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**Impartiality and Independence of Humanitarian Organizations in Environments Controlled by  
Non-State Armed Groups**

A Case Study of Afghanistan Post-2021

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### **Abstract**

The increasing prevalence of non-state armed groups (NSAGs) in contemporary conflicts poses significant challenges for humanitarian organizations, particularly in maintaining the principles of impartiality and independence. This thesis explores the implications of these principles for humanitarian operations in NSAG-controlled environments, with a focus on Afghanistan post-2021. Utilizing a qualitative analysis of International Humanitarian Law (IHL) frameworks, including Common Article 3 (CA3) and Additional Protocol II (AP II), the study examines the legal, ethical, operational, and political challenges faced by humanitarian organizations. The findings emphasize that adherence to the principles of impartiality and independence is crucial, especially in contexts where legal clarity and unified approaches are lacking. These principles not only guide humanitarian actions but also help secure the cooperation of NSAGs and ensure the effective delivery of aid. Moreover, the research highlights the necessity for context-based, principled compromises to maintain the long-term effectiveness and integrity of humanitarian operations. The case study of Afghanistan provides detailed insights and practical recommendations, contributing to a nuanced understanding of the complexities of delivering humanitarian aid in conflict zones and offering actionable solutions to enhance adherence to humanitarian principles in NSAG-controlled territories.

## Table of Acronyms

AP II - Additional Protocol II

CA3 - Common Article 3

GC - Geneva Convention

IASC - Inter-Agency Standing Committee

ICRC - International Committee of the Red Cross

IHL - International Humanitarian Law

IS-KP - Islamic State – Khorasan Province

MSF - Médecins Sans Frontières

NGOs - Non-Governmental Organizations

NIAC - Non-International Armed Conflicts

NRF - National Resistance Front

NSAGs - Non-State Armed Groups

SIGAR - Special Inspector General for Afghanistan Reconstruction

UN - United Nations

UNGA - United Nations General Assembly

UNOCHA - United Nations Office for the Coordination of Humanitarian Affairs

US - United States

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## Introduction

The evolving nature of contemporary conflict has led to a notable increase in the number of NSAGs.<sup>1</sup> This proliferation has introduced intricate challenges for humanitarian organizations, particularly non-governmental organizations (NGOs)<sup>2</sup> which often find themselves in positions where they must compromise their principles of impartiality and independence when interacting with these groups. The reluctance of NSAGs to comply with IHL and their general disregard for these legal norms further complicate the humanitarian space. As a result, civilians increasingly bear the brunt of these conflicts, enduring significant suffering from both direct violence and the broader ramifications of prolonged instability.

The primary threat is no longer global wars between states, but rather the global chaos stemming from armed conflicts within increasingly failing states<sup>3</sup> and the proliferation of powerful belligerent non-state actors. These NSAGs are highly diverse, encompassing groups motivated by ideological, religious, and ethnic factors. Violent conflicts involving these groups are not unprecedented; such conflicts have always existed, and the actors, goals, and methods have not significantly changed throughout history. What is new, however, is the scenario where NSAGs gain exclusive control over a territory, transitioning from

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<sup>1</sup> This category includes armed groups, de facto governing authorities, national liberation movements, and entities that are not or are only partially recognized internationally Ezequiel Heffes and Brian E. Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 *Goettingen Journal of International Law* 39. In 2022, the ICRC identified 524 armed groups of humanitarian concern worldwide. These groups are in Africa, the Near and Middle East, Asia, the Americas, and Eurasia. The number of such groups has consistently ranged between 500-600 over the past three years. See Matthew Bamber-Zryd, 'ICRC Engagement with Armed Groups in 2022' (*Humanitarian Law & Policy Blog*, 12 January 2023) <<https://blogs.icrc.org/law-and-policy/2023/01/12/icrc-engagement-armed-groups-2022/>> accessed 2 June 2024.

<sup>2</sup> For the purposes of this thesis, 'humanitarian organizations' will primarily refer to NGOs and the unique challenges they face in NSAG-controlled environments. However, examples from International Organizations will also be referenced throughout this research to illustrate broader operational challenges and collaborative efforts within the humanitarian sector.

<sup>3</sup> According to Britannica, a 'failed state' is defined as 'a state that is unable to perform the two fundamental functions of the sovereign nation-state in the modern world system: it cannot project authority over its territory and peoples, and it cannot protect its national boundaries.' Naazneen H. Barma, 'Failed State', *Britannica* (2024) <<https://www.britannica.com/topic/failed-state>> accessed 10 July 2024.

rebels, terrorist-designated organizations, and revolutionary groups to de facto governments<sup>4</sup> without state rivalry.<sup>5</sup>

The principles of impartiality and independence are foundational to humanitarian action, influencing the operational decisions and strategies of humanitarian organizations. These principles are particularly crucial in contexts where NSAGs operate, as they help maintain the credibility and effectiveness of humanitarian efforts. Impartiality ensures that assistance is distributed equitably among all affected populations, regardless of their affiliations, ensuring that aid reaches those most in need. Independence protects humanitarian operations from becoming tools of political agendas, allowing organizations to operate without external pressures and biases. In practice, these principles guide the way humanitarian organizations assess needs, allocate resources, and interact with various stakeholders in conflict zones.<sup>6</sup>

Afghanistan, post-2021, serves as a significant case study for this research. Since the Taliban took power, the overall level of violence in the country has decreased,<sup>7</sup> yet the humanitarian landscape has become increasingly complex. The Taliban's control has introduced stringent regulations on humanitarian activities, challenging aid organizations to navigate a highly restrictive environment while adhering to their core principles. The focus on Afghanistan is particularly pertinent due to the extensive presence of NSAGs and the unique political dynamics that influence humanitarian operations. This situation provides a critical lens through which to examine the real-world implications of impartiality and independence in NSAG-controlled territories.

Having observed the enduring hardships faced by the people of Afghanistan—from the Soviet invasion, the subsequent internal conflicts, the United States (US) invasion, and now under the second Taliban regime—my commitment to analyzing the impacts of law and improving the lives of affected populations has deepened. While news outlets provide information about the situation in war-torn countries, the

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<sup>4</sup> A de facto government refers to an authority that controls a country in practice but lacks legal recognition, often acquiring power through unconstitutional means such as a coup or revolution. This differs from a de jure government, which is legally recognized and has a lawful right to govern. Michele Metych, 'De Facto', *Britannica* (2024) <<https://www.britannica.com/topic/de-facto>> accessed 10 July 2024.

<sup>5</sup> See Michael von der Schulenburg, 'The Era of Armed Non-State Actors - Risks of Global Chaos' (*conflictplatform*) <<https://conflictplatform.ox.ac.uk/cccp/research/michael-von-der-schulenburg-the-era-of-armed-non-state-actors-risks-of-global-chaos>> accessed 10 July 2024.

<sup>6</sup> See ICRC, 'The Fundamental Principles of the Red Cross and Red Crescent' <[https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0513.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0513.pdf)> accessed 11 May 2024.

<sup>7</sup> International Crisis Group, 'Thinking Through the Dilemmas of Aid to Afghanistan' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-asia/afghanistan/thinking-through-dilemmas-aid-afghanistan-0>> accessed 7 July 2024.

reality on the ground presents a vastly different and more complex experience than what is typically portrayed.

This study addresses the specific gap in understanding the unique challenges faced by humanitarian organizations operating in conflict zones, with a particular focus on Afghanistan post-2021. By exploring the practical and ethical dilemmas encountered, especially regarding the principles of impartiality and independence, this research aims to provide a detailed analysis that contributes to the existing body of knowledge. The insights gained from Afghanistan's experiences can inform the development of more effective humanitarian strategies and responses in similar conflict settings

This thesis adopts a comprehensive analytical approach to explore the principles of impartiality and independence of humanitarian organizations in environments controlled by NSAGs. Utilizing the historical approach, it examines the evolution of humanitarian principles and the development of NSAGs, providing a thorough analysis of how past events and decisions have shaped contemporary humanitarian policies and practices. The legal approach is central, dissecting key legal instruments such as CA3, AP II, and customary IHL to understand their provisions and implications for humanitarian operations. This framework elucidates the obligations and protections afforded to humanitarian organizations. Moreover, a descriptive analysis details the on-the-ground challenges that humanitarian organizations encounter in NSAG-controlled areas, complemented by an explanatory approach to understand the underlying causes of these challenges. A case study of Afghanistan post-2021 provides an in-depth analysis of the application of humanitarian principles in this context and the unique difficulties faced. Finally, a normative analysis evaluates the adequacy of current legal frameworks and principles, proposing recommendations to enhance the protection and implementation of impartiality and independence in NIACs. By integrating these diverse analytical methods, the thesis offers a holistic and nuanced exploration of the complexities involved in humanitarian action in NSAG-controlled environments, contributing new insights and practical recommendations to the existing body of knowledge.

Extensive research, including contributions from the ICRC, has been conducted on the principles of humanitarian action and the challenges faced by humanitarian organizations in conflict zones. Scholars have analyzed various aspects of IHL, the roles and responsibilities of humanitarian actors, and the dynamics of armed conflicts. However, several critical gaps remain in the current body of literature. First, the law is not clear-cut regarding issues that arise when NSAGs exclusively govern a territory. The status and obligations of these groups under IHL are not sufficiently reflected in existing legal frameworks,



creating ambiguity for humanitarian organizations operating in such environments. Second, humanitarian organizations are often caught between conflicting parties over whose consent is required for their operations, posing significant challenges to achieving their goals without compromising their principles of impartiality and independence. Moreover, there is no common approach that regulates how humanitarian organizations should act when required to engage with NSAGs. This lack of a standardized framework leaves organizations vulnerable to expulsion if they refuse to comply with NSAG demands, potentially abandoning the civilians they aim to assist. The absence of clear guidelines on maintaining neutrality and independence while negotiating access and operations with NSAGs further exacerbates these challenges.

This thesis aims to explore the implications of the principles of impartiality and independence for humanitarian organizations operating in environments controlled by NSAGs, with a particular focus on Afghanistan post-2021. To achieve this aim, Chapter One provides valuable insights into the legal obligations under International Humanitarian Law (IHL) by tracing the historical evolution of humanitarian principles and the rise of NSAGs, illustrating how CA3, AP II, customary law, the ICRC doctrine, and UNGA resolutions have shaped current practices. Chapter Two sheds light on the practical challenges faced on the ground, analyzing the legal frameworks governing humanitarian action in non-international armed conflicts (NIACs), and identifying the ethical, operational, and political challenges encountered by humanitarian organizations. Lastly, Chapter Three conducts a detailed case study of Afghanistan post-2021, illustrating these challenges and proposing practical recommendations for enhancing the effectiveness and integrity of humanitarian operations.

## Chapter One - Legal Framework

The legal framework governing humanitarian aid in conflict zones is crucial for ensuring the safety and effectiveness of humanitarian operations. The Geneva Conventions (GCs), their APs, and the Customary International Law form the cornerstone of this framework, setting forth the rights and protections for civilians and aid workers. In situations of NIACs, humanitarians and conflicting parties should refer to CA3, AP II, customary law, and other sources such as ICRC guidance and United Nations (UN) resolutions to better uphold and adhere to humanitarian principles.<sup>8</sup>

The principles of impartiality and independence are essential for the effective delivery of aid on the ground and for maintaining the credibility of humanitarian operations. While the GCs and APs do not provide formal definitions of these principles, they incorporate them into the framework guiding humanitarian actions during armed conflicts. Impartiality mandates that assistance must be provided solely based on need, without any discrimination on grounds of nationality, race, religion, or political opinion. This principle ensures fairness and equity in the distribution of resources and is critical for gaining the trust of all parties involved in a conflict.<sup>9</sup> Independence ensures that humanitarian actions are not influenced by political, economic, military, or other external objectives, allowing organizations to operate autonomously and focus on carrying out their humanitarian mission.<sup>10</sup>

Despite the legal provisions and the guiding principles, the application of these laws and principles can be ambiguous when dealing with NSAGs. A lack of clarity often complicates situations on the ground, creating significant obstacles for humanitarian organizations. This chapter will trace the historical evolution of humanitarian principles to understand how they have adapted to the increasing prevalence

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<sup>8</sup> As a matter of legal theory, principles are norms that ‘operate at a higher level of generality than rules’ and which help to explain the individual rules or provide the reason for them. Principles of humanitarian action thus are moral imperatives shaped and developed by years of experience and on-site judgments. See Kubo Mačák, ‘A Matter of Principle(s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors’ (2016) 97 *International Review of the Red Cross* 169.

<sup>9</sup> UNGA Res 58/114 (5 February 2004) UN Doc A/RES/58/114; Statutes of the International Red Cross and Red Crescent Movement 2006; Jean Pictet, ‘The Fundamental Principles of the Red Cross: Commentary’ (1979) <<https://www.icrc.org/en/doc/resources/documents/misc/fundamental-principles-commentary-010179.htm>> accessed 18 May 2024; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 1950 (75 UNTS 31) Common Article 3.<<https://www.icrc.org/en/doc/resources/documents/misc/statutes-movement-220506.htm>>.

<sup>10</sup> UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182; Pictet (n 9); Statutes of the International Red Cross and Red Crescent Movement.

of NIACs and examine existing laws and literature that guide the humanitarian community, assessing their sufficiency in addressing these challenges.

### **Evolution of Humanitarian Principles in Humanitarian Practice**

The humanitarian principles known today have evolved significantly to the ‘articulated and well-known four principles’ applied in conflict and disaster zones. The principles of impartiality and independence, along with humanity and neutrality, form the cornerstone of humanitarian action. Humanitarian principles are stemmed from early human history and the ICRC’s contributions. They are embedded in culture<sup>11</sup> and religious teachings such as Christianity, Buddhism, and Islam, among others, emphasize virtues like charity, empathy, and respect for human dignity.<sup>12</sup> This example illustrates that such values later influenced formal humanitarian laws.

Sharpe<sup>13</sup> notes that there is a limited amount of detailed scholarship on the origins of core humanitarian principles that govern international action. Historically, the emphasis may have been on the application rather than the theoretical underpinnings of these principles, as the immediate practical needs and urgency of delivering aid in conflict zones often dictated the actions of humanitarian organizations. Citing the work of another scholar,<sup>14</sup> she explains that these principles largely originate from the ICRC and Red Cross extensive operational experience. Over decades, this accumulated experience has helped form principles that have become standard across the humanitarian sector. This depiction challenges the common view of these principles as merely abstract ideals, highlighting their practical and contested origins.<sup>15</sup>

On the other hand, scholars of the Movement have explored the origins of the ICRC and the Red Cross’s Fundamental Principles. These laid the groundwork for the core humanitarian principles used by NGOs

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<sup>11</sup> ICRC, ‘The Fundamental Principles of the Red Cross and Red Crescent’ (n 6).

<sup>12</sup> Vincent Bernard, ‘Editorial: The Humanitarian Ethos in Action’ (2016) 97 *International Review of the Red Cross* 8; see also Peter Maurer, ‘Humanitarian Diplomacy and Principled Humanitarian Action (Speech, Maison de La Paix, Geneva, 2 October 2014)’ (2016) 97 *International Review of the Red Cross*.

<sup>13</sup> Marina Sharpe, ‘It’s All Relative: The Origins, Legal Character and Normative Content of the Humanitarian Principles’ [2023] *International Review of the Red Cross*.

<sup>14</sup> *ibid.* Thomas G. Weiss, ‘Humanitarian Action’ in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2016) 305; OCHA, *OCHA on Message: Humanitarian Principles* (July 2022) <[www.unocha.org/sites/unocha/files/OOM\\_Humanitarian%20Principles\\_Eng.pdf](http://www.unocha.org/sites/unocha/files/OOM_Humanitarian%20Principles_Eng.pdf)> accessed 14 May 2024.

<sup>15</sup> Marina Sharpe (n 2); Joël Glasman, ‘The Invention of Impartiality: The History of a Humanitarian Principle, from a Legal, Strategic and Algorithmic Perspective’ (Centre de Réflexion sur l’Action et les Savoirs Humanitaires 2020) <[www.msfc-crash.org/en/publications/invention-impairtiality-history-humanitarianprinciple-legal-strategic-and-algorithmic](http://www.msfc-crash.org/en/publications/invention-impairtiality-history-humanitarianprinciple-legal-strategic-and-algorithmic)> accessed 14 May 2024.

and the UN system, underscoring the importance of their history. This narrative began in 1859 when Swiss businessman Henry Dunant was horrified by the casualties of the Battle of Solferino during the Italian Unification War. His efforts to organize local volunteers to aid the wounded led to his influential book<sup>16</sup> post-return to Geneva, sparking the creation of the ICRC in 1863 and the establishment of the first GC in 1864 to aid wounded combatants.<sup>17</sup> Dunant's endeavors to negotiate access and provide impartial assistance to wounded soldiers have marked the event as a historical milestone in the evolution of modern humanitarianism.<sup>18</sup>

Article 6 of the 1864 GC underscores the principle of impartiality by stipulating that '[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for'<sup>19</sup> laying the groundwork for neutral and *impartial* humanitarian action.<sup>20</sup> In addition, the foundational principles of neutrality, humanity, and impartiality that guide the Movement, and consequently, the core humanitarian principles are also traced back to the 1864 GC. The principles of impartiality and independence, among others, were sourced from various documents including ICRC co-founder Gustave Moynier's 1874 pamphlet, informally governed the Movement until 1921. These principles were formally adopted into the Movement's statutes in 1921 and have since been continually refined and reaffirmed through both practice and 'soft law'.<sup>21</sup>

Dunant's contribution and the following conventions were initially designed to oblige states in situations of international armed conflicts.<sup>22</sup> This means that all IHL principles were initially focused on conflicts

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<sup>16</sup> Henry Dunant, *A Memory of Solferino* (International Committee of the Red Cross 1862).

