: Experiencing Forced Migration in the Middle East* (New York: Berghahn Books, 2005), 61.

²¹ *Ibid.*, 66.

relate to an external object (including land) in a certain way, he must take control of it (occupation). The second is that he must give a sign to others that he intends to have the object (declaration). And the third is that he must act in such a way that he places everyone else under an obligation not to interfere with his objects (appropriation) (6: 258-9).

All three features of Kant's theory of property have been relatively well-explored in other contexts.²² What matters for our purposes is the way in which these criteria are set and relate to each other, especially with regard to the role of permissive principles. Kant, says that an agent can take control of the land, if he wills the land, if this land promotes some end of his and if that act of occupation has priority in time; that is to say, if the agent who expresses the will to make use of the object is the first to want to do so (6: 263; 415). But it is interesting to notice that even if, on the one hand, the agent is at freedom to acquire land in order to pursue ends in it, on the other hand, by doing so, he necessarily interferes with the ends of others. So, for example, a latecomer would be constrained in his freedom to use previously available resources, finding that the first occupier has now imposed on him an obligation to refrain from accessing the land. Thus, to say that an agent is allowed to be the first occupier implies that he is (contingently) allowed to suspend the prohibition of interfering with the ends of others. As we shall shortly see, albeit subjectively necessary this action is unilateral. Indeed, even though the agent cannot avoid "occupying" a particular area of geographical space by virtue of being free to pursue his ends there, the exclusion of others (who retain their initial equal right of use) obtains only a permissive authorization. Allowing an agent to

²² See for a recent account that also emphasizes the difference between Kant's theory of property and the Lockean accounts (for example with regard to the Kantian critique of the labour theory) Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy*, 86-106.

acquire land following the criteria specified, amounts to suspending the prohibition of interfering with other's ends only in a provisional and conditional way. Why?

Recall that we defined settlement as the placing of persons and things in a permanent position. We further argued that the justification of this act depends upon an understanding of how the possibility to control things on a permanent basis is possible. The three criteria laid out above are sufficiently strong to explain how agents can be subjectively placed in a relevant position to acquire external things; eg. how they might have a *prima facie* justifiable claim to access objects (or land) in physical space. Given their freedom to be in that area of the earth where nature has placed them, agents cannot be morally prevented from occupying it. But notice that to take possession of any portion of physical space in ways that are relevant to justify lasting possession, implies imposing on other agents an obligation to continuously refrain from interfering with their use of those natural objects. How can we justify that unilaterally imposed obligation?

If one of the conditions justifying settlement is communal use of the earth, prior occupation justifies the unilateral exclusion of others only provisionally and conditionally. It is not enough to say that settlement in the territory promotes a sufficiently important end of agents. Any lasting claim to the land requires a justification of the ability to permanently control the use of its resources *and* to force others to refrain from accessing a good (eg. the land) that the regime of communal use initially guaranteed. Therefore to understand the provisional and conditional nature of the permission to occupy a piece of land, we need to turn to the second important aspect of possession: its relational aspect. That is to say, we need to consider not just how agents can establish a lasting relationship with external things from a subjective perspective (how they come to acquire them in the first place) but how other agents can rightfully

acknowledge the obligation of refraining to access them. It thus turns out that the issue of settlement cannot be sorted out without addressing the issue of exclusion.

VI.

We emphasized that settlement through prior occupation is too weak a criterion to explain how agents can conclusively enjoy rights to permanently be in the land. One notable difficulty the strategy faces is that it only refers to the relationship of agents with external things without justifying the imposition of a unilateral obligation of abstention on other agents. Taking control of an external object (in this case, a piece of land) in ways that are relevant to justify settlement implies that the object is put in one agent's service and rendered unavailable to anybody else. If such agents are to control or derive benefits from the land in a lasting way, the exclusion of outsiders from making analogous claims seems like an essential requirement. But under what conditions can that requirement be satisfied? Who is in a position to impose the relevant obligation of abstention?

The answer here cannot be that this obligation-imposing authority lies with the agent who presently enjoys the benefits of the land. For why should this agent, simply because he is in a position to take control of external things, also enjoy the right to impose obligations of abstention on others?

