Are Institutions and Empiricism Enough?

Review of Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force*, (Oxford University Press 2010) 332pp, Hbk ISBN: 9780195389654

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Legal philosophers have given relatively little attention to international law in comparison to other topics, and philosophers working on international or global justice have not taken international law as a primary focus, either.[2] Allen Buchanan's recent work is arguably the most important exception to these trends. For over a decade he has devoted significant time and philosophical skill to questions central to international law, and has tied these concerns to related issues of global justice more generally. The book under review consists of thirteen papers and a brief introduction, divided into sections on human rights, legitimacy, and the use of force. All of the papers were previously published between 1999 and 2008. Although there is some overlap with Buchanan's 2004 book on international law and justice,[3] these papers largely complement and enrich the discussion from that volume, making their collection here a useful supplement to it and worthwhile in their own right. There is some overlap in the papers themselves, but not so much as to give the feeling of *déjà vu* that one often has when reading a collection of essays.

Buchanan distinguishes his position from competing ones in two main ways. First, he holds that theorizing about international law must be "empirically informed" if it is to be rigorous. (3) Insofar as this means that we cannot rest with *a priori* theorizing, but must also look carefully at how law actually functions, I am in full agreement. I shall show, however, that at several important points Buchanan does not follow his own advice as well as he might, and that this leads him to some doubtful conclusions. Secondly, Buchanan stresses the important role of institutions in international law, and chides other for not giving them sufficient attention. I will discuss Buchanan's use of institutions below, and will raise questions about whether this approach can do all that he wants it to, but first must note that Buchanan's focus on institutions is somewhat idiosyncratic.

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[2] There are exceptions, of course. Important examples include Fernando Teson, *A Philosophy of International Law*, Westview, 1998, and the important work by Larry May on international criminal law.

[3] Buchanan, *Justice Legitimacy and Self-Determination: Moral Foundations for International Law*, Oxford University Press, 2004.

While international relations scholars and political philosophers have been interested in institutions for some time, Buchanan's focus and use differs from the main approaches in both fields. "Institutionalism" in international relations holds that traditional "Realist" approaches are insufficient, in that they ignore and cannot explain the ways that states use institutions in the rational pursuit of their ends, and how institutions, once formed, may take on a life of their own and constrain state action.[4] However, traditional Institutionalism followed Realism in taking states to be unitary actors which follow the dictates of rational choice theory. This is not Buchanan's view. He (rightly, I think) holds that we must "look inside" states to see why they do what they do, and rejects a ration choice account of state action. His account is distinctly normative, and many of the objections he raises against Realism would also apply to a traditional Institutionalist account. While he argues that states have good reason to establish international institutions, the reasons he is interested in are moral, and not the dictates of rational choice theory applied to states as unitary actors, as suggested by the international relations Institutionalist approach.

Buchanan's interests are also largely distinct from debates in the distributive justice literature between those, often inspired by Rawls, who take social institutions to be the primary "site" of distributive justice, and those, often following G A Cohen, who hold that institutions have no deep role to play in questions of distributive justice, and that the principles of distributive justice apply instead to our individual acts.[5] This difference arises not only because Buchanan is not primarily interested in distributive justice in this work, but more importantly because he is largely concerned with ways in which institutions can help our decision-making in international law. They may do this by making decisions fairer or more representative. But, Buchanan's particular contribution is to focus our attention on the ways that institutions can improve our epistemic situations, by overcoming parochial or self-interested perspectives, and improving information gathering, for example. This is an important contribution and one that applies beyond international law. I discuss my doubts about the results that Buchanan claims for this approach below. I shall look at the three section of the book in turn, focusing primarily on one paper in each, discussing the others only briefly. This is only for the sake of space, and not to slight the importance of the other papers.

Buchanan's discussion of human rights begins with two papers devoted to criticizing Rawls's views as set out in *The Law of Peoples*.

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[4] For a helpful overview of I.R. Institutionalism, including excerpts from foundational papers, see Oona A. Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics*, Foundations Press 2005, pp. 49-77.

