

The myth of international humanitarian law

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There is a problem lurking at the heart of international humanitarian law (IHL). The conventional narrative of the field, after noting the usual historical watersheds, concludes that what was once known as the ‘law of war’ (LoW) or the ‘law of armed conflict’ (LOAC) can today equally well be called IHL.¹ On this basis, scholars such as Kolb and Hyde claim that IHL is the updated name for this field, ‘used ... to describe the essential content of the modern law of warfare, as expressed in the Geneva Conventions’.² Others, such as Fleck, and Kalshoven and Zegveld, go further, characterizing IHL as a welcome corrective more accurately reflecting the present-day law.³ This orthodox account remains dominant in public and academic discourse, despite alternative critical perspectives on the natures of LOAC/LoW and IHL emanating from, in particular, the subfield of the history of international law.⁴

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¹ Examples of the conventional treatment of the evolution of IHL include: J. Pictet, *Development and principles of international humanitarian law* (Dordrecht: Nijhoff, 1985); D. Schindler, ‘International humanitarian law: its remarkable development and its persistent violation’, 5 *Journal of the History of International Law*, 2003, pp. 165–88; and M. E. O’Connell, ‘Historical development and legal basis’, in D. Fleck, ed., *The handbook of international humanitarian law*, 3rd edn (Oxford: OUP, 2013), pp. 1–42. While O’Connell defines IHL as ‘the whole of established law governing the conduct of armed conflict’, she nonetheless concedes that some aspects of LOAC/LoW, such as the law of neutrality, cannot be considered IHL as their ‘primary purpose is not humanitarian’. She also acknowledges the relative newness of the term ‘IHL’: ‘Historical development and legal basis’, pp. 1, 11–12. IHL’s equivalence to LOAC/LoW is maintained even in legal textbooks that go on to use LOAC/LoW terminology throughout: see e.g. L. R. Blank and G. P. Noone, *International law and armed conflict: fundamental principles and contemporary challenges in the law of war* (New York: Wolters Kluwer Law and Business, 2013), p. 3; and G. D. Solis, *The law of armed conflict: international humanitarian law in war* (New York: Cambridge University Press, 2010), p. 3 (though Solis later describes the relationship between IHL and LOAC as one of ‘fraternal twins’: see p. 23). The *Law of armed conflict deskbook* published by the US Judge Advocate General’s Legal Center and School (Charlottesville, VA, 2012) also notes that ‘of late, many scholars and nongovernmental organizations refer to this body of law [i.e. LOAC/LoW] as “International Humanitarian Law”’: n. 5, p. 8. See https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2012.pdf. (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 18 Jan. 2017.)

² R. Kolb and R. Hyde, *An introduction to the international law of armed conflicts* (Oxford: Hart, 2008), pp. 16–17.

³ Fleck claims IHL is the more precise name, ‘first due to the preference given to it by the ICRC and the UN, and second with respect to the fact that this term better conveys that there exist important peacetime obligations for dissemination, instruction and training, as well as binding commitments to ensure respect for existing rules’: D. Fleck, ‘Introduction’, in Fleck, ed., *Handbook of international humanitarian law*, p. xv. F. Kalshoven and L. Zegveld argue that the phrases ‘international humanitarian law applicable in armed conflict’ or ‘humanitarian law’ are better suited to express the object and purpose of the law of war: Kalshoven and Zegveld, *Constraints on the waging of war: an introduction to international humanitarian law*, 3rd edn (Geneva: International Committee of the Red Cross, 2001), p. 11.

⁴ See e.g. C. af Jocknick and R. Normand, ‘The legitimization of violence: a critical history of the laws of war’,

What is not explained by this conventional account—nor dealt with in any comprehensive way by the alternative legal perspectives—is *how* and *why* IHL came to be used as a name for this body of law in the first place. Within the legal literature, the answers to these important *political* questions are either completely ignored or, at best, glossed over.⁵ While LoW has a long and illustrious history of use, IHL is *not* mentioned in the documents leading to the 1949 Geneva Diplomatic Conference, or in the text of the resulting four Geneva Conventions of the same year, or in the three Additional Protocols to these Conventions.⁶ Nevertheless, writing in this journal in 2000, Bugnion identifies the purpose of the 1949 conference as ‘to update international humanitarian law in the light of the tragic experiences of the Second World War’.⁷ In fact, there is no reference to IHL in any international treaty before the 1981 Conventional Weapons Convention.⁸

Understanding the origins of the notion of IHL and its relationship with LOAC/LoW is an important exercise on at least two practical grounds. First, charting the rise of IHL on the international stage is likely to provide some insight into the background conditions underpinning the ‘juridification’ of the British armed forces, a topic addressed by Anthony Forster in a 2012 *International Affairs* article. In this domestic context, he notes that: ‘A rights-based system has replaced self-regulation and social notions of authority, tradition, national interest and distinctiveness that underpinned “the way we were” with a set of claims about the irreducible status of rights and their manifestation in law’.⁹ For such a major shift to be explained purely by local factors would be unusual.

Harvard International Law Journal 35: 1, 1994, pp. 49–95; J. F. Witt, ‘The dismal history of the laws of war’, *University of California at Irvine Law Review* 1: 3, 2011, pp. 895–911; A. Alexander, ‘A short history of international humanitarian law’, *European Journal of International Law* 26: 1, 2015, pp. 109–38; D. Kennedy, *Of war and law* (Princeton: Princeton University Press, 2009); Michael N. Schmitt, ‘Military necessity and humanity in international humanitarian law: preserving the delicate balance’, *Virginia Journal of International Law* 50: 4, 2010, pp. 795–839; and J. Rabkin, ‘The strange pretensions of contemporary humanitarian law’, in C. Ford and A. Cohen, eds, *Rethinking the law of armed conflict in an age of terrorism* (Lanham, MD: Lexington, 2012).

⁵ Some hints do appear in certain legal sources, but none are developed in any significant way. So, for instance, Meron identifies the ‘influence of the human rights movement’ to explain why the name ‘IHL’ is used with increasing frequency in preference to LoW/LOAC (T. Meron, ‘The humanization of humanitarian law’, *American Journal of International Law* 94: 2, 2000, p. 239); and A. Roberts and R. Guelff point to the advantage IHL terminology offers in terms of emphasizing an individual’s treatment, regardless of their civilian or military status: Roberts and Guelff, *Documents on the laws of war*, 3rd edn (Oxford: OUP, 2000), p. 2. However, Roberts and Guelff also acknowledge a major disadvantage of this terminology: see discussion below.

⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 1949, United Nations Treaty Series (UNTS) 75: 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 1949, UNTS 75: 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 1949, UNTS 75: 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1949, UNTS 75: 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1977, UNTS 1125: 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2), 1977, UNTS 1125: 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol 3), 2005, UNTS 2404: 19.

⁷ F. Bugnion, ‘The Geneva Conventions of 12 August 1949: from the 1949 diplomatic conference to the dawn of the new millennium’, *International Affairs* 76: 1, Jan. 2000, pp. 41–50 at p. 41 (abstract).

⁸ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 1981, UNTS 1342: 137.

⁹ A. Forster, ‘British judicial engagement and the juridification of the armed forces’, *International Affairs* 88: 2, 2012, pp. 283–300 at p. 299.

Second, the frequency and intensity with which IHL is invoked today in both public and academic discussions about the conduct of hostilities merit its re-examination. For instance, in October 2015, three days after a US air strike on a trauma centre in Kunduz, Afghanistan, the President of Médecins Sans Frontières (MSF) delivered a statement entitled '[MSF] denounces blatant breach of international humanitarian law' and announced: 'We are working on the presumption of a war crime.'¹⁰ It is important to consider the significance, both political and legal, of such statements, as well as what they say about how MSF and other non-governmental organizations (NGOs) perceive their own role within an ongoing armed conflict.

This article argues that a more correct way of thinking about IHL exists which challenges the prevailing orthodoxy that IHL and LOAC/LoW are one and the same, and demonstrates that, on the contrary, the origins, contents and purpose of IHL are altogether different from those of LOAC. Nevertheless, the article reveals a concerted effort to rebrand LOAC/LoW as IHL—first led by the International Committee of the Red Cross (ICRC), and then taken up by human rights groups from the 1980s onwards. For the latter, a shift to IHL was about providing a means to expand their work into armed conflict scenarios; it was not about improving the law or making it more effective for its own sake. For these reasons, IHL is better understood as a political project than an existing body of law; and in this sense, it is a myth.

The fresh approach to IHL advocated here promises to raise the quality of public and academic debates concerning the standards applicable in the conduct of armed force, and to reveal how and why, in contemporary conflicts, such different conclusions about the legality of particular acts of armed force can be drawn.

History and IHL orthodoxy

The traditional narrative of IHL begins by pointing out that constraints on the conduct of war have always existed across time and space, as demonstrated by, among other examples, the Code of Hammurabi (c. 1750 BC); the Hindu *Mahabharata* (200 BC–AD 200); the Chinese *Wei Liaozi* (403–221 BC); the orders of Islam's first caliph, Abu Bakr (c. AD 632); and codes of chivalry (1170–1220).¹¹ Henri Dunant's outrage at the fate of wounded, sick and dead soldiers at the Battle of Solferino during the Franco-Austrian War compelled him to establish the ICRC in the 1860s, which campaigned for protections for soldiers no longer taking part in combat. This advocacy eventually led to the conclusion of consecutive Geneva Conventions, which came to be known as 'Geneva law'. Certain protections in wartime were expressly extended to civilian populations and objects by Geneva Convention IV of 1949, as indicated by its full title.¹²

¹⁰ Statement by Joanne Liu, President, MSF International, 'MSF denounces blatant breach of international humanitarian law', 6 Oct. 2015, <http://www.doctorswithoutborders.org/article/msf-denounces-blatant-breach-international-humanitarian-law>.

¹¹ See e.g. Leslie C. Green, *The contemporary law of armed conflict*, 3rd edn (New York: Juris, 2008).

¹² See note 6 above.

Turning to the United States, the established account of IHL continues. In the 1860s, President Lincoln tasked Francis Lieber with formulating a military code of conduct for his soldiers to guide their action against Confederate forces in the American Civil War. The product of this effort—the Lieber Code—provided the foundation for the 1899 and 1907 Hague Conventions dealing with methods and means of warfare. This second body of law came to be known as ‘Hague law’. Dealing with topics such as the opening of hostilities,¹³ the laws and customs of war on land,¹⁴ bombardment by naval forces in time of war,¹⁵ and the rights and duties of neutral powers in naval war,¹⁶ Hague law focused on the conduct of armed hostilities and their regulation. In other words, Hague law *was* LOAC/LoW, in the ordinary meaning of those terms.

The conventional account goes on to claim that convergence between ‘Geneva law’ and ‘Hague law’ was achieved in 1977, with the signing of Additional Protocol I of the Geneva Conventions, which brought together in the one document extra requirements in relation to the conduct of war, and furthered protections for civilians and combatants.¹⁷ At least since this time, IHL orthodoxy reasons, the terms ‘IHL’, ‘LoW’ and ‘LOAC’ have come to mean the same thing.

Beyond this, the conventional narrative offers little by way of further explanation of the rise of IHL terminology. If IHL is simply the modern phrasing for LoW/LOAC, then why does widespread use of these latter terms persist, four decades after the signing of Additional Protocol I? Examples include the US Department of Defense’s publication of June 2015 entitled *Law of war manual*, in which LoW terminology is used throughout,¹⁸ and military publications from the UK, France, Germany, Canada and Australia.¹⁹ That LOAC/LoW remains

¹³ Convention Relative to the Opening of Hostilities (Hague III), 1907, http://avalon.law.yale.edu/20th_century/hague03.asp.

¹⁴ Convention Respecting the Laws and Customs of War on Land (Hague IV), 1907, http://avalon.law.yale.edu/20th_century/hague04.asp.

¹⁵ Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), 1907, http://avalon.law.yale.edu/20th_century/hague09.asp.

¹⁶ Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), 1907, http://avalon.law.yale.edu/20th_century/hague13.asp.

¹⁷ Christian Tomuschat, *Human rights: between idealism and realism*, 2nd edn (Oxford: Oxford University Press, 2008), p. 298. In 1996, the International Court of Justice stated in its advisory opinion on nuclear weapons that Hague law and Geneva law ‘have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law’: ‘Legality of the threat or use of nuclear weapons’, advisory opinion, 8 July 1996, www.icj-cij.org/docket/files/95/7495.pdf, p. 256, para 75. Others refer to the ‘merging’ of Hague law and Geneva law at this time: Geoffrey S. Corn, Victor Hansen, Richard B. Jackson, Chris Jenks, Eric Talbot Jensen and James A. Schoettler, Jr, *The law of armed conflict: an operational approach* (New York: Wolters Kluwer Law and Business, 2012), p. 48.

