Extract from UN publication:

*Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*

Chapter 3: Framing the Negotiations

January 2006
3 Framing the Negotiations

3.1 Overview

Humanitarian principles, humanitarian policies and international law provide a framework and source of guidance for humanitarian negotiations with armed groups. They can be potent tools for humanitarian negotiators to: (i) define boundaries within which to seek agreement; (ii) assist in generating options for consideration during negotiations; (iii) provide reference benchmarks for evaluation of options and monitoring implementation; (iv) frame the legal obligations of armed groups; and (v) provide incentives for armed groups to negotiate.

This chapter briefly reviews humanitarian principles, humanitarian policies, and relevant provisions of international law, and suggests practical ways in which they can guide humanitarian negotiations with armed groups.

3.2 Humanitarian Principles Underlying Negotiations With Armed Groups

Humanitarian negotiations are a tool to enable, facilitate and sustain humanitarian action, and therefore they must be undertaken in accordance with the three core principles of humanity, neutrality and impartiality that underpin all humanitarian action (Box 1).

Box 1 - Fundamental principles of humanitarian action

| Humanity: | Human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly. The dignity and rights of all victims must be respected and protected. |
| Neutrality: | Humanitarian assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature. |
| Impartiality: | Humanitarian assistance must be provided without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress. |

These three fundamental principles have their origins in operational humanitarian practice, and are reflected to varying degrees in the Charter of the United Nations, International Humanitarian Law, and International Human Rights Law. These principles have also been

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17 The guiding principles of humanity, neutrality and impartiality were adopted by the United Nations General Assembly in resolution 46/182 (19 December 1991).
incorporated into voluntary codes of conduct and organizational mission statements guiding humanitarian agencies and donors. Additional principles complementing these three core tenets of humanitarian action include: Dignity; Respect for Culture and Custom; “Do No/Less Harm”; Operational Independence; Sustainability; Participation; Accountability; Transparency; and Prevention.

3.2.1 Using Humanitarian Principles to Frame Humanitarian Negotiations

Humanitarian principles help to frame humanitarian negotiations in three ways:

1. by providing a source of guidance for humanitarian negotiators on how negotiations should be undertaken;
2. by defining boundaries within which to seek agreement (they set limits to what humanitarian actors can commit to during negotiations); and
3. by providing a set of criteria for developing options for consideration by the negotiating parties.

Based on these three modalities, Table 2 suggests ways in which the humanitarian principles mentioned above can be used to guide the actions of humanitarian negotiators.

<table>
<thead>
<tr>
<th>Humanitarian principle</th>
<th>What the principle means for humanitarian negotiations ...</th>
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</thead>
<tbody>
<tr>
<td>Core Humanitarian Principles</td>
<td></td>
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</tbody>
</table>
| Humanity | ➔ Humanitarian negotiators should clearly communicate to the armed group the paramount interest of their organization(s) as being to alleviate human suffering;  
| | ➔ Armed groups that have limited or no knowledge of the motivations and objectives driving humanitarian action may be suspicious of the motives of humanitarian actors. They may believe that assistance is being provided to opposing groups, or that all the assistance should go to their group, rather than to civilians that are most in need; |

See, for example: International Red Cross Movement and NGOs, The Code of Conduct of the International Red Cross Movement and Non-Governmental Organisations in Disaster Relief (1994). Available through the Steering Committee for Humanitarian Response (SCHR).

These principles are drawn from: The Code of Conduct of the International Red Cross Movement and Non-Governmental Organisations in Disaster Relief (1999) and OCHA documents on principles and policies for humanitarian engagement.
Humanitarian Negotiations with Armed Groups

<table>
<thead>
<tr>
<th>Humanitarian principle</th>
<th>What the principle means for humanitarian negotiations …</th>
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<tbody>
<tr>
<td>Neutrality</td>
<td>➔ Humanitarian negotiations should never endorse, or be perceived to endorse, a particular political aspiration or objective of the armed group; ➔ Negotiation does not mean acceptance, and humanitarian negotiators must make clear that by entering into negotiations they are not endorsing or according any recognition to the armed group;</td>
</tr>
<tr>
<td>Impartiality</td>
<td>➔ Humanitarian negotiators must not enter into an agreement with the armed group that would constrain humanitarian action such that it is no longer delivered on the basis of need alone; ➔ Humanitarian negotiators cannot accept conditions that the armed group may wish to impose restricting beneficiaries of assistance and protection to those within certain ethnic, political or religious groups;</td>
</tr>
</tbody>
</table>

