

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Cosmopolitan “No-Harm” Duty in Warfare: Exposing the Utilitarian Pretence of Universalism

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ABSTRACT

This article demonstrates *a priori* cosmopolitan values of restraint and harm limitation exist to establish a cosmopolitan “no-harm” duty in warfare, predating utilitarianism and permeating modern international humanitarian law. In doing so, the author exposes the atemporal and ahistorical nature of utilitarianism which introduces chaos and brutality into the international legal system. Part 2 conceptualises the duty as derived from the “no-harm” principle under international environmental law. Part 3 frames the discussion within legal pluralism and cosmopolitan ethics, arguing that divergent legal jurisdictions without an international authority necessitates a “public international sphere” to mediate differences leading to strong value-commitment norm-creation. One such norm is the “no-harm” duty in warfare. Part 4 traces the duty to the Stoics, Christianity, Islam, Judaism, African traditional culture, Hinduism, and Confucianism. Parts 5 and 6 explain how the duty manifests in principles of distinction and proportionality under international humanitarian law.

Keywords: cosmopolitan “no-harm” duty in warfare, legal pluralism, cosmopolitan values of restraint and harm limitation, international humanitarian law, principles of distinction and proportionality

ATHENA

Volume 2.1/2022, pp.116-151

Articles

ISSN 2724-6299 (Online)

<https://doi.org/10.6092/issn.2724-6299/14648>



1. Introduction

Is there a duty not to harm in warfare? Positivist lawyers say there is no such duty and ethical choices between military necessity and humanitarian considerations are determined by outcomes that achieve the greater good of minimising losses among one's own soldiers. Such agent-relative utilitarianism is prevalent in military interpretation of international humanitarian law, prioritising protection of one's own interests above prevention of harm to civilians and civilian objects. This perpetuates a longstanding malaise in the international legal system that those with superior means can inflict any harm on those with lesser means. But utilitarianism's pretence of universalism is far removed from cosmopolitan values underpinning international humanitarian law. Philosophical and religious doctrine across centuries and civilisations developed *a priori* cosmopolitan values of restraint and limitation of harm in warfare. During the antiquity period, the Stoics believed that to cause unnecessary harm was to breach the most basic principle that members of humanity should observe in their dealings with one another. Cicero argued that a duty not to harm was owed to other human beings without needing prior connections or social bonds. The commonality of being human and the interest in maintaining humaneness were sufficient to ground an obligation towards others.

This article argues that *a priori* cosmopolitan values of restraint and limitation of harm establish a cosmopolitan "no-harm" duty in warfare that predates utilitarianism and permeates modern international humanitarian law. In doing so, it exposes the atemporal and ahistorical nature of utilitarianism that introduces more chaos and brutality into the international legal system. Part 2 conceptualises the "no-harm" duty as typical of international environmental law where it finds specific expression in the "no-harm" principle. Part 3 situates the discussion within legal pluralism and cosmopolitan ethics by arguing that divergent legal jurisdictions without an

overriding international authority necessitates a “public international sphere” to mediate differences, leading to strong value-commitment norm-creation. One such norm is the “no-harm” duty in warfare, which is traced in Part 4 to the Stoics, Christianity, Islam, Judaism, African traditional culture, Hinduism, and Confucianism. Part 5 explains how the duty manifests in international humanitarian law through the principle of distinction, the prohibition on attacking civilians and civilian objects, and the presumption against attack in ambiguous situations. Part 6 considers the “no-harm” duty as contained in the principle of proportionality, the prohibition of attacks causing excessive civilian harm, and the precautionary obligation to cancel or suspend attacks.

2. Conceptualising the “No-Harm” Duty

A duty is something that must be done or a duty-holder is required to do. In international law we refer to State obligations towards other States, but there is also a wider notion of duty owed to humanity as a whole that supports the international legal order and protects universal values or global common goods. Incremental development of this wider notion of duty can be seen in the customary international environmental law “no-harm” principle under which States have a duty to prevent, reduce, and control pollution and significant transboundary harm. The duty is pronounced in several international judicial and arbitration cases and is adaptable to different contexts beyond the environment. The origins of the “no-harm” principle can be found in the *Trail Smelter* arbitration case concerning transboundary air pollution caused by a Canadian lead and zinc smelter. The tribunal decided that State territorial sovereignty was “limited” by an obligation imposed on States not to allow their territory to be used in a way that causes harm to other States:

under the principles of international law, as well as of the law of the United States, 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 or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence (*Trail Smelter Arbitration*, 1965).

In *Gabcíkovo-Nagymaros Project*, concerning the legality of suspension of a dam project agreed to by treaty, the International Court of Justice (ICJ) conceded that instances where a state of necessity is invoked by a State to suspend and abandon a treaty may include the protection of “essential interests” related to environmental concerns. The Court emphasised “the great significance that it attaches to respect for the environment, not only for States but for the whole of mankind”, citing the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control (*Gabcíkovo-Nagymaros Project*, para. 53). In *Pulp Mills*, concerning the location of a pulp mill on a shared watercourse, the ICJ clarified the obligation of due diligence to prevent transboundary harm as requiring a State to “use all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State” (*Pulp Mills*, para. 101).

These examples of international law’s use of the wider notion of duty foresees a class of beneficiaries not determined by territory or nationality but membership of a global community reliant on global common (sometimes finite) goods where harmful practices can have wider transboundary impacts.

The wider notion of duty falls within the cosmopolitan legal theory developed in this article as it relates to transboundary rights and duties, concern and protection of others beyond one’s own State, and systemic concerns for the benefit of humankind. International law provides for this wider notion through a special class of norms (*jus cogens*) from which no

derogation is allowed, and obligations (*erga omnes*) which are owed to the community of States as a whole (*Barcelona Traction Case, Belgium v Spain*, para. 32). Thus, if transboundary duties for global common goods are considered obligations *erga omnes*, this would entitle each State to take action against violations whether or not they are directly injured or affected by the violation. Jurisprudence of the ICJ affirms both the *jus cogens* nature and obligations *erga omnes* status of core rules of international humanitarian law, further supporting the need for restraint and limitation of harm in warfare crystallising as a broad “no-harm” duty.