¹⁸ US Department of Defense, *Law of war manual* (Washington DC, 2015), <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>. Early on, the manual states in one sentence that IHL has the ‘same substantive meaning as the law of war’, but then reverts to the language of LoW: p. 8.

¹⁹ UK: UK Ministry of Defence, *The joint service manual of the law of armed conflict* (Shrivenham, 2004). France: Ministère de la Défense (France), *Manuel du droit des conflits armés* (Paris, 2012), http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf. Germany: Bundesministerium der Verteidigung (Germany), *Joint Service Regulation (Zdv) 15/2: Law of armed conflict manual* (Bonn, 2013), www.bmvg.de/resource/.../Law%20of%20Armed%20Conflict_Manual_2013.pdf. Canada: Office of the Judge Advocate General (Canada), *The law of armed conflict at the operational and tactical levels* (Ottawa, 2001), https://www.fichl.org/fileadmin/_migrated/content_uploads/Canadian_LOAC_Manual_2001_English.pdf. Australia: in contrast to the other examples where IHL is acknowledged, Australia’s military manual only considers LOAC and LoW synonymous, with no mention of IHL: Australian Defence Doctrine Publication 06.4, *The manual*

the dominant terminology used by those national militaries suggests that the emergence of IHL language has had little effect on how they approach and understand their legal obligations in the battlespace; apparently, what they call LOAC/LoW already deals with everything they need to know.

How, then, are we to understand the purpose of IHL, and what is it about this label that, as Fleck argues, ‘better’ indicates a ‘binding commitment’ to rule-abiding behaviour, after more than a century during which that same commitment flew under the banner of LOAC/LoW? The answers to these questions can be found via a more thorough inspection of the historical record.

Jean Pictet, the ICRC and the emergence of IHL

Contrary to the conventional narrative of IHL, its provenance is far from ancient. Rather, IHL is largely a twentieth-century invention of the ICRC.²⁰ Between 1952 and 1960, in each of the four lengthy commentaries to the Geneva Conventions published by the ICRC,²¹ references to ‘humanitarian law’ or IHL are made, though these terms appear less than a dozen times. In three of these commentaries, LoW or ‘the laws and customs of war’ are mentioned more than 40 times; in the fourth, they are mentioned 25 times. Jean Pictet, a Swiss legal scholar who spent more than 42 years of his career with the ICRC, helped develop this early notion of IHL. Writing in 1966,²² Pictet considered IHL to have two understandings—a wider one and a narrower one. IHL in its widest sense included ‘all the international legal provisions, whether written or customary, ensuring respect for the individual and his well-being’,²³ and was thus composed of two branches of law: LoW (wide sense) and human rights. Later, Pictet renamed IHL in this wide sense ‘humane law’.²⁴ To avoid confusion with Pictet’s narrow understanding of IHL—the focus of our attention, for present purposes—the expression ‘humane law’ will be adopted here.

According to Pictet, the aim of the first branch of humane law—LoW in its wide sense—was ‘to regulate hostilities and attenuate their hardships insofar as military necessity permits’.²⁵ It was composed of two subfields: Hague law and Geneva law. The latter, Pictet pointed out, was also sometimes called the ‘Law of the Red Cross’; Pictet himself named it ‘humanitarian law properly so-called’.²⁶ Thus, in its first incarnation—or IHL 1.0, as I shall call it here—IHL was identical to Geneva law. Within its own sphere, and reflecting Geneva

on the law of armed conflict (Canberra, 2006), <http://docplayer.net/1051779-Executive-series-addp-06-4-law-of-armed-conflict.html>, p. 1-1.

²⁰ The ICRC’s direct role in introducing the term IHL is rarely openly acknowledged. There are some exceptions: see e.g. Schindler, ‘International humanitarian law’, p. 171; Kolb and Hyde, *An introduction to the international law of armed conflicts*, p. 16. However, beyond this bare fact, the details of the ICRC’s role are not explored fully in either volume.

²¹ Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols (Geneva: ICRC, 1952, 1958, 1960).

²² Jean Pictet, ‘The principles of international humanitarian law’, *International Review of the Red Cross* 6: 66, 1966, pp. 455–69.

²³ Pictet, ‘The principles of international humanitarian law’, p. 456.

²⁴ Pictet, *Development and principles of international humanitarian law*, p. 3.

²⁵ Pictet, ‘The principles of international humanitarian law’, p. 456.

²⁶ Pictet, ‘The principles of international humanitarian law’, p. 457.

history and values, IHL 1.0 retained its ‘more specifically humanitarian character, a primordial element of civilization and peace’.²⁷ At the same time, however, it sat alongside Hague law, with its own history, values and emphasis on efficient military practice. Together, Hague law and IHL 1.0 were the substantive means through which the objective of LoW—namely, the regulation of hostilities and the reduction of suffering—would be achieved. However, the extent to which Hague law and IHL 1.0 could achieve this objective would be subject to LoW’s in-built qualification—that is, the principle of military necessity. Acutely aware of the differences between the component parts of LoW, Pictet argued that any future treaty protecting the civilian population from indiscriminate warfare—a major aspiration of the ICRC at the time—would ‘by its very nature’²⁸ form part of Hague law, not part of IHL 1.0.

Law as politics by other means: the invention of IHL 2.0

By the late 1960s the ICRC was seeking to redefine radically the nature and scope of its activities; and the notion of IHL proved the perfect vehicle by which to achieve this aim. At the ICRC’s 21st International Conference in 1969, the regular agenda topic concerning ‘protection of civilian populations against indiscriminate warfare’ was replaced by ‘a more general theme’: namely, the ‘reaffirmation and development of the laws and customs applicable in armed conflict’.²⁹ According to the ICRC, this latter phrase ‘represented something new, a realization ... [that] the task devolving on the Red Cross as regards the development of humanitarian law should in future be conceived and undertaken on a broader basis’.³⁰ In pursuit of this goal, the ICRC expressly advocated abandoning references to LoW, in order to reflect the legally exceptional nature of war in the modern period, and ‘to take account of the deep aspiration of the peoples to see peace installed and the disputes between human communities settled by pacific means’.³¹

How was the shift towards this new and wider role of ‘reaffirmation and development’ justified? The ICRC argued that Hague law was inadequate, particularly when compared with the ICRC’s own law—that is, IHL 1.0. Hague law had not been codified since 1907. Given changes in methods of warfare and ‘the conditions of the international community’, the constraints of Hague law were too few and too imprecise ‘to ensure the protection of the human person as they should in the conflicts that continue to rent [*sic*] the world’.³² Moreover, the ICRC insisted, Hague law lacked a ‘procedure for supervision which would guarantee the application of these rules’,³³ and the ‘defective application’³⁴ of these rules fed

²⁷ Pictet, *Development and principles of international humanitarian law*, p. 2.

