



Position Paper:

Indigenous flora *and* fauna: African resources for African people
Framing sustainable use of wildlife as an Access and Benefit sharing
(ABS) case under the United Nations Convention on Biological
Diversity's Nagoya Protocol on Access to Genetic Resources and the
Fair and Equitable Sharing of Benefits Arising from their Utilisation

Date: March 2021

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KEY MESSAGES

- *In African belief systems, wildlife and plants are indivisible components of communities' biocultural heritage and way of life*
- *Sustainable use of wildlife is a subsistence rights issue*
- *Customary and regulated trophy hunting exemplify sustainable use with positive consequences for community benefits and conservation rights*
- *Commercial use of wildlife, including hunting, qualifies as access and benefit sharing under the Nagoya Protocol*
- *Taking a human rights approach to sustainable use and biodiversity conservation is in line with African rural development policies that aim to improve the livelihoods of indigenous people and local communities.*
- *The Post 2020 Global Biodiversity Framework (GBF) should focus its targets not only on sustainable use, access, and benefit sharing related to plants and genetic diversity. It should extend its terms to include the use of all indigenous species and ecosystems inclusive of wildlife, and protect the subsistence rights of indigenous peoples and local populations who are custodians of such resources.*

Important Definitions

“Genetic resources means genetic material of actual or potential value; genetic material means any material of plant, animal, microbial or other origin containing functional units of heredity. (CBD, Article 2).

Indigenous biological resource: Any living or dead animal, plant or other organism of an indigenous species; any derivative of such animal, plant or other organism; or any genetic material of such animal, plant or other organism. (South African National Environmental Management: Biodiversity Act).

BACKGROUND

In the face of increasing global concern about faltering economies and loss of biodiversity, it is clear that sustainable use (SU) is critical for both biodiversity and human wellbeing. International instruments on the environment have clarified that SU does not threaten, but rather encourages species survival, by providing economic and social incentives against overexploitation and depletion of fauna and flora. This thinking supports the three objectives of the Convention on Biological Diversity – the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits from the use of genetic resources. These are mutually supportive and stand on equal footing.ⁱ This is subsequently reinforced by the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity.ⁱⁱ Indeed, for most communities who are custodians of wild plants and animals, international human rights law has shown that SU is a subsistence rights issue linked to material provisions for peoples' enjoyment of minimal physical and physiological well-being.

However, while the foregoing instruments have proven to be useful in recognising that indigenous peoples and local communities can enjoy Access and Benefit Sharing (ABS) for indigenous plants (flora) found in their territories, the potential for sustainable use of *wild animals* is yet to be adequately harnessed to support access and beneficiation for local and indigenous communities in Africa. Instead, agendas are vigorously promoted at the global level calling for implementation of anti-poor conservation measures including establishment of state protected areas, and banning of hunting and other commercial use of wildlife.

This entrenches a 'silo' or fragmented approach to global legal and policy governance of nature conservation at the expense of the rights of poor people whose survival depends natural resources. It fails to align with African belief systems that view plants and wild animals as inseparable resources and hunting as a sustainable use practice, and imposes a Western animal protectionists' agenda on developing countries, with little regard for, or understanding of, what wildlife means to indigenous peoples and local populations. It also indicates a lack of understanding of knowledge systems associated with the pragmatic concept of community-based natural resource management (CBNRM), an approach that advocates a mutually beneficial relationship between wildlife and human populations living nearby. CBNRM seeks both conservation and local community involvement in wildlife management decision-making, with the financial benefits associated with wildlife-related revenue accruing to local communities. More importantly, it shows lack of knowledge and understanding of how the use of wildlife fits in the operationalisation of sustainable use and Access and Benefit Sharing as envisaged by the Nagoya Protocol and related instruments.

Over decades, the consequence of ignoring the worldview and belief systems of local communities has been shown to damage both nature and people. For instance, a 2019 World Bank report concludes that illegal trade in wildlife deprives governments of between USD7-12 billion a year, and causes between USD1-2 trillion of damage to ecosystems.ⁱⁱⁱ It is thus unsurprising that neither the Biodiversity Target adopted by the CBD for 2010 nor the Biodiversity Targets for 2020 were met. In fact, according to the 2020 WWF *Living Planet Report*, 'our relationship with nature is broken'.^{iv} Studies have also shown that local and indigenous communities have been the worst affected by these failures, for neither their rights nor their worldview are being wholly respected and guaranteed.^v

As the world moves forward to post-2020, transformational change in thinking and approach is needed to halt fragmented governance that focuses only on sustainable use (SU) and Access and Benefit Sharing (ABS) of plants and genetic diversity. Change is necessary to embrace a holistic approach that extends SU and ABS beyond genetic diversity of plants to all indigenous species and ecosystems inclusive of wildlife and its regulated hunting. New thinking is necessary to balance healthy biodiversity with the subsistence rights of indigenous peoples and local populations who are custodians of resources found within their territories.

OBJECTIVES

The objectives of this paper are to:

- Urge advocacy for holistic sustainable use of biodiversity and support the rights of local communities and indigenous peoples to their indigenous biological resources, especially, their plants and wildlife
- Urge the Group of African States to argue that sustainable use of wildlife is a human right of local people and indigenous communities in Africa
- Defend regulated trophy hunting as an example of sustainable use of wildlife and an aid to biodiversity conservation, the wildlife economy, and livelihoods of local populations and indigenous peoples
- Demonstrate to all stakeholders that trophy hunting and other forms of sustainable use of wildlife are supported and should thus qualify as ABS activity under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits
- Encourage the Group of African States (in particular the Southern African Development Community (SADC) sub region) and related policy-makers to be strong advocates for the post-2020 Global Biodiversity Framework (GBF) that extends ABS to indigenous species and ecosystems inclusive of wildlife, and protects the subsistence rights of indigenous peoples and local people who are custodians of such resources.

TARGET AUDIENCES

The policy brief can support the activities of the following stakeholders:

- African Group of Negotiators
- Community-based natural resource management sector
- Animal rights activists
- Policy-makers in the Southern African Development Community
- Policy-makers in other regional economic communities
- Human rights activists
- Hunting and safari operator groups
- Local and indigenous populations and communities
- CBD Secretariat
- CITES Secretariat
- Game managers
- Law and decision-makers in non-African countries.

AFRICAN COSMOLOGY: WILDLIFE AND PLANTS AS AN INDIVISIBLE RESOURCE

The cosmology of people reflects their sense of belonging, meaning, and purpose, which in turn wields a powerful influence on their behaviour and choices.¹ From the perspective of indigenous Africans, plants and wildlife form a unique and indivisible component of the cosmos.² Plants and animals belong to the tangible world which, with all biological life as well as objects without biological life, are connected spiritually.³ In the African worldview, the knowledge of living beings, natural environment, and social life is indissoluble.⁴ This cosmology commands respect for nature, demanding a peaceful and balanced co-existence of the parts of the universe (people, ecosystems, and the biosphere) that are composed of matter, energy and spirit.⁵ Hence, it is an essential aspect of culture for most communities in Africa to use their natural resources in great moderation with future generations in mind.⁶ Such an understanding also obliges communities to sensitise their members to be conscious of caring for the environment, and contributes to the social-environmental well-being of global communities.⁷

It is, however, disappointing that this understanding of African worldview has been disrupted and marginalised by colonialism and cultural prejudice.⁸ This has produced fragmented thinking in legal and policy global governance related to the conservation of nature and the rights of poor people whose survival depends on it. For instance, while the concept of biodiversity considers animals, plants, micro-organisms and their ecosystems, a common global approach since the 1970s has been to break the concept down into different groupings, such as trade in species, World Heritage sites, and migratory species. In other words, the approach of the conventions of the 1970s has been to focus on specific species and sites, with the 1979 Convention on Migratory Species being unique in that it seeks to protect specific species and to link their protection to their habitat.⁹ The Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention),¹⁰ focuses on wetlands. Whereas the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),¹¹ appears to include both fauna and flora, it does not give adequate attention to the interest of local and poor people

¹ O Kehinde 'African Religion and Environmental Dynamics' (2013) 4 (2) *Journal of Studies in Social Sciences* 199–212; D Adom 'Traditional cosmology and nature conservation at the Bomfobiri wildlife sanctuary of Ghana' (2018) 3 (1) *Nature Conservation Research* 35–57

² G Museka and MM Madondo 'The Quest for a Relevant Environmental Pedagogy in the African Context: Insights from Unhu/Ubuntu Philosophy' (2012) 4(10) *Journal of Ecology and the Natural Environment* 258–265

³ N Taringa 'How Environmental is African Traditional Religion?' (2006) *Exchange* 35(2): 191–214.

