THE CONTINUATION OF GENOCIDE WITHOUT MASS MURDER: THE CASES OF 'CULTURAL GENOCIDE' AND 'ECOCIDE' IN AUSTRALIA

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ABSTRACT

The present thesis is based on the concept of cultural genocide which will be illustrated through a literature review. The idea behind cultural genocide is that the concept of genocide as it is widely understood and preserved in the 1948 Genocide Convention, is insufficient. This is based on the conventions reliance on mass deaths as the exclusive criterion for defining genocide. It is argued that the destruction of a people is also, if not more severely achievable through the destruction of a peoples' culture – the foundation of each individual's identity. It is argued that cultural genocide in post-colonial times is often executed against indigenous populations. With respect to the situation of the Aboriginal peoples in Australia, this paper will enhance the concept further, asking the question what role severe, long-term or widespread environmental damage ('ecocide') plays in relation to the cultural decline of indigenous peoples, and which impact expansionist economic policies have. To further an understanding of ecocide the origin of the term and its development in international law will be examined. We will look at the connection Aboriginal peoples share with their traditional land, and if the destruction of the territory is a matter of a 'cultural ecocide' as the land constitutes foundation and soul of many Aboriginal societies. It will be concluded that extreme and copious extraction methods combined with a ruthless pursuit of economic growth and backed by all-allowing domestic legislation create a space that allows for the destruction of traditional lands, and equally the destruction of a holistic social system based on it. For those many Aboriginal groups who still share this connection with their land, it could be said that this situation is indeed based on 'cultural ecocide'.

I. INTRODUCTION

Studies over the last decades show how misconceived the idea of genocide is in the general understanding of the term. This is based on its international criminalisation in 1948 that generally requires the existence of mass murder for an act or situation to be identified as genocide. Slowly, this concept is changing as many scholars have unfolded the original meaning of genocide, which was understood to be committed at the cultural and/or physical level by the term's inventor, Raphael Lemkin. For him different means can achieve the crime of genocide.

The concept of 'cultural genocide' has been used frequently to describe the situation of indigenous people, who, due to assimilation policies by the government of their respective nation-state suffer from the loss of their culture and belonging. The theoretical understanding of 'cultural genocide' will be reviewed in Chapter II.

We will then turn towards another concept called 'ecocide', which describes the crime of widespread, long-term or severe damage caused to the natural environment. The emergence of this idea will be illustrated in Chapter III. This paper argues that the conceptions of ecocide and genocide are closely linked and that the act of genocide can often also be an act of ecocide, when the impact of environmental destruction severely affects the health and wellbeing of a people. We will call this 'cultural ecocide'.

Chapter IV will then turn to our case study of Australia, and will outline the legal and policy frameworks currently in place, that, it can be argued, too easily allow for 'cultural ecocide' to occur. A special emphasis is placed on the struggle for land rights and for the maintaining of their culture of Aboriginal and Torres Strait Islander peoples (ATSIP).

In Chapter V an analysis is made to establish if cultural ecocide is committed in Australia. This will be analysed based on the relationship of Aboriginal Australians to their traditional lands, and the legal options that are being presented to the extractive industries to mine culturally significant territory.

Based on the preceding analysis the paper will conclude that 'cultural ecocide' is and has been committed in Australia, and that the crime seems to be facilitated and aggravated through the recent emergence of destructive extraction methods, called extreme energy methods. Recommendations will be given to counteract this development.

It should be noted from the outset that there are many indigenous groups and individuals in Australia who have thoroughly embraced the Western culture and lifestyle, and who don't wish to live according to traditional practices and do not attribute the same value to the maintenance and reclamation of indigenous peoples' land. This paper will concentrate on those Aboriginal Australians who do live or strive to live according to tradition, whose identity until this day is deeply connected with their traditional lands, and who are culturally connected to the ecosystem

that surrounds them, and that gives their life meaning and their social life structure. However, this does not imply that the indigenous people who decide not to live, dress or act according to their tradition are in any way ‘less’ indigenous.

II. CULTURAL GENOCIDE: A THEORETICAL FRAMEWORK

A. Literature Review

The concept of cultural genocide lies the foundation for the forthcoming analysis of 'cultural ecocide', as it recognises the significance culture has for the survival of a collective, and acknowledges that the destruction of a people can not only occur through violent physical means, but that destruction on the cultural level can cause the death of a group on another – one might say more profound level. The culture is the fabric and soul of a nation. Environmental destruction, as I argue, can impact on both levels, and thus cause the cultural and/or physical destruction of a people, which is why it is necessary to understand how it relates to cultural genocide.

Raphael Lemkin, who coined the term 'genocide' in 1944, has introduced genocide as an act that can be accomplished on two interdependent levels, the physical and the cultural sphere (Lemkin 1944). In 'Axis Rule in Occupied Europe' (1944) Lemkin describes the two phases of genocide. One phase is the "destruction of the national pattern of the oppressed group[,] the other, the imposition of the national pattern of the oppressor". The imposition can take place in different ways. It "may be made upon the oppressed population which is allowed to remain" – this signifies cultural genocide and entails a slow social death for the oppressed nation. The imposition of the national pattern of the oppressor may also be made "upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals" – here Lemkin refers to the physical annihilation of the people, or its eviction or resettlement. Naturally, in real life it will often be impossible to make a clear distinction between the ways of which the imposition takes place. Both types might occur by themselves, or – as culture and physical existence of a group are interdependent – in a mixed form. It could be argued that many state governments today impose the national pattern of the settler society on the often marginalised indigenous peoples within their state boundaries. This can be assumed, because paternalistic and racist patterns of thought have often survived in post-colonial nation-states that are unable to accept several strong cultures (or nations) in one state. Under the surface the dichotomy of a settler-savage relationship is still present in current Western societies, which additionally impacts negatively on the development of an equal and non-discriminatory contact. It seems that parts of this pattern of thought dominate Australia's current policy-making. This will be discussed in depth in Chapter IV.A. National political decisions become increasingly bound by international standards demanded and enforced by the United Nations. It could be said, with the Declaration on the Rights of Indigenous Peoples ('the Declaration') in force and corporate social responsibility gaining more and more importance, that especially developed countries would not pursue a violent approach against their indigenous populations if they were to be in their way of e.g. economic exploitation. The possible repercussions – international criticism, military intervention, loss of reputation, loss of trade agreements, etc. – pose a risk too great.

Lemkin describes cultural genocide as follows: “If the culture of a group is violently undermined, the groups itself disintegrates and its members must either become absorbed in other cultures which is a wasteful and painful process or succumb to personal disorganization and, perhaps, physical destruction.” (Moses 2008: 12) With reference to the genocide in Tasmania he describes the cultural destruction: “With the will to live destroyed, the natives succumbed rapidly to disease and vice and within a few decades the entire race was wiped out. The blame for this destruction of a race lies on the cruelty and lack of understanding of human beings, on the cruelty of the selfish, grasping settlers and convicts who attacked and aroused the spirit of revenge of the originally peaceable natives, and on the lack of understanding of the men who in the end strove to protect them and make them conform to the standard of an alien civilization, and killed them with misguided kindness.” (Lemkin and Curthoys 2005: 179) This quote relates to some aspects that can still be found in contemporary Australia. It could be argued that Aboriginal people are equally required to adopt the system of the settler society to function economically or socially. Driven into welfare dependency indigenous Australians often don’t have much choice but to assimilate and adopt concepts of nature, cultural values and social norms that are very alien to them. The settler society seems to show no interest in an understanding of the indigenous world views, or intentionally discounts them as negligible based on feelings of superiority and paternalism – the legacies of colonialism. This will be further analysed in Chapter V.

In 1987 Barta analyses genocide in a colonial context and claims that the whole idea behind colonization is in its entirety at odds with maintaining the traditional life style for most indigenous peoples, as colonisation is orientated on the acquisition of land, its cultivation, and the exploitation of resources (Barta 1987: 239). The relationship between settler and indigenous societies he calls a “relation of genocide”. He seems to acknowledging a level of cultural genocide as part of colonisation when he states that “[a] greater part [of the dramatic decline of the Aboriginal population], too easily underestimated, was played by demoralization and despair.” (Barta 2008: 116). The interdependency between physical and cultural genocide becomes visible here. It can be imagined how the physical extermination due to colonialisation, that has taken place from the 18th century onwards, was accompanied and interrelated with the destruction at a social level. Genocide undermines indigenous social life by destroying the cultural basis their identity is based on. Barta goes on to explain that “[w]ith many of their women bearing mixed-race children to white men, the black birthrate dramatically in decline, their social structure destroyed, and their traditional culture impossible to maintain, many Aborigines could hardly envisage a future in such a cataclysmic world.” (Ibid.)

In his 2007 article 'What do genocides kill?' Powell further develops Lemkin's notion of the genos and introduces the term 'social figuration'[1], which describes the collective object, but emphasizes the constantly changing nature of the collective's culture. Through cultural genocide the social figuration is harshly interrupted in a way that hinders its cultural reproduction, which can lead to the fact that important cultural aspects – which define that particular nation – will be lost for future generations (Powell 2007: 538). Moreover, Powell analyses Lemkin's understanding of genocide and writes: "[P]hysical genocide and cultural genocide were not two distinct phenomena in Lemkin's mind, but [...] genocide was one process that could be accomplished through a variety of means." (Powell 2007: 534-535).

