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**RE: EMS FOUNDATION AND ANIMAL LAW REFORM SOUTH AFRICA
ANSWERS TO QUESTIONS RECEIVED ON 20 OCTOBER 2020**

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INTRODUCTION

The Minister of Environment, Forestry and Fisheries appointed a “High Level Panel of Experts for the Review of Policies, Legislation and Practices on Matters of Elephant, Lion, Leopard and Rhinoceros Management: Breeding, Hunting, Trade and Handling” (“**HLP**” or “**Panel**”) in October 2019. The Panel made a call for submissions from stakeholders on 27 March 2020.

The EMS Foundation (“**EMS**”) and Animal Law Reform South Africa (“**ALRSA**”) (hereinafter collectively “**we**” or “**us**”) made a formal written submission (the “**Submission**”) to the HLP on 15 June 2020. We also made a virtual presentation at the public consultation held by the HLP on 6 October 2020 and answered questions orally (the “**Oral Presentation**”) (collectively our “**Submissions**”).

In this regard, we wish to refer to Appendix III of our Submission, being a copy of the written submission presented by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, a centre of the University of Johannesburg (“**SAIFAC**”) as well as their virtual presentation at the public consultation held by the HLP on 6 October 2020 and their questions answered (“**SAIFAC Submission**”).

The Secretariat of the HLP sent further questions to EMS and ALRSA at 15h13 on the 20 October 2020. These are reproduced below in bold text. The Panel requested that answers be submitted by 26 October 2020, effectively giving EMS and ALRSA less than 5 working days to formulate further responses to over 15 highly complex questions (the “**Questions**”). Note that both EMS and ALRSA had other prior commitments particularly at this time and our capacity to respond at this time. In terms of an email from the HLP Secretariat to us dated 25 October 2020, the Panel agreed to accept answers by 2 November 2020.

The answers below therefore constitute a brief and non-exhaustive summary of EMS’ and ALRSA’s position on these issues given the prevailing circumstances at the current time. This document is to be read with our full Submission as well as in the context of the Oral Presentation.

We also wish to note that:

1. We have answered some of these questions in our Submissions;
2. Many of the questions received from the HLP are suggestive of a slant in favour of a pre-determined outcome and against the tenor of our submissions. Some of the questions make assumptions that are simply not accurate; and
3. Reference is made in the questions to “wildlife”. We were under the impression that the HLP was reviewing for “Subject Species” being—lions, elephants, rhinos and leopards.

We are non-profit organisations not mandated to determine all potential solutions to the issues considered by the Panel nor wildlife more generally in South Africa. We have pointed out issues with the current status quo, as well as provided potential solutions which will require further input and consideration. Accordingly, we have attempted to highlight some additional resources for the Panel which may be of assistance in providing further context and information. These are in addition to those included in our Submission and Oral Presentation.



We have included some clarifying points and questions below in order to properly equip us to answer the questions posed. These are indicated as “*Clarificatory Question for the Panel.*” below.

The disclaimers as contained in our Submission apply equally to this document with the necessary adjustments.

Yours sincerely,

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QUESTIONS AND ANSWERS

Question 1

What factors and conditions would be seen as acceptable for the use of wildlife in South Africa?

We note that your question refers to wildlife more broadly, as compared to the Subject Species (rhino, lion, leopard and elephant), which we understand is what the Panel is tasked with. Our answers relate to the Subject Species as mandated by the Terms of Reference.

Clarificatory Question for the Panel: Please confirm whether the Panel is also operating in relation to other wildlife or only the Subject Species.

EMS and ALRSA have dealt with this question in great detail in (*inter alia*) Part I of our Submission to the HLP. We are of the view that the primary role of the State in relation to wildlife is to fulfil its Constitutional mandate to protect the environment, protect them as a component thereof, to promote conservation and to fulfil its role as public trustee of the environment and biological diversity for the public at large, both current and future generations. This is particularly relevant for the Subject Species who constitute four of “The Big Five” with significant value to the country and all of her inhabitants (not only economic).

The *use* of wildlife is secondary to this main purpose, and should only be permitted for conservation purposes, and in a manner that is ecologically sustainable. In our view the best way of doing so is to give legal recognition and protection for the fundamental interests of those animals: including to exist, play their roles in nature and thrive in the ecosystems in which they have evolved (i.e. recognise the right of wildlife to be wild). Their interests may only be infringed upon where there is a strong justification for doing so (i.e. in a similar vein as to the case of human beings).

Accordingly, any use of wildlife must give credence to their intrinsic value as individuals, as well as their welfare. In this regard, we refer to the 2016 Constitutional Court judgement in the NSPCA Case which we have dealt with in our Submission and which has been thoroughly discussed in the SAIFAC Submission.¹

It is furthermore important to determine that “use” can have different interpretations. For example, consumptive use and non-consumptive use. Not all use of wildlife infringes on their interests or is fundamentally harmful to their wellbeing—and can have benefits for humans. In relation to the Subject Species, we support a non-consumptive model: this includes but is not limited to wildlife viewing, safaris, photography and other “eco-tourism” that is non-consumptive and exploitative in nature.

Furthermore, due credence must be given to the term “sustainable” in the context of the use.

¹ National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (CCT1/16).

The remaining provisions and words of section 24 of the Constitution² also find application here.

For further indications of what wildlife use might look like and guidelines around this, kindly refer to the “Southern Africa Tourism Services Association NPC research (“SATSA”):

- a. Animal Interaction Research³
- b. Animal Interaction Guide and Tool⁴

To echo this, as per the SATSA Guidelines - the following are Tourism Activities involving captive wildlife that are classified as unacceptable

1. *Performing Animals:*
 - a. *In order to perform in a public show or display, the animal would have undergone training of some form. Training techniques employed frequently involve corporal punishment, tethering and/or food deprivation. All are contrary to the animals’ natural behaviour, may be physically and/or mentally damaging to the animals involved and does not consider the best interests of the individual animal.*
 - b. *The tricks or acts that the animal is required to perform are, in the main, contrary to the natural behaviour of the species and would not be in the best interests of the animal.*
 - c. *The animals do not have freedom of choice to be involved in the performance.*
 - d. *There is no educational or conservation value in watching animals perform unnaturally in public performances.*
2. *Tactile interactions with all infant wild animals*
 - a. *Predators are dangerous animals that can inflict serious damage to humans, whom they may view as prey.*
 - b. *It is unnatural for predators and cetaceans to be in close proximity to humans and thus it could be extremely stressful for these animals to be touched by a human.*
 - c. *In order for predators and cetaceans to be touched, they would need to be trained and handled, sometimes using harmful and negative techniques.*
 - d. *The training and handling techniques as well as the unnatural relationship between a prey-species (humans) indicate that tactile interactions are not in the best interest of the individual animals involved.*
 - e. *There is no education or conservation value in tactile interactions with predators or cetaceans that cannot be achieved better by other means.*
 - f. *Being in captivity will interfere with the natural behaviour of large predators and cetaceans*
*Includes cub petting
3. *Walking with predators or elephants:*
 - a. *Elephants and predators would need to be trained to walk alongside humans as this is an unnatural activity for these animals.*
 - b. *The training and handling techniques employed are frequently harmful to the animal.*
 - c. *The animals do not have freedom of choice to be involved in the activity and it is not an activity that the animal would naturally initiate.*
 - d. *There is no education or conservation value in walking with predators or elephants that cannot be achieved through other means.*

² Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “Constitution”). Government Website: <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>.

