



INTERNATIONAL WILDLIFE LAW AND PROBLEM OF ILLEGAL TRADE: A RELATIVE STUDY BETWEEN INDIAN'S AND U.S.A'S LAWS*

INTRODUCTION

The term endangered species is defined as, "A species at risk of extinction because of human activity, changes in climate, changes in predator-prey ratios, etc., especially when officially designated as such by a governmental agency such as the U.S. Fish and Wildlife Service."¹ This is the general perception of the term endangered species.

International Union for Conservation of Nature [hereinafter, IUCN], established in 1994, categorizes species into different categories decided by many factors such as risk, population etc. IUCN thus defines Critically Endangered (CR), as a category of those species that possess an extremely high risk of extinction in the immediate future as a result of rapid population declines of 80 to more than 90 percent over the previous 10 years (or three generations), a current population size of fewer than 50 individuals, or other factors and Endangered (EN), as those species that possess a very high risk of extinction in the near future as a result of rapid population declines of 50 to more than 70 percent over the previous 10 years (or three generations), a current population size of fewer than 250 individuals, or other factors. These findings are published in the IUCN Red List of Threatened Species.²

Hence endangered species owing to many factors like climatic changes, habitat destruction, illegal trade, urbanization etc. are on the brink of extinction, resulting in a growing need to conserve them. Illegal trade in endangered species is climbing up the ladders to leading causes for extinction of many species making illegal trade in wildlife the fourth largest crime after drugs, armaments and human trafficking. Because of the primary importance of the illegal trade menace and its adverse impacts on sustainable development, there is a growing awareness among the international community to curb the same. The International Consortium on Combating Wildlife Crime [hereinafter, ICCWC]³ defines wildlife crime as, "Acts committed contrary to national laws and regulations intended to protect natural resources and to administer their management and use." This is inclusive of the illicit exploitation of natural resources, such as poaching of animals and

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¹ Dictionary.com Uabridged, *Endangered Species*, Random House, Inc., (Sept. 28, 2015),

<http://dictionary.reference.com/browse/endangered-species>

² The IUCN Red List of Threatened Species, *2001 Categories & Criteria (Version 3.1)*, (Sept. 30, 2015),

http://www.iucnredlist.org/static/categories_criteria_3_1

³ Convention on International Trade in Endangered Species of Wild Flora and Fauna, *Wildlife Crime*, UNEP, (Sept. 28, 2015), <https://www.cites.org/eng/prog/iccwc.php/Wildlife-Crime>

unauthorized logging of trees. It also includes subsequent acts, like converting fauna into products, manufacture, their transportation, sale and possession.⁴

Major wildlife crime in India includes poaching of tigers for their skin, rhinos for their horns and star tortoises as part of chain of pet trade. U.S is the largest importer of endangered species. There are approximately 116 leopards killed in 2014 after 110 leopards killed in 2013.⁵

Dr. Bradnee Chambers, the executive secretary of the UNEP Convention on the Conservation of Migratory Species of Wild Animals stresses on the importance of not only fighting the organized crime syndicates of wildlife trade but also to change the attitudes of the people who demand for the products of endangered species.⁶

THE NEED TO CONSERVE ENDANGERED SPECIES

Theodore Roosevelt once said, "When I hear of the destruction of a species, I feel just as if all the works of some great writer have perished."

The World Wildlife Fund states, "Wildlife crime is...the largest direct threat to the future of many of the world's most threatened species, a threat that continues to get stronger".⁷ Illegal trade is the result of a high demand for products like leather, fur, jewellery etc. made from endangered species; need for an exotic pet trade; lack of awareness and enforcement and good money for the poachers. A CNN documentary called 'Planet in Peril' talks of the high demand in animal parts as cultures like China tend to believe in their medicinal uses.⁸ Despite the causes for the indiscriminate killing of endangered species, one should revisit the repercussions that arise once these species are hunted. Jewellery and the status symbol one gets from owning an exotic pet cannot compare to the problems caused in the very functioning of the ecosystem due to illegal trade. The value and resources the species provide to the sustainable growth of the environment is immense.

Endangered species are now being hunted to extinction, like tearing pages off of history books undervaluing the research and studies that it could contribute to. The very existence of many species is being wiped out depriving the future generations of their right to these species and all they can contribute. Principle 3 of Rio Declaration states the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.⁹ Further Principle 6 of the Stockholm Declaration, 1972 also speaks of the doctrine of intergenerational equity, 'To defend and improve the human environment for present and future generations has become an imperative goal for mankind-a goal to be pursued together with,

⁴ UNODC, *India: Our Endangered Wildlife- A Cause for Concern*, (Sept. 27, 2015), <http://www.unodc.org/southasia/frontpage/2012/june/our-endangered-wildlife-a-cause-for-concern.html>

⁵ Wildlife Protection Society of India, *WPSI's Leopard Poaching Statistics*, (Sept. 28, 2015), www.wpsi-india.org/statistics/leopard.php

⁶ C. Alihusain, *International Wildlife Law and the Problem of Illegal Trade*, Peace Palace Library, (Sept. 27, 2015), <http://www.peacepalacelibrary.nl/2014/04/international-wildlife-law-and-the-problem-of-illegal-trade/>

