

1-1-2016

## Saving the Serengeti: Africa's New International Judicial Environmentalism

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### Recommended Citation

Gathii, James Thuo (2016) "Saving the Serengeti: Africa's New International Judicial Environmentalism," *Chicago Journal of International Law*: Vol. 16: No. 2, Article 3.

Available at: <http://chicagounbound.uchicago.edu/cjil/vol16/iss2/3>

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# Saving the Serengeti: Africa's New International Judicial Environmentalism

James Thuo Gathii\*

## Abstract

*This Article analyzes recent environmental law decisions of Africa's fledgling international courts. In 2014, for example, the East African Court of Justice stopped the government of Tanzania from building a road across Serengeti National Park because of its potential adverse environmental impacts. Decisions like these have inaugurated a new era of enhanced environmental judicial protection in Africa. This expansion into environmental law decision-making by Africa's international trade courts contrasts with other international courts that are designed to specialize on one issue area such as human rights or international trade, but not both. By contrast, Africa's international courts are simultaneously pushing the boundaries of judicial enforcement not only of international environmental law, but also of international human rights.*

*Three major developments account for the turn to and expansion towards international judicial environmentalism: First, the decisions of African governments to pursue mega-development projects such as the Serengeti superhighway, large extractive industry operations, or hydro-electric dams without regard to the environment or the interests of local populations. Second, the channeling of resistance against these mega-development projects through international courts by alliances of those directly affected by these mega-development projects at the grassroots level together with global environmental movements. Third, the repurposing of these international courts to begin enforcing environmental norms included in regional trade and human rights agreements as a result of the opportunity provided by the filing of environmental cases.*

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\* Wing-Tat Lee Chair of International Law, Loyola University Chicago School of Law. I would like to thank Emily Hayes and Katie Cierzan for their invaluable research assistance. This paper is based on ideas developed in my Lecture at my induction as the Wing-Tat Lee Chair of International at Loyola University Chicago School of Law, on 3rd of March 2013.

*The fact that NGOs and individuals have standing to bring cases to Africa's international courts and governments remain committed to pursuing mega-development projects strongly suggests that the trend towards consolidating international judicial environmentalism may continue. Similar cases filed in domestic courts show the continuity and complementarity between national and international courts in environmental law cases. Ultimately, this Article observes that to the extent the cases in Africa's international courts are filed only against States leaves a huge accountability gap. Private actors responsible for the same kind of environmental damage are not amenable to suit in Africa's fledgling international courts. This accountability gap for private actors continues an unfortunate legacy that has degraded the environment in many third world countries, including those in Africa.*

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## I. INTRODUCTION

In June 2014, the First Instance Division of the East African Court of Justice (EACJ) issued a permanent injunction barring the government of Tanzania from building a road across the Serengeti National Park, a United Nations Educational, Scientific and Cultural Organization (UNESCO) world heritage site.<sup>1</sup> The Appellate Division of the EACJ largely upheld that decision in July 2015.<sup>2</sup> This decision (hereinafter the Serengeti case or *Serengeti*) joined a string of recent decisions issued by Africa's fledgling international courts that have inaugurated a new era of judicial environmentalism. Judicial environmentalism is characterized by expansive interpretations of environmental provisions in regional economic integration and regional human rights treaties. My argument is that these new orders to protect the environment inaugurate a new era of enhanced environmental protection through Africa's international courts. They signal the embryonic stages of using courts to enforce international environmental legal commitments in Africa. This may have lessons for other parts of the world. This paper, as far as I can tell, is the first one that systematically discusses how the decisions of Africa's international courts are pushing the boundaries of judicial enforcement of international environmental law in response to three major developments: First, the decisions of African governments to pursue mega-development projects—such as the Serengeti superhighway, large extractive industry operations, or hydro-electric dams—without regard to the environment or local populations. Second, resistance through judicial processes against mega-development projects through alliances of those directly affected by these mega-development projects at the grassroots level together with global environmental movements. Third, how Africa's international courts, spurred by organized groups bringing these cases to them, have repurposed these trade courts to begin enforcing environmental norms included in regional trade and human rights agreements.

These new environmental cases simultaneously expose the possibilities and limits of judicial environmentalism—the possibilities because they have issued unprecedented decisions protective of the environment when government conduct violates treaty-protected environmental rights, and the limits because

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<sup>1</sup> African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania, Ref. No. 9 of 2010, Judgment, East African Court of Justice at Arusha First Instance Div. ¶ 64 (Jun. 20, 2014), <http://eacj.org/wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf> [hereinafter ANAW v. Tanzania].

<sup>2</sup> Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare (ANAW), Appeal No. 3 of 2014, Judgment, East African Court of Justice at Arusha App. Div. (Jul. 29, 2015), <http://eacj.org/?cases=the-attorney-general-of-the-united-republic-of-tanzania-vs-african-network-for-animal-welfare> [hereinafter Tanzania v. ANAW II].

the final outcomes of these decisions are at this point unlikely to severely dent the commitment of African governments to pursue mega-development projects. What is surprising is that these international courts have not shied away from announcing extremely broad and significant remedies often carefully hedged with limitations to protect the courts from political backlash against their expansive judicial environmentalism.

This Article proceeds as follows: Part II reviews the establishment of Africa's regional trade integration system and discusses the multiplicity of their objectives, including those relating to environmental protection. I show that while these integration systems were intended to be primarily about opening up regional trade, the courts established within them have been re-deployed, first to become human rights courts and more recently to protect the environment. Part III discusses the Serengeti case which best exemplifies Africa's judicial environmentalism. It begins by discussing how local and international alliances mobilized to save the Serengeti, a UNESCO world heritage site, through judicial environmentalism in the EACJ. It discusses how the government of Tanzania responded to the litigation. Part IV discusses two other important decisions of Africa's international courts—*Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*<sup>3</sup> from the Economic Community of West African States (ECOWAS) Court of Justice as well as *Social and Economic Rights Action Center (SERAC) v. Nigeria*<sup>4</sup> before the African Commission on Human and Peoples' Rights—to illustrate that there is an emerging judicial environmentalism movement beyond the Serengeti case in Africa.

Part V discusses some particularly important national judicial decisions from Kenya and Zambia that have international dimensions in order to show the continuous nature of the international environmental judicialism of Africa's international courts with national courts as well as to complete the picture on Africa's new environmental judicialism and its limits.

Part VI discusses judicial environmentalism's features and theoretical implications. Here, I discuss how judicial environmentalism represents yet another redeployment of African international courts following their earlier redeployment from trade to human rights cases. This part also critically assesses

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<sup>3</sup> Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria, Judgment, Judgment No. ECW/CCJ/JUD/18/12, Court of Justice of the Economic Community of West African States (Dec. 14, 2012), [http://www.worldcourts.com/ecowascj/eng/decisions/2012.12.14\\_SERAP\\_v\\_Nigeria.pdf](http://www.worldcourts.com/ecowascj/eng/decisions/2012.12.14_SERAP_v_Nigeria.pdf) [hereinafter SERAP v. Nigeria].

<sup>4</sup> Social and Economic Rights Action Center (SERAC) v. Nigeria, 155/96, Afr. Comm'n H.P.R. (Oct. 27, 2001), [http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf) [hereinafter SERAC v. Nigeria].

the prospects of this environmental judicialism for Africa's fledgling international courts and for the enforcement of international environmental law.

## II. THE RISE OF AFRICA'S INTERNATIONAL COURTS AND THEIR RE-REPURPOSED MANDATES

Africa has eight functioning international courts.<sup>5</sup> Every African country except two, Somalia and São Tomé and Príncipe, fall under the jurisdiction of one of these courts.<sup>6</sup> These courts are historically recent, especially relative to international courts in other regions. They all became operational in the first decade of the twenty-first century.<sup>7</sup> Each of these courts was established as a regional trade court to oversee the implementation of regional trade commitments.<sup>8</sup> These courts, incorporated in African regional integration

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<sup>5</sup> These are: the African Court of Human and Peoples' Rights, *see* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Jun. 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III); the East African Court of Justice, *see* Treaty for the Establishment of the East African Community, art. 9(1)(e), Nov. 30, 1999, 2144 U.N.T.S. 255 (providing for the establishment of the EACJ); the Southern Africa Development Community Tribunal, which is currently suspended but in the process of reconstitution, *see* Southern African Development Community, Protocol on the Tribunal and Rules thereof, arts. 15 & 16, Aug. 7, 2000, [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_the\\_Tribunal\\_and\\_Rules\\_thereof2000.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf); the Economic Community of West Africa Court of Justice, *see* Protocol on the Community Court of Justice, art. 2, A/P.1/7/91, [http://www.courtecowas.org/site2012/pdf\\_files/protocol.pdf](http://www.courtecowas.org/site2012/pdf_files/protocol.pdf); the Common Market for Eastern and Southern Africa Court of Justice *see* Treaty Establishing the Common Market of Eastern and Southern Africa, art. 7, Dec. 8, 1993, 2314 U.N.T.S. 265; the Organisation pour l'Harmonisation en Afrique du Droit des Affaires Common Court of Justice and Arbitration, *see* Traité portant révision du Traité relatif à l'Harmonisation du Droit des Affaires en Afrique, Oct. 17, 2008, <http://www.ohada.com/traite/10/traite-relatif-a-l-harmonisation-en-afrique-du-droit-des-affaires.html>; the Common Market for Central Africa Court of Justice, *see* Traité constitutif, art. 2, Mar. 16, 1994, [http://www.internationaldemocracywatch.org/attachments/173\\_CEMAC%20Treaty%20\(French\).pdf](http://www.internationaldemocracywatch.org/attachments/173_CEMAC%20Treaty%20(French).pdf); and the Court of Justice of the West African Economic and Monetary Union, *see* Traité de l'Union Economique et Monétaire Ouest-Africaine, art. 38, Jan. 10, 1994, <http://www.worldtradelaw.net/document.php?id=fta/agreements/waemufta.pdf>. The Arab Maghreb Union does not have a functional court yet. *See* KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 99 (2014). This proposal also includes the African Commission on Human and Peoples' Rights, which, though not formally a court, exercises quasi-judicial functions, and its decisions have been heavily relied upon by African sub-regional courts. This court also excludes the International Criminal Tribunal for Rwanda which is now undergoing dissolution and was established under United Nations Security mandate and the Special Court for Sierra Leone that has received considerable scholarly attention including book-length treatments.

<sup>6</sup> ALTER, *supra* note 5, at 99.

<sup>7</sup> *Id.* at 98 (noting that these courts are "fairly new").

<sup>8</sup> For an extensive analysis, see JAMES GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* 264–97 (2011).

treaties, mimic the European Court of Justice in many respects.<sup>9</sup> Another crucial design feature these courts have in common is that they allow suits to be initiated by non-state actors with very liberal access and admissibility rules.<sup>10</sup>

Although these courts were established as regional trade courts, three of them have primarily decided human rights cases—the East African Court of Justice the Southern African Development Community Tribunal (“SADC Tribunal”), and the West African Community Court of Justice (“ECOWAS Court”); the latter is the only one with an explicit jurisdictional mandate to decide human rights cases.<sup>11</sup> By contrast, the EACJ and the SADC Tribunal have pursued a broad interpretive strategy to justify assuming jurisdiction over human rights by invoking human rights provisions contained in the preambles of treaties establishing regional trade communities.<sup>12</sup> Thus, a major feature of these courts is the manner in which they have repurposed their original mandate over trade disputes to become bold adjudicators of human rights cases and disputes of a political nature. As I have explained elsewhere at length, the repurposing of their mandates is evidence that these courts are becoming enmeshed within regional movements that are aimed at advancing human rights at the national level and that are increasingly spreading at the regional and sub-regional level.<sup>13</sup>

The growth of jurisdiction over human rights in a sub-regional trade court in Africa is surprising, because national courts are subordinated to powerful executives.<sup>14</sup> Judicial checks on expansive exercise of executive power are few and far between in African countries.<sup>15</sup> Hence, the growth of sub-regional African courts that repeatedly issue rulings that governments do not like is unusual. It is in part the result of the growth of strong civil society groups deeply embedded in the regional integration frameworks, particularly in East and West

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<sup>9</sup> ALTER, *supra* note 5, at 151 (noting that most African courts emulate the European Court of Justice).

<sup>10</sup> For the East African Court of Justice, see James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 277 (2013).

<sup>11</sup> Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737, 776–77 (2013); see also Solomon Ebaborah, *The Role of the ECOWAS Community Court of Justice in the Integration of West Africa: Small Strides in the Wrong Direction?* (iCourts, Working Paper, No. 27 (June 2015)), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621453](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621453).

<sup>12</sup> James Gathii, *Sub-Regional Court or Employment Tribunal? The Legacy and Legitimacy of the Case-Law of the COMESA Court of Justice 2001-2015*, in THE LEGITIMACY OF INTERNATIONAL TRADE TRIBUNALS (forthcoming 2015).

<sup>13</sup> Gathii, *Mission Creep*, *supra* note 10, at 295–96.

<sup>14</sup> Paul Brietzke, *Private Law in Ethiopia*, 18 J. AFR. L. 158 (1974).

<sup>15</sup> Kwesi Prempeh, *A New Jurisprudence for Africa*, 10 J. DEMOCRACY 135 (1999).

Africa, as well as the slow but sure emergence of a cadre of judges with a normative commitment to ideals such as the rule of law, human rights, and good governance. The human rights jurisprudence of these sub-regional courts marks a clear departure from the judicial subservience to authoritarian governance and judicial acquiescence to powerful forces that arguably still animates the Common Market for Eastern and Southern Africa Court of Justice.<sup>16</sup> Thus, sub-regional courts are responsive to the failure of domestic mechanisms to redress human rights violations and the threats posed to the rule of law in the absence of any checks at the national level.<sup>17</sup>

Judicial environmentalism represents a second repurposing of Africa's international courts. They were initially repurposed from trade to human rights courts and now they are being repurposed to serve the additional function of adjudicating environmental cases. Decisions such as *Serengeti v. Tanzania*, *SERAP v. Nigeria*, and *SERAC v. Nigeria* show that environmental interest groups have learned from human rights lawyers who successfully transformed these courts from their original mission of adjudicating trade to deciding human rights cases. Thus, as I demonstrate in this paper, domestic and international environmental interest groups worked together on a litigation and publicity campaign that has mimicked that of human rights activists in persuading these courts to decide environmental cases.

Africa's international courts are not the traditional international style courts in which only states can sue states and where jurisdiction is consensual. These new courts have compulsory jurisdiction to decide whether particular law or conduct is consistent with the applicable treaty, and they allow private litigants to initiate litigation.<sup>18</sup> Unlike with traditional international courts that are dependent on the consent of states prior to adjudication, new style courts in Africa allow private actors to bring cases against the states without requiring the state's consent.<sup>19</sup> Private litigants have been more willing than states to file cases

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<sup>16</sup> Gathii, *Sub-Regional Court or Employment Tribunal?*, *supra* note 12.

<sup>17</sup> Alter et al., *supra* note 11, at 778 (arguing that litigation in sub-regional courts "provides a corrective to the limited avenues of legal recourse available to victims of rights abuses in Africa").

<sup>18</sup> ALTER, *supra* note 5, at 5.

