Bringing Law into the Political Sociology of Humanitarianism[1]

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ABSTRACT:

Over the past few years, the study of humanitarianism has emerged as an interdisciplinary subfield in international political sociology. This article maps out some preliminary ideas about the role of legal sociology in this project. The study of international humanitarian law has overwhelmingly been the terrain of doctrinal legal scholars, while the apparent lack of other law has meant that, until recently, legal sociologists have paid little attention to the humanitarian sector. There has also been little scholarly concern regarding the consequences of not asking questions about the role of law in the humanitarian project. We argue that legal sociology helps us understand how rules, standards and norms shape and are shaped by practices and interactions within and across humanitarian spaces globally, and how law contributes to humanitarian governance.

Key words

Humanitarianism, legal sociology, political sociology, transnational governance

1. INTRODUCTION

Over the past few years, the study of humanitarianism has emerged as an interdisciplinary subfield in international political sociology. In this article, we will map out some preliminary ideas about the role of *legal sociology* in this project. Humanitarianism is many things to many people. Humanitarianism is 'an ethos, a cluster of sentiments, a set of laws, a moral imperative to intervene, and a form of government'; it is 'one way to «do good» or to improve aspects of the human condition by focusing on suffering and saving lives in times of crisis or emergency; for instance, humanitarians provide temporary shelter, food, and medical care during wartime or immediately after disasters'.[2] The actors involved include affected populations, civil society, host governments, the private sector, international organisations, humanitarian practitioners, the international humanitarian sector and donors.[3] Historically, humanitarian action has been linked to the normative framework of international humanitarian law (IHL), while emerging as a largely unregulated field of practice.[4] The study of IHL has overwhelmingly been the terrain of doctrinal legal scholars, while the apparent lack of other law has meant that, until recently, legal sociologists have paid little attention to the humanitarian sector.[5] There has also been little scholarly concern regarding the consequences of *not* asking questions about the role of law in the humanitarian project.

In this article, we start from the following definition of the political sociology of humanitarianism:

> The constitution of humanitarian crisis and crisis responses, and how relationships between crises-affected communities, humanitarian actors, host governments and donors emerge from and shape crisis and crisis responses.[6]

This definitional prism allows us to ask questions about authority, governance, legitimacy and power in the global emergency zone. In the following, we argue that legal sociology is of central analytical value to this prism, as it focuses on the study of rules, standards and norms in humanitarian governance. Humanitarian governance is generally understood as the attempt to govern individuals and human collectivities in the name of the preservation of life and the reduction of human suffering. It is exercised through a global system of international organisations, donors, troop-contributing nations and nongovernmental organisations (NGOs) operating in parallel with, as well as across, domestic state structures to respond to and administer a permanent and globalised condition of crisis.[7] Specifically, we argue that legal sociology helps us understand how rules, standards and norms shape and are shaped by practices and interactions within and across humanitarian spaces globally.

We also argue that legal sociology offers important perspectives on the relative lack of regulation of the humanitarian space, and on the normative orderings that occupy this space in competition with, as a substitution for, or in parallel to legal norms. Humanitarian space is not only a term specific to the field of humanitarian action, but also a key concept in the academic discourse on humanitarian action. Humanitarian space is variously conceptualised as a space within which NGOs operate, as a field of humanitarian governance, and as a site where people of concern can claim protection and relief.[8] As scholars specifically focused on the *legal* aspects of humanitarian space and the evolving

law of humanitarian action, we are interested in normative constructions and contestations regarding conceptualisations of aid, agency, crisis, responsibility and rights *within* and *across* different social fields of regulation and governance.

We ask a set of basic questions concerning the relationship between humanitarian governance and law: what is the relationship and legal hierarchy of competing humanitarian values? What type of authority – and legal authority – do humanitarian actors have, and how is this authority produced and constrained through rules, norms and standards; including soft regulation, contractual practices and financial policies? What are the normative implications of enfranchising non-state actors to partially 'see like a state'[9] – and what are the implications for crisis-affected communities and individuals? What does this authority allow humanitarians to do, and to the extent that humanitarian actors are held accountable, how does this happen?

We suggest that in order to situate the contribution of legal sociology within the political sociology of humanitarianism, a four-step approach is useful. First, we begin by identifying a set of trends in contemporary humanitarian action that makes a greater engagement critical. We then move to provide an inventory of the disciplinary and thematic make-up of the emergent field of political sociology of humanitarianism. As a third step, we begin to articulate how we can explore the legal aspects of humanitarian action as transnational practice. In our fourth and final move, we offer a set of specific examples of such practice. Focusing on hard law, we consider the relationship between international humanitarian law and human rights law through a legal sociology lens. Next, we look at soft law and the dynamics of regularisation and norm development. We then turn our attention to the tension between classic notions of needs-based humanitarianism and newer conceptualisations of rights-based humanitarianism that ambiguously cast humanitarian organisations as duty holders. Finally, we consider the potential for a shift towards court-ordered humanitarian practice, as illustrated by the evolving juridification of humanitarian organisations' duty of care for their staff. Scholarly focus on the litigation on behalf of individual humanitarian workers (and beneficiaries) against humanitarian organisations will also situate a legal sociology of humanitarianism more squarely within the methodological traditions and theoretical debates of the law and social change tradition within legal sociology. A brief conclusion follows.

