

## INSTITUTIONALIZING THE JUST WAR? A CRITICAL COMMENT ON BUCHANAN

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**Abstract.** I will argue that Buchanan's argument against the principle that war is permissible only in response to an actual or imminent attack rests on a mistaken understanding of the nature and purpose of the JWN. Buchanan abstracts from the fact that the JWN is not just a moral principle but also a legal rule and, as such, part of an already existing institutionalized system for the regulation of the use of force. Due to this abstraction, he fails to take into account the JWN's role as a fundamental constitutional principle in an already existing society of equal states committed to the values of peace and equality among states. It follows that Buchanan's own argument is arbitrarily incomplete since it mistakenly reduces the JWN to a mere safeguard against miscalculation and manipulation in an imaginary state of nature.

**Keywords:** Allen Buchanan, aggressive war, just war, preventive self-defence, forcible democratization, use of force, legal peace, institutional context

### 1. Introduction

Allen Buchanan has recently offered a re-evaluation of the principle that war is permissible only in response to an actual or imminent attack (Buchanan 2006). According to Buchanan, the sole reason for adopting this rule (Buchanan calls it the 'Just War Norm' or 'JWN') over more permissive principles governing the use of force in the international sphere is to reduce the risks of miscalculation of consequences and of political manipulation that inevitably arise from the use of moral justifications for aggressive war. Those risks, Buchanan argues, could be eliminated or at least significantly reduced by transferring decisions on the aggressive use of force from national governments to an accountability-ensuring international institutional framework. The JWN, Buchanan concludes, is valid only in the absence of such a framework.

It follows, according to Buchanan, that we cannot defend the JWN against proposals to introduce a more permissible framework governing the use of force

simply by pointing to the risks that would result from allowing national governments to invoke moral justifications for aggressive war. Such arguments, in Buchanan's view, are arbitrarily incomplete, since they fail to take into account the possibility that the risks of a more permissive norm or set of norms could be mitigated by embedding such a norm or set of norms in a proper institutional framework. As a result, at least two substantive justifications for aggressive war that are at odds with the JWN, and that Buchanan is concerned to defend, the Preventive Self-Defence Justification and the Forcible Democracy Justification, remain on the table; notwithstanding the fact that adherence to the JWN may be the best option in the absence of an effective institutional framework governing the use of force amongst states.

I will argue that Buchanan's argument rests on a mistaken understanding of the nature and purpose of the JWN. Buchanan abstracts from the fact that the JWN is not a moral principle but a legal rule and, as such, part of an already existing institutionalized system for the regulation of the use of force. Due to this abstraction, he fails to take into account the JWN's role as a fundamental constitutional principle in an already existing society of equal states committed to the values of peace and equality among states. It follows that Buchanan's own argument is arbitrarily incomplete since it mistakenly reduces the JWN to a mere safeguard against miscalculation and manipulation in an imaginary state of nature.

## **2. Buchanan's argument outlined**

Let me begin by outlining Buchanan's argument. Buchanan starts out from the observation that the validity of a norm governing the use of force in the international sphere is dependent on the institutional context (including, as a special case, the absence of an institutional context) within which the norm will be applied. According to Buchanan, this dependence is an instance of a more general phenomenon, of the fact that the validity of rules governing the legitimate use of political power may vary with institutional context. For example, we might be willing to adopt laws which authorize the police to engage in certain rather intrusive forms of surveillance on the condition that the exercise of such powers is subject to judicial review and that police officers can be held to account for their misuse. A moral evaluation of the laws governing the powers of the police, then, cannot abstract from the institutional context within which these laws are applied (see Buchanan 2006:5–6, and Buchanan 2003, Buchanan 2004).

If something similar holds for rules governing the use of force amongst states, a responsible moral evaluation of such rules cannot restrict itself to a comparison of different rules that abstracts from the institutional context within which they are applied. Buchanan's argument for the limited validity of the JWN proceeds on the assumption that the following three contexts are relevant for assessing the validity of rules governing the use of force amongst states:

1. A state of nature (characterized by the absence of an effective international institutional framework) in which states adhere to the JWN, i.e. a state of nature in which it is permissible to wage war only in reaction to direct or imminent attack.
2. A state of nature where JWN is replaced by a more permissive norm that allows individual states to engage in preventive war in order to avert a temporally distant harm and in order to bring about forcible democratization.
3. A state of institutionalized global governance where JWN is replaced by a more permissive norm that allows for preventive war to avert a temporally distant harm as well as for forcible democratization.

Buchanan's argument for limiting the applicability of JWN, in a nutshell, goes as follows (see Buchanan 2006:6–37). He takes it that the defence of JWN must come to rest on consequentialist considerations. This defence would point out that a situation in which JWN is taken to be valid is preferable to one in which it is not since a situation in which JWN is not taken to be valid, and in which states are permitted to rely on more permissive justifications for war, will give rise to morally intolerable risks of misjudgement and abuse.

JWN reduces such risks in virtue of its exclusionary character. It blocks access to justifications for aggressive war, be they based on national interest or moral principle. Let us assume it were recognized that there are at least some justifications that do, in principle, suffice to legitimate aggressive war, war not waged in reaction to direct or imminent attack. It would appear that we would then also have to swallow, at least in the absence of an institutionalized multilateral framework for applying the relevant justifications, that the leaders of any individual state must be the final judges of whether they are in a position, in any particular situation, to invoke one of these substantive justifications for going to war.

This lack of accountability clearly opens the door to bias, misjudgement, and abuse. A sceptic might argue that if all we can count on, in hoping for responsible application of substantive justifications for the aggressive use of force, is the good faith of national political leaders, our situation will, in effect, hardly be distinguishable from one in which it is recognized that states possess an unlimited *jus ad bellum*, a right to go to war whenever they believe that this is required by their vital interests. Given these dangers of reliance on substantive justifications for aggressive war, it must surely be better to take the substantive justifications for aggressive war off the table altogether by adopting strict adherence to JWN.