<sup>17</sup> Marina Sharpe (n 13) 10–11; Jérémie Labbé and Pascal Daudin, 'Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross' (2016) 97 *International Review of the Red Cross* 185–86; Phoebe Wynn-Pope, Yvette Zegenhagen, and Fauve Kurnadi, 'Legislating against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation' (2016) 97.

<sup>18</sup> Kubo Mačák, 'A Matter of Principle(s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors' (2016) 97 *International Review of the Red Cross*, citing Peter Walker and Daniel G Maxwell, *Shaping the Humanitarian World* (Routledge 2014) 22.

<sup>19</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.

<sup>20</sup> International Federation of Red Cross and Red Crescent Societies, *The Fundamental Principles of the International Red Cross and the Red Crescent Movement: Ethics and Tools for Humanitarian Action* (2015) 9 <<https://library.icrc.org/library/multimedialinks/link?url=https%3A%2F%2Flibrary.icrc.org%2Flibrary%2Fdocs%2FDOC%2Ficrc-0513-002-2015.pdf&noticeId=38478>>.

<sup>21</sup> Marina Sharpe (n 13); Phoebe Wynn-Pope, Yvette Zegenhagen, and Fauve Kurnadi (n 17) 240.

<sup>22</sup> The Battle of Solferino was fought between the Austrian army and the Franco-Piedmontese army under the command of France resulting in the unification of Italy. See Britannica, 'Religious Experience - Mysticism, Spirituality, Faith | Britannica' (2023) <<https://www.britannica.com/topic/religious-experience/Religious-experience-and-other-experience>> accessed 2 December 2023; See for example GC I; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949 1950 (75 UNTS 85); Geneva Convention (III)

involving states, with the parties to conflicts being states, leaving non-state conflicts with limited regulation provided in CA3.<sup>23</sup> Moreover, the humanitarian community was dealing with growing pressure and interest from the state. In colonial emergencies, for instance, the Fundamental Principles<sup>24</sup> primarily served as a strategy to manage the tension between humanitarian action and state authority.<sup>25</sup> These conflicts, though internationally significant, were viewed by European colonial powers as internal matters, highlighting the limitations of IHL as outlined by the 1949 GCs.<sup>26</sup> This approach was a challenging dichotomy for humanitarians at the time of decolonization: the aspiration to remain apolitical, adhering to the principles including 'impartiality' and 'independence' contrasted with their dependency on political engagement to achieve humanitarian objectives. Thus, decolonization sharply raised the issue of whether humanitarians could dictate their own terms of engagement in conflict zones, especially when these conditions conflicted significantly with other prevailing interests.<sup>27</sup> Thompson analyzes that during the late-colonial and postcolonial periods, states often portrayed their military involvement in conflicts as humanitarian efforts, integrating charities and NGOs into their security strategies to justify increasing force and control over voluntary aid operations. This manipulation of conflict narratives caused humanitarian organizations, to adopt biased stances that undermined truly impartial humanitarian responses. Despite resistance from humanitarian groups, their funding sources frequently succumbed to these pressures.<sup>28</sup>

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relative to the Treatment of Prisoners of War of 12 August 1949 1950 (75 UNTS 135); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 1950 (75 UNTS 287).

<sup>23</sup> Article 3, common to all four GCs, grants the 'right of initiative' to an impartial humanitarian body to care for the wounded and sick. This provision emphasizes the essential role of impartial humanitarian action under international law, establishing the expectation that States will support such efforts during all types of armed conflicts, thereby ensuring that humanitarian aid remains feasible and effective in any conflict scenario. Phoebe Wynn-Pope, Yvette Zegenhagen, and Fauve Kurnadi (n 17) (emphasis in original 239).

<sup>24</sup> Fundamental Principles refer to the principles guiding humanitarian action, especially when discussing the context of the International Red Cross and Red Crescent Movement. These principles include humanity, impartiality, neutrality, independence, voluntary service, unity, and universality, which are foundational to the ICRC's operations and have shaped broader humanitarian principles.

<sup>25</sup> Andrew Thompson, 'Humanitarian Principles Put to the Test: Challenges to Humanitarian Action during Decolonization' (2016) 97 *International Review of the Red Cross* 61.

<sup>26</sup> GC I; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

<sup>27</sup> Andrew Thompson (n 25) 45–46, 53.

<sup>28</sup> *ibid* 52–53.

During the decolonization period, the humanitarians faced new threats from protracted social conflicts, characterized by fluctuating frequency and intensity of violence. This type of asymmetric warfare,<sup>29</sup> also known as ‘lower threshold’ armed conflict, was characterized by a rise in NSAGs and NIACs, increased civilian involvement, and significant expenditure of human and material resources. This issue was particularly challenging for the ICRC, which had not been deeply involved in colonial wars before adapting to the significant geopolitical shifts of the twentieth century, notably the end of the empire after 1945. A crucial and challenging dialogue emerged within the Movement about the significance, value, and purpose of their Fundamental Principles. This dialogue, concerned with both practical and ethical aspects of humanitarian action, evolved through daily decisions and strategic policy development, questioning how these principles might need to be adjusted in the rapidly decolonizing world.<sup>30</sup> Recognizing the extensive suffering in these conflicts, AP II was adopted to supplement CA3.<sup>31</sup> This aimed to offer more comprehensive protections and address the specific needs and realities of NIAC, thereby enhancing the humanitarian framework established by the GCs.

In the 1990s, the emergence of ‘new humanitarianism’<sup>32</sup> within the global North presented unavoidable existential threats and challenges for humanitarian organizations. This period saw the rise of groups such as Al-Qaeda and ISIS, which fundamentally rejected humanitarian action unless it conformed to their terms. Additionally, the waning influence of the West and the rise of state-centric approaches to crisis intervention presented additional inevitable challenges. While these challenges have prompted questions about the ethical integrity and ongoing relevance of traditional humanitarian principles, they have

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<sup>29</sup> Asymmetric warfare involves the use of unconventional strategies and tactics (guerrilla warfare, terrorism, and other irregular methods) by a force when there is a significant disparity in military capabilities between belligerent powers, making similar types of attacks impractical. See Ellen Sexton, ‘Asymmetrical Warfare’, *Britannica* (2024) <<https://www.britannica.com/topic/asymmetrical-warfare>> accessed 9 July 2024.

<sup>30</sup> Andrew Thompson (n 25) 48–49, 52.

<sup>31</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 1978 (1125 UNTS 609) art 1.

<sup>32</sup> ‘New humanitarianism emerged in response to the late-20th-century crisis of Third World development, proposing new solutions to past failures. Fundamentally political, it challenges the idea of apolitical, neutral humanitarian relief, viewing it as both naive and morally questionable.’ This shift has significant implications for humanitarian work, pushing organizations to reconsider their strategies and roles in conflict zones, aligning their efforts more closely with political contexts, and addressing underlying causes of crises. Fiona Fox, ‘New Humanitarianism: Does It Provide a Moral Banner for the 21st Century?’ (2001) 25 *Disasters* 275.



simultaneously overshadowed the significant adaptations and updates that have occurred within classical humanitarianism.<sup>33</sup>

Humanitarian principles have evolved beyond mere practical tools for accessing victims and have become integral to the core identity and ethos of humanitarianism. This shift signifies a profound change in the humanitarian community's perception and valuation of these principles. They are increasingly viewed not just as means, but as ends in themselves, embodying the ultimate purpose of humanitarian action.<sup>34</sup> This transformation challenges humanitarian organizations to uphold these principles consistently, even when facing political and operational pressures.

### **Theoretical Framework**

The main sources of the legal framework analyzed in this Section are CA3 of the GCs, AP II, and the customary IHL. These sources are crucial for their focus on NIACs, establishing guidance for the work of aid agencies and conflicting party obligations. CA3 sets the minimum standards of humane treatment, while AP II expands on these protections, addressing the specific needs of NIACs. Customary IHL on the other hand, detail required behaviors for both NSAGs and states.<sup>35</sup> Furthermore, the current doctrine on NIACs provides clearer guidelines, aiding the operational clarity for aid agencies. These documents are pivotal for understanding the legal obligations of parties in NIACs and the operational challenges faced by humanitarian organizations.

#### *CA3: Provisions and Implications*

While NIACs are not a recent phenomenon, there has been a significant evolution in the types of NIACs over the past decade. It may be noted that NIACs within the scope of CA3 have also diversified in various forms. Among these, this thesis specifically focuses on situations when an armed conflict occurs between two or more organized armed groups within a single state's territory. This includes scenarios where there is no effective state authority, often referred to as 'failed' state scenarios. In such contexts, CA3 provides

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<sup>33</sup> Stuart Gordon and Antonio Donini, 'Romancing Principles and Human Rights: Are Humanitarian Principles Salvageable?' (2016) 97 *International Review of the Red Cross* 81–82.

<sup>34</sup> *ibid* 79.

<sup>35</sup> ICRC, 'ICRC Engagement with Non-State Armed Groups' (2021) 102 *International Review of the Red Cross* 1087.

the relevant legal framework governing the NIAC.<sup>36</sup> However, the development has raised questions about whether the existing legal framework is adequate to address these new and complex situations

When CA3 is applicable, it stipulates that an impartial humanitarian body, such as the ICRC, can offer its services to the parties involved in the conflict. Firstly, this provision ensures that such offers do not alter the legal status of the conflicting parties. Although not legally binding for the parties to accept services of the ICRC, these offers are generally considered neither unfriendly acts nor unlawful interference.<sup>37</sup> Such offers should not be viewed as a threat to state sovereignty and should not be arbitrarily rejected. This clarification in CA3 aims to reassure states that IHL does not confer recognition, status, or legitimacy on NSAGs. This reassurance is relevant not only in failed state scenarios but also in all forms of NIACs. For example, an acceptance of an ICRC offer of services by an NSAG can only come about through dialogue with the group. ICRC action, under the mandate provided by CA3, therefore, requires engagement with NSAGs, not necessarily confer any legitimacy on NSAGs. Instead, it aims to influence and persuade them to better respect the law, protect civilians, and alleviate suffering.<sup>38</sup> Secondly, 'conflicting parties' implies that CA3 does not establish a hierarchy between parties. It means that IHL applies equally to all parties to an armed conflict and imposes the same obligations on them.<sup>39</sup>

However, CA3 does not explicitly address the issue of obtaining consent for humanitarian access. It focuses on the fundamental protections and obligations of parties to the conflict without specifying mechanisms for consent.<sup>40</sup> Despite this, there is growing recognition in international law that NSAGs controlling territory have responsibilities under international law. This is evidenced by numerous UN Security Council resolutions<sup>41</sup> demanding that all conflict parties respect and facilitate relief operations. Therefore, obtaining NSAG consent is both a practical and legal necessity.<sup>42</sup>

The ambiguity surrounding whether consent should be obtained from both parties and if the consent of the party receiving the offer is sufficient will be elaborated in Chapter Two.

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<sup>36</sup> Jelena Pejić, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 *International Review of the Red Cross*.

<sup>37</sup> ICRC, 'ICRC Engagement with Non-State Armed Groups' (n 35) 1096.

<sup>38</sup> ICRC, 'ICRC Engagement with Non-State Armed Groups' (n 35).

<sup>39</sup> ICRC, 'Equality of Belligerents' (*ICRC*) <[https://casebook.icrc.org/a\\_to\\_z/glossary/equality-belligerents](https://casebook.icrc.org/a_to_z/glossary/equality-belligerents)> accessed 13 July 2024.

<sup>40</sup> Jessica Schaffer, 'State Consent to the Provision of Humanitarian Assistance in Non-International Armed Conflict' (2021) 40(1) *University of Queensland Law Journal* 74 <<https://law.uq.edu.au/files/69464/Schaffer.pdf>> accessed 3 July 2024.

<sup>41</sup> 'UNSC Res 1894' (2009) UN Doc S/RES/1894; 'UNSC Resolution 1923' (2010) UN Doc S/RES/1923; 'UNSC Resolution 2191' (2014) UN Doc S/RES/2191.

<sup>42</sup> See Jessica Schaffer (n 40) 78 citing UNSC Resolutions.



## *AP II: Provisions and Challenges*

AP II to the GCs of 1977 focuses exclusively on NIACs and enhances CA3 without altering its application conditions. However, AP II introduces additional criteria that must be met for a conflict to be governed by its provisions. Specifically, it requires that the NSAG involved in the conflict demonstrate a certain level of organization and control over territory sufficient to carry out sustained and concerted military operations. Moreover, the intensity of the conflict must exceed that of internal disturbances and tensions, making the threshold for application higher than that of CA3. This means that while an impartial organization such as the ICRC can offer its services to both states and NSAGs involved in NIACs, the criteria set out in AP II ensure a more structured and intense level of conflict before its provisions apply.<sup>43</sup>

Moreover, Article 18<sup>44</sup> guides ‘Relief societies’ in the territory of the High Contracting Party, such as the Red Cross, to offer their services to the civilian population. International relief operations must adhere to fundamental conditions that ensure they are strictly humanitarian and impartial. The focus is on providing guarantees of non-intervention and maintaining a commitment to aid based solely on need and without bias. When these conditions are met, relief actions require the consent of the relevant ‘High Contracting Party’, typically the government in power.<sup>45</sup> In exceptional cases where authorities cannot be determined, consent is presumed due to the urgent need for victim assistance and the priority to avoid delays.<sup>46</sup>

Understanding the significance of AP II is crucial for comprehending the legal complexities and operational challenges faced in modern NIACs. By setting stringent criteria for its applicability, AP II ensures that only conflicts with a certain level of organization and intensity are covered, providing a robust legal framework for humanitarian action. However, this also means that smaller, less organized conflicts may not benefit from the same level of legal protection, potentially leaving gaps in humanitarian

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<sup>43</sup> ICRC, ‘ICRC Engagement with Non-State Armed Groups’ (n 35) 1096; ‘Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.’ (*IHL Database*) <<https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-18/commentary/1987>> accessed 10 July 2024.

<sup>44</sup> ‘Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.’ (n 43) art 18(1), (2).

<sup>45</sup> See Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’ (ICRC/Martinus Nijhoff 1987); ICRC, ‘Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ (2016) <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016>> accessed 3 July 2024; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Cambridge University Press 2005) <<https://www.refworld.org/reference/research/icrc/2005/en/98261>> accessed 18 June 2024.

<sup>46</sup> ‘Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.’ (n 43).

coverage. The requirement for state consent in relief operations, as mandated by AP II, further complicates aid delivery in territories controlled by NSAGs, necessitating clear guidelines and effective negotiation strategies to ensure compliance with humanitarian principles and the delivery of aid which will be discussed in Chapter Two, along with its applicability in Chapter Three.

### *Customary IHL*

As illustrated, since the mid-1990s, IHL has expanded its coverage of NIACs, with various treaties being drafted or revised to regulate states and armed groups involved in such conflicts. Customary IHL has similarly broadened its scope.<sup>47</sup>

In addition to treaty law, customary IHL contains certain obligations in regard to relief operations. These include regulations ensuring the rapid and unimpeded passage of humanitarian relief and the freedom of movement for humanitarian relief personnel (rules 55). Customary IHL also encompasses protections specifically for humanitarian relief personnel and objects (rules 31-32).<sup>48</sup> These rules are binding on all parties to the conflict including NASGs, even if they are not signatories to the GCs and their Protocols.<sup>49</sup>

Although the requirement to allow and facilitate humanitarian relief access was removed from the final draft of AP II, the principle remains crucial in IHL. Rule 55<sup>50</sup> addresses the access issue and complements the gap left by AP II. The necessity for humanitarian organizations to have unimpeded access to civilians in need during armed conflicts was also emphasized in the 26<sup>th</sup> and 27<sup>th</sup> International Conference of the Red Cross and Red Crescent in 1995 and 1999. Therefore, the parties to the conflict are obligated to refrain from deliberately impeding the delivery of aid supplies to civilians under their control.<sup>51</sup>

Customary IHL is not explicitly clear on the requirement of consent from NSAGs for humanitarian relief operations. While treaty law, like AP II, specifies the need for state consent, customary IHL emphasizes the necessity for unimpeded humanitarian access. However, it does not explicitly address from which

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<sup>47</sup> GSDRC, 'International Legal Frameworks for Humanitarian Action: Topic Guide' (University of Birmingham 2013) <<https://www.gov.uk/research-for-development-outputs/international-legal-frameworks-for-humanitarian-action-topic-guide>> accessed 10 July 2024.

<sup>48</sup> ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2011) <[https://www.rulac.org/assets/downloads/2011\\_Contemporary\\_Challenges\\_report.pdf](https://www.rulac.org/assets/downloads/2011_Contemporary_Challenges_report.pdf)>; ICRC, 'Rules' (*IHL Database*) <<https://ihl-databases.icrc.org/en/customary-ihl/v1>> accessed 10 July 2024.

<sup>49</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (n 45).

<sup>50</sup> State practice has established that this rule is recognized as a norm of customary international law, applicable in both international and non-international armed conflicts. See *ibid.*

<sup>51</sup> *ibid.*

parties' consent is necessary. This silence leaves room for interpretation and highlights the need for practical approaches to ensure the effective delivery of humanitarian aid in complex conflict situations.