2. RATIONALE: WHY DO WE NEED A POLITICAL AND LEGAL SOCIOLOGY LENS ON HUMANITARIANISM?

In a series of seminal contributions, the geographer Derek Gregory has popularised the concepts 'the global battlespace' and 'the everywhere war' to describe late modern war as a war that can emerge everywhere.[10] Drawing on his work, we propose that the terms 'the global humanitarian space' and 'everywhere crises' are analytically meaningful ways to describe a contemporary humanitarianism that experiences significant institutional expansion and securitisation. We argue that with the rise of a global humanitarian space, vulnerabilities are differentially distributed but widely dispersed, and in consequence humanitarianism is being changed by the slippery spaces through which it is conducted.

Our starting point is three central ideas in thinking about humanitarianism: first, that humanitarian action has traditionally been understood as a short-term and charitable transnational response to human need and human suffering; second, that humanitarian action is seen as driven by an emergency ethos, where the state is often unable or unwilling to protect and aid civilians in the context of conflict or disaster;[11] and third, that over time, there has been a persistent idea animating debates within the humanitarian enterprise that the humanitarian space is shrinking.[12] However, today, much is in flux: it is evident that humanitarian response is often neither short-term nor transnational nor necessarily benevolent in intention or effect. It is also *not* evident that humanitarian space is shrinking: as for humanitarians, there are more of them, they have more money, with which they do more things in more places than ever before, under a patchwork of voluntary accountability regimes.

Humanitarian action is commonly taken to be a short-term and emergency-oriented affair. However, for international humanitarian agencies, their average time in an emergency site is often multiple years, if not decades. While a humanitarian crisis can be officially declared to have ended, the sudden-onset disaster or upsurge in violence is often replaced by contexts of 'regular' poverty and vulnerability to new shocks. With the shifting temporal horizon, aid organisations alter the descriptions of their work, referring for example to 'long-term emergency aid'.[13]

Our understanding of emergencies and where and why they happen is being upended. As illustrated by the European refugee crisis, border control and security practices may be the *sources* of humanitarian suffering.[14] It also illustrates how humanitarianism increasingly comes with a preemptive streak: while humanitarian aid was once designated to assist and protect displaced civilians, humanitarian aid is today also targeted towards protecting *our* way of life against migration.[15] This is particularly apparent in the new configuration of the Global War on Terror, where humanitarian aid is used for stabilisation as aid is channeled towards reducing risks of radicalisation – in a slightly different version than previous stabilisation paradigms, which were geared towards stabilising weak states, building democracy (and winning hearts and minds).[16] In tandem with this 'new' stabilisation, another old debate is being revisited (yet again), namely that of the humanitarian-development nexus. At the 2016 World Humanitarian Summit in Istanbul, the 'new and coherent approach' was emphasised, highlighting the need to bring 'humanitarian, development and peace-building efforts together'.[17] We are now observing a shift where aid efforts are no longer legitimised as 'mere humanitarian', but are increasingly justified as means to an end in tandem with security and foreign relations interests.[18] The point is not the use of humanitarian and development aid as soft power in international politics, but the *articulation* and *justification* of humanitarian and development aid *as* politics.

As the humanitarian community has struggled with the emergencies in Afghanistan, the Democratic Republic of the Congo, Darfur, Haiti, Iraq, Sri Lanka and Syria, a persistent concern has emerged that the humanitarian space is shrinking – a shift that is resulting in serious consequences for both the protection of civilians and the security of humanitarian workers.[19] Collinson and Elhawary have observed that the various definitions of humanitarian space in circulation tend to coalesce around this 'shrinking' notion: the space has been described, for example, as being under siege and in need of safeguarding.[20]

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The notion of the shrinking humanitarian space is both a normative claim about the proper role of humanitarian actors and a set of claims about the nature of threats to the humanitarian space. Generally, observers have attributed the shrinking of the humanitarian space to the politicisation of humanitarian aid, which is viewed as detrimental to principled humanitarian action. In Darfur, Rwanda and Sri Lanka, among others, the perceived failure of humanitarian action was closely linked to the idea that humanitarian actors were seen as political actors with particular agendas. This de facto turn away from principled humanitarian action has been blamed, variously, on donors, stabilisation politics, mission creep and the increased outsourcing of aid delivery to commercial security providers. Some observers hold that the humanitarian space is shrinking because of declining adherence to humanitarian principles.

Dandoy and de Montclos argue, however, that the departure from patterns of the past was not as pronounced as had been suggested, and they question the perceived deterioration in operating environments.[21] Other critics of the 'shrinking space' narrative have observed that humanitarian operations now address a broader range of situations in a larger number of places, entailing the expansion of the international humanitarian system into active conflict zones where the objective is to 'stay and deliver'. This points to a need for further inquiry into the legal and institutional foundations of this expansion. This line of analysis must also be coupled with an analysis of the political economy of these claims about loss of humanitarian access, which are at odds with continuously expanding budgets, activities and institutional structures, and other factors that, similarly, contradict the notion that the humanitarian space is shrinking.

3. DISCIPLINARY CONTEXT: THE INTERNATIONAL POLITICAL SOCIOLOGY OF HUMANITARIANISM

In order to situate our study of law, this part provides a genealogy of the disciplinary and thematic make-up of the emerging field of political sociology of humanitarianism, as situated within the broader rising field of humanitarian studies. In parallel to the expansion of the global humanitarian system, there has been a general rise of humanitarianism as a field of study. The most significant early contributions overlapped with critical development studies, articulating critiques of the ability of international aid to deliver. From the late 1990s, and again from the 2011 Libya intervention, there has been a significant concern with the militarisation of humanitarian aid as a form of global governance in the context of humanitarian intervention, human security and R2P (Responsibility to Protect), which has resulted in a massive literature. As part of this, there has also been rising interest in the historical development of humanitarianism, and its link with the postcolonial imagination. In the last ten years, however, 'humanitarianism' has been taken up as a focus of inquiry in several disciplines. We are beginning to see sustained engagement with the 'economics of humanitarianism', for example.[22]

Partly due to the specific disciplinary history of sociology itself, the emergence of a political sociology of humanitarianism has been slow. As the systematic study of characteristics and patters of human interaction, sociology has been overwhelmingly linked to

the nation state, equating the study of 'the social' with 'the local', and the nation state as the parameters of society.[23] In spite of the universalising ambitions of a number of its founding figures, it has taken a long while for the discipline to expand beyond its heartland of Western industrial societies.[24] In consequence, sociology arrived late to the study of human rights,[25] and is late to the table in the field of humanitarianism too.