In 2010 Short links the concept of cultural genocide to the present day treatment of Aboriginal Australians. Drawing on Powell and Lemkin, Short also argues that cultural genocide is a very different process than naturally occurring cultural change, as genocide is forced upon a group, and cultural development is gradual and often mutually beneficial (2010: 49-53).

As aforementioned, indigenous groups are often forced to become part of a system they oppose, and are also compelled to use the linguistic, legal, and economic means and tools of the oppressor nation to fight their fight for recognition or self-determination. This undermines their claims from the very outset, and incorporates them and the battle into the system they don't know how to operate. Short (2010: 54-55) argues that exactly this approach is visible in Australian policies today.

On the dependence of the individual on a social and cultural framework, Powell (2007: 537) refers to Norbert Elias when he argues that "from before our birth we depend on other human beings for the necessities of life, and for all the possible means by which we could realize our selves in the world. Our very subjectivity is formed out of the practical and taken-for-granted set of skills, attitudes, understandings by which each of us conducts our life, and these develop only through our relationships with each other. The essential human condition is not being, but being with others. And, just as concrete human beings cannot exist independently of society, society cannot exist independently of concrete human beings". This shows why cultural genocide not only affects the collective but disintegrates the individual being itself. Powell (2007: 542) argues that "[i]ndividuals form their personal subjectivity through relations with others in a definite social context, and identification with others is a crucial part of this process. To violently destroy a collective identity, then, is to violently destroy a crucial part of the individual self. This fact alone might entitle collective identities to legal protection on liberal terms. Only in relation to a collective self is it possible for me to be my individual self."

[1] Christopher Powell uses this term arguing that a genos implies the existence of a social figuaration. The term is a derivative from "social structure", a wording used by Norbert Elias in his relational sociology. Powell rejects the use of the word "structure" as that is closely associated with stasis.

Cultural genocide was considered to be included as a crime in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('the Genocide Convention'). This caused a lot of controversy during the drafting process, which is why eventually cultural genocide was excluded from the draft Convention. Thus it is not internationally criminalised. Many governments, it can be assumed, feared that their actions could constitute cases of cultural genocide.[2]

B. With Intent to Destroy

We established that an act of cultural genocide can severely infringe on the integrity, identity and existence of a nation. But does an act have to be intentional to be able to constitute an act of cultural genocide? Is the element of intent at all relevant?

When wording the Genocide Convention an element of intent had been added as a criterion required to be fulfilled for an act to be considered genocidal: "genocide means any of the following acts committed *with intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such". The appropriateness and necessity of this conditional element has been highly contested since the drafting of the convention. This chapter will list some of the main argument made. At the end of the drafting process an element of intent and of motive had been added to the convention.[3]

On the process of drafting the Genocide Convention Leo Kuper writes that "[t]he inclusion of intent in the definition of genocide introduces a subjective element, which would often prove difficult to establish. An attempt to substitute an objective measure proved unsuccessful, and in the result 'intent' was retained[. ...] There still remained the question of further intent, or of motive, represented by the phrase 'on grounds of national or racial origin' etc [contained in the draft Convention of the Ad Hoc Committee]. This limited the grounds which would be necessary to constitute genocide, so that the destruction of a group [e.g.] for profit [...] could not be charged as genocide". (1981: 33) The result was the substitution of that phrase with the words 'as such' instead of an enumeration of grounds. This, Kuper argues, "introduces an ambiguity" (Ibid.). Several of the Committee members had voted in favour of the adoption of the words 'as such' because, as Haitian delegate Mr. Demesmin phrased it, "the author of that amendment had declared that his object was to provide for all motives instead of giving restrictive enumeration, as proposed by the Ad Hoc Committee." (Sixth Committee of the General Assembly, A/C.6/SR.77: 133; quoted by Kuper 1981)

[2] For an in-depth analysis of the forces at play during the drafting process of the Genocide Convention see Short: 2010.

[3] For an analysis on the debate around the drafting process of the Genocide Convention, see Leo Kuper's book 'Genocide'.

Helen Fein argues, in reference to physical genocide, that the destruction of a people can be a by-product of another aim which is not primarily concerned with the effects it has on the side. She calls this "developmental genocide" which describes acts "in which the perpetrator intentionally or unintentionally destroys peoples who stand in the way of the economic exploitation of resources". (Chalk and Jonassohn 1990: 15) Chalk and Jonassohn are convinced that the element of intent needs to be included in the definition of genocide. However, intent in their understanding means that genocide has to be "planned *or predicted"* (Ibid. 26).

For defining an action as genocide, Barta claims, the approach should not be based in legalistic terminology, but on its historic understanding (Barta 2008: 111) "Intentions were disguised by perpetrators of atrocities to make sure they were not called to account and they were disguised – also to escape responsibility – by those who should have called perpetrators to account" (Ibid. 112). He further acknowledges that benevolence and a good will can be the driving force behind genocide, e.g. Christianisation, or the education or civilising of the natives (Ibid. 117).

Patrick Wolfe (2006: 395-404) and Damien Short (2010: 51) argue that the imperative of proving the existence of an official intent is especially difficult when it comes to the cultural genocide of indigenous peoples as the reason for their destruction is often rooted in policies aimed first and foremost at economic growth through resource exploitation, and affect indigenous groups only indirectly, if severely. "Social death could […] occur through sporadic and uncoordinated action or be a by-product of an incompatible expansionist economic system" (Ibid.). Thus an intent to destroy is not necessarily given, and the motive for the destruction of the people lies primarily in the efforts made of gaining control over their land and resources, which causes the destruction of the people "alongside". Eric Wolf (1976: 53) states the inherent nature of genocide in colonisation when he says: "The progress of civilization across the face of the earth is also a process or primary accumulation, of robbery in the name of reason."

In reference to the colonial mission of acquisition of land Barta (2008a: 115) points out that "intentions and effects were visible from the outset" and that the violence "could leave no doubt in black or white minds as to the fate of those who resisted the 'inevitable' course of events [...]. (Barta 1987: 248) This goes to show how ignorance and negligence can cause the state of genocide. According to Reisman and Norchi (1988; quoted by Fein 1990: 409) persistence in a destructive course with foreseeable results can be interpreted as intent to destroy. Barta further advocates for genocide to lose its uniqueness of "having intentionality as its defining characteristic" as it is founded on "complex and only obscurely discerned causes" that can be seen in action as well as in inaction (Barta 1987: 238-239)

Summing up, it seems that intent indeed is not required for genocide to happen. For once, it is highly difficult if not impossible to prove the intent of a group or an individual. Also, intents can be hidden or bogus. Rarely will a government have an official policy of killing indigenous peoples, or state openly the intention of destroying a cultural

minority. Secondly, actions exist that cause genocide not because they intended to, but as a by-product. Thirdly, an act of negligence can be an act of genocide, if the consequences could have been expected. In the case of ecocide an example would be the destruction of an entire ecosystem through the illegitimate disposal of wastewater in a main river system to avoid the costs of proper waste management. An example for cultural ecocide with negative effects on the physical level would be the mass-scale logging of an extensive forest area that is inhabited by a cultural group that relies on hunting in the forest for the physical survival. The cultural level would be affected if their cultural belief system is deeply imbedded in their natural environment, so that its disappearance causes individual disturbance and disorientation, and the loss of the social foundation for the collective. Lemkin acknowledges the importance of unintended consequences when he concedes that "genocidal intent could be inferred where mass death was not explicitly intended but where it was highly probable and reasonably foreseeable". (Moses 2008: 19) On a different note, acts of genocide could also be made dependent on their predictability. It makes sense that a destructive act is an act of genocide if it could have been reasonable assumed or predicted, and the consequences are ignored; or that when in the midst of carrying out a harmful act, one realises the consequences, but decides to proceed anyway.

III. THE CONCEPT OF ECOCIDE

To develop further the concept of cultural genocide this paper is going to analyse the concept of ecocide as the "severe, wilful or long-lasting" damage to the environment (see ENMOD 1976) to subsequently show a connection between both concepts, which we will call cultural ecocide.

Ecocide was first recorded in 1970, when it was used at the Conference on War and National Responsibility in Washington, where Professor Arthur W. Galston "proposed a new international agreement to ban 'ecocide'" (New York Times, 26 February 1970; quote in Weisberg 1970: 4). Over the next year the term was mainly used to describe the chemical warfare the US lead in Southeast Asia. However, John Fried mentions in a publication from 1972 (43) that "although not legally defined, its essential meaning is well-understood; it denotes various measures of devastation and destruction which have in common that they aim at damaging or destroying the ecology of geographic areas to the detriment of human life, animal life, and plant life".

Within international law, according to what has been uncovered so far, ecocide has been a topic for the UN since the beginning of the 1970s as well. At the global-scale in the context of the United Nations Conference on the Human Environment in 1972 in Stockholm ('Stockholm Conference') ecocide was widely discussed at the official and unofficial side events (Björk 1996). The Stockholm Conference was unique in the size and the international attention the event managed to rain on environmental issues. Topics covered were environmental degradation and transboundary pollution.

