



## THE LEGAL STATUS OF SNOW LEOPARDS IN AFGHANISTAN

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6 October 2004

### 1. INTRODUCTION

The elusive snow leopard,<sup>1</sup> found in the most harsh and remote regions of twelve countries across Central Asia,<sup>2</sup> is regarded globally as a critically endangered species threatened with extinction.<sup>3</sup>

The number of snow leopards in Afghanistan is thought to have declined significantly in recent years due largely to a quarter century of war and conflict, the lack of an adequately designed or enforced regulatory framework, a weak central government and the increasing demand for snow leopard pelts.<sup>4</sup> In 1994, it was estimated that there were only 100 to 200 snow leopards left in Afghanistan.<sup>5</sup> These are thought to be concentrated in the northeastern and central portions of the Hindu Kush and the high Pamir valleys.<sup>6</sup>

In considering the legal status of the species in Afghanistan, regard needs to be had to both the international and domestic regulatory frameworks.

### 2. INTERNATIONAL LEGAL FRAMEWORK

Afghanistan is a party to two multilateral environmental agreements (MEAs) that are relevant to the conservation of snow leopards. The first is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the second the Convention on Biological Diversity (CBD).

Afghanistan is not, however, a party to a third MEA that is also relevant to the conservation of snow leopards, namely the Convention on Migratory Species of Wild Animal Species (CMS).

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<sup>1</sup> The taxon of the species is *uncia uncia*. The local *Dari* name is *palang-i-barfi*.

<sup>2</sup> Namely Afghanistan, China, Bhutan, Nepal, India, Pakistan, Tajikistan, Uzbekistan, Kyrgyzstan, Kazakhstan, Russia and Mongolia.

<sup>3</sup> The species was included in The World Conservation Union (“IUCN”) Red List of Threatened Species in 1988. The most recent assessment was done in 2001 for the 2002 Red List and was based on the estimate that the snow leopard’s total effective population size is below 2,500 mature breeding individuals, with a declining trend due to habitat and prey base loss and persecution, and no subpopulation containing more than 250 mature breeding individuals (IUCN, 2002).

<sup>4</sup> Adil, Abdul W. “Status and Conservation of Snow Leopards in Afghanistan”, paper delivered at the Eighth International Snow Leopard Symposium, Islamabad, Pakistan, 1995.

<sup>5</sup> Fox, J.L. “Snow Leopard Conservation in the Wild – a Comprehensive Perspective on a Low Density and Highly Fragmented Population”, paper delivered at the Seventh International Snow Leopard Symposium, Xining, China, 1992. More up-to-date information is lacking.

<sup>6</sup> Adil, *op cit*.

It should be noted that MEAs are not domestically enforceable *per se*. Rather they provide the framework for measures that Afghanistan is obliged to implement in terms of its treaty obligations. Until such time that domestic legislation is enacted in terms of which the treaty obligations are incorporated into national law, the provisions of MEAs (including those relevant to snow leopard conservation) afford scant legal protection.

## 2.1 Convention on International Trade in Endangered Species of Wild Fauna and Flora

CITES operates by imposing controls, mainly through licensing systems, in relation to international trade in specimens of selected species, which are listed in one of three appendices. Appendix I lists species threatened with extinction, in respect of which trade is permitted only in exceptional circumstances. Appendix II lists species that are not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. Appendix III lists species that are protected in at least one country, which country has asked other parties to CITES for assistance in controlling the international trade of those species.

The snow leopard species, considered to be threatened with extinction, has been listed on Appendix I of CITES since 1975.

The parties to the convention have since formally recognised that all Asian big cats (including the snow leopard) are threatened by the illegal use and trade of live specimens and their body parts and derivatives, and has called upon the parties to the convention to improve national legislation and increase efforts at national, regional and international level to combat the illegal killing of and trade in these animals.<sup>7</sup> In addition, the parties have been requested to:

- communicate the details of any significant illegal shipment of Asian big cat parts or derivatives to relevant Parties and to the CITES Secretariat and to conduct appropriate investigations;<sup>8</sup> and
- report to the 49th meeting of the Standing Committee on ways and initiatives that are being considered to encourage local communities to play a part and benefit from the conservation of Asian big cats and their habitats.<sup>9</sup>

Afghanistan adopted and ratified CITES in 1986. The CITES focal point for Afghanistan is the Ministry of Agriculture and Animal Husbandry, in which institutional entity the mandate for wildlife management currently vests. The Ministry of Commerce and Ministry of Finance, in which entities the mandate for customs vests, also have a significant role to play.