As a result, the disciplinary backdrop for political sociology of humanitarianism can be found mainly in the fields of anthropology and international relations (including critical security studies and borrowings from science and technology studies), all of which have had sustained engagement with humanitarianism as a field of study. Of these, anthropology with its focus on non-Western contexts, institutions beyond the nation state and fieldwork-based methods has developed the most comprehensive literature. This literature has predominantly concerned itself with how people – decision makers, donors, recipients and practitioners – interact with the discourses, institutions, symbolisms, structures, and rules of humanitarianism.[26] Of particular interest have been practices and representations of testimonies and witnessing;[27] forced displacement[28] and refugee camps;[29] as well as humanitarian goods[30] and medical humanitarianism.[31] The subfield of legal anthropology has also seen a rising engagement with humanitarianism.[32] In international relations, studies have been concerned with the governance of the humanitarian field, focusing on its institutional designs and issues of legitimacy and legality.[33]

What we understand as the specific body of literature that can be labelled 'international political sociology of humanitarianism' has in recent years given rise to three different strands of thematic arguments. They focus on: (1) borders, camps, and refugees; (2) material practices of aid; and (3) humanitarian governance, including the humanitarian space and the dichotomy between care and control in humanitarian governance. The largest body of scholarship concerns that of borders, camps and refugees. Here, contributions theorise the camp and other 'bare life' settings such as 'the humanitarian border' as political and social space,[34] and the processes of constituting refugees and displaced people as political subjects.[35] Significantly, much of this scholarship overlaps with refugee studies. On the material and spatial practices of aid, and the constitution of 'recipients' and 'aid workers', international political sociology has contributed to unpack the 'rape-stove panacea'[36] or examined personal protective equipment in the context of the Ebola outbreak.[37] Attention has been given to the humanitarian concern with shrinking space,[38] more recently also with a focus on the role of technology and knowledge politics in constituting a humanitarian cyberspace[39] and with respect to the increasing use of biometrics.[40]

From this disciplinary and thematic stocktaking follows two observations. First, that humanitarianism as both empirical practice and theoretical concept transgresses physical and disciplinary borders alike, and that this underlines the need for further interdisciplinarity. Second, and in spite of operating in the liminal spaces of society and law, humanitarianism as a field of study is not yet approached from a legal sociology perspective. Indeed, an approach attuned to the intersection and relations of law and society for humanitarian action seems to be missing in action, both analytically and as an empirical object of study. In recognition that disciplinary perspectives determine approaches as well as questions asked, the rest of this article begins to explore the conceptual and thematic specificities of humanitarianism as legal sociology.

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4. METHODOLOGY: EXPLORING TRANSNATIONAL HUMANITARIAN SPACES THROUGH LAW

First, building on the intellectual origins of sociological approaches to the study of law, we provide an analytical account of how we can make sense of the transnational and multileveled character of law in the humanitarian space. Rather than an efficiency-oriented study of law 'on its own terms' that seeks to understand law's internal workings, or an external and evaluation-oriented approach that focuses on the normative justifiability of law, legal sociology can be conceptualized as an external and empirically-oriented analysis of the 'characteristics of existing systems of law, including the state and development, the causes and effects, and the functions and objectives of the institution and practices of law'.[41] This latter ideal-type places law in the context of society and social sciences, as *law-in-society* whose basic problematique is concerned with how law influences society, how society influences law, and how law and society are co-constituted.[42] As is clear from the previous section, a disciplinary perspective determines more closely the particular type of questions asked in external analyses of law, as it does with other social institutions.

Humanitarianism is in its many reiterations – as empirical and disciplinary field, logic and sentiment, practice and space – primarily transnational in nature. This feature distinguishes it from national and other international social phenomena, and necessitates an analytical scale that transcends a nation state outlook on society and law.

One such methodological approach is provided by the coupling of Bourdieusian sociology to international relations, where Bourdieu's 'methodological toolbox' is put to work in making sense of the formation and structuring of *transnational fields of governance*.[43] The notion of 'field' as a research tool is used to understand how the actions of certain actors structure the social world, but also how they are themselves structured by the social world.[44] Approaching fields as relational social spaces thus enables insights into how norms, rules and practices are shaped by power dynamics, practices and interactions of its agents, and provides tools for empirically 'mapping' or visualising how particular fields are constituted. As a place of struggle, this approach can increase our understanding of the distribution of power within a transnational field, including the relational dynamics between people, institutions and the forms of *capital* at play, such as authority and knowledge, advantages, education and skills – and, not the least, *legal* capital.

By focusing on the valorisation of law in humanitarian action, law is brought into the political sociology of humanitarianism. This approach thus emphasises what is elsewhere undermined in analysis of international legal practices: a focus on social structures,[45] while at the same time enabling a view of the particularity of the transnational as a site of political engagement. Humanitarianism as a 'juridified' transnational field thus emerges as a site of conflict rather than consensus.