⁴ Rios, M. and Mora, A. (Eds.). 2014. Access to Genetic Resources in Latin America and the Caribbean: Research, Commercialization and Indigenous worldview. IUCN-UNEP/GEF-ABS-LAC. Quito, Ecuador. 116 pp., 83

⁵ Reichel E. 2005. Cosmology. In: B. Taylor, J. Kaplan (Eds.): *The Encyclopedia of Religion and Nature*. London: Thoemmes Continuum. pp. 420–425

⁶ Infield M., Mugisha A. 2013. *Culture, Values and Conservation: A Review of Perspectives, Policies and Practices*. Cambridge, UK: Fauna and Flora International. 28 p.

⁷ Reichel et al (n 5 above)

⁸ Museka G., Madondo (n 2 above)

⁹ Convention on the Conservation of Migratory Species of Wild Animals UNTS Volume Number: 1651

¹⁰ Convention on wetlands of international importance especially as waterfowl habitat UNTS Volume Number 14583, art 3(1) on the wise use of wetlands

¹¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora UNTC Volume Number 14537 which calls for the protection of the flora and fauna for the present and future generations

whose livelihoods depend on wild fauna and flora. It has little regard for the rights of local and cultural communities that may be negatively impacted by its implementation.

The 1990s brought more progressive normative approaches, yet the problem remains. For example, the Convention on Biological Diversity (CBD) (1993) has three core objectives: the conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits from the use of genetic resources – that are mutually supportive and stand on equal footing.¹² This was followed by the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2014).¹³ However, the potential of these instruments for adequate harnessing of wildlife for beneficiation of local and indigenous communities in Africa has not been realised. To the neglect of these populations and communities, agendas are still being pushed at the global level for implementation of anti-people or anti-poor conservation measures including establishment of state protected areas, restriction or banning of commercial use of wildlife and the centralisation of the control of wildlife in the state, and stringent legislation including outright ban and criminalisation of activities in the wildlife sector, including trophy hunting.

The silos and fragmented regulatory approach that lack due regard for wildlife and the interests of poor communities have been damaging to both nature and communities that rely on wildlife for survival. Surely, these approaches may have some advantages, but, as the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) warns, they have had limited impact in halting the loss of biodiversity. By way of example, since 1970, many wetlands such as marshes, lakes and shallow coastal wetlands have disappeared in the face of the Convention on International Wetlands of Importance.¹⁴

Based on this trend, should not the current calls for transformational change that requires doing things differently inform a new, holistic way of addressing the biodiversity dilemma in a changing world? Under the Nagoya Protocol, indigenous peoples and local communities can enjoy Access and Benefit Sharing (ABS) for indigenous plants found in their territories. For instance, in South Africa, in 2019 a benefit sharing agreement between the KhoiSan and the South African Rooibos industry was concluded. Based on this agreement, these communities will have access to benefits as a percentage contribution from the commercialisation of Rooibos by the South African Rooibos industry.¹⁵ But, should such an approach not also apply to the fauna found in their territories or in territories elsewhere? Should it not apply, for instance, to regulated trophy hunting, a sustainable practice for their wildlife resource, in the same way it applies to the flora?

It is the aim of this paper to argue the need to align the framing and operationalisation of sustainable use and ABS envisaged under the Nagoya Protocol with African cosmology and right to subsistence of local communities and indigenous peoples. In other words, there is a need for a transformational narrative that resonates with a cosmology that views African fauna and flora as an inseparable resource. More importantly, where the regulated sustainable use of biological

¹² The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69)

¹³ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Doc.: UNEP/CBD/COP/DEC/X/1 of 29 October 2010, preamble

¹⁴ A van Dam 'World Wetlands Day 2019: 'The Ramsar Convention on Wetlands remains important' 31 January 2019, <https://www.un-ihe.org/stories/world-wetlands-day-2019-ramsar-convention-wetlands-remains-important>

¹⁵ The Rooibos Access and Benefit-sharing Agreement <https://naturaljustice.org/the-rooibos-access-and-benefit-sharing-agreement/>

resources (whether fauna or flora) involves commercialisation, indigenous and local peoples and communities should be entitled to the ABS arrangement for such resources in Africa.

SUSTAINABLE USE OF WILDLIFE AS A SUBSISTENCE RIGHTS ISSUE

Sustainable use (SU) refers to the both non-consumptive and consumptive use of wild fauna and flora from nature through hunting/fishing and harvesting. Regulated SU does not threaten species survival but rather encourages it by providing economic and social incentives against overexploitation, habitat destruction, and persecution (especially of dangerous animals). Importantly, for indigenous peoples and local populations who are custodians of the resource, and whose livelihood depends on it, this is a subsistence rights issue. Article 2 of the CBD defines sustainable use as:

(T)he use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.¹⁶

According to the Collaborative Partnership on Sustainable Wildlife Management, 2020, SU refers to:

(T)he sound management of wildlife species to sustain their populations and habitat over time, taking into account the socioeconomic needs of human populations. This requires that all land-users within the wildlife habitat are aware of and consider the effects of their activities on the wildlife resources and habitat, and on other user groups.¹⁷

While the concept of SU is a general feature of most international environmental instruments, its operationalisation as a core component of the right of indigenous and local populations to subsistence is lacking. SU forms a core part of the three objectives of the CBD.¹⁸ The concept is acknowledged by the Nagoya Protocol that highlights the importance of SU for the sustainable livelihoods of communities.¹⁹ It is also a subject of focus in several COP Decisions. In addition to Decision VI/13 which is devoted to the concept,²⁰ Decision V/24 highlights sustainable use as a cross-cutting issue,²¹ while Decision VIII/21 focuses conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction.²²

Although there is a rights deficit in the framing of SU in international environmental law instruments, it is not difficult to link SU to the rights of indigenous and local populations and communities to subsistence. The right to subsistence can be defined as the right to those material provisions needed for one's self-preservation, i.e., those material provisions required for enjoying minimal physical and physiological well-being. Water, food, air, shelter, and access to basic medical provisions and energy sources are normally understood to be included.²³ These apply to

¹⁶ CBD (n 12 above) art 2

¹⁷ Collaborative Partnership on Sustainable Wildlife Management <http://www.fao.org/forestry/wildlife-partnership/93147/en/>

¹⁸ The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69)

¹⁹ Nagoya Protocol (n 13 above) preamble

²⁰ www.cbd.int/decision/cop/?id=7187 COP

²¹ www.cbd.int/decision/cop/?id=7166

²² www.cbd.int/decision/cop/?id=11035

²³ H Shue *Basic rights: Subsistence, affluence and American foreign policy* (2ND ed.). Princeton University Press: Princeton, 23;

satisfaction of the most basic physical and physiological needs of human beings.²⁴ Inadequate access to the sources of subsistence is a major problem and constitutes a recurrent threat for millions of human beings worldwide. Lack of subsistence makes it difficult, if not impossible, to pursue any other interest as human beings.²⁵

Conceptualising SU by communities as a core aspect of right to subsistence aligns with the provisions of key international human rights instruments. Article 25 of the Universal Declaration of Human Rights includes the right to subsistence in affirming that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”²⁶ Article 1(2) of the International Covenant on Civil and Political Rights (ICCPR) equally provides:

“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”

No doubt, most of the people who share habitats with endangered species exist at very basic subsistence levels. Allowing these people to derive economic benefits from wildlife both improves their livelihoods and provides incentives for conservation.²⁷ This is particularly important in Africa, where high population growth, industrialisation, and expansion of agriculture are all competing for the land supporting wildlife.²⁸ Hence, treating SU of these communities as their right to subsistence is pro-development as it can serve as a catalyst for several of the United Nations Agenda 2030’s Sustainable Development Goals (SDGs). It will aid the achievement of Goal 1, which speaks to the urgency of ending poverty in all its forms. Allowing SU by populations whose livelihoods depend on natural resources will help address the issue of poverty. Conceptualising the targets as a human rights issue will also help attain Goal 2 on Zero Hunger as the indigenous and local populations and communities depend the resources not only to feed, but to improve, their general wellbeing. It will galvanise the realisation of Goal 10 dealing with inequality, as it ensures equilibrium of access to resources that matter to their subsistence survival and in a way address what has been called ‘biodiversity apartheid’. It is relevant to other goals including Goal 13 Climate Change, Goal 14 Oceans, Goal 15 Biodiversity, forests, and desertification.

