It is clear that some iconic species of animals are on the brink of extinction. This is not just a crisis for those countries in which those species live, but a global issue. It will ultimately take a collaborative world-wide response to combat the problem.

There are broadly two major causes to this crisis. Firstly, the destruction of the animals’ natural habitat. Secondly, the killing of animals for profit. Poaching is the fourth most lucrative criminal enterprise after illegal drugs, human trafficking and counterfeiting. It is thought to be worth between $8bn to $23bn a year. This is having a dramatic impact on wildlife. There has been a 30% decline in elephants in the last 7 years. Poachers are deliberately trying to kill as many elephants as possible so that they can make ivory even more rare, and drive up prices. The trade in wildlife affects a wide range of animals from the most well known such as Elephants, Rhinos, Tigers and Lions, to Pangolins, Turtles and Rays.

It is the prevention of killing animals for profit that I will seek to address in this article. What follows is not the whole solution, but could be part of it. If there is a real focus through prosecutions and recovering the money that is made illegally, this will act as a deterrent against poaching. It will make it far less profitable (and attractive) to those who take part at every level. Furthermore, this money can then be used to support anti-poaching and conservation efforts.

This will create a cycle of good; where the killing is de-incentivised and the defences of the animal are increased. This cannot be a one country operation; it needs to be actively supported and prosecuted world-wide. Not only does there need to be a consistent approach at the source, in countries which have a poaching problem, but also there ultimately needs to be a global effort where the profits and the goods which result from poaching can be recovered.

The ultimate solution would be an international agreement which would target the proceeds of poaching at every turn. It would also target the smuggling route from the place where the animal is poached to those who are the ultimate purchaser of the animal. It will also need to be combined with a program that targets demand for these products. This needs both an education element and criminal element with bans on goods produced from products gained from the target animals. The ban by China on ivory from 2017 is a welcome move in the second category, but on its own it will not wipe out demand.
An education scheme, including the use of media to make these products less desirable is also needed. This is the requirement of any country that has in place a ban on particular products, as there is a need to stamp out the black market side as well as the illegal trade. Another important aspect of this is to have markers that can differentiate old products from new products: this has historically been difficult, but registration or tagging needs to be considered to stop new items being laundered as old. The asset recovery strategy can provide funding for these schemes when needed, demonstrating how the scheme can tackle the problem from both ends.

I will use the African elephant as an example, but this is a strategy which can be used to reduce the killing of any animal, be it Tiger, Rhino, Gorilla, or Pangolins. This strategy should work to save any animal population that is endangered by poaching, because the gain to the poacher is reduced. There is the argument that as you up the stakes against the poachers they will take more action, there will be further violence by the organised crime groups who run the operations against the anti-poaching operation. This might be true in the short term, but in the long term this operation will make it unprofitable for poaching to continue.

What I will do is set out the overview of this concept. I will then go into the details of what is needed by way of a legal system, the law, implementation strategy and the rewards.

**Overview of asset recovery**

Asset Recovery or Proceeds of Crime Legislation has been in place in a large number of jurisdictions for some time. The majority of the legislation came in between 2002 and 2012, though the concept in some form goes back to the earliest legal systems. This can take the form of the forfeiture of any goods gained directly through crime, or repaying the benefit of the crime back to the state. In the latter approach, the difference between a fine and an asset recovery approach is that in asset recovery the aim of the court is to recover the gain from the crime. A fine is aimed at punishing the defendant and does not look at the victim.

There are different approaches to asset recovery in different legal systems and in different jurisdictions. Broadly there are two types of asset recovery laws. Firstly the recovery of the assets used or gained from crime are taken away. This can either be after a criminal prosecution (i.e. drugs seized in a prosecution are also seized and destroyed) or on a civil basis. This is an approach that has been particularly favoured by US and UK prosecutors. It is called ‘forfeiture’ proceedings. The prosecutors have to show on the civil burden of proof (the balance of probabilities) that the property has come from unlawful conduct. This course of action is against property.