In this manner, we can, for example, approach the notion of humanitarian space as a humanitarian *field,* giving emphasis to the conflicting actors, their positionalities and the differentiating sets of discourses and values at play. And yet while the field approach enables insight into conflicts, frictions, tensions and ultimately power in the humanitarian field/space, our legal sociology brings attention to the constitutive nature of law to this project – to the way in which law and legal capital constitute a power resource among different actors in the humanitarian field/space, as well as to the ways in which legal norms structure

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and are structured by these relations. Although this socio-legal perspective is new to the project of humanitarianism, there is an emerging body of scholarship on the force of law and lawyers in transnational fields.[46] Our approach is not only concerned with transnational legal power networks as they travel and impact upon separate but inter-connected fields (human rights law, international criminal law, international humanitarian law, etc.), but also how legal capital forms part of non-elite behavior.[47]

Here, we also draw on the legacy of legal anthropology and Sally Falk Moore's work and conceptualisation of social fields with porous qualities, with 'flows' between discrete but interconnected semi-autonomous social fields within which the actors operate.[48] The local, national and international humanitarian actions and the 'international humanitarian community' are conceptualised as social fields with a porous quality. Using the idea of semi-autonomous fields as a lens on the humanitarian governance structure, we further situate the inquiry by placing the constitutive nature of humanitarian action at the centre of the investigation. Humanitarian practice is at once a series of day-to-day bureaucratic encounters between crisis-affected people and humanitarians, and a complex transnational practice evolving out of the intricate processes of international policymaking, the domination of specific national agendas, and the ebb and flow of particular cosmopolitan discourses. The field of interaction between crisis-affected people and humanitarians can be described as a site of overlapping and parallel normativities. For example, different from other UN organisations, the UNHCR has a mandate that furnishes it with individual clients, the 'populations of concern'. As shown in the field of refugee studies, both as a cause and an effect of this normative plurality, this site is pregnant with conflicting interests, misunderstandings and suspicion.

Our approach thus enables insight into how fields are simultaneously structured by national/transnational legal orders while having the capacity to generate their own (non-legal) obligatory norms to which compliance can be induced or coerced. As Falk Moore notes, 'law is imposed with uneven and indeterminate consequences, and attention is drawn to the connection between the internal workings of an observable social field and its points of articulation in a larger setting'.[49] In what follows, we show how this conceptual framework is put to use in the analysis of four thematic articulations of law in humanitarianism.

5. THEMATIC ISSUES: SOCIO-LEGAL PERSPECTIVES ON HUMANITARIAN GOVERNANCE AND LAW

To illustrate the importance of developing socio-legal analysis of the humanitarian field, this section sketches out a set of inquiries concerning the relationship between humanitarian governance and law. As we see it, the level at which questions are asked is as important as the subject-matter of those questions. One place to start such an inquiry is at the formal level of codified norms: tensions in legal hierarchies and in the relationships between 'good' normative frameworks like IHL, IHRL and humanitarian imperatives and principles must be identified and analysed in the particular, as these tensions have direct impact on how and where aid and protection is allocated. Another important group of

questions are those asking about what type of authority – and legal authority – humanitarian actors have, and how this authority is produced and constrained through rules, norms and standards; including soft regulation, contractual practices and financial policies. The political decisions and bureaucratic practice that partially or wholly enfranchise non-state actors to 'see like a state' engender significant normative implications.[50] This concerns both access to and absence of humanitarian aid, as well as the manner in which it is distributed. We need to ask about the direct consequences and distributive effects for crisis-affected communities and individuals. We must identify, analyse and understand the attributes of this authority and what it allows humanitarians to do. Finally, more socio-legal focus is needed with respect to how and to what degree humanitarian actors are held accountable through legal or quasi-legal mechanisms. Here, we focus on a specific instance of court-ordered practice: the evolving norm of a duty of care for humanitarian workers.

5.1. Locating Competing Values: Humanitarian Law, Human Rights and Humanitarian Norms

As noted previously, international humanitarian law has historically been the 'default' starting point for thinking about regulation of the humanitarian sector. However, with respect to regulation of armed conflict, there are serious tensions between humanitarian law and international human rights law (IHRL). The vigorous scholarly 'co-application' debate concerning the relationship between IHRL and IHL has practical ramifications for the constitution of the humanitarian field, including how practices are classified, restricted or permitted. The tension between IHRL and IHL concerns the hierarchy between the two with respect to application and interpretive strategies; as well as the divergence in meaning the two bodies of law attribute to certain key concepts and principles that are common to both.

The objective of IHL is to resolve matters of humanitarian concern arising directly from an armed conflict, whether of an international or non-international nature. The rules restrict the rights of parties to a conflict to use whatever methods and means of warfare they might choose, and seek to protect people and property affected, or liable to be affected, by the conflict.[51] Central to the interpretation and implementation of this body of law is a set of core principles that include distinction, military necessity and proportionality. 'Distinction' requires combatants to be distinguished from civilians, and attacks to be limited to legitimate military objectives. 'Military necessity' requires that combat forces engage only in those actions that are deemed necessary to achieve a legitimate military objective. 'Proportionality' prohibits the use of force beyond the level required to accomplish the chosen military objective.

The modern conception of human rights developed in the aftermath of the devastation of World War II and the Holocaust.[52] Unlike IHL, IHRL has developed a strong implementation framework, primarily through the institutionalisation of individual petition rights and through the establishment of regional human rights courts mandated to adjudicate on a range of civil, political, social, cultural and economic rights. The human rights framework is a complex matrix of rights and obligations: state parties are obliged to respect, protect and fulfil human rights. Underpinning this framework are core principles of non-discrimination, participation and proportionality.

