# Wildlife in Peril: Can Environmental Courts Prevent Extinction?

By Jordan Lesser[1]

The degradation of global ecosystems has finally become newsworthy. From the climate crisis, frequent reports on severe global warming impacts from the International Panel on Climate Change (IPCC) with corresponding worldwide protests, studies indicating that bird populations have dropped by 29% in North America since 1970[2], and that African elephants lost nearly a third of their number over a period of only seven years[3] have all been prominent recent news stories. Many are warning that the Earth is entering the "Sixth Great Extinction" in which up to one million species of animals and plants are faced with extinction.[4] Not, however, due to freak natural disasters, such as the asteroid impact believed to have wiped out the dinosaurs and 75% of the Earth's life 66 million years ago, but due to a force that remains indubitably quixotic and pervasive: human activity.

Untangling the web of human-caused factors that can lead to species decline is complex, as it is clear that the global economy built upon fossil fuel use negatively impacts most every species, including ourselves. But reductions in wildlife populations are not only predicated on habitat loss, industrial activity, chemical use or other elements of human civilization known to contribute to species declines; many statutorily protected animals are illegally killed or captured due to the high value of their skins, teeth, horns, tusks, meat or any one of countless other body parts. Global trade in illegal wildlife and wildlife products trade has been estimated to be worth $7-$23 billion (USD) a year by the United Nations Environment Programme (UNEP).[5] Environmental crimes as a whole, incorporating forest products, fisheries and illegal mining operations reach a staggering value of $91-231 billion dollars a year. To put in context, these valuations place environmental crimes close to the level of global drug trade, counterfeiting and human trafficking – and it is often these same international criminal syndicates that also engage in illegal wildlife products trade. The massive value of wildlife and the increasingly sophisticated syndicate operations undertaking poaching efforts often pose significant challenges for enforcement, accountability, and prevention in developing nations that lack adequate resources.

Wildlife poaching has devastated animal populations across the globe. A 2019 study indicates that, while not at its 2011 peak of 30,000 per year, 10-15,000 elephants are poached in Africa annually,

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[2] Jim Daley, 'Silent Skies: Billions of North American Birds Have Vanished' (*Scientific American,* 19 September 2019) <https://www.scientificamerican.com/article/silent-skies-billions-of-north-american-birds-have-vanished/> accessed 8 January 2020.
[3] Niraj Chokshi and Jeffrey Gettleman, 'African Elephant Population Dropped 30 Percent in 7 Years' (*New York Times*, 1 September 2016) <https://www.nytimes.com/2016/09/02/world/africa/african-elephant-population-dropped-30-percent-in-7-years.html> accessed 8 January 2020.
[4] Aylin Woodward, '18 Signs We're in the Middle of a 6th Mass Extinction' (*Business Insider*, 18 June 2019) <https://www.businessinsider.com/signs-of-6th-mass-extinction-2019-3> accessed 8 January 2020.
[5] United Nations Environment Programme, *UNEP-INTERPOL Report: Value of Environmental Crime up 26%*, (Press Release, 4 June 2016) <https://www.unenvironment.org/news-and-stories/press-release/unep-interpol-report-value-environmental-crime-26> accessed 8 January 2020.

threatening the 350,000 total population with virtual extinction in the coming decades.[6] This population number has already declined by 97%, from 12 million African elephants, over the last century.[7] Black rhinoceroses also face staggering declines in populations, now numbering under 5,000, with recent spikes in demand for rhino horn, used in traditional medicines and as a status symbol in China and Southeast Asia. The species remains extremely endangered, and the black rhino could be extirpated from Namibia (home to over 40% of the remaining animals) within ten years due to poaching,[8] with reports indicating that the population has been reduced by 97.6% since 1960.[9]

Since 1975, international law to prevent the loss of endangered species has been in force. Known as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 183 parties have joined this multilateral treaty, agreeing to varying levels of protection for over 35,000 plants and animals and the regulation of wildlife and wildlife products trade. Despite CITES promulgating norms of conduct and limiting trade of wildlife, effective implementation must occur at the national level in each member country, through domestic statute and effective enforcement. Yet to effectively mitigate the shocking losses of wildlife species in the face of new threats, legal and governmental reforms are needed in the countries at greatest risk to losing iconic wildlife species.

One such reform which is supported by international agreements, and, often, constitutional provisions in nations founded in modern times, is the creation of a specialized environmental court system. This paper will address the benefits and structures of various environmental courts in existence, trace the forces behind their development, and highlight their role in combating wildlife crimes, as well as the future of environmental courts across the globe.