### *UN Resolutions*

UN General Assembly (UNGA) has endorsed humanitarian principles in two significant resolutions, further highlighting the importance of upholding humanitarian principles in the delivery of aid. These principles are articulated as the guiding principles of the UN in the context of humanitarian assistance. Resolution 46/182 annex states that 'Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality, and impartiality.' Subsequently, Resolution 58/114 included the principle of independence, recognizing that 'independence. is also an important guiding principle for the provision of humanitarian assistance.'<sup>52</sup>

UNGA resolutions are not binding for member states,<sup>53</sup> or any NSAGs. However, the UNGA has oversight over other principal organs and significant influence over the Secretariat's functioning, including the creation of roles like the Emergency Relief Coordinator and the establishment of OCHA through Resolution 46/182, which governs its operations.<sup>54</sup> These resolutions help in influencing state behavior and shaping customary international law.

### *ICRC's Operational Doctrine*

The existing treaties do not universally endorse the principles of impartiality and independence for all humanitarian actions in armed conflict. The ICRC's doctrine provides essential guidance on issues where clear directives are lacking. This doctrine encompasses the ICRC's Fundamental Principles, which include the universally recognized humanitarian principles of humanity, impartiality, neutrality, and independence, plus two additional principles specifically created by the ICRC: voluntary service and unity. Rooted in both practical experience and the essential legal frameworks established by IHL, the

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<sup>52</sup> This resolution lacks the mandatory language found in Resolution 46/182, and the principle of independence is mentioned in the preamble rather than the operative section, making it less of an obligation. See UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182; UNGA Res 58/114 (5 February 2004) UN Doc A/RES/58/114.

<sup>53</sup> Charter of the United Nations 1945 (1 UNTS XVI).

<sup>54</sup> Marina Sharpe (n 13).

ICRC's doctrine actively promotes and interprets these laws to protect and assist victims of armed conflicts and other situations of violence.<sup>55</sup>

The statutes and doctrine of the ICRC have been shaped by extensive experience and practical application. Much of the ICRC framework is derived from firsthand experience in dealing with various humanitarian situations. The Fundamental Principles of the ICRC offer inspiration and practical tools for achieving humanitarian goals during conflicts and disasters. These principles are recognized under IHL.<sup>56</sup> Movement components like the ICRC, the Federation, and National Societies must adhere to these principles as internal 'Movement law'.<sup>57</sup>

In addition, the principles are not exclusive to the Movement; over time, many organizations have adopted them due to their effectiveness and may interpret and apply these principles in various ways. The ICRC proclamation did not create the principles, though its definitions for humanity, impartiality, neutrality, and independence have been widely adopted.

Jean Pictet,<sup>58</sup> defines the principle of independent as a principle that is crucial for the institution to maintain political neutrality and be free from external influences to ensure its autonomy. He indicated that the Red Cross was required to resist social and economic pressures and remain true to its core objectives. It should reject attempts by any class, group, or public opinion to alter its mission. Additionally, it must avoid letting financial pressures influence its actions. Despite the challenge posed by its reliance on donations, the Red Cross must not compromise its principles.<sup>59</sup> Moreover, humanitarian organizations must coordinate and collaborate to address needs effectively and should obtain permission from relevant authorities for their operations. Thus, independence involves both organizational autonomy and effective collaboration with other actors.<sup>60</sup>

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<sup>55</sup> IFRC, 'Fundamental Principles' (2019) <<https://www.ifrc.org/who-we-are/international-red-cross-and-red-crescent-movement/fundamental-principles>> accessed 20 May 2024.

<sup>56</sup> International Federation of Red Cross and Red Crescent Societies (n 20).

<sup>57</sup> Chatham House, 'The Normative Framework of Humanitarian Action in Armed Conflict: Workshop 1' (Royal Institute of International Affairs 2021) <<https://chathamhouse.soutron.net/Portal/Public/en-GB/RecordView/Index/191239>>.

<sup>58</sup> Jean Pictet was a key figure in the ICRC, instrumental in the development and codification of IHL. He significantly contributed to formulating the ICRC's Fundamental Principles, which guide humanitarian action globally. His work has profoundly influenced modern humanitarian efforts and the legal frameworks supporting them. See ICRC, 'Commemorating Jean Pictet by Keeping His Legacy Alive | International Committee of the Red Cross' (18 September 2014) <<https://www.icrc.org/en/document/commemorating-jean-pictet-keeping-his-legacy-alive>> accessed 10 July 2024.

<sup>59</sup> Pictet (n 9); Ed Schenkenberg van Mierop, 'Coming Clean on Neutrality and Independence: The Need to Assess the Application of Humanitarian Principles' (2016) 97.

<sup>60</sup> Ed Schenkenberg van Mierop (n 61) 308.

In addition, he elaborates that impartiality involves taking action without prejudice or personal preference, as opposed to being neutral, which implies inaction. Impartiality demands thorough, objective analysis and the ability to remove personal biases from charitable actions, often requiring significant internal effort. It elaborates that three interconnected, but distinct concepts were introduced within this principle: non-discrimination, proportionality, and strict impartiality.<sup>61</sup>

Having identified the recipients of humanitarian principles and the obligations of the parties involved, the next question is whether organizations conducting humanitarian operations and the conflicting parties are legally obliged to comply with these principles. Operationally, adhering to these principles assures parties to a conflict that humanitarian activities will not interfere with or favor any side. While these principles may not be legally binding on their own,<sup>62</sup> non-compliance can lead to legal repercussions under IHL. This includes potential violations of IHL, which can have significant legal consequences for parties that fail to uphold the principles of neutrality, impartiality, and independence.<sup>63</sup>

While it is not the primary responsibility of parties in an armed conflict to adhere to humanitarian principles directly, their obligation under IHL is to ensure these principles are upheld. This means they must facilitate and not obstruct humanitarian actions that adhere to these principles. For example, while conflicting parties must comply with IHL, which includes provisions to protect civilians and allow humanitarian aid, they are also responsible for creating an environment where humanitarian organizations can operate according to their principles of impartiality, neutrality, and independence. This dual role is often referred to as 'upholding' or 'promoting' humanitarian principles, ensuring that humanitarian aid reaches those in need without unnecessary hindrance.<sup>64</sup>

The application of IHL obligations to NSAGs is fraught with difficulties due to ambiguous treaty provisions and limited consensus in customary law as shown and agreed by scholars in this chapter. The non-binding means of some regulations and the unwillingness of certain parties often complicate the situation on the ground. This ambiguity is particularly evident when there is little consensus on legal issues for humanitarians dealing with NSAGs in situations of NIAC. The relevance of traditional humanitarian principles has come under scrutiny, with several authors arguing that these principles are

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<sup>61</sup> Pictet (n 9).

<sup>62</sup> For more discussion on the legal foundation of principles see Kubo Mačák (n 8).

<sup>63</sup> Non-compliance can lead to violations under IHL, thereby resulting in legal repercussions, such as accountability for unlawful acts or jeopardizing the legal protection granted to humanitarian operations.

<sup>64</sup> ICRC, 'Respect for IHL | ICRC' (28 July 2014) <<https://www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl/respect-ihl>> accessed 10 July 2024.

closely tied to a specific geopolitical era characterized predominantly by clear-cut interstate conflicts, where military and civilian roles were distinctly separated, and state sovereignty was unquestioned. While these principles are viewed as having an inherent sense of permanence, critics point out that they may not adequately address more complex contemporary scenarios where these clear distinctions and sovereignties are often blurred.<sup>65</sup> The criticism highlights the need for a dynamic approach that can adapt to modern conflicts that address the challenges posed by non-state actors in NIACs.

In Chapter Two, the focus will shift to how these legal ambiguities translate into operational challenges, examining real-world scenarios and the varied methods organizations employ to navigate these issues while striving to uphold humanitarian principles.

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<sup>65</sup> Stuart Gordon and Antonio Donini (n 33) 80.

## Chapter Two – Humanitarian Principle in Practice

As discussed in Chapter One, the practice of humanitarians, notably the ICRC, has contributed to developing humanitarian principles, particularly in dealing with NSAGs in NIACs. This evolution has been a century-long learning process through trial and error, culminating in the Fundamental Principles.<sup>66</sup> The principles and the normative framework guide modern humanitarian action today. While the legal framework provides a foundation for these principles, it is often insufficient to address the complexities of practical implementation.

In recent years, humanitarian organizations have faced unprecedented challenges, including engagement with radical non-state actors who employ unconventional means of warfare,<sup>67</sup> such as attacks on civilians and humanitarian organizations. This new era of conflict has exposed the limitations of political responses to crises, highlighting the crucial role of humanitarian action.<sup>68</sup> Donors and UN agencies note that civilians are increasingly victimized in conflicts, humanitarian access is often denied, and international laws are frequently ignored or violated. In contexts where NSAGs exert control, operational difficulties are compounded. The lines between humanitarian action and political interests often blur, complicating efforts to maintain neutrality and impartiality. This blurring of lines can be seen as a form of political constraint challenging ethical dilemmas in the decision-making of the aid agencies, where humanitarian principles are frequently challenged by the political dynamics of the conflict zones. Consequently, humanitarian organizations must navigate these treacherous waters, balancing their commitment to principles with the pragmatic need to operate effectively in highly politicized environments. Similarly, bureaucratic constraints, and politically and economically motivated attacks on humanitarian personnel limit access to conflict-affected populations.<sup>69</sup>

This chapter deals with ethical dilemmas in humanitarian operations that often arise from the tension between adhering to core humanitarian principles and navigating the complex realities of conflict zones. These dilemmas primarily involve and challenge the decision-making processes within humanitarian organizations when principles require compromise. Additionally, the chapter examines operational

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<sup>66</sup> Abdulfatah Said Mohamed and Ronald Oferinger, “‘Rahmatan Lil-’alamin’ (A Mercy to All Creation): Islamic Voices in the Debate on Humanitarian Principles’ (2016) 97 *International Review of the Red Cross*.

<sup>67</sup> Radical non-state actors are using tactics that are not traditionally recognized as legitimate forms of warfare, making it harder for organizations like the ICRC to operate effectively and safely. These methods can include guerrilla tactics, terrorism, cyber warfare, and attacks on civilians and non-military targets such as humanitarian organizations.

<sup>68</sup> ICRC, ‘Operational Challenges in Carrying out Humanitarian Activities in a Changing Environment’ (2003) <<https://www.icrc.org/en/doc/resources/documents/misc/5udjv6.htm>> accessed 25 June 2024.

<sup>69</sup> Marcos Ferreira, ‘Blurring the Lines in Complex Emergencies: Consequences for the Humanitarian Community’ (The Journal of Humanitarian Assistance 2012).



challenges from both the NSAG's and aid agencies' perspectives. This means that sometimes the lack of clear guidance makes operational reality a challenge for aid agencies, such as the issue of consent, while other times, NSAGs make it inevitable for aid agencies to engage with them to gain access and ensure their operational security. Following the discussion on operational challenges, political constraints will be addressed. The constraints demonstrate how aid is manipulated by NSAGs and the bureaucratic hurdles they impose on them undermining impartiality and independence.

### **Ethical Dilemma**

In evolving situations, characterized by the presence of NSAGs and NIACs there have been instances where humanitarian principles were misused to mask poor performance, negatively impacting the people they aim to assist. The following discussion addresses two primary ethical dilemmas faced by humanitarians: the challenge posed by the behavior of NSAGs, which forces NGOs to make difficult decisions that may compromise principles, and the internal indecision within these entities on how best to uphold their principles.

In Afghanistan pre-2021, the political landscape and conflict dynamics have been influenced by entities like the US, which integrated humanitarian operations into their 'War on Terror' strategy,<sup>70</sup> combining aid with military and political objectives. This blurring of lines between political, military action, and humanitarian assistance complicates the effort to safeguard the independence of humanitarian organizations.<sup>71</sup> While government politicization and military intervention continue to be significant concerns, the increasing number of NSAGs that adopt similar tactics for their political agenda is particularly alarming. This shift not only heightens the ethical challenges for humanitarian organizations but also underscores the growing complexity and risks associated with maintaining their principles of impartiality and independence. The integration of humanitarian aid and military objectives presents significant ethical challenges. It is crucial to understand the intrinsic differences between military and

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<sup>70</sup> It refers to a 'term used to describe the American-led global counterterrorism campaign launched in response to the terrorist attacks of September 11, 2001. Richard Jackson, 'War on Terrorism', *Britannica* (2024) <<https://www.britannica.com/topic/war-on-terrorism>> accessed 11 July 2024.

<sup>71</sup> Paula Richardson Jané and Yannick Meyer (n 72).



humanitarian aims when delivering aid to maintain their impartiality and independence while avoiding alignment with military agendas.<sup>72</sup>

Such blurred line is exemplified in the context of armed escorts offered to humanitarian supplies and convoys. IHL is silent on the issue and the only relevant mention is found in the Commentaries.<sup>73</sup> The UN Inter-Agency Standing Committee (IASC) has provided a non-binding framework that regulates the use of armed escorts. According to these guidelines, armed escorts should only be employed as a last resort. One of the conditions is when state authorities or local non-state actors are either unable or unwilling to allow the movement of humanitarian supplies or personnel, the use of armed escorts is permissible.<sup>74</sup> The ICRC has consistently maintained that the use of armed escorts is generally prohibited. However, exceptions are allowed only if refusing an escort would paralyze humanitarian activities. When armed escorts are permitted, their use must adhere to humanitarian principles. although there is a non-binding framework in place that suggests armed escorts should be used only as a last resort, in practice, especially in insecure contexts, the use of armed escorts by humanitarian actors often becomes common rather than being an exceptional measure. Even though there are significant risks associated with using armed escorts for humanitarian convoys, the legal guidelines and protections regarding their use to prevent targeting by conflicting parties or opportunistic criminals have not been thoroughly examined or established.<sup>75</sup>

When aid agencies are compelled to use armed escorts by NSAGs, it highlights the blurred lines between military and humanitarian aid. While it might be necessary for the security of aid workers in certain contexts, it poses significant ethical and operational challenges. Armed escorts can influence where and how aid is delivered, potentially leading to biased distribution that favors certain groups or areas over others. Decisions about where and how to deliver aid may be influenced by the availability and conditions imposed by armed escorts, rather than purely humanitarian considerations. This dependency can also lead to situations where humanitarian organizations are pressured to comply with the demands of the

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<sup>72</sup> In the context of the 'War on Terror,' military intervention often involves the delivery of tactical and conditional aid. For example, to support the recipient country's military forces for tactical and strategic purposes. Marcos Ferreira (n 71). Conversely, when NSAGs engage in military interference, their aim is typically to gain leverage for various strategic reasons such as control over a population or implement a broader agenda.

<sup>73</sup> The Commentaries suggest that armed escorts may be authorized in areas where control is contested by conflicting parties, particularly when the relief organization does not have the protection afforded by the recognized emblem. Annabel Bassil, 'Armed Escorts to Humanitarian Convoys: An Unexplored Framework under International Humanitarian Law' (2020) 102 *International Review of the Red Cross* 559.

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

armed groups providing the escorts, further compromising their independence. There is also the risk that aid convoys with armed escorts become direct targets, leading to potentially higher casualties in attacks.

The influence of NASGs can be seen in a case study from Somalia where humanitarian organizations have developed working relationships with Al-Shabaab. They allowed Al-Shabaab leaders to suggest specific interventions and accepted certain compromises, such as not operating in areas of greatest need or serving the most vulnerable populations. For example, Al-Shabaab requested an organization to desilt large water catchments from the Siad Barre era, and the organization agreed because it saw community-wide benefits. Organizations reported maintaining minimal monitoring requirements, using before-and-after project photos, GPS coordinates, and satellite images to verify their work.<sup>76</sup>

The reaction of humanitarian organizations, as described in the passage, is a pragmatic approach to dealing with challenging and dangerous environments. While it allows for continued aid delivery and some community benefits, it also involves significant ethical compromises and operational risks. The decision to align an organization's mandate with the demands of NSAGs to ensure aid delivery presents a significant ethical dilemma. On one hand, this approach demonstrates a strong commitment to the core humanitarian mission, ensuring that aid reaches those in need despite challenging circumstances. On the other hand, such compromises may lead to inflexibility and a potential failure to fully engage with the ethical complexities and practical realities inherent in humanitarian work. The key question is whether these compromises, made to align with NSAG demands, are justifiable. This involves balancing the immediate benefits of aid delivery against the long-term impacts on the organization's mission, reputation, and adherence to humanitarian principles.<sup>77</sup>

In addition to military overlap, Dubois and Healy explain that humanitarian principles, viewed as absolute moral imperatives, are often misconstrued as binary rules of compliance or non-compliance. This misunderstanding combines duty-based (deontological) with outcome-based (consequentialist)

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<sup>76</sup> Katherine Haver and William Carter, 'What It Takes: Principled Pragmatism to Enable Access and Quality Humanitarian Aid in Insecure Environments' (Humanitarian Outcomes 2016)

<<https://www.sigar.mil/pdf/lessonslearned/SIGAR-21-46-LL.pdf>>.

<sup>77</sup> *ibid.*

ethics, which can confuse aid agencies.<sup>78</sup> Most donors<sup>79</sup> expect strict adherence to humanitarian principles, creating dilemmas, particularly with NSAGs.