<sup>19</sup> For example, in the ECOWAS Court of Justice, since 2005, individuals have been able to bring cases challenging human rights violations under the African Charter on Human and Peoples' Rights. However, individuals do not have a direct right of access to the court to file cases of violation of ECOWAS trade rules. Only a preliminary reference by a national court or by the ECOWAS Commission or a Member State can initiate such a case. See Alter et al., *supra* note 11, at 753–758.

which have kept these courts busy. This experience accords with that of courts in other regions of the world where direct private access is permitted.<sup>20</sup>

In East Africa, lawyers prevailed in persuading the EACJ to read preambular provisions referring to human rights of the Treaty for the Establishment of the East African Community in a manner that conferred the court jurisdiction to use these provisions to establish a cause of action for human rights violations.<sup>21</sup> This was a significant victory not only because it opened the door for a string of human rights cases but also because the EACJ's parent treaty explicitly provided it did not have jurisdiction over human rights.<sup>22</sup> This is also a paradigm-upsetting move for a court established to oversee regional trade integration rather than to oversee compliance with human rights norms. The EACJ and the SADC Tribunal have turned a classic paradigm of international trade courts upside down.<sup>23</sup> International trade courts like the European Court of Justice and the WTO's Dispute Settlement Body do not decide cases brought by citizens alleging violations of civil and political liberties such as arbitrary arrests, incommunicado detentions, torture, and rendition of terrorist suspects.<sup>24</sup> These types of cases are entertained in courts established with a supervisory mandate to oversee the implementation of a human rights treaty, such as the European Court of Human Rights' mandate over rights under the European Convention of Human Rights.<sup>25</sup>

By contrast, international trade courts, such as the Panels and the Appellate Body of the WTO, can only entertain cases relating to trade, not those raising

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<sup>20</sup> One of the most successful of these courts is the European Court of Justice, which in 2014 received 56,300 cases and 65,800 cases in 2013. EUROPEAN COURT OF HUMAN RIGHTS, *Annual Report of the European Court of Human Rights* 170 (Mar. 2015), [http://echr.coe.int/Documents/Annual\\_Report\\_2014\\_ENG.pdf](http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf).

<sup>21</sup> GATHII, *supra* note 8, at 279.

<sup>22</sup> See Treaty for the Establishment of the East African Community, art. 27(2), *supra* note 5 (providing that at a future date, the Council of Ministers may extend the jurisdiction of the Court to include human rights. To date no such extension has been granted.).

<sup>23</sup> GATHII, *supra* note 8, at 288–90.

<sup>24</sup> See the Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (providing that “[t]he rules and procedures of this Understanding shall apply to disputes brought to the consultation and dispute settlement provisions of agreements listed in Appendix 1 to this Understanding”) [hereinafter DSU]. Appendix 2 includes only Agreements negotiated by WTO Members and does not include non-WTO treaties such as those relating to international human rights. Further, Article 3.2 of the DSU provides that the WTO's dispute settlement system is intended to preserve the rights and obligations of members under the covered agreements.

<sup>25</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

questions such as whether or not there are violations of regional human rights, international human rights or other non-WTO treaties.<sup>26</sup> Although the European Court of Justice often weaves references to the European Convention on Human Rights into its decisions, its jurisdiction in contentious cases was originally designed to oversee economic integration commitments.<sup>27</sup> As such, its jurisdiction was, in its early years, understood to only extend to human rights insofar as these rights related to the market freedoms (such as the right of movement and the right of establishment), rather than the rights established under the European Convention on Human Rights.<sup>28</sup> Even then, what is truly remarkable about the majority of cases that have come before the EACJ, the Economic Community of West Africa Court of Justice (“ECCJ”), and the SADC Tribunal is that they have not in any way been framed as constituting violations of any of the market freedoms of their regional treaties.<sup>29</sup> Instead, they have been primarily based on enforcing human rights provisions in sub-regional, regional, and international law.<sup>30</sup>

These cases have defied the traditional paradigm of international trade courts of deciding trade cases and leaving human rights cases to human rights courts. In international law, this paradigm-upsetting move of African International Trade Courts accepting human rights cases reflects a breakdown of a pervasive distinction between courts that have exclusive economic mandates, on the one hand, and courts that have exclusive mandates over human rights issues on the other. The framers of the post-World War II era consciously distinguished international institutions falling on the economic side (such as the

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<sup>26</sup> Joel P. Trachtman, *The Jurisdiction of the WTO is Limited to Trade*, 98 AM. SOC'Y INT'L L. PROC. 141 (arguing that “only WTO law, not general international law, constitutes substantive law capable of application in WTO dispute settlement”).

<sup>27</sup> Aljandro Saiz Arnaiz & Dra. Aida Torres Perez, *Main Trends in the Recent Case Law of the European Court of Justice and the European Court of Human Rights in the Field of Fundamental Rights*, European Parliament (2012) (finding 57 cross references in the human rights case law of the two courts between 2010 and 2011).

<sup>28</sup> For more on the relationship between the European Court of Justice and the European Court of Human Rights, see ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 367 (2006) (noting in part that since the European Union is not itself a party to the Council of Europe, it is not bound by the European Convention on Human Rights).

<sup>29</sup> For more, see James Gathii, *The Variation in the Use of Sub-Regional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice*, 79 L. & CONTEMP. PROBS. (forthcoming 2016).

<sup>30</sup> Laurence R. Helfer, *Sub-Regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement*, (iCourts Working Paper, No. 32, 1-25 (2015)), <http://ssrn.com/abstract=2653124>.

World Bank, International Monetary Fund and the then General Agreement on Tariffs and Trade), from those falling on the political side (primarily the U.N.).<sup>31</sup>

This design distinguishing political from economic institutions was selected because of the belief that it was necessary to insulate economic institutions from the interference of political matters.<sup>32</sup> Hence, the World Bank and IMF were thought of as institutions charged with non-political, technical mandates over economic matters.<sup>33</sup> By contrast, political affairs such as those relating to peace and security as well as human rights were left to the United Nations.<sup>34</sup> This distinction, with the resulting separation of international courts between those dealing with trade and those dealing with human rights, is reflected in Europe, the Americas, and even in Africa.<sup>35</sup>

The fact that African international courts share a unique resemblance in combining simultaneous decision-making authority over trade and human rights cases calls for an explanation. Why have African international trade courts decided to effectively turn away from the paradigm of courts exclusively exercising a trade mandate, on the one hand, and courts exclusively exercising a human rights mandate on the other? In other words, why have African courts become hybrid courts? Africa's international courts could very well have justified resisting expansive interpretations on the basis of lack of explicit jurisdiction or by invoking technicalities such as admissibility—as African national judiciaries often do when they do not want to anger governments.<sup>36</sup> Why did they fail to travel the well-trodden path followed by national judiciaries?

Ruti Teitel offers a very plausible suggestion. She asks a question pertinent to this discussion and then answers it:

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<sup>31</sup> See James Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 *BUFF. HUM. RTS. L. REV.* 107, 159 n.104 (1999).

<sup>32</sup> *Id.* at 159.

<sup>33</sup> *Id.* at 154.

<sup>34</sup> *Id.*

<sup>35</sup> In Europe, the European Court of Justice primarily entertains cases arising under European Union law, whereas the European Court of Human Rights entertains cases arising from the European Convention on Human Rights. In the Americas, the Inter-American Court of Human Rights entertains cases under the American Convention on Human Rights, whereas trade disputes are the purview of the various regional dispute settlement mechanisms set up under regional trade agreements such as the North American Free Trade Agreement (NAFTA). In Africa, the African Court of Human and Peoples' Rights has jurisdiction over cases arising from the African Charter on Human and Peoples' Rights but no jurisdiction over any trade disputes. Trade disputes are the purview of the respective sub-regional trade courts which are the subject of this paper.

<sup>36</sup> Rachel Ellet, *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda* 347-48 (1998) (Ph.D. dissertation, Northeastern University) (discussing the timidity of the Tanzanian judiciary).

How does judicial discourse shift power by empowering non-state actors, who in turn, by addressing themselves in various ways to international courts and tribunals and being addressed by them, become agents of legitimacy? International courts and tribunals are well situated to supply a rights-based discourse at least partly detached or autonomous from national political cultures and constitutionalisms—universalizable, secular, transnational – and with the authority of high human values.<sup>37</sup>

In other words, these courts offer a set of rules that are not dependent on national legal orders to be invoked and relied upon by private actors. If Africa's international courts depended on national legal orders for cases to be brought, it is likely they would have few to no cases.<sup>38</sup>

Notably, not all of Africa's international courts have repurposed their mandates to include deciding human rights or environmental cases as those in East, West and Southern Africa have. For example, the Common Market for Eastern and Southern African (COMESA) Court of Justice has largely remained an industrial tribunal.<sup>39</sup> Its case law has primarily arisen from employees of the regional integration organization within which the court is nestled.<sup>40</sup> This court has not, unlike the other African sub-regional courts, decided human rights cases. A large part of the explanation for its unique trajectory in redeploying to

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<sup>37</sup> Teitel further argues quite persuasively that:

[i]n a world that is interdependent but not integrated there quite simply may be a need for a potentially universalizable discourse that can still function in a context of difference between persons and peoples, one that comprehends wrongdoing and atrocities, and can be diffused through multiple institutions that would otherwise be isolated or fragmented – a discourse that allows recognition of individual rights and attribution of individual responsibility and accountability with or without the state, hence arguably allowing for some change. International adjudicators are better situated than many other international institutions to supply this discourse and the discourse is arguably a source of self-legitimization for international courts and tribunals.

Ruti Teitel, *LJIL Symposium: A Consideration of "On the Functions of International Courts: an Appraisal in Light of Their Burgeoning Public Authority,"* OPINIO JURIS, (Apr. 9, 2013), <http://opiniojuris.org/2013/04/09/ljil-symposium-a-consideration-of-on-the-functions-of-international-courts-an-appraisal-in-light-of-their-burgeoning-public-authority/>.

<sup>38</sup> For example, in West Africa, cases alleging a violation of ECOWAS trade rules must be referred to the ECCJ by national courts. So far, no such cases have been referred to the ECCJ. *See* Alter et al., *supra* note 11 at 774–75 (discussing the choice in giving human rights cases direct access to the ECCJ and only indirect access for economic cases because of the requirement of a national reference is a political choice member states made in ECOWAS that has resulted in fewer cases to the Court). In East Africa, there is only one instance of a referral of cases from national courts to the EACJ. *Samuel Mukira Muhochi v. The Attorney General of the Republic of Uganda*, Ref. No. 5 of 2011, East African Court of Justice at Arusha (May 17, 2013) (seeking a preliminary ruling on the interpretation and application of Articles 6(d), 7(2) and 124 of the EAC Treaty, which were at issue in the High Court of Kenya).

<sup>39</sup> Gathii, *Sub-Regional Court or Employment Tribunal?*, *supra* note 12.

<sup>40</sup> *Id.*

become an industrial as opposed to a trade integration court has to do with the lack of civil society interlocutors to bring cases to the court, to defend the court, and to lobby for court reform.<sup>41</sup> This, together with its restrictive interpretive mandate and location—first in Lusaka, Zambia and currently in Khartoum, Sudan—accounts for the court's inability to build a broader jurisdictional reach.<sup>42</sup> In addition, even though it shares similarities in its individual access and jurisdictional rules to other sub-regional courts, it is also limited by an exhaustion of domestic remedies rule, which together with its restrictive interpretive strategy has effectively left it to become an industrial tribunal.<sup>43</sup>

### III. THE SERENGETI CASE AND HOW IT ILLUSTRATES ENVIRONMENTAL REPURPOSING OF AFRICA'S INTERNATIONAL COURTS

In June 2014, the first Instance Division of the EACJ delivered an audacious and unprecedented decision. Audacious because as a regional court it was exercising authority to essentially reverse the decision of a sovereign government to build a road within its own borders, and unprecedented because it is the first decision, as far as I can tell, in which an international court invoked international environmental rules to prohibit a government from undertaking a project because to do so would be inconsistent with those rules. To fully appreciate the significance of that decision, this part of the essay will begin by discussing how Tanzania transformed from a socialist country that valued its environment and eschewed big development projects to a market-oriented economy in which big-development projects that have or are likely to have large adverse impacts on the environment are now the norm. It is this turn from a commitment to environmental conservation towards neo-liberal market reforms that brought together local communities opposed to the road across the Serengeti National Park with international environmental groups. One of their strategies became using the EACJ in their opposition to the road project. Thereafter the essay discusses the various phases of the Serengeti case in the EACJ.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

## A. Tanzania: From Environmental Conservationism to Big Development Projects

The Serengeti National Park, located in Tanzania, is a one and one-half million-hectare park designated by UNESCO as a world heritage site because of its pristine natural habitats, wildlife populations, rich biodiversity, and status as a critical ecosystem in East Africa.<sup>44</sup> The populations that live in the Serengeti National Park are mostly indigenous people who depend on the Serengeti for their livelihood and who have lived sustainably in the park for thousands of years. Tanzania became independent from British colonial rule in 1962 as a socialist country dedicated to preserving and protecting its environment.

In the 1990's, Tanzania's commitment to environmental conservation and preservation ended as its political leadership abandoned the socialist commitment to central planning and environmental conservation and adopted a market-centered, neo-liberal development agenda.<sup>45</sup> In addition, once the government adopted a multi-party system of government in the 1990's, it began seeing the indigenous populations of the Serengeti as a potential voting block.<sup>46</sup> Thus, in 2005, Tanzanian President Jakaya Kikwete promised the inhabitants of the Mara Region, the area west of the Serengeti National Park, that the government would build a road connecting them with eastern Tanzania's markets, hospitals, and other services during his presidential election campaign.<sup>47</sup> From Kikwete's perspective, building a road across the Serengeti was consistent with Tanzania's new commitment to stimulating economic growth through large infrastructural projects, and in the process getting political support for the ruling party from the region's 2.3 million residents.<sup>48</sup> Unlike neighboring Kenya, whose nationalist ruling party was ousted from power more than a decade ago, Tanzania's nationalist party—initially the Tanganyika African National Union (TANU), and since 1977; the Chama Cha Mapinduzi (CCM)—still wields the

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<sup>44</sup> UNESCO designates a place a world heritage site because of its cultural or natural significance as defined under the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage. UNESCO, *Serengeti National Park*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/list/156>.

<sup>45</sup> Michael Chege, *Swapping Development Strategies: Kenya and Tanzania After Their Founding Presidents*, in POLITICAL DEVELOPMENT AND THE NEW REALISM IN SUB-SAHARAN AFRICA 247, 250 (David E. Apter & Carl G. Rosberg eds., 1994).

<sup>46</sup> UNESCO, *supra* note 44.

<sup>47</sup> Jeffrey Gettleman, *Serengeti Road Plan Offers Prospects and Fears*, N.Y. TIMES (Oct. 31, 2010), <http://www.nytimes.com/2010/10/31/world/africa/31serengeti.html>.

<sup>48</sup> ANAW v. Tanzania, *supra* note 1, ¶ 22. Among the ideas the government invoked in building the road was the argument that it would lower transportation costs between Mugumu and Loniondo Centers. *Id.*

reins of government although it has a much weaker opposition political movement than Kenya.<sup>49</sup>

Building the road across the Serengeti therefore symbolizes the stakes between two discordant Tanzanian identities: one as the nation of African socialism, idealized by “its founding father” and first President, Julius Nyerere, as free from corrupting foreign investment and centered on agricultural production;<sup>50</sup> and the other as the nation of Western-friendly capitalism and free markets envisioned by President Kikwete, partially reliant on foreign investment for industrial expansion and economic growth.<sup>51</sup>

As a socialist, one of the principal aims and objectives of Nyerere’s platform was to ensure that the government exercised “effective control over the principal means of production and [pursued] policies which facilitate the way to collective ownership of [Tanzania’s] resources.”<sup>52</sup> Nyerere posited that increased agricultural production and pastoral farming would ignite Tanzania’s development.<sup>53</sup> He warned against investment in a large foreign owned industrial sector,<sup>54</sup> because such development would have to rely on foreign aid and corporate investment that would result in the cession of its freedom to such investors.<sup>55</sup> In addition, Nyerere was committed to conservation and wildlife preservation as he set out in his important Arusha Manifesto in 1961.<sup>56</sup> In this Manifesto he solemnly declared on behalf of his nation to preserve the “rich and precious inheritance” of Tanzania’s wildlife and habitat for future generations.<sup>57</sup> He believed Tanzania’s success or failure of this task “would not only [affect] the continent of Africa but the rest of the world as well.”<sup>58</sup>

<sup>49</sup> On Tanzania’s opposition, see generally Barak Hoffman & Lindsay Robinson, *Tanzania’s Missing Opposition*, 20 J. OF DEMOCRACY 123 (2009) (discussing how CCM suppresses any opposition to its near-monopoly of power).