**Additional Principles of Humanitarian Action**

| Operational independence | ➔ Humanitarian negotiators must ensure that humanitarian actors retain operational control and direction of humanitarian activities in any agreed outcome (for example, on issues such as decision-making regarding beneficiaries; modes of assistance etc.); |
| Participation            | ➔ Wherever possible, the perspectives of the beneficiary population should be incorporated into the substance and process of negotiation; ➔ In many cases, representatives of groups that humanitarian organizations seek to assist may be unable to participate directly in the negotiations, due to logistical constraints; difficulties in identifying legitimate representatives; and security concerns (e.g. possible reprisals by armed group); |
| Accountability           | ➔ Humanitarian negotiators and their parent organizations are accountable—to those they seek to assist, to their governing bodies as well as to their donors—for any outcomes to which they may agree in the course of negotiations; |
| Transparency             | ➔ Humanitarian negotiations should be undertaken in a transparent manner, with honesty, openness and clarity about the purposes and objectives of the negotiations. By conducting negotiations in this way, humanitarians will be less likely to be perceived as being partial to a particular group. |
Additional Principles of Humanitarian Action (continued)

<table>
<thead>
<tr>
<th>Humanitarian principle</th>
<th>What the principle means for humanitarian negotiations …</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do No/Less Harm</td>
<td>➔ Humanitarian negotiators should strive to “do no harm” or to minimize the harm that may be inadvertently done simply by humanitarians being present and providing assistance (e.g. where aid is used as an instrument of war by denying access or attacking convoys).</td>
</tr>
<tr>
<td></td>
<td>➔ Humanitarian negotiations, and any agreed outcome between humanitarian organizations and armed groups, should at a minimum not cause harm or result in reduced protection of civilians.</td>
</tr>
<tr>
<td>Respect for culture and custom</td>
<td>➔ Humanitarian negotiators should strive to understand local customs and traditions to ensure that humanitarian work can be conducted with respect for local values to the extent that they do not conflict with internationally recognized human rights (e.g. some interventions require particular sensitivity to local customs, such as dealing with victims of rape). (See Section 4.4).</td>
</tr>
</tbody>
</table>

Case Study: Two dimensions of impartiality

REDUCTION IN PERCEIVED IMPARTIALITY OF WFP IN ANGOLA: In Angola during 1993/1994, constraints on access by WFP assessment teams to UNITA-controlled areas resulted in a greater percentage of food aid being delivered to government-controlled areas (where WFP had more access). WFP subsequently faced accusations of impartial delivery of assistance in favor of the government-controlled areas. UNITA asserted that these areas were better able to withstand UNITA advances due to the food aid, and this resulted in tensions between UNITA and WFP, which at times manifested itself in blockage of road convoys and incidents of shooting at aid aircraft.\(^20\)

ARMED GROUP PERCEPTION OF IMPARTIALITY: In Colombia, the Autodefensas Unidas de Colombia (AUC) armed group has expressed criteria for accepting contacts with humanitarian organizations, which include impartiality, neutrality and confidentiality. This represents a rather unique example of an armed group that is well informed of humanitarian principles and monitors the actions of humanitarian organizations that may wish to engage with the armed group.\(^21\)

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By providing limits beyond which humanitarian negotiators cannot compromise (“No Pass” limits), humanitarian principles can actually strengthen the position of the humanitarian negotiator, enabling him/her to use the principles to set clear limits to the other parties’ demands. For this purpose, humanitarian negotiators can invoke the fundamental principles, and could argue, for example:

“Our organization cannot agree to distribute food only to camps under your control, because, as you know, we provide assistance wherever there is a need.”