⁷ Jackie Grisham & Mr.Erikson, *Swept Under the Rug: Illegal international Animal Trade*, (Sept. 27, 2015), https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAAahUKEwj275nugZ_IAhWDUo4KHak9CBQ&url=http%3A%2F%2Fjackiegrisham.yolasite.com%2Fresources%2FArgumentative%2520Research%2520Paper.doc&usq=AFQjCNF82WH98g6KP2s1VSyY1t0Wxo4QoA&bvm=bv.103627116,d.c2E

⁸ Anderson Cooper Dr. Sanjay Gupta & Jeff Corwin, *Planet in Peril a CNN Worldwide Investigation, Takes Viewers to Front Lines of Environmental Change*, CNN, (Sept. 28, 2015), <http://edition.cnn.com/services/opk/planet.peril/for.html>

⁹ Rio Declaration on Environment & Development, principle 3, June 14, 1992, UN Doc. A/CONF.151/26 (vol. I)

and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.¹⁰

Consider the ripple effect; destruction of one organism in a food chain could have growing unfathomable consequences. They also lead to environmental pollution. The animals we hunt for fur and novelties are the top carnivores needed to curb the herbivore population. The gray wolves of Yellowstone which were hunted indiscriminately are now protected. It was found out they control the elk population which were consuming the trees like aspen and willows. Recovery of the trees provided nesting habitat to migratory birds and beavers.¹¹

Studies show that medicines and cures for diseases are found from animals. The Brazilian Viper's venom has been synthesized into a medication that controls blood pressure and the African frog, *Xenopus laevis*, produces a molecule to prevent infections from body lesions.¹²

There are also the unrecognized benefits; for instance, the decline of fish and wildlife populations have been linked to drainage of the Everglades, solving the situation would result in losses of millions of dollars.¹³ White-lipped Peccaries, a type of wild pig, heavily hunted for meat and pelts, are important seed dispersers of trees in Latin American rainforests and also create open spaces on the forest floor by rooting for food.¹⁴

Endangered species serve as effective indicators, 'Canary in the Coal Mine' effect; they tell us when something is wrong in our life-support system. For example, the rapid decline in bald eagles and peregrine falcons warned of the increase in levels of DDT.¹⁵

Eco tourism is growing revenue in developing countries like India. Revenue generated from this could be used to successfully implement other conservation strategies in the country. A classic example of this can be found in the Virunga mountains case study. Mountain gorillas that were inhabitants of the Virunga Mountain were shot and hunted for purely commercial purposes like bush meat and the traumatized young ones were forcibly taken from their mother's hands to be sold as exotic pets and forced into illegal captivity. They were destroying the world heritage all the while living in poverty. The result after the war was the depleting number of these gorillas.¹⁶ These gorillas had attracted around ten million dollars in tourism revenue to Rwanda.

Scores of endangered species also provide spiritual benefit to the people. Tribes in India, Native America view these species as Nature's Gods. Scientists believe that this connection with nature is an intrinsic part of the human personality. As in the words of Dr. Edward O. Wilson, 'Biophilia or the love of living things is a primary human trait.'¹⁷

IMPACT OF ILLEGAL TRADE ON ENVIRONMENT

¹⁰ Declaration of the United Nations Conference on Human Environment, principle 6, June 16, 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973)

¹¹ U.S. Fish & Wildlife Service, *Why Save Endangered Species*, (Sept. 25, 2015), <https://www.fws.gov/nativeamerican/pdf/why-save-endangered-species.pdf>

¹² Frank J. Mazzotti, *The Value of Endangered Species: The Importance of Conserving Biological Diversity*, University of Florida IFAS Extension, (Sept. 24, 2015), <https://edis.ifas.ufl.edu/uw064>

¹³ *Id.*

¹⁴ Endangered Species Handbook, *Vanishing Species*, Animal Welfare Institute, (Sept. 24, 2015), http://www.endangeredspecieshandbook.org/pdfs/live/esh_chapter4.pdf

¹⁵ *supra* n.12

¹⁶ *supra* n.14

¹⁷ David Clowney, *Biophilia as an Environmental Virtue*, (Sept. 15, 2015), <http://2020vision.com.au/media/7340/biophilia-as-an-environmental-virtue.pdf>

Illegal trade of endangered species is now associated with concepts of transnational organized crime. UN Convention against Transnational Organized Crime defines a transnational organized crime as, "Any serious transnational offence undertaken by three or more people with the aim of material gain".¹⁸

The organized criminal activities usually receive support from the members of the defence and other political elements. For instance, in the case of the Garamba National Park located in Democratic Republic of Congo, there were increased levels of ivory trade poachers from the Sudan People's Liberation Army (SPLA), the army of the DRC (FARDC) and eventually Lord's Resistance Army (LRA) members during conflict.¹⁹ There is an opportunity for insurgency groups like Janjaweed (poachers from Chad), al Shabaab have provided finance for such activities.²⁰

Also the illegal trade could introduce harmful, non-native species that could disrupt ecosystems. This could cause widespread environmental damage. For instance, Chinese Mitten crabs damage river banks and clog drainage system by their burrowing.²¹ Their trade has been banned under the Lacey Act.