Buchanan admits that this argument carries considerable force. However, he argues that it fails to establish that substantive justifications for the use of aggressive force ought to be taken off the table under all circumstances. While it is true that we should prefer a state of nature where JWN is taken to be valid to a state of nature in which it is replaced by a more permissive norm, it is at least unclear whether we should prefer a state of nature where JWN is taken to be valid to a state of institutionalized global governance where JWN is replaced by a more permissive norm. Buchanan charges that defenders of JWN typically fail to take

the comparison to a state of institutionalized global governance into account. Their arguments for JWN, therefore, are “arbitrarily incomplete” (Buchanan 2006:5).

In a state of institutionalized global governance, the risks of abuse or misjudgement that go along with the availability of substantive justifications of aggressive war may well turn out to be considerably lower than in a state of nature. If this is true, then the consequentialist defence of JWN will be in trouble. Adherence to the JWN imposes moral costs, even in a state of nature, since it prevents at least some aggressive wars that would appear to be justifiable on substantive grounds. We have good reason to bear these costs in a state of nature, due to the inherent risks of general access to substantive justifications for aggressive war. However, it seems reasonable to suppose that these risks could be significantly reduced by a suitably constructed, accountability-ensuring international institutional framework. And this entails that it is at the very least an open question whether the benefits of adherence to JWN will always outweigh the moral costs of such adherence. It follows that we have no conclusive reason to support categorical adherence to the JWN. More permissive justifications for war remain available in principle, for all we know (Buchanan 2006:20–22, 37–38).

### 3. The preventive self-defence justification

Let me continue by taking a closer look at one of the substantive justifications of aggressive war championed by Buchanan, the *Preventive Self-Defence Justification* (Buchanan 2006:6–22). Doing so will allow us to understand one crucial underlying assumption of Buchanan’s view more clearly, namely the idea that the JWN is devoid of inherent moral significance, that its sole function is to prevent miscalculation and manipulation, and that its sphere of validity must therefore be limited to a state of nature that lacks an institutionalized form of global governance.

The PSDN (= the preventive self-defence norm) claims that it is permissible for a state to engage in preventive self-defence against those who wrongfully impose a dire risk. Buchanan argues that states are nowadays much more likely to be subject to wrongfully imposed dire risks than they used to be, such that adherence to the JWN, which of course entails exclusion of PSDN, has become much more dangerous. Circumstances have changed insofar as weapons of mass-destruction have become easily available to rogue states, and such states may choose to provide those weapons to terrorists bent on inflicting wholesale destruction unless they are stopped by acts of preventive self-defence. Hence, there would seem to be strong reasons for thinking that states, under today’s changed conditions, ought to be able to engage in preventive war, in order to remove wrongfully imposed dire risks, even if they are not under direct or imminent attack.

Buchanan is well-aware, however, of the risks that would result from allowing states to have direct resort to the PSDN (Buchanan 2006:16–18). Decision-takers may be wrong in their assessment of threats or of consequences of military action.

They are also likely to be biased, in their judgment, towards the interests of their own citizens. What is more, there is the danger that the PSDN will be invoked as a cover for other, concurrent reasons for going to war that would strike everyone as morally indefensible. Finally, there is no effective mechanism to hold decision-takers to account for ill-judged or frivolous invocations of the PSDN.

Buchanan does not pass final judgment on whether these risks still outweigh the moral costs of continuing adherence to JWN. All he claims is that the new conditions and new dangers are likely to have changed the cost-benefit ratio of adherence to the JWN in its disfavour. He also argues, however, that no one is in a position to come up with exact assessments of the cost-benefit ratio of continuing adherence to the JWN (Buchanan 2006:15). We thus end up in a seemingly irresolvable standoff between JWN and the PSDN in a state of nature.

In Buchanan's view, though, there is a third option. We can try to subject the application of PSDN to a "multilateral institutional procedure that ensures the accountability of both the party that proposes preventive force and those who are to approve or disapprove of its request for authorization to use it" (Buchanan 2006:18). Force could be used responsibly, Buchanan argues, by a coalition of democratic states. Democratic states are in any case more likely than other states to use force responsibly. Under the scheme proposed by Buchanan, moreover, they will use force only after they have gained approval from other members of the coalition (see for the details Buchanan and Keohane 2004:1–22). What is more, the members of the coalition of democratic states are to commit themselves to *ex post facto* review of their actions by an impartial international body, staffed by members of reputed NGO's. If the justification for a war initiated on such terms turns out, after the fact, to have been based on avoidable misjudgement or on deception, those who proposed the use of force will face a number of sanctions, such as having a lesser say in post-conflict reconstruction or bearing a larger share of the costs. The democratic coalition should seek UN-approval of its wars, but it would be justified in going ahead regardless if such approval is not to be had. Its membership should be diverse and inclusive. However, the coalition should admit a state only on the condition that its status as a democracy and its human rights record is beyond reproach (Buchanan and Keohane 2004:10–11).

At least for the members of such a coalition, Buchanan argues, the dangers implicit in resort to PSDN would be greatly reduced, probably to the extent of making PSDN preferable to JWN in a state of nature, especially in a post 9/11 world. Buchanan does not commit himself to the view that PSDN, institutionally embedded, would indeed be preferable to continuing adherence to the JWN. What he says is that defenders of JWN tend to overlook the existence of this option. A full defence of JWN would have to show that a properly institutionalized PSDN would be worse than continuing adherence to JWN in a state of nature or, alternatively, that there is overwhelming empirical reason to assume that the aspiration to create a suitable institutional scheme is so thoroughly unrealistic as to be irrelevant from a practical point of view. Neither argument, according to Buchanan, has been made by defenders of JWN, since they have failed to take into

account that the validity of a principle governing the use of force may depend on its institutional context. Defenders of JWN have shown, at best, that adherence to JWN in a state of nature is preferable to PSDN in a state of nature. As a result of this arbitrary incompleteness, no defence of JWN offered so far, Buchanan claims, conclusively justifies a policy of taking PSDN, as well as other plausible substantive justifications for aggressive war, off the table (Buchanan 2006:37–38).