When using humanitarian principles and policies as “No Pass” limits beyond which humanitarian agencies cannot trespass, it is important that humanitarian negotiators communicate these limits in non-threatening language and tone, and clearly communicate the reasons why the organization cannot agree to operate outside these principles.

In addition to establishing “No Pass” limits to negotiations, humanitarian principles provide a basis for developing options to be considered by parties to the negotiations. Continuing with the example above, an option for agreement could be presented as follows:

“Our organization cannot agree to distribute food only to camps under your control, because, as you know, we provide assistance wherever there is a need [USE PRINCIPLE TO DEFINE BOUNDARY]. What we can do, however, is to include the civilians in those camps in our needs assessment … and that will ensure that those most in need in the camps also can be helped.” [USE PRINCIPLE TO GUIDE OPTIONS]

Case Study: Communicating Humanitarian Principles

“Regarding Burundi, during a first meeting called by the Henry Dunant Center in Geneva in 1999, gathering representatives of the Burundian army, opposition forces and the humanitarian community, it became clear that in order to gain greater access to populations caught up in conflict zones, humanitarian agencies should first explain their roles and mandates. Until then, none of the [warring] parties understood clearly the role or the activities of the humanitarian community or the UN in Burundi. The Burundian army accused the UN of ‘feeding the rebels’, while the opposition forces accused the UN of being too close to the government and for distributing aid only where the government dictated. The opportunity to explain the programmes and assert the neutrality of the international humanitarian community was a key breakthrough in this meeting.”

3.3 Elements of International Law Relevant to Humanitarian Negotiations

In addition to fundamental humanitarian principles, the provisions of international law — including International Humanitarian Law (IHL), International Human Rights Law (IHRL), and International Criminal Law (especially The Rome Statute of the International Criminal Court) — provide important framing elements for undertaking humanitarian negotiations.23 This section briefly reviews select elements of international law that are most relevant to humanitarian negotiations with armed groups, and suggests ways in which these legal provisions can guide humanitarian negotiations.

3.3.1 International Humanitarian Law (IHL)

International Humanitarian Law is a set of rules, codified in legal instruments and/or expressed in customary norms, that seeks to restrict the means and methods of armed conflict, and to protect civilians and others who are not, or are no longer, participating in hostilities from the effects of armed conflict.24 International Humanitarian Law applies to situations of international armed conflict (between two or more States) and non-international armed conflict (within a State, and involving non-State armed groups) and binds all parties to an armed conflict. It does not apply in situations of internal disturbance or tension short of armed conflict. Moreover, IHL contains rules that apply to State actors and rules that apply to non-State actors.

International Humanitarian Law consists of treaty-based law and customary international humanitarian law.

Treaty-based International Humanitarian Law

The legal instruments that make up this body of law include (among others): the Hague Conventions of 1907; the four Geneva Conventions of 1949; and the two Protocols Additional to the Geneva Conventions (1977). Treaty-based IHL is based on agreements between States. The provisions of treaty-based IHL that are most relevant to armed groups (as opposed to States) engaged in armed conflict are Common Article 3 of the Geneva Conventions of 1949 (see Box 2), and Additional Protocol II of 1977.25

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Common Article 3 of the Geneva Conventions specifies a number of minimum provisions that each party to the (non-international) armed conflict, including an armed group, is required to uphold. Common Article 3(2) also includes a provision for “special agreements” between parties to a non-international armed conflict to bring into effect other provisions of the four Geneva Conventions. The special agreements referred to in this article are bilateral agreements between the parties (e.g. between an armed group engaged in conflict with a State), which could include, for example, agreements on provision of humanitarian relief to those not or no longer taking part in the conflict.

Additional Protocol II (1977) to the Geneva Conventions develops and supplements the provisions of Common Article 3, and applies to armed conflicts which,

“take place in the territory of a [state signatory to the Protocol] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory…”

Additional Protocol II contains provisions relating to humane treatment of those not taking part in hostilities; care of the sick and wounded; and protection of the civilian population.

Common Article 3 and Additional Protocol II therefore define criteria for regulating the means of armed conflict and for protecting civilians in relation to non-State armed groups.