<sup>50</sup> *Tanzania: Kikwete Support Will Spur Serengeti Road*, OXFORD ANALYTICA DAILY BRIEF (Oct. 1, 2010), <https://dailybrief.oxan.com/Analysis/DB163089/TANZANIA-Kikwete-support-will-spur-Serengeti-Road>.

<sup>51</sup> For an account of President Kikwete’s development plans, see *The Tanzania Five Year Development Plan 2011/2012-2015/2016: Unleashing Tanzania’s Growth Potentials*, THE UNITED REPUBLIC OF TANZANIA PRESIDENT’S OFFICE, PLANNING COMMISSION, (June 2011), [http://www.tzdp.gov.or.tz/fileadmin/\\_migrated/content\\_uploads/FYDP-2012-02-02.pdf](http://www.tzdp.gov.or.tz/fileadmin/_migrated/content_uploads/FYDP-2012-02-02.pdf).

<sup>52</sup> Julius K. Nyerere, *The Arusha Declaration*, in UJAMAA – ESSAYS ON SOCIALISM 13, 15 (1968).

<sup>53</sup> *Id.* at 29.

<sup>54</sup> Julius K. Nyerere, *The Purpose is Man*, in UJAMAA – ESSAYS ON SOCIALISM 91, 96 (1968).

<sup>55</sup> Nyerere, *The Arusha Declaration*, *supra* note 52, at 25–26.

<sup>56</sup> *Conservation Critical to Tanzania’s Future*, MELLOWSWAN FOUNDATION AFRICA-TANZANIA (Aug. 17, 2010), <http://mellowswan africa.org/arusha-manifesto/>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Yet, however well intended Nyerere's commitment was to development through socialism, Tanzania's economy stagnated with only 0.2% growth in real per capita GDP between 1976 and 1984.<sup>59</sup> The nationalization of Tanzania's major commodities led to a sharp decline in production, and the large bureaucracy in Dar es Salaam, Tanzania's capital, led to corruption, patronage, and high import and export taxes.<sup>60</sup> Finally, in June of 1986, a gathering of Tanzania's leading donors in Paris, under the chairmanship of the World Bank, adopted an economic recovery program for Tanzania with market-production priorities.<sup>61</sup> However, while the program may have caused positive GDP growth, it also led to rising income inequality and a collapse of government-provided services.<sup>62</sup>

In contrast to Nyerere's ideal of a socialist Tanzania, President Kikwete, who has continued the 1986 market-oriented economic program for Tanzania, relies on foreign government borrowing and assistance as well as on foreign investors to develop Tanzania's infrastructure, exploit its natural resources, and spur its economy.<sup>63</sup> President Kikwete's economic vision includes a reliable and extensive road network to connect the remote regions of Tanzania to its capital, Dar es Salaam.<sup>64</sup> This road network, including the Serengeti road, will, according to this vision, lower the cost of business in the country and attract investment.<sup>65</sup> Some of the residents of the Serengeti National Park and its environs support the road project because the Mara region is not connected with the large urban markets in eastern Tanzania.<sup>66</sup> For example, Edward Porokwa, the head of the Pastoralists Indigenous Non-Government Organizations, argued that Kenya benefits from cheap Tanzanian cattle at the expense of Tanzanian cattle herders west of the Serengeti who have no access to eastern Tanzania's urban markets.<sup>67</sup>

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<sup>59</sup> Chege, *supra* note 45, at 247, 250.

<sup>60</sup> *Id.* at 268-89, 272-73.

<sup>61</sup> *Id.* at 273.

<sup>62</sup> *Id.*

<sup>63</sup> Paul Kibuuka, *Tanzania: Gov't Now Views Private Sector as Engine for Growth*, ALLAFRICA.COM (Aug. 7, 2014), <http://allafrica.com/stories/201408070465.html>.

<sup>64</sup> Deogratias Mushi, *Tanzania: Reflecting on Kikwete's Five Year Development Plan*, ALLAFRICA.COM (Dec. 22, 2011), <http://allafrica.com/stories/201112230262.html>.

<sup>65</sup> *Tanzania: Kikwete Talks Tough on Roadblocks*, ALLAFRICA.COM (Mar. 22, 2015), <http://allafrica.com/stories/201503232142.html>.

<sup>66</sup> George Omondi, *Kenya, Tanzania Experts Differ on Serengeti Road Plan*, BUSINESS DAILY (Aug. 21, 2013), <http://www.businessdailyafrica.com/Kenya-and-Tanzania-experts-differ-on-Serengeti-road-plan/-/539546/1962852/-/11njmi3z/-/index.html>.

<sup>67</sup> Marc Nkwame, *East Africa: NGOs Attack Kenya Over Serengeti Highway*, ALLAFRICA.COM (Apr. 30, 2012), <http://allafrica.com/stories/201204300003.html>.

President Kikwete has also announced plans to transform the port at Dar es Salaam into a major regional transport center connecting the county and its landlocked neighboring countries to the rest of the world.<sup>68</sup> In order to fund these projects and attract investment, the Tanzanian government relied upon foreign investment<sup>69</sup> and the profits from the privatization of formerly state-run operations, such as those at the port at Dar es Salaam.<sup>70</sup> The government also believes the privatization of the port's services will attract more business to the port as its efficiency increases.<sup>71</sup>

Yet, President Kikwete does not wholly disregard agriculture as a means of development; he simply believes that industrial farming will result in exportable outputs.<sup>72</sup> His vision of development, however, is exactly what Nyerere feared would cause a loss of Tanzanian freedom and the Serengeti road's possible threat to spectacular wildebeest migration from Kenya's Maasai Mara to Tanzania's Serengeti National Park—a migration considered to be a modern “wonder of the world.”<sup>73</sup> In addition, in 2012, President Kikwete attempted to evict the Maasai, an indigenous group of pastoral herders whose ancestral land spans the Maasai Mara Game Reserve in southern Kenya into the Serengeti and surrounding regions in Tanzania,<sup>74</sup> from the Loliondo region.<sup>75</sup> While Nyerere believed the Tanzanian identity resided with these small-scale pastoral herders and farmers, President Kikwete has argued that a “nomadic lifestyle is unproductive,” and would remove the Maasai to make way for efficient agricultural production.<sup>76</sup>

Additionally, Tanzania's development plans directly challenge those of the regional economic powerhouse, Kenya. For example, the planned development

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<sup>68</sup> Edmund Blair & Fumbuka Ng'Wanakilala, *Tanzania President Maps Out Plans for Transport Hub*, REUTERS (Apr. 11, 2014), <http://www.reuters.com/article/2014/04/11/africa-summit-tanzania-transportation-re-idUSL6N0N346U20140411>.

<sup>69</sup> *Id.*

<sup>70</sup> Alex Ngarambe, *Less Delays at Port of Dar as Services are Privatized*, THE EAST AFRICAN (Jul. 12, 2013), <http://www.theeastafrican.co.ke/Rwanda/Business/Less-delays-at-port-of-Dar-as-services-are-privatised/-/1433224/1912856/-/jfaoyz/-/index.html>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *The Maasai People*, MAASAI ASSOCIATION, <http://www.maasai-association.org/maasai.html> (last visited Dec. 1, 2015).

<sup>75</sup> Jason Patinkin, *Maasai Fury as Plan to Lure Arabian Gulf Tourists Threatens Their Ancestral Land*, THE GUARDIAN (Mar. 30, 2013), <http://www.theguardian.com/world/2013/mar/30/maasai-game-hunting-tanzania>.

<sup>76</sup> *Id.*

of the Dar es Salaam port would compete with the port at Mombasa, “east Africa’s main gateway,” and Kenya’s plans to construct a new port at Lamu to transport goods from its own landlocked neighbors to the world.<sup>77</sup> It is very plausible therefore that another motivation for building the road is to challenge Kenya’s economic dominance in the region so that Tanzania could become an alternative to Kenya as the “main gateway” to east Africa.<sup>78</sup> It is notable that Tanzania was initially excluded from the “Coalition of the Willing,” by Kenya, Uganda, and Rwanda, a coalition that is more intent on quickly collaborating to implement regional infrastructural projects to quicken the pace of the East African Community integration agenda.<sup>79</sup> The Coalition eventually included Tanzania, but it caused political friction between itself and Tanzania.<sup>80</sup>

## B. ANAW and the Filing of the Serengeti Case

Founded in 2006, Africa Network for Animal Welfare (ANAW) is a pan-African non-profit environmental conservation organization based in Nairobi, Kenya.<sup>81</sup> ANAW is dedicated to promoting the humane treatment of wild, farm, working, and companion animals and the well-being of communities that live in proximity to these animals.<sup>82</sup> ANAW proceeds from the assumption that wild animals are sentient beings and that they have “feelings, emotions and respond to psychological and physiological changes in the environment.”<sup>83</sup> ANAW’s work has a grassroots focus. This means that it is engaged in efforts with the communities who are in most direct contact with animals with a view to enhancing their mutual welfare.<sup>84</sup> In addition, ANAW aims to build partnerships and networks with “other animal welfare organizations and governments in Kenya and across Africa.”<sup>85</sup> ANAW argues its successes include keeping sport hunting out of wildlife policy and legislation in Kenya; removing and destroying

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<sup>77</sup> Blair & Ng’Wanakilala, *supra* note 68.

<sup>78</sup> *Id.*

<sup>79</sup> Muthoki Mumo, *Tanzania, Burundi to Join “Coalition of the Willing,”* DAILY NATION (Feb. 25, 2014), <http://www.nation.co.ke/lifestyle/smartcompany/Tanzania-Burundi-to-join-coalition-of-the-willing/-/1226/2220606/-/1uwfcw/-/index.html>.

<sup>80</sup> *Id.*

<sup>81</sup> African Network for Animal Welfare, *Page Info*, FACEBOOK, [https://www.facebook.com/pages/Africa-Network-for-Animal-Welfare-ANAW/104162487424?sk=info&tab=page\\_info](https://www.facebook.com/pages/Africa-Network-for-Animal-Welfare-ANAW/104162487424?sk=info&tab=page_info) (last visited Nov. 11, 2015).

<sup>82</sup> *Who We Are*, AFRICAN NETWORK FOR ANIMAL WELFARE, <http://www.anaw.org/index.php/about-us/who-we-are> (last visited Dec. 1, 2015).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

hundreds of snares and therefore saving thousands of animals from poachers; and lecturers from universities and welfare representatives from various African countries about the use of alternatives to lab animals in higher learning.<sup>86</sup> It lists as successes the filing of the Serengeti case against Tanzania in the EACJ in addition to hosting Pan-African and international conferences and workshops.<sup>87</sup>

Saitabao Ole Kanchory, the attorney ANAW hired to bring the Serengeti case against the government of Tanzania, had, prior to being instructed to file the Serengeti case, provided legal advice to ANAW.<sup>88</sup> Ole Kanchory had also been involved in advocacy and litigation in Kenya for and on behalf of indigenous communities dispossessed of their land as a result of government policies and infrastructural projects.<sup>89</sup> He initially wrote a legal opinion for ANAW about the feasibility of bringing the case against the government of Tanzania in the EACJ.<sup>90</sup> ANAW was guided by this legal opinion in deciding to instruct him to file the case.<sup>91</sup> ANAW's Executive Director has argued his organization's mission in bringing the case was designed to "be of future benefit not only to Tanzanians or East Africans but also the entire humanity [sic]."<sup>92</sup>

Serengeti Watch, which I discuss more extensively below, partnered with ANAW in part by providing funding through its Serengeti Legal Defense Fund to ANAW for legal fees and research trips.<sup>93</sup> The Friends of the Serengeti also

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<sup>86</sup> *Our Work: Policies and Legislation*, AFRICAN NETWORK FOR ANIMAL WELFARE, <http://www.anaw.org/index.php/programs/policy-legislation> (last visited Dec. 1, 2015); Rachel Cernansky, *Turning African Wildlife into Money-makers Rather Than Dinner*, TAKEPART (Apr. 13, 2015), <http://www.takepart.com/article/2015/04/13/freing-snared-wildlife-kenya-poachers-snares>; Bobbie Hasselbring, *Hunted To Extinction*, THE CHRONICAL MAGAZINE (Sept. 29, 2014), <http://www.lclark.edu/live/news/28022>; *First FAO Global Multi-Stakeholder Forum on Animal Welfare*, AFRICA NETWORK FOR ANIMAL WELFARE, (2012), [http://www.fao.org/fileadmin/user\\_upload/animalwelfare/ANAW.pdf](http://www.fao.org/fileadmin/user_upload/animalwelfare/ANAW.pdf).

<sup>87</sup> *See Support Our Legal Action to save the Serengeti*, AFRICA NETWORK FOR ANIMAL WELFARE, (Apr. 5, 2011), <https://africanetworkforanimalwelfare.wordpress.com/2011/04/05/support-our-legal-action-to-save-the-serengeti/> (noting that the case is important).

<sup>88</sup> Interview with Saitabao Ole Kanchory, attorney for ANAW, Nairobi, Kenya (Sept. 27, 2015).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* John Mbaria, *Win for Conservationists as East African Court Stops Serengeti Road*, THE EAST AFRICAN (June 21, 2014), <http://mobile.theeastafrican.co.ke/News/Wildlife-conservation-East-African-Court-stops-Serengeti-road/-/433842/2357172/-/format/xhtml/item/1/-/9tywjq/-/index.html>.

<sup>92</sup> Interview with Saitabao Ole Kanchory, *supra* note 88; *see also* Africa Network for Animal Welfare – USA, *Save the Serengeti*, LOVEANIMALS.ORG, <http://www.loveanimals.org/anaw-save-the-serengeti.html>.

<sup>93</sup> Friends of the Serengeti, *The Serengeti Highway Battle Won, the War with the Courts Continues*, AFRICA GEOGRAPHIC (Jul. 30, 2014), <http://africageographic.com/blog/the-serengeti-highway-battle-won-the-war-with-the-courts-continue/>.

provided funds for the Serengeti Legal Defense Fund.<sup>94</sup> ANAW-USA, ANAW's American counterpart, had an online campaign to fund the case.<sup>95</sup> Contributors were asked to donate to the organization through its website.<sup>96</sup>

The international alliance that ANAW brought together in the Serengeti case must be understood as a counterpart to the grassroots organizing around animal welfare issues in Africa that ANAW had been part of before. In addition, the lawyer hired by ANAW to file the case, Saitabao Ole Kanchory, had been involved in filing cases in the Kenyan High Court on environmental conservation on behalf of Maasai communities affected by development projects.<sup>97</sup> He had, for example, represented the Maa Community in its challenge of appointments to the Kenyan National Land Commission,<sup>98</sup> indicating his prior commitment to issues surrounding Maasai community and their land rights. ANAW and perhaps the Serengeti Legal Defense Fund, insofar as I can tell, provided funding for Mr. John Kuloba, the Kenyan environmental impact assessment specialist<sup>99</sup> who evaluated the impact of the Serengeti road and concluded the project should be abandoned due to its negative impacts on the ecosystem, he also testified on behalf of ANAW in the case.<sup>100</sup>

ANAW was therefore the glue that brought together mobilized grassroots indigenous communities, on the one hand, and international environmental and conservation groups, on the other, in their efforts to defeat the building of the road.