³ <https://www.satsa.com/animal-interaction-research-home/>

⁴ https://www.satsa.com/wp-content/uploads/SATSA_HumanAnimalInteractions_Final_6-1.pdf

4. *Tactile interactions with predators and cetaceans*
 - a. *Predators are dangerous animals that can inflict serious damage to humans, whom they may view as prey.*
 - b. *It is unnatural for predators and cetaceans to be in close proximity to humans and thus it could be extremely stressful for these animals to be touched by a human.*
 - c. *In order for predators and cetaceans to be touched, they would need to be trained and handled, sometimes using harmful and negative techniques. • The training and handling techniques as well as the unnatural relationship between a prey-species (humans) indicate that tactile interactions are not in the best interest of the individual animals involved.*
 - d. *There is no education or conservation value in tactile interactions with predators or cetaceans that cannot be achieved better by other means.*
 - e. *Being in captivity will interfere with the natural behaviour of large predators and cetaceans*
5. *Riding of Wild Animals*
 - a. *For any wild animal, having a human ride or sit on it, is contrary to natural behaviour and would not be in the best interests of the animal.*
 - b. *In many cases the animal would need to be trained to accept humans on their backs. These training techniques frequently involve negative reinforcement that is harmful to the animal.*
 - c. *It is likely that the animal may be injured or damaged from having a human ride it or sit on it at some point in its training or tourism duties.*
 - d. *The animals do not have freedom of choice to be involved in the activity, with animals often being forced to accept humans on their backs.*
 - e. *It is not an activity that wild animals would naturally initiate.*
 - f. *There is no educational or conservation value in riding or sitting on a wild animal that cannot be achieved better by another means.*
**includes riding and sitting and is respect of handlers and customers”⁵*

In light of and addition to the above (including the activities as specified by SATSA), without referring to use which *may be acceptable*, the following uses of the Subject Species are **unacceptable**:

- i. Commercial trade in body parts and live animals (all Subject Species)
- ii. Canned hunting (all Subject Species)
- iii. Trophy hunting (all Subject Species)
- iv. Direct physical human interactions for non-veterinary or conservation (all Subject Species)
- v. (limited interpretation purposes (i.e. purely economic)—elephant safari back riding, walking with lions, lion cub

Resources for Panel Review:

- A. Bilchitz, David, Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals (February 15, 2017). Exploring the Relationship Between the Environmental Right in the South African Constitution and Protection for the Interests of Animals South African Law Journal (2017) 240. . Available at SSRN: <https://ssrn.com/abstract=2942112> or <http://dx.doi.org/10.2139/ssrn.2942112>

⁵ <https://www.satsa.com/satsa-animal-interaction-guidelines-holding-statement/>



- B. Scholtz, W. “Ethical and humane use’, intrinsic value and the Convention on Biological Diversity: Towards the reconfiguration of sustainable development and use.” RECIEL. 2020; 00: 1– 8. <https://doi.org/10.1111/reel.12360>
- C. SATSA The Southern Africa Tourism Services Association, “A Guide and Tool for Evaluating Captive Wildlife Attractions & Activities”: https://www.satsa.com/wp-content/uploads/SATSA_HumanAnimalInteractions_Final_6-1.pdf
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Question 2

In your submission you indicate that a moratorium should be placed on commercial hunting in all private game reserves adjoining Kruger National Park pending an independent investigation. Please elaborate on why and the nature of such an investigation?

As explained below, the management of hunting on privately-owned land that is open to the Kruger National Park (“**KNP**”) is not effectively governed and enforcement of laws and protocols intended to protect the biodiversity of the national park is weak. Animals that are not allowed to be hunted in the KNP are allowed to be hunted in these private areas—this is a contradiction and goes against a conservation imperative. An investigation must be conducted into the effectiveness of the governance framework and recommendations made for reform.

The Constitution 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 promote conservation as well as securing ecologically sustainable development and use of natural resources (section 24). Section 3 of the NEM:BA⁶ is entitled “State’s trusteeship of biological diversity” and this section requires the State to manage, conserve and sustain South Africa’s biodiversity and its components and to implement the Act to achieve the progressive realisation of the rights in section 24 of the Constitution.

In South African law, the wildlife within the KNP is held in trust for the benefit of people of South Africa and the state is merely a trustee. Where a national park is open to privately-owned land where hunting or other consumptive uses are allowed, as is the case with the KNP and the Associated Private Nature Reserves (“**APNR**”), the management of the wildlife within the open system must at the very least be transparent, accountable and strictly controlled.

Relevant laws, policies and protocols are being flouted as animal from the KNP are being hunted in the open system.

Numerous reported trophy hunting incidents of lions, elephants and other animals have clearly highlighted that animals from the KNP—who are playing vital genetic and ecological roles, are key individuals in their own complex social communities and generate important income for both the KNP and private reserves through ecotourism—are being killed for profit in some of the APNR reserves.

⁶ National Environmental Management: Biodiversity Act, 10 of 2004 (NEMBA). National Department of Agriculture Website: <https://www.nda.agric.za/docs/NPPOZA/NEMBA.pdf>



There is clear evidence that the hunting protocols governing the private game reserves adjoining the KNP are not being properly enforced. The hunting of a lion in Umbabat Private Nature Reserve in 2018 is a good illustration of this. The province issued permits to Umbabat to hunt a lion despite the fact that the KNP had identified significant historic and current non-compliances with the current hunting protocols by Umbabat.

The Department of Environment, Forestry and Fisheries (“**DEFF**” or the “**Department**”) investigation into the Umbabat hunt noted that the Threatened or Protected Species Regulations, 2007 are not implemented in some of the provinces, yet no action was suggested. In the Umbabat hunt, a lion was hunted in clear contravention of the Regulations, yet no enforcement action was taken. National laws apply equally everywhere in the Republic. The fact that the key regulations protecting threatened and vulnerable species are selectively implemented is a failure of governance and the rule of law.

The current cooperative agreement between the KNP and the private nature reserves was concluded in direct contravention of a resolution by Parliament⁷ and has several key weaknesses including, but not limited to:

- a. hunting and benefit sharing are regulated by means of protocols adopted by a Joint Committee;
- b. compliance by the parties with protocols adopted by the Joint Committee, including hunting and benefit sharing protocols, is not mandatory;
- c. there are no penalties for non-compliance with the protocols;
- d. meetings of the Joint Committee are not open to other stakeholders except by invitation; and
- e. the Joint Committee has no legal personality and it is not clear whether it is public body and subject to the stricter access to information provisions in the Promotion of Access to Information Act, Act, 2000.⁸

We propose that an immediate moratorium on trophy hunting in the APNR reserves is imposed while an independent investigation is conducted into hunting in these reserves. Such an investigation should in our view include at a minimum:

- a. scrutiny of specific hunting incidents as have been raised by non-state actors and the media (some examples have been included in the “Resources for Panel Review below”);
- b. a review and feasibility of the agreement between SANParks and the APNR and all relevant protocols; and
- c. the opportunity for the public to participate meaningfully in all these processes.

Resources for Panel Review:

- A. Parliamentary Monitoring Group, “Hunting in Greater Kruger National Park: SANParks & Mpumalanga Parks Board”: <https://pmg.org.za/committee-meeting/27072/>
- B. Science Daily: <https://www.sciencedaily.com/releases/2020/09/200903114210.htm>

⁷ See: <https://pmg.org.za/committee-meeting/27826/> and <https://pmg.org.za/committee-meeting/27072/>

⁸ Promotion of Access to Information Act, 2 of 2002 as amended (hereinafter “PAIA”) https://www.environment.gov.za/sites/default/files/legislations/promotionof_accesssto_information_act.pdf



- C. UDM Archives: http://www.udm.org.za/archives/2005_archive/20050406_let_holb_assets_available_highest_bidder.htm
- D. EMS Foundation <https://emsfoundation.org.za/wp-content/uploads/Appeal-for-Moratorium-on-Lion-Hunting.pdf>
- E. Nikela: <https://www.nikela.org/young-balule-elephant-shot-13-times-before-horrified-guests/>
- F. YouTube: <https://www.youtube.com/watch?v=DRxUzeL6sUk&app=desktop>
- G. Africa Geographic: <https://africageographic.com/stories/opinion-ceo-asks-whether-trophy-hunting-industry-ruin-krugers-big-expansion-plan/>
- H. Africa Geographic: <https://africageographic.com/stories/opinion-trophy-hunting-in-the-greater-kruger-versus-broader-conservation-priorities/>
- I. Daily Maverick: <https://www.dailymaverick.co.za/article/2019-02-05-does-trophy-hunting-really-benefit-conservation-and-local-communities/>
- J. Conservation Action Trust: <https://conservationaction.co.za/resources/reports/open-letter-unethical-trophy-hunting-of-elephant-in-the-greater-kruger/>
- K. Save The Elephants: <https://savetheelephants.org/wp-content/uploads/2016/11/2004Greenhuntingalts.pdf>
- L. News24: <https://www.news24.com/news24/Travel/fenced-freedom-the-problem-of-being-wild-20160511>
- M. Tourism Update: <https://www.tourismupdate.co.za/article/letter-coalition-tourists-appeal-end-hunting-outside-kruger>
- N. Daily Maverick: <https://www.dailymaverick.co.za/article/2019-02-05-does-trophy-hunting-really-benefit-conservation-and-local-communities/>
- O. IOL: <https://www.iol.co.za/news/south-africa/mpumalanga/skye-the-lion-down-but-not-out-17187376>
- P. Daily Maverick: <https://www.dailymaverick.co.za/article/2018-07-05-digging-for-the-truth-about-skye/>
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Question 3

With reference to the concerns raised on the current approach to sustainable use as highlighted on pages 8 and 9 and concerns noted on page 13 what would the correct interpretation of sustainable use be? Please provide a working definition for the HLP to consider.