The relationship between IHL and IHRL has important legal and ethical implications for the use of military power, and, concomitantly, for the context of humanitarian action: should they apply side by side or should one body of law take primacy? Different de facto situations activate different legal regimes. IHL travels with armed forces abroad and is by nature extraterritorial, while IHRL has traditionally been linked to the territorial jurisdiction of individual states. In peace, all applicable human rights apply. In the case of disturbances, riots/unrests, disasters or other events deemed to give rise to a state of emergency, human rights apply with permitted derogations. In non-international armed conflict between the states and armed groups, between armed groups, and between the state and organised groups with territorial control, relevant non-derogable human rights apply alongside the relevant provisions of IHL. Yet, in international armed conflict the application of non-derogable human rights provisions alongside IHL has been a tenuous issue in recent years.

The issue of primacy comes to the fore with respect to the protection of life. The calculus of when to protect or kill is radically different according to the proportionality considerations of each body of law. The concept of proportionality has a different function within each body of law and employs distinct balancing techniques to determine the legality of an act. In IHL, proportionality springs from the prohibition against indiscriminate attacks and attacks likely to cause disproportionate harm to civilians. Any incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination of the two must not be excessive in relation to the concrete and direct military advantage anticipated from a resort to the use of armed force. But civilian casualties are permitted if the military gain is proportional. In contrast, the proportionality test to be applied in human rights cases envisages restrictions of individual rights for the necessary safeguarding of public interests: human rights law requires that the use of force be proportionate to the aim of protecting life. IHL accepts the use of lethal force and tolerates the incidental killing and wounding of civilians not directly participating in hostilities, subject to the requirements of proportionality. In IHRL, on the contrary, lethal force can only be resorted to if there is an imminent danger of serious violence that can only be averted by such use of force.

In recent years, international law scholarship has undergone a significant empirical turn; yet while these studies examine how international law 'works', a more sophisticated legal sociological approach to this legal matrix would give us a better understanding of how legal tensions are both constituted by and constitutive of contemporary conditions in international society. As aptly put by Martti Koskenniemi, 'much of the search for political direction today takes the form of jurisdictional conflict, struggle between competing expert vocabularies, each equipped with a specific bias'.[53] A legal sociology approach can help us identify and unpack the biases and expert vocabularies, *and by whom they are asserted.* To what extent is the jurisdictional tension between IHL and IHRL a result of conflicting actors and differentiating sets of discourses and values, such as that between 'a human rights centred «law enforcement» paradigm and a more aggressive humanitarian law based «armed conflict» paradigm' in the war on terror, for example?[54] And to what extent is the co-application of these previously distinct legal paradigms a result of consolidating power relations between actors and their 'biases', battled out through legal discourse? Attentive to how law influences humanitarian action, a legal sociological approach will further explore

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the ramifications of 'hard' legal tensions in the everyday practice of military and humanitarian action. For example, to what extent will jurisdictional struggles be refashioned in the mixed paradigm as struggles between rights and needs-based assistance in humanitarian action, and thus reflective of competing moral underpinnings of the humanitarian enterprise as articulated through a set of imperatives and principles?

5.2. Thematic Articulations of Content and Format: Competing 'Good' Values and Soft Law

Moving from tensions between hard law regimes, in what follows we consider contestations and tensions at the level of soft law. The authority of humanitarian actors is produced and constrained through rules, norms and standards; including soft regulation, contractual practices and financial policies. Historically, humanitarian action has been framed in the context of international humanitarian law and in terms of a set of humanitarian imperatives of aiding according to need and 'doing no harm', and in accordance with principles of neutrality, humanity and impartiality. However, there have not been binding treaties regulating the right to humanitarian assistance. As we are beginning to move towards a 'law of humanitarian action',[55] the humanitarian field is experiencing rapid soft law driven norm development, both with respect to the principles of humanitarian aid, and performance standards for humanitarian actors.[56] On a thematic level, we are, for example, currently seeing the development of a body of soft international disaster response law.[57] A legal sociology lens can help us describe and analyse how certain practices, categories, items or events become the object of soft legalisation efforts, and trace how norms travel from a soft to a hard status.

The broader context for the regularisation of humanitarian governance is the accelerating reach of international law into the realm of international administrative governance. In the late 1980s and early 1990s, the lack of accountability and transparency raised serious questions about the procedural legitimacy of international organisations. Serious concerns were raised about the emergence of undemocratic liberalism as a consequence of global bureaucratisation. The answer to this anxiety about bureaucracy was to bring in more of it: it was thought that rationalisation and the emphasis on proper and correct procedures would ensure procedural legitimacy. Hence, the bureaucratisation and regularisation of humanitarian action takes place mostly through the proliferation of soft norms resulting from multilateral legal agreements, international adjudication and the increased law-making capacity of international organisations.[58] Legal sociology may here contribute to develop a critical perspective on this aspect of humanitarian governance, for instance by mapping out the role of legal actors and legal authority in humanitarian organisations and transnational coalition networks in humanitarian governance.

