

Eradicating Ecocide and Cultural Genocide in the Kimberley



Anne Poelina

Mardoowarra as a sacred river to life? The Charter of the United Nations Declaration of Human Rights (UNDHR Charter) declared in 1945, the Preamble states: 'We the people of the United Nations determined to save succeeding generations from scourge of war to promote social progress and better standards of life in greater freedom'. Higgins makes the point that the advancement of peace, gives international legal recognition in referring to the term genocide to describe the enormous deliberate destruction of human life. It is through her work that we come to understand another type of international crime against peace that has arisen, that of Ecocide.

The Longman Dictionary of Contemporary English defines ecocide as 'the gradual destruction of a large area of land, including all plants, animals, etc living there, because of the effects of human activities such as cutting down of trees, and the using of pesticides'. According to Article 5, of the Rome Statute, Ecocide is already in use to some extent, and refers to large scale destruction in whole or in part, of ecosystems within a given territory. For the purpose of international law Polly Higgins proposes the following definition of ecocide, 'the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished'

Furthermore, Higgins champions the view; Ecocide is in essence the very antithesis of life. It can also be the result of human intervention. Economic activity, particularly, when connected to natural resource depletion, can be a driver of conflict. Where such destruction arises out of the actions of mankind, ecocide can be regarded as a crime against the peace of all those who reside in the area. In the event that ecocide is left to flourish, the 21st Century will become a century of resource wars, and chaos. The Rome Statute sets out an extended definition of damage to the environment, specifically as consequences of War Crimes, which provide useful assistance. Article 8(2)(b)(iv) criminalises: 'widespread long term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. Higgins strengthens this statement by suggesting we change one word here 'widespread long-term and severe damage to the natural environment which would be clearly excessive in relation to concrete and direct community advantage, anticipated' and incidents of catastrophic environmental nature can be properly assessed.

Australia is a Commonwealth country and therefore we can use existing European Union (EU) Human Rights case law as 'persuasive' (http://en.wikipedia.org/wiki/Persuasive_precedent). Many countries do this and Australians can too. In the EU there is case law that states: a) where there is a risk of injury or death to humans and b) the authorities have knowledge or ought to have known the risks c) the authorities have a legal duty to close down dangerous industrial activity. Failure by

governments and in some situations Aboriginal representative bodies to protect these rights is a breach of the human right to life. I am stating that if Rey Resources/BlackFin or any other mining company working with any Australian governments to poison Australian citizens on their land and or waters whilst ignoring these risks then these parties have failed the people and their communities by knowingly committing the acts of genocide and ecocide.

The primary issue is the fact that this industrial activity has commenced opening up a coal mining province on the Fitzroy River and Canning Basin. This industrialisation will give rise to excess greenhouse gases and therefore contributes to global instability of the atmosphere and thereby placing current and future humanity at risk of injury and/or death which amounts to a breach of our human right to life. It's the 'death by a thousand cuts' argument. The questions All Australians need to be asking our Australian governments and indeed the world is, why do we have to be poisoned, before we can stop being poisoned? It's much easier to stop industrial activity before it starts then to try and stop an industrial disease after considerable sunk cost investment is made in workforce development, transport, infrastructure, production and ongoing management.

Article 2 of the European Convention on Human Rights (ECHR) sets out the human right to life, as one of the primary human rights: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Human rights, as set out in the ECHR and the UDHR are statements of principle; they are not in themselves determinative and require interpretation by courts to bring out meaning, in particular when applying to factual situations. This applies to any activity, public or private in which the right to life is at risk, especially dangerous industrial activities. In cases where "Knowledge and Reasonable Expectation": Where authorities knew or ought to have known of the risks and should have taken measures, which they did not, these authorities are breaching Article 2.

Although ecocide is not legally recognised as a crime yet, by including it in this article and my advocacy to protect the Mardoowarra, I seek to pave the way for it being considered as such. At the same time of doing this work in Australia Polly Higgins is gearing up for a huge campaign to take Earth law (Ecocide and Earth Rights) to the Earth Summit in Rio de Janeiro 20th-22nd June 2012, this will get more and more media coverage closer to time. I am seeking support to leverage a case for the rights of the people and the Mardoowarra, to choose life. The main issue is, whether there is real and immediate risk to the life of individuals this definition includes future generations and individuals elsewhere in the world.

In the case of mining and resource exploitation on the Mardoowarra, Fitzroy River and into the Canning Basin there is an existing body of evidence to demonstrate these risks are real.

Many traditional owners and other Kimberley people are advocating for more science and the inclusion of traditional ecological and cultural knowledge to demonstrate the need to protect the lives of all people who, live, love and recreate on the Mardoowarra, for generations to come. It will be interesting to see how the Environmental Protection Authority (EPA) in Western Australia develops its Scoping Study for the public review of the mining proposed by Rey Resources/Black Fin?

