

# Territorial Justice in Israel/Palestine

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*This Article examines the two dominant theories of territorial justice — one associated with justice, the other with self-determination. It applies these theories to the case of Israel/Palestine, and to ongoing claims by political actors with respect to territorial rights there. It argues that justice theory seems to straightforwardly support the territorial rights of the State of Israel, at least if historical and retrospective considerations are not at the forefront, though once they are brought in, this argument can be deployed in support of a number of different political positions. The self-determination argument, it is argued, is somewhat less indeterminate and seems to most straightforwardly support a “two-state” compromise. However, as with justice theory, its assumptions can be challenged on a number of fronts, and could also be deployed to buttress other arguments. The merits and challenges of both theories are analyzed through this case study.*

## INTRODUCTION

The Israel/Palestine conflict is widely regarded as a particularly intractable example of an ethno-national conflict between two political communities,

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who claim the same or similar rights of national self-determination over the same territory. For the purposes of this Article, I will assume, unless otherwise specified, that the “territory” in question is all the land in contemporary Israel and the occupied areas, between the Mediterranean Sea and the west bank of the Jordan River. This paper focuses on the place-related dimensions of the conflict. It situates the territorial claims of existing political parties and actors in a deeper theory of territorial rights or territorial justice and argues that although these theories are indeterminate in important ways, thus feeding the intractable nature of the conflict, they do have some implications for current politically salient claims to territory.

The main positions adopted by political actors on both sides with respect to territorial rights fall roughly into three distinct camps. (1) On the radical view, only one group has rights to all the territory between the Mediterranean Sea and the Jordan River. There are radicals on both sides that claim this, or hold positions that give some small concessions to the other side, but these concessions are so minor and so unfair that it suggests that this is their default position. I associate Hamas on the Palestinian side, and religious radicals on the Israeli side, including some members of the Likud party and their supporters in the Trump administration, with this position.<sup>1</sup> For convenience, we can call this position A. Though both (Palestinian and Israeli) versions of Position A can marshal arguments based on both justice and self-determination, the weakness of this position is evident: it is deeply one-sided. Proponents of Position A fail to acknowledge the valid claims and arguments of the other community. (2) The second position is “the two state solution” and it is premised on the idea that both political communities have roughly similar, normatively powerful claims, and that the only fair solution is one that gives each community some territory, in which to implement justice and pursue self-determination. This Article does not examine the particular proposals for fair division on offer, but notes that this position is morally compelling only if the division of land and the powers accorded to each community are fair. This position is associated with Fatah and the Palestinian Liberation Organization in the West Bank, which has recognized the right of Israel to exist, as well as with many Israelis, who tend to support Labor and also some minor left-wing parties, such as the Left Camp of Israel party. This is position B. (3) The third position argues that there should be only one state in the area between the Jordan River and the Mediterranean Sea, which provides equal political rights to all the people living there, where “all the people” includes

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1 Although ‘Israeli’ is a citizenship and so includes some Palestinians, I use the term to refer to Jewish Israelis. This is because it is very rare for a Palestinian Arab, even one with Israeli citizenship, to describe themselves as ‘Israeli’.

people who were previously wrongfully expelled or wrongfully prevented from returning, and that the state should be reflective of all political, religious and cultural identities. This position has recently been argued for by a number of academics who once supported the two state solution but now think that this is no longer feasible (Lustick) or who believe that the two state solution wrongly essentializes group-based characteristics (Bakan and Abu-Laban), and proposes instead a multi-religious, multilingual state that is based on equal citizenship and equal protection of individual rights.<sup>2</sup> Let's call this Position C.

The typology described above is organized according to who the favoured right-holder is, and the scope of the right claimed, but says nothing about the underlying argument for those views. These underlying justificatory arguments are the focus of this Article. This Article is interested in the two dominant, and possibly incompatible, theories of territorial rights: one grounded in justice, the other in collective self-determination. Both discuss the conditions under which a group or a political entity has such rights, namely the rights to exercise jurisdiction, to control and benefit from natural resources, to defend the geographical space, and to control the flow of goods and people across borders. Both theories have something of interest to say to this case, but before outlining the bases for rights over territory, and how these justificatory arguments map onto the three positions outlined above, some definitions and clarifications are in order.

What is territory? The term "territory" refers to the geographical domain of political or jurisdictional authority. It is a political concept and so distinct from land, which is a geographical notion: land is the part of the earth's surface that is not covered by water. Of course, most land is claimed by a state, and so is also territory, but there could be unclaimed land or land that is contested between two states. Further, the territorial domain of the state also extends to the airspace above and to the sea offshore, and so is not coextensive with land. Territory, then, is more than topology, but includes the idea of political authority.

