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DISCUSSION

Pebble in the shoe or elephant in the room?

JELENA BÄUMLER — 17 October, 2014



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A Response to the post by Adrian Di Giovanni

In his post, Adrian Di Giovanni drew our attention to the notion of Do No Harm, focusing on the context of humanitarian assistance. He observes the increase in relying on or at least mentioning this concept on the international level and rightly asks the question what the meaning could be in a more specific sense. I would like to add to the understanding of Do No Harm in international law from a systematic point as well as with regard to its content in the particular context of humanitarian assistance.

Do No Harm in International Law

Adrian points to three areas in which Do No harm is developed in greater detail, namely humanitarian assistance, human rights and international environmental law. First, it should be stressed that the no harm principle is not restricted to these areas but can also be found in other fields of International Law. Second, it is important to note the different role Do No Harm assets in these very different areas.

The roots of the no harm principle in international law lay in international environmental law. In the *Trail Smelter* dispute between the US and Canada over a Smelter that caused adverse effects in the US, the arbitrators formulated the famous and very general statement that “no state has the right, to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state, when the case is of serious consequence.” In this context it is a classical regulatory mechanism of inter-state relations and indeed binding upon states due to its – nowadays – customary law character.

In the second branch, human rights law, it takes a very different shape. Here, the focus lies on the contractual obligation of States to positively undertake measures to safeguard human rights for those under their jurisdiction. It is thus not a regulatory mechanism for inter-state relations and very different from the *Trail Smelter* situation.

Thirdly, there is the field of humanitarian assistance. In this area it may be seen as a common sense consideration, involving different non-state as well as state actors, confronting us with the aspect that if one is (pretending to) do good the helper should not cause harm with the very aid provided. It is again a very different approach than

regulation of inter-state relations, but similarly concerned with negative spillover effects of a certain conduct.

Do No Harm in the particular context of humanitarian assistance

It is this latter area that Adrian is mainly concerned with. He sets out by reminding us of the Hippocratic oath – and yes, it is convincing to expect that a doctor shall not by curing the hand defect the foot. The doctor has to consider the consequences for the whole system instead of just focusing on the one broken part. In other words and taken to the extreme, it might be better not to do something or even nothing, instead of causing more harm than good.

I do agree with Adrian that considering Do No harm leads to uncomfortable questions of what adverse effects we are willing to take in order to achieve other ends that seem more important. Indeed the positive and negative trade-offs are particularly hard to weigh when it comes to humanitarian assistance. Would it have been better had no one been sent to Haiti, now that we have seen the outbreak of cholera? Would it be better if no food was ever given to starving people in order to avoid damaging local food production? Shall we watch and see people dying just to make sure that no adverse effects are created to anyone? I do not think that an all or nothing approach can be the answer, especially in cases of urgent short term situations that demand the international community to help those in great need.

Yet, often short term goals are achieved at the expense of long term harm. Aims are interconnected and often even contradictory. Do No harm reminds us that trying to do

good can lead to negative outcomes and that there is an obligation to make oneself aware of the consequences certain actions may inflict when seen in a wider context. It cannot be sufficient to only have – in a best case scenario – good intentions without ever taking into consideration any long-term effects and eventual negative consequences.

Pebble or elephant?

As with the doctor, the Do No Harm notion is much more than a pebble in the shoe. In fact, it is the elephant in the room: an obvious truth that is either being ignored or going unaddressed or a problem that no one is willing to discuss. The discomfort that comes along with the questions that arise out of the notion of Do No Harm should not lead to shying away from asking these questions or invoking the concept.

What role is there to play for Do No Harm in the context of international assistance or international law in general? Adrian considers Do No Harm to be too open-ended to resolve the trade-offs. Yes, the notion in and of itself will not give us guidance as to what this exactly means in each and every situation. But this is the case with principles in general – they are by their very nature more general and fundamental than norms consisting of specific elements and legal consequences that follow from them. Accusing a principle of being too open-ended is misunderstanding its purpose: it is by their very openness that principles are able to give guidance in a great number of situations without resolving the outcome of a specific case. I disagree that it has great potential “as a soft law norm of international law” but should rather be seen as what it is: a principle of international law.

The No harm principle reminds us, not only with regard to humanitarian assistance but in all its possible fields of application, that almost any action might have negative externalities for others. It thus often lies at the heart of concerns about justice for any legal order. The questions that need to be asked are thus: which negative effects are to be accepted? Which goals are we willing to achieve for which price? And what can and in fact must be done in order to avoid harmful consequences?

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Tags: *Do No Harm*, *Humanitarian Assistance*, *International Humanitarian Law*



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