

## **Preliminary Report on the Role of Laws and Norms in Humanitarian Negotiations**

**September 2016**

**Advanced Training Program on Humanitarian Action  
Harvard Humanitarian Initiative  
Harvard T. H. Chan School of Public Health**

**By Rob Grace and Stephen Wilkinson**

This preliminary report has been produced as part of a research study being conducted by the Advanced Training Program on Humanitarian Action (ATHA), based at the Harvard Humanitarian Initiative (HHI) at the Harvard T. H. Chan School of Public Health. Responding to growing demands for more information, analysis, and policy reflection about humanitarian negotiation, the research study aims to produce a series of working papers that examine various thematic areas and professional dilemmas relevant to practitioners engaging in negotiations related to humanitarian assistance and protection. This working paper series will be based in part on extensive interviews conducted by ATHA with professionals with in depth humanitarian negotiation experience.

The particular focus of this preliminary report is the role that laws and norms play in humanitarian negotiations. The report is based on an initial set of 35 interviews that ATHA conducted with humanitarian professionals between May and August 2016. This document will sketch out ATHA's preliminary findings and analysis. The report aims toward a working paper that will also incorporate findings from a set of 15 (or more) additional interviews, as well as feedback from relevant practitioners and scholars.

The report is divided into five sections. Section I offers information about the methodology of the interviews that constitute the core empirical foundation for this report's findings. Section II focuses on the role of international laws and norms in humanitarian negotiations. Section III addresses other sources of laws and norms (e.g., national laws and Islamic Law) that humanitarian practitioners have integrated into their negotiations. Section IV examines the relationship between interests and legal norms in the practice of humanitarian negotiation. Section V offers concluding remarks.

### **I. Methodology**

The 35 interviews on which this report is based captured the experiences of practitioners with a broad scope of professional experience. Indeed, ATHA sought diversity in the interviewee pool in terms of organizational affiliation, geography, and gender. Many interviewees, throughout

their career, have worked for different organizations and in different regions. Organizations for which interviewees have worked include:

- United Nations agencies (such as International Organization for Migration, Office for the Coordination of Humanitarian Affairs, United Nations Development Programme, United Nations Refugee Agency, United Nations Children’s Fund, and World Food Programme);
- non-governmental organizations (such as American Refugee Committee, Catholic Relief Services, Church World Service, International Rescue Committee, Latin America Group, Medair, Médecins Sans Frontières, Mercy Corps, Norwegian Refugee Council, Oxfam, Peace Brigades International, and Save the Children); and
- entities associated with the Red Cross/Red Crescent Movement (including the International Committee of the Red Cross, as well as national Red Cross and Red Crescent organizations, among them the Lebanese Red Cross and the Norwegian Red Cross).

The contexts in which interviewees have worked include the following countries, broken down by region:

- Africa (Angola, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Egypt, Ethiopia, Ivory Coast, Kenya, Liberia, Libya, Mali, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, Somalia, South Sudan, Sudan, Zimbabwe);
- Middle East (Iraq, Kuwait, Lebanon, Occupied Palestinian Territories, Syria, Turkey, Yemen);
- Asia/Pacific (Afghanistan, Cambodia, China, Georgia, India, Indonesia, Laos, Malaysia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Russia, Sri Lanka, Tajikistan, Thailand, the Philippines, Vietnam);
- Americas/Caribbean (Brazil, Colombia, Honduras, Dominican Republic, El Salvador, Guatemala, Haiti); and
- Europe (former Yugoslavia).

The vast majority of the interviewees have direct experience negotiating with governments and/or armed groups. Two of the interviewees, although not humanitarian negotiators themselves, are engaged in organization-specific initiatives geared toward policy and methodological guidance development. The interviewee pool focused on practitioners who have worked in the field in situations of armed conflict, although several interviewees also had experience working in the context of natural disasters. Some interviewees had experience working on issues in non-conflict settings (for example, addressing detainee issues in a Gulf country), and in post-conflict settings (for example, in Liberia, after the conclusion of the second civil war). Interviewees have engaged in humanitarian negotiations aiming toward a wide range of objectives, including access to deliver aid (ranging from agreements on Memoranda of Understanding to surmounting obstacles at checkpoints guarded by members of armed groups), and protection (including detainee protection, refugee protection, and engaging on issues related to the conduct of hostilities). In terms of gender, 10 of the interviewees were

female while 25 were male.

