Humanitarian Negotiation with Parties to Armed Conflict: The Role of Laws and Principles in the Discourse

Rob Grace
USIP-Minerva Peace Scholar, United States Institute of Peace
Graduate Research Fellow, Harvard Program on Negotiation
PhD candidate in Political Science, Brown University, United States of America
rob_grace@brown.edu

Abstract

This article examines the role of international humanitarian law (IHL) and humanitarian principles in the discourse of humanitarian negotiation. The article is based on extensive, semi-structured interviews conducted with 53 humanitarian practitioners about their experiences engaging in negotiations in the field. The article proceeds in four parts. Part 1 discusses two key factors at play during humanitarian negotiation processes. The first factor is the counterpart's familiarity with relevant legal and normative frameworks. The second factor is the interests that can drive counterparts' behavior. Part 2 presents a framework for understanding how the interaction of these two factors — familiarity and interest-alignment — can shape the discourse of humanitarian negotiation. Part 3 addresses the impact of these same issues on the humanitarian side of the negotiation. In particular, there is the possibility that humanitarian actors themselves might also lack familiarity with IHL and/or humanitarian principles and might find that their interests exist in tension with humanitarian laws and principles. The final section offers concluding remarks.

Keywords: international humanitarian law - humanitarian principles - negotiation - non-state armed groups - conduct of hostilities – protection - access

1. Introduction

This article examines the role of international humanitarian law (IHL) and humanitarian principles in the discourse of humanitarian negotiation, specifically identifying the interactions that humanitarian actors have with a wide range of actors — including governments, non-state armed groups (NSAGs), other key local actors, and donors — in their efforts to implement programs for humanitarian assistance and/or protection.[1] The analysis included throughout draws from, and builds upon, three inter-related strands of research and analysis. The first strand relates to how authorities and armed actors, including governments and NSAGs, perceive humanitarian practitioners, as well as humanitarian laws and principles, in particular humanitarian principles and rules of IHL. The second strand encompasses social scientific analyses of the factors that drive patterns of governmental and NSAG compliance and non-compliance with IHL. The third strand consists of a burgeoning body of work focused on the important role that negotiation plays in the implementation of field operations geared toward humanitarian relief and/or protection. The overarching questions that this article addresses are: under what circumstances are humanitarian laws and principles useful to humanitarian negotiators? What complexities can arise when humanitarian actors integrate these laws and principles into the discourse of their negotiations? And, how can humanitarian professionals mitigate these difficulties?

To illustrate the importance of these questions to the study of humanitarian negotiation, this article turns first to a classic anecdote from the cannon of negotiation theory. This story, which hails from an entirely

[1] For a definition of humanitarian negotiation, see Gerard Mc Hugh and Manuel Bessler, 'Humanitarian Negotiations with Armed Groups: A Manual for Practitioners' (*United Nations Office for the Coordination of Humanitarian Affairs*, 2006) <unocha.org/sites/unocha/files/HumanitarianNegotiationswArmedGroupsManual.pdf > accessed 20 June 2019.

unrelated substantive area — housing construction — illustrates a fundamental aspect of the 'principled' or 'integrative' approach that Roger Fisher and William Ury champion.[2] In the scenario, a dispute arises between a landowner and a construction contractor over how deep the concrete foundation should be for a house that the contractor is building. Fisher and Ury write about how the haggling might unfold:

> 'The contractor suggests two feet. You think five feet is closer to the usual depth for your type of house. Now suppose the contractor says: "I went along with you on steel girders for the roof. It's your turn to go along with me on shallower foundations." No owner in his right mind would yield. Rather than horse-trade, you would insist on deciding the issue in terms of objective safety standards. "Look, maybe I'm wrong. Maybe two feet is enough. What I want are foundations strong and deep enough to hold up the building safely. Does the government have standard specifications for these soil conditions? How deep are the foundations of other buildings in this area? What is the earthquake risk here? Where do you suggest we look for standards to resolve this question?"'[3]

The above quote illustrates how the 'integrative' approach differs from 'positional bargaining' in which both sides argue for their position, offering concessions and exerting pressure on one another in the hope of reaching a compromise. Whereas positional bargaining can be inefficient, leading ultimately to unwise agreements, in contrast, by 'commit[ing] yourself to reaching a solution based on principle, not pressure,' one can avoid '[a] constant battle for dominance [that] threatens a relationship.'[4] Indeed, Fisher and Ury explain that, '[i]t is far easier to deal with people when both of you are discussing objective standards for settling a problem instead of trying to force each other to back down.'[5]

To what objective standards can humanitarian negotiators turn when engaging with governments and/or NSAGs on issues of humanitarian assistance and protection? The humanitarian negotiator might wish to turn to IHL and/or humanitarian principles. Indeed, IHL encompasses a vast array of substantive topics that humanitarian negotiators address with counterparts: for example, the terms of humanitarian access, detainee treatment, and the conduct of hostilities. Similarly, aid agencies have embraced humanitarian principles — in particular, humanity (addressing suffering regardless of where it arises), neutrality (refraining from taking sides in conflicts), impartiality (implementing programming based on need alone), and independence (maintaining autonomy from political forces) — as key tools of gaining and maintaining access during humanitarian emergencies.[6] These core principles are among those proclaimed in the Fundamental Principles of the International Red Cross and Red Crescent Movement in 1965 and later codified in the International Red Cross and Red Crescent Code of Conduct in 1992, as well as in United Nations General Assembly resolutions 46/182 (1991) and 58/114(2005).[7] However, as this article will examine, complexities can arise. For instance, when integrating normative and legal frameworks into the discourse of humanitarian negotiation, the outcome may depend on the counterpart's familiarity with humanitarian laws and principles and the extent to which the counterpart's interests and these laws and principles align.

To probe these dynamics, this article draws from a set of semi-structured interviews conducted with 53 individuals with a broad scope of professional experience working in senior or mid-level field-based positions in the humanitarian sector. The interviews were conducted between May and November 2016.

---

[2] Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin Company 1981).
[3] ibid 85.
[4] ibid 86.
[5] ibid.
[6] 'OCHA on Message: Humanitarian Principles' (*United Nations Office for the Coordination of Humanitarian Affairs*, June 2012) <www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf > accessed 4 November 2019.
[7] ibid.

The interviewee pool included practitioners who have worked for United Nations (UN) agencies; international and national non-governmental organizations (NGOs); and the Red Cross/Red Crescent Movement, including the International Committee of the Red Cross (ICRC), as well as National Red Cross and Red Crescent Societies. Interviewees discussed their extensive, firsthand experiences with humanitarian negotiations in field operations undertaken around the globe: in Africa, the Middle East, the Asia/Pacific region, Europe, and the Americas/Caribbean. Due to the sensitivity of the issues discussed, the interviews were conducted under a protocol that assured interviewees that that their names, organizational affiliations, and identifiable information would remain confidential.