In *Legality of the Threat or Use of Nuclear Weapons* the Court referred to international humanitarian law rules as “intransgressible principles of international customary law” because they are “so fundamental to the respect of the human person and ‘elementary considerations of humanity’” (*Legality of the Threat or Use of Nuclear Weapons*, para. 69). In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court affirmed that rules of international humanitarian law “incorporate obligations which are essentially of an *erga omnes* character.” Common Article 1 of the 1949 Geneva Conventions requires High Contracting Parties “to respect and to ensure respect for the present Convention in all circumstances”, and every State Party to the Conventions, whether or not a party to a specific conflict, is under an obligation to ensure that they are complied with (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 157-159).

3. Legal Pluralism and the “No-Harm” Duty

To posit there is a duty not to harm in international law is to suggest that there is a universal principle or at least a principle that is capable of universalisation. This raises heckles from realist-positivist international lawyers pointing to the decentralised international legal order that has no central enforcement mechanism (Goldsmith and Posner, 2005, 211-213).

Whilst true enough about the lack of a central law-making authority and enforcement body in international law, these need not be the defining features of what is sought for or needed in the international legal order. Indeed, mimicking the State-centred structure, or deference to the “domestic analogy”, proves inadequate at the international level where independent State entities must forge relations in order to tackle cross-jurisdictional, transboundary, and global issues beyond the microcosm of what one State could hope to achieve. Branches of State - executive, legislature, judiciary - are neat organisational tools of how a State should function to meet the needs of its people. But these do not address the “non-neat” nature of composition of the international legal order - States (including post-Westphalian European sovereign entities, post-colonial independent States, post-Cold War independent States, newly independent States); and non-State actors (including self-determination/liberation movements, multinational corporations, indigenous peoples, networked global civil society movements) - and “non-neat” means of law creation and enforcement at the international level. What binds States and non-State actors to come forward to articulate and advocate through international fora and mechanisms? They must perceive some value in doing so. And that value is the possibility of establishing normativity across different jurisdictions to impact those in similar circumstances or facing the same issues. A sense of common purpose in addressing an issue can lead to strong value-commitment adopted as a rule that binds many, passing the threshold from aspirational to normative. Strong value-commitment is immersion in rule-creation despite legal pluralism and structural deficiencies at the international level. Legal pluralism, here, follows Griffiths’ “strong pluralism” of different legal jurisdictions governing territories and peoples without being bound by a single international authority (Griffiths 1986, 5-8).

3.1 Strong Value-Commitment Normativity in the "Public International Sphere"

Strong value-commitment normativity makes a virtue out of a fragmented international legal order of legal pluralism and recognises, in Arendt's words, "the essential human condition of plurality, the acting and speaking together, which is the condition of all forms of political organization" (Arendt, 1999, 202). Just as the commonality of individuals being human and the difference of their individuality, so too is there a commonality of States as formal subjects of international law administering control over defined territories and populations yet difference in terms of how they administer control. Without individuality difference or State jurisdictional difference there would be no public sphere or, more accurately, a "public international sphere" in which interaction could take place. There would instead be a rather stifling outward appearance of homogeneity completely separate from the inward reality of difference in action, words and deeds. Individual State leadership operating in this fashion is tyranny susceptible to self-destruction through disobedience, resistance, rebellion, and revolution. In a similar vein, the insularity and parochial vision of States as concerned with their national interests and protecting their territorial boundaries, belies the machinations of difference within and without which makes it unrealistic to maintain this stance at the international level. It also does not solve transboundary issues requiring exchange of ideas and pooling resources to cooperate in the "public international sphere". So all of this to say that difference, or plurality, is not the problem at the international level. It is the very existence of plurality that provides the need for a "public international sphere" which can then lead to strong value-commitment normativity producing new norms and rules.

At this point we may appear to be heading down the abyss of "the pluralism of chaos" (Mégret, 2020, 539), which is certainly not the intention. Instead, what is being identified here is norm-creation in the "public international sphere" emanating from human commitment to speak and take action. This

norm-creation process is a “cosmopolitan pluralist approach” informed by a set of principles (Berman, 2012, 145-150).

3.2 “Cosmopolitan Pluralist Approach” to Norm-Creation

As a theory of global ethics, cosmopolitanism transcends State interests and territorial boundaries to recognise the formation of an ethical community based on transboundary rights and responsibilities (Linklater, 1998; Vertovec and Cohen, 2002). The Stoics referred to “human fellowship and community” whereby “reason and speech reconcile men to one another, through teaching, learning, communicating, debating and making judgements, and unite them in a kind of natural fellowship” (Cicero, 1991, 21). From this ethical premise of transboundary human fellowship and community emerges cosmopolitan legal theory, which develops our understanding of what justice amounts to in the “public international sphere”, and notions of transboundary rights and responsibilities. Theorists have focused on structural deficiencies at the international level, redistributive justice to manage finite global resources and alleviate poverty, global governance structures, and normative principles such as fairness (Sen, 2009; Pogge, 2002; Archibugi and Held, 1995; Rawls, 1999). Specifically in the context of international humanitarian law, cosmopolitan legal theory is used to develop a “world community interest” approach to norm-creation for new weapons technology (Ulgen, 2016). This approach recognises “global interest issues that impact on humanity, transcend individual State interests and the inter-state dimension, and typically require transnational regulation” (*ibidem*, 10). All of these cosmopolitan theories work with rather than against the prevailing “strong pluralism” of the “public international sphere”. Each offers something different in terms of addressing a structural, process, or substantive issue of international law. What binds them is what Berman refers to as a “cosmopolitan pluralist approach” to norm-creation informed by six principles (Berman, 2012, 144-150). The six principles of cosmopolitan

pluralism can be applied to the existence of a cosmopolitan “no-harm” duty in warfare.