Territory is also distinct from property, which we normally understand as a cluster of claim rights, liberties, powers, and immunities that, when held together with respect to a material thing, represent a form of "ownership." There are, however, some close analogies between the concept of "property" and the concept of "territory." Like "property," the territorial right-holder that

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2 IAN LUSTICK, PARADIGM LOST: FROM TWO STATE SOLUTION TO ONE-STATE REALITY (2019); Abigail B. Bakan & Yasmeen Abu-Laban, *Israel/Palestine, South Africa and the 'One-State Solution': The Case for an Apartheid Analysis*, 37 POLITIKON 331, 351 (2010).

has rights over territory (e.g., an agent, such as the state) typically does not have just one single right but a cluster of different rights, possibly including rights to jurisdiction, rights to control the flow of goods and people across borders, rights to natural resources within the territorial domain, and rights to defend these rights by military means.<sup>3</sup>

What do we mean by a normative “theory of territory”? It is now almost universally accepted amongst theorists working on territorial rights that a normative theory of territory is a theory of the appropriate, normatively defensible relationship between the state, the people, and land.<sup>4</sup> Any theory of territory has to explain how these three elements are related, and to justify the particular configuration. It is a normative theory because it is aimed at justifying the authority of the state, both over people and over the territory that it controls. And any theory of territory will have to explain or justify the rights normally associated with territory—the right, if any, to resources; the right of defense; the right of jurisdiction, and so on. These are the rights that we normally associate with the rightful holding of territory, although it is possible to have some rights in the bundle without having all of them, as is the case in federal systems such as in Canada, where Ontario exercises jurisdictional powers (rights) over its territory but no control over its borders.

In the next two Parts of the Article, I will outline the two standard justifications for territorial rights and their applicability to Israel/Palestine. Specifically, I argue that, while the justice defense seems at first blush to be supportive of position 1 and position 3, and to a lesser extent, position 2, there are a number of difficulties with this form of argument, both philosophical and as they apply to this case. The self-determination argument, I then suggest, is less problematic, and seems to straightforwardly support position 2, but there could be interpretations of some of the conditions (such as “capacity” to be self-determining) that could restrict the right-holder, and so be used to justify position 1, although I think this would not be a strong argument. This view could also justify position 3, though this too is not straightforward, and I outline the circumstances in which it would seem to support 3 over 2.

## I. TERRITORIAL RIGHTS AND JUSTICE

This Part analyzes a justice-based argument for territory, which is widely viewed as a supporting argument for the status-quo, by which I mean it seems

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3 CARA NINE, *GLOBAL JUSTICE AND TERRITORY* (2012).

4 David Miller, *Territorial Rights: Concept and Justification*, 60 *POL. STUDS.* 252 (2012).

to give territorial rights to the State of Israel, on the grounds that Israel is a justice-respecting and democratic state, and thereby holds legitimate authority over its territory. That implication is widely drawn, but it does not directly follow from the argument, because, as I will show, the justice argument is indeterminate in a number of ways.

The justice-based argument for territory derives from Kant and is perhaps the dominant view about what justifies territorial rights. It is a dominant view because it is implicit in our views about state legitimacy and it is consonant with well-established language of human rights and justified political authority. On this view, political communities have territorial rights insofar as they implement justice. For Kant, people who live in close proximity to one another, and therefore cannot avoid interacting, are morally obliged to enter the civil condition and acknowledge a political authority whose coercive law can guarantee their property rights. The justification for its exercise of those jurisdictional/territorial rights is simply that it replaces “a state devoid of justice” with “a rightful condition.”<sup>5</sup>

Modern heirs to Kant adopt the same form of argument—that justice grounds territorial rights—but they are more explicit in adopting the language of rights to characterize a just state. As Buchanan has argued, “any wielder of political power over a territory” must, if it is to be legitimate, do a “credible job of protecting at least the most basic human rights of all those over whom it wields power.”<sup>6</sup> Anna Stilz’s argument adopts a similar form: a state’s claim to territory requires a system of law that “rules in the name of the people,” by “protecting basic rights and granting the people a voice in defining them.”<sup>7</sup> Ypi lists as “essential criteria” for legitimacy “the ability to guarantee the rule of law; to protect basic human rights; and to provide sufficient opportunities guaranteeing citizens’ democratic participation.”<sup>8</sup>

Other Kantian theorists emphasize the minimal nature of the justice criteria: Ripstein, for example, defends a minimalist justice requirement: states that are not barbaric are legitimate in virtue of the minimal justice they do secure. Ripstein, though, does not extend this argument to justify territorial rights specifically, though presumably it could be so extended.<sup>9</sup> This justice argument

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5 IMMANUEL KANT, *METAPHYSICS OF MORALS* 90 (M. Gregor trans., 1996) (1797).

6 ALLEN BUCHANAN, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 247 (2004).

7 Anna Stilz, *Nations, States, Territory*, 121 *ETHICS* 572, 578 (2011).

8 Lea Ypi, *A Permissive Theory of Territorial Rights*, 22 *EUR. J. PHILOS.* 288, 300 (2014).

9 ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 334–44 (2009); BUCHANAN, *supra* note 6, at 256.

is plausible as a requirement for holding territorial rights, in part because it is consistent with our intuitions about the minimum requirements of state action, and, as suggested above, with a well-established literature on human rights.

It is, however, doubtful that *territorial rights* should be grounded in justice considerations, at least as the latter are ordinarily understood. There are at least three philosophical problems with this otherwise compelling argument, which raise questions of interpretation with respect to the three political positions outlined at the beginning of the Article.