Three caveats are important to bear in mind regarding the scope of this article. First, the interviewee pool skews heavily toward international staff, allowing for an examination of the particular difficulties that international staff can face when working in a context where they lack in depth familiarity with the normative and legal terrain relevant to the local environment. Second, whereas this article focuses on issues related to IHL and humanitarian principles during engagements with parties to a conflict, the field of humanitarian negotiation is far broader. Indeed, interviewees discussed a wide range of negotiation types, illustrating that one should view humanitarian negotiation in expansive terms in terms of contexts (involving not only armed conflicts but also natural disasters, pandemics, and internal disturbances where humanitarian actors operate); interlocutors (including not only parties to the conflict but also other local actors, other humanitarian practitioners internally or across organizational lines, beneficiaries, and donors); and relevant international legal frameworks (encompassing, in addition to IHL: human rights law, international criminal law, and international refugee law). This article's substantive focus — namely, humanitarian negotiations with governments and NSAGs during armed conflicts — constitutes just one portion of the broader humanitarian negotiation landscape. Third, as noted above, the interviewee pool consists only of humanitarian actors and not their negotiation counterparts. This methodology allows for a broad and detailed examination of trends across a vast array of contexts, as discerned from assessing humanitarians' perspectives. Although, this methodological choice limits this paper's findings, and it would be beneficial for future research to capture data also from humanitarian negotiation counterparts, including governmental actors, NSAGs, and other key local interlocutors. Doing so will further fill out this analysis by bringing counterparts' firsthand perspectives into the empirical picture.

This article is divided into four parts. Part 1 discusses two issues relevant to the relationship between parties to a conflict and humanitarian laws and principles. The first issue is the counterpart's familiarity with these legal and normative frameworks. The second issue is the interests that can drive counterparts' behavior. Part 2 presents a framework for understanding how the interaction of these two factors — familiarity and interest alignment — can shape how the discourse of humanitarian negotiation proceeds. Part 3 addresses the impact of these same issues on the humanitarian side of the negotiation. In particular, there is the possibility that humanitarian actors might also lack familiarity with IHL and/or humanitarian principles and might find that their interests exist in tension with humanitarian laws and principles. The final section offers concluding remarks.

2. Parties to Armed Conflict and Humanitarian Laws and Principles: Two Key Factors to Consider

This section focuses on two particular aspects that are relevant to assessing the extent to which humanitarian laws and principles are likely to have traction in the discourse of the negotiation. The first element is the counterpart's familiarity with these laws and principles. The second element is the extent to which the counterpart's interests align with the content of IHL and humanitarian principles. The section, first, highlights why these two factors arise as salient elements of focus. To examine these two factors in greater detail, this section then draws on insights from existing literature, complemented by the findings from the research interviews on which this article is based.

a. Humanitarian Negotiation and Objective Standards of Legitimacy: A Brief Overview

There are a multitude of elements to analyze and consider when humanitarian actors prepare for negotiations with parties to armed conflict. Relevant factors include, for example, the counterpart's network of influence; the humanitarian organization's history of negotiating with the counterpart (either at the individual or organizational level); the humanitarian organization's reputation in the country; the substance of the negotiation itself; and the counterpart's interest, or lack thereof, in allowing humanitarian organizations to operate, a factor that shapes humanitarians' leverage and/or bargaining power.[8] A growing body of humanitarian negotiation guidance documents offers humanitarian actors instruction on how to structure thinking and planning around these issues.[9]

These guidance documents emphasize the importance of bringing norms — in particular, IHL and humanitarian principles — into the discourse of humanitarian negotiation. In this respect, humanitarian negotiation guidance tends to draw from, and build upon, the 'integrative' approach to negotiation discussed in this article's introduction.[10] For example, a humanitarian negotiation handbook that Mercy Corps produced is structured around seven elements of the 'integrative' approach, those being: relationship, communication, interests, options, legitimacy, alternatives, and commitment.[11] The handbook emphasizes that standards of legitimacy accepted by all parties to a negotiation 'are especially important in humanitarian access negotiations because international humanitarian law represents a powerful objective criterion in support of emergency assistance.'[12] Furthermore, the handbook continues, '[e]ffective references to the international norms and standards that govern emergency aid, as well as to humanitarian work in similar contexts (i.e. precedent), can persuade state and non-state actors to grant you access.'[13]

However, relevant guidance offers little instruction on how to navigate the various difficulties inherent in referencing IHL and humanitarian principles during humanitarian negotiation processes. A handbook published by the Centre of Competence on Humanitarian Negotiation does provide insights about how humanitarian negotiators' perceived sources of legitimacy can vary across different contexts.[14] This area nevertheless persists as a gap in guidance documents, as well as the still nascent yet emerging body of scholarship on humanitarian negotiation, that warrants further examination. The rest of this section probes more deeply two key factors relevant to consider in terms of wielding humanitarian laws and principles as useful objective standards of legitimacy during humanitarian negotiation processes. First, the counterpart's familiarity with this body of norms plays a role in how the humanitarian negotiator can and should directly reference humanitarian laws and norms. Second, the alignment between, on the one hand, the counterpart's individual and/or organizational interests, and on the other hand, the content of humanitarian laws and

---

[8] See generally Rob Grace, 'Humanitarian Negotiation: Key Challenges and Lessons Learned in an Emerging Field' (*Harvard Humanitarian Initiative,* 2015) <hhi.harvard.edu/sites/default/files/publications/negotiation_lessons_learned_4-15-15.pdf > accessed 9 January 2020.

[9] See generally Deborah Mancini-Griffoli and André Picot, 'Humanitarian Negotiation: A Handbook for Securing Access, Assistance and Protection for Civilians in Armed Conflict' (*Centre for Humanitarian Dialogue*, 2004) <www.hdcentre.org/wp-content/uploads/2016/07/Humanitarian-Negotiationn-A-handbook-October-2004.pdf > accessed 20 June 2019; Mc Hugh and Bessler (n 1); 'Playbook: Negotiating for Humanitarian Access' (*Mercy Corps,* 2018) <www.mercycorps.org/sites/default/files/NegotiatingForHumanitarianAccessPlaybook.pdf > accessed 3 November 2019; 'CCHN Field Manual on Frontline Humanitarian Negotiation' (*Center of Competence on Humanitarian Negotiation*, 2018) <www.frontline-negotiations.org/wp-content/uploads/2018/11/CCHN-Field-Manual-3.pdf > accessed 3 November 2019.

[10] See, for example, Mancini-Griffoli and Picot (n 9) 61-68.

[11] See generally Mercy Corps (n 9).

[12] Mercy Corps (n 9) 6.

[13] ibid.

[14] CCHN (n 9) 106-112.

principles can also shape the extent to which humanitarian laws and principles will likely play a role in bridging a gap between the positions of a humanitarian negotiator and those of his or her counterpart.

b. The Counterpart's Familiarity with Humanitarian Laws and Principles

One could place counterparts on a spectrum of high, medium, and low familiarity with humanitarian laws and principles. 'High familiarity' counterparts have an in-depth knowledge not only of the overarching principles of IHL and humanitarian principles but also the specific details of particular IHL rules. 'Medium familiarity' counterparts have some understanding of certain principles and/or rules but lack a firm grasp of key details of IHL. 'Low familiarity' counterparts have little to no knowledge of humanitarian laws and principles.

In terms of the variation across counterparts' familiarity with and understanding of humanitarian laws and principles, interviewees who have engaged with governmental authorities discerned differences between counterparts at the national level and those in more community-level environments. Indeed, humanitarian laws and principles, as one interviewee stated, 'are usually perceived as something esoteric at the community level when you're working at the grassroots… I personally am not really a proponent of talking about international law when we're in some town hall meeting, because it's just not going to resonate.' Another interviewee elaborated, 'except if we're dealing with the legal experts of the armed forces, the Ministry of Foreign Affairs, or the Ministry of Justice, I wouldn't recommend referring literally to IHL.' As this article will examine in great detail in Part 2, discussing humanitarian laws and principles with counterparts who lack appreciation for and/or knowledge of these frameworks, at a minimum, could fail to play a positive role in pushing the negotiation forward, or even worse, could escalate tensions.