3.3 Six Principles of the “Cosmopolitan Pluralist Approach” and the “No-Harm” Duty in Warfare

First, individuality difference is accepted. Cosmopolitan pluralism accepts difference between individuals, complete strangers, without seeking to enforce sameness or assimilation. There is no superficial group identification or loyalty assumed; rather, individuals are open to operating in a public sphere characterised by individuality differences. Tracing the origins of the “no-harm” duty in warfare we can see influences in both secular and religious doctrine, as well as legal scholarship. Whilst legal traditions and cultures across the centuries have had particular codes of law and ethics relating to conduct in warfare, nevertheless, a persistent thread of commonality emerges of trying to provide some restraint on methods and means of warfare. Part 4 provides analysis of the persistent thread of commonality; suffice to say it is evident in the Stoics’ works, Christianity, Islam, Judaism, African traditional culture, Hinduism, and Confucianism.

Second, conflict is managed through procedural mechanisms, institutions, and practices which draws States and non-State actors into a shared social space, the “public international sphere”. This seemingly undermines pluralism if it requires acceptance and adherence to centralised conflict-resolution mechanisms, institutions, and practices, which we know not all States let alone non-State actors do. But for there to be any possibility of normativity emerging at the international level, there must be some convergence on the existence, utility, and value of such conflict-resolution processes. These do not necessarily have to entail formal adjudication through courts. “Conflict-resolution” is suggestive of armed conflict between opponents whereas it could mean “navigating” differences through dialogue, raising-awareness, representations, and information-gathering at international fora. Berman concedes the “common social space” with underlying values of

procedural pluralism is “a vision consonant with liberal principles ... [which] ... many may reject ... on that basis”, but that it is necessary to have any sort of functioning legal system that can negotiate differences. He argues that a “cosmopolitan pluralist approach” is “*more likely* able to draw participants together into a common social space than a territorialist or universalist framework would” (*ibidem*, 146). When States engage in armed conflict, they enter a theatre of operation governed by international rules protecting civilians and civilian objects, and others who may be designated protected status. Armed conflict is not simply a bilateral matter between States as it disrupts the orderly course of international relations, breaching the fundamental principle of the prohibition on the use of force. Armed conflict engages the whole international community’s interest to seek resolution in the “public international sphere”.

Third, active engagement with differences is the third principle informing a “cosmopolitan pluralist approach”. This means that the decision-makers in conflict-resolution mechanisms, institutions, and practices should be encouraged to actively engage with “questions of multiple community affiliation and the effects of activities across territorial borders, rather than shunting aside normative difference” (*ibidem*, 146). It is incumbent on all decision-makers, particularly those from States engaging non-State actors and international organisations representing international law-making and conflict resolution, to consider whether conflict has arisen due to affiliations beyond territorial boundaries or multiple affiliations, and to properly analyse and categorise the conflict in order to address underlying issues and provide appropriate resolution.

Fourth, taking account of the international systemic value of conflict resolution or navigating differences. Domestic judicial and regulatory decisions within States would take account of “a broader interest in a smoothly functioning overlapping international legal order”, seeing the value of reciprocal tolerance and goodwill. States and non-State actors do not operate in isolation and when armed conflict is resorted to there are wider

ramifications for neighbouring communities, States, and the overall stability of the international legal order. Thus, domestic judicial and regulatory decisions within States would see the benefit in not only limiting the causes of conflict but also having a “no-harm” duty.

Fifth, there may be public policy exceptions to justify “illiberal communities and practices” but this does not mean such practices are fully recognised or the norm. Rather, they require a strong normative statement to justify the exception. The Taliban’s forceful takeover of Afghanistan in August 2021 is a case in point. There is yet to be a strong normative statement from the Anglo-American/European post-Westphalian States actively engaged in international law-making, participation in conflicts and conflict resolution (e.g. the United States, the United Kingdom, the EU, Australia, Canada) justifying the toppling of an elected Afghan government by a repressive and illiberal regime. UN Security Council Chapter VII sanctions continue to apply under Security Council Resolution 1267(1999), freezing assets, funds, and financial resources of the Taliban. The Resolution was adopted in 1999 as an enforcement measure against the Taliban for harbouring terrorists, yet it continues as a leverage for any future recognition of the Taliban as the legitimate government of Afghanistan. Equivocal statements by the UN and States may point to the development of new conditions for formal recognition under international law, such as respect for human rights and the formation of a representative government.

Rather than calling for non-recognition of the Taliban, Security Council Resolution 2593 (2021) called on all parties “to seek an inclusive, negotiated political settlement, with the full, equal and meaningful participation of women, that responds to the desire of Afghans to sustain and build on Afghanistan’s gains over the last twenty years in adherence to the rule of law, and underlines that all parties must respect their obligations.” In October 2021, the Moscow Format Consultations led to a Joint Statement by nine States (Russia, China, India, Pakistan, Iran, Kazakhstan, Uzbekistan, Turkmenistan, Kyrgyzstan) acknowledging that “practical engagement with

Afghanistan needed to take into account the new reality, that is the Taliban coming to power in the country, irrespective of the official recognition of the new Afghan government by the international community” (Chia and Haiqi, 2021), and noting that “a truly inclusive government that adequately reflects the interests of all major ethnopolitical forces in the country” was a precondition to formal recognition. During the period of uncertainty over formal recognition, the Taliban are non-State actors bound by international humanitarian law rules governing non-international armed conflict with terrorist groups within Afghanistan, in particular, common Article 3 of the 1949 Geneva Conventions and Articles 7 and 13(2) of Additional Protocol II. There is harm caused within and outside Afghanistan’s borders with people fleeing to neighbouring States, risking their lives to escape a country they no longer feel secure or safe in. It represents a collapse in global leadership on a matter of systemic impact on the international legal order and on the “no-harm” duty.