The sustainable use of flora (plants) by indigenous peoples and local populations for subsistence purposes resonates through ABS claims under the Nagoya Protocol. For instance, it is core in the ABS claim of the Khoisan peoples regarding *Rooibos*. These peoples often resorted to *Rooibos* after spending hours walking through the Cederberg mountains and used the plant as a remedy for a wide range of ailments, including hypertension and cardiovascular problems, stomach-related ailments, poor blood circulation, and kidney ailments. High in antioxidants and caffeine-

²⁴ A Mancilla *The human right to subsistence*: 06 August 2019 <https://doi.org/10.1111/phc3.12618>

²⁵ Nickel, J. (2007). *Making sense of human rights* (2nd ed.). Malden, MA.: Blackwell Publishing. pp. 138–42

²⁶ United Nations. Universal declaration of human rights (UDHR). (1948).

<http://www.un.org/en/documents/udhr/>

²⁷ Y Baskin “There’s a new wildlife policy in Kenya: Use it or lose it’ (1994) *Science* 265; E Rihoy (ed.) (1995) *The Commons Without the Tragedy: Strategies for Community Based Natural Resources Management in Southern Africa*. Lilongwe, Malawi: SADC Wildlife Technical Coordination Unit

²⁸ I Bond (1993) *The Economics of Wildlife and Land Use in Zimbabwe: An Examination of Current Knowledge and Issues*. Harare, Zimbabwe: World Wide Fund for Nature

free, Rooibos relieves allergic symptoms, provides an energy boost and helps to heal damaged skin. Rooibos is used for relaxation, as well as medicinal purposes, and has been found to be an appetite stimulant as well as an immune booster. Under a 2019 agreement, the San and Khoi communities will receive 1.5% of the ‘farm gate price’ — the price that agribusinesses pay for unprocessed rooibos.²⁹

The next section argues that, in the context of indigenous peoples and local populations, it is only legally fair and environmentally just to extend the approach to flora for ABS purposes to the use of wildlife, inclusive of trophy hunting.

TROPHY HUNTING AS SUSTAINABLE USE

Trophy hunting is a form of regulated use of wildlife that is like traditional hunting in African settings. It shares features of sustainable and subsistence livelihood purposes that define traditional hunting in Africa. In doing so, just as it is the case with the use of plants, it qualifies as a sustainable use of biodiversity resources as set out under the Nagoya Protocol. Broadly defined as the killing of animals for recreation with the purpose of collecting trophies such as horns, antlers, skulls, skins, tusks, or teeth for display.³⁰ Trophy hunting has experienced a growing media backlash, triggered by animal rights campaigners and celebrities who are demanding bans on the import of trophies to the UK and US.³¹ To them, trophy hunting is neither African nor acceptable, and is inconsistent with CITES, as they argue it originated during colonial settlement when the Dutch East India Company in 1652 led foreign hunters to Africa.³² Explorers and hunters killed animals for ivory and hides, principally for trade³³. Hunters combined sport hunting with the international wildlife trade to generate money, as exemplified by killing elephants and harvesting their ivory and hides for trade.³⁴ This increased in the 19th century and was encouraged by British authorities who promoted sport hunting as a means to increase agricultural expansion into historic rangelands.³⁵ Hence, it is argued, trophy hunting is a product of external influence on Africa.

Other critics of the practice contend that paying a fee to kill an animal and collect a trophy as a sign of conquest is unethical and represents objectification of the hunted animal.³⁶ Citing the killing of Cecil the lion in Africa in 2015 that drew wide public attention condemnation³⁷, some argue that trophy hunting is detrimental to conservation of animals. It has also been contended that there are ethical considerations associated with some hunting practices, including shooting

²⁹ Natural Justice *The Khoikhoi Peoples’ Rooibos Biocultural Community Protocol represented by The National Khoisan Council and Including The Cederberg Belt Region’s Rooibos Indigenous Farming Communities* p. 62

³⁰ Sheikh & Bermejo (n 18 above)

³¹ Fieldsport channels ‘Celebs who want ‘trophy hunting’ bans are biggest threat to Africa’s wildlife’ <https://www.youtube.com/watch?v=uVWSK0nTp7I>

³² V Booth & Chardonnet, ‘Guidelines for improving the administration of sustainable hunting in sub-Saharan Africa’ [2-15]

³³ J Holecek and R Valdez, ‘Wildlife Conservation on the Rangelands of Eastern and Southern Africa: Past, Present, and Future’ (2018) 71 *Rangeland Ecology & Management* 246.

³⁴ As above

³⁵ As above

³⁶ C Batavia et al. ‘The Elephant (Head) in the Room: A Critical Look at Trophy Hunting’ (2018) *Conservation Letters* 1-6.

³⁷ PA Sheikh and LW Rosen *Status of the African Lion and Sport Hunting, 2015*, https://www.everycrsreport.com/files/2015-08-07_IF10274_a6eed601e1366da2391dff2e8e139b5fbd50379e.pdf

animals from vehicles and luring animals with bait.³⁸ There are other arguments claiming that the practice adds little value to African economy³⁹ and livelihoods of local people because the amount of trophy-hunting revenue that accrues to communities is disproportionately small.⁴⁰ Critics also assert that, due to corruption, hardly any significant funds from trophy hunting are used for conservation purposes.⁴¹

However, the foregoing arguments are disputed in that they do not conform with the lived experience of African local and indigenous communities who engage in the activity. First, the idea of trophy hunting is not colonial in that the practice of sustainable hunting has always been part of African custom and tradition. In precolonial Africa, hunting of animals took place not only for subsistence and survival, but also for cultural reasons.⁴² Hunters and gatherers in the Kalahari Desert in Southern Africa used great skill to track down animals⁴³ and relied on their remarkable stamina to run down their prey over hours or even days.⁴⁴ The San, regarded as one of the oldest living tribes on earth, traditionally killed their prey with spears, snares, or small bow and poison-tipped arrows. Many indigenous African tribes relied on hunting to protect their livestock herds, to supplement their diets, and as a symbolic rite of passage. The Maasai of Kenya and Tanzania and the Samburu practised hunting, as did the Zulu who traditionally used long throwing spears, short stabbing spears, and shields⁴⁵. In those cultural settings, animals were not only a source of meat and nourishment, but were an important part of social tradition.

