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HUMANITARIAN ACCESS IN ARMED CONFLICT: A NEED FOR NEW PRINCIPLES?

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LIST OF ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
IASC	Inter-Agency Standing Committee
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
MSF	Médecins Sans Frontières
NGO	Non-governmental organisation
NSAG	Non-state armed group
NRC	Norwegian Refugee Council
OCHA	Office for the Coordination of Humanitarian Affairs (UN)
SAVE	Secure Access in Volatile Environments
WFP	World Food Programme

EXECUTIVE SUMMARY

Constraints on humanitarian access continue to inhibit the ability of affected populations to receive adequate assistance in numerous conflict situations. This scoping study was commissioned to determine the feasibility and potential impact of developing new 'principles' of access. It was undertaken between September and December 2018 and involved a literature review and interviews with 22 experts from humanitarian and donor agencies as well as academic and advocacy entities engaged in this issue area.

Key findings are as follows:

At the foundational level, the legal framework of international humanitarian law (IHL), complemented by the core humanitarian principles, provides the basis for access and access negotiations in humanitarian response. In non-international conflicts (the vast majority), IHL provides a weaker legal basis for humanitarian access than is commonly assumed. The moral spirit of the law – that civilians deserve access to humanitarian relief in any sort of conflict – is undermined by the through-line of the rights of sovereignty and the rule of consent. This suggests an even greater need for concerted political pressure by states and creative practices by humanitarians to achieve access goals than the notion that 'the rules are there, they just need to be complied with/enforced'.

To date, the access that humanitarian actors have achieved in armed conflicts has mostly been a result of brokering agreements with parties to the conflict. Faced with increasingly complex dynamics in armed conflict, humanitarian actors have increased investments in guidance, skills and capacities to operate in high-risk and access-constrained environments. As a burgeoning area of practice, a small number of organisations are driving operational change. The organisations that have made the greatest advances in this area show a preference for a pragmatic and contextually driven engagement with parties to the conflict; one which focuses on interests and incentives rather than legal requirements, and which reframes IHL and humanitarian principles in the context of local values and norms.

Access negotiations are primarily undertaken bilaterally, and at subnational levels, and available evidence indicates this is generally more successful than collective approaches. At the same time, country-level collective agreements to enable access have a long history, dating back to 1989. These agreements, variously named 'joint operating principles', 'ground rules' and 'red lines', have been designed to establish thresholds and standards for the humanitarian community to observe, but a few have also been developed with parties to the conflict and reflect joint commitment to ensure secure access. None are considered to have been transformative, and most lack the mechanisms for accountability, but anecdotal evidence show they can help to increase understanding between parties. There is, however, a significant deficit in empirical research on their effectiveness and impact.

There is, at best, cautious interest in developing a new set of access principles, but little optimism that this would solve the problem. Stakeholders expressed a range of concerns, including the risk that a new set of 'principles' will confuse or undermine the current frameworks that inform principled humanitarian action. Many also were sceptical of the feasibility of states agreeing to new principles, given that they have not even shown interest in taking forward recent legal guidance on the access issue. Finally, some fear that the process, inevitably involving the UN, would result in further politicisation of humanitarian action, resulting in even less access. They called instead for greater political pressure on affected states and other parties to the conflict to meet their responsibilities to protect and assist the local population, rather than focusing on creating more space for international responders.

There are a number of alternate options to new principles which the study explored. Options to address gaps in operational good practice include developing high-level guidance and deepening investments in organisational capacities and skill sets. High-level guidance could be generated from empirical evidence on 'what works' in collective and bilateral agreements with conflict parties, which could be shared as concrete examples of ways to facilitate access and resolve potential disputes and obstacles. It could also include analysis of collective scenario development, and the effectiveness of 'triggers for action' in relation to any changing conditions for access. Mechanisms for periodic review of collective agreements could also be established, either through peer review or independent review/evaluation.

Deepening investments in organisational capacities and skills, as well as a cross-sharing of experience would also enable improved practice in the field. There are several promising training and workshop-based initiatives which could be further supported to enable impact at scale, particularly to reach local staff and partners. Incorporating negotiations techniques that focus on the incentives and interest of conflict parties, as opposed to more remote and less compelling notions of their responsibilities under IHL, would also be valuable.

Good practice in donor government behaviour was also repeatedly stressed as an area needing greater attention. Aid conditionality is particularly problematic and potentially brings greater challenges to humanitarian agencies than the constraints posed by affected states. There is a critical need to pursue the development of exemptions from counter-terrorism legislation, as well as to adopt other good practice for partnering in highly insecure contexts such as more flexible (unearmarked) funding, and greater possibilities for multi-year funding. A high-level discussion within the Good Humanitarian Donorship initiative is warranted to pursue this.

In sum, instead of seeking to develop a new set of international principles, for which there is not much appetite or optimism, humanitarian and state actors could instead resolve to support a more limited set of stakeholder commitments. Humanitarian agencies would commit to developing skills and capacities to negotiate access in conflict environments in a way that is principled and where possible, locally coordinated. For their part, donor governments would commit to resourcing these capacities, while at the same time committing not to create additional impediments to access in the form of legal regulations and conditions that disincentivise humanitarian programming in certain areas. This two-track approach could thus serve to strengthen international norms and customs of access without unduly politicising the process. Political pressure can be reserved for its more appropriate targets: the warring parties who are failing to protect civilians and creating humanitarian crises.

1 INTRODUCTION AND METHODOLOGY

The challenges to humanitarian access amid war are far from new, but in the past few years have grown in urgency with major armed conflicts erupting in Syria, South Sudan and Yemen. Millions of civilians have been unable to access critical aid, and humanitarian actors have suffered mounting casualties in trying to reach them. The challenges to access have sparked new political attention on the subject, including in the UN Security Council. This has resulted in new resolutions related to access, as well as a growing number of reports from the Secretary-General. Partly driven by the Syrian crisis, the activity reflects growing concern about access constraints and a fracturing of conflict in a range of affected countries, and resultant weakening of productive dialogue with the conflict parties.

To explore possible solutions to this problem, the UK Department for International Development (DFID) commissioned Humanitarian Outcomes to conduct this scoping study to determine the feasibility and potential impact of developing a new set of international 'principles' of access. The researchers' objective was to determine the level of support and possible options for such principles, and answer two overarching questions:

1. Would new principles have a positive impact on the ground in terms of facilitating access?
2. If so, how could these principles be developed (intergovernmental, UN, International Conference of the Red Cross and Red Crescent Movement, NGO led, etc)?

The purpose of this report is to summarise the current state of thinking and practice around humanitarian access and to gauge the appetite among key stakeholders for developing new high-level principles to address it. The findings reflect a review of current practice and a synthesis of opinion found in the literature and among experts in the field.

1.1 METHODOLOGY

1.1.1 Literature review

The team reviewed key documentary evidence sources on access, including the legal and policy frameworks for access, constraints to access, risk management and programme criticality, negotiations guidance, joint operating principles and other forms of common agreements that have been developed at the country level. They also reviewed global agreements such as Good Humanitarian Donorship, commitments related to the Inter-Agency Standing Committee (IASC)'s Principled Humanitarian Action, and others stemming from the World Humanitarian Summit and Grand Bargain which relate to enabling access.

A total of 128 documents were reviewed and systematically compared using a matrix that categorised them by source, type of document, thematic focus, geographical scope, timeframe and relative quality (a scale rating which considered rigor of methodology and contribution to the field).

Most of the literature was published over the last decade and includes primary sources such as legal and policy frameworks, ground rules and guidance notes, as well as secondary sources. Of the documents reviewed, nearly half were context specific, with the bulk of these focused on four countries: Syria, South Sudan, Somalia and Afghanistan. Other country-specific documents focused on Sudan, Yemen, Ukraine, Sri Lanka, the Democratic People's Republic of Korea and Nigeria.