Loss of wildlife results in loss of revenues through tourism. Thereby the local community like restaurants, hotels, rentals and other attractions suffer.

Hilborn and Sethi using an age structured reserve model studied that legal fisheries will have to decrease their harvest from normal stock if poaching continues in order to preserve marine life, thus affecting both legal businesses that rely on marine life suffer from illegal trade.²²

Sansar Chand v. State of Rajasthan²³, court held that illegal trade is the largest threat to endangered species. The court has also stated that the country's scientific understanding of nature especially in relation to ecological linkages is incomplete and fragment, there is a growing need to conserve these species as we cannot yet perceive the repercussions that may ensue when they become extinct due to the transnational organized crime activities.

So much is the adverse impact on environment, that the Supreme Court in another case²⁴ has asked for the reintroduction of lions in Madhya Pradesh and 'take urgent steps' for recovery of endangered species like the Great Indian Bustard, Dugong, Wild Buffalo etc.

THE INTERNATIONAL SCENARIO

In the light of the importance and impact of trade, many international and United Nations conventions and agreements have been drafted and entered into by countries with a view to conserve endangered species.

General Agreement on Trade and Tariffs [hereinafter, GATT] specify certain provisions that maybe used by the member countries to regulate their imports and exports. Art. I enunciate the

¹⁸ United Nations Convention against Transnational Organized Crime, art. 2, Nov. 15, 2000, 40 ILM 335 (2001)

¹⁹ 6 RENE L. BEYERS ET AL., *Resource Wars and Conflict Ivory: The Impact of Civil Conflict on Elephants in the Democratic Republic of Congo – The Case of the Okapi Reserve*, PLOS ONE, 7 (2011)

²⁰ Katherine Lawson & Alex Vines, *Global Impacts of the Illegal Wildlife Trade The Costs of Crime, Insecurity and Institutional Erosion*, Chatham House, (Sept. 15, 2015), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0214Wildlife.pdf>

²¹ Mitten Crab Recording Project, *About*, (Sept. 30, 2015), <http://mittencrabs.org.uk/>

²² Meghan A. Pastor, *Legal, Moral and Biological Implications of Poaching and Illegal Animal Trafficking on an International Scale*, Salve Regina University Digital Commons @ Salve Regina, (Sept. 15, 2015), http://digitalcommons.salve.edu/cgi/viewcontent.cgi?article=1047&context=pell_theses

²³ (2010) 10 SCC 604

²⁴ Centre for Environmental Law WWF-India v. Union of India and ors, (2013) 8 SCC 234

principle of 'most favoured nation' to all GATT members.²⁵ Art. XIII states that quantitative restrictions must be applied in a non-discriminatory manner.²⁶ Art. XX gives the general exceptions wherein a contracting party might take measures necessary to protect human, animal or plant life or health [Art. XX (b)] or for the conservation of exhaustible natural resources [Art. XX (g)].²⁷ The WTO Panel in the Shrimp Turtle case upheld U.S decision to use TED's to reduce the capturing of turtles along with shrimps though it ultimately ruled against U.S as it was being discriminatory.²⁸

The World Heritage Convention is another tool to preserve endangered fauna. This convention read with the preamble recognizes protection of cultural properties and natural resources and the inter relationship between people and nature.²⁹ Art. 2 define the term 'natural heritage' as including "areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation."³⁰ The Nanda Devi National Park, Kaziranga National Park, Manas National Park are some sites which have been titled as 'natural heritage' under this convention.

India is also party to the Convention on the Conservation of Migratory Species of Wild Animals (CMS) which speaks of the importance of cooperation and effective management for conservation of migratory species which migrate outside the national jurisdiction of a member State. Art. 1 (i) refers to as "taking, hunting, fishing capturing, harassing, deliberate killing, or attempting to engage in any such conduct."³¹ Art. 3(5) prohibit the taking of migratory species listed in Appendix I subject to certain exceptions³². Art. 5 (5)(j) also states that an agreement concluded by a party should implement a measure to manage the taking of migratory species and Art. 5(5)(k) states that procedures to suppress illegal taking should be implemented.³³

International convention for regulation of whaling prescribes the catch limits, protection of whales and imposes restrictions on hunting methods³⁴. In coping with the provisions laid out by the whaling commission, all the cetacean species, i.e., whale, dolphins etc. have been included in Schedule I of Wildlife (Protection) Act, 1972. The convention prohibits the killing, taking, hunting of whales subject to certain exceptions.