The same distinction between counterparts at higher versus lower organizational levels also applies to NSAG counterparts. A Geneva Call study of 19 NSAGs, all of which had signed at least one Geneva Call deed of commitment and had received at least some training on humanitarian laws and/or principles, found that many high-level NSAG actors had some knowledge of the certain IHL norms and humanitarian principles.[15] However, interviewees' comments reveal a trend by which discourse rooted in humanitarian laws and principles fails to resonate with many lower level NSAG counterparts, suggesting that normative and legal familiarity at a high organizational level does not always filter down to the frontline interlocutors with whom many humanitarians in the field engage. This finding confirms previous research on NSAGs' perceptions of humanitarian workers. As the 2017 Aid Worker Security Report notes about humanitarian engagements with NSAGs, 'the concept of a professional humanitarian sector is alien to many of the cultural contexts in which it operates (despite the longstanding presence of aid organisations there).'[16]

One could conceptualize this finding in terms of a framework articulated in a 2004 handbook on humanitarian negotiation published by the Centre for Humanitarian Dialogue. The handbook discusses three 'levels' at which humanitarian negotiations occur. One level is 'high-level strategic,' encompassing '[s]enior humanitarian staff negotiating with one or more parties to the conflict at the highest political level of the state.'[17] An example would be '[n]egotiations with senior national authorities to start operations or to agree on the principles and procedures governing humanitarian action in the conflict zone.'[18] Although

[15] Ashley Jackson, 'In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action' (*Geneva Call*, 2016), 10 <www.genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WHS_Report_2016_web.pdf > accessed 14 December 2018.
[16] 'Aid Worker Security Report 2017 — Behind the Attacks: A Look at the Perpetrators of Violence Against Aid Workers' (*Humanitarian Outcomes*, 2017), 12 <www.aidworkersecurity.org/sites/default/files/AWSR2017.pdf > accessed 13 January 2020.
[17] Mancini-Griffoli and Picot (n 9) 21.
[18] ibid.

the specific dynamics at play depend greatly on the interlocutor and context, at this level — at least compared to the other two levels examined below — it is more likely that humanitarian negotiators will encounter interlocutors familiar with humanitarian laws and principles.

A second level is 'mid-level operational,' meaning negotiations undertaken by '[p]rogramme or project level humanitarian workers negotiating with regional or district level authorities.'[19] Examples include negotiations 'with a military commander of a conflict zone to define the duration and frequency of regular access to populations' and 'negotiations with Ministry of Health officials to set objectives for a public health assistance strategy involving the sites of new wells and the dates of urgent immunization campaigns for children in villages and camps for internally displaced persons (IDPs).'[20] The research findings suggest that, compared with 'high-level strategic' negotiations, the relevance of humanitarian laws and principles at this level is likely to be more mixed due to counterparts' disparate familiarity with this body of norms.

A third level is 'ground-level operational.' This level encompasses negotiations undertaken by '[p]rogramme or project level staff negotiating with junior level state and armed group authorities or community leaders.'[21] Examples include negotiations with village leaders or check-point negotiations with lower-level armed actors. Compared with the two levels discussed above, humanitarian laws and principles appear likely to have a lower degree of relevance at this level, although there are indeed exceptions, due to the fact that counterparts at this level are the least likely to be familiar with humanitarian laws and principles.

Additionally, interviewees, reflecting on their own experiences in the field, perceived that NSAGs generally tend to have a lower level of knowledge of humanitarian laws and principles than governmental interlocutors. Indeed, one could classify the high-level NSAG actors included in the Geneva Call study as 'medium familiarity' counterparts. As the Geneva Call study noted, 'when specifically questioned about the rules of IHL governing humanitarian access, the vast majority of ANSAs [armed non-state actors] consulted feel that they do not have a complete understanding of them and are not able to elaborate on what they entail.'[22] Similarly, a study based in part on interviews with members of 15 NSAGs in the Democratic Republic of the Congo found that these NSAGs 'appeared to have a good overall grasp of the principles, albeit with some erroneous interpretations of application and despite a sometimes patchy knowledge of the differences between the various aid workers (NGOs, UN and government agencies).'[23]

One should be cautious about overgeneralizing, but the aforementioned trends in terms of counterparts at higher versus lower organizational levels, as well as governmental versus non-government interlocutors, appears worthy for humanitarian actors to consider when planning for, as well as implementing, humanitarian negotiation processes. Additionally, as part 3 of this article examines in greater length, an important and related issue is that aid workers' own understanding of humanitarian laws and principles can be lacking. This limited understanding of humanitarian laws and principles can pose a challenge for humanitarian actors who seek to invoke these frameworks as objective standards in their negotiation processes. Part 2 of this article examines these challenges, as well as how such hurdles might be surmounted, in greater detail.

[19] ibid.
[20] ibid.
[21] ibid.
[22] Jackson (n 15) 14.
[23] Justine Brabant and Christoph Vogel, 'In Their Eyes: The Perception of Aid and Humanitarian Workers by Irregular Combatants in the Democratic Republic of the Congo' (*International NGO Safety Organisation*, March 2014), 13 <www.ngosafety.org/assets/uploads/pdf/03032014_In_Their_Eyes_EN1.pdf > accessed 13 January 2020.

Figure 1: Likely Familiarity with Humanitarian Laws and Principles at Three Levels of Negotiation[24]

Level	Actors	Likeliness of encountering counterparts familiar with humanitarian laws and principles
High-level Strategic	Senior humanitarian staff negotiating with one or more parties to the conflict at the highest political level of the State	High
Mid-level Operational	Program or project level humanitarian workers negotiating with regional or district level authorities	Medium
Ground-level Frontline	Program or project level staff negotiating with junior level State and armed group authorities or community leaders	Low

c. The Counterpart's Interests

The interview findings point to interlocutors' interests as another crucial factor that shapes the discourse of negotiations and influences the potential for a fruitful outcome. One interviewee, explaining the interaction of norms and interests in his persuasive efforts during negotiations, stated: 'it's not purely about norms. A good part is about norms. But it's also: "what's in it for me?" It's a mix between the two. It's a mix of how they see the interest to accept what you're saying, because of different aims that they have, but also the fact that it resonates with their own norms.' In the same vein, other interviewees spoke about the importance of 'persuad[ing] doubtful stakeholders of the added value you can provide to them;' 'proving what's in it for the other party, as long as it remains ethical, legal, and aligned with the principles you want to achieve;' and ensuring that 'the other party [has] at least the feeling that you will contribute something good or something positive for their community, or their group or team, or for them.'