A full list of documents is included as Annex 1.

1.1.2 Key informant interviews

The team undertook semi-structured interviews with 22 people from humanitarian and donor agencies as well as academic and advocacy entities engaged in this issue area. The interviews sought to document the perspectives of key stakeholders and experts on the possibilities of establishing new principles for access at

differing levels. The team also drew on related interviews undertaken for other studies on access and principles, where relevant.

A list of those consulted can be found in Annex 2.

1.1.3 Caveats

The study had a short timeframe, with a limited number of interviewees contributing to the findings. Interviewees were also mainly headquarters based and do not reflect the full breadth of perspectives on access, particularly from those engaged in field-level negotiations. There would be value in considering a larger field-based consultation process in order to start on some of the options outlined in the recommendations of this report.

The study involved a thorough search of available access literature; however, policy and guidance on this topic is still in early development and some remains unpublished, internal and often context specific rather than globally applicable. We sought to address those gaps through interviews where possible. Existing examples of joint operating principles are also not well known, though this study has captured more than any previous inquiry on the topic.

2 THE LEGAL AND POLITICAL DETERMINANTS OF HUMANITARIAN ACCESS

The legal basis for the claim that warring parties are obliged to facilitate secure, unobstructed access for humanitarian aid is found primarily in international humanitarian law (IHL), with additional support provided by international human rights law and international criminal law. But while IHL does indeed provide support for the notion of humanitarian access, it is neither definitive in doctrine nor compelling in practice. The original treaty instruments did not foresee the non-international nature of most of today's armed conflicts, involving non-state belligerents on the one hand, and sovereign yet under-capacitated (and at times malign) governments on the other. The more recent Additional Protocols and expressions of customary law are more applicable to non-international conflicts but remain hobbled by the sovereignty principle.

This section discusses the inherent weakness of IHL as a legal foundation to sufficiently influence the behaviour of belligerents to facilitate humanitarian access, and the consequent need for robust additional political and practical measures to realise this goal.

2.1 HUMANITARIAN ACCESS IN INTERNATIONAL LAW: THE CONUNDRUM OF NON-INTERNATIONAL CONFLICT

The four Geneva Conventions and their Additional Protocols contain provisions for humanitarian action amid armed conflict (*'inter-arma caritas'*) as a component of the rules of war incumbent on states parties. The documents stipulate that organised relief aid be provided both to civilians and *hors de combat* (ex-fighters such as the wounded and prisoners of war) and confer a protected status on the organised providers of that aid. The Fourth Geneva Convention is the one most directly relevant to the notion of access for humanitarian aid to civilians, obliging states to 'allow the free passage of all consignments' (Geneva IV, Article 23) of medical supplies as well as food and clothing for children and pregnant women. Additional Protocol I strengthens this provision by obliging states parties more generally to allow 'rapid and unimpeded passage of all relief consignments, equipment and personnel' (Additional Protocol I, Article 70,2).

These provisions would seem to provide a clear and unambiguous legal foundation for humanitarian access, but for the fact that they apply only to state parties engaged in international wars. Today, of course, such wars are rare relative to the internal or 'non-international' armed conflicts that for decades have made up the bulk of the humanitarian caseload. To support claims to unimpeded access for aid in non-international conflicts, humanitarian actors must look to Common Article 3 of the Conventions and to Additional Protocol II, adopted in 1977. However, these too were designed with significant in-built limitations in deference to the sovereignty of the states.

Common Article 3 seeks to ensure that the worst wartime humanitarian violations are proscribed in non-international conflicts just as they are in international ones. It defines non-international conflicts as those 'occurring in the territory of one of the High Contracting parties' (i.e. a state party to the Conventions) and lists the minimum humanitarian protections that must be given to civilians and other non-combatants, and that 'the wounded and sick shall be collected and cared for'. It also calls for the conflict parties to 'further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention' (Common Article 3). On the question of access for and to external relief aid, the language is quite soft, providing only that 'An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.' Additionally, the applicability, or not, of Common Article 3 can be disputed by states parties, including by claiming that the violence within their borders does not meet the threshold of a conflict at all.

In 1977, Additional Protocol II was adopted to develop and supplement the Geneva Conventions to further bolster the protection of civilians in non-international conflicts. It broadens the list of proscribed inhumane actions, emphasises the protected status of medical staff and facilities, and directly addresses the obligations to allow the activities of relief organisations 'such as Red Cross' (but generally acknowledged to apply to other humanitarian organisations as well (Additional Protocol II, [Commentary 4872](#))). Protocol II is commonly invoked as the principal legal basis underpinning free and secure humanitarian access in non-international

conflicts, but its own language contains serious obstacles to this interpretation. It begins with the broad deference given to the state government that might be a conflict party: 'Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State [or] as a justification for intervening... in the armed conflict.' (Additional Protocol II, Preamble.)

Moreover, when stipulating the rights of relief organisations to provide aid to civilians, the Protocol appears to explicitly limit this provision to organisations already present in the country (in other words, it would not apply to a new external humanitarian response or cross-border operations): 'Relief societies located *in the territory* of the High Contracting Party... may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict.' (Additional Protocol II, [Article 18\(1\)](#). Emphasis added.) Finally, the same article notes that relief activities for the benefit of the civilian population are 'subject to the consent of the High Contracting Party concerned.' (Ibid, Article 18(2).) Because of these limitations, and because the threshold for application of the Additional Protocol is generally seen as higher than Common Article 3, some international legal scholars interviewed for this study maintain that Additional Protocol II is an even weaker foundation on which to base humanitarian access than Common Article 3.

The statutes of the International Criminal Court that relate to humanitarian access, in particular the one that prohibits the wilful impeding of relief supplies as a means of starving the civilian population as a war crime, also applies specifically to international armed conflict (ICC Statute, Article 8(2)(b)(xxv)). Certain Security Council resolutions, in particular those that are binding on UN member states because they entail a 'decision' of the Council, can be used to legally stipulate the obligation of the warring parties to facilitate humanitarian access, but apply only to the specific contexts and times they reference.

The basic moral intuition that the rules of humanity should apply equally to non-international conflicts as to international ones has often obscured the fact that this has no firm basis in international law. Given the limited applicability of existing *treaty* law to the problem of access, IHL-based advocacy for humanitarian access has found more scope in the looser constructions of *customary* international law.

2.2 CUSTOMARY INTERNATIONAL LAW AND NORMS OF ACCESS

Treaties are one of the main sources of international law alongside international custom and general principles of law, among others. In the words of the ICJ Statute, 'international custom' is 'evidence of a general practice accepted as law' (ICJ Statute, Article 38(1)(b)). The International Committee of the Red Cross (ICRC) and others have made the case that humanitarian access is enshrined in international customary law, which is comprised of sufficiently widespread, general, and dense practice of states accompanied by a sense that the conduct, whether an act or an omission, is required, prohibited, or permitted by law. For example, ICRC notes 'the obligation to allow the free passage of relief supplies is also set forth in military manuals which are applicable in non-international armed conflicts. The obligation to allow the free passage of relief supplies is also supported by many official statements and other practice relating to non-international armed conflicts.' (ICRC, 2015a.)

ICRC has extrapolated a rule of access in customary law known as 'Rule 55: Access for Humanitarian Relief to Civilians in Need'. This states that: 'The parties to the conflict must *allow and facilitate* rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control' (Ibid., emphasis added.) In its commentary, ICRC notes that the explicit wording 'to allow and facilitate access' was in fact originally included in Additional Protocol II, 'but was deleted at the last moment as part of a package aimed at the adoption of a simplified text.' (Ibid.) It is likely, however, that the 'simplified text' was adopted precisely because states were unwilling to accept the perceived encroachment on sovereignty that this wording would inevitably be seen to entail.