Kant thinks that it is possible to overcome the *impasse* that the issue of original acquisition generates by making the authorization of unilateral possession conditional upon subjection to a collective political authority distributing rights and obligations compatible with principles of equal freedom. Kant's analysis of political obligation and

his justification of the state have already been adequately explored by others.²³ What has gone little noticed is the extension of the permissive principle at the heart of Kant's account of political obligation to the relationship between citizens of different states and the justification of their territorial claims. This cosmopolitan complement to Kant's domestic account of political obligation (in fact their interdependence) has been largely neglected in the literature.²⁴ To understand the rationale for its application we need to return to the issue of how permissive principles justify unilateral acquisition in the presence of a domestic authority.

As we already emphasized, rather than being understood as permanently justified claims that warrant agents' consent to a civil condition (as in many acquisition theories of territory) the right of individuals to settle is considered a merely "provisional" allowance, which permits agents to take control and make use of the land subject to their endorsement of political obligations realizing the principle of right. Unilateral acts of acquisition are authorized if they also entail a commitment to join a political condition in which relationships between persons (hence, indirectly, also their access to resources) are regulated by appealing to a public political authority. This implies that it is only possible to rightfully have something external as one's own if, in the very act of acquiring external resources by unilateral means, we also thereby submit to a collectively established political authority ruling in the name of all. In this way, the unilaterality of initial acquisition and the arbitrary use of exclusionary force is mitigated by the commitment to make our will consistent with others' will through collective rules of property arbitration and enforcement. The necessity of initial acquisition is understood through a provisional allowance of the unilateral right to be the first

²³ See most recently Ibid.

²⁴ For a recent discussion of the "interdependence" argument see also Katrin Flikschuh, "Kant's Sovereignty Dilemma: A Contemporary Analysis," *Journal of Political Philosophy* (forthcoming).

occupier. Yet, at the same time that first occupier is under an obligation to join a rightful political authority, where his freedom in the use of external objects is made consistent with that of all others.

Kant's justification of political obligation brings up this issue very clearly. An agent's unilateral choice, he claims, cannot coerce another agent to resist from using an external object. This would infringe that agent's freedom by imposing upon him an obligation that he would not otherwise have had. "It is only a will putting everyone under an obligation, hence only a collective, general (common) and powerful will, that can provide everyone this assurance. But the condition of being under a general external (i.e. public) lawgiving, accompanied with power is the civil condition. So only in the civil condition can something be mine and yours" (6: 256; 409).

What is the point of permitting unilateral acquisition subject to entrance in a civil condition? A public political authority vested with coercive power can overcome the unilaterality of initial acquisition if two conditions are satisfied: i) publicity; and ii) collective representation. Publicity ensures that the rules according to which external things conclusively become mine or yours are known, understood and consistently applied to everyone. Collective representation ends arbitrary infringements of individual freedom and establishes a coercive body which exercises force in the name of the united will of all. In both cases agents are only bound by laws that they themselves, not other alien agents, have contributed to jointly bring about. But notice that entrance in the civil condition is not a voluntary decision of individuals who consent to being subjected to a rightful political order. Political obligations are already inscribed in agents' enjoyment of benefits that occupancy *de facto* confers on them. Others are being wronged regardless of the agent's intentions, and that wrong ought to be redressed, even if one fails to acknowledge it as such.

These last remarks also help us explain in what way permissive principles justify unilateral acquisition (including exclusion) only if they are coupled with a commitment to join a rightful political authority. As Kant puts it, “the way to have something external as one’s own in the *state of nature* [...] has in its favor the rightful *presumption* that it will be made into rightful possession through being united with the will of all in a public lawgiving”. In the absence of this presumption, a right to having anything external as one’s own is not absolutely granted but holds only “comparatively” as rightful possession (6: 257; 410). Permissive principles are governed by collective political obligations.

We might be tempted to restrict the application of these claims to the justification of individual possession, which one might think is finalized upon subjection to a collective political authority such as the one embodied by the state. Following a similar interpretation, the state’s ability to exercise territorial rights would be justified in virtue of its ability to make and enforce rules turning the provisional holdings of its citizens into rightful property, consistently with the principle of equal freedom. But is this the end of the story?