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In the UK and other commonwealth countries, civil recovery orders are sought by prosecutors where they believe that property has come from unlawful conduct. This is a civil action and does not require a conviction.

The second type of asset recovery is against the person. The court determines the benefit the person has gained from the particular crime or in some circumstances their criminal lifestyle, and then they are ordered to pay off that debt. A finding of criminal lifestyle is made either based on the type of offence committed or the period of time it was committed over. A finding of lifestyle offences makes the defendant show where their income and assets came from over a designated period of time. Usually this period of time is 6 years, on the basis that it is assumed that the money and assets they have gathered are from an illegal source.

The table below shows the different forms of asset recovery under UK and other common law systems. The purpose of it is to demonstrate how different laws can be devised for the same aim. They also overlap and assist.

The way in which the legislation in the UK and other Commonwealth countries such as Kenya and Jamaica is drafted is not necessarily perfect, but it does implement the multi approach system to asset recovery.
What I propose is for countries to implement a law that allows the court to make at least two types of order. First, an ‘in personam’ confiscation order, that makes the defendant justify his criminal lifestyle. This would be a conviction based order. Secondly, a civil recovery order that can be made against property that came from unlawful conduct.

The laws can either be specific (and used only in relation to wildlife crimes), or they can be general. It is having the laws to carry out the purpose that is key. I have attached to this article draft legislation, which is particularly for wildlife crime. This is drafted in a Commonwealth style, but it can be adapted for different legal systems. These orders cannot operate alone. There must also be the ability in legislation to support the gaining of these orders. This will mean having restraint or freezing orders, and investigative orders.

Although having both sets of laws would be ideal, in my view the priority should be a confiscation order based system. This would mean that money can only be recovered if there was a conviction, but the system might be an easier fit to the local jurisdiction. There could also be a plan to phase in the civil recovery type orders.

**Foundations – the legal system to implementation**

Putting the legislation in place is only part of the battle. As mentioned, some countries have legislation that can be used in this context. A country might also have some difficulties with its legal system, such as a severe lack of resources, and/or out-dated procedural rules. These are all problems but not insurmountable ones. The key is to plan how to tackle these problems and implement an asset recovery strategy. The plan should include those who gather the evidence, those who prosecute the matter, and detail which court deals with the matter. This might seem simple but it is key to have clear organisation in implementing this strategy.

Who prosecutes and who gathers the evidence needs to be identified and is the foundation of the strategy. There should be one agency prosecuting wildlife crimes. This will allow the expertise to be concentrated and best practice can be developed. This way there can also be clear co-operation between investigators and prosecutors, and clear decision making.

It is also important to identify early on which court or courts the prosecutions and the asset recovery orders are going to be made by. This will allow training to be directed at the correct judges (ideally a small cadre) and for the court administration to be aware of...
what to expect. Rather than expecting all Judges to cover this novel area of law, having a small amount of specialists has been shown to be more efficient and produce more consistent results for all parties.

A problem for all jurisdictions that have already put in place asset recovery laws has been enforcement. Gaining an order has been relatively easy. It is enforcing the order that has been difficult. There are various reasons for this, including the drafting of the legislation and lack of planning on who should undertake enforcement. This might seem simple, but there has to be a clear strategy from the beginning of the order to ensure it is ultimately enforced.

It is likely that international co-operation will be key. Therefore, the departments dealing with them need to be clear on how to use the systems in place and have the right contacts. I will discuss this further below; although this might seem daunting, in fact it is more a case of clear organisation and co-operation with the right contacts, rather than complicated legal work. This can either be done with current treaties, or ideally in the future through a frame work of particular legal treaties/conventions that deal with this issue specifically. However, the lack of such a treaty should not stop co-operation at this stage.

It is also important to bear in mind that the above plan depends on a robust legal system - this is the foundation. In recent years a significant amount of investment has gone into different jurisdictions. This of course is not the silver bullet. What I recommend is that the plan takes account of the possible limitation jurisdictions and works with them.