[5] See, John Rawls, *A Theory of Justice*, Rev. ed., Harvard University Press, 1971, 1999, p. 6-7. For Cohen, see, e.g., GA Cohen, *If You're an Egalitarian, How Come You're so Rich?*, Harvard University Press, 2001, pp. 134-79.

Rather than spend time on my significant disagreement with the interpretation of Rawls found in these chapters, I will focus my attention on Buchanan's positive contribution to the theory of human rights, a significantly more interesting topic. In chapter 3, "Equality and Human Rights", Buchanan sets out an account of human rights that he calls the "Modest Objectivist View" ("MOV") and seeks to show both what conceptions of equality are required by it and how this conception fits with the larger philosophical literature on egalitarianism. (51) Human rights, on this account, specify "interest that are constitutive of a decent human life", where it is accepted that "there is a plurality of conditions that generally must obtain if an individual is to have the opportunity to live a decent human life." (52) This appeal to basic interests provides a justification for a list of human rights- they are not moral axioms that we somehow intuit- and so may provide a basis that is both less controversial and more determinate than the idea "human dignity". (53)

This account leads to one sort of egalitarianism being inherent in human rights- a type of "descriptive equality". The interests human rights protect are ones we take to be common to all people. Buchanan supplements this descriptive aspect with a "moral equality assumption"- the idea that each of us has the moral obligation to help insure that everyone has the chance to live a minimally decent life. (52) Although this is an obligation that is held by and owed to individuals, the normal way most of us will discharge our obligations will be through various institutions. While much of what Buchanan says in this section is interesting and plausible, controversy is likely to arise when there is disagreement over which interests are "constitutive of a decent human life", and what institutions are necessary to insure these conditions. Buchanan's discussion of whether there is a human right to democracy can serve as an example.

On Buchanan's MOV, whether there is a human right to democracy depends on whether democracy, in some form, is "among the conditions that are generally necessary if the individual is to have an opportunity for a decent human life." (59) Intuitively, it seems clear that people may have the opportunity to live decent lives without democracy, so it would seem that there could be, on this account, no human right to it. But Buchanan does not want to stop here. He points to Sen's work purporting to show that democracies do better at preventing certain bad outcomes, such as wide-spread famine. But of course this work cannot be enough to establish that democracy is "generally necessary" for living a decent life, for two reasons. First, even if it is true that some non-democracies adopt disastrous policies, this would not show that becoming a democracy, in some modestly strong sense, would be the only way for states to avoid this problem. Secondly, it would not show that democracy was sufficient for solving the problem, properly understood. While India, for example, has not had massive famine leading to wide-spread death since independence, it has continually had

large populations with serious enough food shortages to qualify as significant impairments of these people's ability to live decent lives. It is arguable that economic policies attempting to achieve internal self-sufficiency helped lead to these problems. In the mean time, China, clearly not a democracy, has raised huge numbers out of the sort of poverty that makes a decent life impossible. So, it seems that democracy itself is neither necessary nor sufficient for achieving some of the gains Buchanan hopes to secure.

Buchanan does not directly address this sort of worry, but might have it in mind, as he slips from the claim that for democracy to be a human right it must be "among the conditions that are generally necessary" for people to live a decent life (59) to the claim that democracy, on a certain understanding, "is the most reliable institutional arrangement" for providing the sort of protection needed. (60) While democracy, on some understanding, may be the "most reliable" way to provide government accountability and other rights, several problems now arise. To start, it is not clear how "most reliable" became the standard. Why is it not enough to *actually* protect the relevant interests? Buchanan does not address this, leading to significant worries. For one, which institutional arrangement is "most reliable" at protecting certain interests is often highly context-dependent, being strongly influenced by culture, history (including any recent history of ethnic violence), the level of education, access to information, economic development, and so on. It is far from obvious that we can tell, even at a high level of abstraction, what is "the best" way to protect important interests in all cases. This is, I claim, one of many examples where Buchanan's call for more empirical grounding wears thin. But if "the best" way depends on many context-specific factors, then it is highly unlikely that a demand for the universal implementation of a particular institutional arrangement is justified. Furthermore, states that do manage to protect basic human interest without having democracy of the sort called for by Buchanan may rightly claim that his standard is unjustifiably parochial. Why, if they actually do meet the standard, must they meet it in one particular way? That the particular way suggested is "the best" or "most reliable" cannot be an acceptable answer without further argument.