The most important piece of legislation for regulation of trade in endangered species is The Convention on International Trade in Endangered Species of Wild Fauna and Flora [hereinafter, CITES] whose main object is to promote international cooperation for protection of certain species of flora and fauna against over exploitation as a result of international trade. Appendix I prohibits trade of the listed species altogether. Appendix II allows the trade of species mentioned

²⁵ General Agreement on Tariffs and Trade, art. I, Apr. 15, 1994, 1867 UNTS 187

²⁶ General Agreement on Tariffs and Trade, art. XIII, Apr. 15, 1994, 1867 UNTS 187

²⁷ General Agreement on Tariffs and Trade, art. XX, Apr. 15, 1994, 1867 UNTS 187

²⁸ World Trade Organization, *India etc. versus U.S: 'shrimp turtle'*, (Sept. 16, 2015),

https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

²⁹ UNESCO, *The World Heritage Convention*, (Sept. 16, 2015),

<http://whc.unesco.org/en/convention/>

³⁰ Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 2, Nov. 23, 1972, 1037 UNTS 151

³¹ Convention on the Conservation of Migratory Species of Wild Animals, art. I.1, June 23, 1979, 1651 UNTS 333

³² Convention on the Conservation of Migratory Species of Wild Animals, art. III.5, June 23, 1979, 1651 UNTS 333

³³ Convention on the Conservation of Migratory Species of Wild Animals, art. V, June 23, 1979, 1651 UNTS 333

³⁴ International Whaling Convention, *History and Purpose*, (Sept. 16, 2015), <https://iwc.int/history-and-purpose>

provided licenses are granted after in depth scientific scrutiny. Appendix III allows trade of the species mentioned after issuance of certificates and permits.³⁵

Article 1(c) defines trade as, "Export, re-export, import and introduction from the sea".³⁶ CITES requires the set-up of a scientific and management authority³⁷ which has the power to issue permits and licenses for trade of endangered species under Appendix II & III and in exceptional circumstances Appendix I.

Despite being the most promising regulation to minimise illegal trade of endangered species, CITES is also subject to a few limitations. CITES is a non-self-executing treaty which cannot be enforced unless the States implements its provisions in their national legislations.³⁸ The mere ratification of CITES is not enough.

Further India rely more on foreign trade regulations for the implementation of CITES. These laws deal with trade in certain species as restricted or prohibited goods, import and export of which require licenses. These legislations are ill adapted to the specific purposes of CITES. It is suggested that with a federal and parliamentary form of Government in a country like India, the Act should contain all the necessary guidelines, the general layout etc. wherein provisions should be made for the Executive to make regulations.

The financial burden is yet another major problem faced by developing countries like India. The fundamental economic dilemma of conservation comes into play where developing countries in need of funds find it difficult in obtaining them, there is inflexibility of funding eligibility, heavy auditing and reporting requirements.³⁹

Another important defect in CITES is that the information in records are different and tampered with. The estimates in international trade in endangered species are poorly documented. Actual trade differs and is more in number than what is recorded in these documents. A large number of these species are traded under forged documents and the imports and exports take place in the porous trans boundary regions where the trade is not detected due to lack of authorities.

For a new species to be listed in CITES, it involves a two third majority at the Conference of Parties, which according to critics is an onerous process and against the precautionary principle which is one of the fundamental objectives of CITES. However there is a certain degree of flexibility as it does not require consensus based decision making as other conventions.⁴⁰

³⁵ International Conservation, *The Importance of CITES*, Defenders of Wildlife, (Sept. 19, 2015), <http://www.defenders.org/international-conservation/importance-cites>; *See also Trade and Endangered Species, Wildlife and the Law*, Young People's Trust for the Environment, (Sept. 19, 2015), <https://ypte.org.uk/factsheets/trade-and-endangered-species/wildlife-and-the-law>

³⁶ Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. I (c), March 3, 1973, 27 UST 1087

³⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. IX, March 3, 1973, 27 UST 1087

³⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. II.4, March 3, 1973, 27 UST 1087; *See also* Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. VIII.1, March 3, 1973, 27 UST 1087

³⁹ Thirteenth Meeting Of Conference Of Parties Bangkok (Thailand), *Financing Of The Conservation Of And Sustainable International Trade In Species Of Wild Fauna And Flora*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, (Sept. 15, 2015), <https://cites.org/sites/default/files/eng/cop/13/doc/E13-14.pdf>

⁴⁰ David Brown & Erin Swails, *Comparative Case Study 3 The Convention on International Trade in Endangered Species*, Verifor Case Study Odi, (Sept. 30, 2015), <http://citeserx.ist.psu.edu/viewdoc/download?doi=10.1.1.169.378&rep=rep1&type=pdf>

Lastly, CITES implemented a 'significant trade review' mechanism to effectively mitigate the laxity in issuing too many permits without proper findings for trade in Appendix II species. A major criticism of CITES is that it does not exploit the point of sustainable development but focuses too much on a narrower trade related aspect. Further it does not explain the role of trade of endangered species on livelihood and wellbeing of tribal and the local community.⁴¹

India became a party to CITES in October 1976. The Director, Wildlife Preservation is the Management Authority complying with the requirements of CITES. Similarly the Regional Deputy Directors and the Wild Life Crime Control Bureau have been designated as Assistant CITES Management Authority of India.

U.S.A SCENARIO

U.S entered ratified the CITES convention in 1974. Prior to US entry into CITES, there were a few legislations that governed trade of endangered species. The Lacey Act of 1900 was enacted which provides for the FWS authority to detain and inspect imported goods of wildlife including the baggage, parcel and vehicles. Lacey Act primarily prohibits the import, export, transport, sale etc. in violation of federal or state or foreign laws concerning wildlife.⁴² Under the Lacey Act provisions a defendant may be prosecuted for acting with knowledge of the illegal nature of the crime even if the act is not violating the provisions of the statute.⁴³ The Lacey Act also prescribes penalties⁴⁴ and provides for forfeiture⁴⁵ of animal and related articles in case of violation.