My concluding statement reflects the First Preparatory Committee Meeting (Prep-Com 1) of the UN Conference on Sustainable Development (UNCSD) on the 17-19 May 2010 UN, New York Session 2: A Green Economy in the Context of Sustainable Development and Poverty Eradication STATEMENT OF INDIGENOUS PEOPLES 18 May 2010. These are their words:

Indigenous peoples believe that all these talk of a Green Economy should not distract us from addressing the root causes of the global economic and ecological crisis. There are numerous agreements reached in multilateral processes which already conceptualized and defined sustainable development. The problem is that many of these agreements have not been effectively implemented. So we appeal to all the States here to focus on how to address the implementation gap and do what needs to be done. Maybe what we should talk about is what should the roles played by States, the market, the UN and other multilateral bodies, the civil society and indigenous peoples in addressing the gap and implementing sustainable development. How do we get States to comply with their obligations to international environmental, financial and human rights agreements which have been the results of UN meetings for the past 50 years?

The 9th Session of the UN Permanent Forum on Indigenous Issues, which dealt with the theme "Indigenous Peoples' Development with Culture and Identity", concluded and there were many concrete recommendations relevant to the discussions in this room.

Development, whether it is called green or sustainable, should be holistic as the G77 and China statement reiterated yesterday. Holism means integrating all the dimensions of development which include economic, social, political, ecological, cultural and spiritual considerations. When we say development with culture and identity, we mean that development should be underpinned by values of indigenous peoples such as interconnectedness, sustainability, equilibrium, reciprocity, equity, harmony with nature and solidarity. We cannot separate development from the protection and respect of our rights to self-determination, to our lands, territories and resources, our cultural rights, rights, right to free, prior and informed consent and our traditional knowledge, among others. These rights are contained in the UN Declaration on the Rights of Indigenous Peoples. If States and the UN promote and respect this Declaration, sustainable development can become a reality. Thus, we strongly believe that the ecosystem and human-rights based approach to development should be reaffirmed by the UN Conference on Sustainable Development. We also believe that Mother Earth or nature has rights which we human beings should respect. Efforts in promoting Mother Earth rights should be supported.

We have the smallest ecological footprints because of our sustainable lifestyles and livelihoods and because we fought and continue to fight against the degradation and destruction of our ecosystems which are the basis of our cultures and identities. We are already living, practicing and operationalising sustainable development but the obstacles and challenges we face are tremendous. This includes the unfettered and unregulated behaviour of the market, including financial markets. Corporate accountability and the regulation of the market are crucial for a new paradigm for development. Indigenous peoples are now articulating and strengthening their various concepts and practices of living well. These are our contributions to bring about the needed changes to make our planet really green and sustainable.

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Standing on the banks of the Mardoowarra, Fitzroy River in Western Australia we watch our sacred river rising with the new rain and the coming wet season. We stand, watch and wait for news of what is coming in 2012. We worry and we are deeply moved. Threatened by one of the most environmentally and ecologically destructive proposals by Rey Resources/Blackfin are proposing to continue with their plans to establish a 8000 square kilometre thermal coal mining province on the floodplains of the Mardoowarra. We agree these plans are a direct violation of our human rights to life and it is to be viewed as nothing less than an act of ecocide and cultural genocide

As traditional owners of the Lower Fitzroy River we oppose this mine and find it difficult to understand why governments fail to follow recommendations not only from their own reports but other evidence which confirm the need to value and protect all Australian heritage. In Western Australia traditional owners have clear examples of breaches of our human, cultural and Indigenous rights to protect and manage our sacred sites, places and environments which are heritage assets that belong to all Australians. The Mardoowarra holds an important and sacred song line that connects all Kimberley Aboriginal people along the river to their traditional homelands. The song line continues and carries the law. It carries our understanding of how the past, present and future are integrated in song and ceremony into the present day.

The Mardoowarra is listed as a sacred river for the entire length of the river. These multiple values have been registered on both the Department of Indigenous Affairs Heritage Act (WA) and more recently with the National Heritage Listing, yet we have clear evidence governments and Aboriginal representative groups are working with mining company Rey Resources/Blackfin to put this mine on the pristine environment of one of Northern Australia's last wild rivers. The evidence to date demonstrates this mining province should not be allowed to proceed on the "precautionary principles" of the traditional ecological knowledge that the area is known for its geothermal activity. This sacred site gives rise to the boiling hot water bubbling to the surface today, the traditional name for this place, is Doodoodoo, the sound that is heard as the water rushes to the surface. Added to this knowledge is the known geology of the region reported on in 1924 by Geo-Science Australia which confirmed the area around Mt Wynne the proposed site for the initial mine to be highly folded and faulted and therefore unable to hold the toxic waste from the tailings dams being planned by the company to be safely pumped back into the bed rock of the river. There is no doubt in the minds of many Kimberley people Aboriginal and non-Aboriginal that the mining province will destroy the song cycle of the river and its relationships with the people, the environment and its connectivity of surface and sub-surface water ways.

According to Polly Higgins lawyer, author and winner of The Peoples Book Prize in 2011, titled 'Eradicating Ecocide' there are certain principles of universal validity and application that apply to civilisation as a whole. They are principles that underpin the prohibition of certain behaviours for example genocide. The rendering of such actions as illegal is premised on the advancement of higher morality that operates without caveat of qualification, morality based on the sacredness of life, it is still necessary to identify such crimes to prevent those who fail to live by similar values. But what of the wellbeing of all life – not just that of humanity – but of all who inhabit a territory over which one has responsibility? What about the rights of the



3 Nyikina Sisters, Senior Elders Jeanie Warbie and Lucy Marshall with Dr Anne Poelina on the bank of the rising Mardoowarra-Fitzroy River. Image: Ian Perdrisat