In these challenging situations, humanitarians often make trade-offs in practice while claiming adherence due to donor pressure. This leads to a gap between policy and practice, resulting in misperceptions among donors and recipients.<sup>80</sup> Dubois and Healy note that the language used to describe adherence to humanitarian principles significantly impacts the behavior and perceptions of aid workers. Strict terms like ‘complied with’ or ‘adhered to’ create a binary mindset, leading staff to view any compromise as a failure and increasing anxiety. This pressure is exacerbated by donors requiring strict adherence to these principles, which forces agencies to publicly assert full compliance and discourages open discussion of practical compromises.<sup>81</sup>

The authors argue that this rigid approach inhibits the sharing of experiences and undermines coordination, as staff fear retribution for admitting ‘non-compliance’. They propose assessing humanitarian actions based on the efforts to achieve impartiality and other principles, recognizing the complex realities of on-the-ground operations, rather than judging strictly by outcomes. This approach acknowledges the necessity of practical compromises and promotes a more nuanced understanding of humanitarian operations.<sup>82</sup> Instead of viewing any deviation as a failure, it is important to recognize and openly discuss the necessary trade-offs and compromises.<sup>83</sup>

Another challenge lies within the organizations themselves. Humanitarians often struggle with internal decision-making and how to effectively navigate and respond to external pressures, such as those from donors and conflicting parties. Research by Dubois and Healy<sup>84</sup> explores the challenges humanitarians face in applying the principle of impartiality, particularly in deciding who receives aid and what is considered a humanitarian need. A primary challenge is that organizations frequently compromise impartiality by prioritizing the number of people they can reach over the urgency of need or the depth of

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<sup>78</sup> Marc DuBois and Sean Healy, ‘Imperfect Relief: Challenges to the Impartiality and Identity of Humanitarian Action’ [2024] *International Review of the Red Cross* 1.

<sup>79</sup> OECD (Organisation for Economic Co-operation and Development) donors.

<sup>80</sup> Martin Barber and others, ‘Applying Humanitarian Principles in Armed Conflict: Challenges and Ways Forward’ (Chatham House 2023).

<sup>81</sup> Dubois and Healy note that agency staff discuss non-compliance privately in project locations, fearing retribution from headquarters or donors if discussed openly. This inhibits sharing experiences and undermines coordination, contrasting with the view that impartiality should be judged by efforts rather than outcomes. Marc DuBois and Sean Healy (n 81).

<sup>82</sup> Marc DuBois and Sean Healy (n 81).

<sup>83</sup> *ibid.*

<sup>84</sup> Dubois and Healy focus on the internal challenges of impartiality faced by humanitarian organizations, addressing the nuanced difficulties these organizations encounter in maintaining their ethical standards. *Ibid.*

impact. This tendency to assume rather than critically evaluate situations results in a focus on quantity over quality, leading to the neglect of more invisible and unheard communities, and inadvertently reinforcing structural inequalities. For example, Médecins Sans Frontières (MSF) regularly debates difficult trade-offs between higher levels of quality versus reaching greater numbers of people, emphasizing the need to balance scale and impact in alignment with impartiality.<sup>85</sup> Consequently, organizations may prefer safer areas over those restricted by NSAGs, often neglecting remote indigenous populations. Humanitarians have particularly struggled to access the most crisis-affected areas in recent conflicts, including Afghanistan, Syria, and Gaza.<sup>86</sup> Ethical challenges arise because different agencies when dealing with a hurdle, apply humanitarian principles in varying ways, causing inconsistent outcomes.<sup>87</sup> These inconsistencies create a significant ethical dilemma: one organization might justify an intervention using these principles, while another might reject it,<sup>88</sup> based on the same principles, showing the ethical complexities that humanitarian organizations face. These decisions can result in different, sometimes conflicting actions in similar situations, making it harder to implement effective and fair humanitarian aid.

Adhering to core humanitarian principles often entails contradictions and compromises.<sup>89</sup> Balancing operational realities with strict principles is challenging. Dubois and Healy argue that complete adherence to humanitarian principles is often not feasible due to their complex and conflicting nature in crises. For example, findings by Jackson and others,<sup>90</sup> in Afghanistan highlight that many aid workers felt that maintaining impartiality in practice hindered achieving their organizational goals. The difficult conditions on the ground necessitated compromises to the principles of impartiality and independence, leading some to conclude that these principles were 'no longer attainable in practice.' This sentiment was echoed by a country director who noted that strict adherence to these principles would prevent project implementation.<sup>91</sup>

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<sup>85</sup> Marc DuBois and Sean Healy (n 81) 9, 10, 11; citing Veronique Barbelet, Oliver Lough and Sarah Njeri, *Towards More Inclusive, Effective and Impartial Humanitarian Action* (ODI, London 2022) 1.

<sup>86</sup> Marc DuBois and Sean Healy (n 81).

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> Katherine Haver and William Carter (n 79).

<sup>90</sup> Marc DuBois and Sean Healy (n 81) citing Ashley Jackson, Rahmatullah Amiri and Sarah Kilani, *Principled Humanitarian Action in Afghanistan: Research Report* (unpublished, on file with author, May 2023).

<sup>91</sup> *ibid.*

Most agencies, however, view these principles simplistically, reciting them as moral absolutes rather than acknowledging their complexities. Although aid agency staff recognize the need to make difficult decisions, they seldom frame these dilemmas using the language of humanitarian principles. Instead, agencies often maintain an idealistic and sometimes dogmatic understanding of these principles, failing to consider ethical risks in the structured way they address other risks, such as security, financial, and reputational risks.<sup>92</sup> This rigid interpretation means that in practice, aid agencies might struggle with flexibility when confronted with complex situations that demand a nuanced approach. For example, a strict adherence to the principle of neutrality might lead an agency to avoid certain areas altogether, rather than negotiating access that could save lives but might appear to compromise their impartial stance.

In practice, this ‘structured way’ refers to the systematic processes and frameworks that agencies use to manage other risks, such as conducting thorough risk assessments, developing contingency plans, and implementing strict protocols for security. However, similar systematic approaches are often missing when it comes to managing ethical risks. This lack of structured ethical risk management complicates balancing the urgency of interventions with risk acceptance, a challenge further exacerbated by inflexible donor policies. Consequently, ethical risks are frequently overlooked in NGOs' risk management systems, leading to significant operational challenges.<sup>93</sup>

A research summary by Barber and others,<sup>94</sup> indicates that treating humanitarian principles as fixed standards exacerbates gaps in their common understanding. Instead, these principles should be viewed as flexible guidance tools for navigating complex conflict environments. This approach allows for a more pragmatic and effective application of principles, distinguishing between compromises that undermine principles and those made thoughtfully and ethically.<sup>95</sup> This pragmatic approach distinguishes between compromises that undermine principles and those made thoughtfully and ethically. Open discussions are crucial for the principles to evolve and be internalized by humanitarian workers. Dubois and Healy emphasize the need for a balanced approach that respects core principles while being adaptable.<sup>96</sup>

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<sup>92</sup> Katherine Haver and William Carter (n 79).

<sup>93</sup> *ibid.*

<sup>94</sup> Martin Barber and others (n 83).

<sup>95</sup> *ibid* references Ross Upshur, who differentiates between ‘a compromise of principles’ (which implies a loss or weakening of those principles) and ‘a principled compromise’ (which means making a deliberate and thoughtful decision that still respects the essence of the principles). This distinction is crucial in maintaining ethical standards.

<sup>96</sup> *ibid.*

Haver and Carter hold a similar view, explaining that humanitarians should be conscious of the options available and judiciously decide when and what type of compromise is justifiable. If a compromise crosses a certain threshold, it could become a surrender of principle. However, determining where that threshold lies is not always clear-cut. The effort to find an acceptable balance between compromise and principle can itself be seen as a principled action.<sup>97</sup> While operational realities are unavoidable and require consideration, organizations should also consider the negative impacts of their compromises on their credibility<sup>98</sup> and coordination with other organizations.<sup>99</sup> Maintaining a balance between necessary compromises and adherence to core principles is crucial.

## Operational Challenges

### *Obtaining Consent*

As illustrated in Chapter One, humanitarian organizations are primarily required to gain consent from the parties to the conflict. The ICRC commentary,<sup>100</sup> however, indicates that CA3 does not provide clear guidance on the specifics of obtaining consent from ‘parties to the conflict.’ It states that ‘[a]n impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict,’ but does not spell out by whom, nor how, such an offer is to be responded to. It means that it does not specify which party’s consent is necessary, leading to ambiguity about whether consent must be obtained from both parties or if the agreement of the party receiving the offer is sufficient.<sup>101</sup> In exceptional circumstances, seeking and obtaining the consent of the Party concerned may be more problematic in the context of CA3 when there is uncertainty regarding when state authorities have collapsed or ceased to function.<sup>102</sup>

This ambiguity leads to different conclusions by scholars, such as arguing that the consent of NSAGs would suffice when an area is exclusively controlled by NSAGs. Although it is not explicitly clear whether NSAG consent is a legal requirement under the GCs, Shaffer argues that CA3 binds all parties to the conflict to obtaining the consent of both the state and the NSAG. Therefore, in practice, obtaining

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<sup>97</sup> Marcos Ferreira (n 71).

<sup>98</sup> John Ehrenreich, *The Humanitarian Companion: A Guide for International Aid, Development, and Human Rights Workers* (2005).

<sup>99</sup> Larry Minear., *The Humanitarian Enterprise: Dilemmas and Discoveries* (Kumarian Press 2002).

<sup>100</sup> ICRC, ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (*IHL Database*, 2020) <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020>> accessed 12 July 2024.

<sup>101</sup> Jessica Schaffer (n 40).

<sup>102</sup> ICRC, ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 104).

the consent of both the state and the NSAG is crucial to ensure the safe delivery of aid into NSAG-controlled territories. This includes obtaining state consent when the assistance is directed to civilians in territories no longer controlled by the state.<sup>103</sup>

As illustrated, legal framework for the issuance of consent are Article 18(2) of AP II and Rule 55 of the ICRC Customary Law, which clarifies that access to deliver humanitarian aid is subject to consent in both international and NIACs.<sup>104</sup> However, ambiguities arise from this normative framework in practice.

Article 18(2) of AP II explicitly addresses the requirement to obtain the consent ‘of the High Contracting Party concerned’.<sup>105</sup> This provision is interpreted as the ruling government.<sup>106</sup> Schaffer<sup>107</sup> explains that while NSAGs may oversee relief operations in territories they control, they cannot be parties to AP II. Consequently, if state consent is deemed unnecessary, it eliminates the involvement of any High Contracting Party, rendering the requirement for such consent redundant.

Given the silence of CA3 and the explicit mention of the ‘High Contracting Party’ in Article 18(2) of AP II, coupled with the emphasis on state sovereignty in international law, bypassing state consent would conflict with a strict interpretation of the provisions.<sup>108</sup> If the conditions set by AP II are not met, then the necessity for consent remains unclear, further complicating the operational landscape for humanitarian organizations operating in areas controlled by NSAGs. This ambiguity is crucial because humanitarian organizations must navigate these consent issues to operate effectively. In hostile environments, political power dynamics can shift frequently, complicating the operational landscape. The unpredictability of political scenarios, especially in failed states,<sup>109</sup> adds another layer of complexity. It remains unclear whether consent from such a state is necessary or feasible, raising concerns about bypassing the failed state and negotiating solely with NSAGs. This approach could undermine the

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<sup>103</sup> Jessica Schaffer (n 40).

<sup>104</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (n 45).

<sup>105</sup> ICRC, ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ (n 104).

<sup>106</sup> Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (n 45).

<sup>107</sup> The term ‘High Contracting Parties’ refers specifically to sovereign states that have signed and ratified an international treaty, such as AP II to the GCs. NSAGs, by their nature, are not sovereign states. They can be insurgent groups, rebel factions, or other organized armed groups that are involved in conflict but do not represent an internationally recognized government.

<sup>108</sup> Jessica Schaffer (n 40); ICRC’s stance on consent, ICRC, ‘ICRC Q&A and Lexicon on Humanitarian Access’ (2014) 96 *International Review of the Red Cross* 359.

<sup>109</sup> States where institutions and law and order have completely or partially disintegrated due to intense violence, yet still exist nominally on the world map, are commonly referred to as ‘failed States’ or ‘États sans gouvernement.’ In this context, the term ‘failed State’ should be understood to mean a ‘disintegrated’ or ‘collapsed’ state, see Daniel Thürer, ‘The “failed State” and International Law’ (1999) 81 *International Review of the Red Cross* 731.



humanitarian mandate if the former state regains power, potentially jeopardizing the legitimacy and acceptance of humanitarian operations. Consequently, it is essential for humanitarian actors to continually reassess their approach to obtaining consent from both state and non-state actors to maintain operational security and effectiveness.

### *Negotiation and Security of Aid Agencies*

Engagement with NSAGs is essential for aid agencies operating in areas controlled by these groups. Under IHL, aid organizations do not have an inherent right to access conflict regions; their entry must be negotiated with the conflicting parties.<sup>110</sup> This engagement often includes negotiating access, coordinating operations, ensuring the delivery of aid, and securing the safety of their personnel and resources.

Evidence suggests that aid organizations can operate more safely and effectively when armed actors are aware of their presence, understand their activities, and acknowledge their work, even if this acknowledgment is not formal approval.<sup>111</sup> Upholding humanitarian principles helps organizations to successfully negotiate their access. A notable aspect is the frequent discussion and application of these principles by numerous agencies. For example, HERE-Geneva's<sup>112</sup> evaluations of these principles in Iraq, as referenced by Dubois and Healy,<sup>113</sup> reveal that thirteen out of fifteen agencies regularly incorporated these principles into their decision-making processes, priority setting, and access negotiations. This demonstrates the integral role these principles play in guiding humanitarian efforts and how the principles shape strategies to ensure equitable aid distribution and effective access to those in need.

The authors note that although the principles are frequently mentioned in documents and discussions,<sup>114</sup> there is a lack of substantive discussion or a common narrative about their content. This issue is also found in other contexts, such as the UN Evaluation Group's research, which found minimal systematic

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<sup>110</sup> Paula Richardson Jané and Yannick Meyer (n 72) citing Sorcha O'Callaghan and Leslie Leach, 'The Relevance of the Fundamental Principles to Operations: Learning from Lebanon' (2013) 95 *International Review of the Red Cross* 287.

<sup>111</sup> *ibid.*

<sup>112</sup> The Humanitarian Exchange and Research Centre (HERE), HERE-Geneva, 'Principled Humanitarian Assistance of ECHO Partners in Iraq' (NRC, 2017) <<https://www.nrc.no/resources/reports/principled-humanitarian-assistance-of-echo-partners-in-iraq/>> accessed 22 June 2024.

<sup>113</sup> Marc DuBois and Sean Healy (n 81).

<sup>114</sup> The IASC was created by the same UNGA resolution that endorsed the humanitarian principles, <https://interagencystandingcommittee.org/iasc>.



evaluation of the humanitarian principles' performance and no common understanding of their concepts or implementation.<sup>115</sup> Critics challenge humanitarian principles arguing that while principles like humanity and impartiality define what is good, they do not guide how to achieve it. Treating these principles as inviolable goals rather than practical guidelines prevents learning from real-world compromises. This approach undermines both the execution and evaluation of these principles in humanitarian efforts.<sup>116</sup>

The SAVE survey<sup>117</sup> indicated that many humanitarian staff were unsure about how to engage with NSAGs for access and whether it is allowed under their organization's rules or international norms. Only about half of the surveyed staff (51%) reported that their organization communicates with NSAGs. Similarly, only 52% believed it generally acceptable for staff to speak directly with members of these groups to facilitate humanitarian access. Respondents in Afghanistan were the least likely to see negotiations as acceptable (36%), while those in South Sudan were the most likely (64%). The report highlights that many humanitarian organizations still struggle to engage and negotiate access with NSAGs. In interviews and surveys, many field staff expressed uncertainty about whether such contact is even permissible. While good practices exist, they lack consistency across organizations.<sup>118</sup>

The reality is that humanitarian workers face significant access and insecurity challenges in conflict areas, which remain substantial barriers and often lead to a reduction in project activities. The nature of insecurity varies in each conflict zone and may include direct attacks resulting in killings, abductions, injuries, or arrest and detention. For example, in 2004, five MSF aid workers were assassinated in Afghanistan, an attack claimed by the Taliban. This tragic incident led MSF to completely withdraw from the country due to the ongoing operational challenges.<sup>119</sup> Moreover, in Syria, strict limitations and barriers on movement and entry imposed by various parties made it very difficult for humanitarian aid to reach all areas. As a result, humanitarian aid was provided in regions where access has been explicitly agreed upon and negotiated with controlling parties. Consequently, large areas in the north-western and north-eastern parts of Syria do not receive the necessary aid because access to these regions has not been

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<sup>115</sup> Marc DuBois and Sean Healy (n 81).

<sup>116</sup> *ibid.*

<sup>117</sup> The survey is based on fieldwork in four of the most dangerous aid settings (Afghanistan, South Central Somalia, South Sudan, and Syria) from mid-2014 to mid-2016.

<sup>118</sup> Katherine Haver and William Carter (n 79).

<sup>119</sup> Xavier Crombé (with Michiel Hofman), 'Afghanistan. Regaining Leverage' (*msf-crash.org*, 17 February 2012) <<https://msf-crash.org/en/publications/agir-tout-prix-negociations-humanitaires-lexperience-de-msf/i-stories>> accessed 4 July 2024.

successfully negotiated.<sup>120</sup> Such incidents underscore the need for more principled negotiations to ensure both access and the security of aid workers.

There is no set template for initiating or maintaining dialogue with NSAGs to gain acceptance or access to civilians in need. The approach to engagement varies based on numerous factors that may evolve over time and can involve different levels within the group's hierarchy. Interactions can occur directly or through intermediaries, depending on the specific context and circumstances.<sup>121</sup> The primary aim of humanitarian engagement with NSAGs is to secure two preconditions: ensuring security guarantees for aid workers<sup>122</sup> and obtaining access agreements. These agreements represent a pragmatic balancing of interests rather than a compromise on contested issues. Negotiations with NSAGs are less about upholding principles and more about a dynamic process shaped by the participants' pragmatic goals. The skills of the negotiation team and their awareness of the local environment are crucial, as misunderstandings and miscommunications can lead to severe consequences, including being expelled from the country.