Under the Migratory Bird Treaty Act, 1918 it is unlawful to hunt, take, purchase or ship etc. of almost all North American birds with the exception of upland game birds.

Marine Mammals Protection Act, 1972 which protects and prohibits trade of marine mammals like whales, dolphins, sea lions etc. unless specifically exempted.

America's best wildlife trade legislation as yet is the Endangered Species Act, 1973 [hereinafter, ESA]. This Act was enacted to reduce the trade in endangered species. Sec. 3 defines commercial activity as inclusive of trade. "endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man." The term "take" has a comprehensive meaning to include harass, harm, pursue, hunt, etc. S. 4 give the basis for determination. S.9 prohibits import, export, take, deliver, sale of the listed species and S.10 provides the exceptions to S.9. Lastly S.11 provides the penalties.

Trade of endangered species is permitted in special circumstances under such terms and conditions as Secretary may prescribe.⁴⁶ The trade under exceptions are limited. In a recent judgement given by the International Court of Justice, (*Australia v. Japan*) the scientific whaling operations by Japan in the southern ocean or Antarctica was held to be unjustified and not undertaken for the purposes of scientific research. The court ruled that Japan should revoke all the permits given under the JARPA II programme in the southern ocean.⁴⁷

INDIAN SCENARIO

⁴¹*Id.*

⁴² Lacey Act, 18 USC § 42-43 (1900)

⁴³*Id.*

⁴⁴ Lacey Act, 16 USC §§ 3373 (1900)

⁴⁵ Lacey Act, 16 USC §§ 3374 (1900)

⁴⁶ Endangered Species Act, 16 USC § 10 (1973)

⁴⁷ Cymie R. Payne, *Australia v. Japan: ICJ Halts Antarctic Whaling*, American Society of International Law, (Sept. 30, 2015), <http://www.asil.org/insights/volume/18/issue/9/australia-v-japan-icj-halts-antarctic-whaling>

India has always supported the principle of sustainable development. Prior to Wildlife (Protection) Act, 1972 there were the Wild Birds and Animal Protection Act, 1912 and Elephants Protection Act, to regulate trade of endangered species. Now there are numerous provisions in our laws for the protection of wildlife and combating illegal trade in India. The fundamental right to a healthy environment is one of the many facets of the fundamental right to life and personal liberty guaranteed to every person under Art. 21 of the Constitution of India.⁴⁸ Art 245 gives power to the Parliament to make laws for the whole or any part of the territory of India.⁴⁹ Under the concurrent List (List III) the Parliament and State Legislature may make laws regarding protecting of forests and wildlife. Art.48 of the Constitution states "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."⁵⁰ Art 51 A(g) imposes a fundamental duty on the citizens of India to protect the natural environment including wild life and to have compassion to all living beings.⁵¹ Art.253 empowers the Parliament to make any law for implementing any treaty, agreement, or convention with any other country or implement decisions and resolutions made at any international conference⁵².

Environment (Protection) Act,1986 is the 'umbrella' legislation and an enabling law which provides the general framework for all the environmental policies. It gives powers to the Centre to 'take all measures as is necessary and expedient to protect and improve the environment'.⁵³

Other legislations which restrict hunting and indiscriminate killing of wildlife are dealt in the Import Export Policy of India, Code of Criminal Procedure, Indian Penal Code⁵⁴, and Prevention of Cruelty to Animals Act, etc. S. 11 of the Prevention of Cruelty to Animals Act prohibits any person, being even owner from harming or treating the animals with cruelty such as chaining, tethering, torturing the animal by inflicting unnecessary pain, administering injurious drug etc.⁵⁵ Endangered species that are killed for their husk, skin, and other properties are mercilessly beaten, tortured, and cruelly cut. This is in direct violation of Section 11 of PCTA as well as 51 A(g) of the Constitution of India that states that the animals have to be treated with compassion. Wild birds like parakeets and mynas are smuggled in socks, tiny boxes or forever trapped in tiny cages, where their wings are cut with a pair of scissors to prevent them from flying. These activities severely violate PCA Act and Art. 51 A(g).⁵⁶

Most important legislation to regulate trade in endangered species in India is the Wildlife (Protection) Act, 1972 [hereinafter, WPA].

