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Tamar Meisels

# Territorial Rights



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Springer

# TERRITORIAL RIGHTS

by

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 Springer

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

# CONTENTS

<b>Acknowledgments</b>	<b>ix</b>
<b>1. INTRODUCTION</b>	<b>1</b>
1. Preface	1
2. Liberal Nationalism	3
3. Territorial Property and State Sovereignty	5
4. Method and Content	8
<b>2. THE COLLECTIVE NATURE OF TERRITORIAL ENTITLEMENT</b>	<b>13</b>
1. Preface	13
2. National Rights as Collective Rights	13
3. National Rights as Individual Rights	15
4. The Problem	17
5. The Substantive Argument for Collectivity	20
<b>3. 'HISTORICAL RIGHTS' TO LAND</b>	<b>25</b>
1. Preface	25
2. What are 'Historical Rights'?	25
3. Some Preliminary Objections	27
4. From Time Immemorial	30
5. The Nation's Cradle	36
6. Historical Ties and National Interests	38
7. Concluding Remarks	41
<b>4. 'LOOKING FORWARD TO THE PAST'—AN ANALYSIS OF TERRITORIAL CLAIMS BASED ON PRINCIPLES OF CORRECTIVE JUSTICE</b>	<b>43</b>
1. Preface	43
2. Initial Assumptions	44
3. The Question of Reparations	45
4. Classifying Corrective Justice-Type Arguments for Territorial Entitlement as Collective Right Claims	50
5. Territorial Restitution—For and Against	53
6. The Case for Corrective Justice	54
7. The Argument From Supersession	59
8. Concluding Remarks	61
<b>5. 'A LAND WITHOUT A PEOPLE'—AN EVALUATION OF NATIONS' EFFICIENCY-BASED TERRITORIAL CLAIMS</b>	<b>63</b>
1. Preface	63
2. The Efficiency Argument	64

3. Overcoming Some Basic Objections	65
4. The Value of Efficiency	69
5. Concluding Remarks	73
<b>6. THE ETHICAL SIGNIFICANCE OF SETTLEMENT</b>	<b>75</b>
1. Introduction	75
2. Settlement and Self-Determination	75
3. The Concept of Settlement	79
4. The Ethics of Settlement	80
5. Settlement in Disputed Territories	93
6. Concluding Remarks	95
<b>7. GLOBAL JUSTICE AND PRINCIPLES OF EQUAL DISTRIBUTION</b>	<b>97</b>
1. Preface	97
2. Distributive Principles and Bilateral Relationships	98
3. Territorial Redistribution on a Global Scale	102
4. The Appropriate Subject Matter for Territorial Redistribution	103
5. A Liberal-Nationalist Approach to the Value of Territory	106
6. Concluding Remarks	110
<b>8. EARTH—THE FINAL FRONTIER</b>	<b>113</b>
<b>Endnotes</b>	<b>121</b>



# CHAPTER 1

## INTRODUCTION

### 1. PREFACE

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

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

This volume embraces that strain of liberal political thought which, in recent years, has come to the defence of nationalism, and applies it to the very concrete issue of national territorial rights. It concerns the moral evaluation of territorial claims put forward by states (particularly nation states), as well as by non-state groups, within the framework of what has come to be known as 'liberal nationalism'. While authors on liberal nationalism express views on contemporary territorial conflicts, we lack a systematic, well thought-out method of approaching such cases consistently. We are in need of some type of mechanism, some orderly general guidelines that will enable us to reflect upon our views on specific territorial conflicts, as well as to form opinions when we are confronted with new situations. Some attention has of course already been focused on the issue of secession, and at various points throughout this book I refer to the central contributions on this topic.<sup>5</sup> The debate carried on in that literature, however,

deals primarily with the justification of a right to secession and with determining the terms for legitimately exercising this right (who—i.e. what groups—are entitled to secede, and under what conditions would they be justified in doing so). It does not, for the most part, focus on those problems relating to the precise demarcation of boundaries. Furthermore, to the extent that this literature addresses the issue of defining territorial borders at all, it naturally does so only with regard to severing an existing state, while the issue at hand here is a far wider one, which encompasses border disputes between existing states as well as many other prevalent forms of territorial strife which do not involve secession.<sup>6</sup> In spite of existing literature on secession, then, the project of establishing a comprehensive set of morally relevant criteria for demarcating borders remains untackled. How can the acquisition and holding of a particular piece of land by a particular political entity be morally justified? What criteria should liberal nationalists apply when trying to form an opinion in a case where the Xs and the Ys are in dispute over a piece of territory T?