Soft law can harden over time, either as a development towards a treaty making process or by becoming customary law as a result of state practice. A non-exhaustive inventory of soft law items includes instruments such as declarations, recommendations, codes of conduct, action plans, expert opinions, handbooks and CSR (Corporate Social Responsibility) practice. Engaged in these soft norm-setting efforts are states, the UN, international organisations, NGOs and private commercial actors, as well as civil society organisations, trade associations and legal experts. In the context of the continued proliferation of law-

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making procedures and sites, soft law is many things to many actors: political and legal actors see soft law as a pragmatic instrument for governance; the business sector relies on soft law to facilitate private enterprise; and civil society uses soft law as a vehicle for social change. Soft law can be a pragmatic way of overcoming disagreements in negotiation processes, where parties are able to make limited commitments and continue to negotiate. The spread of soft law instruments through global media can capture popular imagination in a way that creates a community around imagined normative obligations, potentially providing a faster route to hard legal commitments. Soft law can also be a powerful metaphor, protecting institutional projects (EU harmonisation, creating a global push for the criminalisation of domestic violence) or codifying collective memories (declarations on genocide or apartheid).[59]

Additionally, however, soft law also functions as a type of technocratic language representing expert knowledge and technical competence. In mainstream legal scholarship, the hard law/soft law dichotomy is a key normative project, posited as a struggle between the advocates and critics of soft law. At the same time, there is general agreement that despite soft law's lack of legally binding force and the absence of formal sanctions, it engenders practical effects on the ground. This is also the case for the humanitarian field.

So far, socio-legal and anthropological interest in soft law has mostly focused on international instruments for human rights protection, which has resulted in an unfortunate scholarly tendency to reify soft law as inherently progressive, and operating according to a limited set of understandings and logics. We should bear this in mind as we engage critically with the emergent law of humanitarian action. The power operating in the crafting of soft law and the logic of softness may create inequality between groups or result in oppression. Constituted on ideas of emergency and urgency, humanitarian space is a site with extreme power differences between actors, to the extent that aid-affected communities are rarely represented around the table when new soft law instruments are drafted. The informality of soft law may jeopardise formalised accountability mechanisms, or weaken the obligations of organisations, humanitarians, private sector actors or states in the humanitarian field. Even when crisis-affected communities participate, the notion of pluralistic participation may conceal that soft law production is actually limited to powerful actors; and contribute to misrepresent how the humanitarian sector is structured both on and according to principles of systemic inequality. Legal sociology could here provide a close study on how best practices and community norms are articulated and codified as soft law.

5.3. Rights-based Approaches and the Elusiveness of Humanitarian Duties

Next, we turn to legal tensions at the level of individuals subject to humanitarian governance. Legal sociology approaches can also help us make better sense of the tensions that arise when humanitarian actors are enfranchised to exercise governance power. A particularly important field of investigation of this governance power can be found in the turn to 'rights-based humanitarianism' (RBA).[60] The obligation to assist according to need is a key humanitarian imperative, and must be seen in the context of principles of neutrality and impartiality. In the late 1990s, the move from needs to rights was conceived by some commentators as a way of formally improving the conceptual framework of humanitari-

anism,[61] while others saw it as a way of allaying public relation concerns, particularly in the aftermath of Rwanda.[62]

By the early 2000s, human rights gradually became mainstreamed as a staple of humanitarian rhetoric and numerous handbooks, manuals and codes of conduct. Supporters saw rights as the appropriate basis for the legitimacy of humanitarianism, moving it 'beyond a dysfunctional philanthropic mindset'.[63] In contrast, according to the critics, the intent of humanitarian action should be to meet needs; RBA would allow for the conditionality of relief and abandonment of neutrality and make humanitarianism part of an imperial transformative project.[64] Critics also argued that when the human rights approach results in displacement of basic needs by rights, this may produce a new hierarchy of deserving and undeserving victims.[65]

While there is decidedly less talk of RBA today than a decade ago – the RBA discourse has lost the 'buzzword' status – humanitarianism is not in any articulate way 'post-rights', and important NGOs and international humanitarian organisations at least nominally describe themselves as rights-based.

Here, we want to point to the tension between the construction of an emergency zone which enfranchises non-state actors to govern, and the structure of human rights law, which requires that individuals have access to accountability mechanisms, including the means for obtaining binding legal redress through state institutions.[66] The basic dilemma that affects communities in a humanitarian setting can be articulated as the following: 'No longer entitled to rights, they can only have security when embraced by humanitarian non-governmental organisations who have already been enfranchised and contracted by powerful state actors to manage them'.[67]

Legalistic versions of RBA are premised on the notion that rights holders are entitled to hold the duty bearer accountable, but according to international law and the view of international humanitarian organisations, the rights are directed principally at the state and its agents. Humanitarian organisations suggest that they must consider 'rights-holders with legal entitlements' but do not see themselves as accountable for the fulfilment of those rights. Organisations sometimes operate with competing definitions of RBA, where humanitarian organisations seek to strengthen the capacities of the rights holders to make claims, and of duty bearers to satisfy those claims, but are not themselves directly accountable to persons of concern.[68] This tension is particularly acute in the work of the UNHCR. The UNHCR's self-definition as 'rights-based' stands in tension to many of its activities, as it carries out its mandate of providing international refugee protection, ranging from refugee status determination procedures to the allocation of durable solutions and the long-term management of refugee camps.[69]

A legal sociology prism can help us analyse how the humanitarian community has adopted a notion of rights-based approaches without a corresponding duty holder, and why humanitarian actors seem to live well with this contradiction. This paradox is particularly important because RBA is a cornerstone of the humanitarian quest for accountability. On the other hand, humanitarian actors do operate with understandings of 'humanitarian duty', and the extent to which these understandings are concerned with legality and legal obligation merits further investigation.