In 1973 an expert on the international law of war crimes, Richard A. Falk, drew up a "Proposed International Convention on the Crime of Ecocide" orienting himself on the 1948 Genocide Convention (Falk 1973).

While Fried saw ecocide as an intentional measure to "disturb or destroy the ecological balance", Falk recognised that environmental damage can be inflicted consciously or unconsciously (Ibid. 93, Fried 1972: 43). Both authors realised that ecocide can be a crime in war as well in peace times. Acknowledging that the element of intent does not always apply, biologist Westing (1974: 26) states that "[i]ntent may not only be impossible to establish without admission but, I believe, it is essentially irrelevant." It can be assumed that the term was widely understood by the mid-1970s.

> *"The Contracting Parties*
> *acting on the belief that ecocide is a crime under international law, contrary to the spirit and aims of the United Nations, and condemned by peoples and governments of good will throughout the world;*
> *recognizing that we are living in a period of increasing danger of ecological collapse;*

acknowledging that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace;
being convinced that the pursuit of ecological quality requires international guidelines and procedures of cooperation and enforcement [...]"

As a criminal act is listed: "(f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military of industrial objectives".
(Proposed Convention on Ecocide; Falk 1973: 93)

In 1978 this draft convention was referenced in a study prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The study had been commissioned to detect the effectiveness of; as well as the feasibility and options for a supplementation or amendment of the 1948 Genocide Convention that had largely been criticised to be loo limited to be applied (Sub-Commission 1978: 115-117). Ecocide was listed as a possible crime for an additional convention. Many governments were supportive of the idea that additional instruments be adopted as they found the Genocide Convention to be ineffective. The report stated that "[i]n the Sub-Commission the view was expressed that any interference with the natural surroundings or the environment in which ethnic groups lived was in effect a kind of ethnic genocide because such interference could prevent the people involved from following their own traditional way of life" (Ibid. 130). Cultural genocide was equally considered to be adopted as an international list in this study.

In 1985 the report on the question of the prevention and punishment of the crime of genocide, a follow-up on the 1978 study was prepared (Sub-Commission 1985d). It stresses the opinion of the members of the Sub-Commission who were vocal in their support for a crime of ecocide seven years earlier (Ibid. 17)[4]. It was recommended that "further consideration should be given to this question". However, ecocide was not mentioned in the final resolution containing recommendations on that matter to the Commission on Human Rights (Sub-Commission 1985c; Sub-Commission 1985a: 25-29 and Annex IV).

Another body that concerned itself with the criminalisation of ecocide was the International Law Commission (ILC)[5] who was tasked by the UN to draft a document listing

[4] Ecocide was defined as "adverse alterations, often irreparable, to the environment - for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence". With the addition that "[i]ndigenous groups are too often the silent victims of such actions". Again, the inclusion of cultural genocide was also addressed in the review. See Sub-Commission 1985: 17.

[5] This UN body is mandated to promote the progressive development of international law and its codification. Members of the ILC are "persons of recognized competence in international law [...that] sit in their individual capacity and not as representatives of their Governments", see: http://untreaty.un.org/ilc/ilcmembe.htm; [accessed 16/07/12].

crimes against peace[6] (General Assembly 1947). The draft 'Code of Crimes Against the Peace and Security of Mankind[7]' ('the draft Code'; precursor to the 1998 Rome Statute, which excluded ecocide in the final document) adopted a provision on ecocide in 1984, but excluded it again after there was strong controversy between Commission members[8] (ILC 1995; ILC 1996). The ecocide provision was mainly included based on precedence in international law[9] (ILC 1984: 89-100). Art. 26, which covered the crimes against the environment, was excluded from the draft Code provisionally in 1995, and finally in 1996 (Ibid.) As the ILC reports yearly to the Sixth Committee of the General Assembly an exchange of opinions and notions can be expected between both bodies. This is recommendable as it can expedite the deliberation and drafting process. However, it can also be feared that the opinions of the independent Commission members are influenced by the delegates of the respective countries sitting in the Sixth Committee.

It is not clear why exactly ecocide was excluded from the list of crimes against peace. What is clear, is that there was a lot of controversy around the respective decisions. Special Rapporteur Doudou Thiam saw is necessary to include a crime of ecocide when the drafting process was resumed in the mid-1980s. One can only assume that the watering down of the provision was a result of the opposition of powerful states, and that the reason was that they couldn't rule out the possibility of committing the crime of ecocide.

The question if ecocide has to be intentional or can also happen through negligence, was addressed by many states in 1993, who criticised the inclusion of the element of intent and the drafting of Article 26. Australia, Belgium, Austria and Uruguay went on record recognising that ecocide during peacetime is often a crime without intent (ILC 1993). Belgium stated "[t]his difference between articles 22 [war crimes][10] and 26 ["wilful and severe damage to the

[6] Today the 1998 Rome Statute codifies four named 'crimes against peace' - genocide, war crimes, crimes against humanity, crimes of aggression.

[7] Draft Code of *Offences* Against the Peace and Security of Mankind until 1987.

[8] The draft Code was on the agenda of the ILC from 1949-57 and 1982-96. The gap in time arose out of difficulties defining the Crime of Aggression and as a result, the General Assembly parked the drafting of the Code.

[9] The Special Rapporteur refers to following international instruments: the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; the Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water; the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies; and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.

[10] One provision of Art.22 on war crimes covers damage cause to the environment in times of war. "Article 22. Exceptionally serious war crimes: 2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts: […] (d) employing methods or

environment"][11] does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive" (ILC 1993: 72). Australia objected on the grounds that "the requisite mens rea in Article 26 should be lowered so as to be consistent with article 22", and Austria went on record stating that "since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment" (Ibid. 66, 68). Despite this criticism the element of intent had never been removed.

Ecocide has been described in several conventions, and it must be noted that this description has been changing over time. Within the 1976 Convention on the prohibition of military or any hostile use of environmental modification techniques (ENMOD) environmental damage is criminalised if it has "widespread, longlasting (sic.) *or* severe effects". In the Article 8(2)(b) (iv) of the Rome Statute 1998 it became a tripartite test with the wording having been changed to 'widespread, long-term *and* severe'. This can be attributed to the drafting process of the 1977 Protocol Additional to the Geneva Conventions (Protocol I), where the wording first had been altered. The tripartite test makes it incredibly difficult to determine an act as being one of ecocide. It is a watered down wording caused by the controversy between states and the fear of being punishable for environmentally destructive behavior.

Domestically, ecocide has been implemented in the criminal laws of Viet Nam[12] - which is not surprising after the US warfare in the country, and Russia[13]. Armenia[14], Belarus[15], Republic of Moldova[16], Ukraine[17] and Georgia[18] have designated ecocide a crime against peace in their criminal penal codes, and so have Kazahkstan[19], Kyrgyztsan[20] and Tajikistan[21]. Although it was excluded by the United Nations, these countries have considered the crime to be serious enough to be adopted nationally. In reference to the draft Code, some penal codes directly state that ecocide constitutes a crime against the peace and security of mankind.

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means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment; […]".

[11] "Article 26. Wilful and severe damage to the environment: An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to…] ."

[12] Penal Code Vietnam 1990 Art 278. "Ecocide, destroying the natural environment", whether committed in time of peace or war, constitutes a crime against humanity.

[13] Criminal Code Russian Federation 1996 Art 358.

[14] Criminal Code of the Republic of Armenia 2003 Art 394.

[15] Criminal Code Belarus 1999 Art 131.

[16] Penal Code Republic of Moldova 2002 Art 136.

[17] Criminal Code of Ukraine 2001 Art 441.

[18] Criminal Code of Georgia 1999 Art 409.

[19] Penal Code Kazakhstan 1997 Art 161.

[20] Criminal Code Kyrgyzstan 1997 Art 374.

[21] Criminal Code Tajikistan 1998 Art 400.

Closely related to the term of genocide the acts of ecocide have a destructive effect on a large scale – on an ecosystem. With cultural ecocide these primarily ecocidal acts do not only affect the environment but the collective linked and connected to it – they have a genocidal effect. In this paper cultural ecocide shall mean the "destruction of the physical and atmospheric environment needed to sustain and negatively affecting the cultural or physical health of a national, religious, cultural or political group in a given geographical region". This definition is derived from a definition of ecocide by Bedau, who calls ecocide the "intentional destruction of the physical environment needed to sustain human health and life in a given geographical region" (Bedau 1974: 44; quoted by Kuper 1981: 35).

As previously established, genocide can be accomplished on the physical and/or cultural level. Thus, the genocidal acts inherent in cultural ecocide can affect a people physically or culturally, which is why technically the term genocidal ecocide would be more appropriate than cultural ecocide. However, the term genocide is not universally being understood as being able to be accomplished on both, the cultural and physical plane – and is often associated only with mass killing. Consequently, I will use the term cultural ecocide to emphasize both - the culturally and physically genocidal effects ecocide can have. Culturally genocidal effects could be all form of mental illnesses – stress, despair, anxiety – and consequent increased suicide rates or the pining away of community members; physically genocidal affects would be the increase in respiratory illnesses, stillbirths and cancer rates in an area polluted by carcinogenic substances.