To be sure, this is how the Kantian theory of political obligation has often been interpreted. This is, for example, how legitimacy-based accounts usually justify states’ ability to exercise territorial rights.²⁵ But the position developed in this paper is different and more radical. The point of the argument about permissibility is to emphasize that any unilateral act of settlement is always partial unless coupled with an obligation to enter into *universally* inclusive political relations. The objections raised

²⁵ See for example Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, 233-88.; Waldron, "Special Ties and Natural Duties." For a recent Kantian-inspired attempt to justify territorial rights on the basis of these criteria see also Stilz, "Why Do States Have Territorial Rights?."

above, apply both to individuals taken as such, and to individuals considered as citizens of particular states. The unilaterality of settlement remains (although in qualitatively different ways) in both cases. This means that even the private possessions of individuals within a state are not conclusively established in the absence of the commitment to universally inclusive political relations. Why?

The relational logic introduced above implies that all those who are brought together by nature and chance cannot avoid affecting one another (i.e. interfering with each other's freedom). Under these circumstances, joining a rightful political authority is obligatory; indeed it is the only condition under which permissive principles can authorize unilateral settlement. States enjoy territorial rights because they impose a public system of laws which establishes rightful conditions of co-existence between all those that nature or chance has placed next to each other. Membership in this rightful political authority is something that citizens inherit through shared political participation. But the relational logic of the argument is such that it does not cease to apply at this point. Since the Earth's surface is not unlimited but closed, Kant argues, the reciprocal influence upon each other's freedom is simply carried from one level to the next: states cannot avoid being next to each other. This is also what explains the necessity of establishing relations of right between states: citizens of different jurisdictions cannot avoid affecting each other in their use of physical space.

To claim that the citizens of different states cannot avoid affecting each other in the international sphere does not necessarily imply that they are in exactly the same position as individuals in the state of nature (although Kant does make use of the argument by "analogy" at various points). What it means is that even the possessions of individuals within the state are not conclusive unless this universal union realizing the principle of right has been established. Domestic, international and cosmopolitan right,

are interdependent rather than analogous. Or, as Kant puts it: “if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undetermined and must finally collapse” (6: 311; 455).²⁶

It is worth noticing that the reasons for this collapse are already inscribed in the prohibition that permissive principles allow us to suspend: the wrongness of unilateral acquisition and the interference with others’ freedom. A unilateral will can “justify an external acquisition only in so far as it is included in a will that is united a priori (i.e. only through the union of the choice of all who *can come* into practical relations with one another) and that commands absolutely”.²⁷ External acquisition remains provisional even after individuals have joined particular states, because the relational logic of the argument is of a *potential* not of an actually existing kind; it does not apply merely to those who *are* connected at present but also to those who *can come* into practical relations. Unilaterality is not absolved when those who come in face to face contact with each other establish a political union according to criteria that respect the equal freedom of all. A similar union continues to make decisions that place under specific obligations both those excluded in space (eg. non-members of that political association) but also those excluded in time (eg. future generations).²⁸ As Kant puts it, a bilateral (and, we might add, multilateral) but still *particular* will is always unilateral; it cannot put everyone under an obligation that is in itself contingent. This requires “a will

²⁶ For a critique of the argument by “analogy” see also Flikschuh, Katrin. “Kant’s Sovereignty Dilemma: A Contemporary Analysis.” *Journal of Political Philosophy* (forthcoming).

²⁷ My italics.

²⁸ Of course, in the case of future generations participation in democratic political decision-making might compensate for the arbitrariness of previous decisions applying to them; the same however could not be said with regard to outsiders.

that is *omnilateral*, that is united *not contingently* but a priori and therefore necessarily, and because of this is the only will that is lawgiving” (6: 263; 415).²⁹

But how exactly should we understand this obligation of the citizens of different states to enter into rightful political relations to each other? And what does the permissive theory of territorial rights have to say with regard to existing conflicting claims on how to draw territorial boundaries? To answer these questions we need to consider how the permissive theory of territorial rights responds to the third problem raised at the beginning of this paper: the particularity question.

VI.