Section 2(37) defines wildlife as inclusive of any animal, bees butterflies, crustacean, fish and moths; and aquatic or land vegetation which forms part of any habitat.⁵⁷

Further hunting is defined as capturing, killing, poisoning, trappings etc. It includes driving any wild animal for purposes mention in (a) or injuring or destroying or taking any part of the body of any such animal, damaging the eggs or disturbing the eggs or nests of birds etc.⁵⁸

⁴⁸Constitution of India, art. 21

⁴⁹ Constitution of India, art. 245

⁵⁰ Constitution of India, art. 48

⁵¹ Constitution of India, art. 51

⁵² Constitution of India, art. 253

⁵³Endangered Species Act, 16 USC § 3 (1973)

⁵⁴ Indian Penal Code, § 428 (1860); See also Indian Penal Code, § 429 (1860)

⁵⁵ The Prevention of Cruelty to Animals Act, § 11(1960)

⁵⁶*Animals used for Entertainment*, PETA, (Sept. 25, 2015), <http://www.petaindia.com/issues/animals-in-entertainment/>

⁵⁷ Wildlife (Protection) Act, § 2 (1972)

In consonance with the provisions of CITES, Section 6 enables the constitution of Wildlife Advisory Board by the State Government or an Administrator of Union Territory. Some of the duties of the Board include advising the State Government in formulation of policy for preservation of wildlife and any matter relating to the schedules.⁵⁹

Section 29 prohibits the destruction, exploitation or removal of any wildlife from its sanctuary except under a permit.⁶⁰

Section 9 of the Act states that "No person shall hunt any wild animal specified in Schedule, I, II, III and IV except as provided under section 11 and section 12."⁶¹

Chapter V of the wildlife (Protection) Act, 1972 deals with the trade and related aspects of wild animals. It states that a wild animal hunted or an animal article, trophy, vessels and tools used to kill or made out from the dead animal shall be the property of the Government.⁶² In *Rajendra Kumar v. UOI*, court held that this chapter was enacted keeping in mind the provisions of CITES and that the complete ban on import of ivory products under this clause did not affect the right to freedom of trade and occupation guaranteed under Art. 19(1)(g).

Lastly penalties of an imprisonment extending up to 3 years or fine extending up to 25000 rupees or both are imposed.⁶³ Another instance is of Telangana state bird 'Indian Roller' is brought to urban centres on religious ground and indiscriminately captured and killed.⁶⁴ In fact the bird is protected under Schedule IV of WPA and thus would attract a penalty under the Act.

COMPARATIVE ANALYSIS

By looking at the legislations of U.S and India, certain lacunas and strengths can be pointed out. The term 'endangered species' defined under ESA is vague and notoriously ambiguous. The Congress neglected to specify the relevant degree of extinction, the relevant base period over which these terms should be evaluated. The terms specified in S.3 are mentioned in general qualitative terms.⁶⁵ Similarly is the provisions of WPA, the legislation does not define endangered species.

Morphological markers like skin, hair colour, etc. cannot be used to catch illegal traders when the species are reduced to meat. Further to exact the location of the species or to determine whether the hunter had a license to hunt that particular species DNA Forensics has to be employed. In India the WPA does not lay emphasis on DNA forensics⁶⁶ that has been effectively employed in U.S. The Conservation Genetics Lab at University of Arizona funded by U.S. Fish and Wildlife Service and the Arizona Game and Fish Department, helps capture poachers and organized crime syndicates through the employment of DNA Forensics of animals. They help bring scientifically

⁵⁸ Wildlife (Protection) Act, § 2 (16) (1972)

⁵⁹ Wildlife (Protection) Act, § 8 (1972)

⁶⁰ Wildlife (Protection) Act, § 29 (1972)

⁶¹ Wildlife (Protection) Act, § 9 (1972)

⁶² Wildlife (Protection) Act, § 39 (1972)

⁶³ Wildlife (Protection) Act, § 51 (1972)

⁶⁴ Coreena Soares, *Dasara turns Deadly for Telangana State Bird Palapitta*, Deccan Chronicle, (Sept. 30, 2015), <http://www.deccanchronicle.com/150913/nation-current-affairs/article/dasara-turns-deadly-telangana-state-bird-palapitta>

⁶⁵ DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW CASES AND MATERIALS*, 1185 (Foundation Press 2002)

⁶⁶ Mukesh Thakur, *Role of DNA Forensics in Curbing Illegal Wildlife Trade*, Panda Illegal Wildlife Trade in India, (Sept. 29, 2015), http://awsassets.wwfindia.org/downloads/traffic_panda_8_oct.pdf

sound evidence.⁶⁷ Thus wildlife parts that are illegally traded have to be identified and DNA Forensics has to be given credence under WPA.

Although S.57 of WPA states that burden of proving shifts to the trader to show that he is authorized to possess a wildlife article, it is important to know that primarily the prosecution has to prove beyond reasonable doubt the guilt of the accused.⁶⁸ Indian legal system follows the principle of presumption of innocence. But this is inherently difficult in environmental law cases which have complex scientific and technical issues. New restrictions placed on ivory trade in U.S clearly place the burden of proof of not having committed an offence on the accused. There is a shift in the burden of proof from the government to the ivory trader.⁶⁹ This provision has also been placed in the Migratory Bird Treaty Act. In India, the court in A.P Pollution control case⁷⁰ held that the prosecution bearing the evidentiary burden in environmental law cases is not fair and thus there needs to be a reverse of the burden of proof. The theory has yet to venture to wildlife crimes.

ESA also contains a citizen suit provision where any person may commence a suit on his own behalf.⁷¹ The same is not applicable in India where only the officials can commence a suit and not the public.

