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Commentary on Strasbourg Principle no. 34: negative and positive obligations of States

Human rights violations by States can occur whether environmental harm or risk of thereof is caused by the State's own actions or omissions, or by the activities or omissions of private actors where the State has failed to guarantee rights in accordance with its duties to regulate, monitor and, if applicable, sanction those activities.

The human rights obligations of States in relation to environmental harm entail a responsibility to regulate and minimize harms not only where these are directly attributable and caused by the State itself and government representatives but also where the harm is caused by third parties. The principle that States are responsible in human rights law for violations caused by the State itself and its agents is fundamental to the law. In the context of environmental harm, this entails the potential for the State to be responsible in human rights law where a government activity causes environmental harm, e.g. where a government-owned operator is the direct cause of pollution or where government employees cause environmental harm. In line with standard practice, the principle spells out that the responsibility of the State relates to actions as well as omissions, e.g. where a State's failure to take specific steps causes environmental harm. In practice, the application of responsibility for human rights violations caused directly by governments gives rise to few problems.

Importantly, the principle also applies to violations attributable to private actors, giving rise to a positive obligation on the State to effectively regulate potentially harmful activities irrespective of who is conducting them. This means that States are expected to put in place regulatory frameworks which ensure a degree of control of environmentally harmful activities (e.g. *Tătar v Romania* (application no. 67021/01) decision of 17-07-2000). Such controls can take the form of licensing and permitting regimes, requiring operators of potentially harmful activities to secure consent from the state prior to commencing operations. Ordinarily, such regulatory regimes would also include provisions for public participation (see Principle 43 of the Strasbourg Principles), allowing

individuals access to the environmental information forming part of the process, the chance to make representations to the decision-making process, and the opportunity to challenge this before an independent body, such as a court or administrative board (*Hatton and others v United Kingdom* (application no. 30622/97) decision of 06-05-1997). Beyond the requirement that the State takes effective measures to regulate potentially harmful activities carried out by private operators, it is also required that the State ensures this regime is effectively enforced (*Pavlov v Russia*, decision of 11-10-2022). This means that once a State has enacted a regulatory framework for the polluting activities, this regime must be given force and complied with. This significantly strengthens the importance of human rights provisions in the context of environmental harm as, for example, in several of the environmental cases before the European Court of Human Rights, successful applicants have been left with few effective remedies in domestic law, e.g. where governments have ignored severe levels of pollution (*Taskin and others v Turkey* (application no. 46117/99) decision of 10-11-2004).

A significant scope of the principle is that it applies not just *ex post* to environmental harm which has occurred but also *ex ante* to environmental risks. This means that a State may be responsible in human rights law where no material harm has taken place but where there is a *risk* of harm (e.g. *Branduse v Romania* (application no. 6586/03) decision of 07-01-2003). Although this is significant, and follows from the principle of prevention (see Principle 15 of the Strasbourg Principles), it poses the question of what threshold of risk triggers application of the responsibility to regulate. Typically, the responsibility to regulate environmental risks arises where such risks are not remote (Principle 17 of the Strasbourg Principles), amount to an actual interference with the claimant's rights, and go above and beyond what is expected of everyday life (*Çiçek and others v Turkey* (application no. 44837/07) decision of 27-02-2020). This means that not every activity, which causes a risk of harm, entails responsibility upon the state. In other words, the threshold disqualifies low-level environmental harm from the scope of human rights law.

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