**Box 2 - Common Article 3 of the Four Geneva Conventions of 1949**

“In the case of armed conflict not of an international character occurring in the territory of one of the [Parties to the Four Geneva Conventions] each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Box 2 continued

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Customary International Humanitarian Law

Customary international law is the body of rules and norms that emanate from established practice—and the widely-held belief that such practice is warranted as a matter of law. For example, even if a State is not a signatory to some of the treaties governing conduct of hostilities in international humanitarian law, the established practice of that State may dictate that it does not deliberately target infrastructure essential to survival of civilians (e.g. water treatment plants). Another example of international customary law is the practice of protecting religious and cultural objects during armed conflict.

One of the most salient provisions of customary international humanitarian law as it relates to situations of armed conflict is the so-called Martens Clause, which appeared in earlier international law treaties and is included in the preamble of Additional Protocol II to the Geneva Conventions of 1949. This Clause states that:

“…in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience…”

The implication of this clause and other provisions of customary international humanitarian law is that the actions of armed groups in times of conflict—even if not governed explicitly by the more formal treaty law—are constrained by norms of established practice regarding protection of those not or no longer engaged in hostilities.

In March 2005, the International Committee of the Red Cross (ICRC) published a study of customary international humanitarian law which aims to overcome some of the challenges associated with the application of treaty-based international humanitarian law. The study identifies 161 rules of customary international humanitarian law clustered in six subject areas: (i) principle of distinction; (ii) specifically protected persons and objects; (iii) specific


methods of warfare; (iv) weapons; (v) treatment of civilians and persons hors de combat; and (vi) implementation.\(^2^9\) The rules are identified as applicable to situations of international armed conflict and/or non-international armed conflict.

### 3.3.2 International Human Rights Law (IHRL)

International human rights law is a body of international law made up of international treaties, declarations and covenants that define the universal, interdependent and indivisible entitlements of individuals. These instruments—including (among others) the Universal Declaration of Human Rights (1948) and the International Covenants on Civil and Political Rights (1966) and on Economic, Social and Cultural Rights (1966)—define obligations of (primarily) States towards individuals in upholding, fulfilling and ensuring respect for those rights.

As in the case of international humanitarian law, the treaties and covenants that constitute international human rights law are signed and ratified by States. While States hold primary responsibility for safeguarding the human rights of populations within their territories, the rights themselves are accorded to individuals. An armed group cannot be a party to the existing human rights treaties/covenants, although individual members of the group can be held accountable for breaches of human rights norms, either under national law, or under international law, especially when such breaches also constitute crimes against humanity (see section on International Criminal Law below).

International human rights law applies both in peacetime and in times of conflict, although States parties to some human rights treaties may exceptionally derogate from certain civil and political rights under strictly defined circumstances (in a state of public emergency, for example). There are nevertheless certain rights that can never be suspended—not even in war. The International Covenant on Civil and Political Rights (ICCPR) provides that the following rights may never be derogated from:

- Right to life (art. 6),
- Prohibition of torture or cruel, inhuman or degrading treatment punishment (art. 7),
- Prohibition of slavery (art. 8, paras. 1 and 2),
- Prohibition of imprisonment because of inability to fulfil a contractual obligation (art. 11),
- Prohibition of retroactive application of criminal law (art. 15),
- Right to recognition as a person before the law (art. 16), and
- Freedom of thought, conscience and religion (art. 18).

Most human rights treaties, among them the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child and its two Optional Protocols on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflicts, do not provide for the possibility of derogation at all.

In addition, certain provisions of international human rights law constitute customary law (as discussed above). Consequently, the norms listed below are considered to be binding on all States, regardless of whether the State has explicitly consented to be bound by a certain treaty. These include:

- freedom from slavery;
- freedom from torture and cruel, inhuman or degrading treatment or punishment;
- freedom from arbitrary deprivation of life;
- freedom from arbitrary arrest and detention;
- freedom of thought, conscience and religion;
- presumption of innocence;
- prohibition of executing pregnant women or children;
- prohibition of advocacy of national, racial or religious hatred;
- prohibition of denial to persons of marriageable age the right to marry; and
- prohibition of denial to minorities of the right to enjoy their own culture, profess their own religion, or use their own language.