The first problem is that, while justice is an important, indeed arguably the central, criterion for a legitimate government, there are counterintuitive implications attached to making territorial rights, which are associated with the state (not just the governing regime), contingent on justice. Let's consider the *historical/empirical criticism* first. This criticism begins by pointing out that, in the past, states were rarely just: they rarely protected human rights, even on a noncontroversial understanding of what that involved, and were also rarely democratic. The requirement that territorial rights track the justice of states has the clear implication that all states in the past lacked rights to their territory. That would mean that more just states could be justified in taking over the territory of less just (or unjust) states, because the unjust state did not have rights over that territory in the first place. But we often think that there was something wrong with taking land, as many imperial powers did, from their colonial subordinates, often justifying their rule over "less civilized" populations in terms of their potentially morally superior rule. Do we really believe that 19th century Morocco had no rights over the territory that we now identify with Morocco?<sup>10</sup> Do we really want to say that the British Empire did not violate territorial rights in India because its preceding princely rulers were unjust? Do we really think that the only wrong of colonialism was that it institutionalized hierarchical relations of domination and subordination, and that the taking of territory was not an additional wrong?<sup>11</sup>

This is not just a backward-looking problem about how to theorize the wrong of colonialism. Many states today are unjust. If territorial rights are contingent on justice, then the conclusion that most contemporary states have no legitimate claim to the territories they govern seems unavoidable. One way to address this is to set the bar fairly low, focusing on the violation of a basic or minimal list of human rights, as Ripstein does. Yet even a basic

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10 Ayelet Banai, *The Territorial Rights of Legitimate States: A Pluralist Interpretation*, 6 INT. THEORY 140 (2014).

11 Margaret Moore, *The Taking of Territory and the Wrong of Colonialism*, 27 J. POL. PHIL. 87 (2019).

human rights condition seems to disqualify many states (as Stilz admits, citing Zimbabwe, Iran, Sudan, China and North Korea as examples).<sup>12</sup>

The second problem is that the justice—or human rights—argument is not adequate, or at least not adequate as a complete justification of territorial rights, because, while it defends a territorial state system, it does not defend or define the precise territory or domain of the state. It tells us that the state ought to be ordered territorially, but not where the state's territory ought to be. To answer this question, which is termed "*the particularity question*," we need to connect particular states with particular geographical areas. This is necessary to address territorial conflicts, such as when two or more states or groups claim the same piece of land, as in the case of Israel/Palestine, or, in the case of secession, to define the boundaries of the seceding unit, or to sort out claims to the seabed or the High Arctic or Antarctica, which require us to think about the principles on which boundaries should be drawn. The answer to the particularity question, which is not provided by the justice argument, would also explain why we are justified in protecting the territory of *our* state, and not just any state.

This is not just a philosophical problem about the coherence and plausibility of this theory of territory, but also concerns its ability to address territorial conflict. This can be seen in high relief by focusing on Israel/Palestine, but this problem emerges in many contested areas. According to the justice theory of territory, the boundaries of territorial justice are the boundaries of legitimate statehood, and so this justificatory argument would seem to justify Israel in its pre-1967 boundaries, at least on the reasonable assumption that Israel is sufficiently just (human rights-respecting, democratic, and protects basic liberal values). Indeed, it could be deployed to support Israeli hardliners who advance what I called above position A—the view that Israel is entitled to its pre-1967 boundaries as well as the Occupied Territories. They might contend that the Israeli High Court of Justice has asserted its authority over the Occupied Territories, thus ostensibly protecting property rights and human rights to a degree and providing a mechanism to adjudicate conflict. On the other hand, it could be reasonably argued that the justice argument ought to apply only to Israel in its pre-1967 boundaries, not the Occupied Territories, since the Palestinian population there is subject to military occupation, which means that they are governed undemocratically, and their basic rights are less well protected than those of Israeli citizens.

Depending then on how minimal the justice bar is, one could defend either the view that Israel is entitled to its current possession of territory (position

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12 Stilz, *supra* note 7, at 588.

A) or that it is entitled to its pre-1967 territory, but not the occupied areas, which might be an important sub-argument for position B.

The third problem concerns the *status quo objection*. Some might claim that appealing to the justice of the Israeli state is not a good argument to defend Israel's control even of its pre-1967 territory, because it is not fair to the group that was forcibly prevented from wielding territorial rights, through which they could implement their own institutions of justice. Palestinians could rightly complain that that formulation of the justice requirement above fails to appreciate that Palestinians could also, given the right conditions, create and maintain their own just state. This suggests that the justice argument should be revised to guarantee opportunities to maintain and implement justice. This revision would move away from the Hamas view that Israel is not entitled to any territory, to support position B outlined above, viz, the two-state solution. It would do so on the grounds that both communities ought to have the opportunity to implement and maintain rules of justice and be supported in that aim. It also raises fairly fundamental questions about the justice defence itself, since, presumably, almost any state emerges in a situation of rival contenders for state power, so retrospectively conferring rights on the winners, without considering the possibility that the losers could have done as well, seems normatively suboptimal and indeed worryingly close to a might-makes-right argument.