Most snow leopards are killed in retaliation against livestock predation, rather than for their furs. Nonetheless, the furs of the cats in question are usually preserved, sold to passing traders and eventually reach the Kabul fur trade stores.<sup>10</sup> Bearing this in mind, CITES, with its focus on international trade of endangered species, is a critically important regulatory instrument.

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<sup>7</sup> Twelfth meeting of the Conference of the Parties, Conf. Res. 12.5 “Conservation of and trade in tigers and other Appendix-I Asian big cat species”.

<sup>8</sup> Decision 12.29.

<sup>9</sup> Decision 12.30.

<sup>10</sup> UNEP/ FAO report entitled “Afghanistan Wakhan Mission Technical Report” dated July 2003, p.27.

Due to war, inadequate resources and lack of capacity, the Afghan administration has until now not been in a position to comply with the provisions of the Convention.<sup>11</sup>

The Afghan administration is currently in discussion with the CITES Secretariat to develop a legislative implementation plan to incorporate CITES into domestic law. It is hoped that this legislation will be enacted in 2005. This would represent a significant move towards improved regulatory protection of snow leopards.

## 2.2 Convention on Biological Diversity

The objectives of the CBD are threefold: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources.

Relevant to the conservation of snow leopards is the obligation on parties to:<sup>12</sup>

- establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
- regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
- promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
- rehabilitate and restore degraded ecosystems and promote the recovery of threatened species through the development and implementation of plans or other management strategies; and
- develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

Afghanistan ratified the CBD in September 2002. As in the case of CITES, the Afghan administration (in particularly the Ministry of Agriculture and Animal Husbandry, the convention focal point) has not had the capacity or resources to take the necessary steps to comply with the convention's provisions.

Prior to the outbreak of war, management and conservation of Afghanistan's wildlife was minimal and consisted primarily of the declaration of wildlife sanctuaries for the purposes of royal hunting. While hunting did occur, indiscriminate hunting and poaching was generally fairly well controlled. In the 1970s, two wildlife reserves in which snow leopards are found were established: the 50,000 hectare Ajar Valley wildlife sanctuary, and the 68,000 hectare Pamir-i-Buzurg sanctuary in the Wakhan Corridor.<sup>13</sup> In the absence of enabling legislation, the precise legal status of these areas is uncertain.<sup>14</sup>

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<sup>11</sup> In particular article VIII of the convention, which sets out the measures to be taken by member states.

<sup>12</sup> Article 8.

<sup>13</sup> Adil, Abdul W. "Status and Conservation of Snow Leopards in Afghanistan", paper delivered at the Eighth International Snow Leopard Symposium, Islamabad, Pakistan, 1995.

<sup>14</sup> UNEP report entitled "Afghanistan Post-Conflict Environmental Assessment" dated January 2003, p.73.

### 2.3 Convention on Migratory Species of Wild Animal Species

The purpose of the CMS is to conserve terrestrial, marine and avian migratory species throughout their range. Afghanistan is not a party to the convention.

Migratory species threatened with extinction are listed in Appendix I of the Convention. The snow leopard has been listed on Appendix I of the CMS since 1985. In regard to such species, parties to the convention are requested to:

- conserve and restore the species habitat;
- prevent, remove, compensate or minimize adverse effects of activities or obstacles that seriously impede their migration; and
- prevent, reduce or control factors that are endangering or are likely to further endanger the species.<sup>15</sup>

In relation to species listed in Appendix I, the convention also obliges parties to prohibit the taking of animals belonging to those species.<sup>16</sup> At the seventh Conference of the Parties the snow leopard attained the status of a “concerted action” species.

