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Ministério dos Negócios Estrangeiros

i. The Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict: An Introduction

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In many, if not most, armed conflicts, far more deaths occur as a result of the humanitarian crisis created by the conflict rather than from hostilities or the use of force.¹ In addition to those who die as a result of a lack of food, water, access to medical care or adequate sanitation, untold suffering is caused in conflicts across the globe to millions of other civilians. However, in many recent conflicts humanitarian actors have faced serious challenges in delivering much-needed relief supplies and services to civilians in need. Humanitarian access has become a central challenge to the protection of civilians in armed conflict. Belligerents often impede the delivery of much needed humanitarian relief supplies exacerbating hunger, disease and want. The United Nations Secretary-General, in his recent reports to the Security Council on the Protection of Civilians, has identified improving access for humanitarian operation as one of the five “core challenges” to enhancing the protection of civilians in armed conflict.²

While there has been considerable discussion on how to overcome operational challenges to the delivery of humanitarian assistance, insufficient attention appears to have been paid to the legal framework that applies to the provision of humanitarian relief in armed conflict. In his November 2013 report to the Security Council, the Secretary-General called for further analysis of one aspect of the law regulating humanitarian relief operations: the issue of arbitrary withholding of consent and the consequences thereof.³ He instructed the United Nations Office for the

1 See Wenger & Mason, ‘The Civilianisation of Armed Conflict: trends and implications’, (2008) *International Review of the Red Cross*, 90 (872), p. 842.

2 U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2009/277 (May 29, 2009), para. 26. This was often repeated in subsequent reports, see e.g. U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2012/376 (May 22, 2012), paras. 57-63 and S/2015/453 (June 18, 2015), para. 7.

3 U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2013/689 (November 22, 2013), para. 80.

Coordination of Humanitarian Affairs (OCHA) to carry out this analysis⁴ and OCHA in turn commissioned the Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations to conduct expert consultations to examine the rules and the options for providing guidance. We were honoured to lead this process of consultation resulting in the elaboration and drafting of the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*.⁵

At the first meeting the experts unanimously agreed that it would not be possible nor, indeed, helpful to focus exclusively on the question of arbitrary withholding of consent. That element of the rules regulating humanitarian relief operations had to be put into its proper context. The *Oxford Guidance* tries to do precisely that. It presents in sequential order the rules regulating key steps of humanitarian relief operations. It consists of a narrative commentary setting out the law and conclusions presenting the key elements of the rules. The Guidance seeks to reflect existing law and to clarify areas of uncertainty. Where the law is unclear or the experts expressed different views on particular issues, the narrative text of the Guidance presents the range of interpretations. Each Conclusion does not necessarily reflect the unanimous view of the experts consulted. In addition to setting out the law, the document also aims to provide some practical guidance as to how some of the legal obligations identified may be implemented by the relevant duty holders.

This article highlights four central questions addressed in the Guidance: (i) whose consent is required for the conduct of humanitarian relief operations in non-international armed conflicts (ii) what amounts to arbitrary withholding of consent (iii) what are the key elements of the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief operations and (iv) what are the consequences of unlawful impeding of humanitarian relief operations.

Whose consent is required in non-international armed conflict?

It is uncontested that consent is required before offers to conduct humanitarian relief operations may actually be implemented. The requirement of consent is explicit in both Article 70(1) of Additional

⁴ *Ibid* para. 80.

⁵ *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (Akande & Gillard, 2016) [hereinafter *Oxford Guidance*], available at: <https://docs.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf>.

Protocol I 1977⁶ (which provides that such operations “shall be undertaken, subject to the agreement of the Parties concerned in such relief actions”) and Article 18(2) of Additional Protocol II 1977 (stipulating that operations “shall be undertaken subject to the consent of the High Contracting Party concerned”).⁷ What is less clear is whose consent is required in non-international armed conflicts. In particular, it is unclear whether, in a non-international armed conflict, the consent of the state is required for operations to bring humanitarian assistance to civilians in areas under the effective control of organised armed groups that can be reached without passing through territory under the state’s effective control – so called “cross-border operations”. This issue is dealt with in Section D of the *Oxford Guidance*.

Two treaty provisions are “relevant”. Common Article 3(2) of the 1949 Geneva Conventions⁸ and Article 18(2) AP II. Common Article 3(2) GCs provides that an ‘impartial humanitarian body . . . may offer its services to the Parties to the conflict’. The provision is silent, however, as to whose consent is required. Some interpret Common Article 3(2) GCs as implicitly allowing humanitarian relief operations to be conducted if the party to which an offer is made, be it a state or an organised armed group, accepts it, regardless of the position adopted by its opponent. On this view, if the humanitarian relief operations do not transit through territory under the state’s effective control, its consent is not required. Others have taken the view that the silence in Common Article 3(2) GCs with regard to consent cannot be interpreted in this manner, particularly in view of the significant infringement of territorial sovereignty that humanitarian relief operations conducted in a state’s territory without its consent would entail.⁹

Article 18(2) AP II is more explicit on this issue, requiring the consent of ‘the High Contracting Party concerned’. While this appears to be a clear reference to the state party to a non-international armed conflict, it may be suggested that the state party to a non-international armed conflict is not “concerned” by humanitarian relief operations intended for civilians

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

8 Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 [GC I], for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 [GC II], Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 [GC III] and Relative to the Protection of Civilian Persons in Times of War, 75 U.N.T.S. 287 [GC IV], August 12, 1949 [hereinafter GCs].