The cultural aspects of hunting are revealed in the folklore, songs and rites of such communities. Although African morality has a generally anthropocentric (or human-centred) character, it emphasizes a deep connection to, and respect for, the nonhuman (animal and natural) world. This relates to the belief of many Africans about their special connections with particular animals, plants, and sacred sites, which may as a result become revered symbols, clan totems, or family emblems, or may be utilised for healing or general medicinal purposes.⁴⁶ A clan's totem animal is sacred to members of that clan and treated with great reverence, but taboos and restrictions do not only concern totem animals -- animals symbolising the good -- but pertain also to particular animals like hyenas, snakes, and owls, traditionally utilised in witchcraft to harm other people. Killing such animals is commonly believed to indicate a bad omen and to invite ill fortune.⁴⁷ Poetry is also an essential component of the hunting culture. Among the Yorubas of West Africa, *Ijala* is the poetry of hunters. It is chanted usually during the festivals of Ogun, the god of iron who is worshipped by all those who use iron—hunters, warriors, and circumcision-experts. Their

³⁸ PA Lindsey, LG Frank, R Alexander, A Mathieson and SS Romañach 'Trophy Hunting and Conservation in Africa: Problems and One Potential Solution' (2007) 21 (3) *Conservation Biology* 880-883

³⁹ Campbell (n18 above)

⁴⁰ Lindsey et al (n 42 above)

⁴¹ AM Hubschle 'The Social Economy of Rhino Poaching: Of Economic Freedom Fighters, Professional Hunters, and Marginalized People' (2017) 65(3) *Current Sociology* pp. 427-447; F. Duckworth, "Ethiopia," in *African Hunting Guide*, ed. T. Wieland (South Africa: Future Publishing), 2004

⁴² V Butler 'Is this the way to save Africa's wildlife?' (1995) *International Wildlife*, 38-43

⁴³ 'Hunting....The definition, history and a video' <https://www.kalahari-trophy-hunting.com/hunting-definition-history.html>

⁴⁴ 'Fearless hunters from ancient tribe use bow and arrows yards from wild cheetahs because they are so in tune with the animals they have 'mutual respect' <https://www.dailymail.co.uk/news/article-2965401/Fearless-hunters-ancient-tribe-use-bow-arrows-yards-wild-cheetahs-tune-animals-mutual-respect.html>

⁴⁵ Impi https://en.wikipedia.org/wiki/Impi#Weapons_and_shields

⁴⁶ K Horsthemke 'Animals and African Ethics' (2017) 7(2) *Journal of Animal Ethics* 119-14

⁴⁷ N Taringa 'How environmental is African traditional religion?' (2006) 35 (2) *Exchange* 191-214.

poetry talks about the animals of the bush and about plants.⁴⁸ The Maasai of East Africa have historically valued lions (except when they have attacked livestock) because they provide warriors with a cultural role that reasserts their power and strength as they protect their communities⁴⁹.

Hunting in traditional African settings is carried out in a sustainable way in that killing is selective: usually carried out to obtain food, clothing, medicine, or to achieve status. Wild animals can also threaten the survival of indigenous communities who co-exist with them.⁵⁰ In Botswana, for example, elephants killed 36 people in 2018, injured dozens more, and destroyed the livelihoods of thousands.⁵¹ Killing of such wildlife is considered a practical necessity.

Trophy hunting as a semblance of sustainable traditional hunting

Studies indicate that many African countries earn most of their trophy-hunting revenue from the ‘big five’ animals: African elephant, lion, leopard, Cape buffalo, and rhinoceros.⁵² Trophy hunting in Africa largely involves the activities of tourists from first world states. Most trophies exported are from lions, lechwe (antelope), certain species of zebra, and leopards.

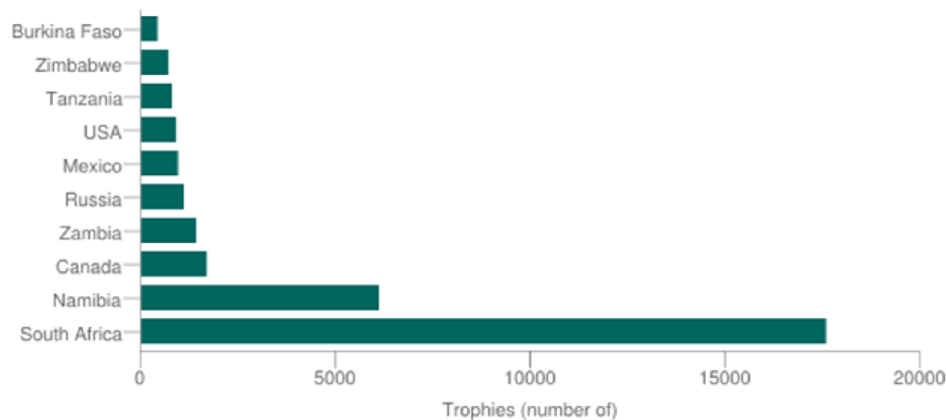


Figure 1. Top 10 Exporters of CITES-Listed Mammalian Trophies
(total between 2011 and 2015, as reported by exporting country)

Source: CITES Trade Database Dashboard, 2019, at <http://dashboards.cites.org/global?id=Mammals>

⁴⁸ Twenty-six items from Special Collections (v)Exhibit ‘V’: Yoruba. (Anonymous, six animal poems) <https://jacket2.org/commentary/twenty-six-items-special-collections-v>

⁴⁹ L Hazzah, A Bath, S Dolrenry, A Dickman and L Frank ‘From Attitudes to Actions: Predictors of Lion Killing by Maasai Warriors’ (2017) 12 (1) *PLoS ONE* 12(1): e0170796. <https://doi.org/10.1371/journal.pone.0170796>.

⁵⁰ Butler (n 46 above) 38–43

⁵¹ <https://resourceafrica.net/open-letter-celebrity-campaigns-undermine-successful-conservation-and-human-rights/>

⁵² R Barnett & C Patterson ‘Sport hunting in the Southern African Development Community (SADC) Region 2006 <https://www.traffic.org/site/assets/files/10068/sport-hunting-in-sadc-region.pdf>

While carried out by foreigners, however, trophy hunting shares similar features with traditional hunting in African settings: sustainable use, subsistence livelihood practices, and cultural recognition.

Evidence shows that trophy hunting is sustainable for certain reasons. Preserving wildlife in a pristine state on a large scale is no longer feasible in view of continued human population increases, economic development, habitat fragmentation, and degradation. Hence, the recognition that genuine interest in hunting wildlife is a core function of wildlife protection: the animals are highly valued by the hunters, and therefore worth conserving. Trophy hunting provides incentives for sustainable use of wildlife in the sense that it creates an interest for wildlife custodians to ensure continued preservation of affected species, at least for their economic value.⁵³ Without such value, the reality is that the future of conservation of these animals will be as bleak as that of wolves, brown bears and other large carnivores that were once plentiful in the UK, Europe and the US. In addition, there is a cultural regulatory dimension that limits harvesting to male animals: the size and quality of the trophy.

One argument used against trophy hunting is the perception that prime breeding males with the largest tusks/horns/manes are taken from the population, thus taking the ‘best’ genetic material out of the population. In reality, however, specimens taken are usually older males who contribute little to breeding, and because hunting quotas are usually a fraction of natural population growth rates, controlled trophy hunting has a negligible impact on overall population sizes or genetic integrity.⁵⁴ The case of the African lion in southern Africa illustrates this point.

The case of the African lion

Countries in southern Africa (i.e., Namibia, South Africa, and Zimbabwe) have long experimented with devolving user rights over wildlife. In recent decades, trophy-hunting earning potential has prompted landowners in southern Africa to convert privately-held rangelands and livestock cattle ranges to wildlife ranches. Scientists report that lion conservation has been successful when landowners pool their land to create collaboratively managed conservancies. This has been the case in Buby Valley and Savé Valley Conservancies in Zimbabwe, and in private conservancies in South Africa.

Lion populations in Namibia have recovered where communities established communal conservancies. Scientists attribute Namibia’s successes to clearly defined user rights over wildlife, the involvement of local communities in wildlife management decisions, and the fact that all earnings from wildlife on communal lands accrue to local communities. They estimate that lions hunted on conservancies in Namibia may generate more than USD60,000 per year. They also describe several policies that have contributed to lion population improvements in Mozambique’s Niassa Reserve: long leases for hunting blocks to incentivise hunting operators to invest in long-term management practices within their concessions, and prohibitions on the hunting of young male lions. Engaging with existing governmental agencies, such as the National Administration for Conservation Areas and the Wildlife Conservation Society, as well as with Mozambican nongovernmental organisations, such as the Niassa Carnivore Project, have allowed development of strategies to work with hunting groups to target only mature individuals, reducing the number

⁵³ R Cohn *The people’s war on Poaching*. Audubon, 1994, 70–84

⁵⁴ WI Morrill ‘The tourist safari hunter’s role in conservation. Paper prepared for Safari Club International’ 1993; VA Herndon Africa Resources Trust *Safari Hunting in Southern Africa*. ART Fact Sheet No. 10. Harare, Zimbabwe.

of immature lions harvested. Meanwhile, scientists note that Kenya, which has prohibited all trophy hunting since 1977, is suffering significant lion population declines.⁵⁵

The foregoing supports the argument that trophy hunting aids conservation and development in the 20th century.⁵⁶ It confirms that the effect of trophy hunting can be no less positive for biodiversity than the effect of sustainable use of flora. For instance, among the Khwe Community in Namibia, it has been reported that sustainable use of both plants and animals is an important approach to enable sustainable livelihoods for the present and future generations.⁵⁷ Despite its commercialisation in South Africa, the continued presence of *Rooibos* shows that the interaction of the KhoiSan communities with the plants have been sustainable.