### 3.3.3 International Criminal Law – Focus on The Rome Statute of the International Criminal Court (ICC)

International criminal law is a body of law derived from general principles of international law, agreements between States on particular aspects of criminal activity, and criminal law commonly recognized by nation States. It is considered by many as encompassing the interface between criminal law aspects of international law, and the international or transnational aspects of national (domestic) criminal law.

Treaty-based international criminal law is codified in agreements such as, The Rome Statute of the International Criminal Court (1998), The United Nations Convention against Transnational Organized Crime (2000), and The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000). This section focuses on the Rome Statute of the International Criminal Court as one international criminal law treaty which has direct and significant relevance for the conduct and accountability of non-State armed groups and hence to humanitarian negotiations with these groups.
The Rome Statute of the International Criminal Court

The International Criminal Court (ICC) is the first, permanent, international court established to promote the rule of law and to exercise its jurisdiction “over persons for the most serious crimes of international concern.” The Court was established by the Rome Statute of the International Criminal Court on 17 July 1998, which entered into force on 1 July 2002.

The Rome Statute sets out the Court’s jurisdiction, structure and functions. The Statute contains provisions that apply in peacetime and times of armed conflict (e.g, those pertaining to crimes against humanity), as well as provisions that apply only in situations of international or non-international armed conflicts (e.g, taking of hostages and other war crimes). In situations of non-international armed conflict, the Statute also applies to conflicts between armed groups. Moreover, for armed conflicts, the Statute expands on the protections afforded to those not participating in hostilities under the four Geneva Conventions of 1949.

The Rome Statute and the International Criminal Court are highly relevant to armed groups participating in conflicts, because:

- The Rome Statute establishes jurisdiction of the ICC over individual members of an armed group in situations of non-international armed conflict; [Rome Statute, Articles 1, 8(2)(c)-(f)]
- In the context of non-international armed conflicts, The Rome Statute defines “war crimes” to include, “serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949” [Rome Statute, Article 8(2)(c)] and twelve other specific types of actions; [Article 8(2)(e)]
- The Rome Statute applies to armed conflicts that take place in the territory of a State where there is protracted conflict between either “governmental authorities and organized armed groups or between such groups”; [Rome Statute, Article 8(2)(f)]
- The ICC can exercise its jurisdiction when either (i) the State on the territory of which the conduct occurred is a party to the Rome Statute; OR (ii) the State of which the accused person is a national is a party to the Statute; [Rome Statute, Article 12(2)]
- The ICC can also exercise its jurisdiction in situations where the crime of genocide, crimes against humanity, war crimes or the crime of aggression appear to have been committed; [Article 5(1)]


31 The twelve categories of action covered by Article 8(2)(e) include: (i) attacks against the civilian population; (ii) attacks against buildings etc, using the distinctive emblems of the Geneva Conventions; (iii) attacks against humanitarian and peacekeeping personnel/resources; (iv) attacks against religious, charitable and other types of building; (v) pillaging a town/place; (vi) acts of sexual violence; (vii) conscripting/enlisting children (< 15 years) in armed groups; (viii) forced displacement of civilians; (ix) “Killing or wounding treacherously a combatant adversary”; (x) declaring that no quarter will be given; (xi) subjecting detainees to physical mutilation or medical/scientific experiments; (xii) destroying of seizing the property of the adversary.
committed in a situation referred to the ICC by the UN Security Council (acting under Chapter VII of the UN Charter);[32] [Rome Statute, Article 13(b)]

- The Rome Statute provides for individual criminal responsibility for members of armed groups for acts that constitute crimes under the Statute; [Rome Statute, Article 25]
- The Rome Statute establishes criminal responsibility of armed group military commanders for acts defined as crimes under the Statute committed by their subordinates within the jurisdiction of the ICC [Rome Statute, Article 28].

The Rome Statute and the International Criminal Court can have a powerful deterrent effect on members of an armed group as they can now be held individually accountable for acts they commit that constitute crimes under the provisions of the Statute, and within the jurisdiction of the Court.

