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Increasing ecocides: On the need for a new global platform for redress

By Dr S Faizi

Dr S Faizi argues that the community of nations should criminalise ecocide and create a mechanism to prosecute the culprits. This should be done by establishing an Environmental Security Council as a democratic, independent multilateral body, and by no means by overburdening the International Criminal Court (ICC) with this new agenda when ICC itself is in dire need of strengthening to enforce its original mandate.

Environmental crimes - massive devastation of the natural environment - are on the increase. Destruction of huge forest areas, savannas, river systems or aquifers is not a rare occurrence. Progressive emission of warming gases to the atmosphere has broken the robust resilience of the environmental system and has started causing havoc around the world. Deluges, sea level rise and droughts have become frequent in their incidence. Colossal environmental crimes, or ecocides, like irreversibly destroying massive ecosystems and blighting environmental resilience through the emission of polluting gases and discharging toxic substances at lethal scales ought to be considered as equivalent to genocides and a means for redress needs to be established. Crimes against the planet should be treated on par with crimes against humanity.

Since we do not currently have a global mechanism to address ecocides, efforts need to be initiated to conceptualise and establish one. The Convention on Biological Diversity (CBD) has on its mandate the review of the progress of implementation of the treaty by the Parties - meaning compliances and infractions - but this hardly happens in the CBD parlance, and even if it happens the CBD has no explicit provision for action on Parties that commit infractions; besides the CBD has covertly unmade itself quite early in its life when the guard of the global South was down¹. The United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol too are similarly hamstrung, not to mention the Paris Agreement where a Party's commitment itself is voluntary. The need for creating a global multilateral mechanism is compelling but this has to happen through a democratic process and with the full participation of the developing countries who bear most of the vital ecosystems and are the primary victims of

¹ S Faizi, "CBD: The unmaking of a treaty", *Biodiversity* Vol. 5 No. 3 (2004).

global warming, rather than the old practice of western institutions conceiving the mechanism in their entrenched neocolonial perspective and selling it to the developing world.

Dovetailing ecocide to ICC?

The International Criminal Court (ICC) was established by the community of nations to address crimes that challenge civilisation itself: genocide, war crimes, crimes against humanity and crimes of aggression. Although ICC's role is crucial in a world of escalating atrocities, its scope is limited by its geographic jurisdiction as it has no mandate over non-Party countries; of the 193 United Nations (UN) Member countries only 123 have ratified the Rome Statute, ICC's founding agreement. The United States has been opposing ICC since its formative days as it has many of the multilateral bodies. The ICC's work has been largely focussed on African States; ten of the ICC's thirteen ongoing investigations are about African countries and is now expanding in its reach to Latin America in the ongoing preliminary investigations.

The reach of ICC even within the Member States is limited and needs to hugely improve if ICC is to live up to its mandate. And then there is this question of countries outside the membership of ICC, although genocide cases in such countries can be taken up if so requested by the UN Security Council through a resolution which is not easy to come through. The route via the Security Council would involve a cumbersome procedure and should have the support of all five permanent Members.

While the performance of ICC cries out for improvement, it is unfair to burden it with this new subject, jurisdiction of ecocide, as some are suggesting. Sophie Wilmès, the Belgian foreign minister called for ecocide to be added on to the mandate of ICC while speaking at the nineteenth session of the Assembly of States Parties (ASP) of ICC in December. French President Emmanuel Macron had made a public call to introduce ecocide on the mandate of ICC. There is also a well funded western non-governmental organization called Stop Ecocide Foundation working vigorously to bring ecocide on the agenda of ICC.

It would be a tempting proposal to add ecocide onto the agenda of ICC and could garner a lot of media attention too, but it would entail a twin fiasco. It would further deteriorate the already weak performance of ICC in addressing the increasing cases of genocides and war crimes in many parts of the world, a condition that drives humanity to a perilous state. Further, dovetailing ecocide to ICC would help trivialise the cause of fighting genocides and on the other hand confuse the struggle against ecocides.

The western civil society formations are excited about the term 'ecocide' and the possibility of embracing it as a cause to add to ICC's jurisdiction, while apparently remaining oblivious to the need for strengthening the efforts to handle the four subject jurisdictions of ICC. And it would be a good campaign agenda for western right wing leaders like Macron as they can obtain an environment cover, secure in the thought that ICC can never reach them. And the civil society players, coming as they are from countries where they are insulated - at least for now - from genocide, crimes against humanity and war crimes, apparently had no qualms about the prospect of overburdening an already under-performing ICC. Such groups also seem to wish to deflect attention from the possibility of exploring other mechanisms for addressing cases of ecocide. Self-mandated western groups are already working on drafts to amend the Rome

Statute. The ideological pedigree of the environmental doctrine of some of the civil society groups could be traced to the slave traders, as was recently revealed in the US².