### C. International NGO Opposition to the Serengeti Road

Although President Kikwete promised to build the Serengeti road in his 2005 election campaign, international mobilization against it did not begin until 2010.<sup>101</sup> An article published in 2013 in *Departures*, a travel magazine, reported

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<sup>94</sup> Wouter Vergeer, *Travel Association Seek to Save the Serengeti*, SAFARI BOOKINGS BLOG (Jun. 27, 2014), <https://www.safaribookings.com/blog/158>.

<sup>95</sup> Africa Network for Animal Welfare – USA, *supra* note 92.

<sup>96</sup> *Id.*

<sup>97</sup> See Ben Ole Koissaba, *Elusive Justice: The Maasai Contestation of Land Appropriation in Kenya; A Historical and Contemporary Perspective*, INTERCONTINENTAL MAGAZINE (Jan. 28, 2015), <https://intercontinentalcry.org/elusive-justice-maasai-contestestation-land-kenya/> (citing S.O. Kanchory, *The Proposed Maasai Land Case Brief* (2006)).

<sup>98</sup> Dr. Kimpei Munei v. the National Land Commission Selection Panel and the Attorney General, Petition 266 of 2012, The High Court of Kenya at Nairobi, Milimani Law Courts (2012).

<sup>99</sup> Omondi, *supra* note 66.

<sup>100</sup> *Id.*

<sup>101</sup> Gettemen, *supra* note 47; Mark Seal, *The Fight Over the Serengeti Highway*, DEPARTURES (Sept. 19, 2013), <http://www.departures.com/travel/travel/fight-over-serengeti-highway>.

that Dr. Dennis Rentsch of the Frankfurt Zoological Association had uncovered Tanzania's plan to pave the road in May of 2010.<sup>102</sup> Dr. Rentsch inferred from tiny red flags dotting the trees along the current road that a construction project through the Serengeti would soon begin.<sup>103</sup> He quickly conveyed this information to his boss, Dr. Markus Bonner, who then attempted to use the agency's influence to stop the construction of the road.<sup>104</sup> When this effort proved unsuccessful, Dr. Christof Schenck, the director of the Frankfurt Zoological Society, sent a letter dated May 31, 2010 to President Kikwete urging him to halt the construction.<sup>105</sup> Dr. Schenck also sent a copy of the letter to a *New York Times* "Opinionator" writer Olivia Judson.<sup>106</sup> Judson then published an opinion on June 15, 2010 on her and the international community's concerns over the proposed road's bisection of the annual wildebeest migration route, now designated as an additional "wonder of the world," and the greater accessibility the road would provide to poachers.<sup>107</sup> Additionally, Dr. Bonner, along with other conservationists and scientists, published an article in *Nature* on September 16, 2010 that decried the planned construction of the road.<sup>108</sup> This enhanced international awareness about the planned road and its potential environmental impact.<sup>109</sup>

Several NGOs became aware of the construction project and began to organize an international response to it.<sup>110</sup> In May 2010, Boyd Norton learned from his Maasai friends of the Tanzanian government's Serengeti highway construction plan.<sup>111</sup> Within a few days Norton created the "Stop the Serengeti Highway" Facebook page that quickly drew international attention to the issue and began to organize opposition to the road.<sup>112</sup> In the fall of 2010, Norton and Dave Blanton, along with the Earth Island Institute, a U.S. conservation-focused

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<sup>102</sup> Seal, *supra* note 101.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Olivia Judson, *Road Kill in the Serengeti?*, NY TIMES OPINIONATOR BLOG (Jun. 15, 2010), [http://opinionator.blogs.nytimes.com/2010/06/15/road-kill-in-the-serengeti/?\\_r=0](http://opinionator.blogs.nytimes.com/2010/06/15/road-kill-in-the-serengeti/?_r=0).

<sup>107</sup> *Id.*

<sup>108</sup> Andrew P. Dobson, et al., *Road Will Ruin Serengeti*, 467 NATURE 272, 272 (2010).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Boyd Norton, *Protecting One of the Great Wildlife Reserves on Earth*, 30 EARTH ISLAND J. 15, 15 (Summer 2015).

<sup>112</sup> *Id.*

NGO based in Berkeley, CA,<sup>113</sup> created a project named “Serengeti Watch.”<sup>114</sup> The Serengeti Watch’s social media campaigns, outreach with other international NGO’s and governments, and organization of Serengeti tourism companies created a diverse and extensive opposition movement to the road.<sup>115</sup> For example, the organization formed the “Friends of the Serengeti” to protect the Serengeti from environmental degradation through sustainable tourism and activism.<sup>116</sup> The Friends of the Serengeti believe that building the road across the Serengeti National Park would decrease the flow of tourists and could lead to major economic losses in an already poor region.<sup>117</sup> Once the road gained international attention, the African Wildlife Foundation, as well as the German government and the World Bank,<sup>118</sup> opposed the plan and supported the road’s construction further south.<sup>119</sup>

#### D. The Serengeti Case in the East African Court of Justice

ANAW filed the case against Tanzania in 2010 seeking a permanent injunction against the government of Tanzania’s proposed construction and maintenance of a 53-kilometer section of the Natta-Mugumu – Tabora B-Kleins Gate – Loliondo Road (“the Road”) across the Serengeti National Park.<sup>120</sup> According to the Tanzanian government, the primary users of the road would be tourists and officials of the Tanzania National Park Authority (TNPA).<sup>121</sup> Any who wished to use the road other than tourists of TNPA would be required to obtain authorization from the park’s management.<sup>122</sup> ANAW’s suit sought an

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<sup>113</sup> *About Us*, EARTH ISLAND INST., <http://www.earthisland.org/index.php/aboutUs/> (last visited Dec. 1, 2015).

<sup>114</sup> *About Us*, SERENGETI WATCH, <http://www.savetheserengeti.org/about-us/> (last visited Dec. 1, 2015).

<sup>115</sup> *Id.*

<sup>116</sup> Vergeer, *supra* note 94; see also *About Friends of Serengeti*, FRIENDS OF SERENGETI, <http://friendsofserengeti.org/home-2/about/> (last visited Dec. 1, 2015); Christopher Doyle, *Save the Serengeti: An ATTA Call to Action*, ADVENTURE TRAVEL NEWS (2010), <http://www.adventuretravelnews.com/save-the-serengeti-an-atta-call-to-action>.

<sup>117</sup> *About Friends of Serengeti*, FRIENDS OF SERENGETI, <http://friendsofserengeti.org/home-2/about/> (last visited Dec. 1, 2015).

<sup>118</sup> Tracy McVeigh, *Frantic Bid to Save Wildebeest’s Serengeti Refuge*, THE GUARDIAN (Mar. 27, 2011), <http://www.theguardian.com/world/2011/mar/27/serengeti-highway-national-park>.

<sup>119</sup> *Worldwide Opposition to Serengeti Road Has Yet to Sway Tanzanian Government*, AFRICAN WILDLIFE FOUNDATION (Mar. 15, 2011), <http://www.awf.org/news/worldwide-opposition-serengeti-road-has-yet-sway-tanzanian-government>.

<sup>120</sup> ANAW v. Tanzania, *supra* note 1, ¶¶ 1-2, 5, 17.

<sup>121</sup> *Id.* ¶ 9.

<sup>122</sup> *Id.*

injunction against the government of Tanzania’s plans to “upgrade, tarmac, pave, realign, construct, create, and/or commission a trunk road across the northern wilderness of the park.”<sup>123</sup>

ANAW asked the court for a number of remedies: first, to permanently prevent the Tanzanian government from “maintaining any road or highway across any part of the Serengeti National Park.”<sup>124</sup> Second, that the court declare that the construction of the road would violate Tanzania’s obligations under the Treaty for the Establishment of the East African Community (“the EAC Establishment Treaty”). Third, that the court find the government of Tanzania accountable for violating its obligations under the EAC Establishment Treaty.<sup>125</sup> Notably, the Tanzanian government initially planned to upgrade the entire 239-kilometer road to asphalt.<sup>126</sup> However, after local and international opposition from NGOs and UNESCO<sup>127</sup> and a government-hired consultant firm advised against paving the road through the Serengeti,<sup>128</sup> the government decided to upgrade the 53-kilometer section passing through the Serengeti “to gravel status only.”<sup>129</sup> The Tanzanian government abandoned its plan to construct a paved road through the Serengeti after it was advised a paved road would likely cause environmental damage and disrupt the annual wildebeest migration—regarded by many as a spectacular wildlife event.<sup>130</sup>

The Tanzanian government first filed a jurisdictional challenge and argued that the case was time-barred.<sup>131</sup> On August 26, 2011, Tanzania’s objections were overruled.<sup>132</sup> The EACJ’s First Instance Division determined that it had jurisdiction over environmental cases brought by any resident of the East African Community and that it had the power to issue a permanent injunction preventing Member States from engaging in any conduct that may “affect the well-being of a shared resource.”<sup>133</sup> However, in October 2011 Tanzania

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<sup>123</sup> *Id.* ¶¶ 10, 17.

<sup>124</sup> *Id.* ¶ 17.

<sup>125</sup> *Id.* ¶ 17(i).

<sup>126</sup> *Id.* ¶ 12.

<sup>127</sup> *Id.* ¶ 27.

<sup>128</sup> *Id.* ¶ 19.

<sup>129</sup> *Id.* ¶ 28.

<sup>130</sup> *Id.* ¶ 56.

<sup>131</sup> *Id.* ¶ 6.

<sup>132</sup> *Id.*

<sup>133</sup> SAVE THE SERENGETI, *Chronology of ANAW Lawsuit to Block the Highway*, FACEBOOK (Feb. 2, 2012), <https://www.facebook.com/notes/stop-the-serengeti-highway/chronology-of-anaw-lawsuit-to-block-the-highway/344571812240687> [hereinafter ANAW, *Chronology*].

appealed this ruling, stating that the court did not have jurisdiction.<sup>134</sup> As a result, the case was sent to the appellate court.<sup>135</sup>

On March 15, 2012, the EACJ Appellate Division ruled in the ANAW's favor by dismissing the government's appeal.<sup>136</sup> In Tanzania's reply to the reference filed in the hearing on the merits in the First Instance Division, it argued first that the road as it currently existed had been in use without any negative impact on the park, and second that it was not the first road of its kind.<sup>137</sup> Tanzania further argued that the case should be dismissed because a Protocol on the Environment envisaged in the EAC Establishment Treaty had not yet been enacted.<sup>138</sup> Tanzania also argued that the EACJ did not have jurisdiction to determine if there were violations of non-EACJ treaties such as International Conventions and Declarations on Environment and Natural Resources.<sup>139</sup> The First Instance Division ruled in favor of ANAW and against Tanzania on June 20, 2014.<sup>140</sup> According to the court, the applicants had demonstrated that Tanzania intended to upgrade, tarmac, pave, realign, create and/or commission a trunk road across the northern wilderness of the world-famous Serengeti.<sup>141</sup> Further, the court held that the provisions relating to the environment in the EAC Establishment Treaty were in force as they were properly ratified, notwithstanding the fact that a Protocol on the Environment had yet to come into force.<sup>142</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare (ANAW), Appeal No. 3 of 2011, Judgment, East African Court of Justice at Arusha App. Div., at 26 (Mar. 15, 2012), <http://eacj.huriweb.org/wp-content/uploads/2012/10/Appeal-Ref-No.-3-of-20111.pdf> [hereinafter Tanzania v. ANAW I].

<sup>137</sup> ANAW v. Tanzania, *supra* note 1, ¶ 19.

<sup>138</sup> *Id.* ¶ 29.

<sup>139</sup> *Id.* ¶ 44.

<sup>140</sup> ANAW, *Chronology*, *supra* note 133.

<sup>141</sup> Tanzania v. ANAW II, *supra* note 2, ¶ 59 (summarizing lower court's findings).

<sup>142</sup> *Id.* ¶ 22–29. The Court cited Article 151 which provides that the protocol “non-conclusion of a protocol does not oust obligations placed on a Partner State by the Treaty itself.” Article 153(1) which the Court cited to buttress its conclusions provides that: “This Treaty and all instruments of ratification and deposit of instruments shall be deposited with the Secretary General who shall transmit certified true copies thereof to all the Partner States.” In addition, there was no evidence that Tanzania or any other Partner State never ratified EACT; however, there was evidence, the Court noted, that Tanzania ratified the Treaty on June 28, 2000. Tanzania was therefore bound by each provision within the EACT according to the court. The Court therefore held that Chapter Nineteen, which relates to the environment, is binding on Tanzania and therefore overruled this as a basis for objecting to the suit.

On whether the applicants were entitled to permanently bar the government of Tanzania from building the road, the court held that if the road project were implemented as originally planned, the effects would be devastating both for the park and neighboring parks, and therefore it shall not be built.<sup>143</sup> The court was sensitive to the arguments of the government of Tanzania, observing in part that while the aim of its decision was to prevent future degradation of an ecosystem, this must be done without taking away the government's ability to develop the economy of the region.<sup>144</sup>

The government of Tanzania then appealed this decision of the First Instance Division to the Appellate Division.<sup>145</sup> In the Memorandum of Appeal, the Tanzanian Attorney General prayed the court to set aside the judgment of the First Instance Division, allow its appeal with costs, and make any other orders it deems just and equitable.<sup>146</sup> Tanzania argued the following grounds for the appeal: first that, the First Instance Court erred in law and fact by issuing a judgment on the Tanzanian government's proposal to upgrade the road to asphalt.<sup>147</sup> Second, that the First Instance Court erred in law and fact in its enforcement of Articles 111–14 of the EAC Establishment Treaty as it has yet to be negotiated, agreed, signed, and ratified by all of the Partner States.<sup>148</sup> Third, that the lower court incorrectly concluded that it had jurisdiction to settle disputes based on other international declarations and conventions outside of the EACT.<sup>149</sup> And finally, the First Instance Court wrongfully granted a permanent injunction against Tanzania as it lacks the power to do so under the EACT.<sup>150</sup> In the Scheduling Conference on September 8, 2014, the parties agreed that the Appellant's four grounds for appeal would comprise the agreed issues for the court's consideration along with a fifth issue of whether the parties

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<sup>143</sup> *Id.* ¶ 82.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ¶ 3.

<sup>146</sup> *Id.* ¶ 4.

<sup>147</sup> *Id.* ¶ 3.

<sup>148</sup> *Id.* Article 111(1)(b) of the Establishment Treaty provides in part that the Partner States shall undertake to take actions “for the protection and conservation of the natural resources and environment against all forms of degradation and pollution arising from developmental activities”; Article 112(1)(e) commits the Partner states to “integrate environmental management and conservation measures in all development activities such as trade, transport, agriculture, industrial development, mining and tourism in the Community”; Article 113 contains commitments on preventing the illegal trade in and movement of toxic chemicals, substances and hazardous wastes; while Article 114(1)(a) obliges Partner States to “take necessary measures to conserve their natural resources.”