However, humanitarian negotiators should be careful not to use, or be seen to use, the International Criminal Court as a threat to armed groups to advance humanitarian negotiations. Humanitarian negotiators need to strike a delicate balance between identifying actions of the armed group that may constitute crimes under the Rome Statute, and being seen to act as agents of the ICC.

3.3.4 Additional Legal Provisions Relevant to Armed Groups

In addition to the provisions of IHL, IHRL and international criminal law, there are additional legal provisions and judicial entities of which humanitarian negotiators should be aware in terms of their relevance to the conduct and accountability of armed groups. Some of these provisions/entities are summarized in Table 3 on the opposite page.

3.3.5 Using International Law to Frame Humanitarian Negotiations

International law helps to guide humanitarian negotiations by:

1. Defining boundaries within which to seek agreement;
2. Framing the legal obligations of armed groups concerning the conduct of hostilities and the protection of civilians;
3. Identifying the substantive issues for negotiation, and providing an entry point for discussion on these issues;
4. Providing reference benchmarks for evaluation of options and monitoring implementation;
5. Providing incentives to armed groups to negotiate.

32 For example, in its resolution 1593 (2005) the UN Security Council, acting under Chapter VII of the Charter of the United Nations, referred the situation in Darfur to the Prosecutor of the ICC.
### Table 3
Summary of additional legal provisions and entities that are relevant to the conduct and accountability of armed groups

<table>
<thead>
<tr>
<th>Legal provision/entity</th>
<th>Observations/What humanitarian negotiators should be aware of …</th>
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<tbody>
<tr>
<td>Accountability of individual members of armed group for their behaviour</td>
<td>➔ It is established legal practice that individual members of armed groups can be held accountable for war crimes, crimes against humanity and genocide;</td>
</tr>
<tr>
<td>War crimes, crimes against humanity and genocide must be excluded from amnesty provisions and amnesty legislation, regardless of the perpetrator</td>
<td>➔ UN Peace Agreements are not permitted to include amnesty provisions for core international crimes. Those who commit or support the commission of war crimes, crimes against humanity or genocide must be held accountable, whether nationally or internationally;</td>
</tr>
<tr>
<td>International Criminal Tribunals of Former Yugoslavia (ICTY) and Rwanda (ICTR)</td>
<td>➔ These Tribunals have helped to clarify aspects of international law pertaining to the accountability of armed groups, including the criminal liability of those aiding and abetting serious violations of IHL; responsibility of a superior for actions of subordinates; consideration of acts of terror as crimes against humanity; and the concept of territorial occupation in IHL;33</td>
</tr>
<tr>
<td>Non-judicial reconciliation commissions and quasi-judicial traditional dispute resolution mechanisms</td>
<td>➔ “Truth Commissions” or “Truth and Reconciliation Commissions” have been used as non-judicial fora for perpetrators of large-scale violence to acknowledge their actions and for victims to be recognized (e.g. South Africa). Similarly, traditional dispute resolution processes may also be relied on for this purpose (e.g. quasi-judicial Rwandan gacaca);</td>
</tr>
</tbody>
</table>

1. Defining boundaries within which to seek agreement

• International law helps to set the boundaries within which humanitarian negotiators can work to seek agreement with armed groups. The process and any outcome of humanitarian negotiations must be in coherence with IHL, IHRL and international criminal law.

• Even though armed groups cannot be parties to many of the treaty-based elements of international law, humanitarian negotiations should seek to secure agreement on recognition and/or support by the armed group for the principles and spirit underlying international law.

Case Study: Support for International Law in Agreement with SPLM on Ground Rules

The agreement on ‘Ground Rules’ for delivery of humanitarian assistance and protection of civilians agreed between Operation Lifeline Sudan and the Sudan People’s Liberation Movement/Army (SPLM/A) in 1995 included in the preamble an explicit expression of support for elements of international humanitarian law and international human rights law:

“In signing this agreement, we [OLS and SPLM/A] express our support for the following international conventions and their principles, namely:


ii. Geneva Conventions of 1949 and the 1977 Protocols additional to the Geneva Conventions.”

2. Framing the legal obligations of armed groups concerning their conduct of hostilities and the protection of civilians

• The provisions of international humanitarian law that relate to the actions of armed groups in times of non-international armed conflict constitute the legal basis for holding these groups accountable in cases where they fail to fulfill their duties and obligations under international law.

