Sovereignty and environmental justice in international law

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1 Introduction

In this chapter, I will examine one narrow aspect of the potential contribution of the notion of 'environmental justice' to the body of international law aiming to protect the environment. I will address the question of to what extent 'environmental justice' may qualify or limit states' sovereign powers under international law to use and destroy their environment as they see fit, as long as it does not cause damage to other states.

For two reasons, this focus may strike the reader as counter-intuitive. First, it might be said that this focus is of limited practical relevance since, if one takes into account transboundary effects as well as the effects on the commons of many activities, not much would be left of states' sovereign rights to exploit their own resources pursuant to their own environmental and developmental policies. Is not everything connected to everything? However, this can easily be exaggerated. The argument would neglect the critical role of thresholds such as 'significant harm' in the definition of states' rights and obligations in regard to environmental harm. It also would understate the degree to which environmental degradation continues largely to be of a local nature.

A second reason why the focus on domestic effects may strike the reader as counterintuitive is that environmental justice originated as a concept of domestic law, and was used to criticise the domestic environmental policies and laws of some states, notably the United States. It responded to particular specific, local concerns over environmental degradation. Indeed, justice issues traditionally concern themselves with the distribution of burdens and benefits within a state. The prime reason that international law takes an interest in issues of environmental justice seems to be the fact that environmental burdens and benefits may be distributed in an unjust manner between states, rather than within states. For most people, the prime connotation of 'environmental justice' in international law therefore will be its application to transboundary issues like transboundary movement of hazardous waste, climate change, and more generally issues concerning the distribution of environmental burdens and benefits between states.

1 Sachariew 1990. 2 Cole and Foster 2000. 3 Falk in Chapter 2 of this volume. 4 Caney 2005a. 5 Adealo 2000. 6 Caney 2005a at 748.
However, the aim of this chapter is to take the debate one step further and to consider the question how, if at all, notions of environmental justice may be relevant for states' powers under international law in regard to the environment within their territory. This question is of obvious relevance. International law has become increasingly concerned with the way in which states protect the environment within their borders, irrespective of immediate transboundary effects. One of many recent examples is the 2003 African Convention on the Conservation of Natural Resources, which stipulates obligations to protect the environment without much regard to transboundary issues.7 The question, on which views will sharply differ, is whether it is desirable to take this development further and to progressively prescribe on the level of international law how a state should, in its domestic system, make choices between environmental, developmental, social and other values. The question before us is whether the notion of environmental justice provides any leads for the interpretation and further development of international law in this regard.

The answer to the question of whether the notion of environmental justice is relevant to a state's sovereignty over its environmental resources of course largely will be determined by the definition of the concept of 'environmental justice' employed. Defining environmental justice in terms of the distribution of environmental burdens and benefits over states or people (whether between or within states)8 will lead to a radically different outcome for our purposes, than if we would construe it in terms of requirements for living in harmony with the natural world.9 This article does not opt for one or the other definition, and does not attempt to debate the merits of particular positions of moral philosophy in connection to environmental protection.10 Rather, it will explore alternative conceptions of environmental justice and examine how these may underpin developments in international law that impinge on the sovereignty of states in regard to the protection of 'their' environment.

The chapter's main argument is that the concept of 'environmental justice', although not a direct source of rights and obligations, indeed can underlie and induce development of international law to curtail the power of states under international law to destroy environment as they see fit as long as there are no significant transboundary effects. The concept may define the contours for the political contestation over environmental protection. However, the article also argues that contestation largely will continue to proceed at domestic, rather than at the international level.

The chapter proceeds in four parts. Section 2 will discuss the continuing dominance of territorial sovereignty. Section 3 will discuss four alternative conceptions of environmental justice, respectively linked to justice towards the environment, distributive justice, intergenerational justice, and social justice. Section 4 argues that, while some of these conceptions indeed may qualify states' powers with regard to their own environment, the scope and object of such qualification is highly contextual and will allow for wide differences between and within states. Section 5 contains the conclusions.