**MEAs create a baseline of principles to establish environmental judiciary**

Many international agreements lay out basic rationales to compel the creation of an environmental court, often through enshrining rights and creating a policy framework for environmental decision-making. One of the earliest global environmental initiatives was the 1992 U.N. Conference on Environment and Development, and the resulting "Rio Declaration" which states in principle 10 that:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making

[6] University of York, 'Africa's elephant poaching rates in decline, but iconic animal still under threat' (*Science Daily*, 28 May 2019) <https://www.sciencedaily.com/releases/2019/05/190528120331.htm> accessed 8 January 2020.
[7] News Desk, 'Elephants decline by 97% in less than a century' (*Africa Geographic*, 9 February 2016) <https://africageographic.com/blog/elephants-decline-97-less-century/> accessed 8 January 2020.
[8] Levi Winchester, 'Rhinos 'Could Become Extinct in Just Over 10 Years' if Poaching Continues' (*Daily Express*, 15 January 2015) <https://www.express.co.uk/news/nature/552490/Save-The-Rhino-says-rhinos-could-become-extinct-in-just-over-10-years-time> accessed 8 January 2020.
[9] Sandra Garcia, *'Black Rhinos Roam Chad for the First Time in 46 Years'* (*New York Times*, 11 May 2018) <https://www.nytimes.com/2018/05/11/science/rhinos-africa-extinction.html> accessed 8 January 2020.

information widely available. *Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*."[10]

Over 170 nations agreed to principle 10, marking the first time that a multinational accord recognized a public right to engage in environmental regulatory processes, including providing government-held information and the right to participate in government decision-making for individual or community benefit. Establishing such rights only creates a pillar of lawmaking and government administration, however, if a decision can be reviewed, if a wrong can be redressed, and if access to justice exists through an independent judiciary. These core tenets transcend environment and development concepts, instead offering a building block of modern governance structures essential to nations governed by the people (Democracy).[11] The Rio Declaration, as non-binding international law, generates a series of important governmental and procedural norms to drive the implementation and development of environmental laws in nations across the world. Sustainable development, the precautionary principle, and other foundational cruxes of environmental law agreed to at the 1992 conference began to create new expectations and public awareness. Many countries have begun to implement specialized environmental courts, in adherence to principle 10.

A decade after the Rio Convention, and several years after the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Global Judges Symposium held in Johannesburg, South Africa in 2002 advanced the international normalization of establishing environmental courts at the national level in furtherance of emerging conservation-based processes and mechanisms. This Symposium was attended by 120 judges from across the world to develop a generalized framework for environmental law interpretation. Members of the global judiciary convened in order to solidify their role in providing positive outcomes for sustainable development and environmental protection, leading to the adoption of the "Johannesburg Principles on the Role of Law and Sustainable Development." These principles pronounce a global order for the importance of the judiciary by stating: "[w]e affirm that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law."[12]

Foundational concepts of environmental adjudication, established at the international level through Multilateral Environmental Agreements (MEAs), create norms and mechanisms for countries to implement. While cultural factors can shape the existence, the lack thereof, or the structure of a

[10] *Rio Declaration on Environment and Development*, *Principle 10*, U.N. Doc. A/CONF. 151/26/Rev.1 (vol. 1) (Jan. 1993) (emphasis added).
[11] United Nations Stakeholder Forum for a Sustainable Future, *Review of Implementation of the Rio Principles* (Study, December 2011) 67 <https://sustainabledevelopment.un.org/content/documents/1127rioprinciples.pdf> accessed 8 January 2020.
[12] The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa [2002] 1 <http://eufje.org/images/DocDivers/Johannesburg%20Principles.pdf> accessed 8 January 2020.

specialized court system, the environmental degradations that impact the public are often similar across the globe. Many face air pollution, water contamination, land use pressures, and are aware of the impacts of a changing climate, including vast losses of wildlife of nearly every type.

Many countries that have implemented or revised their constitution in the years following the Rio Declaration, often expressly include environmental rights for their citizens, folding them into long-established fundamental human rights.[13] In these newer national constitutions, often in developing nations, the emergence of environmental law as a discrete field in the 1970's was either concurrent with formation of a constitution, or had become an expected role of government with constitutional underpinnings. In this sense, environmental law was not conformed to the mold of an existing governmental framework, as seen in the United States and Western Europe, but rather could be ingrained as a foundational constitutional tenet either at a country's birth (Namibia) or through significant structural reform (Kenya; India).[14] With constitutional backing, ECTs have a clear rationale for formation and can serve an important role in preventing environmental degradation, including wildlife poaching.

**Constitutions promote creation of environmental courts**

Since the environmental movement of the 1970's, structures of governance, including constitutions, often expressly grant ecological rights, the right to a healthy environment or sustainable use of natural resources. Courts, in turn, may use these guarantees of broad rights to allow for rulings that resolve cases in ways that implement novel approaches to conflicts, or expand the scope of constitutional provisions to enhance a nation's environmental regulation.