• To the extent that some of these rules of customary international humanitarian law pertaining to situations of non-international armed conflict (for example, as listed in the ICRC study on customary international humanitarian law) extend into areas not explicitly covered in treaty-based international law, they can also assist in framing the obligations of armed groups.

Humanitarian negotiators should ensure that armed groups are aware of their duties and obligations under international law. In communicating the responsibilities of the armed groups, humanitarian negotiators should take care that this is not perceived by the armed group as a threat. Nonetheless, humanitarian negotiators should not give the impression that by entering into negotiations the group members will be absolved or exempt from being held accountable for past, ongoing or future abuses of human rights and breaches of international humanitarian law.

Humanitarian negotiators frequently feel that they are the “weak” party in negotiations with armed groups. However, the provisions of international law and the demonstrated willingness of the UN Security Council, international legal courts and tribunals to hold armed groups accountable for their actions can strengthen the position of humanitarian actors during negotiations.

3. Identifying the substantive issues for negotiation, and providing an entry point for discussion on these issues

International law can provide a basis for identifying the issues upon which the humanitarian negotiations will focus. For example, the humanitarian negotiators could draw on Common Article 3 and Additional Protocol II of the Four Geneva Conventions of 1949 and customary rules of international law to catalogue issues upon which to secure agreement, including: humanitarian access; protection of those not taking part in conflict; care of wounded and sick, etc.

Depending on the particular context, certain provisions of international law can provide an entry point for negotiations with an armed group. There may be particular issues on which the armed group may be more willing to negotiate. For example, negotiations on protection of children from induction into the armed group may provide a starting point for discussion on a range of other issues (e.g. prevention of sexual exploitation of girls). This does not in any way suggest a hierarchy of provisions of international law, but rather seeks to assist in building a foundation for ongoing negotiations.

4. Providing reference benchmarks for evaluation of options and monitoring implementation

International law provides a set of criteria—indepenent from both parties to the negotiations—against which to evaluate options for agreement and implementation of any negotiated outcome. For example, the Convention on the Rights of the Child (CRC, 1989) defines the special protections afforded to children over and above those contained in other human rights treaties. These rights, and measures of the degree to which they are being fulfilled (such as the UN Common Country Assessment Indicator Framework), provide reference benchmarks for monitoring implementation of an agreement, for example to facilitate humanitarian access for the purposes of immunizing children in a given area.
5. Providing incentives to armed groups to negotiate

- Some armed groups may have aspirations to pursue political approaches to achieving their objectives (whether in parallel with or following an approach based on the use of force). In these cases, armed groups may be more sensitive to the perception of the group among national and international actors. If an armed group is fighting for territorial autonomy with a view to establishing a State in the future, the group may be more attuned to the need to respect international human rights law (even though they are not a party to any international human rights treaty). For example, in dealing with international aid agencies, the Kosovo Liberation Army (KLA) always portrayed themselves as “freedom fighters” or “liberators”. In anticipation of the post-war phase, the KLA was actively working to cultivate a positive image of the group among members of the international community, and therefore had a strong incentive to facilitate humanitarian assistance and abide by international human rights norms.

- Armed groups may perceive compliance with international legal norms as enhancing their credibility and their own perceived legitimacy with internal or external audiences, including their own diasporas.

- Armed groups may fear reduction in economic and/or military support if they are found to be acting in breach of international law.

In using elements of international law to frame negotiations with armed groups, humanitarian organizations should be aware that the issue of whether a State of armed conflict exists may be contested or subject to interpretation. A State may argue that the situation in its territory does not constitute an armed conflict, but rather an internal disturbance, leading to the assertion that the relevant provisions of IHL are not applicable. Moreover, a State may claim or declare a state of emergency, which would permit it to derogate from certain human rights (…albeit in certain limited circumstances; See Section 3.3.2).

In these cases, humanitarian organizations should develop a clear understanding of the provisions of IHL and IHRL that apply in the particular context, drawing on legal expertise as required, prior to entering into the negotiations.