### 3. DOMESTIC LEGAL FRAMEWORK

As a starting point, it should be borne in mind that there is lack of clarity regarding what laws exist in Afghanistan, in that all significant collections of legal texts were destroyed during the period of war and conflict. Furthermore, amongst those laws that have been identified, there are significant overlaps and contradictions among different laws promulgated by successive regimes and administrations.<sup>17</sup>

The Bonn Agreement<sup>18</sup> provides that the applicable legal framework until the adoption of a new constitution is the 1964 Constitution (to the extent that it is not inconsistent with the Agreement) and existing laws and regulations (to the extent that they are not inconsistent with the provisions of the Agreement, the 1964 Constitution or Afghanistan’s obligations under the international conventions to which it is a party). The new Constitution<sup>19</sup> was adopted and entered into force in January 2004. Pending the inauguration of the National Assembly, Afghanistan is in a transitional period<sup>20</sup> and the legislative powers that vest in the National Assembly vest temporarily in the executive branch of government.<sup>21</sup>

At present, Afghanistan has no biodiversity or protected areas strategy, policy or regulatory framework. There are however a number of existing laws that are relevant to conservation of snow leopards and snow leopard habitat. These include the Constitution, the Nature Protection Law of 1986 (amended in 2000) and the Hunting and Wildlife Protection Law of 2000. In terms of the Bonn Agreement read with the Constitution, these laws continue to remain valid and enforceable until such time that they are amended or repealed.

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<sup>15</sup> Article III(4).

<sup>16</sup> Article III(5).

<sup>17</sup> Report entitled “Establishing the Rule of Law in Afghanistan”, Special Report 117, United States Institute of Peace, March 2004.

<sup>18</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Reestablishment of Permanent Government Institutions” dated 5 December 2001, endorsed by UN Security Council Resolution 1383 (2001).

<sup>19</sup> Constitution of Afghanistan 1382 (2003).

<sup>20</sup> Article 159 of the Constitution.

<sup>21</sup> Article 160 of the Constitution. Currently, laws are passed by Presidential decree, after adoption by Cabinet.

The capacity of the Afghan administration to administer and enforce laws remains extremely limited. The capacity of the judiciary and police is similarly limited, and judicial infrastructure has largely been destroyed.<sup>22</sup> Furthermore, despite efforts, a rule of law culture has not yet been established. The implication for snow leopard conservation is that even if an adequate regulatory system were to exist, its effectiveness would be limited until such time that enforcement and judicial capacity improves.

### 3.1 Constitution

The Constitution contains two provisions relevant to the conservation of snow leopards.

The first is the obligation on the state to abide by the international conventions that Afghanistan has signed,<sup>23</sup> which would include CITES and the CBD. This provision may be cited to encourage the Afghan administration to take active steps to comply with the procedural and substantive obligations of these conventions.

The second is the obligation on the state to adopt necessary measures for safeguarding the environment.<sup>24</sup> Such measures might include the development of an appropriate policy and regulatory framework, and fulfillment of MEA obligations. This obligation complements and exists side-by-side similar obligations imposed in terms of sector laws.

### 3.2 Nature Protection Law

Despite its title, the Nature Protection Law is structured more as a general framework law than a biodiversity-specific law. The meaning and effect of the provisions of the Act are not altogether clear in that certain provisions conflict, while others overlap. There are also gaping holes in the legislative structure, such as the lack of integrated command and control provisions. Precise statutory interpretation is accordingly not possible.

The Act provides that wild animals are state-owned resources.<sup>25</sup> In many other jurisdictions, ownership of wild animals is only possible pursuant to physical capture and control.<sup>26</sup> However, in view of the abovementioned provision of the Nature Protection Law, it is submitted that snow leopards in Afghanistan remain the property of the state whether alive or dead, and that hunters and traders cannot lawfully acquire ownership through acts of capture or control, as they would in the normal course in many other jurisdictions.

The Act recognizes that the state should protect fauna and flora by, among other things, establishing protected areas and implementing measures to protect endangered species.<sup>27</sup> This duty complements the environmental duty contained in the Constitution, referred to above.

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<sup>22</sup> Report entitled “The Afghan Judicial System under Review” prepared in 2003 by the Italian Justice Project of the Italian Embassy, the lead agency in justice reform sector.

<sup>23</sup> Article 7.

<sup>24</sup> Article 15.

<sup>25</sup> Article 20.

<sup>26</sup> The traditional body of Western law recognizes that ownership of an individual wild animal may only be appropriated or acquired through occupancy or possession; depriving the animal of its natural liberty and rendering it subject to the control of an individual. The Roman law term for such wild animals is *res nullius* i.e. physical things that have no owner. While the individual animal remains wild, it is *res omnium communes* i.e. common to all.

<sup>27</sup> Article 20.