Therefore, humanitarian agencies can better secure access by ensuring that their staff possess the necessary negotiation skills to effectively engage with NSAGs and understand the compromises required for access. When access is denied, organizations must carefully balance advocating for entry with maintaining their core principles of neutrality, impartiality, and independence. The humanitarian community can learn from existing practices and experiences in the absence of sufficient guidance on principled negotiations. For instance, organizations like MSF and the ICRC benefit from their regular engagement with conflict parties. Both view access as a dynamic process that evolves over time, guided by a practical interpretation of principles. These principles are not treated as abstract absolutes but are operationally integrated into negotiations, logistics, and finance.<sup>123</sup>

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<sup>120</sup> Paula Richardson Jané and Yannick Meyer (n 72).

<sup>121</sup> ICRC, 'ICRC Engagement with Non-State Armed Groups' (n 35) 1093.

<sup>122</sup> Max P. Glaser, 'Humanitarian Engagement with Non-State Armed Actors: The Parameters of Negotiated Access' [2005] Humanitarian Practice Network <<https://odihpn.org/wp-content/uploads/2005/06/networkpaper051.pdf>>.

<sup>123</sup> Katherine Haver and William Carter (n 79).

## Political Constraints

In each context, three major types of political actors influence access to humanitarian aid: host governments, donor country governments,<sup>124</sup> and NSAGs. These actors can significantly impact humanitarian operations, often negatively.<sup>125</sup> Over the years, states have engaged in conflicts with NSAGs under the guise of internal conflicts and counterterrorism, pressuring humanitarian organizations to operate within constrained environments. For instance, the Assad government in Syria has been known to manipulate and blockade aid in the rebel-held northwest after the 2023 earthquake.<sup>126</sup> Similarly, international military forces in Afghanistan have been accused of instrumentalizing aid to gather information on the Taliban and Al-Qaeda.<sup>127</sup> Conversely, NSAGs, typically fight to gain territory or achieve their aims. While NSAGs generally lack the broader political agendas of states,<sup>128</sup> they impose significant limitations on the operations of aid agencies when they do have such agendas, challenging the humanitarian mandate.

This part of the thesis will primarily focus on the influence of NSAGs and the restrictions they impose due to a lack of clear guiding principles. The analysis will be conducted from two perspectives: the manipulation of aid by NSAGs and the bureaucratic hurdles they impose. Although there is some overlap among the various political constraints, they have been distinguished in this discussion to facilitate a clearer understanding.

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<sup>124</sup> Hugo Slim argued that humanitarian organizations often depend heavily on financial support from Western governments, which in turn significantly influences their actions to align with the demands of these donors see Paula Richardson Jané and Yannick Meyer (n 72).

<sup>125</sup> Katherine Haver and William Carter (n 79).

<sup>126</sup> The Media Line Staff, 'No Aid in Idlib as Assad Army Targets Rebel-Held Northwest Syria After Earthquakes' (*The Media Line*, 19 February 2023) <<https://themedialine.org/top-stories/no-aid-in-idlib-as-assad-army-targets-rebel-held-northwest-syria-after-earthquakes/>> accessed 30 June 2024.

<sup>127</sup> See Fiona Terry, 'The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action' (2011) 93 *International Review of the Red Cross*.

<sup>128</sup> Examples include [FARC in Columbia, Syrian rebels, etc], which have territorial claims compared to groups like the Taliban 2024, who have more defined political goals; local-level armed actors sometimes seek to extract payments or divert aid for their own use. These local militias or factions, which operate primarily within specific communities, can impose significant constraints on humanitarian efforts. They may demand payments or requisition aid supplies, disrupting the impartial and equitable distribution of assistance, see Katherine Haver and William Carter (n 79).

### *Manipulation of aid<sup>129</sup>*

Humanitarian efforts are increasingly at risk of being rejected by groups that perceive them as misaligned with their ideology or dismissed as ineffective. These groups intentionally create chaos and resist efforts to provide stabilizing aid.<sup>130</sup> For example, the instrumentalization of aid<sup>131</sup> diverts it from its intended purposes.<sup>132</sup> This can involve diverting aid for military objectives, exerting control over populations, or leveraging aid for political gains. Such political constraint imposes additional operational and ethical challenges for humanitarians.

By diverting aid, controlling parties ensure that NGOs' agendas are aligned with their interests. Jané and Meyer,<sup>133</sup> from their series of interviews, explain that in Syria the government diverted aid to use as a war tool, directing assistance to specific areas to penalize regions controlled by rebels. Meanwhile, Mohammed Mahrousa observed that terrorist groups in Syria have developed a deeper understanding of humanitarian principles, which has enabled them to manipulate the aid system more effectively. Additionally, the Taliban pre-2021, to ensure aid was distributed only to areas they controlled,<sup>134</sup> This dual manipulation by state and NSAGs creates a challenging environment for humanitarian agencies striving to provide unbiased aid.

Other examples include organizations operating in Islamic State-controlled areas in Syria, which had to curtail their programs, such as eliminating food and non-food item distributions because the Islamic State did not favor these distributions or deem them unnecessary. Similarly, in Afghanistan, the Taliban suspended the operations of the Swedish Committee for Afghanistan due to the incident involving the

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<sup>129</sup> Manipulation of aid refers to redirecting humanitarian assistance to serve political or economic interests instead of providing relief to those in need.

<sup>130</sup> ICRC, 'Operational Challenges in Carrying out Humanitarian Activities in a Changing Environment' (n 70).

<sup>131</sup> Refers to the use of humanitarian activities or language as a means to achieve political, security, military, development, economic, and other objectives that are not related to humanitarian aims. Michael Barnett, 'Review of The Golden Fleece: Manipulation and Independence in Humanitarian Action by Antonio Donini (Ed.)' (2012) 94 International Review of the Red Cross <<https://international-review.icrc.org/sites/default/files/irrc-887-book-review-donini.pdf>>.

<sup>132</sup> In total war situations, where communities are treated as political pawns, it becomes difficult to ensure that aid is distributed based solely on need. See Marion Harroff-Tavel, 'Neutrality and Impartiality: The Importance of These Principles for the International Red Cross and Red Crescent Movement and the Difficulties Involved in Applying Them' [1989] International Review of the Red Cross.

<sup>133</sup> Paula Richardson Jané and Yannick Meyer (n 72).

<sup>134</sup> *ibid.*

burning of the Holy Book in Sweden.<sup>135</sup> Such actions illustrate the multiple reasons NSAGs might block, interfere, or divert aid, ranging from ideological opposition to specific types of aid to political retaliation against perceived offenses.<sup>136</sup> The incidents highlight how organizations in IS-controlled areas had to adjust their programs based on IS preferences, and the Taliban further illustrates how NSAGs can manipulate aid delivery based on ideological or political motives.

Understanding the motivations behind these attacks is crucial for developing strategies to navigate these complex environments and ensure effective aid delivery. In 2012, researchers conducted 150 interviews with the Taliban, aid agency staff, and ordinary Afghans to understand the Taliban's attitudes and policies toward aid agencies. The Taliban required all agencies to register with senior leadership, meeting conditions such as demonstrating neutrality, respecting Afghan culture, and sometimes paying taxes.<sup>137</sup> They monitored aid projects through informants to ensure compliance and efficiency and check that aid workers were not spying. Non-compliance resulted in severe consequences, including warnings, project closures, and attacks on aid workers.<sup>138</sup>

The Taliban leadership insisted that their violence against aid agencies was not random; rather, local commanders were authorized to expel, attack, and harass them based on perceived infractions. The hostility towards aid agencies stemmed from the belief that they were engaging in espionage for foreign governments, thus making them legitimate targets.<sup>139</sup> Beyond accusations of espionage, the Taliban criticized aid agencies for the imbalance and short-term nature of aid distribution. They believed that these programs were ineffective and temporary, which was a sentiment shared by some local elders. Some commanders expressed frustration over the lack of long-term impact and perceived project quality, believing that aid efforts were superficial and driven by ulterior motives.<sup>140</sup>

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<sup>135</sup> Mohammad Khater Pardes, 'Afghans Fear Taliban's Ban on Swedish Aid Will Further Worsen Humanitarian Crisis' *Radio Free Europe/Radio Liberty* (2023) <<https://www.rferl.org/a/afghanistan-taliban-ban-swedish-ngo-humanitarian-crisis/32504979.html>> accessed 3 July 2024.

<sup>136</sup> Katherine Haver and William Carter (n 79); Marcos Ferreira (n 71).

<sup>137</sup> There were instances where local commanders made local deals with unregistered agencies, but these were less stable and more susceptible to disruption. Ashley Jackson, 'Taliban Policy and Perceptions towards Aid Agencies in Afghanistan' (*Humanitarian Practice Network*, 2013) <<https://odihpn.org/publication/taliban-policy-and-perceptions-towards-aid-agencies-in-afghanistan/>> accessed 2 July 2024.

<sup>138</sup> *ibid.*

<sup>139</sup> Counterinsurgency tactics, especially in Kandahar Province of Afghanistan, had shaped these views, with many Taliban believing that aid agencies were aligned with government and international forces because they operated mainly in government-controlled areas and only moved into previously insecure zones after they had been secured. *ibid.*

<sup>140</sup> *ibid.*

Additionally, the Taliban harbored concerns that aid agencies would disrespect Afghan culture and Islamic values, particularly regarding women's rights, which they viewed as Western impositions. This led to incidents where the Taliban exerted pressure on agencies, such as banning female staff from health clinics and schools. However, there were instances where aid workers negotiated with the Taliban, allowing some engagement with women, provided Afghan cultural norms were respected, such as female employees working only with Afghan women.<sup>141</sup>

### *Bureaucratic hurdles*

NGO laws, travel permits, and visa restrictions imposed by host entities significantly impact the operations of humanitarian organizations. Legal registration is often mandatory for an organization to function within a country. Without visas, international staff cannot enter, and without travel permits, movement within the country is restricted. Although these procedures are standard, the constraints can severely limit or even halt an organization's ability to operate, especially when extensive paperwork and caution are required. Furthermore, the political interests of the host entity can conflict with those of the humanitarian organization, potentially causing the very needs that necessitate the humanitarian presence.<sup>142</sup>

The SAVE report indicated that Al-Shabaab has been known to enforce taxes, impose conditions, and threaten humanitarian aid workers, which can lead to attacks over disputes on employment, contracts, and tax issues.<sup>143</sup> Visas for international actors were denied because they were perceived as supporters of the rebels. This issue can arise from various reasons, including political perceptions and security concerns.<sup>144</sup>

For example, in 2008, Al-Shabaab expelled two US organizations, International Medical Corps and CARE, accusing them of espionage and aiding intelligence agencies. The following year, Al-Shabaab expelled three UN agencies, alleging they were aiding the Somali government and training militias. In 2011, Al-Shabaab closed the offices of all remaining UN agencies and NGOs, accusing them of political

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<sup>141</sup> *ibid.* For additional case studies, see the MSF report on Mali, which highlights significant risks for humanitarian agencies, including the perception of supporting the state's political agenda, leading to the rejection of aid by opposing groups and potential attacks on organizations identified as aligning with the enemy. MSF, 'MSF Warns about the Use of Humanitarian Aid for Political and Military Interests' (2017) <<https://www.msf.org/mali-msf-warns-about-use-humanitarian-aid-political-and-military-interests>> accessed 25 June 2024.

<sup>142</sup> Christopher Lockyear and Andrew Cunningham, 'Who Is Your Constituency? The Political Engagement of Humanitarian Organisations' (2017) 2 *Journal of International Action* <<https://rdcu.be/dMiFk>>.

<sup>143</sup> Katherine Haver and William Carter (n 79).

<sup>144</sup> Paula Richardson Jané and Yannick Meyer (n 72) 40.

bias, dishonesty, and proselytizing. These examples reflect how such perceptions can lead to organizations facing direct political constraints, significantly impacting their ability to deliver aid.<sup>145</sup>

These instances highlight the importance of understanding and navigating the complex political landscapes. By anticipating these challenges and developing strategies to address them, organizations can better prepare to maintain their operations and continue delivering critical aid to those in need.

Having explored the various bureaucratic and political challenges faced by humanitarian organizations in NSAG-controlled territories, the next chapter will apply these insights to a specific case study. This case study will illustrate the complexities and nuances of operating within such environments, providing humanitarian actors with practical knowledge to navigate similar situations effectively.

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<sup>145</sup> Marcos Ferreiro (n 71).



## Chapter Three - Case Study of Afghanistan

Having discussed the theoretical framework and key principles guiding humanitarian action in the previous chapters, this chapter will apply this knowledge to the complex realities of Afghanistan under Taliban control. For the past decades, Afghanistan has been a focal point for numerous studies on humanitarian assistance and IHL. Due to the constant conflicts and power shifts, as in all NIACs, civilians bear the brunt of the suffering and require substantial aid. Humanitarian assistance in such contexts faces both moral and operational challenges, influenced by external factors such as political constraints and operational security issues, as well as internal factors like balancing and adhering to core humanitarian principles while making compromises to stay and deliver aid.

Since the fall of the government in 2021, humanitarian agencies in Afghanistan have encountered unprecedented challenges. This period marks a unique moment in humanitarian history, as a NSAG took full control of the country. Many humanitarian organizations were unprepared for the shift in power dynamics, leading some to suspend operations. Those who remained or resumed operations had to navigate complex decisions to align their actions with the operational realities, underscoring the significant gap between theoretical frameworks and operational realities. This chapter will explore these challenges, illustrating the complex interplay between humanitarian principles and the practicalities of operating in a conflict zone dominated by an NSAG.

### A. Legal Status of the Taliban

In September 2021, the Taliban announced an interim government, also referred to as a 'de facto' ruling authority, led by Mohammad Hasan Akhund. This development raised significant legal questions regarding the applicability of IHL rules and the responsibilities such groups exercise over the territory they control. This section highlights two important discussions: first, the status of the Taliban post-2021, and second, whether the situation in Afghanistan qualifies as a NIAC. Consequently, it will explore the applicability of CA3 and AP II to the ongoing conflicts within the country.

After the Taliban gained control, they nullified the 2004 Afghan Constitution, imposing Sharia law but later planned to temporarily implement articles from Afghanistan's 1964 Constitution that do not contradict Sharia law. Therefore, presented the Taliban as the new government.<sup>146</sup> However, their

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<sup>146</sup> Geneva Academy, 'Non-International Armed Conflicts in Afghanistan' (RULAC 2023) <<https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan>> accessed 7 July 2024.



government has not yet been recognized by the international community, nor have credentials been accepted by the UNGA to represent Afghanistan.<sup>147</sup>

To apply IHL to the case of Afghanistan and clarify its obligations towards the humanitarian community, it is crucial to determine whether the situation of armed violence constitutes a NIAC. This assessment requires evaluating two criteria: first, the intensity of the armed violence must exceed that of internal disturbances and tensions; second, at least one party involved must demonstrate a sufficient level of organization to be recognized as a participant in the conflict.<sup>148</sup>

In Afghanistan, the Taliban maintain great control over the territory and are engaged with two main groups fighting against them, the National Resistance Front (NRF), which is loyal to the former government, and the other with Islamic State – Khorasan Province (IS-KP).<sup>149</sup> The ongoing hostilities between the Taliban and IS-KP, as well as the NRF, are marked by significant violence and sustained military operations. This intensity exceeds that of internal disturbances and sporadic violence. Both the Taliban and their adversaries, IS-KP and NRF, are highly organized. The Taliban has a clear command structure and administrative apparatus, despite functioning as an NSAG. Similarly, IS-KP and NRF possess the organization and capacity necessary to engage in prolonged conflict.<sup>150</sup>

All parties to the conflict in Afghanistan are bound by CA3 of the 1949 GCs and by customary IHL applicable to NIACs.<sup>151</sup> For AP II to be applicable, it should meet specific criteria: it should take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other

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<sup>147</sup> For the second time since the establishment of the Islamic Emirate of Afghanistan, the UNGA, in its 55th plenary meeting of the 77th session on December 16, 2022, postponed the decision on whether to grant the country's UN seat to Afghanistan's new rulers. Thomas Ruttig, 'Whose Seat Is It Anyway: The UN's (non)decision on who represents Afghanistan' (*Afghanistan Analysts Network*, 7 December 2023) <<https://www.afghanistan-analysts.org/en/reports/international-engagement/whose-seat-is-it-anyway-the-uns-nondecision-on-who-represents-afghanistan/>> accessed 12 July 2024.

<sup>148</sup> Geneva Academy (n 150).

<sup>149</sup> In October 2022, the NRF escalated violence in northern Afghanistan, evidenced by a video showing the capture of the Taliban governor for Badakhshan's Shekay district. In December, they demonstrated increased operational capabilities by planning major attacks in Kandahar province. Moreover, in April 2022, fighting between IS-KP and the Taliban resumed with deadly attacks on both sides, leading to increased violence and resulting in the deaths of Afghan forces, fighters, and civilians. This culminated in the Taliban's claim in September 2022 that they had killed IS-KP's shadow governor for Farah province. Moreover, since April 2022, numerous armed groups have emerged in Afghanistan due to rising grievances against the Taliban government. It was reported that ten new armed groups are primarily active in the northern provinces. While current information is insufficient to determine if these groups are parties to NIACs against Afghanistan, the situation is rapidly evolving and under continuous monitoring. *ibid.*

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

organized armed groups, and the conflict must involve organized armed groups that exhibit a command structure and the capacity to sustain military operations and must reach a certain level of intensity.