**Kenya**

For example, one of the countries hardest hit by the poaching crisis, Kenya, finalized a new Constitution in 2010, requiring the creation of the Environment and Land Court (Kenya ELC). Amazingly, the Kenya ELC contains progressive environmental principles from the Rio Declaration and Johannesburg principles within its enabling statute:

In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—

(a) the principles of sustainable development, including;

(i) the principle of public participation in the development of policies, plans, and processes for the management of the environment and land;

[13] Svitilana Kravchenko & John E. Bonnie, *Human Rights and the Environment: Cases, Law and Policy* (Carolina Academic Press 2008) 3.
[14] Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections of the National Green Tribunal of India,* 29 Pace Envtl. L. Rev. 441 at 444 (2012).

> (ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources insofar as the same are relevant and not inconsistent with any written law;
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> (iii) the principle of international cooperation in the management of environmental resources shared by two or more states;
>
> (iv) the principles of intergenerational and intra-generational equity;
>
> (v) the polluter-pays principle; and
>
> (vi) the precautionary principle . . . .[15]

Kenya, with creation of this specialized ELC, effectively codified the baseline environmental mechanisms which the United Nations Environment Programme seeks to promulgate through MEAs as international environmental law and judicial norms. By including in statute the precautionary principle, polluter-pays principle, intergenerational equity, traditional cultural and social principles, and public participation in land and environmental management processes as the formative lens for the ELC to approach adjudication, Kenya is ensuring that these judicial officials will (ideally) have professional specialization to meet these requirements. The now decade-old court has strengthened the environmental rule of law and environmental justice, in accordance with its organic statute, by ruling in favor of good-faith public participation processes and establishing a duty for state agencies to make accessible all relevant information during environmental proceedings.[16] The ability, or indeed the duty, of an environmental court to compel sustainable management of natural resources can reshape the approach for adjudication of wildlife crime and the wildlife products trade, enabling a long-term approach to ecological impacts that often occur over a timeframe that spans multiple generations.

Intergenerational, precautionary, and sustainable approaches to wildlife and environmental management can be effective precisely because they allow for a science-based and/or years-long remedy that transcends the push-pull of the rapid political cycle, which can foster shifting regulatory targets. Also, the codification of international cooperation for environmental resource management acknowledges that natural resource distribution rarely corresponds with political boundaries.[17] In some locations, ECTs are established with geographic jurisdictions based on river basins and population pressures (Sweden) or indigenous communities (Canada), again reflecting that environmental needs and solutions do not always conform to the lines on a map.[18]

15. Environment and Land Court Act (2011) Cap. 12A 19 § 18 (Kenya).
16. Joyce Lutomia, 'Kenya CJ Highlights Need to Protect Environment', (Kenya News Agency, 25 June 2014) http://kenyanewsagency.go.ke/en/?p=27531 accessed 8 January 2020.
[17] *See* Brian J. Preston, *Benefits of Judicial Specialization in Environmental Law; The Land and Environment Court of the New South Wales as a Case Study,* Pace Environmental Law Review, Winter 2012, at 428-29.
[18] George Pring & Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals (2009)* 31 <https://www.eufje.org/images/DocDivers/Rapport%20Pring.pdf> accessed 8 January 2020.

Accordingly, an independent judiciary serves as a critical backstop in enforcing domestic environmental laws as well as integrating the human rights and environmental provisions of international agreements to ensure consistent application of these fundamental values.[19]

**National Green Tribunal of India**

Also in 2010, India created a National Green Tribunal (NGT) – one of a growing list of developing nations that have empowered a specialized environmental court to deal with this complex area of jurisprudence, and ease access for the public to bring a complaint to address an environmental problem.[20]

Rather than a full court, however, India put in place a tribunal, reflective of national characteristics and their particular legal system, as well as unique constitutional and administrative nuances.[21] There can be wide variance, based on what is preferred in each country, for environmental courts to "range from fully developed, independent judicial branch bodies with highly trained staffs and large budgets all the way to simple, underfunded village ECs that handle environmental cases one day a month with rotating judges."[22] Similarly a tribunal may "range from complex administrative-branch bodies chaired by ex-Supreme Court justices, with law judges and science-economics-engineering PhDs, to local community land use planning boards with no law judges."[23]