What exactly are the interests that might drive a party to armed conflict toward, or away from, adherence to humanitarian laws and principles? One could group these interests into four categories. The first category consists of strategically-oriented interests. A wide body of scholarship highlights the ways that a counterpart's strategic interests and IHL norms can be genuinely conflictual. As one scholar has asserted, in wars of attrition (in which a party to the conflict aims to diminish the ability of the other side to wage war successfully), counter-guerilla wars (in which guerilla forces rely on direct material support from the civilian population), and wars with expansive aims (such as extensive territorial control or regime change), it is more likely that parties to a conflict will target non-combatants, in violation of IHL, as 'a means to persuade an enemy government (in a conventional war) or rebel group (in a guerilla war) to accede to the

[24] This figure is adapted from Table 2 in Mancini-Griffoli and Picot (n 9) 21. The first two columns draw language directly from the table, and the third column adds in expectations about the general relevance of humanitarian laws and principles, inferred from this article's research findings.

coercer's political or military demands.'[25] The aim of these parties is either to increase non-combatants' incentives to 'rise up and demand that their government end the war' or to 'undermine an adversary's military capability to resist.'[26] Various large-N empirical studies of combatants' behavior have also concluded that rebels in a weak military position have an incentive to target civilians to pressure governments to make concessions;[27] to terrorize the civilian population as a 'substitute' for fighting military battles;[28] to directly attack aid workers in order to undermine civilian support for the government;[29] or to target segments of the population potentially loyal to the adversary.[30] Evidence also suggests that identity factors — for example, ethnic or cultural differences — can influence combatants' propensity to punish the civilian population loyal to an adversary.[31]

The second category consists of repercussion-oriented interests. This category encompasses the possibility that violating IHL could lead to externally imposed repercussions. These repercussions could be rooted in reciprocity, meaning that one combatant's IHL violations could trigger violations by the opposing side.[32] From a legal standpoint, as the ICRC Customary IHL Database states, '[t]he obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.'[33] Nevertheless, in actuality, it does appear that in armed conflicts, one sides' compliance with certain norms can sometimes be contingent on compliance on the other side's part.[34] One interviewee mentioned using an argument rooted in reciprocity in relation to both detainee issues and siege warfare. For example, when an area was besieged, he would tell his counterpart, '[i]n six months, you might find yourself besieged.' The argument was based on the notion that, if the interlocutor granted access to the besieged area, in the future, if the interlocutor's group was besieged, there would be a greater likelihood that the other side would grant access to the humanitarian organization.

Repercussions could also be legal in nature. Indeed, interviewees discussed engaging with NSAG members who appeared genuinely concerned about the possibility that their behavior could be investigated, and potentially ultimately prosecuted, by the International Criminal Court (ICC). Empirical studies also suggest

[25] Alexander Downes, *Targeting Civilians in War* (Cornell University Press 2008) 4; Benjamin Valentino, Paul Huth and Sarah Croco, 'Covenants without the Sword: International Law and the Protection of Civilians in Times of War' (2006) 58(3) World Politics 339.
[26] Downes (n 25) 4.
[27] See generally Lisa Hultman, 'Battle Losses and Rebel Violence: Raising the Costs for Fighting' (2007) 19(2) Terrorism and Political Violence 205.
[28] See generally Jean-Paul Azam and Anke Hoeffler, 'Violence against Civilians in Civil Wars: Looting or Terror?' (2002) 39(4) Journal of Peace Research 461.
[29] See generally Neil Narang and Jessica Stanton, 'A Strategic Logic of Attacking Aid Workers: Evidence from Violence in Afghanistan' (2017) 61(1) International Studies Quarterly 38.
[30] See generally, for example, Stathis Kalyvas, *The Logic of Violence in Civil War* (Cambridge University Press 2006); and Kentaro Hirose, Kosuke Imai, and Jason Lyall, 'Can Civilian Attitudes Predict Insurgent Violence? Ideology and Insurgent Tactical Choice in Civil War' (2016) 54(1) Journal of Peace Research 47.
[31] See generally Stuart Kaufman, 'Symbolic Politics or Rational Choice? Testing Theories of Extreme Ethnic Violence' (2006) 30(4) International Security 45; and Tanisha Fazal and Brooke Greene, 'A Particular Difference: European Identity and Civilian Targeting' (2014) 45 British Journal of Political Science 829.
[32] See generally Eric Posner, 'A Theory of the Laws of War' (*University of Chicago Law School*, 2002) <www.chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1019&context=law_and_economics > accessed 14 December 2018; and Eric Posner, 'Human Rights, the Laws of War, and Reciprocity' (2013) 6(2) The Law & Ethics of Human Rights 147.
[33] 'Rule 140. Principle of Reciprocity' ICRC Customary IHL Database <www.ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140 > accessed 14 December 2018.
[34] For a social scientific analysis of the role of reciprocity in IHL compliance, see generally James Morrow, *Order Within Anarchy: The Laws of War as an International Institution* (Cambridge University Press 2014).

that the shadow of ICC prosecution can be a restraining factor in terms of combatants' wartime conduct.[35] Although, the shadow effect of the ICC could also give combatants reason to prevent access for humanitarian organizations due to the fear that humanitarians might witness incidents or collect testimonies that would prove incriminating.[36]

The third category consists of legitimacy-oriented interests. Some legitimacy-seeking governments and NSAGs might have an interest in demonstrating adherence to IHL during an armed conflict to secure political support from domestic and/or international audiences.[37] Although, it is important to highlight that this element relates solely to political, not legal, legitimacy. Indeed, Common Article 3 of the Geneva Conventions of 1949 makes clear that its provisions 'shall not affect the legal status of the Parties to the conflict.'[38] Nevertheless, as another interviewee noted of negotiating with legitimacy-seeking NSAGs:

> 'In some cases, just meeting with the other side and giving a non-state armed group the validity of having met officially with the UN constitutes persuasion enough — i.e., going to the field, meeting with them, recognizing them as an interlocutor, is an important step in achieving what they want. They want legitimacy, they want to be recognized, they want to be seen as equal to the government they're trying to overthrow or fighting against or trying to separate from, as the case may be. And so, having the UN, for what it's worth, go out and say, "We recognize you as an interlocutor. We want to deal with you," is part of it.'[39]

Interviewees also relayed experiences operating in territories controlled by authorities, governmental and non-state alike, that had an interest in attending to the needs of its population.[40] One interviewee noted of humanitarian assistance in such contexts:

> 'The leverage is the government doesn't want to pay for it. [...] They're not going to be able to afford it within their own public systems. So the negotiation angle is, "We're going to take care of this burden for you." That's the leverage point. But ultimately […] it is, in a way, a very political leverage point. Because you've got authorities that have pressure on them to be doing something, and if you can step in and do it for them, or you can step in and make it so that issue is somehow reduced for them, that eases their job, in a way.'

The fourth category consists of capacity-oriented interests. Organizational capacity limitations can lead to incentives to commit IHL violations as a means of cultivating organizational cohesion. For example, one scholar has argued that 'wartime rape may be the result of a violent socialization process that takes place

---

[35] See generally Hyeran Jo and Beth Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70(3) International Organization 443.

[36] See generally Melissa Labonte and Anne Edgerton, 'Towards a Typology of Humanitarian Access Denial' (2013) 34(1) Third World Quarterly 39.

[37] See generally Hyeran Jo, *Compliant Rebels* (Cambridge University Press 2015); Jessica Stanton, *Violence and Restraint in Civil War* (Cambridge University Press 2016). On the role of third-party States in inducing IHL compliance, see also Alyssa Prorok and Benjamin Appel, 'Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War' (2014) 58(4) Journal of Conflict Resolution 713. Also, for an experimental study that demonstrates the legitimizing effects that IHL can have in terms of public opinions regarding foreign policy choices, see generally Adam Chilton, 'The Laws of War and Public Opinion: An Experimental Study' <www.chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2353&context=law_and_economics > accessed 14 December 2018.

[38] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention) art 3.

[39] For additional discussion of this aspect of humanitarian negotiation, see McHugh and Bessler (n 1) 14.

