Oxford Guidance on Humanitarian Relief Operations: Comments on Arbitrarily Withholding Consent and the Status of the Guidance

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[*Just Security* and *EJIL Talk!* are co-hosting an online forum on the Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, which was commissioned by the UN Office for the Coordination of Humanitarian Affairs on the request of the UN Secretary-General. See also the introduction to the forum by Dapo Akande and Manu Gillard, and a post by Annyssa Bellal on the perspectives of non-state armed groups.]

The publication of the Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict is – unfortunately – very timely. For the past few years, we have seen humanitarian disasters occur as a result of conflict and the challenges humanitarian workers face in providing assistance in, for example, Syria, Yemen, South Sudan and the Central African Republic. The plight of those caught in the continuing siege of Aleppo shows us on a daily basis the importance of access to humanitarian aid in times of armed conflict. In all these situations humanitarian aid and relief operations have been impeded. The problems humanitarian actors face often follow from the chaotic and unorganised nature of the violence, but access to populations in need has also frequently been withheld by one or more of the warring parties, seemingly on purpose. It is a pleasure to be part of this forum and to make some observations and comments on the new Guidance. I focus my remarks here on one of the key parts of the Guidance, namely, "the issue of arbitrarily withholding of consent to humanitarian relief operations and the consequences thereof" (Guidance, p. 2).

I. Recent history

The UN Secretary-General noted in his 2013 report on the protection of civilians in armed conflict that further analysis of the legal framework on the issue of withholding of consent was required (para. 80). Shortly before that report, Marco Sassoli had suggested "that we should not focus on defining such arbitrariness, *inter alia*, because it is not very efficient to start a negotiation with a minister or a general by claiming that he or she is acting arbitrarily". Nevertheless, arbitrarily withholding of consent was initially the only issue on which the UN Office for the Coordination of Humanitarian Affairs (OCHA) requested the University of Oxford to provide guidance. In response to OCHA, Oxford's experts (Dapo Akande and Emanuela-Chiara Gillard) had wisely "expressed the view" that this issue could not be looked at in isolation from the rest of the rules regulating humanitarian relief operations in situations of armed conflict, and the scope was broadened accordingly. (Guidance, pp 2-3). The resulting Guidance is therefore a lot more comprehensive and in addition to Section E (entitled "Arbitrary Withholding of Consent"), the Guidance encompasses seven more sections.

With respect to the title of that section of the Guidance, as well as the initial instruction by the UN Secretary-General, it should be noted that the relevant international humanitarian law (IHL) provisions do not contain the phrases "arbitrary denial" or "arbitrarily withholding of consent", or any definition of such a notion. It was introduced into parlance by the International Committee of the Red Cross (ICRC), which recounted in its commentary to Article 70(1) of Additional Protocol I that it was said during the drafting process that any refusal to agree to relief must be "for valid reasons, *not for arbitrary or capricious ones*". Since then, however, the ICRC itself seems to have moved away from referring to "arbitrarily withholding of consent" and now mostly speaks of "unlawful denial of consent."

In 2015, the ICRC concluded that "[i]t may […] be argued that a refusal to grant consent resulting in a violation of the party's own IHL obligations may constitute an unlawful denial of access for the purposes of IHL" (p. 29).

II. The Oxford Guidance: Defining what is arbitrary

The Guidance comes to a similar conclusion as the ICRC, when finding that "[e]ssentially, consent is withheld arbitrarily if (i) it is withheld in circumstances that result in the violation by a state of its obligations under international law with respect to the civilian population in question". However, the Guidance identifies two other

instances, by adding consent is arbitrarily withheld if "(ii) the withholding of consent violates the principles of necessity and proportionality; or (iii) consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate" (para. 49), which are explained in the Guidance's paras 52-54.

As the first example of a party's violation of IHL obligations, the Guidance mentions starvation. As a side note, I am happy that the Guidance reiterates that starvation is to be considered as a war crime also in times of non-international armed conflict, despite the Rome Statute not having included it as a war crime in Article 8(2)(e) (see here for a discussion). That said, while "withholding consent to humanitarian relief operations in situations where the civilian population is inadequately supplied and the state intends to cause, contribute to, or perpetuate starvation" (Guidance, para. 51) obviously violates the prohibition on starvation as a method of warfare, it seems difficult to call such conduct arbitrary. Rather, it would simply form part of a calculated or intentional violation of IHL, carried out to arrive at the desired outcome (ie to starve part of the civilian population). In this regard, the ICRC's "unlawful denial of consent"-wording, which also refers to starvation as the prime example, appears to be a better description; and, indeed, the Guidance refers to "unlawful impeding of humanitarian relief operations" later on (Guidance, Section I).

Moreover, the war crime of starvation, as incorporated in the Rome Statute, includes "wilfully impeding relief supplies as provided for under the Geneva Conventions" (Article 8(2)(e)(xxv)), but as there are lawful reasons to deny access under IHL, the question of what constitutes arbitrarily or unlawful withholding of consent is relevant for the determination of whether the crime of starvation was committed (see here, at pp 288-295). Therefore, when arbitrary or unlawful withholding of consent is defined, *inter alia*, as situations in which there is an intent to starve a civilian population, we end up with a circular definition.