2 The continuing dominance of state sovereignty in regard to the environment

The starting point of our analysis is that international law traditionally has been neutral towards the protection by states of their own environment. International law protects states' right to determine for themselves whether to protect or destroy their environment. Principle 2 of the Rio Declaration affirms the basic sovereign right of states to exploit their own resources pursuant to their own environmental and developmental policies, as long as no transboundary effects or effects for the commons occur.11 The much heralded principle that a state must ensure that activities within their jurisdiction or control do not cause damage to the environment of other states, formulated by the tribunal in the Trail Smelter Case,12 and repeated in the Rio Declaration, in itself is agnostic about protection of the environment, even though the net result of its application may well benefit the environment. It is just an application of the more general 'no-harm' principle that the International Court of Justice (ICJ) formulated in the Corfu Channel Case.13 The justification and aim of this no-harm principle is to protect the sovereignty of other states. In the Corfu Channel Case, Albania had to protect the sovereign rights of the United Kingdom. In the Trail Smelter Case, Canada had to ensure that the activities of the smelter at Trail (in the Canadian province of British Columbia) did not cause injury to the United States. But just as international law would have been neutral to any act by the United Kingdom that would have destroyed its own warships, it was neutral to any act of the United States that would be destructive of its own environment. Of course, the Trail Smelter Tribunal was not asked to rule on that latter matter. But, if it had been asked to do so, it would have said that international law did not contain a prohibitive rule. Certainly, in that respect, any transfer of principles of domestic United States law pertaining to the protection of natural resources (that the tribunal laid as the foundation of its main holding on interstate pollution) would have been unwarranted.14

The no-harm principle is not some ancient principle that is part of the history of international (environmental) law. To this day, it is the only obligation pertaining to the protection of the environment that the ICJ has expressly recognised. The Court did so in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear

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8 Casey 2005a.
9 Mickelson in Chapter 15 of this volume.
10 Dobson 1999.
13 Corfu Channel Case (United Kingdom v. Albania), (1949) ICJ Reports 23–3
14 For a recent discussion on the jurisprudence of the tribunal and its history, see Beapties and Miller 2005.
the hidden ambition of this rule is to preserve the equal rights of all states to make use of areas beyond national jurisdiction, and that these equal rights should not be pre-empted by acts of any single state that cause pollution. The rationale of that rule would then not be much different from the rationale of the rule that a state may make no territorial claims over areas beyond national jurisdiction. In any case, this exception is a relatively narrow one and is not further considered in this chapter. 22

All this does not mean that international law has nothing to say about the question whether a state does or does not protect the environment within its borders. Rather, the combination of the fundamental principle of territorial sovereignty and the absence of a prohibitive rule means that international law actually protects states’ rights to make their own decisions in regard to the environment. As noted by David Kennedy, international environmental law is not synonymous with environmentally protective rules. There is also a catalogue of international law norms that enable or even encourage despoliation. 23 International law is not silent on environmental protection within a state’s sovereignty, but regulates it by leaving a liberty. Given states’ historical record in using that liberty, this can hardly be called a neutral position.

This construction of the relevance of international law to environmental policies is not to be confused with a blanket adoption of the Lotus principle that ‘restrictions upon the independence of States cannot … be presumed’ and that international law leaves to states ‘a wide measure of discretion which is only limited in certain cases by prohibitive rules’. 24 The sovereignty of states is restricted by the ‘principles and rules of international law’. 25 In this respect, it would be too narrow to say that a state can do what it likes as long as there is no prohibitive rule. However, this is not the same as saying that a state can only destroy its environment if there is a permissive rule. The key question is whether the ‘principles and rules’ of international law, apart from treaty obligations, limit a state’s power with regard to the protection of its own environment. In the dominant understanding of the state of international law, the answer to that question is still a negative one. It is against this background that we will consider the potential contribution of the notion of environmental justice to the development of international environmental law.

3 Competing conceptions of environmental justice

In order to assess the relevance of international justice for the principle of state sovereignty with regard to the environment, this section will explore four alternative conceptions of (environmental) justice: environmental justice as distributive justice, justice towards the environment, environmental justice as intergenerational justice, and environmental justice as social justice. This overview of possible

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16 **Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly),** (1996) ICI Reports 226, para. 29 (stating that ‘the existence of 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 is now part of the corpus of international law relating to the environment’).


18 Note 15 above, para. 29. 19 Note 16 above, para. 72. 20 Ibid.

21 Principle 2 of the Rio Declaration (note 11 above), also referred to by the ICI in **Legality of the Threat or Use of Nuclear Weapons**, note 15 above, para. 29, and **Pulp Mills**, note 16 above, para. 72.