The permissiveness of the Indian constitution in affirming principles of environmental protection gradually shifted since its first form, dating to independence from the British Empire in 1950 which lacked any environmental provisions, to amendments from 1976 requiring that "the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country," while also affirming a similar fundamental duty for each citizen "to protect and improve the natural environmental including forests, lakes, rivers and wildlife, and to have compassion for living creatures."[24] Following these constitutional amendments, and also based on the existing constitutional right to life and personal liberty, the Indian Supreme Court became enmeshed in environmental policy beyond the standard judicial role of interpretation and adjudication of law.[25] Since about 1980 "the Court has laid down new principles to protect the environment, reinterpreted environmental laws, created new institutions and structures, and conferred additional powers on the existing ones through a series of illuminating directions and judgments."[26] It is striking for a court to use its authority in such an expansive manner, but the perception was that the judiciary: "far from being substitutes for legislative powers – provide authority to the environmental legislation through judicial enforcement and

[19] *Id.*
[20] Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections of the National Green Tribunal of India*, Pace Environmental Law Review, Winter 2012, at 441.
[21] *Id.*
[22] United Nations Environment Programme, *Environmental Courts and Tribunals: A Guide for Policy Makers* (2016) 1.
[23] *Id.*
[24] India Const. art. 48 & art 51A(g) *available at* https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text
[25] Svitilana Kravchenko & John E. Bonnie, Human Rights and the Environment: Cases, Law and Policy (Carolina Academic Press 2008) 69.
[26] *See* Geetanjoy Sahu, IMPLICATIONS OF INDIAN SUPREME COURT'S INNOVATIONS FOR ENVIRONMENTAL JURISPRUDENCE (2008) 3 <http://www.lead-journal.org/content/08001.pdf> accessed 8 January 2020.

interpretation, ensuring consistency and stability to environmental framework."[27] A former Chief Justice of the Supreme Court of India, B.N. Kirpal, remarked in 2002 that "it has frequently fallen to the judiciary to protect environmental interests, due to the sketchy input from the legislature and laxity on the part of the administration."[28] By 2009 the Indian Law Commission issued a report that called for creation of a National Green Tribunal, and a bill was introduced.[29]

With decades of experience in environmental adjudication, the court system saw the need to recommend and, after some debate, establish this NGT through legislation. Here the creation of the tribunal was not a mandate upon the judiciary, nor seen as an affront to the sitting judges (as in the United States where the ideal of the generalist-but-still-expert court was influential in a 1970's report by the Department of Justice recommending against establishing a dedicated environmental court), but instead it was requested by the court itself.

Environmental redress was undoubtedly becoming increasingly important in a country with a population increase of 361 million in 1950 to 1.339 billion today. It was also well understood that access to effective remedy was a fundamental element of the Rio Declaration and that any environmental laws on the books were worthless without a way for the public to engage with the courts. The tribunal's organic statute made several novel judicial practices an essential part of the NGT. Based on decades of experience with environmental law at the Supreme Court, the tribunal is comprised of anywhere from 21 to 41 members, but they are split between judges who hold degrees in the sciences with relevant experience in environment and forestry, and technical experts with government or community organization experience in the environmental field.[30] The recognition of a need for technical expertise in adjudicating complex environmental cases is groundbreaking, and based on the experiences of the Supreme Court of India and reflected in case law from as long ago as 1986.[31] Indeed, neighboring Bangladesh has identified weaknesses in their own environmental court structure which was "not designed to accommodate expert knowledge over environmental matters … [e]xpert knowledge is specially required for the determination of level of pollution which can constitute a violation of environmental law," and laments that no specialized environmental law training is required for judges appointed to the Bangladesh environmental court system.[32] However the Indian system is not without criticism, as the scope of scientific expertise may be too narrowly focused on the engineering and technology fields, per the National Green Tribunal Act, despite the relevance of other disciplines in resolving complex environmental law cases.

Provisions detailing standing procedures identified several ways to trigger access to the NGT, providing for one of the most, if not the most, liberalized mechanisms for bringing a case to an ECT anywhere in the world. One can bring a suit when: "there is a direct violation of a specific statutory

[27] Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections of the National Green Tribunal of India,* 29 Pace Envtl. L. Rev. 441 at 444-445 (2012).
[28] Svitilana Kravchenko & John E. Bonine, *Human Rights and the Environment: Cases, Law and Policy* at 69 (2008).
[29] *Id* at 461.
[30] The National Green Tribunal Act § 4, § 5.
[31] *See* M.C. Mehta v. Union of India and Shriram Foods and Fertilizer {1986(2) SCC 176}
[32] *See* Environmental Law of Bangladesh: Environmental Courts and Judicial Activism – Weaknesses of the Environmental Court § 7A:14

environmental obligation by a person by which, (A) the community at large other than an individual or a group of individuals is affected or likely to be affected by the environmental consequences; (B) or the gravity of the damage to the environment or property is substantial; (C) or the damage to public health is broadly measurable."[33] Additionally, any person can bring a suit, without a lawyer, by sending an email or letter to the court, which enables those who lack economic resources to still seek justice through the rule of law.[34]