There is ongoing debate regarding the applicability of AP II to the current situation in Afghanistan. Afghanistan is a party to the 1977 AP II, which applies to NIACs.<sup>152</sup> The Taliban meet the criteria of effective control and responsible command.<sup>153</sup> However, there is a legal question about whether de facto authorities like the Taliban can be considered High Contracting Parties under AP II. The Protocol traditionally applies to conflicts involving state armed forces and organized armed groups with territorial control. If the Taliban are not recognized as a legitimate state, their status under AP II remains ambiguous.<sup>154</sup> Ben Saul<sup>155</sup> indicates that under international law, the Taliban are considered a 'de facto' government, which means they are obligated to respect international law despite not being formally recognized. Recognition by foreign entities is not what determines a government's legitimacy; rather, it is based on effective, independent, and durable control over a state's territory, recognized authority by the population, and the absence of a rival effective authority. The former Afghan government's authority has collapsed, and it no longer claims to be the government.<sup>156</sup> Conversely, the initial draft by the ICRC had suggested that the Protocol should apply in situations where multiple factions are in conflict without the involvement of government armed forces, such as when a government has collapsed or is too weak to intervene. However, the Conference deemed this scenario too theoretical and excluded it from the final text, despite the ICRC's experience with such situations. As a result, these cases are not covered by the Protocol and only CA3 applies. Nonetheless, the Protocol can still be implemented through special agreements as outlined in CA3.<sup>157</sup>

While the Taliban's control over Afghanistan meets many of the criteria outlined for NIACs under CA3 and AP II, the legal status of the Taliban as a High Contracting Party under AP II remains ambiguous.

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<sup>152</sup> RULAC classifies the situation as NIAC, however, indicates that the current conditions in Afghanistan do not appear to meet the criteria for the application of AP II. See *ibid.*

<sup>153</sup> *ibid.*

<sup>154</sup> *ibid.*

<sup>155</sup> Ben Saul, "'Recognition' and the Taliban's International Legal Status" (*ICCT*, 2021) <<https://www.icct.nl/publication/recognition-and-talibans-international-legal-status>> accessed 8 July 2024; Ayaz Gul, 'Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now' (*Voice of America*, 28 September 2021) <<https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>> accessed 8 July 2024.

<sup>156</sup> Ben Saul (n 159).

<sup>157</sup> ICRC, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.' (*IHL Database*) <<https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-1/commentary/1987>> accessed 13 July 2024.

This ambiguity underscores the need for clarity especially regarding the issue of consent which will be addressed later in this thesis.

### **Navigating the Practical Challenges in Afghanistan**

From the beginning of the Taliban's control over Afghanistan, there has been uncertainty regarding how humanitarian agencies should engage with the new regime. Although some organizations had interactions with the Taliban before 2021, the context has changed significantly. The previous Taliban, as insurgents, operated a decentralized governance model with varied interactions with NGOs, which sometimes included violent actions such as assassinations.<sup>158</sup> post-2021, their capture of the country provides a broader way of interaction for humanitarians. The Taliban's future actions and policies towards such entities were unclear.<sup>159</sup>

The uncertainties surrounding the Taliban's political and military evolution included navigating tensions between local and national agreements, identifying appropriate contacts for discussions on crucial issues like women's rights, and engaging with Taliban commanders. All these matters created dilemmas for humanitarians to solve. This lack of clarity has also weakened the international community's collective bargaining power, as donors and NGOs remain divided over priorities and strategies.<sup>160</sup> These uncertainties continue to pose significant challenges today, exemplified by the ban on female work and increased interference, raising serious concerns for the adherence to core humanitarian principles for aid agencies.

#### *Ethical dilemma*

##### Challenges arising from gender-specific restrictions

Since the Taliban's takeover in 2021, the humanitarian community has struggled with the restrictive environment, notably the ban on female aid workers. Despite initial pauses in programming, most organizations have resumed operations, finding ways to support current and former female staff.

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<sup>158</sup> See Ricardo Munguia death incident in Fiona Terry (n 131).

<sup>159</sup> Florian Weigand and Mark Bowden, 'Afghanistan: Humanitarian Assistance in the Light of a Taliban-Controlled State' (*Centre for Humanitarian Action*, 2021) <<https://www.chaberlin.org/en/blog/afghanistan-humanitarian-assistance/>> accessed 8 July 2024.

<sup>160</sup> *ibid.*

However, ongoing debates and indecision continue to hinder operations, coordination, and morale. No organizations have fully withdrawn, and the challenge of effectively operating under these constraints remains unresolved.<sup>161</sup>

In December 2022, the Taliban issued a decree banning women from working in NGOs, and by April, the decree was extended to include the UN.<sup>162</sup> Although no formal exemptions exist, there is a general agreement that women can continue to work in the health and education sectors. However, their administrative support staff have been barred from office work. The enforcement of this exemption varies significantly at the provincial level.<sup>163</sup> In one province, women were not allowed to work at all; in two provinces, they were only permitted to work during assessments; and in eleven provinces, they were restricted to working solely in health and education programs.<sup>164</sup>

In response, at the national level, the Humanitarian Country Team referred the discussion to the IASC, which initially decided on a month-long partial pause of non-critical humanitarian programs. This pause was not uniformly observed. In late January, IASC Principals visited Afghanistan, developed a framework with minimum criteria for programming, and initiated an operational trial period. Donor governments agreed on principles to avoid normalizing the Taliban's restrictions on women, called for guidelines ensuring meaningful female participation in humanitarian work, and committed to flexibility in program changes and supporting costs related to the ban's impact. Some NGOs included their Afghan female staff in decision-making regarding their response to the ban, but most did not consult Afghan women more broadly or women-led local organizations. At their Afghan female staff's request, some international NGOs publicly opposed the ban, mirroring statements from other international NGOs. However, a few later regretted this move, as it hindered their ability to negotiate exemptions.<sup>165</sup>

Despite these efforts, there remains a significant lack of clarity regarding values and principles in Afghanistan's humanitarian context. Aid agencies are navigating complex commitments rooted in IHL, human rights law, humanitarian principles, sector-wide codes of conduct, standards, and organizational policies. The core dilemma surrounding the ban on female aid workers underscores the tension between

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<sup>161</sup> Mark Bowden and others, 'Navigating Ethical Dilemmas for Humanitarian Action in Afghanistan' (Humanitarian Outcomes 2023) <[https://humanitarianoutcomes.org/HRRI\\_Afghanistan\\_June\\_2023](https://humanitarianoutcomes.org/HRRI_Afghanistan_June_2023)>.

<sup>162</sup> USIP, 'Tracking the Taliban's (Mis)Treatment of Women' (*United States Institute of Peace*) <<https://www.usip.org/tracking-talibans-Mistreatment-women>> accessed 12 July 2024.

<sup>163</sup> Mark Bowden and others (n 165).

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.*

upholding women's rights and the humanitarian imperative to provide aid, as embodied in the principle of humanity.<sup>166</sup> This presents a profound moral challenge: whether to oppose such violations or accept the ban to deliver aid.

The presence of female aid workers is undoubtedly crucial for aid agencies to operate; however, the consensus was that continuing operations was essential for reaching those in need and ensuring humanitarian access, despite the Taliban's restrictions.<sup>167</sup> A majority of Afghan women also preferred aid agencies to stay and deliver assistance. A survey found that just over half of the respondents opposed the Taliban edict and wanted aid workers to remain, while 38% believed they should leave on principle, and 11% were undecided. Therefore, humanitarian organizations shifted some work to online arrangements for women and provided additional resources like internet access and solar panels.<sup>168</sup> Other agencies, found partial solutions through local negotiations, leveraging decentralized power structures across provinces.<sup>169</sup>

NGOs face significant dilemmas due to the persistent gender discrimination and control exercised by the Taliban over aid agencies.<sup>170</sup> These challenges were present during the Taliban's first rule, and agencies were already aware of such policies. The lack of established frameworks and coordination disrupts humanitarian operations and significantly impacts their reputation. Given these ongoing challenges, it is likely that more bans may be imposed, posing additional operational challenges and ethical considerations for NGOs.

In an informal interview with a local female staff member, questions were posed about the organization's situation regarding the Taliban's female employment ban and recently announced salary cuts for female state employees.<sup>171</sup> She explained that most of their projects are health-related, with other fields including English education and computer skills. However, the intentional focus is on health projects. Interestingly, education recipients sometimes include relatives of Taliban members. She noted that the enforcement of

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<sup>166</sup> *ibid.*

<sup>167</sup> The Taliban have reportedly warned international NGOs against attempting to circumvent the ban on female staff. *ibid.*

<sup>168</sup> *ibid.*

<sup>169</sup> Donor governments have been passive in challenging the Taliban's ban on female aid workers and providing coordinated guidance, resulting in a lack of diplomatic consensus or strategy to influence the Taliban. For comprehensive discussion on International community and Donor reaction see *ibid.*

<sup>170</sup> Matthew Fielden and Sippi Azerbaijani-Moghadam, 'Female Employment in Afghanistan: A Study of Decree # 8' (Women's Refugee Commission 2001) <<https://www.refworld.org/reference/countryrep/wcr/2001/en/61600>> accessed 5 July 2024.

<sup>171</sup> RFE/RL's Radio Azadi, "'Systematic Discrimination': Taliban's Drastic Cut In Salaries Of Female State Employees Triggers Anger' *Radio Free Europe/Radio Liberty* (18 June 2024) <<https://www.rferl.org/a/afghanistan-taliban-women-employees-salaries/32998050.html>> accessed 7 July 2024.

hijab regulations has been a major concern. Initially, there was a strong emphasis on the 'good hijab' standard. Although this requirement is less emphasized now, the organization's branch in Mazar was suspended for non-compliance with hijab rules. The Taliban's Vice and Virtue Committee occasionally visits for inspections, and the office mainly reiterates instructions to female staff. Regarding salary concerns, she noted that their coordinator has been informed of the issue but assured that discussions about salary cuts for female NGO staff have not yet taken place, emphasizing the organization's principles of impartiality and independence.<sup>172</sup>

### Compromises in humanitarian operations

As already illustrated in Chapter Two, humanitarian organizations often lack frameworks for making ethical decisions, both individually and collectively. They struggle to define problems in terms of competing moral values and the ethical principles involved. Unlike their security risk management tools, agencies have not developed models or practical guidance for ethical decision-making in their programming. This has led to indecisive and sometimes 'toxic' internal debates and decision-making inertia since the edicts were passed. Without a clear ethical guide, the humanitarian community has been unable to unite and establish a common strategic approach and joint messaging.<sup>173</sup> As evidenced by lessons from the Afghan women's ban, a significant learning opportunity for humanitarian organizations, it is imperative to anticipate such challenges and unify efforts. The Taliban's assertion that certain organizations have complied can create inconsistencies in upholding human rights and humanitarian principles, underscoring the need for collaboration and solidarity among humanitarian actors.

It is a reality that humanitarian principles have never been absolute and often require compromises, particularly in complex humanitarian responses. The nature of humanitarian work inherently involves trade-offs, difficult decisions, and ethical compromises. Unlike professionals in fields such as medicine,

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<sup>172</sup> Personal communication, female NGO employee, [July 2024].

<sup>173</sup> Mark Bowden and others (n 165) 3.



law, journalism, and accounting, humanitarian workers have not yet established a formal code of professional ethics<sup>174</sup> or comprehensive guidelines for addressing ethical dilemmas.<sup>175</sup>

In the context of the female employee ban, nearly all NGOs faced a compromise of their principles of impartiality and independence. Initially, some NGOs suspended their operations,<sup>176</sup> but they soon resumed, recognizing that the most effective way to support women was to remain and continue their work, even at the expense of their ethical and operational values. As Mark Bowden and others, noted, experience has shown that a 'principled pragmatism' approach, which prioritizes immediate needs over long-term goals like justice or development, is necessary. Given the limited influence of humanitarian actors, acts like withdrawing would likely increase suffering and loss of life without achieving policy changes favorable to women.<sup>177</sup>

According to interviews conducted by Mark Bowden and others, interviewees expressed concerns about the extent of compromises being made and the lack of coordination among organizations in Afghanistan. Many others felt that the humanitarian system's credibility was compromised by a perceived lack of principles in its operations in Afghanistan over the years. When humanitarian actors emphasize 'principled programming,' it must resonate within communities and in negotiations with authorities, otherwise, it risks sounding insincere and undermining acceptance. An Afghan staff member of an international NGO noted that each organization was using its own techniques to retain donors, warning that this approach could undermine future negotiations. They emphasized that the Taliban realizes it can achieve its demands because international NGOs are unwilling to leave. They indicated that the response to the edict in Afghanistan could have broader negative implications. If the humanitarian system is

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<sup>174</sup> The ICRC Code of Conduct (1994) translates the foundational principles of the Red Cross into actionable guidelines, applicable to a broad range of humanitarian responders. The Humanitarian Charter (1998) and the Core Humanitarian Standard (2014) emphasize accountability to affected populations. Despite wide endorsement, these documents offer limited guidance on navigating dilemmas when principles clash. The 'do no harm' principle outlines steps to avoid exacerbating conflicts but lacks a framework for determining when harm outweighs intervention benefits. See Mark Bowden and others (n 165).

<sup>175</sup> *ibid.*

<sup>176</sup> 'A BAN ON FEMALE AID WORKERS IN AFGHANISTAN WILL COST LIVES, WARN LEADING AID GROUPS' (CARE, 29 December 2022) <<https://www.care.org/news-and-stories/press-releases/a-ban-on-female-aid-workers-in-afghanistan-will-cost-lives-warn-leading-aid-groups/>> accessed 7 July 2024; 'A Ban on Female Aid Workers in Afghanistan Will Cost Lives, Warn Leading Aid Groups' (NRC, December 2022) <<https://www.nrc.no/news/2022/december/a-ban-on-female-aid-workers-in-afghanistan-will-cost-lives-warn-leading-aid-groups/>> accessed 7 July 2024; Save the Children, 'What the Taliban Ban on Female Aid Workers Means for the Future' (*Save the Children*) <<https://www.savethechildren.org/us/charity-stories/taliban-ban-girls-education-female-ngo-workers>> accessed 7 July 2024; World Vision Afghanistan, 'A BAN ON FEMALE AID WORKERS IN AFGHANISTAN WILL COST LIVES, WARN LEADING AID GROUPS' (29 December 2022) <<https://www.wvi.org/newsroom/afghanistan/ban-female-aid-workers-afghanistan-will-cost-lives-warn-leading-aid-groups>> accessed 7 July 2024.

<sup>177</sup> Mark Bowden and others (n 165).



perceived as accepting a ban on female aid workers, it may embolden authoritarian actors in other regions, such as the Houthis in Yemen and the de facto authorities in Myanmar, to impose further restrictions on women's rights or on the operational independence of aid agencies.<sup>178</sup>

it is important to note that humanitarian actors in Afghanistan have managed to continue some assistance through locally negotiated solutions and workarounds, but the situation remains precarious. These agreements are fragile and could falter if enforcement tightens, rendering aid programming ineffective due to the lack of female providers and recipients. The confusion and intense ethical debates within the humanitarian community highlight the need for more structured processes to navigate these dilemmas. Historically, tough decisions have been devolved to Afghan staff and partners without transparent discussion of risks. In the absence of clear guidelines, the default tendency has been to focus on short-term goals and needs, which may be the most appropriate approach given the complex political context.

This thesis aligns with the concept of principled compromise,<sup>179</sup> which acknowledges that humanitarian principles require compromise and should serve as guiding tools. However, in the current context, the situation is severe not only from a human rights violation perspective but also for the humanitarian organizations themselves. It seems that no clear red line is being observed, and it appears this line has already been crossed. There is no guarantee that the health and education sectors for women will remain unaffected in the future, especially given the initial ban on NGOs and the subsequent inclusion of the UN. The unpredictability is high, as evidenced by the recent wage cuts for female workers, which is alarming and may soon extend to NGOs.

### *Operational challenges*

The operational environment for aid agencies in Afghanistan has been challenging for decades, exacerbated by frequent changes in power and new actors. Humanitarians face two primary challenges in dealing with the Taliban: ensuring the security of staff and navigating the complexities of applying IHL rules concerning consent.

In post-2021 Afghanistan, the operational environment for NGOs in Afghanistan has significantly changed. The primary security threats for aid workers have shifted to include arrest, detention, and

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<sup>178</sup> *ibid* 29.

<sup>179</sup> See Marc DuBois and Sean Healy (n 81).

harassment. Although overall conflict incidents have decreased, incidents perpetrated by de facto authorities against NGOs have risen sharply. While NGOs can now travel more freely, many female staff are unable to work. Despite improved access to previously unreachable areas, not all people in need are easily accessible. The current situation presents high needs but greater reach, lower security risks but increased bureaucratic challenges, requiring constant negotiation with authorities for effective program implementation.<sup>180</sup>

Numerous instances illustrate the harassment and arrest of aid workers, resulting in demotivation and constant scrutiny. In June 2023, authorities arrested a midwife for five hours, threatening her with death if she continued her work with an international NGO.<sup>181</sup> Moreover, in September 2023, the authorities detained 18 national and international aid workers of IAM<sup>182</sup> on the charges of ‘propagating and promoting Christianity’, a strict violation according to the Taliban’s regulations.<sup>183</sup> Furthermore, the International Safety Organization’s incident overview reported that efforts by the current power to influence aid programming and enforce behavioral policies are often accompanied by threats, arbitrary searches of NGO compounds, and arrests of NGO staff, leading to 11 documented incidents only in March 2024. Notable among the incidents were 2 arrests due to staff refusing to allow them to interfere in ‘beneficiary identification’.<sup>184</sup>

UN aid staff are no exception to these security threats. The UN Mission to Afghanistan reported in September 2022 that three of its female Afghan employees were temporarily detained by Taliban security agents. The mission has called on the Taliban to cease the intimidation of its local female staff and urged

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<sup>180</sup> INSO, ‘Reduced Conflict, Ongoing Challenges: What Does NGO Safety Look like in Afghanistan Right Now?’ (*International NGO Safety Organisation (INSO)*, 12 October 2023) <<https://ngosafety.org/latest/ngo-safety-afghanistan-now/>> accessed 6 July 2024.