Trophy hunting as a community subsistence and development rights issue

In view of the degree of poverty of most sub-Saharan African states,⁵⁸ trophy hunting serves a subsistence purpose for local populations. These benefit because sport hunters spend large sums of money for the opportunity to hunt. In the six southern and eastern African countries that permit trophy hunting, for instance, various systems of revenue collection and disbursement have been developed to channel hunting proceeds to wildlife conservation and community development. This approach both supports subsistence use of the species and ensures that animals exist for the use of future generations. Hence, trophy hunting is a mechanism to support economic development in local communities.⁵⁹

The foregoing idea is based on the pragmatic and realist concept of community-based conservation, which advocates that the point of wildlife conservation extends beyond animal welfare to the welfare of people. It is the basis for community-based natural resource management (CBNRM) as a mechanism to encourage local community involvement in wildlife management decision-making and to increase the financial benefit associated with wildlife-related revenue that accrues to local communities. It contrasts with the current move to ban trophy hunting, which again will reinforce the Western animal protectionists' agenda to impose their worldview on developing countries, with little regard for or understanding of what wildlife means to indigenous peoples and local populations. This agenda largely ignores the interests of rural African communities most of whom must coexist with wildlife,⁶⁰ and at very basic subsistence levels.

There are examples of successful case studies of the economic benefit of trophy hunting to local populations and indigenous peoples in Africa, in particular southern Africa. In Zimbabwe, the Communal Areas Management Plan for Indigenous Resources (CAMPFIRE) program in Zimbabwe established economic incentives for communities and landowners to conduct habitat and ecosystem restoration. At one point, CAMPFIRE generated more than USD20 million, of which almost 90% came from trophy hunting, allowing communities to establish management of the

⁵⁵ F Nelson, PA Lindsey and G Balme 'Trophy Hunting and Lion Conservation: A Question of Governance?' (2013) 47(4) *Oryx*, pp. 501-509; and CM Begg et al. 'Effective Implementation of Age Restrictions Increases Selectivity of Sport Hunting of the African Lion' (2018) 55 *Journal of Applied Ecology* 144-145

⁵⁶ PA Lindsey 'Trophy Hunting in Sub Saharan Africa: Economic Scale and Conservation Significance' (2008) *Best Practices in Sustainable Hunting*, pp. 41-47

⁵⁷ Biocultural Community Protocol of the Khwe Community Residing inside Bwabwata National Park, Namibia Draft Version, 24

⁵⁸ R Bonner *At the Hand Of Man: Peril and Hope for Africa's Wildlife* (1993) . New York: Alfred A. Knopf

⁵⁹ Lindsey (n 62 above).

⁶⁰ M Shackley *Wildlife Tourism* (1996) London: Routledge; Swanson, .

resource.⁶¹ The following case study from Namibia illustrates the development purpose that trophy hunting has served there.

Namibia and international trophy hunting

Observers consider Namibia a model for regulating trophy hunting while promoting species conservation. In Namibia, conservative quotas for hunting individual animals are set to promote the conservation and sustainability of wild animal populations. Further, Namibia closely monitors hunts and maintains an accurate database on hunted trophies. Some contend that Namibia's use of conservancies has promoted cooperation among hunting outfitters and local communities: community conservancies now cover more than 12 million hectares in Namibia and extend the conservation benefits of national parks and wildlife corridors. Some observers have noted that community conservancies have benefited communities, reduced poaching, and, in some cases, led to the partial recovery of some wildlife populations. For example, the zebra (*Equus zembra hartmannae*) population increased from levels lower than 1,000 specimens in 1980 to more than 27,000 specimens in the mid-1990s due to management efforts by conservancies. In Namibia, trophy-hunting revenues have contributed to the economic viability of 77 communal conservancies. Trophy hunting provided economic benefits to the communities more quickly than photographic tourism activities (trophy hunting provided benefits within three years of being implemented, whereas photographic tourism provided benefits after six years).⁶²

Another example is found among the Khwe (San) community from Bwabwata National Park in Namibia, who through their resident CBNRM programme called Kyaramacan Association, receives and disburses yearly profits of over 1 million Namibian dollars from trophy and tourism concessions.

The critics of trophy hunting, often focusing on unethical hunting behaviour, will not go away⁶³, even in the face of the evidence of sound benefits to local populations and indigenous peoples. There are other challenges, including allegation of local corruption and the observation that the amount of trophy-hunting revenue that accrues to local communities is disproportionately small.⁶⁴ These challenges need to be met with sensible interventions and do not undermine the fact that trophy hunting is a sustainable use of wildlife that can aid conservation. Enhancing subsistence livelihoods of local people is crucial to the realisation of their rights. The positive economic impact of trophy hunting on local livelihoods is consistent with Article 25 of the Universal Declaration of Human Rights and Article 1(2) of the International Covenant on Civil and Political Rights (ICCPR) which stipulates that no people should be deprived of its own means of subsistence. Adopting such a view will also enhance the fulfilment of UN SDGs such as Goal 1 on ending poverty in all its forms, Goal 2 on zero hunger, Goal 13 on climate change, and Goal 15 on the conservation of biodiversity. The following section presents the legal basis for treating the use of wildlife, in particular, trophy hunting, as an ABS case.

⁶¹ G Peter, H Frost and I Bond, *CAMPFIRE and the Payment for Environmental Services*, International Institute for Environment and Development, London, 2006, p. 21.

⁶² Barnett and Patterson (n 57 above)

⁶³ See for examples controversies around SA President Ramaphosa's involvement in trophy hunting below: <https://www.news24.com/news24/southafrica/news/ramaphosa-denies-secret-trophy-hunting-claim-20201121> ; <https://www.thesouthafrican.com/news/where-is-cyril-ramaphosa-phala-phala-farm-trophy-hunting-peta/>; <https://www.independent.co.uk/climate-change/news/trophy-hunt-south-africa-president-cyril-ramaphosa-peta-b1766560.ht>

⁶⁴ Lindsey et al (n 42 above)

NAGOYA PROTOCOL: HUNTING AS AN ACCESS AND BENEFIT SHARING CASE

The Nagoya Protocol was established pursuant to the CBD, which has three objectives: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. The third objective agrees with the recognition of sovereign right in international law. Article 3 of the CBD provides that states have sovereign rights to exploit their own resources pursuant to their own environmental policies. In terms of Article 6 of the Protocol, access to genetic resources shall be granted by the provider country with prior informed consent (PIC) after benefit sharing arrangements have been established through mutually agreed terms (MAT). Users are required to obtain PIC from the provider country before accessing genetic resources.⁶⁵ According to Article 5 of the Nagoya Protocol, benefits arising from the utilisation of genetic resources as well as subsequent applications and commercialisation shall be shared in a fair and equitable way with the Party providing such resources. Utilisation of genetic resources is defined as ‘research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention’.

Wildlife use, in particular, hunting inclusive of trophy hunting, qualifies as an ABS in that it meets the elements of the objective: (1) fairness and equity; (2) resulting from utilisation of genetic resources; and (3) association with traditional knowledge.

Fairness and equity of the Nagoya Protocol

Fairness and equitable distribution is an essential feature of Access and Benefit Sharing (ABS). Arguably, *it is only fair and equitable for trophy hunting to qualify as an ABS issue for developing states, and indeed the local communities, to benefit from sustainable trophy hunting.* To exclude trophy hunting activity from Nagoya Protocol is to undermine economic value associated with it and in so doing deny local populations and indigenous peoples an opportunity to share from the economic potential of wildlife resources.