Rule 55 thus more clearly states the conflict parties' responsibilities to ensure humanitarian access and many (but not all, and primarily Western) states would agree that it accurately represents customary international law on this issue. However, it is arguably negated in practice in many non-international conflicts by its last clause: 'subject to their right of control'. This means a government, such as Syria, could refuse humanitarian access to parts of the country still within its borders but held by opposition forces, a situation which – in Syria's case – necessitated a set of exceptional Security Council decisions to explicitly require Syria to permit cross-

border humanitarian operations. According to one legal scholar interviewed for this study, by hewing strictly to traditional sovereigntist precepts and the consent requirement, this clause amounts to 'the exception that swallows the rule.'

Nevertheless, advocates for humanitarian access consider international customary law to be the most promising level at which to pitch their efforts. Legal guidance is available for humanitarian actors such as ICRC's [IHL Database of Customary International Law](#), which compiles rules and practices that can be used to support access claims, and the more recent *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (Akande & Gillard, 2016). Commissioned by the Office for the Coordination of Humanitarian Affairs (OCHA), the Oxford Guidance was initially envisioned to focus mainly on the 'arbitrary denial of access' by conflict parties, which the UN Secretary-General had pinpointed as the key area where IHL could be used as a lever for access (Akande & Gillard, 2016; p. 2). Additionally, although Security Council decisions are inherently limited in their scope and 'non-transferable', access advocates can point to a pattern of resolutions supporting access in different contexts and the language they have used: 'meaningful' access, 'unimpeded', 'facilitated' and so on, to build on customary law claims. Conversely, humanitarians can influence the passage of new Security Council resolutions related to access, such as Resolution 2417 (2018) which, while not legally binding, noted the link between conflict and famine and issued a blanket condemnation of impeding humanitarian access and starving civilians as a means of warfare. Resolution 2417 has its origin in a Food and Agriculture Organization of the United Nations (FAO)/ World Food Programme (WFP) report that drew an empirical link between conflict and hunger crises and a related report commissioned by the Netherlands and Switzerland as part of a conflict and hunger discussion series in 2017. (FAO/WFP, 2018; HPG, 2017). Advocacy work and collaborative bodies growing up around that Security Council resolution, such as the 'Friends of 2417' group, provide additional fuel for the norm-building function of customary law.

In their advocacy and negotiation efforts to gain access, humanitarian actors have used IHL to different extents (and with varying degrees of accuracy), often invoking provisions from the Fourth Geneva Convention on the responsibilities of occupying powers and at times conflating them with laws for non-international conflicts (the more accurate ones citing them as general 'principles' and 'standards'). One humanitarian interviewed for this study referred to the IHL provisions for access as 'creatively vague' and shared the sentiment of many others that there is a skill and an art to applying them.

For most humanitarian organisations seeking access on the ground, however, IHL is simply a preamble to the negotiation, providing the overlay of morality and legitimacy before getting down to the details. Said one NGO representative, 'IHL is usually only the first two minutes of the conversation, since it is always a political problem, not a legal one.' Nearly all the experts interviewed resonated with the sentiment that IHL is valid and important, but by itself is no recipe for access. Moreover, most do not see any scope for expanding the legal doctrine, given the political will is lacking even to enforce its clear obligations on states parties. Rather, many see the potential for improvement at the level of negotiation skills, and in strengthening humanitarians' capacity to make bilateral agreements.

The prospect is made all the more challenging, however, by the fact that in non-international conflicts the cooperation of non-state armed actors (sometimes multiple groups in a single conflict) must be secured. These can range from disciplined forces with a clear agenda under a unified command structure to shambolic, quasi-criminal enterprises. Some can be so erratic in their behaviour that even after arrangements are carefully and explicitly negotiated, they can break down immediately, resulting in humanitarian relief being blocked or aid providers attacked. At the other extreme, a group can be coherent in command but adhering to a set of beliefs so opposed to those of their counterparts that it makes agreement on a common foundation of principle exceedingly difficult. In the 2018 report *The Roots of Restraint in War*, ICRC grapples with the question of how to promote adherence to international law when the majority of war fighting forces involved in today's conflicts are decentralised entities driven by wholly different values and incentives than are states. 'In 2017, some 40 per cent of States experiencing armed conflict were confronting jihadi groups, and the vast majority of all foreign interventions are currently against armed groups with a jihadist agenda' (Terry & McQuinn, 2018).

Non-state armed groups (NSAGs) that are intent on imposing their own set of universal fundamentalist values, such as the so-called Islamic State, are not amenable to arguments based on international laws and principles. Yet even with extremist groups, some negotiations have made headway by appealing to the substance of IHL, not cloaked in the language of international law or universal principles, but in a practical, transactional sort of

way, using incentives and appealing to self-interests. Section 4 examines these practical efforts and approaches used by humanitarians to gain and maintain access amid conflict. Before turning to practical examples, however, it is worth discussing an additional obstacle to negotiated humanitarian access in non-international conflicts – the proliferation and intensification of the counter-terror policies and regulations enforced by the Western states whose contributions largely fuel humanitarian response efforts.

2.3 POLITICAL PROSPECTS AND POLITICAL OBSTACLES: THE ACCESS CHALLENGE IN THE COUNTER-TERROR REGULATORY ENVIRONMENT

If, as the consensus seems to hold, IHL is necessary but not sufficient for achieving humanitarian access, any hope of success will depend on a confluence of the practical skill of humanitarian negotiators and the political will of their state supporters. This is complicated, however, by states' global security interests vis-à-vis the NSAGs they have defined as terrorist movements. State policies, particularly those of the US government, enacted to prevent these groups from accessing or diverting material and financial resources, have increased the risks for humanitarian organisations to operate in areas controlled by armed opposition groups in conflicts, and skewed humanitarian coverage as a result.

By 2018, the humanitarian literature was replete with examples of the complexities of providing aid in the face of counter-terrorism legislation. Regulatory measures, including 'lengthy administrative processes and legislation criminalising certain activities necessary for the conduct of humanitarian operations' (UN, 2018 p. 5), have had (documented) negative impacts on humanitarian activities and coverage of need (Burniske et al, 2017; Metcalfe-Hough et al, 2015; NRC, 2015; Stoddard et al, 2016a). The competing priorities of donor governments in the security and humanitarian realms have made working in areas controlled by NSAGs 'a legal minefield for humanitarian actors: their mandate and mission are to provide aid, but they risk committing criminal offences in doing so' (Jones, 2017; p. 15).

Counter-terror regulations and sanctions regimes have the effect of excluding humanitarian action from certain, politically determined areas. This presents a fundamental problem for aid organisations bound by humanitarian principles. Certain restrictions and sanctions regimes can appear to allow for humanitarian relief while at the same time severely limiting it. Gaza is often cited as an example of this. Flowing downstream from government regulations, de-risking policies by banks have likewise amounted to decreased humanitarian activities in certain areas.

The 2018 *Report of the Secretary General on the Conflict-Related Sexual Violence* suggests that 'Member States should meet their security objectives while safeguarding principled humanitarian action by ensuring that counter-terrorism measures are designed and implemented in accordance with international law' (UN, 2018a; p. 5). It cites, as an example of good practice, the European Union's counter-terrorism directive of March 2017, 'which exempts from its scope humanitarian activities provided by impartial humanitarian organisations recognised by international law.' (UN 5, directive (EU) 2017/541, para. 38). Meaningful humanitarian exemptions from sanctions, activity restrictions and no-contact rules (along with acceptance of the unavoidable risk of a certain degree of loss and diversion) would help address the problem. Instead of moving in this direction, however, governments have tightened restrictions and levied increasingly punitive measures against humanitarian actors working in non-international conflict contexts. Aid groups are concerned that other governments and the European Commission Humanitarian Aid Office (ECHO) have taken their lead from the US and are beginning to add their own restrictive clauses to humanitarian funding.

