

# AGAINST 'PERMANENT SOVEREIGNTY' OVER NATURAL RESOURCES<sup>1</sup>

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Abstract: *The doctrine of permanent sovereignty over natural resources is a hugely consequential one in the contemporary world, appearing to grant nation-states both jurisdiction-type rights and rights of ownership over the resources to be found in their territories. But the normative justification for that principle is far from clear. This article elucidates the best arguments that might be made for permanent sovereignty, including claims from national improvement of or attachment to resources, as well as functionalist claims linking resource rights to key state functions. But it also shows that these defences are insufficient to justify permanent sovereignty, and that in many cases they actually count against it as a practice. They turn out to be compatible, furthermore, with the dispersal of resource rights away from the nation-state which global justice appears to demand.*

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*the river...came flowing in a semicircle crossing the border from Sweden and down through this village and back into Sweden a few kilometres further south. And I remembered the year before when I had gazed down into the whirling water and wondered whether in some way or other it was possible to see or feel or taste that the*

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*water was really Swedish and was only on loan this side of the border. But I was so much younger then and didn't know much about the world, and after all it was just a fancy.*<sup>1</sup>

It might be fanciful to suppose, as Per Petterson's young hero does, that water flowing from Sweden tastes somehow Swedish. But though we can be sure that the water, or tin, or copper found in Sweden are no different in their properties from the water or tin or copper found in Norway, there is one sense in which they *are* 'Swedish.' They are Swedish in the sense that international law defines them as the preserve of the Swedish people. A number of instruments of international law stipulate clearly and unambiguously that natural resources are at the 'disposal' of the nation-states 'in' or 'under' which they exist. The United Nations' (1966) International Covenant on Civil and Political Rights, for instance, states that 'All peoples may, for their own ends, freely dispose of their natural wealth and resources.'<sup>2</sup>

This doctrine, which has come to be known as the doctrine of 'permanent sovereignty' over natural resources, is a powerful organising principle within world politics. Although we might make the mistake of assuming it to be a natural fact of a world of states, the principle only came to be elaborated and enshrined within international law during the 1950s and 60s, when it was a highly controversial part of the struggle for decolonisation. Whilst many newly-independent countries were keen to institute a strong doctrine of permanent sovereignty into international law, major world powers were keen to restrict permanent sovereignty with a set of provisos ensuring that natural resources were used for the wider good, and in the interests of global economic cooperation.<sup>3</sup> Still, the principle continues to have a major effect in constituting what we might call the status quo of the contemporary world order. Individual nation-states enjoy an extensive and essentially exclusive set of rights over

the resources within their territories, albeit with exceptions to that rule arising through voluntary treaty-making.

In a pragmatic sense, then, permanent sovereignty is the default position: any argument for a particular distribution of resource rights will have to contend with the fact that states possess those rights as a matter of legal reality, and are unlikely to give them up easily. But ought it to be seen as the default position from the *moral* point of view? What, if anything, is the normative basis of permanent sovereignty? Can it be justified? This article will identify the best available arguments in favour of the doctrine, and assess whether they are adequate to the task of justifying it. Despite its huge significance within world politics, permanent sovereignty is not often explicitly justified within either international law<sup>4</sup> or political philosophy. Some defences do exist, as we will see later in this article. But the method will also be one of extrapolation, whereby we seek to identify whether defences of territorial rights over land, or of self-determination, for instance, *could* be extended to natural resources.

The article begins in section I with some preliminaries, defining resources and resource rights, and distinguishing the question of rights over resources from the question of rights over land. Four arguments in favour of permanent sovereignty will then be adduced - and each, ultimately, will be found wanting. Section II examines whether nation-states have plausible 'improvement'- or 'attachment'-based special claims over 'their' resources. I establish that these two arguments fail to justify national permanent sovereignty. Although there are some improvement-based special claims which might apply at the level of nation-states, these apply to some resources and not to others, and moreover are best responded to by granting not full and exclusive rights over all of the natural resources within a territory, but an appropriate share of the income from the relevant resources. In the case of attachment, whilst there are again some plausible special claims within nation-states, these again fail to justify granting full and exclusive resource rights to them; such attachment-based claims apply to some resources and not to others, do not in any

case demand the full set of resource rights, and in many of the most plausible cases actually challenge, rather than support, the ability of the nation-state to exercise exclusive control over resources.

Section III then examines two rather more ‘instrumental’ arguments which might be advanced for placing resource rights in the hands of nation-*states*, each of which suggests that the doctrine of permanent sovereignty serves an important good (with the candidates being the good of members’ basic rights, and the good of effective conservation of resources), which would not be well served otherwise. The problem with these two arguments is that they are compatible with a regime of dispersed control over resources, and do not require or even recommend thoroughgoing permanent sovereignty. What is a powerful pillar of the contemporary world therefore turns out to stand without adequate justification. The conclusion draws some conclusions from this deficit for debates about global justice and territorial rights.

## **I. Resources and Rights**

To make progress in investigating the justifications (if any) for permanent sovereignty, we need to know, first, what natural resources are, and, second, what it would mean to enjoy rights over them. This article defines natural resources as any raw materials (matter or energy) which are not created by humans, but are available to sustain human activities.<sup>5</sup> This definition follows the usage within international law, and of international organisations overseeing trade in resources. For the purposes of compiling statistics on natural resources and economic growth, for instance, the Organisation for Economic Cooperation and Development suggests that ‘Natural resources are natural assets (raw materials) occurring in nature that can be used for economic production or consumption.’<sup>6</sup>

Natural resources need to be distinguished from the *land* in, on or above which they occur. Though in practice this can be difficult, expensive and destructive, natural resources such as metals, petrochemicals and minerals can in principle be removed and transported away from the land in, on or above which they lie. Economic theory has not traditionally helped us much here insofar as its traditional list of the factors of production (land, labour and capital) included natural resources as a *part* of land. But more recently we tend to find the two separated more clearly both in economics and in the law, so that we witness instead discussion of ‘land *and* natural resources.’ The fact that natural resources are in principle removable from land means that we can intelligibly ask questions about whether rights over each *should* be allocated separately. In fact there is increasing recognition within political theory that rights over resources cannot simply be ‘read off’ from the territorial right to police a particular geographical jurisdiction, and that the standard justifications for rights of jurisdiction or border control cannot simply and immediately be extended to produce a justification for rights over resources. As David Miller puts it, in the absence of an argument why rights to exercise jurisdiction over territory, membership and resources need to be held together, ‘The relationship between the three sets of rights should be regarded as an open question.’ Each may require a separate, albeit potentially overlapping argument.<sup>7</sup>

As a result it is possible – and desirable – to distinguish between indirect and direct claims to natural resources. A *direct* claim to a resource, on my account, is a claim which states that a specified agent has a *prima facie* claim to control, securely access or constrain others’ access to a specified resource simply because of some feature of her relationship with that resource (for instance, that secure access to that resource is in itself necessary to her ability to pursue her central life-plans; see below). An *indirect* claim to a resource, by contrast, is one which states that a specified agent has a claim to control, securely access or place constraints on others’ access to a resource but derives that claim purely from other, prior claims such as claims to

exercise control over land or over borders. Thus a person might say: I must be allowed to control resource x, or to be allowed to exclude others from accessing it, because use of resource x by others will harm the integrity of my land, or violate my (putative) right to regulate access to that land. Such indirect claims are rather a weak basis on which to ground claims to natural resources. For one thing, many natural resources (such as freshwater, fish, wild animals and possibly even oil) are not tied to a particular piece of land but are rather ‘fugacious.’ On the other hand, even claims to resources which are not fugacious are vulnerable to the challenge that if resource x *could* be removed without harming the integrity of the land (for instance, by some high-tech horizontal mining technology), any resource claims would then dissipate. By contrast a direct claim to a resource would remain intact regardless of whether and how others might access or extract it, and does not depend upon a close connection between resources and specific geographical sites. In section II I investigate national special claims which are direct in form, suggesting that nations are entitled to rights over resources because of some feature of their relationship *with those resources*. But it is also possible that nations, or states, might have good indirect claims to natural resources if it can be demonstrated that without that control other valuable ends would suffer. Section III considers two rather more indirect arguments which suggest that important political projects would suffer if states were denied rights over ‘their’ natural resources.