The case for fairness and equity rests on the argument that trophy hunting allows people to derive economic benefits from wildlife, and thereby improve their livelihood. Trophy hunting provides a means of income, employment, and community development.⁶⁶ These are provided through a range of opportunities. Direct payments are made from a hunting company for use of the land (the hunting concession) and its associated quota. The money generated by trophy hunts helps the communities in and around the range areas by providing jobs and money for community services. Private landowners in South Africa and Zimbabwe and communal landowners in Namibia use trophy hunting revenues to pay for guards, rangers, equipment, and infrastructure to manage and protect wildlife.⁶⁷ Other hunter investments, which typically support improved community services like water infrastructure, schools and health clinics, jobs as guides, game guards and wildlife managers, and other hunting-related employment and access to meat.⁶⁸

⁶⁵ Nagoya Protocol (n 13 above) art 7

⁶⁶ D Briggs ‘Trophy Hunting May Be a Key to Saving Wildlife’ ARC Centre of Excellence for Environmental Decisions, March 25, 2015

⁶⁷ DA Balfour, M Knight and P Jones *Status of White Rhinoceros on Private and Communal Land in South Africa: 2012 - 2014*. Department of Environmental Affairs. Pretoria, 2015.

⁶⁸ IUCN ‘Trophy Hunting – Frequently Asked Questions’

Countries at times use trophy hunting revenue to fund the operational costs of government wildlife management authorities, to counter-poaching enforcement activities, and to provide development assistance to local communities. In Zambia, for example, hunting revenues have been used to train and hire village scouts for anti-poaching activities in game management areas and to support community development projects for clinics, shelters, and schools.⁶⁹ The wildlife sector of South Africa has experienced noticeable growth over the years and employs around 100,000 people across the value chain.⁷⁰ This value chain includes trophy hunting, sale of live game, and sale of game meat. One example of the value of live game can be taken from an auction recently held where the total turnover of the auctions was ZAR31 million. The lowest average price paid for any animal at the auction was ZAR10 000 and the highest price paid of a single animal was ZAR800 000. The average price paid for any animal at the auction was ZAR225 224. Further opportunities exist in the sale of game meat, skins for leather, bones, and horns.⁷¹

To ignore the foregoing is unfair because it is inconsistent with the objective of the Nagoya Protocol as can be evinced from its preamble, which provides that ‘the economic value of ecosystems and biodiversity and the fair and equitable sharing of this economic value with the custodians of biodiversity are key incentives for the conservation of biological diversity and the sustainable use of its components’. Also, the preamble emphasises ‘the potential role of access and benefit-sharing to contribute to the conservation and sustainable use of biological diversity, poverty eradication, and environmental sustainability’.

Resulting from utilisation of genetic resources

Although the Nagoya Protocol requires that ABS results from utilisation of genetic resources, there is no provision that extends its application to other resources. The Nagoya Protocol applies to genetic resources that are covered by the CBD, and to the benefits arising from their utilisation. Article 4 of the Protocol, on relationship with international agreements and instruments, provides for exclusion of genetic resources that are within the scope of other specialized ABS agreements, as the provisions of the Protocol do not affect the rights and obligations arising from existing international agreements that are compatible with the objectives of the CBD and the Protocol. This reasoning applies for 64 crops and forages within Annex 1 to the International Treaty on Plant Genetic Resources for Food and Agriculture, signifying that they are exempted from the scope of the Protocol. As there is no international specialised instrument specifically addressing animal genetic resources, the scope of the Nagoya Protocol can be considered to cover genetic resources of all livestock and wild animal species. This is further reinforced by Article 8 (b) Protocol which provides that in developing and implementing its access and benefit-sharing legislation or regulatory requirements, states should pay ‘due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health, as determined nationally or internationally’.

Trophy hunting has not been linked with utilisation of genetic resources, hence, it may be questioned whether it falls within the scope of the Nagoya Protocol. However, there is no provision specifically in the Nagoya Protocol that suggests that trophy hunting does not fall within

⁶⁹ DM Lewis and P Alpert “Trophy Hunting and Wildlife Conservation in Zambia’ (1997) 11 (1) *Conservation Biology*, pp. 59-68.

⁷⁰ Address by President Cyril Ramaphosa at the launch of the Biodiversity Economy Operation Phakisa, Kalahari Waterfront, Thohoyandou, Limpopo 25 August 2018
<http://www.thepresidency.gov.za/speeches/address-president-cyril-ramaphosa-launch-biodiversity-economy-operation-phakisa%2C-kalahari>

⁷¹ <https://www.environment.gov.za/projectsprogrammes/wildlifeconomy>

trading beyond genetic resources. Trophy hunting qualifies because, in terms of the CBD and the Nagoya Protocol, countries may have a national law or policy to regulate ABS beyond genetic resources, that is, by including a broader range of activities than the ‘utilisation of genetic resource’. ABS requirements and procedures at the state level may differ from the Nagoya Protocol, as well as vary from country to country, depending on their approaches and aims.⁷² Such range of activities may extend to bioprospecting on, and biotrade with, indigenous biodiversity resources that are not genetic. These activities include the collection/production, transformation, and commercialisation of goods and services derived from native biodiversity (species and ecosystems) under criteria of environmental, social, and economic sustainability. These may include products ranging from living organisms (e.g. wildlife) to man-made industrial or artisanal products (e.g. handicrafts), as well as services (ecotourism).⁷³ This signifies that national legislation may allow wildlife use, such as trophy hunting, as part of its ABS arrangement. It also means that, although such an approach differs from the Nagoya Protocol, it is no less in conformity with the Nagoya Protocol in the sense that the instrument allows for variation of ABS requirements at the national level.

There are examples of national legislation that have taken utilisation beyond genetic materials for ABS purposes. These arguably cover trophy hunting. In South Africa, the National Environmental Management: Biodiversity Act (NEMBA) and the Bioprospecting, Access and Benefit Sharing Regulation (Bioprospecting Regulation) provide a regulatory framework for ABS. Both of these laws go beyond the Nagoya Protocol’s standard of regulating only “genetic components” of resources to regulating utilisation of the whole of the indigenous biological resource.⁷⁴ NEMBA provides, inter alia, for the fair and equitable sharing of benefits arising from bioprospecting involving ‘indigenous biological resources’. Section 1 of NEMBA defines ‘Bioprospecting’ as ‘any ...development or application of indigenous biological resources for commercial or industrial exploitation” including (b) The utilisation ... of any information regarding any traditional uses of indigenous biological resources by indigenous communities.” According to section 80(2)(a)(i) of NEMBA, indigenous biological resources include plant material whether harvested, cultivated, or altered by means of biotechnology.

Chapter 2 of the Bioprospecting Regulation deals with bioprospecting and exporting of indigenous biological resources as an ABS issue. It covers bioprospecting and biotrade of indigenous biological resources (IBRs) and indigenous genetic resources (IGRs), including for medicinal, nutritional, and cosmetic purposes. It defines 'IBRs' quite broadly to include any living or dead organism of an indigenous species in South Africa, as well as the use of their genes or biochemicals. Consequently, being an indigenous resource, trade prospecting associated with wildlife such as trophy hunting falls within the scope of the IBRs. This is understandable as South Africa has identified trophy hunting and the associated industry of taxidermy, sale of live game, and sale of game meat as one of the substantial drivers of its biodiversity economy.