It is also worth recalling that the threshold for something to amount to starvation is exceedingly high. The ICRC Commentary to the relevant provision of Additional Protocol II defines starvation, by reference to a dictionary, as 'the action of subjecting people to famine, that is extreme and general scarcity of food'. While the Commentary to the related provision of Additional Protocol I appears to set a lower bar (by referring to starvation as both "the suffering of hunger" and the same dictionary definition), the comment that starvation as a method of warfare is "a weapon to annihilate or weaken the population" appears to set a similarly high threshold. The predicament the civilian

population has to be in before its members are considered starving is therefore significantly worse than the civilian population being "not adequately provided" with supplies, as referred to in Article 70 of Additional Protocol I (see also Article 55 of the Fourth Geneva Convention of 1949).

III. Consequence for actors performing relief operations

OCHA, as mentioned above, had asked for clarification of what arbitrary withholding of consent entails "and the consequences thereof". On the latter issue, the Guidance concludes that "[u]nlawful impeding of humanitarian relief operations raises two sets of questions: the responsibility under international law of the party unlawfully impeding operations and of persons responsible therefor; and the consequences of such conduct for those seeking to conduct humanitarian relief operations" (para. 132). The paragraphs that provide an answer to the second question (paras 139-157) may be the Guidance's most interesting part. The Guidance, in some respects, adopts a position like the ICRC. For its part, the ICRC explained that current IHL "does not explicitly regulate the consequences of an unlawful denial of consent and thus does not spell out a general right of access derived from a so called arbitrary/unlawful denial of consent". The Guidance similarly remains cautious by noting that "unlawful impeding of humanitarian relief operations [...] does not automatically give rise to a general entitlement to conduct such operations without the consent of the relevant states". While IHL and international human rights law address when and how relief operations may be conducted, the lawfulness of such operations conducted without the consent of the relevant States is to be determined by reference to other areas of public international law (Guidance, para. 140). Relief operations imposed by a binding Chapter VII resolution of the Security Council are lawful, despite being conducted without the consent of the States concerned. However, "[a]part from such cases, the possibility that humanitarian relief operations conducted without consent are lawful will only arise in extremely limited circumstances" (Guidance, para. 139).

While the ICRC confines its conclusions to explaining that IHL does not prohibit the undertaking of impartial humanitarian operations, the Guidance tries to clarify in what cases such measures maybe in conformity with international law, specifically the sovereignty and territorial integrity of the States concerned, and addresses when the principle of necessity can be relied on (although it should be noted that the Guidance mentions a number of times that necessity may "arguably" be invoked), or when relief operations may be conducted as a form of countermeasures.

I am mindful of Sassoli's warning, quoted above, that invoking a State's arbitrary, or unlawful, behaviour may not help to get access to a population in need, and this likely explains the ICRC's hesitation to say more on the matter. However, the Guidance, even if envisioned as a (non-binding) "restatement of applicable rules", could have gone further – for it to become a reference point in future cases when access to a population in need is denied; or for it to trigger a discussion that would assist in furthering the law; or for it to create new State practice.

IV. The Guidance's status

This brings me to the final issue: the Guidance's somewhat unclear status. Although the Guidance was commissioned by OCHA, its foreword nonetheless states that "[t]he Guidance document does not represent the official position of OCHA or of the United Nations". It is therefore clear that the status of the Guidance cannot be compared to, for example, the ICRC Interpretive Guidance on the notion of direct participation in hostilities under IHL (which – albeit having started as an expert process – as a result of disagreement between some of the experts and the ICRC, was published as an ICRC document, setting out "an expression solely of the ICRC's views" and providing "the organization's official recommendations as to how IHL relating to civilian participation in hostilities should be interpreted"). However, one can wonder what status the Guidance then is. Is it 'merely' an expert report, comparable to the HPCR Manual on Air and Missile Warfare (published under the auspices of another very reputable university)? Although drafted by two persons who are certainly acknowledged experts on the topic, and the input of a panel of further experts, the Guidance does not – at least not beyond stating that "each Conclusion does not necessarily reflect the unanimous view of the experts consulted" (Guidance, p. 3) – give insight into the views of the members of the panel, in a manner as done, for example, in the Tallinn Manual on cyber warfare. Or is it a UN OCHA expert report, in which no institutional position is presented, but an overview of the debate amongst experts is provided (such as the ICRC expert report on occupation)? Or rather an actual UN OCHA document that happens to be drafted by experts (akin to the San Remo Manual on the Law of NIAC)? In terms of the commentary presented and the statement that it "seeks to reflect existing law, and to clarify areas of uncertainty" (Guidance, p. 3), the Guidance appears to be most similar to the San Remo manual (or its predecessor on naval warfare).

Given the respected status of the San Remo manuals, and the number of times they are referenced, that may not be a bad thing. However, as OCHA can be expected to agree with the Guidance's content, and presumably had influenced the content, it is unfortunate that it has not been published as an official OCHA document. The OCHA logo may feature on the front page, but the Guidance's name and title refers to the University of Oxford only. Notwithstanding the fact that the authors deserve much praise for their work and therefore deserve the reference to their university, it would – arguably – have been preferable for OCHA to formally have adopted the Guidance as its institutional position. Although international custom is, in principle, created by States, we see that statements by the United Nations (and not just its Security Council) and other international organisations are frequently invoked to show the existence of a rule of customary law. An "expert report", as a form of academic scholarship, can 'merely' be considered as a subsidiary source of international law (pursuant to Article 38 of the ICJ Statute), whereas an "OCHA Guidance" could have effectively elevated the same document to a primary source of international law. Given the quality of the document, that is a significant opportunity lost.

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