What, finally, would it mean to enjoy rights over a natural resource? Drawing on Elinor Ostrom’s influential work, I suggest a list of key resource rights. A first set of four includes the following: *Access* is the right to interact with a resource and to enjoy ‘non-subtractive’ benefits from it – benefits which, as with pure public goods, do not prevent anyone else enjoying the same right.<sup>8</sup> *Withdrawal* is the right to obtain and indeed to remove resource units for one’s use, or to enjoy subtractive benefits. *Alienation* is the right to sell a resource. The right to *derive income* is the right to obtain proceeds from the sale of a resource, or to extract some other form of

income from it.<sup>9</sup> All four rights in our first tier allow agents to derive benefits from resources. But we can also move up a level and delineate rights to qualify the ways in which such benefits can be enjoyed by others. A second tier of four rights includes the following: *Exclusion* is the right to determine who can access and withdraw a resource. *Management* is the right to set rules for how resources can be accessed or withdrawn, and conversely to make decisions about whether and how particular resources ought to be protected. The right to *regulate alienation* is the right to set rules about how rights over resources can be sold or otherwise transferred. The right to *regulate income* is the right to set rules about who can derive income from resources they have rights over, and how, and as such includes the ability to levy taxes on benefits. Taken together, *subsets* of these eight rights can capture the substance of what are typically called property rights over resources, and what might be termed rights of jurisdiction over them.

The point to make immediately is that these rights are both conceptually and practically separable. We should not be misled into assuming that all these rights in some sense naturally cohere into a single and simple notion of ‘ownership,’ for instance. Honoré’s famous account of the incidents of property makes just this point very clearly. As he puts it, ‘Historically there have been many reasons for separating the standard incidents into two or more parcels. Indeed, historically speaking, the metaphor of splitting may mislead, for in some cases full ownership has been built up from the fragments, not vice versa.’<sup>10</sup> Such fragmentation is not exceptional or aberrant.<sup>11</sup> Hence to ask ‘who owns natural resources?’ is certainly the wrong question, if that question misleads us into assuming that all of the various rights over resources must be concentrated in the hands of a single agent. That might be the *outcome* of an argument about resources but it ought not, at the risk of begging the question, to be its starting point.

Those preliminaries set the scene for what follows. We are looking, in this article, for arguments which might justify granting an extensive set of rights over

natural resources to individual nation-states. The arguments considered in the next section ground resource rights for nations *directly* on special claims which the nations in question putatively have over them, as a result of some feature of their relationship with ‘their’ resources. The arguments considered in section III seek to ground states’ permanent sovereignty in the (indirect) significance of control over resources for valuable ends such as the securing of citizens’ basic rights, or conservation. In each case I demonstrate that, even insofar as the arguments under review are good, they do not suffice to ground anything like a full and exclusive set of resource rights for nation-states. As such permanent sovereignty stands without good justification.

## **II. Permanent Sovereignty and National Special Claims**

Given the relative scarcity of direct arguments for the principle of permanent sovereignty, one place to look for support would be erstwhile defences of control over *land*, to investigate whether these might generate plausible justifications for control over resources too. Whilst not all defenders of territorial rights over land explicitly set out their stall to defend rights over the resources under it, it is nevertheless possible that they provide the conceptual tools for doing so. A variety of nationalist theorists have placed their faith in a justification of national control over territory which focuses on the way in which nations or nation-states come to enjoy a particular kind of relationship with land.<sup>12</sup> A first argument draws on ‘improvement’-based special claims, and suggests that national communities may have invested a good deal of care and work in a territory or its resources, and as such earned rights over that land or those resources. A second argument relies on the significance of ‘attachment,’ and suggests that the attachment which national communities come to form with land (or resources) is crucial from a normative point of view, and justifies granting nation-



states extensive resource rights. Such accounts ground claims in the way in which the people, and land (and perhaps its resources), have become adapted to each other in a deep way. One variant emphasises economic value whereas the other emphasises the centrality of land or resources to national projects or identities; most nationalist accounts, perhaps, advance a combination of both arguments. We will inquire whether nationalist accounts of territorial rights can extend into the domain of resources, and provide a justification for a strong principle of control over resources. I will show that they do not.

### *Improvement-Based National Claims*

Perhaps a special claim from ‘improvement’ might provide us with a reason why nations might be entitled to control the resources within their territories.<sup>13</sup> The argument will suggest that nations add value to natural resources over time, and that this value demands that we place control over those resources in the hands of the nation in question. We need to be able to say here, according to Miller, that a nation has done things to improve a territory (or its resources) which can be appreciated as improvements according to some universal criteria of material value; examples might include cultivating land, digging wells, draining malarial swamps, making land more productive, and so on.<sup>14</sup>

However it is unclear, for three major reasons, whether such an argument can provide solid backing for anything like the doctrine of permanent sovereignty. First, even insofar as the improvement of resources occurs, it is not obvious that it makes sense to attribute this to the national community itself. We might object to such a claim on the basis that the national community is an inappropriate agent to which to attribute praise or blame.<sup>15</sup> But even if we could surmount that issue, it is not empirically obvious that improvement of resources coincides with membership of a

particular national community. As is well known, China has pursued a relentless policy of buying up the natural resources of many African countries, many of which were previously unappropriated. It is not clear what improvement-based claims those African countries would then be able to make. They have certainly sold exploration rights to Chinese companies, but pointing to that fact to justify their possession of resource rights in the first place can only beg the question. Much more generally, in a global economy the extraction and refining of natural resources is frequently the preserve of multinational corporations which employ people in many countries, may pay taxes in another country and dividends to shareholders in still further countries. In very few countries indeed is ownership of natural resources by foreigners actually forbidden, and in the rest the overlap between improvement and national membership will be patchy at best.

Second – and notwithstanding the first objection – improvement-based special claims will be troubled by the fact that the degree of ‘cultivation’ of resources is very variable.<sup>16</sup> Some resources have indeed been improved or protected, but others have not. For instance, some resources will be undiscovered, and it is hard to see how any direct special claims could apply to them. Others will, like freshwater, literally fall from the sky or (often) flow from sources in other countries.<sup>17</sup> Still others will lie dormant, and will not have been improved in any significant sense. In the case of minerals or petrochemicals buried beneath the ground, it is questionable just what the nation has done to earn an entitlement to them.<sup>18</sup> Even if the costs of discovery and extraction might justly be recouped, this will still leave a substantial portion of value – or ‘resource rent’ – which is not created by the national community in question. Why, then, would there be any improvement-based claim over that value?<sup>19</sup>

Perhaps, in attempting to make that view plausible, our defender of permanent sovereignty might suggest that whereas the national community does not *actively* contribute to the creation of that value, it may still do so more passively. For instance, we might say that the market value of a buried resource could be increased

simply by a decision *not* to exploit it, when others do exploit theirs. That decision not to exploit is after all a decision in its own right. But resorting to such arguments is risky for two reasons. For one thing the argument runs the risk of circularity, in grounding a right to control resources on the fact that nation-states reserve the right to exploit or not exploit those resources. The fact that a nation-state has excluded others from exploiting them can hardly justify the right to so exclude them. For another, the claim that nations might add to resources' value just by leaving them *in situ* opens a very troubling can of worms, for by the same token *other* people outside of the nation will add to their value more or less passively too – one nation by desiring that good and hence increasing its market price; a further nation by possessing quantities of the same resource but not selling them. Miller, for instance, earlier pointed out quite correctly that 'the value of the resources available within the territorial boundaries of any one state depend on global institutions such as the international commodity market.'<sup>20</sup> At the very least, this suggests that nations might be entitled to *part* of the income from their resources, but that outside actors might *also* be so entitled. Unless we can establish that nations labour very directly over specific resources (which will not be true in many cases), that possibility is a daunting one.