#### **4. Buchanan on the status of the just war norm and the preventive self-defence justification**

As we have seen, Buchanan relies on the idea that the validity of a norm may depend on institutional context. This general idea, Buchanan suggests, applies to both JWN and PSDN in much the same way. On closer inspection, however, it turns out to be unclear whether this is really what Buchanan is saying. In one revealing remark, Buchanan claims to have established that JWN is not “a fundamental moral principle but at most a contingent moral rule, one whose validity may vary with institutional context” (Buchanan 2006:24). It seems natural to interpret this remark as saying that a norm’s dependence on institutional context is a sufficient condition for its being “at most a contingent moral rule” and not a “fundamental moral principle”. If that is indeed so, then, or so it would seem, PSDN (as well as other substantive justifications for aggressive war, like the “forcible democratization justification”) must have the same contingent and non-fundamental status.

However, Buchanan clearly suggests, though he does not explicitly dwell on the point, that there is an important asymmetry between JWN and PSDN (as well as other plausible substantive moral justifications for aggressive war, like the forcible democratization rationale). PSDN claims, to recall, that it is permissible for some group of people to use preventive force against those who wrongly subject the group’s members to dire, life-threatening risks. And Buchanan clearly implies that this principle is sound. At the very least, we have a good *prima facie* reason to consider ourselves entitled to engage in preventive self-defence whenever someone’s behaviour wrongfully imposes a dire threat on us. As we have seen, Buchanan argues that we may nevertheless have to block access to PSDN in a state of nature (by adopting JWN), in order to reduce intolerable risks of misjudgement and abuse. However, when JWN blocks access to PSDN, in a state of nature, it blocks access to a form of justification for the use of force that continues to articulate a perfectly intelligible moral concern. We will sometimes end up in situations where our adherence to JWN will require us to abstain from using aggressive force even while the particular circumstances clearly provide us with a strong reason for engaging in preventive self-defence. In adhering to JWN and in refusing to act on the basis of PSDN, we thus pay a moral price; a price that – even while it may be well-worth paying – wouldn’t have to be paid under better circumstances.

Contrast this observation about the force of PSDN with what happens to JWN when the latter is superseded by a proper institutional framework. Buchanan clearly believes that once we reach a state of institutionalization that will sufficiently mitigate the risks inherent in allowing appeal to PSDN, the restrictions that JWN imposes on the use of force in self-defence will become altogether irrelevant from a moral point of view. To put the point differently: In Buchanan's view, JWN can validly prohibit uses of force that would be licensed by PSDN (or, for that matter, by some other convincing rationale for the use of aggressive force) only as long as its blanket prohibition of aggressive war is needed to reduce intolerable risks of misjudgement and abuse. However, once these risks are mitigated by an accountability-enforcing institutional framework, there is no longer *any* reason (not even one that is now outweighed or validly excluded) not to use force in cases where such use would conflict with JWN but be licensed by PSDN (or some other convincing rationale for the use of aggressive force). This asymmetry between JWN and PSDN underpins Buchanan's claim that the adoption of JWN over more a more permissive framework for the use of force can only be justified on consequentialist grounds. Buchanan would presumably not say the same thing about PSDN. He argues, in effect, that the default scope of the right to self-defence includes the right to defend oneself against the wrongful imposition of dire threats and that a restriction of that default scope through JWN will only be called for in non-ideal circumstances.

To be sure, one might attack this interpretation of JWN head-on, by arguing that JWN follows from the principle that it is impermissible to aggress against the innocent. Buchanan, of course, agrees that it is impermissible to aggress against or to kill the innocent. However, he argues, convincingly in my view, that one can forfeit one's innocence, and one's consequent right not to be aggressed against or not to be killed in other ways than by being an aggressor oneself, for example by wrongfully imposing dire risks or by keeping a third party in a condition of servitude. PSDN, therefore, does not conflict with the principle that we may not aggress against the innocent. The prohibition of aggressing against the innocent does not justify a rule about the use of force as restrictive as JWN (Buchanan 2006:9–13, Buchanan and Keohane 2004:5–8, Lee 2006:99–107).

Buchanan is committed to the view, to conclude, that JWN is dependent on institutional context in a much stronger sense than PSDN (or other convincing moral justifications for the use of aggressive force). The narrow restrictions which it imposes on uses of force have a point only in one particular (and particularly defective) institutional context, namely in the state of nature. It would therefore make no sense, in Buchanan's view, to try to offer a principled defence of JWN over a more permissive framework for the use of force. There is nothing to be said for adherence to JWN other than that it might, for contingent empirical reasons, be too risky, in some institutionally defective contexts, not to adhere to it.

It follows that the standoff between JWN and PSDN, in Buchanan's view, is not a conflict between different moral values. To answer the question whether we should continue to adhere to JWN or adopt the alternative framework proposed by

Buchanan does not force us to balance, weigh, or prioritize conflicting moral values. The answer depends, rather, on whether an alternative framework would indeed sufficiently reduce the risks of misjudgement and abuse and on whether it would be feasible to put it in place. These questions are empirical questions. Whether we should continue to adhere to JWN or adopt some more permissive standard is therefore itself a purely empirical question.

### **5. Criticizing Buchanan**

This analysis of Buchanan's position suggests the following line of criticism. Buchanan's conception of the challenges involved in defending or rejecting JWN stands and falls with the claim that its negative capacity to reduce risks of bias, misjudgement, and abuse in the application of moral justifications for aggressive war is the only conceivable rationale for adopting JWN over a more permissive set of standards for the use of force. In what follows I will try to outline a different and positive rationale (other than the principle that it is impermissible to kill the innocent) for adopting JWN. This rationale cannot be reduced to the negative function of reducing risks of misjudgement and abuse in the application of substantive justifications for aggressive war. JWN's validity, therefore, does not depend exclusively on the absence of a risk-reducing institutional context. And if JWN's validity does not exclusively depend on the absence of a risk-reducing institutional context, we are not in a position to conclude, without further ado, that there could be no reason for holding on to JWN once the institutional scheme envisaged by Buchanan is shown to be empirically feasible.

My argument will not try to deny that the validity of JWN is indeed dependent on institutional context. But the context within which JWN has validity is not, as Buchanan claims, the state of nature. Rather, it is that of a society of independent states, equal in their sovereignty; a society which is constituted by the prohibition of the use of aggressive force expressed by JWN and by institutions that allow states to settle their conflicts peacefully.