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5.4. Holding Humanitarian Organisations Accountable through Law: Balancing Duty of Care and Acceptance of Risk

Finally, we consider the potential for a shift towards court-ordered humanitarian practice, as illustrated by the 2012 *Samaritan Purse settlement* and the 2015 *Steve Dennis versus the Norwegian Refugee Council* cases from the Oslo District court. These two cases have engendered a shift in the conceptualisation of the duty of care standard from being a good practice standard in human resource management to becoming a standard considered from and articulated through the language of law and liability.[70] The evolving articulation of thresholds for 'reasonable' care and the corresponding determination of negligent behaviour are already having significant effects on security and risk management and insurance procurement in the humanitarian sector.

We suggest that this legal shift should be read in the context of a greater cultural shift across the humanitarian enterprise. As noted above, there is a vigorous academic debate about how the idea of 'aid worker insecurity' has become part and parcel of the broader shrinking humanitarian space narrative, as well as a humanitarian sector subfield in its own right.[71] At the same time, it is clear that a growing number of humanitarian NGOs assume more risk and take on more government work than previously.[72] In parallel to this, we are also seeing the emergence of a cultural and legal conceptualisation of a 'duty of care' as a key value for the sector. The humanitarian sector has always been premised on a substantial acceptance of risk by humanitarian workers. However, as the sector professionalises with respect to the organisation of humanitarian work and with the entry of cadres of career-track humanitarians with degrees in aid work,[73] the previous regimes of risk-assumption are being challenged on several levels. Whereas the humanitarian sector has focused on the need to 'give voice' to victims of sexual violence and torture,[74] there has been a culture of silence (and little public patience) with respect to humanitarian aid workers' 'narratives of suffering'.[75] Hence, on one level, this re-conceptualisation of humanitarian worker identity entails new language such as 'Be Well, Serve Well', and 'humanitarian wellness' and new practices, such as the effort to create a community 'safe space' for testimonies about burnout, depression or sexual assaults;[76] or, on a more upbeat note, 'sharing your humanitarian wellness story'.[77]

The emergence of a juridified duty of care norm has been closely intertwined with this cultural shift. In the last five years, the duty of care standard has been reframed from being a standard for human resource management to become a legal liability standard, with substantive implications for human resource management. This development is based on a series of events and legal actions that have shown that while humanitarian work is construed increasingly as professional 'work', the global and unpredictable nature of this work means that humanitarian workers find themselves outside of national worker compensation schemes and outside the scope of insurance schemes designed to provide adequate compensation for physical, physiological and emotional harm stemming from the character of the work. The 'evolving standard of care that may impose a duty on them to take reasonable precautions for the safety of such persons placed in harm's way'[78] comprises of a bundle of duties: to determine acceptable and accepted risk by staff; to organise a security apparatus; to train staff properly in security management and hostage situations; and to ensure that staff is informed about the threat situation in the theater.

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In 2010, Flavia Wagner, a program manager for the Christian human rights organisation Samaritan's Purse in Darfur was abducted by Sudanese rebels. In 2011, Wagner sued Samaritan's Purse and the negotiation group, Clayton Consultants Inc., in a US district court.[79] Wagner accused Samaritan's Purse of failing to train its employees properly and of ignoring signs of kidnapping threats. The lawsuit claimed that a delay in the ransom payment caused her greater suffering than if the ransom had been paid earlier and with less regard for economics than for her safety. Wagner settled out of court with Samaritan's Purse and Clayton Consultants in 2012.[80] This case was unique in the sense that it brought the humanitarian sector into the domain of litigation. However, it did not change or challenge any law or prevailing legal standard: according to the NGO's lawyer, the settlement agreement was explicitly 'not an admission of liability in any respect', and it denied 'all allegations of wrongdoing'.[81]

In November 2015, an Oslo District Court delivered its judgment in the case of *Steven Patrick Dennis v. the Norwegian Refugee Council* (NRC).[82] The case concerns negligence under Norwegian law, and with compensation meted out according to the principles of Norwegian tort law. Dennis, a Canadian, sued for compensation following his kidnapping and shooting in June 2012 in Dadaab refugee camp, Kenya. Three other NRC staff were also kidnapped and one driver was killed. The group was held for four days before they were released in a rescue operation led by Kenyan authorities and a local militia. The staff were flown to Nairobi for medical treatment and debriefing before different arrangements were made for their post-care, including compensation through NRC and insurance. In February 2015, Dennis submitted a claim to the Norwegian court for additional compensation from NRC. As the parties disagreed about the amounts and costs allowed to be covered, and in particular about Dennis's demand that NRC admit to gross negligence, several attempts at court mediation failed. After a dramatic trial, the Court found NRC to be liable for compensation and to have acted with gross negligence.

To establish negligence, there had to be personal injury, evidence that NRC could have acted differently to avoid the kidnapping, and that there was a relationship between NRC's actions and the injury. The finding of 'gross negligence' on NRC's part required the court to find evidence of conduct representing 'a clear deviation from responsible conduct'. The Court ruled that NRC should pay Dennis cumulative compensation of approximately NOK 5.5 million (around USD $650,000).[83]

This duty of care standard is the first of its kind to be spelled out by a court. However, it remains to be seen whether this case from a district court in a civil law jurisdiction will be precedent-setting. Also, despite a clear cultural shift, this development is not without its detractors who are concerned that by 'elevating our duty of care obligations to a level that may meet liability standards in home societies we risk fundamentally sabotaging our operational mission.'[84] Nevertheless, these examples illustrate interesting developments regarding the standardisation of humanitarian governance through litigation and adjudication. They also indicate that this field both lends itself well to and is in need of a closer scrutiny through a legal sociology prism. Three particular issues are of note. First, activities and processes that were previously considered 'good practice' within a human resources framework are increasingly juridified. The norms underpinning the rationale for these activities and the way they are organised are clarified and standardised. In the process,

these new norms and standards also produce new practices and activities. Second, they also reshape the modes of organising work and workers, including the use of funds. For example, as a result of the Wagner case, the purchase of liability insurance to cover potential lawsuits from kidnapped employees became more widespread.[85] In the aftermath of the Steve Dennis case, organisations have struggled to define what constitutes acceptable levels of insurance for a multinational staff. These distributive effects merit specific attention. Third, this type of litigation also provides scholars with an opportunity to observe and analyse court practice in the context of the broader theoretical and methodological traditions of sociology of law.[86] The task, then, is to draw out and analyse the normative elements specific to humanitarian action.