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

were entitled to the remedies sought.<sup>151</sup> Both the Appellant and the Respondent, ANAW, filed submissions and the court decided the case on July 29, 2015.<sup>152</sup>

On the question whether the First Instance Division erred in law by enforcing Articles 111–114 of the EACT when those Articles have yet to be negotiated, agreed to, signed, and ratified by all EACT partner states through an appropriate protocol, Tanzania lost the appeal.<sup>153</sup> These provisions impose on EACT Member States obligations, duties, and undertakings with regard to their mutual cooperation on environmental issues.<sup>154</sup> The Appellate Division held that all provisions of the EACT (Articles 5(3)(c)–114(1)) are “live and vibrant” provisions of the EACT and, as such, are subject to the Court’s interpretation and application pursuant to its Article 27(1) power to do so and its Article 23(1) power to ensure compliance with the EACT.<sup>155</sup> The Appellate Division held that the failure of EACT partner states to ratify a Protocol on the Environment and Natural Resources does not void the obligation of the Partner States to be bound by the EACT and has nothing to do with the Court’s ability to interpret and apply Articles 111–114.<sup>156</sup>

The Appellate Division held that Articles 111–114 of the EAC Establishment Treaty, which relate to environmental obligations, responsibilities, and standards of EAC states, are self-executing and do not require a protocol or other special act, process, procedure or proceeding to establish their enforcement.<sup>157</sup> In a very important finding the Appellate Division affirmed that these provisions are not only obligations of the Partner States, but also causes of action allowing an injured party to seek a remedy against the state for their breach without having to demonstrate “a personal tort, right, infringement, injury or damage specific to himself.”<sup>158</sup> The Appellate Division held that the EAC Establishment Treaty does not require the Partner States to ratify a Protocol on the Management of the Environment and Natural Resources in order for Articles 111–114 to become enforceable.<sup>159</sup>

ANAW also prevailed on the question of whether the First Instance Division had erred in law by considering whether Tanzania had violated non-

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<sup>151</sup> *Id.* ¶ 5.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* ¶¶ 33–39.

<sup>154</sup> *Id.* ¶ 22.

<sup>155</sup> *Id.* ¶ 23.

<sup>156</sup> *Id.* ¶ 24.

<sup>157</sup> *Id.* ¶ 25.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

EAC international environmental declarations and conventions such as the African Convention on the Conservation of Nature and Natural Resources of 2003, the Rio Declaration of 1992, the Stockholm Declaration, the U.N. Convention on Migratory Species of Wild Animals, the U.N. Convention of Biodiversity of 1992, and the U.N. Declaration on the Environment and Development of 1992.<sup>160</sup> The Appellate Division found that the First Instance Court's decision did not rely on these non-EAC international conventions and declarations regarding environmental protection.<sup>161</sup> The Appellate Division noted that even if the First Instance Division had considered aspects of these international instruments, it would not "have been unduly alarmed" because EAC Member States "do subscribe to the various standards, norms and values of these Conventions."<sup>162</sup> The Appellate Division ruled, by analogy to another of its decisions on human rights, that there is nothing that precludes it from referring to relevant provisions of non-EAC treaties "in order to interpret the EAC Treaty."<sup>163</sup> It further ruled that such references are relevant where the EACT recognized in the language of the EAC treaties and as such become "*ipso jure* obligations" of EAC Member States.<sup>164</sup>

On the question of whether the court has jurisdiction to grant permanent injunctions against sovereign EAC Partner States, the Appellate Division held that the Court had jurisdiction to issue a permanent injunction against EAC Partner States.<sup>165</sup> It held that a permanent injunction is an equitable remedy "encapsulated" within Article 23(1) of the EACT as well as Rule 1(2) of the court's Rules of Procedure derived from Article 42 of that treaty.<sup>166</sup> The Appellate Division concluded that the EACJ's power to grant a permanent injunction is an inherent right available to every court of law in order to adjudicate cases.<sup>167</sup>

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<sup>160</sup> *Id.* ¶ 40.

<sup>161</sup> *Id.* ¶ 47.

<sup>162</sup> *Id.* ¶ 48.

<sup>163</sup> *Id.* ¶ 49.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* ¶¶ 50–56.

<sup>166</sup> *Id.* ¶ 51. According to the court, Article 23(1) names the EACJ a "judicial body" with the ability to "ensure" the Partner States adhere to their EACT obligations. *Id.* ¶ 53. In order to be a judicial body and fulfill its role to hold Partner States accountable to the EACT, the Court must have the attributes of other judicial bodies, such as the ability to grant permanent injunctions. *Id.* Additionally, Rule 1(2) of the Court's Rules of Procedure provides that nothing in the Rules may, "limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice," like a prohibition granting permanent injunctions against Partner States. *Id.* ¶ 54.

<sup>167</sup> *Id.* ¶ 55.

The foregoing finding sits in stark contrast to the Appellate Division's final finding on the question of whether the First Instance Division properly considered Tanzania's reference challenging the Applicant's "mere proposal" to construct the Serengeti road.<sup>168</sup> Here, the Appellate Division's judgment is murky for several reasons. First, the question whether what ANAW was challenging was a "mere proposal" or not was not litigated in any earlier parts of the case. Tanzania raised it for the first time in the appeal against the merits decision of the First Instance Division.<sup>169</sup> The Appellate Division recognized this issue was being raised for the first time in the appeal.<sup>170</sup> Notwithstanding the fact that this issue was being raised for the first time, the Appellate Division curiously held that the First Instance Division Court had the obligation to confirm that ANAW's case centered on a "real live dispute," and not a mere proposal to build a road.<sup>171</sup> Relying on cases it had decided earlier on the question of mootness,<sup>172</sup> the Appellate Division held that the function of the EACJ courts is to rule on concrete disputes between adverse parties, not to entertain hypothetical questions.<sup>173</sup> It held that under Article 30 of the EACT, parties may only "challenge the legality of an 'act, regulation, directive, decision, or action' of a Partner State" that it alleges violates the EACT.<sup>174</sup> Actions of the Applicant that may have constituted a disputable action include agreed upon architectural plans and drawings and/or bills of quantities.<sup>175</sup> The Appellate Division relied on a statement made by the First Instance Division Court to the effect that "all parties now agree that if the initial plan [were] implemented," its negative impacts on the Serengeti would not outweigh the benefit of connecting the residents of Mugumu-Loliondo to Dar es Salaam.<sup>176</sup> This statement, according to the Appellate Division, demonstrated that Tanzania had abandoned its proposal to construct a paved road across the Serengeti. For this reason the Appellate Division held that such inaction or omission by a Partner State could not constitute a cause of action under Article 30 of the EACT. This is because

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<sup>168</sup> *Id.* ¶ 58–80.

<sup>169</sup> *Id.* ¶ 64.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* ¶ 67.

<sup>172</sup> *Id.* ¶¶ 68–70.

<sup>173</sup> *Id.* ¶ 71.

<sup>174</sup> *Id.* ¶ 75.

<sup>175</sup> *Id.* ¶ 76.

<sup>176</sup> *Id.* ¶ 74.

challenging a proposal as opposed to conduct would not suffice to be a case in controversy under Article 30.<sup>177</sup>

These findings that ANAW's case challenged a "mere proposal" to build a road and that it was unactionable sit in sharp contrast to the Appellate Division's endorsement of ANAW's case in other respects. For example, in ordering that each party to the case bear their own costs, the Appellate Division noted that ANAW had

partially triumphed in their quest (in this, the first Environmental Case of its kind to be brought before this Court). They brought the Reference and have prosecuted it not out of any wish for personal, corporate, or private gain; but out of the public spirited interest of the noblest kind—namely conservation, preservation and protection of a natural resource which . . . is truly a gem of a heritage, one-of-a-kind for all mankind.<sup>178</sup>

A second reason for the murkiness of the Appellate Division's judgment is that it did not explicitly lift the permanent injunction that was imposed by the First Instance Division.<sup>179</sup> This lack of clarity seems purposeful—the Appellate Division may well have realized that expanding the wings of the EACJ to cover environmental disputes would wither on the vine if the court did not only affirmatively endorse its jurisdiction to entertain such suits, but at the same time realized that it had to make the government of Tanzania happy so that the court suffered no backlash.<sup>180</sup> The judgment was confusing enough that in September 2015 when I interviewed ANAW's lawyer who had litigated the case, he too was unsure what the Appellate Division intended by not lifting the permanent injunction.<sup>181</sup> Clearly, getting an order that could be served on the government of Tanzania pursuant to the judgment was out of the question because of this lack of clarity. Yet Tanzania on its part can see the writing on the wall. Should it decide to make concrete plans to build the road, ANAW can go back to the court and get orders to permanently bar it from building the road. The final decision of the Appellate Division is less emphatic than its earlier decision discussed above, in which it announced that the EAC Establishment Treaty binds Member States "to observe a variety of express undertakings and obligations concerning the promotion, preservation, conservation and protection of the environment" that are "clearly and emphatically" within the court's

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<sup>177</sup> *Id.* ¶¶ 75, 79–80.

<sup>178</sup> *Id.* ¶ 81.

<sup>179</sup> *Id.* ¶ 82.

<sup>180</sup> On the backlash against Africa's international courts, see Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, EUR. J. INT'L L. (forthcoming 2016).

<sup>181</sup> Interview with Saitabao Ole Kanchory, *supra* note 88.

purview.<sup>182</sup> Since that earlier decision, major changes had occurred on the court; in particular, one of the longest-standing members of the court from its inception, Harold Nsekela, had retired as Judge and President of the court.<sup>183</sup> He had been replaced by a younger cadre of judges on the Appellate Division that may, based on the final Serengeti decision, appear less likely to use the jurisdiction of the EACJ to directly challenge EAC Member State prerogatives.<sup>184</sup>

#### IV. JUDICIAL ENVIRONMENTALISM IN ADDITIONAL AFRICAN INTERNATIONAL COURTS

##### A. Social-Economic Rights and Accountability Project v. Federal Republic of Nigeria<sup>185</sup>

Next I discuss, *Social-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*, decided by the ECOWAS Court of Justice in December 2012.<sup>186</sup> The plaintiff, SERAP, is a non-governmental organization registered in Nigeria, and the defendants are the Federal Republic of Nigeria, the Attorney General of the Federation, and the Chief Law Officer of the Federation.<sup>187</sup> The original complaint filed by the registered trustees of SERAP on July 23, 2009 was brought against nine defendants: the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd., AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC, and Exxon Mobil.<sup>188</sup> However, all of the defendants apart from the President and the Attorney General raised preliminary objections to the ECOWAS Court of Justice's jurisdiction over them, and the court ultimately

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<sup>182</sup> Tanzania v. ANAW I, *supra* note 136, at 11.

<sup>183</sup> Hillary Nsambu, *East African Court of Justice President Bids Farewell*, EHABARI (May 29, 2014), <https://celebritynewshabari.wordpress.com/2014/05/29/east-africa-court-of-justice-president-bids-farewell/>.

<sup>184</sup> This trend may have begun on the human rights side with the Appellate Division cutting back against the expansive holdings of the First Instance Division, *see, for example*, Omar Awadh v. Attorney General of Uganda, Appeal No. 2 of 2012, East African Court of Justice App. Div., at 15 (Apr. 15, 2013), [http://eacj.huriweb.org/wp-content/uploads/2013/09/AG\\_Uganda\\_v\\_Omar\\_Awadh\\_and\\_6\\_Others.pdf](http://eacj.huriweb.org/wp-content/uploads/2013/09/AG_Uganda_v_Omar_Awadh_and_6_Others.pdf) (strictly construing the two month limitation for bringing cases and reversing the invocation of the doctrine of continuing violations adopted by the First Instance Division).

<sup>185</sup> SERAP v. Nigeria, *supra* note 3, ¶ 2.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* ¶¶ 1, 2.

<sup>188</sup> *Id.* ¶ 3.

held that it had no jurisdiction over these particular defendants.<sup>189</sup> The court rejected the defendants' preliminary objection regarding the plaintiff's alleged lack of legal standing and held that the plaintiff was a legal person who had the "*locus standi*" to file a claim in the court.<sup>190</sup> SERAP filed an amended petition against solely the President of the Federal Republic of Nigeria and the Attorney General of the Federation in March of 2011, and these defendants filed a joint defense in response.<sup>191</sup> In this claim, SERAP alleged that the Niger Delta, the densely populated land area surrounding the delta of the Niger River at the Gulf of Guinea on the Atlantic Ocean, has suffered extreme environmental degradation as a result of oil spills in the region.<sup>192</sup> These oil spills have resulted for a variety of reasons, including human error, vandalism or theft of oil, and poor maintenance of oil extraction infrastructure, and they have caused significant harms to the human inhabitants of the Niger Delta region.<sup>193</sup> It was alleged that "[h]undreds of thousands of people" have been affected by these spills, especially the "poorest and other most vulnerable sectors of the population."<sup>194</sup>

In the case, SERAP sought a declaratory judgment to the effect that the residents of the Niger Delta were entitled to "the internationally recognized human right to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to a clean and healthy environment . . . and the right to life and human security and dignity."<sup>195</sup> SERAP also petitioned the court to make a declaratory judgment that Nigeria breached its international human rights obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and People's Rights (ACHPR) as a result of its "failure and/or complicity and negligence . . . to effectively and adequately clean up and remediate contaminated land and water" in the Niger Delta region.<sup>196</sup> Similarly, SERAP alleged that the defendant breached its obligations under these treaties due to its failure "to establish adequate monitoring of the human impacts of oil-related pollution" and its "systematic denial of access to information to residents of the Niger Delta about

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<sup>189</sup> *Id.* ¶¶ 6–8.

<sup>190</sup> *Id.* ¶ 7.

<sup>191</sup> *Id.* ¶¶ 9–10.

<sup>192</sup> *Id.* ¶¶ 12–13.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* ¶ 18.

<sup>195</sup> *Id.* ¶ 19(a).

<sup>196</sup> *Id.* ¶ 19(b).

how oil exploration and production [would] affect them.”<sup>197</sup> SERAP further sought six orders directed at the defendants: to ensure that the residents of the Niger Delta were allowed to fully attain “an adequate standard of living, including adequate access to food, to healthcare, to clean water, [and] to clean and healthy environment;”<sup>198</sup> “to hold the oil companies operating in the Niger Delta responsible for their complicity in the continuing serious human rights violations” there;<sup>199</sup> “to solicit the views of the people of the area throughout the process of planning and policy-making on the Niger Delta”;<sup>200</sup> to “establish adequate regulations for the operations of multinationals in the Niger Delta, and to effectively clean up and prevent pollution and damage to human rights”;<sup>201</sup> “to carry out a transparent and effective investigation into the activities of oil companies in the Niger Delta and to bring to justice those suspected to be involved . . . in the violation of human rights”;<sup>202</sup> and to “individually and/or collectively pay adequate monetary compensation” of one billion dollars “to the victims of human rights violations in the Niger Delta.”<sup>203</sup>

Although the Federal Republic of Nigeria maintained that the ECOWAS Court of Justice did not have jurisdiction to examine any alleged violations of either the ICCPR or the ICESCR and that only the domestic Nigerian courts could examine these violations,<sup>204</sup> the court held that the Supplementary Protocol that amended Article 39 of the Protocol on Democracy and Good Governance on January 19, 2005, provided that “the court has jurisdiction to determine cases of violation of human rights that occur in any Member State”<sup>205</sup> and that “the rights set up in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States.”<sup>206</sup> The court held that together, these provisions demonstrated that it had jurisdiction over a relatively wide range of claims that alleged violations of any of the various human rights protected under any international treaty to which an ECOWAS Member State has signed.<sup>207</sup> The court further

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<sup>197</sup> *Id.* ¶ 19(c), (d).

<sup>198</sup> *Id.* ¶ 19(e).

<sup>199</sup> *Id.* ¶ 19(f).

<sup>200</sup> *Id.* ¶ 19(g).

<sup>201</sup> *Id.* ¶ 19(h).

<sup>202</sup> *Id.* ¶ 19(i).