As is the case with the first question in this document, EMS and ALRSA has considered the current approach to sustainable use in great detail in our Submission. We have accordingly not resubmitted the same comments, which apply equally herein.

We also wish to point out that as per our Submission from June 2020,⁹ we asked the Department and Panel to provide a legal opinion as to why their current interpretation is justifiable. We have

⁹ See specifically our Submission, Section I, Part A, Paragraph 3.



yet to receive a response to this request. Notably, as a State actor in the new constitutional dispensation, justification is a requirement of administrative action. Thus, the onus of providing information as to the current interpretation and the policies and legislation on which these are based should be on the Department and should be offered up for public consideration.

Sustainable use as it is currently being interpreted and applied by DEFF and others in relation to Government is neither ecologically nor ethically sustainable and is a continuation of the pre-Constitutional approach.

The Constitution sets the framework within which all law and policy must function. Constitutional values, and recent jurisprudence requires a shift away from colonial and exploitative past towards humans, animals and nature and towards Ubuntu, Respect and Care. Herein, we refer to the judgement in *Lemthongthai*¹⁰: “The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general.”

The current interpretation of sustainable use must be replaced — an alternative is suggested by the integrative approach we have already elaborated upon and which is discussed in the article by Professor Bilchitz.

Section 24 of the Constitution gives everyone the right “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that... secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

The United Nations Educational, Scientific and Cultural Organization (UNESCO) references the 1987 Brundtland Commission Report, defining the term “sustainable development” as (our emphasis) “development that meets the needs of the present **without compromising the ability of future generations to meet their own needs.**”¹¹ There have been attempts to further define the term sustainable development, which remains a critically important task, given that nations have failed to adequately use this concept to address global challenges, as was intended.¹²

It must be stressed that Section 24 does not give any person the right to “sustainable use” of wildlife. The provision itself provides that where natural resources *are* used this must be “ecologically sustainable”. It is our view that the mandate of the Department is not to promote the use of biodiversity; it is to protect the environment and to ensure that where use of wildlife is

¹⁰ *Lemthongthai v S* (849/2013) [2014] ZASCA 131; 2015 (1) SACR 353 (SCA) (25 September 2014), <http://www.saflii.org/za/cases/ZASCA/2014/131.html> at paragraph 20

¹¹ *Sustainable Development*, UNESCO, <https://en.unesco.org/themes/education-sustainable-development/what-is-esd/sd>.

¹² See generally Erling Holden, Kristin Linnerud & David Banister, *Sustainable development: Our Common Future revisited*, 26 GLOBAL ENVIRONMENTAL CHANGE 130 (2014), <https://www.sciencedirect.com/science/article/pii/S0959378014000727> (providing indicators and thresholds for four primary dimensions of sustainable development - safeguarding long-term ecological sustainability, satisfying basic needs, and promoting intragenerational and intergenerational equity).



permitted in terms of the Constitution, it must protect the integrity of ecosystems and promote their wellbeing and continued survival. Furthermore, section 24 refers only to the promotion of “justifiable economic and social development” (our emphasis). Practices such as farming lions for trophy/canned hunting and/or exportation and use of their bones are not “justifiable” for the purposes of section 24.

A reconfigured and reimagined system of governance is necessary and needs to be urgently mainstreamed and developed if we are to achieve our global biodiversity targets and commitments and halt the mass extinctions and collapse of ecosystems which threaten human survival (and the most vulnerable in our society which will be the hardest hit). This new system of environmental governance must be based on:

- a. The recognition that the intrinsic value of animals as individuals, conservation, animal welfare, environmental protection and section 24 are intertwined;
- b. Due and proper consideration of section 24 specifically and the relevant provisions as contained in this section—including “sustainability”, “current **and** future generations”, “justifiability”, .
- c. The Constitution, Constitutional values, constitutional judgements and other court judgements. This would also include the notions of the purposive approach and transformative constitutionalism¹³;
- d. The Rights of Nature and Earth Jurisprudence;¹⁴ and
- e. Other relevant considerations.

Question 4

In your view does the integrative approach prohibit all forms of consumptive use and what in your view is the definition of consumptive use?

We do not wish to get into terminological disputes about what constitutes consumptive or non-consumptive use. In general, the current approach of the government is inconsistent with the integrative approach as adopted by the Constitutional Court. In our understanding, what is clear is that the integrative approach only would allow uses consistent with respect for individual animals and their intrinsic worth. We quote below from Professor Bilchitz’s explanation from his article of what truly sustainable use involves (we have omitted the footnotes) (emphasis added):

“An alternative integrative approach to understanding ‘sustainable use’, on the other hand, gives equal weight to the composite term, ‘sustainable’ and ‘use’. Sustainability here qualifies and colours the notion of use itself such that certain uses become impermissible. The Oxford English Dictionary defines sustainable primarily as involving being ‘able to be maintained at a certain rate or level’. In this context, this definition illustrates the

¹³ See for example: Bilchitz, David, Does Transformative Constitutionalism Require the Recognition of Animal Rights? (September 9, 2009). Southern African Public Law Vol 25, No. 2, 2010 , Available at SSRN: <https://ssrn.com/abstract=1872936>

¹⁴ See further resources as provided for in Question



relationship between sustainability and the notion of conservation, and suggests the importance of maintaining animals of a particular species in existence. The integrative approach recognises that the ability to guarantee the survival and continuation of animals from different species depends upon cultivating attitudes in human beings towards them that are respectful of their interests. This approach recognises the deep inter-relationship between individuals and the rest of the ecological system; in so doing, it maintains that there is a necessary connection between the adoption by humans of attitudes and behaviours of respect for individual animals—in the manner they are interacted with and treated – and the very long-term sustainability with which they will be used.

The integrative understanding recognises that there is a legitimate sense in which we may use all those things that are in the ‘environment’. Indeed, the idea of ‘use’ alone is not necessarily objectionable in that, even in the human context, there are uses we make of other people that are legitimate. We can utilise the services of an electrician, for example, provided we pay them, and we may depend on a shopping teller at a supermarket to acquire our groceries. **These forms of use are morally and legally acceptable as they do not undermine the respect we owe to other human beings and are consistent with it.** They accord, for instance, with the famous second formulation of the categorical imperative provided by Immanuel Kant: ‘so act that you use humanity, whether in your own person or the person of any other, always at the same time as an end, never merely as a means’. This principle does not preclude using others for achieving one’s ends but forbids reducing them merely to instruments for our own ends.

The integrative approach understands the notion of ‘sustainable use’ in relation to animals in a similar manner. **The use of animals is legitimate provided it meets certain conditions.** It is to be understood along the lines of the Kantian qualification above: that, as we saw, **individual animals may be used as a means, but never treated, merely as a means.** Sustainable use enshrines, on this approach, a conception whereby **any use is legitimate only if it is done in a manner compatible with respect for the entity in question that is being used.** It would thus reject the idea that the killing of animals such as lions for mere pleasure or entertainment constitutes a form of ‘sustainable use’. Similarly, removing baby elephants from their mothers and subjecting them to cruel forms of training to force them to allow people to ride on their backs would not qualify as being a ‘sustainable use’.”

Resources for Panel Review:

- A. Bilchitz, David, Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals (February 15, 2017). Exploring the Relationship Between the Environmental Right in the South African Constitution and Protection for the Interests of Animals South African Law Journal (2017) 240. . Available at SSRN: <https://ssrn.com/abstract=2942112> or <http://dx.doi.org/10.2139/ssrn.2942112>



Question 5

In your view does the integrative approach prohibit certain management systems, including those that are lethal in nature?