This approach clearly provides very easy access to the courts, to a degree that some might find too permissive,[35] yet ensuring no undue barriers limit environmental complaints may help address one of the root causes of wildlife poaching: corruption.[36] Still, one critical caveat limits the ultimate effectiveness of the court. Each expressly enumerated statute that defines the jurisdiction of the National Green Tribunal,[37] often praised as a way to eliminate uncertainly about what is an "environmental matter" that should come before the tribunal, applies to only civil cases and not criminal offences. For this reason, to date, the Wildlife Act is not included in Schedule 1 and wildlife crimes will not come before the Green Tribunal of India. This oversight seems ripe for citizen complaint through liberalized standing measures, or for the Supreme Court to remedy though an innovative ruling that compels a change to the tribunal's structure.

A recent United Nations report confirmed, in an assessment of illegal trade in African Elephant ivory, that corruption of local, regional, national officials, including park rangers, customs officers, and other conservation specialists, is often fundamental to a successful flow of black-market goods. The risk of confiscation also drops significantly if the officials themselves are engaged in the scheme.[38] Despite the influx of criminal syndicates and the corresponding rise in highly-advanced poaching techniques, this UN report indicates reliance on those with special access to endangered animals or authority within a nation's bureaucracy to provide the simplest way to both obtain and reliably export wildlife products to meet demand.[39] India is not immune to these pressures, and in 2016 four park employees were arrested for involvement in poaching endangered one-horned rhinos, and a forest ranger was arrested after police found illegal tiger skins and ivory in his house.[40] All of these arrests were in the Kaziranga preserve in northeastern India where wildlife guards are authorized to use a shoot-to-kill policy on anyone they suspect of poaching.[41] Records indicate that over sixty people have been killed there in nine

[33] The National Green Tribunal Act § 2(m)(i).
[34] Pring & Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment,* 11 Or. Rev. Int'l L. 301 at 323.
[35] *Id.*
[36] *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME, *World Wildlife Crime Report: Trafficking in protected species*, (2016) <http://www.unodc.org/documents/data-and-analysis/wildlife/World_Wildlife_Crime_Report_2016_final.pdf> accessed 8 January 2020.
[37] Including *inter alia* in "Schedule 1" of Section 14 of the National Green Tribunal Act: The Water (Prevention and Control of Pollution) Act, 1974 & 1977; The Forest (Conservation) Act, 1980; The Air (Prevention and Control of Pollution) Act, 1981; The Environment (Protection) Act, 1986; The Biological Diversity Act (2002).
[38] *Id* at 28.
[39] *Id.*
[40] *See* 'UN report confirms corruption is biggest threat to ivory, as wildlife officials arrested across Africa and Asia' (*Survival International,* 14 June 2016) <http://www.survivalinternational.org/news/11312> accessed 8 January 2020.
[41] *Id.*

years.[42] With high risk to poachers in this preserve, syndicates may prefer to find a compromisable official to do the killing and collecting of wildlife products, under the cover of government legitimacy. Within India's court system, allowing for simple filing of a case directly with the NGT combined with permissive standing, could serve as a critical way to combat wildlife poaching without reporting, for example, a suspected poaching within a protected area to other officials who may also be complicit.

**South Africa**

Not all court-requested environmental ECTs show the same institutional durability as in India, however. For example, an environmental court (SAEC) was established in the Western Cape Province in South Africa in 2003. [43] The SAEC was originally established to combat wildlife crime, providing a forum to prosecute abalone poachers who were damaging coastal marine parks.[44] Upon its founding, the Minister of the Environment called the SAEC part of a "war on poaching syndicates" and indicated the government's broader conservation initiative was resolutely "determined to break these syndicates destroying our country's valuable resources."[45] Immediate success was realized with a first-year conviction rate of seventy percent for wildlife crimes cases, up from ten percent in prior years.[46]

Ultimately leading to its undoing, the SAEC (including a second court established in 2007) was created and implemented by the South African court system. However, without a legislative mandate for its establishment, the SAEC was subsequently shut down in the face of a growing unwillingness of the court administration to provide funding and facilities.[47] The South African example shows great promise for achieving better outcomes in wildlife crimes cases, but also demonstrates that domestic law authorizing an environmental court is crucial to ensure a specialized ECT's existence throughout the ebb and flow of domestic political and economic cycles. It also underscores the need to frame an effective environmental court, which ideally prevents degradation and theft of natural resources, as a mechanism to encourage sustainable development and a healthy environment that provides tourism, ecological and agricultural benefits. Securing a steady funding stream for a dedicated environmental court is simplified with a tacit understanding that effective adjudication is in the public, and national, interest.