<sup>203</sup> *Id.* ¶ 19(j).

<sup>204</sup> *Id.* ¶ 24.

<sup>205</sup> *Id.* ¶ 25.

<sup>206</sup> *Id.* ¶ 27.

<sup>207</sup> *Id.* ¶ 28.

fortified this holding by citing an earlier precedent, that “once the concerned right for which the protection is sought before the court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.”<sup>208</sup> In an especially broad ruling, the court thus determined that it had jurisdiction to decide cases in which claimants alleged violations of rights asserted in the ACHPR, the ICCPR, and the ICESCR, and these international instruments preempt the Nigerian Constitution if there is a conflict over whether a particular human right is protected, such that the international instrument’s language prevails.<sup>209</sup>

SERAP alleged numerous violations indicative of the nature of litigation in Africa’s fledgling international courts: Articles 1–5, 9, 14–17, and 21–24 of the ACHPR; Articles 1, 2, 6, 9–11, and 12.1–12.2(b) of the ICESCR; Articles 1, 2, 6, 7, and 26 of the ICCPR; and Article 15 of the Universal Declaration of Human Rights (UDHR).<sup>210</sup> It alleged five of these violations with much greater specificity.<sup>211</sup> The plaintiff first argued that Article 11 of the ICESCR, which establishes “the right of everyone to an adequate standard of living – including adequate food” and requires states to ensure the availability and accessibility of food to their citizens, was violated when the Nigerian government failed to protect the natural resource that people in the Niger Delta depend upon for food, as there have been thousands of oil spills and other environmental damage to fisheries, farmland, and crops without the government providing adequate clean-up.<sup>212</sup> It also alleged that this right to adequate food was violated when the government allowed private oil companies to destroy food sources and failed to prevent these companies from contaminating and polluting the crops and fish in the Niger Delta area.<sup>213</sup> The plaintiff next argued that Article 6 of the ICESCR, which obligates states “to recognize the right of everyone to the opportunity to earn their living by work,” was violated.<sup>214</sup> SERAP alleged that the Nigerian government was obligated to take “all necessary measures” to prevent violations of this right, even if those violations were caused by non-state third party actors, such as private oil companies.<sup>215</sup>

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<sup>208</sup> *Id.* ¶ 36.

<sup>209</sup> *See id.* ¶¶ 35–40.

<sup>210</sup> *Id.* ¶ 63.

<sup>211</sup> *See id.* ¶¶ 64–72.

<sup>212</sup> *Id.* ¶ 64.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* ¶ 65.

<sup>215</sup> *Id.*

In addition, the plaintiff alleged that the right to health, as defined in Articles 16 and 24 of the ACHPR and in Article 12.1 of the ICESCR, was violated as the Nigerian government “failed to promote conditions” that allow people to lead healthy lives.<sup>216</sup> It claimed that the defendant’s “failure to prevent widespread pollution as a consequence of” allowing the oil industry to access the Niger Delta region directly led to “the deterioration of the living situation for affected communities” within the Niger Delta area.<sup>217</sup> SERAP also alleged that the Nigerian government compounded the problem not only by failing to regulate oil producing activities in the region, but also by failing to enforce the clean up of oil spills after they had occurred.<sup>218</sup>

Nigeria responded by denying that oil exploration and production has a direct relation with poverty in the region and by stating that the plaintiff’s allegations are merely speculative.<sup>219</sup> It argued that the Nigerian federal government established the Oil Minerals Producing Area Development Commission (OMPADC), which later became the Niger Delta Development Commission (NDDC) with the exclusive purpose of formulating policies, implementing projects, and acting as a liaison with the oil companies with regards to environmental problems that arise from oil exploration.<sup>220</sup> This commission was also created to advise the Nigerian government on the prevention and control of oil spillages and environmental pollution in the Niger Delta area.<sup>221</sup> Nigeria also argued that it was not its responsibility, but the responsibility of the license holder, to take “all reasonable steps to avoid damage and to pay compensation” to oil pollution victims, and that these license holders should be the ones held liable for any damages.<sup>222</sup>

In its decision, the court ruled only with respect to Articles 1 and 24 of the ACHPR, which together outline the obligation of every African nation state to “take every measure to maintain the quality of the environment . . . such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development.”<sup>223</sup> The court determined that the Federal Republic of Nigeria was under the international obligation of both ACHPR articles and that it failed to adopt sufficient measures, as outlined in

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<sup>216</sup> *Id.* ¶ 67.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* ¶ 68.

<sup>219</sup> *Id.* ¶ 74.

<sup>220</sup> *Id.* ¶ 79.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* ¶ 82.

<sup>223</sup> *Id.* ¶ 101.

Article 1 of the Charter, to ensure its citizens the enjoyment of the human right outlined in Article 24,<sup>224</sup> “the right to a general satisfactory environment favorable to their development.”<sup>225</sup> The court disagreed with Nigeria, which had argued that the responsibility for oil pollution should be shifted only to those companies that hold licenses for oil exploration.<sup>226</sup> Instead, the court held that state actors are in the best position to hold overarching responsibility for widespread damages of this kind.<sup>227</sup>

The court dismissed SERAP’s original petition for the Federal Republic of Nigeria to pay a one billion dollar punitive fee, as it ruled that it would be impracticable to grant pecuniary compensation to individual victims for many reasons.<sup>228</sup> However, the court held that the Nigerian government must take all necessary measures to achieve the objectives sought by Article 24 of the ACHPR “to maintain a generally satisfactory environment favorable to development.”<sup>229</sup> It ordered the government to take measures, “within the shortest possible time, to ensure the restoration of the Niger Delta,” “to prevent the occurrence of damage to the environment,” and “to hold the perpetrators of the environmental damage accountable.”<sup>230</sup>

## B. SERAC & CESR v. Nigeria

Another case arising from the Niger delta, this time filed before the African Commission on Human and People’s Rights, was filed by another NGO, the Social and Economic Rights Action Center and the Center for Economic and Social Rights against the government of Nigeria more than a decade earlier than the SERAP suit in the ECOWAS Court of Justice.<sup>231</sup> In its case, SERAC alleged that “the military government of Nigeria ha[d] been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC),” and that therefore the Nigerian government had “caused environmental degradation and health problems resulting from the contamination of the environment.”<sup>232</sup> SERAC argued “that

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<sup>224</sup> *Id.* ¶ 107.

<sup>225</sup> *Id.* ¶ 98.

<sup>226</sup> *Id.* ¶ 109.

<sup>227</sup> *See id.* ¶¶ 106–09.

<sup>228</sup> *See id.* ¶¶ 113–17.

<sup>229</sup> *Id.* ¶ 119.

<sup>230</sup> *Id.* ¶ 121.

<sup>231</sup> *See generally* SERAC v. Nigeria, *supra* note 4.

<sup>232</sup> *Id.* ¶ 1.

the Nigerian government ha[d] condoned and facilitated these violations by placing its legal and military powers” in the hands of the oil companies.<sup>233</sup> Further it was alleged that the government did not monitor the oil companies’ operations or compliance with required standard safety measures in their operations.<sup>234</sup> The petition also alleged that the government ignored the concerns of the people affected, in particular the Ogoni communities, and “responded to [their peaceful] protests with massive violence and executions of Ogoni leaders.”<sup>235</sup> Such violence included attacking, burning, and destroying Ogoni villages and homes with military-type weapons.<sup>236</sup> Finally, the petition alleged that the Nigerian government “destroyed and threatened Ogoni food sources through a variety of means,” including its “irresponsible” oil development policies and practices that had contaminated the soil and water, and its raids on Ogoni villages that had destroyed crops and farm animals.<sup>237</sup>

The complaint argued that the foregoing conduct constituted violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the ACHPR.<sup>238</sup> The ACHPR contains the parameters of what the African Commission on Human and People’s Rights has jurisdiction over. It took approximately five-and-a-half years before the Commission heard the complaint after numerous postponements and deferments.<sup>239</sup> Among Nigeria’s objections was the argument that the petition was not admissible before the Commission.<sup>240</sup> The Commission rejected these objections, noting that the Federal Republic of Nigeria has incorporated the ACHPR into its national domestic law, and all rights contained in this Charter may be brought as claims in Nigerian national courts.<sup>241</sup> Article 16 of the Charter outlines the human right to both physical and mental health, and Article 24 of the Charter outlines the human right to a clean environment.<sup>242</sup> Both of these rights acknowledge that a clean and safe environment is closely linked to the quality of life and safety of the individuals living within that environment.<sup>243</sup> The Commission held that the Nigerian government “facilitated the destruction of

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<sup>233</sup> *Id.* ¶ 3.

<sup>234</sup> *Id.* ¶ 4.

<sup>235</sup> *Id.* ¶ 5.

<sup>236</sup> *See id.* ¶¶ 7, 8.

<sup>237</sup> *Id.* ¶ 9.

<sup>238</sup> *Id.* ¶ 10.

<sup>239</sup> *See id.* ¶¶ 12–34.

<sup>240</sup> *See id.* ¶¶ 35–42.

<sup>241</sup> *Id.* ¶ 41.

<sup>242</sup> *Id.* ¶ 50.

<sup>243</sup> *See id.* ¶¶ 50–53.

Ogoniland” within the Niger Delta and in doing so negatively affected the physical well-being of the Ogoni people.<sup>244</sup> The Commission held that the Nigerian government had acted in stark contrast against its obligation to protect the persons under its authority from interference with the total enjoyment of their rights outlined in the Charter.<sup>245</sup>

In particular, the Commission held that the Nigerian government not only violated Article 24 of the Charter, outlining the human right to a clean environment, but it also violated Article 16 of the Charter with regard to the right to the best attainable state of mental and physical health; Article 14 with regard to the right to property; and Article 18(1) with regard to the right to the protection of the family.<sup>246</sup> The Commission interpreted these rights to implicitly provide the right to shelter.<sup>247</sup> The Commission also held that the Nigerian military government’s facilitation of the destruction of numerous Ogoni villages and homes constituted a violation of the right to housing.<sup>248</sup> The Nigerian government was also held to have violated the right to life and the right to economic, social, and cultural development with its destruction and contamination of the Ogoni people’s food sources.<sup>249</sup> The Commission argued that both international law and human rights law must be “responsive to African circumstances” and that environmental rights were an essential element of human rights law in Africa.<sup>250</sup>

The Commission further required the Nigerian government “to ensure the protection of the environment, health and livelihood” of the individuals residing in Ogoniland by stopping all attacks, conducting an investigation into human rights violations, prosecuting those actors who inflicted the violations, ensuring adequate compensation to victims of those harms, making sure that appropriate assessments are made for any future oil development through effective and independent oversight bodies, and providing information on health and environmental risks to communities likely to be affected by potentially harmful operations.<sup>251</sup>

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<sup>244</sup> *Id.* ¶ 58.

<sup>245</sup> *Id.* ¶ 45.

<sup>246</sup> *See id.* ¶¶ 58–67.

<sup>247</sup> *Id.* ¶ 60.

<sup>248</sup> *See id.* ¶¶ 61–63.

<sup>249</sup> *See id.* ¶¶ 65–66.

<sup>250</sup> *Id.* ¶ 68.

<sup>251</sup> *Id.* ¶ 69.

V. JUDICIAL ENVIRONMENTALISM IN TWO AFRICAN NATIONAL COURTS

A. Friends of Lake Turkana Trust v. Honorable Attorney General of Kenya (sued on behalf of the Government of the Republic of Kenya) and Kenya Power & Lighting Company Ltd.<sup>252</sup>

This case was brought by the Friends of Lake Turkana Trust, a registered trust that works to protect and conserve the waters of Lake Turkana in the very dry and arid northern part of Kenya.<sup>253</sup> It champions the rights and interests of the communities within the Lake Turkana Basin. It filed a case against the government of Kenya and the Kenya Power and Lighting Company which generates and distributes electricity in Kenya.<sup>254</sup> The suit was originally filed in the Constitution and Human Rights Division of the High Court of Kenya but was transferred to the Environment and Land Court pursuant to the division parceling out cases under the Kenyan Constitution.<sup>255</sup> The petition claimed that an alleged agreement between the Kenyan and Ethiopian governments to construct a series of dams had serious adverse consequences. It alleged that those dams would deprive the people who reside in the Lake Turkana area in Kenya of their rights to livelihood, lifestyle, and cultural heritage and attachment to Lake Turkana in violation of Articles 26 and 28 of the Kenyan constitution.<sup>256</sup> It also claimed that the Kenyan government violated Articles 62 and 69 of the Constitution of Kenya when it failed to act as a public trustee of the land and conduct a full impact assessment on the potential side effects of the construction and operation of these hydroelectric power-producing dams.<sup>257</sup> In particular, the plaintiff was concerned about the Gilgel Gibe III Dam, a high roller-compacted concrete dam with an associated hydroelectric power plant.<sup>258</sup> Finally, the petition alleged that the arrangements between the Kenyan and

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<sup>252</sup> Friends of Lake Turkana Trust v. The Honorable Attorney General and The Kenya Power & Lighting Company Ltd., ELC Suit No. 825 of 2012, Judgment, Environment and Land Court at Nairobi (May 19, 2014) available at <http://kenyalaw.org/caselaw/cases/view/97700/> [hereinafter Friends of Lake Turkana Trust v. Kenya].

<sup>253</sup> *Id.* at 1; see also *Our Work*, FRIENDS OF LAKE TURKANA, <http://www.friendsoflaketurkana.org/our-work/projects> (last visited Dec. 4, 2015).

<sup>254</sup> Friends of Lake Turkana Trust v. Kenya, *supra* note 252, at 1–2.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 3.

<sup>258</sup> *Id.* at 2.

Ethiopian governments would jeopardize the environment and threaten the cultural heritage of the communities surrounding Lake Turkana.<sup>259</sup>

The plaintiff sought an order of mandamus that would compel both the Kenyan government and the Kenya Power and Lighting Company Limited to make “full and complete disclosures of each and every agreement or arrangement entered into or made” with the Ethiopian government relating to the proposed purchase of 500 megawatts from the Gibe III dam.<sup>260</sup> It also requested an order prohibiting both defendants from entering into further agreements with Ethiopia relating to the purchase of 500 megawatts until a “full and thorough independent environmental impact assessment on the potential effects of Gibe III project on Lake Turkana and the affected communities has been undertaken.”<sup>261</sup>

In reply the government of Kenya, Kenya Power and Lighting Company and the interested party argued the proposed project was part of the National Transmission Grid, which aligns with Kenya’s Vision 2030’s National Electricity Supply Master Plan.<sup>262</sup> Under this plan, Kenya plans to connect power substations with those in the rest of the East African Region and beyond, and the Ethiopian-Kenyan electricity interconnection is the flag ship project for this plan.<sup>263</sup> The interested party argued that the project’s socio-economic effects are vast and include income from short-term employment and a nation-wide, sustainable, reliable supply of electricity.<sup>264</sup> Further they argued Kenya would be able to rely on an electricity supply that comes from a cleaner source, as opposed to the typical and environmental-harming burning of fossil fuels to produce energy.<sup>265</sup> Thus in these arguments we see the same type of justification the government of Tanzania used to justify constructing a road through the Serengeti—an emphasis on economic benefits of a large infrastructural investment without a concurrent concern for the environmental impact of the project. From this perspective, the government argued that the project was more beneficial than detrimental to Kenyans. The government further argued that there was no contract between Ethiopia and Kenya to purchase 500 megawatts of electricity from the proposed Gibe III Dam Project.<sup>266</sup> As such, just as

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<sup>259</sup> *Id.* at 3.

<sup>260</sup> *Id.* at 2.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 5.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 4.

