

## The Institutionalised Morality of War: Beyond Just War Theory's Morality–Law Dualism

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### Introduction

Over the past decade, a growing literature has emerged within just war theory regarding the relationship between the objective morality of war (MW) and the conventional law of war (LW).<sup>1</sup> Some scholars argue that the MW and LW, although different in form, are by and large the same in substance;<sup>2</sup> other scholars hold that the MW and LW often fail to overlap in substance and may sometimes even conflict with one another.<sup>3</sup> This article contributes to this debate by engaging with a set of groundbreaking claims from the recent work of Allen Buchanan pertaining to the relationship between the MW and the existing or prospective institutions governing war.<sup>4</sup> Buchanan's main claim is unambiguous: contemporary just war theory has

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<sup>1</sup>Adil Ahmad Haque, 'Law and Morality at War' (2014) 8 *Criminal Law and Philosophy* 79. Adil Ahmad Haque, *Law and Morality at War* (Oxford University Press 2017); Seth Lazar, 'The Morality and Law of War' in Andrei Marmor (ed), *The Routledge Companion to the Philosophy of Law* (Routledge 2012). Jeff McMahan, 'The Law of War and the Morality of War' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford University Press 2008); Henry Shue, 'Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits' (2013) 26 *Leiden Journal of International Law* 271. Jeremy Waldron, 'Deep Morality and the Laws of War' in Seth Lazar and Helen Frowe (eds), *The Oxford Handbook of Ethics of War* (Oxford University Press 2018).

<sup>2</sup> Henry Shue, 'Laws of War, Morality, and International Politics'; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (HarperCollins 2006).

<sup>3</sup> Cécile Fabre, 'Guns, Food, and Liability to Attack in War' (2009) 120 *Ethics* 36. Cécile Fabre, *Cosmopolitan War* (Oxford University Press 2012); Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693; Jeff McMahan, *Killing in War* (Oxford University Press 2009); David Rodin, *War and Self-Defense* (Oxford University Press 2002).

<sup>4</sup> Allen Buchanan, *Institutionalizing the Just War* (Oxford University Press 2018).

failed to appreciate the profound impact of the existence or nonexistence of institutions on the process of both evaluating the moral status of an armed conflict and conceptualising the moral principles that determine this status. This claim, I argue, has weighty repercussions for the MW-LW debate.

Throughout this article, I will be employing the term 'institutions of war' (IW) in order to denote an expansive and diverse array of war-related international entities. These include: intergovernmental and nongovernmental organisations (eg the United Nations Security Council and the International Committee of the Red Cross); international courts and ad-hoc tribunals (eg the International Criminal Court and the International Criminal Tribunal for Rwanda); formal military alliances and ad hoc military coalitions (eg NATO and the Syrian Democratic Forces); treaty and customary law (eg the Geneva Conventions and the custom against state aggression); and strategic military norms and doctrines (eg the balance of power and 'mutually assured destruction'). With this conception of the IW in hand, I argue that Buchanan's claim about the MW-IW relationship has two major implications for the MW-LW debate. First, it would substitute for the relatively narrow LW category a broader IW category. Second, and coupled with Buchanan's claim that the MW is conditioned by institutional context, this substitution would undermine the new MW-IW dualism by demonstrating that its two component parts exist in a state of interdependent fusion as a singular yet heterogeneous entity. This entity shall be referred to as the 'institutionalised morality of war' (IMW). This two-part process of (1) substitution and (2) fusion results in a novel and more accurate understanding of the normative ontology of war (NOW).

The article proceeds in four parts. Part I provides an overview of the MW-LW literature and the fault lines that have emerged in the accompanying debate over the relationship between the MW and LW. Part II summarises the key arguments of Buchanan's recent book *Institutionalizing the Just War* and considers the impact of these on the assumptions and aims of contemporary just war theory. Parts III and IV analyse the more specific impact of Buchanan's arguments on the MW-LW debate. Part III describes the process of substitution, in which a MW-IW dualism replaces the original but ultimately incoherent MW-LW dualism. Finally, Part IV describes the

process of fusion, in which the inadequacy of the MW-IW dualism itself reveals the complex existence of the IMW.