To be sure, this society, as it presently exists, is seriously defective from a moral point of view, perhaps to the point of forcing us to reject JWN. I will not try to answer the question whether this is indeed the case. Like Buchanan himself, I am not primarily interested in rejecting or defending JWN but rather in figuring out what an argument for its defence or rejection would have to show. My point will be that Buchanan's outline of the options that need to be discussed in defending or rejecting JWN is itself incomplete. It fails to take account of the distinctive value served by JWN in a distinctive kind of institutional context.

The real question we face, it seems to me, is not whether to live in a state of nature with JWN or in the state of institutionalized governance, with more permissive justifications for aggressive war, envisaged by Buchanan. It is whether to create a system of international governance through which some group of states empowers itself to use aggressive force, on the basis of a number of substantive

justifications, while it denies the same right to other states, or whether to continue to labour under the constraints of a system of international governance based on the sovereign equality of all states, as expressed by universal adherence to JWN. A rejection of the second of these options cannot be evaluated solely on the basis of the aim of avoiding misjudgement or abuse in the application of context-independent moral principles. It entails a real moral cost that Buchanan fails to address, namely the abandonment of the value of *legal peace*.

## 6. The institutional place of the just war norm

Note that there is something odd about the claim that JWN should govern the use of force in a state of nature. Buchanan attributes this claim to “just war theory”, but it is not that easy to name a particular proponent of the view among traditional just war theorists (however, see Walzer 1977). This is perhaps no accident. As Buchanan himself remarks in a footnote, traditional scholastic theories of the *jus ad bellum* were not committed to JWN (Buchanan 2006:2). Rather, they tended to make room for a number of substantive justifications of aggressive war (see e.g. Aquinas 2002:239–242). Traditional scholastic just war theory is based on an implicit rejection of the idea that the relations between states could ever be portrayed as constituting a state of nature in the early modern sense of the term. In scholastic just war theory, just war is typically seen as a form of punishment or enforcement of natural right. The idea that states should be held bound to JWN, unsurprisingly, did not find a foothold.

The case for JWN as a principle valid in a state of nature does not seem to get much better, though, once we turn to early modern theorists of the state of nature. Both Hobbes and Locke would have rejected the idea that JWN could be a valid moral rule in a state of nature. For Hobbes, a rule to abstain from all uses of force other than to repel direct or imminent attack cannot be valid unless one has assurance that others will abide by the same rule. However, since it is reasonable, in a state of nature, to doubt that one will have such assurance, the rule cannot be valid in a state of nature. Rather, we will at least have to be able to appeal to PSDN, if we are to have any chance of survival in that state (Hobbes 1991: 91–111). From a Lockean point of view, adherence to JWN in a state of nature would conflict with the exercise of one’s natural right to punish violators of the law of nature, for the reason that such exercises of punishment will typically take the form of aggressive uses of force, of uses of force that do not respond to direct or imminent attack. To claim that such use of force for punishment is impermissible in a state of nature, Locke would presumably argue, would rob the law of nature of its limited effectiveness in the state of nature (see Locke 1967: 271–273).

The reason why Buchanan attributes the claim that JWN is a valid rule in a state of nature to just war theory, I suspect, is ultimately to be sought in the fact that something like JWN undoubtedly forms part of positive international law. According to positive international law, it is impermissible for a state to resort to

the use of force for any other reason than to defend itself against actual or imminent attack unless such use has been authorized by the UN Security Council (Byers and Chesterman 2003). One might argue that this scheme is not to be equated with a blanket prohibition of aggressive war, since it does make room for preventive uses of force if they are authorized by the Security Council. However, it clearly does amount to a blanket prohibition of the use of aggressive force on the part of states or coalitions of states that do not act on behalf of the UN. What is more, the UN Charter envisages authorizations of aggressive force on the part of the Security Council only as a counter to standing threats to peace among states and not, for example, to bring about forcible democratization. Hence, a rule very much like JWN indeed seems to be at the heart of contemporary positive public international law.

However, we should note that the idea that JWN could be a valid principle of conduct in a pure state of nature does not gain any support from JWN's status as a positive international legal rule or from the relevant pieces of the history of international law. Efforts to establish JWN as a legal standard of conduct binding on states had come into swing only after WWI, and they were not to be successfully concluded until after WWII and the creation of the UN. These efforts, moreover, were clearly not undertaken on the basis of the view that JWN could have legal validity apart from an institutionalized system of international arbitration that would allow for the equitable and peaceful settlement of disputes among states. Rather, they were undertaken, from the start, on the basis of the view that JWN could have legal validity only as part of such a system. When JWN came into effect as a legal rule, it did so as a part of an institutionalized system of global governance that was supposed to make the aggressive use of force and the threat of the use of such force superfluous and therefore impermissible. It was never held to be legally binding on states in a state of nature (Kimminich 1997:74–83).

What, then, is the real institutional locus of JWN? Throughout the history of legal and political thought, JWN was never taken to apply to individuals (or collectives) in a state of nature. Neither, we might add, was it ever taken to bind those who possess legitimate authority to enforce the law and to punish. What JWN describes, rather, is the residual power to use force that is left to an individual who is subject to a legitimate public authority invested with a monopoly of the legitimate use of aggressive force. An individual in this condition is not entitled to punish others for past misdeeds since she is obliged to defend her rights by appeal to the courts whenever possible. And since she enjoys reasonable assurance against attack by others, given that the state's claim to a monopoly on the use of force is reasonably effective, she cannot invoke a principle like PSDN to justify preventative aggression against others. As a result, she is prohibited from using force against others unless she is defending herself or others from an ongoing or imminent attack (see e.g. Locke 1967:323–325).

To sum up, the constraints that JWN would impose on states and their power to make war are apparently analogous to the restrictions on the use of aggressive force that are commonly taken to bind a person who is subject to a state that can

legitimately claim a monopoly of force. This observation suggests that there might be an alternative explanation for the claim that JWN is a valid principle governing the conduct of states, one that does not see JWN's purpose solely as that of reducing risks of misjudgement and abuse. The claim that JWN is binding on states might be explained on the basis of the view that states either already are or that they at least could be subjected to an institutionalized system of positive international law *in much the same way and for much the same reasons* as individual citizens are subject to the laws of the state.