We have explained above that the integrative approach requires dealing with animals in a way that is consistent with respect for individuals. We reference our understanding of the approach in response to answer the questions. The very notion of ‘management’ (and specifically in the context of the question) presupposes a sense in which humans are superior to other animals and can manage their (nonhuman animals’) lives. The integrative approach, in our view, would recommend using notions such as co-habitation, interrelationship and engagement rather than the arrogant, anthropocentric idea of ‘managing’ other beings and systems.

We recognise that human beings have massive power vis-à-vis other animals and the environment as a whole. Many (if not most) of our activities have a massive impact upon them as well. In our dealings with other creatures, the integrative approach—consistent with its approach of respect – requires a balance between the interests of humans and other animals. Situations of conflict should be avoided where possible but, where they occur, just as in the case of human beings, a balancing of interests must take place.

In law, this involves a test called proportionality (we cannot elaborate on that here). In general, a balancing of interests would mean that one cannot simply obliterate the interests of another. As such, usually lethal interventions would be impermissible. There are exceptional contexts—such as self-defence – where lethal force may be used—in the case of humans too—but the requirements are very onerous to meet and would involve there being no other way to respond.

In general, it would not be possible to meet these tests and non-lethal approaches would have to be adopted.

Resources for Panel Review:

- A. Bilchitz, David, Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals (February 15, 2017). Exploring the Relationship Between the Environmental Right in the South African Constitution and Protection for the Interests of Animals South African Law Journal (2017) 240. . Available at SSRN: <https://ssrn.com/abstract=2942112> or <http://dx.doi.org/10.2139/ssrn.2942112>

Question 6

Is the integrative approach more in line with the animal rights theory or eco-centrism or both?



The integrative approach was adopted by the Constitutional Court in the NSPCA case and requires *inter alia* the linking of conservation and animal welfare. It has been developed by Professor David Bilchitz in a powerful and important article in the South African Law Journal.

The question posed by the Panel is a philosophical one and would require a lengthy engagement with the origins of the approach as well as each of the theories. The question also fails to recognise its connectedness to other theories—such as African moral theory, which are critically important. In our view, there is no need to label the approach nor to specifically align it with other theories: it stands on its own two feet. It recognises the foundational intrinsic value of animals who must be respected as individuals and protection given to their fundamental interests. At the same time, it recognises that animals are part of a wider ecosystem and are in relationship with other animals—nonhuman and human, plants and other features thereof. In particular, the view, as we understand it, would require a balancing of interests between humans and animals with neither having interests that are absolute vis-à-vis one another.

As such, it has multiple philosophical influences including African moral philosophy which, importantly, recognises the power and importance of harmonious and respectful relationships between individuals. Professor Bilchitz elaborated upon this in the SAIFAC Submission and oral presentation to the Panel.

Resources for Panel Review:

- A. Bilchitz, David, Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals (February 15, 2017). Exploring the Relationship Between the Environmental Right in the South African Constitution and Protection for the Interests of Animals South African Law Journal (2017) 240. . Available at SSRN: <https://ssrn.com/abstract=2942112> or <http://dx.doi.org/10.2139/ssrn.2942112>

Question 7

Reference on page 19 was made to “*Exploitative and cruel practices such as captive lion breeding for human interaction, canned hunting and the lion bone trade have been rationalized under the banner of ‘sustainable use’. Currently the mantra of ‘sustainable use’ is repeated constantly and goes unquestioned in the context of sustainable development, which includes the international trade in endangered species. The question as to whether the ‘use’ is actually sustainable under real world conditions is never asked. This needs to change and it needs to change urgently, given the extraordinary threats to biodiversity*”. What solutions do EMS and ALR have in terms of the captive bred lion industry and the thousands of lions they have? If it is closed, what proposals do EMS and ALR have on how this should be done? In this process, how is the individual rights to property weighed up against the described interpretation of section 24 as provided. This applies to other calls in the submission to close certain practices.



The question about whether we can immediately close practices that are in violation of the Constitution raises the issue of transitioning from past exploitative practices, which as a country we have undertaken to do.

A few pertinent principles are relevant to this question:

- i. Government must make policy that is in line with the Constitution, constitutional values, Constitutional Court (and other South African Court) judgements and Parliamentary instructions.
- ii. Section 24 of the Constitution states that South Africans have the right to have the environment protected, for the benefit of present and future generations, **through reasonable legislative and other measures.**
- iii. Government should not perpetually allow practices in violation of the Constitution and other aforementioned considerations.
- iv. Government is entitled (and obliged) to regulate and ban certain practices and products. Such regulation may impact on personal rights to property (and other personal rights). Such regulation must be in line with the Constitution and done in terms of the relevant legal processes.
- v. Government is entitled to take policy decisions in relation to contentious and damaging practices.
- vi. Government is entitled and should make policy decisions that are in the public interest.
- vii. Government should prioritise the economic benefits of a handful of people over the public good, public opinion, the public heritage, and the public future.
- viii. No rights in the Constitution are absolute. The right to property is not absolute. The right to property does not trump other constitutional rights, nor does it trump other laws and regulations. These rights are limited by various factors - reasonableness, law of general application, section 36 of the Constitution, and various other factors.
- ix. Industries come and go all the time and often disappear due to government intervention.
- x. The decision to farm, breed and kill (*inter alia*) lions for profit is an inherently highly risky and highly controversial business decision.
- xi. If this was in the non-animal context: Would a polluter be entitled to seek compensation? And if so—why? Would a landmine manufacturer seek compensation when countries make the decision to no longer produce landmines? And if so – why?
- xii. If compensation is a consideration—will the captive big cat industry compensate the loss and potential economic, reputational and other harm caused to the country by their activities?
- xiii. Government is entitled to issue permits, decline permits or put conditions on permits. Government can accordingly phase out commercial lion farming in a constitutionally-compliant and lawful manner, without expropriation, and without paying any compensation.
- xiv. NEM:BA also allows for permits to be cancelled if the carrying out of the activities in question “has a detrimental impact on the species”. Sufficient evidence of detrimental impact exists to justify cancelling the permits immediately without paying compensation, and we are advised that doing so would not constitute an arbitrary deprivation, or expropriation, of private property.

The following are examples of some immediate actions by Government that can be undertaken:



- a. announcing that no new permits to keep captive lions will be issued and existing permits will not be renewed;
- b. amending the conditions in existing permits to protect the welfare of captive lions;
- c. amending the conditions in existing permits to require the sterilization of all captive lions;
- d. setting a zero quota for the export of lion bones in terms of CITES in order to remove the financial incentive to circumvent the law. Allowing the industry to continue to kill lions for the trade in lion bones as a means of limiting the number of lions while government is closing down the industry should NOT be considered as this will be endorsing criminality and supporting the illegal wildlife trade. Research has clearly shown that the legal trade of lion bones is part of the illegal trade.
- e. conducting an independent forensic audit of all lions in captive breeding facilities and the industry as a whole;
- f. developing a comprehensive national plan for dealing with the current captive lion population in way that is humane and promotes both the conservation of the species as a whole as well as the well-being of those animals as far as possible. It should be done in such a way that regulates people to create infrastructure for true sanctuaries, repurposes jobs and reskills workers. Government must collaborate with animal welfare and protection organisations, civil society and other stakeholders who have the skills to deal with animal welfare matters and repercussions. We already have a starting point. In 2009 an NGO Alliance Grouping (including the NSPCA) sent a proposal document to the Department outlining how to resolve the issues relating to this industry. **This document is currently being revisited and adapted by several organisations, who, in collaboration, will send through a basic roadmap to the HLP by the 10th of November 2020.**

None of the above actions by Government involve the arbitrary deprivation of property nor unjustifiably infringe any individual's right to property. It is further important to consider that the right to environment applies to all 57 million plus members of the South African public as "weighed" against the handful of persons whose right to property would be infringed by the shutting down of one very specific industry that benefits a few. Without a healthy and sustainable environment, other rights become unenforceable.

Furthermore, as indicated in our responses to Questions 1 and 3 above, we believe that treating wildlife as property is neither consistent with the reality that wild animals (specifically the Subject Species at hand) are proven sentient beings with agency and intrinsic value. They are not merely objects, and current practices are neither justifiable nor useful from a conservation perspective nor are they in line with the Constitutional Court judgement, constitutional values, other judgements and Parliamentary instructions.

Consequently, we also advocate for the further development of our legal system so that it is more closely aligned with these factors, foreign and international developments, public sentiment, reality and science (among other factors we have already highlighted).