It should also be born in mind that the upside for all the parties that participate in the planning is that they will receive a share of the assets which are recovered as set out below. This, as is intended, will give them an incentive to participate in the scheme, and will hopefully result in the whole justice system, (particularly in relation to these cases) being strengthened.

**How to reap the rewards?**

As stated above, the primary point of asset recovery is to take away the monetary incentive for the criminal, but a very useful part of this is to use the recovered money to improve the situation and strengthen the anti-poaching position. This needs to be part of the plan. If it is not, then the money will be dissipated by good intentions but not be used for a clear purpose.

In my view, an ideal split would be that the funds were divided. 50% of the funds would go to a general anti-poaching authority. This can give grants to causes that promote anti-poaching. This could involve funding anti-poaching rangers, and go towards educating people on the damage of poaching. These grants could be a one off or a regular commitment. The fund should be run by a small (3 to 5 people committee of experts) and should set out transparently where the funds go. The key is simplicity and a lack of bureaucracy. What needs to be avoided is a failure to spend the funds, or for them to go on unrelated projects. These are issues that have arisen with similar, earlier funds.

The remaining 50% should be split among the agencies that bring the prosecution. In the United Kingdom this happens in the Asset Recovery Insentivisation Scheme. The difference in this proposed scheme is that the money should be focused on the parts of the system that have been working on the poaching cases. My proposed splits would be 16.6% to the police or anti poaching rangers; 16.6% to the prosecution who bring the case; and 16.6% to the courts. Although these organisations can ask for further grants from the general fund, these regular ‘payments’ will provide them with a regular incentive to bring these cases.

This type of sharing scheme might be politically difficult to implement: but done correctly would bring a great incentive to prosecuting poaching and recovering assets, and allow the funding of these operations in the long term.

**International Effort**

What I have set out above are the steps to forming a national program. But the asset recovery program has to be seen in an international context in two main ways. Firstly, the trade of animal parts is international, so the effort needs to be globally coordinated. Countries can have their own initiatives but there needs to be an overall collective direction and agreements on co-operation. This might be in the form of a UN directive, amendments to current treaties or memos of understanding.

These agreements need to set out a collective purpose of recovering assets from those who gain an income from wildlife crime. This does not just mean poachers, but it also needs to be those who are involved in supporting them, trafficking the products and selling them to the customer. Furthermore, the agreement should include a mechanism that will allow
countries to share information on wildlife offences, pursue investigations and exchange information. The overriding agreement will only show a dedicated objective of all signatories, but to get to this position we need an agreed consensus. This will not be easy. Although there have been recent initiatives by China and other counties which are large markets, there is yet to be a consensus. Hopefully this will work over time, but an international agreement cannot wait until then. It has to be in place as soon as possible to make the crime vastly less profitable.

Secondly, in a practical way we cannot wait for these agreements to be put in place. There are currently enough treaties in place to provide a framework to combat this type of organised crime. Any country which implements an asset recovery program needs to use the mutual legal assistance treaties it has at its disposal. This might not be as easy as it sounds, as the prosecuting authority will need to build up links and mutual understandings with the countries it wishes to ask assistance from. This should be on the grounds of earlier agreements, but it might need new ground to be broken.

**Examples of possible programs**

This is an outline of how a program could work to target the poaching of any type of animal. It could work to combat the poaching of elephants, turtles, ray’s, or any other exploited and endangered animal. Below I will outline three possible examples of programs which could use asset recovery to target wildlife crimes. The first two examples highlight the difficulties for a nationally focused program and an internationally focused program. The third example is a program tailored for maritime based wildlife crime.

I have included examples where current laws can be used, and where new law would need to be imposed. In my view it is best to try and use the laws in place at present, while developing further laws to assist further asset recovery.

**Example One – Endangered Birds in UK or similar jurisdiction**

At present endangered birds in the UK such as ospreys are adequately protected, with those who hunt them or steal their eggs being adequately prosecuted. But if this was to become a more serious issue, prosecutors could use the Proceeds of Crime Act 2002 (‘POCA’) to go after the perpetrators benefit, and to cripple the network that took the eggs and the smugglers who sold them for profit. If POCA was to be used in this context, the most appropriate route would be to use conviction based asset recovery (confiscation). In my view it is useful to use confiscation, as the prosecutions could be tailored so that a criminal lifestyle cannot be pursued.