Tanzania argued in the *Serengeti* appeal to the Appellate Division against the First Instance Division's merits decision, the fact that there was no agreement meant that the plaintiff's claim is premature and unactionable.<sup>267</sup> The government argued it did not have control to determine whether the Gibe III construction project would take place, and that a Kenyan court was an inappropriate forum in which to entertain a case based on a proposed construction project that occurs on a transnational level.<sup>268</sup>

In its judgment, the court found it had jurisdiction over the claim and the parties involved in the lawsuit and that there was not a more appropriate legal forum or instrument for hearing the alleged claim.<sup>269</sup> The court noted there was no foreign state or intergovernmental entity brought into the lawsuit as a party that would make the court unable to hear the case.<sup>270</sup> The court determined that it was established under section 13(3) of Kenya's Environment and Land Act of 2012 and conferred with jurisdiction to "hear and determine applications for redress of a denial, violation ... or threat to, rights or fundamental freedom relating to a clean and healthy environment."<sup>271</sup>

The court then looked to whether the fundamental rights of the plaintiff had actually been violated and whether the respondents had obligations with regard to remedying these violations. The plaintiff first alleged that there was a violation of the right to life and dignity, as enumerated in Articles 26 and 28 of the Kenyan Constitution, because the purchase of electricity from Ethiopia would allegedly deprive the affected communities of their livelihood, lifestyle, and cultural heritage.<sup>272</sup> The plaintiffs provided extensive information and studies in order to demonstrate the alleged likely negative effects that the Gibe III Dam construction project would have on the Lake Turkana communities.<sup>273</sup> In particular, the court looked at two documents: a commentary written by the Africa Resources Working Group and a report by International Rivers.<sup>274</sup> These reports indicated that the water resource scheme project planned along the Ethiopian Omo River would significantly reduce the downstream of the river and thus drastically reduce the level of Lake Turkana, as

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 7–8.

<sup>270</sup> *Id.* at 7.

<sup>271</sup> *Id.* at 8.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 11.

<sup>274</sup> *Id.* at 11–12.

the river contributes approximately 80% of the waters of Lake Turkana.<sup>275</sup> The Omo River Delta area is located in northern Kenya, and this land is used intensively by agropastoralists who live in the delta and along the north and northeast of Lake Turkana.<sup>276</sup> According to the studies, a reduction in the level of the lake would possibly destroy these agropastoral systems, along with the abundant livestock herding and fishing done in this area.<sup>277</sup> This would in turn cause more pressure on the fewer remaining resources in Kenya-Ethiopian border region, as the approximately 300,000 current Lake Turkana community members would have to find an alternative way to make a living.<sup>278</sup> One of the studies argued that the lake's fragile ecosystem has already started shrinking, making it significantly more vulnerable to global climate change, and that a drastic reduction in the size of the lake could destroy it.<sup>279</sup> The Gibe III Dam specifically would reduce the available Omo River water for Lake Turkana both during the two-year process in which the Gibe III Dam's reservoir would be filled using the water and also by the dam's diversion of the water for large-scale irrigation in the Omo Valley.<sup>280</sup> The studies alleged that this drastic impact on Lake Turkana has barely been considered in the project's environmental impact assessment and that project preparation thus far has ignored the customary Kenyan downstream water rights in the shared river basin.<sup>281</sup> Even after consideration of these studies, however, the court agreed with the respondents that there was not enough to find that any rights had actually been violated. It stated that there was insufficient reports or evidence as to the actual effect of the Gibe III hydroelectric project, and at the current stage, the court could not make a finding that the plaintiff's right to dignity, life, livelihood, and cultural and environmental heritage had been violated.<sup>282</sup>

The plaintiff next made the allegation that its right to information, pursuant to Articles 10, 35, and 69 of the Kenyan Constitution, had been violated as the Kenyan government had refused to disclose the nature and details of the alleged agreement between the Ethiopian and Kenyan governments.<sup>283</sup> Article 10 of the constitution enumerates that the Kenyan

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<sup>275</sup> *Id.* at 11.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 12.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 13.

<sup>283</sup> *Id.*

government, including the state and all of its public officers, must act with a high standard of integrity, transparency, and accountability.<sup>284</sup> Article 35 of the Constitution provides that every citizen has the right of access to information held by the state or held by another person and required for the exercise of the protection of any right or fundamental freedom.<sup>285</sup> In a previous case, the Court had also ruled that this article imposes a positive duty on the state to actively provide information in the public interest, regardless of whether it has been specifically requested.<sup>286</sup> On this issue, the court ruled that the respondents and had a duty to provide the petitioners with all information relevant to the purchase and transmission of electric power from Ethiopia, but that the petitioner was not entitled to information relating to the terms of any agreement entered into between the two governments concerning to the purchase of electricity.<sup>287</sup>

The court held that even if power purchase agreements might not have yet been entered into, and there was no concrete evidence of harm already suffered, the respondents and interested party had a duty to establish that no environmental harm would arise from the said agreements and projects.<sup>288</sup> It further held that as trustees of the environment and natural resources, the government and the power companies owed a duty to the Lake Turkana communities to ensure that the lake's resources are sustainably managed, utilized, and conserved, and to exercise the necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the Ethiopian government that may have any effects of this kind.<sup>289</sup> However, the court declined to grant an order prohibiting the Kenyan government from entering into any agreement with the Ethiopian government to purchase electricity without first completing a full and thorough independent environmental assessment of the project.<sup>290</sup> The court determined that granting this order was outside of the court's authority.<sup>291</sup> It held that any environmental impact assessment will have to be determined in a relevant regional or international forum after an official agreement has been entered into, and the

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<sup>284</sup> The CONSTITUTION OF KENYA, art. 10 (2010).

<sup>285</sup> *Id.* art. 35.

<sup>286</sup> Friends of Lake Turkana Trust v. Kenya, *supra* note 252, at 14.

<sup>287</sup> *Id.* at 15.

<sup>288</sup> *Id.* at 16.

<sup>289</sup> *Id.* at 17.

<sup>290</sup> *Id.* at 19.

<sup>291</sup> *Id.*

court itself was unable to order the government or the interested party to complete these assessments in a particular way.<sup>292</sup>

This case deals more directly with the hypothetical nature of claims when litigants seek judicial orders to prevent projects that are yet to be undertaken. Yet at the same time, the court, unlike in the *Serengeti* case, did not argue that the lack of absolute certainty about the nature of these potential harms did not prevent the court from using the lens of the precautionary principle in international environmental law under which it was foreseeable that petitioners reasonably believed that the project would adversely impact thousands of people in the vicinity of Lake Turkana in northern Kenya to make a livelihood, and would undermine their cultural heritage and attachment to Lake Turkana.<sup>293</sup> Although the court did not stop the construction of a cascade of dams along the river that feeds Lake Turkana, thus endangering the delicate eco-system of the region as well as the right to a clean and healthy environment, it nevertheless found that the petitioners right to information was violated.<sup>294</sup>

The case also demonstrates how judicial environmentalism is seeping into national judiciaries. It shows how mega-development projects that have an international dimension can be amenable to jurisdiction in a domestic court. Finally it indicates the authority a domestic court can wield to order a government and state owned corporations to make a full and complete disclosure to the potential victims regarding any arrangement that might adversely affect their rights, including the right to a clean and healthy environment.

#### B. Appellants v. Zambian Government and Mwembeshi Resources Ltd., High Court of Lusaka, Zambia<sup>295</sup>

Another decision demonstrating how judicial environmentalism is seeping into national judicial systems comes from Southern Africa. The High Court of Zambia sitting in Lusaka heard an appeal made by an aggregate of Zambian conservation groups against a decision of the Zambian Minister of Lands, Natural Resources and Environmental Protection in January of 2014 to allow the Zambian corporation, Mwembeshi Resources Ltd., to continue its plans to develop its Kangaluwi Copper Project, which lies within the Lower Zambezi

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<sup>292</sup> *Id.* at 20.

<sup>293</sup> *Id.* at 16.

<sup>294</sup> *Id.* at 15.

<sup>295</sup> Discussed in Zambezi Resources Limited, *June 2015 Quarterly Operations Report* (Jul. 3, 2015), [www.zambeziresources.com/\\_content/documents/1120.pdf](http://www.zambeziresources.com/_content/documents/1120.pdf) [hereinafter Zambezi Resources].

National Park in Zambia.<sup>296</sup> Mwembeshi Resources Ltd. is a wholly-owned subsidiary of Zambezi Resources Ltd., a large Australian natural copper exploration and development company.<sup>297</sup> Zambezi Resource Ltd. was issued a twenty-five year mining license by the Zambian government in March of 2011 to operate an open-faced copper mine—the Kangaluwi Copper Project.<sup>298</sup>

In February of 2014, one month after the appeal was heard, the Lusaka High Court issued a stay of execution on the Project's development that has since then stalled the Kangaluwi Project.<sup>299</sup> The decision was expected in April of 2015, but it has been delayed.<sup>300</sup> In the meantime, the stay of execution remains in place, and the outcome of the appeal has not yet been announced.<sup>301</sup>

The proposed Kangaluwi Copper Project covers the copper deposits of Kangaluwi, Chisawa, and Kalulu, and it is located 180 kilometers east of Lusaka, Zambia. The entire Project area lies within the Lower Zambezi National Park.<sup>302</sup> The park surrounds 120 kilometers of the Zambezi River, and it is one of the four most visited parks in Zambia.<sup>303</sup> It also has a significant diversity of wildlife and communities.<sup>304</sup> According to official company reports, prospective drilling in this area has led the company to believe that there are significant amounts of copper to be retrieved from this roughly 245 square kilometer area. For this reason, it sought a twenty-five year large scale mining license for this area in March of 2011.<sup>305</sup> Although the company's submitted environmental impact assessment for the Project was rejected by the Zambian Environmental Management Agency shortly after it received the mining license, Zambezi Resources Ltd. appealed the rejection, and the Minister of Lands, Natural Resources and Environmental Protection, overturned the rejection of the Project's environmental impact assessment and gave full permission for use of the copper mine.<sup>306</sup> This decision is the one currently on appeal.<sup>307</sup> One of the

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<sup>296</sup> *Id.* at 1.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 2.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 1.

<sup>301</sup> *Id.* at 1–2.

<sup>302</sup> *Id.* at 1.

<sup>303</sup> *Id.*

<sup>304</sup> Paul Steyn, *Lower Zambezi National Park Mining Project is 'Fatally Flawed,' says Report*, NATIONAL GEOGRAPHIC (Nov. 14, 2014), <http://voices.nationalgeographic.com/2014/11/14/lower-zambezi-national-park-mining-project-is-fatally-flawed-says-report/>.

<sup>305</sup> Zambezi Resources, *supra* note 295, at 2.

<sup>306</sup> Steyn, *supra* note 304.

reports that supports the appellants' view is entitled "Kangaluwi Open-pit Copper Mine in the Lower Zambezi National Park," which was written in November of 2014, after the court had heard the most recent appeal.<sup>308</sup> The report criticizes Zambezi Resources Ltd.'s lack of transparency with respect to information regarding the potential negative impacts of open-pit mining inside important protected areas in Zambia, such as the Lower Zambezi National Park.<sup>309</sup> More specifically, it argues that the company has failed to give a thorough assessment of the potential social, environmental, and economic impacts that the Kangaluwi Mine would have on the surrounding area within the Lower Zambezi National Park, and there is still today a critical lack of information to address any concerns about these potential impacts.<sup>310</sup>

Some potential negative impacts considered by this report include long-term harm to the health of the Zambian people, wildlife, environment, and tourism industry, and it also questions the Kangaluwi Copper Project's ability to undertake responsible mining practices in a protected area that is vital to Zambia's sustainable tourism industry.<sup>311</sup> The Park is bordered to the south by the Zambezi River, and contamination of this river and its tributaries from mining runoff is argued by the appellants to be a serious concern if the Project were allowed to progress.<sup>312</sup> The Project site is near an important water catchment for the entire Zambezi River system.<sup>313</sup> The human population concentrated along this river system, whether in Zambia or across national borders in Zimbabwe or Mozambique, has the potential to be negatively affected through contaminated water consumption, contaminated fisheries, and the contamination of trophic food chain levels.<sup>314</sup> The Project also has the potential to negatively impact thousands of people who depend on artisanal fishing, subsistence agriculture, and animal husbandry for their livelihoods.<sup>315</sup> Levels of soil contamination associated with open-pit copper mining are high, and the report alleges that at this point Zambia has a lack of capacity to regulate

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<sup>307</sup> *Id.*

<sup>308</sup> K. Leigh, *Evaluation Report: Kangaluwi Open-pit Copper Mine in the Lower Zambezi National Park*, LOWER ZAMBEZI TOURISM ASSOCIATION (Nov. 2014), [http://voices.nationalgeographic.com/files/2014/11/Evaluation-Report\\_-Mining-Lower-Zambezi\\_LZNP\\_Nov2014.pdf](http://voices.nationalgeographic.com/files/2014/11/Evaluation-Report_-Mining-Lower-Zambezi_LZNP_Nov2014.pdf).

<sup>309</sup> *Id.* at 2.

<sup>310</sup> *Id.* at 2–3.

<sup>311</sup> *Id.* at 3–4.

<sup>312</sup> *Id.* at 4.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 40.

<sup>315</sup> *Id.*

and enforce health and safety standards for such a mining project.<sup>316</sup> Contaminants such as copper can persist in the environment for hundreds of years and play a key role in long-term environmental pollution.<sup>317</sup> Open pit mining also involves large-scale deforestation and road building, and this has the potential to significantly impact the wildlife within the national park.<sup>318</sup>

Thus in many respects, this case, like the Serengeti case in the EACJ and the Gibe III Dam case in the Land and Environment Court in Kenya, is premised on potential environmental harms. In all these cases a fragile ecosystem was argued to be under threat arising from a mega-development project. Thousands of residents who live in the vicinity of these development programs advance claims that their livelihood, food, shelter, and a clean and safe environment would be adversely affected. The suit was filed against the Zambian government and a wholly-owned local subsidiary of a multinational corporation in a national court where there was no jurisdictional contest. Unlike in the Gibe III case from the Land and Environment Court in Kenya, there were no claims of constitutional violations relating to the right to information—possibly because the Constitution of Zambia, unlike the 2010 Constitution of Kenya, does not guarantee such a right.<sup>319</sup> However, both cases raised the absence of a credible environmental impact assessment.

Unlike the *Serengeti* decision, or the decision of the ECOWAS Court of Justice and the African Commission on Human and Peoples Rights with regard to the Niger Delta, these national court decisions did not directly raise questions of violations of sub-regional, regional, or international law. Thus a major advantage of international courts is their ability to test the legality of mega-development projects against rules of international law generally and international environmental law in particular. Finally, it is also quite clear that the two national court decisions from Kenya and Zambia discussed above were, like the Serengeti case, predicated on potential environmental harm. Plaintiffs, as we have seen, have a harder time prevailing in such cases. By contrast, the cases arising from the Niger Delta where environmental harm is very evident and occurred in the past or is continuing, the African Commission on Human and Peoples Rights as well as the ECOWAS Court of Justice had no hesitation issuing decisions against the government of Nigeria. A major hurdle that litigants who bring these suits face in international courts is their inability to entertain suits against corporate actors. However, national courts much more easily fill

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<sup>316</sup> *Id.* at 42.

<sup>317</sup> *Id.* at 45.

<sup>318</sup> *Id.*

<sup>319</sup> See The CONSTITUTION OF KENYA, *supra* note 284, art. 42 (providing that “[e]veryone has a right to a healthy and clean environment”).

this gap as we have seen in both the Gibe III case from Kenya and the Zambian mining case as well.