The interviews were conducted via Skype, except for two, which were conducted in person. Additionally, the interviews were audio recorded to facilitate the process of generating a write-up of the interview, except for two, for which the interviewees opted not to have the conversation recorded in audio. Interviews were conducted under the understanding that citations would be anonymous and that identifiable information would not be included in any publications resulting from this research.

Two caveats are important to note about the interviewee pool. First, the interviewee pool is not comprised of a random selection of practitioners across the entire humanitarian sector. Instead, ATHA initially drew primarily from practitioners who had already engaged with ATHA in some capacity, either by attending an ATHA training on negotiation or by contributing to ATHA's monthly podcast series. ATHA also employed snowball sampling, seeking referrals during interviews for additional potential interviewees. Therefore, one should not necessarily consider the interviewee pool to be broadly representative of the entire humanitarian sector. Instead, the interviewee pool represents a select group of professionals, many of whom had already engaged in a certain degree of professional reflection on the practice of humanitarian negotiation. Second, although the interviewee pool does include a selection of national staff working in the Middle East and Africa, the large majority of interviewees were international staff. Interviewees discussed the importance of national staff to the practice of humanitarian negotiation, as well as the differing dynamics that international versus national staff face in relation to issues such as cultural knowledge, security risks, and opportunities for training. These findings suggest the importance of further probing the experiences of national staff in future research in this area.

## **II. International Laws and Norms**

Interviewees expressed a wide range of views on the utility of international law in the discourse of humanitarian negotiations. Some responses were more definitive than others. Indeed, various interviewees asserted in clear terms the relevance or irrelevance of international law to their negotiations, while others expressed uncertainty about how the law could serve as a useful tool in negotiation. The range of views can be compiled into three broad categories:

- 1) Uncertain – These interviewees expressed that they did not exactly know how international norms could be useful during negotiations. One interviewee said of a training on international humanitarian law (IHL) that she took, “It was interesting. I do not understand how it relates to my job. It’s cool to know. But that doesn’t factor into my reality.”
- 2) Certain of Utility – Interviewees falling into this category asserted that international legal norms definitively are a useful tool for negotiation. One interviewee emphasized of IHL and human rights law, “If you’re going to be a humanitarian negotiator, you need to know that subject matter very well. That’s connected to knowing what you’re negotiating, what you want to get out of it, and what you want your final position to

be.”

- 3) Certain of Irrelevance – These interviewees asserted that international legal norms have not proved to be a useful tool for negotiation. As one interviewee stated, IHL had “no traction or influence” in most of the contexts in which he has worked.

The rest of this section focuses on, first, factors discussed during interviews that might explain this variation across different types of contexts and different types of interlocutors regarding the utility of international law; second, the opportunities that international law bought forth for those practitioners who fell into the second category mentioned above; and third, challenges relevant to integrating international law into the discourse of humanitarian negotiation.

### **A. Variation Across Contexts and Types of Interlocutors**

A clear finding from the interviews is that the utility of international law to humanitarian negotiators depends greatly on the context and the nature of the interlocutor. As one interviewee stated, “The rule of law is so important. It’s a cornerstone. But honestly, it depends on the context. It depends on the person.” Another interviewee elaborated:

Depending very much on contexts, there are different degrees where this legal argument sticks or where you might have to depart more and more and actually go more into what is the rationale of it and try to convince them by other means than a purely legal argument... There are contexts that are so legalistic or normative that, if you win the legal argument, you basically get the right and achieve the humanitarian objective. But there might be other contexts where, if you just argue on the basis of your book and treaty, then the people will just give you a hazy look, and it doesn’t help at all. That’s the range of situations that you might be confronted with.

Interviewees also addressed the fact that the utility of international law in any given conflict can change over time. As an example, in relation to the Syria conflict, one interviewee compared opportunities at the beginning of the conflict with those in the current situation:

I think there’s a shift there that’s quite noticeable in terms of how IHL worked in negotiations at the beginning of the conflict and how it works now. You try to use it now and people basically laugh you out of the room. What IHL? Have you seen how many clinics have been bombed? There’s no respect for IHL. Attempting to use that in negotiation doesn’t carry the same weight that it did previously.