The final principle relates to cosmopolitan pluralism seeking a middle ground between realist-positivist fixation on sovereign territorial paramountcy, and universalism’s overbearing centralism. Thus, “successful” mechanisms, institutions, or practices within the “public international sphere” will be those that “simultaneously celebrate both local variation and international order and recognize the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange” (Berman, 2012, 150). The “no-harm” duty is not a complete anathema to individual legal traditions and jurisdictions to be meaningless. Drawing from the persistent thread of commonality in trying to provide some restraint on methods and means of warfare, this can be aligned with a cosmopolitan “no-harm” duty.

4. Cosmopolitan Roots and Contemporary Manifestations of the “No-Harm” Duty

One clear example of how the “no-harm” duty in warfare is rooted in historical religious and secular *a priori* values of restraint and limitation of harm is the principle of distinction. The idea of separating combatants from non-combatants, the sparing of innocents, is as old as warfare itself. Ancient civilisations and cultures established customs and practices to distinguish between combatants and civilians, especially women, children, the elderly, and clergy. Prior to the Westphalian period of State formation, restraint and limitation of harm were advocated as practices. Numerous international legal scholars have refined these customs and practices to crystallise a norm of harm-limitation or do-no-harm under international law. Despite Vitoria’s unethical categorisation of the “barbarian other” and “civilised European”, his natural law theory on the law of nations advocated a customary practice of treating strangers humanely during war (Vitoria, 1991, 277ff.; Cavallar, 2008). Grotius notably developed specific rules of limiting harm in warfare which had the effect of sparing innocents (e.g. prior to war an exit period for persons on enemy territory; prohibition of killing or injuring persons on neutral territory; prohibition of killing children, old men, priests and scholars, prisoners of war, and women) (Grotius, 1625, 4.7-4.8, 11.9-11.10, 11.13). These scholarly perspectives and ancient civilisations and cultural norms established rules of engagement in warfare intended to reduce or eliminate harm.

4.1 Stoics’ Prescient Duties

The Roman Stoics’ law of nations, *jus gentium*, originally for the purpose of governing relations with foreigners, extended to relations between States centred on principles of cooperation and minimisation of harm. On the basis of “human fellowship and community”, Cicero developed a series of principles and duties relevant to moral conduct of individuals in peace and

wartime. The commonality of being human sufficed to warrant “certain duties that we owe to even to those who have wronged us” (Cicero, 1913, 35-37). Duties in warfare included honouring promises to enemies, prohibiting poisoning or treacherous killing of enemies, and prohibiting inflicting unnecessary suffering on enemies (*ibidem*, 35-45, 83).

These prescient duties are indeed reflected in contemporary international law: the principle of *pacta sunt servanda* as a general principle of international law and specific to the law of treaties as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties and customary international law; the prohibition of perfidious acts that betray an enemy’s trust and confidence in warfare as reflected in Article 37(1) of the 1977 Additional Protocol I to the Geneva Conventions and customary international law; the prohibition of poison and poisoned weapons in Article 70 of the 1863 Lieber Code and Article 23(a) of the 1907 Hague Convention IV Regulations; the principle of preventing unnecessary suffering of enemy combatants in the 1868 St. Petersburg Declaration, the 1899 Hague Declaration Concerning Asphyxiating Gases, the 1899 Hague Declaration Concerning Expanding Bullets, Article 23(e) of the 1907 Hague Regulations IV Respecting the Laws and Customs of War on Land, and Article 35(2) of the 1977 Additional Protocol I to the Geneva Conventions, as well as forming part of customary international law.

A final contribution from Cicero’s conception of duties in warfare was premised on proportionality; that any proportionate retributive action may be taken against an enemy so long as it is not gratuitous violence and “great care should be taken that nothing be done in reckless cruelty or wantonness” (*ibidem*, 83). This is reflected in the principle of proportionality today, as contained in Articles 51(5)(b) and 57(2)(a)(iii) and (b) of the 1977 Additional Protocol I to the Geneva Conventions and customary international law, which requires evaluating whether an anticipated military advantage to be gained from an attack is proportionate to the expected incidental civilian injury, including death to civilians and damage to civilian objects.

4.2 Christianity's Just War and Virtuous Warriors

Early Christian theological writings on war and its consequences sought to inculcate warrior values of restraint and limitation of harm. Founder of the just war theory, Augustine elaborated virtue ethics of self-awareness, compassion, and restraint. He counselled, “condemn injustice without forgetting to observe humanity. Do not indulge a thirst to revenge the horrors inflicted by sinners, but rather apply a willingness to heal the wounds of sinners” (Augustine, 2004, 62). Properly understood, Augustine’s just war theory is not a licence to kill. It is a carefully crafted dictum against presumption and excess; war is a response to an injustice by an aggressor and should never be entered into lightly for revenge or cruelty (Augustine, 1954, 207). The virtuous warrior’s heightened sense of humaneness and compassion restrained their action and conduct, including prohibiting attacks on places of worship in order to provide sanctuary for victims of warfare (*ibidem*, 19, 24-25, 27).

Aquinas deemed war a “sin contrary to peace” (Aquinas, 2006, Q.37) yet also sought to set parameters for legitimate resort to war. The just war theory was further developed to include three conditions: (i) the need for a sovereign authority to declare war; (ii) the existence of a just cause, which is when there is a response to a prior injustice committed by the enemy; and (iii) the need for an intention to do justice and attain peace (*ibidem*, Q.40 Article 1). Similar to Augustine, Aquinas emphasised warrior virtues, in particular “military prudence” and “protection of the entire common good” which is the attainment of peace (*ibidem*, Q.50 Article 4).

