

States' Resource Rights: Locating the Limits

A. John Simmons (University of Virginia)

A Commentary on Margaret Moore, "Natural Resources, Territorial Right and Global Distributive Justice" and Avery Kolers, "Justice, Territory, and Natural Resources"

Contemporary nation-states are in part legally defined by their control over specific geographical territories. And it is generally assumed – and confirmed by existing international law – that states' territorial rights include or directly imply corresponding rights over the natural resources located within their lawful territories. Such a tight connection between territorial rights and resource rights holds, of course, only if states' territorial rights are "robust". Robust territorial rights include at least rights to exclusive legal jurisdiction over the territory, rights to exclusive control of movement (of persons and materials) over the boundaries of the territory, and rights to exclusive control over the non-human things and beings contained in (or constitutive of) the territory.

Cosmopolitan theorists deny that the robust territorial rights conferred upon sovereign states by international law correspond to states' actual *moral* rights over their territories. States' boundaries, they claim, ought to be "open" or very "soft" (with respect to immigrants and travelers, say), being legitimately subject to only quite limited control by states themselves. Similarly, cosmopolitans have challenged states' claims over the natural resources within their territorial boundaries. Resource-rich countries, they argue, are morally required at least to share their good fortune, and possibly to equalize access to or wealth deriving from their resources, with less fortunate states. Cosmopolitans sometimes challenge even the jurisdictional claims of modern states, though this is far less common. (As a rule, natural reservations about the possibility or the desirability of a world-state leave even cosmopolitans in favor of "districted" performance of the core jurisdictional tasks of states.)

Margaret Moore and Avery Kolers both defend (in different ways) positions that lie somewhere between a full endorsement of the robust resource rights claimed by actual states and the international resource-egalitarianism endorsed by cosmopolitan critics of states' claims. Moore defends a position on states' resource rights that is explicitly intended to constitute a more defensible middle ground between attempted "statist" justifications of full and exclusive state resource rights and cosmopolitan denials that states have any special rights over "their" natural resources. Moore takes the value of collective self-determination to imply significant, but still limited, rights for legitimate states to control the natural resources within their territories. Kolers defends a theory of natural resources – that is, a theory of what natural resources *are* – that is designed to "unify" or "reconcile" the frameworks employed by "self-determinists" (like Moore and, I assume, the statist she criticizes) and cosmopolitan defenders of global equality.

Kolers' basic strategy is to argue that the central values to which cosmopolitans appeal – namely, the equal consideration of all persons and fairness to all in the distribution of basic goods – in fact commit them to accepting a "claimant-relative, intentional" conception of natural resources (2, 23, 31). Because what counts as a resource varies socially or culturally (8), and because resources are intention-dependent (rather than natural) kinds – resources are not just things, but things toward which

we've "adopted a certain stance" (14) – it would be unfair and a denial of equal treatment were the cosmopolitan's proposed global resource tax to be applied as if "resources" could be impartially identified (by their inherent value or by the benefits available from exploiting them). Rather, Kolers proposes, we should understand legitimate territorial rights to centrally include the rightholder's right to, in effect, declare (through its social and economic practices) what counts as a resource within the rightholder's "particular packet of geospace" (18). Such a theory allows, with cosmopolitanism, that territorial rightholders (which might or might not turn out to be existing states) have global responsibilities to share resources. But it also takes seriously, with self-determinists, the fact that different attitudes toward the material world (and different kinds of links between particular groups and particular places) are legitimately manifested in societies/cultures and in their political and economic structures (31-2). It is this fact that gives them the right to determine how their resources are to be identified (for the purpose of assessing their true global responsibilities).

Moore, in a similar spirit (and accepting a theory of resources that appears to be consistent with Kolers' [3]), argues that each legitimate state's global responsibilities must be understood to be in important ways relative to the particular social and cultural histories and values of that state. She identifies both reasons why states should have some special rights of control over the resources in their territories and reasons why these rights of control must be understood to be less robust than those claimed by actual states. The reasons favoring state control are that subjecting resources to political authority is necessary to avoid "tragedies of the common" and that, given a reasonable pluralism of views regarding how lands and resources should be used, collective self-determination requires that groups be entitled to make decisions about use themselves (3-6). Further, it would be unfair to simply insist (as cosmopolitans do) that legitimate states' resources be shared with the global poor, because the value of those resources is often a function of societal choices and efforts, and because specific land (with its associated resources) is often non-instrumentally valuable to groups in ways that must be respected if they are to be allowed to be genuinely self-determining (10-15). These arguments do not imply, however (Moore argues), that states must have unlimited control over resources or rights to the "full stream of benefits" flowing from their resources. Rather, they imply rights of control only so far as these are necessary for self-determination and for rewarding the investment that avoids commons tragedies (7).