I want to end this section by noting that the South African judiciary has also made significant steps in protecting the environment. Thus a former Chief Justice of South Africa's Constitutional Court noted from the bench that "courts have a crucial role to play in the protection of the environment."<sup>320</sup> The foregoing survey demonstrates the expanding role of domestic courts in implementing, applying and enforcing environmental laws in a manner that mirrors the case law of Africa's international courts. Together, national and international courts have therefore played an important role in giving content to environmental rights; facilitating administrative justice in environmental law; promoting judicial access to enforcing environmental obligations; examining the validity of governmental conduct in the area of the environment and making links between rights of indigenous peoples to environmental rights.

## VI. FEATURES OF INTERNATIONAL ENVIRONMENTAL JUDICIALISM AND ITS THEORETICAL IMPLICATIONS

What are the features of judicial environmentalism arising from our examination of the foregoing cases? A major feature of judicial environmentalism is the manner in which Africa's international courts have embraced the principle of systemic integration, which is promoting coherence within a fragmented system of international law rules. Thus, although these international courts are established within sub-regional trade integration schemes, they interpret and apply norms of international human rights and environmental law both under Africa's regional human rights system and under multilateral environmental treaties. In effect these courts apply and interpret rules of international law outside their immediate sub-regional treaty system. Take the example of the East Africa Court of Justice's First Instance Division Serengeti decision on the merits, which stopped the government of Tanzania from building a road through a UNESCO world heritage site.<sup>321</sup> The court invoked a rule of systemic integration contained in Article 130(1) of the Treaty for the Establishment of the East African Community, that serves an equivalent role to that of Article 31(3)(c) of the Vienna Convention of the Law of Treaties, and concluded that East African Community treaties should not be interpreted

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<sup>320</sup> *Fuel Retailers Ass'n of South Africa v. Director Gen, Env'tl Mgmt.*, 2007 (6) SA 4(CC) paras. 39G–40F (S. Afr.). For an international survey of the role of national judiciaries, see *THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES*, (Louis J. Kotze & Alexander R. Paterson eds., 2009) (Also discussing the Johannesburg Principles on the Role of Law and Sustainable Development, adopted by the Global Judges Symposium, 2002.).

<sup>321</sup> *ANAW v. Tanzania*, *supra* note 1.

in isolation of other treaties such as the African Convention on Conservation of Nature and Natural Resources, the Rio Declaration, the Stockholm Declaration, and the U.N. Convention on Biodiversity.<sup>322</sup> As interpreted by the EACJ, Article 130(1) of the Treaty for the Establishment of the East African Community strongly suggests that EAC treaties should be interpreted in a manner that furthers the objectives of these other treaties.<sup>323</sup> Similarly, Article 21(b) of the SADC Tribunal Protocol gives the Tribunal authority to “develop its own community jurisprudence having regard to applicable treaties, general principles, and rules of public international law.”<sup>324</sup> This broad interpretive rule has given the Tribunal leeway to draw from a variety of legal sources beyond treaty law such as aspirational norms and legal scholarship. This contrasts sharply with other international legal fora such as the WTO’s dispute settlement in which non-WTO law cannot be interpreted to override WTO rules.<sup>325</sup>

#### A. Theoretical Implications

The resort to international judicial environmental decision-making indicates a new redeployment of an African international courts, and demonstrates that the evolution of African international courts is unlikely to replicate the European model on which they are based. Second, this turn demonstrates that proposals to establish international environmental courts underestimate the capability of newer courts to be redeployed from their original mandates to new aims. African international courts have indeed been evolving incrementally as a result of new rules in second generation regional trade agreements that include goals such as human rights and environmental protection. New players, like NGOs, have a vested interest in mobilizing these rules and evolving contexts in which regional cooperation has slowly but surely come to be accepted by States as putting constraints on their sovereignty.<sup>326</sup> The emergence of judicial environmentalism in Africa’s international courts is nevertheless surprising.

This is because it has long been assumed that there needs to be a more structured, organized, and coordinated model of claiming environmental

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<sup>322</sup> *Id.* at ¶ 48.

<sup>323</sup> *Id.*

<sup>324</sup> Protocol on the Tribunal and Rules thereof, *supra* note 5.

<sup>325</sup> Joel Trachtman, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, 98 AM. J. INT’L L. 859 (2004) (book review) (arguing that “even if other international law were to modify WTO law under international law generally, these modifications would not be applicable in WTO dispute settlement”).

<sup>326</sup> For a similar analysis in the context of the ECOWAS Court of Justice, *see* Alter et al., *supra* note 11.

violations, particularly through international courts.<sup>327</sup> Others have argued that the best way to promote transnational environmental values is to have an international environmental court.<sup>328</sup> Yet others have argued that it would be best to retrofit existing international courts to better protect the environment.<sup>329</sup>

African international courts have evolved differently from the consensus in the literature described above. Although African international courts were established as trade courts to decide cases on regional trade integration, they have been redeployed first to protect human rights and now to protect the environment. The courts have turned to treaty language that protects the environment in standalone provisions, rather than invoking human rights provisions to find violations of environmental protections.<sup>330</sup>

The EACJ has become a convenient forum to break down the strong prevalence of positivism—the idea that courts construed rules so strictly that they ignored their underlying policy rationales as expressed in their object and purpose. The EACJ’s case law solidly rejects such an approach to judicial decision-making.<sup>331</sup> In this respect, the EACJ is heralding a new era of judicial review of violations not only of human rights, but also of environmental provisions. You may ask, why have the judges of the EACJ tended to act so differently when they sit on their national courts—that is we assume national courts are overwhelmingly positivist—why have these judges behaved differently when they are sitting on the regional court? A regional court that does not require judges to disclose their votes insulates judges from the backlash that they fear they might suffer at home if they made similar decisions. Further, we must not assume that national courts have been uniformly hostile to deciding human rights cases as the EACJ has. The point here is that the EACJ has been fairly uniform in deciding human rights cases even when such decisions were clearly seen to undermine the authority of member governments in a way that national courts have not.

Africa’s international courts are recent creations. Although they imitate older courts and in particular the European Court of Justice in form, their human rights case law indicates that they embrace institutional flexibility in their decision-making more than the WTO’s Dispute Settlement Body would

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<sup>327</sup> Hari M. Osofsky, *Learning from Environmental Justice*, 24 STAN. ENVTL. L. J. 71 (2005).

<sup>328</sup> Alfred Rest, *Need for an International Court for the Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation*, 24 ENVTL. L. & POLY 173 (1994). For a review of the 1992 effort of the International Court of the Environment Foundation, see Ole W. Pedersen, *An International Environmental Court and International Legalism*, 24 J. ENVTL. L. 547 (2012).

<sup>329</sup> Osofsky, *supra* note 327.

<sup>330</sup> *Id.*

<sup>331</sup> Gathii, *Mission Creep*, *supra* note 10.

embrace. By defying the distinct compartmentalization of trade and human rights courts, African International Trade Courts have broken the post-second world war distinction of separate realms for economic and human rights judicial institutions. Now they have further expanded their jurisdiction over environmental cases. In so doing this they have, on occasion issued bold orders such as the one stopping the construction of the Serengeti highway. Clearly, there are limits to the amount of institutional flexibility that can be achieved. Resources for significantly expanding the role of these courts are limited.

Yet, I think it important to note that the willingness of these courts to embrace environmental cases—a willingness that is instructive for multilateral tribunals such as the WTO’s dispute settlement body. In other words, there is no reason why the WTO’s dispute settlement body could not borrow more from the preambular aspirations of the Treaty Establishing the WTO, as well as GATT 1994, which both refer to goals like the creation of full employment and sustainable development.<sup>332</sup> The preambular provisions of the WTO’s Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains similar aspirational language when it refers to not only the protection of intellectual property rights, but also to the promotion of technological innovation and the transfer of technology to the mutual advantage of producers and users of technological knowledge.<sup>333</sup> The TRIPS Agreement also refers the ability of WTO members to adopt “measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.”<sup>334</sup> This preambular language could be mobilized with the same results we have seen, first for human rights cases, and subsequently for environmental cases in Africa’s international courts.

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<sup>332</sup> See General Agreement on Tariffs and Trade 1994, Pmb. ¶ 2, Apr. 15, 1994, 1867 U.N.T.S. 187 (providing in part “[r]ecognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand.”); Marrakesh Agreement Establishing the World Trade Organization, Pmb. ¶ 1, Apr. 15, 1994, 1867 U.N.T.S. 154 (providing that the Parties to this WTO Agreement: recognize “their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand expanding the production of and trade in goods and services, while allowing the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of development”).

<sup>333</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, Apr. 15, 1994, 1869 U.N.T.S. 299, [hereinafter TRIPS Agreement].

<sup>334</sup> *Id.* art. 8.1.

In fact, newer generational regional trade agreements between the E.U. and African, Caribbean, and Pacific countries contain references to goals such as human rights, the rule of law and democracy, and the protection of the environment.<sup>335</sup> It seems to be widely accepted that these provisions are merely hortatory or non-binding<sup>336</sup> and in my view these provisions point to the adaptation to changing circumstances—for survival these institutions have to keep in line with changing political, social, and economic conditions. What African international courts have shown though, is that these provisions are not vestiges of institutional survival or merely decorative tools to be left as lofty aspirations without the prospect of their enforcement. African international courts are showing that what many international lawyers have referred to as fragmentation in international law, which refers to the existence of so many separate legal regimes or systems that have nothing to do with each other, can be addressed within existing institutional structures. In short, even though these courts were established as international trade courts, they have become relevant to the environmental and human rights concerns of African citizens as well.

They decided not to behave like the WTO's Dispute Settlement Body which continues to narrowly confine its mandates to decide only cases that raise trade issues exclusively under WTO rules. That Africa's international courts have not decided to confine their role to merely trade issues also shows that African regional trade agreements are not merely confined to achieving market liberalization. After all, these agreements have commitments in a broad variety of areas.<sup>337</sup> The interpretive approach of African regional trade courts is therefore consistent with these multiple objectives to the extent that this approach does not give priority to one set of objectives (for example, trade) over another (for example, human rights). In fact as the case law that I have discussed in this Article shows, there is nothing to suggest that these courts cannot

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<sup>335</sup> For a view that such “soft” commitments to human rights are included in trade treaties in the context of West, East and Southern Africa, see Alter et al., *Backlash Against International Courts in West, East and Southern Africa*, *supra* note 180.

<sup>336</sup> For example, in the WTO, preambular provisions have been held by the Appellate Body as only capable of adding color and texture (rather than a different interpretation than that found in the substantive provisions), see Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 153, WT/DS58/AB/R (Oct. 12, 1998) (holding that the language of the Preamble of the WTO Agreement “demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development.” As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994.). For more, see James Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention of the Law of Treaties*, 15 HARV. J. LAW & TECH 291 (2002).

<sup>337</sup> GATHII, *supra* note 8.

simultaneously decide trade cases while deciding environmental and human rights cases. As these courts grow and as their legitimacy spreads and people get to know how to use them, separate chambers could be established within them to decide cases of different genres—a chamber to decide trade cases, a chamber to decide human rights cases, and another to decide environmental cases, for example. If separate chambers were established, I would hope that the flexibility in deciding cases that straddle different issue areas, so that an environmental division would not decide a human rights issue in an environmental case for example, would not be lost in that process.

Ultimately, this Article has demonstrated the expanding role of Africa's international and domestic courts in implementing, applying and enforcing environmental laws and policies. Together, national and international courts have therefore played an important role in giving content to environmental rights; facilitating administrative justice in environmental law; promoting judicial access to enforcing environmental obligations; examining the validity of governmental conduct in the area of the environment; and making links between rights of indigenous peoples to environmental rights. These new roles assumed by African international courts are a far cry from the excessive reliance on common law concepts such as nuisance and negligence that existed prior to the enactment of modern environmental statutes at the national, regional and sub-regional levels in the last two decades. It is this expanded landscape of environmental law along with broadened standing and active involvement of civil society groups that has resulted in Africa's new judicial environmentalism.

## VII. CONCLUSIONS

Corporate actors, particularly foreign investors in developing countries, operate in the not so clear zone between international law and domestic law.<sup>338</sup> This Article has however shown that between international and national law is a growing and vibrant regime of regional law complete with judicial institutions at the pan-African level. While these courts are new and fledgling and susceptible to political backlash, they are beginning to provide a new and important forum for holding governments accountable for violations of regional environmental law agreements. Of course, this accountability does not stretch far enough to hold corporate actors accountable, but clearly the groundwork has been laid down by these cases. In addition, there is a proposal to expand the jurisdiction of the African Court of Human and Peoples' Rights that might help address this gap. Under this proposal, there will be a new clause on corporate criminal

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<sup>338</sup> Penelope Simons, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 J. ENV'T. & HUM. RTS. 5, 33 (2012).

liability added to a revised Charter of the African Court of Human and Peoples' Rights that could potentially be used to hold corporate actors accountable for environmental harms.<sup>339</sup>

This Article has demonstrated how African international courts are mobilizing international environmental law in unprecedented ways. As the African Commission on Human and Peoples Rights noted in 2001, environmental rights “are essential elements of human rights in Africa.”<sup>340</sup> The cases discussed in this Article exemplify a judicial environmentalism that is unique to Africa—one shaped by treaty provisions that oblige African countries to have regard for the environment and mobilized by non-state actors to hold governments accountable, particularly for undertaking infrastructural activities or endorsing extractive initiatives inconsistent with the protections embodied in these provisions. If the cases discussed in this paper are anything to go by, there are good prospects for international judicial environmentalism in Africa. The fact that NGOs and individuals can bring cases in these courts and the courts continue to remain receptive and responsive, the trend may continue. It would also be reinforced by the availability of a related and parallel stream of cases in national judiciaries as we have seen with the examples from Kenya and Zambia. The fact that these cases are filed against states however leaves a huge accountability gap to the extent private actors responsible for the same kind of environmental damage are not amenable to suit in Africa's fledgling international courts. This accountability gap for private actors continues an unfortunate legacy that has degraded the environment in many third world countries, including in Africa.<sup>341</sup> In addition, while Africa's new judicial environmentalism is welcome particularly in adding the protection of the environment as a value alongside economic development, it is important not to overestimate the ability of these judicial interventions to guarantee the success of environmental goals particularly when the development paradigms that are triggering the kind of cases discussed in this Article remain embedded in programs of economic development that are not designed to faithfully comply with the kind of

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<sup>339</sup> For more on this, see Don Deya, *Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA (Mar. 6, 2012), [http://www.osisa.org/sites/default/files/is\\_the\\_african\\_court\\_worth\\_the\\_wait\\_don\\_deya.pdf](http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_don_deya.pdf).

<sup>340</sup> SERAC v. Nigeria, *supra* note 4, ¶ 68.

<sup>341</sup> For an excellent analysis, see Carmen Gonzalez, *Environmental Justice, Human Rights and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 162-63 (2015), and Karin Mickelson, *Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories About International Environmental Cooperation*, 43 OSGOODE HALL L. J. 137, 150-54 (2005).

environmental protections invoked by NGOs to hold governments accountable.<sup>342</sup>

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<sup>342</sup> For caution in thinking about judicial interventions in favor of environmental protection in another context, see Balakrishnan Rajagopal, *Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle*, CENTER FOR THE STUDY OF LAW AND GOVERNANCE (Jawaharlal Nehru University, Working Paper, CASLG/WP/04, 2004), [http://www.jnu.ac.in/cslg/workingPaper/04-Limits%20Law\(Rajagopal\).pdf](http://www.jnu.ac.in/cslg/workingPaper/04-Limits%20Law(Rajagopal).pdf).