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Commentary on Strasbourg Principle no. 15: principles of prevention and precaution

Principle 15 of the Strasbourg Principles of International Environmental Human Rights Law refers to prevention and precaution, identifying them as cornerstones for implementing international human rights law. Consequently, these two principles or guidelines are essential for the effective implementation of human rights.

Prevention is commonly taken as the Golden Rule of international and national environmental law, while precaution could emerge as an additional guarantee of the same. Prevention is nearer to the activity in question – investment, pollution etc., while precaution has a wider margin. Prevention has always been a part of law in many other areas, developing a set of instruments, while precaution might rather be taken as a legal innovation to provide extended and more remote warrants, relying more on interpretation. Prevention is using the general logic of law, while precaution is turning it somewhat upside down – altering among other the burden of proof. Prevention and precaution as lead principles could emerge in international and domestic law during the past decades, prevention is somewhat earlier.

Prevention was mentioned in the final decision of the Trail Smelter Arbitration (1941), emphasizing at the same time the role of the permit in prevention and in effect that a State has an obligation to prevent transboundary harm. The Stockholm Declaration (1972) in Principle 21 underlined again the responsibility of the State "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction", while in Principle 7 the duty to prevent pollution of the seas has also been declared. A year later, the (first) programme of action of the European Communities on the environment (1973) states under Title II on principles that "1. The best environment policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to

counteract their effects." This is a handy summary of prevention. Among the different measures of prevention, careful planning (Stockholm, Principle 2), prior assessment of potentially harmful effects on the environment of planned activities (1982 Convention of the Law of the Sea, art. 206, the 1991 Espoo Convention of Environmental Impact Assessment, Art. 22 of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses) might be mentioned as examples. The Rio Declaration (1992) in Principle 2 reinforces Stockholm Principle 21. The Global Pact for the Environment , an expert draft of 2017 in its Art. 5 reinforces on the one hand these messages, adding environmental impact assessment, plus a kind of monitoring obligation.

In domestic legislation prevention might also be identified, as in National Environmental Policy Act (1969) in USA, being among the first which introduced environmental impact assessment as a special preventive instrument. With the First Action Programme, prevention has been a fundamental constituent of European environmental policy and law. When environmental interests could find their proper place in primary legislation of the EC (Single European Act, 1986), in Art. 130r, Par. 2 prevention develops as the lead principle of environmental action – today it is Art. 191, Par. 2 of the Lisbon Treaty.

Prevention being a guarantee for environmental rights is translated into those instruments which are all applied in environmental law, such as meaningful planning, permitting, environmental assessment, proper control and monitoring by the authorities. Under prevention there is a considerable knowledge, information on likely consequences, as an appropriate basis for decision-making and action of the authorities. The dictum 'prevention is better than cure' refers to the duty of care and due diligence on behalf of everybody, primarily the states.

Prevention has is limits, primarily the lack of proper information, proof, or scientific evidence. If full evidence is needed before any intervention is made, it might be too late to act. In case of greater public interests, a more sensible principle is desirable – the precautionary principle, balancing the limitations of environmental protection versus economic interests. The idea behind is to provide the responsible institutions with power to intervene even without having a full proof of potential environmental damage. The roots are going back to '*Vorsorgeprinzip*' in the seventies in Germany. In international law, the first reference has been in the in World Charter for Nature in 1982. In the European law around the same time the Sandoz case (C-174/82) reference might be mentioned.

In 1992 the Principle 15 of the Rio Declaration summarized the essence of the precautionary approach: "… Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The UN Framework Convention on Climate Change and the Convention of Biological Diversity both refer to the precautionary principle (1992). At the very same year, the Maastricht Treaty in its Article 130r(2) encapsulated the

principle. In 1998, the European Court of Justice articulated the meaning of the principle in the BSE case (Case C-157/96): “Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.” The precautionary principle is applicable when the situation encapsulates the potential of a high risk of serious negative effects, endangering greater interests (human health, environment etc.), with a potential of being irreversible, and there is a lack of full scientific certainty. The burden of proof is shifted, since the person who wishes to carry out an activity is to prove that it will not cause harm.

The practice of the Hungarian Constitutional Court might serve as a good example, how to use these principles in combination (Decision No. 13/2018 (IX.4.) AB): “[20] ... based on the precautionary principle, when a regulation or measure may affect the state of the environment, the legislator should verify that the regulation … does not cause any irreversible … it does not even provide any ground in principle for causing such damage. … the precautionary principle shall pose a restriction on the measure, and in this respect the legislator shall be constitutionally bound to weigh and to take into account in the decision-making the risks that may occur with a great probability or for sure. On the other hand, the preventive principle … should guarantee the prevention of the occurrence of processes that may damage the environment.”

Gyula Bándi, August 2023