It may be worth beginning our analysis of this question by comparing the permissive theory of territorial rights with a class of rival, but sufficiently similar, views: legitimacy-based accounts. As in the permissive theory, territorial rights are justified with reference to how the will of citizens is involved in a decision-making authority with coercive powers such as the state. In this group of theories the ability to guarantee the rule of law; to protect basic human rights; and to provide sufficient opportunities guaranteeing citizens’ democratic participation are all essential criteria to understand why the state is justified to establish and maintain jurisdiction over a piece of land. Moreover, legitimacy-based accounts are sensitive not just to what opportunities citizens make available to each other through the institutions of the state but also on how these institutions relate to outsiders. Hence, to the list of “internal” criteria, legitimacy-based accounts usually add a set of supplementary, “external” requirements. To mention but the most relevant ones, a state is entitled to exercise territorial rights if

²⁹ My italics.

it is not implicated in human rights violations outside its borders; if its citizens have a rightful claim to be in the specific territory defined by the boundaries of the state, and if the state has not come to establish territorial rights through usurpation of others' land.³⁰

But let us consider more carefully this last requirement. Its rationale is of course clear: if we only focus on the conditions that a state must presently satisfy in order to be able to claim territorial rights, we overlook the potential injustice involved in the establishment of its jurisdictional authority over a land that may have been acquired through foreign invasion. This question appears in turn linked to the particularity issue mentioned above. We must be able to explain why not just any given territory but a particular piece of land falls under the jurisdiction of any given state, in order to understand the kind of wrongdoing involved in acts of occupation of foreign lands on the part of other, perhaps internally just, states.

Yet, resolving this question reveals a tension at the heart of the legitimacy-based justification of territorial rights. Least the reasoning be circular, usurpation does not count as usurpation unless an independent reason has been given as to why people are collectively entitled to be in a particular territory and not in another. But this is also where the problem lies. If we are trying to explain what justifies territorial rights, we cannot introduce criteria (such as the non-usurpation one) that rely on territorial rights having already been justified. All that the latter argument goes to show is how boundaries could be rightfully protected and preserved once they have been established, not how they ought to be drawn in the first instance.

³⁰ See Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. For a Kantian-inspired elaboration see Stilz, "Why Do States Have Territorial Rights?."

How does the permissive theory of territorial rights help us address the particular boundary problem? Recall our observations on what provisionally justifies individual settlement, and recall the permissive principle through which we framed initial acquisition. Earlier in the paper we argued that agents are provisionally permitted to take control over any given piece of land, if they have been brought there by nature or chance, if they will the use of the land, and if they enter in a political union ruling in the name of all. To say that these agents are *prima facie* permitted to acquire a piece of land is not to say that they can lay conclusive claim to it. It is simply to emphasize that if this is coupled with a commitment to join a universal rightful political authority, theirs is an act that exceptionally suspends the prohibition of not interfering with others' ends. Individuals need somewhere to be, and they also need some way of securing their existence on earth. Taking control of land and establishing a particular jurisdiction in it is one plausible, if unilateral, way of achieving this goal. But, as we saw above, unilaterality is permitted only in virtue of what it purports to achieve: a condition where jointly framed political institutions rightfully regulate the claims of all.

What this argument suggests is that states are the kinds of institution where a first approximation to the idea of a universal union of people mutually constraining each other's freedom has been reached (to some degree). The fact that the union of individuals in states provides a first approximation to the establishment of universal rightful conditions is extremely important. For, as we shall shortly see, this fact introduces one relevant disanalogy regarding how we go about, politically, trying to shift from a condition in which rights over specific portions of territory are assigned in a permissive way to one in which they are conclusively established. But before examining the implications of this point, let us return to the particularity question. Why do states

enjoy a permission to exercise territorial rights in one specific area of geographical space rather than another?