6. CONCLUSION: AN EMPIRICAL AND THEORETICAL KNOWLEDGE DEFICIT, BOOMERANG EFFECTS AND THE NEW HUMANITARIAN SPACE

Humanitarianism – as a transnational practice field and a cluster of cosmopolitan sentiments – is expanding. As part of this, the field is legalising. Beyond international humanitarian law, humanitarian action is increasingly compelled and constrained by a plethora of soft law and legal discourses, and what was once a largely unregulated field of practice is now emerging as a transnational humanitarian space where authority, governance, legitimacy and power is progressively invoked through law. There is therefore a significant need to re-conceptualise this humanitarianism in terms of power, legitimacy and regimes of control and surveillance. To this aim, this article represents a first attempt at thinking through the relationship between law and humanitarian governance from the perspective of political sociology. We have reflected on the types of overarching questions asked about law in this context: how does law influence humanitarian action, how does humanitarian action impact law, and how are they mutually constitutive? We have also outlined the ways in which the sociology of law offers a methodological and theoretical toolbox for unpacking this power.

Humanitarianism's avowedly benevolent ambitions for ordering and eradicating crisis is manifested through a global system of organisations operating within, in parallel with, and above and across the domestic state system. Yet while it is legitimated by moral universals (neutrality, humanity etc.), humanitarianism is also a field epitomising global divisions and inequalities. In this highly stratified field of humanitarian action, the individual is increasingly becoming a subject of international law. How and with what implications this development is taking place, needs further investigation. Legal sociology locates the competing values between international human rights law and international humanitarian law, and unpacks the values shaping the dynamics of soft law. In this manner, legal sociology enables critical inquiry of 'where' and 'by whom' values and legal norms are accentuated, developed or undermined, for example by drawing on its well-established research tradition on the study of legal authority and professions. Similarly, we need a more comprehensive understanding of how and to what degree humanitarian actors are held accountable through legal or quasi-legal mechanisms, including but not limited to internal disciplinary procedures, law-based sanctions (such as fines), contractual mecha-

nisms, negotiated settlements or court cases. Inquiries of this nature will contribute to making humanitarian governance more transparent which, in lieu of democracy, is fundamental to its legitimacy.

NOTES

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2 Miriam Ticktin, 'Transnational Humanitarianism' (2014) 43 *Annual Review of Anthropology* 273, 274. DOI: 10.1146/annurev-anthro-102313-030403. Drawing on the work of the Humanitarian Coalition, we understand a humanitarian emergency as an event or series of events that represent a critical threat to the health, safety, security or wellbeing of a community or other large group of people. These events can be grouped under the following headings: natural disasters (which includes earthquakes, tsunamis, volcanic eruptions, floods, avalanches, droughts, storms, cyclones, epidemics, plagues); man-made emergencies (armed conflict, fires, transport crashes or industrial accidents) and complex emergencies (combining natural and man-made elements to include food insecurity, armed conflict and displaced populations). Complex emergencies are typically characterised by extensive violence and loss of life, large-scale displacement, and widespread societal and economic damage. Complex emergencies often involve the hindrance or prevention of humanitarian assistance by political and military constraints and security risks for humanitarian workers. As noted by the Humanitarian Coalition, '[r]egardless of the type of disaster, survivors are left in urgent need of life-saving assistance such as shelter, food, water and health care': see Humanitarian Coalition, 'What is a humanitarian emergency?' <http://humanitariancoalition.ca/sites/default/files/factsheet/fact_sheet-_what_is_a_humanitarian_emergency.pdf>.

3 The humanitarian sector is formally organised around the Inter-Agency Standing Committee (IASC), established in 1992 to strengthen the delivery of humanitarian assistance. The members of the IASC are the heads or designated representatives of the UN operational agencies (FAO, OCHA, UNDP, UN-HABITAT, UNHCR, UNICEF, WFP, WHO), and with the ICRC, IFRC, IOM, OHCHR, the Special Rapporteur on the Human Rights of IDPs, the UNFPA, and the World Bank, as well as the NGO consortia International Council of Voluntary Agencies, Inter-Action and the Steering Committee for Humanitarian Response as associated members. In addition, the humanitarian sector comprises of a multitude of local and national NGOs, and governmental humanitarian agencies, and – controversially in terms of recognition – a host of for-profit entities and private sector actors. See IASC Secretariat, 'The Inter-Agency Standing Committee (IASC)' (Geneva / New York) <https://interagencystandingcommittee.org/system/files/iasc_2-pager_v2015-06-18.pdf>.

4 Natural, man-made and complex disasters trigger a host of different legal obligations and rights. While it is clear that international human rights law, international humanitarian law, refugee law and the soft law on internal displacement are of key importance, the role and rele-

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vance of international disaster response law and other technical legal frameworks that regulate humanitarian access have so far largely been underappreciated by scholars studying the humanitarian legal field. See also Andrej Zwitter and others (eds), *Humanitarian Action: Global, Regional and Domestic Legal Responses* (Cambridge University Press 2014). DOI: 10.1017/CBO9781107282100.

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