²⁸ Pictet, ‘The principles of international humanitarian law’, p. 457.

²⁹ ICRC, *Reaffirmation and development of the laws and customs applicable in armed conflicts*, report submitted to the 21st International Conference of the Red Cross (Geneva, 1969), p. 1.

³⁰ ICRC, *Reaffirmation and development*, p. 2.

³¹ ICRC, *Reaffirmation and development*, p. 11.

³² ICRC, *Reaffirmation and development*, p. 7.

³³ ICRC, *Reaffirmation and development*, p. 7.

³⁴ ICRC, *Reaffirmation and development*, p. 7.

perceptions of inadequacy. The inadequacy of Hague law, the ICRC asserted, had a negative impact on the observance of IHL 1.0, as belligerents themselves considered Hague law and IHL 1.0 ‘as a single whole’.³⁵ For this reason, a distinction between the two could no longer be maintained. Therefore, the ICRC concluded, the law applicable to armed conflict had to be considered in its entirety; and

the main efforts for its development should now be directed essentially to the parts of this law which are inadequate ... i.e. the rules concerning the conduct of hostilities, in their broadest sense, and the rules applicable to internal conflicts.³⁶

In one fell swoop, the ICRC had swallowed up the core of Hague law within its mandate. Although the ICRC would retain its traditional remit and role in relation to IHL 1.0, its focus would now concentrate on ‘developing’ Hague law. This was rationalized on the basis of the ICRC’s own assessment of the inadequacies of Hague law—inadequacies which the ICRC apparently considered itself qualified to fix. The ‘gaps’ in the content, application and ‘supervision’ of Hague law identified by the ICRC would now be filled by the ICRC itself, and its new, enlarged mandate, covering vast swathes of Hague law and IHL 1.0, would be rebranded as ‘IHL’—or IHL 2.0, as I shall call it here.

This is evident from the ICRC’s submission to the conference of government experts it convened in 1971. The submission claimed that IHL was an abbreviation for the expression ‘international humanitarian law applicable in armed conflicts’, and that it covered the following topics:

those rules of the law of armed conflict which are *clearly humanitarian in nature*, namely those which protect human beings and the property essential to them. Consequently, the term covers not only the Geneva Conventions but also treaty or customary law rules which, *for humanitarian reasons*, lay down limits to be observed in the conduct of hostilities, the use of weapons, the behaviour of combatants and recourse to reprisals, as well as norms intended to ensure the proper application of those rules (e.g. supervision and penal sanctions).³⁷

Excluded from the purview of IHL 2.0 at this time were ‘the outbreak or termination of hostilities; non-hostile relations between belligerents; the disposal of enemy property; sea warfare; the hostilities between air forces and the law of neutrality’.³⁸ However, perhaps anticipating the future inclusion of these fringe topics, the ICRC added: ‘that some of these rules may be humanitarian in nature is, as some experts pointed out, not to be ignored’.³⁹ The ICRC also used the opportunity to exclude human rights from IHL 2.0, signalling a departure from Pictet’s early work.⁴⁰

³⁵ ICRC, *Reaffirmation and development*, p. 8.

³⁶ ICRC, *Reaffirmation and development*, p. 8.

³⁷ ICRC, *Introduction*, report submitted to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1971), pp. 25–6 (emphasis added).

³⁸ ICRC, *Introduction*, p. 25.

³⁹ ICRC, *Introduction*, p. 25, n. 3.

⁴⁰ ICRC, *Introduction*, p. 26.

The political and legal consequences of IHL 2.0 vs LOAC/LoW

Thus, IHL 2.0 did not simply bring the heart of Hague law and IHL 1.0 under the ICRC's remit—it completely recast the foundation and character of the core of Hague law, forcing it together with IHL 1.0 under the banner of a common, binding, uniting humanitarianism. No longer were Hague law and IHL 1.0 component parts of a regime known as LOAC/LoW, which expressly acknowledged military necessity—a notion which acts as both an authorization of *and a restraint* on a warrior's conduct. Instead, under IHL 2.0, the crux of Hague law—its purposes and its contents—was repackaged in exclusively humanitarian terms.⁴¹ The ICRC's submission included reference to 'military necessities' only in the broadest sense, asserting 'the imperative interest in seeing to it that limitations of a humanitarian nature to be placed on [them] are fixed in times of peace'.⁴²

This occurred despite the fact that, in reality, the motivating factors driving the evolution of Hague law had always been of a mixed character.⁴³ This evolution demonstrated that military considerations such as the professional values and standards of the armed forces, the desire to promote efficiency of military effort and the intent to encourage conduct that aided strategic success had been just as important, if not more important, in rationalizing new provisions of Hague law as humanitarian impulses *per se* ever had been. However, with the advent of IHL 2.0, these rationales were subsumed by the overriding discourse of humanitarianism—a discourse which played to the ICRC's strengths, in a field of its own invention.

This leap to IHL 2.0 is not only significant as a demonstration of the norm-creating political power wielded by the ICRC specifically and the humanitarian sector more generally—a topic to which we shall return shortly. It is also important from a legal perspective. Within LOAC/LoW, four guiding principles for military action are widely recognized: military necessity, humanity, proportionality and distinction.⁴⁴ As regards decision-making, the emphasis is on achieving a balance among the four principles: there is no hierarchy of principles; all must be applied. So, for instance, a soldier cannot rely on a broad reading of 'military necessity' to authorize acts otherwise prohibited by the law. Unless the individual's actions also reflect application of the other three principles—namely, the avoidance of unnecessary suffering; a calculation that the concrete and direct military advantage anticipated by the individual's actions outweighs the expected loss or damage to civilian life and objects; and the drawing of a distinction between civilian objects and military targets—they are likely to fall foul of LOAC/LoW.

⁴¹ As Yoram Dinstein notes, 'the emphasis on the adjective "humanitarian" [in the term 'IHL'] tends to create the false impression that all the rules governing hostilities are—and have to be—truly humanitarian in nature, whereas in fact not a few of them reflect the countervailing constraints of military necessity': *The conduct of hostilities under the law of international armed conflict*, 2nd edn (Cambridge: Cambridge University Press, 2010), p. 19. He argues instead in favour of interpreting the 'humanitarian' in IHL as 'merely indicat[ing] the considerations that *may have* steered those responsible for crafting the legal norms in question' (p. 19, emphasis added).