In the paragraph above, I argued for a reformulation of the justice argument to avoid the status quo objection, which would focus on opportunities to enact and maintain justice. That move is supportive of position B, viz, that a possible or justified territorial solution would involve two potentially just states or two autonomous and potentially just entities with some kind of federal or confederal overarching power. However, an important indeterminacy would remain. We need to know where to draw the boundaries between the two entities. On this critical question, the justice theory is silent because it takes the present, *de facto* creation of justice as itself bestowing territorial rights and boundaries. It could, however, be combined with a conventionalist understanding of fair division of territory, where two equal parties agree to divide the land fairly, and here the idea of fairness could be explicated in terms of what would be agreed to from equal initial positions and equal bargaining power. This fairness requirement is not met in the current political order, where one side has the land, and hence more bargaining power, but we could employ heuristic devices aimed at modelling such a fair division, involving presumably the internationalization of Jerusalem, which is holy to both parties.

There is an additional area of indeterminacy connected to the justice argument, which concerns whether the justice criterion applies to state-formation itself. Let us assume that Israel meets both the minimal democratic and justice

(rule of law, protection of human rights) conditions that are typically invoked by the justice argument for the conferral of territorial rights, either in the geographical space of Israel proper or, more contentiously, in the occupied areas as well. The problem now is that this argument seems *insufficiently retrospective*. This point is a little different from the point above, concerned with generalizing the opportunities to secure justice: instead it asks whether justice should apply to state–formation and the territory involved in the creation of the state. The claim here is that, while Israel might now qualify as a just state, it could be argued that this is the wrong baseline, because the 1949 state involved the coercive displacement of many Palestinians from the area, the creation of governance institutions that privileged Israelis and not Palestinians, and the forcible prevention of return by those Palestinians who found they were on the wrong side of the military (and subsequent state) border.

To some extent, proponents of the justice argument for the conferral of territorial rights are aware of this problem and have addressed it. Buchanan, for example, has pointed out that a state cannot gain rights over territory if it does so unjustly: it must not unjustly displace some other group, or usurp an already legitimate state.<sup>13</sup> Buchanan’s formulation does not exactly address the problem that we are confronted with, however. He points out that it is not justified on this argument to usurp the authority of a legitimate state. But does the no–usurpation condition also apply to usurping the capacity of a people, like the Palestinians, who were in the process of decolonizing from Britain? Here justice theory is unclear. Since, presumably, the British did not rightfully hold territorial rights, and the Palestinians did not (yet) constitute a just state, there was no usurpation of a legitimate authority.

Perhaps, though, the justice argument could be applied even further back, to the founding of Israel and the prior question of whether Israel is entitled to be in its current territory. This move raises the question of how the justice argument can address the particularity question—how it can justify the possession of particular territorial units. If justice is the main legitimating argument for holding rights to territory, and if injustice can forfeit rights to territory, then it would seem that Israel should have been created in part of Germany. Germany after all had been egregiously unjust, indeed genocidal, and, if anything would forfeit rights over territory, on that argument, the scale and horror of the injustice of Nazi Germany would. And if the experience of European Jews in that period reveals the precariousness of being a permanent minority in multiple states, and a diasporic people in a world organized by territorial states, then this seems to justify the Jewish people in having their

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13 BUCHANAN, *supra* note 6.

own state, and the German state losing territory because it forfeited its status as a just state (which is entitled to its territory).

At this point, it is clear that the justice defense of territorial rights, while attractive in some respects, is also seriously deficient in others, and does not offer a coherent answer to territorial rights and boundaries in most complex or contested cases. Some aspects of the justice argument, especially the focus on present justice, do justify Israel, but other aspects suggest that the geographical domain of the state of Israel cannot be defended on this argument, and certainly not the Occupied Territories. This approach also cannot offer a nonarbitrary account of the boundaries of either a two-state solution or even the single State of Israel, except by examining retrospectively where in fact Israel did manage to implement justice, which is question-begging in the way described above. Of course, the argument is question-begging for all cases of contentious boundaries, not only in this case.

Let us then turn to the rival theory, to see if it fares any better.

## II. TERRITORIAL RIGHTS AND SELF-DETERMINATION

In this Part, I will consider the argument for territorial rights rooted in the value of realizing collective self-determination, rather than justice. This argument cannot easily be married to the justice account above, because it requires us to view the people as the appropriate holder of territorial rights, and to do so through a coherent normative account of the appropriate relationship between government, territory and people. It could be the case, of course, that justice emerges at the second level, in justifying particular regimes, but not territory itself. On that view, considerations of self-determination justify manageable and stable polities and borders within which a group can exercise control over their collective life, and justice considerations enter at the second level, because presumably the rules and policies and practices of such a group ought also to be just. I will set aside the ways in which justice might enter into such an argument, focusing only on the relationship between self-determination and justified control over territory or territorial rights.

In making this argument, I am to some extent following Michael Walzer and John Stuart Mill. The former appeals to the concept of self-determination in *Just and Unjust Wars*, where he suggests, following Mill, that self-determination is the right of a people “to become free by their own efforts, if they can.”<sup>14</sup> Walzer also argued, in responding to critics of his theory, that “the real subject

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14 MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 88 (1977).

of my argument is not the state at all but the political community that (usually) underlies it.”<sup>15</sup> The argument developed here follows this structure, but there are many different ways to conceptualize the people as a collective agent, and one need not presuppose the common view that “the people” are linked to a “cultural community” or an “inherited culture.”