### 1. The Morality–Law Dualism

Whereas the MW-LW issue was given its initial framing in a 2008 book chapter by Jeff McMahan,<sup>5</sup> it emerged within the context of a broader methodological and substantive debate that has played out among just war theorists over the past several decades. This debate has pitted ‘traditionalist’ theorists, such as Michael Walzer, Henry Shue, and David Luban, against ‘revisionist’ theorists, such as McMahan himself, David Rodin, and Cécile Fabre.<sup>6</sup> One of the major flashpoints in this debate concerns the claim that the LW, as found primarily in international customary and treaty law, maps more or less evenly onto the MW. This claim entails that, despite obvious *formal* differentiation (the MW is a set of objective imperatives, while the LW is a set of artificial conventions), the MW and LW embody nearly identical *substantive* directives. Traditionalists generally affirm this claim, while revisionists generally deny it.

Let us examine two examples of this disagreement. First, on the question of which combatants may permissibly be killed in war, traditionalists maintain that the MW and LW speak with one voice. This voice proclaims the ‘moral equality of combatants’, a doctrine which states that no matter the justness or unjustness of the cause for which they happen to be fighting, all combatants are equally liable to be killed. Although various justifications of this doctrine exist, Walzer’s account remains the most influential.<sup>7</sup> Revisionists, on the other hand, argue that here as elsewhere the MW and LW stand at odds with one another. Thus, while the LW stipulates the legal equality of combatants, the MW insists on the moral *inequality* of combatants.

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<sup>5</sup> McMahan (n 1).

<sup>6</sup> Fabre, ‘Guns, Food, and Liability to Attack in War’ (n 3). Fabre, *Cosmopolitan War* (n 3); David Luban, ‘Just War and Human Rights’ (1980) 9 *Philosophy and Public Affairs* 160; McMahan, ‘The Ethics of Killing in War’ (n 3). McMahan, *Killing in War* (n 3). Rodin (n 3). Shue (n 2). Walzer (n 2).

<sup>7</sup> Walzer (n 2).

According to revisionists, only 'unjust combatants', due to their being morally responsible for an unjust threat, may permissibly be killed. 'Just combatants', conversely, are entitled to defend themselves against the unjust threat posed by unjust combatants, and without thereby surrendering their own right not to be killed.

A similar divergence surrounds the legal proscription against the deliberate killing of civilians not actively participating in an armed conflict. Traditionalists assert that this rule is in substance coextensive with the corresponding moral principle of 'noncombatant immunity'. This doctrine, which has also received its canonical justification from Walzer, insists on the unqualified wrongness of intentionally killing *all* noncombatants, both those fighting for the just side and those fighting for the unjust side (but *not* of unintentionally killing while nonetheless foreseeing the deaths of some noncombatants, provided these deaths are proportionate to achieving a just aim).<sup>8</sup> Revisionists reject this morality-law overlap, averring that morality sometimes permits (and even perhaps requires) the killing of legally immune noncombatants who, despite their physical remoteness from the field of battle, may nonetheless possess a high degree of liability for unjust acts of war. This liability may derive from the fact that the noncombatants in question are situated high atop the chain of command, where the most authoritative decision-making capacities inhere. It may however also apply to those situated lower down the chain of command, or even to ordinary members of civil society, such as workers employed at a munitions factory, whose material contributions to an unjust war effort pass some threshold of liability.<sup>9</sup>

Thus, on these two significant points – the alleged moral equality of combatants and alleged noncombatant immunity – traditionalists and revisionists are at odds with one another. They are also at odds in relation to the MW-LW issue. As indicated above, traditionalists view the MW and LW as formally different but substantively equivalent. For revisionists, the MW and LW are neither formally nor substantively equivalent, but rather

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<sup>8</sup> *ibid.*

<sup>9</sup> Fabre, 'Guns, Food, and Liability to Attack in War' (n 3).

formally and substantively different. Put differently: although traditionalists recognise that moral principles and legal conventions are fundamentally dissimilar in structure, function, and process of creation, they maintain that the prescriptive propositions that are expressed by the two entities are ultimately the same. Revisionists concur with the first of these claims but deny the second. Hence the MW and LW together constitute either a formal dualism (according to traditionalists) or a formal and substantive dualism (according to revisionists). In either case, there is something that seems to separate the MW from LW. For this reason, we can speak of a MW-LW dualism as framing this aspect of the traditionalist-revisionist dispute.