22 Joyner 2001 at 354.

23 Kennedy 2004 at 143.

24 SS Lotus (Turkey v. France), PCIJ Series A, No. 10, 18, 19.

25 **Legality of the Threat or Use of Nuclear Weapons**, note 15 above, para. 22.
interpretations of environmental justice is by no means exhaustive. Conceptions of environmental justice that are not discussed, even though they may have some relevance to the qualification of state sovereignty in respect of the protection of the environment, include procedural justice\textsuperscript{24} and corrective justice.\textsuperscript{27}

3.1 International distributive justice

Environmental justice has come to international law along two strands. In either strand, environmental justice is predominantly distributive justice. The first strand is an extension of the domestic environmental justice debate, primarily taking place in the United States, to international law. This discourse was essentially on matters of distribution. Environmental justice concerns emerged as a result of the disproportionate burden of environmental hazards or undesirable land uses borne by low-income and minority communities.\textsuperscript{26}

The second strand is an extension of the discourse in relation to international society\textsuperscript{29} and international law\textsuperscript{30} to (international) environmental law. This discourse naturally was concerned with issues of distribution: international justice seeks to ensure that resources are distributed in a fair way across peoples or states. Much of the discourse on justice in international relations and international law is a direct challenge to state sovereignty. From the perspective of international justice, state sovereignty can be said to be "prima facie" unjust because it is at odds with resource distribution that is necessary for a just world.\textsuperscript{31}

In both strands, justice discourse focuses on distribution between states, collectivities and/or individuals: how should a society or group (or the international community) allocate its scarce resources or products among individuals with competing needs or claims?\textsuperscript{32} and seek the alleviation of poverty and the diminution of inequality (or at least certain dimensions of it) as a matter of justice?\textsuperscript{33}

The approach that international law has taken towards (environmental) justice as distributive justice has been ambiguous. While much has been done to promote development and the redistribution of resources,\textsuperscript{34} the international legal system as a whole remains pitted against a more equitable distribution. For instance, it empowers non-representative governments that borrow funds from international financial markets and place their governments more in debt with Western investors for projects that may not have the backing of the local population. Thereby, it may do as much to sustain an unjust system of distribution as it may do to curb that.\textsuperscript{35}

What the concept of environmental justice brings to this established debate on distributive justice is that it factors in environmental burdens and benefits in the equation of things that should be distributed. Environmental justice is concerned with the undue imposition of environmental burdens on innocent communities that are not parties to the activities generating such burdens.\textsuperscript{36} Global environmental justice then refers to the global distribution of environmental burdens and benefits.\textsuperscript{37}

This construction of environmental justice may be of much significance for the development of international environmental law on global issues and indeed may be said to underlie much of modern development of international environmental law. But it does not seem helpful if we would seek a qualification of the sovereign right of states to exploit their own resources pursuant to their own environmental and developmental policies. It might even be said that it would have a reverse effect. The main environmental degradation has occurred in the states and societies that have been able to develop mostly — it is the otherwise "advantaged" communities that generally have caused and suffered the worst environmental consequences. In distributional terms, we then should be concerned with the right of underdeveloped states to develop and to deplete their resources in a way that "the West" has done. Environmental justice then might even be used as a basis for the entitlement to pollute.

There is an alternative interpretation. Even though the bulk of environmental degradation has taken place in the West, the negative effects of economic development in developing states have been sizable and, moreover, often, directly or indirectly, are caused by development elsewhere, for instance by activities of multinational corporations and/or Western states and/or international organizations. Movement of hazardous waste to developing countries and the general pattern of shifting of environmental burdens to developing countries indeed may well be analysed from this concept of environmental justice.\textsuperscript{38} Several principles and rules in regard to such issues as climate change, protection of the ozone layer and transboundary movement of hazardous waste then may be said to seek to counteract such distributive injustice. However, in both interpretations such rules of international law are quite agnostic about the protection of the environment that otherwise lies within the domain of a state's sovereignty. It may be that certain rules of international law disallow a Western state or a transnational corporation based in an industrialized state to cause pollution in an African state,\textsuperscript{39} but such a rule would not really be concerned with the question whether that African state protects its environment itself. The large number of treaties concerned with transboundary water pollution,\textsuperscript{40} transboundary air

\textsuperscript{24} Notably the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, 38 ILM (1999) 517. Note also that, in some interpretations, it is held that the 'right to a healthy environment' has procedural aspects, including the right to information, the right to participate and the right to effective remedies. See also Giorgiotta 2002.

\textsuperscript{25} The no-bane principle in inter-state relations can in its compensatory aspects be seen as an application of the corrective justice principle. See Bugge in Chapter 21 in this volume.