Of course, there are many ways of assailing this rather close analogy between individual subjection to the laws of a state and the subjection of a state to the system of international law, both from an empirical and from a moral point of view. If any of these carries the day, we should, I believe, abandon the idea that JWN is at all applicable to states, instead of making the implausible claim that JWN would apply in a state of nature. If JWN is to be defensible at all, as a principle binding on states, it will have to be defended, it seems to me, on the basis of the idea that it makes sense to draw an analogy between an individual's subjection to the law of a state and a state's subjection to international law.<sup>1</sup>

### 7. Why the just war norm is valid in the domestic context

In this paper, I can only give a very preliminary defence of the analogy. Before I do so, however, I need to take a look at the reasons why JWN is taken to be

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<sup>1</sup> Of course, the analogy between individuals and political communities is common coin in debates about intervention. See for classical examples Mill 1859, Walzer 1977:86–91. As will become clear below, I agree with Mill and Walzer that a state need not be fully democratic for the analogy to hold and for it to possess some moral standing (and thus to possess a *prima facie* right not to be interfered with). However, I will not try to contribute to the ongoing debate of what gives moral standing to political communities. Mill claims, in effect, that if a community has such standing, then, just as in the individual case, intervention will always stand in need of some special justification, such as the danger of harm to others, which is not required if the people to be interfered with are 'barbarians'. Buchanan's arguments, of course, are unlikely to fail this purely moral requirement of non-intervention. After all, the PSDN is a special justification for intervention. JWN, by contrast, makes much more stringent requirements for abstention from the use of force than would follow, on a Millian view, from the simple fact of moral standing on the part of the community that we consider using violence against. JWN requires not just that there be a special reason for intervention or for the use of force (such as the wrongful imposition of a dire risk or past wrongdoing that creates a liability to punishment or an enforceable duty to make reparations). It states that the use of force on the part of an individual state or a group of individual states is impermissible unless its aim is to stop *ongoing* or *imminent* attacks. I have argued that the view that states should be held to his further restriction presupposes the view that they are subject to a legal order. JWN, in other words, forms part of a *specifically legal* doctrine of non-intervention. The applicability of this doctrine to a community probably presupposes moral standing, but it is not an automatic consequence of a community's moral standing, just as the extent of our duty not to use force against fellow citizens is not an automatic consequence of their natural moral standing as human beings. My interest is limited to the question whether it makes sense to apply the legal doctrine to the current relations between states and whether we should want to do so.

binding on citizens of a legitimate state. If the reasons why JWN is taken to be binding on individual citizens of a legitimate state do not fit Buchanan's conception of what validates JWN, we are well on our way to refuting Buchanan's account, provided our analogy between the subjection of individuals to the law of the state and the subjection of states to the institutions of international law is defensible.

My basic contention with respect to an individual citizen's subjection to JWN is the following. It would be wrong to claim that an individual citizen is bound by JWN, bound to respect the state's monopoly of coercive force, only for the reason that individual persons would be liable to bias, misjudgement, and abuse if they were to interpret the laws (as well as the legally enforceable rules of morality) on their own account. Some individuals are much more likely to be afflicted by misjudgement or bias than others. But we do not believe that it would be any more permissible for those who are unlikely to misjudge or to engage in abuse to resort to the private use of aggressive force against fellow citizens than it would be for anyone else.

We would not think it acceptable, for instance, for a particularly virtuous citizen of a state to go ahead and attack others or take their property under the pretext of enforcing the law (or legitimately enforceable moral rules) against wrongdoers. We would not think his proposed course of action any more acceptable, if he made a promise to consult with his friends (who so happen to be equally high-minded lovers of justice), to act only with their approval, and to make amends after the fact, should his actions, in their judgment, turn out to have been ill-advised. We would not be willing to condone such action even if we knew of some especially virtuous citizens that they would, in fact, be able reliably to reduce bias, misjudgement, and abuse in their private uses of aggressive force on the condition that they adopted such a procedure. All developed legal systems punish those who so resort to violence for the mere act of disrespecting the state's monopoly to apply coercive force, irrespective of whether their claim to be enforcing the law (or moral rules that are or ought to be included in the law) turns out to be substantively justified or not.

If the fact that decisions taken by the judicial institutions of the state usually tend to be better shielded from misjudgement and abuse than decisions taken by individuals were our only reason for denying citizens the use of aggressive force, for holding them bound to JWN, there would seem to be no good reason for us to deny the use of aggressive force to the high-minded friends. After all, there seems to be no good reason to deny that they might indeed be able, by consulting among themselves, sufficiently to shield their actions from misjudgement and abuse. So why do we nevertheless deny the use of aggressive force to all citizens, even to those who are virtuous enough, individually or collectively, to make unbiased, well-informed, and non-abusive use of it?

As far as I can see, there are two closely related reasons for our rejection of the actions of the high-minded friends that have nothing to do with reducing the dangers of bias, misjudgement, and abuse. The first reason is that the stance of the

high-minded friends violates the principle of moral equality amongst citizens. The high-minded friends claim, in effect, that they are entitled to use aggressive force against others (while their fellow citizens are not) due to the fact that they are sufficiently virtuous, at least as a collective, to shield their uses of aggressive force from the danger of bias, misjudgement, and abuse while other, less high-minded individuals or groups are not. The argument put forward by the friends is really only a slight variation of the blunt claim that some individuals are virtuous enough to be permitted to engage in aggressive force while others are not. The friends claim, in effect, that no one is individually virtuous enough to be allowed to use aggressive force, but that some individuals are much closer to the relevant threshold than others (this idea is clearly implicit in Buchanan and Keohane 2004: 10). If such individuals start to consult with each other, and to hold each other to account, they will acquire the right to use aggressive force, while other individuals will continue to lack it, due to their inferior degree of individual virtue which will bar them both from joining the high-minded friends and from using aggressive force themselves.