[42] *Id.*
[43] MICHAEL FAURE & WILLEMIEN DU PLESSIS, THE BALANCING OF INTERESTS IN ENVIRONMENTAL LAW IN AFRICA 424 (2011).
[44] '*South Africa Sets Up New Environmental Court*' (*Afrol News,* 24 February 2004) http://www.afrol.com/articles/11360 accessed 8 January 2020.
[45] *Id.*
[46] *Id.*
[47] *See* FAURE & DU PLESSIS

**Structural advantages of a specialized national environmental court**

Several definitive studies based on a review of national environmental courts and tribunals have clarified what structural advantages a specialized judicial forum can provide. Specifically, a dedicated environmental court could be expected to provide the following systemic advantages: (1) expertise via specialized training and exclusive jurisdiction for expert environmental courts; (2) efficiency; (3) visibility (of environmental crimes and judgments); (4) reduced cost (rules and procedures could be adapted to lower costs); (5) greater uniformity in the application of laws and precedent; (6) standing could be more broadly defined to enhance access; (7) commitment to environmental justice; (8) government accountability (the court could provide oversight of executive and ministry policy); (9) prioritization; (10) creativity by using flexible rules of procedure and/or evidence; (11) alternative dispute resolution could be implemented; (12) issue integration (with respect to wildlife poaching and organized crime, many laws may be required for effective prosecution, outside the scope of traditional environmental management); (13) remedy integration; (14) public participation, with enhanced Internet-based information for reporting; (15) public confidence (the public could be more confident that wildlife crimes were being dealt with adequately); (16) problem-solving (a dedicated court could look at the issue of wildlife poaching broadly, to solve the problem through all appropriate legal means); and (17) effective judicial interpretation (through interpretation and rulings a dedicated court could give teeth to environmental laws and constitutional environmental provisions).[48]

***Mobile Environmental Courts: Bringing Justice to the Wilderness***

As a part of earlier research for a public interest law group, the author traveled to Namibia with a team of international lawyers in 2016 and 2017 to learn about their wildlife poaching crisis and develop a report in conjunction with local experts. One popular recommendation, presented before a workshop of 60 government officials and stakeholders, was to create an environmental court to better apply the rule of law to wildlife crimes in the face of increased criminal syndicate activity across the country. Namibia has the second lowest population density of any country (behind only Mongolia), and illegal poaching often happens in remote deserts and isolated communities far from administrative centers that would usually host a regional court. Accordingly, to hold a trial on environmental matters within a reasonable timeframe, justices would need to travel to various locations by establishing a mobile court.

Certain logistical issues arise with a mobile court that would need to be addressed, and are not challenges unique to the Namibian context. These issues include the schedule of the court, managing case flow, and organizing matters so that they are heard in a timely manner, but with geographic rotation. These are important considerations to ensure that a mobile court is effective and cases are

48. *See* GEORGE PRING & KATHERINE PRING, U.N. ENV'T PROGRAMME, ENVIRONMENTAL COURTS AND TRIBUNALS: A GUIDE FOR POLICY MAKERS 13-14 (2016); GEORGE PRING & KATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 14-16 (2009); MALCOM GRANT, REPORT TO THE DEPARTMENT OF ENVIRONMENT, TRANSPORT AND THE REGIONS 2-3 (2000); U.N. ENV'T PROGRAMME, UNEP GLOB. JUDGES PROGRAMME, APPLICATION OF ENVIRONMENTAL LAW BY NATIONAL COURTS AND TRIBUNALS: PRESENTATION 9: REMEDIES IN ENVIRONMENTAL CASES, https://wedocs.unep.org/bitstream/handle/20.500.11822/20277/Remedies-Environmental-Cases.pdf?sequence=1&isAllowed=y (accessed 1 January 2020).

processed in a timely manner. They are not, however, reasons to avoid implementing mobile courts. Indeed, mobile courts already exist in many countries and have had a substantial amount of success.

According to a report provided by the United Nations Development Programme (UNDP) about mobile courts in Sierra Leone, Democratic Republic of the Congo (DRC), and Somalia, along with pre-crisis courts in the Central African Republic, implementation of mobile courts has led to improvements in the rule of law and judicial efficacy.[49] These successes include increased access to justice for remote communities, reducing the backlog of cases in the lower courts, and strengthening the role of the formal justice system in areas where traditional justice mechanisms are prevalent.[50] In the DRC, the mobile courts have also served justice on defendants who thought that they were untouchable in the remote areas where they were carrying out their crimes.[51] Each success has not come without challenges, however, and the UNDP report describes significant complications to developing mobile courts across all three African countries: (1) sustainability and funding, (2) planning and logistical issues, and (3) lack of awareness of the legal process by users.[52] These limitations and concerns are prevalent across the developing world.