<sup>181</sup> UNAMA, ‘Human Rights Situation in Afghanistan: MAY - JUNE 2023 UPDATE’ (2023) <[https://unama.unmissions.org/sites/default/files/human\\_rights\\_situation\\_in\\_afghanistan\\_may\\_-\\_june\\_2023\\_0.pdf](https://unama.unmissions.org/sites/default/files/human_rights_situation_in_afghanistan_may_-_june_2023_0.pdf)>.

<sup>182</sup> International Assistance Mission.

<sup>183</sup> IAM, however, stated that it was unaware of the allegations against its staff and reiterated its commitment to the principle that aid should not advance any political or religious views, and confirmed that all staff adhere to Afghan laws. See Ahmad Mukhtar, ‘U.S. Woman Arrested in Afghanistan among 18 Aid Workers Held for “Promoting Christianity,” Local Official Says’ (*CBS News*, 18 September 2023) <<https://www.cbsnews.com/news/afghanistan-us-woman-arrested-aid-workers-taliban-ghor-promoting-christianity/>> accessed 7 July 2024.

<sup>184</sup> The arrests included accusations of being affiliated with an armed group and criminal charges. See INSO, ‘March 2024 - NGO Incidents Overview’ (*INSO*, 2024) <<https://sway.cloud.microsoft/FiPk2681DjffSTfG>> accessed 7 July 2024.

them to guarantee the safety and security of all UN personnel operating in Afghanistan. In response, Taliban spokesmen have strongly denied these allegations.<sup>185</sup>

### Obtaining consent

In post-2021 Afghanistan, the principle of obtaining state consent for humanitarian aid is complex and ambiguous. CA3 does not provide clarity on the issue of consent. Additionally, while AP II explicitly addresses consent, it is not applicable in Afghanistan's current situation. The applicability of AP II to Afghanistan is debated because, although NSAGs like the Taliban control significant territories, they may not be considered contracting parties under AP II. Therefore, the only remaining guidance comes from customary IHL and interpretations of the provision of consent under CA3.

If aid targets civilians in Taliban-controlled areas without passing through state-controlled territory, it might be argued that Taliban consent alone could suffice. However, the general interpretation of CA3 leans towards requiring state consent as well to respect sovereignty principles and IHL. In practice, the former Afghan government's authority has collapsed, lacking even a formal constitutional claim to governance.<sup>186</sup> Officials who fled or remained do not rival the current regime.<sup>187</sup> The problem arises for organizations in obtaining state consent according to CA3. If consent from both parties is required, and there is no effective state or claim to statehood, it is unclear whom organizations should approach for consent and how.

Addressing this issue is crucial as the situation in Afghanistan evolves unpredictably, with no certainty about who will remain in power. There are two scenarios to be concerned about. One is that if the former government regains power, though unlikely, humanitarians must be prepared to avoid being caught off guard and neglecting their responsibilities under the GCs. The lack of preparedness was evident when the Taliban defeated the former government, leading to the suspension of many organizations unprepared for the new reality and each organization responded differently to the change in power.<sup>188</sup> As the political

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<sup>185</sup> Reuters, 'U.N. Says Three Afghan Female Staff Temporarily Detained by Taliban' *Reuters* (12 September 2022) <<https://www.reuters.com/world/asia-pacific/un-says-three-afghan-female-staff-temporarily-detained-by-taliban-2022-09-12/>> accessed 8 July 2024.

<sup>186</sup> Ben Saul (n 159).

<sup>187</sup> Akmal Dawi, 'Former Afghan Leaders Powerless Inside, Outside Their Homeland' (*Voice of America*, 22 August 2023) <<https://www.voanews.com/a/former-afghan-leaders-powerless-inside-outside-their-homeland/7235860.html>> accessed 8 July 2024.

<sup>188</sup> See generally Julie Trentemøller Faarup, 'How Have NGOs Reacted and Adapted to the Taliban Takeover in Afghanistan?' (Norwegian University of Life Science 2022) <<https://nmbu.brage.unit.no/nmbu-xmlui/bitstream/handle/11250/3004679/Master%20Thesis.pdf?sequence=1&isAllowed=y>>.

landscape remains volatile, it is crucial for humanitarian actors to continually reassess their strategies to maintain operational security and effectiveness while upholding their ethical obligations.

The second scenario involves the growing influence of the NRF and IS-KP. If these groups gain more control and power, humanitarian organizations will face additional complexities in obtaining consent and navigating the operational landscape. Therefore, it is imperative for humanitarian actors to stay adaptable and vigilant, ensuring they are prepared for any shifts in power dynamics to continue their crucial work without interruption. More clarity in the legal framework regarding consent in such evolving scenarios is urgently needed to ensure the uninterrupted and principled delivery of humanitarian aid.

### *Political constraints*

#### Manipulation of aid

There is a risk that humanitarian aid, as a major source of foreign financial support, could become entangled in the Taliban's internal politics and power struggles,<sup>189</sup> including rent-seeking behaviors.<sup>190</sup> The manipulation of aid manifests in several forms such as diversion of aid for their fighters, exerting control over populations, leveraging aid for political gains, and channeling resources to favored groups or areas to strengthen power dynamics.

There is extensive evidence of the deliberate diversion of aid from specific areas of the country. For instance, the Bamyán Foundation report highlights significant issues with humanitarian aid distribution, particularly towards the Hazara community.<sup>191</sup> It is argued that a large portion of humanitarian aid is distributed unjustly and based on ethnic, religious, political, and regional affiliations.<sup>192</sup> Another report indicates that while NGOs seek to prioritize aid for the most vulnerable groups, such as pregnant women,

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<sup>189</sup> Anecdotal evidence suggests that current internal conflicts within the Taliban are primarily about controlling financial resources, such as revenues from border crossings, taxation, and aid, rather than policy disagreements. Florian Weigand and Mark Bowden (n 163).

<sup>190</sup> This concept is often associated with efforts to gain economic benefits through manipulation or exploitation of the political and economic environment.

<sup>191</sup> See Haley Ott and Sami Yousafzai, 'U.S. Taxpayers Helping Fund Afghanistan's Taliban? Aid Workers Say They're Forced "to Serve the Taliban First"' (*CBS News*, 21 April 2023) <<https://www.cbsnews.com/news/afghanistan-taliban-tax-dollars-after-withdrawal/>> accessed 6 July 2024; The community include for example, Daikundi province, a predominantly Hazara area and western Kabul, home to a significant Hazara and Shia population. See Mahsa Elham, Sana Atef, and Sayed Mahdi Hashemi, 'Zan Times Exclusive: How the Taliban Pilfer Humanitarian Aid' (*Zan Times*, 24 April 2023) <<https://zantimes.com/2023/04/24/zan-times-exclusive-how-the-taliban-pilfer-humanitarian-aid/>> accessed 6 July 2024.

<sup>192</sup> Etilaatroz, 'Tabeez dar ravaand-e tozi'e komak-ha dar Ghazni; niazmendi qawm o mazhab nemi-shenasad [Discrimination in the distribution process of aid in Ghazni; "Need knows no ethnicity or religion]' (*etilaatroz*, 12 March 2022) <<https://www.etilaatroz.com/138095/discrimination-in-the-process-of-distributing-aid-in-ghazni/>> accessed 7 July 2024.

orphans, widows, and others in dire need, the Taliban imposes their own list of selected beneficiaries. Refusal to comply with such pressures would result in NGOs being banned from working, with various pretexts preventing the NGO from operating altogether, ultimately depriving others of the much-needed aid.<sup>193</sup>

The report underscores a critical aspect, noting that while the Taliban cannot directly dictate to the UN, organizations like the WFP and even NGOs subcontracted by the ICRC find it challenging to resist Taliban pressure. An example recounted in the report involves a meeting with a provincial governor where the Taliban demanded that aid be provided to the families of deceased suicide bombers and injured Taliban soldiers unable to work.<sup>194</sup>

Findings of local media show that Taliban officials often directly interfere in the aid distribution process and pressure the officials and employees of aid organizations to distribute this aid to their desired areas and individuals. For example, In Ghor Province, the Taliban governor has consistently summoned officials from humanitarian organizations, dictating which areas of the province should receive aid. The officials, operating under constant fear and threats, find themselves unable to oppose the governor's directives. Those who dared to resist faced severe consequences, including arrest and torture by the Taliban. The governor's pressure has led to a significant impact, with several heads of organizations in Ghor resigning from their positions.<sup>195</sup>

The spokesperson for the Taliban governor in Ghor rejected the interference, however, he confirmed that the committee that oversees the work of organizations 'might' have rejected employees of these organizations for not meeting 'conditions and restrictions'. He indicated that during the weekly and monthly meetings with organization officials, the governor accused these officials of espionage and creating 'discord.' The Taliban governor inquired why the organizations were not fulfilling their duties, prompting the organizations to explain their objectives. According to Hamas, it became clear that their goals were the same as those prohibited by Islam. Therefore, the governor issued a stern warning to organization officials, stating that they should fully commit to their work and service or leave. Following the meeting, Hamas issued a statement on the governor's office's official WhatsApp group, accused NGOs, who conducted surveys and distributed aid with ethnic and arbitrary biases. The statement

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<sup>193</sup> Haley Ott and Sami Yousafzai (n 196).

<sup>194</sup> *ibid.*

<sup>195</sup> Mahsa Elham, Sana Atef, and Sayed Mahdi Hashemi (n 196).

claimed that NGOs favored areas with residents who had served in the Republic's government while neglecting regions inhabited by Mujahideen and unaffiliated individuals.<sup>196</sup>

The Taliban's interference extends beyond administrative control; they forcibly and through threats reclaim humanitarian aid, including food and cash assistance, from aid recipients.<sup>197</sup> Sources indicate that diverted aid is used in several ways, including being redirected to Taliban fighters and supporters, sold in markets,<sup>198</sup> extorted,<sup>199</sup> or allegedly used for road construction<sup>200</sup> and other similar purposes.<sup>201</sup>

There is also the concern of ongoing exchanges of accusations without resolution, which may ultimately prove counterproductive. For instance, the 2023 Special Inspector General for Afghanistan Reconstruction (SIGAR) report accused the Taliban of profiting from US-funded education programs by generating tax revenues and engaging in illicit activities. These activities include establishing fake NGOs and infiltrating or extorting existing NGOs to control and divert international donor aid.<sup>202</sup> In response, the Ministry of Economy rejected the report, stating there is no evidence of interference.<sup>203</sup> Additionally, the Taliban labeled comments from the Special Inspector, who accused them of not facilitating UN aid to those in need,<sup>204</sup> as unprofessional.<sup>205</sup> Such accusations often do not lead to any fruitful outcomes and may instead exacerbate tensions and hinder cooperation.

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<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.*

<sup>198</sup> Bamyan Foundation, 'Management Of Humanitarian Aid Distribution to the People of Afghanistan, Especially the Hazaras' (2022) <<https://bamyanfoundation.org/unfair-distribution-of-humanitarian-aid>> accessed 7 July 2024.

<sup>199</sup> Moqim mehran, 'Discrimination in Aid Distribution: Grievances of Ghazni Residents' (*Hasht-e Subh*, 8 May 2023) <<https://8am.media/eng/discrimination-in-aid-distribution-grievances-of-ghazni-residents/>> accessed 6 July 2024.

<sup>200</sup> According to ZanTimes, the Taliban have ordered local people to work on the construction and repair of roads and then paid their wages with flour, oil, and other food items that were previously collected from the people.

<sup>201</sup> RFE/RL's Radio Azadi and Ron Synovitz, 'Cash-Strapped Taliban Uses Foreign Aid Intended For Starving Afghans To Pay State Employees' *Radio Free Europe/Radio Liberty* (25 January 2022) <<https://www.rferl.org/a/taliban-foreign-aid-starving-afghans/31670691.html>> accessed 7 July 2024.

<sup>202</sup> SIGAR, 'Status of Education in Afghanistan: Taliban Policies Have Resulted in Restricted Access to Education and a Decline in Quality' (2023) <<https://www.sigar.mil/pdf/evaluations/SIGAR-24-01-IP.pdf>>.

<sup>203</sup> PBS News, 'U.S. Watchdog Says the Taliban Are Benefiting from International Aid through "fraudulent" NGOs' (*PBS News*, 23 October 2023) <<https://www.pbs.org/newshour/politics/u-s-watchdog-says-the-taliban-are-benefiting-from-international-aid-through-fraudulent-ngos>> accessed 7 July 2024.

<sup>204</sup> T. Christian Miller, 'U.N. Has Flown \$2.9B in Cash to Afghanistan Since Taliban Seized Control' (*ProPublica*, 20 March 2024) <<https://www.propublica.org/article/united-nations-cash-afghanistan-following-taliban-takeover>> accessed 7 July 2024; for more details on the cash going for humanitarian assistance in Afghanistan see SIGAR, 'Cash Shipments to Afghanistan: The UN Has Purchased and Transported More than \$2.9 Billion to Afghanistan to Implement Humanitarian Assistance' (2024) Evaluation Report <<https://www.sigar.mil/pdf/evaluations/SIGAR-24-12-IP.pdf>>.

<sup>205</sup> TOLONews, 'Ministry of Economy Rejects Claims of Humanitarian Aid Embezzlement' (*TOLONews*, 25 March 2024) <<https://tolonews.com/business-187950>> accessed 7 July 2024; see also BBC News, 'Sokhanguy-e Taliban: Yek dolar ham az komak-ha-ye beyn-ol-melali be hokumat-e ma nemi-rasad [Taliban spokesperson: Not a single dollar of international aid



The Taliban have strategically placed individuals aligned with them within certain aid organizations. Some NGO employees describe that although Taliban interference in humanitarian aid was previously widespread but unofficial, the new directives intensify the pressure from the ‘de facto’ state and their officials on aid operations. They indicate that the intervention in organizational affairs has become routine and some organizations are compelled to hire individuals affiliated with the Taliban, often without requiring these individuals to undergo examinations.<sup>206</sup>

The discussed operational challenges are not solely due to constraints imposed by the Taliban; there are also instances of unfair distribution and administrative challenges, such as a lack of proper surveys and unfair employment practices within aid organizations, which hinder effective aid delivery. A report accuses ICRC of not being entirely independent in its operations explaining that their program implementation has been influenced by the governing authorities and the Afghan Red Crescent Society.<sup>207</sup> Additionally, the report indicates that residents of Ghazni province have accused UN partner organizations of discriminatory practices in selecting impoverished families for aid. Locals claim these organizations subjectively choose districts for aid distribution, allegedly excluding areas blacklisted by the Taliban. This suggests that regions with greater Taliban influence receive more aid, leaving other areas deprived.<sup>208</sup>

There are numerous local and international reports detailing issues of diversion and violations, which this thesis cannot encompass entirely. However, it is evident from the analysis that such interferences and constant compromises are becoming the norm.<sup>209</sup> Before these practices become deeply entrenched, it is crucial to ensure that the humanitarian principles of impartiality and independence find clarity within aid organization.

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reaches our government]’ (*BBC News*, 25 July 2023) <<https://www.bbc.com/persian/articles/cj7jyv2e2pro>> accessed 6 July 2024; Mitra Majeedy, ‘Afghan Diplomat Highlights Poverty in Afghanistan at UN Meeting’ (*TOLOnews*, 1 July 2023) <<https://tolonews.com/business-184005>> accessed 6 July 2024.

<sup>206</sup> According to Hasht-e Sobh, a source from an organization mentioned that once two positions were advertised within the organization. The exam was postponed twice, and eventually, it was announced that a person affiliated with the Taliban’s economic chief had been appointed, making the exam unnecessary. See Amin Kawa, ‘Taliban Skilfully and Strategically Shuffling Their Personnel in Organizations’ (*Hasht-e Subh*, 18 March 2024) <<https://8am.media/eng/taliban-skilfully-and-strategically-shuffling-their-personnel-in-organizations/>> accessed 7 July 2024.

<sup>207</sup> Bamyān Foundation (n 203).

<sup>208</sup> Moqim mehran (n 204).

<sup>209</sup> Haley Ott and Sami Yousafzai (n 196).



## Bureaucratic hurdles

The humanitarian community in Afghanistan faces daily bureaucratic challenges regarding targeting, recruitment, distribution processes, and access restrictions. Reports from 2022 indicate that Taliban authorities have been attempting to control humanitarian activities by influencing beneficiary lists, interfering with hiring practices, disputing the types of assistance provided, and prioritizing which communities receive aid.<sup>210</sup> The behavior not only poses significant challenges to the independence of humanitarian efforts, raising ethical and operational concerns while undermining the autonomy of aid organizations.

For instance, the Taliban conduct uncoordinated visits to aid agency offices, inspecting documents and contracts between international organizations and contractors. They have also demanded to be included in decision-making processes related to project implementation and personnel hiring.<sup>211</sup> Similarly, a report by *Hasht-e Subh Daily* revealed that the Taliban have mandated representatives from the office of the provincial governor and the group's economic directorate to oversee all hiring processes. Organizations failing to comply with these mandates will have their recruitment deemed illegal and nullified by the Taliban. The report refers to two letters from local-level authorities who previously communicated directives verbally to organizations and are now formalizing these instructions in written form. They have declared that overseeing the recruitment processes of both domestic and international organizations is considered a fundamental responsibility of the group. The letter indicated that several domestic and foreign organizations have established collaborative working relationships with the Taliban for project implementation. It also warns that non-compliance with this directive will lead to the cancellation of all recruitment processes by these organizations. According to NGO employees, extensive Taliban interference has caused national and international organizations operating in the education sector to halt their activities. This cessation has negatively impacted both the Afghan population and those working within these organizations.<sup>212</sup>

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<sup>210</sup> Mark Bowden and others (n 165); Fiona Gall and Dauod Khuram, 'Between a Rock and a Hard Place – Multifaceted Challenges of Responders Dealing with Afghanistan's Humanitarian Crisis. A Report on the Perspectives of National NGOs' (International Council of Voluntary Agencies (ICVA) 2022) <<https://www.icvanetwork.org/uploads/2022/03/Final-ICVA-Report-AFG-v2.pdf>>.