Host governments arguably have even stronger incentives to define certain groups as terrorist and to take action to prevent humanitarians from negotiating with them. As one interviewee said, 'Negotiated access requirements are scariest for states, because it threatens to legitimise the terrorists. To the extent that we are increasingly living in a world where states are seeing their armed opponents as 'terrorists', they do not and will not behave like it is a conflict party.' Most recently, the Nigerian government has taken this line with humanitarians trying to operate in the North East of the country where Boko Haram is active.

Given that efforts to facilitate humanitarian access are perceived in many cases to be in direct conflict with states' security interests, and, conversely, the obstruction of humanitarian access as a potential tool for advancing those interests (Labonte & Edgerton, 2013), marshalling the political will to meaningfully improve humanitarian access will be difficult. Humanitarian law no doubt plays a role, but it does not provide the key.

As one of our legal experts interviewed said, 'These are politics and policy questions.' It requires a recognition that 'humanitarian groups have to be able to negotiate with NSAGs in ways that will make states uncomfortable.'

In the meantime, humanitarians on the ground have been experimenting, individually and collectively, with a variety of different practical approaches to achieve access, as the next section details.

3 RECENT EFFORTS TO BRIDGE THE HUMANITARIAN ACCESS GAP: DEVELOPMENTS IN POLICY, OPERATIONS AND ADVOCACY

Agreements to allow passage of humanitarian relief are often seen by political actors as the low-hanging fruit (or at times the only reachable goal) of peace-making efforts. Nevertheless, examples of humanitarian access being secured this way are few and far between. The operational access that humanitarian actors have achieved in conflicts has mostly been a result of their own efforts as opposed to political intervention or multilateral accords. The more successful of these approaches have focused on direct negotiation, and are often carried out in ways that are highly pragmatic and transactional, appealing to interests as opposed to global precepts, although humanitarian principles remain the guiding framework. Most agencies also work to gain access individually more often than jointly, with their efforts focused at the local level.

This section reviews the current state of practice among humanitarians confronting the access problem, and the different operational approaches taken in cases where conflict parties are unwilling to meet their moral responsibilities to facilitate aid for civilians.

3.1 REDEFINING THE ACCESS PROBLEM AND THE SCOPE FOR SOLUTIONS

Access challenges have prompted a good deal of research and policy development in the humanitarian sector. Much of the literature to date has focused on describing and analysing the access constraints, with a smaller body of evidence focusing on the effects of these constraints on humanitarian coverage, and how it can be improved (Egeland et al., 2011; Stoddard et al., 2016a; Jackson & Zyck, 2017; Steets et al., 2018). In addition, the grey literature reveals that a small number of humanitarian organisations are driving operational change with guidance and training materials on access strategies, negotiations and documented evidence on what has worked in securing access (Carter & Haver, 2016; MSF, 2018; Steets et al., 2018; Harmer & Fox, 2018).

The humanitarian principles of neutrality, impartiality and independence have long been considered the cornerstone of secure access in conflicts, and consistently underscored in the policy literature. Until recently, however, analysis and guidance on how to operationalise humanitarian principles within access strategies has not been well developed. The literature review found that past reports rarely, if ever, critically engage the question of whether or not agencies have sought to do more than allude to IHL and adherence to the principles.

The tendency to treat humanitarian principles as sacrosanct, presenting them in unquestioning and uncompromising terms, has had the effect of limiting the perceived scope of action for humanitarians. When the access problem is defined in terms of violations of law and principle, it follows that the only appropriate solution is to convince conflict parties to comply by means of advocacy efforts and 'promotion of IHL'. There is limited evidence on the effectiveness of advocacy for gaining access (Stoddard et al., 2015), as well as concerns that advocacy efforts risk being manipulated and extended for a wider range of political purposes. The Emergency Humanitarian Coordinator, humanitarian coordinators and OCHA all play a role in raising access concerns with government authorities – and increasingly these efforts are taken all the way through to Security Council discussions – although actual impacts of those efforts are hard to determine (UNSC Resolutions 2165, 2417 and 2225). Interviewees stressed that engaging in higher-level advocacy efforts, particularly in intergovernmental forums like the Security Council, can quickly politicise the dialogue in the eyes of warring parties. Such engagement, therefore, needs to be carefully considered and detached from the day-to-day negotiations of operational agencies to avoid their being perceived as political agents.

Over the past few years the framing around access and humanitarian principles has begun to shift, with more recent literature acknowledging that actual practice in access-limited contexts inevitably entails compromise on principles (Terry, 2016; Haver & Carter, 2016; Steets et al., 2018). Organisations that recognise when such compromises need to be made, and have a structured way of making difficult decisions, tend to be more successful in remaining present in high-risk environments (Haver & Carter, 2016).

Guidance for access efforts, and negotiation specifically, has also proliferated, driven by a recognition of the need for more concrete support for staff operating at the frontlines of conflicts (see for example McHugh &

Bessler (2006); the Swiss Federal Department of Foreign Affairs (FDFA) 2014; Conflict Dynamics International, 2017) Additionally studies such as the Overseas Development Institute (ODI)'s *Talking to the Other Side* and Humanitarian Outcomes' *Secure Access in Volatile Environments* (SAVE) research on negotiations have contributed applied research from the field. Much of the research focuses on experience in negotiating with non-state actors, however, and the evidence is weaker around 'what works' in negotiating with states.

Training on humanitarian access has increased in various contexts, delivered by organisations such as Conflict Dynamics International and Professionals in Humanitarian Assistance and Protection, and more recently, the Centre of Competence on Humanitarian Negotiation supported by the Harvard Humanitarian Initiative's Advanced Training Program on Humanitarian Action. A small number of organisations also have their own internal training programmes and/or provide mentoring and coaching. The range of guidance and training does not, however, reflect institutional uptake which requires significant attention, as does cross-sharing of knowledge and experience (Harmer & Fox, 2018).

Civil-military guidance is also relevant for enabling secure access in armed conflict, although not widely cited in access policies or joint agreements with parties to the conflict (IASC, 2008). Its value has been seen mainly in establishing a standard for the use of military assets to enable access; these are used (and at times, imposed) on a more routine basis in high-risk settings (Steets et al, 2018). The evidence suggests that civil-military guidance and the more recent adoption of deconfliction, while valuable, do not consistently have a bearing on parties to the conflict behaviour (Egeland et al., 2011; AWSD, 2017;).

Despite the developments in policy, guidance and training, most humanitarian organisations do not have well-developed internal policies and positions on access and negotiations. This is partly the result of a view that a pragmatic and contextually driven engagement with local authorities and conflict parties – based on mandate, experience and local acceptance – is the most effective approach. However, it also stems from organisations' reluctance to state explicitly what they are willing and unwilling to accept when negotiating for access, including payments or concessions to authorities, and their uncertainty as to whether engagement with certain parties to the conflict is even allowed (Haver & Carter, 2016). The SAVE study found that, at times, organisations' senior management created an environment of intentional obscurity about internal policies and directives on the topic, due to the sensitive nature of the task and particularly to avoid running afoul of donor governments' political concerns and counter-terrorism legislation (Haver & Carter, 2016).

3.2 NEGOTIATED ACCESS IN PRACTICE

Over the past 20 years, the approaches to enable access in armed conflict have fallen within four broad categories:¹

- 1) Bilateral and inter-agency negotiations – direct or indirect – with a party or parties to the conflict.
- 2) Joint principles, protocols or ground rules - facilitated by OCHA, an NGO consortium, or the Humanitarian Country Team. A small number have also been signed by parties to the conflict.
- 3) Red lines or rules established for internal use by humanitarian organisations.
- 4) Peace agreements between parties to the conflict which include requirements such as observing IHL, humanitarian principles, and ensuring the safety of aid operations.