Three particular factors emerged during interviews as particularly relevant to explaining the varying utility of international law. The first factor is the capacities of the humanitarian negotiator. Indeed, one issue that interviewees—especially those with legal expertise—repeatedly raised is humanitarian negotiators’ general lack of knowledge of international legal norms. In simple terms, 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.

Although, it is important to note that increased capacity in this area is not the only relevant issue. Indeed, as another interviewee stated, "Even though I am an international lawyer, [and] the organisation 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."

The second factor is the nature of the interlocutor. There is a range of possible positions that interlocutors have taken, very much influenced by different interests (as will be addressed in the next section of this report). Variations can occur across different segments of one side in the context of an armed conflict. For example, a government minister may dismiss norms and prioritize political expediency, while a military commander may engage more openly in a legal discussion (or vice versa). Knowing when the legal and humanitarian discourse is likely to be overridden by political positions (or other interests) would appear to be a necessary assessment to undertake prior to engaging with any given interlocutor. Along these lines, one interviewee asserted, "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." Another noted, "International law has sometimes had a big impact on access negotiations, but only on a very high level."

Interviewees also noted differences between governments and non-state actors, with states generally seeming to be relatively more receptive to legal engagement. When it comes to non-state armed groups (NSAGs), one interviewee stated, "In many contexts, they see IHL as part of the international agenda, which is not always accepted." Interviewees noted that NSAGs tend to have a lower level of knowledge of IHL than government interlocutors. Even for certain NSAGs that had articulated an organizational policy seeming to embrace IHL, evidently due to command and control issues, this knowledge and respect for IHL did not necessarily filter down to lower levels. Even for local governmental actors, though, there can be a perhaps surprisingly high level of risk associated with legal argumentation, as one interviewee stated:

Certainly, throwing a legalistic argument at local government would have been hugely problematic. I think that would have been a huge insult. For me to lecture them on international law, when they are the government representatives and the body that has been entrusted to govern that area, it would not have been something which they saw I was in a position to do. They were the ones who were upholding law and order, and that was for them to interpret, not for me to dictate.

Although, as another interviewee mentioned, an important long-term, strategic consideration is that preventive exposure of governments to IHL before conflicts arise may lead IHL to play a more powerful role in humanitarian negotiation discourse:

I put a lot of importance and attention to preventive activities with regard to IHL... You

never know if, ten years later, you—not you, yourself, but a colleague from your organization—will meet this person again in a very high decision making position. You really need to keep this very broad view and get away from just seeing the present emergency.

A third factor is the negotiation environment, and in particular, the proximity to the ‘front lines.’ Indeed, one interviewee highlighted the very charged nature of the frontline environment:

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.’

In this sense, understanding the context in which a given request is being made appears incredibly important. Furthermore, knowing how to incentivize behavior that appears counterintuitive to the counterpart appears to be a huge challenge.

## **B. Opportunities**

Before addressing the various challenges with regard to engagement with the international normative framework during humanitarian negotiation (as will be examined below), this section first reflects on the potential utility of this framework. In this regard, practitioners discussed several ways that international law yielded advantages or opportunities.

### **1. Framing of the Conversation**

Several practitioners commented that international law helps, to some extent, frame the parameters of the conversation, either implicitly or explicitly. One interviewee stated, “Knowing your legal position decides or influences the kind of discussion you want to have and how you want to have that conversation.” According to another interviewee, “Thinking about intergovernmental processes and international law—for example, international refugee law—it certainly frames so much of the discourse, the dialogue, the terminology, et cetera.”