[40] Previous research has also examined this issue in various contexts. See, for example, Brabant and Vogel (n 23) 14.

among the rank and file of combatant groups, especially groups with low levels of internal cohesion.'[41] This element can be relevant for NSAGs and governments alike. Various scholars have also examined the role that internal organizational monitoring and enforcement of individual combatants' behavior plays in patterns of IHL compliance.[42] If an organization lacks an incentive and/or the capacity to monitor and sanction non-compliance, as well as train combatants in IHL, then individual combatants' personal preferences could take precedence.[43] Along these lines, one member of al-Shabaab (AS) has stated,

> '[m]ost of the members are youngsters who are not paid regularly and are highly charged and emotional as a result of the constant indoctrinations to keep them going… This freedom they have, to do what suits them with impunity, is also part of AS's way of keeping their soldiers highly motivated. They are not paid, hence are left to follow their instincts to destroy and feel high. This is a kind of payment.'[44]

It is also possible that military or political leaders at the senior level could have an interest in preventing or mitigating civilian victimization but remain unable to successfully restrain lower level fighters due to command and control issues.[45] It is thus the case that bringing humanitarian laws and norms directly into a humanitarian negotiation process would have little utility if the interlocutor has no organizational capacity to actually abide by IHL and respect humanitarian principles, even if the interlocutor has an individual desire to do so.

Another important dimension, as one scholar writes, is that 'various issues [encompassed by IHL] provide varying levels of opportunities for individuals to commit violations, [so one should expect] overall levels of compliance [to] vary across issues.'[46] For example, one would expect IHL violations at sea to be rarer since acts in that domain require commands from high-level officers, distinct from harm inflicted by individual soldiers, for example, in relation to detainee treatment and civilian targeting. For such issues, the extent to which the party to the conflict successfully implements appropriate training and disciplinary measures will play a key role in IHL compliance.[47]

---

[41] Dara Kay Cohen, *Rape During Civil War* (Cornell University Press 2016) 17.

[42] For example, see generally Marcatan Humphreys and Jeremy Weinstein, 'Handling and Manhandling Civilians in Civil War' (2006) 100(3) American Political Science Review 429; Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press 2007); Reed Wood, 'Rebel Capability and Strategic Violence Against Civilians' (2010) 47(5) Journal of Peace Research 60; Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' *(International Committee of the Red Cross,* 2004) <https://www.icrc.org/en/publication/0853-roots-behaviour-war-understanding-and-preventing-ihl-violations > accessed 9 January 2020; and Fiona Terry and Brian McQuinn, 'The Roots of Restraint in War' *(International Committee of the Red Cross,* 2018) <https://www.icrc.org/en/publication/roots-restraint-war > accessed 9 January 2020. For a theory that emphases this aspect of IHL as an essential element in IHL's emergence and evolution, see generally Eyal Benvenisti and Amichai Cohen, 'War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective' (2014) 112(8) Michigan Law Review 1363.

[43] For empirical analyses of this issue in relation to U.S. military and foreign policy decision-making, see generally Laura Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104(1) American Journal of International Law 1; Michael Scharf, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate' (2009) 31 Cardozo Law Review 45; and Andrew Bell, 'Leashing the "Dogs of War": Examining the Effects of LOAC Training at the U.S. Military Academy and in Army ROTC,' Proceedings of the Annual Meeting (2014) 108 CUP 370, 373.

[44] Humanitarian Outcomes (n 16) 17.

[45] See generally, for example, Nicholai Hart Lidow, *Violent Order: Understanding Rebel Governance through Liberia's Civil War* (Cambridge University Press 2016).

[46] Morrow (n 34) 116.

[47] ibid.

3. Laws and Principles in the Discourse of Humanitarian Negotiation: Four Possible Trajectories

This section examines how the two factors discussed above — the counterpart's familiarity with humanitarian laws and principles and the counterpart's interests — interact, resulting in four possible trajectories. The first potential trajectory is the production of a fruitful normative discourse in which humanitarian laws and principles have notable traction in the negotiation. The second involves normative gap bridging in which the humanitarian negotiator seeks either to turn to other sources of norms that align with IHL and humanitarian principles or to cultivate the counterpart's understanding of these laws and principles. The third is a (less fruitful) normative stalemate in which the counterpart can use humanitarian laws and principles against the humanitarian negotiator. The fourth possible trajectory is a lack of normative traction, meaning the humanitarian negotiator is unable to forge common normative ground with the counterpart. The rest of this section will sequentially examine each of these trajectories.

Figure 2: Four Possible Trajectories

		Relationship between counterparts' interests and humanitarian laws and principles	
		Aligns	**Conflicts**
Counterparts' familiarity with humanitarian laws and principles	**High or Medium**	Fruitful normative discourse	Normative stalemate
	Low	Normative gap bridging	Lack of normative traction

a. Fruitful Normative Discourse

When a counterpart's interests align with humanitarian laws and principles and the counterpart has a high, or even medium, level of familiarity with these legal and normative frameworks, fruitful normative discourse rooted in IHL and humanitarian principles can unfold. According to one interviewee, 'there are contexts that are so legalistic or normative that, if you win the legal argument, you basically… achieve the humanitarian objective.' In the words of another interviewee, 'when you are faced with a counterpart who knows the law, as well as the work of the organizations,' IHL and humanitarian principles can prove to be useful.

In particular, interviewees discussed fruitful negotiations that incorporated humanitarian laws and principles into the discourse with counterparts who had legitimacy-oriented interests (for example, NSAGs seeking a connection to the international community or local authorities desiring to demonstrate their ability to attend to the needs of their people), as well as repercussion-oriented interests (for example, combatants desiring that the other side treat detainees in accordance with IHL or counterparts concerned with international legal ramifications of their actions). Conversely, interviewees articulated difficulties in

negotiations when interests that were strategically-oriented or capacity-oriented led a counterpart to have a propensity to violate IHL.

For certain interlocutors, state actors in particular, humanitarians have benefitted from highlighting the consent-based nature of IHL.[48] Interviewees also highlighted that engaging on the basis of international law could be useful in terms of conceptually connecting the humanitarian negotiator to the broader international community. As one interviewee stated, 'you really have to be sure they understand what international humanitarian law is. They really have to have the feeling that they are not dealing only with you, they are dealing with international actors, and sometimes they are dealing even with other countries.' Turning beyond international law, the consensual nature of other formal documents — for example, letters of agreement, operational documents, and memoranda of understanding — signed by various parties have also played an important role in humanitarian negotiations. One interviewee emphasized the particular value of such documents as a reference point in negotiations with government actors, noting that, in his experience, parties have generally strived to abide by such agreements.

Nevertheless, it is also important to note that contexts in which humanitarian laws and principles play a prominent and explicit role in the discourse do not appear to be the norm for humanitarian negotiation.[49] The words of one interviewee capture this reality:

> 'For me, [international law is] always very much in my mind in a negotiation. But I have to say, honestly, very rarely have I felt that it was at the core of a negotiation… But even when you don't bring the law into a negotiation, I would say it's always there, one way or another, implicitly for you and your interlocutor. It's always in the minds of the interlocutor, especially when you engage with Member States. When you engage with States, I have to say, for me, I like to think about IHL as some sort of benchmarks or red lines to use — "the non-negotiable." …It provides you with a sort of ethical framework to make sure that you are a principled pragmatist or a principled realist…'

As these comments suggest, whether or not humanitarian actors bring IHL and humanitarian principles explicitly into the discourse of negotiations, these laws and principles can play an important role in implicitly framing the discussion.

b. Normative Gap Bridging

When a counterpart's interests align with IHL and humanitarian principles, but the counterpart has a low familiarity with these sets of norms, humanitarian actors often turn to normative gap bridging. There are two possible routes toward achieving this end. First, humanitarian actors can strive to inform their counterparts about the content of IHL and humanitarian principles.[50] This possibility can be especially important given the aforementioned fact that humanitarians often operate in contexts where local actors lack prior familiarity with the principles that undergird humanitarian action.