3.4 Translating Principles into Practice: Humanitarian Policies

Humanitarian policies assist in translating humanitarian principles and legal provisions into an operational setting, generally focusing on a particular area of humanitarian action. Humanitarian policies contextualize the core principles mentioned above, and elaborate options for humanitarian action that adhere to those principles. Two examples of humanitarian policies in particular areas are:

On the issue of civil-military relations: IASC Reference Paper on “Civil-Military Relationship in Complex Emergencies” (28 June 2004);
On the issue of **internally-displaced persons**: IASC Document: “Implementing the Collaborative Response to Situations of Internal Displacement: Guidance for UN Humanitarian and/or Resident Coordinators and Country Teams” (2004); and OCHA “Handbook for Applying the Guiding Principles on Internal Displacement” (1999);

In general these types of policy documents define the scope of humanitarian operations in a particular area.

### 3.4.1 Using Humanitarian Policies to Frame Humanitarian Negotiations

While many of the existing humanitarian policy documents do not relate specifically to actions of armed groups, they nonetheless provide a source of options for humanitarian negotiators to consider in undertaking negotiations with armed groups. For example, elements of the guidelines on civil-military relations that generally relate to official military forces can also provide useful insight into the limits of interaction with armed groups (as another type of military actor).
Points to Remember—Framing the Negotiations

➔ Humanitarian principles, policies and international law provide a framework and source of guidance for humanitarian negotiations with armed groups.

HUMANITARIAN PRINCIPLES

➔ Three core humanitarian principles of humanity, neutrality and impartiality; Additional principles: Dignity; Respect for Culture and Custom; Do No/Less Harm; Independence; Sustainability; Participation; Accountability; Transparency; and Prevention.

➔ These principles guide humanitarian negotiations by: (1) providing a source of guidance for humanitarian negotiators on how negotiations should be undertaken; (2) defining boundaries within which to seek agreement; and (3) providing a set of criteria for developing options for consideration by the negotiating parties.

INTERNATIONAL LAW RELEVANT TO HUMANITARIAN NEGOTIATIONS

➔ International Humanitarian Law (IHL) applies to situations of armed conflict (international and non-international); includes treaty-based and customary international humanitarian law.

➔ Armed groups are not party to international humanitarian law treaties, however, IHL binds all parties to an armed conflict, State and non-State actors. Common Article 3 of the Geneva Conventions of 1949 specifies a number of minimum provisions that the parties to an internal armed conflict, including armed groups, are required to uphold (see Box 2).

➔ Customary international humanitarian law is the body of rules and norms that emanate from established State practice—and the widely-held belief that such practice is warranted as a matter of law.

➔ International human rights law (IHRL) applies in peacetime as well as in conflict; Defines rights of individuals and duties and obligations of States (primarily) to safeguard and fulfill those rights; International human rights treaties are adopted by States.

➔ The International Criminal Court (ICC) is the first international court established to promote the rule of law and to exercise its jurisdiction over persons for the most serious crimes. The Court was established by the Rome Statute of the ICC in July 1998.

➔ The Rome Statute establishes jurisdiction of the ICC over individual members of an armed group; It defines “war crimes” to include, “serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949", and provides for
Points to remember (continued)

individual criminal responsibility for members of armed groups for acts that constitute crimes under the Statute.

➔ The ICC can exercise its jurisdiction when either (a) the State on the territory of which the conduct occurred is a party to the Rome Statute; OR (b) the State of which the accused person is a national is a party to the Statute.

➔ International law guides humanitarian negotiations by: (1) defining boundaries within which to seek agreement; (2) framing the legal obligations of armed groups; (3) identifying the substantive issues for negotiation; providing an entry point for discussion on these issues; (4) providing reference benchmarks for evaluation of options and monitoring implementation; and (5) providing incentives to armed groups to negotiate.

HUMANITARIAN POLICIES

➔ Humanitarian policies assist in translating and implementing humanitarian principles and legal provisions into an operational setting, generally focusing on a particular area of humanitarian action (e.g. guidelines on civil-military relations, IDPs).

➔ Humanitarian policies can guide humanitarian negotiations by broadening the range of options that parties to the negotiations can consider as a basis for agreement.