The traditionalist-revisionist debate is, however, not the only lens through which to analyse the MW-LW issue. Some scholars have focused on examining the functional linkages between the MW and LW, asking: what are the proper functions of the legal conventions of war in light of the objective moral principles of war? This question is equally important to an understanding of the MW-LW dualism. McMahan echoes a view common among philosophers when he describes the LW as 'conventions established to mitigate the savagery of war'.<sup>10</sup> In this view, the LW operates with a humanitarian and ostensibly consequentialist purpose, in the service of minimising aggregate human suffering in war. Other scholars hold that the LW is designed to maintain a just and workable balance between important military objectives and moral imperatives.<sup>11</sup> This view suggests that if the LW is too demanding, it risks being ignored by belligerents, thus potentially leading to openly lawless, anything-goes armed conflict.

Adil Haque proposes a different, instrumentalist conception of the LW's relationship to the MW, 'according to which the laws of war should help

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<sup>10</sup> McMahan, 'The Ethics of Killing in War' (n 3) 730.

<sup>11</sup> MN Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Virginia Journal of International Law* 796; Henry Shue, 'Do We Need a "Morality of War"?' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford University Press 2008).

soldiers conform to the morality of war'.<sup>12</sup> Haque argues that any divergence of the LW from the MW can be justified if, in obeying a LW that diverges from the MW, combatants are thereby able to bring their actions into conformity with the MW to a greater degree than if they had attempted to obey the MW directly. The question of whether this condition itself holds hinges in turn on two empirical assumptions: first, that the MW is too complex for a combatant to attempt to obey it directly in the midst of combat; second, that the facts of war are too complex for a combatant to be certain that she is making the correct moral judgment in light of these facts.

These diverse readings of the functional relationship between the LW and MW have at least one quality in common: they all presuppose that the MW is a non-contingent constant of the NOW. The MW, so this interpretation goes, is essentially immune to shifts in empirical circumstance, including institutional circumstance. Although the moral principles of war may influence the legal conventions of war, the latter may not influence the former in an equivalent manner. In this way, the relationship between the MW and LW seems to be not only dualistic, but asymmetrical as well, with the MW wielding a power over the LW that the LW does not wield over the MW. Besides being shared by philosophers examining the MW-LW issue from a functionalist perspective, these assumptions also seem to be shared among both traditionalists and revisionists. As a result, they represent a consensus position in an otherwise starkly drawn debate. But are these assumptions in fact justified? It is this question that Buchanan's thesis in *Institutionalizing* tackles head-on.

## 2. Morality of War, Institutions of War

Buchanan's motivation in composing the essays in *Institutionalizing* might be framed as a kind of just war theorist's jeremiad. The target of his righteous indignation is contemporary just war theory itself. '[Just war] philosophers', he declares early on, 'should quit acting as if they thought that just war theory is a theory for the state of nature – a condition in which there are no

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<sup>12</sup> Haque, 'Law and Morality at War' (n 1) 79.

institutions worth mentioning and in which questions of institutional innovation simply do not arise'.<sup>13</sup> According to Buchanan, the primary preoccupation of today's leading ethicists of war is a set of arcane problems generated, not by the living reality of war or the need to generate action-guiding norms, but by the philosophical literature itself, which has become increasingly rarefied and self-referential over time. In order to begin remedying this intellectually worrisome situation, he implores these theorists to incorporate empirical insights from political science and international relations (IR) theory, which could yield valuable tools, insights, and recommendations for better understanding the functional and normative relationship between the MW and both existing and prospective IW.