3.2.1 Bilateral and inter-agency negotiations

Evidence suggests that most access agreements are made bilaterally, and that organisations prefer to operate independently – either in direct dialogue with parties to the conflict or through their own intermediaries. Most agreements are ad hoc, unpublished and made at local levels, but a few organisations such as Médecins Sans Frontières (MSF) and ICRC also invest at national and regional levels, and have regularised these engagements with parties to the conflict. These two organisations are notable for having achieved good access in hard-to-reach areas. This is partly based on their approach to negotiations, and also due to a strong internal 'triage' culture (at global and/or country level) which is driven by the goal of reaching people who are most in need – rather than simply executing programmes in reachable areas (Haver & Carter, 2016). Their highly independent and flexible funding structures also provide the advantage of more time and scope for building relationships

¹ A useful resource which captures a wide range of agreements is Geneva Call's [Directory of Armed Non-State Actor Humanitarian Commitments](#) called 'Their Words'.

and contextual understanding (Haver & Carter, 2016). Finally, they provide the type of aid programming that is of value not only to civilians, but which also directly benefits conflict parties, i.e. field hospitals, and (in the case of the ICRC) prisoner services and the exchange and return of mortal remains.

Most agencies recognise that despite a preference for bilateral negotiations, the way in which negotiations are made can impact other organisations. It is also increasingly clear that it can be counterproductive for multiple organisations to maintain relations with a particular NSAG (Carter & Haver, 2016). In reality, ad hoc, local-level coordination between agencies is constantly occurring and can increase opportunities for access when approached strategically. It can also help prevent agencies from being played off against one another. The SAVE study documented a number of cases in South Sudan and Syria where joint approaches to negotiations were seen as essential (Carter & Haver, 2016). Having shared sectoral responsibilities can also enable joint negotiations. For example, WFP and ICRC have at times negotiated on each other's behalf, and share responsibilities for food assistance in some high-risk, hard-to-reach areas (Steets et al, 2018).

Where agencies are reticent to undertake broader inter-agency negotiations is in cases where they have been hampered by the political and operational limitations of the UN, which is the primary mechanism for developing coordinated approaches (Haver & Carter, 2016). A Norwegian Refugee Council (NRC) study found that having a way for NGOs to coordinate on access (separate from UN bodies) promotes open information-sharing, which in turn enables better decision-making by individual agencies while also creating more opportunities for collaborating on access problems (O'Rourke, 2016). This underscores the fact that agreements of a bilateral and inter-agency nature are not mutually exclusive, and that informal opportunities to collaborate can be valuable.

3.2.2 Joint principles, protocols and red lines

Joint agreements at the country level have been variously named as joint operating principles, operating guidelines, guiding principles, and ground rules. For the purposes of this study, they are defined as agreements which are designed to establish shared thresholds or to ensure standards for principled access in insecure operating environments. They are not intended to constitute a joint negotiation as such, but instead to communicate clearly and consistently how the humanitarian community functions, and to provide a framework for bilateral and joint negotiations (Carter & Haver, 2016; Jackson & Zyck, 2017; OCHA, internal). In some instances, the inclusion of the term 'joint' refers to principles or protocols developed *with* parties to the conflict, and normally with NSAGs, but there is no common approach that has been taken to date, and not all joint agreements include parties to the conflict.

Red lines tend to be consistently defined as the actions or conditions deemed unacceptable by aid providers and beyond which they will not operate. They are attempts, for example, to reduce instances of harassment, extortion or inappropriate taxation imposed by local groups (Egeland et al., 2011). Red lines can be stand-alone or accompany joint operating principles/protocols/ground rules.

While not abundant in number, over a dozen have been developed over the years, dating back as far as 1989, across a range of conflict settings. As well as those outlined below, there are numerous other unpublished, sub-national agreements.

Box 1: Examples of joint operating principles, ground rules and red lines

- > Sudan: Ground Rules of Operation Lifeline Sudan (1989/resigned in 1995)
- > Liberia: Principles and Protocols of Humanitarian Operations (1995)
- > Democratic People's Republic of Korea: Statement of Humanitarian Principles (1998, updated 2001)
- > Sudan/Darfur: Principles for Collaboration between UN, NGOs and the Humanitarian Coordination of the Representation of the Rebel Movement in Darfur (Sudan) (No date)
- > Somalia: Towards an Effective Humanitarian Partnership: Somalia Draft Protocol with Supreme Council of the Islamic State (2006) (Draft Protocol)
- > Sri Lanka: Guiding Principles for Humanitarian and Development Assistance in Sri Lanka (2007)

- > Somalia: Inter-Agency Standing Committee Ground Rules: Advisory Note on Practical Considerations for Negotiations in Somalia (2009)
- > Somalia: NGO Consortium: NGO Position Paper on Operating Principles and Red Lines (2009)
- > Afghanistan: Principles of Access: Assisting People in Need in Afghanistan (2014)
- > Syria: Protocols of Engagement with Parties to the Conflict to Deliver Humanitarian Assistance in Northern Syria (2014)
- > Syria: UN: Principles of Engagement of Humanitarian Organizations with Civilian Administration Entities Cross-border Humanitarian Response (No date)
- > Ukraine: Humanitarian Country Team: Guidelines for Humanitarian Operations (2015)
- > Northeast Nigeria: OCHA: Guidelines for Humanitarian Operations (2016) (Draft)
- > Syria: UN Parameters and Principles of Assistance in Syria (2017)
- > Yemen: Humanitarian Country Team: Joint Operating Principles of the Humanitarian Country Team: A Principled delivery of humanitarian assistance in Yemen (No date)

The first joint approach designed to delineate the minimum acceptable standards for humanitarian operations was the *Ground Rules* established for *Operation Lifeline Sudan* in 1989. ODI's *Politics of Principle* report discusses how this and the *Principles and Protocols of Humanitarian Operations* agreement, established a few years later in Liberia, were designed to deal with three main concerns: 1) insecurity for agency staff and assets, 2) a fear of aid fuelling the conflict, and 3) the widespread and systematic abuses of IHL and human rights law by armed groups (Leader, 2000). Almost 30 years later, the agreements established to enable principled and secure access today, including in Nigeria, Syria and Yemen, have many commonalities with those developed decades ago. For instance, most agreements reference humanitarian principles and some reference the relevant legal frameworks and UN resolutions, including IHL, human rights law and UN General Assembly Resolution 46/182. Some also highlight the primary responsibility for protecting and assisting populations in need lies with all parties controlling the areas where those populations live. Some have accompanying red lines which humanitarian organisations agree not to accede to, including: provide beneficiary information, allow influence over the selection of staff, allow the use of armed escorts, allow influence over the content or findings of needs assessments, provide humanitarian assistance to conflict parties, take control of humanitarian stores, pay taxes or duties on aid deliveries, or accompany humanitarian staff carrying out humanitarian activities. The UN, and specifically OCHA, has often initiated the agreements, and OCHA also shares suggested wording with humanitarian coordinators and country teams to guide their approach to establishing such mechanisms.

Some recent attempts have sought creative ways to increase accountability. In Syria, the *Protocols of Engagement with Parties to the Conflict to Deliver Humanitarian Assistance in Northern Syria*, signed by approximately 30 NSAGs along with the humanitarian community, included an uptake/dissemination strategy involving diaspora organisations providing training to the NSAG signatories (Jackson & Zyck, 2017). In Yemen, the recently established *Joint Operating Principles of the Humanitarian Country Team: A Principled Delivery of Humanitarian Assistance* is accompanied by a *Triggers for Action* document, which outlines specific points as to when to discontinue humanitarian assistance if the operating principles are not adhered to. In certain places the parties/authorities have also come up with their own protocols; for example, town councils in Southern Syria devised a set of protocols for operating in their area, and then also sought to coordinate its implementation (Carter & Haver 2016).