### **2. Invoking the Consensual Nature of International Law**

Practitioners also reflected on the strategic role that international norms can play in negotiations. One potential strategic advantage, when the primary interlocutor is a state actor, is the consent-based nature of international law. By engaging with international norms,

humanitarians can highlight that such norms are not being demanded of the state by the negotiator, but rather, serve as a 'reminder' to the state of what they have already agreed to do. In addition, practitioners can also present specific projects as a means of assisting the government in meeting these obligations, reinforcing a notion of partnership. Such an approach would appear to be an interesting attempt to push back against the perceived adversarial nature of a normative based interaction, as one interviewee elaborates:

Take our work on gender here, which is quite advanced and quite aggressive. Part of our messaging is that we're just doing things that the Government of Afghanistan has already agreed to do. The Government of Afghanistan is a signatory to CEDAW [Convention on the Elimination of All forms of Discrimination Against Women], and they have legislation related to women's rights, and there's also Islamic tradition in that area. We emphasize this legislation and point to these international agreements to which the government has joined to say, 'You've already agreed to this, so there's no controversy here. We just want you to apply it.'

The converse aspect of this issue is the challenge of engaging with NSAGs, who haven't signed onto to such agreements. As another interviewee mentioned, also referring to the case of Afghanistan, "In the case of the Taliban areas here, they reject those things because they say, 'We didn't sign that.'"

### **3. Legitimacy: Connection to the International Community**

Interviewees also highlighted an additional potential benefit of engaging with international norms, that being the role that such discourse can play in connecting the humanitarian negotiator to the international community. Interviewees noted that they have framed discussions to highlight the fact that, by engaging with the humanitarian negotiator, the counterpart is, in a way, also engaging with that 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."

To some degree, in relation to the legitimacy that humanitarian negotiators can derive from invoking international law, there appears to be a degree of separation between the ICRC, on the one hand, and other humanitarian organizations, on the other. The ICRC and international law have a clearer and more defined relationship, given that the ICRC is specifically addressed in international treaties such as the Geneva Conventions. This reality may very much influence the role international norms play in negotiation, as indicated by the below comments from a humanitarian negotiator working for the ICRC:

For me, IHL is useful because, at least for the ICRC, it gives me the legitimacy to talk. The very fact that I arrive in conflict areas and engage with parties to the conflict is because of IHL. IHL, for me, is very important to assert the legitimacy of the ICRC, in dealing with them, asking them to listen to me. The very fact that I'm there, in whatever context, to engage in Yemen or Afghanistan or Syria is because my mandate is from IHL.

But Using legal norms for negotiation is not enough—far from enough in many contexts.

The question remains to what extent other humanitarian actors, while not in the same position as the ICRC, can leverage legitimacy through the various provisions of IHL referring to humanitarian action. Indeed, one concern raised during the interviews was that counterparts could, and have, invoked the elevated position of the ICRC within the Geneva Conventions to justify blanket access denial to all actors who are *not* the ICRC.

#### 4. Post-Negotiation Tool

One final aspect of legal engagement during humanitarian negotiations that interviewees mentioned was the utilization of IHL for “sorting out details” *post facto*, highlighting that international norms can be useful prior to, during, and after negotiation. According to one interviewee, “I never had a situation where the initial permission to get access was granted just based on the international humanitarian law argument. That, for me, has never worked. It was useful to organize a bit of the details afterwards.”

#### C. Challenges and Limitations

Whilst numerous interviewees reflected on the potential utility of international laws and norms, as discussed in the section above, various practitioners also mentioned circumstances when international law was counterproductive or led to serious challenges during negotiations. First, interviewees discussed contexts in which the legal framework itself was controversial, serving to drive a wedge between interlocutors in negotiations. For example, the existence of an armed conflict is sometimes not accepted by the interlocutor and/or is seen as a controversial issue. In such instances, incorporating the law into the discourse of a negotiation could yield more problems than solutions. According to one interviewee:

Sometimes, you might reach a situation where directly speaking about the law, for example, qualifying a situation, saying that this is clearly an occupation or a non-international armed conflict, you might have an issue where a party completely disagrees with that. And if you start out on that basis, you might not be able to operate.

Second, counterparts can exploit the law in ways that work against humanitarian practitioners’ objectives. One recurring theme that arose along these lines was the risks that derive from the centrality of government consent to humanitarian access. Indeed, interviewees raised the concern that direct reference to IHL can reinforce the notion of control and power resting in the hands of the state interlocutor, potentially undermining the negotiation. Interviewees also discussed “grey zones” 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 humanitarian negotiation objectives.