⁴² ICRC, *Introduction*, p. 38.

⁴³ Roberts and Guelff, *Documents on the laws of war*, p. 2.

⁴⁴ See e.g. the national LOAC/LoW publications cited above (nn. 18–23), and discussion in A. P. V. Rogers, *Law on the battlefield*, 2nd edn (New York: Juris, 2004), pp. 3–17. The US recognizes a fifth principle, honour: US Department of Defense, *Law of war manual*, p. vii.

The way in which IHL 2.0 defines itself and its purpose by reference to humanitarianism, however, privileges this value above all others. Legal practitioners from the common-law tradition, and those practising EU law, are familiar with the purposive rule of statutory interpretation, which allows legislation to be interpreted by reference to the purpose for which it was brought into existence. In deciding what the purpose of a particular text is, related materials produced prior to the text's creation may be consulted. Similarly, article 31 of the Vienna Convention on the Law of Treaties determines that the terms of a treaty 'shall be interpreted in good faith in accordance with their ordinary meaning ... in the light of [the treaty's] object and purpose'.⁴⁵ In deciding on a treaty's purpose, the Vienna Convention names a range of materials that can be consulted.⁴⁶ By insisting that the rules falling within its bounds share a single, common, 'humanitarian' purpose, IHL 2.0 shuts down modes of legal argument which rely on the traditional, non-humanitarian purposes of LOAC/LoW to guide how a particular rule is to be given legal effect in practice. Under IHL 2.0, only methods of argument that prioritize humanitarian purposes are likely to win the day.

The ICRC's advocacy in support of IHL 2.0

Since the early 1970s, the ICRC has worked tirelessly to promote acceptance of IHL 2.0 as the proper body of law regulating armed conflict. It was the ICRC that provided the draft documents which formed the basis of negotiations leading to the 1977 Additional Protocols; and the full title of the diplomatic conference hosting these negotiations mirrored exactly the ICRC's new terminology about the 'reaffirmation and development of international humanitarian law'.⁴⁷ Although IHL was not cited in the final texts of the Additional Protocols, the negotiations provided a useful opportunity to air and endorse the new lexicon.⁴⁸ In plenary speeches, various state parties including Austria, Cuba, France, Morocco, Poland and the United States adopted the language of IHL, but no consistency in what they meant by 'IHL'—IHL 1.0, IHL 2.0, Pictet's 'humane law', or simply an alternative wording for LOAC/LoW—was ever achieved.⁴⁹

In 1982, the ICRC's statutory role in advocating understanding and dissemination of the law was still expressed specifically in terms of the Geneva Conventions.⁵⁰ By 1988, however, this role had been transformed into a duty to promote understanding and dissemination of '*knowledge* of international humanitarian law applicable in armed conflicts'⁵¹—arguably a much broader undertaking. In the

⁴⁵ Vienna Convention on the Law of Treaties, 1969, UNTS 1155: 331.

⁴⁶ See arts 31(2), (3) and 32 of the Vienna Convention on the Law of Treaties.

⁴⁷ The conference's full title was the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974–1977.

⁴⁸ See discussion in Alexander, 'A short history of international humanitarian law', p. 123.

⁴⁹ See e.g. *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva: Federal Political Department, 1978), vol. 5.

⁵⁰ 'ICRC statutes brought into line with the revised statutes of the International Red Cross and Red Crescent Movement', *International Review of the Red Cross* 28: 263, 1988, pp. 153–65, p. 156.

⁵¹ 'ICRC statutes brought into line', p. 157 (emphasis added).

1980s and 1990s, IHL and its dissemination increasingly became a top priority for the ICRC.⁵² In 1995, at the 26th International Conference of the Red Cross and Red Crescent, the ICRC was tasked with the production of a comprehensive study of customary IHL.⁵³ Ten years later, the resulting publication identified 161 rules which, the ICRC claimed, held the status of customary international humanitarian law—that is, rules that bound all parties to an armed conflict, whether or not those parties had ratified those rules in their own national jurisdictions. The study attracted strong criticism from official sources in the United States, Belgium and Canada, as well as from unofficial sources worldwide.⁵⁴

NGO advocacy in support of IHL 2.0

While the ICRC clearly took the lead, it was not solely responsible for propelling IHL 2.0 out of specialist circles into treaty law and the wider public vocabulary. From the early 1980s onwards, in pursuit of their own political goals, NGOs also started to adopt and promote the language of IHL 2.0. In the vanguard was Human Rights Watch (HRW). In 1992, HRW used the language of IHL in an attempt to justify an expansion of its own peacetime human rights mandate to armed conflict situations regulated by LoW/LOAC:

Over the past decade, Human Rights Watch has increasingly devoted itself to monitoring the conduct of the parties to armed conflicts in an effort to promote compliance with international humanitarian law, or the laws of war. Human Rights Watch's focus on war monitoring derives from its belief that by far the largest number of victims of severe violations of human rights worldwide are the noncombatants who are killed, injured, deprived of food and other necessities, or forced to flee from their homes *because of the manner in which opposing forces seek to prevail militarily*. In addition, this focus reflects the fact that *such war-related abuses of human rights* were largely neglected by the worldwide human rights movement before *Human Rights Watch determined to assume this role*. International humanitarian law was hardly ever mentioned in the reports of human rights organizations until Human Rights Watch began doing so in 1982.⁵⁵

⁵² This is supported by a 1983 ICRC report which claims that in 1981 dissemination of IHL was made 'one of [the ICRC's] prime objectives for the years ahead': 'Dissemination of international humanitarian law and of the principles and ideals of the Red Cross: summary of work from 1 December 1981 to 15 August 1983', *International Review of the Red Cross* 23: 237, 1983, pp. 338–53 at p. 338. Further confirmation is provided by the growing range of articles on this topic published by the *International Review of the Red Cross* during this period: see e.g. Jovica Patrnogic, 'Thoughts on the relationship between international humanitarian law and refugee law, their promotion and dissemination', *International Review of the Red Cross* 28: 265, 1988, pp. 367–78; Christophe Lanord and Michel Deyra, 'Dissemination in academic circles: the Jean Pictet competition', *International Review of the Red Cross* 35: 306, 1995, pp. 341–6; and the special issue on 'Dissemination: spreading knowledge of humanitarian rules', *International Review of the Red Cross* 37: 319, 1997. In 1997, the ICRC had approximately 50 people focused on IHL dissemination activities, spending c. US\$20–25 million: David Forsythe, *The humanitarians: the International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2005), p. 272, n. 65.