To answer this question we can draw on our analysis of settlement as occupying a permanent place in the world. Groups of people are naturally separated from others: one reason may be geographical features, for example the fact that there is an ocean here, a river there, mountains between fields, and so on. Initially only geographical features might explain what forces certain individuals and not others to act in common within a given area. Of course as their relationships improve other commonalities might develop: they might start speaking the same language, they might share a set of practices through which they regulate life together, and so on. Nationalists may be right that this is how groups end up occupying specific areas of geographical space. Acquisition theories may be right to say that it matters if these groups collectively improve the territory and deserve to enjoy the benefits of their work. But neither argument is enough to explain how a particular portion of territory could be considered *permanently* theirs and how outsiders can be forced to stay away. Other theories, for example legitimacy-based ones, might add that only when groups of people are united in a political association similar to the one we call “state” the conditions for lasting possession are established. But again, that is no more than a first step. Entering in state-based political relations only partially absolves members of that association from the unilateral acquisition of commonly available areas of the Earth. For even if we grant that, upon entering the civil condition, external possessions within a particular political association are allocated with due consideration for the equal claims of fellow-members, the unilaterality of their acts with regard to all other agents remains unresolved.

The case of individuals constituted in states displays a similar unilaterality with regard to external acquisition as that of individuals within the state. By taking possession of a specific territory and enacting a public system of laws in it, citizens both exercise their external right to appropriate previously available land and resources and prevent these from being available to anyone else. On the one hand, their acquisition of particular territories is linked to their necessary occupation and collective subjection to a system of laws; on the other hand it is incompatible with the freedom of whoever else is outside and finds itself under a unilaterally imposed obligation of abstention. The need for a system of rights assigning to each agent what belongs to it, subject to reciprocally binding constraints is felt in the case of citizens of different states as much as in the individual one. Before that, any existing partition of the territory is only provisional and conditional at best.

One might object to this argument by saying that there is a relevant disanalogy between states' exercise of territorial rights and that of individual property rights in the state of nature. But I am not denying that. My claims are not grounded on a argument "by analogy", they are grounded on an argument of interdependence. What I am saying is that the principle that permits unilateral acquisition lifts the prohibition of not-interfering with each other's freedom only by imposing an obligation to join a *universal* public political authority. Without this, any system of exclusive control of external things (whether individual or collective) cannot be considered conclusive.

Of course, had the usable space on earth been infinitely large, states could exercise territorial jurisdiction wherever they wished without their citizens' affecting each other's claims. But the spatially determined and finite nature of areas available on earth makes the problem of unilateral acquisition of usable areas of the earth and the related infringement of other's freedom one of the most pernicious. Permissive

principles allow us to consider acts of initial acquisition provisionally justified but ultimately conditional upon the creation of a rightful political authority. This obligation is not exhausted when individual claims are subjected to a domestic general will. Permissive principles do not apply merely to individual holdings; they also apply to territorial jurisdictions.

In the absence of political conditions under which external acquisition is made consistent with the equal freedom of every potential inhabitant of the Earth, the holdings of individuals, and the territorial rights of states through which those holdings are protected, will remain merely provisional. Settlement and exclusion are permitted only if they are followed by a duty to enter in rightful political relations overcoming the unilaterality of first occupation. But the entrance into state-based political relations is only a partial, even if very important, step towards the justification of lasting possession. Without the further integration of that internal act of political constitution-formation with a project to enter into universally inclusive political relations, the rights to both property and territory exercised by citizens of particular states will never be permanently justified.

Let us now consider more closely how the permissive theory of territorial rights addresses the particularity question compared to other accounts. One interesting feature is here the fact that the permissive theory can afford to be ecumenical with regard to how groups of people end up occupying specific geographical areas. Different theories of territorial rights will have different views on why exactly this particular group of people, in this particular territory has succeeded in taking control and establishing certain political institutions. Acquisition theories will argue that individuals

or collective property owners have made efficient use of its land and resources.³¹ Nationalist theories will argue that a group sharing particular historical and cultural features has developed a material and symbolic relationship to the land, involving both present and future generations.³² Legitimacy-based theories will argue that this coincides with the area where the state has successfully managed to enforce the rule of law. And so on. From the point of view of the permissive theory of territorial rights, any of these stories is as good as that of any other. Even if the citizens of particular states have ended up occupying and collectively enacting law in particular territories in either one of the ways described by these accounts, the kind of claims they can be collectively authorized to make over specific areas of geographical space are provisional and conditional at best.