\textsuperscript{26} Gunn 1996 at 122–45.

\textsuperscript{27} Nagel 2005 at 113; Caney 2005b.

\textsuperscript{28} Brilmayer 1996 at 611; Franck, 1989; Shelton in Chapter 3 of this volume.

\textsuperscript{29} Beitz 1975.

\textsuperscript{30} Roemer 1996.

\textsuperscript{31} Jackson 2005 at 281–2.

\textsuperscript{32} See e.g. the essays in Weiss, Drenters and De Waaer 1998.

\textsuperscript{33} Pogge 2001 at 334–43.

\textsuperscript{34} Adeboye 2000.

\textsuperscript{35} Caney 2005a at 748.

\textsuperscript{36} This is the main focus of Anand 2004.

\textsuperscript{37} See Ebbesson in Chapter 14 of this volume.

pollution or transboundary movement of waste or chemicals essentially seek to prevent one state from causing injury to the environment of other states without the consent of that latter state, thereby foreclosing the sovereign options of that latter state. The prior informed consent principle, contained in the 1998 Rotterdam Convention, is a conspicuous example of this category: as long as a state consents to receive the hazardous waste of chemicals, international law is, irrespective of the effects, agnostic. Indeed, they may be said to aim at the protection of the territorial state's sovereignty to decide in its own manner how to handle its natural resources.

The larger point here is that distributive justice is largely a global process that has no immediate aims and effects for how states arrange their internal affairs. It has been extrapolated from the domestic sphere to the international level, but the principles that have been adjusted for application to the international level are not easily transferred back within the domestic domain of a state.

Largely the same applies when we do not focus on the distribution of impacts of environmental harm, but on the distribution of burdens imposed by international environmental law. For instance, in international climate policy, debates over fairness predominantly concern the equitable distribution of the costs of emissions-reduction measures rather than consideration of equity in the burden of impacts. Such concerns of environmental justice are to some extent being addressed by modern international environmental law, for instance by the principle of 'common and differentiated responsibilities'.

The purport of this set of principles is to ensure that the developing countries, that have not yet had the possibility to develop in a way that the West has had, are not required to carry equal costs of prevention. But such principles in themselves largely seek more to achieve some form of distributive justice by keeping open the door to future development, and in themselves offer little to curb state sovereignty.

3.2 Justice towards the environment?

The second construction of the notion of 'environmental justice' is justice between people and the environment as such. This construction could provide the basis for the obligations of states to protect the environment as such, and not just to protect the environment if that would harm the sovereignty of other states. That construction thus could lead to a fundamental qualification of the first leg of Principle 2 of the Rio Declaration.

International law now contains a wide variety of obligations to protect the environment as such, irrespective of the harmful effects on states or other entities. These include the Biodiversity Convention, regional nature conservation treaties, in particular in Africa and Europe, and modern watercourse treaties, in particular in Europe. These treaties do express a common concern that has little to do with the protection of sovereignty and oblige states to take protective measures, irrespective of effects on other states. Even though most of these treaties are fundamentally tilted to the protection of the rare and exotic over the protection of the environment as such (members of a species are entitled to protection if the species threatens to be extinct, but not so the member of an abundantly available species), one may discern a trend in these treaties of moving beyond the sovereignty paradigm. It has even been argued that, also under general international law, states would now have an obligation to prevent environmental harm, apparently for the sake of the environment, rather than for the sake of preventing physical injury to other states.

It is contested whether the concept of justice can provide a proper basis for obligations towards the environment as such. Brian Barry notes that the concept of justice cannot 'be deployed intelligibly outside the context of relations between human beings'. He adds:

justice and injustice can be predicated only on relations among creatures who are regarded as moral equals in the sense that they weigh equally in the moral scales.

Treaties aiming at the protection of the environment as such, and the alleged general obligation to prevent harm, could be premised on notions other than (environmental) justice – such as on the existence of moral obligations towards nature, existing independently of considerations of justice, rather than on environmental justice as such.

This position has been criticised by other scholars. We can in this legal analysis leave aside the merits of both positions in moral philosophy. It can be noted, though, that the concept of environmental justice in this interpretation is rather one-dimensional and would not provide a basis for resolving the competing economic, social, and international claims that are at the heart of decisions of policy and law affecting the environment.
3.3 Intergenerational justice

A third construction of environmental justice is environmental justice as part of intergenerational justice. In a certain sense this is a variant on distributive justice as discussed above. It maintains the distributional element that is inherent in justice. However, rather than focusing on distribution within the present generations (whether groups, peoples or states), it focuses on distribution between different generations.