The third and most significant problem is that even if the improvement-based argument generates a plausible national special claim over resources, it is far from clear that it should be responded to by allocating exclusive and full resource rights to nation-states. Observe here that in the first instance, according to Miller, it is the *value added* to a resource which the nation has a putative claim over, and not the resource itself: 'the nation as a whole now has a legitimate claim to the enhanced value that the territory [or resource?] now has.'<sup>21</sup> We might then ask why the correct response is not to allocate a quite specific form of resource right to nations, rather than the full complement of resource rights. In particular, we might, if we accepted the argument from the creation of value through to some kind of national entitlement,

accord nations a right to derive income: a right to a part of the *proceeds* should those resources be sold, or perhaps some other form of income. But it is not clear why they ought to be accorded any broader set of rights.

We need an argument, then, why improvement-based special claims – even insofar as they are good - need to be met by giving particular nation-states a full set of exclusive resource rights. In particular, even if nations *did* have property-like claims over the resources in their territories we would need additional reasons for thinking that a regime of individual national jurisdiction was also necessary, as opposed to a global jurisdictional regime for instance. One reason for also invoking jurisdictional rights has recently been suggested. Miller has argued that according limited resource (or property) rights to a national community will not allow its members to securely reap the benefits of their labours, in the absence of more substantial rights of jurisdiction over resources. As he puts it, ‘If a group has added value to territory, its continued enjoyment of the value it has created will always be insecure unless the territory is controlled by political institutions that represent the group.’<sup>22</sup> One nation’s ability to derive income from its oil, for instance, will perpetually be vulnerable to external agents’ decisions concerning the legitimate use and sale of that resource. If an outside actor can potentially change and change again the rules determining how, when and under what constraints income from resources will flow back to rightful recipients, then receipt of that income will be highly insecure.

The argument here appears to target rights of jurisdiction in addition to national property rights. However, Miller’s argument is not sufficient to establish that a nation ought to enjoy exclusive jurisdiction over ‘its’ natural resources. In the first instance, observe that the argument only stipulates that *some* agent should be given stable jurisdiction over resources, and that we should be able to construe this agent as a *representative* of the nation which purportedly owns a resource. This argument does not give us any reason why this should be a single agent, or if so why that single agent should be the nation in question. A Kantian might say, for instance, that rights

over objects such as natural resources are never ultimately secure until the civil authority of states is nested within a cosmopolitan international order. If what we are after are stable and just rules of property, then we ought to commit ourselves to the emergence of such an order. Alternatively we might argue, on the basis of an interest in the good governance of resources (see section III), for a dispersed multi-level system of proprietorship over resources. If that system also upheld generally stable rules on resources, and adequately represented those who had created value, there would again appear to be no objection. Short of a rebuttal of such possibilities, the case for exclusive national control has not been made.

We can, in fact, turn Miller's objection more forcefully against his own desired conclusion. If we accept that the nation ought, if it is to reliably benefit from its efforts, to exercise a share in jurisdiction over any resources within its territory, once we acknowledge (as Miller appears to) that the national community is only *one* of the agents capable of increasing the value of a particular resource then it becomes much less plausible to hold that this jurisdiction should be exclusively national. If the value of a given resource is the product of the efforts of nationals, non-nationals and / or participants in the 'international commodity market' then we have the question of how to secure any stream of income to which *outsiders* might be entitled. Exclusive national jurisdiction would appear to render outsiders' claims 'always insecure' themselves, and specifically vulnerable to the whim of the local nation-state. A regime of shared jurisdiction over resources, in which each party was appropriately represented, would appear to be optimal, other things being equal.<sup>23</sup>

### *Attachment-Based National Claims*

Perhaps nations might be entitled to rights over their resources because they have integrated control over those resources into their collective life-plans, and come to

understand themselves *as communities* as collections of people who live in a close relationship with this forest or that gold-seam. Miller also suggests such an attachment-based argument for national resource control, noting that particular territories (and perhaps the resources within them) come to attain symbolic importance for nations as a result of their occupation of those territories, symbolic value which may be ‘valuable’ to them alone.<sup>24</sup> I have suggested elsewhere that that the attachment-based argument for resource rights is often credible,<sup>25</sup> and so rather than question the validity of attachment-based special claims themselves, I want to cast doubt on whether they can plausibly generate a claim for exclusive national control over all natural resources within a given territory. I will suggest that there are several reasons why this is highly unlikely.

The first is that the kind of strong and enduring attachment Miller appears to have in mind typically applies to a limited subset of resources, rather than to all resources within a territory. This suggests that if it applies to nations at all, the attachment-based justification will be patchy and uneven in its application. Simply put, there will be many other resources which simply do not figure in the national imagination in any significant way, and which are in fact relatively neglected. The logic of the attachment-based argument suggests that claims over such resources will also be lacking.

The second reason is that a strong and enduring attachment appears to be a quality of rather small-scale communities, rather than nations themselves. A good example might be the *Saami* people of Scandinavia: roughly sixty thousand members of an indigenous community which has sustained itself for more than a thousand years by herding reindeer. The task of feeding and herding reindeer dictates the movements of *Siidas* – small groups composed of several families – across the seasons. It provides an economic foundation, but also provides a shared cultural focus for that community. What we have in this case is a situation where there is an intimate and profound connection between an individual’s identity and its ability to

securely interact with a specific natural resource. Whilst all of us will have life-plans dependent on the availability of some natural resources (including, at the very least, the objects of our basic rights, such as clean air and drinking-water), some of our life-plans demand secure access to specific natural resources. We don't understand ourselves *as fishermen* or *as hunters* if there are no fish to fish, or no prey to hunt, and Saami people may not understand themselves as Saami people if they are denied secure access to 'their' reindeer herds. Now even in the Saami case it is an open question to what extent resource claims are weakened by the recent 'modernisation' of the semi-nomadic Saami existence (with reindeer-herding being transformed by the introduction of two-way radios, snowscooters and cross-country motorbikes), or by the gradual 'Scandinavianisation' of the Saami (with only an estimated ten percent of the community now engaging in herding, or dependent upon it for their upkeep). But otherwise the case looks like providing a plausible basis for attachment-based special claims over some resources. When we shift our focus to nations, though, it just does not seem possible to produce examples where a majority of the members of a given nation genuinely identify *as part* of that nation as a result of their direct relationship with specific natural resources.

Both reasons suggest that although attachment appears capable of generating good special claims over some resources, it appears highly unlikely to give us the argument for permanent sovereignty which is being sought. In fact it is worth returning to the concrete political implications of the Saami case, for it is not only the case that the specifics of the Saami case fail to transfer substantially to the national case. More worryingly than that, the Saami case threatens to actually *challenge* the case for exclusive national control over resources. It is worth pointing out that the rights of the Saami people – like the rights of indigenous peoples in many other parts of the world – are claimed *against* nation-states. The Saami community – like many indigenous communities (or 'non-state peoples') in the Americas – fail to map onto national boundaries. Rather, the Saami land – *Sapmi* – spans Norway, Sweden,

Finland and Russia (as do the reindeer-herds themselves, given their seasonal movements). Furthermore, although the logic of international law has often channelled the claims of indigenous people as though they were claims for something like permanent sovereignty over resources, their actual character has often been very different (and often much more limited).<sup>26</sup> Through forums such as the Saami Council<sup>27</sup> the Saami people are able to campaign for equitable treatment across several countries, and during the Council's membership of the World Council of Indigenous Peoples it was able to voice an indigenous challenge to the principle of exclusive national control. In this context, rather than each country granting the Saami control over 'its' reindeer, in granting rights over reindeer and then allowing the Saami to move their herds freely across national borders it may be more accurate to say that each country has, often reluctantly, *relinquished* control over these herds.