⁷² ‘Frequently Asked Questions on the Nagoya Protocol on ABS’

<https://unctad.org/system/files/non-official-document/ditc-ted-03122016-IVcongress-UEBT-FAQ-Nagoya%20protocol.pdf>

⁷³ UNCTAD ‘Implications for BioTrade of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization’

http://www.biotrade.org/ResourcesPublications/UNCTAD_DITC_TED_2011_9.pdf

⁷⁴ National Environmental Management: Biodiversity Act (NEMBA) 2004; Bioprospecting, Access and Benefit Sharing Regulation (Bioprospecting Regulation) 2008

Moreover, construing trophy hunting as a driver of biodiversity economy and improvement of the livelihoods of local populations is consistent with the Constitution of South Africa, in particular, Article 24 which provides that everyone has the right to have the environment protected *for the benefit of present and future generations* through reasonable legislative and other measures that— (a) prevent ... ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. It aligns with the NEMBA, which provides for the regulation of bio-prospecting involving indigenous biological resources as well as the regulation of export of indigenous biological resources for bio-prospecting or any other kind of research. Furthermore, the Act provides for a fair and equitable sharing by stakeholders of benefits arising from bio-prospecting involving indigenous biological resources.⁷⁵

Namibia follows a similar proactive path that accommodates trophy hunting. Through its legislation, Access to Biological and Genetic Resources and Associated Traditional Knowledge Act,⁷⁶ it not only regulates genetic resources, but applies to the protection of the rights of local populations over biological resources. It defines ‘biological resources’, to include organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity; while its provision on ‘bioprospecting’ largely capture exploratory activities of commercial value.⁷⁷

The Southern African Development Community’s Regional Biodiversity Strategy (2008) considers more than the utilisation of genetic resources. The instrument highlights priority actions required to release the wealth locked up in the region’s biological resources through value addition and biotrade, on a sustained basis. It acknowledges that wildlife based tourism brings millions of dollars in foreign currency into the SADC Region, ranking among the top three contributors to the GDP of most countries of southern Africa, and of benefit to local communities.⁷⁸ In particular, it notes that the key economic driver for CBNRM in southern Africa has been wildlife (large mammals), *mostly through trophy hunting and eco-tourism outside protected areas*.⁷⁹ Hence, appropriate access and benefit sharing arrangements are necessary to harness these resources throughout the Southern African region.⁸⁰

Based on the foregoing, it can be asserted that in so far as the Nagoya Protocol allows for variation at the national level, legislation on utilisation that supports trophy hunting as a sustainable use of biological resource is consistent with and can be brought within the ABS requirements.

Associated with traditional knowledge

The term ‘traditional knowledge’ (TK) is capable of interpretation that goes beyond knowledge associated with genetic resources held or owned by indigenous and local communities. It can include traditional knowledge associated with sustainable use of wildlife, and thereby accommodate trophy hunting.

⁷⁵ NEMBA (n 80 above) Chapter 6

⁷⁶ Namibia Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

⁷⁷ As above

⁷⁸ The Southern African Development Community Regional Biodiversity Strategy (SADC Biodiversity Strategy) 42

⁷⁹ SADC Biodiversity Strategy (n 85 above) 63

⁸⁰ SADC Biodiversity Strategy (n 85 above) 13, 21, 35

While traditional knowledge may have been linked to the ‘utilisation of genetic resources’⁸¹, the importance of traditional knowledge to conservation of biodiversity is recognised in a range of international and national environmental law instruments. The CBD aims at promoting the protection of traditional knowledge. Article 8 (j) provides for In-situ Conservation as follows:

“Each Contracting Party shall, as far as possible and as appropriate ... subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”

Another important provision on the protection of traditional knowledge is Article 10(c) of the CBD that calls upon contracting parties to ‘as far as possible and as appropriate ... protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirement’. The importance of traditional knowledge as a crucial tool in conservation is recognised by the Nagoya Protocol.⁸² Article 12(1) of the Protocol underscores the significance of flexibility in relation to scope of TK. It provides that “in implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable with respect to traditional knowledge associated with genetic resources.”⁸³ At the continental level, the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (African Model Law) provides for state-community benefit sharing, making it a mandatory entitlement for both the State and the community concerned, to receive a portion of the commercialisation of any knowledge associated with the use of biological resources.⁸⁴ The African Model Law specifies that the local community involved is entitled to a minimum of at least 50% of the earnings from the use of the knowledge.⁸⁵ The SADC Biodiversity Strategy notes that TK has an important role in vital areas such as food security and agricultural development.⁸⁶

At the national level, in particular, within the context of ABS, there is national legislation that covers traditional knowledge beyond the utilisation of genetic resources. For instance, in Namibia, the Traditional Access to Biological and Genetic Resources and Associated Traditional Knowledge Act defines ‘associated traditional knowledge’ as “the accumulated individual or collective knowledge, practices, innovations or technologies associated with biological and genetic resources which is created or developed over generations by local communities, vital for conservation, sustainable utilisation of biological and genetic resources and of socioeconomic

⁸¹ M Mudiwa ‘Global Commons: The Case of Indigenous Knowledge, Intellectual Property Rights and Biodiversity’; OO Moody The Nagoya Protocol: A Possible Solution to the Protection Of Traditional Knowledge In Biodiverse Societies of Africa

http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2935/Moody_LLM_2011.pdf?sequence=1;

⁸² Nagoya Protocol (n par. 22 of the Preamble)

⁸³ Nagoya Protocol (n) art 12(1).

⁸⁴ African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (AML)

⁸⁵ AML (n 91 above) art 22 of the AML

⁸⁶ AML (n 91 above) 49, 50

value”. In South Africa, according to the Bioprospecting Regulations,⁸⁷ traditional use or knowledge refers to the “customary utilisation or knowledge of indigenous biological resources by an indigenous community, in accordance with written or unwritten rules, usages, customs or practices traditionally observed, accepted and recognised by them, and includes discoveries about the relevant indigenous biological resources by that community”. In terms of this definition, skills, know-how, and practices of local populations associated with trophy hunting, in so far as they aid conservation and are of socioeconomic value, will constitute traditional knowledge within the meaning of ABS.

Many reasons have been advanced for such recognition. First, a regulatory regime that respects and protects TK is less likely to create a disincentive for conservation of biodiversity.⁸⁸ Second, doing so is a recognition of the role of indigenous peoples and local communities who are custodians to the majority of the earth’s biodiversity. Hence, it is noteworthy that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms their right to maintain, control, protect and develop their TK and Intellectual Property (IP) rights to such knowledge, including that relating to GRs, the knowledge of fauna and flora.⁸⁹ Third, such a recognition has potential benefits to the knowledge holders (both individuals and communities, and by extension host countries), the former especially because of their dependence on it for practically all facets of their livelihoods, health, and general well-being.⁹⁰ Fourth, the majority of the communities and countries holding TK are poor,⁹¹ hence, it is widely believed that the protection of TK could drastically improve their lives,⁹² because TK has economic value.⁹³ Fifth, it can also help with the promotion of innovation⁹⁴ among populations who, as a result of their experience, can make novel contributions that deserve protection⁹⁵. Sixth, protection of TK is an imperative as a response to biopiracy, a concept widely regarded as ‘theft’ of indigenous peoples’ knowledge and resources.⁹⁶

In the particular context of trophy hunting, recognising traditional knowledge of local populations for ABS purposes is no less important and urgent than recognition of traditional knowledge associated with the commercialisation of plants. Indigenous communities see no difference between the use of flora and fauna as they form part of the indivisible resource found in their territories’ communities. Communities in southern Africa have indeed advocated the need for ABS in relation to the whole flora and fauna resource. In Namibia, the Khwe Community, for instance, view animals and plants as important to their survival, livelihood, and way of life. They live sustainably with the resources that they use as food and medicine.⁹⁷ In South Africa,

⁸⁷ Bioprospecting Regulations (n 80 above)

⁸⁸ Nagoya Protocol (n above) par. 22 of the preamble

⁸⁹ United Nations Declaration of the Rights of Indigenous Peoples, art 31(1), preamble

⁹⁰ G Dutfield & U Suthersanen *Global Intellectual Property Law* (2008) 329

⁹¹ As above

⁹² Dutfield & Suthersanen (n 97 above) 49

⁹³ Dutfield & Suthersanen (n 97 above) 329.

⁹⁴ C Correa *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2000) 38

⁹⁵ S Scotchmer ‘Standing on the Shoulders of Giants: Protecting Cumulative Innovators’ in Scotchmer S (ed) *Innovation and Incentives* (2004) 132,

⁹⁶ O Arewa ‘Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalisation of Intellectual Property’ (March 2006) Case Research Paper Series in Legal Studies; Working Paper 04-19; K Srinivas ‘Traditional Knowledge and Intellectual Property Rights: A Note on Issues, Some Solutions and Some Suggestions’ (2008) 3 *Asian Journal of WTO and International Health Law and Policy* 86 – 87, 90

⁹⁷ Address by President Cyril Ramaphosa (n 75 above)

according to President Ramaphosa, “over generations, biodiversity has fed communities, healed them, sheltered them and provided the means and the inspiration for cultural expression. Hence, it is important that the custodians of genetic resources and the holders of our traditional knowledge can fully benefit from the tangible and intangible heritage they possess”⁹⁸. The traditional knowledge of San peoples has been recognised for ABS in the context of plants as shown in the previously discussed case of *Rooibos* (see previous section) and that related to *Hoodia* plants.