**1. Sustainability and Funding**

Funding and sustainability directly impact long-term viability. The mobile courts examined were all, to varying degrees, funded by international organizations, such as UNDP, rather than domestic governments.[53] Where high levels of funding were provided, donors often directed the courts to prioritize certain cases and the mobile courts were seen as unsustainable due to lack of funding certainty. Additionally, these outside benefactors could, at least in theory, exert undue influence and introduce a limit on the autonomy of any court excessively dependent upon international funding.[54] The courts seen as most sustainable were those where the government provided a separate budget to operate the courts, perhaps supported by a smaller amount of international donor funds.[55]

While it would be desirable for international funds to contribute to establishing a Namibian environmental court and, specifically, to training the judges and special wildlife crimes prosecutors, it would be ideal for the Namibian government to allocate annual funds to the operations of the court in the same manner in which Namibia's other courts are funded. Also, it should be made clear to donors, including in statute, that they do not have the authority to direct the court to prioritize certain cases or

49. *See* Monica Rispo, U.N. Dev. Programme, Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, Democratic Republic of the Congo and Somalia 6-7, 10-14, 16-17 (May 2014), http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/evaluation-of-undp-s-support-to-mobile-courts-in-drc--sierra-leo.html.
50. *Id*.
51. Michael Maya, Am. Bar Ass'n Rule of Law Initiative, Mobile Courts in the Democratic Republic of Congo: Complementarity in Action? (Dec. 2012), https://worldjusticeproject.org/sites/default/files/mobile_courts_in_the_democratic_republic_of_congo_maya.pdf.
52. *See* Rispo, *supra* note 49, at 7, 11, 14-15, 18-21.
53. *See id.* at 6, 10, 16, 20; *see also* Maya, *supra* note 51, at 34-36 (with endnote #4 delineating the major international foundations and governments that had helped fund mobile courts in the DRC).
54. *See* Rispo, *supra* note 49, at 6, 19-20, 27-28.
55. *See id.*

otherwise affect the operations of the court. This is important in order to maintain the independence of the judiciary and for long-term efficacy of the court.

## 2. Logistical and Planning Issues

The mobile courts reviewed in the UNDP report fell into one of two categories in terms of planning: (1) ad hoc court sessions where a court session could be requested by the parties or when the judiciary deemed it was needed; or (2) planned, timetabled sessions.[56] Although the ad hoc sessions, particularly in the DRC, proved useful in reducing the backlog of cases where they were most needed, they also tended to be costly and, ultimately, somewhat inefficient.[57] In addition, some defendants suffered from prolonged detention due to delays in the arrival of the mobile courts.[58]

Courts that followed the second approach and scheduled a mobile sitting in advance had more success.[59] There are various ways to accomplish this logistically. For example, every year, Sierra Leone's Chief Justice issued an order that specifies the locations and the schedule for the mobile high court.[60] Also in Sierra Leone, the mobile magistrate courts had more flexibility in selecting their locations and schedule to cover eight stations.[61] This method provided more certainty to the circuit tour than in the other countries examined.[62] A mobile court's schedule could be set annually, biannually, or even quarterly based on the caseload need and population and geographic factors unique to each country. In Namibia, there could also be an option for a regional matter to be expedited in Windhoek or another particular regional center by petition if the issue were especially time-sensitive. This procedure could be used in any jurisdiction to ensure timely access to judicial remedy, in the spirit of the Rio Declaration.

## 3. Lack of Awareness of Legal Process

A third major issue identified in the three African countries described in the UNDP report was a lack of awareness of the legal process, which can hinder operation of the courts and reduce social integration of legal norms.[63] In Sierra Leone, the absence of witnesses in court produced high levels of adjournment rates.[64] It was reported that the courts often drew a large number of individuals who were interested in learning about court process but, in some areas, training programs were needed to successfully boost knowledge of legal procedures and rights.[65] The same issue was found in Timor Leste, but there, efforts were made to run legal awareness initiatives simultaneously with the mobile court

56. *Id.* at 24-25.
57. *See id.* at 11, 20.
58. *Id.*
59. *Id.* at 24-25.
60. *Id.* at 6.
61. *Id.*
62. *See id.* at 6-7, 11, 13.
63. *See id.* at 7, 11, 14, 19, 21, 25.
64. *Id.* at 7.
65. *Id.* at 21.

hearings.[66] Running the sessions simultaneously proved to be "exceptionally challenging," and eventually a separate project was set up for the legal awareness sessions.[67]

A lack of awareness of the legal process, however, is not a problem that is unique to mobile courts but rather can adversely impact the judicial system as a whole. The specialized training that should be cultivated for an environmental court and special wildlife-crime prosecutors would help ensure that judges and prosecutors are adequately trained in such issues. Namibia, or any jurisdiction, may also consider a legal awareness initiative, particularly in the communities that have seen a significant amount of poaching and in which mobile courts would sit, to educate the public about these new courts and how they would work. Such educational outreach could take place in conjunction with educating citizens about any new changes to the wildlife-crime and environmental legislation that may be adopted, including stricter penalties, and could also have the effect of deterring wildlife crimes.