The evidentiary use of sniffer dogs is growing with current increase in organized wildlife crime. In India WPA provides for the Director, Chief Warden or any police officer not below rank of sub inspector to enter into premises, search and seize.⁷² Thus these dogs prove to be invaluable in catching poachers but Indian Evidence Act, 1872 does not provide for evidence by sniffer dogs to be treated as conclusive proof largely owing to the ground that they cannot be cross examined.⁷³ However the Bombay High Court in a case⁷⁴ held, "It is scientifically accepted that dogs are rated as extremely intelligent animals... and that some breeds of dogs...are specially utilized for hunting and tracking because of their abnormally high talents. If the dog belongs to one of these categories and if it is shown to the Court that it has been specially trained for purposes of detection, not only would the dog-tracking evidence will be admissible, but it will have to be relied upon as being evidence of a very high calibre." U.S courts are keener on leaning towards admission of evidence given by sniffer dogs. In Florida v. Harris, J. Elena Kagan reversed the Florida Supreme Court decision and held that the detection dog's evidence gave probable cause to the police to search Harris' car.⁷⁵

Endangered species are being listed under the ESA through a comprehensive listing process.⁷⁶ The species to be listed are determined on factors like habitat destruction, overutilization for specific purposes, diseases, natural or man-made mechanisms for survival etc. The problem with ESA listing criteria is that it should be made "solely on the basis of the best scientific and commercial

⁶⁷ Science Daily, Saving Wildlife with Forensic Genetics, (Sept. 20, 2015),

<http://www.sciencedaily.com/releases/2011/06/110608153540.htm>

⁶⁸ *Wildlife Crime Investigation A Handbook for Wildlife Crime Investigating Officers*, Wildlife Crime Control Bureau Ministry of Environment and Forests Government of India, (Sept. 26, 2015),

<http://wccb.gov.in/WriteReadData/userfiles/file/Wildlife%20Crime%20Investigation%20Manual.pdf>

⁶⁹ Bryan Christy, *United States Tightens the Noose on the Ivory Trade*, National Geographic, (Sept. 25, 2015),

<http://news.nationalgeographic.com/news/2014/02/140211-united-states-rules-wildlife-trafficking-ivory-science/>

⁷⁰ *A.P. Pollution Control Board (1) v. Prof. M.V. Nayudu*, (1999) 2 SCC 718

⁷¹ Endangered Species Act, 16 USC § 9 (1973)

⁷² Wildlife (Protection) Act (1972)

⁷³ Saurabh Sharma, *Sniffer Dog in Court of Law The Evidentiary Value*, Panda Illegal Wildlife Trade in India, (Sept. 29, 2015), http://awsassets.wwfindia.org/downloads/traffic_panda_8_oct.pdf

⁷⁴ *Babu Magbul Shaikh vs State of Maharashtra*, 1993 Cr. L.J 2808

⁷⁵ *Florida v. Harris*, Oyez, (Sept. 20, 2015), http://www.oyez.org/cases/2010-2019/2012/2012_11_817

⁷⁶ Endangered Species Act, 16 USC § 4 (1973)

data available." This uses many normative words and is defined vaguely. Further the factors taken into consideration are not substantial enough to state whether the species are threatened or endangered. The species that can be listed are only vertebrates and thus shows arbitrariness. Also it is a time consuming process. However the ESA gives highest priority to threat and taxonomic distinctiveness of species. Thus there is a small room for species to be listed on popularity or its state on being higher life forms.⁷⁷ Further Congress tends to pass non-discretionary rules and the section provides for public consultation.⁷⁸ In India, though many species are listed, they tend to pick and preserve the popular species. The Wildlife (Protection) Act does not provide for a listing criterion nor allows for public consultation. P.O. Nameer, South Asian coordinator, in situ, Conservation Breeding Specialist Group, Species Survival Commission, IUCN, says, "This is definitely a concern ... There is a tendency of decision-makers to focus on 'charismatic' mammals for conservation, while others are left out of programmes ... A more holistic approach is needed to conservation in India."⁷⁹ This phenomenon breaches the concept of environmental racism which is intentionally targeting a particular class or communities for discriminatory treatment in governmental policies and corporate practices.⁸⁰

The poor implementation of the existing endangered species related trade laws like the WPA etc. is an ever growing concern in the country. The crux of the problem is due to lack of awareness and governance, political influence and corruption. It is said that the actual conflicts comes down to not the trade between trade and environment but between environment and humans. The real question is which take precedence over the other.⁸¹ Provisions to curtail this are ensured in U.S where the Secretary under the ESA shall implement a system monitor the status of species.⁸² To ensure further transparency the Secretary under ESA must publish findings related to endangered species and the proposed regulations in the Federal Registrar.⁸³ The lack of legal and environmental awareness is appalling in India. For instance, the country has a strong law banning the transport of cows from one state to another for slaughter. Yet lakhs of cattle are thrown in trucks in one state like Karnataka, TN every year to be slaughtered in another state like Kerala.⁸⁴ Thus there needs to be provisions which inculcate transparency in WPA.

A lower penalty for illegal trade does not act as a deterrent force.⁸⁵ ESA provides for civil and criminal penalties. A civil penalty in contravention of the provisions of the Act would extend up to 25000 dollars and a penalty for criminal violation is 50000 dollars and an imprisonment that extends up to 1 year.⁸⁶ WPA on the other hand provides a greater imprisonment provision but there must be an increase in penalties as these organized crime syndicates are not deterred by just meagre civil penalties.