4.3 Islam's “Jihād” and Distinction Between Combatants and Civilians

Islamic jurists had their own conception of a just war, referred to as “jihād”, requiring certain formalities under law and justifications in accordance with religion or societal customs (Khadduri, 1955, 57-58). Such a war can only be declared and waged by the State (not individuals) with authority and responsibility vested in the head of State. Rules were established to

distinguish between combatants and civilians, and to prohibit certain types of conduct in warfare. It was prohibited to kill civilians and prisoners of war, as well as to destroy animals, fertile land with crops, and trees. Poisonous weapons were also prohibited (Hassan, 1974, 173). Prisoners of war and deceased bodies of enemy combatants were not to be ill-treated (*ibidem*, 177; Khadduri, 1955, 108). Further categories of protected persons (women, children, monks, old men, people sitting in places of worship, traders, merchants, and contractors) were not to be killed (Ibrahim, 1984, 132-133). Modern manifestations of these rules are contained in the following: fundamental guarantees under common Article 3 of the 1949 Geneva Conventions (requires humane treatment of civilians and *hors de combat* and prohibits outrages upon personal dignity); Articles 1(2) and 75 of the 1977 Additional Protocol I to the Geneva Conventions (requires enemy combatants to be afforded protection under the principles of humanity and the dictates of public conscience, and treated humanely); Articles 13 and 14 of the 1949 Geneva Convention III and Article 11(1) of the 1977 Additional Protocol I to the Geneva Conventions (requires prisoners of war to be treated humanely at all times); Article 15 of the 1949 Geneva Convention I, Articles 18 Geneva Convention II, Articles 13, 120-121 Geneva Convention III, Article 16 Geneva Convention IV, and Article 34 of the 1977 Additional Protocol I to the Geneva Conventions, which require prevention of ill-treatment of deceased enemy combatants, humane treatment of prisoners of war and deceased prisoners of war, and special protection for wounded and sick civilians.

4.4 Prohibition on Sustenance Destruction and Siege Warfare in Judaism

Maimonides, a leading scholar of medieval Judaism, was concerned about preventing wanton destruction and established a prohibition on sustenance restrictions on civilians under siege, such as destruction of fruit trees and blocking access to water, and an obligation to allow the enemy to surrender or exit by offering peace and not besieging a city from all four sides

(Maimonides, 1170-1180, chap. 6, paras. 1, 7 and 8). Jewish warfare rules were said to be founded on “gentleness” and “humanity” even towards enemies (Josephus Book II, para. 30). Maimonides’ prohibition on siege warfare reflects international humanitarian law’s concern with protecting civilians. Article 54 of the 1977 Additional Protocol I to the Geneva Conventions, and Article 14 of Additional Protocol II prohibit starvation of civilians as a method of warfare, and attacks, destruction, removal or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, and drinking water.

An interesting anomaly in the law’s development of the prohibition on siege warfare is Lieber’s personal endorsement of siege and apparent subsequent permissibility under the doctrine of military necessity under Article 14 of the 1863 Lieber Code. Article 14 states, “military necessity, as understood by modern civilised nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war” (Lieber Code, 1863). Article 15 continues that military necessity “admits of all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable ... it allows all destruction of property ... and of all withholding of sustenance or means of life from the enemy” (*ibidem*). Predating Lieber, certain Islamic jurists considered permissible besieging enemy cities, using siege artillery to destroy city walls and houses, burning or flooding enemy territory, cutting water canals and destroying water supplies, and using poison, blood or any material to spoil drinking water in order to force the enemy to capitulate (Khadduri, 1955, 105-106). Judaism distinguished wars against the six peoples of Canaan (the Hittites, Amorites, Canaanites, Perizzites, Hivites, and Jebusites) as exempt from restraints on destruction and conduct (Hassner and Aran, 2013, 81-82; Roberts, 1988, 232-233).

The Lieber and other anomalies seem to contradict a “no-harm” duty. But these anomalies are dated iterations of a type of warfare presumptive of gaining military advantage at all costs, immersed in a misguided utilitarian perspective of short, sharp action leading to the greater good of humanity, as exemplified in Article 29 of the Lieber Code: “the more vigorous wars are pursued, the better it is for humanity. Sharp wars are brief.” The complexity of today’s types of warfare in terms of hybrid terrains, multiple actors, access to diverse weaponry, and asymmetric capabilities of non-State actors, certainly does not guarantee “sharp and brief” wars. Lack of reference to the humanitarian rationale for the “no-harm” duty risks positioning war as a normal course of conduct rather than a measure of last resort. We have seen devastating consequences of military necessity justifications, such as during the American Civil War when the Union Army General Sherman advocated scorched-earth tactics, pillaging, and indiscriminate killing of civilians (McPherson, 1990, 809), and during the Second World War when “total war” and “unconditional surrender” were used to justify aerial bombardment and fire-bombing of German and Japanese cities (Overy, 2005, chap. 15; Messer, 2005, chap. 16). More recent conflicts in Iraq and Afghanistan have left decades-lasting systemic, transboundary problems of asymmetric warfare with non-State actors, regional instability, proliferation of weapons, humanitarian crises, and displacement and migration of local populations.

4.5 Protection of Collective Goods in African Traditional Culture

In pre-colonial traditional African societies, oral tradition devised community-based rules governing conduct in warfare. These rules pertained to protection of sources of human sustenance, especially water, cattle, and land, which were collective goods and not legitimate military objectives (Mubiala, 1989; Diallo, 1976; Kappeler and Kakooza, 1986). Warriors were expected to uphold virtue ethics prohibiting the killing of wounded or surrendering enemy combatants, requiring negotiations prior to declaring war, and providing emissaries with safe passage (Diallo, 1976, 10; Bello,

1980, 19). As mentioned above, protection of collective sustenance goods is reflected under Articles 54 and 14 of Additional Protocols I and II respectively. The environment, as a broader collective good, is protected under Article 35(3) of Additional Protocol I which prohibits the employment of methods and means of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment.