Thus, even if first occupation matters to establish provisional rights, the particularity problem cannot be solved with an inward-looking approach which neglects how citizens of that state interact with others, both across space and across time. The answer to the question of why states are entitled to one particular area of geographical space cannot be conclusively provided; not until a political authority realizing the universal principle of right is founded. Permissive principles may well end up endorsing the kind of boundaries that we have. The conclusive justification of these boundaries is not necessarily constrained by what was done in the past for these boundaries to emerge in the current form. What matters especially is how states now act politically to overcome the unilaterality of that initial acquisition, not how territory was initially subjected to their control.

³¹ See, for example, for the individualist version Steiner, "Territorial Justice.", Simmons, "On the Territorial Rights of States." for the collectivist one Nine, "A Lockean Theory of Territory.", Meisels, *Territorial Rights*..

³² Miller, "Territorial Rights: Concept and Justification."

VII.

The implications of this view may appear slightly troubling. Does the permissive theory of territorial rights imply that any well-meaning state can now currently invade the territory of another (recalcitrant) state provided it forces it to enter into a universal political association? Does it imply that the current territorial claims of long-suffering nations or the demands of internally oppressed ethnic groups are better ignored? Does it imply that we should pay no attention to the present distribution of natural resources because any state can enjoy what it has, provided something is done to end the current state of affairs?

Kant explicitly condemns any act of territorial annexation. But he does so in ways that might appear to undermine the application of permissive principles to territorial rights. So let me start answering these questions by putting at rest the objection that denies a possible application of the permissive principle to issues of territorial rights. In his famous passage condemning usurpation, Kant argues that a state “is like a trunk, it has its own roots and to annex it to another state is to do away with its existence as a moral person” (8: 344:318). One might infer from this position that the territory of states is analogous to the body of an individual, where the presumption of inviolability would be grounded on the fact that states are equivalent to moral persons who do not come to acquire territory but who simply “have it”.³³ Since no external objects of choice would be at stake, no unilaterality problem would arise. But Kant clearly indicates that

³³ This is exactly how Arthur Ripstein puts it, by arguing that in the case of states there is neither a problem of unilateral choice in the establishment of the “mine and thine” nor one of mutual assurance in the use of force, but only one of indeterminacy in the interpretation of the right to self-defence. See Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy*, 227-8.

permissive principles do apply to territorial issues, indeed he introduces the very definition of such principles in the context of illustrating the wrongness of acquiring territory by means of inheritance, exchange, sale or donation.³⁴ His argument is that even though the “status of possession” (Besitzstand) of a certain territory acquired by those means is incompatible with the principles of right, his prohibition of similar annexations only applies to the “way of acquiring” in the future and does not require us to remedy what was done in the past. This, he argues, is because even though the “status of possession” of a given territory “does not have what is required in order to be called right” this was “in its time ... taken to be legitimate according to the public opinion of each state at the time” (8: 347-8; 320-1). And this is why permissive principles are taken to apply.

So the problem in the case of states’ territorial rights is not that we cannot say that their possession of a certain piece of land is unilateral, just like the possession of land by their citizens is unilateral. The partition of boundaries is not beyond critique. The real issue is that permissive principles are transition principles; they can only be retroactively invoked to justify a unilateral acquisition that has happened in the past, in the absence of rightful conditions of reciprocal interaction.³⁵ And even that past unilateral acquisition is only justified conditionally, subject to the obligation of entering into universal conditions of right. As Kant puts it, “this authorization to continue in possession, would not occur if such an alleged acquisition were to take place in the civil

³⁴ See 8: 347-8; 320-1.

³⁵ This argument is very clear: “in the permissive law here, the prohibition presupposed is directed only to the future way of acquiring a rights (eg. by inheritance) whereas the exemption from this prohibition, i.e. the permission is directed to the present status of possession, which in the transition from the state of nature to the civil condition can continue as possession that, though not in conformity with rights, is still possession in good faith”.

condition; for then as soon as its nonconformity with rights were discovered it would have to cease, as a wrong" (8: 348; 321).