⁵³ Jakob Kellenberger, 'Foreword', in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law* (Geneva: ICRC, 2005), vol. 1, p. xvi.

⁵⁴ W. Hays Parks, 'Perspective and the importance of history', in Michael Schmitt and Louise Arimatsu, eds, *Yearbook of international humanitarian law*, vol. 14, 2011, pp. 361–82 at p. 378.

⁵⁵ Human Rights Watch, *World Report 1992*, www.hrw.org/reports/1992/WR92, p. 22 (emphasis added).

The myth of international humanitarian law

Referring back to that time in a speech from 2010, Kenneth Roth, HRW's Executive Director, explained further:

Beginning in 1982 or 1983, we began referring to common Article 3 of the 1949 Geneva Conventions ... Human Rights Watch always took a fairly flexible approach to interpreting IHL. Common Article 3 of the Geneva Conventions supplies basic principles but doesn't provide all the answers. We would thus typically look to instruments like the first Additional Protocol to the Geneva Conventions, which technically applies only to international armed conflict but sets forth a number of principles that were widely accepted as customary international law. *Basically, we applied those provisions to internal conflicts—recognizing that this wasn't technically right from a legal perspective but we weren't going to court. These were not legal arguments needed to convince a judge. Rather, we needed to refer to a set of norms that would persuade public opinion that certain military conduct was wrong. If we could do that successfully, it didn't matter whether the law technically applied or not.* Very frequently we would use this broader principled approach to push the boundaries of the law, even where the law had not caught up ...

... It's the approach we used with the Landmines Convention [of 1997] and the Cluster Munitions Convention [of 2008][both of which cite IHL in their preambles]. It has been a very deliberate approach all the way along.

Now, one last reason we felt it was important to rely on international humanitarian law was that the traditional human rights law framework looked exclusively at how a government treated people within its own country. *You needed IHL if you were going to look at how a government acted outside of its territory.* This was less of an issue in the early- to mid-1980s than it became with the Panama invasion to get Noriega. It became even more important in the first Gulf War with the kind of military means that we saw deployed there. Human rights law didn't help you address that situation. *We needed IHL if we were going to make arguments to address the United States and the other major Western militaries, which we thought was important to do.*⁵⁶

Thus, the rise of IHL 2.0 cannot simply be explained by reference to the ICRC and its intensive efforts to expand its own terms of reference, status and influence on the international stage. By recharacterizing LOAC/LoW in 'humanitarian' terms, IHL 2.0 provided NGOs confident in their own 'humanitarian' credentials with the conceptual device and purported political standing to extend their advocacy to armed conflict scenarios for the first time. The effects of armed conflict on civilians were no longer characterized as tragic consequences inevitably arising from the fact that a war existed; instead, they were 'war-related abuses of human rights' caused by *how* adversaries fought those wars.

Previously, debates concerning the legality or otherwise of wartime conduct had remained largely within the preserve of those most qualified and experienced to deliberate upon them: namely, the military establishment itself. Subsequently, NGOs—using the language of IHL 2.0—would wade in on such issues in the public domain, trading on their reputation for neutrality in their core field tasks to garner support for their views. However, as Roth's quote above indicates,

⁵⁶ Kenneth Roth, 'Human rights: from practice to policy', in Carrie Booth Walling and Susan Waltz, eds, *Proceedings of a research workshop*, University of Michigan, Oct. 2010, humanrightshistory.umich.edu/files/2013/05/PracticetoPolicyI.pdf, pp. 25–8 (emphasis added).

NGO adoption of IHL 2.0 at this time was anything but politically neutral: IHL 2.0's true value to NGOs was as a tool for applying pressure on states—especially western ones—in relation to their military activities. For NGO purposes, then, IHL 2.0 was a political instrument with which they could play fast and loose, as they saw fit, in furtherance of their own aims—and with little regard for longstanding, widely applied conventions of legal analysis, reasoning or methods of interpretation. As long as IHL 2.0 was accepted as the rightful successor to LOAC/LoW, NGOs with any 'humanitarian' aspirations could claim expertise, and thus could profess authority in public to speak about, or even adjudicate on, legal issues arising during hostilities just as well as, if not better than, state-based justice mechanisms.

Samaritans and judges?⁵⁷ IHL 2.0, NGOs and armed conflict from the 1990s onwards

By the late 1990s and early 2000s, various NGOs were going well beyond advocacy on behalf of IHL 2.0 in a general sense, publishing their own analyses of how it applied to specific, real-life conflict scenarios, based on their own information-collecting activities, and according to their own evidentiary standards. Examples include the International Crisis Group's 2000 report 'documenting violations of international humanitarian law in Kosovo 1999';⁵⁸ HRW's 2003 briefing paper entitled *International humanitarian law issues in a potential war in Iraq*;⁵⁹ and No Peace Without Justice's 2004 report *Conflict mapping in Sierra Leone: violations of international humanitarian law 1991 to 2002*.⁶⁰ An earlier No Peace Without Justice report 'on serious violations of international humanitarian law in Kosovo in 1998' went as far as naming specific individuals, calling on the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia to focus efforts 'on establishing the criminal responsibility of [the named individuals] for the violations of international humanitarian law committed in Kosovo in 1998'.⁶¹ Crucially, the phrase 'or otherwise' is not included after the word 'responsibility' in that sentence. This increase at the international level in the number of actors seeking some sort of role in the policing of IHL 2.0 echoes a similar domestic development with respect to the norms and practices of the UK's armed forces.⁶²

⁵⁷ This is a reference to a quotation from an interview with Jean Pictet, when discussing the nature of the humanitarian role: 'One can't be the Samaritan and the judge at the same time. It is impossible'. Cited in Peter Capella, 'The man who wrote the rules of war', *Guardian*, 12 Aug. 1999, <https://www.theguardian.com/theguardian/1999/aug/12/features11.g2>.

⁵⁸ International Crisis Group, *Reality demands: documenting violations of international humanitarian law in Kosovo 1999* (Brussels, 2000), www.files.ethz.ch/isn/28008/093a_humanitarian_violations_kosovo.pdf, p. 1.