Third, many interviewees discussed circumstances in which counterparts embraced the discourse of IHL but only in a bad faith manner. One interviewee elaborates:



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.

Indeed, interviewees expressed the view that, in many instances, an interlocutor will accept IHL as a framework but will dispute the relevance of IHL to the particular instance at hand. One interviewee stated:

Most of them don't challenge the rules, the principles. They will find a justification: because they don't have a choice, or it's not true, you don't have reliable information. Many groups... say they are obliged because of asymmetric warfare, they don't have the means. Nobody will be challenging the rule itself—except now from certain extremist groups.

Along the same lines, another interviewee said of IHL:

From my experience, there is generally a well accepted—I hope I do not exaggerate here—acceptance for international norms. Obviously, when it comes to whether stakeholders accept that these norms are relevant in a specific situation, that is an altogether different question. Accepting international norms broadly and accepting them for your specific context that you are responsible for as a minister or commander are definitely two different things.

How can humanitarian practitioners deal with the broad acceptance of a norm but the rejection of its applicability for a specific context? The interviewee quoted above stated that he still strives to find an effective approach:

That's a question I'm still wondering myself. I haven't found a very satisfactory answer yet. You have to work with time. You have to try to really re-ask yourself the question, considering the situation: do you really have a good approach? Do you really have a good strategy? Should you not try it differently? In such situations, it's much more important that you question yourself about whether you have a good approach or a good strategy. If you are facing a very skillful and resourceful interlocutor, it's a very challenging situation.

Other interviewees discussed specific concerns that IHL is too stringent and lacks the flexibility needed for successful negotiation. One interviewee asserted, "Coming in with a very strong idealism can actually be dangerous. If you are so strict, you can actually invite problems. I will admit that when I had death threats, I had my part in escalating the situation to the point where that happened." Many interviewees spoke of times when, despite their desire to utilize IHL and

demand adherence to the international framework, they simply needed to be pragmatic. In the words of one interviewee, “I believe the most important tool that we need to keep in our mind is to be, as much as we can, pragmatic and to keep and preserve, more or less—and I stress the phrase ‘more or less’—the humanitarian principles.”

An overarching theme and challenge when discussing issues of flexibility and pragmatism *vis-à-vis* humanitarian negotiations is the need to separate out the specific norm being discussed. One interviewee elaborated on this topic in relation to the sequencing of negotiating about assistance issues and protection issues. The following quote highlights the overarching dilemma:

It’s protection versus assistance. Are we negotiating to offer material assistance, and are we willing to compromise the protection issues we see so that we can have that physical access? Or are we trying to balance the two? Exactly how to get that equation right, I don’t know, because there’s one argument that says once we’re physically there, once we get in, even if there are protection issues, we will be able to address them in time as we’re able to build trust. As we’re able to maintain that access, we’ll be able to address the protection. If we try to start with protection, we won’t be able to have the physical access to provide the material support. But equally, our job is not about supporting the well-fed dead. We’re about actually fulfilling that full spectrum of humanitarian services. So that certainly is the hardest part in what I’ve seen.

Such considerations lead to many difficult questions: Is it ever acceptable to negotiate toward a position that accepts that a counterpart will not respect IHL? In what circumstances would an incremental approach to full respect of international standards be appropriate? When would it not be appropriate? It would appear that these issues require a great deal of reflection.

### **III. Other Sources of Norms Relevant in the Local Context**

Given the difficulties mentioned above, many interviewees expressed the need for drawing on normative sources beyond international law in humanitarian negotiations. 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. If you have a common normative reference, even if it’s not respected, you can always discuss things with people.

As this statement suggests, the need and desire for a common framework seems to propel arguments toward other normative frameworks. 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. She stated:

Instead of having the 'refugee' discussion, let's talk about duty of care. Let's talk about medical ethics. Can we define some life-threatening scenarios where they would actually fulfill their duty of care regardless of who they are? By framing it as more of a technical or medical discussion, then we can gain some ground.