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

The liberal-nationalist response to these difficulties has so far taken one of the two forms. The first is despair, of the kind described by David Miller in the passage cited above. The second is what can be referred to as 'mediation through denial': an attempt to form opinions on particular territorial disputes (and, in the case of world leaders, even an attempt to adjudicate them), while totally dismissing the particularistic, nationalist arguments voiced by either side.<sup>7</sup> The first option is a luxury that liberal nationalism can no longer afford. Since land, territory and homelands are at the heart (or are at least form a significant part) of any reasonable account of nationalism, it follows that issues concerning territorial distribution should, if there is anything at all to theories of liberal nationalism, be able to be tackled from this perspective. The second avenue of evasion is even more problematic than the first. It bears grave consequences, not for any particular academic theory, but for the actual ability to achieve the very goal it strives for. Given the tremendous force that nationalism has proven to be—for better or for worse—in the modern world, and the central role that territory has played in the history of nationalism, the outright dismissal of nationalist arguments is unlikely to help reduce international strife.<sup>8</sup> Quite the contrary. The lack of a clear understanding

of the nature and possible *normative* (rather than merely psychological) force of these claims can only be detrimental to their adjudication.

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

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

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

## 2. LIBERAL NATIONALISM

It is sometimes said that the term 'nationalism' (and for that matter 'liberalism' as well), rather than representing one coherent doctrine, stands instead for an entire family of ideas or political movements, which exhibit all the wide variety of characteristics one would normally encounter in the members of any flesh-and-blood family. If 'nationalism' and 'liberalism', respectively, are indeed the surnames, so to speak of two extended families of theoretical doctrines or political programmes, why then the recent union

between these two highly contested concepts, may accurately be described as having bred an entire clan of political ideas conjoined under the name of 'liberal nationalism'.

Much has been written in this field in the last two decades, and I shall not reiterate much of it. It is now necessary to widen, rather than deepen, the scope of the liberal-nationalist enterprise so that it may come to encompass the territorial element of nationalism, which has so long been neglected by it.<sup>10</sup> Even for this limited purpose, however, I must begin with a few, very general, words concerning the most basic and widespread components of this doctrine.

For liberal nationalists, the term 'nation', in the relevant sense, is taken to denote a cultural, rather than racial, group sharing some joint social attributes (such as language, history, customs, lifestyle, etc. and—I would venture to add—territory), even though it is widely agreed that no specific common characteristic constitutes a necessary condition for nationhood, except perhaps the existence of national consciences.<sup>11</sup>

In the broadest and most inclusive terms, liberal nationalism comprises two general strands of argument, which often appear side by side. The first, weaker, version confronts the traditional liberal opposition to nationalism's many illiberal manifestations, primarily in the twentieth century, and its often violent and inhumane consequences. Against this, 'liberal nationalism' asserts that nationalism can, in principle, be compatible with basic liberal premises, most notably the primacy of individuals and their well-being, and the moral requirement of universalisability.<sup>12</sup>

Both these liberal premises underlie all arguments throughout. They also serve as the basic liberal restraints on any nationalist claims raised here. Each type of argument for territorial entitlement examined in the following chapters is considered solely from the perspective of its contribution to the well-being of individuals and its potential service to what liberal nationalism takes to be some of their most basic interests. As for the second stipulation, it goes without saying that all conclusions concerning territory must apply equally to all national groups in like cases.

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

Liberal arguments purporting to base the normative significance of nationalism on individualistic grounds assume initially that in our contemporary world nationalism is the primary form of cultural association, and therefore also the primary source of individuals' cultural identity. The type of arguments which usually follows these assumptions has recently been suitably dubbed 'a liberal version of cultural nationalism'.<sup>13</sup>

Proponents of such arguments proceed by asserting that individuals have an interest in culture because it is a prerequisite for their freedom. The ability to exercise this freedom and to shape one's life autonomously, they argue, is dependant on possessing certain 'cultural materials' such as language, modes of behaviour and a choice of lifestyles. Since exercising individual liberty is assumed to be contingent on the availability of these so-called 'cultural materials'—materials that are at present supplied primarily by national cultures—it follows that individuals' interests in national culture are fundamentally important from any perspective, which holds liberty dear, thus warranting liberal support for their institutional protection.<sup>14</sup>

However, it has been pointed out more than once that such arguments can provide a basis only for an individual's right to some culture or another, not for a right to a specific national culture.<sup>15</sup> Thus, this argument is either supplemented or supplanted by the claim that individuals ought to be granted a variety of political rights ensuring the respect and protection of their national culture because that culture is a component of their identity.<sup>16</sup>

It is worthwhile spelling out this type of argument, if only in brief, for the assumptions which underlie it and the conclusions drawn from them are basic to 'liberal nationalism' for all its immense variety. Thus, they form a central part of the background assumptions to a liberal-nationalist analysis of territorial rights.