Thus the possibilities that have presented themselves so far in the process of criminalising ecocide on the international plane through the UN are to either include it in the 1948 Genocide Convention, to include it as a crime against peace in the 1998 Rome Statute, or to individually criminalise specific harmful acts against the environment.

Let us recall that "Lemkin never stipulated that genocide was solely a crime of state, and the UN convention concurred in naming individuals as well as state officials as potential perpetrators." (Moses 2008: 18) Ecocide, as we will see in Chapter V.B, equally is a crime that can be committed by the state, or by individuals, as for example the executives of a transnational company (TNC) that by omission of the facts ignored the culturally ecological consequences of an extraction projects.

IV. AUSTRALIA – PARAMETERS FOR A CONTINUING GENOCIDE AND REOCCURRING ECOCIDE?

> *"The late David Burrumarra believed that human and ecological rights are most properly embedded each within the other. That is, one cannot speak in a holistic way about human rights without speaking also of ecological rights, and vice versa. He outlined the three main principles which he taught to young people, and he defined them as the 'real human rights': 'Do the ceremony properly for your homeland and for yourself. Understand the land and everything on it so you can manage it properly. When you are a bungawa [leader] you will stand up and do the business properly for your homeland and Australia.'" (cited by Rose 1996: 86)*

This section will analyse the current situation in Australia which provides the setting in which cultural ecocide may occur, and may prove detrimental to the health of an Aboriginal nation.

A. The Legal and Policy Framework

In recent decades a number of decisions made, policies followed and laws introduced have had Short (2010: 54-61) doubt the genuine nature of the reconciliation process introduced by the Australian government in 1991, and the strive for an relationship based on equality between settler society and indigenous population. This unequal footing is still visible today, and becomes clear in the approach taken toward indigenous peoples and laid down in Australian legislation in regard to mining projects. Is the current situation of ATSIP prone to create cases of cultural ecocide?

The indigenous people of Australia have never entered into a treaty arrangement with the settler state, which denied the recognition of the land ownership of the Aboriginal and Torres Strait Islander peoples (ATSIP) , and which turned them into "the victims of appalling injustice and Racism" (Short 2010: 53). Efforts made by the National Aboriginal Conference in April 1979, and subsequently the Aboriginal Treaty Committee to campaign for the adoption of a treaty came to nothing. Then and today, the demands revolved around the recognition of their traditional lands, and the claim for self-determination, which would introduce the requirement of participation and consent from the particular Aboriginal nation for decisions concerning the respective territory, nation, or culture. Moreover, claims involved the protection of Aboriginal culture, traditions and identity, and the compensation for seizure and damaging of indigenous land. The Australian government has not recognized the sovereignty of the Aboriginal peoples to

date, hence a treaty has never been drawn up or signed. A reconciliation process, commenced in 1991, did not address or accommodate any of the claims, but "exhibited an overtly assimilationist nation-building agenda" (Short 2010: 54). However, it induced a process of embedding Aboriginal culture into the culture of the settler society, which led many people to perceiving and addressing Aboriginality through the eyes and within the parameters of the settler nation. This is ignorant to the fact that many Aboriginal issues can't be resolved without addressing the land rights or self-determination claim.

The claim to rights to land, not addressed by the reconciliation process, has been taken a step forward by the Mabo judgement in 1992 (Mabo and Others v Queensland (No. 2) (1992)), which established that there is at least the possibility of Aboriginal and Torres Strait Islander peoples to hold rights to land or 'native title'. It was made sure that this did not grant a consequent right to self-determination. Native title, as Short explains, "is merely a right of occupation" (2010: 54). To apply for the recognition of native title the Native Title Act (NTA) 1993 required the proof of traditional connection to the land and an occupation by the indigenous group at the time of the application, which excludes displaced Aboriginal groups. Short argues that the narrow phrasing of the NTA that allows only limited application is due to the vested interests of the extractive industry that lobbied the Commonwealth government (Ibid.). The act has been adopted to ensure that the claims to land rights would be dealt within the framework of the settler state. The most important aspect to note is that the Native Title Act only allows for a right to negotiate, the Native Title holders cannot simply reject proposed development plans of their land. The whole approach by the federal government allows for inequalities between indigenous and settles societies to persist, and for a subjection of ATSIP to future development projects of the government that are made in collaboration with the extractive industry sector. Further watered down in 1996, the Native Title Act would now be trumped by property interests of non-indigenous Australians. Another important piece of land rights legislation, the Aboriginal Land Rights (Northern Territory) Act (ALRA) 1976, has also been severely diluted with amendments made between 1987 and 2006. The veto option it provided could no longer be used against proposed mining projects. Moreover, a permit system that was in place, and required people to obtain permission to enter and stay on indigenous land, has been made dependent on a new system of leasing. Now, bodies of the Federal or Northern Territory government, although only with the agreement of the respective Land Council, were able to acquired head leases over indigenous land for ninety-nine years, which would also give permission for any sublease holder to conduct 'legitimate business' – independent from the permit system.

Without any doubt serious infringements have been made on the indigenous autonomy and claim for land rights. Consistent with those was the adoption of the Aboriginal Cultural Heritage (Qld) Act (ACHA) 2003 that on the face of it recognizes Aboriginal people as the "primary guardians, keepers and knowledge holders of Aboriginal cultural heritage" (ACHA 2003: 11). Areas and objects of significance to Aboriginal people are stated to be protected with

this piece of legislation. The act relies on the compliance with devised 'duty of care' provisions which rather vaguely require those carrying out activities in significant areas to "take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage" (ACHA 2003: 19). An explanation of what the minimally required measures are to comply with this vague provision is not given, which severely weakens the level of protection the act is supposed to provide. The penalties for non-compliance are, as we will later see, a trivial amount for multi-million dollar corporations.

Another novelty arrangement of ACHA are 'cultural heritage management plans' (CHMP), that are to be developed and approved any time an 'Environmental Impact Statement' (EIS) is required for a project under another legislation. This holds true for most extractive operations. Again, CHMPs do not warrant a veto right, but require a notification and negotiation process between the indigenous party and the project proponent to reach an agreement on how to protect cultural heritage within the area in question and, if "harm can not reasonably be avoided, to minimise harm to Aboriginal cultural heritage" (ACHA 2003: 62-63). In many cases the agreement reached in a CHMP grants the traditional owners of the land to collect the artefacts and objects of cultural significant. Often however the land itself is not spared the upheaval and encroachment by construction and mining processes. Stop orders, provided for in the ACHA, can only halt an activity that damages or threatens to damage cultural heritage for a maximum amount of 60 days (Ibid. 26-27).

Most mining companies operating in Australia proudly display both pieces of legislation, CHMP and EIS, on their websites. It seems that they serve more to secure the good reputation of the extractive industries than further a cultural heritage protection, or the rights to traditional lands, autonomy or equality for Aboriginal Australians. The need to obtain permits has been replaced by the duty of care provisions and the CHMP process (Queensland Government 2012a).

Although it is said to not affect the existing rights of ownership of cultural heritage, nor native title rights, the legislation provides no other option but to enter into an agreement through drafting a CHMP, which again leaves traditional land vulnerable as harm to Aboriginal culture is not fully safeguarded with the act. ACHA clearly gives more leeway to people entering the land for conducting business than it gives to the affected indigenous people.

Based on a publication that reported widespread sexual abuse of Aboriginal children in the Northern territory, in 2007 the Howard government adopted the Northern Territory National Emergency Response Act (commonly known as 'the Intervention') in its last year[22]. Actions taken in the context of the Intervention included the suspension of the permit system on indigenous territory, the seizure of Aboriginal community land through five-year leases, and the total or proportional retention of welfare benefits (Short 2010: 56). The report 'Little Children

[22] The 'Little Children are Sacred' report was commission by the Northern Territory government, and prepared by Pat Anderson and Rex Wild QC.

are Sacred' recommends on more than one occasion the establishment of community-controlled services and organizations and states that "[w]hat is required is a determined, coordinated effort to break the cycle and provide the necessary strength, power and appropriate support and services to local communities, so they can lead themselves out of the malaise: in a word, empowerment!" (NT Government 2007: 13). After the Intervention had been announced, Pat Anderson, co-author of the report, said: "There is no relationship between the Federal response and our recommendations. We feel betrayed and disappointed and hurt and angry […] at the same time" (Crikey 2007). Arrernte and Gurdanji woman Pat Turner, Coordinator of the Combined Aboriginal Organisations of the Northern Territory and former CEO of the Aboriginal and Torres Strait Islander Commission, accused the government of 'using child sexual abuse as the Trojan horse to resume total control of our lands' (Maddison 2008: 44; Houston 2007). Referring little to the recommendations made by the report, many of measurements taken by the federal government seem to serve only the purpose of weakening the control indigenous people had previously gained over their land – land that is rich in natural resources. The land tenure through the imposed five-year leases especially takes away indigenous control. During the five-year period state bodies are able to continue negotiation over the ninety-nine-year leases provided for in the ALRA "under gross asymmetric power relations" (Short 2010: 57). Recalling that the federal government has cut welfare benefits before, and under the pressure of poor housing and social services in indigenous areas, the government has a lot leverage to press indigenous people to give up their land rights for resource exploitation.