Buchanan's pointed critique of contemporary just war theory can be broken down into at least four interrelated criticisms: (1) just war theory is insufficiently empirical; (2) just war theory is excessively analytical; (3) just war theory is, as a consequence of (1) and (2), insufficiently 'institutionalised'; (4) just war theory is, as a consequence of (3), necessarily incapable of explicating the MW. These criticisms depend for their validity on certain key assumptions about: the nature of the empirical world (specifically, of the institutions operating in that world); the nature of the MW; and the nature of the methodologies employed by contemporary just war theorists. Let us focus on the most important and far-reaching of these assumptions, and the major premise of Buchanan's argument. We can call this bedrock assumption the 'institutional morality of war thesis' (IMWT):  
IMWT: The nature of the objective moral principles of war *is at least partially dependent on* the nature of the empirical institutional context of war.

With the IMWT, Buchanan wants us to confront a troubling fact: just war theory, as currently practiced, is a stillborn enterprise. That is, because 'traditional just war theory was developed on the implicit assumption of *negligible institutional capacity* for improving decisions to engage in war', its resources are inadequate for constructively engaging with the IMWT, let

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<sup>13</sup> Buchanan (n 4) 10.

alone for rigorously testing the soundness of the IMWT.<sup>14</sup> Furthermore, 'once we take seriously the idea that institutions can reshape the moral possibilities, (it becomes clear that) the proper object of assessment for just war theory is not norms considered in isolation, but rather norm/institution packages, due to the fact that whether a norm is valid can depend upon whether it will function within a particular institution'.<sup>15</sup> Arguing for the soundness of the IMWT in this way allows Buchanan to delineate a dilemma for those philosophers who see nothing very wrong with the status quo. These philosophers must accept one of either two propositions, both of which are prima facie unconvincing: 'either (1) that the validity of norms does not depend upon institutional context, or (2) that existing institutional resources for constraining war are negligible *and* the creation of new institutional resources is either not feasible or not worth the cost'.<sup>16</sup>

This dilemma is a false one. If this were not the case, then the IMWT would be merely a critical thesis, and not also a constructive thesis. Recall that a defining objective of *Institutionalizing* is to demonstrate that philosophers do have a third option: they can acknowledge the fact that the guiding suppositions and methods of just war theory are inadequate and hence in need of significant retooling. By making such an acknowledgment, and by working to move beyond the latter through meaningful gestures of reform, philosophers can discover a means of extricating themselves from the dilemma's horns. On the other hand, despite its ultimate falsity, the dilemma as described remains not only nontrivial, but powerful, for its existence risks calling into question the very identity and tenability of a venerable philosophical tradition. In its substantive and methodological underpinnings, this just war theory tradition has remained remarkably consistent across time and space. In this sense, whereas its immediate target is contemporary analytical just war theory, Buchanan's book exerts a more global reach, encompassing just war theory *tout court* and as instantiated throughout history, from the time of St Augustine to the present day.

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<sup>14</sup> *ibid* 11 (emphasis added).

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid* 23.

As befits its central purpose, *Institutionalizing* contains several chapters that offer more or less concrete empirical proposals for institutional reform and innovation. In one such chapter, Buchanan shows that, contrary to the conventional view in both just war theory and international law, preventive wars (eg wars undertaken to avert temporally distant and therefore necessarily hypothetical harms) are notably definition unjustifiable. On the contrary, if preventive wars can in any sense be called unjustifiable, it is only in the sense of being *contingently* unjustifiable. This is because the inevitable moral risks surrounding wars of this type are not constant across all possible worlds; rather, the degree of severity of such risks hinges directly on institutional context. Consequently, moral risk 'can be reduced to acceptable levels if the decision to engage in preventive war is made within well-designed institutional constraints, procedures aptly designed to improve the epistemic context of decisions and counteract leaders' incentives to exaggerate the seriousness of threats of temporally distant harms'.<sup>17</sup> The chapter sketches out what such institutional constraints and procedures might look like, imagining an ad hoc, multilateral contract that must be entered into by states supporting a preventive war as well as by those opposing it.