---

[48] See Marco Sassoli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1(1) Journal of International Humanitarian Legal Studies 5, 29.

[49] For an overview of the role of 'law talk,' as well as other modes of persuasive discourse that humanitarian actors — specifically the ICRC — use in persuasive efforts to promote IHL compliance, see generally Steven Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War' (2011) 22(2) The European Journal of International Law 459.

[50] Although, see Sassoli (n 48) 28, which notes that IHL dissemination 'must begin during peacetime, for once an armed conflict breaks out, with its heightened levels of animosity and polarization, it is often too late to learn the applicable rules and to alter practices accordingly.'

Second, humanitarians can 'translate' IHL rules and humanitarian principles into values, laws, or norms drawn from other normative or legal frameworks that might more effectively resonate with the counterpart. Interviewees discussed how the need for a common normative framework can propel negotiators toward other sources of laws and principles. In the words of one interviewee, 'you need to go beyond IHL. You need to have a common normative framework with anybody with whom you're discussing. Otherwise, you cannot discuss anything.' Sometimes moving beyond international law has allowed interviewees to depoliticize negotiations. For example, one interviewee mentioned that, for medical issues, rooting arguments not in international law but in the notion of 'duty of care' was more productive.

Along these lines, interviewees discussed, in particular in relation to negotiations with governmental actors, the role that national laws can play in the discourse of humanitarian negotiation. One interviewee discussed his experiences emphasizing with counterparts 'how the national norms have already integrated the general norms of humanitarian principles.' Another interviewee concurred, stating, 'when you raise arguments about certain conditions, be it of detention or conditions with regard to the civilian population, it can be a stronger argument if you come with the national legislation.' Additionally, several interviewees discussed the possibility of bringing cultural norms or religious values into the discourse of negotiations. As one interviewee emphasized, 'IHL also draws a lot of its heritage from previous existing norms and rules, among which are Islam, Buddhism, Christianity, Taoism, and Judaism. So it's not something that comes without direct links to what existed before.'[51] Interviewees also spoke about ways in which during negotiations they have appealed to general notions of humanity. One interviewee discussed addressing the shelling of civilians with a counterpart, stating, 'we'd make legal reference to the obligations of the parties… We would mention IHL as a matter of principle, but the arguments were mainly about values.' As one interviewee described, the overarching strategy is to 'make the norms appear appealing and understandable and rooted in the common sense, the culture, the principles of your interlocutor.'

However, there are four potential pitfalls to a strategy of norm 'translation.' First, essential tensions can exist between certain local and international norms.[52] For example, one interviewee described negotiating with an NSAG whose ideology conflicted with norms of humanitarian action. This interviewee stated, speaking specifically of the principle of impartiality, by which humanitarians seek to design programming based on needs:

> 'We come in with a very specific view that we must reach the most vulnerable, which doesn't always align well with local perspectives and local views. Particularly in Kurdish areas, where we're working, where they have a much more socialist approach, "everybody gets something." There are multiple cases, not just for us but also for other organizations, where you do distributions to the most vulnerable, the local power brokers come in, collect everything you distributed, and redistribute so that everybody gets something.'

Second, even though a certain normative framework may facilitate one goal, other aspects of that framework may run into stark contradiction with humanitarians' aims, leading a humanitarian negotiator to become 'caught' within the rubric of an ultimately very problematic set of norms. As one interviewee elaborated:

> 'If we start exchanging on the basis of values and trying to identify common values, you might be trapped into a corner where you don't want to associate with the values of the other side… I think

[51] For an examination of these issues, see Omar Mekky, 'An Unwarranted Human Sacrifice in the Middle East' (*ICRC Humanitarian Law & Policy Blog*, 26 September 2016) <www.blogs.icrc.org/law-and-policy/2016/09/26/human-sacrifice-middle-east/ > accessed 14 December 2018.

[52] For a discussion of NSAG perceptions that the activities of humanitarian organizations have violated religious or cultural norms, see Humanitarian Outcomes (n 16) 14.

about the example of finding points of convergence between IHL and Islamic law, about the principle of humanity. But then, what if we continue exchanging on the basis of common values and we need to have a debate about Sharia law, and the other side believes that this is the natural outcome of the exchanges that we had previously about values. I wouldn't be able to associate myself with certain aspects of Sharia law — for example, harsh physical punishment. So, while we need to identify and understand the values of the other party, we have to be cautious while using values in negotiation processes.'[53]

Similarly, national laws could be problematic for humanitarian aims. Indeed, this issue can affect humanitarian actors who work in countries where, for example, the legal system suffers from a lack of due process or where national counterterrorism laws criminalize humanitarian action for particular actors.[54]

Third, the utility of national laws, or other norms relevant in the local context, also depends on the extent to which the counterpart accepts and understands that normative or legal framework. In the words of one interviewee on the relevance of national law in the discourse of humanitarian negotiation, 'if it's the States, the government, yes, maybe it's more effective. If you're dealing with an armed group that is opposing the State, then national law is useless.' Interviewees also observed differences across centralized versus localized contexts. One practitioner stated of Afghanistan, 'from Kabul, the law is reasonably well understood. At the provincial level, vaguely understood. At the district level, not understood at all… If they don't understand it, then it's not something you can actually use.' In the words of another interviewee, 'In many fragile States, the local legal structures are not very important, nor do they carry much weight, in negotiations, especially where traditional power structures are more important than formal government power structures.'

Fourth, there is a risk, especially for international staff, of having a comparatively lower level of knowledge of the local normative framework relative to their local counterparts. Interviewees raised concerns that, in many instances, both sides of the negotiation might lack the specific capacities to comprehensively engage on the same normative basis. Just as the counterpart might lack familiarity with IHL, the humanitarian negotiator might lack adequate knowledge of local laws and/or norms.

c. Normative Stalemate

If the counterpart is knowledgeable about IHL and humanitarian principles but does not have an interest in abiding by them, or if the humanitarian negotiator and the counterpart disagree on their interpretation of laws and/or principles, humanitarian negotiators who integrate humanitarian laws and principles into the negotiation discourse might find that they slip into what one could call a normative stalemate.[55] In such scenarios, the counterpart has the capacity to successfully engage in legal and normative discourse, but engaging on this level is unlikely to be productive. Instead, discussing humanitarian laws and principles

[53] For more on the overlap and tensions between IHL and Islamic law, see generally Nesrine Badawi, 'Islamic Jurisprudence and the Regulation of Armed Conflict' (*Program on Humanitarian Policy and Conflict Research Harvard University*, February 2009) 2, <www.reliefweb.int/sites/reliefweb.int/files/resources/8FC97823516EEEDA4925762E001ABDA8-Harvard_Feb2009.pdf > accessed 14 December 2018; and Heba Aly, 'Islamic Law and the Rules of War' (*The New Humanitarian*, 24 April 24 2014) <www.thenewhumanitarian.org/analysis/2014/04/24/islamic-law-and-rules-war > accessed 20 June 2019.

[54] For example, see generally Dustin Lewis, Naz Modirzadeh, and Gabriella Blum, 'Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism' (*Harvard Law School Program on International Law and Armed Conflict*, September 2015) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2657036 > accessed 14 December 2018.