Importantly, the Act prohibits the undertaking of any activity that threatens rare and endangered species.<sup>28</sup> The term “rare and endangered species” is undefined. It is assumed that snow leopards would however fall within this definition as they are internationally recognized as such. The nature and spectrum of the activities falling within this prohibitory net is unclear. However, it is submitted that it would be reasonable to conclude that the killing of snow leopards, whether in retaliation for livestock predation or for fur, would be one of the activities the legislators had in mind. It is not immediately clear whether or not the activities of other key actors in the trade chain (traders, transporters and retailers) are also prohibited. It is submitted that the prohibition has been so broadly drafted (whether intentionally or otherwise) that indeed it would capture the activities of these actors.

Any person who contravenes the provision commits a crime.<sup>29</sup> The Act also provides that illegally gained benefits must be handed over to the state.<sup>30</sup>

It is submitted that the Afghan authorities may successfully use the provisions of this law to prosecute hunters, traders and Kabul-based retailers of snow leopards and their pelts. It also empowers the state to confiscate pelts from such persons, which would further discourage their trade.

### **3.3 Hunting and Wildlife Protection Law**

The purpose of the Hunting and Wildlife Protection Law is to regulate the hunting of birds and wildlife throughout Afghanistan. This is achieved through the demarcation of certain areas in which hunting is permitted (provided that the hunter is in possession of a valid hunting permit issued by the Ministry of Agriculture and Animal Husbandry), and others in which it is not.<sup>31</sup> A person who contravenes the provisions of the law commits a crime.<sup>32</sup>

Accordingly, hunting of snow leopards in the Ajar Valley wildlife sanctuary and the Pamir-i-Buzurg sanctuary in the Wakhan Corridor (which, despite uncertainty as to their precise legal status, are nonetheless without doubt protected areas) is unlawful.

The Act empowers the Ministry of Agriculture and Animal Husbandry to ban the hunting of certain species,<sup>33</sup> and obliges same to ban the hunting of endangered species.<sup>34</sup> It is not clear whether or not the state has fulfilled this obligation.<sup>35</sup>

### **3.4 Environmental Framework Law**

The Afghan administration is in the process of developing an environmental framework law. Once enacted, its biodiversity and enforcement related provisions would be relevant to snow leopard conservation. It is anticipated that biodiversity and protected areas related regulations will be promulgated under the Act once it has entered into force. It is hoped that the legal

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<sup>28</sup> Article 25.

<sup>29</sup> Article 55.

<sup>30</sup> Article 56.

<sup>31</sup> The areas in which hunting is not allowed include protected areas, national parks and valleys declared as off-limits for the purposes of hunting (article 2).

<sup>32</sup> Article 24.

<sup>33</sup> Article 14(2).

<sup>34</sup> Article 17.

<sup>35</sup> Officials within the Ministry of Agriculture and Animal Husbandry have indicated that decrees banning hunting of certain species exist, however, despite diligent search, UNEP has been unable to locate any written record of such decrees.

status of snow leopards in Afghanistan will at such time become more certain.

#### **4. RECOMMENDATIONS**

It is recommended that the following steps be taken to improve the legal protection currently afforded to Afghanistan's snow leopard population.

- Development of a snow leopard action plan or strategy.<sup>36</sup>
- Encouragement of and assistance to the Afghan administration to adequately enforce the provisions of existing legislation, in particular the Nature Protection Law.
- Adoption and ratification of the CMS.
- Development of domestic legislation to incorporate into CITES into domestic law.
- Development of a protected areas strategy, policy and regulatory framework.

#### **5. CONCLUSION**

Largely as a result of the consequences of decades of conflict, Afghanistan has not complied with its international obligations to develop appropriate measures to conserve and prevent trade in snow leopards, which is adversely affecting the species. Some domestic regulatory protection exists, however its effectiveness is hampered by weak enforcement of the relevant legislative provisions. These weaknesses will be addressed to some extent as institutional capacity and resources are developed, a rule of law culture established and appropriate steps are taken to comply with the MEAs to which Afghanistan is a party and develop an integrated regulatory framework for biodiversity conservation and management. The assistance and guidance of the international community, including relevant conservation bodies such as the Snow Leopard Network, is required in order to achieve this.

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<sup>36</sup> The assistance of the Snow Leopard Network, which is a partnership of organizations and individuals from government and private sector who work together for the effective conservation of the snow leopard, its prey, and their natural habitat to the benefit of people and biodiversity, might be sought in this regard.