There are at least three elements of such a theory of territory, which need to be further explicated. First, there is the idea that the people themselves should be the primary right-holder, and this requires that we can identify the people as a collective agent, in a way that is distinct from, and conceptually independent of, the state itself. Second, there is the challenge of linking the people with land so as to connect it to the geographical domain on which they are entitled to organize their collective lives and be self-determining. Third, we need to explain the value that would be realized, which, I argue, is the value of self-determination.

### **A. The People as a Collective Agent**

The first challenge is to identify the people as the territorial right holder; or, more precisely, the holder of a meta-jurisdictional right to be collectively self-determining in a specific geographical domain. It's much easier to attribute territorial rights to the state: the state is a standard kind of collective agent, with a decision-making mechanism, such that we can attribute choices or decisions to it which are independent of the choices and decisions of any individual member of the state. It is much more difficult to attribute collective agency to “the people” in a way that isn't circular and doesn't fall back on the state as the mechanism by which “the people” speak. I propose, however, that we can describe “the people” as the collective agent if (1) a large majority of people are in a relationship with one another that involves a shared political commitment to establishing rules and practices of self-determination; (2) they have the political capacity to establish and sustain institutions of political self-determination; and (3) they possess an objective history of political cooperation together, through for example participating in state or sub-state institutions, or even through mobilizing and participating in a resistance movement. The relationship speaks to the fact that it cannot be a momentary encounter; it must be temporally extended—both with a history and with (in normal cases) the expectation of a future—and it realizes moral goods that are intrinsic to that relationship. A “people” so described can be an agent insofar as it makes sense to attribute actions and projects and plans

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15 Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. PUB. AFF. 209, 210–11 (1980).

to it, which are independent of the actions of any of its constituent members, and it also (I argue elsewhere) satisfies both the individuation condition (that is, it explains how one people can be distinguished from another) and the continuity condition (that is, it explains how a people can be identified over time, while still changing), which are important desiderata of a collective agent.<sup>16</sup>

## B. The Territory of the People

The second challenge is identifying the “territory” of “the people” so defined. Here we can appeal to the idea that individuals and “peoples” have rights to land, which helps to define the territorial right. I will not spend much time on this, in part because there is convergence by all the competing theories of territory on the idea that rights attach to individuals who are legitimately settled on the land.<sup>17</sup> There is a moral right of residency which attaches to individuals and has three components: a general liberty right to settle in an unoccupied area; a right of non-dispossession, by which I mean a right to remain, at liberty, in one’s home and community and not to be removed from the place of one’s projects, aims and relationships; and a right of return, when an individual has been unjustly dispossessed of the land on which s/he has a right to reside. But it would be wrong to think of place-related rights as attaching only to individuals, since individuals are not isolated and atomistic but operate within a structure of relationships that give meaning to their lives. They have collective identities that are integral to their sense of who they are, and collective aspirations as members of their social groups. So, in addition to (and indeed conceptually inextricably linked to) the idea of a right of residency is a group right of occupancy, where the groups in question—a people—also have rights to a place, which are forged not simply independently by individuals living in a place, but also by individuals as members of collectives, whose members share a geographical location with one another, and whose locus is defined by the activities and projects central to that relationship.

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16 MARGARET MOORE, *A POLITICAL THEORY OF TERRITORY* (2015). See also ANNA STILZ, *TERRITORIAL SOVEREIGNTY: A PHILOSOPHICAL EXPLORATION* (2019).

17 MARGARET MOORE, *ETHICS OF NATIONALISM* (2001); Margaret Moore, *Which People and What Land? Territorial Right-Holders and Attachment to Territory*, 6 INT’L THEORY 121 (2014); MOORE, *supra* note 16; Stilz, *supra* note 7; MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

### C. The Value of Self-Determination

Finally, what value is served by conferring territorial rights (and specifically the right of meta-jurisdictional authority) on peoples so defined, over the areas that they occupy? It seems that the primary answer is self-determination. Although this is a recognized legal right, enshrined in Art. 1, par. 2 and Article 55 of the U.N. Charter,<sup>18</sup> I assume that there is a moral (and not merely legal) right to collective self-determination. This moral right follows from the idea that political communities are valuable in part because they are spaces in which members co-create their own political project and together implement their own conception of justice. Institutions of political self-determination give expression to the communities in which people live, and they express people's identities. They are an important forum in which collective autonomy can be expressed and people can shape the context in which they live, thereby realizing their political aspirations free of external domination. Proponents of this view emphasize that the process of making the rules that govern a people's collective existence is itself morally valuable; those who exercise collective self-government have the institutional mechanisms to shape the conditions of their existence, and their future together, and are thereby more autonomous—or experience a different (collective) dimension of autonomy—as compared to the strict individual (private sphere) protection of autonomy model.<sup>19</sup>

