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DISCUSSION KICK-OFF

A Pebble in the Shoe: Assessing International Uses of Do No Harm

ADRIAN DI GIOVANNI — 15 October, 2014

My paper published in the last edition of 'Law and Politics in Asia, Africa and Latin America' (VRU) is the product of bureaucratic wanderings. Over a number of years, in a meetings on a variety of international topics, I repeatedly heard the same phrase being uttered: "we take a Do No Harm approach." At first blush, those words had an immediate appeal. Doctors have followed that principle for centuries (*primum non nocere*) as part of the Hippocratic Oath. Why wouldn't international actors, when setting out to do 'good,' want to avoid causing harm or make things worse off? The more Do No Harm language kept popping up,

however, the more I was left with a nagging question: What does it in fact mean to take a Do No Harm approach, in the case of international assistance? The impetus to write this paper was to answer that question.

My interest was primarily from an international law perspective. Historically, Do No Harm's increased popularity has coincided with greater attention under international law to the responsibility and liability of international actors. Interestingly, Do No Harm is nowhere found in binding sources, treaties or otherwise, but is invoked in connection with a range of international legal norms, both hard law and soft law. The question at the outset, thus, was whether Do No Harm's increased use has helped to reinforce or clarify the content of legal norms related to harm arising from international assistance.

Do No Harm's content

For the most part, Do No Harm appears in passing, an apparent moral badge, often when introducing discussions of technical topics. In three major areas, however, Do No Harm's content is developed in more detail: international humanitarian assistance, international human rights law and international environmental law. Here is a quick summary for each area:

- *Humanitarian assistance (disaster relief, peace- and state-building)*: Do No Harm appeared in the early 1990s as part of a larger questioning of humanitarian principles like neutrality and the humanitarian imperative. The main idea was to ensure that assistance did not fuel or exacerbate conflicts through better analysis of context. Do No Harm is not generally asserted a legal principle.

- *International human rights law*: Do No Harm is used as a shorthand for the obligation to 'respect' human rights obligations. Those obligations typically carry an obligation to provide a remedy in cases of violation. Do No Harm is used as part of efforts to develop new human rights obligations that would apply to businesses and also to clarify the role of human rights in respect to states' official development assistance (ODA). The human rights and business uses make clear an obligation for businesses to provide a remedy for harms. ODA uses, by contrast, do not explicitly link donor commitments to avoid harm (i.e. respect human rights) with commitments to provide remedies for harms in recipient, developing countries.

- *International environmental law*: Language of 'No Harm' more frequently appears, as shorthand for existing international obligations derived from the prohibition on transboundary pollution. Over time, it has acted as a framework principle, helping to spur more elaboration of more detailed obligations to avoid harm.

Do No Harm in all three areas emphasizes the need to perform due diligence, that is, prior assessments of the impact of planned interventions. In practice, this requirement appears to have translated into a risk mitigation approach, which I worry reflects technocratic ('box checking') tendencies to implementing international activities. If true, that approach could yet work at cross-purposes to Do No Harm's basic premise of understanding and being more responsive to local contexts.

A reflexive principle

More profoundly, to evoke notions of 'doing no harm' is to confront squarely discomforting questions about what harms should be avoided, and what it means to avoid and take responsibility for them. Taking responsibility for harms might require, as a first step, choosing to avoid one set of

harms, at the expense of causing another (i.e. as between different kinds of harms, harms to different groups, or harms in short- versus long-term harms). In this way, Do No Harm is a reflexive principle: it helps to restate some of the deepest questions about responsibility for international activities. This is the pebble in the shoe.

The potential choices between harms are most apparent in 'converging spaces' of operation, where Do No Harm's different uses increasingly collide. Real world examples include situations where climate change mechanisms (like carbon-credit schemes) threaten the human rights of forest-peoples. Similarly, military-style operations in non-war contexts, like efforts to address urban violence in the favelas in Rio de Janeiro, illustrate how humanitarian law and humanitarian assistance principles risk bumping up against basic human rights to life and security of the person. Yet high-level international officials and policy documents invoke Do No Harm in efforts to build bridges between international spheres such as human rights, climate change and humanitarian assistance, but without recognizing the potential trade-offs at play. In other words, those uses engender a false sense of coherence between spheres, by glossing over basic questions of which regime's definition of harm should prevail in cases of conflict. No easy task, to be clear, given the potentially disparate and hotly contested priorities at play.

My conclusion is that the tendency to gloss over those trade-offs reflects a political inertia to confront them head-on. In those instances, Do No Harm is arguably invoked more for its rhetorical force than anything. It lends a certain, indisputable authority, ethical or otherwise, to various types of conduct, which helps to side-step a series of thorny policy

and political choices, concerning the nature and apportionment of various actors' responsibility. Do No Harm *per se* is too open-ended to resolve the trade-offs and the gaps in regulation that it so helpfully flags. The goal in reviewing its various uses was thus to draw attention to possible confusions in using Do No Harm. Ultimately, this is a call for greater rigour in use of language and to resist the temptation to invoke terms for their political expediency. True accountability and responsibility for international harms, at a minimum, requires clarity on the basic rules of the game. Do No Harm holds great potential, as a soft law norm of international law, to help build that clarity – mainly because of its popular, rhetorical appeal. To date, however, Do No Harm's uses demonstrate how this clarity remains very much a work in progress. The international community has recognized the pebble in its shoe but has failed to take it seriously, preferring for now to keep on walking despite any nagging discomfort that persists.

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This post continues the Völkerrechtsblog cooperation with the journal Law and Politics in Asia, Africa and Latin America / Verfassung und Recht in Übersee. An earlier post by Mariana Mota Prado in this series is posted here.

A response to this post has been published here.

Tags: *Development*, *Do No Harm*, *General Principles*, *Humanitarian Assistance*, *International Humanitarian Law*

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