Environmental crimes were indeed discussed as an issue to be addressed by ICC in the formative negotiations on the Rome Statute but the negotiators decided against it so as to be focussed on the four types of atrocities against humanity. It may also be borne in mind that any amendment to the Rome Statute would require two thirds majority in the ASP. What ICC actually needs now is a global civil society movement in support of the enforcement of its current mandate without regard to the politics of countries in question.

An Environmental Security Council

Regardless of the campaign of western groups where they could also embed a couple of helpless small island countries, we clearly need to have a robust multilateral mechanism to address the massive ecological crimes that are on the rise. States' (and non-state players') liability for environmental damages caused beyond their national jurisdiction, and compensation for such damage, is already recognised in the Rio Declaration of the UN Conference on Environment and Development (UNCED) 1992, where its principle 13 requires States to "cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction". Although the Declaration is not legally binding on the States that have endorsed it, they do have a political obligation to fulfil this commitment they have set for themselves, yet it has still to happen.

This concept was made legally enforceable in the Convention on Biological Diversity (CBD), adopted on the occasion of UNCED, although the language was watered down. Article 14.2 of CBD requires Parties to 'examine' the issue of liability and redress for damage to biodiversity, except where such liability is a purely internal matter. And this concept has been operationalised vis a vis living modified organisms (LMOs) in the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress 2018, a supplemental agreement to the Cartagena Protocol on Biosafety 2003. The Supplementary Protocol provides for liability and compensation for damages caused by LMOs resulting from a transboundary movement. The liability and compensation can be determined by the national administrative authority under the Protocol, in addition to civil liabilities.

As a negotiator in the formative meetings of both the Rio Declaration and CBD, I recall the staunch opposition the US raised against the liability and compensation provision in both the instruments. One major reason why the US refuses to ratify CBD is that same provision. The United Kingdom, equally opposed, had campaigned against this Article among friendly countries before it finally decided to ratify the treaty. On issues of criminal culpability, the opposition will be far greater though we don't need to worry about that now.

The legal basis for prosecuting criminal culpability for ecocides can be built on from the above mentioned instruments as well as the Rome Statute. Environmental offense is regarded as a crime only in very few countries, one example is India's law³ to prevent atrocities on the Scheduled Castes (the Dalit 'untouchables') and Scheduled Tribes (Adivasis, the Indigenous People) which reckons the corrupting or fouling of water sources used by the target caste

² See for eg. <https://theconversation.com/american-environmentalisms-racist-roots-have-shaped-global-thinking-about-conservation-143783>.

³ See <https://ncsk.nic.in/sites/default/files/PoA%20Act%20as%20amended-Nov2017.pdf>.

groups as a criminal atrocity (although this provision was invoked only once and even that case, filed in 2017 by the Indigenous People of Plachimada village, Kerala against the Coca Cola company for polluting their drinking water source, has not even been fairly investigated so far).

We need to conceive the right kind of global institutional arrangement for handling international crimes against nature. It cannot be added onto ICC. The UN Security Council cannot be vested with such a mandate as that body itself represents an inversion of democracy and is gravely in need of structural reform. CBD and UNFCCC are progressively being weakened in their own limited mandate let alone take up criminal redress mandate. The environmental crisis has deepened to become a serious threat to the continuation of human civilisation itself and this calls for the creation of an Environmental Security Council as an independent multilateral body, under the UN umbrella, with the provision of one-country-one-vote, mandated with both judicial powers to address ecocides and global policy setting powers for environmental management. It can have a judicial wing and a wing for technical and policy affairs, and its membership shall constitute all willing countries, who will elect a bureau composed of a reasonable number of countries. The global environmental court part of it can be modelled on the ICC with the necessary modifications.

Given current resource constraints faced by multilateral institutions, it would be wise to consider transforming the United Nations Environment Programme (UNEP) into the Environmental Security Council, with a completely new set of people and management instruments. Nairobi will be the right location; other options can also be considered, such as having the judicial part and technical and policy part in two different countries, but both of these should be developing countries where the costs will be less than in any western country and visa provisions easier, and it helps avoid the overcrowding of certain western cities with offices of multilateral organisations. The technical and policy part will be a reformed form of the current UNEP, which has progressively lost its steam since the retirement of Dr Mostafa Tolba as its head in 1992 and all the five heads since then have been from developed countries, some like a 'promotion' from the International Union for Conservation of Nature (IUCN) and one even had to quit on serious corruption charges. And parallel to multilateral negotiations on the formation of the Environmental Security Council, negotiations for the much-needed statutory integration of the several multilateral environmental treaties could also be held. These treaties could also have shared secretariat provisions, preferably aligned to the proposed Environmental Security Council mechanism. An Environmental Security Council is not an entirely new idea; way back in 1989 the UNEP Governing Council had deliberated such a concept - though the contours of the proposed institutions were not clear - and decided to defer but never took it up again. I, as a youth delegate at the meeting, was disappointed to see the proposal introduced by the Soviet Union and Iran virtually shot down by the US, but it is time that we had an Environmental Security Council to keep the planet habitable at least for another two hundred years.

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