Resources for Panel Review:

- A. Parliamentary Committee of Environmental Affairs relating to the shutting down of the Captive Lion Breeding Industry arising from the "Colloquium on Captive Lion Breeding for Hunting in South Africa: harming or promoting the conservation image of the



country, held on 21 and 22 August 2018” <https://pmg.org.za/taled-committee-report/3595/>

- B. National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (CCT1/16).
- C. Bilchitz, David, Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals (February 15, 2017). Exploring the Relationship Between the Environmental Right in the South African Constitution and Protection for the Interests of Animals South African Law Journal (2017) 240. . Available at SSRN: <https://ssrn.com/abstract=2942112> or <http://dx.doi.org/10.2139/ssrn.2942112>

Question 8

Page 21 makes reference to conservation areas – have EMS and ALR given thought to how these are to be funded – sustainable long-term funding?

Conservation areas are critical to ensuring the achievement of section 24, the human right to environment, and thus designated monies must be set aside for such. The relevant members of Government tasked with allocating funds to the achievement of Constitutional rights and necessary public tasks are best placed to answer this question.

Our Submission makes suggestions regarding long-term funding, also on page 21, including various eco-tourism and community initiatives and carbon credit schemes. Creating conservation areas is necessary to the long-term survival of the ecosystems which comprise them. Ensuring the survival of natural ecosystems is in turn necessary to human survival and consequently the State must take responsibility for ensuring that they are adequately funded, including by promoting and facilitating funding from the National Treasury as well as other sources.

At the same time, South Africa must prioritise public employment in areas such as restoration and protection of wetlands, water sources, conservation of species in the wild and ecosystems and improving habitat connectivity. This must be accompanied by education, skills promotion and learning and capacity building initiatives to support effective implementation and robust processes to ensure transparency, accountability and reporting.

South Africa must look beyond its current approach to consumptive use and trade in wildlife and their body parts and consider a longer-term, more comprehensive global perspective – one that will offer more coherent, creative and effective financing solutions to mega-biodiverse countries in the South, such as our own, that are home to wildlife and biodiversity.

The 2019 Inter-governmental Science-Policy Platform for Biodiversity and Ecosystem Services Global Assessment indicated that “business as usual” has created widespread ecosystem degradation. We therefore need new models of conservation finance and fiscal policy based on the public good benefits of conserving landscapes and a “One Health” approach. The coronavirus pandemic has significantly disrupted traditional conservation finance models relying on the



privatisation and commodification of nature wildlife. South Africa needs to develop maintainable and defensible alternatives for conserving multi-functional landscapes that deliver positive outcomes for humans, nonhumans and nature.¹⁵

Question 9

On page 68 it is stated “DEFF’s approach is anachronistic and diametrically opposed to the international trend towards different philosophies of law such as an eco-centric one (e.g. Earth Jurisprudence) that seek to regulate human beings in accordance with the understanding that we are all members of a community of life from which we derive our wellbeing. Consequently, maintaining the health and integrity of the ecological communities that sustain life (including the whole “Earth Community”) must take precedence over the short-term commercial interest of a minority of the individuals of one species.” A contrary position is that the majority of jurisdictions with environmental rights framed them anthropogenically – please could more detail be provided on the “international trend” in this regard as reference was only made to 4 countries.

The fact that most jurisdictions with anthropogenically-framed environmental rights have not changed the human-centred framing of environmental rights is neither evidence contradicting the trend identified by ourselves and others, nor an argument in favour of not developing legal systems further in line with this trend. On the contrary, the evidence of the catastrophic collapse of wildlife populations globally provides clear evidence that these legacy governance systems are inadequate to conserve wildlife sufficiently well.

Environmental rights such as the right in section 24 of the Constitution, have traditionally been regarded as human rights. Human rights are, by their very nature, anthropocentrically focused. Our Constitutional Court has however suggested how such a right could be understood and interpreted in a wider way integrated with respect for the intrinsic value of animals.

The “international trend” that we referred to has been tracked by the United Nations Harmony with Nature Programme¹⁶ since 2009 and it is increasingly clear that Earth Jurisprudence (or ecological approaches to law) is likely to be one of the most significant influences on the development of law (including human rights law) for many decades.

The four countries that we mentioned represent the tip of the iceberg. As evidence of this accelerating trend, we have provided (in terms of an email with a We Transfer link dated 8 October 2020) the Panel with the July 2020 Report of the UN Secretary General on Harmony with Nature¹⁷ and the Supplement to that report which document over 170 cases of developments in Earth Jurisprudence that took place in many countries around the world during the second half of 2019 and the first half of 2020 only.

¹⁵ For example see Centre for the Study of Existential Risk at Cambridge University, <https://www.cser.ac.uk/>

¹⁶ <http://www.harmonywithnatureun.org>

¹⁷ <https://www.undocs.org/en/A/75/266>



There are many ways the right of nature, and similar concepts, are being incorporated in legal systems throughout the world—in constitutions, in legislative developments, in agreements, declarations, court cases and various other ways. Many are in force and others are in progress. Some jurisdictions which have incorporated the rights of nature in various forms include:

1. Ecuador
2. Bolivia
3. Uganda
4. Brazil
5. New Zealand
6. India
7. Bangladesh
8. USA (in local jurisdictional laws)
9. Tribal, Indigenous and First Nations across the world including in Canada, USA and others
10. Colombia: In six court decisions and one decree
11. Netherlands
12. Legislation in progress, at the moment:
 - a. Argentina
 - b. Australia
 - c. El Salvador
 - d. Nigeria
 - e. Philippines
 - f. Spain
 - g. Sweden
13. Policy for rights of nature in Chile

And there are many, many more. We encourage and ask that you please see the “Resources for the Panel” section below for further information. On reviewing same, it will become abundantly clear that this is a growing, international trend, and one which South Africa is falling behind, even on the African continent.

African Earth jurisprudence practitioners and the Gaia Foundation¹⁸ are facilitating similar progress in recognizing customary governance in Benin, Kenya and Zimbabwe.

There are many reasons why adopting a right-based approach for earth and nature would be advantageous for South Africa. These include the following:

- This approach strengthens the ability of rural and other people to protect the ecosystems on which they depend for their livelihoods, whereas the current system is heavily biased in favour of the people and companies with the most money and is resulting in the environmental degradation to the detriment of current and future generations. The evidence of the inadequacies of legal systems to stem environmental destruction, is overwhelming.
- Our current legal system is insufficient to ensure that human and ecological communities will thrive because it legitimises and facilitates the exploitation of Nature. A legal system that only recognises that people and juristic persons like companies have rights inevitably results in those holders of rights exploiting Nature which has no legal rights. This is

¹⁸ <https://www.gaiafoundation.org/>



similar to the situation in which slave owners (who were persons in the eyes of the law) exploited slaves which the law classified as property and consequently incapable of having rights.

- The Earth Jurisprudence approach reconciles law with science e.g. recognising that human laws must be aligned with the laws of physics, chemistry, ecology etc. to ensure that humans do not degrade the environment and exceed planetary boundaries (as is currently occurring with biological diversity).
- The Earth Jurisprudence approach is consistent with the worldview reflects in many indigenous cultures that have been more successful in living in ways that do not seriously degrade the environment - which is why it is supported by indigenous people around the world. It is aligned with African philosophies and African customary law, including African conceptions of the interdependence of humanity with other beings and the importance of duties to the wider community, which includes other-than-human beings.

As Munyaradzi Murove, puts it: “... *Africa yet possesses in its own traditional culture the roots of an ethical paradigm to solve the current environmental crisis. This is an ethic of an interdependence of individuals within the larger society to which they belong and to the environment on which they all depend. This ethic is based on the concepts of Ukama (Shona) and Ubuntu/Botho (Zulu, Xhosa, Sotho and Tswana). While the Shona word Ukama means relatedness, Ubuntu implies that humanness is derived from our relatedness with others, not only those currently living but also through past and future generations. When these two concepts are compounded, together they provide an ethical outlook that suggests that human well-being is indispensable from our dependence on, and interdependence with, all that exists and particularly with the immediate environment on which all humanity depends. Were this to be developed as an environmental ethic appropriate to the contemporary world it would inspire people north and south to combat threats of pollution and environmental degradation.*”¹⁹

In this regard it is important to appreciate that the concept of “community” extends far beyond the living human beings which a particular individual may have relationships with during his or her lifetime. It embraces both ancestors and generations to come as well as other-than-human beings since all are bound together by living forces to create the unified whole that is the universe.