⁷⁷ *Listing a Species as Threatened or Endangered*, U.S Fish & Wildlife Service, (Sept. 25, 2015), <https://www.fws.gov/endangered/esa-library/pdf/listing.pdf>

⁷⁸ Endangered Species Act, 16 USC § 5(1973)

⁷⁹ Mohit M. Rao, *India has 988 Species on IUCN Red List*, The Hindu, (Sept. 25, 2015), <http://www.thehindu.com/news/national/india-has-988-species-on-iucn-red-list/article7123147.ece>

⁸⁰ Liz Osborn, *Endangered Animals in Europe*, Current Results Weather and Science Facts, (Sept. 25, 2015), <http://www.currentresults.com/Endangered-Animals/europe.php>

⁸¹3 SANJAY UPADHYAY VIDEH UPADHYAY, HANDBOOK ON ENVIROMENTAL LAW ENVIRONMENTAL PROTECTION, LAND, AND ENERGY LAWS 88-89 (Lexis Nexis Butterworths)

⁸² Endangered Species Act, 16 USC § 4 (1973)

⁸³ *Id.*

⁸⁴ N.G. Jayasimha, *The Law and Animals: What to do When You See Cruelty*, Legal Services India, (Sept. 29, 2015), <http://www.legalservicesindia.com/articles/animals.htm>

⁸⁵ *supra* n.7

⁸⁶ Endangered Species Act, 16 USC § 11 (1973)

However Praveen Bhargav, Managing Trustee for Bengaluru based Wildlife Conservation NGO Wildlife said that the problem with increasing penalties is that judicial officers tend to not award higher sentences as greater quality of evidence is required for greater sentences.⁸⁷ Thus better conviction rate will prove to be more deterrent than endlessly increasing the penalties for the poaching for commission of illegal trade; yet in India both low penalties and low conviction rates pose a serious problem. The enforcement agencies in Ranchi have seized 15 cages with more than 60 birds including the protected species of parakeets, lovebirds, cockatoos etc.; yet have not convicted one person for the stated offence of illegal trade.⁸⁸

Another problem with India's implementation of the law is that the law enforcing personnel are not provided adequate training; understaffed and proper remuneration is not provided. Even the machines and tools they are provided with are of substandard and are hardly updated. 60%-70% of the flora and fauna are outside the purview of the national parks and sanctuaries and hence they are not protected. There is greater level of difficulty in assessing the actual rate at which the animals are being poached.⁸⁹ ESA provides for financial assistance, encourages foreign countries to protect the species through programs, treaties; attempts to educate and train foreign personnel.⁹⁰ Awareness and financial assistance could attempt to solve India's implementation problem.

Further WPA prescribes no time limits nor lists a detailed procedure in regards to S.19-25. Also S.26 -A (3) which prescribes boundaries of a sanctuary which can be changed by the State Government results in provisions being used to indiscriminately denotify protected areas with inappropriate frequency. An example of this is Narayan Sarover wildlife sanctuary in Gujarat.⁹¹

Lastly a very important problem that prevails in both Indian and American laws is the challenges courts face trying to integrate scientific findings in the legal principles. Questions posed to science are invariably restrained by legal and political choice.⁹² This also results in a backlog of cases in the courts and does not effectively curb wildlife crime. To mitigate this situation is to implement courts for wildlife crimes, have a greater research base, and adopt bio centric approaches to illegal trade in endangered species.

CONCLUSION

Thus there are similarities and difference between the Indian legislations in regards to trade and U.S legislations for the same. It is important to understand that poaching is an ever growing problem. To minimize the rate of illegal trade is a difficult task. It is met with implementation problems, lacuna in legislations and backlog of existing cases in courts with low conviction rates. Though India's laws may be good but not good enough; with the implementation of CITES followed by cooperation of many countries in an effort to combat wildlife crime, there is a positive step taken in the direction to curb the crime.

⁸⁷Malia Politzer, *Wildlife Protection: Nowhere to Roam*, (Sept. 30, 2015),

<http://www.livemint.com/Leisure/j8MPXyqIffH7rcP9KdUUxI/Wildlife-Protection--Nowhere-to-roam.html>

⁸⁸A.S.R.P. Mukesh, *Bird Racket hits Highway High Weak Implementation in Wildlife Laws fails to Curb illegal Trade in Endangered Species near Capital*, The Telegraph, (Sept. 29, 2015),

http://www.telegraphindia.com/1150907/jsp/jharkhand/story_41192.jsp#.VgNAzJeBif5

⁸⁹A. Samant Singhar, *LAWs FOR PROTECTION OF WILDLIFE IN INDIA: NEED FOR AWARENESS Towards Implementation and Effectiveness*, (Sept. 30, 2015),

http://wgbc.ces.iisc.ernet.in/biodiversity/sahyadri_enews/newsletter/issue2/elephant-pdf-file/128_10_6.pdf

⁹⁰ Endangered Species Act, 16 USC § 8 (1973)

⁹¹*supra* n.81

⁹²*supra* n.65