This proposal, in its emphasis on contractual agreement among states and its respect for the prerogatives of national sovereignty, anticipates another, more detailed proposal that is presented in the book's final chapter. Here Buchanan focuses on a different but related taboo of international law and ethics: the prospect of one state's intervening in another state for the purpose of protecting a democratic government from an authoritarian coup, or to stem a resurgence of civil unrest. He argues for the establishment of 'a pre-commitment regime' to be created by treaty, by which a legitimate government can in effect avail itself of an insurance policy by authorising a particular state or group of states to intervene if there is an attempt to overthrow it by force or if there is a resumption of large-scale ethno-national violence'.<sup>18</sup> This regime would at once complement the intervention-authorisation powers of the Security Council and correct for some of the

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<sup>17</sup> *ibid* 18.

<sup>18</sup> *ibid* 19.

defects of this institution that would prevent it from sanctioning justifiable, pro-democratic interventions. At the same time, it would render the decision of whether to accede to such a regime fully a matter of the free exercise of an individual state's sovereignty.

Through these and other inventive proposals, Buchanan makes the case for a different way of engaging with the ethics of war, one in which philosophers are obliged 'to think institutionally' about *both* the mostly clear and categorical moral principles of war *and* the often chaotic and conditional empirical reality of war.<sup>19</sup> In this way, his overriding practical objective is nothing short of showing how just war theory might serve as 'an example of how expertise in moral reasoning can make a positive difference in the world'.<sup>20</sup>

### 3. Substitution: From Morality-Law to Morality-Institutions

So far, we have seen that one important dimension across which the debate between traditionalist and revisionist just war theorists has played out concerns the relationship between the MW and LW. In addition, we have seen that Allen Buchanan has broken new intellectual ground in his ardent commitment to institutionalising the objective morality of war and his wider vision of a more empirically informed, praxis-oriented just war theory. In this part, the focus is on the intersection of these two developments.

To begin with, three operative questions take us to the core of this part's purpose. The first question asks: do the MW and LW exhaust the NOW? That is, is there more to the NOW than claims of either a moral or legal nature? The second question asks: if there is indeed more to the NOW than claims of this sort, then what else is there? An answer to this second question leads, in turn, to a third one: how does this hitherto unknown entity relate to the moral and legal propositions with which it cohabits the NOW? It is these questions that Buchanan's argument can help us answer. Yet this argument

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<sup>19</sup> *ibid* 20.

<sup>20</sup> *ibid* 21.

also provides strong reasons to doubt the essential plausibility and tenability of the MW-LW dualism.

The first question is the most fundamental of the three. In order for the MW and LW to exhaust the NOW, it would have to be the case that *nothing* can be coherently claimed about the NOW that is not of either a moral or a legal nature (or both). The traditional reluctance of mainstream IR theorists, particularly realists, to acknowledge an independent and nontrivial motivating role for nearly *any* normative variable in state-to-state interactions does not help the matter.<sup>21</sup> To be sure, some mainstream IR theorists, particularly constructivists but also some neoliberal institutionalists, talk a great deal about norms; yet they frequently do so with a considerable degree of hedging, qualifying, and conceding vis-à-vis the preeminence that the variable of raw material power supposedly enjoys within the international system.<sup>22</sup> While philosophers, including just war theorists, are more inclined to discuss international relations from a strictly normative perspective, they have focused almost exclusively on issues of morality and law within the field of all international normative phenomena. But if philosophers have failed to grasp the crucial fact that war is substantially more than morals and laws, what precisely, in Buchanan's view, *is* it to be situated squarely within the realm of the NOW, and yet also

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<sup>21</sup> Joseph M Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism' (1988) 42 *International Organization* 485; John J Mearsheimer, 'The False Promise of International Institutions' (1994) 19 *International Security* 5; John J Mearsheimer, *The Tragedy of Great Power Politics* (W W Norton and Company 2001); Stephen Walt, *The Origins of Alliances* (Cornell University Press 1987); Kenneth N Waltz, *Theory of International Politics* (Addison-Wesley 1979).