### D. The Self-Determination Theory and the Israeli-Palestinian Conflict

The above requirements for identifying a people and justifying the people in the exercise of collective self-determination apply to both groups—Israelis and Palestinians. Both Israelis and Palestinians satisfy the requirement of “peoplehood” in that each represents a group bound together by a history of cooperation, an expectation of a future together, and a commitment to establish rules and practices of political self-determination. Of course, Palestinians and Israelis also live in a shared space, live under (at least some) shared institutions presently, and are engaged in some cooperative enterprises. And each group is further subdivided into different subgroups, with distinct identities, relations, and practices of cooperation. But for the purposes of determining the kind of group that ought to exercise political self-determination there are only two, Israelis and Palestinians, because each group seeks to establish and maintain its own institutions of political cooperation. We should expect that there will

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18 U.N. CHARTER, art. 1, ¶ 1, art. 55.

19 MOORE, *supra* note 16; DAVID MILLER, IS SELF-DETERMINATION A DANGEROUS ILLUSION? (2020); STILZ, *supra* note 16.

be disagreements about how deep or how shallow these institutions need be, as indicated in the Introduction. For some people separate statehood is not necessary; there could instead be a land of Israel/Palestine, with two mutually constituting peoples, with some local forms of self-determination and executive power-sharing at the central level. For others, each side warrants its own state. Indeed, for radicals on each side, only their own side is entitled to its own state. But that disagreement is not a disagreement about whether they are separate peoples or not. The moral value of collective self-determination that undergirds this theory has the advantage—at least over the justice theory of territory—that it requires only that the group in question—the people—aspire, and has the capacity, to be collectively self-determining.

Although this argument seems straightforwardly to support position B outlined above—the two state solution—there could be interpretations of the prerequisites for territorial rights that might lead to support for either position A or position C.

One argument that could be made focuses on the capacity requirement for conferring territorial rights on a group. This argument could be made by radicals on the Israeli side, who raise questions about the capacity of Palestinians to establish and maintain their own territorial state. It could not plausibly be made by Palestinians about the Israeli state, because it is obvious that Israel exists and is able to effectively maintain its own institutions of self-determination.

This line of argument—concerning the conditions for capacity—presses on a deeper philosophical question about the role of capacity in a normative theory of territorial rights. The problem here is that, on the one hand, there's no point to conferring rights to create and maintain institutions of government to realize collective self-determination if in fact the group lacks the capacity to maintain those institutions. On the other hand, this looks like a problematic condition from a normative perspective, because groups that have been oppressed may lack the capacity for that reason. How, then, can we define the capacity requirement in a way that is consonant with the normative aims of a theory of (territorial) right? Probably the best way out of this dilemma is to specify that there are third-party duties to groups that lack capacity, to assist them in building the conditions for self-determination, as long as this can be done in ways that don't involve injustice. It is beyond the scope of this paper to identify the duty-bearers—who have these duties—except to say that, morally speaking, it seems to be generally shared among other self-determining entities. This thought is supported by reflection on the role of international actors in facilitating smaller entities in their exercise of self-determination; after all, part of the reason why Israel has capacity is precisely because it has had the support of powerful friends, so this is not an

intrinsic and endogenous feature of the group. If the Palestinians and Israelis are similarly situated, morally speaking, except for the capacity requirement, it seems incumbent on external actors, including perhaps especially Israel, to help build capacity, rather than treat this as a blocking condition.

There is a second and much more contentious element in this argument, which concerns the idea that the “self-determining group” ought to be in “legitimate occupancy” of the geographical area. This occupancy right is important to link territory to the group in question. The standard way to identify the territory of “the people” is to identify the area or geographical space that members of the group legitimately “occupy.”

This argument does not directly address the problem that arises in places like Israel/Palestine, where people who were in legitimate occupancy of a place were expelled, removed, or simply fled from the path of war or violence and found themselves on the wrong side of a border and unable to return. Nor was this simply a matter of happenstance. There was a policy on the part of Israel to prevent the return of the Palestinians who lived there, and also to expropriate land or property that was then “abandoned”—but abandoned only because the prior owners or occupants could not return to it—and make it part of the Israeli state. Examples of such policies include laws related to expropriation of abandoned areas, emergency land requisition, absentee property law, and the expropriation of depopulated lands for public purposes.<sup>20</sup> Simply focusing on the present occupancy of the “people” fails to acknowledge that existing occupancy patterns may be created through prior and ongoing injustice, so to build territorial rights on them would be to build a moral entitlement on an existing injustice.

How, then, should we think about the problem of linking a people with a territory in cases where people have been removed from said territory? This is a tricky issue, which is germane not only to Israel/Palestine but elsewhere, including Cyprus, Crimea, and throughout the Caucasus. At one level, of course, the self-determination argument addresses this problem by claiming that a group can exercise territorial jurisdiction over a particular geographical space only where the members legitimately occupy the area, and the qualifier “legitimately” is important here. This argument could be used to support position 1—the claim that the only group that is in legitimate occupancy of the area that we know of as Israel/Palestine are the Palestinian people. This is because the creation of Israel, it could be claimed, involved forcible population removal, which is wrong in itself, because it is often coercive, and

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20 IAN LUSTICK, *ARABS IN THE JEWISH STATE* 170–82 (1980); Michael Saltman, *The Use of the Mandatory Emergency Laws by the Israeli Government*, 10 *INT’L J. Soc. L.* 385 (1982).

because it violates Palestinians' rights of residency and occupancy; and then the state of Israel prevented Palestinians from returning to said land, where they could recreate their lives and try to mend the relationships broken by these tragic events.