Despite their prevalence over time and across countries, critical research on the mechanics and effectiveness of bilateral and joint approaches (beyond anecdotal country-level reporting) is lacking. The most informative analytic cross-country review was undertaken by ODI in 2000, and strikingly there is nothing in the literature after this date with the same level of analysis (Leader, 2000). While the SAVE study looked at access strategies and negotiations, it did not look in detail at these common approaches to enable secure access through the mechanisms of joint protocol or principles (Carter & Haver, 2016). Thus, while joint approaches continue to be developed, the evidence on their concrete operational benefits is inconclusive. To address this, several interviewees noted there would be considerable value in establishing a mechanism of periodic review of a (real-time) implementation of joint principles, either as peer review or as an independent review or evaluation. This

could draw on recent experience in establishing protocols and triggers in northern Syria and Yemen. A peer review or evaluation could examine both the efforts of the humanitarian community and the authorities, or NSAGs to adhere to the agreement, including identifying what has worked in encouraging adherence to rules, and what has proved challenging. Specific and detailed findings do not necessarily have to be shared beyond the humanitarian country team, and could help to course correct and reflect on progress, particularly where triggers for action have been set up but not acted on. More generic findings could be developed as shareable for cross-country lesson learning.

3.2.3 Peace agreements

The insertion of humanitarian goals into peace agreements is well established.² There are a good number of peace agreements that include reference to respecting and ensuring respect for IHL and humanitarian principles and/or also focus on protection of civilians.

Since 2010, peace agreements also started to explicitly reference the need for parties to facilitate rapid and unimpeded humanitarian access, including agreements established for Sudan/Darfur, South Sudan, Syria, Somalia and Yemen. Some agreements also detail particular issues such as humanitarian needs, capacity, administration and provision of security. Interviewees confirmed that having a humanitarian agenda within a peace agreement or ceasefire can help to establish common ground among the parties involved, and make it easier to deal with more contentious issues like the mechanics of establishing and maintaining a ceasefire. In opening up opportunity for dialogue in a separate setting, it is also in theory valuable for humanitarian entities as another route to broker access challenges. But it also has risks. To preserve the integrity of principled humanitarian negotiations and minimise the influence of political interests on them, humanitarian organisations and coordination structures have sought to conduct negotiations separately from political negotiations. In addition, anecdotal evidence would suggest that such agreements do not have a bearing on the access situation, including because, at times, the signatories to agreements are not those causing the access constraints.

Yet as far as the authors are aware, there is no literature on the subject of peace agreements and the extent to which these processes have proved valuable for humanitarian access. A forthcoming study on the degree to which peace agreements in Syria have influenced access will be valuable in building this nascent evidence base.³

3.3 ONGOING ISSUES AND CHALLENGES

Interviewees highlighted a range of challenges in the current practice of negotiated access and establishing agreements with conflict parties:

First, a fundamental question is the extent to which organisations seek to act individually or collectively. Although evidence suggests there is more to be gained by collective bargaining – or at least maintaining a common bargaining position – there are significant incentives for agencies to continue acting alone. And most agencies will stipulate that they will not relinquish their ability to have bilateral discussions on access for their own operations. It remains the reflex position of most humanitarian organisations, and often of their counterparts in the negotiations. Second, common approaches tend to signal a significant slow-down in the process of negotiations and tend to result in establishing agreements which satisfy the lowest common denominator. As one interviewee highlighted, this has ramifications ‘down the line’ because agreements lack the detail to indicate a way forward on a wide range of complex issues, at which point agencies tend to determine their own path ‘rather than seek to scenario plan for 20,000 possibilities’ through an inter-agency process. This coupled with the fact that many staff lack the training to work at an inter-agency level with the complexity of compromise and contradiction means working independently is both easier and more effective. Third, each organisation is subject to different pressure points – reputational, fiduciary, security – which means maintaining collective accountability in implementing agreements is challenging, if not impossible (Haver & Carter, 2016; Steets et al, 2018). Finally, increasingly stringent counter-terror restrictions and a growing

² Of the 1,500 peace agreements made available on [Peace Agreements Database](#), about 150 reference humanitarian goals.

³ The Institute for Social Studies and the Political Settlements Research Programme at the University of Edinburgh are examining the extent to which peace agreements calling for humanitarian access in Syria have impacted the access of national and international humanitarian organisations between 2011 and 2018. A publishing date for the study has not yet been set.

domestic hostility towards humanitarian action in some donor states have created a culture of fear among agencies, leading them to be less transparent about their access negotiation efforts. As a result, said one NGO representative, 'We are being our own worst enemies. Rather than doing something collectively and working on the big picture, we are all sort of hunkering down.'

In addition, while there is broad agreement that common agreements can serve to clarify agencies' access expectations with armed groups, those groups themselves regularly don't observe the rules (Jackson & Zyck, 2017). As one interviewee said: 'Politically they have to show something but operationally [they are often] not committed.' The proliferation and potential splintering of armed groups makes it more difficult to garner ongoing observance. One interviewee also observed that, unlike in the common agreements of decades ago, conflict parties today 'don't necessarily seek a visible dialogue with you as a form of legitimisation', as did the South Sudanese forces and the FARC, for example, in earlier times.

There is also a more substantial challenge around the incentives and pressures imposed by the competitive funding environment that has meant aid organisations struggle to uphold agreed red lines. Interviewees noted that these are continually 'crossed' because agencies are, at times, under significant donor, and as a result, senior leadership pressure to deliver in hard-to-reach/high-risk areas which means donors themselves contribute to aid organisations crossing agreed 'lines' in order to be seen to be responsive. In one scenario, an interviewee described three NGO partners that had negotiated collective red lines and requested that their donor enforce the rules, arguing that the donor needed to take responsibility for their collective behaviour, including managing the tensions between being principled and gaining access.

These issues underscore the range of challenges in current practice around negotiated access. The next section examines the prospects for improving current practice, including whether it is possible to develop new principles, or other ways in which to enhance individual and collective approaches to secure access.

4 NEW ACCESS PRINCIPLES: OPPORTUNITIES AND OBSTACLES

4.1 PROSPECTS FOR DEVELOPING NEW ACCESS PRINCIPLES

Experts and key stakeholders consulted for this study widely agreed on the need to improve the access dialogue at both the global and local levels, recognising that IHL and humanitarian principles do not appear to be particularly motivating to parties to the conflict, or always well understood by practitioners. Taken as a whole, their feedback indicates an openness to the idea of formalising a more explicit international understanding of the need and means for humanitarian access in conflict. However, they also expressed a wide degree of scepticism about establishing new *principles* per se. Most interviewees noted the risk that a new set of 'principles' (as compared with guidance or best practices) would confuse or undermine the frameworks which currently exist to inform principled humanitarian action, and which remain poorly understood and require greater operational attention and application. As one interviewee said: '... is it the principles or the accountability of parties adhering to them?'

Although it was not the subject of the scoping study, the researchers also observed a deep and unanimous reluctance to re-examine IHL as a basis for access. It is not realistic to expect that diplomats will be able to square the circle of humanitarian access rights within the internal conflicts of sovereign states, and the prospect raises fears that 'we end up further back than we started'. States have already signalled their reluctance to adopt a more expansive view of the humanitarian access provisions by their silence in greeting the recently released *Oxford Guidance* (Akande & Gillard, 2016). Rather than risk what has already been codified, practitioners and scholars prefer to think of and employ the IHL provisions as 'creatively vague'. Finally, many interviewees also pointed to the need for rethinking how IHL is used to defend international humanitarian action. Rather than directing their efforts to create more space for international responders, it would be more valuable for political actors to emphasise the responsibilities of parties to the conflict to adhere to IHL in protecting and assisting the local population.