Resources for Panel Review:

- A. United Nations Harmony with Nature Website:
<http://www.harmonywithnatureun.org/>
- B. July 2020 Report of the UN Secretary General on Harmony with Nature
<https://www.undocs.org/en/A/75/266>
- C. List of Countries that have implemented law/policy:
<http://www.harmonywithnatureun.org/rightsOfNature/>
- D. Prior resolutions & reports: <http://www.harmonywithnatureun.org/unDocs/>

¹⁹ Murove, Munyaradzi Felix, “An African Environmental Ethic based on the Concepts of Ukama and Ubuntu” in African Ethics. An Anthology of Comparative and Applied Ethics, Murove, Munyaradzi Felix (Ed), 2009, University of KwaZulu Natal Press, pp. 315 to 316.



Question 10

Eco-centric approaches seem to be equated with animal rights (please see page 69 as an example), is this the position of EMS and ALR? This is also reflective in references to systemic ecosystem approach versus individual animal approaches that seemed to be in conflict in the submission.

We have answered the question of our approach in responding to the question about the integrative approach above in relation to Question 6. This question itself betrays a bias that these are the two options we must adopt and fall in line with the expectations of the questioner. In addition, it is extremely clear that each of the eco-centric approach and the animal rights approach are two distinct areas of academia and practice. While there is an overlap, these are not equated and we reject the comment that we equate the two.

As we have mentioned, the integrative approach draws on multiple influences and creates a coherent philosophy that is based on respect, inter-relationship and a balancing of interests.

Question 11

No reference was made to the move towards the “One welfare” approach – please could EMS and ALR give their input on this?

Clarificatory Question for the Panel: Please confirm whether reference should be to “One Health” or “One Welfare”. If the latter, please can you clarify the context of which you deem this relevant to the Subject Species and the tasks of the Panel.

Our approach is as set out above and in our submission and please refer to the SAIFAC submission regarding constitutionality. If this “One Welfare”²⁰ approach is the one that is referred to by the Panel, we are of the view that this is not the main approach applicable. It appears to relate to “animal keeping systems”. As we are of the view that the Subject Species should not be farmed nor consumed, it is unclear how this relates to the task of the Panel.

The Panel has been constituted to review policies, legislation and practices relating to four Subject Species – i.e. elephants, lions, leopards and rhinos. It is not immediately clear to us how this fits in with the mandate of the Panel.

If this reference was intended to be a reference to the “One Health” approach – this is based on the recognition that the health of people is closely connected to the health of animals, plants and our shared environment, and that achieving optimal health outcomes requires taking an integrated approach. This approach is described in the Manhattan Principles on “One World, One Health” which were adopted by health experts from around the world who met on 29 September 2004 for

²⁰ <https://www.onewelfareworld.org/about.html>



a symposium focused on the current and potential movements of diseases among human, domestic animal, and wildlife populations.

Question 12

In respect of the submissions relating to Indigenous Knowledge and involvement on page 71, how do EMS and ALR respond to instances where traditional use is lethal, i.e. traditional forms of hunting?

In summary, we do not understand why this question is being asked as it is outside the scope of work of the HLP. It is also not clear to us how many indigenous groups practice “traditional forms” of hunting against elephants and rhinos.

Clarificatory Question for the Panel: Please confirm which specific indigenous groups and which specific lethal uses are referred to in this question?

On page 71 of our Submission we clearly indicate our perspective on the issue of indigenous knowledge. As is mentioned, indigenous knowledge systems can be instructive in moving away from exploitative approaches to wild animals towards a jurisprudence that is Earth-centric (i.e. eco-centric). The Earth Jurisprudence approach is in fact consistent with the worldview reflected in many indigenous cultures that have been more successful in living in ways that do not seriously degrade the environment—which is why it is supported by indigenous people around the world. It is aligned with African philosophies and African customary law, including African conceptions of the interdependence of humanity with other beings and the importance of duties to the wider community, which includes other-than-human beings. Similarly, an Earth Jurisprudence would require that the rights of humans with respect to cultural practices involving animals must be balanced with the rights of animals to exist and thrive in the ecosystems in which they evolved.

In our view, a decision about whether or not a form of traditional hunting should be permitted should not be based on whether or not the hunting in question is traditional, but on whether allowing that hunting is justifiable. Whether or not it is justifiable would involve weighing-up the hunter’s need for food, against the loss of the animal’s lives, within the context of what would be best for the ecosystem as a whole. Many indigenous customary law system have evolved hunting methods and restriction that take account of the need to respect, and not exploit, wildlife. Our submission, which makes the case for a move towards a more caring way is in line with indigenous knowledge systems which promote a more harmonious ethic and relationship with nature. Trophy hunting and farming wildlife to send their bones overseas is not comparable to indigenous hunting for sustenance.

If there are specific examples of indigenous groups trophy hunting elephants, rhinos, lions and leopards as part of their culture, we would be interested to find out the views of such groups, and whether this is still a culture that is actively being practiced by them today.



It is quite clear that in the case of most traditional communities their approach to hunting is vastly different to trophy hunters. But even then, communities of Africa are not frozen in existing practices.

It is simply not true to say that ‘customary law can never change and that it cannot be amended by legislation’ (Case CCT 49/03, Bhe para 44). In the *Bhe* judgment, Justice Langa held that the rules of succession in traditional communities needed to change in light of our constitution to recognise gender equality. In a similar manner, practices are not ossified and societies evolve.²¹

The intrinsic value of animals that the Constitutional Court has recognised and the need for an integrative approach to conservation requires a reflection on past practices and to shift them where necessary—against hunting for instance.

The rights of cultural, religious and linguistic communities in section 31 of the Constitution cannot be exercised in a manner inconsistent with the Bill of Rights. Given the requirements of section 24, as developed by the Constitutional Court, there would not be a strong claim by any community to perpetrate a practice that fails to accord animals the respect they deserve.

Resources for Panel Review:

- A. Chief Stephen Fritz - Chief Of The South Peninsula Khoisan Nation Council:
https://www.youtube.com/watch?v=X5My5Y_Bq1A
- B. Elisa Galgut, “Animal Rights and African Ethics: Congruence or Conflict?”, *Journal of Animal Ethics*, Volume 7, Number 2, Fall 2017, pp. 175-182 (Article) Published by University of Illinois Press: DOI: 10.5406/janimalethics.7.2.0175,
<https://www.jstor.org/stable/10.5406/janimalethics.7.2.0175>
- C. Danford T. Chibvongodze, “Ubuntu is Not Only about the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management”
- D. Horsthemke, Kai. (2015). *Animals and African Ethics*.

Question 13

Reference on page 75 calls for several bans related to captive-breeding, farming of wild animals for trade; international and local trade in wildlife body parts and consumption of wildlife body parts. How does EMS and ALR envisage these bans being affected and how should potential resulting socio-economic implications be addressed?

Our Submission has already set out a practical approach to banning captive breeding and farming of lions; a similar approach can be taken with banning captive breeding of any wild animal. Although doing so would result in those engaged in these activities suffering some financial losses, in our view the net socio-economic impacts for society would be positive because it would:

²¹ [https://collections.concourt.org.za/bitstream/handle/20.500.12144/2202/Full%20judgment%20\(731%20Kb\)-2167.pdf?sequence=12&isAllowed=y](https://collections.concourt.org.za/bitstream/handle/20.500.12144/2202/Full%20judgment%20(731%20Kb)-2167.pdf?sequence=12&isAllowed=y) and <https://collections.concourt.org.za/handle/20.500.12144/2202>



- i. Ensure compliance with and promote the Constitution, Constitutional Values, rulings of the Constitutional Court and other higher courts; Parliamentary Instructions;
- ii. be beneficial to tourism and South Africa's international reputation;
- iii. Ensure broader environmental protection as well as biodiversity;
- iv. reduce the risk of the transmission of zoonotic diseases; and
- v. have various other benefits as we have already mentioned in our Submissions and herein, which we have not repeated again.

As we have also already mentioned, we need to rethink the concepts of “value” as currently construed. We are not accounting for the true value of animals in the wild (either individually or as a whole) nor otherwise and focusing purely on immediate, economic gains for a very small population.