The example of indigenous communities does supply, then, a case where a plausible claim for resource rights can be made – but in so doing it does not, typically, bolster the case for national resource rights. Indeed it may undercut it. The best hope for defenders of national control would presumably be to point towards truly national cases where the same very intense relationship between resources and communal identity can be identified. But it is not clear that such examples can be provided (and it is certainly the case that they have not yet *been* provided by defenders of national control). Rather, it appears likely that insofar as genuinely national attachment to resources exists, it will be both specific to particular resources, and also potentially satisfied by way of limited resource rights. Typical cases may include ones where there is a close connection between specific resources and parts of the landscape – where a specific kind of extractive industry, for instance, has played a key role in a nation's socio-economic development, and where that development has clearly left its mark on the landscape. But such attachments could be respected by granting rights to access such sites, and perhaps rights to continue to derive some income from traditional industries of extraction or husbandry. It is not clear why they would



demand a full complement of resource rights, and it is far from clear that such arguments extend to *all* of the natural resources to be found within each national community. In sum, the attachment-based argument appears supremely unlikely to deliver good grounds for *full* resource rights over *all* of the resources within a nation-state. It will be partial in both scope and content.

### **III. Resource Control and the State**

Even if we consider the nationalist arguments canvassed in the last section to be unable to present nation-states with a full set of rights over all of ‘their’ natural resources, we might still try to defend that conclusion on other grounds. An alternative is to focus on the value of effective *states*. Perhaps states secure important goods for individuals, and perhaps it is the case that they are unable to secure those goods unless they are able to exercise effective ownership or jurisdiction over the resources within their territories. If we can demonstrate that states’ can advance important ends of justice, and also demonstrate that their ability to advance those ends of justice depends upon their having such rights, then we will have derived what could be called a ‘functionalist’ argument for resource rights. I examine two kinds of functionalist argument in this section. The first would suggest that states are valuable (as well as legitimate) insofar as they protect the basic rights of their citizens, and that to enable states to protect basic rights in this way we need to accord them control over their resources. But in fact I will demonstrate that this position is compatible with quite limited control over resources, and certainly does not require anything approaching permanent sovereignty. The second argument would suggest that according control over resources to states (or Peoples, on Rawls’s account) produces the best outcomes in terms of the conservation and effective use of resources. But the evidence for this argument is very weak, and the good in question – here

conservation – turns out to be compatible – and likely *more* compatible - with a situation whereby rights over resources are dispersed across a range of institutional settings.

### *Citizens' Basic Rights and Permanent Sovereignty*

One potentially promising alternative to the nationalist arguments examined in the last section would be a 'functionalist' view, according to which states have a duty to meet the basic rights or needs of their citizens, a duty which in turn requires them to exercise control over the natural resources within their territory. Broadly speaking a functionalist account of territorial rights seeks to ground those rights on the way in which states serve the interests of their subjects. States, we might say, are necessary to 'provide a unitary and public interpretation of the rights of individuals and to enforce those rights in a way that is consistent with those individuals' continued freedom and independence from one another.'<sup>28</sup> If we did not have states, individuals' basic rights or needs would go without adequate protection. The important question though, for our purposes, is whether states' ability to protect their citizens' basic needs depends on full and exclusive rights over the *natural resources* within their territory.<sup>29</sup>

Cara Nine's recent account of states' resource rights grounds them precisely on the essential functions of states. Nine claims that a collective such as a state may acquire territorial rights if the acquisition 'is necessary for the provision of members' basic needs [and] does not prevent others from meeting their basic needs.'<sup>30</sup> And giving a state rights over the natural resources within its territory is something that is necessary to ensure 'secure access to the objects of members' basic needs.'<sup>31</sup>

But even accepting as plausible the claim that a state which secures its members' basic needs is (at least minimally) legitimate, the important question for

our purposes is just *which* rights over *which* resources are necessary to meet citizens' basic needs. Here Nine's position appears to have changed over time. At one point she argued that 'a state [must] have exclusive territorial rights regarding the control of the natural resources within its borders.'<sup>32</sup> The claim appeared to be that full and exclusive rights over natural resources (in short, permanent sovereignty) is simply a necessary element of self-determination.<sup>33</sup> But it is questionable why we should think this, and indeed why we should favour any vision of self-determination which asked so much of us. After all, we can easily imagine regimes of mixed individual (including foreign), common and state ownership where the state reserved for itself key jurisdictional rights, regulated the extraction, exchange and expatriation of resources, and perhaps taxed owners at each stage, without claiming for itself the status of owner. It would be much too strong to suggest that such a state would not enjoy self-determination. Notably, recent defences of national self-determination – such as that of David Miller, for instance – are not arguments for complete or rigid sovereignty over all internal affairs, and are compatible with the *ad hoc* transfer of power upwards to, for instance, confederal bodies; as a result, Miller suggests, 'there is no reason to make a fetish out of national sovereignty.'<sup>34</sup> Miller could be wrong about that, of course. But if he is, then he is in good company. Not only does his judgement accord with other recent theorists of self-determination,<sup>35</sup> but it also accords with the broad redefinition of sovereignty post-World War II – with what is sometimes called the 'human rights revolution,' which sees sovereignty increasingly intimately tied to the observance of basic human rights.<sup>36</sup> It also accords with the growth of 'governance' at the global and trans-national level, which sees a pooling of states' authority to make decisions on a series of issues.<sup>37</sup> In the case of natural resources, states have placed bounds upon their own authority by signing key international instruments, and joining key international organizations, governing the use of for instance fisheries, trans-boundary waterways, and hazardous chemicals.<sup>38</sup> We have also witnessed the gradual emergence in international law of a set of *duties*

accompanying permanent sovereignty which, although at present rather weak, seek to constrain the ways in which states use natural resources. Examples include the duty to respect the rights and interests of indigenous peoples,<sup>39</sup> the duty to equitably share trans-boundary natural resources,<sup>40</sup> and the duty to use resources sustainably,<sup>41</sup> amongst others. Sovereignty over natural resources has not therefore been a static and absolute category, but one which has been constrained by the partial sharing of sovereignty over resources between states and by the parallel growth in duties under international law.

Nine's more recent view is considerably more nuanced, insofar as it now allows quite significant constraints on states' resource rights. Not only should we refuse their territorial claims over the 'commons' (such as the Arctic and Antarctic regions); but we should also refuse to grant states rights over the resources buried deep under their territories. These are resources which, as I suggested in the last section, states appear to have done little or nothing to ground any claims over. Moreover, and more pertinently from Nine's point of view, control over underground resources appears at best weakly connected to a state's ability to exercise jurisdiction over a territory.<sup>42</sup>

But even if we accept Nine's functionalist account, this is not the only qualification we should make. Recall that the functionalist account is grounded on a state's ability to meet citizens' *basic needs* (or as Stilz puts it, basic rights). But if the focus is properly on basic rights, then why not grant states control over precisely *whatever resources are necessary to meet basic rights*, rather than *all resources within a territory*? This challenge has two parts: why grant states rights over the resources within their territories, and not over some general pool of resources? And: why grant states rights to resources over and above those necessary to meet basic rights?