4.6 Hinduism's Humane Means of Warfare

From a conception of common humanity involving acceptance and respect for different beliefs and traditions, ancient India set parameters around the conduct of warfare to include categories of protected persons as well as humane practices particularly when fighting an enemy. It was prohibited to kill innocent bystanders, non-combatants, and travellers. Defeated enemies were to be treated humanely and poisonous weapons were not to be used. Certain rules focused on how to conduct combat with the enemy to ensure fairness, avoid unfair advantage, and respect humanity. Combat between mounted and unmounted soldiers was prohibited. Collective attacks against a single soldier and killing a soldier temporarily at a disadvantage during battle were prohibited. Warriors were not to engage in what were considered unjust and improper conduct such as striking someone from behind, poisoning the tip of the arrow, or attacking the sick, old, children, or women (The Laws of Manu, chap. VII, verses 90-92; Mahabharata, Book 12, Section XCV; Penna, 1985, 188-190).

Notions of fairness, avoiding unfair advantage, and respect for humanity in conflict come closest to the cosmopolitan approach. These are reflected in the principle that methods and means of warfare are not unlimited, as contained in Article 35(1) of the 1977 Additional Protocol I to the Geneva Conventions; the provisions on humane treatment previously mentioned; and restrictions or prohibitions on certain types of weapons which by their nature cause superfluous injury or unnecessary suffering, or which are indiscriminate because they cannot be directed at a specific military objective,

or because their effects cannot be limited (e.g. mines and booby-traps, anti-personnel mines, poison and poisoned weapons, chemical weapons, and prohibition of blinding laser weapons that cause permanent blindness).

4.7 Confucian Influence on Restraining Doing Harm

Ancient China regulated conduct in warfare through martial rules and customs. In the fifth century BC the Chinese military strategist, Sun Tzu, codified rules on military planning, attacks, strategy, warrior attributes, and methods of warfare. Maximising potential for victory was a prevailing objective tempered by limitations derived from Confucian virtue ethics. Examples include: the expectation that commanders exhibit “wisdom, credibility, benevolence, courage, and strictness”; preservation of the enemy capital city, army, and battalions as the best method of warfare; “subjugating the enemy’s army without fighting is the true pinnacle of excellence”; besieging a walled city is the worst strategy; humane treatment of captured soldiers (Sun Tzu, 1994, 167, 177, 174). Launching an attack by fire was considered indiscriminate and inhumane (Miller, 2015, 35). Conducting war in a remote location away from non-combatants served to limit doing harm to innocents (Yu Kam-por, 2010, 107). Warfare at all costs was not efficient or wise, and a distinction should be made between warring States and their peoples (Miller, 2015, 73). Flooding the enemy’s State was inhumane, and wanton destruction of civilian objects, looting, and imprisonment of enemy civilians was inhumane as well as imprudent as it exposed the attacker ruler to counter attacks (Mencius, 2009, Book 1B.11, Book 6B.11).

Prudent strategising is one explanation to Confucian restraints on doing harm. Yet strategising to avoid fighting in the first place is fundamentally different from Lieber utilitarianism.

5. The "No-Harm" Duty and the Principle of Distinction

Generally, the principle of distinction under international humanitarian law is a manifestation of the "no-harm" duty. The fact that warring parties cannot associate animosity with or direct hostilities towards whole populations and innocents is a mark of humanitarian achievement. Under customary international law and Articles 51(2) and 52(1) of Additional Protocol I, civilians and civilian objects must not be the subject of an attack. Articles 41(1) and 51(2) of Additional Protocol I prohibit attacks on *hors de combat*, and civilian populations and individual civilians respectively. Similar prohibitions apply in non-international armed conflicts under Articles 7 and 13(2) of Additional Protocol II. The principle of distinction operates in particular ways to demonstrate the existence of a "no-harm" duty, namely, by prohibiting attacks on civilians and civilian objects, and by the presumption against attack in ambiguous situations.

5.1 Prohibition on Attacking Civilians and Civilian Objects

Article 50(1) of Additional Protocol I defines a "civilian" as "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol [i.e. prisoners of war, combatants, *hors de combat*]". Article 50(2) makes reference to "civilian population" which under Article 50(3) does not lose its civilian status if there are individuals who do not satisfy the definition of a "civilian". Under Article 51(2) it is prohibited to attack civilians and the civilian population, suggesting protection of the group and individual. Definitions under Article 50 recognise individuals comprise the population through phrases such as "a civilian is any person", "a person is a civilian", "the civilian population comprises all persons who are civilians", which means the protection is predicated on the individual rather than requiring that the individual belongs to a group or collective. Referring back to the historical religious and secular *a priori* values of restraint and harm limitation, we see

a persistent thread of commonality to differentiate categories of persons deemed innocents or vulnerable to be spared from harms way, rather than offering generic large-scale protections to populations. This may even be formulated as a right; because such individuals have done nothing to forfeit their right not to be attacked they should not be subject to attack (McMahan, 2009).

Article 52(1) of Additional Protocol I does not define “civilian objects” instead operating a negative rebuttable presumption that these are “all objects which are not military objectives”. Thus, civilian objects are protected against attack, unless and for such time as they are military objectives (ICRC Customary International Humanitarian Law Study, Rule 10). The rebuttable element is introduced if the object can be deemed a military objective, under Article 52(2), by virtue of its nature, location, purpose or use. But even if it is identified as falling within one of these characteristics, Article 52(2) requires that the object “make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.” Two elements must be simultaneously satisfied for an object to constitute a “military objective” and therefore be subject to attack: (i) its nature, location, purpose or use makes an effective contribution to military action; and (ii) its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Without going into detailed definitions and interpretations of the object characteristics, the key thing to note in the two-element test is the presence of a restraining and harm-limiting value in the form of a range of attack options, namely, “total or partial destruction, capture or neutralisation”. There is no expectation or requirement for elimination or annihilation of the object. Indeed, the availability of attack options indicates the need for restrained thinking to determine an appropriate level of attack according to the circumstances encountered and the object observed, without causing unnecessary or excessive harm. It would not make sense to opt for total

destruction when a definite military advantage could be gained by capturing or neutralising the object. Lieber utilitarianism's prioritisation of military necessity fails to take account of this restraining and harm-limiting value.