With no veto right left, in recent years many indigenous people have decided to enter into an 'Indigenous land use agreement' (ILUA) with extraction companies instead of going through lengthy negotiation processes. The provision of ILUAs was incorporated into the NTA in 1998-1999.

Amendments made to the several acts, the physical intervention and policies that derived from the Northern Territory National Emergency Response Act have not been the product of consultation of the affected Aboriginal communities.

The NTNERA has been repealed in 2011, but many of their provisions have been maintained in a set of three acts often referred to as the Stronger Future Bills that have passed in the Senate in June 2012. Critics are concerned that these pieces of legislation will continue the Intervention in the NT for another ten years (ABC News 2012c). Thus, it could be argued that the physical dimension of the Australian genocide has stopped, but that the cultural genocide has continued undetected. Assuming this, I will aim to examine if the continuing cultural genocide is linked to the ecologically destructive patterns existent in the territories of many Aboriginal peoples today, and promoted by the social parameters created by the federal government.

This is substantiated by Powell (2007: 543) who says that "[t]he shift from abuse and persecution to genocide involves a fundamental qualitative transformation, from a relation that assigns the Other an inferior or denigrated position in the wider figuration to which both persecutor and persecuted belong, to one that works to deny them any position at all". By denying the indigenous population the right to free, prior and informed consent they are not only denied an equal treatment – the fact that consultation is not sought at all by either government staff or the corporate site goes to show that either agent does reject the notion of the indigenous peoples to have any position in the debate.

The right to free, prior and informed consent (FPIC) has in fact been recognised in many international treaties and by several international bodies. The Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has reiterated over the years, and especially in relation to Australia, that indigenous people have a right to FPIC under article 5(c) in regard to the development of their lands. General Recommendation 23 from 1997 reads[23]:

> *"[T]he rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources [should be recognized and protected] and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, […] steps [shall be taken] to return those lands and territories" (CERD 1997, Arts. 4(c),4(d), 5).*

The right to FPIC is further implied in Art. 1 of the 1966 International Covenant on Civil and Political Rights (ICCPR). It is covered in the Art. 6, 7 and 15 of the ILO Convention No. 169, to which Australia is a party, and was recognised within the UN Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva from 5-7 Dec. 2001 (para. 52). The Convention on Biological Diversity 1992 in its article 8(J) also covers the right to FPIC as does the recently adopted 2006 Declaration on the Rights of Indigenous Peoples in its Arts. In 2011 the Special Rapporteur on the rights of indigenous peoples, James Anaya, also reaffirms strongly the duty to consent by states before the latter enter into an agreement with third parties (GA 2011: 17, para. 88). "[F]ull and objective information" needs to be provided about any project affecting the community. (Ibid. 18, para. 90) Companies shall "promote the full assumption by States of [the] responsibility [to obtain FPIC]" and act in accordance with the due diligence principle to not proceed with a project if the state has not fulfilled its obligation to consult with the indigenous peoples (Ibid. 19-20, para. 99).

[23] See also the concluding observations of CERD in 2000 (GA 2000: 18), and the concluding comments on Australia's reports of 2000 and 2002 (CERD 2005: 3).

Rose (1996: 85) puts it this way: “The concept of a living world depends on communication: it requires that one listen as well as speak; it requires an attitude of attentiveness and a degree of respect. I would say that the concept of a truly living world requires a shift in thinking for many settlers.”

V. CULTURAL ECOCIDE IN AUSTRALIA

A. Identity Based on a Connection with the Land

> *"Indigenous Australians have helped to create the landscape. Through their continuing relationship with the land, Aboriginal and Torres Strait Islander people have developed a comprehensive knowledge of its resources and needs. Their land management practices are complex techniques that rest on a vast body of knowledge […].*
> *'There is no place without a history; there is no place that has not been imaginatively grasped through song, dance and design, no place where traditional owners cannot see the imprint of sacred creation'." (McCarthy 1996: v)*

> *Country, to use the philosopher's term, is a nourishing terrain. Country is a place that gives and receives life. Not just imagined or represented, it is lived in and lived with. Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place, […r]ather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart's ease. (Rose 1996: 7)*

This chapter of the book aims to help understand the meaning of land for the Aboriginal peoples of Australia. The concept of cultural ecocide is based heavily on the fact, that the destruction of the land can not only physically, but mentally harm the members of a group and severely disintegrate the collective. This chapter argues, that this is due to a connection to the land, that is intertwined with their social order, cultural norms, values and legal system, and thus with the peoples' identity. The argument is that a profound destruction of this relationship, i.e. the land, leaves the group without any connection to their past, the laws of their society, and their traditions. The point is made that the damage of their land robs Aboriginal peoples of their soul and leads to desperation through evoking an identity crisis and by erasing the essential link to guidance and belonging transmitted through stories related to their land and their historic past. Moreover, this state of being can lead to severe mental illnesses and increase the suicide rate of a community (see Chapter V.B).

In the Aboriginal conception of country there are no absolute boundaries, country is conceived through different classifications – as sea country, land country, sometimes even as sky country – and cultural differences are respected. (Rose 1996: 9-10, 19) Country is synonymous with life. So it is understood that every person has the right to take from the land what he himself

needs to survive, but that the right to life belongs to animals just as much as it does to people. The skillful use of fire by Australia's indigenous people throughout the 40,000 years of their existence, their care for regeneration, the creation of sanctuaries, and selective harvesting are said to have contributed on a large scale to the biodiversity of Australia and its productivity throughout time. The social and ritual norms of every Aboriginal society derive from the management of the life of the country, as that responsibility is interwoven in several social institutions – marriage, trade and "shared along dreaming tracks". Aboriginal Australians are linked to their country through their laws, emotions, economy, spiritually and intellectually. It gives them one of "the strongest and deepest purposes in life". (Ibid.)

Country to Aboriginal Australians is a balanced and interdependent place, which holds many elements, "living things". Thus it follows that the destruction of animals, plants or the soil, is a self-inflicted wound, as we are all interconnected. In their world view, people are a part of nature. Most importantly, "[i]t is not up to humans to take supreme control, or to define the ultimate values of country." (Ibid.) This stands in contradiction with the political and economic system in place in Australia, which according to the doctrine of capitalism, ascribe different levels of value to natural goods – resources – and promote the commodification of goods for the simple aim of making profit.

Aboriginal art, music, dance, philosophy, religion, ritual and daily routine is founded to a great extend on the country, and the link the Aboriginal people have to it. Every part of land is unique and inviolable, and the knowledge about the land derives from listening and learning; it has been tested over time, applies locally, and holistically takes into consideration the entire system. (Rose 1996: 11-15)

This holds true for many indigenous groups all over the world. In 1976 Wolf (55) writes about the Aché, a hunting and gathering people in Paraguay, that the deprivation of and removal from their traditional lands means ethnocide. "Taking the Aché from his forest deprives him of his humanity", and his identity, when the connections to customs are cut, and "his hope of reintegration into that world [is annihilated]".

Ramanathapillai (2008: 114) calls this the 'ecological-self'. She explains: "[R]ituals and ceremonies of […] traditions symbolically expressed the natives' beliefs that they were not separate from nature. An individual's personal self is not simply constructed out of social, political, or cultural values, but also out of one's deeper physical closeness to the earth […]. This ecological-self affirms that the natives' sense of being is drawn from and extended to the landscape they grew into. Ancestral land gives them a sense of home with ease; thus the voices of traditional village chiefs in Vietnam have been seen as the voices of the land." She sees "eco-violence as an act that damages the balance of an ecosystem by disrupting

the flow of its energy. Large-scale eco-violence is 'ecocide'" (Ibid. 118).

Contrary to Western approaches to culture and inhabited land according to Aboriginal belief land is not empty only because cultural signs of the existence of a people aren't unmissably displayed. (Rose 1996: 17, 29) The acquisition of Aboriginal land and the simultaneously concurring gradual decline of Aboriginal land management can be equated with the loss of life, a system out of balance, and a clipped link between the Aboriginal peoples to their native lands that forms a part of their identity.

