OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT

Comments on the Draft Substantive (Zero Draft) of UN Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security

On behalf of the Oxford Institute for Ethics, Law and Armed Conflict team, thank you for yesterday's rich and timely discussion on the Zero Draft. It was a pleasure to engage with you. We have prepared a short list of written comments that we hope will assist you in the final stages of drafting. **First**, the Draft is not explicit enough about the starting point of analysis on the international legal framework. **Second**, the Conclusions section does not advance the discussion as to *how* international law applies in cyberspace. **Third**, the Draft does not provide an accurate statement of the law on the obligation not to allow one's territory to be used in a manner contrary to the rights of other States.

(1) At para 27, the Draft states that 'In their discussions at the OEWG, States recalled that international law, and in particular the Charter of the United Nations in its entirety, is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful ICT environment.' It should be made clear that *international law in its entirety* applies to ICTs. The current wording suggests that the phrase 'in its entirety' relates solely to the Charter.

(2) The Conclusions section does not identify *how* international law applies in cyberspace. The obligations enumerated at paras 28-30 only feature in the subsection 'Discussions', and should be affirmed in the subsection 'Conclusions and Recommendations'.

(3) Para 30 mischaracterises the obligation of States, under international law, not to allow their territory to be used in a manner contrary to the rights of other States. It is stated that States 'should seek to ensure that their territory is not used *by non-State actors acting on the instruction or under the control of a State*' to commit internationally wrongful acts (italics added). The words italicised suggest that: a) this is a policy recommendation rather than an existing obligation under international law; b) the obligation only exists for actions of non-state actors that are *attributable* to the State. When the acts of non-state actors are attributable to the State, the State is responsible *for these acts* regardless of the location of their commission, that is, regardless of whether they take place on its own territory or outside. However, under a well-recognised international law principle, affirmed by the International Court of Justice in the *Corfu Channel* case and reaffirmed in subsequent cases, a State is responsible for *its own failure to act* when it knowingly allows its territory to be used by other actors for acts contrary to the rights of other States. The obligation exists, indeed is only important, when the acts of the other actor are not carried out under the instructions or effective control of that State. The words italicised should be deleted and the language of 'should' replaced by 'must'.

We very much welcome your engagement with academic institutions and the industry sector, and we look forward to collaborating with you in the future.

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