We believe, however, that fellow citizenship is incompatible with the recognition of distinctions in natural moral worth among citizens that would justify extending a right as important as the right to enforce the law and to punish to some individuals while denying it to others. The principle of the moral equality of citizens would seem to require, rather, that if some are individually entitled to resort to aggressive force, on the basis of their personal virtue, then everyone must be so entitled, which would of course dissolve civil society. The principle would seem to entail as well that if someone chooses to become a member of civil society, he must do so on equal terms with others, namely on the condition that he, as well as anyone else, will accept to be bound by JWN. Among those who consider themselves fellow citizens, adherence to JWN is therefore an indispensable moral requirement.

The second reason not to go along with the high-minded friends is provided by the fact that one of our primary aims, in subjecting ourselves to a state that installs and maintains a legal order, is to receive assurance against all private uses of aggressive force, not just against private uses of aggressive force that high-minded people will agree are substantively ill-advised, biased, or abusive. It is considered essential to shared membership in a civil society that all members are publicly committed not to rely on the private use of aggressive use of force in their dealings with each other. Whenever any two members of civil society have a conflict, they are taken to have an obligation to submit their case to impartial arbitration provided by the courts and to leave the enforcement of claims of right that find judicial recognition to the state. The state, in turn, applies coercive power only under the constraints of the rule of law, i.e. on the basis of known legal rules and after due process of law has been given. As a result, it is in each individual's power to avoid being subjected to acts of aggression by complying with a determinate standard of conduct provided by the positive laws and judicial decisions of the state.

Our interest in such an arrangement is clearly not reducible to an interest in achieving an enhanced degree of reliability in the correct application of moral justifications that license the use of aggressive force or that would license the use of aggressive force in a context in which such uses are not too liable to miscarry. It is an interest in not being subject to coercive force on the basis of the private judgment of any other individual or social group as to when an exercise of such force would be substantively justified.

It is not difficult to see why we ought to be interested in this particular form of non-subjection. Even well-informed and conscientious deliberators will often continue to disagree indefinitely over the question whether substantive moral considerations license a particular use of coercive force. What is more, it will in many cases be impossible, due to the possibility of reasonable disagreement, to distinguish biased or abusive uses of force from honest attempts to apply moral principles. The function of the state in governing coercive force, therefore, cannot be only that of reducing the risk of cognitive error or bias in the application of substantive justifications for the use of aggressive force. Rather, the state faces the challenge of organizing the use of coercive force in a way that we will all be able to regard as legitimate even while we continue to disagree on the level of substantive moral argument. In order to rise to this challenge, the state must at the very least assure us that no individual (or group) who believes that coercive force ought to be deployed against us will be permitted to act on nothing but its own judgment in the matter.

I will henceforth refer to the special relationship of equality and assurance among citizens I have just outlined as 'legal peace'. Legal peace is an institutional value through and through, in the sense that it could not exist outside of an institutionalized community claiming a monopoly of force. However, it would be wrong to infer from this that our interest in legal peace is not a fundamental interest. Our interest in legal peace antedates the existence of political community: It is a central motive, after all, for creating political institutions. The fact that JWN will be valid in the particular institutional context of organized political community, in other words, is a positive reason to enter that context, given that JWN serves legal peace. JWN, then, need not be understood as merely a negative and restraining principle that is valid only because it allows us to limit the incidental harm likely to arise in a suboptimal context we would do best to leave behind. Our reasons for thinking that individual citizens ought to be held to JWN do not boil down to an interest in reducing bias, misjudgement, or abuse in the application of justifications for the use of aggressive force. Rather, respect for JWN on the part of all citizens is required to secure a positive value, the value of legal peace.

The high-minded friends, in our example, openly reject legal peace. Their stance amounts to a conscious challenge to their legal system's claim to a monopoly of coercive force, and insofar as it is successful, it will tend to undermine the legal peace afforded by that monopoly; not just for the friends themselves but for everyone else as well. The position of the high-minded friends

may or may not be justifiable, all things considered. I do not want to rule out the possibility that a state that successfully claims a monopoly of force and realizes legal peace might be so gravely defective in other ways as no longer to merit respect. But even in such a case, its revolutionary overthrow in favour of a scheme in which exclusive clubs of high-minded (or not so high-minded) friends take the law into their own hands, even if only for the time being, would inevitably carry a morally relevant price, namely the undermining of legal peace.

In order to show that it is justifiable to pay that price we will have to show that circumstances are such that we have sufficient reason to forego legal peace. However, we will not be able to show this simply by pointing out that some alternative arrangement for increasing the reliability with which our decisions conform to substantive moral standards for the use of force (like a coalition with our high-minded friends) is available to us as a matter of fact. If the attractiveness of our proposal to use aggressive force within such an arrangement is compared only to JWN in a state of nature, the price of the abandonment of legal peace will remain unaccounted for, and the justification for our proposed right to engage in the aggressive use of force will remain tainted with moral arbitrariness.

### **8. The just war norm in the international context**

The big question that arises from these considerations, needless to say, is whether we can transfer this conclusion to the society of states, by drawing an analogy between the subjection of a citizen to the state and the subjection of the state to international law. Someone who was interested in drawing such an analogy would likely point out that the system of contemporary positive international law indeed purports to claim a monopoly of coercive force and to bring about a non-discriminatory and non-hegemonic legal peace among all states. It imposes JWN on all states and it endows an international body with the exclusive power to authorize uses of force that are not covered by the right of self-defence against actual or imminent attack. So let us assume, for a moment, that it is permissible to draw the analogy. It would follow that Buchanan's proposal will have to be justified as an explicit abandonment of the ideal of international legal peace among states.

There can be no legal peace unless it is recognized that no subject of the law is entitled to authorize itself to use aggressive force against others. In Buchanan's scheme, however, the members of the democratic coalition claim to be able to authorize themselves to use aggressive force against other states, due to their superior moral reliability in the application of moral justifications for the use of aggressive force. And it is hard to see how such a claim could fail to lead to a general erosion of acceptance for JWN as a part of positive international law and thus to the undermining of the prospect of legal peace among states. Buchanan's state of institutionalized global governance, in other words, is really only a transformed state of nature, one in which a contingent barrier to the unilateral use

of aggressive force has been removed by the formation of a coalition of unusually virtuous states that hold each other to account for the substantive moral probity of their decisions to resort to aggressive force and thus acquire an exclusive moral right to aggress against others.