Narrative recalling of the past that provide guiding stories and include valuable ancient knowledge and create laws and social norms for the present are often referred to as dreamtime, the history or story. These are to a large extent connected to and speak of certain characteristics of the natural surroundings of the area of the community – these can be created by ancestors like petroglyphs or cave paintings, or they could be the mountains, the river or simply rocks. (Ibid. 26) Dreaming creates behavioural patterns for the relationship with the land, e.g. to not overuse it. "There is a profound sense that this world was not created specifically for human beings. Wisdom for humans lies in being aware of life systems and in behaving responsibly so as to sustain the created world." (Ibid. 28)

Laklak, a Datiwuy Elder from Bawaka, North East Arnhem Land describes it as follows: "Land is your family too. Place is your family too. You always come from the land. This place, Bawaka, is mother land to me. I am caretaker, the public officer. This is the Yothu Yindi relationship. You always have to think about the land, without it you have no matha—language, identity, culture, kinship." (quoted in Lloyd et al. 2012: 1088)

Aboriginal are connected to their country – "emotionally, psychologically and metaphysically". The wellbeing of the country reflects in the wellbeing of its people. (Rose 1996: 38, 39) " A woman explains: "You've got to understand, […] I'd give my life for this mountain." According to the law of the peoples, if one has not been given the right, one does not act in another people's country as one would do in one's own. People do not sing to it, or paint it, nor do they maintain it through traditional burning techniques or interfere in any other way. "Knowing what one is responsible for also means knowing what one is not responsible for […]." (Ibid.)

One fact important to point out is that the Aboriginal holistic world view is not a static system, but can incorporate new elements. For example, God, Jesus, or Noah's Ark, have all been conceived through stories and the logic of the country in many Aboriginal groups. (Rose 1996: 41-42)

"The Arrernte people … have important sacred sites where lots of Dreamings meet up with each other. These places were like … the biggest, the most wonderful cathedral in Australia.

And, of course, they were also the best places for recolonisation. There's a place called Running Waters, the best waterhole in central Australia, which was an absolute sanctuary. The waterhole runs for about four miles. Pelicans breed in it. It is now utterly stuffed! It was the very first place that white people came in and unwittingly put all their cattle. In other words, it's as if the whites came up here, found the cathedral and then went and shat on the altar!" (Peter Latz; quoted by Rose 1996: 77) Rose goes on to explain that 75 per cent of Australia are rangeland, and that over half of the area used by white people is degraded. This is due to the lack of controlled land burning techniques ('firestick farming') indigenous peoples have used for millennia in well-chosen areas to maintain the land. Rose argues that the white Australians do not have the understanding of Australia's ecosystems as Aboriginal Australians do, which they believe is shown through the disappearance of endangered species and the rearing of cattle that leaves water dirty and foul. (Ibid. 63-68, 78-80)

At this point I would like to introduce the theory of cultural memory by Aleida and Jan Assmann (2010: 121-137). The scholars argue that cultural memory is one of three aspects of the collective memory. Cultural memory serves the recount and remembrance of past events and the preservation of rituals and traditions, which are the foundation for the social order and value system of a society. Cultural memory works through "an externalization and objectivation of memory, which is individual and communicative, and evident in symbols such as texts, images, rituals, landmarks and other 'lieux de mémoire'". (Ibid. 122) Most importantly it is at the core of group identity. "Memory is knowledge

with an identity-index, it is knowledge about oneself; that is, one's own diachronic identity, be it as an individual or as a member of a family, a generation, a community, a nation, or a cultural and religious tradition." (Ibid. 123)

I argue that the country of the Aboriginal people in Australia serves them as a part of their cultural, and thus collective, memory. The ecological space is directly linked to their identity-index, and the destruction of the country is equally linked to the destruction of the collective and individual identity, which leads to consumptive feelings of despair, the loss of a sense of belonging, hollowness, and purposelessness.

It seems that in post-colonial Australia, social patterns of colonial times promoting an unequal balance of power, and the imposition of the settler's culture and relation to natural land, have in part survived. Fanon, an advertiser of the anti-colonial liberation movement in Algeria's fight for independence observes the following: "The truth is that colonialism in its essence was already taking on the aspect of a fertile purveyor for psychiatric hospitals. [...] Because it is a systematic negation of the other person all attributes o humanity, colonialism forces the people it dominates to ask themselves the question constantly: 'In reality, who am I?' [...] Hostile nature, obstinate and fundamentally rebellious, is in fact represented in the colonies by the bush, by mosquitoes, natives and fever, and colonization is a success when all this indocile nature has finally been tamed. Railways across the bush, the draining of swamps and a native population

which is non-existent politically and economically are in fact one and the same thing." (Fanon 1963: 200-201) He describes the impact of the dominant colonial society on the psychological state of the native population, and the identity crisis the impact of the foreign social and cultural norms creates. He also equates cultural decline based on land with political and economic absence.

The assessment of the Australian Bureau of Statistics is a prime example for how the indigenous culture is presently understood in the terms and conceptions of the Western world, and how the aboriginal culture has become incorporated in its entirety into the system imposed by the settler society. It seems like the Aboriginal nations have become part of the Australian nation-state. In their assessment of the health of the Aboriginal culture no reference can be found to the prevailing importance of the connection to their land (ABS 2009). The cultural health is measures through the involvement of Aboriginal and Torres Strait Islander people in cultural events, ceremonies or organizations, among which are mentioned "festivals or carnivals involving arts, craft, music or dance; or men's or women's business". This seems to be a paradox in itself, as the stated cultural activities are cultural events that are held and were introduced by the settler society – that is festivals, carnival, and business events. Thus the maintenance of indigenous culture is measured through the conduct of events of the settler society. The ABS states further that these events help to "provide an indication of a person's level of cultural attachment". However, cultural attachment differs tremendously from cultural retention.

According to ABS in 2008 only 25% of all indigenous Australians had been living "in their homelands or traditional country" (ABS 2009).

B. The Role of Economically Expansionist Policies

> "Every culture is motivated to preserve their history. Despite being so much younger in comparison to Aboriginal culture, Western culture has serious laws that protect its sacred places and religious sites. This protection stops many activities like abseiling down St Patrick's Cathedral or setting up camp at the Shrine. Yet Western laws do not accord anywhere near the level of respect for sacred Aboriginal land. They allow tourists to climb the most sacred of sites, Uluru, and they allow for mining to occur on sacred land.
>
> Can you imagine the extent of trauma experienced by my people when the family/land connection is severed? The impact of this separation can be too devastating for any amount of monetary compensation. In perspective, it would be far less painful for the chief executive of Fortesque Metals, Andrew Forrest, to be forced to give up his house for a pittance, watch his church demolished and his family gravesite dug up" (McKinnon-Dodd 2011).

As previously established many Aboriginal peoples of Australia have a strong connection to their land, which functions as the core of their being as a collective as well as an individual. Land is their lebenswelt, their point of nexus where everything their social figuration contains relates to. After having analysed the political and legal status that is in existence in Australia at the moment, this chapter will now look at the impact of different extraction industries on the natural environment and on the cultural health of various Australian indigenous groups. I thereby aim to examine if ecocide is or could potentially occur in Australia, and establish the link between ecocide and cultural genocide to determine if cultural ecocide play a role at presence.

When listing the "methods and techniques of genocide", Lemkin describes physical genocide as "massacre and mutilation, deprivation of livelihood (starvation, exposure, etc. often by deportation), slavery - exposure to death;" and cultural genocide as the "desecration and destruction of cultural symbols (books, objects of art, loot, religious relics, etc.), destruction of cultural leadership, destruction of cultural centres (cities, churches, monasteries, schools, libraries), prohibition of cultural activities or codes of behaviour, forceful conversion, demoralization." (McDonnell and Moses 2005: 504-505) With regard to the introductory quotation, the link between ecocide and cultural decline can easily be drawn. The environmental destruction in this case is equal to a destruction of the cultural foundation.

This section aims at discussing the implications of new extreme energy extraction methods that have emerged over the last decades. Especially in the last few years, methods that were considered too expensive, too invasive and most often too dangerous, have been on the rise as conventional extraction methods of fossil fuel struggle to fulfil the increasingly high need for energy.

Although a fairly new term, actions of cultural ecocide have been committed under the banner of economic advancement at least since the beginning of the colonialisation period. Wolf writes in 1976 (52): "Hunters and gatherers [...] have been dying and continue to die all along the internal margins of Latin America. Hundreds and thousands like them – in Peru, Brazil, Venezuela, Colombia – are driven daily from their former hunting territories to make room for incoming settlers and plantations, roads, airstrips, pipelines, oil wells. And this is hardly a new process [...]."

Economic expansionist policies that have proven to be especially harmful for indigenous populations all over the world are the ones that brought forth cultural ecocide through logging and extractive activities, including conventional mining and extreme energy extraction methods.

Australia is rich in many minerals and resources. The majority of extractive industries in Australia conduct business in a) coal mining, mainly black and brown coal; b) oil and gas

extraction, mainly natural gas and petroleum extraction and oil shale mining; c) metal ore mining, including iron ore, bauxite, copper ore, gold ore, mineral sand, nickel ore, silver-lead-zinc ore and other metal ore like uranium ore; and d) non-metallic mineral mining and quarrying, as diamond and opal mining (Australian Bureau of Statistics 2006: 96-105). Also conducted are petroleum and mineral exploration activities.

Understood as being part of the extreme energy techniques are the mining of the tar sands, mountain top removal, deep water drilling, as well as the extraction of coal bed methane and shale gas through hydraulic fracturing ('fracking'), and the extraction of coal through underground coal gasification (UCG). In Australia underground coal gasification, and hydraulic fracturing are the most common extreme energy methods, although the methods of UCG it not widespread yet. It is argued that these techniques prove extremely harmful to the surrounding environment and the indigenous peoples living in close proximity.