<sup>22</sup> G John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton University Press 2001); Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887; Ted Hopf, 'The Promise of Constructivism in International Relations Theory' (1998) 23 *International Security* 171; Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984); Joseph S Nye Jr, *Soft Power: The Means to Success in World Politics* (Public Affairs 2004); John G Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 *International Organization* 855; Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press 1999).

to constitute more than morals or laws (or a combination thereof)? This is, in essence, the second question.

Buchanan's book as a whole is premised on the idea that, in addition to the MW and LW, a broad and varied assortment of empirical, manmade, war-related entities exists within the NOW. Together, this assortment can be termed the IW and includes any of the institution-types listed in the Introduction and also entities not mentioned in this list. The term 'institution' is a rather ambiguous and polysemic one within the international relations and international political theory literature, with different writers sometimes using the term quite differently. It is most important to note that a clear ontological gap appears to separate morality (a system of implicit, uncoded, customary, and often ambiguous values and prescriptions) from both laws (systems of usually explicit, codified, enforced, and generally unambiguous rules) and institutions (systems of usually explicit, codified, sometimes enforced, and generally unambiguous rules, social practices, decision-making procedures, organisational structures, *inter alia*). At the same time, laws and institutions, for their part, exhibit between themselves an intimate semantic relationship. Put straightforwardly, *all laws are a specific form of institution*, while not all institutions are a specific form of law. The second clause is true because the concept of institution encompasses more than the concept of law, so that an entity – for example, an organisational structure – can be other than a law and still be a specific form of institution. But if all laws are indeed institutions, then to make reference to institutions is also to make reference to laws, while to make reference to morality is to make reference to neither institutions nor laws, but rather to some relatively distinct normative entity. The MW, LW, and IW – as three specific examples of the general concepts of morality, law, and institution – are no exception to these observations, which together prepare the ground for the third question.

This brings us to the last stage of a process of conceptual substitution that began with the first question about whether the NOW can be wholly reduced to morality and law. To understand what is meant here by 'substitution', consider some propositions about the contents of the NOW, all of which

have been stated in one or another form above, or else follow from something that has been stated above:

1. The NOW contains at a minimum the MW, LW, and IW.
2. The MW is ontologically distinct from both the LW and IW.
3. The LW is both part of and entirely subsumed by the IW.
4. The IW is neither part of nor subsumed by the LW, but rather encompasses more than the LW.

Hence: 5. The NOW contains at a minimum the MW and IW.

If the inference from propositions 1 to 4 (the premises) to proposition 5 (the conclusion) is sound, then there seems to be something seriously incoherent about the MW-LW dualism. Simply put, that the MW and LW do not belong together is in the first instance a matter of mismatched *scale*, as opposed to mismatched *substance*. The MW is a subcategory of the NOW; the LW, by contrast, is a subcategory of the IW, which is in turn a subcategory of the NOW. This means that the LW is a sub-subcategory, or secondary subcategory, of the NOW, and that the MW and IW are coequal categories of the NOW. Consequently, since  $MW > LW$ , and  $LW < IW$ , and  $IW = MW$ , the true dualism within the NOW is not MW-LW, but MW-IW: ie a dualism comprised wholly of moral propositions about war and institutional (including legal) claims about war.

If this argument succeeds, then the standard MW-LW dualism should be substituted by a novel MW-IW dualism. Such substitution is warranted by a proper understanding of the concepts in question. One might, of course, deny one or more of the premises set out above; for example, one might deny that the LW is both part of and entirely subsumed by the IW. This could be done by first arguing that law in general should not be understood as one institution among others and from there moving to the conclusion that the LW in particular should not be understood as one institution among others within the IW. This, however, would seem to be a fairly unconventional view of the ontological status of law and, as such, would require a suitably powerful argument. Another strategy would be to deny that the MW is ontologically distinct from the IW and LW, perhaps by arguing that the MW is in fact – along with the LW – part of (and perhaps entirely subsumed by) the IW. Assumedly this would necessitate demonstrating that morality is, like law, no more than a discrete species of institution. But this is rather

unconvincing. In any event, this idea would also need to be supported by a powerful argument, considering that morality – being a system that is typically neither explicit, nor codified, nor (in pre-legislative form) enforced, nor unambiguous – seems to fall short of some very basic institutional criteria. At the same time, such criteria fail to capture the essence of what it means to be a moral value or prescription.