In response to an argument along the lines of position 1, which distinguishes between legitimate and illegitimate occupancy and grounds the entitlement of Palestinians in their prior, rightful occupancy of the place, it is possible to push back on this claim, in the way suggested by Jeremy Waldron.<sup>21</sup> Once sufficient time has elapsed that we are in a multigenerational injustice case, the analysis of territorial rights changes. Typically, the situation of the descendants of the perpetrators strengthens over time, at least if we are operating with an interest theory of rights, where rights protect interests and the interests must be sufficiently strong that they justify holding others under duties. In the case of the descendants of the victimized, usurped group, the rights weaken over time; they do not have a relationship with each other (if they are dispersed) nor a relationship to the land. They may have a desire to be in a relationship to the land, to the physical location, but this is different from actually being in relation to the land. It is analogous to the difference between being a good friend, and thinking that someone could be a good friend. Moreover, in many cases the descendants of the original victims, having moved away, start to build lives elsewhere, and after a time these places feel like home. The descendants of the perpetrators, we assume, also live in the place that their ancestors won, but they do so "innocently," in the sense that they were born there, grew up there, and know only that place as the locus of their relationships, plans and projects. This does not mean that the original injustice has been superseded, in Waldron's provocative phrase, since a wrong was done, but it does mean that the entitlements have changed. And it also may mean that the solutions available to "correct" the original wrong become more limited as time goes on: restitution looks increasingly problematic, as it might involve further injustice, whereas apology alone seems inadequate to appreciate the full scale of the wrong.

This picture of rights strengthening and weakening over time depending on the physical location of the occupancy group is not completely accurate, however, as there are a number of intervening variables that introduce sources of asymmetry to this general temporal framework. First, the "innocence" of the descendants of the perpetrators is persuasive when applied to goods whose origins are unknown, but is less persuasive when the individual knows that the good in question is stolen. And here there is at least a different story to be told about the original boundaries of Israel, which were created with the

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21 Jeremy Waldron, *Superseding Historic Injustice*, 103 *ETHICS* 4 (1992).

blessing of the United Nations, and allowed for the partition of Palestine, thus paving the way for the creation of the Jewish state. This legal fact may not change the moral situation of invasion and loss. However, it does mean that the descendants of the perpetrators (the children of the original Israeli Jewish settlers) have a legitimate expectation of a settled occupancy in that geographical location. They may feel that their claims and entitlements, plans and projects with respect to the place are reasonable, and in any case they may have nowhere else to go.

The analysis surely is different with respect to the territory of the West Bank, the settlement of which which was a clear violation of international law. Israel's obligations as an occupying power have been spelled out in the Fourth Geneva Convention, which mainly concerns its duties with respect to the original inhabitants, but also makes explicit that settlements of the occupying power on this territory are illegal.<sup>22</sup> UN Security Council Resolution 242 calls on Israel to withdraw from the occupied territories;<sup>23</sup> this was affirmed in UN Security Council Resolution 338.<sup>24</sup> In addition, many reputable international organizations have made clear the illegal (under international law) status of Israel's hold on these territories. In this context, it is doubtful that the second- and third-generation settlers can be described as wholly "innocent," since they are at least guilty of not returning said land, and must have known that their occupancy on this land could not be assumed as a basic just background feature of their life.

A further complicating factor concerns refugees who have been expelled or fled and then been unable to return, but are not able to settle anywhere: they are stuck in a refugee camp, stateless. Since they are not integrated into another political community, their main claim must of course be against the original community that expelled them. It's true that the claims of descendants are weaker than that of the original victims in the sense that they do not have a relationship to the land; what they have is the desire to have a relationship with particular others and a desire to be related in important ways to the land, and this desire is not the same as actually having the land. But it is the best place for them, comparatively speaking, and it places responsibility at the doors of the perpetrators of the original injustice, or those who have persisted in preventing their return.

It seems, then, that this general presentist picture of occupancy, which is at the heart of the self-determination argument, works best when groups

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22 GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, AUG. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

23 S.C. Res. 242 (Nov. 22, 1967).

24 S.C. Res. 338 (Oct. 22, 1973).

legitimately occupy a place. Where there is multigenerational injustice of a kind that creates illegitimate occupancy, some (weaker) version of Waldron's view that rights increase and weaken over time applies. This is because the rights are grounded in interests and the interests themselves are related to the person's actual, physical relation to the land. This is, of course, not ideal. It furnishes an incentive for groups to seize land and hold onto it long enough to gain rights to it, and an incentive also for groups to ensure that their expelled members are not integrated into their host states, but remain a perpetual thorn in the side of the original aggressor state. Notwithstanding that problem, the Waldron argument above suggests that, while the original expulsion of Palestinians and creation of the State of Israel on this land could not be condoned, present generations of Israeli Jews have residency and occupancy rights in the land of Israel (not the occupied territories), which they ought to share with the Palestinians who seek to return. This right does not, however, apply to the Jewish populations throughout the world, notwithstanding the Israeli state's claim of a "right to return" there.