I will continue by examining different extraction methods that are in use in Australia, their health implications and impact on indigenous groups through a few case studies to assess the current situation with regard to the assumption of the existence of potential case of cultural ecocide.

Underground coal gasification is a technique in use in Australia since 1999 (Sury et al. 2004: 12). It describes a coal exploitation process where a deep well is being drilled into the surface, oxygen and water is being released underground and the coal is set on fire to subsequently capture the gas (World Coal Association 2012b). UCG has long been considered as being too dangerous due to repeatedly reported groundwater contamination, and has only recently been deployed on a larger global scale for coal that cannot be mined as the seam is too deep, thin or fractured (The Pembina Institute 2010b: v-vi). A report released in 2004 and initiated by DTI Cleaner Coal Programme comprises a "Review of Environmental Issues of Underground Coal Gasification" (Sury et al. 2004: 12). It states that "[m]ore recently, a large scale UCG trial involving the technology developed in Uzbekistan has been operated from 1999 to 2002 in Chinchilla, Australia. […] The trial included nine vertical process wells and gas has been produced from a 10 m thick coal seam at a depth of about 140 m. During operations, approximately 32,000 tonnes of coal have been gasified. No information is currently available concerning the linking method applied and the environmental impact (water quality and subsidence)." (Ibid. 12) According to the operator, energy company Linc Energy, the plant in Chinchilla, about 300 km west of Brisbane, is "world's leading" UCG Demonstration Facility (Linc Energy 2012). In April 2011, ABC News reports that "[t]he Queensland Government has approved three pilot UCG projects but last year two of them, Cougar Energy based at Kingaroy and Carbon Energy near Dalby, had contamination scares. Cougar was shut down and Carbon Energy has just been allowed to reopen with stricter controls" (ABC News 2011a). Tests at the UCG plant near Kingaroy detected benzene and toluene in groundwater close to the plant (Queensland Government 2010). The plant in Chinchilla was allowed to remain in operation

although the Queensland Government states that here "contamination issues have also been reported" (Ibid.). ABC News reports that a "government report into the three pilots has found no problems with Linc Energy" (ABC News 2011a).

Much uncertainly is prevalent about the consequences of UCG. In Juli 2010 AgForce, who is representing Queensland's rural producers, voiced strong concern about the plan of opening the Chinchilla plant. Referring to past experiences they stated that "[t]he contamination of underground water in Cougar Energy's pilot Underground Coal Gasification plant near Kingaroy is threatening the livelihood of local farmers and justifies AgForce's concerns about the environmental impacts of mining on agricultural land. [… T]he farm organisation has serious concerns about the government and resource industry's lack of communication and understanding regarding the impact of resource exploration and extraction activities." As carcinogenic chemicals benzene and toluene had been discovered in Cougar Energy's groundwater monitoring bores "rural property owners within a two kilometre radius of the UCG plant and two kilometres of Plantation bore had been advised not to use water from their bores for human consumption or stock watering until further testing is done" (AgForce 2010). Friends of the Earth spokesperson Drew Hutton also comments on the lack of experience with the UGC technology: "The State Government is conducting an uncontrolled experiment with the environment of Queensland with both UCG and coal seam gas. UCG must be shut down immediately and there must be a moratorium on all CSG development until there are clear answers to the questions being raised about its social and environmental impacts" (Six Degrees 2010). In addition to that Cougar Energy has kept quiet about a contamination leak for two months before alerting the government in order to raise more than AUS$1 million from investors in the interim period (Courier-Mail 2010)[24]. This conduct and the referenced experiences do not raise trust in the operations or in the extraction method. The Wakka Wakka peoples of Queensland have made a native title claim over an area of 27,000 km² stretching from North Burnett to the Western Downs, where the three UCG plants are located (ABC News 2012b). The Queensland South Native Title Services, a company funded under the *Native Title Act 1993* (Cth) to carry out the functions of a representative body, says that the "existing mining claims will not be affected" (Ibid.). Further traditional owners of south-east Queensland are the Barunggam, Jarowair, Yiman, Turrbal, Jagera, Wakka Wakka, Jarowa, Djakunda, Gooreng Gooreng, Cobble Cobble, Gambuwal and Githabul peoples, whose traditional lands are threatened of being contaminated by existing or future UCG plants (ATNS 2010; Six Degrees 2012).

[24] Courier-Mail states: "The company at the centre of the Kingaroy water-poisoning scare raised more than $1 million from investors before its contamination leak was made public. Cougar Energy has since admitted it first knew of the leak in April and told the State Government on June 30, but the public was not made aware until Independent MP Dorothy Pratt raised the issue in Parliament on July 14, the day Cougar completed its fund-raising."

Another technique from the realm of extreme energy is the extraction of coal bed methane and shale gas through hydraulic fracturing ('fracking'). The gas inside the coal seam in recovered after water is pumped out of the ground to release pressure and the methane gas. Often it is necessary to use additional hydraulic fracturing, which means that water mixed with chemicals is pumped under high pressure into the ground, which creates fractures and sets free the methane. Wells are drilled so the methane can escape more easily to the surface – passing through ground water level (World Coal Association 2012a). Coal bed methane mining, also known as coal seam gas (CSG) mining, has been increasingly in use in Australia and faced a strong opposition after experiences in the United States by members of the general public have given rise to the suspicion of the method of hydraulic fracturing not being safe. Lock the Gate, an alliance of thousands of Australians, is one major opponent to extreme energy methods like CSG and shale gas mining and UCG (Lock the Gate 2011b). Their website lists 167 local action groups that promote the fight against these unconventional extraction techniques, as well as the relentless expansion of the coal mining industry (Lock the Gate 2011a). The publications on their website show a great disappointment in the Australian government that "undermin[es] the rights of Australian citizens to meet the demands of international corporate greed", and "sanction[s] destructive impacts on their land, their health, their water and their environment" (Ibid.). Aboriginal groups voiced their opposition against CSG mining on their traditional land on numerous occasions. Two examples are the fear of the Goolarabooloo and Jabirr Jabirr people that the construction of a gas processing plant at James Price Point in Western Australia will cause the destruction of their traditional land; and the opposition of indigenous land owners against fracking ventures and thousands of wells in the Northern Territory (ABC Rural 2011; ABC News 2011c). The NT Resources Department is reported to have said that a full Environmental Impact Statement assessment may not be held for every fracking approval.

Fines for disturbing Aborginal artefacts were issued in the past at AUS$ 3,000, a meagre amount in the calculations of billion-dollar projects (ABC Newcastle 2011). Similarly, the NSW Environment Protection Authority has fined the energy company Eastern Star Gas twice amounting to AUS$3,000 and issued one formal warning for polluting a creek in the Pilliga Forest in NSW with wastewater from coal seam gas mining (NSW Government 2012). The amount seems rather trivial when one looks at the reported half-year profit of Santos – who acquired Eastern Star Gas in late 2011 – of $504 million (Santos 2011: 4,6). a GDP of ??? it becomes clear that the amount will fail to have a deterrent effect. Moreover, a local action group claims that it required their effort to test the water and to expose the offence, which would prove that big gaps exist in the regulation of the coal seam gas industry (Stop Pilliga Coal Seam Gas 2012).

ABC News (2012a) projects that in total an estimated 40,000 coal seam gas wells will be drilled in Australia, that, as conservative estimates predict, 300 gigalitres of water will be drawn from the ground each year – and possibly contaminated in the process – and that the CSG industry will produce "as much greenhouse gas as all the cars on the road in Australia". Most

CSG mines will be established in the east of Queensland and New South Wales where the Great Artesian Basin is located.

Under the tar sands in Canada First Nation groups currently suffer under severe health effects. Fortunately, Australia has not arrived at that state yet. In comparison to Canada, the cases of cultural ecocide in Australia seem to be based on the destruction of the cultural foundation on the group, whereas in Canada's case in addition to the cultural decline the physical health of large parts of the indigenous groups is severely compromised.

Conventional forms of mining have proven to be as controversial when it comes to the infringement on Aboriginal peoples land. Several examples can be given for mining projects that have severely impacted and destroyed Aboriginal land and with it an important part of their cultural identity. One example shall be mentioned here: the Caval Ridge Mine. After receiving approval of their Environmental Impact Statement (EIS), work at the Caval Ridge Mine site began at the beginning of 2012 (BMA 2012: 1-2). The mine is part of the BMA Bowen Basin Coal Growth Project, which also includes a new open-cut coal mine, Daunia Mine; a replacement of the existing Moranbah airport; and an ample expansion of existing open-cut and underground coal mine Red Hill Mine (Queensland Government 2012b).