Several interviewees discussed the salience in negotiations of appealing to general notions of humanity. Regarding a negotiation related to respect for IHL, one interviewee stated, "We would mention IHL as a matter of principle, but the arguments were mainly about values." For example, when addressing the shelling of the civilian population, this interviewee stated, "we'd make legal reference to the obligations of the parties" but would then argue on the basis of the suffering of the population. The approach was to appeal to the common values of the negotiator and the interlocutor. Another interviewee stated about counterparts with whom she has negotiated:

These people are also humans. So when there's extreme suffering, many of them understand that. They understand that there is a need to support those people... A lot of it comes back to basic humanity. In the contexts that I've worked in, there's quite extreme need, and there's a recognition that there's extreme need... There's a recognition that, 'Yes, those people need support.' So that's the leverage: an appeal to basic humanity.

Interviewees also highlighted the importance of national laws for humanitarian negotiation, as indicated by the following quotes:

- "For a government that is conscious of its sovereignty, I find it more useful to say, for example, 'It's your IDP policy that says this,' to bring an example of how the national norms have already integrated the general norms of humanitarian principles. I find that generally to be more effective, particularly with governments that see it as an 'imposition' when you come in discussing international humanitarian principles."
- "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."
- "[National law is] very important as well. Often, international laws and regulations have to be implemented into national legislation. Parliament has to ratify accession of a country to international law but also they have to make sure that this international treaty is reflected in their national legislation. You definitely have to be very well aware of the national law and integrate this into your negotiation."
- "In some countries, you can actually use a lot of the domestic law. When you try to negotiate things like the release of detainees on humanitarian grounds, or when you have minors in detention and they shouldn't be there, domestic law can actually be useful."

And finally, many practitioners reflected on the fact that other sources of norms, such as religious norms, were useful and appropriate in many situations. Such norms can be invoked in

a manner complementary to IHL, as set out below:

We really have to be sensitive to the context, to the kinds of groups, the kinds of states. And if you can use other arguments—moral or sometimes religious, which we sometimes use, and the interests of the parties—this can be useful. IHL is good but is not enough and has to be complemented by other approaches.

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.

The overarching strategy, as one interviewee described, is to “make the norms appear appealing and understandable and rooted in the common sense, the culture, the principles of your interlocutor.” Although, as with international law, many challenges and limitations also arise, as described below.

#### **A. Conflicts of Norms**

One of the central and recurring issues identified was the challenge of conflicting norms, in particular in relation to international law. Interviewees raised several serious concerns and dilemmas, as exemplified by the following statement:

The problem now is, with most of these stateless armed groups, they fundamentally go against your values. A lot of NGOs are basically carrying Western-influenced liberal values. Gender equality, for example, various aspects like this that you bring forward. But then, you're dealing in conflicts with sides who are carrying values that are alien to yours. But you have to reach out and cross those boundaries. But you find that impacts on your programs. For example, education: separation of boys and girls at an early age. There's a whole host of these day-to-day dilemmas that go fundamentally against what you as an agency are trying to project. I think, for the sake of remaining operational, you turn a blind eye to some of these points. And I think that puts you on a slippery slope.

One very significant concern is that even though a certain normative framework may facilitate one goal, other aspects of that framework may run into stark contradiction of one's goals and aims, leading a humanitarian negotiator to become “caught” within the rubric of an ultimately very problematic normative framework. One interviewee elaborates:

We all have values. And we should try to identify common points of interest with the other party. But I wouldn't put too much emphasis on values because, with certain actors with whom you need to negotiate, it could become tricky. 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 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.

## **B. Lack of Acceptance, Knowledge, and/or Effectiveness**

Similar to IHL, the utility of national law in humanitarian negotiation also depends on the extent to which the legal framework is accepted and understood by the counterpart. In this area, as with IHL, a divide can exist between states and NSAGs, and different environments can require different approaches. The following quotes illustrate these points:

- “It also depends on to whom you talk. 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.”
- “In Afghanistan, the law is not very well understood. 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 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.”

Along these lines, another interviewee asserted that, in his experience, he has found that national law has “very little influence.” However, this interviewee noted that he has worked in the context of high intensity conflicts, where there has been a security vacuum in which national law generally plays a limited role. Noting that the utility of national law can vary from context to context, he stated, “It depends on the legal system. If it's strong, you may use it.”