Conversely, a requirement of "the best" or "most reliable" method of protecting rights might show too much. We should have little confidence that the particular form of democracy found in any given country meets these high standards. Buchanan notices this problem when he says that trying to specify which sort of democratic government is required would be parochial, (60) but how he is justified in moving beyond the bare requirement of protecting basic interests, however his is done, but not actually requiring "the best" or "most reliable" method, as he had earlier called for, is not clear. Despite these worries, there is much of interest in Buchanan's account. In particular, his defense of human rights against certain charges of parochialism in chapter 4 is often

convincing. But, I hold that when we take his call for empirical rigor and consistency more seriously, we are left with a somewhat sparser list of human rights than Buchanan suggests.

The next four papers focus on the legitimacy of international law, including the compatibility of international law with democracy. Two are co-written, and one provides a convincing demolition of parts of Jack Goldsmith and Eric Posner's book, *The Limits of International Law*. I focus on one particular worry with the papers, especially with chapter 6, in this section. Buchanan often talks about diverse areas of international law in a way that suggests that either all of these areas must be legitimated in the same way or perhaps must be legitimated all together. (The name of chapter 6, "The Legitimacy of International Law", indicates the approach.) While Buchanan notes a traditional tripartite division of international law- customary, treaty, and that arising from "global governance" institutions- he then approaches questions of legitimacy as if we should want or expect the same account for all of international law. This is a mistake.

Even in domestic legal systems we can and should give different accounts of the legitimacy of constitutional law, criminal law, tort law, and so on. In the international realm we have not only this problem, but also face the fact that there is no single "international legal system". Even if it is no longer the case (if it ever was) that international law is not a system at all, but rather a mere collection of distinct rules,[6] when we leave *a priori* theorizing behind for close empirical investigation, we see that international law is best thought of as being made of a number of largely distinct systems, some with important overlap, but without a unifying system behind them that might be legitimated once and for all.

Once we notice this, two things emerge. First, the challenges to international law that Buchanan notes can no longer be seen as challenges to international law as such, but only to particular parts of it. So even if a part is successfully challenged (or defended), this would leave the other parts untouched. More importantly for Buchanan, (and as I have shown elsewhere[7]) this means that his attack on the idea that state consent plays a meaningful role in international law (143-6) must, at least, be re-cast in a more careful way, looking at the role played by consent in particular instances of international law. Sometimes the conclusion to draw will be not that consent has no role to play, as Buchanan suggests (144), but rather that purported international law is not legitimate- a conclusion we might sometimes reach when strong states extort "consent" from weaker ones, for example. But in other cases we may decided that consent is both necessary and sufficient for legitimacy, or that it has no meaningful role to play in a particular

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[6] See HLA Hart, *The Concept of Law*, 2nd ed., Oxford University Press, 1994, p. 236 for this claim

[7] Matthew Lister, "The Legitimating Role of Consent in International Law", *Chicago Journal of International Law*, Vol. 11, No. 2, Winter 2011, pp. 663-91.

instance. But this must be determined by looking closely at actual instances of international law, without the assumption that it makes up one unified system. We again see the advantage of Buchanan's advice to look closely, but see that he has not sufficiently followed it.

The final section of the book consists of five papers on the use of force, including humanitarian intervention, just war theory and the acceptability of "preventive" war, and "illegal" actions aimed at improving international law. These interesting and provocative chapters are likely to be among the most controversial in the book. I will focus on the case for preventive war.