For our purposes, this focus leads to a fundamentally different outcome. Whereas, in the distributive justice discourse, it is in principle immaterial how a state treats its domestic environment, for intergenerational justice this is critical. Although the concept of intergenerational equity often is applied to transboundary or commons issues (for instance, to climate change), responsibilities towards future generations do not distinguish between the territorial loci of environmental harm.

The concept or principle of sustainable development, that implements the concept of intergenerational justice in the international legal system, indeed lacks any restriction on its territorial scope. Sustainability generally is seen as a necessary condition of intergenerational justice: we should at least leave people in the future with the possibility of not falling below our level. Though this concept raises a variety of problems (e.g. if the future population is larger, should we forego our needs to allow satisfaction of the vital needs of future generations), the territorial scope is not among those. The principle is not contingent on a transboundary nature of environmental harm, and it applies fully to environmental degradation located within a state's boundary. This conclusion may be supported by the fact that, of course, we do not know today the state borders of tomorrow.

This territorially unlimited concept of sustainable development has had a clear influence in positive international law pertaining to sovereignty and environmental law. A notable example is the African Charter of Human and Peoples' Rights, stating in its preamble that: 'States are responsible for protecting and conserving their environment and natural resources and for using them in a sustainable manner with the aim to satisfy human needs according to the carrying capacity of the environment.' It also underlies the Convention on Biological Diversity – similarly unbothered by transboundary issues. Also noteworthy is the International Law Association's New Delhi Declaration on Sustainable Development (2000), referring to the duty of states to ensure sustainable use of natural resources. This would mean that states are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems.

In its manifestation in the concept of sustainable development, intergenerational equity requires the reconciliation between economic development and protection of the environment. This principle does not provide by itself the legal answers to the balancing processes between development and environmental protection. But it may fulfill a role as a background principle that informs the development and interpretation of the law. It also may play a more independent role in the balancing of interests. The Indian Supreme Court held in the Narmada case that:

when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.

3.4 Social justice

In the fourth interpretation, environmental justice is considered as being part of a broader concept of social justice. Though social justice is essentially distributive in nature and thus overlaps with the second construction, the focus here is a different one. Whereas distributive justice as used in international law is essentially distribution between states or groups, social justice refers also to justice within a state's sovereign domestic sphere.

What distinguishes this construction from the construction of justice towards the environment is that environmental justice is not seen here as a justice relationship between humans and the environment, but as one element in the distribution of goods and benefits between human beings.

Though traditionally international law has been quite neutral on how states consider and balance social aspects, there is little doubt that international law indeed influences in many ways domestic social justice. Leaving aside the intended or unintended consequences of apparent neutrality on the actual balances struck within states, human rights, in particular social and economic rights, are obviously a constituent component of social justice. As such, social justice squarely is a concern for modern international law.


Gabriélkő–Nagymaros Project (Hungary v. Slovakia), note 17 above para. 140.

Low 1999 at 36.

*Narmada Bhavani Amdal v. Union of India and Others, ILDC 169 (IN 2000), para. 143.*
There seems increasing support for considering the interests of protection of the environment as part of the considerations of social justice. It has been said that environmental injustice and human rights violations are inextricably interwoven.\(^67\)

It has also been suggested that the concept of sustainable development, that initially mainly was seen in terms of a reconciliation between environment and economic development, should be understood as also encompassing social interests. The New Delhi Declaration on Sustainable Development (2000) postulated the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.\(^68\)

There is much merit in making these connections. International environmental policies cannot be separated from social objectives and policies. An important illustration of this approach is the judgment by the South African Constitutional Court in the case of Fuel Retailers Association of Southern Africa v. Director-General.\(^69\) The case involved an application for a filling station in White River, Mpumalanga. In assessing the legality of the decisions of the administration on the application, the Court expressly considered the principle of sustainable development under international law. It said that 'economic development, social development and the protection of the environment are now considered pillars of sustainable development',\(^70\) and that '[t]he integration of economic development, social development and environmental protection implies the need to reconcile and accommodate these three pillars of sustainable development'.\(^71\) The Court used this construction, in both international and domestic law, as the basis for its interpretation of the applicable statute to the effect that the environmental authority includes the consideration of socio-economic factors as an integral part of its environmental responsibility.\(^72\)

4 Sovereignty, environmental justice, and diversity

It follows from the above that the constructions of environmental justice as justice towards the environment, as intergenerational justice and as social justice each may underlie the development of the law in a direction that qualifies the scope of states’ sovereign powers over their domestic environmental policies. However, it is clear that such qualification will proceed only at a highly abstract level. Already, the notion of justice between states has to allow for diversity of policies and economic and social

\(^{67}\) Adeilo 2000; Hendrick 2006.