5.2 Presumption Against Attack in Ambiguous Situations

In cases where there is doubt about civilian or civilian object status the law operates with a presumption against attack. The ICRC Commentary makes clear the presumption against attack is intended to protect the civilian population and prevent belligerents from arbitrarily and unilaterally declaring civilian objects as military objectives (ICRC, 1987, 637 para. 2030, 638 para. 2037).

Article 50(1) provides that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian." The ICRC Commentary clarifies that persons who have not committed hostile acts but whose status is in doubt "because of the circumstances" should be considered civilians "until further information is available" and not be subject to attack (*ibidem*, 612 para. 1920). This suggests that any degree of ambiguity is sufficient to trigger the presumption against attack. But it is not clear what standard of human judgement is being applied, the factors entailing "the circumstances" that would need to be considered, and the sort of "further information" that could rebut the presumption. On the standard issues, the ICTY Appeals Chamber in *Prosecutor v Blaškić* referred to "the expected conduct of a member of the military" (*Prosecutor v Blaškić* 2004, para. 111). On the factors entailing "the circumstances" and what amounts to "further information", it would not make sense or support the underlying value of civilian protection to adopt a Lieber utilitarian interpretation that prioritises military necessity. A simple formulation of this type of interpretation is that an armed conflict constitutes "the circumstances" requiring a response based on military necessity. But it is clear that the rules on civilian protection and prohibition on attacking civilians apply in the context of armed conflict so it is insufficient to repeat that there is an armed conflict taking place to rebut the presumption against

attack in cases of ambiguous civilian status. More is needed to demonstrate a valid rebuttal, particularly as this will lead to a serious consequence of injury or death of another human being. Invocation of military necessity also creates arbitrariness and unfettered discretion which is unjustifiable, unethical, and not in the spirit of the underlying value of civilian protection and harm-limitation contained in the law.

Unlike the two-element test determining military objectives which offers refinement through object characteristics, human target characteristics are not defined to assist in assessing "the circumstances" or "further information". One resolution is to refer to Article 51(3) stating that civilians lose protection when they "take a direct part in hostilities." The ICRC's guidance on "direct participation in hostilities" requires that: (i) the act of participation is likely to adversely affect military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack; (ii) there is a causal link between the act of participation and the expected harm; and (iii) the act of participation is specifically designed to directly cause the requisite level of harm in support of a party to the conflict and to the detriment of another (ICRC, 2009, 46). Another resolution, argued by Haque (2007), is to operate a standard of reasonable belief based on decisive evidence. A person should be considered a civilian unless there is decisive evidence that they are a combatant and the risk of sparing them is substantially greater than the risk that they are a civilian.

As for ambiguous civilian objects, the law also protects these through a presumption against attack. The ICRC Commentary clarifies that civilian objects are protected against attack, unless and for such time as they are military objectives (ICRC Customary International Humanitarian Law Study, Rule 10). Article 52(3) of Additional Protocol I provides that "in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so

used.” The provision is illustrative rather than exhaustive in identifying civilian objects as a place of worship, house or dwelling, or a school, mainly due to a lack of consensus in the drafting process as to what amounts to a civilian object (ICRC, 1987, 638 paras. 2035-2036). Even if a civilian building is on the frontline it cannot be subject to an attack unless it is certain that the building accommodates enemy combatants or military objects (*ibidem*, para. 2034). Requiring “certainty” is a higher threshold than simply relying on a broad discretion of military necessity. It also preserves the underlying value of civilian object protection.

The “no-harm” duty is further represented in precautionary measures which must be applied under Article 57 of Additional Protocol I. Thus, under Article 57(2)(a)(i), those planning or deciding an attack must do everything feasible to verify that the object is: (i) not a civilian object; (ii) not subject to special protection; (iii) constitutes a military objective under Article 52(2); and (iv) not prohibited by the provisions of the Protocol to attack. Failure to properly exercise human judgement in working through the rules contained in Articles 50, 52, and 57 by invocation of military necessity can lead to tragic consequences. NATO’s bombing of the Chinese Embassy in Belgrade, in 1999, is a case in point. As a result of inappropriate target location techniques, and failures in target verification and review process, the Embassy was mistakenly attacked killing three Chinese citizens, injuring fifteen others, and causing extensive damage to the Embassy and other buildings in the surrounding area (ICTY Final Report, 2000, paras. 80-82).

6. The “No-Harm” Duty and the Principle of Proportionality

Once a lawful target is selected, the law continues to apply the underlying value of civilian protection and harm-limitation through the principle of proportionality, which requires a decision to be made as to whether the anticipated military advantage to be gained from an attack is proportionate to the expected incidental civilian injury, including death to civilians and

damage to civilian objects. The principle is contained in customary international law and Articles 51(5)(b) and 57 of Additional Protocol I. An attack is prohibited if it is expected to cause excessive loss of civilian life, injury to civilians, or damage to civilian objects. Additional Protocol II, which applies to non-international armed conflicts, does not explicitly refer to the principle. But the preamble refers to “the humanitarian principles enshrined in Article 3 common to the Geneva Conventions” and the protection afforded by “the principles of humanity and the dictates of the public conscience”, which reflect the underlying value of civilian protection and harm-limitation through application of the principle of proportionality. Indeed, it would not make sense to allow excessive harm to take place in non-international armed conflicts yet prohibit excessive harm in international conflicts. So the principle applies to both international and non-international armed conflicts (ICRC Customary International Humanitarian Law Study, Rule 14; Bothe, Bartsch and Solf, 1982, 678). The principle of proportionality operates in particular ways to demonstrate the existence of a “no-harm” duty, namely, by prohibiting attacks that cause excessive civilian harm, and by the precautionary obligation to cancel or suspend attacks.