Preventive war is war that seeks to avert a harm that is not imminent, and hence is a more permissive category than preemptive war, the sort approved by traditional just war theory. (280) In chapters 11 ("Institutionalizing the Just War") and 12 ("Justifying Preventive War"), Buchanan seeks to show that traditional arguments against preventive war are not convincing, especially in the face of the "new conditions of terrorism". (258-63) Buchanan's argument that preventive war is at least sometimes acceptable has two aspects. First, he argues that both consequentialist and "rights based" arguments against preventive war are less convincing than many have thought. Secondly, he argues that by institutionalizing a preventive war norm we can reduce the dangers inherent in it to acceptable levels. I will raise doubts about both aspects.

One major problem with an argument for preventive, as opposed to preemptive, war is that, as the danger to be prevented is not yet imminent, there may be significant doubt that it will ever come to fruition at all. War is an extreme response, and we have good reason, both consequentialist and "rights based", to want to limit it as much as possible. Buchanan argues that "institutionalizing" the preventive war norm solves the epistemological difficulties. For reasons I will discuss below, I am significantly less optimistic about this than Buchanan is. However, in the articles in question, Buchanan largely assumes that this is possible, and then asks how traditional objections to preventive war hold up, taking the epistemic difficulties as solved. Those skeptical of preventive war should resist this move.

Much like debates over torture, where one side wishes to postulate that we know the person to be torture is a terrorist who knows where a ticking bomb is about to explode, and that there is no way to stop it without torture, there is good reason here to not engage with such debates, at least not without a clear and convincing account of how we would have such knowledge, and have it with a high degree of certainty. I will return to this last point momentarily, but here must stress why this extremely high degree of certainty is needed. Buchanan goes to great length to show that many military members who would be killed in a preventive war are legitimate targets, especially if they are given the chance to surrender before an attack. (290-6) I did not find these arguments fully persuasive, but was much more taken aback by the fact

that civilian casualties were not considered with any care at all. Yet civilian casualties are all but inevitable in even "pinpoint" attacks. We can, I think, be much more certain of this than we are ever likely to be that a case of preventive war is truly necessary. It is deeply implausible, in almost every case, that civilians are themselves culpable enough to justify targeting them. And, even knowingly putting them at risk, given that they are innocents, requires significant justification, and a very high degree of certainty that a preventive attack is the only way to avoid a grave harm. The mere possibility of such certainty, while perhaps of some purely philosophical interest, is not enough to justify moving away from the old standards. The burden of proof must be on those who would move away from the old standard- against torture or limiting ourselves to preemptive war- to show that we have the right sort of certainty.

Here Buchanan relies on his claim that institutions can solve this problem. I am much less confident. Again as in the torture case, preventive war cases are ones where we can expect that the incentives will be such as to encourage states to get the answer wrong. Buchanan suggests that having multiple parties consider the issue would help (286), but I am here most reminded of the warning from a "demotivational" poster about meetings: sometimes, none of us is as dumb as all of us. Group reasoning does not necessarily lead to better outcomes. Buchanan insists that this must be done in ways so as to require full information sharing and an explicit discussion of intelligence, but offers no reason to think this is plausible, and we can well expect that a state considering war would be less inclined to share all it knew. Buchanan further suggests that states with recent records of serious human rights violations should be excluded from the process, but if taken seriously this would exclude nearly all the states which might make use of such an institution, including the U.S. In short, Buchanan has given us no reason to think an institution that could achieve the needed level of certainty is plausible or even possible, short of the invention of crystal balls. It is perhaps unfair to expect a philosopher to do more. But, without this work, the argument for preventive war is at best worthless, and potentially much worse, in that, like the ticking bomb scenario, it may serve to give comfort and encouragement to those would use the argument without the needed certainty. Here we see the limits of an appeal to institutions, an appeal that re-appears over and over in the book. Unless and until we have some idea of how such institutions would work and are given reasons to think they are plausible, such appeals are mere hand-waiving. This is an attractive option in political philosophy- one I have engaged in myself on occasion- but we should not mistake it for the serious work needed, especially when the stakes are as high as they are in the sorts of cases discussed in this book.