While the case made above for the substitution of a new MW-IW dualism for the current MW-LW dualism appears solid, this solidity ensures of itself neither the stability nor the sustainability of a MW-IW dualism. That is, it is still possible to pose the question: is a MW-IW dualism stable and sustainable as such, or is it destined to collapse – and perhaps be replaced – in a manner similar to its MW-LW predecessor? As shall be shown, Buchanan's work provides an answer to this question as well.

#### 4. Fusion: The Institutionalised Morality of War

As noted in Part II, Buchanan's IMWT is essentially the claim that what we understand to be the nature of objective moral facts about war is at least partially a function of empirical institutional facts about war. Assuming that the converse of this claim is also true like that which is institutionally possible is at least partially a function of what is morally permissible – we can conclude that moral facts and institutional facts interpenetrate and influence one another to the point of at least *pro tanto* interdependence. These ostensibly separate types of facts cannot easily come uncoupled, if indeed they can at all. Therefore, if one wants to know the answer to a moral question such as whether a combatant is required, permitted, or forbidden to take one enemy noncombatant's life in order to save one friendly combatant's life, one must first ask questions pertaining to existing institutional structures. Similarly, if one wants to ascertain information pertaining to a specific institutional structure, one must first ask questions about the moral assumptions regarding the institution's area of focus. If Buchanan is right, then the MW and IW are not only deeply intertwined with one another; they are also, in a certain sense, indistinguishable from one another. Taken together, these claims suggest a negative response to the question posed at the end of the previous part: ie that a MW-IW dualism, as

such, is neither stable nor sustainable. This is because, in order for a MW-IW dualism to not collapse in on itself, its two constituent terms – the MW and IW – must retain a certain level of substantive distinctness vis-à-vis each other. Otherwise, the dualistic structure will be undermined. While a dualism can bear a high degree of *functional* interpenetration among its constituent terms it cannot bear a condition in which these terms *ontologically* interpenetrate each other. In other words, the parts of a standard dualism *operate interdependently* without by any means *existing interdependently*.

If two functionally interdependent terms also exhibit ontological interdependence, then it is difficult to see how they could bind together to form a dualism because a duality is, by definition, an ontologically dual entity within which a pair of sub-entities coexists. Yet, if the sub-entities in question shape one another to the point where one cannot meaningfully ask what one sub-entity is without first knowing what the other one is, then one is no longer dealing with a typical instance of dualism. Rather, one is dealing with another type of entity altogether, one characterised by ontological irreducibility and oneness of substance (eg substance monism), but also by considerable internal complexity. According to these assumptions and others made above, in order to demonstrate that the substitution of a MW-IW for a MW-LW dualism must lead to the collapse of the MW-IW dualism itself, it is only necessary that the following two propositions be true: 1. A dualistic entity cannot sustain a nontrivial degree of ontological interdependence among its constituent parts; and 2. The MW and IW are, to some nontrivial degree, ontologically interdependent. Assuming these propositions hold, there is good reason to think that a MW-IW dualism is a self-undermining entity, if not a contradiction in terms. But if the relationship between the MW and IW cannot be characterised as dualistic, how can it be characterised?