Locating the limits on states' resource rights in this way, however – that is, locating them principally by trying to balance a partial acceptance of cosmopolitan skepticism about states' territorial sovereignty against a rejection of the cosmopolitan egalitarian alternative – comes with a cost. This orientation toward the problem of resource rights seems to focus our attention unduly on potential unfairness in the application of a cosmopolitan global resource tax. There is no denying, of course, that it seems unfair to tax nations for their possession of things that others, but not they, regard as resources, or to tax them for their possession of what is non-instrumentally precious to them – to, in effect, pressure the Lakota to strip mine the Black Hills or the Bedouin to cover their desert with oil derricks. But this focus also introduces the hazard of being *excessively* sensitive, or giving too much weight on balance, to cultural differences of this sort.

This difficulty is in fact touched on by Moore herself toward the close of her paper (22-4). Let us suppose (with Moore) that nations have no duty to establish equal control for all nations over the world's resources, or (with Kolers) that territorial rightholders have no duty to pay a global tax proportionate to their share of "resources" (that is, to their share of "resources" conceived in some non-intention-dependent way). What exactly, then, *is* the nature of the moral duty that better-off legitimate nations have toward worse-off ones? Moore suggests, plausibly, a duty to insure that all have a decent life or a duty to assist other collectives in becoming self-determining (17, 20). While such duties do, of course (and as Moore insists [21]), look like ones that can be discharged by simple redistributions of societal wealth – rather than by any kind of tax on resources – there remains the question of whether nations with resources (or with what others regard as resources) might not as a result be duty-bound to develop or harvest those "resources" in order to acquire the wealth necessary to assisting persons or groups in desperate straits (of which the world seems always to possess an almost unlimited supply).

Suppose that territorial rightholders have the right to authoritatively decide what counts for them as a resource (as Kolers suggests), or that they have the right to exclusive control over land with non-instrumental value for them (as Moore suggests). These positions appear to have implications that are every bit as counter-intuitive as those that Kolers' and Moore's arguments are designed to resist, at least once we attempt to conjoin them with almost any reasonable view about states' moral responsibilities toward the global poor. Do such local rights of resource-control have simple moral priority over all societal duties to alleviate need and suffering in the world? May nations, despite ample, easily-harvestable, valuable "resources", escape any responsibility to use them to assist the desperately poor of the world, simply by claiming rights of resource-control? If so, nations' actual responsibilities begin to look perilously thin and their resource rights perilously robust, the position no longer looking quite like the middle ground between the statist/self-determinist and the cosmopolitan extremes. Moore, at least, suggests a possible willingness to bite this particular bullet (23).

The problem here is, however, worse than simply one of uncertainty about where to locate the balance between states' rights of control and states' global responsibilities. For "resource"-rich nations may, on this approach to the problem, *make themselves* part of the global burden for others to bear. Imagine, for instance, a case in which a nation's cultural or religious orientation toward its land renders it incapable of sustaining itself, despite its wealth of easily-harvestable "resources". Must other nations feed and support it out of their vastly more meager endowments? Can that really be required in order for other nations to count as having respected its right to self-determination or its intention-dependent declarations about resources? The answers here seem to me quite plainly to be 'no'. If that is correct, however, then states' (or territorial rightholders') legitimate claims over resources must be limited in other ways than those suggested by the arguments of Moore and Kolers.

And there are good, but still non-global-egalitarian, reasons for locating these limits differently than do Moore and Kolers. Philosophical theories of states' territorial rights seem to me to divide naturally into three (very) broad camps. *Voluntarist theories* maintain that groups of persons that choose to be (and are capable of being) self-determining political societies in fact possess the moral right to be such. And political societies with rights of self-determination have, in consequence, the right to a territory on which to be self-determining. On "plebiscitary" versions of voluntarism, the majority of

persons in a territory have the right to choose to create a self-determining polity on that territory. On Lockean versions of voluntarism (like the one I have myself defended¹), freely incorporated groups have the same kind of moral right to self-determination that was enjoyed naturally by the individual members prior to incorporation. But merely possessing the right to be self-determining does not entitle a group to a territory, any more than being a naturally free person entitles a person to a piece of land. Rather, on the Lockean view, the territorial rights of voluntarily incorporated groups can only derive from members' conveyance to their states of certain of the rights they antecedently possessed over privately owned land (rights which, in turn, derived from individual members' "labor" on that land).

Second, *functionalist theories*² derive states' robust rights to territorial control from the fact that controlling territory is necessary to states' performances of their morally mandatory functions. The moral mandates in question generally derive from either (broadly) Kantian or consequentialist moral theories. Kantians take the morally mandatory function of states to be that of doing justice – that is, making it possible for there to be determinate, enforceable individual rights or producing a just distribution of all basic goods in the society. Consequentialists take the morally mandatory task of the state to be that of maximizing overall good results. In both cases, reasonably robust territorial rights for states are thought to be required for discharging these functions, while the need for local districting in the performance of these functions is defended both through world-state skepticism and by the local nature of the tasks at issue.