What, then, of our first challenge? Are there any good reasons why states ought to be able to meet their citizens' basic rights by using the *particular* resources

found within their own territories? If the functionalist account can give us an account of just why states should be entitled to those specific resources, then it might have achieved something significant. Unfortunately the argument for that contention is not entirely clear, at least insofar as functionalist accounts have thus far been developed. Perhaps the functionalist account might be supplemented with arguments drawn from the nationalist account. We might say, for instance, that *insofar as* improvement-based or attachment-based special claims overlap with state boundaries, the contention that states should enjoy jurisdiction over basic shares of their own resources is strengthened. But that would provide rather weak support because, as we have already established, it is not clear that special claims do overlap very neatly with state boundaries, and many of the most plausible attachment-based special claims appear to challenge, rather than support, exclusive state jurisdiction.

With regards to the second part of the challenge, restricting state claims to those resources necessary to meeting basic rights – which the logic of the functionalist argument would appear to support – would potentially rule out rights over a large pool of resources. There may be some communities in which the minimal quantity of natural resources available is precisely sufficient to meet basic needs. But in many communities, there is an ‘excess’ (and often a very considerable ‘excess’) of resources which are not necessary for meeting basic rights. Why grant rights over these? On the other hand, there will be some communities in which the resources available are *insufficient* to meet basic rights. Here presumably the functionalist account would have to grant claims on *other* states’ resources, and in so doing limit the permanent sovereignty of those states.

The functionalist account is likely to constrain states’ rights in other ways too. If what we are concerned about was the protection of individual rights then we might want to prevent states using resources in ways that damaged the basic rights of outsiders, for instance. But we might also suspect that the rights of individuals were likely to be best protected by a regime of dispersed and multi-level governance of

resources (see below). In principle there are a variety of institutions which could protect the basic rights of individuals, and simply stipulating that these rights have to be protected by a single agent – the state – would be indefensible.

Thus the functionalist account, in the end, appears to demand relatively little in the way of resource rights. The one thing it certainly does demand is an entitlement to the natural resources needed to meet citizens' basic rights. But that is compatible with – and in cases of shortfalls in some states will *demand* – constraints on permanent sovereignty. And since no plausible account of justice will deny individuals the objects of their basic rights, the functionalist account here seems to have established very little.

### *Conservation and Permanent Sovereignty*

We have already examined a functionalist account according to which states putatively derive resource rights from their mission to protect the basic rights of their citizens. But that is not the only functionalist argument possible. An alternative would focus on the way in which resources are *used* – efficiently or otherwise – and suggest that states ought to enjoy rights over resources because a system of permanent sovereignty will produce an optimal pattern of resource use. Such an argument might lean on the commonplace claim that assets (such as resources) will deteriorate in value unless they are 'owned' or controlled by a single, specified agent. John Rawls appears to lean towards more broadly functionalist arguments for territorial rights in *The Law of Peoples*, though not always in much explicit detail. But he certainly does suggest, at two points in that essay, that territorial rights might be justified via a parallel with property. Much as an asset 'tends to deteriorate' 'unless a definite agent is given responsibility for maintaining it,' so a government ought to take responsibility for a territory and for 'maintaining the land's environmental integrity.'<sup>43</sup> The argument, as we might reconstruct it, suggests that we will endure a

‘tragedy of the commons’ unless specified parties are allocated an interest in conserving resources and their value.

The structure of this argument is a plausible one: resource control on the part of individual states (or Peoples) serves an important good – effective conservation of resources – which would not be secured by any rival system. Like the functionalist argument from the basic rights of citizens, it places its faith in an empirical conjecture that such a regime of resource rights will reliably *serve* an end of justice.

As Rawls presents it the functionalist argument from conservation or efficient use is underdeveloped – it really does not progress beyond that initial parallel with property, the staple of liberal economic theory. Even so, however, there are already three points that we need to bear in mind about the argument as it stands. First, it is not obvious why we would take Rawls’s argument to support extending *all* resource rights to individual states. Elinor Ostrom’s pioneering work, for instance, has established that there are many examples of communal ‘proprietorship’ rather than ownership over natural resources in which resources are effectively and sustainably used and managed. In such cases the ‘proprietors’ of those resources enjoy rights to access and manage resources, along with some rights to withdraw from the common stock, but do not enjoy rights to alienate them or even necessarily to derive income from them. As such granting agents rights to sell or derive income from resources does not appear to be strictly necessary for them to have an incentive to use them wisely.<sup>44</sup>

Second, the economists’ argument which Rawls picks up on is actually an argument for *individual* ownership, which is meant to establish its superiority over the inefficiency and wastefulness of state control. That argument standardly suggests that individual ownership is necessary for the retention and creation of lasting value, whereas communally-held assets will tend to deteriorate in value, at least relatively.<sup>45</sup> But Rawls actually appears to want to use that argument to justify something like communal ownership. Economists are unlikely to be convinced, as their view is

precisely that communal ownership is insecure in its benefits. Indeed if at the global level assets are *already* owned and looked after by individuals, then as far as the economists are concerned the problem may be a non-problem. Why then (as far as *they* are concerned) stipulate a need for national control? None of this is to say that the economists are right; but it is to say that it is far from obvious how Rawls can support his own argument by leaning on evidence which is usually held to serve the opposite conclusion.

Third and most importantly, even if we reformulate the argument to suggest that the optimal use of resources will come once we grant exclusive rights over them to individual states, what is the evidence for that contention? To an environmental scientist, the claim that the optimal basis for securing the best use of precious and scarce resources was a regime of untrammelled state control would presumably be alarmingly anachronistic. Moreover, although Rawls's *Law of Peoples* depicts a world of potentially autarkic states which are free to choose whether to engage with the global marketplace or not, in reality it is a stubborn fact that states are already comprehensively dependent on the natural resources of other countries. The UK, for example, has fed its population for at least two hundred years only by supplementing its own production with foodstuffs produced overseas, demanding amongst other things vast quantities of freshwater for their production. It is not clear whether it could sustain anything like its present population without access to other states' freshwater. Four countries, in fact - the US, Australia, Canada and Brazil - are currently engaged in a massive, though unplanned, transfer of 'virtual' water to the rest of the world without which shortages of water for food production would become disastrous very quickly.<sup>46</sup> We could make similar points about the reliance of countries on the rainforests of the Amazon and Congo regions, for example, in their capacity as key carbon sinks. Resource-cycles such as the global freshwater cycle or the cycle of carbon emission and absorption cannot, as we know very well, be controlled by individual nation-states, but they are indispensable to life as we have



come to know it. Fisheries policy appears to be a further case where the exclusive pursuit of national interests exacerbates, rather than eases, the tragedy of the commons Rawls is apparently concerned with, and where a sustainable future appears to demand greater transnational cooperation.<sup>47</sup>

Thankfully there are instances of the trans-national governance of resources which have produced fairly robust advances. Prime examples would include the governance of fisheries, or of schemes aimed at the forest protection such as the International Tropical Timber Organization.<sup>48</sup> Such schemes have proliferated to produce a mosaic of trans-national resource governance with overlapping jurisdiction and mixed – but nevertheless significant – degrees of success. Perhaps the most sustained and coordinated programme of trans-national resource governance has emerged under the auspices of the European Union. Although general conclusions are not easy to arrive at, it does seem to be the case that the EU has been instrumental in resolving – or at least mitigating – a series of collective action problems over resources. Whereas individual states have little incentive to adopt expensive principles of environmental regulation, the knowledge that like rules will be applied to all EU member-states makes them much more attractive.<sup>49</sup> Insofar as exclusive national control can be an obstacle to resource conservation,<sup>50</sup> more complex forms of global and trans-national governance of resources have already delivered results - and, if we are to avoid the worst case scenarios of climate scientists, we have to hope that these are only the first of many such experiments in resource governance beyond the state.