It is proposed here that the MW-IW relationship is best characterised as a *fused entity*. A fused entity, like a dualistic one, can be thought of as an entity that is comprised of identifiable sub-entities (of course, while a dualistic entity is by definition limited to two such sub-entities, a fused entity can in principle contain any number of sub-entities). Arguably, where fusion and dualism part ways ontologically is in the degree to which their respective

sub-entities have undergone a process of integration. In the case of the dualistic entity, there is weaker integration and stronger autonomy among sub-entities. In the case of the fused entity, there is stronger integration and weaker autonomy among sub-entities. The most important thing to note here is that, in the case of fusion alone, *there is no longer a precise – let alone perfect – means of distinguishing between sub-entities in terms of where one terminates and another begins, and vice versa*. This means that, as far as the MW-IW relationship is concerned, the MW and IW are too deeply integrated for one to be able to formulate propositions about either the MW or IW in isolation from each other. Instead, when formulating a MW-proposition, one is to a certain extent formulating an IW-proposition as well, and vice versa. In short, whether we are discussing the norms of armed conflict or some other phenomenon altogether, some requisite level of ontological indistinguishability is the essence of fusion.

To put the above point in more concrete terms, a combatant confronted with a moral dilemma would not need to know anything about the codified rules of engagement concerning enemy combatants, about existing punitive measures for unjust combatants, or about the identity (including the legitimacy) of whatever entity has instituted these rules and measures, among many other categories of pertinent information. Additionally, the architects of an ad-hoc tribunal for trying accused war criminals of a non-international armed conflict could design the latter institution without knowing anything about the ethics of punishment or of criminal procedure; likewise, the member states of a formal military alliance for balancing against and thereby deterring the potential aggression of another, non-allied state, could design the latter institution without knowing anything about the ethics of self - or other - defense or of jus ad bellum calculations like proportionality and necessity. Neither scenario tracks the reality of what we at this point have reason to think we know, both empirically and intuitively, about the NOW. To therefore assert that MW-propositions and IW-propositions can come apart so easily, if at all, is to make a controversial claim at the very least, one carrying with it a not insignificant burden of argumentation.

On the other hand, if MW-propositions and IW-propositions *cannot* become easily uncoupled, then it is more accurate to speak of a fused IMW: that is,

an all-inclusive set of interdependent moral and institutional propositions about war. When we talk about what is right and wrong within the normative domain of armed conflict, we are typically talking about the IMW. This last statement raises an interesting question: might the IMW render the NOW itself redundant? The answer, I would argue, is no, for the reason that it is possible to imagine a set of normative facts and claims about war that fall more or less cleanly outside the scope of the IMW. These facts and claims could include certain contemporary practices and customs that are either not sufficiently developed, clear, formalised, recognised, or obeyed to warrant being characterised as institutions. Hence, although it is beyond the scope and purpose of this article to examine the specifics of any such practices or customs in detail, it should be noted that the existence of an all-inclusive IMW does not automatically threaten the autonomous existence of the NOW. Until shown to be otherwise, the IMW should be thought of as a subset of the NOW, just as the MW and IW should be thought of as subsets – albeit intersecting ones – of the IMW. In short, the NOW, IMW, IW, LW, and MW are all part of what we talk about in the context of what to do and not to do in the domain of war.

### Conclusion

This article has argued that recent work by Allen Buchanan on the idea of institutionalising the morality of war harbors major implications for how we should think about the relationship between the MW and LW and, more broadly, between the MW and the full range of IW. Buchanan's arguments in *Institutionalizing the Just War* make it difficult to adhere to the conventional view of this relationship as held by contemporary just war theorists. According to this view, the relationship between the MW and LW is best characterised as dualistic: that is, moral propositions and legal propositions pertaining to armed conflict can be said to comprise two substantively distinct aspects of a nonetheless ontologically coherent normative entity. Buchanan's work suggests that this view is deeply misguided by demonstrating how the MW and IW – law being one institution among others – manifest a high degree, not only of ontological interaction, but also of ontological interdependence. In essence, the nature of the objective moral principles of war is at least partially dependent on the nature of the empirical

institutional context of war. This entails that the question of which moral norms about war should be considered valid and just is also a question of which institutions currently exist or could prospectively exist for the purpose of realising, defending, and promoting these norms. Similarly, the question of what type of institutions we should design and in what manner we should design them is also a question of what type of moral assumptions and objectives we in the first instance possess.