## **C. Capacity and Credibility**

As with any normative exchange, the most productive engagements are likely to be those in which both sides are familiar and comfortable with that specific framework. Practitioners raised concerns that, in many instances, both sides of the negotiation may lack the specific capacities and capabilities to comprehensively engage on the same normative basis. The humanitarian negotiator might lack adequate knowledge of local laws and/or norms. The interlocutor, as noted previously, might lack knowledge of the international legal framework. The question then remains how the two sides can find common normative ground. Furthermore, interviewees raised the concern that, even if a humanitarian negotiator is well-versed in national laws, that practitioner, as an international staff, might still lack credibility in the eyes of the counterpart to engage effectively in discussions rooted in the local normative framework.

#### IV. The Role of Interests

The interviews on which this report is based also point to another important factor—the interests of the interlocutor—that shapes the discourse of negotiations and influences the direction and success of humanitarian negotiations. One interviewee, explaining the role of norms and interests in his persuasive efforts during negotiations stated:

It's definitely a combination. I mean, 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.

Along these lines, another interviewee stated that difficulties arise in negotiations “when parties don't speak the same conceptual language or when there are not mutual interests.” Indeed, this issue arose as a prominent theme in the interviews, as indicated by the following quotes, each from a different interviewee:

- “Of course, whether there is a shared interest or whether I am able to present it as a shared interest would be another point.”
- “Based on my previous experience, normally, when you succeed, it's because you also provide something. The other party should have at least the feeling that you will contribute something good or something positive for their community, or their group or team, or for them.”
- “You have to imagine and make a plan about how you can persuade doubtful stakeholders of the added value you can provide to them. It's a two-way thing where not only me, the negotiator, wants to achieve something. You definitely have to keep in mind the situation and the psyche of your counterpart. Otherwise, you are hammering down points which the counterparts just don't want to hear.”
- “I don't personally think that success in a negotiation means I get what I want. It really has to be a win-win situation. You have to compromise. This requires really knowing who you're talking to, what their interests are.”
- “Don't be idealistic... There isn't a perfect solution. At the end, there should be a compromise, which is a win-win situation for both parties.”
- “It's always about 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.”

These quotes—and specifically, the final quote included above—suggest an inherent challenge for humanitarian negotiators. When the interlocutor's interests align with relevant legal norms and humanitarian principles, a negotiated outcome satisfactory for the humanitarian professional would theoretically be within reach. But how can humanitarian negotiators grapple with situations in which interests and norms exist in opposition to one another? Furthermore, if the extent to which interests and norms align necessitates compromise on the part of the humanitarian, how much compromise is acceptable? How far is too far? Does the very act of compromise suggest a prioritization of the counterpart's interests over norms of humanitarian protection? Even if so, in the absence of a viable alternative, is compromise not

the best option?

Regarding the actual interests at hand, interviewees' assertions confirm and complement past and ongoing discussions found in policy and social scientific literature centered on examining the factors that influence compliance with norms of IHL.<sup>1</sup> One can group these interests into three categories. First, there are the material needs (for aid or medical assistance, for example) of the government or armed group in question. This can include the need for the authorities to attend to the needs of its population. Along these lines, one interviewee noted of humanitarian assistance:

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. Trying to separate out the humanitarian side from anything political is a little bit naïve.

Second, there is the issue of reciprocity, a factor particularly relevant in relation to detainee treatment. One interviewee mentioned using this argument in relation to both detainee issues and siege warfare. For example, when an area was besieged, he would use the argument that, "In 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.

Third, there are issues of the authority's legitimacy and image in relation to either local or international audiences. This factor tends to be particularly relevant when negotiating with NSAGs. Although engaging with NSAGs does not confer legal legitimacy on these groups, one result of negotiating with such groups can be to enhance the group's political legitimacy. One interviewee notes:

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

---

<sup>1</sup> For examples of relevant literature, see generally O. Bangerter (2011). Reasons why armed groups choose to respect international humanitarian law or not. *International Review of the Red Cross* 93 (882): 353-384; A. Bellal and S. Casey-Maslen (2011). Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors. Geneva Academy of International Humanitarian Law and Human Rights; H. Jo (2015). *Compliant Rebels*. Cambridge: Cambridge University Press; and J. Morrow (2014). *Order Within Anarchy: The Laws of War as an International Institution*. New York: Cambridge University Press.

it's worth, go out and say, 'We recognize you as an interlocutor. We want to deal with you,' is part of it.