Another general concern was that this initiative might be perceived as promoting greater access for international (Western) humanitarian actors paid for by (Western) donor governments, and thus as another 'IHL baton' with which to beat affected governments and NSAGs. If indeed perceived this way, it would be counter-productive, reducing the tolerance and willingness of conflict parties to facilitate access. A number of interviewees recalled discussions in early 2018 about the Secretary-General's *Annual Report on Children and Armed Conflict* on whether denial of humanitarian access to civilians could be added as a trigger for listing in the annex to the report. The proposal raised concerns that it might have been perceived as unduly threatening to parties to the conflict, and that the complexity of determining a *denial*, as compared with a violation of IHL, could undermine the monitoring mechanism and lessen opportunities for dialogue and negotiation. As an aside, a number of interviewees noted that this new principles initiative could be perceived as a 'backdoor' to the Protection of Civilians initiative, one that would equally raise questions and potentially close doors.

Finally, experts were sceptical as to the potential relevance and effectiveness of a set of global principles to field-level access challenges. As one said, 'At the end of the day you are faced with very specific actors, behaving in a specific way in a specific context (that changes rapidly). You simply can't solve that with a new set of high-level principles.'

4.2 INVESTING IN PRACTICAL HIGH-LEVEL GUIDANCE, FIELD-BASED CAPACITIES AND GOOD DONORSHIP

Despite the concerns over the new principles, there was resounding agreement that improvements in understanding and expanding the guidance and operational tools for access would be highly valuable, and participants welcomed the opportunity that this scoping study offers to consider possible ways forward. Interviewees pointed to the need for the development of concrete guidance, as well as increased investment in skills and capacity including local capacity. This could be underpinned by building the empirical evidence on the effectiveness of joint agreements. Interviewees also pointed to the considerable need for action on the part of donor governments in establishing their role as enablers of access.

4.2.1 High-level guidance and good practice

There are challenges to establishing guidance and good practice at the global level. Yet some stakeholders agreed that there are generalisable points and lessons that should be brought out based on analysis of the effectiveness and uptake/implementation of dialogue and agreements with parties to the conflict at field level. These particularly concern administrative or bureaucratic constraints imposed by governments.

Options include:

- > increasing the body of empirical evidence of what works/lessons learned from past successful agreements
- > developing shareable examples of concrete messaging to parties to the conflict, and responses to humanitarian partners to increase cross-agency learning
- > establishing a mechanism of periodic review of a (real-time) implementation of ground rules in a given conflict setting, either as peer review or as an independent review or evaluation
- > developing training based on the evidence of negotiation techniques that focus on the incentives and interests of parties to the conflict, as opposed to the more remote and less compelling notions of their responsibilities.

This last option, which might have seemed heretical in years past, has gained increasing traction among NGOs working in conflict settings. One representative interviewed for this study spoke of how his organisation was beginning to look outside the humanitarian sector for practical negotiation skills, such as the 'Getting to Yes' approach (Fisher, 1981; Fisher et al., 2011). A recognition appears to be growing that adopting a transactional approach is not antithetical to humanitarian action in war, which after all was born of the pragmatic recognition that it is of benefit to all sides. Nor does it mean dispensing with humanitarian principles, but rather reframing them in a way that resonates more strongly with local norms and values.

One interviewee noted that practical and meaningful measures which address standards for parties to the conflict *and* humanitarian actors have been the most promising in their analysis. For example, a no-guns policy in hospitals and free treatment for patients tend to be extremely well understood by all actors (albeit these are not always respected) and can lead to other positive developments in changing behaviour and respect for access and lead to better quality programming. Interviewees also suggested that it could be useful to establish more formal means by which parties could resolve potential problems and maintain dialogue, such as a pre-dispute resolution mechanism.

Guidance and good practice could be cross-shared with affected states and other parties to the conflict in advance of and during negotiations as concrete examples of ways in which administrative and other procedures could be put in place to facilitate access.

4.2.2 Investing in capacities for secure access

A number of interviews underscored the increasing complexity and high stakes of armed conflict operations, including that it is not about 'three trucks of food at a check point in Darfur anymore...' Armed conflicts are anything but linear and predictable, and there's a need to improve how the humanitarian system works effectively with this complexity. Systems thinking says results are going to be achieved less through direct impact and more through maintaining integrity of decision-making, as well as from relationships and influence (Levine, 2015). Some of these challenges can be addressed by greater flexibility for operational decision-making especially in flexible funding, but it also requires building the skill sets to work with the unpredictability with which interlocutors and conflict parties behave. It was noted that there is a lot more that can be done to draw insights from literature and empirical work on negotiations expertise, including from other fields such as business and legal, as well as to better document actual humanitarian negotiations experience, both multi-party and bilateral. To date, this remains a significant gap in the literature.

4.2.3 Improving access through good donorship

As well as establishing high-level guidance and deepening skills and capacities which are fit-for-purpose, interviewees consistently circled back to the role of states as critical to improving conditions: 'they are the ones trying to exempt themselves from obligations'. At the broadest level, interviewees called for governments, including the UK, to champion the norms of IHL and principled humanitarian action among states and work toward political solutions in conflict countries.

More specifically, donor governments face a critical challenge in their own policies around how to increase access to the most vulnerable populations, mostly situated in high-risk contexts. As highlighted in Section 2, aid conditionality, intentional or not, has the effect of limiting aid to the most vulnerable populations and urgently needs attention (Stoddard et al., 2016a).

Interviewees highlighted that the *Good Humanitarian Donor Principles and Good Practice* are not well developed on the role of donor governments in relation to access. It calls for respect for and promotion of the implementation of IHL, and Good Practice #17 calls for donor governments to: 'Maintain readiness to offer support to the implementation of humanitarian action, including the facilitation of safe humanitarian access'.

A number of interviewees welcomed the recent initiative of the chairs of Good Humanitarian Donor to place counter-terror legislation and rulings on the agenda for its 2018/19 meetings. It is seeking to broaden understanding of their role and impact, and potentially establish, at a minimum, a set of 'soft dos and don'ts' for donor governments, and a collection of evidence on the issue area. A bolder step would be to establish an exemption/waiver for humanitarian action which has been called for in recent research (Stoddard et al., 2016a). As an example of an exemption, in 2011, in response to dire famine conditions, the Security Council passed resolution 1972, which exempted humanitarian agencies and their implementing partners from the financial sanctions that applied to Somalia territories under the control of armed opposition groups (UNSC, 2011).

Recent literature points to additional measures that donors could also consider including:

- > Reviewing donor policies and procedures to ensure there is enough flexibility to allow projects to be driven by need, including re-evaluating time restrictions, administrative procedures and prioritised sectors and geographic areas on an ongoing basis and in consultation with implementing partners.
- > Agreeing a compact with donors on measures to strengthen and safeguard adherence to the humanitarian principles in funding.
- > Strengthening principled financing, for example by investing in a better overview of coverage levels.
- > Increasing flexible funding and using it to address coverage gaps.
- > Establishing criteria to reject funding when it compromises principles.

These efforts would lead to greater 'risk sharing' meaning that donors would not use implementing partners as a way to mitigate their own risk ('risk transfer'), but rather would make jointly acknowledged risk a stated part of the partnership in delivering the humanitarian response (Stoddard et al., 2016b).