Buchanan's proposal, I conclude, involves a rejection of the ideal of international legal peace, of the formation of an international lawful condition amongst states. In order to justify such a rejection, it seems to me, one would either have to show that international legal peace, contrary to appearances, is not a distinctive value, that its realization is practically infeasible, or that the current situation is such that its actual or potential value is outweighed by the likely moral gains of a discriminatory system of international governance that institutionalizes the aggressive use of force on the part of some states. None of these arguments is made explicit by Buchanan, as far as I can see, since the ideal of legal peace is simply never recognized as a possible normative basis of a system of international institutions.

Needless to say, the conception of international legal peace needs more careful defence than I can give it here. Let me conclude by giving a list of possible attacks on the analogy I have been working with, and by indicating what kind of reply I think might be given to each.

One might of course argue that it is fundamentally wrong to begin with to claim that members of the society of states are in a position analogous to the citizens of a state. Despite appearances, the society of states finds itself in a state of nature. While it may be true that the UN Charter purports to create a situation of international legal peace, it patently fails to do so. There is no impartial arbiter in many conflicts between states, as the UN Security Council is merely a privileged club of particularly powerful states who will act as judges in their own cause once push comes to shove and who will support efforts to enforce UN resolutions only if it suits their interests. But if we are living in a veiled state of nature, the creation of an alternative institutional framework based on the shared values of democratic states cannot possibly be a sacrifice of legal peace, since legal peace among states does not presently exist. The formation of a coalition of democratic states, then, must be a net gain in the moral quality of international life, if the empirical conditions outlined by Buchanan are fulfilled.

The problem with this defence of the democratic coalition is that it fails to take account of the fact that the formation of such a coalition would do more than just do away with a botched attempt to create legal peace. It would clearly destroy even the prospect, for the foreseeable future, of a reform of existing international institutions with the goal of improving them into better instruments of legal peace. And the destruction of this prospect cannot be justified by simply pointing out that the existing international institutional framework for the governance of the use of force still falls short of its declared aim to bring about legal peace among states. It will no doubt be replied that the transformation of the Security Council into a truly impartial institution is not to be hoped for since the states now represented in the Council are unlikely to agree to such a measure. This is certainly a serious

problem of feasibility, but I would think it is hardly a more serious problem than that of getting the Russians or the Chinese to agree that they should consider themselves bound by JWN while America, Britain, or India claim to be entitled to use aggressive force due to their superior virtue.

A second line of criticism would admit that there is international legal peace among states, that the existence of international legal peace is a good thing, and that the formation of the democratic coalition would indeed destroy it. However, it may still turn out to be the case that the world would, on balance, be 'a better place' even without legal peace, for example if respect for legal peace among states were to make it too difficult for democratic nations willing to protect the human rights of subjects of predatory states to do so. The relatively weak development of international law as regards its capacity to protect individual human rights should lead us to expect that we may very well be in such a situation. But an argument to this conclusion would have to include a balancing of the price of abandoning legal peace against the expected benefit of helping those in distress. It would therefore be wrong to claim that an aggressive use of force on the part of the democratic coalition would *automatically* be justified wherever an accountability-ensuring coalition of the kind envisaged by Buchanan is in place. Once we admit that legal peace is a distinct value, we admit that there is more that might speak against the use of aggressive force on the basis of a plausible substantive moral justification than the dangers of bias, misjudgement, and abuse in the application of that justification.

A final attack would restrict the relevance of the analogy I have been drawing on more principled grounds, and thus aim to undercut the claim that the value of international legal peace is potentially endangered by the formation of the coalition of democratic states. The analogy between domestic and international legal peace, or so one might argue, fails for the reason that states are not real persons with real, morally relevant interests of their own that merit equal respect. States, rather, can be entitled to protection from attack or from being dominated through threats of the use of force only insofar as they genuinely represent the legitimate interests of their citizens. This condition, however, will be fulfilled only as long as a state is democratic and fully respects and protects its citizens' individual human rights (see Buchanan 2004a:454–456).

This normative claim is often supplemented by an empirical thesis concerning the relations among democratic states. Since the members of the democratic coalition are very unlikely to have (and thus to see) any reason to use aggressive force against each other or other fully democratic states, the coalition is very unlikely ever to come into conflict with the value of international legal peace insofar as it is indeed a value. Put differently: Legal peace is owed only between democratic states (or rather: democratic peoples). And these, in any case, can be expected not to provide each other with any substantive reasons for the use of aggressive force. As a result, we can reasonably expect that the value of international legal peace and the use of aggressive force on the part of the coalition of democratic states will not clash in political reality.

In response to the first part of this challenge one would have to show that the group of states that do represent the interests of their citizens in ways that entitle them to legal peace (on the condition that they are willing to give it) is significantly larger than the group of fully democratic states. If this result could be established, we should certainly continue to expect conflicts between the value of legal peace and the claims raised by Buchanan's coalition of democratic states.

There can be little doubt that there are states which are not fully democratic but which nevertheless provide crucially important services to all those whom they govern (and do so with more efficiency and fairness than any other form of governance that could easily be put in place by violent outside interference). The governed, in many such cases, undoubtedly identify with their states and consider them legitimate (or at least more legitimate than any form of rule that could be imposed by violent outside interference) (see for a recent defence of the moral standing of such 'decent' states Rawls 1999). Individual citizens of such states would clearly be put in a disfavoured position if Buchanan's proposal came to be realized.