To what extent have, can, and should humanitarian negotiators use different levers of pressure to work these interests in their favor? Interviewees discussed various modes of pressure, including threats of public denunciation, scaling down or withdrawing entirely from a country or region of a country, and legal consequences at the international level. Interviewees also mentioned relying on donor governments to pressure recalcitrant authorities. Furthermore, several interviewees mentioned employing, as a last resort, a false threat during a negotiation. For example, one interviewee discussed an instance in which he negotiated with members of an NSAG in an effort to persuade them not to slaughter hospital patients. The interviewee stated that there was a "misunderstanding of our mandate and the international community in general." He continued:

Some of the brigade leaders were eager to know, if they committed violations, whether we would report to the International Criminal Court and the Security Council. We don't do that. But in this situation, I told them, 'Of course.' ...We were telling them... they would have to be held responsible and would be prosecuted by the International Criminal Court. We told them that if they kill them, they would be held responsible.

The interviewee stated that, in this context, the false claim that the organization would transfer information to the International Criminal Court proved to be a successful deterrent. But, he continued, there is a trade-off in short-term versus long-term aims. On the one hand, the interviewee stated, "You have to be agile. In that context, it was really life saving." On the other hand, he said of this tactic:

We do not recommend it. We have to be clear about our mandate. We have to be consistent. It's not good for our future access. If you have armed groups believing that, by your work, you will be a witness against them and will report against them to be prosecuted, then it will affect access... I will not recommend it and will not advise my colleagues to do this... It will hamper and jeopardize our security and access in many other contexts... It proved effective. But it was that day, that time, that context.

## V. Concluding Remarks and Points for Further Reflection

Taking a step back from the particularities of humanitarian negotiation to broader negotiation theory, the findings of this preliminary report illustrate the difficulties of approaching humanitarian negotiation with a "principled negotiation" approach. This finding is particularly relevant given the prevalent role that the "principled negotiation" approach plays in trainings and policy literature relevant to humanitarian negotiation.<sup>2</sup> As described in *Getting to Yes*, the seminal book that first outlined the principled negotiation approach:

---

<sup>2</sup> For example, see HD Centre for Humanitarian Dialogue (2004). *Humanitarian Negotiation: A Handbook for Securing Access, Assistance and Protection for Civilians in Armed Conflict*, Geneva, Switzerland, p. 28; and UNHCR (2009). *Essentials of Humanitarian Negotiation Workshop*.



In short, the approach is to commit yourself to reaching a solution based on principle, not pressure. Concentrate on the merits of the problem, not the mettle of the parties. Be open to reason, but closed to threats... A constant battle for dominance threatens a relationship; principled negotiation protects it. It 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.<sup>3</sup>

In a famous “principled negotiation” example from *Getting to Yes*, a person whose car has been destroyed negotiates with an auto insurance company about how much the insurance company owes him. The “principled negotiation” recommendation is to hinge the negotiation on objective criteria, such as the car’s “blue book” value, referring to the Kelley Blue Book, deemed to be an authoritative listing of automobile prices.<sup>4</sup> In doing so, both sides of the negotiation accept the authoritative nature of an external document and use that document as a basis for determining the outcome of the negotiation.

But in humanitarian negotiation, what should the “objective standards” be? The humanitarian negotiator might want those standards to be the norms of IHL. However, as this report describes, such engagement is fraught with challenges. Efforts to seek common normative ground through national laws or other norms deemed more relevant to the interlocutor also lead to difficulties. One interviewee, who is well versed in the “principled negotiation” model, pointed to the “blue book” example, stating, “With the purchase of a car, you can point to: here’s what’s done elsewhere and here’s the cost in the blue book. That helps frame things, and I think you need to use things like that. In a negotiation for access, though, I’m not sure how you’d use the blue book.”

---

<sup>3</sup> R. Fischer and W. Ury (1984). *Getting to Yes*. Middlesex, England: Penguin Books, p. 86.

<sup>4</sup> *Ibid.*, p. 88