If there were any subjects who could not be convicted they could be dealt with by either civil recovery or using the ‘POCA tax recovery provisions’. This is a simple example of how a jurisdiction with a mature asset recovery regime could use them to counter those who commit wildlife crimes (whose main aim is profit).

**Example Two – Elephants**

Elephants are clearly targeted by international organised crime groups. Therefore, any asset recovery response would need to act on two levels. First, go after the foot soldiers who undertake the initial poaching and processing of the ivory. Ideally, there would be a
two stage asset recovery program against them, using a conviction based confiscation system and a non conviction based recovery law. The aim would be to use these laws to put the burden on those connected to poaching to prove their assets were legally gained. This measure will mean that if you are connected to poaching, your assets can be removed. This system can be based on the laws of the countries which home elephants, though there are ways in which they can be strengthened.

The second strand of the program is to go after the organised crime group as a whole. This would need an international response. It would ideally be based on civil recovery, as it will be difficult to gain convictions against those who control the poaching trade, given their position in the trade and the jurisdictions in which they operate. It would need all countries involved to make the ivory trade illegal: these countries would also have to impose appropriate laws and the infrastructure to implement them. This part of the plan will need international cooperation and coordination.

This dual approach would have the effect of putting pressure on the initial supply by making it less attractive for poachers. The global approach would put further pressure on ivory traders and make it less attractive to them as parts of their profits would be taken away. The program will also gain funds that can be shared between participating countries and be used to assist the fight against poaching.

Example Three – Hunting of Manta Ray’s

The hunting of sea based creatures creates some unique issues. Primarily, which jurisdiction the animal and therefore the crime is committed in. There is also the difficulty of who coordinates the enforcement. Therefore, to do this we need an approach similar to the approach used to stop whaling but with an asset recovery element. In my view, there would have to be a ban (preferably international) to some degree that would then be enforced by a country or multiple countries. One part of the ban would be that anyone involved in breaching the ban would have some form of asset recovery penalty.

This could be in a number of forms which can allow those enforcing the ban to impose penalties against those who poach the ray’s directly and then those who trade in those connecting goods. A balance of conviction based and non-conviction based systems would be best.

Future steps

In conjunction with the legal route of an asset recovery program, we
need to decrease the interest and desire for the product. This needs to be done through an education programme and through national programs encouraging alternatives. Although these programs will not be directly linked to the asset recovery programs, they can be funded by the assets recovered. Asset recovery is not a silver bullet, but if it is correctly implemented it will make the activity of poaching less attractive through the risk of legal consequences and removal of the potential financial gain. Whilst this might act as a deterrent, it will also mean the organised groups will fight even harder to keep the proceeds of their crime.

This is definitely a fight worth having - many already endangered species are dependent on a mechanism to address poaching and thus help preserve their future. Admittedly, it will be initially hard to establish: but it will also provide a way to increase the funding required in the fight against poaching. If enacted correctly, asset recovery will provide an upward spiral to counter the current downward spiral the poachers have forced us into, which could result in the planet losing multiple species of animals forever.

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Barnaby has a range of experience in fraud, international asset recovery, financial crime and professional discipline law, particularly in healthcare and sports law matters. He is regularly instructed in tax tribunal matters (in a POCA context) and civil recovery. Barnaby’s international asset recovery and financial crime practice includes experience of dealing with corruption, money laundering, fraud offences (that have an international angle) and recovering the proceeds of these offences.

He has experience of all areas of the Proceeds of Crime Act both domestically and internationally. In addition to his busy practise, Barnaby writes the chapters on International Asset Recovery and Terrorism Finance for Millington and Sutherland Williams on POCA and recently completed a series of seminars and articles on changes to POCA under the Criminal Finance Act 2017. Barnaby is ranked in the Legal500 as a ‘leading individual’ in POCA and Asset Recovery law.