6.1 Prohibition of Attacks Causing Excessive Civilian Harm

Article 51(5)(b) prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The wording is replicated in Article 57 on precautionary measures. The decision as to whether “excessive” harm will result from an attack is reached by posing three questions - (i) what is the expected incidental civilian harm? (ii) what is the anticipated concrete and direct military advantage? and (iii) is the civilian harm excessive in relation to the military advantage? If there is an affirmative answer to (iii), then the attack is prohibited. The decision is based on the “reasonable military commander” standard, which requires an “honest expectation” and

“reasonableness” taking into account all relevant factors related to the anticipated military advantage, and the expected civilian loss and damage (ICTY, 2000, para. 50). But in practice, the three-part question is conflated to focus on Lieber utilitarian prioritisation of military necessity with a number of states asserting a presumption favouring operational judgement above all else (Canada, 2001; *Fuel Tankers Case*, 63-65; Israel, 2009; The Netherlands, 2005).

The ICRC Commentary clarifies that “incidental loss” means the primary concern of incidental effects attacks may have on persons and objects (ICRC, 1987, 684 para. 2212). A number of factors determine the nature of harm posed by the attack including: location; terrain; weapon accuracy; weather; the nature of military objectives; and combatant skills (*ibidem*). “Concrete and direct military advantage anticipated” means an attack carried out in a concerted manner in numerous places can only be judged in its entirety. But this does not mean that several clearly distinct military objectives within an urban area can be considered a single objective, which would breach Article 51(4)(a) (*ibidem*, 685 para. 2218). The “advantage anticipated” must be a military advantage and it must be concrete and direct; so creating conditions conducive to surrender by means of attacks which incidentally harm the civilian population are not permissible. A “military advantage” can only consist of ground gained and annihilation or weakening of the enemy armed forces (*ibidem*), yet Australia, New Zealand, the United States, and Israel explicitly recognise protection and security of their own combatants as a “military advantage” (Australia, 2006; Canada, 2001; New Zealand, 1988; the United States, 2007; Israel, 2009).

Although there is no definition of what constitutes “excessive” in relation to the “concrete and direct military advantage anticipated”, the underlying value of civilian protection and harm-limitation permeates the interpretation and application of the principle of proportionality. First, the aim is clearly to spare civilian casualties and losses. The ICRC is clear on the “golden rule” that should apply, namely, the duty to spare civilians and civilian objects

(ICRC, 1987, 684 para. 2215). The ICRC also directs that in situations which are unclear “the interests of the civilian population should prevail” (ICRC, 1987, 626 para. 1979). Second, to remain faithful to the underlying value and overall rationale of international humanitarian law, military necessity should not trump the prohibition on attacking civilians. Third, if “excessive” is determined solely by the subjective assessment of a commander based on military necessity, this unacceptably shifts risk to civilians in armed conflict and does not reflect the law in terms of the presumption in favour of civilian protection and the obligation to prevent excessive civilian harm. An unfettered discretion of subjective judgement biased towards military necessity is unethical (Ulgen, 2017/2018, 174-175 and 177-178), and contrary to the underlying value of civilian protection and harm-limitation.

6.2 Precautionary Obligation to Cancel or Suspend Attacks

Precautionary measures in attack constitute a norm of customary international law applicable in both international and non-international armed conflicts (ICRC Customary International Humanitarian Law Study, Rule 18; *Prosecutor v Kupreškić*, 2000, para 524). Article 57(2)(a)(iii) provides an obligation on those planning or deciding an attack to “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” A commander must “refrain from deciding” to launch an attack where application of the proportionality principle determines civilian harm to be excessive. Again, the standard of commander judgement is that expected of a “reasonable military commander”, and, as argued above, subjectivity concerns should be resolved in favour of the underlying value of civilian protection and harm-limitation. As the ICTY held in *Prosecutor v Kupreškić*, “the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to

expand the protection accorded to civilians” (*ibidem*, para. 525). The significance of the obligation to refrain from deciding to attack is further illustrated by its violation constituting a grave breach punishable as a war crime under Article 85(3) of Additional Protocol I.

Article 57(2)(b) provides an obligation on those planning, deciding or executing an attack, to cancel or suspend an attack “if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The choice of means and methods of attack is also subject to the underlying value of civilian protection and harm-limitation, with Article 57(2)(a)(ii) providing an obligation “to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” This also accords with the principle contained in Article 35(1) of Additional Protocol I that methods and means of warfare are not unlimited. State practice also shows that States regard means and methods of warfare as part of the proportionality assessment (Colombia, 1999; India, 1995; Spain, 2007), and in some instances the proportionality of employing certain types of weapons is called into question (e.g. the Rwandan army’s use of grenades and rocket-launchers against persons carrying guns, machetes and stones; NATO drone strikes on Libya) (Report on the Practice of Rwanda, 1997; Russian Federation, 2012).

7. Conclusion

Utilitarianism’s brutalization of the “public international sphere” through its particular approach to international humanitarian law is today characterised by intermingling micro (local, national) and macro (global, transboundary) interests, and profiteering from the resulting confusion. It is atemporal and

ahistorical to claim that the law requires a primary consideration of utilitarianism. As we have seen, such a primary consideration would be conceptualised in different ways: the Lieber utilitarian interpretation that prioritises military necessity; interpreting “military advantage” as protecting one’s own combatants; and a presumption that favours the commander’s operational judgement. However, each of these steers away from the underling value of civilian protection and harm-limitation which creates a “no-harm” duty. The existence of centuries’ old diverse legal traditions and cultures with a persistent thread of commonality providing restraints on methods and means of warfare and differentiating categories of persons to limit harm, reveals utilitarianism’s atemporal and ahistorical nature. Utilitarianism’s failure to recognise harm-limitation as intrinsic to international humanitarian law prevents its universalisation. By contrast, pre-existing cosmopolitan values of restraint and limitation of harm are evident throughout history. Legal pluralism and cosmopolitan legal theory converge to produce strong value-commitment norm-creation in the form of a “no-harm” duty. Instances of practices seemingly opposed to the “no-harm” duty, such as the Lieber, Islamic and Judaic permissibility of siege warfare, have been superseded by the vagaries of modern warfare requiring harm-limitation rules. In the modern law, a series of prohibitions, presumptions, and negative rebuttable presumptions prove the existence and operation of a “no-harm” duty.

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