The identity-based type of argument reasonably presupposes, first, that people's interests in components of their identity (components such as race, gender or sexual preferences) are fundamental human interests, i.e. the type of interest warranting protection by moral and political rights. Certainly, from the view point of any theory which values individualism and cherishes individual identity, the interest not only in adhering to one's identity but also in gaining respect and protection for the components thereof must be viewed as a fundamental human interest. Second, this argument assumes, almost irrefutably, that culture forms an important source of individual identity. Finally, it makes an empirical observation to the effect that 'the culture of most people living today is a national (or quasi national) culture.'<sup>17</sup>

Culture, in the relevant sense, is commonly assumed to include elements such as language, customs, lifestyle, and the like. This study suggests that territory, i.e. specific terrain as well as the concept of a national homeland, forms a principal aspect of national culture and consequently of individuals' cultural identity.<sup>18</sup> Thus, at various central junctures of the overall argument, it advances the liberal-nationalist argument from identity one step further in an attempt to reveal its territorial implications.

Finally, one further group of liberal arguments for the endorsement of nationalism concerns the latter's contribution to the ability of states to successfully pursue liberal-democratic values and goals. According to this mode of liberal-national argument, it is desirable that state citizenries share a common national identity in order to generate the kind of human emotions and incentives necessary to uphold and maintain ideals and policies such as a democratic system of government, social justice, and even the physical protection of the liberal-democratic state in the face of external military threats.<sup>19</sup>

While this last type of argument has little, if any, direct bearing on the specific project engaged in here, it is nonetheless part and parcel of the liberal-national framework as a whole, and as such is noteworthy. The scholars who employ such arguments in their liberal defence of the national phenomenon do not employ them exclusively. Side by side with this last type of argument, they refer to and rely on further arguments which are more relevant to the project at hand. We shall therefore have occasion to revisit the works associated primarily with this last type of liberal-nationalist argument as well.

### 3. TERRITORIAL PROPERTY AND STATE SOVEREIGNTY

So far, I have stressed my reliance on the doctrine of liberal nationalism as a primary source of reference, and indeed as a background assumption, for my deliberations on

territorial rights. Since the territorial demands made by nations are essentially a type of ownership claim, it seems natural to turn next to the liberal literature on property rights as a further source of insight on the issue at hand. Appealing to this source in connection with territorial issues is, however, by no means an obviously legitimate step to take.

Throughout this book, I refer to, and rely heavily on, ideas derived from this liberal tradition, most notably the work of John Locke. To Locke himself, the move from the defence of private property to the justification of national sovereignty appeared straightforward enough. Locke notoriously described the state as a voluntary association among individual property owners on whose pre-existing real-estate holdings the territorial jurisdiction of the state they formed and its limits were based.<sup>20</sup> Aside from various inconsistencies within Locke's own comments on this matter (some of which are addressed in the course of this book), this Lockean link between private property rights and state sovereignty has itself been fiercely criticized. It has been pointed out more than once that national claims to territory differ significantly from the individual property rights defended by early liberal thinkers, and that therefore the Lockean shift from the justification of the one to the grounding of the other is invalid.<sup>21</sup>

Lea Brilmayer, for instance, points out quite rightly that: 'Territorial sovereignty and property ownership are not necessarily the same things. It is possible for sovereignty to be vested in one entity's hands, while property ownership is vested in another's. For example, New York's purchase of property in Connecticut does not make New York sovereign over that land. Connecticut, not New York, possesses the right to tax and regulate the property.'<sup>22</sup>

Admittedly, we all know that property rights and state sovereignty are not the same things, nor do they always go hand in hand. Individual members of nation A may have property rights to land which is under the jurisdiction of nation B. Moreover, nations themselves may own property, such as the buildings in which embassies and consulates are situated, which are nevertheless under the jurisdiction of a foreign state. As important as this distinction is, however, we would be wrong to make too much of it as an obstacle to drawing on ideas taken from the realm of property rights in order to assess claims to national sovereignty. While sovereignty and property are indeed two distinct concepts, they are nevertheless intimately related enough to warrant the suspicion that whatever argument favours the one may have serious implications for the justification of the other as well. Though admittedly different notions, they are hardly irrelevant to each other. Once we get past the theoretical distinction and all the scholarly examples that might go with it, we soon find that in reality the two are closely connected in more ways than one.

First, property and sovereignty are two forms, or two aspects, of ownership rights. Property in our connection refers to the ownership of land, while sovereignty includes *inter alia* the right to make the laws concerning real-estate (as well as other) property. That is, at least one very important aspect of sovereignty is the overall control of property within one's jurisdiction. As Paul Gilbert puts it, the right of sovereignty (or as he calls it 'a right to jurisdiction') 'includes the right to decide what rights do go with property and which do not'.<sup>23</sup> So sovereignty rights are 'powers' in the Hohfeldian sense. They involve, among other things, the right to specify and govern all property arrangements within a given territory.