[55] The author extends thanks to Julia Brooks for suggesting the term 'normative stalemate' to describe this phenomenon.

might actually increase tensions if there are disagreements over facts or legal interpretations. It is also possible that the counterpart might be able to use the law against the humanitarian negotiator by exploiting 'grey' areas in the law, where a lack of clarity, or an array of different possible interpretations, could allow a skilled interlocutor to use the law to undermine a humanitarian negotiator's objectives. In this sense, the result is a normative stalemate, in which discourse rooted in IHL and humanitarian principles proceeds but actually leads the humanitarian negotiator to become 'stuck.'

Interviewees discussed numerous relevant examples in which humanitarian negotiators found themselves caught in unproductive legal argumentation rooted in IHL and humanitarian principles. One interviewee negotiated with a counterpart who invoked the Geneva Conventions to justify blanket access denial to all humanitarian organizations except the ICRC. This interlocutor argued that the Geneva Conventions do not require governments to grant access to more than one humanitarian organization, claiming that, since the government was allowing the ICRC to operate in its territory, other humanitarian organizations could legitimately be denied access. An interlocutor might also not accept the existence of an armed conflict, and hence, the applicability of IHL. In such instances, incorporating the law into the discourse of a negotiation could yield more problems than solutions. Interviewees also discussed instances in which a counterpart embraced the discourse of IHL but only, as one interviewee stated, in a 'bad-faith' manner. This interviewee elaborated on one operational environment in which he worked:

> 'The national and local governments were incredibly sensitive to their public image, so they were never going to admit to doing something which was violating international law. They were very conscious in all the messaging that they were supporting international law. It was bad-faith readings for the most part, but nevertheless, they didn't want to engage with a question about whether or not IHL is valid, whether or not it applies. They accepted it in principle, but then undermined it at every opportunity they could in practice.'

Conversely, humanitarian actors have found during negotiations that some NSAGs have a skeptical, or even hostile, view of IHL. As one author has written, various NSAGs have criticized the 'State-centric nature of international law, particularly regarding the need to obtain consent [for humanitarian access] from host states.'[56] Additionally, NSAGs 'often believe that international law, and the international legal and security architecture, are inherently or practically biased against them.'[57] In such negotiations, discourse rooted in IHL evokes a critique of the law itself as an appropriate normative framework.

d. Lack of Normative Traction

When engaging with counterparts who lack both familiarity with, and an interest in abiding by, humanitarian laws and principles, humanitarian negotiators are likely to struggle to cultivate a mode of normative discourse that gains any traction. One interviewee discussed the difficulties that can arise in negotiations 'when parties don't speak the same conceptual language or when there are not mutual interests.' Other interviewees affirmed working in contexts where humanitarian objectives and the strategically-oriented interests of the parties to the conflict appeared to be in stark tension with one another.

---

[56] Jackson (n 15) 13. For an example of NSAG frustration over the need for humanitarian organizations to obtain State consent, and the perception that humanitarians have been too deferential to State-imposed access restrictions, see Irina Mosel and Ashley Jackson, 'Talking to the Other Side: Humanitarian Negotiations in Southern Kordofan and Blue Nile, Sudan' (*Humanitarian Policy Group*, 2013) 10 <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8591.pdf > accessed 14 December 2018.

[57] Marina Mattirolo, Stuart Casey-Maslen, and Alice Priddy, 'Reactions to Norms: Armed Groups and the Protection of Civilians' (*Geneva Academy of International Humanitarian Law and Human* Rights, January 2014), 13 <www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Policy%20Briefing/Geneva%20Academy%20Policy%20Briefing%201_Amed%20Groups%20and%20the%20Protection%20of%20Civilians_April%202014.pdf > accessed 14 December 2018.

One interviewee stated of access negotiations, 'In some environments you're negotiating with a government that does not want you to work in an area, regardless of the impact of your activities. In fact, the impact can be a negative thing because they want these people to suffer, they want these people to die.'

In such contexts, a negotiated outcome might not be possible. As the above interviewee described, negotiations with the government 'were never going to succeed,' and as a result, 'the only option was to access the area from the neighboring country, which in the end we chose to do.' Another interviewee discussed the lack of traction that discourse rooted in humanitarian laws and principles can have in a highly emotionally charged frontline environment. He asserted:

> 'The rebels were on the front line. Very polarized, very emotional. They had also had their people killed around them. And then asking them to take care of the enemies was very difficult for them to accept. You can tell them that IHL obliges them to treat the enemy, this is a rule, but, when it comes to the frontline, an emotional and polarized situation, it was very difficult to use this argument actually. We used it the first two nights. But they were not listening to us and we were not listening to them. We were saying, "IHL requires you to respect this and to accept and treat these wounded in the hospital." And they were saying, "You are crazy. They are the enemy. My friend or my brother was killed. And we don't accept that."'

Such contexts differ from those where IHL and humanitarian principles can lead humanitarian negotiators toward a normative stalemate, as discussed above. In contrast, in situations where the counterpart lacks not only an interest in abiding by IHL and humanitarian principles but also familiarity with the law, discourse rooted in humanitarian laws and principles does not even resonate at all.

4. The Humanitarian Side of the Negotiation

The analysis thus far has not grappled with the key elements examined — familiarity with IHL and humanitarian principles, as well as the interests at play — in terms of the humanitarian side of the negotiation. This section fills this gap by discussing instances when humanitarian actors lack sufficient knowledge of IHL and humanitarian principles and when humanitarian actors are guided by regulatory frameworks — such as counterterrorism legislation and/or donor contracts — that cause their interests and/or behavior to diverge from humanitarian laws and principles.

a. Humanitarians' Familiarity with Humanitarian Laws and Principles

The ability to use laws and principles effectively in negotiation at all — as an implicit framing device or as an explicit component of the negotiation discourse — hinges on whether the humanitarian negotiator has sufficient knowledge of humanitarian laws and principles, as well as an understanding of how to integrate those laws and principles strategically into the negotiation process. A key issue that interviewees, especially those with legal expertise, repeatedly raised is humanitarian negotiators' general lack of knowledge of international legal norms. Along these lines, one practitioner stated, 'many, or maybe even most, humanitarian organizations don't know how to work in conflict areas. Their staff are not clear on international humanitarian law. There's no training done on IHL or international human rights law. I just feel like it's something that's poorly understood.'

These comments suggest the important role that cultivating knowledge of humanitarian laws and principles could play in humanitarian negotiation capacity building efforts. However, the interview findings also suggest that it is important to train practitioners not only on the content of humanitarian laws and principles but also on how and when these legal and normative frameworks can be useful for humanitarian actors when engaging with interlocutors in the field. Such capacity building efforts, of course, will not be a panacea for humanitarian negotiation difficulties. As another interviewee stated, 'Even though I am an

international lawyer, [and] the organization I work for strongly emphasizes the need to respect IHL, the fact of the matter is that international law has hardly played any role in the negotiations I have conducted.' Indeed, even humanitarian actors with an in depth understanding of humanitarian laws and principles might still find it to have little to no practical value, depending on contexts where they work, the counterparts with whom they engage, and the substantive issues that they negotiate. Nevertheless, the ways in which humanitarian laws and principles can help frame a negotiation or even help to push forward a negotiation suggest that the law can be a potentially valuable tool to have at the humanitarian negotiator's disposal.

b. Humanitarian Organizations' Interests

Interviewees discussed the fact that their approaches to negotiations are shaped not only by the international legal frameworks commonly associated with humanitarian action — including IHL and humanitarian principles — but also by other regulatory frameworks, such as counterterrorism laws, as well as policies and regulations required by donor contracts. In this vein, interviewees discussed contexts where they did not engage with certain NSAGs because doing so was proscribed by the State, and consequently, humanitarian workers faced the threat of prosecution. One interviewee discussed related issues but framed the discussion as a donor-driven phenomenon:

> 'The reality is that you have humanitarian needs in areas controlled by groups who are on the opposite side of the fence from a lot of our donors. Donor accountability is at such a stage now that, the terms put on you to operate within these areas, they're not impossible, but they're pretty damn near there… These things make it much more difficult to work because, rather than the flexibility to deal with the complex scenario on the ground, you're trying to make sure that you are complying with your donor regulations.'