The concept of value needs to also take into account various other relevant factors such as, but not limited to:

1. Intrinsic value (as individuals and at a broader level)
2. Ecological and environmental value (within this heading includes but is not limited to the value of a healthy and functioning environment; biodiversity and genetic considerations;
3. Value to the South African public at large (past heritage, current and future generations) – including the personal and emotional value
4. Tourism impacts (including damaging and harmful reputational impacts exploitative practices and occurrences)

These “economic” considerations need to be weighed against any perceived current economic benefits as well as in consideration of economic impacts of not shutting such industries down.

In terms of the implementation, any bans will need to be effected through the necessary regulatory and legal processes, utilising existing law to the extent possible (amendment or regulations, where applicable). Notably, Government has in many instances in the past implemented bans on practices or products, and these have **all** had socio-economic impacts. A recent example is the ban on the sale of alcohol and cigarettes during the COVID-19 pandemic. Putting aside specific controversies in respect of these bans, they have had major impacts for commercial entities as well as businesses. The fact that same will have social, economic and various other consequences is not a substantive reason **not to** implement such a ban or process. In addition, bans can and often are challenged, which is why it is critical that same are done with due regard to the relevant legislation, requisite powers and legal processes as prescribed.

The bans we have provided for are in pursuit of legitimate ecological, environmental, social, political, legal and other aims. They are justifiable in light of these aims as well as the supreme law of our country, the Constitution.

A ban on the consumption of wildlife body parts (for food or medicine) where there is a risk of the transmission of zoonotic diseases can be effected via existing health and food safety legislation (it is acknowledged that this legislation is not administered by the Department itself).

This should not be controversial; where there is a risk of the transmission of zoonotic diseases, any potential socio-economic impacts on the industry must be weighed against the risk to human



and animal health and the subsequent costs to society of containing, treating and eradicating such diseases (or epidemics and pandemics)²².

A ban on trade in wildlife body parts from lion, leopard, rhino and elephant could be effected by the Minister making a prohibition on such trade in terms of section 57(2) of NEMBA since these animals are all listed as threatened or protected species in terms of that Act.

Where prescribed and otherwise necessary, notice can (and should) be given to industry (and other applicable) stakeholders and a phase-out plan implemented to reduce the socio-economic impacts of the ban. This has been done in the past with other practices harmful to the environment, as well as other bans that have been implemented by the Government (whether temporarily or permanently).

The effects and impacts of these bans, whether social, economic or otherwise will need to be considered properly and alternatives may be prescribed. One particular example we suggest to mitigate such implications would be the development and implementation of re-skilling programmes for those vulnerable workers working in these areas. We believe this will in fact be a welcome change given that such workers in many instances have not received adequate and proper training and are working in harmful conditions.

Resources for Panel Review:

- A. Ross Graeme Harvey, 'Towards a cost-benefit analysis of South Africa's captive predator breeding industry, *Global Ecology and Conservation*, Volume 23, 2020, e01157, ISSN 2351-9894, <https://doi.org/10.1016/j.gecco.2020.e01157>.
(<http://www.sciencedirect.com/science/article/pii/S2351989420306983>)
- B. Cutler DM, Summers LH. The COVID-19 Pandemic and the \$16 Trillion Virus. *JAMA*. 2020;324(15):1495–1496. doi:10.1001/jama.2020.19759
- C. <https://www.imf.org/external/pubs/ft/fandd/2019/12/natures-solution-to-climate-change-chami.htm>
- D. "Donut Economics":
 - a. See for example: World Economic Forum: "Meet the doughnut: the new economic model that could help end inequality":
<https://www.weforum.org/agenda/2017/04/the-new-economic-model-that-could-end-inequality-doughnut/>
 - b. Kate Raworth: "Exploring Donut Economics": <https://www.kateraworth.com/>
- E. World Economic Forum: "Whales are vital to curb climate change - this is the reason why" The <https://www.weforum.org/agenda/2019/11/whales-carbon-capture-climate-change/>

²² The costs of, for example, a pandemic outbreak due to consumption of wildlife or other zoonotic diseases "The coronavirus pandemic will end up costing Americans \$16 trillion" (Cutler DM, Summers LH. The COVID-19 Pandemic and the \$16 Trillion Virus. *JAMA*. 2020;324(15):1495–1496. doi:10.1001/jama.2020.19759)



Question 14

On page 120 it was noted that there are many alternatives to the trade in Elephant ivory that would be financially beneficial to South Africa. These alternatives to trade in ivory would have long-term positive results for the country’s citizens and would protect their natural heritage at the same time. – please provide detail on these alternatives, only tourism was noted and not all areas are suitable for tourism.

This question seems to conflate issues of the trade in ivory with land use. It is unclear to us how the trade in elephant products equates to land not being viable for tourism.

Clarificatory Questions for the Panel: Please confirm the intention of this question. It is difficult to ascertain what the concern is here? Is it that an owner of land somehow is able to have elephants for their ivory or trade in ivory but that such land is not suitable for tourism?

Is the question about alternatives to a trade in ivory for economic purposes?

If an “area” is not suitable for tourism (unclear what this means in this context), is the Panel suggesting that the area would be suitable for ivory trade somehow?

While we have fundamental issues with the question, we have attempted to deal with some of the issues raised by it below:

In summary, our position is that trading in ivory is detrimental to the long-term survival of elephants on the continent. That is evident from the research report we reference below. If South Africa continued trading in ivory it would be going against the international trend towards shutting down ivory markets and banning trade. It would also adversely affect South Africa’s reputation as an eco-tourism destination and may lose the country tourism revenue. Trade in ivory is impossible to regulate effectively and invariably creates illegal markets and promotes illegal activities. It is not a question of shutting down a viable source of revenue for the country and needing to find an alternative.

We should be thinking about how to place a ‘public good’ or ‘ecosystem service’ value on elephants because elephants are critical agents for the environment, including our efforts to mitigate climate change. We should be promoting alternative conservation activities that could sustain elephants and protected areas and scale up existing schemes that directly incentivise local community members to conserve the landscapes in which elephants thrive.

With respect, it seems that there is an unsubstantiated assumption in the way the question is framed that there is somehow an on-going benefit to South Africa killing and trading in elephant ivory. The ivory trade is leading to extirpation of elephants. The idea that a global ivory market could be part of the solution to the survival of elephants is counter-intuitive and frankly dangerous, particularly because the species remains in decline across the African Continent. Speculating on elephant extinction is unconscionable and fails to recognise the sheer intelligence, sentience and complex social structures of elephants.

Worthy of consideration is: who are these speculators going to sell it to? Stockpiles of ivory belonging to dead elephants no longer have any use. The current global environment is one of ivory trade bans and demand reduction. This not likely to change. Ivory is banned in China, Hong



Kong and Taiwan, among other countries, and this is growing all the time. A near total ban of ivory exists in the USA and the UK. New Zealand is moving towards a ban too. The European Union and Japan are being urged to shut their ivory markets. By even considering growing demand, South Africa would be going against the tide of reason, and indeed will become a pariah state.

Elephants are worth far more alive than dead (in fact, 76 times more according to this Study),²³ and if a monetary value is to be attributed to their worth (which we oppose as they have intrinsic value), then this should be done in terms of correctly understanding their contribution to ecological functionality, of which carbon sequestration and tourism value are two vital elements. Moreover, elephants are a keystone species. Like whales in marine ecosystems, they are irreplaceable agents of maintaining ecosystem health and dynamism in terrestrial ecosystems. Of course, it remains extremely difficult to attribute an economic value to elephants given their intrinsic worth. Nonetheless, in a similar vein to the work completed on whales²⁴, we could also place a ‘public good’ or ‘ecosystem service’ value on elephants to show that elephants are critical agents in efforts to mitigate climate change.

What we should be doing is promoting alternative conservation activities that could sustain elephants and protected areas and scale up existing schemes that directly incentivise local community members to conserve the landscapes in which elephants thrive.

Humanity is at risk of overstepping earth’s planetary boundaries. Part of the reason is that we have collectively failed to value the ecological systems on which our survival ultimately depends. Instead of properly conserving that which has been entrusted to us, we have over-exploited terrestrial and marine ecosystems. The consequence is that we have created impending climate tipping points. The stability and resilience of our planet is in peril. A key barrier to the notion of ‘one health’ and staying within our planetary boundaries are precisely the misguided ‘sustainable use’, endless growth models in which the idea that we can benefit financially from the sale of ivory are located. This view has actually led us to the point of generating ecologically irreversible risks—and the massive costs, including human existentialism—that need to be borne along with it.