In short, arguing for the superiority of permanent sovereignty as a guarantor of resource conservation or efficient use is far from straightforward. Rawls may have delivered a plausible argument to the effect that conservation of resources requires that specific parties are allocated an interest in their preservation. But he has not delivered the conclusion that this should be a single entity (or a single kind of entity, such as the state), or that the interest in the preservation of resources should or must

be concentrated at one level. It seems likely that if caring for the environmental integrity of resources is what we care about, then trans-national 'proprietorship' is at least part of an ideal solution. We could also draw support from the United Nation's recent emphasis on developing policy frameworks for the management of what it designates Shared Natural Resources, such as water, which are held to be inadequately protected by a regime of primarily national control.<sup>51</sup> In other cases, a degree of communal proprietorship at the *sub*-national level will also be preferable.<sup>52</sup> So whilst Rawls's initial argument has a plausible structure, evidence for the conclusion that effective proprietorship over natural resources will always occur at the level of peoples or nation-states is weak. As with the broader functionalist account, the good of resource conservation would appear to be compatible with considerably qualified rights on the part of nation-states. Indeed we have good reason to suspect that from the point of view of conservation the dispersed governance of resources would be optimal.

## **Conclusions**

In recent years discussion of the territorial rights of nation-states has come on in leaps and bounds. Several things have become obvious during this time. One is that defending states' territorial rights is not easy, not least in the face of the claims of outsiders. To the contrary, if defending the interests of individuals is what we care about, granting states very firm territorial rights is a blunt instrument indeed.<sup>53</sup> It may have been thought in the past that defending the territorial rights of states was a rather easy enterprise, but this is not the case any longer; and while the sophistication of defences of territorial rights is increasing, so too are the challenges they have to face becoming more apparent.

A second conceptual advance has been the recognition that the traditional elements of a state's territorial rights – standardly comprising rights to exercise control of borders, to maintain jurisdiction over land, and to control resources – are not as tightly intertwined as was once thought. Each, potentially, requires a separate justification. This article has investigated the prospects for defending one element of a state's territorial rights, as understood within contemporary international law. It has been suggested that defending permanent sovereignty over natural resources is fraught with difficulties. Arguments often advanced to defend control over land (such as nationalist arguments which, on my analysis, typically press special claims based on improvement and / or attachment) can be partially extended to cover resources, but do not take us even close to permanent sovereignty for nation-states. Functionalist arguments possess initial promise in presenting us with an account of how the rights of individuals cannot be defended without states enjoying some rights over resources (though, note, they do not necessarily tell us why there should be states as opposed to some other organisation or web of organisations). But they do not justify anything like permanent sovereignty either: their claims, even insofar as we ought to accept them, are much more easily satisfied. Functionalist arguments from conservation would tend to support a dispersal of resource rights away from nation-states, across a variety of institutional settings. Functionalist arguments from basic rights cannot rule that possibility out either – in fact if they take individual rights seriously they ought to endorse it.

I want to pause now to examine just where our discussion of arguments for permanent sovereignty leaves us, and to emphasise a rather striking fact about the argument so far. I have considered four arguments which appear to offer the best available justifications for permanent sovereignty, and found them wanting. As I have suggested, introducing special claims does not speak in favour of permanent sovereignty, but in favour of granting quite limited rights which in any case are at least partly orthogonal to any national claims. Similarly, taking citizens' basic rights,

or conservation, seriously speaks in favour of distinctly limited rights for states, and suggests that constraints on states' permanent sovereignty are both allowable and, indeed, required.

The striking fact – which more observant readers will have spotted – is that in so doing I have made no reference, in this article, to general claims to resources or to broader principles of global justice. I have *not* suggested that permanent sovereignty is unjustified because it denies individual equal – or equalizing – shares of resources. Neither have I asserted that resource distribution is morally arbitrary (which in any case is to put the cart before the horse if it means that we do not pay serious attention to special claims), and found arguments for permanent sovereignty accordingly wanting.<sup>54</sup> Neither, finally, have I invoked the spectre of bloody history, and suggested that permanent sovereignty is undermined by the facts of colonialism, resource grabs and the sheer historical brutality of the drawing of boundaries. Rather, I have examined each of the four arguments on their merits and shown, in each case, that following the logic of the argument leads us *away* from, rather than towards, exclusive permanent sovereignty over resources. Even without invoking wider claims of justice – even if improvement, attachment, the protection of citizens' basic rights, or the effective use of resources is all that we care about – permanent sovereignty is found wanting.

But if we relax this – rather massive – constraint on the argument thus far and allow broader claims of justice their due weight, the sheer clumsiness of permanent sovereignty in serving justice becomes undeniable. A full account of how we ought to balance special and general claims over resources would require much longer treatment.<sup>55</sup> But if our question is whether permanent sovereignty actually offers the best possible integration of special and general claims over natural resources, the answer is resoundingly negative. Permanent sovereignty does serve to protect a nation-state's right to some of the income from resources which it has improved or protected – but only by the rather blunt measure of granting it a right to

all of the income from resources (and indeed all other rights over them), whether they have been improved or protected or not. It performs at best moderately well on the issue of attachment, and I have suggested that the strongest attachment-based claims relate to small-scale communities which in fact are often engaged in ongoing struggles to wrest resource rights away from the nation-state. At the same time, anyone outside of the national community who has developed a symbolic attachment to a given resource – a Canadian Hindu wishing to perform *puja* at the Ganges, for example – can be barred from accessing it at the whim of the local nation-state. Permanent sovereignty cannot be justified by pointing to the need to secure the basic rights of citizens, and the struggle to secure those rights must at least sometimes require us to place constraints on control over resources. Permanent sovereignty performs poorly in terms of conservation, and there is strong evidence that the optimal governance of scarce resources would see their management partially devolved both upwards and downwards from the state. Finally, and damningly, the regime of permanent sovereignty simply ignores the claims of outsiders, insofar as it restricts any benefits from resources to members of the nation-states in which they happen to lie.

In recent years key decisions and instruments of international law have increasingly emphasised the need to balance any claims to national control over resources with the interests of non-citizens and with the requirements of sustainability and intergenerational justice.<sup>56</sup> The arguments of this article suggest that we ought to welcome such developments, and seek to extend them. Whatever a just regime of resource rights ought to look like, a doctrine of untrammelled permanent sovereignty must be an obstacle from rather than a boon from the point of view of justice.

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<sup>1</sup> Per Petterson, *Out Stealing Horses*, translated by Anne Born (London: Vintage, 2006), p. 40.

<sup>2</sup> For the full text, see <http://www2.ohchr.org/english/law/ccpr.htm>

<sup>3</sup> As the arguments surrounding the drafting of the relevant instruments of international law amply illustrate, these debates about the broad principle of permanent sovereignty were informed by very specific and contingent political and economic goals. In particular, newly-independent countries were concerned principally to disqualify concessions over key natural resources which had been granted – in the years before independence – to corporations based in developed countries, whereas the latter (including the UK, the US and France) adverted to constraining arguments about the importance of sustaining global trade in an effort to protect precisely those concessions. For a full and illuminating account, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Responsibilities* (Cambridge: Cambridge University Press, 1997).

<sup>4</sup> That is evident in the wording of the 1966 Covenant cited above, for instance, which does not provide any reasons supporting permanent sovereignty. The only clue we have is the fact that the clause about permanent sovereignty is included in an article (Article 1) about self-determination. We will consider the connection between permanent sovereignty and self-determination in section III.