According to this interviewee, 'international humanitarian law creates the framework for how you approach these things. But then, you have the framework of your compliance with your donor, which has a massive impact on your ability to work.' Another interviewee stated of the impact of donor interests, '[Donors] have pushed for certain humanitarian action to take place by flooding it with funds. They expect that action to occur regardless, at times, of whether you think this is the right thing to be doing, or whether you're trying to negotiate with them to possibly focus on another angle or another area. Sometimes the interests override the imperative itself.'[58]

In one situation that an interviewee described, an NGO operated under a government donor contract that proscribed negotiation with all NSAGs in the country. The contract was shaped by the donor government's concern about violations of counterterrorism laws, a pervasive issue for humanitarian organizations operating in environments where Islamic extremist groups, or other NSAGs designated as terrorists by domestic or international bodies, are present.[59] The interviewee said about this contract term, which inhibited the organization from engaging with NSAGs:

> 'What does that mean? With our donors, are they talking about not negotiating, as in somehow giving the non-state armed groups more leverage? Are they saying that we shouldn't be giving them payments in order to have access to areas? Or is it something as simple as day-to-day negotiation at roadblocks? That is something that… you have to do. Otherwise, you don't get five kilometers down the road, because there are roadblocks everywhere. And they are manned by non-

[58] For an example in which humanitarian organizations faced 'political criticism' rooted in concerns about 'hidden political agendas,' as well as critiques of humanitarians' technical competency, see Brabant and Vogel (n 23) 15-19.
[59] See generally Naz Modirzadeh, Dustin Lewis, and Claude Bruderlein, 'Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape' (2011) 93(883) International Review of the Red Cross 623.

state armed groups. So you have to speak to those people. Whether you're giving them some sort of leverage by doing that, or whether they're just asking what you're doing and waving you through, those things can potentially be seen as negotiations.'

This example indicates the challenges of navigating the various regulatory frameworks under which humanitarians operate. Just as counterterrorism laws and policies create a framework that conflicts with the traditional international humanitarian legal architecture by criminalizing the delivery of humanitarian services to individuals associated with groups designated as terrorist entities, a donor contract that proscribes negotiation — increasingly acknowledged as a core aspect of humanitarian action — exists in tension with basic operational feasibility requirements. Nevertheless, it is clear that, in addition to the challenges inherent in developing the capacity to use humanitarian laws and principles strategically, humanitarian practitioners sometimes must also grapple with regulations that can hinder the ability to operate in an effective and principled manner.

These issues relate to a strand of scholarship that analyzes humanitarian organizations as bureaucratic entities driven to ensure their own organizational survival, sometimes at the expense of the actual humanitarian situation on the ground.[60] Indeed, it can be the case that humanitarian organizations fail to meaningfully serve local actors' humanitarian needs or even exacerbate certain local actors' vulnerabilities.[61] These dynamics present a set of humanitarian negotiation challenges that are internal in nature. As these comments suggest, in addition to navigating the numerous external challenges discussed throughout this article, the individual humanitarian negotiator also needs to engage with internal dynamics that can drive a humanitarian organization to actually work against the aims of humanitarian laws and principles.

Conclusion

This article has offered a framework for understanding the role that discourse rooted in IHL and humanitarian principles can play in humanitarian negotiation processes. As this article has explained, humanitarian actors negotiating with parties to armed conflict have engaged in fruitful normative discourse (with counterparts knowledgeable about humanitarian laws and principles and with interests compatible with humanitarian aims); undertaken normative gap bridging (with counterparts who had compatible interests but lacked knowledge of IHL and humanitarian principles); fell into normative stalemates, meaning that counterparts engaged in legal and normative discourse but in a manner that did not facilitate humanitarian aims (with counterparts familiar with IHL and humanitarian principles but with incompatible interests); and had engagements in which normative discourse lacked meaningful traction (with counterparts unfamiliar with humanitarian laws and principles and with incompatible interests). Additionally, humanitarians' familiarity (or lack thereof) with humanitarian laws and principles and deference to other potentially conflictual regulatory frameworks can constitute additional complicating factors in humanitarian negotiation processes.

[60] For example, see generally Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004); David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004); and Christopher Coyne, *Doing Bad by Doing Good: Why Humanitarian Action Fails* (Stanford University Press 2013).

[61] For case studies in which these issues have arisen, see generally Alexander Cooley and James Ron, 'The NGO Scramble: Organizational Insecurity and the Political Economy of Transnational Action' (2002) 27(1) International Security 5; and Emmanuel Tronc, Rob Grace, and Anaïde Nahikian, 'Humanitarian Access Obstruction in Somalia: Externally Imposed and Self-Inflicted Dimensions' (*Harvard Humanitarian Initiative*, 2018) <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3284256 > accessed 4 November 2019.

It remains worthy to investigate further the extent to which the issues that this article has examined are unique to humanitarian negotiation. It is likely that examining humanitarian negotiation through the lens of broader negotiation scholarship could further illuminate the nature of the challenges related to the role of laws and principles, as well as how these challenges can be surmounted. Whereas this article, as a first step, has offered a preliminary examination of humanitarian negotiation through concepts drawn from the 'integrative' negotiation model, it appears important to push further in this direction, with the aim of exploring how negotiation theory can inform humanitarian negotiators' practices.

Additionally, the issues that this article has explored point toward the question of the role that training in humanitarian laws and principles can and should play in capacity building efforts across the humanitarian sector. On the one hand, the fact that many interviewees viewed IHL as irrelevant to their wok in the field suggests the limited utility of IHL in humanitarian negotiation with many interlocutors. Furthermore, as this article has discussed, bringing IHL explicitly into the discourse of a negotiation can even be counterproductive. On the other hand, interviewees discussed instances when humanitarian laws and principles have proved useful. In what ways can and should humanitarians use IHL as a tool during humanitarian negotiations? How can and should capacity building efforts prepare humanitarian actors to leverage the potential usefulness of IHL, and conversely, to avoid the potential pitfalls that sometimes emerge when referencing these norms during the course of a negotiation? This article has sought to provide a framework to guide further thinking about these questions.

Acknowledgements

The research for this article was undertaken under the auspices of the Harvard Humanitarian Initiative, with funding from the Swedish International Cooperation Agency, fund number: 210665. The author extends gratitude to Steven Wilkinson, who co-authored a preliminary report upon which this article builds. The author also thanks Anaïde Nahikian, who collaborated on designing the interview methodology and conducting the interviews, and also offered useful comments. The author also benefitted from comments and suggested edits received from Julia Brooks, Ashley Jackson, Omar Mekky, Hugues Robert, Emmanuel Tronc, and two anonymous reviewers. Serena Hajjar provided invaluable support by transcribing interviews, as did Meredith Blake and Edward Young. Any mistakes remain those of the author.