Finally, *nationalist theories* hold that only groups that have certain characteristics (beyond mere willingness to be a polity) possess the right of self-determination. These characteristics generally include features like a shared history, shared language, or shared culture. And on many versions of nationalism, a further characteristic that is required for a right of self-determination is the group's attachment to a particular geographical territory on which the right to be self-determining may be exercised. The territory in question might be the group's "national homeland", or it might in some other way be specially tied to the group through the group's history or productive labor.

Elements of more than one of these three kinds of theories of territorial right are sometimes combined in a pluralistic theory. Nationalist theories, for instance, have sometimes incorporated elements of the Lockean account in order to try to better explain the attachments to particular territories that give nations their specific territorial claims.³ This ability to explain how states could have rights to particular territories – rather than simply rights to some territory or other – has long been an apparent advantage of voluntarist and nationalist approaches to territorial rights. So some essentially functionalist theories have incorporated non-functionalist elements in order to try to negate that advantage.⁴

All of these defenses of at least reasonably robust territorial rights for (certain kinds of) states tend to proceed with one eye focused outward on the cosmopolitan skeptic. But perhaps the focus

¹ "On The Territorial Rights of States", *Philosophical Issues: Social, Political and Legal Philosophy*, Vol. 11 (2001).

² I borrow this name for them from Anna Stilz, "Nations, States, and Territory", *Ethics* 121:3 (April 2011), 576.

³ E.g., Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005).

⁴ Stilz, "Nations, States, and Territories", 583-5.

ought to be more inward. For when we think specifically about the “resource rights” that are generally assumed to fall out of such accounts of territorial rights, it is not immediately apparent *how* such rights can be plausibly derived from *any* of the theories on offer.

Consider, for a moment, the full range of resource rights claimed by contemporary nation-states and confirmed by international law. While the territorial boundaries of contemporary nation-states are of course defined by imaginary lines on the surface of the earth, states claim rights to control far more than those enclosed surface spaces: they also claim various rights over the airspace above that surface space, the sea and seabed (if any) surrounding it, and the subterranean spaces beneath it.

Claimed airspaces and territorial waters, while complicated and non-uniform, seem at least largely motivated by states’ justified functions of national defense and coordination of transportation. But international accords now recognize as well states’ claims to large “exclusive economic zones” ranging out to 200 nautical miles from the state’s sea baseline. Such zones give states control over seabed resources and marine economic activities. Here, of course, states’ territorial claims are driven not by reasonable concerns about national defense or traffic control, but simply by concerns to maximize national control of possible sources of wealth. Similarly, states claim territorial rights over subterranean areas – and over the minerals, water, oil, and other resources located there – extending in a (very) rough cone from the state’s surface territorial boundaries to the center of the earth. Here again only science fiction could fabricate defensive or traffic-control rationales for these claims to the interior of the earth. In short, contemporary states routinely include among their territorial claims not only claims to used and stewarded surface resources (such as farmland, timber, surface water, etc.), but also claims to things far beneath land and sea, to things control over which is in no way necessary for the state’s performance of its core tasks – indeed, to things that cannot even be harvested with existing technology and to things that are not yet even known to exist (and so to things from which no benefit at all to the nation is expected or relied upon).

It is very hard to see how any of the theories of territorial rights summarized above could even begin to defend (moral) resource rights for states that are remotely as extensive as these legal rights. Voluntarist theories are guided (in motivating their claims about territorial and resource rights) either by what is needed for groups to be self-determining or by what has been labored on or improved by members of the group. Neither rationale seems likely to justify states’ claimed rights over vast areas of the sea and seabed, over many subterranean (and especially undiscovered) resources, or, indeed, over anything that is not relatively central to the lives and labors of states’ members. The same seems true of both nationalist justifications of territorial rights and Kantian functionalist accounts. And it is at least hard to imagine how a consequentialist functionalist argument could legitimate anything like the very extensive resource rights to which actual states lay claim (given the amount of dire need in the world). States make many legally valid claims to places (and things) on which their members do not live, on which they do not labor, which are crucial to neither their security nor their way of life.

Indeed, once we begin down this skeptical path, state resource rights can begin to look increasingly “unnatural”. While states’ legal resource-control rights are conceived of territorially, it is important to remember that this connection between territorial rights and rights over all resources in

the relevant territory is not in any way (morally, physically, conceptually) necessary. We sometimes, for instance, recognize (special or exclusive) rights for those who simply discover new things. So it would not be morally odd if we recognized my (or my group's) right to resources that I/we discovered first, even if those resources were discovered on, beneath, or around some alien state's claimed territories – discovered, say, through data collected by satellite observation or by exploration that had been permitted by the host state – and that were perhaps extractable without upsetting local activities or sensibilities. One thus need not embrace comprehensive cosmopolitan doubts about states' territorial and resource rights (based on a commitment to global equality) in order to suspect that no moral justification is available for the full range of such rights that are claimed by actual states. A proper approach must, I think, proceed by examining each kind of resource claim made by contemporary states, evaluating each in the strict light of the (purported) justifying rationale for the state.