⁵⁹ Human Rights Watch, *International humanitarian law issues in a potential war in Iraq* (New York, 2003), www.hrw.org/sites/default/files/reports/Iraq%20IHL%20formatted.pdf.

⁶⁰ No Peace Without Justice, *Conflict mapping in Sierra Leone: violations of international humanitarian law 1991 to 2002* (New York, Brussels and Rome, 2004), <http://www.npwj.org/ICC/Conflict-Mapping-Sierra-Leone-Violations-International-Humanitarian-Law-1991-2002.html>.

⁶¹ No Peace Without Justice, *Report on serious violations of international humanitarian law in Kosovo in 1998* (New York, Brussels and Rome, 1999), <http://www.npwj.org/sites/default/files/documents/File/Report%20Kosovo%201998-1.pdf>, pp. 1, 62.

⁶² Forster, 'British judicial engagement', p. 297.

In an ironic twist, the Overseas Development Institute's 2000 report entitled *The principles of humanitarian action in international humanitarian law* found it necessary to point out that 'despite the increasing currency of this phrase [i.e. IHL] in debates about humanitarian assistance, there appears still to be a widespread misunderstanding of its content ... and in particular an over-estimation of the proportion of international humanitarian law which relates to humanitarian relief'.⁶³

This 'misunderstanding' of the relationship between IHL 2.0 and LOAC/LoW remains alive and well today. On their websites, both HRW and Amnesty International maintain that there are three key principles underpinning IHL: distinction, proportionality and precaution.⁶⁴ This schema is somewhat different from the four principles recognized by LOAC/LoW discussed above, yet both organizations—along with other IHL supporters—still insist that IHL 2.0 and LOAC/LoW are the same thing. Interestingly, ICRC sources are inconsistent on this point; support for both schemas can be found, depending on which ICRC publication is consulted.⁶⁵

In continuing to maintain the fiction that IHL 2.0 and LOAC/LoW are equivalents, the pro-IHL NGO community confronts a difficult question: if these regimes are the same, then how do NGOs often reach different conclusions from those of the armed forces, in relation to the legality or otherwise of the same wartime conduct? The NGO solution to this quandary is to portray the armed forces as the enemies of IHL. This is clear from another part of Roth's 2010 speech:

One final point about IHL, generally, concerns the ways in which the use of IHL has affected our advocacy work ... what has been most interesting is that up until the time that human rights groups began taking on IHL, militaries loved the fact that this was a special domain. There were only a handful of people in the world who had any idea what this specialized body of law meant and it was very comfortable for militaries because military lawyers interpret IHL in a way that is deferential to the military. What began to change was the knowledge and understanding of the broad categories, such as indiscriminate warfare ... The military hated this intervention by human rights groups because suddenly they had lost their monopoly over the interpretation of humanitarian law. The military now had to deal with groups that had developed quite a bit of military expertise and which they used through the press to convince the public that the nice comfortable definitions propounded by the military lawyers were not justified. As a result, we now have a much more pluralistic environment in which these terms are interpreted. And that's all to the good in terms of defending human rights in warfare.⁶⁶

⁶³ Kate Mackintosh, *The principles of humanitarian action in international humanitarian law* (London: Overseas Development Institute, 2000), www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf.

⁶⁴ See Human Rights Watch, *Eastern Ukraine: questions and answers about the laws of war*, 11 Sept. 2014, www.hrw.org/news/2014/09/11/eastern-ukraine-questions-and-answers-about-laws-war; Amnesty International, *Armed conflict: the issue in detail*, www.amnesty.org/en/what-we-do/armed-conflict/.

⁶⁵ Cf. e.g. (1) the ICRC's IHL training module entitled *The basic principles of international humanitarian law*, where the principles of distinction, proportionality and precaution are cited (app.icrc.org/elearning/en/ihl); and (2) Marco Sassoli, Antoine A. Bouvier and Anne Quintin, *How does law protect in war?*, 3rd edn (Geneva: ICRC, 2011), vol. 1, pp. 13–14, where the four principles of military necessity, humanity, distinction and proportionality are cited.

⁶⁶ Roth, 'Human rights: from practice to policy', pp. 31–2.

Thus, for Roth, who fully adopts and endorses the IHL 2.0 paradigm, the varying positions with respect to the law taken by human rights groups and humanitarian organizations *vis-à-vis* the armed forces are explained simply as different interpretations of the same legal regime. Military lawyers are too close to the armed forces and this affects their understanding of how the law operates. The military is not used to the analyses provided by its lawyers being publicly challenged as unjustified by groups with ‘quite a bit of military expertise’. Interpretation in a more pluralistic setting is a positive development if one’s goal is the defence of human rights in war.

However, for those adhering to the LOAC/LoW paradigm, the picture is very different. Whether one likes it or not, LOAC/LoW *is* a special domain, not because it has nothing in common with other bodies of law, but by virtue of the fact that, unlike those others, it is specifically and uniquely designed to apply in armed conflicts. Other legal regimes operate in peacetime—that is, on the basis that the underlying political conditions that make law possible are largely settled. This is precisely the assumption that, by definition, does not hold in the case of LOAC/LoW. It is therefore not just another ‘specialized body of law’ on a par with, for example, maritime law or space law or canon law. Furthermore, military lawyers are not especially ‘deferential to the military’; rather, their job requires them to interpret and apply the law in accordance with the established practices and principles of the legal profession. In a context subject to LOAC/LoW, this means with due regard to achieving a balance between the enduring principles of military necessity, humanity, proportionality and distinction. It does not mean giving effect to the law in the most humanitarian way possible, above all other considerations. If it did, one of two situations would result: either (1) no shot would ever be fired, and thus armed conflict would likely cease to exist; or (2) armed conflict would persist, and the law would be entirely abandoned within the first few minutes.

Moreover, whether or not definitions provided by military lawyers are considered ‘justified’ depends very much on the normative standard against which they are measured. It may be that the definitions used by military lawyers do fall short of the ‘humanitarian’ benchmark that groups with or without ‘quite a bit of military expertise’ claim IHL 2.0 demands; however, this is not the same as saying these definitions either are without basis under LOAC/LoW or offend its provisions. In private, few military law practitioners would ever consider the legal concepts and definitions they apply in their work as ‘nice’ and ‘comfortable’. Behind closed doors, like lawyers practising in other areas of the law, they debate points of interpretation among themselves, before settling on a preferred view. A more pluralistic environment for legal interpretation is fine; but, at a minimum, all participants need to be talking about the same legal paradigm, and be willing to use its accepted modes of analysis and interpretation.