4.3 POTENTIAL FORUMS FOR ADVANCING ACCESS INITIATIVES

There are a range of options for advancing access initiatives. But the diversity of stakeholders – state, non-state and civil society – and the differing types of initiatives raised during this scoping study suggest that there should be no single forum or entity to take efforts forward. Rather there are a range of forums which could be considered. Options and some of the potential drawbacks or lessons from other experience are laid out here:

The UN offers the widest tent to engage on issues of access, and political/humanitarian actors can already bring specific access constraints to the UN Security Council and advocate for it to support context-driven remedies, such as the permission to conduct cross-border operations in Syria. There are three main challenges in taking access-related initiatives derived from this study through the Security Council or another UN political body, however. First, as a state-based entity it excludes the opportunity to engage NSAGs. Their lack of representation outside of country, and at times, regional dialogues, means the UN is not the ideal setting for ensuring a diversity of representation. Second, taking action through the UN increases the likelihood of it being an overly political process that risks – at worse – resulting in reduced access for operational agencies because of the association of the initiative with politically driven position/s. And third, some interviewees pointed to the fact that most diplomats do not, understandably, have strong credentials or experience in issues of humanitarian operations and access, further risking the likelihood of political positions being the overriding driver of any dialogue on access.

Yet there are some useful intergovernmental access initiatives that have been developed by UN member states, such as the *Safe Schools Declaration* and the UN Resolution 2286 on the protection of health care

facilities and workers. These were carefully developed and are seen as effective in 1) highlighting existing legal obligations but requiring states to do more to tackle the issue, and 2) working with civil society organisations to increase monitoring and reporting on the behaviour of conflict parties in observing those agreements. It was noted however that both of these initiatives address particular 'sectors' (health and education) and have largely been tackled as 'state services', and therefore, at least at the outset, there has been less concern that NSAGs have not been involved in their development.

The Good Humanitarian Donorship initiative, as mentioned earlier, is a potentially valuable intergovernmental forum to pursue good practice issues at the donor level. In all cases (UN, other intergovernmental processes), interviewees noted that taking initiatives forward requires champions, and diverse members, including 'Southern' partners. 'It needs someone to take responsibility and 'walk the talk' ' as one interviewee highlighted, as well as a broader coalition of the willing. In addition, there is value in starting with a small set of interested donor governments, and bringing in conflict-affected countries over time.

Regional forums were also discussed, but few participants could point to viable options, other than noting the comparative success of the Kampala Convention on displacement, which is largely seen to have been effective in garnering agreement around language and process as a minimum.

Stakeholders, particularly those from humanitarian agencies, stressed that for their needs, coordination and practitioner-based forums were most viable for the development of high-level guidance, tools and skills/capacity building. Forums for this include pursuing efforts through the annual International Conference of the Red Cross and Red Crescent Movement, deepening and diversifying engagement with the Centre of Competence on Humanitarian Negotiation, and using NGO consortiums such as Interaction. Sphere was also highlighted as a possible mechanism for establishing standards.

5 CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

Despite the inherent weaknesses of international humanitarian law as it applies to non-international conflicts, the solution to humanitarian access challenges is not to be found in the codification of new principles. The issue is not that conflict parties have been exploiting loopholes, it is that they have not felt sufficient pressure or incentive to comply with humanitarian norms. A Western-led initiative to develop new international principles is unlikely to make conflict parties behave differently, and risks further politicising the humanitarian endeavour, which will have counterproductive results. It also risks diluting or confusing the existing core humanitarian principles, to which nearly all international and many national organisations, as well as donor governments, have made institutional commitments.

Recognising that some conflict parties will never bend to normative pressure, there are two parallel routes to improving access that humanitarian actors and political actors should take separately:

Humanitarian actors should improve their skills and strengthen their institutional capacity to negotiate access. This would start with compiling and analysing empirical evidence as to what works in bilateral and multi-agency/collective agreements, including how conflict parties have been incentivised to change behaviour. Investment in negotiation skill sets that go beyond the realm of IHL and a traditional presentation of humanitarian principles, and with a greater emphasis on understanding conflict dynamics and the political economy of aid, stands the greatest chance of extending operational presence. At present there are promising initiatives in the areas of inter-agency capacity building as well as training, coaching and mentoring which can be further developed to improve individual institutional and collective capacities.

Political actors, including and especially donor governments, should focus their efforts on stopping and counteracting the humanitarian violations of other political actors, applying pressure to states and conflict parties to protect civilians and avert humanitarian crises. By the same token, they should take steps to cease contributing to the access problem themselves. As was repeatedly underscored by stakeholders, the risks and disincentives imposed by counter-terrorism policies have hindered humanitarian access and urgently need to be addressed. Alongside the impacts of counter-terror legislation, donor governments play a critical role in the success or failure of collective commitments to principled action and related red lines. Donors should increase their awareness of the joint operating principles and protocols agreed to at country level, as well as the triggers for red lines, and seek to support partner agencies in upholding them – collectively, including by allowing greater operational flexibility.

5.2 RECOMMENDATIONS

Based on the evidence from the literature, and the perspectives of the participants to this study, it is not viable to recommend developing new international access principles for armed conflict. The study, however, provided the opportunity to identify a number of critical measures which could be advanced in the form of individual and collective commitments, and are outlined here:

Humanitarian organisations

1. Develop high-level guidance based on empirical evidence of 'what works' in bilateral and collective approaches to establishing agreements with conflict parties.
2. Establish a mechanism of real-time periodic review of the implementation of agreements (protocols/ground rules etc) in conflict-affected countries, either as a peer review process or an independent review/evaluation.
3. Deepen investments in capacity building, including scalable front-line staff training initiatives which include local staff and partners. These could build on or seek to complement current initiatives such as NRC's train-the-trainer and the Centre for Humanitarian Competence's workshops-based training models.

4. Invest in a more open and rigorous culture of learning, where access strategies, advocacy efforts and negotiations experience are documented and shared, where possible, and regularise opportunities for an access dialogue with a view to improving collective practice.
5. Replicate and expand successful programme models that work with NSAGs to communicate and reframe IHL and humanitarian principles in the context of relevant norms and values.

Possible forums for institutionalising and advancing these commitments include OCHA/IASC, NGO consortia and Sphere.

States/donor governments:

6. Commit to resourcing the above initiatives to improve access evidence, guidance and capacities.
7. Review counter-terror regulations and sanctions regimes with a view to removing additional impediments to access. Revisit and seriously consider the idea of humanitarian exemptions/waivers from sanctions regimes and no-contact rules. Share good practice with other states.
8. Review the *Principles and Good Practice of Humanitarian Donorship* to strengthen the language on donor responsibilities in risk-sharing, financing and other areas of support to enable operational actors to work in insecure armed conflict settings with greater flexibility to manage risk.
9. Increase and regularise an inter-agency/donor dialogue on access, including encouraging a more open dialogue on the types of risks and compromises organisations face when operating in high-risk settings, and forge a common approach to developing jointly owned (donor and agency) understanding of residual risk.

The recommended possible forums for taking forward these commitments is the Good Humanitarian Donorship initiative and the OECD Development Assistance Committee. Any multilateral efforts should be coupled by pursuing the commitments in respective donor capitals.

As a final appeal to state actors, this study's findings suggest they should consider the degree to which humanitarian violations have been both normalised and instrumentalised in the political dialogue around conflicts by not taking action when such violations occur. Political efforts by the Security Council and individual member states should be directed in the first instance to addressing the root causes of the humanitarian needs and stressing that conflict parties hold the primary responsibility for protecting and assisting vulnerable populations in their areas of control. Violations should be independently investigated, and perpetrators should be held to account. Appropriate means to achieve this, including through establishing tribunals should be considered. When violations continue, and humanitarian access is blocked, or humanitarian organisations are attacked, strong political consequences such as arms embargoes must be on the table.

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ANNEX 2: PEOPLE INTERVIEWED

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