The implications of this point are not limited to the prohibition of annexation in the ways Kant specifies. No unilateral action is justified in the civil condition, neither that which attempts to restore justice where it is considered absent, nor that which attempts to force recalcitrant states to join a rightful political association. Once some basis for the establishment of rightful conditions has been constructed, we are not in the state of nature: our institutions, though imperfect, have already prepared the conditions under which the principles of right can be fully realized. Some constraints on unilateral individual actions have already been placed, at least as far as those sharing the same jurisdiction are concerned.³⁶ Hence, even though the citizens of any given state are only provisionally entitled to the territory they currently occupy, this does not mean that other states can lay a claim to that territory by means of another unilateral act. But someone might object: what if we are dealing not with states but with groups of people which have failed to establish even these minimal institutional foundations?

This is a very serious question. Kant raises it when assessing the attempts of colonists to settle in particular areas of the earth, in contrast to the will of natives, and by appealing to the backward nature of their social organization. It might be asked, he argues, whether "when neither nature nor chance but just our own will brings us into the neighborhood of a people that holds no prospect of a civil union with it, we should not be authorized to found colonies, by force if need be, in order to establish a civil union with them and bring these human beings (savages) into a rightful condition". The

³⁶ And of course some institutions might be better than others from the point of view of fully realizing the principles of right. However, as already emphasized, the purpose of this paper is to illustrate the logic of permissive principles, not to go into detailed discussions on the nature of various types of political institutions.

attempt of European powers to settle in territories inhabited by the American Indians, the Hottentots or the inhabitants of New Holland, and to justify these colonial enterprises through acquisition-theories of territorial rights was all too familiar to Kant.³⁷ His answer seems to be that “all these supposedly good intentions cannot wash away the stain of injustice in the means used for them” (6: 353; 490). But the argument is not targeted merely at the prohibition of violence, as such. The point holds even when more subtle measures, are endorsed, for example when we ask whether we should not be authorized to control the territory of these natives “by fraudulent purchase of their land” and “by making use of our superiority without regard for their first possessions” (6: 266; 417).

These remarks are not without contemporary resonance: how distant is the situation Kant describes from one in which the soil and resources of these less-civilized (now we would say “developing”) countries is purchased by a dozen companies based in “democratic” states? What difference does it make if crowds of colonists reaching exotic shores have been replaced by teams of lawyers and bankers flying in business class? And most importantly, how does the permissive theory of territorial rights both compel countries to enter into political relations with each other and justify their resistance when forced to doing so?

To answer this question we need to consider what exactly the permissive principle prescribes with regard to relations between groups whose territorial rights have only provisionally been established. Since the earth is initially commonly available for use, and since territorial rights are only provisionally justified, outsiders cannot be

³⁷ For a study of the relationship between eg. the Lockean theory of acquisition and colonialism see Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996). For a discussion of Kant’s cosmopolitanism in relationship to colonialism see Peter Niesen, “Hospitality and Colonialism,” *Politics and Ethics Review* 3, no. 1 (2007).

denied a right to visit. To claim otherwise would be to arm first occupiers with a permanent right to exclude – something that, as we have seen, is impossible to unilaterally establish. “Since possession of the land, on which an inhabitant of the earth can live, can be thought of as possession of a part of a determinate whole, and so as possession to which each of them originally has a right, it follows that all nations stand *originally* in a community of land” (6: 352; 498). This however is not a *rightful* community of possession (*communio*) and consequently of use of the land. For that, as we have seen, we need a universally inclusive mechanism of political adjudication.

Now, the fact that first occupation does not equip natives with a claim as strong as the right to exclude well-meaning visitors, does not imply that these visitors are granted a right to settle. Unilaterality presents a threat in both directions: when displayed by natives we mitigate its consequences by granting foreigners a right to visit; when displayed by foreigners we mitigate its consequences by refusing them a right to settle. In both cases, Kant says, a special contract is required to regulate their reciprocal relations; one which is arrived at without exploiting the ignorance of the parties and which cannot, in any case, be permanently established unless “it extends to the entire human race” (6: 266; 418).

There is a final important point to mention when examining the application of permissive principles to the issue of territorial rights. Even though, as we have seen, the realms of domestic, international and cosmopolitan right are interdependent and neither of them can be safeguarded without working for the realization of the other, one relevant issue deserves attention. In the case of individuals, permissive principles recognize the legitimacy of initial acquisition only at the price of *coercing* them to join a rightful political condition. In the case of states, as Kant’s reaction to colonialism (and, by extension, neo-colonialism) has illustrated, dissenting states can be *invited* but not

coerced to enter in rightful political relations with other states. But how can the permissive theory of territorial rights both compel states to join a rightful political association yet also acknowledge the legitimacy of their resistance in doing so? How can subjection to a reciprocally established political authority be both necessary and avoidable?