Commendable are the environmental conditions imposed on operator BHP Billiton Mitsubishi Alliance (BMA) Coal Operations by the Department of Sustainability, Environment, Water, Population and Communities in regard to the permission of only limited clearance of Brigalow and Bluegrass – both listed under the Environment Protection and Biodiversity Conservation Act 1999 (Australian Government 2011: 2). However, the decisions made in relation to the protection of Aboriginal cultural heritage are rather weak. An assessment of the cultural heritage values that has been prepared in January 2008 – on behalf of BM Alliance Coal Operations Pty Ltd. and prepared by Northern Archaeology Consultancies Pty Ltd in consultation with Native Title Claimants, the Barada Barna Kabalbara and Yetimarla People – makes clear the cultural repercussion of that project. It states that "[t]he wealth of cultural heritage values associated with the watercourses in the project area is under considerable threat from mining related activities[, and that a]ll subsurface disturbance caused by activities within this zone should be monitored by Woora representatives" (Hatte 2008: 63). Moreover, it is recommended in the report that in the areas "[w]here it is proposed that creeks be diverted to make way for a mine pit, long term planning should take into account the effect of the diversion on the cultural, as well as the physical and ecological, effects on the banks. It is recommended that the identified isolated artefacts and low density scatters, apart from those within specifically defined or protected zones, be salvaged by Traditional Owner representatives prior to any development works" (Ibid.).

Although in the state of analysing the feasibility of the project, these statements show clearly that the recommendations made are already based on the fact that the mining project will

proceed as planned. It seems decided that diversion of creeks and salvage of culturally valuable items is the only possibility of preserving parts of the highly fragile Aboriginal heritage. In regard to the Cultural Heritage Management Plan (CHMP) the report further commends that arrangements should be made "for the ongoing management and protection of cultural heritage after the mine is decommissioned", and that the return to the "approximate areas" of salvaged artefacts should be considered – "though that area may be a rehabilitated one dramatically altered in appearance" (Hatte 2008: 64). It might be said in other words that the cultural items are planned to be isolated from the land just as the people have been removed from their territory. This exemplifies the meaning behind the provision in the ACHA 2003 – which we examined earlier – that covers the requirement to protect Aboriginal cultural heritage, and if "harm can not reasonably be avoided, to minimise harm to Aboriginal cultural heritage" (ACHA 2003: 62-63).

The case studies show that the environment is often severely impacted by mining. However, in the latest record on the expenditures of mining and manufacturing industries in Australia it becomes clear that environmental protection is not a main priority for the corporations. Only 1% of their total expenditure has been spent on measures to protect the environment in 2000-01 (Australian Bureau of Statistics 2002). Furthermore, it is stated that "[l]and newly disturbed for mining operations was nearly 40,000 hectares and the area of minesites (sic.) under rehabilitation held by the mining industry was nearly 35,000 hectares." (Ibid.) Now, what does rehabilitation mean? Without further knowledge one would easily assume that the idea behind that concept is to return the disturbed part of the natural environment into its original state. Van Acker and Eddy (1992: 89) however argue that this is not possible as simple replanting will not restore the vegetation the way it was before the heavy extraction machinery caused the upheaval and mixture of several layers of soil and vegetation. Nor will it restore boreal forest in Canada that has developed over thousands of years, or the land characteristics of an area that are of great importance to many Aboriginal Australians. It should also be kept in mind that land destruction is not only caused by the mine itself, but also by the entire infrastructure that came with it.

Many indigenous groups have in fact entered into agreements with energy companies and the state over the use of their land for extraction purposes. O'Faircheallaigh (2006: 3) says the incentives for such a decision are the prospect of better economic opportunities for younger generations, which would also counteract problems such as substance abuse, imprisonment, domestic violence, and suicide that derive from the loss of a sense of belonging. He calls it a "balancing act" between people's desire for development, their desire to look after country, to benefit financially, and to be included in an otherwise rather antagonising society – the 'settler' society (Ibid. 4).

The Australian Bureau of Statistics (2012) has released a report on suicides in Australia from 2001 to 2010. It states that "[i]n the Aboriginal and Torres Strait Islander population, the highest age-specific rate of suicide was among males between 25 and 29 years of

age (90.8 deaths per 100,000 population). [...] In the non-Indigenous population, the highest rate of suicide occurred among males between 35 and 39 years of age (25.4 deaths per 100,000). [...] The greatest difference in rates of suicide between Aboriginal and Torres Strait Islander people and non-Indigenous people was in the 15-19 years age group for both males and females. Suicide rates for Aboriginal and Torres Strait Islander females aged 15–19 years were 5.9 times higher than those for non-Indigenous females in this age group." Suicides accounted for 4.2% of all registered deaths of people identified as Aboriginal and Torres Strait Islander in 2010, compared with 1.6% for all Australians. This data shows that suicide rates are a lot higher for indigenous people than non-indigenous Australians.

Some Aboriginal groups have been forced into agreements based on bogus promises, or their declining cultural or social situation in their communities. Many agreements seem to be based on the fact that employment opportunities are promised to Aboriginal communities, or that the indigenous group expects compensation from the mining corporation to further their progress to becoming a self-sustaining community (see Fraser Coast Chronicle 2011). Moreover many agreements seem to be based on the fear that the mining project will go ahead with or without the indigenous consent due to the many ambiguous policies governments have adopted in the past.

Also the obtaining of FPIC is presently still neglected by some energy companies and even by bodies representing Aboriginal claims. In reference to the intentions of Armour Energy to carry out exploration for petroleum and gas on native title land, the Australian Petroleum Production and Exploration Association (APPEA), the body representing coal seam gas companies, says that traditional owners will be consulted prior to the exploration, and that this was standard procedure for companies (ABC News 2011b). "The process requires that the company has its cultural heritage approvals in place […] before they can conduct any exploration. […] The system doesn't allow them to start exploring without those consents", he states on the plan to explore around Doomadgee and Burketown (Ibid.). Local Aboriginal people deny that consultation has taken place and that that would be a recurring matter.

In May 2012 a local newspaper reported that the NSW Aboriginal Land Council is acting in opposition to the wishes of the Illawarra Local Aboriginal Land Council, and the indigenous groups affiliated with it (Illawarra Mercury 2012). The NSW Aboriginal Land Council has applied for an examination of an extensive land strip around Wollongong in the south of Sydney. Exploration for CSG mining is planned. The Illawarra Local Aboriginal Land Council has strongly fought against such a development for decades, and their claims were well-known, so that it seems at odds that not even consultation of that regional body took place. A total of five applications have been lodged by the NSW Aboriginal Land Council in the first few months of 2012 – one of whom covers an even greater area of 47,000 km². Mr. Kennedy, the Chairman of the Illawarra Local Aboriginal Land Council states: "This is not the right way to go about helping future generations; all this does is sacrifice our culture and heritage by putting money and mining first. We're outraged our very own state body would be acting against our

obvious interests" (Ibid.). This however demonstrate the diversity of opinion that can be found between the diverse Aboriginal groups, as well as within one community, especially in regard to mining (Howlett 2010: 466-467).

VI. CONCLUSION

The present analysis shows clearly the existence of cultural ecocide in Australia. Victims are the already marginalised the indigenous peoples. The Australian government to this day seems to benefit from the inequality of power within the society between indigenous people and non-indigenous Australians. It continues to walk down a path that includes the disempowerment of Aboriginal people through the control of the settler state over their territory, and accepts the cultural destruction of indigenous groups, as the control over resource extraction could not be maintained if control over the land was given back to the traditional owners. In doing so it makes use of the legal system that allows the state to never lose full control over their land. Main beneficiaries of the mining industry is the white Australian population with many indigenous communities living under horrible living conditions based on poor housing and social services in their areas. The destruction of their land and the encroachment on their culture – the cultural ecocide – are by-products in an intent to secure a path of energy production based on finite fossil fuels.

Following recommendation I want to make. Firstly, FPIC and a consultation procedure should be introduced as a compulsory requirement for all decisions affecting indigenous communities or territories. Secondly, FPIC and a veto right should also be established in relation to all discussion around the use of traditional lands by extractive industries. Thirdly, a veto right needs to be introduced into all key pieces of legislation, like the Native Title Act 1993 and the Aboriginal Cultural Heritage Act 2003. Moreover, there is a need to introduce stricter regulations for corporations to ensure their compliance with agreements made in regard to EISs or CHMPs. Furthermore, to counteract the imbalance of power between settler and indigenous societies, improved housing and social services need to be provided in remote areas. Strongly recommendable is also the amendment or abolishment of the Stronger Future Legislation of 2012. Control over their own destiny needs to be reestablished in indigenous communities to tackle substance abuse and rising suicide that are a consequence of cultural ecocide. The profound indigenous knowledge of land management can be used to work within the boundaries of resilience of the natural ecosystem when extracting resources. Also recommendable would be the official recognition of indigenous culture, practices and sites to tackle the settler-savage dichotomy that still persists until today.

In regard to the international legal sphere, an adoption of a convention of ecocide which includes cultural ecocide, or the adoption of ecocide on the list of crimes against peace would help setting a standard and further the establishment of a social norm. An amendment of the Genocide Convention, as once envisaged to include ecocide, cultural ecocide and cultural genocide, would also help to further that aim.

In general it is imperative to strive towards the gradual achievement of becoming independent from fossil fuel. The rejection of extreme energy extraction methods until comprehensive studies proof that they do not negatively impact on people - physically or

culturally - or on the environment, would be a prime achievement to help counteract the crime of cultural ecocide.

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