Finally, legal interpretation is a necessary and important task *in and of itself*, to support the implementation of the law during hostilities—surely the most fundamental and desirable objective of any legal regime purporting to regulate armed conflict. The extent to which it contributes to the explicit political goal

of ‘defending human rights in warfare’, however defined, must be a secondary consideration, at best. Indeed, to place the vital tasks of interpretation and application of LOAC/LoW in the service of such overt political aims is to jeopardize the wide and longstanding state-based consensus around vast swathes of this body of law, painstakingly built up over decades. It also risks dragging LOAC/LoW into political disputes at the centre of the fighting.

Conclusion

From the discussion presented in this article, it is evident that the shift towards a rights-based system underpinned by claims about the ‘irreducible status of rights and their manifestation in law’, as described by Forster in the British context, is not merely a domestic phenomenon. Rather, the rise of IHL on the international stage, with its emphasis on humanitarian standards as applied to the individual, has provided the conceptual space for such change to take place. As IHL and LOAC/LoW continue to compete at the international level, it may be worth keeping in mind Forster’s further observation that ‘rights-based systems of law bring with them permanent instability because of the inevitable conflicts that arise in relation to rights; and they are inherently unstable, because it is almost impossible to bring all the rights possessed by all the parties involved into alignment’.⁶⁷

With its insistence on the ‘humanitarian’ purpose and nature of the laws governing the conduct of hostilities, IHL has ostensibly made accessible the interpretation, application and implementation of this body of law to anyone claiming a stake in humanitarian issues. Thus, as a consequence of IHL, experience in and of the humanitarian sector provides sufficient grounds upon which to perform ‘legal’ analyses and draw ‘legal’ conclusions; for, as Roth pointed out, the real purpose in doing so is not to contribute to upholding the law for its own sake, but to achieve particular political ends. Under IHL, actual expertise in, for example, prisoner handling or targeting decisions in accordance with the law is just one ground—among other, apparently equally valid grounds—upon which to claim standing to comment or adjudicate on legal matters arising from armed conflict. As a consequence of IHL then, in the public domain, practitioners of military law no longer enjoy exclusive jurisdiction on such issues; they are no longer considered the only ‘specialists’ in this field.

On this basis, MSF was perfectly entitled to conclude publicly, just three days after the fact, that a ‘blatant’ violation of IHL had occurred; that its hospital had been ‘deliberately bombed’; and that claims of a ‘mere mistake’ could not be used as an excuse to ‘brush aside’ the attack—well before all the evidence related to the incident could be collected, let alone properly investigated by the relevant military authorities.⁶⁸ In this case, avoiding conduct prejudicial to a live legal issue was

⁶⁷ Forster, ‘British judicial engagement’, p. 299.

⁶⁸ The conclusions of the US military investigation into the Kunduz hospital air strike were finally released on 25 Nov. 2015; the investigation found that several technical and human errors were responsible for this ‘tragic, but avoidable accident’: Jim Garamone, ‘Campbell: Kunduz hospital attack “tragic, avoidable accident”’, <http://www.defense.gov/News/Article/Article/631304/campbell-kunduz-hospital-attack-tragic-avoidable-accident>.

clearly not a priority for MSF. The key challenge for organizations such as MSF, Human Rights Watch and the ICRC is reconciling their willingness to instrumentalize the law in pursuit of their wider political goals with the fundamental principle of political neutrality, on which they rely in order to carry out their core humanitarian work in times of armed conflict. As Pictet noted about Red Cross institutions towards the end of his career:

[they] must beware of politics as they would of poison, for it threatens their very lives. Indeed, like a swimmer, the ICRC is in politics up to its neck. Also like the swimmer, who advances in the water but who drowns if he swallows it, the ICRC must reckon with politics without becoming a part of it.⁶⁹

Today, this observation could be extended to all actors engaged in humanitarian work.

This article also reveals that the problem at the heart of IHL cannot be explained away simply by reference to different approaches to legal interpretation, as Roth maintains. Instead, what is currently taking place is a battle between two very different bodies of law which have evolved in very different ways: LOAC/LoW and IHL. Both claim to be authoritative as regards the regulation of armed conflict. Contrary to Roth's claim, when NGOs entered the military–legal fray via the promulgation of IHL 2.0, the military did not lose its monopoly over the interpretation of IHL, because it never had one in the first place. IHL, whether version 1.0 or 2.0, has always been a product of the humanitarian sector. As regards the regulation of hostilities today, the central challenge is not competing interpretations of the laws of war; it is the *war of laws* taking place in public between NGO boardrooms and the battlefield.

Against this backdrop, the core myth of IHL is that it is a body of law at all. While various treaties now exist which endorse the notion of IHL in the abstract, there is no international agreement which defines IHL on its own terms, let alone sets down its provisions in a comprehensive way. Without such agreement, the only way of overcoming this fatal flaw in IHL's status is to accept wholly the premises upon which the conventional narrative of the regulation of hostilities is built—namely, that LOAC/LoW, which does enjoy significant treaty status, is an antecedent of IHL, and today the terms are synonymous. On this reasoning, the corpus of LOAC/LoW treaties provides the solid legal foundation upon which IHL relies. As LOAC/LoW and IHL are now 'the same', there is no need for IHL to be endorsed and detailed formally by states via a new international convention, as this would represent a superfluous duplication of effort. This sleight-of-hand argument not only provides an answer to the tricky question of IHL's credentials and legitimacy as law, but is also politically expedient for IHL proponents, who know the likelihood of militarily active states agreeing to replace LOAC/LoW with the distinct, humanitarianism-first approach of IHL is next to zero. Evidence of this is provided by the various state military publications listed above that continue to use LOAC/LoW wording. The backlash against the ICRC's

⁶⁹ Cited in Capella, 'The man who wrote the rules of war'.

The myth of international humanitarian law

2005 study of 'customary' IHL also highlights the limitations of using notions of widespread state practice to bolster IHL's status, in the absence of IHL-specific treaty law.

This article has exposed the legal fictions supporting the myth of IHL. Contrary to the conventional narrative about IHL, the article demonstrated that IHL's origins, contents and purpose are far from identical to those of LOAC/LoW. As a result, IHL's claim as successor to LOAC/LoW is not proved. Thus, IHL is better understood not as a subfield of international law, but as a political project by and for international humanitarian and human rights organizations in support of their own political objectives. It has very little to do with the actually existing legal obligations of individual combatants during hostilities. For that, we still have LOAC/LoW.