<sup>5</sup> For a similar definition, see Mathias Risse, *On Global Justice* (Princeton: Princeton University Press, 2012).

<sup>6</sup> Organisation for Economic Cooperation and Development Glossary of Statistics: <http://stats.oecd.org/glossary/search.asp>. This definition of natural resources is contested by those who suggest that whether a substance counts as a ‘natural resource’ depends fundamentally on the attitude taken to that substance by the agent or community currently using it. I discuss but reject that view in Chris Armstrong, ‘Resources, Rights and Global Justice: A Response to Kolers,’ *Political Studies* (forthcoming 2013).

<sup>7</sup> David Miller, ‘Territorial Rights: Concept and Justification,’ *Political Studies* 60.2 (2012): 252-68, at 254; see also Anna Stilz, ‘Nations, States and Territory,’ *Ethics* 121 (2011): 572-601; and Christopher Heath Wellman, ‘Political Legitimacy and Territorial Rights,’ ms. A. John Simmons similarly observes that the ‘connection between territorial rights [over land] and rights over all resources in the relevant

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territory is not in any way (morally, physically, conceptually) necessary.’ Simmons, ‘States’ Resource Rights: Locating the Limits,’ online symposium on resource rights: <http://territorynetwork.wordpress.com/>, at pp. 5-6.

<sup>8</sup> On the features of pure public and collective goods, see for instance Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods and Club Goods* (Cambridge: Cambridge University Press, Second Edition 1996).

<sup>9</sup> Ostrom listed rights to access, withdraw, manage, exclude and alienate as the key resource rights. See Ostrom, ‘Private and Common Property Rights,’ in B. Bouckaert and G. De Geest (eds) *Encyclopedia of Law and Economics, vol. II. Civil Law and Economics* (Cheltenham: Edward Elgar, 2000), pp. 332-79, at p. 339. In the first tier of rights, I have added the right to derive income since it is conceptually distinct from the others; in the second tier of rights I have similarly added rights to regulate income and alienation.

<sup>10</sup> Tony Honoré, ‘Ownership,’ in his *Making Law Bind* (Oxford: Clarendon Press, 1987), pp. 161-92, at p. 187.

<sup>11</sup> As one leading legal account of property has it, ‘property institutions diverge enormously in the range of elements they comprise.’ For instance, what we might call ‘use-privileges’ are often separated from the right to accumulate wealth from a resource: ‘The shareholders in a public company or the beneficiaries under a large trust have private wealth – cashable claims on scarce resources – without necessarily having any substantial use-privileges over the items vested in the company or trustees.’ J. W. Harris, *Property and Justice* (Oxford: Oxford University Press, 1996), p. 28, p. 27. Defenders of global distributive justice might observe the reverse too: that a party might enjoy the right to access or use a resource without having claims to derive (all of the) income from it.

<sup>12</sup> See for instance Margaret Moore, *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998); Tamar Meisels, ‘Liberal Nationalism and Territorial Rights,’ *Journal of Applied Philosophy* 20.1 (2003): 31-43; David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007). For a less obviously nationalist account which nevertheless shares some core features with that account, see Avery Kolers, *Land, Conflict and Justice* (Cambridge: Cambridge University Press, 2009).

<sup>13</sup> Interestingly although Miller suggests that resource rights might require a different justification from jurisdictional rights over territory, the argument he makes for national resource rights is grounded in

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the same improvement- and attachment-based arguments that he uses to justify control over land. See Miller, 'Territorial Rights: Concept and Justification.'

<sup>14</sup> Miller, 'Territorial Rights,' at 259.

<sup>15</sup> For some arguments to that effect, see Jacob Levy, 'National and Statist Responsibility,' *Critical Review of International Social and Political Philosophy* 11.4 (2008): 485-99.

<sup>16</sup> Miller, *National Responsibility*, p. 219.

<sup>17</sup> The sharing of rights over freshwater between nation-states already has a long history. Nearly half of the land surface of the planet can be considered as part of one international river basin or another, and the water from international river basins accounts for around 60% of global freshwater supply. More than 220 nation-states – in other words, the great majority of them – are already sharing water with a neighbouring country. See Peter Gleick, 'Water in Crisis: Paths to Sustainable Water Use,' *Ecological Applications* 8.3 (1998): 571-79.

<sup>18</sup> Miller seemed to concede that point, though it is not clear whether his argument can dispense with it entirely and still function in the way he wishes it to. In *On Nationality*, he states that he does not wish to endorse the view – which he identifies with Israel Kirtzner – that in discovering a natural resource we create value in it. Miller, *On Nationality* (Oxford: Clarendon Press, 1995), p. 106, note 34.

<sup>19</sup> For a fuller discussion of this argument with regards to Norwegian oil wealth, see Chris Armstrong, 'Sovereign Wealth Funds and Global Justice,' *Ethics and International Affairs* (forthcoming 2013).

<sup>20</sup> Indeed Miller continues to say that 'Since states are enriched and impoverished in seemingly arbitrary ways by such institutions, this triggers an obligation on the part of resource-rich states to aid those that are relatively poor'; *ibid.* p. 105. Such an argument plays a much less obvious role in his more recent work.

<sup>21</sup> Miller, *National Responsibility*, p.218.

<sup>22</sup> Miller, 'Territorial Rights,' at 263.

<sup>23</sup> For a useful critical discussion of Miller's insecurity-based argument, see Kim Angell, 'Do Insecure Property Rights Ground Rights of Jurisdiction?' *Res Publica* 19.2 (2013): 183-92.

<sup>24</sup> Miller, 'Territorial Rights,' at 261-2.

<sup>25</sup> See Chris Armstrong, 'Justice and Attachment to Natural Resources,' *Journal of Political Philosophy* (forthcoming 2014). Note, though, that my own account does not rely on facts about *collective* identification, in the way that nationalist accounts do.



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<sup>26</sup> For a good account of the way in which Saami claims have often failed to challenge the overwhelming fact of state sovereignty in Scandinavia, see Fae Korsmo, 'Nordic Security and the Saami Minority: Territorial Rights in Northern Fennoscandia,' *Human Rights Quarterly* 10 (1988): 509-24.

<sup>27</sup> See [www.saamicouncil.net](http://www.saamicouncil.net).

<sup>28</sup> Anna Stilz, 'Nations, States and Territory,' p.580.

<sup>29</sup> Stilz is not sure that it does (at least by itself), and suggests that by contrast to the right to territorial jurisdiction over land, any putative rights to control resources 'requires a more complex justification.' *Ibid.*, 573. Though Stilz does not say so, it might be that she believes something like an occupancy-based account can help to support states' rights over natural resources.

<sup>30</sup> Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012), p. 41.

<sup>31</sup> *Ibid.*, p. 42.

<sup>32</sup> Cara Nine, 'The Moral Arbitrariness of State Borders: Against Beitz,' *Contemporary Political Theory* 7 (2008): 259-79, at 272.

<sup>33</sup> A rather different account of the connection between national self-determination and control over resources has been suggested recently by Margaret Moore ('Natural Resources, Territorial Rights and Global Distributive Justice,' *Political Theory* 40.1 (2012): 84-107). Moore suggests that it is important for self-determining peoples to have control over the rules of use and transfer of natural resources. But although Moore emphasises the value of self-determination, attachment actually appears to do the significant work in the argument, in distinction to – and arguably in opposition to – any broader claims based on national self-determination (on which I cast doubt in this section). Furthermore, it is striking that the key examples Moore produces of communal connection to specific resources actually undermine rather than underpin claims to control on the part of nation-states. Her key examples (the Lakota Sioux, and cultural minorities in New Zealand and Papua New Guinea) are of communities which are engaged in struggles to wrest control over resources *away* from the state.