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

A second, and related, link between property and sovereignty rights in the national context concerns the protection of property and securing its endurance and full enjoyment. Securing property rights within a given territory—that is, assuring that the prolonged holding of individual ownership over land within it will prevail—may very well entail granting sovereignty rights over that territory to the group whose members own property within it. As things stand today, practically all of the earth's territory is divided into states, each representing the culture of one (or more) national group, and each presiding and exercising sovereignty rights over territory. Under such circumstances, securing both the continued existence of one's property rights and their full enjoyment in light of one's cultural attitudes and lifestyle is strongly linked to the issue of national sovereignty.

It might be said in response that the sovereign body entrusted to uphold individual property rights need not be a cultural-national one, but could instead be some form of culturally unaffiliated 'handy state' that would serve to secure the property rights of all its citizens. Though this might be true in principle, the prospect of any state being totally culturally neutral in its attitude towards property arrangements is implausible. More to the point, I will assume throughout that, at least for the foreseeable future, territorial questions should be asked, and can be usefully answered, only within the framework of the existing world order. This also explains why I do not concern myself with the justification of national sovereignty as such, but rather assume that most nations possess such rights over some territory, and focus on establishing the just criteria for determining which nations should have sovereignty over what territory. Within this framework of nation states, we have no realistic option other than vesting sovereignty in a body which represents some culture(s) or another. Futuristic 'handy states' are not at present a pragmatic alternative. Nor do we possess the practical option of denying sovereignty rights altogether. At most, sovereignty rights might be severed from property rights so



that the latter right over a given piece of land is granted to the individual members of one cultural group (i.e. nation), while the sovereignty over the said territory remains in the hands of another group. This is the case, for example, when American or Australian courts grant property rights over segments of land to members of their indigenous populations, while the sovereignty over those places remains in the hands of the larger state.<sup>24</sup> But such cases serve only to further emphasize the fact that property owners are often put at a disadvantage when these rights are not accompanied by sovereignty for their own cultural group, and thus lend force to my argument that the two rights are strongly connected. This last claim is easily substantiated by pointing to the vast amount of time it took these indigenous peoples to have their property rights even partially recognized, and the problems they encounter in any attempt at reconstructing their way of life within an overall alien culture. The ultimate destiny of those property rights lies in the hands of those who are sovereign over it, and who consequently control the first-order rules governing property.

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

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

#### 4. METHOD AND CONTENT

This book contains chapters of differing lengths. Each of its substantive chapters (i.e. Chapters 3–7) is dedicated to a different prototype of argument, which may potentially justify territorial domination. As indicated in the opening section, I deliberately draw on those arguments which are frequently enlisted by contemporary national groups in



defence of their territorial claims. Such arguments, while varied, are nonetheless finite in number. Some arguments purporting to justify territorial acquisition, most notably discovery, were once especially popular but have since vanished from the territorial debate. I do not confront any such archaic arguments which have become obsolete.<sup>25</sup>

One further argument which is not addressed here, though it still has some contemporary following, is based on military conquest. Quite obviously, from any liberal perspective, the mere fact that a national group has succeeded in conquering another state's territory cannot serve as grounds for a moral right to the territory in question. As Allen Buchanan points out, 'it is hard to see how a genuinely liberal theory could justify conquest as a legitimate mode of acquisition... liberal theories by their nature take the problem of justifying the use of force very seriously. And among the justifications for the use of force they countenance the expansion of state territory is not to be found'.<sup>26</sup>

The arguments included here are presented in the five central chapters following the next. First, Chapter 2 makes a general point concerning the nature of territorial rights and takes a stand in favour of viewing these rights as collective ones. Next comes the first two substantive chapters (Chapters 3 and 4), which examine various historical arguments for territorial entitlement. The first of these, Chapter 3, titled '“Historical Rights” to Land', is dedicated to two related versions of historical entitlement arguments, namely (1) the claim that the national group in question was the first to occupy the territory it lays claim to, and (2) the more sophisticated claim that the territory in question played an important role in the history of the said national group. Next, Chapter 4 deals with territorial claims couched in terms of corrective justice. Chapter 5 questions the relevance of efficiency arguments to the issue of territorial right. Chapter 6 is a lengthy chapter, which attempts to establish a case for the moral significance of national settlement of territory. Finally, Chapter 7 concerns principles of distributive justice and examines the egalitarian perspective on the issue of territorial entitlement.

There is a kind of internal logic to this ordering of these chapters as they proceed, in a sense, from past to future. I set out with arguments to the effect that certain historical events are entitling factors. This is followed by two arguments for territorial entitlement which are most relevant and lend greatest force to the claims of the present occupants of a given territory. The final argument presented here is forward-looking in that it examines a proposal for territorial distribution, which is closely linked to aspirations for future global justice in the allocation of territory.

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