**The Future of Environmental Courts**

It is clear as we begin the 2020's that global environmental consciousness is on the rise. Issues of justice related to climate change,[68] pollution and waste,[69] and yes, loss of biodiversity,[70] among other interrelated ecosystem-wide concerns are featured repeatedly in major news outlets across the globe. Indeed, Time Magazine's 2019 Person of the Year was sixteen-year-old climate change activist Greta Thunberg, further cementing environmentalism as a modern cause célèbre, and hinting at the burgeoning public demand for environmental protections.[71]

Does this renewed interest in environmental redress, while often politically-focused, also embrace a heightened role for a "green" judiciary? An analysis completed for the United Nations Environment Programme indicates a recent "explosion" of specialized environmental courts and tribunals (ECTs), leading to a dramatic shift in, and increased prominence of, environmental

[66] Id. at 17.

[67] Id.

[68] Andrew Freedman, Jason Samenow, Rick Noack and Karly Domb Sadof, 'Climate change in the 2010s: Decade of fires, floods and scorching heat waves' (*Washington Post*, 1 January 2020) <https://www.washingtonpost.com/graphics/2020/weather/amp-stories/climate-change-in-the-2010s/> accessed on 8 January 2020
"As the decade closes, there is a growing recognition that climate change is having more calamitous impacts on ecosystems and human society than expected, and scientific concern over tipping points that no longer seem as distant."

[69] Laura Parker, 'We Made Plastic. We Depend On It. Now We're Drowning in It' (*National Geographic*, June 2018) <https://www.nationalgeographic.com/magazine/2018/06/plastic-planet-waste-pollution-trash-crisis/> accessed on 8 January 2020.

[70] Brian Resnick, 'The species the world lost this decade: This decade has made it clear: Humans are killing Earth's great biodiversity' (*Vox*, 9 December 2019) <https://www.vox.com/energy-and-environment/2019/12/9/20993619/biodiversity-crisis-extinction> accessed on 8 January 2020.

[71] See Environmental Voter Project, "Exploration of U.S. Voting Behavior and Attitudes" 9 December 2019, https://www.environmentalvoter.org/sites/default/files/documents/report-exploration-us-voting-behavior-attitudes.pdf Stating "14% of registered voters now list "addressing climate change and protecting the environment" as their #1 priority over all other issues."

adjudication.[72] Showing a swift growth in ECTs, from 350 worldwide in 2009, to over 1,200 ECTs in at least 44 countries by 2016, this proliferation is attributed to a rising public outcry.[73]

> "Calls for improved access to environmental justice, the environmental rule of law, sustainable development, a green economy and climate justice are being heard around the world. In response, policy makers, decision makers and other stakeholders – legislators, judges, administrative officials, business and civil society leaders – are responding by taking a hard look at their governance institutions and are creating new judicial and administrative bodies to improve access to justice and environmental governance. ECTs are increasingly being looked to as the logical solution to the existing barriers in traditional justice systems."[74]

With the rebirth of environmentalism as a top-tier issue for peoples across the globe, and recognition of the critical role that a specialized judiciary can play in protecting and empowering environmental protections, ecological benefits, and the human right to a healthy environment, it is clear that ECTs will be at the forefront of conservation measures in the 21st century. As discussed, a strong court system, providing accountability and consistent rulings, can hold those who commit wildlife crimes accountable, and ideally, catalyze effective enforcement and give teeth to domestic environmental laws and implement the principles of international agreements, including preventative measures.

Humanity sits at the crux of unprecedented environmental degradation: The Sixth Great Extinction, climate change, waste and plastics disposal with a skyrocketing global population – these are challenges that must be confronted now, before any control over the outcome becomes merely an illusion. As John Muir reminds us to look beyond anthropocentrism: "[t]he world, we are told, was made especially for man — a presumption not supported by all the facts."[75]

[72] *See* GEORGE PRING & KATHERINE PRING, U.N. ENV'T PROGRAMME, ENVIRONMENTAL COURTS AND TRIBUNALS: A GUIDE FOR POLICY MAKERS 1 (2016)
[73] *Id* at 1-2.
[74] *Id.*
[75] John Muir, *A Thousand Mile Walk to the Gulf*, (Houghton Mifflin Company 1916)