<sup>211</sup> Amin Kawa (n 211).

<sup>212</sup> Amin Kawa, 'Extensive Taliban Interference in Aid Organizations: These Agencies Are Viewed as "Western Software"' (*Hasht-e Subh*, 10 June 2024) <<https://8am.media/eng/extensive-taliban-interference-in-aid-organizations-these-agencies-are-viewed-as-western-software/>> accessed 7 July 2024.

Such aid disruptions are on the rise. According to UN Office for the Coordination of Humanitarian Affairs (UNOCHA), over 40% of districts regularly experience disruptions to aid delivery, with other districts facing sporadic and time-limited interruptions.<sup>213</sup> Moreover, in a briefing to the UN Security Council in December 2023, the UNOCHA highlighted a significant increase in the de facto authorities' involvement in humanitarian programming over the past year. This interference has resulted in a 21% rise in bureaucratic and administrative impediments from January to October 2023 compared to the same period in 2022.<sup>214</sup> The Taliban have imposed movement restrictions on humanitarian staff, allowed interference by de facto authorities and unqualified personnel in aid distribution, and demanded that humanitarian organizations share confidential data. Although aid organizations have refused to share such data, these restrictions have made their operations, particularly those supporting women and girls, exceptionally difficult.<sup>215</sup>

The consistent disruptions and rising levels of interference may have severe consequences for the people of Afghanistan, as many humanitarian organizations cannot withstand the escalating challenges and may ultimately resort to withdrawing completely. For example, a UNOCHA snapshot reveals that 56 programs were temporarily suspended in July 2023 due to access constraints, including 'Interference in the implementation of humanitarian activities,' 'Restriction of movement of agencies, personnel, or goods within the affected country,' and 'Violence against humanitarian personnel, assets, and facilities.'<sup>216</sup> If such hurdles persist, there is no guarantee that projects will not be completely suspended.

## Lessons learned and the way forward

The manipulation of aid in Afghanistan presents significant challenges for humanitarian organizations, necessitating a nuanced approach to maintain operational integrity and effectiveness. Insights can be

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<sup>213</sup> Marti Flacks, Lauren Burke, and Nicolas Jude Larnerd, 'The Taliban's Increasing Restrictions on Civil Society and Aid Organizations' [2023] Center for Strategic & International Studies <<https://www.csis.org/analysis/talibans-increasing-restrictions-civil-society-and-aid-organizations>> accessed 7 July 2024.

<sup>214</sup> UNOCHA, 'Afghanistan: Humanitarian Needs Push Record Levels at Year's End | OCHA' (OCHA, 2023) <<https://www.unocha.org/news/afghanistan-humanitarian-needs-push-record-levels-years-end>> accessed 7 July 2024.

<sup>215</sup> Marti Flacks, Lauren Burke, and Nicolas Jude Larnerd (n 218).

<sup>216</sup> The suspension of aid programs in July ranged from 1 to 30 days, with 17% still suspended. preceding month. The incidents encompassed various forms of interference: interference with Programming, delays with MoU signing, interference with staff recruitment, request for staff list and sensitive data, interference or attempted interference into beneficiary selection, and aid diversion.

drawn from the experiences of various NGOs and international aid agencies to navigate these complexities effectively. humanitarians have adopted various methods to tackle these challenges. Some techniques, while successful in specific contexts, may not be universally applicable.

Based on previous experiences and current challenges, the following brief recommendations have been merged with lessons learned for aid agencies,

### *Impact of Organizational Trust*

At times, the level of access may depend on which organization is conducting negotiations with the Taliban. For instance, Terry in her research refers to the ICRC as a more trusted organization among the Taliban pre-2021. She indicates that as early as September 2003, the ICRC received a letter from the Taliban stating: ‘We can differentiate between organizations that are sympathetic to Afghans and those that are puppets of the Americans.’<sup>217</sup>

Moreover, the International Rescue Committee successfully negotiated specific terms with local Taliban officials after the ban on female employees was announced. After negotiations, the Taliban allowed them to restart health and nutrition programs in 10 provinces, including female staff participation. Following this, the Ministry of Education approved the IRC to resume educational programs in one province.<sup>218</sup>

Human Rights Watch has found that there is a noticeable variation in behavior among the Taliban towards the NGOs, ‘whereas national groups ‘working in legal sectors, promoting human rights and justice’ have all been shut down.<sup>219</sup> In 2023, the WFP ceased food assistance for 10 million Afghans due to a substantial funding deficit. Critics argue that the restrictions imposed by the Taliban have exacerbated the humanitarian crisis and deterred foreign donors from contributing. The Taliban dismisses allegations that their policies hinder humanitarian aid, accusing donors of politicizing the assistance. Mujahid stated in a social media-hosted seminar, ‘We don’t need their assistance. Spare us from their “[foreigners]

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<sup>217</sup> The staff included ICRC and ACF (Action Contre la Faim) captured on various occasions.

<sup>218</sup> Marti Flacks, Lauren Burke, and Nicolas Jude Larnerd (n 218).

<sup>219</sup> <https://www.hrw.org/news/2022/01/18/afghanistan-taliban-deprive-women-livelihoods-identity>

harm”.’<sup>220</sup> The Taliban's rhetoric, dismissing the need for foreign assistance, signals a deep-rooted resistance to external influence, complicating efforts to address the humanitarian crisis effectively. This thesis analyzes and suggests ways that might help humanitarians expand their humanitarian space and promote respect for the IHL.

### *Effective Negotiations and Community Engagement*

Negotiations are essential in areas such as recruitment, program types, logistics, and the employment of female staff. Greg emphasizes the need for NGOs to adopt a coordinated approach tailored to the needs, realities, and perspectives of the communities they serve. ‘While collaboration with de facto authorities is necessary, there are non-negotiable principles we must uphold. Currently, we strive to balance access with respecting our core principles,’ he notes. Achieving this balance requires timely and accurate information, as well as the ability to coordinate and confirm strategic decisions effectively.<sup>221</sup>

Female-headed NGOs have found that engaging directly with local authorities and building supporters and allies among them is more effective than public advocacy. The differing attitudes among Taliban leaders, combined with Afghanistan's highly decentralized structure and varying power bases in Kandahar, Kabul, and provincial capitals, create both opportunities and risks for humanitarian actors. Provincial ulemas, newly empowered and seen by some as instruments of greater control from Kandahar, play significant decision-making roles. This situation creates a useful 'grey zone' for negotiation, with agencies often relying on the personal relationships they are able to develop<sup>222</sup>. Therefore, it is crucial for humanitarians to learn from one another, collaborate on broader issues, and apply context-based strategies according to their organization's capabilities and the on-ground reality.

The lack of negotiation skills and strategies to address negotiable issues can significantly impact the operational success of humanitarian organizations. As highlighted earlier, organizations have adopted various methods to tackle the issues they face. This approach allows them to find more space for their

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<sup>220</sup> Ayaz Gul, ‘UN Sounds Alarm on Shortage of Afghan Humanitarian Aid’ (*Voice of America*, 3 April 2024) <<https://www.voanews.com/a/un-sounds-alarm-on-shortage-of-afghan-humanitarian-aid-/7555206.html>> accessed 5 July 2024.

<sup>221</sup> INSO (n 185).

<sup>222</sup> Mark Bowden and others (n 165).

operations, but they must also consider how their negotiations contribute to the broader humanitarian community. Organizations might also leverage the Taliban's desire for international legitimacy to negotiate terms that align with humanitarian principles. This can involve ensuring transparent aid distribution and adherence to core humanitarian standards.

### *Pausing Operations*

One strategy organizations use to respond to unpredictable or complex situations is pausing operations. While suspending operations, as seen in previous instances like 2001, can serve as a protest against restrictive policies, it is often not a viable long-term solution and should be a last resort. Suspensions indicate a failure to adapt and can leave vulnerable populations without critical support. Organizations must explore alternative strategies to continue their work while addressing ethical concerns. The threat of humanitarian withdrawal has not influenced the Taliban, who have instead hardened their policies and further restricted women's and girls' rights. National and international humanitarian efforts, despite strong advocacy and negotiations, have often been futile or counterproductive. Local-level negotiations have allowed some humanitarian work to continue, but broader advocacy efforts have largely failed. The Taliban do not see humanitarian aid as useful for achieving their goals, and ceasing aid could concede more ground to the Taliban, complicating future recovery efforts.<sup>223</sup>

The lessons learned above are among many valuable insights gained from the context of humanitarian action. Providing solid recommendations for complex environments requires careful consideration of each unique situation, as a policy or practice effective in one area may not be as successful in another. However, to help humanitarian actors push beyond existing barriers, a few key strategies can be proposed.

Firstly, all actors involved—humanitarian organizations, NSAGs, states, and donor states—should follow a mechanism of supervision that leverages existing recommendations and successful practices. This mechanism should encourage actors to draw from evidence-based approaches and structured methodologies to identify and implement effective practices.

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<sup>223</sup> *ibid.*

Secondly, by using these established practices, particularly humanitarian actors can gather and document their experiences in a more systematic and evidence-based manner. This structured approach should consider the local context and meticulously record the challenges faced by humanitarian workers. Such comprehensive documentation can significantly contribute to the reevaluation and reinforcement of humanitarian principles and existing legal frameworks. Therefore, when newly established or even experienced organizations encounter similar challenges, they can adhere more closely to humanitarian principles by utilizing this system of evidence-based, context-specific practices. This approach not only promotes adherence to core humanitarian values but also fosters a more unified and effective response to the complexities of operating in NSAG-controlled environments.

Another important recommendation is for scholars of the IHL to enhance contributions and clarity within existing legal frameworks. IHL is often viewed as a legal body primarily regulating state practices and providing provisions for state actors. However, with the increasing prevalence of NSAGs and the growing number of civilians in need, it is imperative that scholars and practitioners work towards expanding the doctrine. Utilizing the experiences and lessons learned from the field, the frameworks should be reevaluated and refined to better address the complexities of NSAG-controlled environments and provide clearer guidelines for aid agencies.

This effort would involve a collaborative approach, drawing insights from on-the-ground experiences to develop legal provisions that are more applicable and relevant to the current humanitarian landscape. By doing so, the legal frameworks governing humanitarian action can become more robust and adaptable, ensuring that humanitarian organizations can operate more effectively while maintaining their core principles of impartiality and independence.

This thesis acknowledges that some practices have already been implemented by organizations, and it reemphasizes the importance for humanitarian agencies to revisit and elaborate on strategies that have proven effective or show potential in armed conflict situations. Humanitarian organizations are encouraged to make decisions through a principled mechanism, ensuring that their actions consistently align with core humanitarian principles. Navigating ethical dilemmas pragmatically is essential, focusing on immediate needs while clearly articulating the rationale behind any compromises.

For instance, in the context of Afghanistan, this might involve supporting female staff through remote work and advocating for their rights without compromising core humanitarian values. Remote

management could be an effective strategy, as evidenced by the adaptation to the ban on female aid workers in Afghanistan. This approach allows humanitarian operations to continue despite on-the-ground restrictions. Furthermore, strengthening the implementation of existing ICRC and UN resolutions and advocating for new ones can help enforce accountability for non-state actors. These resolutions could establish clearer guidelines for the engagement of humanitarian organizations with non-state entities, ensuring that political and bureaucratic challenges do not impede the delivery of aid.

Going forward, it is essential for the humanitarian sector to develop robust organizational policies and frameworks that preclude ethical dilemmas and adapt to evolving conflict dynamics. Moreover, to establish clear red lines, such as refusing to participate in human rights violations, is crucial. Humanitarian organizations have a profound moral responsibility to ensure their actions do not unduly harm the people they aim to help. Upholding ethical standards not only aligns with humanitarian principles but also enhances the effectiveness and reach of operations.

Although the burden largely falls on the organizations, open discussions with donors and exploring collaborative solutions can help balance principles with practical considerations and minimize harm. By fostering such dialogues, humanitarian agencies can better navigate the complex environments they operate in, ensuring that their missions are both principled and effective.



## Conclusion

This thesis aimed to explore the implications of the principles of impartiality and independence for humanitarian organizations operating in environments controlled by NSAGs, with a specific focus on Afghanistan post-2021. By engaging with a diverse array of materials, including international law, scholarly work, and the practices of both local and international NGOs, the research has illuminated the complex interplay between humanitarian principles, legal frameworks, and the operational realities faced by aid organizations in NSAG-controlled areas.

The findings underscore the critical importance of adherence to the principles of impartiality and independence. These principles not only guide humanitarian actions but also help secure the cooperation of NSAGs and ensure the effective delivery of aid. However, the study revealed several key points: the legal frameworks, including CA3 and AP II, while providing a foundation, often lack the clarity needed for effective implementation in NSAG-controlled territories. Additionally, humanitarian organizations face significant ethical, operational, and political challenges, such as obtaining consent from both states and NSAGs, negotiating access and security, and dealing with manipulation and bureaucratic constraints imposed by NSAGs. The necessity for context-based, principled compromises was highlighted as essential for maintaining long-term operational effectiveness and integrity.

Three key observations emerge from this analysis. Firstly, some organizations have compromised their principles for short-term aid delivery. While some have successfully gained access by making concessions, the long-term repercussions of these compromises may undermine the integrity of humanitarian operations. Conversely, other humanitarian organizations, instead of compromising their principles to gain access or cooperation from NSAGs, have opted to halt their operations. This suspension of activities is used as a strategic move to pressure NSAGs into complying with humanitarian principles or agreements. However, such strategies often did not yield effectiveness as they could sanction the people in need. Current conditions suggest that Afghans and humanitarian organizations might experience similar restrictions and new regulations not seen in the past.<sup>224</sup>

Secondly, the intentions and ideologies of de facto authorities often conflict with those of humanitarian organizations, leading to a disregard for humanitarian principles. This misalignment poses significant

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<sup>224</sup> Marti Flacks, Lauren Burke, and Nicolas Jude Larnerd (n 218).

challenges to maintaining impartiality and independence in aid delivery. Thirdly, the evolving nature of these situations, compounded by the lack of clear exit strategies and legal clarity, further complicates humanitarian efforts. Humanitarian organizations must recognize that remaining true to their core principles is crucial for sustaining operations when legal frameworks are ambiguous. Adopting a pragmatic approach to principles, rather than merely observing the normalization of violations, can help ensure continued aid delivery.

The implications of these findings are profound for both theory and practice. The study contributes to a nuanced understanding of the complexities involved in delivering humanitarian aid in conflict zones. It emphasizes the need for humanitarian organizations to remain steadfast in their principles while being adaptable to the evolving contexts of NSAG-controlled environments. Addressing these challenges requires a multifaceted approach involving more than just humanitarian actors. Donors and the international community must also play a role by listening to the intentions of NSAGs and addressing their concerns rather than simply assigning blame. For NSAGs seeking greater legitimacy, increased adherence to IHL is essential.

Based on the findings, several practical recommendations are proposed. Efforts should be made to clarify the legal obligations of NSAGs under IHL, particularly concerning humanitarian access and the protection of aid workers. Humanitarian organizations should invest in training staff in negotiation skills to effectively engage with NSAGs while maintaining impartiality and independence. Additionally, developing and implementing context-specific strategies that balance adherence to humanitarian principles with the practical realities of operating in NSAG-controlled areas is essential. By fostering collaboration among humanitarian organizations, donors, the international community, and NSAGs, and by prioritizing principled pragmatism, the effectiveness and integrity of humanitarian operations can be enhanced, ultimately benefiting the vulnerable populations they serve.

This study acknowledges certain limitations, including its focus on a single case study. Another limitation is the diversity and number of NSAGs, which complicates the ability to draw broad conclusions and make specific recommendations applicable to all organizations. Additionally, there is not a broad understanding of the challenges faced by organizations, as many incidents remain confidential due to donor pressure and internal policies. Future research should consider comparative analyses across multiple NSAG-controlled environments to validate and expand upon these findings. Additionally,

quantitative studies could provide more robust data on the impacts of adhering to humanitarian principles in conflict zones.

It should be remembered that the history has a value of its own, but a review of the past may also be a means of gaining a better understanding of the present and preparing for the future. The frameworks and practices established over time form the foundation of current humanitarian efforts, offering critical insights into the evolving nature of conflict and aid delivery. By examining historical contexts and past interventions, humanitarian organizations can learn from previous successes and failures, adapting their strategies to better address contemporary challenges. This continuous learning process is essential for developing effective responses and ensuring the principles of impartiality and independence are upheld in increasingly complex environments. Thus, the lessons of history are invaluable for humanitarians as they strive to navigate the intricate landscape of modern conflicts and enhance their capacity to provide meaningful assistance to those in need.

This thesis has provided a comprehensive analysis of the challenges faced by humanitarian organizations in NSAG-controlled areas and emphasized the critical role of impartiality and independence in navigating these challenges. The insights and recommendations offered aim to enhance the effectiveness and integrity of humanitarian operations, contributing to better outcomes for vulnerable populations in conflict zones. By reflecting on their practices and maintaining a principled approach, humanitarian organizations can better navigate the ethical, operational, and political challenges they face.

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