The San and the Hoodia plant

The San people’s traditional knowledge of the Hoodia plant, freely conveyed to anthropologists and researchers many decades ago, provided the crucial lead that guided scientific tests towards the invention and eventual registration of an international family of patents on the treatment of obesity by the South African Council for Scientific and Industrial Research (CSIR) who later licensed Phytopharm in the United Kingdom to undertake further development and commercialization of the invention. In the absence of access and benefit sharing legislation, and as a result of international media exposure of the Hoodia case, CSIR and the South African San Council entered into negotiations to develop a Memorandum of Understanding, in recognition of the collective rights of the San as the owners of the indigenous knowledge on the use of Hoodia. The process included workshops that were attended by the San from Botswana and Namibia as well as experts on community development from Canada. The South African San Council was mandated by WIMSA to pursue negotiations in terms of this agreement, which were successfully concluded, and a benefit sharing agreement was signed on 24 March 2003. The core terms of the agreement are that, the San people will, in the continued success of the product, receive the following. 8% of all milestone payments received by CSIR during the development stages of the project; and, * 6% of all royalty payments to be received by CSIR as a result of commercial sales of the anti-obesity product based on Hoodia, for the duration of the patents.⁹⁹

Considering the legal consideration in some states of the concept of traditional knowledge it can be argued that there is no basis for excluding wildlife, in particular, trophy hunting, from ABS because trophy hunting has associated traditional knowledge which brings it within the ABS regime. Among the Inuit, for instance, the harvest of the polar bear is based on quotas that are updated annually through a co-management system that combines the best available scientific and traditional ecological knowledge. Based on traditional knowledge the Inuit decide how to allocate the quota between subsistence and trophy hunts, with all meat from either used locally.¹⁰⁰ Similarly in Africa, traditional knowledge exists in the form of skills and know-how in relation to which animals to hunt and not to hunt, in which season to hunt, and how hunting is conducted.

⁹⁸ As above

⁹⁹ SADC Biodiversity Strategy (n 85 above) 14

¹⁰⁰ ‘Informing decisions on trophy hunting’ A Briefing Paper for European Union Decision-makers regarding potential plans for restriction of imports of hunting trophies, April 2016 https://wwfint.awsassets.panda.org/downloads/iucn_informingdecisionsontrophyhuntingv1_1.pdf; T Shadbolt, G York and EWT Cooper ‘Icon on Ice: International Trade and Management of Polar Bears’. Traffic North America and WWF-Canada. Vancouver, B.C, 2012

A holistic, not a fragmented, sustainable use of biodiversity, and support of the rights of local communities and indigenous peoples should constitute a core aspect of the ABS regime. Just as the use of plants are qualified for ABS under the Nagoya Protocol, wildlife use, and in particular, trophy hunting, qualifies as an ABS in states where it is lawful and meets the elements of the Nagoya Protocol which allows for variation of ABS requirements at the national level.

IMPLICATIONS FOR POST 2020 GBF INTERVENTIONS

In the light of the foregoing discussion, present and future dialogue about the Global Biodiversity Framework (GBF) should not only focus on sustainable use and ABS of plant genetic diversity but should extend to the all indigenous species and ecosystems inclusive of wildlife, thereby protecting the subsistence rights of indigenous and local people who are custodians of such resources.

Targets set out in the Draft post-2020 GBF Targets renew emphasis on the three key objectives of the CBD – conservation, sustainable use and benefit sharing. SU and benefit sharing have received heightened emphasis. The following targets are especially relevant to the concept of sustainable use:

- **Target 4:** “By 2030, ensure that the harvesting, trade, and use of wild species of fauna and flora is legal, at sustainable levels and safe”
- **Target 8:** “By 2030, ensure benefits, including nutrition, food security livelihoods, health and wellbeing, for people, especially for the most vulnerable through sustainable management of wild species of flora and fauna”
- **Target 15:** “By 2030, eliminate unsustainable consumption patterns, ensuring people everywhere understand and appreciate the value of biodiversity, make responsible choices commensurate with 2050 biodiversity vision, taking into account individual and national cultural and socioeconomic conditions”
- **Target 20:** “By 2030, ensure equitable participation in decision-making related to biodiversity and ensure rights over relevant resources of indigenous peoples and local communities, women and girls as well as youth, in accordance with national circumstances”.

There is, however, lack of sufficient ambition in that the focus of benefit sharing is currently limited to genetic diversity. There is also paucity of human rights language that respects the worldview of indigenous peoples and local populations. For reasons already provided in this brief, ABS should extend to include indigenous species and ecosystems resources inclusive of wildlife and protect the subsistence rights of indigenous peoples and local populations. The lack of use or unambiguous reference to rights in these targets may undermine, and in fact, ignore the rallying cry of vulnerable indigenous and local populations and communities in Africa who depend on natural resources for subsistence and survival.

The lack of clear framing of sustainable use as a human right in Targets 4 and 8 may justify a strategy of conservation by states that exclude indigenous and local populations and communities from access and use of natural resources. Target 15, dealing with unsustainable consumption, is unhelpful without a human rights approach as it does not distinguish between the poor and the rich, the South and the North, and may therefore encourage ‘biodiversity apartheid’, a situation whereby the rich have choices while the poor become marginalised and deprived. The reference in Target 20 to the consideration of rights of indigenous peoples and local communities,

women and girls as well as youth, is weak. It is premised on 'national circumstances' which indirectly may motivate states to act as they wish.¹⁰¹

Integration of a human rights approach in the wording of the targets could bring about a fundamental and transformational change in how sustainable use is understood and implemented at the national level. More importantly, it can deliver, on four counts, positive understanding and implementation of sustainable use of resources that accommodate the interests of indigenous and local populations and communities. It can help achieve developmental goals, strengthen sustainable livelihoods with biodiversity, inspire environmental justice, and boost genuine accountability. Applying a human rights approach to sustainable use is pro-development. For indigenous and local populations and communities, sustainable use is a development issue.

CONCLUSION

In African belief systems, wild animals and plants are indivisible components of communities' biocultural heritage and way of life. Across the continent, sustainable use of these resources is embedded in the traditions and subsistence livelihood practices of indigenous people and local communities. Hunting and harvesting of wild animals and plants by people living in these areas needs to be considered in light of sustainable use as a legal principle. This includes customary and regulated trophy hunting, which both benefit local economies and support conservation of these resources as valued assets. These activities qualify for access and benefit sharing under the Nagoya Protocol in the light of its provision for interpretation at national level. To ensure fair and just treatment, the Post 2020 Global Biodiversity Framework's must explicitly recognise the rights of indigenous people and local communities to sustainably use and benefit from both plants and wildlife.

ⁱ The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69)

ⁱⁱ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Doc.: UNEP/CBD/COP/DEC/X/1 of 29 October 2010, preamble

ⁱⁱⁱ B Blare 'The real costs of illegal logging, fishing and wildlife trade: \$1 trillion–\$2 trillion per year, 29 | October 2019 <https://blogs.worldbank.org/voices/real-costs-illegal-logging-fishing-and-wildlife-trade-1-trillion-2-trillion-year>

^{iv} WWF Living Planet Report 2020 <https://livingplanet.panda.org/en-us/>

^v AO Jegede *The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications* (Pretoria University Law Press, 2016); M Hansungule & AO Jegede *The impact of climate change on indigenous peoples' land tenure and use: The case for a regional policy in Africa* (2014) 21 (2) *International Journal on Minority and Group Rights* 256-291

¹⁰¹ AO Jegede, *Protecting indigenous peoples' land rights in global climate governance*, in S Duck, S Jodoin and A Johl (eds) *Integrating human rights in global climate governance* (Routledge, 2018) 199-212