<sup>34</sup> David Miller, *On Nationality*, p. 101, p. 103.

<sup>35</sup> Note, for instance, that in their influential defence of self-determination, Margalit and Raz suggest that 'the right to self-determination is neither absolute nor unconditional. It affects important and diverse interests of many people...Those who may benefit from self-government cannot insist on it at

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all costs. Their interests have to be considered along those of others.’ Avishai Margalit and Joseph Raz, ‘National Self-determination,’ *Journal of Philosophy* 87.9 (1990): 439-61, at 461.

<sup>36</sup> See for instance Christian Reus-Smit, ‘Human Rights and the Social Construction of Sovereignty,’ *Review of International Studies* 27.4 (2001): 519-38.

<sup>37</sup> See for instance Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004). For some forceful objections to the idea that the sovereignty of the state cannot be either practically or conceptually shared across a variety of institutions, see Thomas Pogge’s discussion of ‘cosmopolitanism and sovereignty.’ Pogge, *World Poverty and Human Rights* (Cambridge: Polity 2002), pp. 178-81.

<sup>38</sup> In the case of fisheries, there are many transnational organizations regulating fishing both inside and outside of states’ territorial waters, including most notably the European Fisheries Control Agency, an agency of the European Union. For an introduction to other Regional Fisheries Management Organizations, see [http://ec.europa.eu/fisheries/cfp/international/rfmo/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/rfmo/index_en.htm). In the case of freshwater, many decades of international cooperation has seen the widespread acceptance of a notion of ‘limited territorial sovereignty.’ For discussions, see Nurit Klot, Deborah Shmueli and Uri Shamir, ‘Institutions for Management of Transboundary Water Resources: their Nature, Characteristics and Shortcomings,’ *Water Policy* 3 (2001): 229-255. In the case of hazardous chemicals, the most famous example of successful transnational regulation is probably the regime for the control of Chlorofluorocarbons (CFCs) which emerged in the late 1980s, beginning with the Montreal Protocol of 1987. For an historical account, see Peter Morrisette, ‘The Evolution of Policy Responses to Stratospheric Ozone Depletion,’ *Natural Resources Journal* 29.3 (1989): 793-821.

<sup>39</sup> On which see Nico Schrijver, ‘Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources,’ in I. Boerefijn and J. Goldschmidt (eds 2008) *Changing Perceptions of Sovereignty and Human Rights* (Antwerp: Intersentia), pp. 85-98; see also S. James Anaya and Robert Williams, ‘The Protection of Indigenous Peoples’ Rights over Land and Natural Resources in the Inter-American Human Rights System,’ *Harvard Human Rights Journal* 14 (2001): 33-86.

<sup>40</sup> Trans-boundary natural resources include waterways, fish, oil, gas and atmospheric resources. But international law has developed most fully in the case of waterways. See for example Owen McIntyre, *Environmental Protection of International Watercourses under International Law* (Aldershot: Ashgate,

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2007). For an investigation of the (somewhat ambiguous) injunction to use such resources ‘equitably,’ see for instance G.J. Syme, B.E. Nancarrow and J.A. McCreddin, ‘Defining the Components of Fairness in the Allocation of Water to Environmental and Human Uses,’ *Journal of Environmental Management* 57.1 (1999): 51-70.

<sup>41</sup> The 1972 Stockholm Declaration on the Human Environment declared a duty on the part of states to ‘adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment.’ See <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=97&articleid=1503>. For some relevant key decisions in international environmental law, see Cairo Robb (ed) *International Environmental Law Reports 1: Early Decisions* (Cambridge: Cambridge University Press, 1999).

<sup>42</sup> Cara Nine, *Global Justice and Territory*, p. 43.

<sup>43</sup> John Rawls, *The Law of Peoples and ‘The Idea of Public Reason Revisited’* (Harvard: Harvard University Press, 1999), p. 8; see also pp. 38-9.

<sup>44</sup> Elinor Ostrom, ‘How Types of Goods and Property Rights Jointly Affect Collective Action,’ *Journal of Theoretical Politics* 15.3 (2003): 239-70.

<sup>45</sup> For an example of that kind of argument, see R.J. Smith, ‘Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife,’ *CATO Journal* 1 (1981): 439-68. Smith argues that ‘the only way to avoid the tragedy of the commons is to end the common property system by creating a system of private property rights’ in natural resources such as wildlife (at 467).

<sup>46</sup> Tony Allen, *Virtual Water* (London: I.B. Tauris, 2011); see also Arjen Hoekstra and Ashok Chapagain, *The Globalization of Water* (Oxford: Blackwell, 2009), chapter 3.

<sup>47</sup> This is far from being a new conclusion. Note for instance the view that ‘the ultimate solution [for preserving fish stocks] is to treat these resources as a giant commons managed as a trust by some international agency such as the United Nations.’ S. V. Ciriacy-Wantrup and Richard Bishop, ‘“Common Property” as a Concept in Natural Resources Policy,’ *Natural Resources Journal* 15.4 (1975): 713-728.

<sup>48</sup> See <http://www.itto.int/>. For an evaluation of the ITTO’s success to date, see Duncan Poore, *Changing Landscapes: The Development of the International Tropical Timber Organization and its Influence on Tropical Forest Management* (London: Earthscan, 2003).

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<sup>49</sup> For useful comparative studies, see Norman Vig and Michael Faure (eds) *Green Giants? Environmental Policies of the United States and European Union* (Cambridge: MIT Press, 2004). See also John McCormick, *Environmental Policy in the European Union* (Basingstoke: Palgrave Macmillan, 2001), chapter 9.

<sup>50</sup> Rawls himself suggested that poverty in developing countries is often caused precisely by poor decision-making in a context of abundant resources. Rawls, *The Law of Peoples*, p. 108. It is also worth observing that processes of state-building have frequently been accompanied by environmental transformation, often with dramatically negative consequences for the conservation of natural resources.

<sup>51</sup> For a bibliography of UN Reports on shared control over water as one example of a shared resource, see <http://www.internationalwaterlaw.org/bibliography/UN/UNILC/>. For an approach to water scarcity which focuses on the need for both local solutions (such as shared governance of particular river basins) and a ‘global ethic’ of solidarity in sharing access to water, see Malin Falkenmark and Jan Lundqvist, ‘Towards Water Security: Political Determination and Human Adaptation Crucial,’ *Natural Resources Forum* 21.1 (1998): 37-51.

<sup>52</sup> It is notable that all of the examples of sound communal proprietorship over natural resources which Ostrom cites are local rather than national; and indeed she cites many studies which suggest that the maximum scale for effective proprietorship over some natural resources is much, much smaller than the national level. See Ostrom, ‘Private and Common Property Rights,’ pp. 347-8. Of course, some of these small-scale cases could also be trans-national.

<sup>53</sup> See for instance the developing debate about immigration and the right to exclude; e.g. Philip Cole and Christopher Heath Wellman, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011).

<sup>54</sup> For a cautious note about the role that the idea of moral arbitrariness should play in global egalitarian arguments, see Chris Armstrong, ‘National Self-determination, Global Equality and Moral Arbitrariness,’ *Journal of Political Philosophy* 18.3 (2010): 313-34.

<sup>55</sup> See Chris Armstrong, *Justice and Natural Resources: A Global Egalitarian Theory*, unpublished manuscript.

<sup>56</sup> See e.g. Schrijver, *Sovereignty over Natural Resources*, chapters 9-11. For a country-by-country overview of the impact of these decisions and instruments on domestic law, see Alice Palmer and Cairo

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Robb (eds 2004) *International Environmental Law Reports Volume 4: International Environmental Law in National Courts* (Cambridge: Cambridge University Press).