As a citizen of the Federal Republic of Germany, I am part of a community that is entitled not to be subjected to aggression as long as it does not aggress itself. If I were a citizen of Iran, by contrast, I could enjoy peace (understood as the mere absence of fighting, not as legal peace), only at the discretion of politicians in democratic countries that are entitled, according to Buchanan's view, to use aggressive force, regardless of how non-aggressively my state behaves. Politicians in Washington, London, and so on, will decide whether my state's aim to develop the use of nuclear power wrongfully imposes a risk on some other state and whether this risk is so dire as to warrant a pre-emptive use of military force. In answering the latter question, the members of the democratic coalition would, of course, have to take the effects of the use of military force on individual Iranian citizens into account. A pre-emptive attack would be morally unjustified, in everyone's book, if the harm done to Iranian civilians who are not themselves responsible for the imposition of the risk were to exceed by far the potential harm averted by the attack. But the fact remains that my political representatives would not be entitled to any say in the matter, and neither would they be able to appeal, for a solution to the conflict, to a genuinely impartial international institution.

On the assumption that my state fulfils the two criteria of decency outlined above, and given that it behaves non-aggressively, this fact would amount to a form of disenfranchisement. This disenfranchisement would be problematic even if there were no reason to think that it will favour a conscious tendency on the part of the members of the democratic coalition to decide in a partial or biased manner, for example by putting disproportionate weight on the security interests of their own citizens. Even if the members of the democratic coalition attempted, in good faith, to rid themselves of such bias, I would still indirectly be denied participation in an international community of right whose members refrain from the use of aggressive force against each other and I would thereby remain deprived of the enjoyment of international legal peace. To try to get around this problem by pre-

tending that governments which are not fully democratic *altogether* fail to represent or express the interests of their subjects *in any way*, or by assuming that the benevolent leaders of the democratic coalition are the true representatives of these interests, strikes me as a bit of a dodge. I am not arguing that the disenfranchisement entailed by Buchanan's proposal could never be justifiable. What I am concerned to point out is that it is a moral price which inevitably goes along with Buchanan's project and that needs to be taken into account in assessing its justifiability.

Finally, the second part of the third challenge, the assumption that democratic states can be expected not to give each other any ground to contemplate the use of aggressive force, conceals a further problem. Let us imagine that Iran is a fully democratic state, but that it still tries to develop the use of nuclear power and that this is still considered, not implausibly, to amount to the wrongful imposition of a dire risk on its neighbours. (It does not seem to be that much of a stretch to picture a fully democratic government of Iran as verbally hostile to Israel as the government that is now in place.) If such a scenario is politically possible, Buchanan's project will be in trouble.

States are to be offered membership in Buchanan's coalition if and only if they are fully democratic. The underlying reason for extending the offer of membership to fully democratic states is the assumption that fully democratic states are more likely than non-democratic states to arrive at morally defensible judgments of policy. They will, on the one hand, abstain from taking decisions that would provide others with a moral reason to contemplate the use of force against them and they are more likely than non-democratic states to judge correctly in having resort to substantive justifications for the use of aggressive force. If the scenario outlined above were politically possible, we would have to conclude that the underlying assumption of sufficient moral reliability does not necessarily apply to all democratic states. It would appear to be clear, moreover, that democratic states to which it does not apply should not be allowed to become members of the coalition since such membership would undercut the coalition's moral reliability or else its capacity to act. Instead, the coalition should include only those democracies that are sufficiently reliable in arriving at morally defensible decisions. However, this replacement of institutional democracy with substantive moral reliability, as the requirement for accession to the coalition, will create a serious problem for Buchanan.

Buchanan, as we have seen, himself admits that individual democratic states should not be allowed to use aggressive force since their governments are prone to bias, misjudgement, and abuse, though to a significantly lesser extent than non-democratic governments. Democratic states must form a coalition to control each other's residual tendencies towards bias and misjudgement in order to collectively attain enough moral reliability to be allowed to use aggressive force. The potential for a certain measure of disagreement on the particulars, among the members of the coalition, is therefore as crucial, as a control for individual bias and imprudence, as their agreement on a set of basic values. However, collective

decision-making within the coalition can be expected to provide this control only if we hold on to the regulative assumption that a state's position merits to be taken seriously as a counter to one's own potential bias, even if one perceives it as morally wrong, if that state is democratic in the institutional sense.

A coalition for intervention that rejects institutional democracy as a sufficient condition for membership, it is to be feared, will be prone to lose the capacity to exercise the kind of control against individual bias and misjudgement Buchanan thinks is necessary. If the coalition's membership is self-selecting, and if we replace the fact of institutional democracy with substantive moral reliability (as perceived by the present members of the coalition) as the criterion of whether a state is worthy of entry, then those who are already members will select new members, in all likelihood, for agreement with their own views on the particulars, and not for a commitment to a shared set of basic values whose application may turn out to be controversial. In other words, there is an overwhelming danger that the present members of the coalition will not only refuse to deal with obviously irresponsible democracies but also with those whose differing views are needed to provide control for their own potential bias and imprudence. This process need not even involve any conscious politics of self-interest, though it likely will. After all, it is often genuinely difficult to figure out whether some normative disagreement is best described as a dispute about basic value, as a disagreement on the applicative level, or as a symptom of someone's self-interested unwillingness to adopt a moral point of view. If a coalition were to fall prey to such biased selection for membership, there would no longer be any good reason, according to Buchanan's own view, to trust it with the use of aggressive force.

The upshot of this is that Buchanan is committed to the empirical claim that our hypothetical scenario about a democratic Iran is politically impossible, for the reason that the institutions of democracy will always suffice to prevent a state from engaging in the kind of severely irresponsible and threatening behaviour that should disqualify it from membership in the coalition. I cannot evaluate the plausibility of this claim in the space of this paper. Let me say, though, that it is certainly open to doubt. Its falsity would face us with the dilemma of either running the danger of admitting morally irresponsible (though institutionally democratic) states into the coalition for intervention or of running the danger of selecting for bias in the coalition's membership. However, if we indeed face that dilemma, we might have good reason to hold on to a more restrictive framework for the use of force, one that is based on JWN and that affords legal peace to all decent states that refrain from aggression.

## **9. Conclusion**

Admittedly, the defence of the analogy between states and individuals offered here is only a sketch that needs a lot more elaboration. What I hope to have shown, nevertheless, is that there is reason to think that Buchanan's attempt to vindicate a

right to the use of aggressive force for a coalition of democratic states is, to use his own words, ‘arbitrarily incomplete’. It overlooks the role of JWN in serving the value of legal peace.

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