Extraction and exploitation of so-called ‘wildlife resources’ has proved unamenable to effective policing and provides an opportunity for laundering—essentially it is impossible to effectively regulate the wildlife trade. By encouraging legal sales, South Africa is also encouraging the rampant illegal killing of elephants elsewhere in Africa. Importantly, research shows that this CITES-sanctioned sale went hand-in-hand with a 71% increase in ivory smuggling

Elephants are highly intelligent, sensitive and social beings that have their own intrinsic worth, a worth that needs to be protected. The Norms and Standards²⁵ relating to elephants recognise this. They have complex social systems and qualities beyond our understanding. There is substantial scientific research in this regard. Elephants are extremely important to South Africa, not only to our tourism industry and the economic benefits they bring but to the people of our country, our

²³ <https://blogs.scientificamerican.com/extinction-countdown/elephants-are-worth-76-times-more-alive-than-dead-report/>

²⁴ Chami, R., Cosimano, T., Fullenkamp, Connel, Oztosun, S., 2019. Nature’s solution to climate change: A strategy to protect whales can limit greenhouse gases and global warming. *Financ. Dev.* 56, 34–38.

²⁵ The Norms and Standards relating to the Management of Elephants in South Africa, Government Notice 251 in Government Gazette 30833 of 29 February 2008.



heritage and the various cultures represented in our nation. In addition, as change agents, they are also a major component of biodiversity, in their own right.

Supporting the ivory trade and treating elephants as mere things and commodities will negatively affect South African tourism more generally and 'brand south Africa' more broadly - this is because the global public are not only troubled by South Africa's uncaring, highly exploitative, wildlife policies but also because people have a special affinity with elephants. This has much to do with the indisputable science about *who* elephants are as individuals, as family members, as social groups, as clan members and as members of the larger elephant society. Causing intergenerational trauma to elephants through exploitative, violent human-based activities and greed is not the kind of world people want to live in now and is reminiscent of an era best forgotten.

Obtaining revenue from killing elephants for their ivory is not only a dying enterprise, it is counter-intuitive, disrespectful and representative of a *modus operandi* that is currently responsible for bringing the world to its collective knees.

South Africa must look beyond consumptive use and trade in wildlife and their body parts and consider a longer-term, more comprehensive global perspective – one that will offer more coherent, creative and effective management and financing solutions to countries, such as our own, that are home to elephants.

Resources for Panel Review:

- A. 'Does Legalisation Reduce Black Market Activity?' Evidence from a Global Ivory Experiment and Elephant Poaching Data'
https://static1.squarespace.com/static/55667009e4b04bbb290cc837/t/58fda89c8419c294e0470830/1493018782444/HSIANG_SEKAR_w22314.pdf

Question 15a

In your submission, EMS and ALR indicate that “We believe that we cannot simultaneously aim to take care of nature while continuing and promoting exploitative and harmful practices to it” and “that the notions of ‘conservation’ and ‘sustainable use’ should be interpreted in an ‘integrative’ approach rather than the existing ‘aggregative’ approach”. To better understand the position of EMS and ALR, the HLP request a response on the following. As part of an integrative approach, could EMS and ALR agree that an integrated approach would require full cost accounting of an activity - looking at its sustainability in terms of its social impact and responsibility, its full environmental and ecological impact, as well as economic sustainability?

We have already addressed the key components of the integrative approach and referenced the importance article by Professor Bilchitz. In short, once again, the notion of full cost accounting is quite abstract and moves away from a focus on individuals and the respect they deserve. Impact is not just general and animals are not resources—they are beings with intrinsic value. The integrative approach is holistic and would require considering effects on humans, animals and the



environment as a whole. That has to take place in a context of recognising inter-relationship and inter-dependency. Respect would require in cases of conflict a balancing of interests. In general, win-win situations should be sought for all.

Question 15b

Acknowledging that everything we do has an impact on the environment, why the specific focus on for example hunting? What is the view of EMS and ALR in terms of the impact of photographic tourism on the welfare of the four species (animals collared for ease of view – or disturbances in social behaviour), its use of natural resources and its environmental footprint such as water use, emissions, waste generation, etc.? Is this seen as exploitive and/or harmful or sustainable use?

We are slightly confused by the question—it is unclear why animals “use of natural resources and its environmental footprint such as water use, emissions, waste generation, etc.” is being asked in the context of welfare, exploitive and/or harmful and or sustainable use?

Clarificatory Question for the Panel: Please confirm how aspects of an animals use of resources relate to welfare and sustainable use?

In light of the confusion, we have assumed the question relates to concern by the Panel of photographic tourism on the Subject Species. In short, we do not view photographic tourism (done respectfully with no physical interaction, force or influence) as exploitive or harmful use. We view same as a form of sustainable use.

With regard to the “specific focus on trophy hunting”, there is a major difference between shooting an animal dead with a weapon, or shooting a photograph of an animal with a camera (again—done properly—for example forcing or scaring an animal into a place for a photograph would be exploitive and harmful and thus unacceptable). It is not immediately clear to us what the misunderstanding is with the focus on hunting (consumptive use) particularly as compared with non-consumptive use (photo taking). While the question acknowledges that all human activities impact on nonhuman animals and the environment, it fails to acknowledge that such impacts and harms are extremely different and vary in scale. This should be immediately apparent. Collaring an animal for observation or killing an animal has very different impacts on the animal, and the environment.

If the Panel is concerned about the environmental impacts of an animal, it is important to note that animals also have positive impacts on their environment (see statements and studies relating to whales and elephants for example). Any negative impacts of animals are exacerbated through the intensive keeping, farming and use of such animals. Thus, if the concern of the Panel is negative environmental impacts, this should ultimately deter any captivity, breeding and other activities involving these species. There are currently nearly four times more lions in captivity than there are in the wild. South Africa is intensively breeding rhinos and keeping them in captivity. This is clearly unnatural and worsening any potentially negative ecological impacts of such animals.



We advocate an integrative approach to the “management” of wild animals. In terms of this approach, a wild animal has an interest, which may be a limited right in some circumstances, to exist and thrive in the ecosystem in which it evolved. All of the Subject Species with which the HLP are concerned are considered trophy animals and permits are issued for hunting them as trophies. Our Submissions show that not only is trophy hunting repugnant to an ever-increasing number of people, it is actually harmful to South Africa’s image as an eco-tourism destination (including safaris, etc.) and trophy hunting does not even generate much revenue compared to other forms of tourism.

Trophy hunting is particularly repugnant as it demonstrates no respect for the intrinsic worth of animals and allows them to be killed for a trivial purpose—the ‘entertainment’ of the hunter. It is about domination rather than inter-relationship and there is no balancing but simply a ‘hunter’-take-all approach. It is completely out of line with the integrative approach or any ethical approach to the environment. Trophy hunting is also a continuation of our colonial heritage brought by the Western world which we must reject in our new constitutional democracy.

It involves clearest illustration of the commodification, control and domination of animals. As has been said exhaustively elsewhere in our Submissions, such an approach to animals is the root cause of the current threats to human survival by mass extinctions and climate change.

We do not dispute that eco-tourism, like almost every *any human activity*, has an environmental footprint. It should be done in a way consistent with the integrative approach and such that it reduces harmful impacts. It is, however, entirely possible to be consistent with the approach to animals we have advocated for in our Submissions.

Question 16

Our countries’ protected areas alone are not sufficient to protect the countries wildlife and the four species. For private sector and communities to conserve wild habitats and associated species, the landuse has to compete with other land uses in terms of viability. How do EMS & ALR propose these areas foot the bill for conservation in areas not suitable for photographic tourism and /or without hunting/use?

This complex question has been answered in detail in our formal submission (see paragraphs 13ff on page 20). It is not a question of simply asking how areas can “foot the bill” for conservation without photographic tourism or hunting. A new economic model has to place far higher and more realistic value on irreplaceable biodiversity. We have already discussed this in various places.

The right to environment is a constitutional, enshrined and guaranteed human right. Government must promote this right through reasonable legislative and other measures. It is the role of Government to determine how this right must be achieved.



CLOSE

We look forward to receiving responses to our queries raised to the Panel herein as well as the requests made in our Submission for June 2020.