9 *Oxford Guidance*, paras. 25-26.

in territory under the effective control of an organised armed group. Consequently, its consent is required only if the relief operations must transit through territory under its effective control. On this view, if the territory under the effective control of an organised armed group can be reached from another country directly, the state's consent is not required.¹⁰

The majority of the experts were not persuaded by this interpretation of Article 18(2) AP II. First, the suggestion that a state is not 'concerned' by humanitarian relief operations taking place on its territory, even if it is in areas beyond its effective control, appears contrary to basic considerations of territorial sovereignty. Second, this interpretation would suggest that there may be circumstances where *no* High Contracting Party is concerned by a humanitarian relief operation, making the express reference to the consent of 'the' High Contracting Party in Article 18(2) AP II redundant.¹¹

In light of the silence of Common Article 3(2) GCs and of the specific reference to 'the High Contracting Party' in Article 18(2) AP II, *the Oxford Guidance* adopted a position that gave due weight to general principles of international law relating to a state's territorial sovereignty but also to its responsibility towards the civilian population. The consent of the state in whose territory the humanitarian relief operations are intended to be conducted is always required. This state will, however, have a more limited range of grounds for withholding consent where relief is intended for civilians in territory under the effective control of organised armed groups.¹²

Arbitrary withholding of consent

Despite the apparently absolute nature of the requirement that consent be obtained, it has been accepted that such consent may not be withheld arbitrarily. This principle prohibiting arbitrary withholding of consent is derived *first*, from the need to provide an effective interpretation of the relevant treaty texts, which gives effect to all aspects of those provisions and does not render parts of them redundant;¹³ *second*, from the intention

10 *Oxford Guidance*, para. 27-28.

11 *Oxford Guidance*, para. 29.

12 *Oxford Guidance*, para. 30.

13 The principle of effectiveness (or effective interpretation; *ut res magis valeat quam pereat*) is considered of customary character, its application being required by the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969) [hereinafter VCLT]. The principle suggests that between two possible interpretations of a provision, the interpreter should choose the one which makes the provision meaningful and effective, rather than the one which makes it redundant and thus ineffective. See indicatively paragraph 6 of the commentary to Articles 27-28 VCLT,

of those who negotiated the Additional Protocols, as reflected in the drafting history of the provisions;¹⁴ and, *third*, from practice subsequent to the adoption of the Protocols.¹⁵ In other words, the principle prohibiting arbitrary withholding of consent to humanitarian relief operations, where the preliminary conditions for such operations to be undertaken are met¹⁶, derives from the interpretation of the relevant treaty texts which best accords with Articles 31 and 32 of the Vienna Convention on the Law of Treaties dealing with treaty interpretation.¹⁷

Although there is widespread acceptance of the principle that consent to humanitarian relief operations must not be arbitrarily withheld,¹⁸ there is little clarity as to what constitutes arbitrary withholding of consent. There is no definition or guidance in any treaty and, to date, the precise meaning of the concept has not been addressed by any international or national tribunal, human rights mechanism or fact-finding body.

Generally, in international law, the notion of arbitrariness has a wide meaning.¹⁹ However, while there is no single or all-encompassing definition, international humanitarian law, international human rights law and general principles of public international law provide guidance on the type of conduct that would justify the conclusion that an actor is acting arbitrarily in withholding consent to humanitarian relief operations.

Report of the International Law Commission on the work of its eighteenth session, *Yearbook of the International Law Commission, 1966*, Vol. II, p. 219, para 6; *US – Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Report, 29 April 1996, WT/DS2/AB/R, p. 23; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 2011 ICJ Reports 70, pp. 125-126, paras. 133-134; Gardiner, R. (2015), *Treaty Interpretation*, 2nd ed. Oxford: Oxford University Press, p. 179-81.

14 On the relevance of the *travaux préparatoires* of a treaty in ascertaining the common intentions of the parties as supplementary means of interpretation under Art. 32 VCLT, see Waldock, Third Report on the law of treaties, *Yearbook of the International Law Commission, 1964*, Vol. II, p. 58, paras. 20-21.

15 Art. 31(3)(b) VCLT.

16 The conditions are set out in Section C of the *Oxford Guidance*.

17 Articles 31 and 32 VCLT are generally accepted to reflect customary international law, see e.g. *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Reports 53, pp. 69-70, para 48; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 1994 ICJ Reports 6, p. 21, para 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 1996 ICJ Reports 803, p. 812, para 23.

18 See for example the ICRC Commentary of 2016 to Art. 3 GC I, paras. 832-839, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169934 [accessed 12 Feb. 2017]. See also Institute of International Law, *Resolution on Humanitarian Assistance* (September 2, 2003), Art. VIII.

19 For a comprehensive analysis on the matter see Akande & Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict', (2016) 92 *International Law Studies* 493 ff.