To say that outsiders cannot exercise force on dissenting states to induce them to enter in rightful political relations with them, is not the same as saying that no attempt should be made to that effect. Kant's reasons for rejecting the interventionist attitude have to do with the fact that, however primitive, an association of individuals with some form of social organization and with a will to subject to joint rule, is already a step beyond an anarchic society where individuals act with no common aim.³⁸ This is also the crucial difference between individual appropriators in the state of nature, and collective political agents attempting to enter in rightful political relations with each other. The reasons for resisting the temptation to invade outsiders to promote their political emancipation are similar to the ones for not endorsing an internal right of rebellion: there is always a transition point where all public authority is destroyed and the conditions upon which principles of right rest are annihilated.³⁹

Hence, the point of emphasizing the provisional and conditional status of territorial rights is not to say that boundaries should be dissolved or arbitrarily redrawn, or to justify the right of so-called legitimate states to intervene in the territory

³⁸ I have commented on this issue in Author 1. See also for a recent discussion of the tension Flikschuh, "Kant's Sovereignty Dilemma: A Contemporary Analysis."

³⁹ Consider, for example, Kant's remarks on the analogy between foreign invasion and revolution: "the attempt to realize this idea should not be made by revolution, by a leap, that is, by violent overthrow of an already existing defective constitution (for there would be an intervening moment in which any rightful condition would be annihilated) (6: 355; 492). I have discussed Kant's views on the right to rebellion in Author 3.

of others. To maintain that, would be to engage in the same kind of unilateral judgment that makes permissive principles applicable in the first place. It would also imply ignoring the fact that permissive principles only lift prohibitions concerning what was done in the past, and not what should be done in the future. The permissive theory of territorial rights does not provide an effortless remedy to all the real-world territorially-determined challenges to which we are currently exposed. But what it does give us is a standard on the basis of which to frame of our political judgments; a political end to the realization of which to direct our civic enterprise. The idea of a universal association of states plays in the permissive theory of territorial rights a regulative function, it supports members of that political association in developing emancipatory political projects and it directs their efforts to a universally encompassing ideal of rightful relations. The duty to reform institutions so as to make more progress in the direction of a rightful political association of states should be interpreted as a civic and historical duty: its content is not dictated by a philosopher's invective but ought to be collectively framed.

VII.

Let me conclude this discussion by considering how the permissive theory of territorial rights addresses the three questions I raised at the beginning of this paper: the right to settle, to exclude and to settle and exclude with regard to a specific territory. The right to settle is explained through agents' occupation of some area of geographical space and their joint creation of a collective political authority that adjudicates claims compatibly with principles of equal freedom, within a given territory. To the extent to which this use of the territory necessarily affects outsiders and entails a unilateral infringement of

their freedom, the right to exclude is permitted only if coupled with the attempt to establish rightful political relations between states. Consequently outsiders cannot be denied a right to enter, but neither can they be granted a permanent right to settle. This condition also helps to explain why even though acquisition of a *particular* territory is a result of historical and political contingencies that can only be retroactively justified, this contingency does not authorize us to modify the present partition of boundaries. It simply compels us to invest political efforts in creating a kind of political association in which territorial claims can be subject to global, public arbitration.

The permissive theory of territorial rights acknowledges the contingency of boundaries and ascribes territorial rights to states only provisionally and conditionally. However we ought to be cautious about jumping into conclusions about how these conditions ought to be enforced. If we take seriously the permissive principle laid out above, states' present enjoyment of rights over their territory is intrinsically bound to their taking up a series of political obligations towards both their citizens and outsiders. A state's domestic jurisdiction cannot be assessed regardless of how it acts in the international sphere; it is intrinsically related to it. The permissive theory of territorial rights makes us, as citizens, aware of both the historical contingency of territory and of its political necessity. Whilst rendering permissible the maintenance of an order which appears, as such, intrinsically hard to justify, it compels us to invest political efforts in rising above its unilaterality.