Thus far, I have suggested that the self-determination argument tends to support position 2—the two-state solution. I have analyzed two arguments that could be advanced by more radical proponents of position 1—one focusing on capacity, which denies the right of self-determination to Palestinians; and the other focusing on illegitimate occupancy, which denies the right to Israelis. But what about position 3? Could the self-determination argument be deployed to support the idea of a multinational, multi-religious, multiethnic state in the area of Palestine/Israel, which recognizes the equal individual rights of all its inhabitants?

There are two strategies to move an argument premised on the value of group self-determination to a single state solution, inclusive of all identities. One is to point out that the self-determination argument doesn't necessarily support a statist territorial structure. It doesn't necessarily follow from an appreciation of the value of collective self-determination that this has to take a statist form, with each group exercising its own political self-determination within its own state structures. This is clear in many cases beyond Israel/Palestine, in part because the self-determination argument will fail to determine precise boundaries when, as is often the case, members of distinct groups of people are interspersed. If groups are thoroughly intermixed on the same territory, then nonterritorial self-determination, where each has institutional mechanisms to enable it to exercise some kind of control over its collective life, is a possibility. Indeed, over most spheres where coordination is necessary, self-determination can be achieved through group-based power-sharing. There is now a rich literature on the consociational (power-sharing) democracy tradition, which reveals how self-determination can be achieved through cross-community

executive power-sharing; proportionality rules throughout the governmental and public sectors; territorial self-government or political autonomy; and veto rights for minorities.<sup>25</sup> What is required to be fair to both groups, and to enable each to see the shared state as a site of self-determination, is usually some mix of self-rule (by the group) and shared rule (by the groups).

The argument in the paragraph above is premised on rival group identities, or distinct people, but group-based identities themselves are neither natural nor necessary nor given. They are socially and politically constructed. This means that it is possible that, over time, two previously distinct groups may come to feel that they are one people, who seek to be self-determining together in a particular place. When this is so, the political structures in which people exercise self-determination over their collective lives should reflect their shared identity. The self-determination argument doesn't rule out that possibility. It doesn't assume some kind of natural or authentic "self" that ought to be "self-determining." However, it is hard to see that this is likely in the Israeli-Palestinian context, in the near or even medium-term future, although of course power-sharing of the kind envisioned above, within a territorial entity, might, over time, and through fair and reciprocal cooperation, make this a possibility.

## CONCLUSION

Let me now sum up. Both theories of territorial justice could be used to defend the full range of political positions identified at the beginning of this Article. The justice argument seems to apply most straightforwardly to justify the geographical territory of Israel excluding the Occupied Territories, though interpretive disagreements, especially over the role of past injustices, can be invoked to support both position 1 and position 3. Both (Palestinian and Israeli) versions of Position 1 are problematic, not because they cannot marshal arguments, but because they fail to appreciate the valid arguments of the other community. The self-determination argument seems to most naturally support the idea of two peoples exercising self-determination over the collective life of their own political community (position 2—the two-state solution), or doing so within a state where each exercises a form of local self-determination (a version of position 3). Again, though, concerns about

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25 AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (1977). See also John McGarry et al., *Integration or Accommodation? The Enduring Debate in Conflict Regulation*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?* 41 (Sujit Choudhry ed., 2008).

past injustices could rear their head, because the occupancy principle, which defines the area to which each group is entitled, assumes *legitimate* occupancy, and concerns about this could be used to support a radical ( Hamas ) version of position 1, which again is problematic because one-sided.

An argument could possibly also be made in defense of the occupancy and then political rights of the Jewish people, and so in defense of the Israel, which does not rely on either (generalizable) territorial right theory. This argument focuses on the very particular humanitarian case posed at the historical juncture when the State of Israel was created. I have already examined this case with respect to Nazi Germany having been egregiously unjust and therefore no longer entitled to its territory, with the concomitant idea that, if a Jewish homeland was to be created, it ought to have been on German soil. That this didn't happen reveals the problem with justice theory: it is insufficiently sensitive to other elements beyond justice, such as the relationship of the group to particular lands and to places of particular cultural or other significance. And for a group that had suffered so much, that had been subject to a genocidal regime that revealed the precariousness of being a permanent minority in many lands, it would have been terribly inadequate, perhaps even an insult, to place Israel in the heart of Bavaria.

This last argument is not a generalizable argument, because it doesn't make sense to think that groups are entitled to places that they once occupied, two thousand years earlier, or to places they have a sentimental attachment to. It may, however, have been justifiable in the particular context of Israel and the situation that the Jewish people of Europe found themselves in in the postwar period. But even that justification cannot justify the further denial of the occupancy and territorial rights of the Palestinians, nor the view that the right of return properly applies to Jewish people everywhere, rather than Palestinians who once had legitimate occupancy of the place and aspire to return.