\(^{68}\) For connection between sustainable development and social justice, see also Dobson 1999.

\(^{69}\) New Delhi Declaration, note 60 above.

\(^{70}\) Fuel Retailers Association of Southern Africa v. Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others, Case CCT 67/06 (decision of 7 June 2007), available at www.constitutionalcourt.org.za/sirbin/egaiaisi/2007/09/18t1/17t0/SHBSI/o/52O1-CCT767-06.

\(^{71}\) Ibid., para. 53.

\(^{72}\) Ibid., para. 55.  

\(^{73}\) Ibid., para. 62.
Any qualification or limitation of the first leg of Principle 2 of the Rio Declaration requires a contextual assessment, also involving the wide range of values relevant in the implementation of the right of self-determination.80 This already holds for transboundary issues (for example, equitable balancing in the law of international watercourses) and the administration of treaties like the Kyoto Protocol, and it certainly holds for domestic environmental issues. International law leaves substantial room for political contestation in the domestic arena, within the context of the emerging normative considerations identified in the previous section.

On the one hand, the room for domestic political contestation is inherent in the use of open and contextual norms, as illustrated by the Biodiversity Convention. On the other hand, this development is spurred in part by the use of non-legal norms, for instance in the form Forest Principles.81 Forest management is one of the most obvious examples of a resource management issue that in many respects essentially is within the domestic jurisdiction of states. It involves in most cases a triangle of interest of an environmental, developmental and social nature. Any attempts to prescribe in a meaningful way at the international level how states should strike that balance have come to nothing – as exemplified in the impossibility to agree on a formal legal text. This does not mean that international law has nothing to say on the matter. It has become common to refer to the use of ‘soft law’ as a sign of the rich variety of normativity, but it equally continues to protect states’ pre-existing legal powers. It does provide for a set of general legal principles, objectives and procedures that defines the parameters and establishes the ground rules of what can be termed ‘global forest law’.82 This consists of a combination of widely ratified multilateral conventions that directly or indirectly deal with forestry issues, a number of international principles of the use of natural resources and an increasing body of non-legally binding texts that formulate the normative concerns at stake. However, the decisions to balance these various principles essentially remains at the domestic level.

The resulting picture of an international recognition of generally recognised parameters that have to compete at the domestic level shows that there can be some agreement as to the direction of balances and the relevant issues to be considered. However, inevitably this will result in different outcomes in different states. This can also be seen as fragmentation between different regimes. The phenomenon of fragmentation is mostly located at the international level between different international regimes, but is even more dominant when applied at the domestic level, where domestic actors continue to be entitled to project the rule resulting from the colliding values with legal meaning.83

5 Conclusion

The notion of ‘environmental justice’ is open to a variety of meanings and applications. At least some of those (in particular, intergenerational justice and social justice) are relevant as a conceptual basis for qualifying states’ sovereign rights to formulate their environmental and developmental policies as long as there are no significant transboundary effects.

One may question whether environmental justice has anything to add to the principles of sustainable development, equity and integration that, from different angles, appear to aim for similar goals. However, none of these other principles are well established in themselves. Environmental justice can be seen as one largely overlapping concept, working in the same direction. The emergence of environmental justice simply points in the same direction and thereby may underpin our thinking, and perhaps our policies on integration of social, economic and environmental spheres.

However, we have also seen that the concept of environmental justice in itself does not provide any answers to the required levels of forms of environmental protection. Rather, it provides the parameters for actual contestation of values that may overlap but may just as well compete. The key question is not only what these values are, but also who is endowed with the authority to decide on collisions. International law continues to confer that power largely on the domestic level. In that respect, environmental justice provides contours for the exercise of states’ sovereign rights to determine their own developmental and environmental policies, while it does not and cannot dictate the outcomes.

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80 Koskenniemi 2004 at 211, noting that the universal level ‘only identifies the authoritative concerns and actors, while material regulation will be decided contextually, often by setting up an informal “regime” to manage the problem.’
82 Brunnee and Nollkaemper 1996.
83 Koskenniemi 2004 at 206.
84 Note 63 above.
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